

# Chapter 7

## Damages and Remedies

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# Damages and Remedies

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## 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'), formerly known as the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('HREOC Act')<sup>1</sup> 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 FMC under s 46PO(4) since the federal unlawful discrimination jurisdiction was transferred to those courts on 13 April 2000.

The tables at 7.2.2-5 set out damages awards in all federal discrimination cases decided since 13 April 2000.

## 7.2 Damages

### 7.2.1 General approach to damages

#### (a) Torts principles apply

The Full Federal Court discussed the approach to damages under the *Sex Discrimination Act 1984* (Cth) ('SDA') in the matter of *Hall v Sheiban*.<sup>2</sup> Lockhart, Wilcox and French JJ delivered separate judgments and while there

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

<sup>2</sup> (1989) 20 FCR 217.

is no clear ratio on the issue of damages, the case has been cited for the proposition that torts principles are a starting point for the assessment of damages under discrimination legislation, but those principles should not be applied inflexibly.<sup>3</sup>

Lockhart J expressed the view that:

As anti-discrimination, including sex discrimination, legislation and case law with respect to it is still at an early stage of development in Australia, it is difficult and would be unwise to prescribe an inflexible measure of damage in cases of this kind and, in particular, to do so exclusively by reference to common law tests in branches of the law that are not the same, though analogous in varying degrees, with anti-discrimination law. Although in my view it cannot be stated that in all claims for loss or damage under the Act the measure of damages is the same as the general principles respecting measure of damages in tort, it is the closest analogy that I can find and one that would in most foreseeable cases be a sensible and sound test. I would not, however, shut the door to some case arising which calls for a different approach.<sup>4</sup>

His Honour went on to say that, generally speaking, the correct approach to the assessment of damages under the SDA is to compare the position the complainant might have been in had the discriminatory conduct not taken place with the situation in which the complainant was placed by reason of the conduct of the respondent.<sup>5</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>6</sup>

## **(b) Multiple causes of injury/loss**

In *Gama v Qantas Airways Ltd (No 2)*,<sup>7</sup> the applicant made various allegations of race and disability discrimination in employment. Whilst 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

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<sup>3</sup> 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*.

<sup>4</sup> (1989) 20 FCR 217, 239.

<sup>5</sup> (1989) 20 FCR 217, 239.

<sup>6</sup> *Johanson v Blackledge* (2001) 163 FLR 58, 83 [110]; *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91, [39]; *McAlister v SEQ Aboriginal Corporation* [2002] FMCA 109, [150]; *Escobar v Rainbow Printing Pty Ltd (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].

<sup>7</sup> [2006] FMCA 1767.

basis that many of his allegations of discrimination, which had been said to have caused his depressive illness, had failed.<sup>8</sup>

On appeal,<sup>9</sup> the Full 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>10</sup>

The Full Court overturned the finding of Raphael FM that certain 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>11</sup>

### **(c) Hurt, humiliation and distress**

In a number of cases it has been held that in assessing general damages for hurt, humiliation and distress, awards should be restrained in quantum, although not minimal. Such awards should not be so low as to diminish the respect for the public policy of the legislation. In *Hall v Sheiban*,<sup>12</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>13</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

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<sup>8</sup> [2006] FMCA 1767, [127].

<sup>9</sup> *Qantas Airways Ltd v Gama* [2008] FCAFC 69.

<sup>10</sup> [2008] FCAFC 69, [99] (French and Jacobson JJ, with whom Branson generally agreed, [122]).

<sup>11</sup> [2008] FCAFC 69, [121].

<sup>12</sup> (1989) 20 FCR 217, 256. See also *Gilroy v Angelov* (2000) 181 ALR 57, 76 [105]; *Johanson v Blackledge* (2001) 163 FLR 58, 84 [115] citing with approval *Horne v Press Clough Joint Venture* (1994) EOC 92-591, 77, 179; *Wattle v Kirkland (No 2)* [2002] FMCA 135, [71].

<sup>13</sup> [1988] 2 All ER 118.

physical injury to the body or the mind which may persist for months, in many cases for life.<sup>14</sup>

In *Clarke v Catholic Education Office*<sup>15</sup> ('Clarke'), however, Madgwick J emphasised the compensatory nature of damages, stating:

It was faintly suggested, on the strength of remarks made in a case decided by the Human Rights & Equal Opportunity Commission, that there were policy reasons why damages for a breach of the DDA should be substantial. It was also faintly suggested that an award should not be so low that it might be eaten up by non-recoverable costs. Both propositions must be rejected. Damages are compensatory and no more.<sup>16</sup>

His Honour awarded \$20,000 plus \$6,000 in interest for the hurt caused to the student on whose behalf the case had been brought (a sum upheld on appeal and described as 'relatively modest'<sup>17</sup>). The respondent in that matter 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. The basis for the award of general damages was as follows:

Fortunately, as matters transpired, the injury to [the student] has probably not been great: the injury to his parents' sensibilities may have been acute but the damages are not to compensate them. They are to compensate the 'aggrieved person', namely [the student].

[The student] would have been distressed and confused by the events in question. As a result of the respondents' proscribed conduct, he was effectively removed from the company of his primary school peers and friends on his transition to high school. Further and very significantly, these were friends who had learned Auslan. That would be very distressing. His transition was from a religious to a secular milieu, an added degree of change to cope with. As a child, it is very likely that he would and did register the respondents' attitude as one of rejection of him on account of his deafness, even though the disinterested adult can see that the position was much more complex than that. That would have been hurtful.

In the scheme of things, the harm to [the student] is likely to prove to have been transient and not extreme. There is no warrant to inflate damages. In my view \$20,000 together with some allowance for interest on three quarters of that sum would be ample compensation. I assess such interest at \$6,000.<sup>18</sup>

Chris Ronalds SC has commented as follows on the issue of general damages:

The damages in the discrimination arena under this head are relatively modest and amounts between \$8000-\$20000 are common. It appears that the courts have not accorded much weight or significance to the emotional loss and turmoil to an applicant occasioned by acts of unlawful discrimination and harassment. On some occasions, there was not sufficient or any evidence to support a claim for such damages.<sup>19</sup>

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<sup>14</sup> [1988] 2 All ER 118, 122.

<sup>15</sup> (2003) 202 ALR 340.

<sup>16</sup> (2003) 202 ALR 340, 360 [83].

<sup>17</sup> *Catholic Education Office v Clarke* 138 FCR 121, 149 [134] (Sackville and Stone JJ).

<sup>18</sup> (2003) 202 ALR 340, 360-61 [84]-[86].

<sup>19</sup> Chris Ronalds, *Discrimination Law and Practice* (3<sup>rd</sup> ed, 2008), 223.

