Human Rights and Equal Opportunity Commission

Federal Discrimination Law 2005

Supplement 1 March 2005 – 1 July 2007

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Introduction

This supplement to *Federal Discrimination Law 2005* covers significant cases that have been decided in the federal unlawful discrimination jurisdiction between 1 March 2005 and 1 July 2007.

The supplement is designed to be read with the original publication and replaces earlier supplements. It follows the numbering and headings contained in *Federal Discrimination Law 2005*, with additional headings to cover any new matters of interest. It also updates the tables of damages provided in the original publication.

Please note that the Commission anticipates publishing another edition of *Federal Discrimination Law* in early 2008. Until that new edition is published, these cumulative supplements will be released periodically.

Chapter 2: The Age Discrimination Act

2.5. General Exemptions

2.5.1 'Positive Discrimination'

The *Age Discrimination Amendment Act 2006* (Cth)[1] adds the following example under s 33(a) of the ADA:

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

2.5.3 Exemption relating to superannuation, insurance and credit

The *Age Discrimination Amendment Act 2006* (Cth) expands the s 38 exemption. The exemption now applies to anything done in direct compliance with a regulation that relates to superannuation, even if the enabling Act does not relate to superannuation.[2]

2.5.6 Exemption relating to direct compliance with laws, orders of courts including taxation legislation and social security legislation

The *Age Discrimination Amendment Act 2006* (Cth):

- creates a new exemption for acts done by a person in direct compliance with the provision of an Act, regulation or other instrument contained in the new Schedule 2;[3]

- adds Commonwealth Acts, regulations and other instruments to Schedule 1, expanding the Acts, regulations and other instruments to which the s 39(1) exemption applies;

[1] The *Age Discrimination Amendment Act 2006* (Cth) commenced on 22 June 2006.
[2] See new s 38(1)(b).
[3] See new s 39(1A).

- amends s 39, so the exemption now includes acts done in direct compliance with a provision of a Commonwealth Act, regulation or other instrument which requires a person to form an opinion about the age of another person upon whom a document is to be served;[4] and

- expands the s 41 exemption by:

  - specifying additional Acts, regulations and instruments for which the exemption is available;[5] and

  - creating a new exemption for things done 'in accordance with an exempted employment program'.[6] 'Exempted employment program' is defined as being a program, scheme or arrangement that:

    (a) is conducted by or on behalf of the Commonwealth Government; and

    (b) is primarily intended to:

        (i) improve the prospects of participants getting employment; or

        (ii) increase workplace participation; and

    (c) meets at least one of the following requirements:

        (i) it is also intended to meet a need that arises out of the age of persons of a particular age, regardless whether the need also arises out of the age of persons of a different age;

        (ii) it is also intended to reduce a disadvantage experienced by people of a particular age, regardless whether the disadvantage is also experienced by persons of a different age;

        (iii) it requires participants to enter into contracts, and is not made available to persons under the age of 18;

        (iv) it is made available to persons eligible for a particular Commonwealth benefit or allowance;

        (v) it is not made available to persons eligible for a particular Commonwealth benefit or allowance.[7]

[4] See new s 39(9).
[5] See new s 41(2AA) and s 41(6).
[6] See new s 41A.
[7] See new s 41A(3).

Chapter 3: The Racial Discrimination Act

3.1 Introduction to the RDA

3.1.2 Other Unlawful Acts and Offences

In *Shaikh v Campbell & Nivona Pty Ltd*,[8] Commissioner Innes stated the following in relation to s 17 of the RDA:

> In order to make out a case under this section (s 17) the complainant has to show incitement, assistance or promotion of someone carrying out unlawful acts. Incitement denotes encouragement in an active way.[9]

In *Obieta v NSW Department of Education and Training*,[10] Cowdroy J cited with approval the above passage, adding:

> To establish her claims pursuant to this section, Ms Obieta must show that the particular respondents were actively inciting or encouraging behaviour that is made unlawful by a provision of Part II of the RDA (s 17(a)) or that the respondents assisted or promoted the doing of such acts (s 17(b)).[11]

The applicant in that case also alleged that she had been victimised, in breach of both the RDA and SDA. Justice Cowdroy confirmed that one of the grounds of victimisation in the relevant sections of the RDA or SDA must be a 'substantial and operative factor' for the alleged victimisation.[12]

3.1.3 Interaction between RDA, State and other Commonwealth Laws

In *Clark v Vanstone*,[13] Gray J held that it was necessary, by virtue of s 10 of the RDA (amongst other factors), to read down a section of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) ('the ATSIC Act') and a Determination made under it relating to 'misbehaviour'. His Honour held that the ATSIC Act and the Determination imposed a higher standard of behaviour on those holding office under the ATSIC Act than is imposed by the law on those elected or appointed to similar offices under other legislation. His Honour noted that some of the offices in ATSIC could only be held by Indigenous people and that there was a likelihood that others would also be held by Indigenous people. Further, Gray J noted that:

> [I]ndigenous people are much more likely to be found by courts to have committed criminal offences, particularly offences of the public order kind, than are non-indigenous people. In construing the word 'misbehaviour' in the context of the ATSIC Act, this is a factor which must be taken into consideration, lest indigenous people, significant numbers of whom will have had experience with the criminal justice system, be deprived of representation by those who have also had such experiences. The danger of disqualifying too high a proportion of

[8] [1998] HREOCA 13 (24 April 1998).
[9] Ibid p 8.
[10] [2007] FCA 86.
[11] Ibid [232].
[12] Ibid [240], citing *Damiano & Anor v Wilkinson & Anor* [2004] FMCA 891, [22] (Baumann FM).
[13] (2004) 211 ALR 412.

> indigenous people from being representatives, because of experiences with the criminal justice system, is also obvious.[14]

His Honour concluded that the imposition of a higher standard on office holders under the ATSIC Act than on those elected or appointed to similar offices was racially discriminatory and the relevant provisions should therefore be read down.

On appeal in *Vanstone v Clark*,[15] this aspect of the decision of Gray J was overturned. Weinberg J, with whom Black CJ agreed, noted that the Determination applied to a range of officers and positions held by both Indigenous and non-Indigenous persons. The Court agreed with the submission of the appellant that 'it is no answer to the structure and text of the Act to engage in speculation that holders of such officers were likely to be indigenous'.[16] Weinberg J stated:

> Had the 2002 Determination provided a different test for suspension or termination of indigenous persons from that applicable to non-indigenous persons, it would obviously trigger the operation of s 10, and result in an adjustment of rights, as a matter of construction, as contemplated by the section… However, that is not the case here. There is no inconsistency of treatment based upon race within either the Act, or the 2002 Determination.[17]

3.2 Racial Discrimination Defined

3.2.1 Grounds of Discrimination

(c) National origin

AB v New South Wales[18] involved a substantive determination of the issues that had first been litigated as an application for an interim injunction in *AB v New South Wales Minister for Education and Training*.[19] The applicant, a child, had been refused admission to a selective high school operated by the State of NSW. Admission was refused because the applicant was not an Australian citizen or permanent resident. This was alleged to discriminate against the applicant on the basis of his Romanian national origin. The case was argued as one of *indirect* discrimination (see 3.2.3 below).

His Honour considered the possible relevance of Article 1(3) of ICERD which provides:

> Nothing in this Convention may be interpreted as affecting in any way the legal provisions of the States' Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

[14] Ibid 445 [99].
[15] [2005] FCAFC 189.
[16] Ibid [198].
[17] Ibid [199].
[18] [2005] FMCA 1113.
[19] [2003] FMCA 16.

Driver FM asked 'whether the requirement, based as it is on citizenship or residence, is protected by [Article 1(3)]'. His Honour concluded that it was not and that the Article was:

> limited in its operation to legal provisions concerning the grant or refusal of nationality, citizenship or naturalisation, rather than conditions or requirements based upon the existence of nationality, citizenship or naturalisation. In any event, the limitation in Article 1 is silent on the question of residence.[20]

3.2.2 Direct Discrimination Under the RDA

(b) Drawing inference of racial discrimination

In *Meka v Shell Company Australia Ltd*,[21] the applicant was a foreign national whose application for employment was not considered by the respondent. This was found to have been, in part, by reason of administrative error in the office of the respondent. In fact, the applicant was not eligible for the position for which he applied as he did not meet other criteria (that he be a graduate with no more than three years experience).

In the absence of any direct evidence as to racial discrimination, the Court was asked to infer that this was the reason for the decision. However, counsel for the applicant had not cross-examined the witnesses for the respondent who had denied that the applicant's race was a factor in the decision. In those circumstances, the Court was not prepared to draw the inferences that the applicant sought to be drawn.[22]

In *Gama v Qantas Airways Ltd (No.2)*[23] Raphael FM was also asked to draw inferences that certain remarks and treatment of the applicant in the workplace, indicated an entrenched attitude towards the applicant, based on his race.

The applicant alleged that he was discriminated against by co-workers and superiors on the basis of his race (the applicant is Goan) and disability (physical injuries sustained at work and depression). The applicant also alleged that his employer was vicariously liable for the action of its employees. The applicant claimed that he was denied the same conditions of work and opportunities for training and promotion that were afforded to other employees and that certain remarks made to him by his supervisor and co-workers, amounted to unlawful discrimination.

Raphael FM held that there was insufficient evidence to persuade him that there were systemic problems in the workplace or a culture in the workplace which led to a rejection of the applicant's attempts at promotion.[24] However, his Honour found that specific statements made to the applicant that he looked 'like a Bombay taxi driver', that he walked up the stairs 'like a monkey' and other comments suggesting that the applicant knew how to manipulate the worker's compensation system, amounted to unlawful discrimination on the grounds of the applicant's race and disability. His Honour found that the employer was vicariously liable for the acts of unlawful discrimination as they were comments either made by or in the presence of the

[20] Ibid [44].
[21] [2005] FMCA 250.
[22] Ibid [22]-[23].
[23] [2006] FMCA 1767. For a discussion of this decision, see Christine Fougere, 'Vicarious liability for race and disability discrimination in the workplace', (2007) 45(3) *Law Society Journal* 37.
[24] Ibid [97].

applicant's supervisor. His Honour awarded the applicant the sum of $40,000.00 in general damages. The matter is currently on appeal.

(c) Proving the elements of s 9(1)

(i) Baird v Queensland

The decision of the Full Federal Court in *Baird v Queensland*,[25] emphasises a number of aspects to the correct approach to s 9(1) of the RDA: on the one hand, the need to approach the section broadly and flexibly, on the other the need to carefully address each of the elements of the section.[26]

The *Baird* litigation concerned the underpayment of wages to Aboriginal people living in the Hope Vale and Wujal Wujal communities in Queensland. Those communities were managed, in the relevant period, by the Lutheran Church ('the Church') which was funded by the Queensland government ('the Government') for this purpose.

It was alleged that the applicants had been paid at a lower level to that being paid to other people performing similar work for the Government and/or at a level below relevant award rates. This was claimed to be racially discriminatory. The claim covered the period from 1975 (when the RDA commenced) until 1986 (at which time Aboriginal people living on Government and church-run communities were paid award wages).

The decision at first instance

At first instance,[27] the applicants had argued that the Government was responsible for the discrimination either:

- As the employer, through the agency of the Church, contrary to s 15 of the RDA (which prohibits discrimination in employment); and/or

- Through the act of paying grants to the Church which were calculated to include a component for wages to be paid at under-award rates, contrary to s 9(1) of the RDA.

Significantly, the Church was not a respondent to the case. Furthermore, the appellants' case did not (for reasons unclear) include an argument of ancillary liability under s 17 of the RDA which makes it unlawful for a person to 'assist or promote whether by financial assistance or otherwise' the doing of an act of racial discrimination.

At first instance, Dowsett J found against the applicants on both aspects of their case. He found that the Church, not the Government, employed the appellants and that it did so in its own right. The claim under s 15 of the RDA therefore failed. Further, his

[25] [2006] FCAFC 162.
[26] For a discussion of this case, see Jonathon Hunyor, 'Landmark decision in Aboriginal wages case' (2007) 45 (1) *Law Society Journal* 46.
[27] *Baird v State of Queensland* [2005] FCA 495.

Honour found that there was no basis for asserting that the calculation of the grants involved a discriminatory element, nor was there a basis for finding that the payment of grants had the 'purpose or effect of depriving the applicants of their proper pay rates'.[28] The claim under s 9(1) was therefore also unsuccessful. Significant to his Honour's reasoning in relation to s 9(1) was the following:

> The Government was under no obligation to make payments to the Church for use on the missions. No doubt, in discharge of its duty to maintain peace, order and good government throughout the state, it had an interest in seeing that the missions were well run. Clearly, it considered that the payment of grants would contribute to that outcome. However it is difficult to see how the payment of a grant could involve a relevant discriminatory element based on race. Such payments were, in themselves, entirely neutral, save for the fact that they were intended to benefit indigenous people… [t]here is no suggestion that other grants were made at higher rates to facilitate higher payments to non-indigenous workers. As to discrimination in *calculating* the amount of each grant, there is no evidence that the Government calculated payments to other organizations using higher wage rates. The applicants have established that the grants were not sufficient, themselves, to enable the Church to pay award wages, but there is no basis for asserting that the calculation of the grants involved any discriminatory element.[29]

The decision on appeal

On appeal, the decision of Doswett J was overturned.[30] Allsop J (with whom Spender and Edmonds JJ agreed) found that Dowsett J had erred in requiring the appellants to:

- Demonstrate an obligation for the Government to make payments to the Church; and

- Provide a 'real life comparator' or comparison against which to assess the 'discriminatory element'.

The Full Court held that neither aspect is a necessary element of s 9(1).

Allsop J noted the international context of the RDA, which is based on the *International Convention on the Elimination of all Forms of Racial Discrimination.* His Honour noted that the purpose of the Convention and the RDA is the 'elimination of racial discrimination in **all** its forms and manifestations – not merely as manifested by people who are obliged to act in a particular way', and that to achieve this broad purpose 'requires broad and elastic terminology'.[31] In particular, Allsop J noted that

> it is important to treat the terms of s 9(1) as comprising a composite group of concepts directed to the nature of the act in question, what the act involved, whether the act involved a distinction etc based on race and whether it had the relevant purpose or effect…[32]

Allsop J also noted that s 9(1) does not require a direct comparison to be available to demonstrate discrimination. His Honour observed that '[t]hose suffering the

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[28] Ibid [138]-[142].
[29] Ibid [138].
[30] [2006] FCAFC 162. The Human Rights and Equal Opportunity Commission was granted leave to intervene in the appeal. The Commission's submission are available at: http://www.humanrights.gov.au/legal/intervention/baird.html.
[31] Ibid [62], emphasis in the original.
[32] Ibid [61].

disadvantage of discrimination may find themselves in circumstances quite unlike others more fortunate than they'.[33]

Addressing the elements of s 9(1)

The three significant questions in the matter were identified as being:

1. Whether the calculation and payment of grants involved the setting of a sum for payment of wages based on below-award rather than award wages;
2. Whether that 'distinction' between rates used in calculation was 'based on race'; and
3. Whether this had the effect of impairing human rights as required by s 9(1).[34]

The Full Court found that, on the facts as determined by Dowsett J, a breach of s 9(1) was made out. The acts of calculating and paying the grants by the Government clearly involved a distinction between award wages and below-award wages. Such distinction was made by reference to the Aboriginality of the persons on reserves who were to be paid out of those grants. This connection was evident from the Cabinet submissions concerning the grants and could be inferred from the findings that the Government:

- Paid below-award wages to Aboriginal workers on the reserves that it administered directly;
- Calculated grants including a sum for wages based on below-award wages being paid to Aborigines on Church-run reserves; and
- Paid award wages to its own employees who were not on reserves.

The Full Court also concluded that the act of the Government had the effect of impairing human rights:

> [I]n circumstances where the State knew that it was not financially feasible for the Church to pay substantially more in wages on the reserves than the amounts allowed for in the grants and where the State calculated the grants in part by reference to below-award wages, the acts of the State involving the distinction based on race can be seen to have had a causal effect on the impairment of the right of the appellants as recognised by Article 5 of the Convention to equal pay for equal work.[35]

3.2.3 Indirect Discrimination Under the RDA

(d) Not reasonable in the circumstances

In *AB v New South Wales*,[36] Driver FM held that the term, condition or requirement imposed upon the applicant that he be an Australian or New Zealand citizen or an Australian permanent resident in order to be eligible for education in a selective school operated by the respondent was not reasonable in the circumstances. His Honour stated:

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[33] Ibid [63] (Allsop J).
[34] Ibid [65] (Allsop J).
[35] Ibid [74] (Allsop J).
[36] [2005] FMCA 1113.

> I accept that places at selective schools in New South Wales are a scarce commodity. Many more students apply than are selected. I also accept that it is reasonable to impose requirements to ensure that, as far as is practicable, persons entering a selective school are likely to complete their course of education. However, that purpose could, in my view, be achieved by a requirement that the student has applied for Australian permanent residency or citizenship. Making such an application demonstrates a commitment to live in Australia indefinitely sufficient to meet the expectation of completion of a course of secondary education.
>
> It is true that the fact that there is a reasonable alternative that might accommodate the interests of an aggrieved person does not, of itself, establish that a requirement or condition is unreasonable. The Court must objectively weigh the relevant factors, but these can include the availability of alternative methods of achieving the alleged discriminator's objectives without recourse to the requirement or condition: *Catholic Education Office v Clarke* (2004) 138 FCR 121 at 146 [115]. It is well known that the process of obtaining permanent residency and citizenship in Australia can be a lengthy one. Even where an application is refused, the process of review and appeal can take years. The present applicant has lived in this country for ten years and is seeking permanent residency. In my view, there is nothing in his circumstances which render it less likely that he would complete a course of education at Penrith Selective High School than if he had already been granted permanent residency or citizenship. The respondent's condition is unnecessarily restrictive and is disruptive to the educational expectations of both NSW residents, and those who may relocate to NSW from other States, which do not have selective public schools.[37]

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

(e) Ability to comply with a requirement or condition

In *AB v New South Wales*,[38] the applicant, a boy of Romanian national origin, complained that he could not comply with the requirement or condition that he be an Australian or New Zealand citizen or an Australian permanent resident in order to be eligible for education in a selective school operated by the respondent.

The Court found that it was appropriate to make a comparison between persons of Romanian national origin and persons of Australian or New Zealand national origin ('national origin' being a concept distinct from citizenship) in determining whether or not indirect discrimination had occurred. Driver FM held:

> There is nothing before me to persuade me that the broad class of persons born in Australia who might be considered persons of Australian national origin are better able to comply with the respondent's requirement for citizenship or permanent residence than persons of Romanian national origin, whether they were born in Romania or in Australia.[39]

His Honour concluded that the applicant's claim failed on this 'question of evidence'.[40]

[37] Ibid [41]-[42].
[38] [2005] FMCA 1113.
[39] Ibid [56].
[40] Ibid [57].

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

In *AB v New South Wales*,[41] Driver FM accepted that Article 5 of ICERD 'establishes that the right to education and training is a fundamental right protected by [ICERD]'.

In the matter of *Bropho v State of Western Australia*,[42] Aboriginal residents of the Swan Valley Nyungah Community (Reserve 43131 - 'the Reserve') complained that the *Reserves (Reserve 43131) Act 2003* (WA) ('Reserves Act') and actions taken by an Administrator appointed under that Act interfered with the enjoyment and exercise of their human rights and fundamental freedoms.

What were the effects of the Reserves Act?

The effects of the Reserves Act were broad and far reaching for the residents of the Reserve and included:

- Removing the power of care, control and management of the Reserve from the Swan Valley Nyungah Community and placing it with an Administrator who was empowered to make directions in relation to the care, control and management of the Reserve.

- Denying judicial review of any of the actions taken by the Administrator.

The Administrator acted under the Reserves Act to direct all persons to leave the Reserve and prohibited entry of the Reserve.

Why was the Act passed?

The Reserves Act was passed as a result of recommendations made at a Coronial Inquest into the death of a teenage girl at the Reserve. It was also passed in response to a spate of physical and sexual assaults of women and children on the Reserve, teenage suicides and substance abuse between 1993 and 2002. Attempts by welfare agencies and the police to assist the victims of the assaults and to investigate the claims, were resisted and hampered by some of the residents of the Reserve.

One of the functions of the Reserves Act was to give an appointed Administrator the power to direct who could leave and enter the Reserve.

Once the Reserves Act had been passed, many of the residents left the Reserve.

What were the grounds of the claim?

