



*Human Rights and
Equal Opportunity
Commission*

Change and Continuity:
Review of the Federal Unlawful Discrimination
Jurisdiction
September 2000 - September 2002

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Executive Summary

On 13 April 2000, the function for the hearing of complaints of unlawful discrimination under the *Racial Discrimination Act 1975* (Cth) (RDA), *Sex Discrimination Act 1984* (Cth) (SDA) and the *Disability Discrimination Act 1992* (Cth) (DDA) was, after 14 years of operation, removed from the Human Rights and Equal Opportunity Commission (HREOC) and vested in the Federal Court and the Federal Magistrates Service (FMS). This change to the administration of federal unlawful discrimination law was met with some trepidation by the sections of the community that feared that the development of jurisprudence in the area would be compromised by a more legalistic approach by the judiciary and that the capacity of the FMS and the Federal Court to make costs orders would result in applicants being burdened, as a matter of course, with the costs of the respondent if their proceedings were not successful.

After those legislative changes, HREOC remained the federal body responsible for the administration of complaints of unlawful discrimination and also continued to exercise other functions relevant to the development of the jurisdiction, such as the function of undertaking research for the purposes of promoting the objects of RDA, SDA and DDA. In that context, HREOC undertook to review the operation of the new jurisdiction for a two year period from the date of the first decision being handed down (being 13 September 2000 to 13 September 2002) so as to:

- assess the nature of the jurisprudence that was emerging from the FMS and the Federal Court in respect of unlawful discrimination law;
- enable it to more fully consider concerns that the transfer of the jurisdiction would result in the law being interpreted in a more ‘conservative’ fashion than it was by HREOC;
- consider the manner in which interlocutory applications, procedural and evidentiary matters were being dealt with by the FMS and the Federal Court; and
- analyse statistically the costs orders that were being made by the FMS and the Federal Court and the principles that were being applied in the making of such orders.

In summary, the review makes the following conclusions:

- to the extent that it is possible to comment on jurisprudential trends after only two years, the interpretation and development of the law under the RDA and SDA by the Federal Court and FMS was largely consistent with the principles that had been developed by HREOC and the courts that reviewed its decisions during the duration of its jurisdiction;
- some principles under the DDA have been interpreted by the FMS and the Federal Court in a more restrictive manner since the jurisdiction was transferred. However, that more restrictive approach has taken place in the context of the administrative law review of a decision of HREOC. The matter in which HREOC’s decision was challenged (which is now awaiting hearing by the High Court on 29 April 2003) would have proceeded whether HREOC did or did not retain its hearing function. In those circumstances, it is not necessarily correct to attribute any narrowing of the relevant principles under the DDA to the transfer of jurisdiction to the FMS and Federal Court. If a restrictive approach is ultimately favoured by the High Court then it may be that the appropriate response is legislative amendment of the DDA rather than directing criticism at the FMS and Federal Court; and

- where an applicant was unsuccessful in proceedings substantively relating to an application arising out of a complaint of unlawful discrimination, the FMS and the Federal Court did not order, as a matter of course, that the unsuccessful applicant pay the costs of the respondent. The FMS did so in 64% of decisions made during the review period and the Federal Court did so in 50% of decisions.

Chapter 1

Background

1.1 Introduction

This is a review of the unlawful discrimination jurisdiction of the FMS¹ and Federal Court for the period 13 September 2000 (the date of the first decision under the jurisdiction) to 13 September 2002 (the review period). In particular, the review focuses on the jurisprudential development of the law of unlawful discrimination during this time as well as the manner in which costs orders have been made in the jurisdiction during that period.

So as to understand the purpose of this paper, it is necessary to appreciate the changes in the administration of federal unlawful discrimination legislation over the last decade.

1.2 Background to Legislative Change

1.2.1 The Scheme Prior to 1995

The federal unlawful discrimination regime administered by HREOC under the RDA, SDA and DDA from the period 1992 to 1995 consisted of the following features:

- the Race Discrimination Commissioner, Sex Discrimination Commissioner and Disability Discrimination Commissioner investigated and attempted to conciliate complaints of unlawful discrimination under the RDA, SDA and DDA;
- where the relevant Commissioner determined that the investigation into the complaint would not continue because, for example, the alleged act the subject of the complaint was not unlawful, the complaint was out of time or lacking in substance, the complainant could request an internal review by the President of the Commissioner's decision and;
- where the complaint was not conciliable and the Commissioner was of the view that it should be referred for a hearing, the hearing was conducted by HREOC and the complaint either dismissed or substantiated.

The need for reform of federal unlawful discrimination legislation in Australia resulted from the High Court decision of *Brandy v HREOC*². The High Court considered the operation of provisions of the RDA³ that required HREOC, upon completion of a hearing of a complaint, to register with the Federal Court registry, the determination made by it in relation to a substantiated complaint. Upon registration, the determination was to have effect as if it were an order of the Federal Court. The High Court held that the provisions were unconstitutional as their effect was to vest judicial power in HREOC contrary to Chapter III of the Constitution.

¹ Section 8 of the *Federal Magistrates Act 1999* (Cth) provides for a federal court to be known either the 'Federal Magistrates Court' or the 'Federal Magistrates Service'. The Attorney General's preferred title is the 'Federal Magistrates Service'.

² (1995) 183 CLR 245.

³ Identical provisions were in the *Sex Discrimination Act 1984* (Cth) and *Disability Discrimination Act 1992* (Cth).

1.2.2 Legislative Reform

The Government responded to the decision of *Brandy v HREOC*⁴ by introducing the *Human Rights Legislation Amendment Act 1995* (Cth) which repealed the registration and enforcement provisions of the RDA, SDA and DDA and provided that if a complainant sought to enforce a determination of HREOC then the complaint would need to be the subject of a hearing *de novo* by the Federal Court and an order in the complainant's favour which could then be enforced.

The obvious disadvantage of this regime was that a complainant could pursue his or her complaint through a hearing before HREOC (and possibly incur legal fees in doing so), have the complaint substantiated and a determination made in his or her favour, only to have to re-run the proceedings before the Federal Court in the event that the respondent did not comply with HREOC's determination.

The Human Rights Legislation Amendment Bill 1996 (HRLA Bill) was the Government's ultimate response to the situation created by *Brandy v HREOC*.⁵ The HRLA Bill and its subsequent manifestations,⁶ proposed to amend provisions of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act), RDA, SDA and DDA so as to implement the following significant changes to the functions of HREOC and the federal unlawful discrimination regime:

- the complaint handling provisions in the RDA, SDA and DDA were repealed and replaced with a uniform scheme in the HREOC Act;
- responsibility for the investigation and conciliation of complaints was removed from the Race Discrimination Commissioner, Sex Discrimination Commissioner and Disability Discrimination Commissioner and vested in the President;
- the right to an internal review by the President of matters terminated by reason of, for example, being out of time or lacking in substance, was removed;
- HREOC's hearing function into complaints of unlawful discrimination under the RDA, SDA and DDA was repealed and provision made for complainants to commence proceedings in relation to their complaint before the Federal Court⁷ in the event that it was not conciliated when before HREOC for investigation;
- the Race Discrimination Commissioner, Sex Discrimination Commissioner, Disability Discrimination Commissioner, Human Rights Commissioner and Aboriginal and Torres Strait Islander Social Justice Commissioner were given an *amicus curiae* function in relation to proceedings arising out of a complaint before the Federal Court or the FMS.

⁴ (1995) 183 CLR 245.

⁵ *Ibid.*

⁶ The Human Rights Legislation Amendment Bill 1998 (Cth) and the Human Rights Legislation Amendment Bill 1999 (Cth).

⁷ When the HRLA Bill was introduced, the FMS was not in existence and *Federal Magistrates Act 1999* (Cth) was yet to be introduced into Parliament. Schedule 16 of the *Federal Magistrates (Consequential Amendments) Act 1999* (Cth) commenced on 13 April 2000 and inserted references to the Federal Magistrates Court into the HREOC Act (as amended by the HRLA Act) wherever references to the Federal Court appeared.

1.3 Features of the New Jurisdiction

There were features of the new unlawful discrimination jurisdiction in the Federal Court that departed significantly from the jurisdiction exercised by HREOC.⁸ In particular, there was no provision in the HRLA Bill to prevent costs orders being made in relation to unlawful discrimination proceedings (no such orders could be made by HREOC). Furthermore, while the HRLA Bill provided that the Federal Court would not be ‘bound by technicalities or legal forms’, the rules of evidence would still apply whereas they had not before HREOC. This feature tied in with a more generalised interest of practitioners, advocacy groups and HREOC itself as to how unlawful discrimination jurisprudence would develop in the Federal Court once the jurisdiction was transferred from the specialist tribunal at HREOC.

Each of these features and their consequences was the subject of considerable public debate and concern when the HRLA Act was before Parliament and has provided the impetus for HREOC conducting this review.

1.3.1 Costs Jurisdiction

The HREOC jurisdiction for hearing complaints of unlawful discrimination did not provide to HREOC the power to order one party to pay the costs of the other party or parties in respect of HREOC hearings or associated procedural steps.⁹ The jurisdiction was, therefore, ‘costs free’.

The feature of the new jurisdiction in the Federal Court¹⁰ that provoked the most concern from sectors of the community was that the Federal Court was ‘costs jurisdiction’ in which costs orders could be made against a party and there was no legislative provision in the HRLA Act that would limit the making of costs orders by the judge hearing the proceedings.¹¹

The concerns of the community were put to the Senate Legal and Constitutional Legislation Committee (Senate Committee) that considered the HRLA Bill and can be summarised as follows:

- the possibility of costs being awarded against complainants would deter them from pursuing their rights in the Federal Court;¹²

⁸ There was also concern expressed initially as to the fees to be charged by the Federal Court and FMS. This concern was substantially addressed, however, by both jurisdictions introducing a fee of \$50 for the filing of applications in the unlawful discrimination jurisdiction (compared to filing fees of \$273 (FMS) and \$574 (Federal Court) for other initiating applications filed by individuals). See *Federal Court of Australia Regulations 1978* (Cth) Schedule 1AA and *Federal Magistrates Regulations 2000* (Cth) Schedule 1, item 2.

⁹ However, it remained possible (particularly after the High Court’s decision in *Brandy v HREOC* (1995) 183 CLR 245) that matters initially heard by HREOC would make their way to the costs jurisdiction of the Federal Court.

¹⁰ As stated above, the FMS was not included in the sections of the HREOC Act until the HRLA Act commenced operation on 13 April 2000. The FMS was, therefore, not referred to in the community debate surrounding features of the new jurisdiction. The FMS, however, is also a costs jurisdiction.

¹¹ A detailed discussion of the nature of a costs jurisdiction is at [4.2.1] in Chapter 4.

¹² Submission by Disability Discrimination Legal Advocacy Service, Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Consideration of Legislation Referred to the Committee: Human Rights Legislation Amendment Bill 1996* (June 1997) [4.40].

- the costs jurisdiction would weigh the whole system of complaint handling in favour of respondents, who usually can command greater resources than complainants;¹³ and
- people with disabilities in receipt of social security, would be very reluctant to take cases to the courts as they would not be able to pay any costs order.¹⁴

In its submission to the Senate Committee, HREOC supported the existence of a costs jurisdiction in unlawful discrimination proceedings as it was of the view that it would enable many people to have legal representation who otherwise would be dependent on a grant of legal aid. The reasoning for this was that solicitors would be more inclined to act for people on a contingency basis where there is a likelihood of a costs order being made rather than the situation that existed in HREOC's jurisdiction where any costs had to be paid out of an award of damages. HREOC was of the view, however, that the jurisdiction should be limited to the ordering of the payment of party-party costs (that is, the reasonable costs that would have been incurred in conducting the litigation) rather than solicitor-client costs (that is, what it actually cost for the litigation to be conducted). This limitation to the Federal Court's power to order costs was not adopted and the discretion to order costs was left unfettered.

1.3.2 Formality and Legal Conservatism

There were some sectors of the community that supported the transfer of the unlawful discrimination jurisdiction to the Federal Court on the basis that it was appropriate for the area of law to be given standing by being included in the mainstream judicial system. As one witness to the Senate Committee stated, 'it is high time human rights were given equal regard to property rights and, therefore, by placing this jurisdiction in the Federal Court there is an opportunity for that to occur'.¹⁵ Another witness gave evidence that the professional and expedient manner in which the Federal Court supervised and managed its matters would be to the benefit of the new jurisdiction.¹⁶

The majority of views expressed about the new jurisdiction, however, evidenced a concern that by transferring the unlawful discrimination jurisdiction to the Federal Court, an element of formality and legal conservatism would be applied to the jurisdiction to the detriment of applicants.

The HRLA Bill specifically provided for the Federal Court not to be bound by technicalities or legal forms.¹⁷ Unlike the HREOC hearing jurisdiction, however, the rules of evidence applied to the unlawful discrimination jurisdiction in the FMS and Federal Court. There was concern expressed to the Senate Committee that the application of the rules of evidence would deter applicants from representing themselves and overly complicate proceedings.¹⁸

Moreover, there was speculation as to how the unlawful discrimination jurisprudence would evolve before the Federal Court. Some of these concerns were founded in the manner in which the Federal Court had reviewed decisions of HREOC under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*. As one commentator noted,

¹³ Submission by Women's Electoral Lobby, *ibid*.

¹⁴ Submission by National Federation of Blind Citizens of Australia, *ibid* [4.41].

¹⁵ Evidence of Dr Scutt on behalf of Women for Workplace Justice Coalition, *ibid* [4.3].

¹⁶ Evidence of Ms C Ronalds on behalf of National Children's and Youth Law Centre and the National Pay Equity Coalition, *ibid* [4.6].

¹⁷ Now s46PR of HREOCA.

¹⁸ Senate Legal and Constitutional Legislation Committee, above n [12], [4.18] to [4.21].

In exercising its jurisdiction in anti-discrimination cases until now, the Federal Court has been ready to identify detailed legal errors in HREOC's decisions, but has been much less willing to defer either to the specialist expertise of HREOC in anti-discrimination law, or to its having heard evidence and assessed credibility at first hand.

When judges interpret anti-discrimination legislation as if it were any other piece of legislation and embodied no significant underlying principles, such as acknowledgement of social inequality and the need to reduce it, they are in accordance with the rule of law and the legal tradition of treating individuals as neutral (though in practice this might amount to assuming others share the judges' values and understandings).¹⁹

There was also concern expressed that neither the FMS or Federal Court would have a specific human rights division and that,

specialist and clear understanding of the issues facing people who are experiencing discrimination, and even personal experience of the disadvantage, are required for appropriate human rights justice. Many judges in this area have already shown a tendency to devalue the personal and emotional aspects of [the] human rights jurisdiction".²⁰

Another commentator noted that 'judges are so often drawn from privileged social groups and are unlikely to have their own first-hand experience of discrimination'.²¹

The Federal Court assumed responsibility for the unlawful discrimination jurisdiction on 13 April 2000 when the substantive provisions of the *Human Rights Legislation Amendment Act No. 1 1999* (Cth) (HRLA Act) (passed by Parliament on 23 September 1999) commenced operation.²² The relevant provisions of the *Federal Magistrates (Consequential Amendments) Act 1999* (Cth) also commenced operation on that day and amended the HREOC Act (as amended by the HRLA Act) so as to extend the jurisdiction for the hearing of proceedings arising out of complaints of unlawful discrimination to the FMS.

1.4 Background to this Review

During parliamentary discussion regarding the HRLA Act, the Government expressed its commitment to reviewing the impact of the legislative changes to the unlawful discrimination jurisdiction.²³ HREOC is well qualified to contribute to such a review given that it exercised the function of hearing unlawful discrimination complaints for over 14 years and has a specialised knowledge of the area of law. Furthermore, HREOC's interest in the development of the unlawful discrimination jurisprudence in the new jurisdiction was founded in the functions that it continued to exercise once the hearing jurisdiction was transferred from it to the FMS and Federal Court.

HREOC retained the function, to be performed by the President,²⁴ of investigating and conciliating complaints of unlawful discrimination.²⁵ The exercise of such a function needs to be

¹⁹ Beth Gaze, 'The costs of Equal Opportunity' (2000) 25(3) *Alternative Law Journal*, 125, 129.

²⁰ Sharon Offenberger and Robin Banks 'Wind out of the sails – new federal structure for the administration of human rights legislation' (2000) 6(1) *Australian Journal of Human Rights* 239, 243.

²¹ Gaze, above n [19], 126.

²² Under transitional provisions in the HRLA Act, HREOC retained responsibility for matters where the inquiry had started prior to 13 April 2000: s13.

²³ Commonwealth, *Parliamentary Debates*, Senate, 20 September 1999, 8407 (Amanda Vanstone, Minister for Justice and Customs).

²⁴ Section 8(6) of the HREOC Act.

²⁵ Section 11(1)(aa) of the HREOC Act.

informed by any developments or changes in the jurisprudence of unlawful discrimination under the RDA, SDA and DDA.

Furthermore, HREOC has functions of promoting an understanding and acceptance, and the public discussion, of human rights in Australia,²⁶ examining enactments for the purpose of whether they are inconsistent with any human right²⁷ and reporting to the Attorney-General on laws that should be made or action that should be taken by the Commonwealth on matters relating to human rights.²⁸ In order for HREOC to perform these functions it needs to be aware of the developments in the unlawful discrimination jurisprudence in the new jurisdiction so as not only to educate others but also to form a view as to whether it should recommend that any changes need to be made to the legislation that governs the jurisdiction.

For the above reasons, HREOC has already published a paper which reported, on the basis of survey and comparative complaint data, that for the calendar year following the commencement of the HRLA Act (that is, 2001) the legislative changes had not significantly impacted on the manner in which parties approach complaints before HREOC or deterred complainants from bringing matters under federal unlawful discrimination law.²⁹ The intention of this review is to complement those findings by focusing on the jurisprudential developments in the jurisdiction and to update to 13 September 2002, the analysis made in that paper in relation to costs for the period 13 September 2000 to 13 September 2001.

1.5 Objectives of the Review

In light of the above background, HREOC has focused in this review on three areas. The first being the jurisprudential trends that have emerged in the first two years of the jurisdiction, the second being the manner in which interlocutory applications, procedural and evidentiary matters have been dealt with and thirdly, the principles that have governed the exercise of the costs jurisdiction by the FMS and Federal Court.

1.5.1 Jurisprudential Trends

This review has examined all the decisions handed down during the relevant period by the FMS and the Federal Court to identify those points of law on which there has been significant judicial comment since the hearing function was transferred from HREOC. The review then provides an assessment as to how the jurisprudence in relation to the relevant point of law has developed since the topic was considered by HREOC and the courts in the pre-HRLA Act period.

The decisions of the FMS and Federal Court that have not raised significant legal points are included, though in less detail, in the form of a Case Digest.

An assessment of the principles governing damages awards under the relevant legislation is also considered.

²⁶ Section 11(1)(g) of the HREOC Act.

²⁷ Section 11(1)(e) of the HREOC Act.

²⁸ Section 11(1)(j) of the HREOC Act.

²⁹ 'Review of Changes to the Administration of Federal Anti-Discrimination Law Reflections on the initial period of operation of the Human Rights Legislation Amendment Act (No.1) 1999 (Cth)' available on HREOC's website at www.humanrights.gov.au.

1.5.2 Other Applications, Procedural and Evidentiary Matters

The review has also considered those decisions that do not relate to the substantive application arising out of a complaint of unlawful discrimination but rather deal with interlocutory, procedural or evidentiary matters. The principles that have been applied by the FMS and the Federal Court in dealing with such matters are of interest as they reveal the manner in which each jurisdiction deals with the practical issues that may arise in the course of proceedings.

1.5.3 Costs Awards

Given the community concern with the unlawful discrimination jurisdiction in the FMS and Federal Court being a jurisdiction in which costs orders could be made, the other focus of the review is to assess the manner in which costs orders are being made in the new jurisdiction and the principles that are being applied in the making of those orders.

As stated above, HREOC has previously published a paper which included a statistical and jurisprudential analysis of costs orders made by the FMS and Federal Court during the period 13 September 2000 to 13 September 2001. Chapter 4 and Appendix A of the review update that statistical and jurisprudential analysis, such that it now spans the period 13 September 2000 to 13 September 2002.

1.6 Methodology

For the purposes of this review, all decisions handed down by the FMS and Federal Court in the unlawful discrimination jurisdiction for the period 13 September 2000 to 13 September 2002 were carefully considered. The total of 105 decisions were then considered as follows:

- Decisions in which it was decided on a final and non-summary basis whether to uphold or dismiss a claim of unlawful discrimination ('substantive decisions') were divided up according to the ground of alleged discrimination (that is, whether the ground was under the RDA, SDA and DDA). These decisions are considered in Chapter 2 below.

The decisions that contained points of law on which there has been significant judicial comment since the hearing function was transferred from HREOC to the Federal Court and the FMS are discussed under the sections headed Matters of Interest. The substantive decisions that dealt with points of law that have less jurisprudential significance are considered under the sections headed Case Digest.

A brief assessment of the principles used in the making of damages awards by the FMS and Federal Court in relation to decisions under the RDA, SDA and DDA is also provided.

- Decisions arising from other applications (that is, those not the subject of substantive decisions), procedural and evidentiary matters were considered and are analysed in Chapter 3.
- All of the decisions were analysed so as to reveal the outcome of the application and the costs order, if any, made in the proceedings and the principles applied in making the relevant order. The results of this analysis are at Chapter 4 and Appendix A.

Chapter 2

Jurisprudential Trends

2.1 Introduction

This chapter analyses the jurisprudence developed by the FMS¹ and Federal Court² under the RDA, SDA and DDA during the review period. Each part deals with one of the Acts and is divided into three sections as follows:

Matters of Interest

This section highlights those points of law on which there has been significant judicial comment since the hearing function was transferred from HREOC to the FMS and the Federal Court. It is intended to provide some analysis of cases where the federal magistrate or judge(s) of the Federal Court have:

- strongly endorsed a decision or reasoning made under HREOC's hearing function;³ or
- departed from a decision or reasoning made under HREOC's hearing function; or
- provided comment on an area of law that has traditionally been contentious.

Case Digest

This section surveys all the remaining cases that have discussed a substantive (that is, non-procedural) issue under the relevant legislation during the review period. The cases have been grouped under topical headings for ease of reference.

Damages

This section reflects on the manner in which damages were dealt under the relevant legislation when the jurisdiction was with HREOC and the principles that are emerging in relation to damages awards under the jurisdiction before the FMS and the Federal Court.

¹ Please note that for ease of reference by the reader, the citations used for FMS unlawful discrimination decisions are those used in the electronic version at www.fms.gov.au rather than the citation in the Federal Court Reports.

² Please note that for ease of reference by the reader, the citations used for Federal Court unlawful discrimination decisions are those used in the electronic version at www.fedcourt.gov.au rather than the citation in the Federal Court Reports.

³ Please note that HREOC's decisions appear electronically at www.austlii.edu.au. As the electronic version of the decisions does not have paragraph or page numbers, the original HREOC citation is given as well as, where available, a reference to an extract of the decision in the CCH Equal Opportunity Cases.

2.2 Racial Discrimination

2.2.1 Matters of Interest

(A) Grounds of Discrimination: Race, Colour, Descent or National or Ethnic Origin

The general prohibition against discrimination, set out in s9 of the RDA makes it unlawful for a person 'to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin...'. Elsewhere in the RDA, the grounds of unlawful discrimination are 'race, colour or national or ethnic origin', omitting the ground of 'descent'.⁴ The meaning of each of those listed grounds, and the relationship between them, has been the subject of consideration by the courts before the commencement of the HRLA Act and by the Federal Court and the FMS during the review period.

i. The Law under the HREOC Hearing Function

The meaning of 'national origin' was considered by Sackville J in *Australian Medical Council v Wilson*⁵ (*Siddiqui*), and it was held that it 'does not simply mean citizenship'.⁶ His Honour cited with approval,⁷ Lord Cross in *Ealing London Borough Council v Race Relations Board*,⁸ a case which had considered the materially similar *Race Relations Act (UK)*:

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

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

... Of course, in most cases a man has only a single 'national origin' which coincides with his nationality at birth in the legal sense and again in most cases his nationality remains unchanged throughout his life. But 'national origins' and 'nationality' in the legal sense are two quite different conceptions and they may well not coincide or continue to coincide⁹.

Sackville J stated that this view was powerfully supported by Article 1(2) of the *International Convention for the Elimination of All Forms of Racial Discrimination (CERD)*¹⁰ which specifically provides that CERD is not to apply to distinctions, exclusions, restrictions or preferences made by a State Party between citizens and non-citizens.

The Full Federal Court in *Macabenta v Minister of State for Immigration and Multicultural Affairs*¹¹ (*Macabenta*), followed *Siddiqui*¹² and rejected the submission that 'national origin'

⁴ See ss10,11, 12, 13, 14, 15 and 18C of the RDA.

⁵ (1996) 68 FCR 46.

⁶ *Ibid* [75].

⁷ *Ibid*.

⁸ [1972] AC 342.

⁹ (1996) 68 FCR 46, [75].

¹⁰ Opened for signature 21 December 1965, 660 UNTS 195 (entered into force generally 4 January 1969 and in Australia 30 September 1975).

¹¹ (1998) 159 ALR 465.