In *Shiels v James*,<sup>20</sup> Raphael FM suggested, in the context of a sexual harassment matter, that the authorities indicated a range for damages for hurt and humiliation of \$7,500-\$20,000. However, Branson J in *Commonwealth v Evans*<sup>21</sup> commented, without expressing a concluded view, that this range seemed 'higher than the authorities fairly support'.<sup>22</sup>

In *Phillis v Mandic*,<sup>23</sup> Raphael FM noted the difficulty in assessing appropriate damages for hurt and humiliation in discrimination cases and stated:

It is often the case that the Courts are assisted in this determination by medical evidence in the form of psychological or psychiatric assessments. Given that it is the effect of the accepted acts of harassment and not the act itself that is relevant, it is appropriate that due regard is had to the expertise of the medical profession.<sup>24</sup>

His Honour also suggested that comparisons with damages awards in other cases should be undertaken with caution:

At some point judicial officers are required to assess damages having regard to the individual circumstances before them. A degree of comparison between decided cases is both unavoidable and appropriate. However care needs to be taken to ensure that particular acts are not 'rated'. To do so ignores the requirement to 'consider the effect on the complainant of the conduct complained of': *Hall v Sheiban* [(1989) 20 FCR 217 at 256]. The award of general damages in discrimination matters is not intended to be punitive but rather to place complainants in the situation that they would otherwise have been in had the harassment not occurred: *Howe v Qantas* [2004] FMCA 242; *Hall v Sheiban* (supra). To do so clearly requires specific reference to a person's individual circumstances.<sup>25</sup>

In *South Pacific Resort Hotels Pty Ltd v Trainor*,<sup>26</sup> the appellant challenged the decision at first instance<sup>27</sup> to award damages to a victim of sexual harassment who had a pre-existing 'significant psychological vulnerability'. The appellant argued that as the respondent was not a person of 'normal fortitude', she had not made out any entitlement to damages because, as a threshold matter, the events relied upon must have been such as would have affected a person of 'normal fortitude'. The submission was said to be reinforced by the fact that the respondent's vulnerability was not disclosed to the employer at the time she was employed so that it would be 'quite unfair, and contrary to the policy of the SDA', to impose liability on the appellant (employer) for the unseen consequences of the harassment committed by the respondent's co-worker.<sup>28</sup>

It was also argued that 'the notion of what a reasonable person would have anticipated, which forms an element of the statutory definition of sexual harassment in s 28A of the SDA, carries through to an assessment of damages'. Hence, 'if the overall reaction of a victim could not have been anticipated by a reasonable person any damage suffered by such a person

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<sup>20</sup> [2000] FMCA 2, [79].

<sup>21</sup> [2004] FCA 654.

<sup>22</sup> [2004] FCA 654, [82].

<sup>23</sup> [2005] FMCA 330.

<sup>24</sup> [2005] FMCA 330, [24].

<sup>25</sup> [2005] FMCA 330, [26].

<sup>26</sup> (2005) 144 FCR 402.

<sup>27</sup> *Trainor v South Pacific Resort Hotels Pty Ltd* (2004) 186 FLR 132.

<sup>28</sup> (2005) 144 FCR 402, 410 [44] (Black CJ and Tamberlin J with whom Kiefel J agreed).

would be altogether outside the contemplation of the statute and thus not recoverable'.<sup>29</sup>

The Full Federal Court rejected these submissions. On the issue of 'normal fortitude', Black CJ and Tamberlin J, with whom Kiefel J agreed, stated:

Care should be taken to avoid the introduction of the notion of 'normal fortitude' into discrimination law and particularly into the law relating to sexual harassment. It is a potentially dangerous irrelevancy in this context, readily capable of misuse in support of the false idea – perhaps hinted at rather than stated bluntly – that some degree of sexual harassment (or some other form of unlawful discrimination) would and should be accepted by persons of normal fortitude. With respect to sexual harassment the true and only standard is that prescribed by the statutory definition.

The submission that Ms Trainor was in some way disqualified from an award of damages because she did not disclose her particular vulnerability to her employer seems to have been based on no more than a general notion of unfairness. In any case, there was no evidence that Ms Trainor knew that she suffered from a psychiatric condition that should have been disclosed to the employer. Nor, indeed, was there any evidence to suggest that she was (or thought she was) unable to cope with normal working conditions – conditions that she was entitled to expect would not involve acts of sexual harassment by another employee in the accommodation provided for her by the employer.<sup>30</sup>

The Court also rejected the notion that the 'reasonable person' test in the context of sexual harassment carried over into the assessment of damages. Black CJ and Tamberlin J noted that there is a 'sharp distinction' drawn by the legislative scheme between

on the one hand, the definition of sexual harassment in the SDA and the operation of that Act in making sexual harassment unlawful in certain circumstances and, on the other hand, the power conferred by the HREOC Act to make an order for damages by way of compensation if the court is satisfied that there has been unlawful discrimination.<sup>31</sup>

In the context of a successful claim of unlawful disability discrimination,<sup>32</sup> Heerey J awarded the applicant \$20,000 for non-economic loss. His Honour noted that the applicant 'has suffered substantial mental anguish. Perhaps he does not have a particularly stoic makeup, but, to apply the aphorism of the common law, the unlawful discriminator must take the plaintiff as it finds him'.<sup>33</sup>

#### **(d) Aggravated and exemplary damages**

In *Hall v Sheiban*<sup>34</sup> the Federal Court held for the first time that aggravated damages may be awarded in discrimination cases. Lockhart J cited with approval the statement of May LJ in *Alexander v Home Office*<sup>35</sup> that aggravated damages may be awarded where the defendant behaved 'high-

<sup>29</sup> (2005) 144 FCR 402, 410 [45].

<sup>30</sup> (2005) 144 FCR 402, 411 [51]-[52].

<sup>31</sup> (2005) 144 FCR 402, 410 [46].

<sup>32</sup> *Gordon v Commonwealth* [2008] FCA 603.

<sup>33</sup> [2008] FCA 603, [119].

<sup>34</sup> (1989) 20 FCR 217.

<sup>35</sup> [1988] 2 All ER 118.

handedly, maliciously, insultingly or oppressively in committing the act of discrimination'.<sup>36</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>37</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>38</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>39</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>40</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>41</sup> He stated, however, that the stress of litigation is not, in itself, sufficient to attract an award of aggravated damages: 'the defendant must conduct his or her case in a manner which is unjustifiable, improper or lacking in bona fides'.<sup>42</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>43</sup>

In *Font v Paspaley Pearls Pty Ltd*<sup>44</sup> ('*Font*'), the applicant sought aggravated damages by reason of the conduct of the respondents in the course of the litigation. Raphael FM noted:

In this case the conduct of the respondents complained of is the putting into evidence, by way of affidavits of the respondents witnesses and cross-examination of the applicant, various matters relating to the way she conducted herself with men, her conversations on sexual matters and her dress. Although the applicant sought to have these matters removed from the affidavits, I was pressed by the respondents to keep them in. I did so reluctantly and subject to their relevance. I found nothing relevant about them.

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<sup>36</sup> (1989) 20 FCR 217, 239.

<sup>37</sup> (1989) 20 FCR 217, 240.

<sup>38</sup> (1989) 20 FCR 217, 240.

<sup>39</sup> (2001) 111 FCR 240.

<sup>40</sup> (2001) 111 FCR 240, 297 [180].

<sup>41</sup> (2001) 111 FCR 240, 297 [181].

<sup>42</sup> (2001) 111 FCR 240, 297-298 [182]. His Honour's decision was applied in *Oberoi v Human Rights & Equal Opportunity Commission* [2001] FMCA 34, [44].

<sup>43</sup> *Elliott v Nanda* (2001) 111 FCR 240, 298 [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.

<sup>44</sup> [2002] FMCA 142, [161]-[166].