The applicants claimed that the Reserves Act and the actions of the Administrator were in breach of ss 9(1), 10 and 12(1)(d) of the RDA. They claimed that the effect of the Reserves Act was to interfere with their enjoyment of various human rights, namely:

- The right to own property

[41] [2005] FMCA 1113.
[42] [2007] FCA 519.

- The right to freedom of movement and residence
- The right to equal treatment before tribunals
- The right to participate in public affairs.

Decision

Nicholson J held that the applicants had no right of ownership over the Reserve and that any right they did have over the land was in the nature of a statutory responsibility (pursuant to a Management Order which had given powers to the Swan Valley Nyungah Community). His Honour held that even if the applicants were found to have a right of ownership, the direction by the Administrator to exclude certain people from entering the Reserve and directing others to leave it, was given to both Aboriginal and non-Aboriginal residents and was therefore not made on the basis of their race.[43]

In relation to the right to freedom of movement and residence on the Reserve, Nicholson J found that such a right is not absolute and is necessarily restricted by private ownership and the general law. His Honour found that the applicants' right of residence on the Reserve and movement within it was dependent upon their community being the Manager of the Reserve (pursuant to a Management Order). It was therefore vulnerable to the Minister's exercise of power to revoke the appointment of the manager. His Honour found that the Reserves Act did not limit the applicants' freedom of movement or residence. In relation to whether the actions of the Administrator did limit this freedom, his Honour stated:

> The enactment of s 7 raised the possibility that the Administrator may act so as to effect the freedom of movement and residence of the persons on the Reserve. However, without that 'act' being taken, there was no operative causal link.[44]

Nicholson J reasoned that whilst the Administrator did have the power to direct residents to leave the Reserve and the power to exclude others from entering it, there was no need for him to exercise this power as many of the residents had already left the Reserve.[45]

In relation to the privative clause contained in the Reserves Act - which operates to deny any person affected by the actions of the Administrator the right to apply to the Courts for judicial review – Nicholson J found that it did interfere with the right of Aboriginal persons who were residents of the reserve to have equal access to tribunals.[46] However, his Honour held that it was not indirectly discriminatory as it was reasonable and proportionate in the circumstances.[47]

[43] Ibid [361].
[44] Ibid [424].
[45] Ibid [424].
[46] Ibid [443].
[47] Ibid [551].

Nicholson J also found that the applicants had not proved the claim that their right to participate in public affairs had been deprived by the Reserves Act or the actions of the Administrator.[48]

Nicholson J held that, in any event, the Reserves Act was a 'special measure' – see 3.3 below.[49]

This matter is currently on appeal before the Full Federal Court.

3.3 Exceptions: Special Measures

In the matter of *Vanstone v Clark*,[50] the Full Court considered whether or not a section of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) ('the ATSIC Act') and a Determination made under it relating to 'misbehaviour' were inconsistent with s 10 of the RDA (see 3.1.3 above). The Full Court also considered, in *obiter* comments, a suggestion by the appellant that the ATSIC Act, insofar as it prevented persons other than Aboriginal persons or Torres Strait Islanders from being appointed as Commissioners, constituted a 'special measure' under s 8 of the RDA and could therefore not be impugned as being racially discriminatory.

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

> Section 31(1) of the ATSIC Act makes it a qualification for appointment as an ATSIC Commissioner that a person be an Aboriginal or Torres Strait Islander. Whether that section is a 'special measure' is of no consequence. The question is whether the 2002 Determination [relating to misbehaviour] is a 'special measure', and therefore immune from attack as being discriminatory. On no view can cl 5(1)(k) be described as a measure enacted 'for the sole purpose of securing adequate advancement of certain racial or ethnic groups'. Nor can it be characterised as a protective measure. It is not a measure designed to achieve 'substantive equality': *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 81 ALD 1 per Kenny J.
>
> The Minister submitted that once it is conceded that s 31(1) is a 'special measure', any limits inherent in or attached to the office designated by that section are part of the special measure, and cannot be separately attacked as racially discriminatory. According to that submission the terms on which a Commissioner can be suspended from office, including the power to specify the meaning of misbehaviour, are part of the terms of that office. In my view, this submission cannot be accepted. It involves a strained, if not perverse, reading of s 8 of the RDA, and would thwart rather than promote the intention of the legislature. If the submission were correct, any provision of an ancillary nature that inflicted disadvantage upon the group protected under a 'special measure' would itself be immune from the operation of the RDA simply by reason of it being attached to that special measure.[51]

Similarly in the matter of *Bropho v State of Western Australia*[52] (see discussion above at 3.2.4) Nicholson J held that the *Reserves (Reserve 43131) Act 2003* (WA) ('Reserves Act'), was a special measure pursuant to s 8 of the RDA. In arriving at this conclusion, Nicholson J

[48] Ibid [445].
[49] Nicholson J also found that the Reserves Act and actions taken under it were not contrary to the RDA as they were not 'based on race' and were 'reasonable and proportionate' – Ibid [551].
[50] [2005] FCAFC 189.
[51] Ibid [208]-[209].
[52] [2007] FCA 519.

considered the list of elements in Art 1(4) of the ICERD, as set out by Brennan J in *Gerhardy v Brown*,[53] and stated the following[54]:

> (1) the Act conferred a benefit upon some of the Aboriginal inhabitants who were women and children by removing the manager being the community believed by Government to be the source of failure to protect them and by empowering an Administrator to take steps to remove the threatening environment. The benefit conferred upon them was to establish a system which would enable them to access such protection as they may require in common with the access enjoyed by Aborignal or non-Aboriginal persons living outside the Reserve. The advancement conferred was the removal of what was reasonably perceived by Government to be the impediment to their equal enjoyment of their human rights and fundamental freedoms.
>
> (2) the class from which the individuals the subject of the measure came was based on race, namely the Aboriginality of the inhabitants of the Reserve. (This is a different question to whether the Reserves Act contains provisions addressed to both Aboriginal and non-Aboriginal persons or to whether the effect of the Act is disproportional in its impact on Aboriginal persons so as to give rise to indirect discrimination).
>
> (3) the sole purpose of the Act was to secure adequate advancement of the beneficiaries in order that they could enjoy and exercise equally with others their human rights and fundamental freedoms.
>
> (4) the enactment occurred in circumstances where the protection given to the beneficiaries by the special measure was necessary in order that they may enjoy and exercise equally with others their human rights and fundamental freedoms.

His Honour noted that a large number of the women living on the Reserve did *not* agree with the enactment of the Reserves Act and had made their objection known in an open letter to the Premier of Western Australia.[55] However, Nicholson J held that the wishes of the beneficiaries of a purported special measure were not necessarily a relevant factor in determining whether something was a special measure. The contrary view expressed by Brennan J in *Gerhardy v Brown* was not, in Nicholson J's view, supported by the other members of the High Court in that case and was therefore not followed.[56]

Note that this matter is currently on appeal to the Full Federal Court.

3.4 Racial Hatred

3.4.5 Reasonably likely to Offend, Insult, Humiliate or Intimidate

(a) Objective Standard

The decision in *Jones v Toben*[57] (at first instance) and in *Toben v Jones*[58] (on appeal) was followed in *Jeremy Jones v The Bible Believers' Church.*[59]

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[53] 159 CLR 70.
[54] Ibid [579]
[55] Ibid [570].
[56] [2007] FCA 519, [569].
[57] [2002] FCA 1150
[58] (2003) 199 ALR 1
[59] [2007] FCA 55.

Add to footnote 199: *Obieta v NSW Department of Education and Training & Ors* [2007] FCA 86 [223].

3.4.7 Exemptions

(c) Reasonably and in good faith

(i) Objective and subjective elements

In *Jeremy Jones v The Bible Believers' Church*[60] the Court rejected the respondent's submission that material published on the internet denying the existence of the Holocaust had been published in good faith, noting that the deliberate use of provocative and inflammatory language together with a careless disregard for the effect of such language upon the people likely to be hurt by it was a clear indication of a lack of good faith on the respondent's behalf. This follows *Bropho v Human Rights and Equal Opportunity Commission* where the Full Federal Court held that the expression 'reasonably and in good faith' required a subjective and objective test.[61]

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

In *Jeremy Jones v The Bible Believers' Church*,[62] the applicant claimed that the respondent discriminated against Jewish people by publishing on the Bible Believers' Church website, a denial (amongst other things) of the existence of the Holocaust. The respondent claimed an exemption under s18D of the RDA ('acts done reasonably and in good faith') arguing that matters about which the complaints had been made formed part of an academic or public interest discussion in relation to 'Zionist' policies and practices. Conti J dismissed the claim, holding;

> I have not been able to identify, much less rationalise, however, the existence of any such discussion in the context of the present proceedings and of the conduct complained of by the application which has led thereto.[63]

[60] [2007] FCA 55.
[61] (2004) 204 ALR 761, 785-786 (French J), 795 (Lee J).
[62] [2007] FCA 55.
[63] Ibid [63].

Chapter 4: The Sex Discrimination Act

4.1 Introduction to the SDA

4.1.2 Limited Application Provisions and Constitutionality

In *South Pacific Resort Hotels Pty Ltd v Trainor*,[64] the Full Federal Court upheld the decision of the Federal Magistrate at first instance[65] to the effect that the SDA applies generally to acts done in external Territories, such as Norfolk Island. Section 9(3) of the SDA provides that '[t]his Act has effect in relation to acts done within a Territory' and the Full Court found that this was unqualified in its terms and dealt with the application of the SDA generally: there is no additional requirement for an act done in a Territory to also fall within the scope of ss 9(5) to 9(20) of the SDA.[66]

The Full Court also rejected an argument that s 106 of the SDA, providing for vicarious liability, did not apply to the Territory of Norfolk Island as it was 'not one of the prescribed provisions of Part II or of the prescribed provisions of Div 3 of Part II' and therefore 'fell entirely outside the limits described in s 9'.[67] The Full Court held that s 9(3) provides that '[t]his Act' has effect in relation to acts done in a Territory and does not merely provide that 'the prescribed provisions' have effect in relation to acts done within a Territory.[68]

Section 9(10) of the SDA was considered by the Federal Court in *AB v Registrar of Births, Deaths and Marriages*.[69] In this case, the applicant brought a claim of marital status discrimination in the provision of services pursuant to ss 6 and 22 of the SDA. The applicant is a post-operative transsexual who applied to alter the record of her sex in her birth registration. The *Births, Deaths and Marriages Registration Act 1996* (Vic) provides that the Registrar cannot make the alteration if the applicant is married. The applicant was married. The Registrar refused the application.

The Registrar defended the claim on the basis that by reason of the limited application provisions (at s 9), s 22 of the SDA had no operation in relation to this case. This is because ss 9(4) and 9(10) of the SDA provide that s 22 only has effect in relation to discrimination against women, and only to the extent that it gives effect to CEDAW and not otherwise. The Registrar argued that CEDAW is concerned with marital status discrimination only to the extent that the discrimination also involves discrimination against women. In this case there was no discrimination against women, as a man would have been treated in the same way as the applicant.

Heerey J accepted the Registrar's proposed construction of CEDAW and dismissed the applicant's claim. Heerey J stated:

> …the Convention addresses a particular species of the genus discrimination, namely discrimination against women. Discrimination against women means treating women less

[64] [2005] FCAFC 130.
[65] *Trainor v South Pacific Resort Hotels Pty Ltd* [2004] FMCA 374.
[66] [2005] FCAFC 130 [18]-[19] (Black CJ and Tamberlin J, Kiefel J agreeing).
[67] Ibid [22] (Black CJ and Tamberlin J, Kiefel J agreeing).
[68] Ibid.
[69] [2006] FCA 1071. The Sex Discrimination Commissioner appeared as *amicus curiae* in the proceedings.

> favourably than men because they are women. In the terminology of discrimination law the '*comparator'* is men…[70]
>
> The reference to 'marital status' operates as a reminder that one familiar form of discrimination against women has been treating women less favourably than men where women were married.[71]

And further:

> …the Convention does not deal with marital status discrimination *per se*, which must mean discrimination against, any persons, whether men or women, on the ground that they are married, or unmarried. The discrimination contemplated by the Convention includes discrimination against women because of their marital status. But this necessarily involves discrimination against a person who is *both* a woman *and* married (or unmarried).[72]

Heerey J held that having regard to s 9(10) of the SDA, s 22 had no operation in relation to the Registrar's conduct. The action of the Registrar in refusing to alter the applicant's birth certificate had nothing to do with the applicant being a woman. Had the applicant been a man, the result would have been the same.[73] In reaching his decision, Heerey J held that 'giving effect to' in s 9(10) of the SDA means 'giving legal effect to'.[74]

4.2 Direct Discrimination under the SDA

4.2.3 Direct Marital Status Discrimination

In *AB v Registrar of Births, Deaths and Marriages,*[75] the applicant brought a claim of marital status discrimination in the provision of services pursuant to ss 6 and 22 of the SDA. The applicant is a post-operative transsexual who applied to alter the record of her sex in her birth registration. The *Births, Deaths and Marriages Registration Act 1996* (Vic) provides that the Registrar cannot make the alteration if the applicant is married. The applicant was married. The Registrar refused the application.

Heerey J dismissed the applicant's claim on the basis that by reason of ss 9(4) and 9(10) of the SDA, s 22 of the SDA had no operation in relation to the Registrar's conduct.[76] Sections 9(4) and 9(10) provide that the prescribed provisions of Part II of the SDA (including s 22) have effect in relation to discrimination against women, to the extent that the provisions give effect to CEDAW and not otherwise.

Heerey J held that CEDAW prohibits discrimination against women (treating them less favourably than men) because of their marital status. However, CEDAW does not deal with marital status discrimination *per se*. This is because 'one cannot leave out an essential element of the concept of discrimination against women, that is to say the denial of equality with men'.[77] In this case, the action of the Registrar in refusing to

[70] Ibid [32].
[71] Ibid [35].
[72] Ibid [53].
[73] Ibid [60].
[74] Ibid [17].
[75] [2006] FCA 1071. The Sex Discrimination Commissioner appeared as *amicus curiae* in the proceedings.
[76] See further discussion of this case at 4.1.2 above.
[77] [2006] FCA 1071, [52].

alter the applicant's birth certificate had nothing to do with the applicant being a woman. Had the applicant been a man, the result would have been the same.[78]

4.2.4 Direct Pregnancy Discrimination

(a) Generally

In *Dare v Hurley*,[79] the applicant alleged that she was dismissed from her employment either because she was pregnant or because of her request for maternity leave. The respondent contended that the applicant's employment was terminated because she had acted inappropriately by deleting documentation from the company's computer system, by installing password protection on documents contrary to company policy and by reporting in sick by means of an SMS message.

Driver FM considered that the appropriate hypothetical comparator for the purposes of s 7(1) of the SDA was an employee of the respondent subject to the same terms of employment: that is, one who had expressed a wish to take a period of unpaid leave; whose work performance was not assessed as unsatisfactory prior to the leave request; and who password protected two documents without instruction and reported in sick by means of an SMS message.[80] His Honour found that in dismissing the applicant, the respondent treated her less favourably than the hypothetical comparator would have been treated because of her need for maternity leave: a characteristic that appertains to women who are pregnant. His Honour held that the respondent acted unlawfully in dismissing the applicant in breach of s 7(1) and s 14(2)(c) of the SDA.[81]

In *Fenton v Hair & Beauty Gallery Pty Ltd*,[82] the applicant attended for work after an absence due to illness related to her pregnancy. 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'. His Honour stated:

> The fact was that Ms Fenton had presented for work, was not sick and wanted to work. Ms Hunt had decided not to take the risk of permitting Ms Fenton to work because she did not want a repetition of the events of 18 December 2003 [on which day the applicant had been ill and had to leave work]. Ms Hunt's motives may have been benign (she was genuinely concerned for Ms Fenton's welfare) but Ms Fenton was treated less favourably than the hypothetical comparator would have been in the same circumstances. Ms Fenton was denied a week's salary that she was entitled to earn. A valued employee with Ms Fenton's skills and experience who was temporarily unfit for work but then presented for work fit at a time when her services were sorely needed, would not have been turned away. It was Ms Fenton's pregnancy that caused Ms Hunt to send Ms Fenton home because of her concern for her welfare. However, the decision should have been left for Ms Fenton. In sending Ms Fenton home and thereby depriving her of a week's salary, Ms Hunt discriminated against Ms Fenton by reason of her pregnancy contrary to s.7(1) and s.14(2)(b) of the SDA. Ms Hunt denied Ms Fenton access to paid employment for a week which was a benefit associated with her employment. Alternatively, the denial of paid employment was a detriment for the purposes of s.14(2)(d).[83]

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[78] Ibid [60].
[79] [2005] FMCA 844.
[80] Ibid [104].
[81] Ibid [116].
[82] [2006] FMCA 3.
[83] Ibid [97].

In *Ilian v ABC*,[84] the applicant took a period of two years and four months leave in the context of pregnancy and confinement during which time she gave birth to two children. The leave comprised predominantly maternity leave, but also included long service leave, recreation leave and sick leave.[85] Upon her return to work, the applicant's employer failed to allow her to return to the position she had held before the commencement of her leave. The applicant alleged that her employer's conduct was because of her pregnancies and the taking of maternity leave, and brought a claim of both sex and/or pregnancy discrimination pursuant to ss 5 and 7 of the SDA.

McInnes FM upheld the applicant's claim under s 7(1)(b) of the SDA, accepting that the applicant was treated less favourably than a comparator on the ground of her pregnancy. In relation to the issue of a comparator, McInnes FM stated:

> It is sufficient for the Court to find as it has found that the Respondent's usual practice for employees who have taken leave of an extended nature is that they return to their previous duties.[86]

McInnes FM held that the reason for the less favourable treatment was the applicant's pregnancies and the taking of maternity leave. McInnes FM confirmed that the taking of maternity leave is a characteristic that appertains generally to women who are pregnant or potentially pregnant.[87] Having found that the respondent contravened s 7 of the SDA, McInnes FM stated that it was not necessary for the Court to consider any claim pursuant to s 5 of the SDA.

(b) Relationship between Pregnancy and Sex Discrimination

In *Dare v Hurley*,[88] the applicant brought a claim under both s 5(1) and s 7(1) of the SDA. The applicant alleged that she was dismissed from her employment either because she was pregnant (s 7(1)) or because she was a woman who sought leave for the purposes of her confinement and the care of her expected baby (s 5(1)). Driver FM stated:

> …the matter can and should be resolved by reference to the pregnancy discrimination claim rather than the sex discrimination claim. I accept Mr Robinson's submission that s 7(1) of the SDA covers the field: *Human Rights and Equal Opportunity Commission v Mt Isa Mines Pty Ltd* ('*Mt Isa Mines*').[89]

The decision in *Mt Isa Mines*[90] was also followed in *Sheaves v AAPT Limited*.[91] In this case, the applicant claimed she was discriminated against by her former employer upon her return to work following a period of maternity leave. She alleged direct and indirect discrimination on the grounds of sex (s 5(1)) and pregnancy (s 7(1)). Mowbray FM dismissed the application. He concluded that the work provided to the applicant by her employer on her return after a significant period of absence was

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[84] [2006] FMCA 1500.
[85] McInnes FM characterised the leave taken by the applicant as maternity leave. He stated that '[i]t would be unduly technical to characterise the total absence as anything other than relating to the two pregnancies and births.': ibid [180].
[86] Ibid [185].
[87] Ibid [47], following *Thomson v Orica Australia Pty Limited* [2002] FCA 939.
[88] [2005] FMCA 844.
[89] Ibid [104].
[90] Above n 59 [104].
[91] [2006] FMCA 1380.

appropriate and did not amount to discrimination. Mowbray FM stated that the work provided to Ms Sheaves:

> …after a significant period of absence – to get her computer and e-mail systems working, and particularly to self-train on new products, services and systems and to 'buddy up' and assist the other account managers – was appropriate.[92]

And that:

> Ms Sheaves had no entitlement to any specific portfolio of accounts. Indeed under her contract of employment her 'duties and responsibilities…may be varied from time to time by the Company at its discretion'.[93]

4.3 Indirect Discrimination under the SDA

4.3.1 Defining the 'Condition, Requirement or Practice'

In *State of New South Wales v Amery & Ors*[94] ('*Amery'*) the respondents were employed by the NSW Department of Education as temporary teachers. They alleged that they had been indirectly discriminated against on the basis of their sex under ss 24(1)(b) and 25(2)(a) of the *Anti-Discrimination Act 1977* (NSW) ('ADA') because, as temporary teachers, they were not entitled to access higher salary levels available to their permanent colleagues for the same work.