¹² (1996) 68 FCR 46. See also *De Silva v Minister for Immigration* [1998] FCA 95 and *Ebber v Human Rights and Equal Opportunity Commission* (1995) 129 ALR 455.

could be equated with ‘nationality’ for the purposes of ss9 and 10 of the RDA.¹³ The Full Court held that the phrase ‘race, colour or national or ethnic origin’ in s10 of the RDA should bear the same meaning in the RDA as it bears in CERD, under which the ‘core concern is racial discrimination’.¹⁴ The Full Federal Court held that the words ‘colour, or national or ethnic origin’ were intended to give ‘added content and meaning to the word “race”’ and ‘capture the somewhat elusive concept of race’.¹⁵

The Full Federal Court continued

In our opinion, the description ‘ethnic origin’ lends itself readily to factual inquiries of the type described by Lord Fraser in *Mandla v Lee*[at 562]. For example, is there a long shared history? Is there either a common geographical origin or descent?, is there a common language?, is there a common literature?, is there a common religion or a depressed minority? One can easily appreciate that the question of ethnic origin is a matter to be resolved by those types of factual assessments. Ethnic origins may once have been identifiable by reference to national borders, but that time ended hundreds or perhaps thousands of years ago. To some extent the same can be said of national origins as human mobility gained pace. It may well also be appropriate, given the purpose of the Convention, to embark on a factual enquiry when assessing whether the indicia of a law include national origin as a discrimen. Ethnic origins may have become blurred over time while national origins may still be relatively clear. That further reference point of national origin may be needed in order to identify a racially-discriminatory law. National origin may in some cases be resolved by a person's place of birth. In other cases it may be necessary to have regard to the national origin of a parent or each parent or other ancestors either in conjunction with the person's place of birth or disregarding that factor. If by reference to matters of national origin one can expose a racially-discriminatory law, then the Convention will have served its purpose. However, no Convention purpose is in any manner frustrated by drawing a distinction between national origin and nationality, the latter being a purely legal status (and a transient one at that)...¹⁶

In *Commonwealth of Australia v Stamatov*,¹⁷ von Doussa J applied *Macabenta*¹⁸ in finding that the meaning of ‘national origin’ should be confined to characteristics determined at the time of birth – ‘either by the place of birth or by the national origin of a parent or parents, or a combination of some of those factors’.¹⁹ In that case, Mr Stamatov, who was of Bulgarian nationality and had lived and worked in Bulgaria, was required to satisfy security checks for a position with the Department of Defence. Bulgaria was a country where security checks could not be meaningfully conducted, with the result that Mr Stamatov was found to be ‘uncheckable’. His Honour held:

The evidence... was clear that the elements of checkability which caused Mr Stamatov’s background to be uncheckable concerned checks with security authorities in the place where the applicant resided. The checks were concerned with the activities of the applicant and were unrelated to the national origins within the meaning of that expression as construed in *Macabenta*. The fact that Mr Stamatov had been born in Bulgaria of Bulgarian parents was an irrelevant coincidence. A person of any other national origin that had lived his or her adult life in Bulgaria, and had followed the educational and employment pursuits of Mr Stamatov would also have a background that was uncheckable.²⁰

¹³ Ibid 473-474.

¹⁴ Ibid 472.

¹⁵ Ibid 472-473.

¹⁶ Ibid 472-474.

¹⁷ [1999] FCA 105.

¹⁸ (1998) 159 ALR 465.

¹⁹ Ibid [34]. The same approach was taken by Merkel J in *De Silva v Minister for Immigration* [1998] FCA 95, 18: “Although there are obvious difficulties in any precise definition of “national origin” as that term is used in the RD Act, in my view it does not mean current nationality or nationality at a particular date which has no connection with the national *origin* of the persons concerned”.

²⁰ Ibid [35].

ii. *The Law as Interpreted by the Federal Court and FMS*

Following the commencement of the HRLA Act, the meaning of ‘race’ was considered in the context of disputes between Aboriginal people in *Williams v Tandanya & Ors.*²¹ Driver FM held:

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

It will be apparent to anyone with even a rudimentary understanding of Aboriginal culture and history that the Australian Aborigines are not a single people but a great number of peoples who are collectively referred to as Aborigines. This is clear from language and other cultural distinctions between Aboriginal peoples. It is, in my view, clear that the RDA provides relief, not simply against discrimination against ‘Aboriginals’ but also discrimination against particular Aboriginal peoples. There is no dispute that the applicant is an Aboriginal person. There was some dispute within the Kaurna community as to the applicant’s links to that community. The alleged acts of discrimination by the first, second, fifth (and, possibly third) respondents are all related in one way or another to that dispute and the alleged exclusion and lack of consultation are all linked by the applicant to his particular cultural associations within the Aboriginal community. In principle, I am satisfied that these acts, if found to be discriminatory, could constitute discrimination against either s9 or s13 of the RDA.²²

In *Miller v Wertheim*,²³ the Full Federal Court dismissed a claim of racial discrimination in relation to a speech made by the respondent (himself Jewish) which had criticised members of the Orthodox Jewish community for allegedly divisive activities. The Full Court stated that it could be ‘readily accepted that Jewish people in Australia can comprise a group of people with an “ethnic origin”’²⁴ for the purposes of the RDA, and cited with approval the New Zealand decision of *King-Ansell v Police*.²⁵ However, in the present case, the members of the group ‘were criticised in the speech because of their allegedly divisive and destructive activities, not because the group or its members were of the Jewish race, of Jewish ethnicity or because they were persons who adhered to the practices and beliefs of orthodox Judaism’.²⁶ His Honour did not discuss further whether or not persons ‘adhering to the practices and beliefs of orthodox Judaism’ were a recognisable group for the purposes of the RDA.

iii. *Conclusion*

While the cases prior to the transfer of jurisdiction to the Federal Court and FMS dealt with the meaning of ‘national origin’ and those after the transfer of jurisdiction considered the meaning of ‘race’ and ‘ethnic origin’, the approach taken by the Courts appears to be consistent. The decision of Driver FM in *Williams v Tandanya*²⁷ suggests that the various components of the expression ‘race, colour or national or ethnic origin’ are to be considered as interlinked, as was stated in *Macabenta*.²⁸ The focus of the inquiry is placed on the identity of the relevant group, as distinguished by factors such as language and culture.

²¹ [2001] FMCA 46.

²² *Ibid* [21].

²³ [2002] FCA 156.

²⁴ *Ibid* [14].

²⁵ [1979] 2 NZLR 531.

²⁶ [2002] FCA 156,[13].

²⁷ [2001] FMCA 46.

²⁸ (1998) 159 ALR 465.

(B) The Requirement for Intention or Motive

Unlawful discrimination as defined by s9(1) of the RDA requires that a ‘distinction, exclusion, restriction or preference’ be ‘based on’ race or other of the related grounds. Elsewhere in the RDA, unlawful discrimination is defined to occur when a prescribed act is ‘by reason of’ race or other of the related grounds²⁹ and in the case of racial vilification, the relevant act must be done ‘because of’ race or other grounds.³⁰ The extent to which these expressions require an intention or motive to discriminate and the possible differences between such expressions has been subject to varying judicial interpretations.

i. The Law under the HREOC Hearing Function

During the life of the HREOC hearing function, there were differing approaches by members of the High Court when interpreting phrases such as ‘on the ground of’ and ‘by reason of’ as to whether an intention or motive to discriminate is required. In *Australian Iron & Steel Pty Ltd v Banovic*³¹ (*Banovic*), the High Court considered provisions prohibiting discrimination ‘on the ground of’ sex under the *Anti-Discrimination Act 1977* (NSW). Deane and Gaudron JJ held that the absence of intention or motive would not preclude the action in question from constituting discrimination. Similarly, Mason CJ and Gaudron J in *Waters v Public Transport Corporation*³² (*Waters*) considered provisions of the *Equal Opportunity Act 1984* (Vic) prohibiting discrimination ‘on the ground of’ disability and held that motive and intention are not necessary for a finding of discrimination.

However, McHugh J in *Waters*³³ held that the act of the alleged discriminator must be *actuated* by the status of the person alleged to be discriminated against such that the status of the victim must be at least one of the factors which *moved* the discriminator to act as he or she did. His Honour held that if they acted genuinely on a non-discriminatory ground they cannot be said to have acted on the ground of the status of the victim.³⁴

In *Siddiqui*,³⁵ Sackville J referred to these judgments and stated that ‘the preponderance of opinion favours the view that s9(1) [of the RDA] does not require an intention or motive to engage in what can be described as discriminatory conduct’.³⁶

In *Macedonian Teachers’ Association of Victoria Inc v HREOC*³⁷ (*Macedonian Teachers*), Weinberg J also considered the meaning of the words ‘based on’ in s9(1) of the RDA. His Honour extensively considered Australian and international authorities³⁸ and noted that the relevant requirement was one of ‘sufficient connection’ rather than ‘causal nexus’.³⁹ His Honour held that while there must be a ‘close relationship between the designated characteristic and the impugned conduct’, to require a relationship of cause and effect ‘would be likely to significantly

²⁹ See ss10, 11, 12, 13, 14 and 15.

³⁰ See s18C of the RDA.

³¹ [1989] 168 CLR 165.

³² [1991] 173 CLR 349.

³³ *Ibid.*

³⁴ McHugh J was discussing s17(1) of the *Equal Opportunity Act 1984* (Vic) which his Honour described as dealing with direct discrimination.

³⁵ (1996) 68 FCR 46.

³⁶ *Ibid* [74].

³⁷ [1998] 91 FCR 8.

³⁸ *Ibid* 24-41.

³⁹ *Ibid* 33.

diminish the scope for protection which is afforded by that subsection'.⁴⁰ His Honour noted further that proof of a motive to discriminate is not necessary.⁴¹

The Full Federal Court on appeal indicated their agreement with Weinberg J's construction of s9(1).⁴²

ii. The Law as Interpreted by the Federal Court

The requirement for intention or motive in discrimination under the RDA has been considered by the Federal Court since the transfer of the unlawful discrimination jurisdiction. In *Creek v Cairns Post Pty Ltd*⁴³ (*Creek*), Kiefel J considered the differing approaches of the members of the High Court to the interpretation of phrases such as 'on the ground of' and 'by reason of' in the context of s18C of the RDA. The applicant alleged that a photograph published of her by the respondent was offensive behaviour contrary to s18C of the RDA as it 'portrayed her as a primitive bush Aboriginal' and misrepresented her living conditions.⁴⁴

Kiefel J suggested that the construction placed on phrases such as 'on the ground of' and 'by reason of' may be explained by differing views being held as to whether or not the provisions relating to direct and indirect discrimination were mutually exclusive. Her Honour noted, for example, that McHugh J in *Waters*⁴⁵ considered the examples given by Deane and Gaudron JJ in *Banovic*⁴⁶ where motive or intention could not be said to be a necessary condition of liability, as cases falling within the concept of indirect discrimination.⁴⁷

Kiefel J followed McHugh J's view in *Waters*⁴⁸ that the act must be 'actuated' by the status of the person who is discriminated against, noting that the approach gives meaning to such words as 'on the ground of' and 'because of' and noting Lockhart J's discussion in *HREOC v Mt Isa Mines Ltd*⁴⁹ (*Mount Isa Mines*) of the need to have regard to the plain words of the sections.⁵⁰

Furthermore, Kiefel J suggested that giving consideration to the 'true reason' for the relevant action in light of all the circumstances (an approach consistent with that taken by Dawson J in *Banovic*⁵¹), would address the concerns expressed by Deane and Gaudron JJ in *Banovic*⁵² that discrimination legislation operates with respect to unconscious acts.⁵³

Her Honour cited the reference in *Siddiqui*⁵⁴ to the statement of Doyle CJ in *Aboriginal Legal Rights Movement v State of South Australia*⁵⁵ that s9 requires a consideration of 'whether the racial distinction is a material factor in the making of the relevant decision...'.⁵⁶ Kiefel J states

⁴⁰ Ibid.

⁴¹ Ibid 34, 40-41.

⁴² *Victoria v Macedonian Teachers' Association of Victoria Inc & Another* (1999) 91 FCR 47.

⁴³ [2001] FCA 1007.

⁴⁴ Ibid [5].

⁴⁵ [1991] 173 CLR 349, 400-1.

⁴⁶ [1989] 168 CLR 165, 176.

⁴⁷ [2001] FCA 1007, [20].

⁴⁸ [1991] 173 CLR 349.

⁴⁹ [1993] 46 FCR 301.

⁵⁰ [2001] FCA 1007, [20]. See also, in the context of the SDA, Allsop J's judgement in *Thomson v Orica* [2002] FCA 939, [161]. Allsop J there extracted, at length, Lockhart J's decision in *HREOC v Mount Isa Mines Ltd* [1993] 46 FCR 301 and indicated that he agreed with his Honour's discussion of the meaning of 'by reason of'.

⁵¹ [1989] 168 CLR 165, 184.

⁵² Ibid.

⁵³ [2001] FCA 1007, [23].

⁵⁴ (1996) 68 FCR 46.

⁵⁵ [1995] 64 SASR 551.

⁵⁶ Ibid [25].

this view is not contrary to that of McHugh J in *Waters*⁵⁷ given that Doyle CJ later referred to the question of whether race is exposed as ‘the *true basis* of the decision (emphasis added)’.⁵⁸

Kiefel J then crystallised the question to be considered:

In the present case the question is whether anything suggests race as a factor in the respondent’s decision to publish the photograph... the enquiry is whether the publication of a photograph, showing the applicant’s apparent living circumstances was motivated by considerations of race.⁵⁹

In *Jones v Scully*,⁶⁰ Kiefel J’s reasoning in *Creek*⁶¹ was considered by Hely J. His Honour held that:

... at the end of her discussion of the relevant authorities, her Honour adopted an approach to s18C(1)(b) which enquired into whether ‘anything suggests race as a factor in the respondent’s decision to publish’ the work in question. I respectfully propose to follow that approach.⁶²

In *Hagan v Trustees of the Toowoomba Sports Ground Trust*⁶³ (*Hagan*), the interpretation by Weinberg J in *Macedonian Teachers*⁶⁴ of the words ‘based on’ in s9(1) of the RDA were cited with approval. Drummond J stated that although s9(1) ‘does not require proof of a subjective intention to discriminate on the grounds of race (although that would suffice), there must be some connection between the act and considerations of race’.⁶⁵

iii. Conclusion

At this stage it appears the Federal Court is moving towards the view taken by McHugh J in *Waters*⁶⁶ as to the construction of words such as ‘on the ground of’ and ‘by reason of’. However, the words ‘based on’ in s9(1) of the RDA continue to be interpreted more broadly and without the need for proof of intention or motive to discriminate.

(C) Proof of Discrimination – Standard of Proof

It is clear that the complainant bears the onus of proof in establishing a complaint of racial discrimination. The standard of proof required to be met has been the subject of frequent discussion in the cases. In particular the courts have considered to what extent the test set out in *Briginshaw v Briginshaw*⁶⁷ (*Briginshaw*) should be applied. In *Briginshaw*, Dixon J stated:

[W]hen the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitively developed. Except upon

⁵⁷ [1991] 173 CLR 349.

⁵⁸ [2001] FCA 1007, [26].

⁵⁹ *Ibid* [28].

⁶⁰ [2002] FCA 1080.

⁶¹ [2001] FCA 1007.

⁶² *Ibid* [114].

⁶³ [2000] FCA 1615.

⁶⁴ [1998] 91 FCR 8.

⁶⁵ *Ibid* [39]. The objective nature of the test of discrimination was also confirmed in *Paramasivam v Wheeler & Ors* [2000] FCA 1559, [8]. Similarly, a subjective belief by an applicant that they were subjected to discrimination will not suffice; see for example *Paramasivam v Jureszek* [2001] FCA 704, affirmed on appeal in *Paramasivam v Juraszek* [2002] FCAFC 141. Note that Ms Paramasivam’s application concerning HREOC’s handling of this and other complaints was dismissed by Madgwick J in *Paramasivam v Tay* [2001] FCA 758, affirmed on appeal in *Paramasivam v Tay* [2002] FCAFC 143.

⁶⁶ [1991] 173 CLR 349.

⁶⁷ (1938) 60 CLR 336.

criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.⁶⁸

i. The Law under the HREOC Hearing Function

The standard of proof required to establish an allegation of racial discrimination was considered by commissioner Keim in *D'Souza v Geyer and Directorate of School Education Victoria*,⁶⁹ who stated that:

The [Racial Discrimination] Act does not make specific provision about who has the onus of proof or what standard of proof is required... In this regard, I am guided by the remarks of the President, Sir Ronald Wilson, in *Djokic v Sinclair and Central Queensland Meat Export Company (Aust) Pty Ltd* (1994) EOC 92-643 (digest only) at p. 77-419 where he applied the test enunciated in the High Court decision of *Briginshaw* [which] sets out the civil standard of proof frequently referred to as the balance of probabilities. However, as the President points out in his reasons, where an allegation is serious, one requires 'persuasive proof' of the complainant's allegation. Most allegations of racial discrimination are likely to be serious in nature and require the Commissioner hearing the matter to be persuaded by the evidence. Although the President's remarks in that case related specifically to a complaint of sexual harassment under the *Sex Discrimination Act*, the case involved both racial and sex discrimination and, in my view, the remarks are applicable to complaints under both pieces of legislation.⁷⁰

Sir Ronald Wilson, the then President of HREOC, took a similar approach in *Australian Macedonian Human Rights Committee (Inc) v State of Victoria*.⁷¹ The complaint related to a directive issued by the Victorian Government, requiring all departments and agencies to 'refer for the time being to the language that is spoken by people living in the Former Yugoslav Republic of Macedonia, or originating from it, as Macedonian (Slavonic)'. It was claimed that this impaired the recognition, enjoyment or exercise of a number of human rights and fundamental freedoms and accordingly constituted racial discrimination. HREOC held:

Applying the test enunciated in *Briginshaw*... if a finding in support of the complainant means that the Government must be found to have deliberately discriminated against one section of the community in order to favour another section and therefore be deserving of wide condemnation for such a lack of probity in office, then such a finding would surely call for proof based on more than a mere balance of probabilities.⁷²

The appeal from this decision was considered by Weinberg J in *Macedonian Teachers*.⁷³ The approach taken by HREOC on this issue was initially upheld by Weinberg J, who stated:

In my view, it was open to the Commissioner to conclude that the nature of the complaint made against the second respondent was such that, at least in its final form, it called for the application of the *Briginshaw* principles when making findings of fact. It is no badge of honour for any government to be found to have contravened a provision of an anti-discrimination statute. The fact that such a contravention may be found to have occurred without any intent on the part of that government to discriminate, and for laudatory motives, does not significantly diminish the gravity of any such finding.

⁶⁸ Ibid 361-2.

⁶⁹ (Unreported, HREOC, Commissioner Keim, 25 March 1996).

⁷⁰ Ibid 18.

⁷¹ (Unreported, HREOC, Sir Ronald Wilson, 8 January 1998).

⁷² Ibid 7.

⁷³ (1998) 91 FCR 8.

As for the contention that the Commissioner erroneously construed the *Briginshaw* principle by treating it as though it sanctioned the adoption of a third standard of proof, mid way between the civil and criminal standards of proof, I do not accept that this was what the Commissioner intended to convey when he said that ‘such a finding would surely call for proof based on more than a mere balance of probabilities’. In my view, this statement was no more than a convenient shorthand method of articulating the *Briginshaw* principle...⁷⁴

His Honour cited with approval⁷⁵ the decision of Drummond J in *Ebber v Human Rights and Equal Opportunity Commission*⁷⁶ (*Ebber*) in which it was held that ‘a finding of unlawful conduct could only be made against the respondent if it was proved to the standard referred to in *Briginshaw*...’.⁷⁷

This aspect of Weinberg J’s decision, however, was rejected by the Full Federal Court on appeal.⁷⁸ The Full Court cited Deane, Dawson and Gaudron JJ in *G v H*⁷⁹ in which their Honours had noted that due regard must be had to the nature of the issue involved because not every case involves issues of importance and gravity envisaged by *Briginshaw*.⁸⁰ That case concerned the paternity of a child and it was held that the principle had no application. As to the present case, the Full Court stated:

In this case the complainants did not make, and did not need to make, any ‘serious allegations’ against the respondent, and they submitted to the Commission that it should confine itself in its determination to an examination of the effect of the directive given by the respondent in the terms of s9 of the Act without considering the motives of the government.

In the present case it is not necessary to make a finding of ‘deliberate’ discrimination against one section of the community in order to favour another section, and the probity of the Victorian government is not in issue. The mere finding that a government has contravened a provision of an anti-discrimination statute without considering the circumstances in which the contravention occurred is not, in our view, sufficient to attract the *Briginshaw* test. We disagree with his Honour’s conclusion that the absence of intention to discriminate does not significantly diminish the gravity of any such finding.

As the first respondent submits, there are many examples of governments being held to have discriminated unlawfully against individuals or groups of individuals without resort to the principle in *Briginshaw*. They referred to the case of *Bacon v Victoria* (unreported, Supreme Court of Victoria, 7 November 1997, Beach J) where the issue was whether the education policy of the Victorian government was discriminatory. Beach J held that it was, but his Honour did not invoke the *Briginshaw* principle. That case was similar, in principle, to this one. No issue of fraud or impropriety was raised or needed to be determined.⁸¹

ii. The Law as Interpreted by the Federal Court and FMS

The Full Federal Court’s decision in the *Macedonian Teachers*⁸² was not referred to in *Sharma v Legal Aid Queensland*⁸³ (*Sharma*). Mr Sharma complained of racial discrimination in recruitment decisions made by the respondent. The applicant contended that the only explanation for the failure of his application for the positions was his race as he was otherwise qualified adequately for them. Kiefel J noted that:

⁷⁴ Ibid 44.

⁷⁵ Ibid 43.

⁷⁶ (1995) 129 ALR 455.

⁷⁷ [1998] 91 FCR 8, 467-468.

⁷⁸ *State of Victoria v Macedonian Teachers Association of Victoria* (1999) 91 FCR 47. The Court otherwise upheld the decision of Weinberg J which had focused primarily on the issue of ‘based on’ race (considered above) and dismissed the appeal.

⁷⁹ (1994) 181 CLR 387, 399.

⁸⁰ (1999) 91 FCR 47, 50.

⁸¹ Ibid 50.

⁸² Ibid.

⁸³ [2001] FCA 1699.

It was accepted by Counsel for the applicant that the standard of proof for breaches of the *Racial Discrimination Act 1975* is the higher standard referred to in *Briginshaw*...⁸⁴

On appeal,⁸⁵ the Full Court stated:

It was common ground at first instance that the standard of proof for breaches of the RDA is the higher standard referred to in *Briginshaw*... Racial discrimination is a serious matter, which is not lightly to be inferred: *Department of Health v Arumugam* [1988] VR 319, 331. No contrary argument was put on the hearing of the appeal, apart from the comment that there is no binding authority on this Court that *Briginshaw* should be applied in cases of this nature.⁸⁶

iii. Conclusion

The absence of any consideration by the Federal Court or the Full Federal Court in *Sharma*⁸⁷ of the apparently contrary decision of the Full Federal Court in the *Macedonian Teachers*⁸⁸ leaves some doubt surrounding the issue of the application of what is referred to as the ‘*Briginshaw* principle’ or the ‘*Briginshaw* test’ in discrimination cases.

It should be noted that the decision of Dixon J in *Briginshaw*⁸⁹ stands for the proposition that in cases involving more serious allegations (or allegations which are more unlikely or carry more grave consequences), evidence of a higher probative value is required for a decision-maker to attain the requisite degree of satisfaction. It is clear from Dixon J’s statement in *Briginshaw*⁹⁰ that there is no ‘higher standard of proof’ as the Full Court decision in *Sharma*⁹¹ seems to suggest. Similarly, it is not strictly correct to refer to the ‘invoking’ or ‘resorting to’ the ‘principle in *Briginshaw*’ as the Full Court does in the *Macedonian Teachers*:⁹² the principle is to be applied in all cases.

The true issue is what circumstances will increase the seriousness of a case such that the court will require evidence of a higher probative standard in order to be satisfied that the applicant has made out his or her allegation of discrimination. *Macedonian Teachers*⁹³ suggests that not all complaints made under the RDA are properly to be considered of such ‘seriousness’ as to require such evidence of a higher probative standard. The failure of the courts in *Sharma*⁹⁴ to consider the decision, while apparently taking the view that the higher standard of evidence will be required in all cases under the RDA, leaves the position unclear.

(D) Proof of Discrimination – Racism and Reliance upon Inferences

The existence of systemic racism has been routinely acknowledged by decision-makers considering allegations of race discrimination. The extent to which this enables inferences to be drawn as to the basis for a decision, particularly in the context of decisions about hiring or promotion in employment, was considered by HREOC when it had the unlawful discrimination jurisdiction and, since the commencement of the HRLA Act, by the FMS and Federal Court.

⁸⁴ Ibid [62].

⁸⁵ *Sharma v Legal Aid (Qld)* [2002] FCAFC 196.

⁸⁶ Ibid [40].

⁸⁷ [2001] FCA 1699.

⁸⁸ (1999) 91 FCR 47.

⁸⁹ (1938) 60 CLR 336.

⁹⁰ Ibid 361-2.

⁹¹ [2002] FCAFC 196, [40].

⁹² (1999) 91 FCR 47, 50.

⁹³ (1999) 91 FCR 47.

⁹⁴ [2001] FCA 1699.

i. The Law under the HREOC Hearing Function

In *Murray v Forward & Merit Protection Review Agency*⁹⁵ HREOC was asked to draw inferences of racial discrimination from conduct of the respondent that was said to be based on an acceptance of racial stereotypes. In particular it was complained that views had been formed as to the inadequate literacy of the complainant which could only be explained by an acceptance of stereotypes relating to the literacy of Aboriginal people generally. Sir Ronald Wilson stated:

I have not found the resolution of this issue an easy one. Counsel acknowledges that to accept his submission on behalf of the complainant I must exclude all other inferences that might reasonably be open. I am sensitive to the possible presence of systemic racism, when persons in a bureaucratic context can unconsciously be guided by racist assumptions that may underlie the system. But in such a case there must be some evidence of the system and the latent or patent racist attitudes that infect it. Here there is no such evidence. Consequently there is no evidence to establish the weight to be accorded to the alleged stereotype.⁹⁶

ii. The Law as Interpreted by the Federal Court and FMS

In *Sharma*⁹⁷ Kiefel J held that a court should be wary of presuming the existence of racism in particular circumstances:

Counsel for the applicant submitted that an inference could be drawn because of the known existence of racism combined with the fact that the decision in question was one to be made between people of different races. It would seem to me that the two factors identified, considered individually or collectively, raise no more than a possibility that race might operate as a factor in the decision-making.⁹⁸

In *Sharma*,⁹⁹ the Federal Court in dealing with allegations of discrimination in recruitment for senior legal positions, was referred to the small number of people employed by the respondent coming from non-English speaking backgrounds, particularly at the level of professional staff and the fact that nobody holding the position for which they applied in any of the respondent's offices was from a non-English speaking background. The applicant argued that inferences could be drawn from this as to the racially discriminatory conduct of the respondent. Kiefel J stated:

In such cases statistical evidence may be able to convey something about the likelihood of people not being advanced because of factors such as race or gender. The case referred to in submissions: *West Midlands Passenger Transport Executive v Jaquant Singh* [1988] 1 WLR 730, 736 is one in point. There it was observed that a high rate of failure to achieve promotion by members of a particular racial group may indicate that the real reason for refusal is a conscious or unconscious racial attitude which involves stereotypical assumptions about members of the group. It will be a question of fact in each case. Here however all that can be said is that a small number of the workforce of the respondent comes from non-English speaking backgrounds.¹⁰⁰

The Full Federal Court on appeal¹⁰¹ upheld her Honour's decision and agreed that in appropriate cases, inferences of discrimination might be drawn:

It may be accepted that it is unusual to find direct evidence of racial discrimination, and the outcome of a case will usually depend on what inferences it is proper to draw from the primary facts found: *Glasgow City Council v Zafar* [1998] 2 All ER 953, 958. There may be cases in which the motivation may be subconscious. There may be cases in which the proper inference to be drawn

⁹⁵ (Unreported, HREOC, Sir Ronald Wilson, 17 September 1993).