They did not assist me in anyway to form a view about the applicant or the truth of her allegations ... I accept the submission by the applicant's Counsel that the former evidence was no more than an attempt to blacken the character of the applicant so that I should think less favourably of her in coming to any conclusions about the truthfulness of her evidence or the quantum of any damage she might have suffered. I think the whole exercise was unjustifiable and inappropriate and must have added to the distress felt by the applicant in giving her evidence and proceeding with the claim.<sup>45</sup>

In considering the appropriate remedy given the respondent's conduct, Raphael FM distinguished between 'exemplary' and 'aggravated' damages. His Honour noted that exemplary damages are more punitive than compensatory in character. The type of action which might occasion an award of exemplary damages is

reprehensible conduct which might perhaps have warranted punishment, rather than findings of the infliction of hurt, insult and humiliation.<sup>46</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>47</sup>

When considering conduct 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>48</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>49</sup>

In *Hughes v Car Buyers Pty Ltd*<sup>50</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

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<sup>45</sup> [2002] FMCA 142, [160].

<sup>46</sup> [2002] FMCA 142, [162], citing *Hehir v Smith* [2002] QSC 92, [42].

<sup>47</sup> [2002] FMCA 142, [165].

<sup>48</sup> [2002] FMCA 142, [165].

<sup>49</sup> [2002] FMCA 142, [166]. Cf *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.

<sup>50</sup> (2004) 210 ALR 645.

the course of the proceedings. The respondent had failed to respond to correspondence from the 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 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.

While the applicant did not seek exemplary damages, 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 under s 46PO(4) of the 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' (s 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>51</sup>

Walters FM cited<sup>52</sup> the following passage from the judgment of Windeyer J in *Uren v John Fairfax and Sons Pty Ltd*:<sup>53</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.

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>54</sup>

Similarly, in *Frith v The Exchange Hotel*,<sup>55</sup> Rimmer FM held that the court has power to award aggravated damages under s 46PO(4) but does not have the power to award exemplary damages.<sup>56</sup> Her Honour appears to have reached this view on the basis of a 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>57</sup> Her Honour further referred to the decision of *Harris v Digital Pulse*,<sup>58</sup> in which Spigelman CJ questioned the description of exemplary damages as 'damages'.

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<sup>51</sup> (2004) 210 ALR 645, 657 [68].

<sup>52</sup> (2004) 210 ALR 645, 657 [69].

<sup>53</sup> (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).

<sup>54</sup> (2004) 210 ALR 645, 657 [71].

<sup>55</sup> [2005] FMCA 402.

<sup>56</sup> [2005] FMCA 402, [99].

<sup>57</sup> [2005] FMCA 402, [100]-[105].

<sup>58</sup> (2003) 197 ALR 626, 629.

Rimmer FM adopted the findings of Walter FM in *Hughes* that aggravated damages are compensatory in nature<sup>59</sup> but declined to award aggravated damages because she found that the respondent had been entitled to defend himself by attacking the credit of the applicant and had not conducted the proceedings in any way that would justify an award of aggravated damages.<sup>60</sup>

Note, 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>61</sup> observed, ‘the list of specified orders in s 46PO(4) is not exhaustive – see the use of the word “including”’.<sup>62</sup> This suggests that the Court may, indeed, enjoy the power to make orders for exemplary damages in appropriate cases.

### **(e) A finding of discrimination is necessary**

In *Moskalev v NSW Department of Housing*<sup>63</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>64</sup>

The Department of Housing 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>65</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>66</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>67</sup> It follows that the order was made ultra vires.<sup>68</sup>

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<sup>59</sup>[2005] FMCA 402, [106].

<sup>60</sup>[2005] FMCA 402, [112].

<sup>61</sup>(2002) 124 FCR 106.

<sup>62</sup>(2002) 124 FCR 106, 123 [80].

<sup>63</sup>[2006] FMCA 876.

<sup>64</sup>[2006] FMCA 876, [35].

<sup>65</sup>(2007) 158 FCR 206.

<sup>66</sup>Section 15 of the *Federal Magistrates Act 1999* (Cth) (‘FMA’) provides 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.

<sup>67</sup>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.

## 7.2.2 Damages under the RDA

The following table gives an overview of damages awarded under the RDA since the transfer of the hearing function to the FMC and the Federal Court on 13 April 2000. The reasoning underlying those awards is summarised below.

**Table 1: Overview of damages awarded under 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>McMahon v Bowman</i> [2000] FMCA 3	\$1,500 (non-economic)
(c)	<i>Horman v Distribution Group</i> [2001] FMCA 52	\$12,500 (non-economic: including medication costs)
(d)	<i>San v Dirluck Pty Ltd</i> (2005) 222 ALR 91	\$2,000 (non-economic)
(e)	<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
(f)	<i>Gama v Qantas Airways Ltd (No 2)</i> [2006] FMCA 1767, upheld on appeal: <i>Qantas Airways Ltd v Gama</i> [2008] FCAFC 69	Total Damages: \$71,692 \$40,000 (non-economic loss) \$31,692 (medical expenses and interest)
(g)	<i>Silberberg v The Builders Collective of Australia Inc</i> [2007] FCA 1512	No damages awarded
(h)	<i>Campbell v Kirstenfeldt</i> [2008] FMCA 1356	Total damages: \$7,500 (non-economic)
(i)	<i>House v Queanbeyan Community Radio Station</i> [2008] FMCA 897	Total damages: \$6000 for each applicant (non-economic)
(j)	<i>Trapman v Sydney Water Corporation &amp; Ors</i> [2011] FMCA 398	Total damages: \$5,000 (non-economic)

### (a) Carr v Boree Aboriginal Corporation

In *Carr v Boree Aboriginal Corporation*<sup>68</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>70</sup> In the absence of any evidence to the contrary, his Honour

<sup>68</sup> (2007) 158 FCR 206, 213 [34]. See also *Neate v Totally & Permanently Incapacitated Veterans Association of NSW Ltd* [2007] FMCA 488, [24].

<sup>69</sup> [2003] FMCA 408.

<sup>70</sup> [2003] FMCA 408, [9].

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>71</sup> and the fact that no medical evidence had been adduced.

**(b) McMahon v Bowman**

In *McMahon v Bowman*,<sup>72</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>73</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.

**(c) Horman v Distribution Group**

In *Horman v Distribution Group*<sup>74</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 s 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>75</sup>

**(d) San v Dirluck Pty Ltd**

In *San v Dirluck Pty Ltd*,<sup>76</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'.

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<sup>71</sup> [2003] FMCA 408, [12].

<sup>72</sup> [2000] FMCA 3.

<sup>73</sup> [2000] FMCA 3, [30].

<sup>74</sup> [2001] FMCA 52.

<sup>75</sup> [2001] FMCA 52, [70].

<sup>76</sup> (2005) 222 ALR 91.

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>77</sup>

**(e) Baird v Queensland**

In *Baird v Queensland*,<sup>78</sup> the Full 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.

**(f) Gama v Qantas Airways Ltd**

In *Gama v Qantas Airways Ltd (No 2)*,<sup>79</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>80</sup> the Full 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.

**(g) Silberberg v The Builders Collective of Australia Inc**

In *Silberberg v The Builders Collective of Australia Inc*,<sup>81</sup> Gyles J held that the second respondent had contravened s 18C of the RDA by posting messages on a forum maintained by the first 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.

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<sup>77</sup> (2005) 222 ALR 91, 107 [46]-[47].

<sup>78</sup> [2006] FCAFC 198.

<sup>79</sup> [2006] FMCA 1767.

<sup>80</sup> *Qantas Airways Ltd v Gama* [2008] FCAFC 69.