Under the *Teaching Services Act 1980* (NSW) (the '*Teaching Act*'), the teaching service is divided into permanent employees and temporary employees. Different conditions attach to each under the Act. As well, under the award[95] permanent teachers are paid more than temporary teachers. The award contains 13 pay scales for permanent teachers and 5 for temporary teachers; the highest pay scale for temporary teachers is equivalent to level 8 of the permanent teachers scale.

The respondents alleged that the Department imposed a 'requirement or condition'[96] on them that they have permanent status to be able to access higher salary levels.

Different approaches were taken to this issue by members of the High Court.

Gleeson CJ agreed with Beazley JA in the NSW Court of Appeal[97] that the relevant conduct of the Department was its practice of not paying above award wages to temporary teachers engaged in the same work as their permanent colleagues. His Honour said that it was in this sense that the Department 'required' the respondents to

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[92] Above n 70 [127].
[93] Ibid.
[94] [2006] HCA 14. For discussion of this decision, see Joanna Hemmingway, 'Implications for Pay Equity in State of NSW v Amery', (2006) 44(5) *Law Society Journal* 44-45.
[95] The Crown Employees (Teachers and Related Employees) Salaries and Conditions Award.
[96] Note that the ADA definition of indirect discrimination refers to a 'requirement or condition' (s 24(1)(b)) and does not include a 'practice' as in s 5(2) of the SDA.
[97] *Amery & Ors v State of New South Wales (Director General NSW Department of Education and Training)* [2004] NSWCA 404.

comply with a condition of having a permanent status in order to have access to the higher salary levels available to permanent teachers.[98]

Gummow, Hayne and Crennan JJ (Callinan J agreeing)[99] held that the respondents had not properly identified the relevant 'employment'.[100] Their Honours held that 'employment' referred to the 'actual employment' engaged in by a complainant. They stated that:

> [T]he term 'employment' may in certain situations, denote more than the mere engagement by one person of another in what is described as an employer-employee relationship. Often the notion of employment takes its content from the identification of the position to which a person has been appointed. In short, the presence of the word 'employment' in s 25(2)(a) prompts the question, 'employment as what?' [101]

As different conditions attached to permanent and temporary teachers under the *Teaching Act*, their Honours held that the respondents were not employed as 'teachers' but as 'casual teachers'.[102] Hence, the alleged requirement or condition was 'incongruous'.[103]

Kirby J dissented. He stated Gummow, Hayne and Crennan JJ's approach as 'narrow and antagonistic' and inconsistent with the beneficial and purposive interpretive approach to remedial legislation.[104] In particular, Kirby J stated that the majority's approach gives 'considerable scope [to] employers to circumvent … [discrimination legislation] … [A]ll that is required in order to do so is for an employer to adopt the simple expedient of defining narrowly the "employment" that is offered'.[105] His Honour held that the Department imposed a requirement or condition of 'permanent employment' on the respondents in order to gain access to the higher salary levels.[106] This was because the terms on which the Department offered employment to the respondents included the 'relevant terms specifically addressed to non-permanent casual supply teachers … [which] terms discriminated against the respondents'.[107]

4.3.3 Reasonableness

In *Amery*, the respondents were employed by the Department of Education as temporary teachers and alleged that they had been indirectly discriminated against on the basis of their sex under ss 24(1)(b) and 25(2)(a) of the *Anti-Discrimination Act 1977* (NSW) ('ADA') because, as temporary teachers, they were not entitled to access higher salary levels available to their permanent colleagues for the same work.

Gleeson CJ (Callinan and Heydon JJ agreeing)[108] was the only member of majority to consider the issue of reasonableness. His Honour stated that the question of

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[98] [2006] HCA 14, [17].
[99] Ibid [205].
[100] Ibid [69], [78].
[101] Ibid [68].
[102] Ibid.
[103] Ibid [69].
[104] Ibid [138].
[105] Ibid [137].
[106] Ibid [142].
[107] Ibid.
[108] Ibid [203] (Callinan J) and [210] (Heydon J).

reasonableness in this case was not whether *teaching* work of a temporary teacher has the same value of a permanent teacher, but 'whether, having regard to their respective conditions of employment, it is reasonable to pay one less than the other.'[109]

In light of the 'significantly different' incidents of employment for permanent and temporary teachers, in particular the condition of 'deployability', his Honour held that it was reasonable for the Department to pay permanent teachers more.[110] Furthermore, his Honour held that, it would be impracticable for the Department to adopt the practice of paying above award wages to temporary teachers.[111]

Although compliance with an award does not provide a defence under the ADA, Gleeson CJ held that the 'industrial context' may be a relevant circumstance in determining 'reasonableness'.[112] Of course, the ADA differs from the SDA in this regard: under ss 40(1)(e) and (g) of the SDA direct compliance with an award provides a complete defence.

4.5 Areas of Discrimination

4.5.1 Provision of Services and Qualifying Bodies

In *AB v Registrar of Births, Deaths and Marriages,*[113] Heerey J held that the refusal to alter the record of the applicant's sex in her birth registration was the refusal of a service. Heerey J stated, in obiter:

> 'Service' involves an 'act of helpful activity' or 'the supplying of any…activities…required or demanded' (Macquarie Dictionary) or 'the action of serving, helping, or benefiting, conduct tending to the welfare or advantage of another' (Shorter Oxford Dictionary). Altering the Birth Register was an activity. The applicant requested the Registrar to perform that activity. The carrying out of that activity would have conferred a benefit on the applicant. The Registrar, because of the terms of the BDM Act, declined the request to carry out that activity. This was the refusal of a service. An activity carried out by a government official can none the less be one which confers a benefit on an individual.[114]

4.6 Sexual Harassment

4.6.2 Unwelcome Conduct

In *San v Dirluck Pty Ltd,*[115] the applicant alleged she was sexually harassed during her employment at a butcher shop by her manager, Mr Lamb. Raphael FM found that the conduct of Mr Lamb which involved regularly greeting the applicant with the question 'How's your love life' and on one occasion stating 'I haven't seen an Asian

[109] Ibid [20].
[110] Ibid [19].
[111] Ibid [21], [24].
[112] Ibid [22].
[113] [2006] FCA 1071. The Sex Discrimination Commissioner appeared as *amicus curiae* in the proceedings. This case is discussed further at 4.1.2 and 4.2.3 above.
[114] Ibid [65]-[66].
[115] [2005] FMCA 750.

come before' was conduct of a sexual nature and unwelcome. Relevantly, Raphael FM stated:

> I do not subscribe to the theory put forward by the respondents that because Ms San did not make many direct complaints to Mr Lamb and did on occasion answer him back that this indicated that she accepted the remarks as ordinary employee banter. Firstly… it appeared to be directed almost exclusively at Ms San and secondly I accepts Ms San's evidence and the submissions made on her behalf that she saw Mr Lamb, who was for a time the manager of the premises, as a person in a superior position to her to whom she would have, at least to some extent, to defer. It would not be easy for her to tell him that she found the remarks unwelcome. I accept that she took what steps she could personally by answering very shortly and then by responding positively to alleviate the situation.[116]

4.6.4 The 'Reasonable Person' Test

In *San v Dirluck Pty Ltd*,[117] the respondents' witnesses gave evidence of conduct by the applicant which indicated that she made racist and sexist remarks. Raphael FM stated:

> …the fact that Ms San may have made these remarks or acted in this way does not excuse any breaches of the Act by others. Her conduct could only go to consideration of whether the sexual remarks directed at her were likely to offend, humiliate or intimidate her.[118]

And further:

> …a reasonable person having heard the evidence of Ms San that she said to Mr Teasel '*what* the fuck is your problem' would not consider that she would have been offended when she was told to 'fuck off' by Mr Lamb. It might also be argued in those circumstances that the use of the word 'fuck' did not constitute conduct of a sexual nature. But the gravamen of the allegations against Mr Lamb is not the simple use of swear words in conversation but the making of remarks of a sexual nature directed at the applicant consistently and almost exclusively.[119]

Raphael FM was satisfied that a reasonable person would have anticipated that the applicant would be offended, humiliated or intimidated by the conduct of the respondent, Mr Lamb. [120] Raphael FM was also satisfied that Mr Lamb's statement 'I haven't seen an Asian come before' constituted unwelcome conduct and such conduct could reasonably be anticipated to have offended the applicant.[121]

4.6.5 Sexual Harassment as a Form of Sex Discrimination

In *Frith v The Exchange Hotel*,[122] the applicant claimed that she was sexually harassed in the course of her employment with the Exchange Hotel by a director of the company, Mr Brindley. The applicant further claimed that the actions of the director amounted to sex discrimination within the meaning of s 14(2) of the SDA. Rimmer FM found that Mr Brindley had sexually harassed the applicant within the meaning of s 28A and 28B of the SDA and that such conduct amounted to sex

[116] Ibid [23].
[117] [2005] FMCA 750.
[118] Ibid [27].
[119] Ibid [33].
[120] Ibid.
[121] Ibid [34].
[122] [2005] FMCA 402.

discrimination within the meaning of s 14(2) of the SDA. Rimmer FM held the Exchange Hotel vicariously liable for the actions of Mr Brindley pursuant to s 106 of the SDA.[123]

In reaching his decision, Rimmer FM expressly disagreed with the reasoning of Branson J in *Leslie* on the issue of whether s 14 of the SDA applied in cases which involved the sexual harassment of one employee by another. His Honour stated:

> …it seems to me that the SDA *does* render unlawful discrimination by a fellow employee (in this case, Mr Brindley) on the ground of sex. Although it is true that Mr Brindley may not himself have discriminated against Ms Frith on the grounds of sex within the meaning and contemplation of section 14 (because, after all, he was not her employer in his personal capacity), the effect of section 106 is that the Exchange Hotel is deemed to have *also* done the relevant acts thereby triggering the provisions of section 14.[124]

4.8 Vicarious Liability

The Federal Magistrates Court's recent decision in *Lee v Smith & Ors* [2007] FMCA 59 ('*Lee*'), confirms the broad scope for an employer to be held vicariously liable under Federal discrimination laws for acts of their employees occurring outside the workplace.

In this case, the Commonwealth (Department of Defence) was held vicariously liable under section 106(1) of the SDA for the rape, sexual discrimination, harassment, and victimisation of Cassandra Lee, a civilian administration officer at a Cairns naval base. Lee was sexually harassed, intimidated and, ultimately, raped following a private social function by a naval officer, Austin Smith.

This case is particularly significant given the *nature* of the act for which the employer was held vicariously responsible (a crime – rape) and the *context* in which the act occurred (a private, social function).

Central to the Court's finding that the Commonwealth was vicariously liable, was its conclusion that the rape 'arose out of a work situation' and, in fact, 'was the culmination of a series of sexual harassments that took place in the workplace'.

Lee demonstrates that the vicarious liability provisions under the *Sex Discrimination Act 1984* (Cth) ('SDA') are much wider than those at common law. Accordingly, in cases of sexual harassment and discrimination, a lower standard will apply to establish a connection between an employee's actions and their employment.

The decision in *Trainor v South Pacific Resort Hotels Pty Ltd* was upheld by the Full Federal Court on appeal in *South Pacific Resort Hotels Pty Ltd v Trainor*.[125] The Full Court cited with approval the decision of Branson J in *Leslie v Graham*,[126] in which an employer was found vicariously liable under s 106 of the SDA for sexual harassment that was found to have occurred in the early hours of morning in a

[123] Ibid [57], [77], [82].
[124] Ibid [80]. Note Rimmer FM did not refer to the decision of Walters FM in *Hughes v Car Buyers Pty Limited* (2004) 210 ALR 645, 653 [42]-[43].
[125] [2005] FCAFC 130.
[126] [2002] FCA 32.

serviced apartment that the complainant and another employee were sharing whilst attending a work-related conference. The Full Court concluded that the decision in *Leslie v Graham* could not be distinguished from the present matter in which an employee had been sexually harassed by a fellow employee while off-duty in staff accommodation quarters.[127]

Black CJ and Tamberlin JJ held:

> The expression 'in connection with' in its context in s 106(1) of the SDA is a broad one of practical application and, as in *Leslie v Graham*, the facts here point readily to the conclusion that Mr Anderson's conduct in the staff accommodation was 'in connection with' his employment within the meaning of s 106(1) of the SDA. The Federal Magistrate was correct in coming to the conclusion that he did.
>
> We would add that the expression chosen by the Parliament to impose vicarious liability for sexual harassment would seem, on its face, to be somewhat wider than the familiar expression 'in the course of' used with reference to employment in cases about vicarious liability at common law or in the distinctive context of workers compensation statutes. Nevertheless cases decided in these other fields can have, at best, only limited value in the quite different context of the SDA.

Kiefel J also held that vicarious liability in tort requires 'a much stronger connexion' between an employee's conduct and their employment than is required by the SDA. Her Honour cited with approval the decision of the Supreme Court of Canada in *Robichaud v The Queen*,[128] to the effect that analogies between discrimination legislation and tort law in determining liability are inappropriate 'for the reason that legislation of this type is directed to removing certain ani-social conditions'. Further, in tort law 'what is aimed at are activities somehow done within the confines of the job a person is engaged to do, not something, like sexual harassment, that is not really referable to what he or she was employed to do'.[129]

Kiefel J also referred to the decision of the UK Court of Appeal in *Jones v Tower Boot Co*,[130] a case that considered the vicarious liability of an employer for acts of an employee that were done 'in the course of employment' under the *Race Relations Act 1976* (UK). Waite LJ there recognised the need for a wide interpretation to be given to that expression (also used in the *Sex Discrimination Act 1975* (UK)) and observed that to construe the words in accordance with the common law doctrine of tortious liability of an employer would mean that the more heinous the act of discrimination, the less likely it would be that the employee would be liable.[131] Kiefel J concluded:

> In my view no narrow approach to the operation of s 106(1) is warranted. It is consonant with its purpose to read the words 'in connection with the employment of the employee' as requiring that the unlawful acts in question be in some way related to or associated with the employment. Once this is established it is for the employer to show that all reasonable steps were taken to prevent the conduct occurring, if they are to escape liability under s 106(2). In this way the aim of the Act, to eliminate sexual harassment in the workplace, might be achieved. This will require that employers take steps to ensure that it does not occur. The Act encourages that approach. Whilst I am not suggesting that the employer takes on proof about

[127] [2005] FCAFC 130, [38] (Black CJ and Tamberlin J with whom Kiefel J agreed).
[128] (1987) 40 DLR (4th) 577.
[129] [2005] FCAFC 130, [68], citing *Robichaud v The Queen* ibid 584.
[130] [1997] 2 All ER 406.
[131] Ibid 415, cited at [2005] FCAFC 130, [69].

> the steps taken at the outset, the operation of s 106(1) is wide and an employer must be vigilant of the possibility of such practices in the workplace.

In *Ingram-Nader v Brinks Australia Pty Ltd*,[132] Cowdroy J held Driver FM erred in finding that no prima facie case existed against the respondent employer because the individual employees alleged to have committed the unlawful acts were not parties to the proceedings. Cowdroy J stated that:

> All that is required in order to make out a prima facie case against an employer is to establish a prima facie case against an employee of that employer. Once established, the provisions of s 106 deem an employer liable without the need for an appellant to prove the elements of vicarious liability against the employer.
>
> I also consider that an individual employee alleged to have engaged in unlawful discrimination need not be a party to a proceeding in order that the Court make a finding in respect of the lawfulness of their conduct. The words of s 106(1) that '*this Act applies in relation to that person as if that person had also done the act*' indicate that an employer is to be severally liable for the discriminatory conduct of its employee.[133]

Cowdroy J held that s 106 of the SDA is consistent with common law principles of vicarious liability of employers for tortious conduct of employees:

> At common law joint tortfeasors are jointly and severally liable for any loss occasioned by their tortious conduct. It follows that an employee does not need to be joined into proceedings against an employer for conduct of that employee in respect of which the employer is vicariously liable. The same effect is achieved by s 106 of [the SDA] in relation to an employer whose employee has engaged in unlawful discrimination.[134]

Cowdroy J also rejected the submission that the unlawful conduct arising under s 106 of the SDA did not constitute 'unlawful discrimination' under s 3 of the HREOC Act because s 106 did not fall within Part II of the SDA:

> The conduct [the alleged sexual harassment] is not made unlawful by s 106 of the SDA, but rather by s 28B. The effect of s 106 is to deem the employer liable for the unlawful conduct committed by individual employees. Section 28B falls within Pt II of the Act. Accordingly, a complaint relying upon s 106 is a complaint alleging '*unlawful discrimination*' as defined in s 3 of the HREOC Act.[135]

[132] [2006] FCA 624.
[133] Ibid [29]-[30].
[134] Ibid [33].
[135] Ibid [26].

Chapter 5: The Disability Discrimination Act

5.1 Introduction to the DDA

5.1.4 Jurisdiction over decisions made overseas

In *Clarke v Oceania Judo Union*,[136] the applicant claimed that the respondent discriminated against him, contrary to s 28 of the DDA ('Sport'), on the basis of his disability, being blindness.

The respondent prohibited Mr Clarke from competing in the judo Open World Cup tournament held in Queensland in November 2005. Mr Clarke alleged he was also effectively excluded from participating in the training camp which followed the tournament, as the respondent required him to attend with a carer, which he refused to do.

The respondent made an interlocutory application objecting to the Court's jurisdiction. The respondent argued that the appropriate jurisdiction to hear the matter was that of New Zealand, where the respondent is incorporated and where the relevant decision to exclude Mr Clarke from the contest was made.

Raphael FM dismissed the respondent's application. His Honour held where relevant act/s of discrimination occurred within Australia, it is irrelevant where the actual decision was made.[137]

5.2 Disability Discrimination Defined

5.2.1 'Disability' Defined

In *Rana v Flinders University of South Australia*[138] ('*Rana*'), Lindsay FM stated that the decision in *Purvis* 'establishes beyond doubt… that no distinction is to be drawn between the disability and its manifestations for the purposes of establishing whether discrimination has occurred'.[139] The applicant in *Rana* claimed that he was excluded from courses at the respondent university was because of his mental illness. The respondent acknowledged that the applicant was excluded from one of the courses by reason of his behaviour, which included refusing to take part in group activity. Lindsay FM noted that:

> If I were satisfied that Mr Rana were discriminated against on account of his behaviour which behaviour was a manifestation or expression of his mental illness then that would amount to discrimination for the purposes of ss 4 and 5 of the [DDA].[140]

[136] [2007] FMCA 292.
[137] The Court adopted the submissions of the Acting Disability Discrimination Commissioner, appearing as *amicus curiae*, on this point.
[138] [2005] FMCA 1473.
[139] Ibid [52].
[140] Ibid [54].