⁹⁶ *Ibid* 4.

⁹⁷ [2001] FCA 1699.

⁹⁸ *Ibid* [63].

⁹⁹ [2001] FCA 1699.

¹⁰⁰ *Ibid* [60].

¹⁰¹ *Sharma v Legal Aid (Qld)* [2002] FCAFC 196.

from the evidence is that, whether or not the employer realised it at the time or not, race was the reason it acted as it did: *Nagarajan v London Regional Transport* [1999] 3 WLR 425, 433.¹⁰²

As discussed above, the Full Court went on to indicate a view that the standard of proof for breaches of the RDA is the ‘higher standard referred to in *Briginshaw*’ and that racial discrimination was ‘not lightly to be inferred’. The Full Court continued:

In a case depending on circumstantial evidence, it is well established that the trier of fact must consider ‘the weight which is to be given to the united force of all of the circumstances put together’. One should not put a piece of circumstantial evidence out of consideration merely because an inference does not arise from it alone: *Chamberlain v The Queen [No 2]* (1983 – 1984) 153 CLR 521 at 535. It is the cumulative effect of the circumstances which is important provided, of course, that the circumstances relied upon are established as facts.¹⁰³

The issue was also considered in *Tadawan v State of South Australia*¹⁰⁴ a case in which the applicant, a Filipino-born teacher of English as a second language, alleged victimisation by her employer on the basis of having made a previous complaint of racial discrimination. It was argued that victimisation could be inferred in the decision not to re-employ the applicant on the basis of the following factors: the applicant’s superior qualifications and experience; that the applicant was ‘first reserve’ for a previous position but was not given any work; that new employees were taken on in preference to providing work for the applicant; and the lack of cogent reasons for the preference of new employees. Raphael FM commented:

In the absence of direct proof an inference may be drawn from the circumstantial evidence. The High Court has said that ‘where direct proof is not available it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference; they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture ... But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then though the conclusion may fall short of certainty it is not to be regarded as a mere conjecture or surmise...’ (*Bradshaw v McEwans Pty Ltd* (1951), unreported, applied in *TNT Management Pty Ltd v Brooks* (1979) 23 ALR 345).¹⁰⁵

iii. Conclusion

Recent decisions of the Federal Court and FMS continue to demonstrate the caution expressed by HREOC in *Murray v Forward and Merit Protection Review Agency*¹⁰⁶ in drawing inferences of racial discrimination, despite acknowledgement of its systemic nature. The cases highlight the difficulties faced by complainants in proving racial discrimination in the absence of direct evidence.

(E) Section 18C: Racial Hatred

Racial vilification provisions were introduced into the RDA in 1995.¹⁰⁷ Initially the changes resulted in little jurisprudence from HREOC. However, since the commencement of the HRLA Act there have been several decisions in which they have been considered.

Section 18C of the RDA provides:

¹⁰² *Ibid* [40].

¹⁰³ *Ibid* [41].

¹⁰⁴ [2001] FMCA 25. See also *Oberoi v HREOC & Ors* [2001] FMCA 34, [23] and *Maghiar v State of WA* [2001] FMCA 98, [15] and on appeal *Maghiar v State of WA* [2002] FCA 262, 24-25.

¹⁰⁵ *Ibid* [41].

¹⁰⁶ (Unreported, HREOC, Sir Ronald Wilson, 17 September 1993).

¹⁰⁷ *Racial Hatred Act 1995* (Cth), commenced 13 October 1995.

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

- (1) It is unlawful for a person to do an act, otherwise than in private, if:
- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
 - (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

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

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

- (3) In this section:

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

i. The Law under the HREOC Hearing Function

Prior to the loss of the unlawful discrimination jurisdiction, HREOC considered the following components of s18C of the RDA.

(a) Objective Standard

The words ‘reasonably likely’ in s18C(1) establish an objective standard.¹⁰⁸ However, in *Hobart Hebrew Congregation and Jeremy Jones v Olga Scully*¹⁰⁹ (HHC), Commissioner Cavanough stated that ‘although the test is objective, it may be that the alleged vilifier must take the other person or group as he or she finds them’.¹¹⁰

Hely J in *Jones v Scully*¹¹¹ held that ‘as the test is an objective one it is not necessary for an applicant to prove that any person was actually offended, insulted, humiliated or intimidated by the conduct in question’.¹¹²

(b) Otherwise than in Private

The RDA requires that the statement in question be made otherwise than in private. It is clear that the focus in s18C is on the nature of the act, rather than its physical location per se: an act does not need to have occurred in a ‘public place’ for it to satisfy the requirement that the act has occurred ‘otherwise than in private’. Commissioner Innes made this observation in *Korczac v Commonwealth of Australia (Department of Defence)*¹¹³ and stated that, reading the RDA as a

¹⁰⁸ *Bryant v Queensland Newspapers Pty Ltd* (Unreported, HREOC, Sir Ronald Wilson, 15 May 1997).

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

¹¹⁰ *Ibid* 20.

¹¹¹ [2002] FCA 1080, [245].

¹¹² *Ibid* 99.

¹¹³ (Unreported, HREOC, Commissioner Innes, 16 December 1999). Extract at (2000) EOC 93-056.

whole, the phrase ‘otherwise than in private’ should be read consistently with the broad concept of ‘public life’ that appears in s9 of the RDA and Article 5 of CERD.¹¹⁴

Examples of this requirement being satisfied are leaflets being distributed to people in a certain area, including placement of material in their letterboxes¹¹⁵ and the publication of material on a non-password protected Internet site.¹¹⁶

(c) Persons to Whom the Provisions Apply

Section 18C(1) of the RDA operates to protect a person or group who possess a particular ‘race, colour or national or ethnic origin’. In *HHC*,¹¹⁷ Commissioner Cavanough accepted that Jews in Australia should be regarded as a group with common ethnic origins for the purposes of Part IIA of the RDA.¹¹⁸ It was also noted that the legislature expressed an intention to provide protection from racial hatred to ‘peoples such as Sikhs, Jews and Muslims’.¹¹⁹

(d) Requisite Causal Relationship

In *HHC*,¹²⁰ Commissioner Cavanough held that the phrase ‘because of’ in s18C(1)(b) requires ‘a relationship of cause and effect’ between the act complained of and the race, colour, national or ethnic origin of the relevant person or group of people.¹²¹ The Commissioner considered the view of Commissioner Johnston in *Bryl & Kovacevic v Nowra and Melbourne Theatre Company*¹²² that the relevant inquiry was whether the national or ethnic origin was ‘a cause which contributed to the conduct’ and suggested that such an approach may not always be appropriate. Commissioner Cavanough stated:

I would agree that it is necessary to show a relationship of cause and effect between the act complained of and the race, colour, national or ethnic origin of a relevant person or group of people. But, at least in a case where the very thing complained of is the vilification of a person or group of persons expressly by reference to their race or ethnic origin, it is important not to over-analyse the case so as to discern a further or separate requirement that the act of racial/ethnic vilification be engaged in because of the race/ethnicity of the victim(s). To do so may introduce a double requirement which is not actually contained in s18C(1) on a fair reading of it.¹²³

It is clear from s18B however, that it is not necessary that racial hatred be the dominant cause and neither can racial hatred be ‘a mere ‘background factor’ to satisfy s18C.¹²⁴

(e) Defences

Commissioner Cavanough in *HHC*¹²⁵ considered whether the law infringed upon the constitutional implication of freedom of political communication. He referred to *Lange v*

¹¹⁴ Ibid 29.

¹¹⁵ *HHC & Jones v Scully* (Unreported, HREOC, Commissioner Cavanough, 21 September 2000).

¹¹⁶ *Jones v Toben* (Unreported, HREOC, Commissioner McEvoy, 5 October 2000). Extract at (2000) EOC 93-110.

¹¹⁷ (Unreported, HREOC, Commissioner Cavanough, 21 September 2000).

¹¹⁸ See also *Jones v Toben* (Unreported, HREOC, Commissioner McEvoy, 5 October 2000) 28; *Jones v Scully* [2002] FCA 1080.

¹¹⁹ (Unreported, HREOC, Commissioner Cavanough, 21 September 2000) 18, noting the Explanatory Memorandum for the *Racial Hatred Bill* 1994.

¹²⁰ Ibid.

¹²¹ Ibid 22.

¹²² (Unreported, HREOC, Commissioner Johnston, 21 June 1999).

¹²³ (Unreported, HREOC, Commissioner Cavanough, 21 September 2000) 23.

¹²⁴ See *HHC & Jones v Scully* (Unreported, HREOC, Commissioner Cavanough, 21 September 2000) 22-23; *Jones v Toben* (Unreported, HREOC, Commissioner McEvoy, 5 October 2000) 29-30.

¹²⁵ (Unreported, HREOC, Commissioner Cavanough, 21 September 2000).

*Australian Broadcasting Corporation*¹²⁶ and *Levy v Victoria*.¹²⁷ He found that while the restrictions imposed by s18C(1) of the RDA might, in certain circumstances, burden freedom of communication about government and political matters, bearing in mind the exemptions available, Part IIA of the RDA was ‘reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of government prescribed under the Constitution’.¹²⁸ The legitimate end included the fulfilment of Australia’s international obligations under CERD, in particular Article 4.

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

Commissioner McEvoy in *Jones v Toben*¹²⁹ considered a complaint in relation to a website which published material that the applicant claimed was ‘malicious anti-Jewish propaganda’.¹³⁰ The material on the website purported to investigate ‘the allegations that Germans systematically killed six million Jews’ as well as the ‘Jewish-Bolshevik Holocaust’. It also contained other material about Jewish people more generally. Commissioner McEvoy held that proving the truth of a statement is not, of itself, a defence against a claim that the statement constitutes racial hatred, although it may be relevant in the context of other defences available.

The Federal Court in *Jones v Scully*¹³¹ considered allegations that the respondent had distributed leaflets and brochures offensive to Jewish people in contravention of Part IIA of the RDA. The Federal Court noted that the truth or falsity of a statement is not determinative of whether or not it is ‘offensive’. The fact that an assertion may be wrong does not, of itself, establish a breach of s18C, nor is a true statement incapable of being offensive. However, the possible relevance of the truth or falsity to the question of offensiveness was left open. The Federal Court held:

The present proceedings were not concerned with the truth or falsity of what was distributed by the respondent; rather, it was concerned with whether her leaflets were reasonably likely to offend, insult, humiliate or intimidate Jews in Australia. Although I appreciate that the truth or falsity of what is contended in the respondent's leaflets is relevant to this question, as I have explained above at [104] the fact that false assertions are made in a leaflet does not of itself establish a contravention of s18C.¹³²

ii. The Law as Interpreted by the Federal Court and FMS

It is now helpful to consider the manner in which the Federal Court and FMS have dealt with the elements of racial hatred required by s18C of the RDA.

¹²⁶ (1997) 189 CLR 520.

¹²⁷ (1997) 189 CLR 579.

¹²⁸ (Unreported HREOC, Commissioner Cavanaugh, 21 September 2000) 12-14.

¹²⁹ (Unreported, HREOC, Commissioner McEvoy, 5 October 2000) 13.

¹³⁰ *Ibid* 13.

¹³¹ [2002] FCA 1080. The Court declined to order a retraction as ‘a retraction is only appropriate where it has been established by an applicant that what has been published or disseminated by a respondent is false.’ Note that despite the date of this decision, it was decided under the law prior to the HRLA Act amendments, having originally been a complaint determined by HREOC.

¹³² *Ibid* [245].

(a) Objective Standard

Kiefel J held in *Creek*¹³³ that the act in question must have ‘profound and serious effects, not to be likened to mere slights’.¹³⁴ Her Honour noted that the nature or quality of the act in question is tested by the *effect* which it is reasonably likely to have on another person of the applicant’s racial or other group. Kiefel J stated that the question to be determined is whether the act in question can, ‘in the circumstances be regarded as reasonably likely to offend or humiliate a person in the applicant’s position’.¹³⁵

In *Creek*¹³⁶ the respondent had published an article concerning the decision by the Queensland Department of Family Services, Youth and Community Care to place a young Aboriginal girl in the custody of the applicant, a relative of the child’s deceased mother and guardian of the child’s two brothers. The child had previously been in the foster care of a non-Aboriginal family. The focus of the article was whether the Department’s decision was a reaction to the ‘*Stolen Generation*’ report, which had been published earlier that year and had spoken of Aboriginal people having in the past suffered because of their removal from their families.

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

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

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

... feel offended, insulted or humiliated if they were portrayed as living in rough bush conditions in the context of a report which is about a child’s welfare. In that context it is implied that that person would be taking the child into less desirable conditions. The offence comes not just from the fact that it is wrong, but from the comparison which is invited by the photographs.¹³⁷

In *Horman v Distribution Group Limited*¹³⁸ (*Horman*) the applicant submitted that the use of the word ‘wog’ in relation to the applicant and others was offensive and discriminatory to the applicant. There was also evidence that the applicant used the word herself with respect to another employee. Raphael FM stated that he was prepared to find that the applicant did use the word herself, stating:

¹³³ [2001] FCA 1007.

¹³⁴ *Ibid* [16].

¹³⁵ *Ibid* [12].

¹³⁶ [2001] FCA 1007.

¹³⁷ *Ibid* [13].

¹³⁸ [2001] FMCA 52.

...the very words used indicated that when she used them she intended to insult [the other employee]. It follows from this that she believed that the word ‘wog’ could be used in an insulting manner, and I am prepared to find that in the instances in which I have accepted that it was used, that it was used in that way with respect to the applicant.¹³⁹

Context is an important consideration in determining whether a particular act constitutes racial hatred and absent any clear indication to the contrary words spoken should be interpreted as having their obvious meanings. This is illustrated in *Charan v Commonwealth Insurance Limited*¹⁴⁰ where the applicant complained that she was treated less favourably on the basis of her race during her employment with the respondent and that she was ultimately dismissed by the respondent by reason of her race. She also complained that she was called a ‘bitch’ and a ‘shit’ by an employee of the respondent and that this amounted to a breach of s18C of the RDA. Driver FM dismissed the application, stating:

I find, on the balance of probabilities, that the applicant was not called a ‘bitch’ or ‘shit’ by any employee or agent of the respondent. Even if an employee or agent of the respondent had used those words they were not racially motivated. Those words, if used, were a result of personal animosity. The words themselves are not obviously referable to any race or racial characteristic.¹⁴¹

In *Hagan*,¹⁴² Drummond J considered whether or not the use of the word ‘nigger’ was offensive to indigenous people in the naming of the ‘ES “Nigger” Brown Stand’.¹⁴³ His Honour noted evidence from witnesses of Aboriginal descent that neither they, nor members of the broader Toowoomba Aboriginal community, were, in fact, offended by the use of the word in this context. Drummond J also took into account the fact that the allegedly offensive word had been displayed for 40 years and there had never been any objection to it prior to the relevant complaint.¹⁴⁴

(b) Otherwise than in Private

Driver FM held in *Gibbs v Wanganeen*¹⁴⁵ (*Gibbs*) that the applicant bears the onus of establishing that the relevant act was done otherwise than in private.

The FMS in both *McMahon v Bowman*¹⁴⁶ and *Gibbs*¹⁴⁷ cited with approval the decision of Commissioner Innes in *Korzac v Commonwealth of Australia (Department of Defence)*,¹⁴⁸ to the effect that the act must be done otherwise than in private, but need not be done ‘in public’.

Driver FM in *Gibbs*¹⁴⁹ applied the reasoning of Commissioner Innes, stating that s18C(2) of the RDA ‘is inclusive but not exhaustive of the circumstances in which an act is to be taken as not being done in private’.¹⁵⁰ Driver FM took a broad interpretive approach to the provision, stating that ‘[t]he legislation is remedial and its operation should not be unduly confined’.¹⁵¹ His Honour

¹³⁹ Ibid [55].

¹⁴⁰ [2002] FMCA 50.

¹⁴¹ Ibid [59].

¹⁴² [2000] FCA 1615, [15].

¹⁴³ Ibid.

¹⁴⁴ Ibid [28]-[31]

¹⁴⁵ [2001] FMCA 14, [7].

¹⁴⁶ [2000] FMCA 3.

¹⁴⁷ [2001] FMCA 14.

¹⁴⁸ (Unreported, HREOC, Commissioner Innes, 16 December 1999).

¹⁴⁹ [2001] FMCA 14.

¹⁵⁰ Ibid [11].

¹⁵¹ Ibid [12].

suggested that it was ‘not possible for Parliament to stipulate all circumstances where a relevant act is to be taken as not being done in private’.¹⁵²

Driver FM found that certain comments made in a prison were ‘in private’.¹⁵³ His Honour considered the Victorian case of *McIvor v Garlick*¹⁵⁴ which addressed the meaning of a public place under the Victorian *Summary Offences Act 1966*.¹⁵⁵ He noted that the case was a material guide to the meaning of the words ‘public place’ at common law.¹⁵⁶

In deciding whether a prison is a public place, Driver FM noted that a prison is a closed community to which access and egress are strictly regulated.¹⁵⁷ His Honour suggested that because prisoners live there, it has some of the attributes of a private home¹⁵⁸ and he concluded that it is not in general a public place, although some parts may be a public place depending on the circumstances. Furthermore, it is possible that an act done within a prison may be done otherwise than in private, depending upon the circumstances, even if done in a place that is not a public place.¹⁵⁹ His Honour reasoned that an act may take place there otherwise than in private if members of the public, meaning ‘persons other than prisoners or correctional staff’ were actually present in the area at the place where the act occurred, when it occurred, or at least within earshot.¹⁶⁰ Driver FM also referred to the ‘quality of the conversation’. His Honour noted that ‘the exchange was intended by the respondent to be a private one’ and concluded that the statements were not made ‘otherwise than in private’.¹⁶¹

In *McMahon v Bowman*,¹⁶² words shouted across a laneway between one house and another were taken to be in the sight or hearing of people in a public place for the purpose of s18C(2)(c) as it would be ‘reasonable to conclude that they were spoken in such a way that they were capable of being heard by some person in the street if that person was attending to what was taking place’.¹⁶³ It was not necessary to prove that the people who were present in the street at the time of the incident heard what occurred.¹⁶⁴ In *Chambers v Darley*¹⁶⁵ Baumann FM referred approvingly to this analysis.

In *McGlade v Lightfoot*,¹⁶⁶ Carr J held, in dismissing an application by the respondent for summary dismissal, that it was ‘reasonably arguable’ that the act of a politician giving an interview to a journalist and ‘using the words complained of was an act which caused the same words to be communicated to the public’.¹⁶⁷ Moreover, Carr J held that ‘[t]he same applies, in my view, to the subsequent ‘picking up’ by a local newspaper of the original article published in a national newspaper’.¹⁶⁸

¹⁵² *Ibid.*

¹⁵³ *Ibid* [18].

¹⁵⁴ [1972] VR 129.

¹⁵⁵ [2001] FMCA 14, [13].

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid* [14].

¹⁵⁸ *Ibid* [15].

¹⁵⁹ *Ibid* [14].

¹⁶⁰ *Ibid* [17].

¹⁶¹ *Ibid* [18].

¹⁶² [2000] FMCA 3.

¹⁶³ *Ibid* [26].

¹⁶⁴ Raphael FM based this view on other cases dealing with ‘public place’ in a summary offences context: *R v James Webb* [1848] 2 C & K 933 as applied in *Purves v Inglis* [1915] 34 NZLR 1051.

¹⁶⁵ [2002] FMCA 3, [10].

¹⁶⁶ [2002] FCA 752, [34].

¹⁶⁷ *Ibid* [26].

¹⁶⁸ [2002] FCA 752, [34]. Note, however, that these views were expressed as being provisional and subject to re-consideration at the final hearing of this matter; [37].

(c) Persons to Whom the Provisions Apply

As outlined above, *Creek*¹⁶⁹ concerned a newspaper article the subject of which was the transfer of an Aboriginal child from foster care to the care of the applicant, an Aboriginal woman. The applicant alleged that she was portrayed in a photograph accompanying the article in a manner that contravened s18C of the RDA.

Kiefel J held that when considering s18C(1)(a), it is necessary to define the relevant group of which the applicant is a member, finding that ‘race’ may be too wide a description in some cases. She noted that in the context of the present case, ‘Aboriginal peoples’ views about being portrayed as having a more traditional lifestyle, will differ depending upon where and in what circumstances they live. Kiefel J accepted a narrow definition of the applicant’s group, namely Aboriginal mothers, or carers of children, residing in the applicant’s town.¹⁷⁰

(d) Requisite Causal Relationship

Drummond J held in *Hagan*¹⁷¹ that s18C(1)(b) implies that there must be a causal relationship between the reason for doing the act and the race of the ‘target’ person or group.¹⁷² His Honour also held that s18C(1)(b) should not be interpreted mechanically, but rather, should be applied in light of the purpose and statutory context of s18C – namely, as a prohibition of behaviour based on racial hatred.¹⁷³ Drummond J concluded, after examining the Second Reading Speech of the RDA, that ‘it would give s18C an impermissibly wide reach to interpret it as applying to acts done specifically in circumstances where the actor has been careful to avoid giving offence to a racial group who might be offended’.¹⁷⁴

Kiefel J held similarly in *Creek*¹⁷⁵ that s18C(1)(b) requires a consideration of the reason for the relevant act. However, her Honour held that the reference in the heading of Part IIA to ‘behaviour based on racial hatred’ does not create a separate test requiring the behaviour to have its basis in actual hatred of race. Sections 18B and 18C establish that the prohibition will be breached if the basis for the act was the race, colour, national or ethnic origin of the other person or group. Whilst the reason for the behaviour may be a matter for enquiry, the intensity of feeling of the person committing the act need not be considered (although it may explain otherwise inexplicable behaviour).¹⁷⁶

In *Miller v Wertheim*,¹⁷⁷ the Full Court of the Federal Court of Australia held that a speech made by the first respondent may have been reasonably likely, in all the circumstances, to offend a small part of the Orthodox Jewish community. However, this did not, in itself, satisfy the requisite causal relationship of s18C because

¹⁶⁹ [2001] FCA 1007.

¹⁷⁰ *Ibid* [13].

¹⁷¹ [2000]FCA1615.

¹⁷² *Ibid* [16].

¹⁷³ *Ibid* [34].

¹⁷⁴ *Ibid* [36].

¹⁷⁵ [2001] FCA 1007.

¹⁷⁶ *Ibid* [18].

¹⁷⁷ [2002] FCAFC 156.

[t]he group and its members were criticised in the speech because of their allegedly divisive and destructive activities, and not because the group or its members were of the Jewish race, of Jewish ethnicity or because they were persons who adhered to the practices and beliefs of orthodox Judaism.¹⁷⁸

iii. Conclusion

The decision of Commissioner Innes in *Korczac v Commonwealth of Australia (Department of Defence)*¹⁷⁹ was cited with approval in relation to the issue of whether an act occurs ‘otherwise than in private’. There was otherwise little reference to earlier decisions in the recent decisions of the FMS and Federal Court, although they appear to have developed the jurisprudence consistently with earlier decisions on issues such as the objective nature of the test to be applied and the nature of the ‘causal relationship’ required.

(F) Human Rights and Fundamental Freedoms

Section 9 of the RDA provides protection for a person’s human rights and fundamental freedoms ‘on an equal footing’ with persons of other races. Section 10 provides for the equal enjoyment of rights by people of different races. In applying these provisions, the courts have considered closely the meaning of the terms ‘human rights’ and ‘fundamental freedoms’.

i. The Law under the HREOC Hearing Function

The High Court has given consideration to the meaning of human rights and fundamental freedoms protected by ss 9 and 10. In *Gerhardy v Brown*,¹⁸⁰ Mason J noted that the rights protected under s10(1) (and s9(1)) are not confined to rights of the kind referred to in Article 5 of CERD. His Honour held:

The expression ‘human rights’ is commonly used to denote the claim of each and every person to the enjoyment of rights and freedoms generally acknowledged as fundamental to his or her existence as a human being and as a free individual in society ... As a concept, human rights and fundamental freedoms are fundamentally different from specific or special rights in our domestic law which are enforceable by action in the courts against other individuals or against the State, the content of which is more precisely defined and understood.¹⁸¹

¹⁷⁸ Ibid [12]-[13].

¹⁷⁹ (Unreported, HREOC, Commissioner Innes, 16 December 1991).

¹⁸⁰ (1985) 159 CLR 70.

¹⁸¹ Ibid 101,102.