<sup>81</sup> [2007] FCA 1512.

## (h) **Campbell v Kirstenfeldt**

In *Campbell v Kirstenfeldt*,<sup>82</sup> Lucev FM held the applicant had been subject to six separate acts of racial hatred in breach of s 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>83</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>84</sup> The respondent was also ordered to make a written apology.

## (i) **House v Queanbeyan Community Radio Station**

In *House v Queanbeyan Community Radio Station*<sup>85</sup> Neville FM found that 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>86</sup> There was also no evidence the actions of the radio station had impaired the employment of the applicants. Damages of \$6000 were awarded to each applicant. Costs were also awarded against the radio station.

## (j) **Trapman v Sydney Water Corporation & Ors**

In *Trapman v Sydney Water Corporation & Ors*<sup>87</sup> Scarlett FM awarded the applicant \$5000 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 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 and the Federal Court on 13 April 2000. The reasoning underlying those awards is summarised below.

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<sup>82</sup> [2008] FMCA 1356.

<sup>83</sup> [2008] FMCA 1356, [44].

<sup>84</sup> [2008] FMCA 1356, [44].

<sup>85</sup> [2008] FMCA 897.

<sup>86</sup> [2008] FMCA 897, [124].

<sup>87</sup> [2011] FMCA 398.

Note that sexual harassment matters are not dealt with in this section: they are considered separately in 7.2.4.

**Table 2: Overview of damages awarded under the SDA**

	<b>Case</b>	<b>Damages awarded</b>
(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)
(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) 176 FLR 214	\$7,500 (non-economic loss)
(j)	<i>Gardner v All Australia Netball Association Ltd</i> (2003) 197 ALR 28	\$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) 188 FLR 1; <i>Howe v Qantas Airways Ltd (No 2)</i> [2004] FMCA 934	Total Damages: \$27,753.85 (plus interest) \$3,000 (non-economic loss)

	Case	Damages awarded
		\$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>88</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)
(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)

### (a) Font v Paspaley Pearls Pty Ltd

In *Font v Paspaley Pearls Pty Ltd*,<sup>89</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>90</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>91</sup>

<sup>88</sup> See *Iliff v Sterling Commerce (Australia) Pty Ltd (No 2)* [2008] FMCA 38.

<sup>89</sup> [2002] FMCA 142.

<sup>90</sup> See 7.2.1(d) above.

<sup>91</sup> [2002] FMCA 142, [155].

**(b) Grulke v KC Canvas Pty Ltd**

In *Grulke v KC Canvas Pty Ltd*,<sup>92</sup> the precise basis of the claim is unclear from the decision, although Ryan J noted that he was satisfied that s 14 of the SDA had been contravened. His Honour awarded \$7,000 for lost earnings and \$3,000 as compensation for 'psychological harm inflicted by the injury to the applicant's feelings which occurred during the course of employment'.<sup>93</sup> That injury was said to be 'substantially exacerbated by the termination of that employment in the circumstances that she recounted'<sup>94</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>95</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 s 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>96</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>97</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>98</sup>

**(d) Song v Ainsworth Game Technology Pty Ltd**

In *Song v Ainsworth Game Technology Pty Ltd*,<sup>99</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 s 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

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<sup>92</sup> [2000] FCA 1415.

<sup>93</sup> [2000] FCA 1415, [2].

<sup>94</sup> [2000] FCA 1415, [2].

<sup>95</sup> [2001] FMCA 91.

<sup>96</sup> [2001] FMCA 91, [31].

<sup>97</sup> [2001] FMCA 91, [38].

<sup>98</sup> [2001] FMCA 91, [42].

<sup>99</sup> [2002] FMCA 31.

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>100</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>101</sup>

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>102</sup>

**(f) Mayer v Australian Nuclear Science & Technology Organisation**

In *Mayer v Australian Nuclear Science & Technology Organisation*<sup>103</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 3 days a week. Entitlements for economic loss suffered in terms of lost salary, motor vehicle benefits and superannuation amounted to \$30,695. The applicant received this compensation for the period when she was entitled to receive a full-time income and the three-month notice period. She did not receive any compensation for the period following as the respondent was entitled to

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<sup>100</sup> [2002] FMCA 122.

<sup>101</sup> [2002] FMCA 122, [40].

<sup>102</sup> [2002] FMCA 122, [42].

<sup>103</sup> [2003] FMCA 209.

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>104</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>105</sup> The respondent was ordered to deduct from the damages awarded and remit to the ATO an amount due for income tax calculated on the basis that the damages awarded included an assessable income in the sum of \$13,642 and an eligible termination payment in the sum of \$9,852.<sup>106</sup>

### **(g) Evans v National Crime Authority**

At first instance in *Evans v National Crime Authority*<sup>107</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>108</sup>

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<sup>104</sup> [2003] FMCA 209, [95].

<sup>105</sup> [2003] FMCA 209, [97].

<sup>106</sup> 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.

<sup>107</sup> [2003] FMCA 375.

<sup>108</sup> [2003] FMCA 375, [111]-[112].

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>109</sup> In upholding the appeal, Branson J held that the appropriate award for non-economic loss in the circumstances was \$12,000.<sup>110</sup>

#### **(h) Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd**

In *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd*,<sup>111</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:

Ms Rispoli should receive a substantial sum for her non-economic loss, given the period of approximately 16 months over which it was experienced, given that it was aggravated by the confirmation of Ms Rispoli's loss of status in March 2000 and given the need to enforce respect for the public policy behind the SDA.<sup>112</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>113</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 Ms Rispoli's loss of income following her resignation was broken by her own action'.<sup>114</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.

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<sup>109</sup> *Commonwealth v Evans* [2004] FCA 654.

<sup>110</sup> [2004] FCA 654, [84].

<sup>111</sup> [2003] FMCA 160.

<sup>112</sup> [2003] FMCA 160, [92].

<sup>113</sup> [2003] FMCA 160, [91].

<sup>114</sup> [2003] FMCA 160, [89].

**(i) Kelly v TPG Internet Pty Ltd**

The applicant in *Kelly v TPG Internet Pty Ltd*<sup>115</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>116</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 ss 7 and 22 of the SDA. The applicant was awarded the sum of \$6,750 by way of agreed damages. This covered lost match payments, sponsorship and hurt and humiliation suffered by the applicant.

**(k) Ho v Regulator Australia Pty Ltd**

In *Ho v Regulator Australia Pty Ltd*,<sup>117</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 Federal Court in *South Pacific Resort Hotels Pty Ltd v Trainor*,<sup>118</sup> discussed at 7.2.1(c) above, 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>119</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>120</sup> and special damages of \$24,753.85 calculated on the basis of the applicant's salary for

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<sup>115</sup> (2003) 176 FLR 214.

<sup>116</sup> (2003) 197 ALR 28.

<sup>117</sup> [2004] FMCA 62.

<sup>118</sup> (2005) 144 FCR 402.

<sup>119</sup> (2004) 188 FLR 1. See also *Howe v Qantas Airways Ltd (No 2)* [2004] FMCA 934 for further discussion of the calculation of damages.

<sup>120</sup> (2004) 188 FLR 1, 152 [133].

sick leave purposes for the period when she was entitled to be taking that leave.<sup>121</sup>

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>122</sup>

**(m) Dare v Hurley**

In *Dare v Hurley*,<sup>123</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>124</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>125</sup>

**(o) Rankilor v Jerome Pty Ltd**

In *Rankilor v Jerome Pty Ltd*,<sup>126</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>127</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

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<sup>121</sup> (2004) 188 FLR 1, 151-152 [132], [2004] FMCA 934 [8].