However, the Court found that there was insufficient evidence that the behaviour that had caused the respondent to exclude the applicant was, in fact, a manifestation of a mental illness, rather than having some other cause.[141] In particular, the applicant had admitted to having refused to participate in group activity in a previous course undertaken at the university to be able to 'take the University on' in litigation in which allegations of discrimination because of his alleged mental illness could be agitated.[142]

5.2.2 Direct Discrimination under the DDA

(a) Issues of causation, intention and knowledge

(i) Causation and intention

In *Ware v OAMPS Insurance Brokers Ltd*[143] (see 5.2.2(b) and 5.3.1(c) below), Driver FM stated that whilst it was not necessary for the applicant to establish that the respondent had intended less favourable treatment, 'motive may nevertheless be relevant to determine whether or not an act is done "because of" a disability'.[144] In relation to the demotion of the applicant, Driver FM stated:

> The question is why was [the applicant] demoted? Was it because of or by reason of his disabilities?
>
> [The applicant's] absences from the workplace provided Mr Cocker with what he regarded as sufficient cause for demotion but the real reason for the demotion was that Mr Cocker had exhausted his capacity to accommodate [the applicant's] condition. To my mind, this establishes a sufficient causal link between the less favourable treatment and [the applicant's] disabilities.[145]

In relation to his dismissal, his Honour stated that:

> To the extent that the termination decision was based upon pre-existing concerns about [the applicant's] performance and behaviour, it was discriminatory. [The applicant's] performance and behaviour were influenced by his disabilities. … [The respondent] had accepted (grudgingly) that no summary dismissal action would be taken. [The applicant] would be given the chance to prove himself by reference to specified criteria. He was not given a reasonable opportunity to prove himself and he was not assessed against those criteria. The hypothetical comparator would have been judged against those criteria. [The applicant] was not judged against those criteria essentially because [the respondent] changed his mind. In dismissing [the applicant], [the respondent] recanted the consideration that he gave [the applicant] by reference to his disabilities. The dismissal was therefore because of those disabilities.[146]

In *Tyler v Kesser Torah College*,[147] Driver FM applied *Purvis* to a case in which a student with behavioural difficulties was temporarily excluded from the respondent school. His Honour found on the facts of that case that the action of excluding the

[141] Ibid [61].
[142] Ibid [46].
[143] [2005] FMCA 664.
[144] Ibid [112].
[145] Ibid [112]-[113].
[146] Ibid [120].
[147] [2006] FMCA 1.

student was taken in order to ensure compliance by the school with its duty of care, not because of the child's disability.[148]

In *Hollingdale v North Coast Area Health Service*,[149] the applicant was dismissed from her employment because of her refusal to attend work. Driver FM found that the respondent had dismissed the applicant not because of her disability, relevantly keratoconus, but because it believed that the applicant was a 'malingerer':

> Ms Hollingdale refused to attend work was because she claimed she was unfit for work because of her keratoconus. She had a medical certificate certifying that she was unfit for work. The Area Health Service refused to accept it. I find that the Area Health Service believed that Ms Hollingdale was malingering. No other conclusion is reasonably open on the evidence. It was because the Area Health Service believed that Ms Hollingdale was malingering, and therefore had no medical reason for non attendance at work, that she was dismissed. It necessarily follows that her keratoconus was not the reason for her dismissal. Rather, the reason was the belief of the Area Health Service that Ms Hollingdale had no medical condition which prevented her from working. An employer does not breach the DDA by dismissing a malingerer or someone who is believed to be one [footnote: *Forbes v Commonwealth* [2004] FCAFC 95].[150]

In *Wiggins v Department of Defence – Navy*,[151] the Navy argued that it did not transfer the applicant to other duties because of her disability, but because of her absences from work. McInnis FM rejected this submission, saying that:

> [T]he absence was clearly due to the depression and the submissions by the Respondent seeking to distinguish the absence from the disability should not be permitted. The leave taken by the Applicant I am satisfied was due almost entirely to her depressive illness for which she required treatment. It is inextricably related to her disability and in turn it was the disability which effectively caused the concern … and led to the transfer.[152]

(ii) Knowledge

In *Wiggins v Department of Defence – Navy*,[153] the Navy argued that it had no knowledge of the applicant's disability. They argued that the officer who demoted the applicant did not know the nature and extent of her disability, only that the applicant had a medical condition confining her to on-shore duties. McInnis FM rejected the Navy's submission. His Honour 'deemed' the officer to have known the nature and extent of the applicant's disability as he could have accessed her medical records if he wanted to. This was sufficient to 'establish knowledge in the mind of' the Navy.[154] His Honour stated that:

> I reject the submission of the Respondent that the Navy does not replace Mr Jager as the actual decision-maker in the context or that the maintenance of information in a file does not equate to operational or practical use in the hands of the discriminator. In my view that is an artificial distinction which should not be permitted in discrimination under human rights legislation. To do so would effectively provide immunity to employers who could simply regard all confidential information not disclosed to supervisors as then providing a basis upon

[148] Ibid [105].
[149] [2006] FMCA 5.
[150] Ibid [159].
[151] [2006] FMCA 800.
[152] Ibid [170].
[153] [2006] FMCA 800.
[154] Ibid [168].

> which it could be denied that employees as discriminators would not be liable and hence liability would be avoided by the employer.[155]

(b) The 'Comparator' under s 5 of the DDA

In *Ware v OAMPS Insurance Brokers Ltd*,[156] the applicant, who suffered from Attention Deficit Disorder and depression, claimed that the respondent had directly discriminated against him in his employment on the basis of his disability contrary to ss 15(2)(c) and 15(2)(d) of the DDA. The respondent claimed that its treatment of the applicant had been because of his poor work performance, not his disability.

Applying *Purvis*, Driver FM held that the proper comparator in this case was:

(a) an employee of OAMPS having a position and responsibilities equivalent of those of the applicant;

(b) who did not have Attention Deficit Disorder or depression; and

(c) who exhibited the same behaviours as the applicant, namely poor interpersonal relations, periodic alcohol abuse and periodic absences from the workplace, some serious neglect of duties and declining workplace performance, but with formerly high work ethic and a formerly good work history.[157]

Driver FM held that the respondent had treated the applicant less favourably by demoting and subsequently dismissing the applicant.[158] This was because the respondent had not demoted or dismissed the applicant with reference to the criteria it had indicated to the applicant by letter that his future performance would be assessed, but some other criteria (namely, his unauthorised absences from the workplace for which he subsequently granted sick leave).[159] His Honour held that, as the applicant's 'relaxed attitude to his attendance' had been 'tolerated' by the respondent for a long time and, given the culture of 'long lunches' also 'tolerated' by the respondent, if unauthorised absence was to 'the predominant consideration' for the future treatment of the applicant, that should have been made clear to the applicant in its letter to the respondent specifying the criteria against which his future performance would be assessed.[160]

Consequently, his Honour held that the applicant had been treated less favourably than the hypothetical comparator would have been in being demoted and subsequently dismissed, as the hypothetical comparator would have been assessed against the specified performance criteria:

> If the hypothetical comparator had had the same work restrictions placed on him … it is reasonable to suppose that those work restrictions would have reflected the concerns of OAMPS and that the hypothetical comparator's performance would have been judged against the criteria stipulated. In the case of [the applicant], the employer, having accepted his return to work on a restricted basis, having regard to his disabilities, treated him unfavourably by demoting him by reference to a factor to which no notice was given in the letter … setting out

[155] Ibid.
[156] [2005] FMCA 664.
[157] Ibid [100].
[158] Ibid [102]-[106].
[159] Ibid [110].
[160] Ibid.

> the conditions which [the applicant] must meet and the criteria against which his performance would be assessed. I find that the hypothetical comparator would not have been treated in that way.[161]
>
> …
>
> [As well, t]o the extent that the termination decision was based upon [the applicant's] absence from the workplace on 22 and 24 September 2003, this was less favourable treatment than the hypothetical comparator would have received in the same or similar circumstances because of [the applicant's] disabilities, for the same reasons I have found the demotion decision was discriminatory. The absences were properly explained after the event and a medical certificate was provided. The hypothetical comparator would not have been dismissed for two days absence for which sick leave was subsequently granted.[162]

In *Hollingdale v North Coast Area Health Service*,[163] Driver FM held that it was not discriminatory for the respondent to require the applicant to undergo a medical assessment, following a period of serious inappropriate behaviour caused by the applicant's bi-polar disorder. His Honour held that a hypothetical comparator, being an employee in a similar position and under the same employment conditions as the applicant who behaved in the same way but did not have bi-polar disorder,[164] would have been treated the same way:

> If such a hypothetical employee had exhibited the inappropriate behaviour of Ms Hollingdale to which a medical cause was suspected (as it was here) medical intervention would almost certainly have been sought. I have no reason to believe that the hypothetical comparator would have been treated any differently than Ms Hollingdale. It was untenable for the Area Health Service to have a mental health employee exhibiting behaviours which might stem from a mental disability and which adversely impacted upon other employees at the workplace.[165]

In *Moskalev & Anor v NSW Dept of Housing*,[166] the applicant alleged the Department directly discriminated against him by refusing to put him on its priority housing register. Driver FM held that the proper comparator was a person without the applicant's disability, who is seeking accommodation of the same kind and who asserts a medical or other reason for requiring that accommodation.[167]

In *Huemer v NSW Dept of Housing*,[168] the applicant alleged that his tenancy was terminated by the Department because of his mental illness. In rejecting the claim, Raphael FM held that the Department's action was a consequence of numerous complaints about the applicant's anti-social behaviour and the decision to evict him was made by the Consumer Trade and Tenancies Tribunal on the basis that he had breached his tenancy agreement.[169] In relation to whether the applicant was treated less favourably due to anti-social behaviour caused by his disability, Raphael FM applied *Purvis* and concluded that:

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[161] Ibid [111].
[162] Ibid [119].
[163] [2006] FMCA 5.
[164] Ibid [140].
[165] Ibid [150].
[166] [2006] FMCA 876.
[167] Ibid [28].
[168] [2006] FMCA 1670.
[169] Ibid [8].

> The course of action taken in dealing with the manifestation of Mr Huemer's disabilities was taken for the protection of the other tenants of the estate and the staff of [the Department]. It was action of a type similar to that discussed in *Purvis.*[170]

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

In *Tyler v Kesser Torah College*,[171] a student with behavioural difficulties was temporarily excluded from the respondent school. The school's regular discipline policy was not applied to the student and the Court noted as follows:

> To that extent, Rabbi Spielman treated Joseph differently from how he would have treated a student without Joseph's disabilities. However, that fact by itself does not establish unlawful discrimination. The College had already decided in consultation with the Tylers that Joseph had special needs that required a special educational programme. These were special educational services for the purposes of s 5(2) of the DDA. The non application of the College's usual discipline policy to Joseph was an element of those special services. It follows, in my view, that the non application of the school's discipline policy to Joseph could not, of itself, be discriminatory for the purposes of s 5(1) of the DDA.[172]

5.2.3 Indirect Discrimination under the DDA

(b) Defining the 'requirement or condition'

In *Ferguson v Department of Further Education*,[173] the applicant, who is profoundly deaf, was enrolled in a Diploma of Engineering (Electronics) at the Tea Tree Gully campus of the Torrens Valley Institute of TAFE. The applicant claimed that the respondent had discriminated against him on the basis of his disability by requiring him to comply with the requirement or condition that he substantially attend his classes, undertake resource based learning and communicate with other students, lecturers and support officers with limited assistance from an Auslan interpreter.[174] Raphael FM dismissed the application on the basis that, even if the applicant had had the benefit of more assistance there was no evidence that it would have allowed him to complete the course any earlier as he claimed.[175]

However, in the course of his reasoning, Raphael FM suggested that the failure of the respondent to assess the applicant's needs and to ensure that he received sufficient interpreting time to maintain progress at a rate commensurate with that of a non-disabled person of the applicant's intellectual capacity needs assessment, would have more accurately described the 'requirement or condition' imposed on the applicant:

> It may be that if the applicant had somehow incorporated the failure to provide the needs assessment as part of the actual requirement or condition rather than limiting the requirement or condition to attending his classes etc with only limited assistance from an Auslan interpreter a case might have been capable of being made out. An example of such a claim would have been:

[170] Ibid [9].
[171] [2006] FMCA 1.
[172] Ibid [104].
[173] [2005] FMCA 954.
[174] Ibid [30].
[175] Ibid [32], [35].

> *TAFE required Mr Ferguson to comply with the requirement or condition that he undertake his learning and complete his course within a reasonable time without the benefit of a needs assessment.*
>
> That seems to me to [be] a facially neutral requirement or condition which [the applicant] could have provided that a substantially higher proportion of persons without the disability were able to comply with. He could also have proved that it was not reasonable having regard to the circumstances of his case.[176]

In making those remarks his Honour referred to the comments of Tamberlin J in *Catholic Education Office v Clarke*[177] concerning the importance of the proper characterisation of the condition or requirement from the perspective of the person with the disability.[178]

(d) Reasonableness

In *Hurst and Devlin v Education Queensland*,[179] the requirement or condition said to have been imposed on the applicants by the respondent was that they receive their education in English (including in Signed English[180]) without the assistance of an Auslan[181] teacher or interpreter. In determining whether that requirement or condition was 'reasonable', Lander J followed the approach of Madgwick J in *Clarke* and stated that the 'question of reasonableness will always be considered in light of the objects of the Act'.[182] His Honour held that it was not unreasonable for Education Queensland not to have adopted a bilingual-bicultural program[183] in relation to the education of deaf students prior to 30 May 2002,[184] stating:

> I am satisfied on the evidence … that Education Queensland has progressed cautiously but appropriately, towards the introduction of a bilingual-bicultural program and the use of Auslan as a method of communication for those programs.
>
> It must be accepted that an education system cannot change its method of education without first inquiring into the benefits of the suggested changes and the manner in which those changes might be implemented.
>
> It must be first satisfied that there are benefits in the suggested changes. It must be satisfied that it can implement those changes without disruption to those whom it is delivering its service.

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[176] Ibid [33].
[177] [2004] FCAFC 197, [12]-[13].
[178] [2005] FMCA 954, [34].
[179] [2005] FCA 405. For a discussion of the decision of Lander J, see Ben Fogarty, 'The Silence is Deafening: Access to education for deaf children', (2005) 43(5) *Law Society Journal* 78-81.
[180] Signed English is the reproduction of English language into signs. It has the same syntax and grammar as English and as such, is not a language separate from English: [2005] FCA 405, [127]-[128]. Signing in English, however, refers to the use of Auslan signs in English word order: ibid [129].
[181] Auslan is the native language of the deaf community in Australia. It is a visual-spatial language with its own complex grammatical and semantic system and does not have an oral or written component: ibid [125]-[126].
[182] Ibid [74]-[75].
[183] A bilingual-bicultural approach to the education of the deaf recognises Auslan and Signed English as distinct languages and students are instructed in Auslan as a first language and learn Signed English as a second language: ibid [466].
[184] Ibid [790].

> It was appropriate, in my opinion, for Education Queensland to take the time that it did in considering the benefits which would be associated with bilingual-bicultural program and the use of Auslan.
>
> I accept the respondent's argument that changes, as fundamental as those proposed in the bilingual-bicultural program, should be evolutionary rather than revolutionary. It is too dangerous to jettison a system of education and adopt a different system without being first sure that the adopted a different system without first sure that the adopted system is likely to offer increased benefits to the persons to whom the education is directed.[185]

However, Lander J found that 'Auslan will still be of assistance to those who are profoundly deaf even if delivered on a one-on-one basis';[186] though the Total Education Policy adopted by the respondent did not allow for Auslan as a method of communication.[187] Consequently, (without making any findings about the reasonableness of the Total Communication Policy), his Honour held that it was unreasonable for the respondent not to have assessed the applicants' needs prior to 30 May 2002 to determine whether they should be instructed in English or in Auslan, which assessment would have established that 'it would have been of benefit to both of [the applicants] to have been instructed in Auslan rather than in English'.[188]

The first applicant (Hurst) successfully appealed the decision of Lander J to the Full Federal Court.[189] That appeal was only in relation to Lander J's finding that Hurst, unlike Devlin, was able to comply with the condition of being taught without the assistance of Auslan (discussed at 5.2.3(e) below). The Court did not disturb or discuss Lander J's findings on the issue of reasonableness.

(e) Inability to comply with a requirement or condition

In *Hurst and Devlin v Education Queensland*,[190] the respondent was found to have imposed a requirement or condition upon the applicants that they receive their education in English without the assistance of an Auslan teacher or interpreter. Lander J stated that whether the applicant had or could comply with the requirement or condition was a 'matter of fact'.[191] In relation to the application by Ben Devlin, his Honour held that the evidence that he had fallen behind his hearing peers academically established that he could not comply with the requirement or condition imposed on him by the respondent, though the respondent's conduct was not the only reason he had fallen behind.[192]

However, his Honour held that Tiahna Hurst had not established that she could not comply with the requirement or condition that she be instructed in English as there was no evidence that she had fallen behind her hearing peers academically as a result of receiving her education in English.[193] While his Honour accepted that that may be as a result of the 'attention which she receives from her mother and the instruction

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[185] Ibid [781]-[785].
[186] Ibid [793].
[187] Ibid [794].
[188] Ibid [795]-[797].
[189] *Hurst v State of Queensland* [2006] FCAFC 100. The Human Rights and Equal Opportunity Commission was granted leave to intervene in these proceedings.
[190] [2005] FCA 405.
[191] Ibid [69].
[192] Ibid [805]-[806].
[193] Ibid [819].

which she no doubt receives from her mother in Auslan', he stated that it was 'a matter on which the experts have not discriminated'.[194]

The finding of Lander J that Tiahna Hurst was able to comply with the respondent's condition as she could 'cope' without the assistance of Auslan was reversed on appeal.[195] The Full Federal Court unanimously held that Lander J had incorrectly focused on the comparison between the academic performance of Tiahna Hurst and that of her peers.[196] Rather, the Court held that the critical issue was:

> whether, by reason of the requirement or condition that she be taught in English without Auslan assistance, she suffered serious disadvantage.[197]

The Full Federal Court further held that a child may be seriously disadvantaged if 'deprived of the opportunity to reach his or her full potential and, perhaps, to excel'.[198] In summary, the Court held:

> In our view, it is sufficient to satisfy that component of s 6(c) (inability to comply) that a disabled person will suffer serious disadvantage in complying with a requirement or condition of the relevant kind, irrespective of whether that person can 'cope' with the requirement or condition. A disabled person's inability to achieve her or her full potential, in educational terms, can amount to serious disadvantage. In Tiahna's case, the evidence established that it had done so.[199]

5.2.5 Disability Standards

In *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,[200] the applicant, a disability rights organisation, alleged that the respondent council had built or substantially upgraded a number of bus stops since the commencement of the Transport Standards which did not comply with those standards.

The application was summarily dismissed by Collier J on the basis that the applicant, as an incorporated association, was not itself 'aggrieved' by the alleged non-compliance with the Transport Standards.[201]

The respondent council had also sought to have the matter summarily dismissed on a separate ground relating to the 'equivalent access' provisions under the Transport Standards. The Council claimed that as no individual instance of discrimination had been alleged, the applicant had not proven that the respondent had failed to provide equivalent access to an individual who could not negotiate the relevant bus stops by reason of the council's failure to comply with the Transport Standards. Although unnecessary to decide this issue, Collier J stated the following in *obiter*:

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[194] Ibid [819]-[820]. For a critique of this finding of his Honour see, B Fogarty, 'The Silence is Deafening: Access to education for deaf children', (2005) 43(5) *Law Society Journal* 78-81.
[195] *Hurst v State of Queensland* [2006] FCAFC 100 (Ryan, Finn and Weinberg JJ). For a discussion of this case, see Natasha Case, 'Clarifying indirect disability discrimination', (2006) 44(9) *Law Society Journal* 42.
[196] Ibid [106].
[197] Ibid.
[198] Ibid [125].
[199] Ibid [134].
[200] [2007] FCA 615.
[201] Ibid [52]-[69]. See below discussion at 6.2.1.

> I do not accept the submission of the respondent that the applicant's claim should be dismissed unless the applicant proves that the respondent has failed to provide equivalent access to an individual, who cannot negotiate the public transport infrastructure by reason of a failure of the respondent to comply with the Standards. In my view, as submitted by the applicant, the provisions in the Disability Standards as to equivalent access go to conduct which may be raised in defence of alleged failure of the respondent to comply with the Disability Standards. It is not appropriate to determine issues relevant to equivalent access in the absence of the evidence, a hearing, and consideration of a key issue relevant to this case, namely whether the conduct of the respondent has breached the DD Act. In my view, this issue is not relevant to the issue of standing, or whether the applicant is an aggrieved person for the purposes of the HREOC Act and the DD Act.[202]

5.3 Areas of Discrimination

5.3.1 Employment (s 15)

(b) 'Arrangements made for the purposes of determining who should be offered employment'

In *Vickers v The Ambulance Service of NSW*,[203] the applicant passed the initial stages of the respondent's job application process, including interview. He was then referred for an independent medical assessment. During that assessment the applicant disclosed that he suffered from Type 1, insulin-dependent diabetes. Despite the applicant providing a letter supporting his application from his treating endocrinologist, his application was refused. The applicant claimed that the respondent had discriminated against him pursuant to s 15(1)(a) 'in the arrangements made for determining who should be offered employment' on the basis that it had effectively applied a blanket policy of excluding all persons with diabetes without taking into account their individual characteristics.[204]

Raphael FM found that there was insufficient evidence to infer that either the respondent or the organisation that had carried out the medical assessment had applied a blanket policy of excluding applicants with diabetes.[205] His Honour also held that the respondent's process of selection, including the medical assessment stage, was the same for the applicant as for others.[206]

However, his Honour ultimately found in favour of the applicant on the basis that the respondent had breached s 15(1)(b) (discrimination in determining who should be offered employment) and had failed to make out any of the defences under s 15(4).

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[202] Ibid [73].
[203] [2006] FMCA 1232. For discussion of this case, see Brook Hely, 'Judge me by what I can do – not by what you think I can't', (2006) 44(11) *Law Society Journal* 48.
[204] The applicant relied in particular upon the decision of the NSW Administrative Decisions Tribunal in *Holdaway v Qantas Airways* (1992) EOC 92-395.
[205] [2006] FMCA 1232, [39].
[206] Ibid [40]–[42].