Similarly, Brennan J stated:

The term connotes the rights and freedoms which must be recognized and observed, and which a person must be able to enjoy and exercise, if he is to live as he was born - 'free and equal in dignity and rights', as the Universal Declaration of Human Rights proclaims... The conception of human rights and fundamental freedoms in the Convention definition of racial discrimination describes that complex of rights and freedoms the enjoyment of which permits each member of a society equally with all other members of that society to live in full dignity, to engage freely in any public activity and to enjoy the public benefits of that society.¹⁸²

The High Court also considered the expression 'right' in *Mabo v The State of Queensland (No. 1)*,¹⁸³ Deane J stating:

The word 'right' is used in s10(1) in the same broad sense in which it is used in the International Convention, that is to say, as a moral entitlement to be treated in accordance with standards dictated by the fundamental notions of human dignity and essential equality which underlie the international recognition of human rights: cf. the preamble to the International Convention.¹⁸⁴

In *Secretary, Department of Veteran's Affairs v Mr and Mrs P*,¹⁸⁵ the Federal Court considered whether entitlement to a war veteran's benefit (namely a government-subsidised housing loan) was a right or freedom protected by ss9(1) or 10 of the Act. The matter came before the Federal Court as a review of a decision of HREOC under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*.¹⁸⁶ Drummond J held:

Although it is well-established, as the Commissioner recognised, that neither s9(1) nor s10(1) of the RD Act is confined to the rights actually mentioned in Article 5 of the Convention, those sections are nevertheless concerned only with rights fundamental to the individual's existence as a human being. In *Ebber v Human Rights and Equal Opportunity Commission* (1995) 129 ALR 455, I reviewed relevant High Court authority and said, at 475:

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

I concluded, at 476-477:

*...the rights and freedoms protected by ss9(1) and 10(1) [the RD Act] do not encompass every right which a person has under the municipal law of the country that has authority over him or every other right which he may claim; rather are those sections limited to protecting those particular rights and freedoms with which the Convention is concerned and those other rights and freedoms which, like those specifically referred to in the Convention, are fundamental to the individual's existence as a human being.*¹⁸⁷

Drummond J held the right to the war veteran's benefit in question 'cannot be characterised as a right of the kind which is the concern of s9 and s10 of the RD Act'¹⁸⁸ as the benefit, being 'confined to those persons who have served the interests of one nation against the interests of

¹⁸² Ibid 125-6.

¹⁸³ (1988) 166 CLR 186.

¹⁸⁴ Ibid 229.

¹⁸⁵ (1998) 160 ALR 421.

¹⁸⁶ (Unreported, HREOC, Commissioner Keim, 24 July 1997).

¹⁸⁷ Ibid 426. In *Ebber* Drummond J held that the applicants' claim that their German educational qualifications (in architecture) should be accepted as sufficient for the purposes of registration under Queensland law is not of itself a claim to a human right or fundamental freedom of the type protected by ss9 and 10.

¹⁸⁸ Ibid 427.

other nations, stands outside the range of universal human rights'.¹⁸⁹ Further, the benefit 'cannot be regarded as falling within the kind of right to social security and social services mentioned in para (e)(iv) of Article 5' of CERD as para (e)(iv) 'deals only with State-provided assistance to alleviate need in the general community and with benefits provided to advance the well-being of the entire community of the kind that many national states now make available to their citizens'.¹⁹⁰

In *Macabenta*,¹⁹¹ Tamberlin J held:

Although Article 5 of the Convention is cast in wide terms in respect of the right to residence, it does not follow that every non-citizen who lawfully enters Australia has any claim by way of a right to permanently reside here. The equality envisaged in the enjoyment of the enumerated rights does not encompass circumstances where a government, on compassionate grounds, has declined to return a group of persons from certain states to their national states. Therefore, the law does not unequally affect persons from other countries who do not have a similar history and who are differently affected because of that history.¹⁹²

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ (1998) 154 ALR 591.

¹⁹² Ibid 600.

ii. **The Law as Interpreted by the Federal Court and FMS**

In *Hagan*¹⁹³ Drummond J held, citing *Ebber*:¹⁹⁴

[Section 9(1)] is not directed to protecting the personal sensitivities of individuals. It makes unlawful acts which are detrimental to individuals, but only where those acts involve treating the individual differently and less advantageously to other persons who do not share membership of the complainant's racial, national or ethnic group and then only where that differential treatment has the effect or purpose of impairing the recognition etc of every human being's entitlement to all the human rights and fundamental freedoms listed in Article 5 of [ICERD] or basic human rights similar to those listed in Article 5.¹⁹⁵

This includes the right of every person who is a member of a particular racial group to go about his or her recreational and other ordinary activities without being treated by others less favourably than persons who do not belong to that racial group. This point was upheld on appeal.¹⁹⁶

Drummond J held that the maintenance of a sign saying 'The ES "Nigger Brown" Stand' at an athletic oval by trustees who had satisfied themselves it would not give offence to Aboriginal persons generally did not,

... even if based on race, [involve] any distinction etc having either the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom of the kind referred to in s9. Only Mr Hagan's personal feelings were affected by the act. Because there was no distinction etc produced by the act capable of affecting detrimentally in any way any human rights and fundamental freedoms, there was no racial discrimination involved in the act.¹⁹⁷

iii. **Conclusion**

The Federal Court and FMS continue jurisprudential developments of the pre-HRLA Act period by ensuring that 'human rights' and 'fundamental freedoms' are interpreted as referring to rights and freedoms that are fundamental in nature and of general application, as distinct from the assertion of a 'right' that is personal to the claimant.

2.2.2 Case Digest

(A) **Rights to Equality before the Law – s10 of the RDA.**

In *Sahak v Minister for Immigration & Multicultural Affairs*,¹⁹⁸ Goldberg and Hely JJ referred to *Mabo v State of Queensland*¹⁹⁹ in stating:

Section 10 of the RDA is concerned with the operation and effect of laws, rather than with the activities or conduct of individuals. It is the practical operation and effect of the impugned law which is relevant²⁰⁰.

¹⁹³ [2000] FCA 1615.

¹⁹⁴ [1995] 129 ALR 455.

¹⁹⁵ [2000] FCA 1615, [38].

¹⁹⁶ (2000) 105 FCR 56, [28].

¹⁹⁷ [2000] FCA 1615.

¹⁹⁸ [2002] FCAFC 215.

¹⁹⁹ (1988) 166 CLR 186, 230.

²⁰⁰ [2002] FCAFC 215, [34].

Their Honours continued:

‘[i]n order to enliven the operation of s10 of the RDA, [one] must establish both that the prejudice of which complaint is made arises by reason of a statutory provision whose purpose or effect is to create racial discrimination, and also that the prejudice amounts to an exclusion from, or impairment of, a human right or fundamental freedom, or a right of a kind referred to in Article 5 of the [International Convention on the Elimination of All Forms of Racial Discrimination (1975)]’.²⁰¹

(B) Special Measures – s8(1) of the RDA.

In *Bruch v Cth of Australia*,²⁰² a non-indigenous Australian student claimed that the Commonwealth had unlawfully discriminated against him in contravention of ss9 and 13 of the RDA by virtue of his ineligibility for ABSTUDY benefits. McInnis FM held that the ABSTUDY scheme did not cause the Commonwealth to contravene the RDA because it constituted a ‘special measure’ for the benefit of Indigenous people within the meaning of s8(1) of the RDA.²⁰³

(C) Breach of a Human Right does not necessarily amount to Breach of RDA

In *Li v Minister for Immigration & Multicultural Affairs*,²⁰⁴ Emmett J held that while it may be that the applicants can prove that they were denied a particular right, it did not follow that there had been discrimination. In that case, Emmett J suggested that the applicant may have been able to prove that they had been denied the right to ‘security of person and protection by the State against violence or bodily harm whether inflicted by government officials or by any individual group or institution’²⁰⁵ as required by Article 5 of CERD to which s10(2) of the RDA refers. However, this did not in and of itself mean that ‘the applicants, as persons of a particular race, colour or national or ethnic origin, do not enjoy that right in so far as that right is also enjoyed by persons of another race, colour or national or ethnic origin’.²⁰⁶

(D) Using Civil Proceedings to Challenge a Criminal Conviction

In *Michaels v Commonwealth*²⁰⁷ the applicant alleged that acts by a member of the National Crime Authority which lead to his conviction, namely false accusation, evidence tampering and perjury, involved a distinction or preference based on national origin or race with the purpose or effect of denying the applicant the enjoyment of his liberty, for the purposes of s9(2) of the RDA.

The Federal Court refused to grant an extension of time to commence proceedings, stating:

In my view, in the light of the authorities to which I have referred, I should not, as a matter of principle, permit a suit in this Court the avowed and central aim of which is to call for a finding that the criminal conviction of the applicant was wrongly made, that is to collaterally attack the conviction. Alternatively, the overwhelming public policy evident in the cases to which I have referred persuades me that I should not, as a matter of discretion, allow this to happen and that I should not exercise my discretion to give any extension of time for that reason.²⁰⁸

²⁰¹ Ibid [35].

²⁰² [2002] FMCA 29.

²⁰³ Ibid [51].

²⁰⁴ [2001] FCA 1414.

²⁰⁵ Ibid [19].

²⁰⁶ Ibid.

²⁰⁷ [2002] FCA 1130.

²⁰⁸ Ibid [48].

(E) Material in Correspondence Failing to show Unlawful Discrimination

In *Paramasivam v Shier*,²⁰⁹ the applicant had claimed that the responses to her letters to the Australian Broadcasting Commission were inadequate and that the respondents had discriminated against her on the grounds of race on account of their failure to respond to what she described as ‘my expressions of ethnic knowledge’.²¹⁰ The Full Federal Court, on appeal from the decision of Lindgren J at first instance,²¹¹ agreed with his Honour’s finding that there was nothing in any of the material that would support a contrary conclusion that ‘no reasonable cause of action of unlawful discrimination’ was made out.²¹²

2.2.3 Damages

(A) Damages Awards under the HREOC Hearing Function

Prior the commencement of the HRLA Act, it appears to have been accepted that the principles discussed in *Hall v Sheiban*²¹³ (*Sheiban*) in relation to assessment of damages under the SDA, applied equally to assessment of damages under the RDA: that is, tort principles should be applied, albeit flexibly.²¹⁴

A further interesting feature of RDA remedies jurisprudence during the pre-HRLA Act period was the making of orders for apologies.²¹⁵

The highest award of compensation in respect of breaches of the RDA prior to the commencement of the HRLA Act was \$55,000 awarded by Commissioner Webster in *Rugema v Gadsten P/L & Derkes*.²¹⁶ The Commissioner allowed \$30,000 in respect of pain and suffering and loss of enjoyment associated with a major depressive disorder resulting from racial abuse. The balance of the award was in respect of lost wages and future loss of income.

(B) Damages Awards under the FMS and Federal Court

In *McMahon v Bowman*²¹⁷ Driver FM, in considering the appropriate amount of the award of damages, excluded the altercation between Mr Bowman and Mr McMahon that had formed part of the complaint on the basis that the altercation was the subject of proceedings in the local court (where Mr McMahon was defending a charge of assault) ‘as Mr McMahon should not be twice punished for his actions’.²¹⁸ His Honour was of the view that the words the subject of the complaint,

²⁰⁹ [2002] FCAFC 142.

²¹⁰ *Ibid* [3].

²¹¹ *Paramasivam v Shier* [2001] FCA 545.

²¹² [2002] FCAFC 142, [6].

²¹³ (1989) 20 FCR 217.

²¹⁴ See, by way of example, *V v Australian Red Cross* (Unreported, HREOC, Commissioner Johnston, 30 March 1999) and *Ardeshirian v Robe River Iron Associates* (1993) 43 FCR 475 and *Jacobs v Fardig* (Unreported, HREOC, Commissioner Innes, 27 April 1999).

²¹⁵ See, by way of example, *Wagga Wagga Action Group v Eldridge* (1995) EOC 92-701 and *Hobart Hebrew Congregation and Jones v Scully* (Unreported, HREOC, Commissioner Cavanough, 21 December 2000).

²¹⁶ (Unreported, HREOC, Commissioner Webster, 26 June 1997).

²¹⁷ [2000] FMC 3.

²¹⁸ *Ibid* [30].

addressed as they were to an entire family including impressionable children, were insulting and the appropriate amount of compensation would be \$1,500.

In the case of *Horman*,²¹⁹ the applicant partially succeeded in her complaints under the RDA and the SDA. In awarding damages, Raphael FM took into account the medical symptoms the applicant suffered (mainly anxiety and panic attacks, confirmed by medical practitioners, and concern over the possibility of miscarriage), and the type of incident to which the applicant was subjected. His Honour awarded \$12,500 including special damages for medication costs.²²⁰

Although the complaint was not upheld in *Creek*,²²¹ Kiefel J noted that, if the applicant had been successful, an apology would not have been worthwhile with respect to the readership of the newspaper in which the allegedly vilificatory material was published, due to the lapse of almost four years. Kiefel J suggested, however, that a short apology would have been ordered because it may have helped vindicate the applicant in the eyes of her own community. In reaching this view, Kiefel J took into account the increased hurt caused by the respondent to the applicant by the perceived loss of regard in which she was formerly held in her community. A failure of the respondent to acknowledge that it had acted for racist reasons, and the withholding of an apology would be taken into account in assessing the extent of the injury and corresponding compensation to redress it.²²² Kiefel J did not consider it necessary to consider separate and additional awards of aggravated damages. Her Honour stated that she would have made an award of \$8000.²²³

In *Gibbs*,²²⁴ Driver FM also considered the relief that he would have awarded had the complaint succeeded. His Honour concluded that because the applicant, a prison officer, had complained under the prison complaints procedure and the respondent was already subjected to a penalty, it would be neither necessary nor desirable to impose an additional penalty.²²⁵ However his Honour stated that ‘the legislation is not punitive, it is compensatory’²²⁶ and noted that where a person sustains injury to their feelings or otherwise some form of compensation may be necessary.

His Honour suggested that although the FMS cannot arbitrarily refuse relief where it is called for, as a general principle, matters such as this can and should be adequately dealt with in accordance with the rules regulating conditions within the prison.²²⁷

²¹⁹ [2001] FMCA 52. An application for leave to appeal from this decision out-of-time was refused; see *Horman v Distribution Group Ltd t/as Repco Auto Parts* [2002] FCA 219.

²²⁰ *Ibid* [70].

²²¹ [2001] FCA 1007.

²²² *Ibid* [34].

²²³ *Ibid* [35].

²²⁴ [2001] FMCA 14.

²²⁵ *Ibid* [20].

²²⁶ *Ibid* [21].

²²⁷ *Ibid* [21].

2.3 Sex Discrimination

2.3.1 Matters of Interest

(A) The Relationship between Sex Discrimination and Sexual Harassment

i. The Law under the HREOC Hearing Function

The relationship between the grounds of sexual harassment and sex discrimination in employment has long been an issue for judicial consideration. Prior to the legislative proscription of sexual harassment as a separate ground of discrimination by the Commonwealth and all of the States and Territories, the NSW Equal Opportunity Tribunal held that unwelcome sexual conduct was sex discrimination under the *Anti-Discrimination Act 1977* (NSW) (as it then was) in the decision of *O'Callaghan v Loder*.²²⁸

The issue also arose in relation to the SDA, even after the insertion of the sexual harassment provisions (ss28 and 29 as they then were), in the decision of *Aldridge v Booth*.²²⁹ Spender J held that sexual harassment was a form of sex discrimination (a finding necessary to constitutionally justify the sexual harassment provisions of the SDA as the *Convention on the Elimination on All Forms of Discrimination Against Women* (CEDAW),²³⁰ the supporting treaty for the SDA, does not expressly proscribe sexual harassment). This position was supported by the decision of *Sheiban*²³¹ in which French J held that s28 of the SDA (the pre cursor to the current sexual harassment provisions in the SDA) 'puts beyond doubt that sexual harassment is a species of unlawful sex discrimination...[t]he requirements of s14 relating to discriminatory treatment in the terms and conditions of employment or subjection to detriment are subsumed in the nature of the prohibited conduct.'²³² Lockhart J stated²³³ that it was an open question as to whether sex discrimination was wide enough to encompass sexual harassment, but that a finding that s14 does not include sexual harassment of the kind to which s28 is directed would appear contrary to the trend of judicial opinion. Wilcox J expressed no view on the matter.²³⁴

This aspect of the decision in *Sheiban*²³⁵ was followed in subsequent HREOC decisions.²³⁶

ii. The Law as Interpreted by the Federal Court and the FMS

Following the commencement of the HRLA Act, Wilcox J considered this issue in *Gilroy v Angelov, Botting & Botting t/as C & T Botting Cleaning Co*²³⁷ (*Gilroy*). In that case, the applicant lodged a complaint under both ss14 and 28B of the SDA alleging sexual harassment against a fellow employee and sex discrimination against her employer. Although Wilcox J was satisfied

²²⁸ [1984] EOC 92-023.

²²⁹ [1988] EOC 92-222.

²³⁰ Opened for signature 18 December 1979, [1983] ATS 9, (entered into force generally 3 September 1981, and in Australia 27 August 1983).

²³¹ [1989] 20 FCR 217.

²³² *Ibid* 77,428.

²³³ *Ibid* 77,392.

²³⁴ *Ibid* 77,407.

²³⁵ (1989) 20 FCR 217.

²³⁶ See, for example, *W v Abrop Pty Ltd t/as Schoonens' Computer Services* (1996) EOC 92-858; *Rice v Nolan and Oettle* (2001) EOC 93-128; *Evans v David Lee & Commonwealth Bank* (1996) EOC 92-822; *A v Caboolture Shire Council* (1992) EOC 92-403; *A v B* (1991) EOC 92-367.

²³⁷ [2000] FCA 1775.

that the first respondent did sexually harass the complainant, he expressed reservations about whether s14 applied to this case and stated that s28B was enacted specifically to deal with such complaints:

I have reservations as to whether s14(1) or (2) applies to this case. I think these subsections are intended to deal with acts or omissions of the employer that discriminate on one of the proscribed grounds. It is artificial to extend the concepts embodied in those sections in such a manner as to include the sexual harassment of the employee by another. As it seems to me, it was because s14 did not really fit that case that s28B was enacted. To my mind, s28B covers this case.²³⁸

In contrast, in *Elliott v Nanda & Commonwealth of Australia*²³⁹ (*Elliott*), Moore J disagreed with Wilcox J in *Gilroy*²⁴⁰ ‘to the extent that His Honour could be taken to have expressed the view that s 28B was enacted because it is artificial to extend s14 to situations of sexual harassment.’²⁴¹ Moore J agreed with French J in *Hall v A & A Sheiban P/L*²⁴² and Spender J in *Aldridge v Booth*²⁴³ that ‘s14 is capable of extending to conduct that constitutes sexual harassment under Div 3 of Part II.’²⁴⁴ His Honour went on to say that ‘such a principle is consistent with the purpose of and scheme of the SD Act and also with the overseas jurisprudence set out in *Hall v A & A Sheiban* and *O’Callaghan v Loder* on the nature and scope of “sex discrimination”.’²⁴⁵ Moore J also cited with approval²⁴⁶ decisions of HREOC which had clearly proceeded on the basis that conduct is capable of constituting both sex discrimination under ss5 and 14 and sexual harassment under Div 3 of Pt II.

Moore J was satisfied the conduct of Dr Nanda was in breach of s14(2)(d) and said:

I have found that the conduct of the respondent involving touching the applicant and the sexual references or allusions specifically directed to the applicant were unwelcome, offensive and humiliating to the applicant and that a reasonable person would have anticipated as much. I am therefore satisfied that they imposed a detriment, within the meaning of s14(2)(d), on the applicant on the grounds of her sex.²⁴⁷

This approach was also adopted in *Horman*²⁴⁸ and *Wattle v Kirkland & Kirkland (t/as Kirk’s Radio Cab)*²⁴⁹ and *Wattle v Kirkland & Anor (No.2)*.²⁵⁰

In *Johanson v Blackledge Meats*²⁵¹ (*Johanson*) Driver FM found that the provision by a butcher’s shop to a customer of a dog bone intentionally prepared in a phallic shape constituted sexual harassment. The applicant also alleged that this conduct constituted sex discrimination for the

²³⁸ Ibid [102].

²³⁹ [2001] FCA 418.

²⁴⁰ [2000] FCA 1775

²⁴¹ Ibid [127].

²⁴² (1989) 20 FCR 217.

²⁴³ [1988] EOC 92-222.

²⁴⁴ Ibid [127].

²⁴⁵ Ibid.

²⁴⁶ Ibid [128].

²⁴⁷ Ibid [130].

²⁴⁸ [2001] FMCA 52.

²⁴⁹ [2001] FMCA 66.

²⁵⁰ [2002] FMCA 135, [67]. Driver FM expressly applied the reasoning of French J in *Hall v A & A Sheiban* (1988) 20 FCR 217, 274-277 and Moore J in *Elliott v Nanda & Commonwealth* [2001] FCA 418 [125]-[130].

²⁵¹ [2001] FMC 6.

purposes of ss5 and 22 of the SDA. The applicant was required to take this approach because the sexual harassment provisions of the SDA have limited operation pursuant to s9(4) of the SDA. Driver FM referred to s9(10) of the SDA which provides that if CEDAW is in force in Australia (which it is), then the sexual harassment provisions have effect in relation to discrimination against women, to the extent that those provisions give effect to CEDAW. Driver FM noted that s9(10) extends the operation of the SDA in relation to discrimination against women and referred to the definition given to discrimination in Article 1 of CEDAW as ‘any distinction, exclusion or restriction made on the basis of sex’ which impairs or nullifies the ‘enjoyment or exercise by women...on a basis of equality of men and women, of human rights and fundamental freedoms’.²⁵²

Noting the decision in *Aldridge v Booth*,²⁵³ Driver FM stated that even though the current sexual harassment provisions in the SDA are wider than those considered in that case, ‘there is no reason to suppose that they do not give effect to [CEDAW]’.²⁵⁴ In the case before his Honour, as there was no other connection with Commonwealth legislative power except that referred to in s9(10), Driver FM considered²⁵⁵ that the conduct of the respondents would not be unlawful sexual harassment unless it also constituted unlawful sex discrimination.

Applying the reasoning of Samuels JA in *Jamal v Secretary of Department of Health*,²⁵⁶ Driver FM held that in order to constitute discrimination within the meaning of ss5 and 22 of the SDA (and hence to constitute unlawful sexual harassment within the SDA by reason of s9(10)), the respondents must have engaged in some conduct which was deliberate and which was referable to the applicant’s sex, or a characteristic of her sex.²⁵⁷ His Honour concluded that this test had been satisfied on the evidence.

iii. Conclusion

Apart from the decision of Wilcox J in *Gilroy*,²⁵⁸ the jurisprudence of the Federal Court and FMS adopts the jurisprudence and approach of HREOC.

(B) Sexual Harassment

i. Section 28A of the SDA

Section 28A of the SDA provides:

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

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

²⁵² Ibid [92].

²⁵³ (1988) EOC 92-222.

²⁵⁴ Ibid [94].

²⁵⁵ Ibid.

²⁵⁶ (1988) EOC 92-234.

²⁵⁷ Ibid [95]-[96].

²⁵⁸ [2000] FCA 1775.

- (2) In this section:
conduct of a sexual nature includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

Since the commencement of the HRLA Act, s 28A has been considered by both the FMS and the Federal Court in a number of matters. As will be discussed below, those decisions are largely consistent with the jurisprudence that existed prior to the commencement of the HRLA Act. For ease of reading, those two bodies of jurisprudence have been discussed under joint thematic headings, rather than separating them into headings of ‘pre’ and ‘post’ HRLA Act decisions (as has been done for other matters of interest in this part).

ii. Conduct of a Sexual Nature

It will be apparent that s28A(2) defines the term ‘conduct of a sexual nature’ in a non-exhaustive fashion.

Prior to the commencement of the HRLA Act, a broad interpretative approach was applied in relation to the scope of that term. For example, both in the Federal jurisdiction and in other Australian jurisdictions, exposure to sexually explicit material and sexually suggestive jokes was held to constitute conduct of a sexual nature.²⁵⁹

That line of cases was expressly approved by Driver FM in the cases of *Cooke v Plauen Holdings*²⁶⁰ (*Cooke*) and *Johanson*.²⁶¹ In the latter case, the sale of a dog bone ‘shaped so as to resemble a human penis’ was held to be conduct of a sexual nature.²⁶² Similarly, in the case of *Alekovski v Australia Aerospace Pty Ltd*,²⁶³ Raphael FM found that the conduct of a co-worker of the applicant, including his declaration of love for the applicant, his suggestion that they discuss matters at his home, his reference to the applicant’s relationship with her partner, and then repeating all of these things the following day, getting into a temper and becoming agitated when the applicant refused to do as he wished, constituted unwelcome conduct of a sexual nature.²⁶⁴

HREOC cases also confirmed that while certain conduct may on its own not amount to conduct of a sexual nature, it may do so if it forms part of a broader pattern of inappropriate sexual conduct.²⁶⁵ That view was expressly adopted by Raphael FM in *Shiels v James & Lipman Pty Ltd*²⁶⁶ (*Shiels*), in which it was held that incidents relating to the flicking of elastic bands at the applicant were of a sexual nature as they formed part of a broader pattern of sexual conduct.²⁶⁷

²⁵⁹ *Bennett v Everitt* (1988) EOC 92-244; *Kiel v Weeks* (1989) EOC 92-245; *Horne v Press Clough Joint Venture* (1994) EOC 92-556; *Hooper v Mt Isa Mines* (1997) EOC 92-879; *Doyle v Riley* (1995) EOC 92-748; *Bebington v Dove* (1993) EOC 92-545; *Hawkins v Malnet Pty Ltd* (1995) EOC 92-767; *G v R & Department of Health and Community Services* (Unreported, HREOC, Sir Ronald Wilson, 17 September 1993); *Djokic v Sinclair* (1994) EOC 92-643; *Hill v Water Resources Commission* (1985) EOC 92-127 and *Freeshore v Kozma* (1989) EOC 92-249.

²⁶⁰ [2001] FMCA 91, [24].

²⁶¹ [2001] FMCA 6, [84].

²⁶² *Ibid.*

²⁶³ [2002] FMCA 81.

²⁶⁴ *Ibid.*

²⁶⁵ For example, *Harwin v Pateluch* (Unreported, HREOC, Commissioner O’Connor, 21 August 1995).

²⁶⁶ [2000] FMCA 2.