<sup>122</sup> [2004] FMCA 242, [133].

<sup>123</sup> [2005] FMCA 844.

<sup>124</sup> [2006] FMCA 3.

<sup>125</sup> [2006] FMCA 3, [98].

<sup>126</sup> [2006] FMCA 922.

<sup>127</sup> [2007] FMCA 1960.

parenthood. Burchardt FM awarded Ms Iliff \$22,211.45 plus interest<sup>128</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 *Workplace Relations Act 1996* (Cth).

On appeal,<sup>129</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 *Workplace Relations Act 1996* (Cth).

#### **(q) Poniatowska v Hickinbotham**

In *Poniatowska v Hickinbotham*,<sup>130</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.

#### **(r) Maxworthy v Shaw**

In *Maxworthy v Shaw*<sup>131</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>132</sup>.

### **7.2.4 Damages in sexual harassment cases**

The following table gives an overview of damages awarded in sexual harassment cases under the SDA since the transfer of the hearing function to

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<sup>128</sup> *Iliff v Sterling Commerce (Australia) Pty Ltd (No 2)* [2008] FMCA 38.

<sup>129</sup> *Sterling Commerce (Australia) Pty Ltd v Iliff* [2008] FCA 702.

<sup>130</sup> [2009] FCA 680.

<sup>131</sup> [2010] FMCA 1014.

<sup>132</sup> *Ibid* [193]-[196].

the FMC and the Federal Court on 13 April 2000. The reasoning underlying those awards is summarised below.

**Table 3: 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) 181 ALR 57	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) 163 FLR 58	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)
(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 v Car Buyers Pty Ltd</i> (2004) 210 ALR 645	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)

	Case	Damages awarded
		\$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) 186 FLR 132; 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) 222 ALR 91	\$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)
(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)

### (a) **Gilroy v Angelov**

The applicant in *Gilroy v Angelov*<sup>133</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

<sup>133</sup> (2000) 181 ALR 57.

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>134</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>135</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>136</sup>

The Commonwealth, as second respondent, was also found to be liable for the conduct of Dr Nanda under s 105 of the SDA. Moore J accordingly held that the amounts awarded (with the exception of the award of aggravated damages) could be recovered from either respondent, although the applicant could not be compensated twice. In arriving at that conclusion, his Honour rejected the Commonwealth's submission to the effect that the applicant could only obtain relief for sexual harassment against Dr Nanda, stating:

This submission fails to give full effect to s.105 which results in a person to whom the section applies being treated as having done the unlawful act of another...the Court has power under s 46PO(4) to make such orders...as it thinks fit [including] an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent.<sup>137</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

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<sup>134</sup> (1989) 20 FCR 217.

<sup>135</sup> (2001) 111 FCR 240.

<sup>136</sup> (2001) 111 FCR 240, 298 [185]. See 7.2.1(d) above.

<sup>137</sup> (2001) 111 FCR 240, 298 [186].

the powers conferred by the legislation. I do not suggest that some common law principle, such as that which applies to joint tortfeasors, is to be applied in the present case with a particular result. As the respondent was the primary and immediate cause of the compensable loss and damage, he should bear the greater portion of the burden. I do not accept, however, that the Commonwealth should bear none of the burden. First, orders are not being made to punish either the respondent or the Commonwealth but rather are being made to compensate the applicant. Secondly, had the Commonwealth not engaged in conduct which I have found permitted the unlawful conduct of the respondent, that unlawful conduct would or may never have taken place. Accordingly I propose to order that, in the event that the respondent satisfies the liability to pay the \$15,100, the Commonwealth is to contribute \$5000. If the Commonwealth satisfies the liability then the respondent is to contribute \$10,100. Plainly it is only the respondent who is liable to pay the \$5000 aggravated damages.<sup>138</sup>

### (c) **Shiels v James**

In *Shiels v James*<sup>139</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>140</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>141</sup> His Honour further noted that the higher awards had been made in cases involving more physical action<sup>142</sup> or more substantial physical sequelae.<sup>143</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>144</sup>

### (d) **Johanson v Blackledge**

In *Johanson v Blackledge*,<sup>145</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).

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<sup>138</sup> *Elliott v Nanda* [2001] FCA 550, [14].

<sup>139</sup> [2000] FMCA 2.

<sup>140</sup> [2000] FMCA 2, [62]-[64].

<sup>141</sup> 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'.

<sup>142</sup> *Harwin v Pateluch* [1995] HREOCA 23 (extract at (1995) EOC 92-770).

<sup>143</sup> *Smith v Buvet* (1996) EOC 92-840.

<sup>144</sup> [2000] FMCA 2, [79].

<sup>145</sup> (2001) 163 FLR 58.

**(e) Horman v Distribution Group**

The applicant in *Horman v Distribution Group*<sup>146</sup> led medical evidence concerning the effect of the conduct which was found to constitute sexual harassment and discrimination in contravention of s 14(2)(b) of the SDA. That evidence indicated that the applicant had suffered from anxiety and panic attacks and that, as a result of a heated argument the applicant had with another employee in September 1997, the applicant nearly suffered a miscarriage. Raphael FM found that the applicant's symptoms fell within the 'less serious band', although he specifically noted that he was not underestimating the 'concern that any pregnant woman in the workplace would feel at the possibility of a miscarriage brought about by actions in the workplace'.<sup>147</sup> His Honour awarded the amount of \$12,500, which was a global figure to compensate the applicant for general non-economic loss and any special damage for the cost of medication.

**(f) Wattle v Kirkland**

In *Wattle v Kirkland*<sup>148</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>149</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>150</sup> The matter was remitted and heard by Driver FM, who awarded the same amount as Raphael FM for general damages.<sup>151</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>152</sup>

**(g) Aleksovski v Australia Asia Aerospace Pty Ltd**

In *Aleksovski v Australia Asia Aerospace Pty Ltd*<sup>153</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

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<sup>146</sup> [2001] FMCA 52.

<sup>147</sup> [2001] FMCA 52, [70].

<sup>148</sup> [2001] FMCA 66.

<sup>149</sup> *Kirkland v Wattle* [2002] FCA 145.

<sup>150</sup> [2002] FCA 145, [3].

<sup>151</sup> *Wattle v Kirkland (No 2)* [2002] FMCA 135, [71].

<sup>152</sup> [2002] FMCA 135, [70].

<sup>153</sup> [2002] FMCA 81.

traumatic as those of many people who come before this court making allegations of sexual harassment'.<sup>154</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>155</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 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>156</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 twelve months. In those circumstances, her Honour awarded the applicant \$4,000 for general damages.

Her Honour also awarded the applicant damages to compensate her for loss she incurred in connection with relocating following the acts of sexual harassment. The amounts allowed under that head were \$600 for the applicant's moving costs and \$500 to compensate the applicant for the loss of goods and furniture which the applicant disposed of or gave away prior to moving.

#### **(i) Beamish v Zheng**

In *Beamish v Zheng*,<sup>157</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>158</sup> This was corroborated by

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<sup>154</sup> [2002] FMCA 81, [102].

<sup>155</sup> [2002] FMCA 109.

<sup>156</sup> [2002] FMCA 109, [157].