(c) 'Benefits associated with employment' and 'any other detriment'

In *Ware v OAMPS Insurance Brokers Ltd*,[207] the applicant, who suffered from Attention Deficit Disorder and depression, claimed that respondent had directly discriminated against him in breach of s 15(2)(d) by:

- unilaterally changing the terms and conditions of his employment;
- the removal of his assistant;
- placing restrictions on his performance of duties;
- the setting of criteria against which his performance was to be judged, and not providing him with any opportunity to fulfil those criteria on any realistic, or fair timeframe; and
- demoting him.[208]

Driver FM found that, on the evidence, whilst the applicant's duties were unilaterally altered by the respondent, this did not constitute a detriment as the applicant had not objected to the change: on the contrary, he had expressed satisfaction with them and they had been a measure to 'better fit [the applicant's] duties with his capacity'.[209] However his Honour held that the removal of the applicant's assistant,[210] imposition of work restrictions[211] and his demotion were 'detriments' within the meaning of s 15(2)(d).

(d) Inherent requirements

In *Vickers v The Ambulance Service of NSW*,[212] the respondent argued that the applicant was unable to safely perform the inherent requirements of being an ambulance officer due to him suffering from Type 1, insulin-dependent diabetes. The respondent argued that the applicant's diabetes posed a grave risk to the safety of himself, his patients and the community at large due to the risk of him suffering a hypoglycaemic event whilst driving an ambulance at a high speed or whilst treating a patient.

In applying *X v Commonwealth*,[213] Raphael FM held that the risk posed by a person's disability must be considered in light of that person's individual characteristics. In addition, that risk must be balanced against other relevant factors, including the likelihood of that risk eventuating. His Honour held that there is no requirement on an employer to 'guarantee' the safety of a potential employee and others – this would be 'far too exclusionary of persons with diabetes'.[214]

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[207] [2005] FMCA 664.
[208] Ibid [102].
[209] Ibid.
[210] Ibid [103].
[211] Ibid [104].
[212] [2006] FMCA 1232.
[213] (1999) 200 CLR 177.
[214] [2006] FMCA 1232, [47].

His Honour accepted the evidence that the applicant's diabetes was very well controlled and a hypoglycaemic event was therefore very unlikely.[215] His Honour further held that the chances were even more remote that he would suffer a hypoglycaemic event whilst driving an ambulance or treating a patient and in circumstances where a delay of 30 – 60 seconds to pull the ambulance over or stop treating the patient to consume some glucose would be a critical delay in the care of his patient.[216]

5.3.2 Education

Note that the defence of unjustifiable hardship now applies to the treatment of students after their admission. The DDA was amended to provide for this broader coverage of the unjustifiable hardship defence by the *Disability Discrimination Amendment (Education Standards) Act 2005* (Cth) ('the Education Standards Act') which commenced operation on 1 March 2005.

That Act also made other amendments to s 22 of the DDA. Section 22 now provides as follows (amendments in bold):

> (1) It is unlawful for an educational authority to discriminate against a person on the ground of the person's disability or a disability of any of the other person's associates:
>
> (a) by refusing or failing to accept the person's application for admission as a student; or
>
> (b) in the terms or conditions on which it is prepared to admit the person as a student.
>
> (2) It is unlawful for an educational authority to discriminate against a student on the ground of the student's disability or a disability of any of the student's associates:
>
> (a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority; or
>
> (b) by expelling the student; or
>
> (c) by subjecting the student to any other detriment.
>
> **(2A) It is unlawful for an education provider to discriminate against a person on the ground of the person's disability or a disability of any of the person's associates:**
>
> **(a) by developing curricula or training courses having a content that will either exclude the person from participation, or subject the person to any other detriment; or**
>
> **(b) by accrediting curricula or training courses having such a content.**
>
> (3) This section does not render it unlawful to discriminate against a person on the ground of the person's disability in respect of admission to an educational institution established wholly or primarily for students who have a particular disability where the person does not have that particular disability.
>
> **(4) This section does not make it unlawful for an education provider to discriminate against a person or student as described in subsection (1), (2) or (2A) on the ground of the disability of the person or student or a disability of any associate of the person**

[215] Ibid [49]–[50].
[216] Ibid [51]–[53].

> **or student if avoidance of that discrimination would impose an unjustifiable hardship on the education provider concerned.**

The Education Standards Act also inserted into s 4(1) of the DDA the following definition of 'education provider':

> ***education provider*** means:
>
> (a) an educational authority; or
>
> (b) an educational institution; or
>
> (c) an organisation whose purpose is to develop or accredit curricula or training courses used by other education providers referred to in paragraph (a) or (b).

Readers should also note the commencement of the Disability Standards for Education as of 18 August 2005. More information in relation to those Standards is available via the Attorney-General's Department website: http://www.ag.gov.au/

In *Applicant N v Respondent C*,[217] one issue in the case was whether the Respondent, a child care centre, fell within the definition of an 'educational authority' for the purposes of s 22 of the DDA. McInnes FM held that the expression 'educational authority' should be interpreted broadly and would include a child care centre.[218] His Honour held:

> On the evidence and the pleadings before this court, at the very least, in my view, the Respondent can be said to manage an institution which provides for education of children in **the development of mental or physical powers and/or the moulding of some aspects of character.**[219] (emphasis added)

5.3.3 Provision of Goods, Services and Facilities

(a) Defining a 'service'

In *Rainsford v State of Victoria & Anor*,[220] the applicant appealed the decision of Raphael FM that in providing transport between prisons and cell accommodation, the first and second respondents had not provided the applicant with a service within the meaning of the DDA.

The Full Federal Court allowed the applicant's appeal, remitting the matter back to the Federal Magistrates Court to be determined according to law. In relation to the issue of whether the first and second respondents had provided the applicant with a service within the meaning of the DDA, Kenny J (with whom Hill and Finn JJ agreed) applied *Waters* and *IW* and stated that:

> The Federal Magistrate erroneously relied on a distinction that he drew between the provision of services pursuant to a statutory discretion and 'the situation … where no discretionary element exists'.[221]

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[217] [2006] FMCA 1936.
[218] Ibid [38] – [43].
[219] Ibid [42].
[220] [2005] FCAFC 163.
[221] Ibid [54].

> In addition to the management and security of prisons, the purposes of the Corrections Act 1986 (Vic) include provision for the welfare of offenders. The custodial regime that governs prisoners under this Act is compatible with the provision of services to them: see, for example, s 47. Indeed this proposition is fortified by the provision of the Prison Services Agreement to which counsel for Mr Rainsford referred on the hearing of the appeal. In discharging their statutory duties and functions and exercising their powers with respect to the management and security of prisons, the respondents were also providing services to prisoners. The fact that prisoners were unable to provide for themselves because of their imprisonment meant that they were dependent in all aspects of their daily living on the provision of services by the respondents. Although the provision of transport and accommodation would ordinarily constitute the provision of services, whether the acts relied on by Mr Rainsford will constitute services for the DDA will depend upon the findings of fact, which are yet to be made and, in particular, the identification of the acts that are said to constitute such services.[222]

(b) 'Refusal' of a service

In *Wood v Calvary Hospital*,[223] the applicant had requested admission to the 'Calvary at Home' scheme, which allowed patients to be treated by hospital staff at home or attend the hospital for treatment on a daily basis.[224] The applicant requested that she be treated at home.[225] Upon making that request, she was told that she would not be able to be treated at home because of her past intravenous drug use and past aggressive behaviour due to the danger to nurse attending her home.[226] However, at the time that the applicant requested to be treated at home, the home visits scheme was closed to new entrants because of staff shortages.[227]

At first instance, Brewster FM held that there must be a service available to be offered before that service can be said to have been refused. As the service was closed at the relevant time, there was no refusal of a service and s 24 did not apply.[228]

However, on appeal to the Federal Court,[229] Moore J disagreed with this approach. His Honour emphasised that the meaning of 'refusing' in s 24(1)(a) should be given a beneficial construction and the section 'does not cease to apply where a putative discriminator is for some reason temporarily unable to provide the goods or services.'[230] Nevertheless, Moore J rejected the appeal on the basis that the appellant was treated no differently to a person without a disability, as the program was closed to all patients:

> The Federal Magistrate's finding that the home visits program was closed seems to lead, inevitably, to the conclusion that the appellant was treated no differently than a person without the disability would have been treated. Neither would have been provided with the service. It is therefore unnecessary to consider the construction of a comparator for the purpose of s 5. The Federal Magistrate was correct in reaching the conclusion that the hospital did not contravene s 5.[231]

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[222] Ibid [55].
[223] [2005] FMCA 799.
[224] Ibid [9].
[225] Ibid [16].
[226] Ibid [11], [14].
[227] Ibid [19].
[228] Ibid [23].
[229] [2006] FCA 1433.
[230] Ibid [28]
[231] Ibid [31].

(c) Assistance animals

In *Forest v Queensland Health*,[232] the applicant claimed that the respondent discriminated against him by refusing to provide him access to and services at Cairns Base Hospital and at Smithfield Community Health Centre, while he was accompanied by one or both of his dogs.

The applicant has a psychiatric disability and argued that he relies on his two dogs as assistance animals (within the meaning of s 9(1)(f) of the DDA) to alleviate his psychological difficulties.

In respect of both applications, the Federal Court, Queensland, found that:

- The respondent discriminated against the applicant within the meaning of ss 6 (indirect discrimination) and 9(1)(f) (guide dogs/ assistance animals) of the DDA; and
- The respondent's conduct was unlawful within the meaning of ss 23(1)(a), 23(1)(b) (access to premises); and 24(1)(a) and 24(1)(b) (goods, services and facilities) of the DDA.

In reaching her conclusions, Collier J accepted the submissions of the Disability Discrimination Commissioner (who appeared in the matter as *amicus curiae*) in relation to the meaning of an assistance animal under s 9 of the DDA. In doing so, she expressed her concern about the broad scope of this provision and its lack of clarity.

5.6 Victimisation

Section 42 of the DDA provides as follows:

> (1) It is an offence for a person to commit an act of victimisation against another person.
>
> Penalty: Imprisonment for 6 months.
>
> (2) For the purposes of subsection (1), a person is taken to commit an act of victimisation against another person if the first-mentioned person subjects, or threatens to subject, the other person to any detriment on the ground that the other person:
>
> (a) has made, or proposes to make, a complaint under this Act or the *Human Rights and Equal Opportunity Commission Act 1986*; or
>
> (b) has brought, or proposes to bring, proceedings under this Act or the *Human Rights and Equal Opportunity Commission Act 1986* against any person; or
>
> (c) has given, or proposes to give, any information, or has produced, or proposes to produce, any documents to a person exercising or performing any power or function under this Act or the *Human Rights and Equal Opportunity Commission Act 1986*; or
>
> (d) has attended, or proposes to attend, a conference held under this Act or the *Human Rights and Equal Opportunity Commission Act 1986*; or

[232] [2007] FCA 936.

(e) has appeared, or proposes to appear, as a witness in a proceeding under this Act or the *Human Rights and Equal Opportunity Commission Act 1986*; or

(f) has reasonably asserted, or proposes to assert, any rights of the person or the rights of any other person under this Act or the *Human Rights and Equal Opportunity Commission Act 1986*; or

(g) has made an allegation that a person has done an act that is unlawful by reason of a provision of this Part;

or on the ground that the first-mentioned person believes that the other person has done, or proposes to do, an act or thing referred to in any of paragraphs (a) to (g) (inclusive).

In *Damiano v Wilkinson*,[233] the applicants had brought a claim of disability discrimination on behalf of their son, Anthony, who was a student. It was alleged that he was unfairly treated in class and in his capacity as a student trombone player who wished to join the school band and participate in other musical events. A complaint was subsequently made about the conduct of the principal of the school, after the complaint of discrimination had been lodged with HREOC. The conduct considered by the Court[234] was:

- the failure to return three phone calls made by the parents;
- shouting at the parents during a phone conversation, including shouting that he would speak to the mother 'only when he was ready to do so'; and
- making statements to the local paper including that the complaint was 'trivial, vexatious, misleading or lacking in substance', that the matter had been taken 'to the highest authority and thrown out' and that the school 'is currently investigating what legal recourse we have in terms of taking action against people who are guilty of these sorts of complaints, because there is a high degree of harassment we want investigated'.

This conduct was said to have caused Anthony emotional distress and to constitute victimisation.

In upholding an application for summary dismissal, Baumann FM held that for victimisation to be established, one of the grounds referred to in s 42(2) of the DDA must be a 'substantial and operative' factor in the action taken.[235] It is necessary to show a causal link between the detriment (or threat to cause detriment) and the making of a complaint to HREOC. While 'detriment' is not defined by the DDA, Baumann FM considered that it involves placing a complainant 'under a disadvantage as a matter of substance',[236] or results in a complainant suffering 'a material difference in treatment'[237] which is 'real and not trivial'.[238]

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[233] [2004] FMCA 891.
[234] Note that other conduct alleged by the applicants was found not to have formed part of the complaint to HREOC and was excluded from consideration by virtue of s 46PO(3) of the HREOC Act: ibid [39].
[235] Ibid [22], citing *Bailey v Australian National University* (1995) EOC 92-744.
[236] Ibid [23], citing *Bogie v University of Western Sydney* (1990) EOC 92-313.
[237] Ibid, citing *Bailey v Australian National University* (1995) EOC 92-744.
[238] Ibid, citing *Sivanathan v Commissioner of Police (NSW)* (2001) NSWADT 44.

Baumann FM was satisfied that the allegations in relation to the phone calls could not, if proved, amount to victimisation within the meaning of s 42 of the DDA as they were 'trivial and lack particularity'.[239] The comments made to the newspaper also could not constitute victimisation. Those relating to the complaint that had been made to HREOC were accurate and were an understandable response to the allegations made to the newspaper by the applicants.[240] The statement that the school was investigating legal recourse against the applicant was not a threat.[241]

In *Drury v Andreco Hurll Refractory Services Pty Ltd (No 4)*,[242] the respondent was found to have made a decision not to re-employ the applicant because of his previous complaint to HREOC and consequent proceedings in the Federal Court and because he had threatened in correspondence to repeat that action were he not given employment. Raphael FM stated:

> I can understand that the company might have been disturbed by [the applicant's] correspondence with them. But that correspondence when read in context and as a whole is no more than a firm assertion of [the applicant's] rights. The Act does not excuse the respondent to a victimisation claim because the proposal to make a complaint to HREOC is couched in intemperate words. In this particular case, and again reading the correspondence as a whole, I do not think that it could be so described. Certainly [the applicant] says that if he is not offered work he will take the matter up again with HREOC and certainly he suggests he will be calling witnesses and requiring documents to be produced, but he also says that he doesn't want to go to court and he wants to settle the matter by getting back his job and by using the money earned from that job to repay the company the costs he owes them for the previously aborted proceedings before Driver FM.[243]

In *Penhall-Jones v State of NSW (No.2)*,[244] Driver FM dismissed the applicant's claims that she had been victimised under s 42 by her employer, the NSW Ministry of Transport ('the Ministry'). The applicant claimed the incidents of victimisation were as follows:

1. Being 'verbally abused' by her supervisor after the applicant failed to attend a scheduled meeting.

2. A 'programme of bullying' by her supervisor.

3. The proposals made by the Ministry during the HREOC conciliation conference including:

   (a) the Ministry's offer of a payment of money in settlement of the applicant's disability discrimination claim;

   (b) the Ministry's proposal that the applicant resign her employment in return for a payment of money.

   The applicant characterised the offer made by the Ministry to be a 'bribe', and the proposal that she resign a threat amounting to victimisation.

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[239] [2004] FMCA 891, [24].
[240] Ibid [28].
[241] Ibid [29].
[242] [2005] FMCA 1226.
[243] Ibid [31].
[244] [2006] FMCA 927.

4. A letter from the Acting Director-General of the Ministry, Mr Duffy, indicating that a continuation of her conduct of making false and vexatious complaints against the Ministry, which conduct is contrary to the duties of fidelity, trust and good faith owed by an employee to an employer, might lead to the termination of her employment.

In relation to the first claim, Driver FM held that verbal abuse in the workplace, particularly by a supervisor, can be a 'detriment' for the purposes of s 42 of the DDA.[245] However, whilst 'open to criticism', the supervisor's conduct was not linked to the applicant's HREOC complaint but was an 'overreaction' to the applicant's failure to attend the scheduled meeting.[246]

In relation to the second claim, Driver FM held that, when viewed in the context of the prior animosity between the applicant and her supervisor, her supervisor's attitude and behaviour towards the applicant was not victimisation but arose out of her 'growing dislike' for the applicant.[247]

Driver FM dismissed the applicant's third claim as 'ridiculous'.[248] Driver FM stated:

> Ms Penhall-Jones attended the conciliation conference at HREOC on 28 September 2004 in the company of her legal representatives...A settlement of the claim of unlawful disability discrimination was discussed. The payment of money was discussed…The Department proposed that, in return for a payment, Ms Penhall-Jones would resign her employment…
>
> Ms Penhall-Jones now chooses to characterise the offer made by the Department as a 'bribe' and the proposal that she resign her employment as a threat amounting to victimisation. This is ridiculous. She herself in the conference had offered to resign in return for the payment of a sum of money. It was reasonable for the respondent to seek to limit its liability to Ms Penhall-Jones by securing the cessation of her employment in return for adequate compensation. Ms Penhall-Jones did not regard the monetary offer as adequate but she did not have to accept it. The HREOC conciliation process is non binding and no one is forced to agree to anything. The attempt by Ms Penhall-Jones to use the private conciliation conference to support her claim of victimisation is most unfortunate. If such a tactic were to become common it would imperil the conciliation role of HREOC as respondents would be reluctant to participate in conciliation for fear of the process then being used against them.[249]

Driver FM also dismissed the applicant's fourth claim, in relation to the letter from Mr Duffy, stating:

> [T]he threat, in my view, falls short of victimisation. That is because the threat was a consequence not of the fact of the complaint of unlawful discrimination made by Ms Penhall-Jones, or her participation in the conciliation conference on 28 September 2004. Rather, the threat was a consequence of the intemperate and continuing allegations by Ms Penhall-Jones which Mr Duffy, on advice, genuinely viewed as unfounded, false and vexatious, to the extent of probably constituting a breach of the duty of trust and confidence necessary to the continuation of the employment relationship.[250]

[245] Ibid [125].
[246] Ibid [126].
[247] Ibid [127].
[248] Ibid [129].
[249] Ibid [128]-[129].
[250] Ibid [136].

Chapter 6: Procedure and Evidence

6.1 Introduction

In *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,[251] Collier J considered the principles to be applied in determining an application by a special purpose Commissioner for leave to appear as *amicus curiae*. Her Honour noted the general proposition stated by Brennan CJ in *Levy v State of Victoria*:[252]

> The footing on which an amicus curiae is heard is that that person is willing to offer the Court a submission on law or relevant facts which will assist the Court in a way in which the Court would not otherwise have been assisted.[253]

Her Honour then referred to the particular position of the special purpose Commissioners by reason of their statutory *amicus curiae* function under the HREOC Act. Her Honour stated:

> The *amicus curiae* function conferred on the special purpose Commissioners under the *HREOC Act*, in my view indicates acknowledgement by Parliament that the Court can obtain useful assistance from the Commissioners as statutory *amicus curiae*. In the *HREOC Act*, Parliament also recognises the position, expertise and knowledge of the Commissioners, and I note the duties and functions of the Commission as set out in s 10A and s 11 of the *HREOC Act* to that effect.[254]

6.2 Who is Entitled to make a Complaint to HREOC?

6.2.1 'A Person Aggrieved'

In *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,[255] the applicant was a volunteer incorporated association, established to advance equitable and dignified access to premises and facilities. Collier J summarily dismissed its application alleging that the respondent council was in breach of s 32 of the DDA (contravention of a disability standard[256]) in relation to a number of bus stops. Her Honour held that the applicant, as an incorporated association, was not itself 'aggrieved' by the relevant conduct because, unlike its members, the applicant did not actually use the relevant bus stops.

In dismissing the proceeding, Collier J outlined the following guiding principles in determining whether an organisation is a 'person aggrieved':

- 'Person aggrieved' is a mixed question of fact and law.[257]

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[251] [2006] FCA 1214.
[252] (1997) 189 CLR 579, 604-605.
[253] [2006] FCA 1214, [5].
[254] Ibid [6].
[255] [2007] FCA 615.
[256] See 5.2 above.
[257] Ibid [40].