²⁶⁷ [2000] FMCA 2, [72].

iii. **Single Incidents**

Prior to the commencement of the HRLA Act, it appears to have been accepted that a one-off incident could amount to sexual harassment, as well as on-going behaviour. In *Sheiban*,²⁶⁸ all three members of the Federal Court in separate judgments expressed the view that the then s28(3) of the SDA (now replaced by s28A) was capable of including a single incident. Justice Lockhart stated that s28(3) 'provide[d] no warrant for necessarily importing a continuous or repeated course of conduct.'²⁶⁹ Both Wilcox²⁷⁰ and French²⁷¹ JJ expressed the view that while the ordinary English meaning of the word 'harass' implies repetition, s28(3) did not contain such an element and did not use the word 'harass' to define sexual harassment. French J emphasised that 'circumstances, including the nature and relationship of the parties may stamp conduct as unwelcome the first and only time it occurs'.²⁷²

In *Bennett & Anor v Everitt & Anor*,²⁷³ Einfeld J, as the then President of HREOC, expressed a similar view, stating that in the absence of an invitation or intimation from an employee that sexual advances or conduct would be welcome, the legislation should not be read as permitting a generally available 'trial contact' by an employer to ascertain whether sexual behaviour is consented to or welcomed by an employee.²⁷⁴

This approach has been adopted in relation to s28A in the post HRLA Act cases.²⁷⁵ In addition, Driver FM in both the cases of *Cooke*²⁷⁶ and *Johanson*²⁷⁷ accepted the view taken in the decision of *Bennett & Anor v Everitt & Anor*²⁷⁸ that the question of whether a single action or statement can constitute sexual harassment depends on the nature or quality of the action or statement. While some conduct may be so troublesome or vexing to be of such a nature as to cause offence sufficient to constitute sexual harassment, other conduct may not.

iv. **Having Regard to all of the Circumstances, a Reasonable Person would have Anticipated that the Person Harassed would be Offended, Humiliated or Intimidated**

The jurisprudence emerging from the Federal Court and FMS has adopted the approach of the pre-HRLA Act jurisprudence which confirmed that the test for sexual harassment is objective and does not depend on whether the perpetrator intended to act in a sexual way or was aware that he or she was acting in a sexual way.²⁷⁹ In addition, there is no reasonableness test in relation to the nature of the applicant's reaction to the relevant conduct.²⁸⁰ The test is whether a reasonable person in all the circumstances would have anticipated that a complainant would be offended,

²⁶⁸ (1989) 20 FCR 217

²⁶⁹ *Ibid* 231.

²⁷⁰ *Ibid* 247.

²⁷¹ *Ibid* 279.

²⁷² *Ibid*.

²⁷³ (1988) EOC 92-244.

²⁷⁴ (1988) EOC 92-244, 77,263.

²⁷⁵ See, for example, judgements of Driver FM in *Johanson v Blackledge Meats* [2001] FMCA 6, [85] and *Cooke v Plauen Holdings* [2001] FMCA 91, [25], applying *Hall v A & A Sheiban Pty Ltd* 20 FCR 217 and *Leslie v Graham* (Unreported, HREOC, Commissioner Innes, 21 July 2000).

²⁷⁶ [2001] FMCA 91, [25].

²⁷⁷ [2001] FMCA 6, [85].

²⁷⁸ (1988) EOC 92-244,77,278.

²⁷⁹ *Johanson v Blackledge & Blackledge t/as Michael Blackledge Meats* [2001] FMCA 6, [84]; *Cooke v Plauen Holdings* [2001] FMCA 91, [24]; *Alekovski v Australia Asia Aerospace Pty Ltd* [2002] FMCA 81, [83]; *Font v Paspaley Pearls & Ors* [2002] FMCA 142, [134].

²⁸⁰ *Kiel v Weeks* (1989) EOC 92-245,77,355.

humiliated or intimidated.²⁸¹ In *Johanson*,²⁸² Driver FM also adopted the reasoning²⁸³ in the HREOC decision of *G v R & Department of Health, Housing and Community Services*²⁸⁴ that it is not necessary for a complainant alleging sexual harassment to be the conscious target of the conduct, and that an accidental act can therefore constitute harassment.²⁸⁵

Decisions of the FMS have provided some interesting illustrations of the application of the objective test. In the case of *Horman*,²⁸⁶ the respondent submitted that when considering the application of the objective test, the FMS must take into account all the evidence, including findings about the applicant's veracity.²⁸⁷ Raphael FM accepted evidence as to the applicant engaging in certain behaviour herself.²⁸⁸ Nevertheless, Raphael FM took the view that it does not:

necessarily follow... that a person in the position of the applicant would still not be offended, humiliated or intimidated by some of the actions and remarks that I have found were made. To do this would assume an assent to a form of anarchy in the workplace that I do not believe a person in the position of the applicant would subscribe to. It is also significant that even Ms Gough, who was otherwise accepting of almost all the forms of behaviour that took place wanted to draw a line at the use of certain words. There was no denying of Ms Gough's entitlement to draw such lines, why should the applicant not be permitted the same right?²⁸⁹

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

The difficulty in attempting to take the approach argued for by Mr Rushton is that it seems to assume that a willingness to use swear words oneself equates with an acceptance of them being used against one. I am not sure that a reasonable person would not anticipate that the applicant would be offended, humiliated or intimidated by bad language solely because the applicant herself also used it from time to time.²⁹⁰

In *Font v Paspaley Pearls Pty Ltd*²⁹¹ (*Font*), Raphael FM was not prepared to make a finding of sexual harassment in relation to comments made to the applicant (as opposed to the physical contact) because his Honour was not satisfied that a reasonable person would have anticipated that the applicant would have been offended, humiliated or intimidated.²⁹² However, in relation to the physical contact which his Honour found to constitute inappropriate action, Raphael FM refused to accept the existence of a 'defence of homosexuality'.²⁹³ The fact that a person conducts themselves in a manner which would otherwise be in breach of s28A cannot be negated by the fact that the person may not have any sexual designs upon the victim:

²⁸¹ *Johanson v Blackledge & Blackledge t/as Michael Blackledge Meats* [2001] FMCA 6, [85]; *Cooke v Plauen Holdings* [2001] FMCA 91, [25]; *Horman v Distribution Group Limited* [2001] FMCA 52, [50]; *Wattle v Kirkland* [2001] FMCA 66, [46]; *Alekovski v Australia Asia Aerospace Pty Ltd* [2002] FMCA 81, [83]; *Elliot v Nanda & Commonwealth of Australia* [2001] FCA 418, [109]; *Kennedy v ADI Ltd* [2001] FCA 614; *Wattle v Kirkland & Anor (No 2)* [2002] FMCA 135, [67].

²⁸² [2001] FMC 6.

²⁸³ *Ibid* [89].

²⁸⁴ (Unreported, HREOC, Sir Ronald Wilson, 23 August 1993).

²⁸⁵ [2001] FMC 6, [89].

²⁸⁶ [2001] FMCA 52.

²⁸⁷ *Ibid* [51].

²⁸⁸ *Ibid*.

²⁸⁹ *Ibid*.

²⁹⁰ *Ibid* [49].

²⁹¹ [2002] FMCA 142.

²⁹² *Ibid* [130].

²⁹³ *Ibid* [134].

The SDA is a protective Act. It is designed to protect people from the type of behaviour which other members of the community would consider inappropriate by reason of its sexual connotation. It is the actions themselves that have to be assessed, not the person who is carrying them out.²⁹⁴

Further to this, Raphael concluded that there is no requirement in the SDA that the protagonist should be of a different sex or of a different sexual preference to the victim.²⁹⁵

v. Other Aspects of s28A of the SDA Considered by the FMS and Federal Court

For completeness, it should be noted that the FMS and Federal Court have considered other aspects of s28A of the SDA, such as the requirement that the conduct be unwelcome²⁹⁶ and the meaning of the phrase ‘offended, humiliated or intimidated’.²⁹⁷ Those aspects of those decisions are beyond the scope of this review. Those interested should refer to the cases in the two immediately preceding footnotes.

vi. Conclusion

The sexual harassment jurisprudence emerging from the Federal Court and FMS appears to be largely consistent with the jurisprudence which existed prior to the operation of the HRLA Act.

(C) Direct Discrimination on the Ground of Family Responsibilities (s7A SDA)

i. The Law under the HREOC Hearing Function

Prior to the commencement of the HRLA Act, there were relatively few cases²⁹⁸ that considered the family responsibility provisions in the SDA (s7A and s14(3A)) and there were no HREOC cases that had upheld a complaint of unlawful discrimination on this ground.

The definition of discrimination on the ground of family responsibilities appears in s7A of the SDA and, unlike the other grounds in the SDA, the definition is restricted to direct discrimination. In addition, discrimination on the ground of family responsibilities is made unlawful only in relation to the area of dismissal in employment (s 14(3A)).

In *McCreadie & Anor v Volandu Pty Ltd & Anor*,²⁹⁹ Commissioner Innes held that the evidence had not established that the complainant had been either actually dismissed or constructively dismissed³⁰⁰ and therefore an essential element of s14(3A) had not been made out. As a result of this finding, it was not necessary for the Commissioner to make findings with regard to the allegations of less favourable treatment or the grounds on which such treatment may have occurred, although he did indicate that on the evidence before him, the complainant would have found this difficult.³⁰¹

In *Hickie v Hunt & Hunt*³⁰² (*Hickie*), a preliminary issue was whether Ms Hickie’s relationship with Hunt and Hunt for the period in question should be considered a

²⁹⁴ Ibid.

²⁹⁵ Ibid.

²⁹⁶ See *Horman v Distribution Group Limited* [2001] FMCA 52, [44], *Wong v Su and Another* [2001] FMCA 108, [18] and *Elliott v Nanda & Commonwealth of Australia* [2001] FCA 418, [108].

²⁹⁷ See *Cooke v Plauen Holdings Pty Limited* [2001] FMCA 91, [26]-[29].

²⁹⁸ *McCreadie & Anor v Volandu Pty Ltd* (Unreported, HREOC, Commissioner Innes, June 1998); *Hickie v Hunt & Hunt* (Unreported, HREOC, Commissioner Evatt, 9 March 1998). Extract at (1998) EOC 92-910.

²⁹⁹ (Unreported, HREOC, Commissioner Innes, 4 June 1998).

³⁰⁰ Ibid 8, 9.

³⁰¹ Ibid 10.

³⁰² (Unreported, HREOC, Commissioner Evatt, 9 March 1998). Extract at (1998) EOC 92-910.

partnership or one of employment. Commissioner Evatt noted the importance of this distinction³⁰³ for the purposes of deciding whether discrimination had occurred on the ground of family responsibilities, as there is no equivalent to s14(3A) in the area of partnership in s17 of the SDA. Ultimately, Commissioner Evatt took the view that Ms Hickie's position was best described as that of a 'provisional partner' who would proceed to full partnership if matters worked out³⁰⁴ and there was therefore no need to consider the issue of discrimination on the ground of family responsibilities.

ii. The Law as Interpreted by the Federal Court and the FMS

An allegation of discrimination on the ground of family responsibilities was the major issue dealt with in the case of *Song v Ainsworth Game Technology Pty Limited*³⁰⁵ (*Song*). In that case, the applicant sought to continue an informal practice she had maintained for nearly one year, of leaving the workplace for approximately twenty minutes (from 2.55pm to 3.25pm) each afternoon to transfer her child from kindergarten to another carer. Raphael FM found that when the employer sought to impose upon the applicant the condition that she attend work from 9am until 5pm with a half hour for lunch between 12pm and 1pm, she was treated less favourably than a person without family responsibilities who would have expected flexibility in starting and finishing times and in the time of taking meal breaks.³⁰⁶ Subsequently, the respondent unilaterally changed the applicant's condition of employment from full time to part time employment. Raphael FM found that this change was imposed by the respondent on the basis that it would allow the applicant to comply with her family responsibilities.³⁰⁷ His Honour held that the actions of the respondent constituted a dismissal of the applicant, and that one of the grounds for that dismissal was the applicant's family responsibilities in breach of s14(3A) of the SDA.

Raphael FM also referred to discussions that his Honour had had with Counsel for the parties during the course of the hearing concerning whether he was required to make a finding of indirect discrimination on the ground of sex under s5(2) of the SDA before moving on to consider whether the applicant was dismissed on the ground of family responsibilities.³⁰⁸ His Honour concluded that this was not the case and could not 'see any necessity for an attempt to qualify s14(3A) by reference to s5' of the SDA.³⁰⁹ In his Honour's view:

...the natural and proper meaning of s.14(3A) is that if an employee is dismissed by reason of that employee's family responsibilities the employer has ipso facto discriminated against her. I believe that I am supported in my view that this is a stand alone provision by reference to s.3 of the SDA where the objects of the Act are set out. The elimination of discrimination involving dismissal of employees on the ground of family responsibilities is a separate object to the elimination of discrimination on the grounds of sex.³¹⁰

In *Escobar v Rainbow Printing Pty Ltd*,³¹¹ Driver FM acknowledged³¹² that the case before him involved a factual situation effectively the reverse of that in *Song*.³¹³ Rather than a case where the

³⁰³ Ibid paragraphs A1-A2 of Annexure A.

³⁰⁴ Ibid paragraph A17 of Annexure A.

³⁰⁵ [2002] FMCA 31.

³⁰⁶ Ibid [72].

³⁰⁷ Ibid [83].

³⁰⁸ Ibid [66].

³⁰⁹ Ibid [84].

³¹⁰ Ibid. An appeal in relation to this matter was heard by a full Court of the Federal Court but was discontinued before judgment was handed down as the parties settled the matter.

³¹¹ [2002] FMCA 122.

³¹² Ibid [33].

³¹³ [2002] FMCA 31.

employer essentially compelled the employee to work part time, Driver FM found that prior to the applicant's return from maternity leave, she sought to reach an agreement with the respondent that she return to work on a part time basis. Following that conversation, but prior to the applicant's return to work, the respondent employed another person to fill the applicant's full time position. On the day that the applicant returned to work, the respondent told her that there was no part time work available and terminated the applicant's employment.

Driver FM found that the breach of s14(3A) on the facts of the case was clear. He stated that the issue is 'a simple one of causation [and that] the 'but for' test is applicable'.³¹⁴ His Honour stated:

There is no doubt in my mind that the applicant was dismissed by the respondent when she presented herself for work on 1 August 2000. The employment relationship between the parties had continued to that point and the applicant was clearly sent away from the workplace on the understanding that the employment relationship was then severed. The reason for the dismissal is also clear. The reason was that Mr Meoushy was unwilling to countenance at that time the possibility of the applicant working part time and had filled her full time position, rendering that position also unavailable. Mr Meoushy had taken that action because he had formed a view (I think correctly) that the applicant was unwilling to work full time because of her family responsibilities. I am left in no doubt that the applicant was dismissed from her employment on 1 August 2000 because of her family responsibilities.³¹⁵

Driver FM also noted³¹⁶ the comments made by Raphael FM in *Song*³¹⁷ to the effect that a breach of s14(3A) does not depend upon a finding of discrimination pursuant to s5(2) of the SDA and that discrimination is proven once an applicant has established that she was dismissed and that the dismissal was on the ground of family responsibilities. Driver FM stated that it was 'unnecessary for me to express any view on that proposition'.³¹⁸ However he did consider the relationship between s14(3A) and s5(1) of the SDA, and found that on the facts of this particular case, that if a breach of s14(3A) could be made out, then discrimination contrary to s5(1) would also be established because the applicant, as a woman was treated less favourably than a male employee without family responsibilities.³¹⁹ In expressing this view, Driver FM accepted³²⁰ the following comments of Commissioner Evatt in the case of *Hickie*.³²¹

Although no statistical data was produced at the hearing, the records produced by Hunt and Hunt suggest that it is predominantly women who seek the opportunity for part time work and that a substantial number of women in the firm have been working on a part time basis. I also infer from general knowledge that women are far more likely than men to require at least some periods of part time work during their careers, and in particular a period of part time work after maternity leave, in order to meet family responsibilities. In these circumstances I find that the condition or requirement that Ms Hickie work full time to maintain her position was a condition or requirement likely to disadvantage women.³²²

As will be discussed in section 2.3.1(D)(i) below, in that passage Commissioner Evatt was considering a claim of indirect discrimination under s5(2) of the SDA rather than one of direct discrimination under s5(1).

³¹⁴ *HREOC v Mt Isa Mines* (1993) 118 ALR 80,90.

³¹⁵ [2002] FMCA 122,[36].

³¹⁶ *Ibid* [33].

³¹⁷ [2002] FMCA 31.

³¹⁸ [2002] FMCA 122,[33].

³¹⁹ *Ibid*.

³²⁰ *Ibid*.

³²¹ (Unreported, HREOC, Commissioner Evatt, 9 March 1998, extract at (1998) EOC 92-910).

³²² *Ibid* [6.17.10].

The applicant also alleged that the conduct of the respondent amounted to indirect discrimination on the ground of her sex contrary to s14(2)(c) of the SDA. The findings made by Driver FM in this regard are discussed at 2.3.1(D)(ii) below.

iii. Conclusion

The paucity of HREOC jurisprudence in relation to the family responsibilities provision makes any comparison with the FMS jurisprudence on this ground difficult.

(D) Part Time Work and Indirect Discrimination on the Ground of Sex (ss5(2) and 7B of the SDA)

i. The Law under the HREOC Hearing Function

The leading HREOC case dealing with this issue was *Hickie*.³²³

The ‘provisional partnership’ relationship between the complainant and Hunt and Hunt was discussed above in section 2.3.1(c)(i). The complainant had returned to work in that capacity at a law firm after a period of maternity leave. Upon her return, she worked on a part time basis, three days per week. She was told at a performance review that she needed to work five days per week in order to maintain her position at the firm and that working three days per week was not considered acceptable by her assessor. The opinions formed by the assessor in that performance review later influenced the preparation of a further review which recommended that the complainant’s contract not be renewed.

The complainant contended, amongst other things, that that conduct amounted to indirect discrimination within the meaning of s5(2) of the SDA, in that it imposed a requirement for her to work full time which had, or was likely to have, the effect of disadvantaging women.

Commissioner Evatt accepted that submission in the passage extracted in section 2.3.1 (C)(ii) above (approved by Driver FM in *Escobar v Rainbow Printing Pty Ltd*).³²⁴

The respondent argued that such a requirement was reasonable and therefore not discriminatory by virtue of s7B of the SDA. Commissioner Evatt rejected that submission on the basis that such a condition would inevitably disadvantage female legal practitioners and would therefore institutionalise and perpetuate indirect discrimination against those persons.³²⁵

ii. The Law as Interpreted by the Federal Court and the FMS

Commissioner Evatt’s decision in *Hickie*³²⁶ has been approved and applied by the FMS.

The facts of *Escobar v Rainbow Printing Pty Limited (No 2)*,³²⁷ were discussed in section 2.3.1(C)(ii) above.

³²³ (Unreported, HREOC, Commissioner Evatt, 9 March 1998). Extract at (1998) EOC 92-910.

³²⁴ [2002] FMCA 122.

³²⁵ (Unreported Commissioner Evatt, 9 March 1998). Extract at (1998) EOC 92-910, [6.17.12].

³²⁶ (Unreported, HREOC, Commissioner Evatt, 9 March 1998). Extract at (1998) EOC 92-910.

³²⁷ [2002] FMCA 122.

Driver FM found (in the event that he was wrong in relation to the findings of direct discrimination discussed in section 2.3.1(C)(ii) above), that the respondent's conduct constituted indirect discrimination on the basis of sex, contrary to s14(2)(c) of the SDA.³²⁸ His Honour held that the refusal to countenance part time work involved the imposition of a condition that was likely to disadvantage women because of their disproportionate responsibility for the care of children. His Honour expressly relied upon the decision of Commissioner Evatt in *Hickie*³²⁹ in support of that finding.³³⁰

His Honour further found that s7B did not provide the respondent with a defence as the condition imposed was not reasonable. His Honour based that finding on the following matters:

- the respondent had, at least initially, been prepared to countenance the possibility of the applicant working part time;
- while the employment of a full time employee to fill the applicant's position reduced the flexibility of the respondent to offer part time employment, that reduction of flexibility was one that the respondent brought upon itself; and
- the employment of the full time employee was undertaken without reference to the applicant in circumstances where the respondent had agreed to discuss the applicant's future working arrangements.³³¹

iii. Conclusion

In this area, the FMS has approved and adopted the jurisprudence and approach of HREOC.

(E) Maternity Leave – Direct Discrimination on the Basis of a Characteristic that Appertains generally to Sex and Pregnancy (ss5(1)(b) and 7(1)(b) SDA)

i. The Law under the HREOC Hearing Function

The rights of women and obligations imposed on employers on the return of a woman to her job after taking a period of maternity leave was the subject of some judicial consideration during the period in which HREOC retained its hearing function.

In the case of *Gibbs v Australian Wool Corporation*,³³² the complainant alleged that she was placed into a new position on her return to maternity leave which, in her view, was a demotion, and that this amounted to direct discrimination on the ground of her sex and pregnancy. During the complainant's absence of six months, the department she had been working in for eight years was restructured and the employee who had been temporarily appointed to replace her while she was on maternity leave was permanently appointed to the position two days before the complainant was due to return to work. The complainant was not consulted during the restructure and only learnt about her new position on the day she returned from maternity leave. The respondent denied that the complainant had been demoted. It argued that the new position carried the same salary and conditions as the complainant's former position and that it was possible that by gaining experience in a new area, the complainant's prospects of promotion within the organisation would be enhanced.

³²⁸ Ibid [37].

³²⁹ (Unreported, HREOC, Commissioner Evatt, 9 March 1998). Extract at (1998) EOC 92-910.

³³⁰ Ibid [33], [37].

³³¹ Ibid [37].

³³² (1990) EOC 92-327.

Sir Ronald Wilson, the then president of HREOC, held that on the facts of the case, the complainant had not been demoted on her return from maternity leave. He found, however, that the way in which the complainant was transferred to her new position, and in particular, that she was not consulted about the proposed changes affecting her role, did amount to discrimination.³³³ Sir Ronald held that the arbitrary transfer of the complainant to other duties on her return from maternity leave constituted a detriment within s14(2)(d) of the SDA and that her pregnancy, being the reason for her absence on leave, was a factor in the consideration leading to that transfer.³³⁴

*Gibbs v Australian Wool Corporation*³³⁵ has also been considered in other jurisdictions relating to issues of maternity leave and employment.³³⁶

ii. The Law as Interpreted by the Federal Court and FMS

In the case of *Thomson v Orica Australia Pty Ltd*³³⁷ (*Thomson*), the applicant had been employed for nine years before taking 12 months maternity leave. A few days before she was due to return to work, the applicant was advised that she would not be returning to her pre-maternity leave position and that she would be performing new duties. She alleged that the changes to her job amounted to a demotion and that the respondent's actions amounted to a constructive dismissal.

Allsop J considered the applicant's duties, tasks and responsibilities at the time of taking maternity leave and those of the position she was offered on her return. His Honour found that the job offered to the applicant on her return was 'of significantly reduced importance and status, of a character amounting to a demotion (although not in official status or salary)'.³³⁸ Allsop J considered that the appropriate comparator, for the purposes of s7(1) of the SDA, was a similarly graded account manager with the applicant's experience who, with the employer's consent, took 12 months leave and who had a right to return on the same basis as the applicant pursuant to the employer's Family Leave Policy. Allsop J decided that the complainant had been treated less favourably than another employee in equivalent circumstances who was not pregnant³³⁹ and that this conclusion also applied to a consideration of discrimination on the ground of sex pursuant to s5(1) of the SDA.

The Federal Court also considered the issue of constructive dismissal and formed the view that the actions of the employer constituted a serious breach of the implied term of the contract of employment that an employer will not, without reasonable cause, conduct itself in a manner likely to damage or destroy the relationship of confidence and trust between the parties,³⁴⁰ and that the applicant was entitled to treat herself as constructively dismissed at common law.³⁴¹

Allsop J concluded that unlawful discrimination had occurred pursuant to s14(2) of the SDA.

³³³ Ibid 78,220.

³³⁴ Ibid.

³³⁵ (1990) EOC 92-327.

³³⁶ See, for example, *McNelis v University of Melbourne* (1993) EOC 92-487; *Kennedy v Maher & Holmes Advertising Pty Ltd* [1989] NSWEO, 15 April 1998.

³³⁷ [2002] FCA 939.

³³⁸ Ibid [53].

³³⁹ Ibid [138].

³⁴⁰ Applying *Burazin v Blacktown City Guardian* (1996) 142 ALR 144, 151.

³⁴¹ [2002] FCA 939,[148].

iii. Relationship Between ss5(1) and 7(1) of the SDA

A further point of interest as regards this topic is the relationship between ss5(1) and 7(1) of the SDA. Complaints alleging direct discrimination in relation to the issue of return to work after a period of maternity leave have often been argued on the basis that the taking of a period of maternity leave is a characteristic that appertains generally to women (s 5(1)(b) of the SDA) and is also a characteristic that appertains generally to women who are pregnant (pursuant to s7(1)(b) and/or s7(1)(c) of the SDA).

In *Gibbs v Australian Wool Corporation*,³⁴² although discrimination was alleged to have occurred on both grounds, Sir Ronald Wilson made findings in relation to the allegation of pregnancy discrimination only. The issue has also been considered in State jurisdictions. For example, in the cases of *Bear v Norwood Private Nursing Home*³⁴³ and *Marshall v Marshall White & Co Pty Ltd*,³⁴⁴ decisions of the South Australian Sex Discrimination Board and the Victorian Equal Opportunity Board respectively, the condition of being pregnant was said to be a characteristic of the female sex and a characteristic that generally appertains to persons of the female sex.

In the case of *Mount Isa Mines*,³⁴⁵ Lockhart J held that if the facts of a particular case concern an aggrieved person who is pregnant or who has a characteristic that appertains generally to or is generally imputed to pregnant women, then s7 of the SDA operates exclusively of s5.³⁴⁶

In *Thomson*,³⁴⁷ Allsop J accepted that less favourable treatment on the grounds that a woman has taken maternity leave can amount to discrimination on the basis of pregnancy,³⁴⁸ as well as discrimination on the basis of sex.³⁴⁹ Allsop J considered that although the SDA had been amended since *Mount Isa Mines*,³⁵⁰ he should follow the decision of Lockhart J in relation to the exclusive operation of s7 from s5. This led to the conclusion, in Allsop J's view, that although his Honour was satisfied that the facts of the case would have supported a conclusion of unlawful discrimination under s5(1)(b) and (c) and s14(2), his Honour should limit relief to that based on ss7(1) and 14(2).

iv. Conclusion

The relatively few cases decided in relation to this issue make a comparison between HREOC jurisprudence and the developing jurisprudence since the commencement of the HRLA Act difficult. However, where relevant to the issues before him, Allsop J appeared to find useful the reasoning in *Gibbs v Australian Wool Corporation*,³⁵¹ and expressly adopted the approach of Lockhart J in *Mount Isa Mines*.³⁵²

³⁴² (1990) EOC 92-327.