<sup>157</sup> [2004] FMCA 60.

<sup>158</sup> [2004] FMCA 60, [20].

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>159</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>160</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.

#### **(k) Hughes v Car Buyers Pty Ltd**

The respondents in *Hughes v Car Buyers Pty Ltd*<sup>161</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>162</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

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<sup>159</sup> [2004] FMCA 74.

<sup>160</sup> [2004] FMCA 74, [35].

<sup>161</sup> (2004) 210 ALR 645.

<sup>162</sup> (2004) 210 ALR 645, 655-656 [60].

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>163</sup>

### **(l) Trainor v South Pacific Resort Hotels Pty Ltd**

Coker FM in *Trainor v South Pacific Resort Hotels Pty Ltd*<sup>164</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>165</sup>

### **(m) Phillis v Mandic**

In *Phillis v Mandic*,<sup>166</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

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<sup>163</sup> See further 7.2.1(d) above.

<sup>164</sup> (2004) 186 FLR 132.

<sup>165</sup> (2005) 144 FCR 402.

<sup>166</sup> [2005] FMCA 330.

on her, described by the Court as being 'in the minimal range of depression'.<sup>167</sup>

**(n) Frith v The Exchange Hotel**

In *Frith v The Exchange Hotel*,<sup>168</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>169</sup> Raphael FM found that the second respondent had sexually harassed the applicant in breach of s 28B(2) of the SDA and also contravened s 18C(1) of the RDA. The first respondent accepted that it was vicariously liable under s 18A of the RDA and s 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>170</sup>

**(p) Cross v Hughes**

In *Cross v Hughes*,<sup>171</sup> Lindsay FM held that the first respondent had sexually harassed the applicant in contravention of ss 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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<sup>167</sup> [2005] FMCA 330, [28].

<sup>168</sup> [2005] FMCA 402.

<sup>169</sup> (2005) 222 ALR 91.

<sup>170</sup> (2005) 222 ALR 91, 107 [46].

<sup>171</sup> [2006] FMCA 976.

**(q) Hewett v Davies**

In *Hewett v Davies*,<sup>172</sup> Raphael FM held that the first respondent had sexually harassed the applicant in breach of s 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>173</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>174</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>175</sup> it was held that the first respondent had sexually harassed the applicant in breach of s 28(2) of the SDA and that the second

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<sup>172</sup> [2006] FMCA 1678.

<sup>173</sup> [2007] FMCA 59.

<sup>174</sup> [2007] FMCA 1092.

<sup>175</sup> [2011] FMCA 283.

respondent was vicariously liable under s 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 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.

## 7.2.5 Damages under the DDA

The following table gives an overview of damages awarded under the DDA since the transfer of the hearing function to the FMC and the Federal Court on 13 April 2000. The reasoning underlying those awards is summarised below.

**Table 4: 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) 184 ALR 83	\$3,000 (non-economic loss)
(c)	<i>Travers v New South Wales</i> (2001) 163 FLR 99	\$6,250 (non-economic loss)
(d)	<i>McKenzie v Department of Urban Services</i> (2001) 163 FLR 133	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)
(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%)

	<b>Case</b>	<b>Damages awarded</b>
(l)	<i>Clarke v Catholic Education Office</i> (2003) 202 ALR 340, upheld on appeal <i>Catholic Education Office v Clarke</i> [2004] FCAFC 197	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 Hurl Refractory Services Pty Ltd (No 4)</i> [2005] FMCA 1226	\$5,000 (non-economic loss) Damages for economic loss to be agreed
(q)	<i>Wiggins v Department of Defence – Navy</i> (2006) 200 FLR 438; 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>176</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] FCAFC 96,	\$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)

<sup>176</sup> Affirmed in *Hurst v Queensland (No 2)* [2006] FCAFC 151.

**(a) Barghouthi v Transfield Pty Ltd**

In *Barghouthi v Transfield Pty Ltd*,<sup>177</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>178</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>179</sup>

**(c) Travers v New South Wales**

In *Travers v New South Wales*,<sup>180</sup> Raphael FM agreed with the views<sup>181</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:

- 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.

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<sup>177</sup> (2002) 122 FCR 19.

<sup>178</sup> (2000) 184 ALR 83.

<sup>179</sup> (2000) 184 ALR 83, 97 [89].

<sup>180</sup> (2001) 163 FLR 99.

<sup>181</sup> (2001) 163 FLR 99, 117 [73].

**(d) McKenzie v Department of Urban Services**

Raphael FM in *McKenzie v Department of Urban Services*<sup>182</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>183</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) 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>184</sup>

**(e) Oberoi v Human Rights & Equal Opportunity Commission**

In *Oberoi v Human Rights & Equal Opportunity Commission*,<sup>185</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.

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<sup>182</sup> (2001) 163 FLR 133.

<sup>183</sup> (1995) EOC 92-714.

<sup>184</sup> (2001) 163 FLR 133, 155 [94].

<sup>185</sup> [2001] FMCA 34.

**(f) Sheehan v Tin Can Bay Country Club**

The respondent club in *Sheehan v Tin Can Bay Country Club*<sup>186</sup> was found to have unlawfully discriminated against the applicant pursuant to s 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>187</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>188</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>189</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>190</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>191</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

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<sup>186</sup> [2002] FMCA 95.

<sup>187</sup> [2002] FMCA 44.

<sup>188</sup> [2002] FMCA 31.

<sup>189</sup> [2002] FMCA 44, [55].

<sup>190</sup> [2003] FMCA 140.

<sup>191</sup> [2003] FMCA 140, [28].

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>192</sup>

**(i) McBride v Victoria (No 1)**

The applicant in *McBride v Victoria (No 1)*<sup>193</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>194</sup> McInnis FM held that this constituted unlawful discrimination contrary to ss 15(2)(b) and (d) of the DDA. His Honour found that the incident caused 'significant upset and hurt' to the applicant and awarded \$5,000 in damages.

**(j) Bassanelli v QBE Insurance**

Raphael FM in *Bassanelli v QBE Insurance*<sup>195</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>196</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>197</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.

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<sup>192</sup> [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].

<sup>193</sup> [2003] FMCA 285.

<sup>194</sup> [2003] FMCA 285, [48].

<sup>195</sup> [2003] FMCA 412, affirmed on appeal: *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88.

<sup>196</sup> [2003] FMCA 412, [56].

<sup>197</sup> [2002] FMCA 176.

### (l) **Clarke v Catholic Education Office**

The respondent in *Clarke v Catholic Education Office*<sup>198</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 Federal Court in *Catholic Education Office v Clarke*.<sup>199</sup> Sackville and Stone JJ commenting that the damages awarded by the primary judge were 'relatively modest'.<sup>200</sup>

### (m) **Power v Aboriginal Hostels Ltd**

In *Power v Aboriginal Hostels Ltd*,<sup>201</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 disability. Brown FM noted that it was conceded the applicant did not suffer a specific psychiatric or psychological illness following his dismissal.<sup>202</sup> His Honour was of the view that *Randell v Consolidated Bearing Company SA Pty Ltd*,<sup>203</sup> *Song v Ainsworth Game Technology Pty Ltd*<sup>204</sup> and *X v McHugh (Auditor-General for the State of Tasmania)*<sup>205</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>206</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 eighteen 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>207</sup>

### (n) **Trindall v NSW Commissioner of Police**

The applicant in *Trindall v NSW Commissioner of Police*<sup>208</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

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<sup>198</sup> (2003) 202 ALR 340.