- Whether a person is aggrieved is an objective test. The person must, in the eyes of the court, be aggrieved and must have more than a mere intellectual or emotional interest in the subject matter of the proceedings.[258]
- There is a different jurisprudential basis for identifying whether an applicant has a 'special interest' in the subject of proceedings sufficient to be granted standing under general law, compared with whether an applicant is a person aggrieved for the purposes of a statutory right of action such as under the HREOC Act. However, in resolving these questions, the matters taken into account are often similar.[259]
- 'Person aggrieved' should not be interpreted narrowly and should be given a construction that promotes the purpose of the relevant Act.[260]
- A body corporate is capable of being a person aggrieved, such as if the association is discriminated against on the basis of the race, disability, sex or age of its members.[261]
- Merely incorporating a body and providing it with relevant objects does not provide it with standing it otherwise would not have had.[262]
- Whilst incorporated associations are typically community organisations and should not ordinarily be equated with trading corporations, they are nevertheless bodies corporate which may sue or be sued in their own name. The interests of its members are therefore 'arguably irrelevant'. This can be distinguished from the position of unincorporated associations, which may be aggrieved by a matter that affects the interests of its members.[263]
- Some cases have accepted that an incorporated association may have standing in human rights or environmental matters, although courts have typically applied principles as to standing in such cases strictly.[264]

Her Honour also held that a decision by HREOC to accept a complaint is not determinative or binding on the court, on the question of whether the complainant is 'aggrieved'.[265]

6.2.2 Bodies Corporate

In *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,[266] Collier J accepted that members of an incorporated association may individually be 'aggrieved' for the purposes of commencing proceedings under the HREOC Act.[267] However, her Honour considered that, because an incorporated association is a separate corporate entity that may sue and be sued in its own name, the individual interests of its members are 'arguably irrelevant'.[268] Crucially, her Honour considered that the

[258] Ibid [41]. See also [52]-[53].
[259] Ibid [42]-[43].
[260] Ibid [44]-[45].
[261] Ibid [46], [54].
[262] Ibid [48].
[263] Ibid [49]-[50]. See also [58].
[264] Ibid [51].
[265] Ibid [37]-[39].
[266] [2007] FCA 615.
[267] Ibid [69].
[268] Ibid [50].

applicant in the proceedings had merely an intellectual or emotional interest in the subject matter which was not sufficient to make it 'aggrieved' for the purposes of commencing proceedings under the HREOC Act.[269]

However, her Honour accepted that an incorporated association may be aggrieved where it is treated less favourably based on the race, disability etc of its members, such as by being refused a lease of premises.[270] Her Honour also distinguished the applicant from an *unincorporated* association, in which case the interests of the members would be relevant.[271]

Her Honour also left open the prospect of an incorporated association being sufficiently 'aggrieved' if **all** of its members were similarly aggrieved by the relevant conduct.[272] Alternatively, an incorporated association may be 'aggrieved' if it is a sufficiently recognised peak body in respect of the relevant issue, although her Honour suggested that this latter point was 'of somewhat debatable significance'.[273]

6.5 Scope of Applications made under s 46PO of the HREOC Act to the FMC and Federal Court

6.5.1 Parties

(b) Respondents

In *Lawrence v The Commonwealth of Australia and Ors*,[274] Smith FM refused an application by the applicant for leave to join as respondents to the proceedings persons other than those who were respondents to the terminated complaint to HREOC. Smith FM stated:

> In my opinion, the requirement that each respondent to an application under s.46PO must have been a 'respondent to the terminated complaint' is a jurisdictional requirement of an application such as is now brought by the applicant. Such appears to have been the opinion of Jarrett FM in *Gauci v Kennedy & Anor* [2005] FMCA 1505 at [53].[275]
>
> …
>
> The significance of the jurisdictional limits on this Court which refer to the ambit of the terminated complaint and the parties to the terminated complaint, appears from the scheme of the [HREOC] Act. It sets up a process whereby complaints are initially assessed and investigated administratively. Even at that stage, the [HREOC] Act requires the persons who are specifically affected to be identified as parties to the administrative proceeding. The [HREOC] Act describes the persons against whom complaints are made as 'respondents' from the inception of the proceeding (see the definition of 'complaint' and 'respondent' in s.3).

[269] Ibid [41], [52]-[53], [67]. See also 6.2.1 (above).
[270] Ibid [46], [54].
[271] Ibid [50], [58], distinguishing *Executive Council of Australian Jewry v Scully* (1998) 79 FCR 537.
[272] Ibid [60], distinguishing *Manuka Business Association Inc v The Australian Capital Territory Executive and Minister for the Environment, Land and Planning* [1998] ACTSC 86.
[273] Ibid [63].
[274] [2006] FMCA 1792.
[275] Ibid [12].

> Moreover, the Commission itself is given a function of determining who are respondents to the complaint. This appears, in particular, from s46PF(3)...[276]

6.8 Applications for Extension of Time

6.8.2 Principles to be Applied

In *Ingram-Nader v Brinks Australia Pty Ltd*,[277] Cowdroy J held that Driver FM had incorrectly applied the test of whether the respondent had been prejudiced by delay (principle 4 of the principles adopted by McInnis FM in *Phillips v Australian Girls' Choir Pty Ltd*[278]). The appellant had made his application to the FMC under s 46PO of the HREOC Act 58 days after the expiry of the prescribed 28 day period. In declining leave to file his application out of time, Driver FM had taken into account the prejudice arising from the period of time which had elapsed since the alleged conduct had occurred (some five years at the time the HREOC complaint was made). The appellant argued that in assessing prejudice to the respondent arising from the delay the only prejudice Driver FM was entitled to take into account was that caused by the 58 day delay in lodging his application with the FMC. Upholding the appeal, Cowdroy J stated that:

> I have not been referred to any authority in which a court has taken into account prejudice caused by delay occurring prior to the commencement of the prescribed period.
>
> …
>
> I agree with the submission of the appellant that Driver FM erred in taking into account the prejudice suffered by the respondent which predated the expiry of the prescribed period. The only relevant period for consideration of prejudice is the 58 days following the expiry of the prescribed period.[279]

In *Bahonko v Royal Melbourne Institute of Technology*[280] ('*Bahonko*'), Weinberg J stated that the principles to be applied when deciding whether to extend time for filing an application under s 46PO of the HREOC Act were those enunciated by Wilcox J in *Hunter Valley Developments Pty Limited v Cohen.*[281] In *Bahonko*, the applicant had made her application to the Federal Court under s 46PO of the HREOC Act approximately 11 days after the expiry of the prescribed 28 day period. Weinberg J accepted that the applicant's illness during the delay period was an acceptable explanation for failing to file her application and claim in time. However, Weinberg J refused the applicant's application for an extension of time on the basis that there was

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[276] Ibid [15]-[16].
[277] [2006] FCA 624.
[278] [2001] FMCA 109.
[279] [2006] FCA 624, [17], [19].
[280] [2006] FCA 1325, [24]. Note: Weinberg J makes no reference to the decision of McInnes FM in *Phillips v Australian Girls' Choir Pty Ltd* [2001] FMCA 109. However, Weinberg J does refer to the decision of *Ingram-Nader v Brinks Australia Pty Ltd* [2006] FCA 624 where Cowdroy J notes that the principles enunciated by McInnes FM in *Phillips v Australian Girls' Choir Pty Ltd* [2001] FMCA 109 were drawn almost verbatim from those formulated by Wilcox J in *Hunter Valley Developments Pty Limited v Cohen* (1984) 3 FCR 344, 348-349.
[281] (1984) 3 FCR 344, 348-349.

no evidence to support the applicant's claims of unlawful discrimination and '[i]t would therefore be futile to extend time to enable her to pursue a hopeless case'.[282]

6.8.4 Extension of Time for Filing Appeals

In *Gauci v Kennedy and University of Queensland*,[283] Collier J granted the applicant an extension of time to file his notice of motion seeking leave to appeal Jarrett FM's decision to summarily dismiss his discrimination application. Collier J applied the principles set out by Wilcox J in *Hunter Valley Developments Pty Ltd v Cohen.*[284] Her Honour held that whilst the applicant's reasons for the delay were 'barely adequate', the second respondent had not suffered any 'substantial' prejudice as a result of the delay, and the case before Jarrett FM could not be said to be 'so very clear' as to justify summary dismissal.[285]

In *Foster v State of Queensland*,[286] an application for leave to appeal was made 14 days out of time.

Greenwood J held that three important considerations justify an extension of time: first that there were a number of applicants; second that the applicants live in a remote community with limited ability to communicate with their lawyers; and third that the issues had to be explained to each applicant and instructions taken from each individual resident in a remote community.[287]

6.8A State Statutes of Limitation

The HREOC Act does not provide for any strict time limit for bringing a complaint of unlawful discrimination to HREOC. The President has a discretion to terminate a complaint if it is lodged more than 12 months after the alleged unlawful discrimination took place: see s 46PH(1)(b). Termination on this basis does not, however, prevent a complainant from making an application to the Federal Court or Federal Magistrates Court in relation to that alleged discrimination. As set out in section 6.8 of this publication, such an application must be brought within 28 days of termination or such further time as the court concerned allows.

The applicability of State statutes of limitation to unlawful discrimination proceedings has arisen in a number of recent matters.[288] Section 79 of the *Judiciary Act 1903* (Cth) provides as follows:

> The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

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[282] [2006] FCA 1325, [83].
[283] [2006] FCA 869.
[284] These principles are set out at 6.8.2 of the text.
[285] [2006] FCA 869, [29]-[30] and [44].
[286] [2006] FCA 1680.
[287] Ibid [52].
[288] For discussion of these recent cases, see Jonathon Hunyor, 'Time limits for unlawful discrimination claims' (2006) 44 *Law Society Journal* 40.

In *McBride v Victoria*,[289] McInnis FM expressed doubt as to whether or not the terms of the *Limitation of Actions Act 1958* (Vic) applied to proceedings commenced under the HREOC Act. On the other hand, in *Gama v Qantas Airways Ltd* ('*Gama*')[290] Raphael FM expressed the view that the similarly worded *Limitation Act 1969* (NSW) did apply to proceedings under the HREOC Act, such proceedings being 'an action for damages for breach of statutory duty' in accordance with s 14(1)(b) of the NSW Act.

In *Baird v Queensland* ('*Baird*'),[291] the Federal Court assumed that the *Limitation of Actions Act 1974* (Qld) applied to the proceedings and found that its effect is to bar proceedings commenced in court more than six years after termination by the President of HREOC. The Court noted that the limitation period established by the Queensland Act was to be calculated from the date on which the 'cause of action' arose. Dowsett J held that a 'cause of action' only existed under the HREOC Act upon termination by the President of HREOC as before such time there was no right to relief before a court (and HREOC has no power to grant such relief).[292]

This decision was not considered in *Gama*, in which a different result was reached. In *Gama*, while deciding the matter on another basis, the Federal Magistrates Court expressed the view that events taking place more than six years before proceedings were commenced in court were statute-barred.[293] It has been suggested that the approach in *Baird* is the preferable one.[294]

6.10 Applications for summary dismissal

For proceedings commenced in the Federal Court or FMC (or High Court) **after** 1 December 2005, new provisions apply in relation to summary judgement and dismissal (the former rules are outlined in *Federal Discrimination Law 2005* at 6.10).[295]

The court may now give judgment for one party against another in relation to the whole or any part of a proceeding if the court is satisfied that the other party has 'no

[289] [2001] FMCA 55, [10].
[290] [2006] FMCA 11, [6].
[291] [2005] FCA 1516.
[292] Ibid [9].
[293] [2006] FMCA 11, [6]-[9].
[294] See note 288 above. See also the decision in *McBride v Victoria* [2001] FMCA 55 in which the Court's analysis seems to be similar to that in *Baird*, but suggests that it is necessary for an application to be lodged *with HREOC* within 6 years.
[295] *Wang v Secretary, Dept of Employment and Workplace Relations* [2006] FCA 898. Order 20, r 1A of the Federal Court Rules now states that the Order only applies to proceedings commenced prior to 1 December 2005. The Rule also contains a note, stating 'See section s 31A of the [*Federal Court of Australia Act 1976* (Cth)] in relation to proceedings commenced on or after 1 December 2005.' By contrast, the Federal Magistrates Court Rules reflect a more hybrid approach. Rule 13.07 mirrors the 'new' provisions introduced by s 17A of the *Federal Magistrates Act 1999* (Cth), although the 'old' provisions under Rule 13.10 still remain. The relationship between Rules 13.07 and 13.10 is considered by McInnes FM in *MG Distribution Pty Ltd & Ors v Khan* (2006) 230 ALR 352, [38]-[44].

reasonable prospect' of successfully prosecuting or defending the proceeding or that part of the proceeding.[296] Importantly, the relevant provisions also provide that:

> (3) For the purposes of this section a defence or a proceeding or part of a proceeding need not be:
> (a) hopeless; or
> (b) bound to fail;
> for it to have no reasonable prospect of success.

The relevant Explanatory Memorandum makes clear that the new provisions were intended to introduce a broader and less demanding assessment of the lack of merits compared with the former general law principles relating to summary judgement:

> Section 31A moves away from the approach taken by the courts in construing the conditions for summary judgment by reference to the 'no reasonable cause of action' test, in *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 and *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125. These cases demonstrate the great caution which the courts have exercised in regard to summary disposal, limiting this to cases which are manifestly groundless or clearly untenable.
>
> Section 31A will allow the Court greater flexibility in giving summary judgment and will therefore be a useful addition to the Court's powers in dealing with unmeritorious proceedings.[297]

This sentiment has been reflected in a number of decisions implementing the new provisions.[298] A number of decisions have, however, suggested that courts may still continue to exercise the power of summary dismissal sparingly.

For example, in *Boston Commercial Services Pty Ltd v GE Capital Finance Australasia* ('*Boston Commercial*'),[299] Rares J observed that 'Experience shows that there are cases which appear to be almost bound to fail yet they succeed'.[300] His Honour continued:

> I am of [the] opinion that in assessing what reasonable prospects of success are for the purposes of s 31A, the Court must be very cautious not to do a party an injustice by summarily dismissing the proceedings where, in accordance with the principles in *Hocking v Bell* (1947) 75 CLR 125, contested evidence might reasonably be believed one way or the other so as to enable one side or the other to succeed. As soon as the evidence may have such an ambivalent character prior to a final determination, I am of opinion that then, as a matter of law, at that point there are reasonable prospects of

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[296] *Federal Court of Australia Act 1976* (Cth), s 31A; *Federal Magistrates Act 1999* (Cth), s 17A; *Judiciary Act 1903* (Cth), s 25A. These amendments were all introduced by the *Migration Litigation Report Act 2005* (Cth). Despite this Act's title, the amendments apply to all types of proceedings, not only migration matters.
[297] *Migration Litigation Reform Act 2005* (Cth) Explanatory Memorandum, [22]-[23]. The same comments were made in relation to the equivalent provisions affecting the FMC and High Court, see [27]-[28] and [32]-[33] respectively.
[298] See, eg, *Vans, Inc v Offprice.com.au Pty Ltd* [2006] FCA 137, [10]-[12] (Wilcox J); *Jewiss v Deputy Commissioner of Taxation* [2006] FCA 1688 [26]-[29] (Mansfield J); *Forton Automotive Treatments Pty Ltd v Jones (No 2)* [2006] FCA 1401, [21] (French J); *Duncan v Lipscombe Child Care Services Inc* [2006] FCA 458, [6] (Heerey J).
[299] [2006] FCA 1352.
[300] Ibid [42].

> success within the meaning of s 31A. Unless only one conclusion can be said to be reasonable, the moving party will not have discharged its onus to enliven the discretion to authorize a summary termination of the proceedings which s 31A envisages.[301]

In *Hicks v Ruddock*,[302] Tamberlin J acknowledged that the standard under the new provisions was less strict compared with the pre-existing general law principles.[303] However, his Honour nevertheless emphasised that such principles remained pertinent to the need for caution in approaching summary dismissal applications:

> In a case where evidence can give colour and content to allegations and where questions of fact and degree are important, the Court should be more reluctant to dismiss a proceeding on the face of a pleading: see *Boston Commercial Services Pty Ltd v G E Capital Finance Australia Pty Ltd* [2006] FCA 1352 at [45]. The underlying principle is that the need for a summary judgment must be clear before the court will intervene to prevent a plaintiff submitting a case for determination in the usual way. Once it appears that there is a real issue to be determined, whether it be of fact or law, and that the rights of the parties depend on it, the court should not terminate the action by way of summary judgment. As Barwick CJ said in *General Steel* at 129-130, great care must be exercised to be sure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of the opportunity to have his or her case tried by the appointed tribunal. The general principle that a person should not lightly be shut out from a hearing is cogent – the onus on the party applying for summary judgment is heavy.[304]

In *Vivid Entertainment LLC & Ors v Digital Sinema Australia Pty Ltd & Ors*,[305] Smith FM, after extensively reviewing the authorities dealing with the new provisions,[306] concluded:

> [I]n the absence of guidance from the Full Federal Court on the interpretation of s.31A, I will follow the cautious approach of Rares J (in *Boston Commercial*) and Jacobson J (in *Commonwealth Bank of Australia v ACN 000 247 601 Pty Ltd (in liq) (formerly Stanley Thompson Valuers Pty Ltd)* [2006] FCA 1416). In particular, I agree with and will apply the principles summarised by Jacobson J, in the following slightly amended terms:
>
> - In assessing whether there are reasonable prospects of success on an application or a response, the Court must be cautious not to do an injustice by summary judgment or summary dismissal.
>
> - There will be reasonable prospects of success if there is evidence which may be reasonably believed so as to enable the party against whom summary judgment or summary dismissal is sought to succeed at the final hearing.
>
> - Evidence of an ambivalent character will usually be sufficient to amount to reasonable prospects.

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[301] Ibid [45]. See also *Commonwealth Bank of Australia v ACN 000 247 601 Pty Ltd (in liq) (formerly Stanley Thompson Valuers Pty Ltd)* [2006] FCA 1416, [30]-[33] (Jacobson J).
[302] [2007] FCA 299.
[303] Ibid [12].
[304] Ibid [12]-[13]. See also *MG Distribution Pty Ltd & Ors v Khan* (2006) 230 ALR 352, [38]-[44] (McInnes FM).
[305] [2007] FMCA 157.
[306] Ibid [18]-[30].

- Unless only one conclusion can be said to be reasonable, the discretion ... cannot be enlivened.

- The Court should have regard to the possibility of amendment and additional evidence in considering whether only one conclusion can be said to be reasonable. In that consideration, the conduct of the parties and the other circumstances of the case may be relevant.[307]

The new provisions do not permit summary dismissal or judgment simply because of deficient pleadings. Rather, the prospects of the claim or defence underlying those pleadings must be considered. In *Fortron Automotive Treatments Pty Ltd v Jones (No 2),*[308] French J held:

> The question which has to be answered in an application for judgment under s 31A is whether the party against whom the application is made has any "reasonable prospect" of successfully prosecuting or defending "the proceeding" or the "part of the proceeding" in issue. That question is not to be answered by a finding that a party's statement of claim or defence fails to disclose a reasonable cause of action or defence. A pleading may be rectified by amendment so as to raise a reasonable cause of action or defence. It follows that a finding that a pleading should be struck out under O 20 does not mean there must be judgment against the party whose pleading it is. There may yet, by amendment, be a reasonable prospect of successfully prosecuting or defending that proceeding.[309]

His Honour continued:

> Section 31A is not a vehicle for simply striking out parts of pleadings that are deficient. Section 31A allows for "judgment" or nothing. Alternative remedies with respect to deficient pleadings must be found in the rules of Court.[310]

6.10.1 Principles applied

(c) Onus/material to be considered by the court

In *Cate v International Flavours & Fragrances (Aust) Pty Ltd*,[311] an application considered under the 'new provisions' relating to summary dismissal (discussed above') McInnis FM noted the balancing of interests necessary in considering summary dismissal of human rights proceedings, stating:

> It is also relevant at the outset to note that human rights proceedings necessarily involve what might be described as significant claims where it is in the public interest for those claims to be the subject of a hearing so that the allegations can be properly tested. It is in the interests of both parties for serious allegations.
>
> However, balanced against the desire to provide an opportunity for an Applicant to pursue proceedings based upon unlawful discrimination must be the need to ensure a Respondent is not put to the trouble and expense of meeting allegations which have no reasonable prospect

[307] Ibid [30].
[308] [2006] FCA 1401.
[309] Ibid [20].
[310] Ibid [21]. See also *Vivid Entertainment LLC & Ors v Digital Sinema Australia Pty Ltd & Ors* [2007] FMCA 157, [29] (Driver FM).
[311] [2007] FMCA 36

> of success pursuant to human rights if it does not meet the statutory definition of the discrimination alleged.[312]

In *Paramasivam v The State of New South Wales*,[313] Smith FM rejected an application for summary dismissal on the basis that the applicant's factual allegations, if accepted, could form the basis of a successful claim of discrimination.[314] However, Smith FM noted that the applicant had been a frequent litigator in several courts in relation to a variety of other complaints. Moreover, the applicant had shown a past hostility to meeting orders for the payment of costs. His Honour therefore considered it appropriate to stay the proceedings pending payment by the applicant of a $10,000 security.[315]

(d) Examples of where the power has been exercised

- it was accepted that the applicant (an incorporated association) was not a 'person aggrieved' for the purposes of commencing proceedings, on the basis that it was not itself affected by the relevant conduct but had merely an emotional or intellectual interest in the proceedings.[316]

Add to footnote 207: See also *Neate v Totally & Permanently Incapacitated Veterans Assoc. of NSW Limited* [2007] FMCA 488; *Cheng v Nicolas* [2007] FMCA 755 (dismissal of complaint at final hearing) and *Paramasivam v University of New South Wales* [207] FCA 875.