³⁴³ (1984) EOC 92-019.

³⁴⁴ (1990) EOC 92-304.

³⁴⁵ (1993) 46 FCR 301.

³⁴⁶ *Ibid* 327-328.

³⁴⁷ [2002] FCA 939.

³⁴⁸ *Ibid* [165].

³⁴⁹ *Ibid* [168]. His Honour noted that he considered *Gibbs* to be 'illuminating': at [166]

³⁵⁰ At the time *Mount Isa Mines* was heard, s7 of the SDA did not include the ground of potential pregnancy.

³⁵¹ (1990) EOC 92-327.

³⁵² (1993) 46 FCR 301.

(F) Marital Status Discrimination (s6 of the SDA)

i. The Law under the HREOC Hearing Function

The marital status discrimination provisions in the SDA were the subject of a number of decisions during the period in which HREOC retained its hearing function. Perhaps the most notable of those were the series of HREOC and Federal Court decisions in the *Dopking* litigation.³⁵³ Those decisions arose from a complaint concerning the housing benefits available to an unmarried soldier transferred to a new location as compared to the benefits available to similarly transferred soldiers who were accompanied by family members. The Full Federal Court held that those facts did not involve either direct³⁵⁴ or indirect³⁵⁵ discrimination on the ground of marital status.

In other interesting jurisprudence during the pre-HRLA Act period, Commissioner Johnston found that a refusal to provide infertility treatment to a person because the person was unmarried constituted discrimination on the ground of marital status.³⁵⁶

ii. The Law as Interpreted by the Federal Court and the FMS

Since the HRLA Act commenced, the FMS and the Federal Court have considered only two claims of unlawful discrimination on the ground of marital status.³⁵⁷ In each matter, the claims were dismissed without significant discussion of the relevant provisions of the SDA.

iii. Conclusion

Although the FMS and Federal Court have not considered the marital status discrimination provisions in any detail since the HRLA Act commenced, one would expect that the jurisprudence in this area is unlikely to alter (given that the Federal Court and Full Federal Court had the opportunity to consider those provisions in detail in the *Dopking* litigation prior to the commencement of the HRLA Act).

(G) Vicarious Liability – Defence of Taking ‘All Reasonable Steps’

Section 106 of the SDA provides:

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

³⁵³ *Sullivan and Others v Department of Defence* (1991) EOC 92-366; *Commonwealth v HREOC* (1991) 32 FCR 468; *Sullivan and Others v Department of Defence* (1992) EOC 92-421; *Commonwealth v HREOC* (1993) 46 FCR 191; *Dopking v Department of Defence* (Unreported, HREOC, Sir Ronald Wilson, 24 October 1994), extract at (1995) EOC 92-669 and *Commonwealth v HREOC* (1995) 63 FCR 74.

³⁵⁴ *Commonwealth v HREOC* (1993) 46 FCR 191, per Lockhart and Wilcox JJ, Black CJ dissenting.

³⁵⁵ *Commonwealth v HREOC* (1995) 63 FCR 74, per curiam.

³⁵⁶ *MW and Ors v Royal Women’s Hospital and Ors* (1997) EOC 92-886.

³⁵⁷ *Drachnikov v DIMA* [2002] FMCA 23 and *Song v Ainsworth Game Technology Pty Limited* [2002] FMCA 31. It should also be noted that the marital status provisions in the SDA were considered in the matter of *McBain v State of Victoria* (2000) 99 FCR 116. However, those proceedings related to the application of s109 of the *Constitution* and are outside the scope of this review. The interpretation of the marital status provisions also arose during argument before (but not in decision of) the High Court in the related proceedings of *Re McBain; Ex Parte Australian Catholic Bishops Conference* (2002) 76 ALJR 694.

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

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

The focus of any defence raised under s106(2) will generally be the term ‘all reasonable steps’.

i. The Law under the HREOC Hearing Function

It has sometimes been suggested that the defence in s106(2) will be available if the employer has no knowledge that any relevantly unlawful behaviour has occurred or is threatened (even if the employer has not taken any active steps to prevent such behaviour).

Such a suggestion was considered and rejected in the case of *Boyle v Ishan Ozden & Ors*³⁵⁸ (*Boyle*). There was no evidence in that matter that any steps had been taken by the employers to prevent the commission of sexual harassment in the workplace.³⁵⁹ The Human Rights Commission (as it was then known) (Commission) also noted that at all relevant times, the employers were absent from the workplace on an overseas trip, implying that they had no knowledge that the alleged acts of sexual harassment were occurring. Nevertheless, the Commission found that s106 of the SDA ‘attaches vicarious liability to the [employers] unless they have done something active to prevent the acts complained of’³⁶⁰ and found the employers vicariously liable for the actions of its employee towards another employee. In other words, the Commission found that the reasonableness factor applies to the nature of the steps actually taken and does not involve consideration of whether it was reasonable not to have taken any steps in the first place.

A further issue considered in the pre-HRLA Act jurisprudence was whether the size of the employer’s organisation was relevant to the issue of reasonableness under s106(2).

For example, in the case of *Evans v Lee & Commonwealth Bank*,³⁶¹ the actions of Mr Lee, a branch manager of the Commonwealth Bank (CBA), were found to constitute sex discrimination against Ms Lee, a customer of the CBA, in breach of s22 of the SDA and sexual harassment in breach of s28G of the SDA. The CBA sought to avoid liability for those matters, arguing that it had taken all reasonable steps to prevent the unlawful conduct occurring and relied specifically on material it had distributed on the topic of sexual harassment to its staff over a period of years, including a code of conduct, a video, and circular letters dealing with sexual harassment in the workplace.

Commissioner Jones was not satisfied that the defence in s106(2) had been made out. The Commissioner appeared to have regard to the size of the CBA, stating:

It is true that the CBA is a large organisation and...the CBA cannot be expected to have knowledge of the propensity of each particular employee. This also means, however, that CBA has a duty to ensure that its policies are communicated effectively to its executive officers, and that they accept the responsibility for promulgating the policies and for advising of the remedial action when breached.

³⁵⁸ (1986) EOC 92-165.

³⁵⁹ Ibid 76,614.

³⁶⁰ Ibid.

³⁶¹ (Unreported, HREOC, Commissioner Jones, 3 May 1996) Extract at (1996) EOC 92-822.

In my view, the evidence discloses that in the CBA's policies there was virtually no focus on sexual discrimination/ sexual harassment in the provision of banking services. There was clearly no instruction to staff at the...branch about these matters nor, it seems, was there any check through the audit process that the CBA's policies, limited as they were, were communicated to staff. In particular, there does not appear to have been clear guidelines as to how the staff ought to handle a problem where conduct was engaged in by a manager which might be classified as unlawful under the discrimination legislation.³⁶²

ii. The Law as Interpreted by the Federal Court and FMS

Both the FMS and Federal Court have given some consideration to the question that arose in *Boyle*:³⁶³ that is, whether the defence in s106(2) can be made out solely on the basis of the employer's lack of knowledge of the unlawful behaviour.

In *Gilroy*³⁶⁴ where the employers owned a small contract cleaning business, Wilcox J found that since the respondent employers had actual knowledge of the harassment which had taken place, and had done nothing about it, they did not have a defence under s106(2). His Honour stated that this finding meant that it was not necessary for him to express any concluded view as to the availability of a defence under s106(2) to an employer who has done nothing to prevent sexual harassment of one employee by another, but in circumstances where the employer has no knowledge that any improper behaviour has occurred or is threatened.³⁶⁵ This may, on one view, suggest that his Honour was prepared to reconsider the principle established by *Boyle*.³⁶⁶

In contrast, Driver FM expressly approved the *Boyle*³⁶⁷ principle in *Johanson*.³⁶⁸ In that case, the respondents were the proprietors of a small butcher's shop with less than six employees. The respondents were responsible for overseeing all aspects of the daily operations of the business although they were not always present in the shop. In considering whether the respondents could establish a defence under s106(2), Driver FM accepted that the respondents were unaware that their employees had provided the applicant with the goods in question. However, applying the principle in *Boyle*,³⁶⁹ his Honour found this to be irrelevant. His Honour also confirmed that authorisation by an employer of specific acts of harassment does not need to be shown before vicarious liability applies.³⁷⁰

The FMS and Federal Court have also considered, in a number of decisions, the possible relevance of the size of the employer to the defence under s106(2) of the SDA (this being one of the matters considered relevant by Commissioner Jones in *Evans v Lee & Commonwealth Bank*³⁷¹).

In those decisions, the FMS and Federal Court have noted that the SDA does not distinguish between large and small employers, in terms of the availability of the defence provided for by s106(2).³⁷² However, it also appears to have been accepted that the size of the employer will be

³⁶² Ibid 31-32.

³⁶³ (1986) EOC 92-165.

³⁶⁴ [2000] FCA 1775.

³⁶⁵ Ibid [100].

³⁶⁶ (1986) EOC 92-165.

³⁶⁷ (1986) EOC 92-165.

³⁶⁸ [2001] FMCA 6.

³⁶⁹ (1986) EOC 92-165.

³⁷⁰ *State Electricity Commission of Victoria v Equal Opportunity Board & Ors* (1989) EOC 92-259. This principle was also applied in *McAlister v SEQ Aboriginal Corporation v Lamb* [2002] FMCA 109.

³⁷¹ (Unreported, HREOC, Commissioner Jones, 3 May 1996).

³⁷² See *Gilroy v Angelov* [2000] FCA 1775, [100]; *Johanson v Blackledge Meats* [2001] FMCA 6, [101]; *Cooke v Plauen Holdings* [2001] FMCA 91, [37].

relevant to the question of whether the steps taken by the employer to prevent the acts in question were reasonable. Thus in *Johanson*,³⁷³ Driver FM stated:

The SDA does not distinguish between large and small employers, in terms of the availability of a defence under s.106(2)...it would be unrealistic to expect all employers, regardless of size, to adhere to a common standard of preventative measures. This defence has been interpreted in Australia as requiring the employer or principal to take some steps, the precise nature of which will be different according to the circumstances of the employer. Thus, large corporations will be expected to do more than small businesses in order to be held to have acted reasonably. I note, however, that the reasonableness factor applies to the nature of the steps actually taken and not to determine whether it was reasonable not to have taken steps in the first place.³⁷⁴

His Honour made similar comments in *Cooke*.³⁷⁵ Other Federal Magistrates also appear to have accepted that principle.³⁷⁶

The question of reasonableness involves consideration of many other matters particular to individual cases. The range of factors considered relevant by the FMS and the Federal Court is beyond the scope of this review.³⁷⁷

iii. Onus of Proof

A further point of interest as regards this topic is the question of who bears the onus of proof in relation to the elements required to be established under ss106(1) and (2) of the SDA.

In establishing vicarious liability under s106(1) of the SDA, the applicant bears the onus of proof in establishing, on the balance of probabilities, that the alleged acts of harassment or discrimination occurred. Accordingly, the applicant bears the onus of proof in establishing that there is a relationship of employment or agency³⁷⁸ and that the alleged act of discrimination occurred ‘in connection with’ the employment of an employee or duties of an agent. The phrase ‘in connection with’ has been held to have a more expansive meaning than that given to words such as ‘in the course of’ or ‘in the scope of’.³⁷⁹ In the view of Rimmer FM, the clear intention of s106(1) in using the word ‘connection’ was to catch those acts that are properly connected with the duties of an employee.³⁸⁰

Once an applicant has satisfied s106(1), then the onus of proof shifts to the employer or principal to establish that it took all reasonable steps to prevent the alleged acts taking place pursuant to s106(2) of the SDA.

³⁷³ [2001] FMCA 6.

³⁷⁴ *Ibid* [101].

³⁷⁵ [2001] FMCA 91, [37].

³⁷⁶ See, for example, *McAlister v SEQ Aboriginal Corporation & Lamb* [2002] FMCA 109, [143] where Rimmer FM stated: “Care needs to be taken when considering the meaning of the expression “taking reasonable steps to prevent sexual harassment occurring”. The Sex Discrimination Act expects all employers to adopt preventative measures. This defence has been interpreted in Australia as requiring the employer to take some steps, the precise nature of which will be different according to the circumstances of the employer. Thus large corporations will be expected to do more than smaller businesses in order to be held to have acted reasonably.”

³⁷⁷ Those interested in the issue should see, in addition to the cases referred to above: *Shiels v James & Lipman Pty Ltd* [2000] FMCA 2 and *Aleksovski v Australia Asia Aerospace Pty Ltd* [2002] FMCA 81.

³⁷⁸ Cf *Deborah Worsley-Pine v Kathleen Lumley College* [2001] FCA 818; *Wattle v Kirkland* [2001] FMCA 66 (this decision was overturned on appeal (*Kirkland v Wattle* [2002] FCA 145) on another point).

³⁷⁹ *McAlister v SEQ Aboriginal Corporation for Legal Services* [2002] FMCA 109, [135].

³⁸⁰ *Ibid*.

iv. Conclusion

The jurisprudence emerging from the Federal Court and FMS since the commencement of the HRLA Act is largely consistent with previous HREOC jurisprudence.

(H) The Meaning of the Word ‘Permits’ in s105 of the SDA

Section 105 of the SDA provides:

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

Issues have arisen in the pre and post the HRLA Act cases as to whether ‘permitting’ requires knowledge on the part of the permittor.

i. The Law under the HREOC Hearing Function

In *Howard v Northern Territory (Howard)*,³⁸¹ Sir Ronald Wilson used expressions including ‘knowledge or at least willful blindness or recklessness in the face of the known circumstances’³⁸² as being necessary to demonstrate that a person had ‘permitted’ for the purposes of s105 of the SDA. However, Sir Ronald was dealing with the degree of knowledge required of the positive elements of an act of sexual discrimination in a case where:

there was nothing in the circumstances to put [the alleged permittor] on inquiry as to the lawfulness of [the principal discriminator’s] decision or to require them to interrogate him to satisfy themselves of the lawfulness of his decision.³⁸³

In *Cooper v Human Rights and Equal Opportunity Commission*³⁸⁴ (*Cooper*), Madgwick J considered the materially identical provision in the DDA.³⁸⁵ The issue was whether it was necessary to prove that the permittor knew that there was no unjustifiable hardship³⁸⁶ in order to establish liability under the equivalent of s105 of the SDA. His Honour held that it was not, stating:

It is not essential to the concept of permission, in this context, that the permittor should know or believe in the lack of cogency of an assertion of unjustifiable hardship, particularly having regard to the unavoidably subjective features included in such an assertion and in knowledge or belief about it.³⁸⁷

His Honour did not consider that Sir Ronald’s decision in *Howard*³⁸⁸ was inconsistent with that approach.³⁸⁹

³⁸¹ (Unreported, HREOC, Sir Ronald Wilson, 19 December 1994). Extract at (1995) EOC 92-672.

³⁸² *Ibid* 78,133.

³⁸³ *Ibid*.

³⁸⁴ (1999) 93 FCR 481.

³⁸⁵ Section 122.

³⁸⁶ Within the meaning of s11 of the DDA.

³⁸⁷ (1999) 93 FCR 481, 494.

³⁸⁸ (Unreported, HREOC, Sir Ronald Wilson, 19 December 1994). Extract at (1995) EOC 92-672.

³⁸⁹ *Ibid*.

ii. *The Law as Interpreted by the Federal Court and the FMS*

In *Elliott*,³⁹⁰ the issue was whether the Commonwealth, through the Commonwealth Employment Service (CES), permitted acts of discrimination on the grounds of sex involving sexual harassment. The primary respondent was a medical doctor. The applicant obtained employment as a receptionist with the doctor via services provided by the CES. There was evidence indicating that the respondent knew that several young women placed with the respondent had made allegations to the effect that they had been sexually harassed in a manner that would constitute discrimination on the ground of sex.

Moore J noted that *Cooper*³⁹¹ indicated that the notion of ‘permitting’ should not be approached narrowly in the context of the SDA or the DDA. His Honour went on to state:

In my opinion, a person can, for the purposes of s105, permit another person to do an act which is unlawful, such as discriminate against a woman on the ground of her sex, if, before the unlawful act occurs, the permitter knowingly places the victim of the unlawful conduct in a position where there is a real, and something more than a remote, possibility that the unlawful conduct will occur. That is certainly so in circumstances where the permitter can require the person to put in place measures designed to influence, if not control, the person’s conduct or the conduct of the person’s employees.³⁹²

Moore J held that the CES had permitted the discrimination to take place as the number of complaints of sexual harassment should have alerted the CES to the distinct possibility that any young female sent to work for the doctor was at risk of sexual harassment and discrimination on the basis of sex.³⁹³ The fact that the particular caseworker who facilitated the employment of the applicant was probably unaware of those complaints was found by Moore J to be immaterial. His Honour said that the collective knowledge of the officers of the CES was to be treated as the knowledge of the Commonwealth.³⁹⁴

iii. *Conclusion*

Moore J’s decision in *Elliott*³⁹⁵ may, on one view, give a wider and more beneficial interpretation to ‘permits’ in the context of s105 of the SDA than Sir Ronald Wilson’s decision in *Howard*.³⁹⁶ However, as noted above, it seems arguable that Sir Ronald’s discussion in *Howard*³⁹⁷ was specific to the facts before him.

2.3.2 Case Digest

(A) Meaning of ‘Services’

In *Ferneley v The Boxing Authority of New South Wales*³⁹⁸ (*Ferneley*), Wilcox J considered whether the respondent provided ‘services’ within the meaning of s22 of the SDA.

³⁹⁰ [2001] FCA 418.

³⁹¹ (1999) 93 FCR 481.

³⁹² *Ibid* [163].

³⁹³ *Ibid* [169].

³⁹⁴ *Ibid* [170].

³⁹⁵ [2001] FCA 418.

³⁹⁶ (Unreported, HREOC, Sir Ronald Wilson, 19 December 1994). Extract at (1995) EOC 92-672.

³⁹⁷ *Ibid*.

³⁹⁸ [2001] FCA 1740.

The respondent had certain statutory functions under the *Boxing and Wrestling Control Act 1986* (NSW) (*Boxing Act*), including under s8(1), which provides:

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

There were no provisions in the *Boxing Act* for registration of females. The applicant applied to the respondent to be registered as a kick boxer in New South Wales. That application was refused by the respondent, on the basis of s8(1) of the *Boxing Act*.

It was accepted by all parties that the respondent should be treated as the Crown in right of the State of New South Wales.³⁹⁹

In the proceedings before the Federal Court, the applicant sought, *inter alia*, a declaration that s8(1) of the *Boxing Act* was inoperative by reason of inconsistency with s22 of the SDA and the operation of s109 of the *Constitution*.

It was necessary to consider whether the respondent's acts of failing to consider, on its merits, the applicant's application for registration involved a failure to provide a 'service' within the meaning of s22.

Wilcox J held that, as Parliament had made a special provision in s18 of the SDA concerning sex discrimination by authorities empowered to confer an authorisation or qualification needed for engaging in an occupation, s22 must be read down to the extent necessary to exclude cases covered by that special provision. His Honour stated that this view was supported by the structure of the SDA, the fact that the heading of Division 1 was 'Discrimination in Work' and the fact that Division 2 was headed 'Discrimination in Other Areas.' His Honour noted that the registration sought by Ms Ferneley was to enable her to 'work' (as professional kick boxing was her source of income) and stated that discrimination in that area should therefore not be read to extend to provisions relating to 'other areas'.⁴⁰⁰

Wilcox J thus held that it was not a breach of s22 for the respondent to decline to consider Ms Ferneley's application on its merits and the proceedings were dismissed on that basis.

(B) Section 42 of the SDA

The respondent in *Ferneley* also contended that, even if it was found to be providing a service and thus bound by s22, the exemption in s42 of the SDA would apply. Section 42(1) states:

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

In obiter comments, Wilcox J rejected the respondent's contentions regarding the applicability of s42.⁴⁰¹

His Honour indicated that he preferred the submissions of the applicant and the Sex Discrimination Commissioner to the effect that s42(1) is only concerned with mixed-sex sporting

³⁹⁹ Ibid [2].

⁴⁰⁰ [2001] FCA 1740, [64]-[66].

⁴⁰¹ Ibid [95].

activities and has no application to same sex sporting activity.⁴⁰²

(C) Claim brought in Relation to Australia's Protection Visa System

In *Dranichnikov v DIMA*,⁴⁰³ the applicant arrived in Australia in January 1997 with her husband and daughter on tourist visas. The family subsequently lodged an application for a protection visa. The applicant's husband was specified in that application as the principal applicant. The applicant and her daughter were 'secondary applicants' for the purposes of the application. The family's application was rejected.

The applicant then attempted to lodge her own application for a protection visa. This subsequent application was rejected on the basis that, as the applicant had previously sought protection in Australia as a refugee, the *Migration Act 1958* (Cth) precluded her from making a further application for a protection visa whilst in the migration zone.

In the proceedings before the FMS, the applicant complained primarily that the respondent had not allowed her to make her own claims to be a refugee and had therefore treated her less favourably than her husband. She also complained that she was discriminated against on the basis of her sex and marital status in the manner in which her application was handled by the respondent, including, amongst other things, their failure to interview her in connection with the application.

His Honour found that the alleged 'obstruction' and/or 'prevention' of the applicant's attempts to make her own application did not arise from her gender or marital status, but arose from the way in which she chose initially to make the application as a family member and a mistake as to law adopted by the respondent in the manner in which it dealt with her subsequent application for a protection visa. Baumann FM noted that as a result of the decision in *Dranichnikov v MIMA*,⁴⁰⁴ the applicant was not prevented from making a further claim for a protection visa on the basis of her own claim to be owed protection obligations.

Baumann FM found that neither of those matters amounted to discrimination under the SDA.

(D) Presumptions in Discrimination Proceedings

In the case of *Wattle v Kirkland & Kirkland (t/as Kirk's Radio Cab)*,⁴⁰⁵ Raphael FM stated that in:

[c]onsidering whether or not to accept the applicant's evidence I started from the base that a person was unlikely to make up and bring to prosecution allegations of this nature against a businessman of some profile in a small country town. There is nothing novel about this assumption and it is one that can be easily rebutted if the complainant is shown to have a motive for making his or her complaints. In this case the respondent has attempted to show as a motive the dismissal of the applicant. The difficulty which I have in accepting this submission is that the applicant attended upon her doctor and complained of sexual harassment before she was dismissed. Furthermore, the evidence relating to the unsatisfactory nature of the applicant's driving put forward as a reason for

⁴⁰² Ibid [89]-[94].

⁴⁰³ [2002] FMCA 23.

⁴⁰⁴ (2001) FCA 769.

⁴⁰⁵ [2001] FMCA 66.

her dismissal was only put forward very late in the day and not contained in any of the original affidavits.⁴⁰⁶

The respondent appealed this decision and Dowsett J allowed the appeal⁴⁰⁷ on the basis that the Federal Magistrate had erred in applying a presumption that one party is unlikely to invent and bring to prosecution the allegations in question unless they are justified. His Honour stated that:

It is clear...that a relevant tribunal cannot start with the presumption that one party is unlikely to make up and bring to prosecution the allegations in question unless they are justified. The magistrate was obliged to determine which evidence was to be accepted in the case. That obligation could not be discharged by making an assumption of that kind and placing the onus of rebutting it upon the other party. In this respect the magistrate has misunderstood his function. The matter should be remitted to the Magistrates Court for re-hearing. Clearly enough the re-hearing should be by another magistrate.⁴⁰⁸

The re-hearing took place before Driver FM who held that the first respondent sexually harassed the applicant, and both respondents discriminated against the applicant, contrary to the SDA.⁴⁰⁹

(E) Unilateral Change of Full Time to Part Time Employment Constitutes Dismissal

In *Song*,⁴¹⁰ Raphael FM made a finding of fact⁴¹¹ that the respondent had unilaterally changed Ms Song's conditions of employment from full time to part time. Ms Song alleged that this conduct amounted to discrimination on the ground of her family responsibilities. As discrimination on this ground is only made unlawful under s14(3A) of the SDA if an employee is dismissed, the FMS considered whether the change in the conditions of employment amounted to a dismissal.

Raphael FM found that the change in employment conditions did amount to a dismissal and that the applicant had not repudiated her contract by refusing to work the shorter hours required in a written warning from her employer, because, in the Federal Magistrate's view, that requirement was discriminatory and unlawful.⁴¹² In coming to this view, Raphael FM rejected the respondent's argument that dismissal for the purposes of the SDA requires a total cessation of employment and stated⁴¹³ that, in line with authorities cited by the applicant, he was entitled to give the word 'dismiss' in the SDA a more purposive and wide ranging construction, which would include changing a person's employment arrangements from full time to part time work.

2.3.3 Damages

(A) Damages Awards under the HREOC Hearing Function

Prior to the commencement of the HRLA Act, the Full Federal Court discussed the general approach to damages under the SDA in *Sheiban*.⁴¹⁴

⁴⁰⁶ Ibid [35]. It is interesting to note that in the case of *McAlister v SEQ Aboriginal Corporation & Anor* [2002] FMCA 109, [70], Rimmer FM appeared to apply a similar presumption.

⁴⁰⁷ *Kirkland v Wattle* [2002] FCA 145.

⁴⁰⁸ Ibid [5].

⁴⁰⁹ *Wattle v Kirkland & Anor (No.2)* [2002] FMCA 135.

⁴¹⁰ [2002] FMCA 31.

⁴¹¹ Ibid [68].

⁴¹² Ibid [83].

⁴¹³ Ibid [75].

⁴¹⁴ (1989) 20 FCR 217.