<sup>199</sup> (2004) 138 FCR 121.

<sup>200</sup> (2004) 138 FCR 121, 149-150 [134].

<sup>201</sup> [2004] FMCA 452.

<sup>202</sup> [2004] FMCA 452, [73].

<sup>203</sup> [2002] FMCA 44.

<sup>204</sup> [2002] FMCA 31.

<sup>205</sup> (1994) 56 IR 248.

<sup>206</sup> [2004] FMCA 452, [74]-[76].

<sup>207</sup> [2004] FMCA 452, [81]-[82].

<sup>208</sup> [2005] FMCA 2.

discrimination.<sup>209</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>210</sup> Interest was also awarded.<sup>211</sup>

### (o) **Hurst and Devlin v Education Queensland**

In *Hurst and Devlin v Education Queensland*,<sup>212</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>213</sup> Lander J awarded the second applicant \$20,000 (plus \$4,000 in interest)<sup>214</sup> for the hurt, embarrassment and social dislocation which had been occasioned by his inability to communicate in any language.<sup>215</sup>

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>216</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>217</sup>

The first respondent (Hurst) appealed the decision of Lander J to the Full Federal Court,<sup>218</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>219</sup> the respondent was found to have victimised the applicant contrary to s 42 of the DDA by deciding that it would not consider employing him because of previous and threatened future applications under the HREOC Act (now the AHRC Act) alleging disability discrimination. The respondent was ordered to pay the

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<sup>209</sup> [2005] FMCA 2, [185].

<sup>210</sup> [2005] FMCA 2, [187].

<sup>211</sup> [2005] FMCA 2, [189].

<sup>212</sup> [2005] FCA 405.

<sup>213</sup> [2005] FCA 405, [797], [806].

<sup>214</sup> [2005] FCA 405, [866].

<sup>215</sup> [2005] FCA 405, [846].

<sup>216</sup> [2005] FCA 405, [859]-[861].

<sup>217</sup> [2005] FCA 405, [855]-[857].

<sup>218</sup> *Hurst v State of Queensland* (2006) 151 FCR 562.

<sup>219</sup> [2005] FMCA 1226.

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>220</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>221</sup>

**(r) Vickers v The Ambulance Service of NSW**

In *Vickers v The Ambulance Service of NSW*,<sup>222</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>223</sup>

**(s) Hurst v Queensland**

In *Hurst v Queensland*,<sup>224</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 s 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

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<sup>220</sup> (2006) 200 FLR 438.

<sup>221</sup> (2006) 200 FLR 438, 481-482 [202].

<sup>222</sup> [2006] FMCA 1232.

<sup>223</sup> [2006] FMCA 1232, [55].

<sup>224</sup> (2006) 151 FCR 562.

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 Lander J's finding that there be no award of damages.<sup>225</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>226</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>227</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>228</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>229</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>230</sup>

#### **(v) Gordon v Commonwealth**

In *Gordon v Commonwealth*,<sup>231</sup> Heerey J held that the respondent had discriminated against Mr Gordon by dismissing him from his employment as a

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<sup>225</sup> (2006) 151 FCR 562, 585 [137].

<sup>226</sup> [2006] FCAFC 151.

<sup>227</sup> [2006] FCAFC 151, [26].

<sup>228</sup> [2007] FMCA 931.

<sup>229</sup> (2007) 161 FCR 152.

<sup>230</sup> *Queensland (Queensland Health) v Forest* [2008] FCAFC 96.

GST Field Officer, APS 4 level, at the Australian Taxation Office ('ATO') on the basis of his imputed (or actual) hypertension.<sup>232</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>233</sup> An amount of \$8030 was also awarded as representing the amount Mr Gordon would have to repay to Centrelink.<sup>234</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>235</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>236</sup> His Honour was satisfied that Mr Gordon had suffered substantial mental anguish and awarded \$20,000 for non-economic loss.<sup>237</sup>

### (w) **Maxworthy v Shaw**

In *Maxworthy v Shaw*<sup>238</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 affect 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>239</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>240</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 s77 of the FMC Act for interest from the date of judgment.

## 7.3 Apologies

Divergent views have been expressed by courts as to the appropriateness of ordering an apology.

In *Creek v Cairns Post Pty Ltd*,<sup>241</sup> 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

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<sup>231</sup> [2008] FCA 603.

<sup>232</sup> [2008] FCA 603, [58]-[62].

<sup>233</sup> [2008] FCA 603, [102].

<sup>234</sup> [2008] FCA 603, [103].

<sup>235</sup> [2008] FCA 603, [113].

<sup>236</sup> [2008] FCA 603, [98].

<sup>237</sup> [2008] FCA 603, [121].

<sup>238</sup> [2010] FMCA 1014. Note damages were also awarded

<sup>239</sup> *ibid* [155]-[188].

<sup>240</sup> *ibid* [189]-[192].

<sup>241</sup> (2001) 112 FCR 352.

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>242</sup>

In *Forbes v Commonwealth*,<sup>243</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>244</sup>

In *Cooke v Plauen Holdings Pty Ltd*,<sup>245</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>246</sup>

In *Escobar v Rainbow Printing Pty Ltd (No 2)*,<sup>247</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>248</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>249</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 feel'. Her Honour cited with approval the view of Hely J in *Jones v Scully*<sup>250</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>251</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>252</sup>

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<sup>242</sup> (2001) 112 FCR 352, 360-361 [35].

<sup>243</sup> [2003] FMCA 140.

<sup>244</sup> [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 *Oberoi v Human Rights & Equal Opportunity Commission* [2001] FMCA 34 in which an apology was ordered.

<sup>245</sup> [2001] FMCA 91.

<sup>246</sup> [2001] FMCA 91, [43].

<sup>247</sup> [2002] FMCA 122.

<sup>248</sup> [2002] FMCA 122, [43].

<sup>249</sup> [2002] FCA 1150, [106].

<sup>250</sup> (2002) 120 FCR 243, 308 [245].

<sup>251</sup> (2001) 163 FLR 99.

<sup>252</sup> (2001) 163 FLR 99, 116-117 [73].

And again by his Honour in *Evans v National Crime Authority*:<sup>253</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>254</sup>

In *Gulke v KC Canvas*,<sup>255</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>256</sup>

In *Lee v Smith (No 2)*,<sup>257</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>258</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).

## 7.4 Declarations

In *Commonwealth v Evans*,<sup>259</sup> Branson J considered in detail the power to make declarations under s 46PO(4) of what is now the AHRC Act and found that it was appropriate to apply general law principles.<sup>260</sup> At general law it is established that a trial judge should not make a declaration which is not tied to

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<sup>253</sup> [2003] FMCA 375.

<sup>254</sup> [2003] FMCA 375, [115]. See also *Carr v Boree Aboriginal Corporation* [2003] FMCA 408, [14].

<sup>255</sup> [2000] FCA 1415.

<sup>256</sup> [2000] FCA 1415, [4].

<sup>257</sup> [2007] FMCA 1092.

<sup>258</sup> [2007] FMCA 1092, [16].

<sup>259</sup> [2004] FCA 654.