Add to footnote 208: See also *Applicant N v Respondent C* [2006] FMCA 1936.

6.12 Application for Suppression Order

Contrary to the decision of Brown FM in *CC v Djerrkura*[317], Smith FM in the matter of *Lawrance v The Commonwealth of Australia & Ors*[318] rejected an application by the applicant for an anonymity order to suppress her name. Smith FM held that the Federal Magistrates Court has the power to control publication of its proceedings pursuant to s.61 of the *Federal Magistrates Court Act 1999* (Cth) and that this allows it to make an order forbidding or restricting the publication of particular evidence or information. His Honour stated the test as follows:

> In the present case, therefore, it is necessary for me to be satisfied that an anonymity order is *'necessary'* for the purpose of *'prevent[ing] prejudice to the administration of justice'*.[319]

In rejecting the application for an anonymity order, Smith FM found that the applicant's claims in the case do not involve confidential dealings or matters of privacy or secrecy which must be preserved in the interests of the administration of justice. His Honour stated that:

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[312] [2007] FMCA 36, [74] and [75].
[313] [2007] FMCA 1033.
[314] Ibid [13]-[24].
[315] Ibid [4], [27]-[29]. See also *Paramasivam v University of New South Wales* [2007] FCA 875, [17] (Tamberlin J).
[316] *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2007] FCA 615.
[317] [2003] FMCA 372.
[318] [2006] FMCA 172.
[319] Ibid [48].

> As in many human rights cases in this Court, the applicant seeks vindication in a judicial determination of her claims that she has suffered infringements of her human rights. In my opinion, both the general and particular interests of justice suggest that generally this should be performed in public, once the complaint has passed from the administrative forum of the Human Rights and Equal Opportunities Commission.[320]

6.15 Standard of Proof in Discrimination Matters

6.15.2 Cases under the SDA

In *Fenton v Hair & Beauty Gallery Pty Ltd*,[321] the applicant claimed that she was sent home without pay and then dismissed from her employment by reason of her pregnancy. Driver FM held that the case was not one that warranted the application of the higher standard referred to in *Briginshaw*.[322]

In *Wiggins v Department of Defence – Navy*,[323] the applicant made allegations of sex discrimination and sexual harassment by her naval superiors. McInnis FM held the nature of the allegations and the context in which they allegedly occurred made them serious enough to 'attract the *Briginshaw* test'.[324]

In *Ilian v ABC*,[325] the applicant alleged that her employer had unlawfully discriminated against her on the basis of her sex and/or pregnancy by failing to allow her to return to her previous position upon her return to work from maternity leave. McInnes FM held that having regard to the nature of the allegations, 'it is not…a claim which could properly be characterised as one which ought to attract the *Briginshaw* test.'[326]

6.15.3 Cases under the DDA

In *Tyler v Kesser Torah College*,[327] the applicant complained of disability discrimination in his exclusion from the respondent school. Driver FM held that the case was not one that warranted the application of the higher standard referred to in *Briginshaw*.[328]

In *Hollingdale v North Coast Area Health Service*,[329] the applicant made allegations of disability discrimination in employment. Driver FM notes that there were 'no allegations… of fraud or criminal or even moral wrongdoing' and there was no question of 'any grave consequences' flowing from adverse findings against the respondent. In those circumstances the case was not one that warranted the application of the higher standard referred to in *Briginshaw*.[330]

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[320] Ibid [52].
[321] [2006] FMCA 3.
[322] Ibid [78].
[323] [2006] FMCA 800.
[324] Ibid [50].
[325] [2006] FMCA 1500.
[326] Ibid [22].
[327] [2006] FMCA 1.
[328] Ibid [100].
[329] [2006] FMCA 5.
[330] Ibid [138].

In *Wiggins v Department of Defence – Navy*,[331] McInnis FM held that the applicant's claims under the DDA, 'whilst significant, are not of such seriousness as to attract the *Briginshaw* test'.[332]

In *Penhall-Jones v State of NSW (No.2)*,[333] the applicant alleged that she had been victimised under s 42 of the DDA by her employer the NSW Ministry of Transport. In relation to proving her allegations, Driver FM stated:

> In considering the allegations I require a high degree of satisfaction that victimisation is established. An allegation of victimisation is an extremely serious matter which may have grave consequences for a respondent. Such allegations must be proved to the *Briginshaw* standard.[334]

In *Applicant N v Respondent C*,[335] the Applicant alleged that the Respondent child centre had discriminated against him on the basis of his disability by failing to appropriately apply a particular government benefit for his benefit. McInnes FM held that the *Briginshaw* standard of proof applied, for the following reasons:

> To allege that a child care centre has unlawfully discriminated against a disabled child, in my view, is a serious and grave allegation.
>
> It is particularly serious when the allegation is based not simply on a failure to provide an item of equipment or a means of access but is directed to what might be described as the day-to-day care of a child and/or the misuse of appropriate Commonwealth funding which in part is designed to optimise, in consultation with appropriate specialists, the use by the [applicant].[336]

Despite this conclusion, his Honour ultimately did not consider the evidence on the basis of an application of *Briginshaw*, but rather on the basis of what he termed the 'normal balance of probabilities standard of proof':

> However, even if I am wrong in relation to the appropriate standard of proof and even if the normal standard of balance of probabilities applies, that does not detract from the seriousness and gravity of the allegations and nor does it detract from the conclusions I otherwise draw in relation to the nature of the case.[337]

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[331] [2006] FMCA 800.
[332] Ibid [52].
[333] [2006] FMCA 927.
[334] Ibid [122].
[335] [2006] FMCA 1936.
[336] Ibid [28] – [29].
[337] Ibid [31]. See also [

6.16 Miscellaneous Procedural and Evidentiary Matters

6.16.5 Statements made at HREOC Conciliation

In *Treacy v Williams*,[338] Connolly FM ruled that those parts of the applicant's affidavit evidence that raised matters discussed during a HREOC conciliation conference were inadmissible.[339]

6.16.6 Security for Costs

In *Drury v Andreco Hurll Refractory*,[340] Raphael FM declined to order security for costs against an applicant who had not paid costs to the respondent from earlier proceedings. His Honour followed the approach taken in *Elshanawany v Greater Murray Health Service*[341] and *Croker v Sydney Institute of TAFE (NSW)*[342] and applied standard principles in determining the application.[343] Although dismissing the application for security for costs, his Honour stated, with reference to *Elshanawany* that there was no 'underlying legislative policy' or 'aspects of public interest' that 'weigh in the balance against the making of an order'.[344]

For an example of a case in which security for costs was ordered, see *Paramasivam v The State of New South Wales.*[345]

6.16.8 Judicial Immunity from Suit under Federal Discrimination Law

In *Paramasivam v O'Shane*,[346] Barnes FM summarily dismissed proceedings commenced against a NSW Magistrate alleging discrimination contrary to the RDA. His Honour was satisfied that the conduct complained of on the part of the Magistrate was conduct that, if it occurred, occurred in the exercise of her judicial function or capacity. The Magistrate was accordingly protected from liability under the RDA by operation of the doctrine of judicial immunity.[347] Following *Re East; Ex parte Nguyen*,[348] Barnes FM held that judicial immunity applied not only to judges of superior courts but also to state magistrates.[349]

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[338] [2006] FMCA 1336.
[339] Ibid [14].
[340] [2005] FMCA 186.
[341] [2004] FCA 1272.
[342] [2003] FCA 942.
[343] [2005] FMCA 186, [11].
[344] Ibid [20].
[345] [2007] FMCA 1033.
[346] [2005] FMCA 1686.
[347] Ibid [49].
[348] (1998) 196 CLR 354.
[349] [2005] FMCA 1686, [44].

6.16.10 Appointment of Litigation Guardians under the FMC Rules

In *L v HREOC*,[350] the Full Federal Court considered the appointment of litigation guardians in the FMC.

Under the FMC Rules a person 'needs' a litigation guardian if the person does not understand the nature and possible consequences of the proceeding or is not capable of adequately conducting, or giving adequate instruction for the conduct of, the proceeding.[351] A person who 'needs' a litigation guardian may only start, continue, respond to or seek to be included as a party to a proceeding by his or her litigation guardian.[352] A litigation guardian may be appointed at the request of a party or on the Court's own motion.[353]

The Full Court confirmed that litigants of full age are presumed to be competent unless and until the contrary is proved, and the onus is on the person who asserts lack of competency.[354] The Court also observed that:

> the fact that a litigant has put forward a case that reveals no reasonable cause of action may say nothing at all about the litigant's capacity to present such a case. The presumption that an adult person is capable of managing their own affairs is hardly likely to be displaced merely because a case has been commenced that has no prospect of success.[355]

In relation to the issue of determining whether a person 'needs' a litigation guardian, the Court stated that '[t]he means by which the court will determine whether a guardian should be appointed can vary from case to case'.[356] While medical evidence will ordinarily be required to be placed before the court, there may be cases where medical evidence is not available, as for example, when a person refuses to submit to a medical examination, or where the lack of capacity is so clear that the medical evidence is not called for. In those cases, 'and perhaps others, the court is entitled to rely on its own observation to make an assessment about the capacity of a party'.[357]

6.16.11 'No case' submission

In *Applicant N v Respondent C*,[358] McInnes FM considered the correct approach to a 'no case to answer' submission and when a party should be put to an election. His Honour cited with approval the decision of the Full Court of the Supreme Court of Victoria in *Protean (Holdings) Ltd (Receivers and Managers Appointed) & Ors v American Home Assurance Co*[359] and held that the court should consider:

- the nature of the case;

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[350] [2006] FCAFC 114.
[351] Rule 11.08(1).
[352] Rule 11.09(1).
[353] Rule 11.11(1).
[354] [2006] FCAFC 114, [26].
[355] Ibid [34].
[356] Ibid [27].
[357] Ibid citing *Murphy v Doman* (2003) 58 NSWLR 51, [37] and *AJI Services Pty Ltd v Manufacturers Mutual Insurance Ltd* [2005] NSWSC 709, [57].
[358] [2006] FMCA 1936.
[359] (1985) VR 198.

- the stages reached in the hearing;
- the particular issues involved; and
- the evidence that has been given. [360]

His Honour further held that the public interest is an additional relevant matter in human rights cases:

> There is, in my view, a further public interest element, not addressed in the *Protean* decision, which applies to human rights cases, which, in my view, strengthens the decision in this instance not to put the Respondent to its election. It is relevant in considering the nature of the claim, in my view, that it is not in the public interest to discourage no-case submissions. ...
>
> Respondents may well be exposed to considerable expense defending unmeritorious claims, and, given what are often serious and almost quasi-criminal allegations, it is not appropriate, in my view, to put the Respondent to an election. The no-case submission, if successful, may well benefit all parties, by reducing the cost burden significantly, and Respondents should not be discouraged in making a no-case submission in the same manner as normal civil or commercial disputes by putting a moving party to an election.[361]

[360] Ibid [24].
[361] Ibid [35] – [36].

Chapter 7: Damages and Remedies

7.2 Damages

7.2.1 General Approach to Damages

(b) Hurt, humiliation and distress

In *Phillis v Mandic*,[362] 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.[363]

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.[364]

In *South Pacific Resort Hotels Pty Ltd v Trainor*,[365] the appellant challenged the decision at first instance to award damages to a victim of sexual harassment who had a pre-existing 'significant psychological vulnerability'.[366] 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. [367]

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

[362] [2005] FMCA 330.
[363] Ibid [24].
[364] Ibid [26].
[365] [2005] FCAFC 130.
[366] *Trainor v South Pacific Resort Hotels Pty Ltd* [2004] FMCA 374.
[367] [2005] FCAFC 130, [44] (Black CJ and Tamberlin J with whom Kiefel J agreed).

any damage suffered by such a person would be altogether outside the contemplation of the statute and thus not recoverable'.[368]

The Full 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.[369]

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 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.[370]

(c) Aggravated and exemplary damages

In *Frith v The Exchange Hotel*,[371] Rimmer FM stated in *obiter* comments that he disagreed with Raphael FM's conclusion in *Font v Paspaley Pearls* that the court has a power to award exemplary damages. Rimmer FM's stated:

> [i]t is clear from section 46PO(4) that the 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'. It follows, in my opinion, that although the court has power to award aggravated damages, it does not have power to award exemplary damages.[372]

(d) A finding of discrimination is necessary

In *New South Wales Department of Housing v Moskalev*[373] Cowdroy J upheld an appeal by the NSW Department of Housing ('the Department') against a decision of Federal Magistrate Driver which required the Department to reassess the eligibility of the applicant and his family for priority housing. Cowdroy J held that given there was

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[368] Ibid [45].
[369] Ibid [51]-[52].
[370] Ibid [46].
[371] [2005] FMCA 402.
[372] Ibid [99].
[373] [2007] FCA 353

no finding of unlawful discrimination by the Department against the applicant, there was no power for the Court to make the order it did against the Department. His Honour stated as follows:

> 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[374] 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.[375] It follows that the order was made ultra vires.[376]

7.2.2 Damages under the RDA

Table 1: Overview of damages awarded under the RDA

Case		Damages awarded
(e)	*Baird v Queensland No 2* [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)	*Gama v Qantas Airways Ltd (No.2)* [2006] FMCA 1767	Total damages: $71,692 $40,000 (non-economic loss) $31,692 (medical expenses and interest)

(e) Baird v Queensland

In *Baird v Queensland*,[377] 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 were between $17,000 and $85,000.

(f) Gama v Qantas Airways Ltd

In *Gama v Qantas Airways Ltd (No.2)*,[378] 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. His Honour noted that the applicant had not been able to make out the more serious allegations in his claim

[374] 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.
[375] 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.
[376] [2007] FCA 353 at [34]. See also *Neate v Totally & Permanently Incapacitated Veterans Assoc. of NSW Limited* [2007] FMCA 488 at [24].
[377] [2006] FCAFC 198.
[378] [2006] FMCA 1767.

and found that the discriminatory treatment contributed 20% to his injury. The decision is currently on appeal.

7.2.3 Damages under the SDA Generally

Table 2: Overview of damages awarded under the SDA

Case		Damages awarded
(m)	*Dare v Hurley* [2005] FMCA 844	Total damages: $12,005.51 $3,000 (general damages) $9,005.51 (special damages)
(n)	*Fenton v Hair & Beauty Gallery Pty Ltd* [2006] FMCA 3	Total damages: $1,338 plus interest $500 (non-economic loss) $838 (economic loss including associated contractual claim)
(o)	*Rankilor v Jerome Pty Ltd* [2006] FMCA 922	Total damages (including costs): $2,000

(m) Dare v Hurley

In *Dare v Hurley*,[379] Driver FM held that the respondent had dismissed the applicant in breach of s 14(2)(c) of the SDA. 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. His Honour 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*,[380] 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'.[381]

(o) Rankilor v Jerome Pty Ltd

In *Rankilor v Jerome Pty Ltd*,[382] 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.

[379] [2005] FMCA 844.
[380] [2006] FMCA 3.
[381] Ibid [98].
[382] [2006] FMCA 922.

7.2.4 Damages in Sexual Harassment Cases

Table 3: Overview of damages awarded in sexual harassment cases under the SDA

Case		Damages awarded
(m)	*Phillis v Mandic* [2005] FMCA 330	$4,000 (non-economic loss)
(n)	*Frith v The Exchange Hotel* [2005] FMCA 402	Total damages: $15,000 $10,000 non-economic loss $5,000 economic loss
(o)	*San v Dirluck Pty Ltd* [2005] FMCA 750	$2,000 (non-economic loss)
(p)	*Cross v Hughes & Anor* [2006] FMCA 976	Total damages: $11,822 $3,822 (economic loss) $7,500 (non-economic loss, including aggravated damages)
(q)	*Hewett v Davies & Anor* [2006] FMCA 1678	Total damages: $3,210 $210 (economic loss) $3,000 (non-economic loss, including aggravated damages)
(r)	*Lee v Smith & Ors* [2007] FMCA 59	$100,000 (unspecified)

(m) Phillis v Mandic

In *Phillis v Mandic*,[383] Raphael FM found that the respondent had sexually harassed the applicant through a range of conduct that included repeatedly asking to see her 'padlock' (a reference to her navel ring), seeking to dance with her, repeatedly asking if he could eat a banana that she was eating, grabbing her arm and pushing a toolbox between her legs. The applicant was awarded $4,000 for non-economic loss based on medical evidence as to the impact of the harassment on her, described by the Court as being 'in the minimal range of depression'.[384]

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

In *Frith v The Exchange Hotel*,[385] Rimmer FM found that a director of the Exchange Hotel, Mr Brindley, had sexually harassed the applicant 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. Rimmer FM 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. Rimmer FM awarded the applicant $10,000 for (general) non-economic loss.

[383] [2005] FMCA 330.
[384] Ibid [28].
[385] [2005] FMCA 402.

(o) *San v Dirluck Pty Ltd*

In *San v Dirluck Pty Ltd*,[386] Raphael FM found that the second respondent breached s 28B(2) of the SDA and s 18C(1) of the RDA. The first respondent accepted its vicarious liability under s 18A of the RDA and s 106 of the SDA. Raphael FM accepted that the remarks made by the second respondent including 'How's your love life', 'I haven't seen an Asian come before' and 'Fuck off ching chong go back home' were hurtful to the applicant. However, Raphael FM did not accept that the remarks contributed towards the applicant's decision to leave her employment. His Honour awarded the applicant $2,000 in damages. His Honour 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.[387]

(p) *Cross v Hughes & Anor*

In *Cross v Hughes & Anor*,[388] Lindsay FM held that the first respondent had sexually harassed the applicant under ss 28A and 28B of the SDA. Lindsay FM 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 to her over the weekend. Lindsay FM awarded $3,822 for economic loss, $5,000 for general damages and $2,500 aggravated damages to compensate the applicant for the conduct of the respondent in prolonging the proceedings.

(q) *Hewett v Davies & Anor*

In *Hewett v Davies & Anor*,[389] 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 special damages 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 HREOC.

[386] [2005] FMCA 750.
[387] Ibid [46].
[388] [2006] FMCA 976.
[389] [2006] FMCA 1678.

7.2.5 Damages under the DDA

Table 3: Overview of damages awarded under the DDA

Case		Damages awarded
(o)	*Hurst and Devlin v Education Queensland* [2005] FCA 405	Total damages: $64,000 $40,000 (economic loss) $20,000 (non-economic loss) $4,000 (interest)
(p)	*Drury v Andreco Hurll Refractory Services Pty Ltd (No 4)* 920050 FMCA 1226	$5,000 (non-economic loss) Damages for economic loss to be agreed.
(q)	*Wiggins v Department of Defence – Navy* [2006] FMCA 800, [2006] FMCA 970	Total damages: $25,000 (non-economic loss)
(r)	*Vickers v The Ambulance Service of NSW* [2006] FMCA 1232	Total damages: $5,000 (non-economic) (this was the amount sought by the applicant, although the court indicated that it would have ordered a higher amount)
(s)	*Hurst v State of Queensland* [2006] FCAFC 100	No damages awarded.[390]

(o) Hurst and Devlin v Education Queensland

In *Hurst and Devlin v Education Queensland*,[391] 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.[392] Lander J awarded the second applicant $20,000 (plus $4,000 in interest)[393] in general damages for the hurt, embarrassment and social dislocation which had been occasioned by his inability to communicate in any language.[394]

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).[395] 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.[396]

[390] Affirmed in *Hurst v State of Queensland (No 2)* [2006] FCAFC 151.
[391] [2005] FCA 405.
[392] Ibid [797] and [806].
[393] Ibid [866].
[394] Ibid [846].
[395] Ibid [859]-[861].
[396] Ibid [855]-[857].