Lockhart, Wilcox and French JJ delivered separate judgements:

Lockhart J expressed the view that:

As anti-discrimination, including sex discrimination, legislation and case law with respect to it is still at an early stage of development in Australia, it is difficult and would be unwise to prescribe an inflexible measure of damage in cases of this kind and, in particular, to do so exclusively by reference to common law tests in branches of the law that are not the same, though analogous in varying degrees, with anti-discrimination law. Although in my view it cannot be stated that in all claims for loss or damage under the Act the measure of damages is the same as the general principles respecting measure of damages in tort, it is the closest analogy that I can find and one that would in most foreseeable cases be a sensible and sound test. I would not, however, shut the door to some case arising which calls for a different approach.⁴¹⁵

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

French J went further, stating that the measure of damages is to be found:

not in the law of tort, but in the words of the statute which require no more to attract the exercise of the Commission's discretion than that the loss or damage be 'by reason of' the conduct complained of.⁴¹⁶

His Honour then referred to a number of decisions in which the view had been taken that the breach of unlawful discrimination legislation was a species of tort and observed that whether that view was strictly correct or not, the 'measure of damages is to be governed by the statute and the rules applicable in tort can be of no avail if they conflict with it'.⁴¹⁷

In contrast, Wilcox J described a claim under the SDA as a species of 'statutory tort'.⁴¹⁸

Despite the absence of a clear ratio, *Sheiban*⁴¹⁹ has generally been cited for the proposition that, while torts principles may be the starting point for the assessment of damages under the SDA, those principles should not be applied inflexibly.⁴²⁰

The highest award of damages made under the SDA prior to the commencement of the HRLA Act was for an amount of \$135,000 awarded in *Dunn Dyer v ANZ Banking Group Limited*.⁴²¹ That award was comprised of the sum of \$125,000 in respect of economic loss and \$10,000 in respect of emotional upset suffered by the applicant. A higher general damages component was awarded in *Tenuyl v Hayden Delaney and Calcium Nominees Pty Ltd*.⁴²² In awarding \$20,000 for general damages, Commissioners Atkinson and Kalantzis observed that '[t]he youth of the complainant, the maturity of the respondent, the relationship of trust between employer and

⁴¹⁵ Ibid 239.

⁴¹⁶ Ibid 281.

⁴¹⁷ Ibid.

⁴¹⁸ Ibid 261.

⁴¹⁹ (1989) 20 FCR 217.

⁴²⁰ See eg *Stephenson v HREOC* (1995) 61 FCR 134, 142.

⁴²¹ (Unreported, HREOC, Commissioner Keim, 29 August 1997).

⁴²² (Unreported, HREOC, Commissioner Atkinson and Commissioner Kalantzis, 13 May 1996).

employee and the serious nature of the assault perpetrated by [the sexual harasser] on [the applicant] puts it into the higher category of damages that can be awarded'.⁴²³

(B) Damages Awards under the FMS and Federal Court

i. General Principles

The jurisprudence regarding awards of damages for contraventions of the SDA during the period 13 September 2000 to 13 September 2002 has tended to be specific to the particular facts under consideration. However, the following general principles have emerged:

- Damages under the SDA should be assessed on the torts based approach of placing the applicant in the position she or he would have been had the unlawful conduct not taken place.⁴²⁴
- In assessing damages for hurt, humiliation and distress (that is general damages), awards should be restrained in quantum, although not minimal. On the other hand, awards compensating for injured feelings should not be so low as to diminish the respect for the public policy of the legislation.⁴²⁵
- It is important to distinguish between aggravated and exemplary damages. A useful discussion of the distinction between those two heads of damages in the context of a sexual harassment claim may be found in Raphael FM's decision in *Font*.⁴²⁶ The applicant in that case sought aggravated damages on the basis of the following matters:

...the conduct of the respondents complained of is the putting into evidence, by way of affidavits of the respondents' witnesses and cross-examination of the applicant, various matters relating to the way she conducted herself with men, her conversations on sexual matters and her dress. Although the applicant sought to have these matters removed from the affidavits, I was pressed by the respondents to keep them in. I did so reluctantly and subject to their relevance. I found nothing relevant about them. They did not assist me in anyway to form a view about the applicant or the truth of her allegations... I accept the submission by the applicant's Counsel that [that evidence] was no more than an attempt to blacken the character of the applicant so that I should think less favourably of her in coming to any conclusions about the truthfulness of her evidence or the quantum of any damage she might have suffered. I think the whole exercise was unjustifiable and inappropriate and must have added to the distress felt by the applicant in giving her evidence and proceeding with the claim.⁴²⁷

His Honour noted that exemplary damages are punitive in character, rather than compensatory and went on to discuss the importance of that distinction in the following passage:

The importance of the distinction between compensatory and punitive damages is that an applicant must establish a loss in order to be awarded compensatory damages. Even where that loss is constituted by something as abstract as hurt or humiliation the Courts have striven to measure those feelings and give them a value. In the decided cases on these matters in a discrimination context these would appear to have been a focus on the aggravating conduct rather than on its effect. This is not unreasonable where the aggravating conduct may consist of activity at the trial, as it did here. Is the applicant expected to ask for an adjournment to produce further medical evidence of her distress

⁴²³ Ibid [6].

⁴²⁴ *Johanson v Michael Blackedge Meats* [2001] FMCA 6, [110]; *Cooke v Plauen Holdings Pty Limited* [2001] FMCA 91, [39]; *McAlister v SEQ Aboriginal Corporation and Anor* [2002] FMCA 109, [150]; *Escobar v Rainbow Printing Pty Limited* [2002] FMCA 122, [39] and *Wattle v Kirkland (No 2)* [2002] FMCA 135, [70].

⁴²⁵ *Gilroy v Angelov* [2000] FCA 1775, [105]; *Johanson v Michael Blackedge Meats* [2001] FMCA 6, [115] and *Wattle v Kirkland (No 2)* [2002] FMCA 135, [71].

⁴²⁶ [2002] FMCA 142.

⁴²⁷ Ibid [160].

occasioned by the unwarranted prosecution of the respondent's case? I think not. I think it is safer to recognize ...the punitive element in these damages.⁴²⁸

The following sections provide an overview of the awards of damages for contraventions of the SDA made by the Federal Court and the FMS during the review period. Sexual harassment matters constituted by far the largest number of matters in which damages were awarded.⁴²⁹

ii. Sexual Harassment Matters

(a) Damages Awards by the Federal Court

During the review period, the Federal Court awarded damages in two matters involving claims of sexual harassment.

The applicant in *Gilroy*⁴³⁰ was dismissed from her employment. However, Wilcox J found that the dismissal was not causally connected to the acts of sexual harassment which his Honour had found to have taken place. Rather, his Honour found that the dismissal was caused by a misunderstanding and jealousy on the part of one of the principals of the respondent employer.

In those circumstances, there could be no award of special damages for economic loss arising from the dismissal. Nevertheless, Wilcox J found that the conduct that constituted sexual harassment had serious consequences for the applicant. Those consequences were exacerbated by her employer's failure to support her and by her abrupt and unfair dismissal. Wilcox J quoted and adopted his comments in *Sheiban*⁴³¹ in relation to the calculation of general damages for discrimination and awarded the applicant \$20,000 plus interest under that head.

A similar amount for general damages (\$15,000) was awarded by Moore J in *Elliott*.⁴³²

In that matter, the first respondent (Dr Nanda) was found to have engaged in conduct which amounted to sexual harassment and discrimination on the basis of sex. The Commonwealth was found to be liable for that conduct under s105 of the SDA (see section 2.3.1(H) above).

In addition to compensation for general damages, his Honour awarded \$100 as compensation for counselling received by the applicant.

His Honour held that those amounts could be recovered from either respondent, although the applicant could not be compensated twice. In arriving at that conclusion, his Honour rejected the Commonwealth's submission to the effect that the applicant could only obtain relief for sexual harassment against

Dr Nanda, stating:

This submission fails to give full effect to s.105 which results in a person to whom the section applies being treated as having done the unlawful act of another...the Court has power under s.46PO(4) to make such orders...as it thinks fit [including] an order requiring a respondent to pay to

⁴²⁸ Ibid [165]. Although the applicant in *Font* had not, in terms, claimed exemplary damages, Raphael FM found that the basis upon which damages were sought was clearly articulated and awarded the amount of \$7,500 by way of exemplary damages.

⁴²⁹ For the purposes of this discussion, 'sexual harassment' is used to encompass claims of sexual harassment under Part II Division 3 of the SDA and unwelcome sexual conduct constituting discrimination on the basis of sex (see discussion in section 2.3.1(A) above).

⁴³⁰ [2000] FCA 1775.

⁴³¹ (1989) 20 FCR 217.

⁴³² [2001] FCA 418.

an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent.⁴³³

Moore J further found that Dr Nanda (but not the Commonwealth) was liable to pay the applicant the amount of \$5,000 in aggravated damages to compensate her for the additional stress and mental anguish resulting from the considerable delay to the resolution of the complaint caused by him, in particular his failure to participate in the HREOC hearing. Moore J referred to unlawful discrimination tribunal decisions including the HREOC decision in *Greenhalgh v National Australia Bank*.⁴³⁴

His Honour permitted the parties to make further submissions addressing the form of orders to be made to give effect to his Honour's findings. In his subsequent decision regarding that issue, Moore J said:

In my opinion both the respondent and the Commonwealth should be jointly ordered to pay the applicant \$15,100 compensation on the basis that, if that liability is satisfied by one party, the other party effectively provide contribution. In the orders I use the words 'joint and several' to signify the nature of the liability to pay that I intend to create, by the orders, in exercise of the powers conferred by the legislation. I do not suggest that some common law principle, such as that which applies to joint tortfeasors, is to be applied in the present case with a particular result. As the respondent was the primary and immediate cause of the compensable loss and damage, he should bear the greater portion of the burden. I do not accept, however, that the Commonwealth should bear none of the burden. First, orders are not being made to punish either the respondent or the Commonwealth but rather are being made to compensate the applicant. Secondly, had the Commonwealth not engaged in conduct which I have found permitted the unlawful conduct of the respondent, that unlawful conduct would or may never have taken place. Accordingly I propose to order that, in the event that the respondent satisfies the liability to pay the \$15,100, the Commonwealth is to contribute \$5000. If the Commonwealth satisfies the liability then the respondent is to contribute \$10,100. Plainly it is only the respondent who is liable to pay the \$5000 aggravated damages.⁴³⁵

(b) Damages Awards by the FMS

The FMS made awards of damages in a relatively higher number of sexual harassment matters as compared to the Federal Court during the review period. As would be expected, those awards covered a wider range in terms of quantum.

Raphael FM awarded general and special damages in *Shiels*.⁴³⁶

As to the first head, his Honour noted that the sexual harassment cases heard by HREOC and the Federal Court during the time that HREOC had its hearing function indicated a range for general damages of between \$7,500 and \$20,000. His Honour further noted that the higher awards had been made in cases involving more physical action (*Harwin v Pateluch*⁴³⁷) or more substantial physical sequelae (*Smith v Buvet & Anor*⁴³⁸). Bearing these matters in mind, Raphael FM ordered the respondents to pay the applicant \$13,000 for hurt and humiliation.

His Honour also awarded special damages for economic loss in the amount of \$4,000, which he described as a 'cushion for loss of employability'.

⁴³³ Ibid [186].

⁴³⁴ (1997) EOC 92-884. It is possible that that award might have been better characterised as an award of exemplary damages (see discussion of *Font* in section 2.3.3(B) above- although, note that Moore J specifically found that the applicant had suffered additional non economic loss in this matter).

⁴³⁵ *Elliott v Nanda & Commonwealth* [2001] FCA 550, [14].

⁴³⁶ [2000] FMCA 2.

⁴³⁷ (Unreported, HREOC, Commissioner O'Connor, 21 August 1995).

⁴³⁸ [1996] EOC 92-840.

Driver FM compared the hurt and distress suffered by the applicant in *Johanson*⁴³⁹ to those suffered by the applicant in *Shiels*.⁴⁴⁰ His Honour expressed the view that the sexual harassment in *Johanson* was substantially less serious than *Shiels*,⁴⁴¹ involving a single event which occurred by accident with none of the consequences involved in *Shiels*.⁴⁴² Accordingly, he awarded \$6000 for general damages, reduced by one third in recognition of a voluntary apology made by the respondents.

His Honour also allowed the applicant \$500 for special damages (being compensation for the cost of three counselling sessions).

The applicant in *Horman*⁴⁴³ led medical evidence concerning the effect of the conduct found to constitute sexual harassment and discrimination in contravention of section 14(2)(b) of the SDA. That evidence indicated that the applicant had suffered from anxiety and panic attacks and that, as a result of a heated argument the applicant had with another employee in September 1997, the applicant nearly suffered a miscarriage. Raphael FM found that the applicant's symptoms fell within the 'less serious band', although he specifically noted that he was not underestimating the 'concern that any pregnant woman in the workplace would feel at the possibility of a miscarriage brought about by actions in the workplace.'⁴⁴⁴ His Honour awarded the amount of \$12,500, which was a global figure to compensate the applicant for general non-economic loss and any special damage for the cost of medication.

The highest amount allowed for general damages in respect of a sexual harassment claim during the review period was \$15,000, awarded to the applicant in *Wattle v Kirkland & Kirkland (t/as Kirk's Radio Cab)*.⁴⁴⁵ In arriving at that figure, Raphael FM referred to the applicant's evidence that she suffered hurt and humiliation, fear and concern, which manifested itself in panic attacks and exacerbation of her existing asthma.

Despite difficulties with the evidence led by the applicant (who was self represented), his Honour also awarded \$9,100 to compensate the applicant for lost earnings for twenty-six weeks. Raphael FM found that the lack of evidence of a medical nature meant that he could not extend the period for loss of earnings beyond that time.

Raphael FM's decision in *Wattle v Kirkland & Kirkland (t/as Kirk's Radio Cab)*⁴⁴⁶ was successfully appealed.⁴⁴⁷ Although the calculation of damages was not the subject of the appeal, Dowsett J noted that 'the basis of calculating the award may be suspect'.⁴⁴⁸ The matter was remitted and heard by Driver FM,⁴⁴⁹ who awarded the same amount as Raphael FM for general damages.⁴⁵⁰ However, the applicant claimed a lesser amount for economic loss than that awarded by Raphael FM, to take into account the payment of a disability support pension during the period for which she claimed lost income.⁴⁵¹

⁴³⁹ [2001] FMCA 6.

⁴⁴⁰ [2000] FMCA 2.

⁴⁴¹ *Ibid.*

⁴⁴² *Ibid.*

⁴⁴³ [2001] FMCA 52.

⁴⁴⁴ *Ibid* [70].

⁴⁴⁵ [2001] FMCA 66.

⁴⁴⁶ *Ibid.*

⁴⁴⁷ *Kirkland v Wattle* [2002] FCA 145.

⁴⁴⁸ *Ibid* [3].

⁴⁴⁹ *Wattle v Kirkland & Anor (No 2)* [2002] FMCA 135.

⁴⁵⁰ *Ibid* [71].

⁴⁵¹ *Ibid* [70].

A relatively lower award in respect of general damages for a successful sexual harassment claim was made by Raphael FM in *Aleksovski v Australia Asia Aerospace Pty Ltd*.⁴⁵² His Honour stated that he was ‘prepared to accept that the applicant was seriously offended by the conduct of [the harasser]’, however ‘the applicant’s experiences were not as traumatic as those of many people who come before this court making allegations of sexual harassment.’⁴⁵³ His Honour ordered that the respondent pay the applicant the sum of \$7,500 by way of damages for non-economic loss. His Honour refused the applicant’s claim for damages in respect of economic loss incurred as a result of her dismissal. His Honour was not satisfied that there was a causal connection between the applicant’s dismissal and the conduct constituting sexual harassment.

Another relatively low award for general damages in a sexual harassment matter was made by Rimmer FM in *McAlister v SEQ Aboriginal Corporation and Anor*.⁴⁵⁴ Her Honour referred to Raphael FM’s discussion in *Shiels*⁴⁵⁵ of the range for general damages for sexual harassment matters, stating:

In [*Shiels*⁴⁵⁶] Raphael FM reviewed a number of cases and found that the current range for hurt and humiliation is between \$7,500.00 and \$20,000.00. He was, however, looking at cases involving overt and sustained sexual harassment. This case is distinguishable from those cases; it was a one-off request for sex by Mr Lamb in return for providing a single service. It was not repeated. Accordingly, the award for non-economic loss should be at least at the lower end of the scale.⁴⁵⁷

Rimmer FM noted that the applicant’s hurt and humiliation in the matter before her was initially substantial, but that there was no evidence before her to suggest when it resolved. Her Honour further noted that the applicant’s evidence was that she had received counselling for a period of twelve months. In those circumstances, her Honour awarded the applicant \$4000 for general damages.

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

*Font*⁴⁵⁸ was discussed in section 2.3.3(B)(i) above in relation to exemplary damages. In addition to the amount allowed for exemplary damages, Raphael FM awarded the applicant the amount of \$10,000 as general damages. In arriving at that figure, his Honour had regard to a schedule of damages awarded during the period HREOC had its hearing function and to decisions of the FMS. His Honour also noted that he had borne in mind ‘what I regard to be a serious failure of the first respondent to put in place any appropriate machinery for dealing with this type of complaint’.⁴⁵⁹

⁴⁵² [2002] FMCA 81.

⁴⁵³ *Ibid* [102].

⁴⁵⁴ [2002] FMCA 109.

⁴⁵⁵ [2000] FMCA 2.

⁴⁵⁶ *Ibid*.

⁴⁵⁷ *Ibid* [157].

⁴⁵⁸ [2002] FMCA 142.

⁴⁵⁹ *Ibid* [155].

iii. Other Matters

(a) Federal Court

*Grukke v. KC Canvas Pty Ltd*⁴⁶⁰ was the only non-sexual harassment matter for a breach of the SDA in which damages were awarded by the Federal Court in the review period. The precise basis of the claim is unclear from the report, although Ryan J noted that he was satisfied that s14 of the SDA had been contravened. His Honour awarded \$7,000 for lost earnings and \$3,000 for general damages as compensation for ‘psychological harm inflicted by the injury to the applicant’s feelings which occurred during the course of employment.’⁴⁶¹ That injury was said to be ‘substantially exacerbated by the termination of that employment in the circumstances that she recounted’⁴⁶² (again the nature of those circumstances is unclear from the report). Ryan J declined to order an apology in light of the fact that the respondent was a corporation and that a pecuniary award of damages had been made.

(b) FMS

The applicant in *Cooke*⁴⁶³ failed to make out a claim of sexual harassment. However, Driver FM was satisfied that the applicant had been discriminated against on the basis of her sex in contravention of s14 of the SDA. His Honour refused the applicant’s claim for economic loss. In assessing general damages at an amount of \$750, his Honour said:

Although in recent times there has been a tendency for damages awards for non-economic loss to increase, most of the higher awards of damages in recent years have concerned very serious cases of sexual harassment. I have found that this is not a case of sexual harassment. The conduct complained of in this case was reprehensible in management terms but not otherwise. It was conduct that a reasonable person would have anticipated would be distressing to a young and inexperienced employee.⁴⁶⁴

In *Song*,⁴⁶⁵ Raphael FM awarded the applicant \$10,000 general damages in respect of a claim that the applicant’s dismissal involved discrimination on the ground of family responsibilities in contravention of s14(3A) of the SDA. His Honour also awarded damages for loss of earnings up to the date of judgment. His Honour did not give extensive reasons in making those awards. His Honour also ordered that the applicant be reinstated and made orders varying her employment agreement.

*Escobar v Rainbow Printing Pty Limited (No.2)*⁴⁶⁶ also involved a successful claim of discrimination on the ground of family responsibilities.

In calculating the applicant’s economic loss, Driver FM first reduced the amount claimed to take into account the fact that, if the applicant had not been dismissed, she would have been available for work only two days per week.

His Honour further reduced the amount of damages claimed for economic loss having regard to the applicant’s duty to mitigate her loss. The applicant’s relationship with her partner broke down after her dismissal. From the time that that relationship broke down, she was unable to

⁴⁶⁰ [2000] FCA 1415.

⁴⁶¹ *Ibid* [2].

⁴⁶² *Ibid*.

⁴⁶³ [2001] FMCA 91.

⁴⁶⁴ *Ibid* [42].

⁴⁶⁵ [2002] FMCA 31.

⁴⁶⁶ [2002] FMCA 122.

work (save for limited casual work) by reason of her family responsibilities. His Honour said that the applicant's inability to work from that time was not something for which the respondent should be held responsible.

In relation to non-economic loss, his Honour said:

... the applicant suffered hurt, humiliation and distress when she was terminated... In *Hickie v Hunt & Hunt* an amount of \$25,000 was awarded for non economic loss. In *Song v Ainsworth Game Technology* the sum of \$10,000 was awarded. Both of those cases involved a continuing employment relationship in unsatisfactory circumstances and the distress of the applicant was ongoing. In the present case the distress of the applicant was severe initially but would have resolved within a few months when the applicant reconciled herself to her present position. In addition, there was an intervening factor of the breakdown of the applicant's personal relationship with her partner for which the respondent was not responsible. An award of damages for non-economic loss in the present case should be somewhat lower than that awarded in *Hickie* and in *Song*. The award made in *Bogel v Metropolitan Health Services* (2000) EOC Para 93-069 was in the sum of \$2,500 which I find to be an appropriate award in the present circumstances.⁴⁶⁷

2.4. Disability Discrimination

2.4.1 Matters of Interest

(A) Knowledge of a Disability

The extent to which an alleged discriminator can be found to have discriminated against another person (the aggrieved person) on the ground of his or her disability where the discriminator has no direct knowledge of that disability has long been an issue for judicial consideration.

i. The Law under the HREOC Hearing Function

In *X v McHugh, Auditor-General for the State of Tasmania*⁴⁶⁸ (X), HREOC's then-President, Sir Ronald Wilson, found that the respondent had discriminated against the applicant, who had been diagnosed with paranoid schizophrenia, on the basis of his disability when it dismissed him from his employment. The applicant was dismissed because of his poor work performance. Although in the period leading up to his dismissal the applicant had provided his employer with medical reports to explain this performance, the nature of his disability had been deliberately concealed from the respondent. Sir Ronald held that:

The objective of the Act is to eliminate, as far as possible, discrimination against persons on the ground of disability in areas of public life; it therefore proscribes, not merely deliberate discrimination, but thoughtless discrimination as well. ...

It is not necessary that an employer know of the existence of the disability. It is enough if an employer is shown to have discriminated because of a manifestation of a disability.⁴⁶⁹

In other HREOC matters, however, it was found that no unlawful discrimination had occurred in circumstances where the respondents were unaware of the complainant's disabilities. In *H v S*⁴⁷⁰ the respondent university had imposed limitations on the ability of the complainant (H) to access computer facilities because of H's threatening behaviour towards staff. The behaviour resulted from a personality disorder, but this was unknown to the respondent. Commissioner Webster

⁴⁶⁷ Ibid [42].

⁴⁶⁸ (1994) 56 IR 248.

⁴⁶⁹ Ibid 257.

⁴⁷⁰ (Unreported, HREOC, Commissioner Webster, 23 July 1997).

dismissed the application, finding that ‘a person, who was not suffering a disability, who had approached staff in the same manner as H would have had the same restrictions placed upon that person as were imposed upon H’.⁴⁷¹ The same approach was taken by Commissioner Kenny in *White v Crown Ltd*⁴⁷² in which the respondent was found not to have discriminated against the complainant in circumstances where he was refused entry to licensed premises because his appearance (including his gait and slurred speech, manifestations of an acquired brain injury) suggested that he was drunk.

The decision of Sir Ronald Wilson in *X*⁴⁷³ was followed by Commissioner Innes in *Purvis v State of New South Wales (Department of Education)*⁴⁷⁴ (*Purvis*). In this case, Commissioner Innes found that the applicant, who has an intellectual disability which manifests itself in behavioural problems, had been discriminated against by the State school he attended when he was suspended and ultimately excluded from the school. Commissioner Innes held that it was not necessary for all of the teachers at the applicant’s school to have been aware of his disability:

I find that, overall, staff at SGHS had a very poor knowledge of the nature of Daniel’s disabilities, and the implications of those disabilities. This lack of understanding is a fundamental issue in this case.⁴⁷⁵

....

I note the evidence that some of the teachers at SGHS were not aware of the nature of Daniel’s disability, or of some of the disabilities which he has. However, it is not necessary for them to have been aware, or fully aware, of the disabilities in order to have participated in alleged discriminatory acts for which the respondent may be liable, *X v McHugh* (1994) EOC 92-623.⁴⁷⁶

However, on review under the *Administrative Decisions Judicial Review Act 1977* (Cth), Emmett J declined to follow this approach. In *State of New South Wales (Dept of Education) v Human Rights and Equal Opportunity Commission*,⁴⁷⁷ Emmett J concluded that:

[W]here an educational authority is unaware of the disability, but treats a person differently, namely, less favourably, because of that behaviour, it could not be said that the educational authority has treated the person less favourably because of the disability...⁴⁷⁸

While the decision of Emmett J was appealed to the Full Federal Court,⁴⁷⁹ the decision of the Full Court did not make any findings on the issue of knowledge of disability.

ii. The Law as Interpreted by the Federal Court and FMS

Prior to Emmett J’s decision in *State of New South Wales (Dept of Education) v Human Rights and Equal Opportunity Commission*,⁴⁸⁰ the issue of whether disability discrimination can occur when the respondent has no knowledge of the complainant’s disabilities was considered in *Tate v Rafin & Wollongong District Cricket Club Inc.*⁴⁸¹ In that case the applicant had his membership of the respondent club revoked following a dispute. The applicant claimed, in part, that the revocation of his membership was on the ground of his psychological disability which

⁴⁷¹ Ibid 5.

⁴⁷² (Unreported, HREOC, Commissioner Kenny QC, 24 July 1997), 11. See also *R v Nunawading Tennis Club* (Unreported, HREOC, Commissioner Dodson, 25 September 1997) in which it was found that a single incident of unacceptable behaviour (such behaviour being a manifestation of the complainant’s disabilities) had not given the respondent sufficient knowledge of the complainant’s disabilities, or its manifestations, to allow a finding that the actions of the respondent in suspending the membership of the complainant were ‘by reason of’ the complainant’s disability. In that case, Commission Dodson followed the decision of Commissioner Kenny in *White v Crown Ltd* while distinguishing the case from Sir Ronald Wilson’s decision in *X*.

⁴⁷³ (1994) 56 IR 248.

⁴⁷⁴ (Unreported, HREOC, Commissioner Innes, 13 November 2000). See also *Y v Australia Post* (1997) EOC 92-865.

⁴⁷⁵ Ibid 75.

⁴⁷⁶ Ibid 108.

⁴⁷⁷ [2001] FCA 1199.

⁴⁷⁸ Ibid [35].

⁴⁷⁹ *Purvis v State of New South Wales (Department of Education & Training)* [2002] FCA 503.

⁴⁸⁰ [2001] FCA 1199.