<sup>260</sup> [2004] FCA 654, [57]-[60].

proven facts.<sup>261</sup> Branson J also cited the following passage from *Warramunda Village Inc v Pryde*.<sup>262</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>263</sup>

Her Honour appeared to reject the submission that s 46PO(4)(a) of the 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>264</sup> In the decision under appeal, Raphael FM had declared ‘that the respondent unlawfully discriminated against the applicant contrary to s 14(2) of the *Sex Discrimination Act* 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>265</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>266</sup>

In *McGlade v Lightfoot*,<sup>267</sup> the primary relief sought by the applicant was a declaration that the conduct of the respondent was unlawful by virtue of s 18C of the RDA. Carr J found that it

would be fit to grant the declaration sought. It is a useful and appropriate way of recording publicly the unlawfulness of the making by the respondent of comments which received considerable publicity and were reasonably likely to offend and insult the relevant persons identified above.<sup>268</sup>

Similarly, the applicant in *Silberberg v The Builders Collective of Australia Inc*<sup>269</sup> sought a declaration that the conduct of the respondents contravened s

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<sup>261</sup> *Rural Press v Australian Competition and Consumer Commission* (2003) 203 ALR 217, [89]-[90] (Gummow, Hayne and Heydon JJ).

<sup>262</sup> (2001) 105 FCR 437.

<sup>263</sup> (2001) 105 FCR 437, 440 [8].

<sup>264</sup> [2004] FCA 654, [60].

<sup>265</sup> [2004] FCA 654, [61].

<sup>266</sup> [2004] FCA 654, [88].

<sup>267</sup> (2002) 124 FCR 106.

<sup>268</sup> (2002) 124 FCR 106, 123 [78].

<sup>269</sup> [2007] FCA 1512.

18C of the RDA. Upon finding the applicant's claim to be substantiated, Gyles J made such an order.<sup>270</sup>

In *Eatock v Bolt (No.2)*<sup>271</sup> the applicant was granted a declaration that not only stated that the writing of certain newspaper articles contravened s 18C, but included that the conduct was not exempted from being unlawful under s 18D. Bromberg J stated that 'to do so, served to properly record the way in which the Court resolved the application before it'<sup>272</sup>

## 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 s 46PO(4)(a) of the AHRC Act in a number of cases.

In *Jones v Scully*,<sup>273</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>274</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>275</sup>

In *Jones v Toben*,<sup>276</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>277</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>278</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 of the actions the subject of the complaint, and the potential educative and

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<sup>270</sup> See also *Gordon v Commonwealth* [2008] FCA 603, [84].

<sup>271</sup> [2011] FCA 1180.

<sup>272</sup> *Ibid* at [7].

<sup>273</sup> (2002) 120 FCR 243.

<sup>274</sup> (2002) 120 FCR 243, 308-309 [247].

<sup>275</sup> (2002) 120 FCR 243, 309 [247].

<sup>276</sup> [2002] FCA 1150.

<sup>277</sup> [2002] FCA 1150, [108]–[110].

<sup>278</sup> (2002) 41 CHRR D/274, [299]–[300].

preventative benefit that could be achieved by open discussion of the principles enunciated in the decision.<sup>279</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>280</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>281</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>282</sup> a case concerning a contravention of the *Trade Practices Act 1974* (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>283</sup> Similarly, orders capable of restraining lawful as well as unlawful conduct have been criticised by the courts.<sup>284</sup>

In *Silberberg v The Builders Collective of Australia Inc*,<sup>285</sup> the applicant sought, and was granted, orders restraining the second respondent from further publishing website messages that Gyles J had found to contravene s 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>286</sup> the Full 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

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<sup>279</sup> [2002] FCA 1150, [111].

<sup>280</sup> [2002] FCA 1150, [107].

<sup>281</sup> [2002] FCA 1150, [105], [113]. Her Honour's decision was upheld on appeal: *Toben v Jones* (2003) 129 FCR 515.

<sup>282</sup> (1977) 16 ALR 181.

<sup>283</sup> (1977) 16 ALR 181, 204-205 (Brennan J), 195-196 (Franki J).

<sup>284</sup> *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).

<sup>285</sup> [2007] FCA 1512.

<sup>286</sup> [2006] FCAFC 151.

restraining the respondent from continuing to deny her the services of a full-time Auslan interpreter.<sup>287</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>288</sup> The Court held that, whilst there was ‘no doubt’ that the Court is empowered to grant injunctive relief by s 46PO of [what is now the AHRC Act], as well as by ss 23 and 24(1)(a) of the *Federal Court of Australia Act 1976* (Cth),<sup>289</sup> there was not sufficient evidence of a likelihood of a future contravention of the appellant’s rights.<sup>290</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>291</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>292</sup>

In light of the above matters, the Court rejected the application for injunctive relief.

## 7.6 Other Remedies

A range of other forms of relief have been considered by the Courts.

In *McGlade v Lightfoot*,<sup>293</sup> in addition to seeking a declaration that the conduct of the respondent was unlawful by virtue of s 18C of the RDA, the applicant sought an order that the respondent make a donation to the Aboriginal Advancement Council. It was submitted that s 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>294</sup> His Honour indicated, however, that the Court was not limited to the orders specified in s 46PO(4):

I do not think that is the case in this matter because the order sought is not sought for the purpose referred to in that sub-paragraph. However, the list of specified orders in s 46PO(4) is not exhaustive – see the use of the word ‘including’.<sup>295</sup>

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<sup>287</sup> [2006] FCAFC 151, [4].

<sup>288</sup> [2006] FCAFC 151, [20].

<sup>289</sup> [2006] FCAFC 151, [3].

<sup>290</sup> [2006] FCAFC 151, [23].

<sup>291</sup> [2006] FCAFC 151, [24].

<sup>292</sup> [2006] FCAFC 151, [25].

<sup>293</sup> (2002) 124 FCR 106.

<sup>294</sup> (2002) 124 FCR 106, 123 [81].

<sup>295</sup> (2002) 124 FCR 106, 123 [80].

In *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,<sup>296</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>297</sup> His Honour ordered that the respondent construct and install internal hand basins in those toilet blocks within nine months.<sup>298</sup>

Raphael FM in *Sheehan v Tin Can Bay Country Club*<sup>299</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>300</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>301</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>302</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>303</sup>

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<sup>296</sup> [2004] FMCA 915.

<sup>297</sup> [2004] FMCA 915, [81].

<sup>298</sup> [2004] FMCA 915, [94]. A similar order was made in *Cooper v Holiday Coast Cinema Centres Pty Ltd* [1997] HREOCA 51.

<sup>299</sup> [2002] FMCA 95.

<sup>300</sup> [2002] FMCA 31.

<sup>301</sup> [2002] FMCA 31, [87].

<sup>302</sup> [2006] FMCA 1232.

<sup>303</sup> [2006] FMCA 1232, [55].

In *Gordon v Commonwealth*,<sup>304</sup> Heerey J decided not to make an order to retrospectively reinstate Mr Gordon in his former position within the Australian Taxation Office at APS 4 level because the particular employment from which Mr Gordon was dismissed no longer existed.<sup>305</sup>

In *Caves v Chan & Ors (No.2)*<sup>306</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>307</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 s 18C of the RDA and further, were not exempt under s 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>308</sup>.

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<sup>304</sup> [2008] FCA 603.

<sup>305</sup> [2008] FCA 603, [93].

<sup>306</sup> [2010] FMCA 817 [66] – [73].

<sup>307</sup> [2011] FCA 1180.

<sup>308</sup> *Ibid* at [15].