(p) Drury v Andreco Hurll Refractory Services Pty Ltd

In *Drury v Andreco Hurll Refractory Services Pty Ltd (No 4)*,[397] 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 alleging disability discrimination. The respondent was ordered to pay the applicant $5,000 in general damages. The Court 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 effort to mitigate his loss.

(q) Wiggins v Department of Defence – Navy

In *Wiggins v Department of Defence – Navy*,[398] the respondent was found to have directly discriminated against the applicant by demoting her whilst she was on sick leave, without her consent or even consulting her. The applicant was awarded $25,000 for the hurt, humiliation and upset. McInnis FM stated a significant amount of damages was appropriate because:

- the respondent's policy operated to permit the unlawful discrimination;
- as a person suffering from depression is more vulnerable, the consequences of unlawful discrimination can be regarded as more significant; and
- the applicant continued to suffer for a significant period after her resignation form the Navy.[399]

(r) Vickers v The Ambulance Service of NSW

In *Vickers v The Ambulance Service of NSW*,[400] 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.[401]

(s) Hurst v State of Queensland

In *Hurst v State of Queensland*,[402] the Full Federal Court overturned the finding of Lander J that the appellant could 'cope', and therefore comply, with the requirement

[397] [2005] FMCA 1226.
[398] [2006] FMCA 800.
[399] Ibid [202].
[400] [2006] FMCA 1232.
[401] Ibid [55].
[402] [2006] FCAFC 100.

that she receive her education without the assistance of Auslan. 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. However, at first instance Lander J had held that even if his finding on ability to comply was incorrect, the appellant had suffered no loss due to her young age at the relevant time and the short period of time relevant to her complaint. Lander J's findings on damages were not agitated on appeal, despite being drawn to the attention of the appellant's counsel. The Court held that it was therefore appropriate to maintain Lander J's finding that there be no award of damages.[403]

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 State of Queensland (No 2)*,[404] 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.[405] The question of injunctive relief is discussed at 7.5 below.

7.5 Orders Directing a Respondent not to Repeat or Continue Conduct

In *Hurst v State of Queensland (No 2)*,[406] the Full Federal Court considered submissions from the parties on whether the appellant should be entitled to injunctive relief or compensation. The appellant sought an injunction restraining the respondent from continuing to deny her the services of a full-time Auslan interpreter.[407]

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'.[408] The Court held that, whilst there was 'no doubt' that the Court is empowered to grant injunctive relief by s 46PO of the HREOC Act, as well as by ss 23 and 24(1)(a) of the *Federal Court of Australia Act 1976* (Cth),[409] there was not sufficient evidence of a likelihood of a future contravention of the appellant's rights.[410] 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.[411] 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:

[403] Ibid [137].
[404] [2006] FCAFC 151.
[405] Ibid [26].
[406] [2006] FCAFC 151.
[407] Ibid [4].
[408] Ibid [20].
[409] Ibid [3].
[410] Ibid [23].
[411] Ibid [24].

> 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.[412]

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

7.6 Other Remedies

In *Tyler v Kesser Torah College*,[413] Driver FM made comment on the availability of remedies under the HREOC Act. In that matter, the applicant had sought an order that the respondent school accept him back as a student. While Driver FM dismissed the application and stated that he would not have made such an order as it was not appropriate in the circumstances, his Honour was of the view that the power to make such an order existed:

> Section 46PO(4) of the HREOC Act is not an exhaustive statement of the orders that can be made by the Court and I would not regard resort to s 15 of the *Federal Magistrates Act 1999* (Cth) as unavailable.[414]

In *Moskalev & Anor v NSW Department of Housing*,[415] Driver FM held the applicant had not been discriminated against by not being put on the priority housing register. Even so, his Honour directed the respondent to reassess the applicant's entitlement to priority housing. This was done using his power in s 15 of the *Federal Magistrates Act 1999* (Cth) which provides that the Federal Magistrates Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds as it thinks appropriate.[416] 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.[417]

In *Vickers v The Ambulance Service of NSW*,[418] 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

[412] Ibid [25].
[413] [2006] FMCA 1.
[414] Ibid [108].
[415] [2006] FMCA 876.
[416] Ibid [35].
[417] Ibid.
[418] [2006] FMCA 1232.

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.[419]

Chapter 8: Costs Awards

8.1 Introduction

8.1.2 Power to Limit and Set Costs

In *Vickers v The Ambulance Service of NSW*,[420] an application under Rule 21.03 was brought by consent to fix the costs recoverable on a party-party basis in the sum of $5,000. The application was granted.

In *Flew v Mirvac Parking Pty Ltd*,[421] the applicant made an application under Rule 21.03 for an order that $5,000 be the maximum costs recoverable on a party-party basis. The respondent opposed the application. Barnes FM dismissed the application. In considering the principles relevant to the exercise of discretion to specify maximum costs under Rule 21.03, Barnes FM stated:

> [I]t is relevant as part of all the circumstance of the particular case to consider matters such as the timing of the application, whether the order sought is proposed to apply for the benefit of both parties, the nature and likely complexity of the claim and the extent of the remedies sought, the costs likely to be incurred as well as any other matters which may go towards establishing that there should be a departure in advance from the usual rules as to quantification of the amount of costs to be payable by the ultimately unsuccessful party.[422]

Turning then to the circumstances of this case, Barnes FM held:

> The applicant suggested, and the respondent did not dispute, that the factual and legal complexity of the proceedings was a relevant factor. I consider it relevant to take such matters into account, but in the circumstances of this case I am not persuaded on the material before the Court that it can be said that this matter is at the lower end of the scale of legal complexity of matters within the jurisdiction of this Court. I accept that, as conceded for the respondent, the application arises out of a relatively confined factual basis. However it involves claims of both direct and indirect discrimination and also harassment and victimisation, each of which is denied by the respondent. As contended for by the respondent, this adds levels of complexity...
>
> The next matter raised by the applicant is the suggestion that only a modest amount of money is sought. The economic loss sought in this case is a modest sum. However it is not the only remedy sought. It is apparent from the points of claim filed by the applicant that he also seeks an unparticularised amount of general damages as compensation for loss, hurt, humiliation and distress resulting from the alleged discriminatory conduct, harassment and victimisation. Further, he seeks declarations and an order requiring the respondent to return the applicant to

[419] Ibid [55].
[420] [2006] FMCA 1232, [56].
[421] [2006] FMCA 1818.
[422] Ibid [48].

> 'regular floor duties and not to confine the applicant solely to booth duties'. A certain amount of complexity is likely to be involved in any assessment of whether the orders sought by the applicant should be made, should the conduct alleged be established.
>
> It was also contended for the applicant that there would be a deterrent to the applicant if the maximum costs were not fixed as sought. It is clear that fear of exposure to costs may act as a deterrent to litigation. While it would, as Wilcox J stated in *Woodland* at [31], be 'undesirable' to take a course that would force applicants to abandon legitimate proceedings, it has not been established that the applicant would be 'forced' to abandon the litigation. In any event, impecuniosity of one party or claims about the relative financial significance of the cost of proceedings for the parties cannot of themselves be determinative.
>
> …
>
> Further, it is notable that there is no suggestion of public interest in the present proceedings. This was a factor found to be of some significance in *Woodland v Permanent Trustee Company Ltd* (1995) 58 FCR 139. It was in that context that Wilcox J at [31] apparently considered it undesirable that the applicants in representative proceedings be forced to abandon litigation with the potential to benefit thousands of people.
>
> Insofar as the applicant makes a general claim about the 'unfairness' of a deterrent effect on applicants in human rights proceedings of the prospect of an adverse costs order on a party/party basis, I note first the existence of Schedule 1 to the Rules … but also that there is nothing in the legislation indicating that policy considerations warrant a special provision as to costs in human rights matters (see *Fetherson* at [9]). This is, of course, not to say that it will not be appropriate to make an Order under Rule 21.03 in a human rights proceeding. Rather, each case must be determined on its particular circumstances.
>
> The applicant's contention that the substantive case was 'arguable', simply in the sense of not vexatious or frivolous, is not of assistance. While the extent of the 'serious arguability' of an aspect of a case may be relevant, this cannot be assessed on the material before the Court...
>
> …I note that this is not a case in which the parties consent to the making of a Rule 21.03 order.[423]

Barnes FM held that, having regard to all of the circumstances of the case, the applicant had failed to demonstrate that this was an appropriate case for a Rule 21.03 order.

8.3 Factors Considered

8.3.1 Where there is a Public Interest Element

In *Hurst and Devlin v Education Queensland*,[424] the first applicant (Hurst) had been unsuccessful in her application under the DDA.[425] She had argued that the respondent's failure to provide her with an Auslan interpreter as part of its 'Total Education Policy' constituted indirect discrimination on the basis of disability (deafness). The issue of costs was considered in *Hurst and Devlin v Education Queensland (No 2)*.[426] In seeking to resist having a costs order made against her next friend (her mother Ms Smith), it was argued by the applicant, amongst other things, that there was a public interest in having the 'Total Education Policy' clarified

[423] Ibid [50]-[58].
[424] [2005] FCA 405.
[425] Note, however, that the first applicant (Hurst) successfully appealed this decision to the Full Federal Court: *Hurst v State of Queensland* [2006] FCAFC 100.
[426] [2005] FCA 793.

through the litigation as it 'affects the rights of numerous disabled children in the vital area of their education'.[427]

Lander J apparently accepted that when litigation is brought in the public interest, this might be a relevant matter to which regard should be had in the exercise of the discretion to award costs, citing the decision in *Oshlack v Richmond River Council*.[428] Nevertheless, his Honour stated:

> No doubt it would be in the interests of all parties if Education Queensland's Total Communication Policy could be understood by all persons affected in the same way. However, in my opinion, legal proceedings are not the appropriate medium for the purpose of examining the ambiguities in an education policy.[429]

Lander J also found that it was not relevant that Ms Smith had nothing to gain personally from the proceedings and may become bankrupt as a result of the costs order.[430] Lander J ordered the first applicant to pay the respondent's costs.

This costs order was ultimately overturned when the first applicant successfully appealed the decision of Lander J. On appeal, the costs order followed the outcome of the appeal.[431]

In *AB v New South Wales (No 2)*,[432] the Court considered the issue of costs for an applicant who was unsuccessful in bringing a claim of indirect racial discrimination in the admission criteria for a NSW selective High School.[433] In the exercise of his discretion, Driver FM ordered that there be no order for costs, stating (footnotes in square brackets):

> …the applicant was represented *pro bono publico* by Mr Robertson. It is appropriate that the Court should place on record its gratitude to counsel for his willingness to appear on that basis. Counsel only agrees to appear *pro bono publico* where an element of public interest is discerned. As I said in *Xiros v Fortis Life Assurance* [[2001] FMCA 15 at [24]], there is always an element of public interest in human right proceedings, given that the legislation is beneficial and seeking to redress the public mischief of discrimination.
>
> However, ordinarily in human rights proceedings a claimant is exercising a private right to claim damages. There will frequently be an insufficient public interest element to outweigh the general principle that costs should follow the event in such proceedings [see *Physical Disability Council of NSW v Sydney City Council* [1999] FCA 815]. I was also taken by Ms Barbaro to a decision of Federal Magistrate Raphael in *Minns v New South Wales (No 2)* [2002] FMCA 197] where His Honour said, at paragraph 13, that something more than precedent value is required in order to establish an element of public interest sufficient to warrant a departure from the ordinary principle that costs follow the event.
>
> In this case, in my view, a combination of the public interest inherent in a case which is relatively novel and which counsel recognised by appearing *pro bono publico*, the fact that there was no claim for damages but simply the seeking of a right of access to a public school

[427] Ibid [31].
[428] (1998) 193 CLR 72.
[429] [2005] FCA 793, [33].
[430] Ibid [38].
[431] *Hurst v State of Queensland* [2006] FCAFC 100, [136]. The Full Court set aside Lander J's order that the first applicant pay the respondent's costs. The Full Court ordered that the respondent pay the costs below, as well as the costs of the appeal.
[432] [2005] FMCA 1624.
[433] See *AB v New South Wales* [2005] FMCA 1113.

> (which raised an issue of public importance) and the fact that but for the issue of evidence the applicant would have succeeded, all lead me to the view that there should be no order as to costs.[434]

In *Wiggins v Department of Defence – Navy*,[435] McInnis FM held that the case had a significant public interest element relevant in determining costs.[436] His Honour identified the issues of public interest as being:

- the treatment of employees in the armed forces suffering from depression;[437]
- the manner in which the armed forces makes provision for the communication to relevant supervising officers of the nature of the condition suffered by an officer leading to the classification of fit for shore activities;[438] and
- ensuring that serving personnel of the armed forces are provided with the opportunity of rehabilitation and advancement of their career.[439]

After citing those factors, his Honour stated:

> In my view, those factors are sufficient to constitute a significant degree of public interest above and beyond the benefit which the applicant obtains personally from the decision of the court. In that sense, although the public interest element in this case coincides with the personal interest of the applicant, it is still a public interest element of significance which I regard as relevant to take into account in the exercise of my discretion concerning costs.[440]

However, a stricter approach to the question of public interest in relation to costs was taken in the Federal Court decision of *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council*.[441] The Court held the applicant, a disability rights organisation, did not have standing to commence proceedings alleging a breach of the *Disability Standards for Accessible Public Transport 2002* (created under s 31 of the DDA). On the question of costs, AAA argued that the proceedings raised issues of public interest, noting that AAA had:

- sought to raise important issues relevant to the scope and operation of disability standards made under the DDA; and
- brought the proceedings to effect social change, rather than for personal or financial gain.

The Court rejected these arguments, for the following reasons:[442]

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[434] [2005] FMCA 1624, [5]-[7].
[435] [2006] FMCA 970.
[436] Ibid [42]. Applying *Physical Disability Council of NSW v Sydney City Council* [1999] FCA 815, [9] per Madgwick J; *Jacomb v Australian Municipal, Administrative, Clerical Services Union* [2004] FCA 1600, [10] per Crennan J.
[437] [2006] FMCA 970, [39].
[438] Ibid [40].
[439] Ibid [41].
[440] Ibid [42].
[441] [2007] FCA 974.
[442] Ibid [26]-[33].

- A human rights and/or discrimination case will not automatically be regarded as proceedings in the public interest.

- The weight of the case law was against AAA having standing to be able to bring the proceedings.

- The question of standing of an organisation to bring proceedings in relation to a breach of disability standards is not of sufficient public interest to cause the Court to depart from its usual orders.

- Given that AAA lacked standing to commence the proceedings, the Court was never able to consider the merits of the case so the substantive issues that AAA sought to raise were never resolved.

- The case did not raise fundamental rights of individuals to take action on their own behalf to determine their rights.

8.3.3 The Successful Party Should Not Lose the Benefit of their Victory

Add to footnote 67: See also *Frith v The Exchange Hotel* [2005] FMCA 1284, [6] (Rimmer FM).

8.3.4 Courts Should be Slow to Award Costs at an Early Stage

See also the decision of Driver FM in *Neate v Totally & Permanently Incapacitated Veterans Assoc. of NSW Limited (No.2)*[443] where his Honour awarded costs to the respondent who had successfully brought an application to dismiss the complaint on the grounds that there was no reasonable prospect of the applicant succeeding on the application. His Honour found that the respondent was represented by counsel at all times and that such representation was reasonable in the circumstances[444].

8.3.5 Unmeritorious Claims and Conduct which unnecessarily prolongs Proceedings

In *Kelly v TPG Internet Pty Ltd (No 2)*,[445] the applicant was partly successful in her claims. Raphael FM declined to reduce the award of costs to the applicant, noting that '[she] did not fail because I disbelieved her. She failed because I took a different view of the law to that which she was promoting. I do not believe that she should be robbed of the fruits of her success…'.[446] His Honour suggested, however, a different approach may be taken in cases where the pleadings were unnecessarily lengthy:

> As I stated *in arguendo* there may be much to recommend a different approach by the courts to this question that would possibly rid them of the prolix form of pleading to which one has become accustomed in the commercial or equity divisions of the state supreme courts, and to

[443] [2007] FMCA 896.
[444] Ibid [4].
[445] [2005] FMCA 291.
[446] Ibid [7].

> some extent in the Federal Court. But this is not one of those cases and there is equally much to be said for the proposition that proceedings should not be even further prolonged by lengthy arguments as to how much time was taken in the preparation and hearing of unsuccessful constituents of a claim…[447]

In *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,[448] the Federal Court held that a party should not be regarded as having succeeded in relation to only part of its claim simply because some of its arguments had not been accepted:

> While clearly some arguments put before the Court by the respondent in its application for summary dismissal were not accepted, nonetheless it is not unusual for a successful party to advance a number of alternative arguments to the Court and be ultimately successful on only some of them. I agree with the respondent that this result does not mean that the respondent was 'successful only in part' in this case.[449]

The unsuccessful party in that case had also alleged that the Council had unreasonably prolonged the proceedings. This argument was primarily based on the fact that the Council's application for summary dismissal had also sought to raise constitutional questions, however those questions could not be heard because of the Council's failure to comply with the requirements of s 78B of the *Judiciary Act 1903* (Cth). The Court did not accept that this was a sufficient basis to warrant departure from the usual rules as to costs.[450]

8.4 Applications for Indemnity Costs

8.4.1 General Principles on Indemnity Costs

In *Piper v Choice Property Group Pty Ltd*,[451] McInnis FM found that the respondent to the proceedings was not the appropriate party for the applicant to pursue in relation to her complaint of discrimination. This fact was raised by the respondent in correspondence seeking to have the application discontinued prior to it being argued in court.

McInnis FM summarily dismissed the application and awarded indemnity costs at a fixed sum of $3,500 to the respondent. His Honour found that it was not a relevant factor in the present case that the respondent had been unwilling to participate in the conciliation process. McInnis FM further found that although the application had been terminated at an early stage in proceedings, this was not to be taken into account as a factor in favour of the applicant as the respondent had sought the matter to be finalised at an earlier stage by way of discontinuance or dismissal by consent.

8.4.2 Offers of Compromise

In *Meka v Shell Company of Australia Ltd (No 2)*,[452] Driver FM found that the form of offer made did not strictly comply with Order 23 but that the respondents should receive indemnity costs on an application of general principles. Indemnity costs were

[447] Ibid [6].
[448] [2007] FCA 974.
[449] Ibid [18]. See also [22].
[450] Ibid [34]-[39].
[451] [2005] FMCA 87.
[452] [2005] FMCA 700.

awarded from the day after the offer was rejected. While this date was a period of time later than the offer was to have expired, the Court held, in effect, that the respondent had kept the offer open by calling the applicant's solicitor to discuss it.[453]

In *San v Dirluck Pty Ltd (No 2)*,[454] the respondent had made a number of offers to settle the matter, none of which were accepted. The offers were made conditional upon the matter being settled 'with no order as to costs'. The last such offer was made on the first day of the hearing of the matter, expressed as follows:

> 1. The first respondent and second respondent to pay the applicant the total combined sum of $5,000 by way of damages.
>
> ….
>
> 3. The complaint to be withdrawn with no order as to costs.

The applicant was successful in the proceedings[455] and was awarded $2,000 in damages. The respondent sought indemnity costs on the basis of the rejection of the final offer made. Raphael FM commented that this sum was 'obviously less that the $5,000 offered… but it is quite clearly not less than the amount of $2,000 plus the applicant's reasonable costs calculated under schedule 1 of the Federal Magistrates Court Rules'.[456]

His Honour cited from the decision in *Dr Martens (Australia) Pty Ltd v Figgins Holdings Pty Ltd (No 2)*,[457] in which Goldberg J had stated:

> … I do not consider it appropriate in determining whether an order for indemnity costs should be made to take into account a Calderbank offer which makes an all in offer inclusive of money and the claimant costs.[458]

Raphael FM concluded as follows:

> … I think that the reference in each of the letters upon which [counsel for the respondent] relies to the fact that the complaint is to be withdrawn with no order as to costs, is an indication that the costs matter is not up for negotiation but is included in the award. In the circumstances, I am satisfied that none of the offers made by the respondent, fair as they might have been in respect of the general damages, constituted an offer in excess of the value of the judgment to the applicant. For that reason, I do not propose to alter the view I had expressed in the original judgment, namely that the applicant should obtain her costs from the respondent.[459]

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[453] Ibid [7].
[454] [2005] FMCA 846.
[455] See *San v Dirluck Pty Ltd* [2005] FMCA 750.
[456] [2005] FMCA 846, [8].
[457] [2000] FCA 602.
[458] Ibid [32].
[459] [2005] FMCA 846, [13].