⁴⁸¹ [2000] FCA 1582.

manifested itself in aggressive behaviour, although the respondent club was unaware of his disability. Wilcox J concluded that the club had not treated Mr Tate less favourably because of his psychological disability, and stated:

The psychological disability may have caused Mr Tate to behave differently than if he had not had a psychological disability, or differently to the way another person would have behaved. But the disability did not cause the club to treat him differently than it would otherwise have done; that is, than it would have treated another person who did not have a psychological disability but who had behaved in the same way. It could not have done, if the club was unaware of the disability.⁴⁸²

iii. Conclusion

It would seem that, as a result of the decisions in *State of New South Wales (Dept of Education) v Human Rights and Equal Opportunity Commission*⁴⁸³ and *Tate v Rafin & Wollongong District Cricket Club Inc*,⁴⁸⁴ the approach taken by Sir Ronald Wilson in *X*⁴⁸⁵ that knowledge of disability is not required for there to be liability for unlawful discrimination is unlikely to be followed. The issue may receive further clarification by the High Court in the Purvis matter⁴⁸⁶ for which special leave has been granted to Mr Purvis to appeal against the decision of Full Court of the Federal Court.⁴⁸⁷ This appeal will be heard on 29 April 2003.

(B) Manifestation of Disability

Related to the issue of knowledge of a complainant's disability is the issue of whether and to what extent a distinction is to be drawn between a disability and its manifestations. As the above cases demonstrate, it may be that a respondent is aware of the manifestations of a disability (such as 'aberrant' behaviour) but not the underlying disability. Such cases have generally sought to resolve the issue on the basis of the respondent's knowledge. However, in cases where the respondent is aware of both the manifestation and the underlying disability, a further issue becomes to what extent such a distinction can properly be drawn.

i. The Law under the HREOC Hearing Function

Sir Ronald Wilson in *X*⁴⁸⁸ found that a claim of discrimination would be made out if the relevant less favourable treatment occurred because of a manifestation of a disability.⁴⁸⁹ The applicant in that case had been diagnosed with paranoid schizophrenia and complained of discrimination on the basis of his disability when he was dismissed from his employment because of his poor work performance. Sir Ronald stated:

... I find that the respondent's evaluation of the complainant's work performance... namely, lack of interpersonal skills, failure to exercise reasonable judgement and refusal to accept counselling reflected a manifestation of the symptoms of the complainant's illness. The dismissal therefore discriminated against the complainant on the ground of his disability.⁴⁹⁰

⁴⁸² Ibid [67]. It should be noted that Wilcox J did not consider the HREOC decisions of *X v McHugh*, *Purvis*, *H v S*, *White v Crown Ltd* or *R v Nunawading Tennis Club*. Wilcox J's decision in *Tate v Rafin* was cited with approval but distinguished in *Randell v Consolidated Bearing Company (SA) P/L* [2002] FMCA 44, per Raphael FM, [46].

⁴⁸³ [2001] FCA 1199.

⁴⁸⁴ [2000] FCA 1582.

⁴⁸⁵ (1994) 56 IR 248.

⁴⁸⁶ *Alexander Purvis on behalf of Daniel Hoggan v State of NSW (Department of Education and Training) and Human Rights and Equal Opportunity Commission* No. S423 of 2002.

⁴⁸⁷ *Purvis v State of New South Wales (Department of Education & Training)* [2002] FCA 503.

⁴⁸⁸ (1994) 56 IR 248.

⁴⁸⁹ Ibid 257.

⁴⁹⁰ Ibid 258.

Commissioner Jones followed this decision in *McNeil v Commonwealth of Australia*,⁴⁹¹ stating:

It follows that in dismissing the complainant, the respondent was doing so for reasons brought about by, and hence on the ground of, her disability - namely that her inefficiency and her frustration was caused by her disability not being adequately accommodated and also, in part, for displaying behaviour that was a manifestation of her disability.⁴⁹²

Similarly, in *Y v Australia Post*,⁴⁹³ the complainant had a psychological disorder which resulted in disturbed behaviour. Commissioner Carter agreed with the approach taken in *X*,⁴⁹⁴ stating:

To discriminate against a person suffering a mental disorder because of the behaviour of that person which directly results from that mental disorder, is to discriminate against that person because of the mental disorder.⁴⁹⁵

Commissioner Kenny took a different approach in *White v Crown Ltd*,⁴⁹⁶ finding that discrimination on the basis of the manifestations of the complainant's disability does not amount to unlawful discrimination under the DDA:

The conduct of an alleged discriminator will not be directly discriminatory as described in s.5 of the Act unless the discriminator is shown to have treated the aggrieved person less favourably *because of* his disability. In the present case it has not been established to my satisfaction that, on the balance of probabilities, the security guard refused Mr White entry to the Casino in February 1995 *because of* Mr White's disability. On Mr White's account, he was refused entry into the Casino in February 1995 because the guard determined that, by reason of Mr White's behaviour (including his deportment, his speech and his appearance), he was intoxicated, or there was a sufficient risk that he was intoxicated to justify refusing him entry.⁴⁹⁷

The case of *Purvis v State of New South Wales (Department of Education)*,⁴⁹⁸ highlights the difficulty in separating a disability from its manifestations. As outlined above, the applicant, who has an intellectual disability which manifests itself in behavioural problems, claimed to have been discriminated against by the State school he attended. Commissioner Innes followed the approach of Sir Ronald Wilson in *X*⁴⁹⁹ and Commissioner Carter in *Y v Australia Post*⁵⁰⁰ and stated:

... I am satisfied, from all of the evidence before me, that Daniel's behaviour occurs as a result of his disability. Mr Purvis gave evidence that Daniel's intellectual disability 'may manifest itself in his behaviour'. The evidence of Dr Wise was very clear that Daniel's behaviour and his intellectual disability 'all result from severe brain injury'. Dr Wise said 'the major part of his difficult behaviour would be disinhibited and uninhibited behaviour'. Mr Lord said 'his behaviour quite often is a way of expressing himself, particularly when he's finding it very difficult and very emotional'.

I am satisfied that, in this case, Daniel's behaviour is so closely connected to his disability that if I find that less favourable treatment has occurred on the ground of Daniel's behaviour then this will amount to discrimination on the ground of his disability.

Commissioner Innes noted the decision in *White v Crown Ltd*⁵⁰¹ and distinguished it on the basis that it involved an application of a strict set of criteria for admission to the Casino rather than a situation of employment or education, where the relationship between the parties is ongoing.⁵⁰²

⁴⁹¹ (Unreported, HREOC, Commissioner Jones QC, 26 June 1995).

⁴⁹² *Ibid* 20.

⁴⁹³ (Unreported, HREOC, Commissioner Webster, 23 July 1996).

⁴⁹⁴ (1994) 56 IR 248.

⁴⁹⁵ *Ibid* 38.

⁴⁹⁶ (Unreported, HREOC, Commissioner Kenny QC, 24 July 1997).

⁴⁹⁷ *Ibid* 10-11

⁴⁹⁸ (Unreported, HREOC, Commissioner Innes, 13 November 2000).

⁴⁹⁹ (1994) 56 IR 248.

⁵⁰⁰ (Unreported, HREOC, Commissioner Webster, 23 July 1996). Commissioner Innes also indicated that he was following the decision of the Queensland Anti-Discrimination Tribunal in *L v Minister for Education* (1996) EOC 92-787.

⁵⁰¹ (Unreported, HREOC, Commissioner Kenny QC, 24 July 1997).

⁵⁰² (Unreported, HREOC, Commissioner Innes, 13 November 2000), 108.

However, the decision of Commissioner Innes was overturned by the Federal Court on review in *State of New South Wales (Dept of Education) v Human Rights and Equal Opportunity Commission*,⁵⁰³ Emmett J concluding that:

... there is a distinction to be drawn between a disability within the meaning of the Act, on the one hand, and behaviour that might result from or be caused by that disability on the other hand. Less favourable treatment on the ground of the behaviour is not **necessarily** less favourable treatment by reason of disability. The position might be different in a case where the disability necessarily resulted in the relevant behaviour. That is not the present case. The behaviour of the complainant is not *ipso facto* a manifestation of a disability within the meaning of the Act nor any disability of the complainant within the meaning of the Act.⁵⁰⁴

....

The Commission, in effect, treated the behaviour of the Complainant as necessarily being a manifestation of his disability. However, while, in the case of the Complainant, his behaviour was in fact the result of or caused by his disability, that behaviour is not necessarily caused by or the result of a disability such as the disability of the Complainant. As such, the Commission misconstrued the operation of ss 5 and 22(2) of the Act. It follows that the Commission erred in its approach as a matter of law, such as to attract s 5(1)(f) of the ADJR Act.⁵⁰⁵

Emmett J's decision was supported by the Full Bench of the Federal Court on appeal in *Purvis v State of New South Wales (Department of Education & Training)*.⁵⁰⁶ The Full Court stated that:

... Emmett J was correct in holding that HREOC had misdirected itself as to the proper construction of s 4 of the Act in regarding the conduct of the complainant which occasioned the actions of those in charge of the school as part of the disability of the complainant. In our opinion, that conduct was a consequence of the disability rather than any part of the disability within the meaning of s 4 of the Act. This is made quite explicit in subs (g), which most appropriately describes the disability in question here and which distinguishes between the disability and the conduct which it causes...

....

It follows that we do not agree that the statement summing up earlier HREOC decisions, and applied in the HREOC decision under review, that to discriminate against a person suffering a mental disorder because of the behaviour of that person which directly results from that disorder is to discriminate against that person because of the mental disorder, is applicable in circumstances such as the present. In the first place, it assumes, rather than demonstrates, the existence of discrimination and does not reflect the language of ss 4 or 5 of the Act. In the second place, it is, in reality, an application of the "but for" test, the difficulties of which in this field (albeit in relation to another statute) are explained by Lockhart J in *HREOC v Mt Isa Mines Ltd* at 326.⁵⁰⁷

ii. **The Law as Interpreted by the Federal Court and FMS**

In *Randell v Consolidated Bearing Company (SA) P/L*,⁵⁰⁸ the applicant had a mild dyslexic learning difficulty and complained of discrimination when he was dismissed as a result of poor work performance. Rather than distinguishing between the disability and its manifestations, Raphael FM stated:

In my view there is no distinction between this applicant's 'disability' and its 'manifestation'. His 'disorder' resulted in his 'learning differently'. He learned more slowly. He was dismissed because he was learning *too* slowly.⁵⁰⁹

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

⁵⁰³ [2001] FCA 1199.

⁵⁰⁴ *Ibid* [36], emphasis in the original.

⁵⁰⁵ *Ibid* [45]

⁵⁰⁶ [2002] FCA 503.

⁵⁰⁷ *Ibid* [28] – [31].

⁵⁰⁸ [2002] FMCA 44.

⁵⁰⁹ *Ibid* [48].

cited with approval the decision in *X*⁵¹⁰ to the effect that discrimination “because of a manifestation of a disability” will amount to discrimination for the purposes of the DDA. His Honour sought to distinguish the decision of Wilcox J in *Tate v Rafin & Wollongong District Cricket Club Inc*,⁵¹¹ considered by Emmett J in *State of New South Wales (Dept of Education) v Human Rights and Equal Opportunity Commission*,⁵¹² on the basis that the decision in *Tate v Rafin* turned on the issue of knowledge of the disability.⁵¹³

In *Minns v State of New South Wales*⁵¹⁴ the applicant suffered psychological disabilities, the manifestations of which were behavioural problems. Having found against the applicant for other reasons, Raphael FM did not want to address the issue of whether the applicant’s conduct was itself the disability from which suffered or the manifestation of it, noting that special leave to appeal to the High Court had been sought in *Purvis*.⁵¹⁵

iii. Conclusion

The question of whether discrimination on the basis of a ‘manifestation’ of a disability, such as behaviour, is synonymous with discrimination on the basis of that disability remains unsettled. While the decision of Emmett J and the Full Federal Court in the *Purvis* matter appears to depart from the approach taken in *X*,⁵¹⁶ it may be that the decision is distinguishable on the basis of its particular facts: most relevantly the finding that the behaviour through which the relevant disability manifested itself was not a necessary result of the disability. The decision Emmett J does not rule out that his conclusion may have been different if the “disability necessarily resulted in the relevant behaviour”,⁵¹⁷ while the decision of the Full Court similarly limits itself to the particular circumstances of the case.⁵¹⁸ It should shortly be given some clarification by the High Court of Australia in the *Purvis* matter.⁵¹⁹

(C) Direct Discrimination – The Choice of a ‘Comparator’

Section 5(1) of the DDA provides:

For the purposes of this Act, a person (‘discriminator’) discriminates against another person (‘aggrieved person’) on the ground of a disability of the aggrieved person if, because of the aggrieved person’s disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in the circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.

The use of the words ‘less favourable than’ in s5(1) require that a comparison be made between the treatment of the aggrieved person and the treatment of another person without the disability. That other person, whether actual or hypothetical, is usually referred to as the ‘comparator’.

The issue of how an appropriate comparator is chosen in a particular case has been a complicated and vexed one since the inception of the DDA, and one that continues to be the subject of academic and judicial debate.

⁵¹⁰ (1994) 56 IR 248.

⁵¹¹ [2000] FCA 1582.

⁵¹² [2001] FCA 1199.

⁵¹³ [2002] FMCA 44, [46].

⁵¹⁴ [2002] FMCA 60.

⁵¹⁵ *Ibid* [267].

⁵¹⁶ (1994) 56 IR 248.

⁵¹⁷ *State of New South Wales (Dept of Education) v Human Rights and Equal Opportunity Commission* [2001] FCA 1199, [36]

⁵¹⁸ *Purvis v State of New South Wales (Department of Education & Training)* [2002] FCA 503, [31].

⁵¹⁹ *Alexander Purvis on behalf of Daniel Hoggan v State of NSW (Department of Education and Training) and Human Rights and Equal Opportunity Commission* No. S423 of 2002.

i. The Law under the HREOC Hearing Function

It was accepted in HREOC decisions, many of which were approved by superior courts,⁵²⁰ that, when undertaking the comparison required by s5 of the DDA, characteristics of the person with the disability were not to be imputed to the comparator.

The rationale for this approach was described by Sir Ronald Wilson in *Dopking v Commonwealth of Australia*:⁵²¹

It would fatally frustrate the purposes of the Act if the matters which it expressly identifies as constituting unacceptable bases for differential treatment ... could be seized upon as rendering the overall circumstances materially different, with the result that the treatment could never be discriminatory within the meaning of the Act.⁵²²

HREOC's approach was approved in *IW v City of Perth & Ors*.⁵²³ by Toohey J (with Gummow J concurring) and Kirby J, the only members of the Court to consider this issue. Their Honours rejected the respondent's argument that, as the aggrieved person had HIV AIDS, the comparator should be imbued with the characteristics of an HIV AIDS sufferer. If this approach had been accepted, there would not be any discrimination under the DDA if a person with HIV AIDS was treated less favourably on the basis of a characteristic pertaining to HIV AIDS sufferers, such as infection, so long as the discriminator treated less favourably all persons who were infectious.

A similar approach to the choice of an appropriate comparator was adopted by Commissioner Innes in *Purvis*.⁵²⁴ In this case, a student with a disability which manifested itself in behavioural problems was suspended, and eventually expelled, from his State high school. The student alleged that his suspension and expulsion constituted direct disability discrimination. Commissioner Innes found that the comparator for the purpose of s5 of the DDA was another student at the school in the same year but without the disability.

However, Emmett J, in his review of the above decision in *State of New South Wales (Department of Education) v HREOC and Purvis*,⁵²⁵ found Commissioner Innes' choice of the comparator to be flawed. His Honour stated that:

The Commission correctly considered the treatment that had been accorded to Year 7 students of the School in 1997. However, it erred so far as it did not consider the treatment that would have been accorded to a Year 7 student of the School in 1997 who had engaged in behaviour similar to that of the complainant and who did not have the complainant's disability. The requirement that the comparison between the treatment of an aggrieved person and the treatment of a person without the disability in circumstances that are the same or are not materially different requires an examination of the treatment that would be accorded to a student without the comparator's disability on the hypothesis that such a student had behaved in the same way as the complainant...

If such a hypothetical student would not have been suspended and would not have been excluded from the School, it would follow that the Complainant was treated less favourably than such a hypothetical student. However, if such a hypothetical student would have been treated in the same

⁵²⁰ For example, Lockhart J in *HREOC v Mt Isa Mines* (1993) 118 ALR 80; the Full Bench in *Commonwealth of Australia v HREOC* (1993) 119 ALR 133; Toohey J and Kirby J in *IW v City of Perth* (1997) 191 CLR 1; *Garity v Commonwealth Bank of Australia* [1999] HREOCA 2, 46. Cf *Boeringer Ingelheim Pty Ltd v Reddrop* [1984] 2 NSWLR 13.

⁵²¹ (Unreported, HREOC, Sir Ronald Wilson, 24 October 1994).

⁵²² This passage was approved by Lockhart J in *HREOC v Mt Isa Mines*, 118 ALR 80 and the Full Bench in *Commonwealth of Australia v HREOC* (1993) 119 ALR 133.

⁵²³ (1997) 191 CLR 1, 34 (per Toohey J), 68-69 (per Kirby J).

⁵²⁴ (Unreported, HREOC, Commissioner Innes, 13 November 2000).

⁵²⁵ [2001] FCA 1199.

was, there was
no discrimination.⁵²⁶

The approach of Emmett J was approved on appeal to the Full Bench of the Federal Court in *Purvis v State of New South Wales (Department of Education)*.⁵²⁷ The Full Court made it plain that it did not accept that ‘a comparison between the actual and the hypothetical for the purpose of assessing the existence of discrimination can never involve the hypothetical including behaviour of the kind exhibited by the actual’.⁵²⁸ The Full Court found that the proper comparison for the purpose of s5 of the DDA was:

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

The principal object of the Act is to eliminate discrimination **on the ground of** disability (of the defined kind) in the nominated areas (s 3). The object is to remove prejudice or bias against persons with a disability. The relevant prohibition here is against discrimination **on the ground of** the person's disability (s 22). Section 5 of the Act is related to the assessment of that issue. It is difficult to illustrate the comparison called for by s5 by way of a wholly hypothetical example, as it involves a comparison of treatment by the **particular** alleged discriminator, and requires findings of fact as to the particular disability, as to how the alleged discriminator treats or proposes to treat the aggrieved person, and as to how that alleged discriminator treats or would treat a person without the disability. The task is to ascertain whether the treatment or proposed treatment is based on the ground of the particular disability or on another (and non-discriminatory) ground. There must always be that contrast. To be of any value, the hypothetical illustration must make assumptions as to all factual integers.⁵²⁹

The Full Court doubted the approach adopted by Lockhart J in *HREOC v Mt Isa Mines Ltd*⁵³⁰ and concluded that the decisions of Toohey and Kirby J in *IW v City of Perth*⁵³¹ were given in the context of the *Equal Opportunity Act 1984 (WA)*, which has a different structure to the DDA. The Full Court preferred the decision of Clarke JA in *Waterhouse v Bell*⁵³² and Mahoney JA in *Boeringer Ingelheim Pty Ltd v Reddrop*.⁵³³

It is interesting to note that the approach of Emmett J and the Full Federal Court is consistent with the earlier decision of *Commonwealth of Australia v Humphries*.⁵³⁴ In this case, the complainant, who is visually impaired, alleged that she had been discriminated against on the basis of her disability by her employer as it had, *inter alia*, failed to provide her with equipment to perform her job. Kiefel J found that the comparison required by s5 of the DDA was between the complainant, who needed certain equipment to function in her job, and other persons employed in similar positions, who were not disabled but had reasonable needs for equipment to enable them to carry out their duties.

ii. The Law as Interpreted by the Federal Court and FMS

In *McKenzie v Department of Urban Services & Canberra Hospital*⁵³⁵ (*McKenzie*) a case decided before the decision of Emmett J in *State of New South Wales (Department of Education) v*

⁵²⁶ Ibid [51], [52].

⁵²⁷ [2002] FCA 503.

⁵²⁸ Ibid [32].

⁵²⁹ Ibid [29], [32].

⁵³⁰ 118 ALR 80.

⁵³¹ (1997) 191 CLR 1.

⁵³² (1991) 25 NSWLR 99.

⁵³³ [1984] 2 NSWLR 13.

⁵³⁴ [1998] 1031 FCA.

⁵³⁵ [2001] FMCA 20.

HREOC and Purvis,⁵³⁶ the FMS followed the HREOC approach to identifying a comparator. In this case the applicant, who has a physical disability (ophthalmoplegia) and a stress-related disability, claimed that her employer had discriminated against her by failing to provide her with rehabilitation and training (after an absence from work on stress leave) and suitable alternative employment over a two year period.

Raphael FM concluded that the employer had discriminated against the applicant on the basis of her disability. In undertaking the comparison required by s5 of the DDA, Raphael FM did not impute the characteristics of the applicant's disability, namely a 'prickly and combative personality'⁵³⁷ that was 'quick to complain and slow to conciliate',⁵³⁸ to the comparator. Instead he found that, in dismissing the applicant, the employer had treated her less favourably than another employee without those personality manifestations.⁵³⁹

*Randell*⁵⁴⁰ and *Minns v State of New South Wales*⁵⁴¹ (*Minns*) were decided after the Federal Court's decision in *State of New South Wales (Department of Education) v HREOC and Purvis*,⁵⁴² and in these cases the FMS adopted a different approach to that of Raphael FM in *McKenzie*.⁵⁴³

In *Randell*,⁵⁴⁴ the applicant, who had a mild dyslexic learning difficulty, was employed by the respondent on a traineeship to work in the warehouse sorting and arranging stock for delivery. The applicant was dismissed after seven weeks.

Raphael FM found that the appropriate comparator was other difficult trainees employed by the respondent.⁵⁴⁵ As the evidence established that in the past the respondent had sought assistance in relation to such difficult trainees from Employment National but, in the case of the applicant, it had failed to do so, Raphael FM concluded that the applicant was 'discriminated against in breach of s5(1) of the DDA in that he received less favourable treatment than a person without his disability would have received'.⁵⁴⁶

In *Minns*,⁵⁴⁷ the applicant, a student at two consecutive State schools, alleged that those schools had directly discriminated against him on the basis of his disability by requiring that he attend part-time, by suspending him and by expelling him. The applicant suffers from Asperger's syndrome, Attention Deficit Hyperactivity Disorder and Conduct Disorder.

In determining whether the allegation of direct discrimination had been made out, Raphael FM applied the reasoning of Emmett J in *State of New South Wales (Department of Education) v HREOC and Purvis*.⁵⁴⁸ As it was not submitted by either party that an actual comparator existed in this case, Raphael FM was of the view that the appropriate comparator was a hypothetical

⁵³⁶ [2001] FCA 1199.

⁵³⁷ *Ibid* [71].

⁵³⁸ *Ibid*.

⁵³⁹ *Ibid*.

⁵⁴⁰ [2002] FMCA 44.

⁵⁴¹ [2002] FMCA 60.

⁵⁴² [2001] FCA 1199.

⁵⁴³ [2001] FMCA 20.

⁵⁴⁴ [2002] FMCA 44.

⁵⁴⁵ *Ibid* [48].

⁵⁴⁶ *Ibid*.

⁵⁴⁷ [2002] FMCA 60.

⁵⁴⁸ [2001]FCA503.

student who had moved into both high schools with a similar history of disruptive behaviour to that of the applicant.⁵⁴⁹ His Honour ultimately found that there was no direct disability discrimination as in the majority of cases he could not conclude that the treatment of the applicant had been ‘less favourable’ than that of this hypothetical student.⁵⁵⁰

iii. Conclusion

The issue of what constitutes a proper comparison for the purpose of s5 of the DDA remains a live one. The Full Federal Court in *Purvis v State of New South Wales (Department of Education)*,⁵⁵¹ approving Emmett J’s decision in *State of New South Wales (Department of Education) v HREOC and Purvis*,⁵⁵² departed from the approach adopted by HREOC. The formulation favoured by the Full Court has since been followed by the FMS in a very similar factual context in *Minns*⁵⁵³ and also in *Randell*.⁵⁵⁴

It is anticipated that this issue will soon be considered by the High Court as it has granted special leave to Mr Purvis to appeal against the decision of Full Court of the Federal Court on this issue. This appeal will be heard on 29 April 2003.

(D) The Concept of ‘Reasonable Accommodation’

i. The Law under the HREOC Hearing Function

It is often suggested that a principle of ‘reasonable accommodation’ is found in s5(2) of the DDA, which is in the following terms:

For the purpose of subsection [5](1) [extracted above at 3.1.2], circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability.

In *Garity v Commonwealth Bank of Australia*,⁵⁵⁵ Commissioner Nettlefold asserted that the principle of reasonable accommodation ‘should be regarded as a central principle of disability discrimination law’.⁵⁵⁶

The most authoritative exposition of this principle in HREOC’s decisions is found in *Mrs J obo of herself and AJ v A School*.⁵⁵⁷ In this case, Sir Ronald Wilson stated that:

It will be remembered that s5(2) of the Act ensures that it is not just a question of treating the person with a disability in the same way as other people are treated; it is to be expected that the existence of the disability may require the person to be treated differently from the norm; in other words that some reasonable adjustment be made to accommodate the disability.⁵⁵⁸

On review in the Federal Court in *A School v HREOC & Anor*,⁵⁵⁹ the respondent argued that this interpretation of s5(2) was incorrect as it imposed a positive obligation to treat a person with a disability more favourably than a person without a disability. Mansfield J did not accept this

⁵⁴⁹ [2002] FMCA 60, [197].

⁵⁵⁰ *Ibid* [211].

⁵⁵¹ [2002] FCA 503.

⁵⁵² [2001] FCA 1199.

⁵⁵³ [2002] FMCA 60.

⁵⁵⁴ [2002] FMCA 44.

⁵⁵⁵ (Unreported, HREOC, Commissioner Nettlefold, 25 January 1999).

⁵⁵⁶ *Ibid* 68.

⁵⁵⁷ (Unreported, HREOC, Sir Ronald Wilson, 23 March 1998).

⁵⁵⁸ *Ibid* 17.

⁵⁵⁹ [1998] 1437 FCA.

(although he ultimately found that HREOC had erred in other ways). His Honour asserted that it is not necessarily the case that, where the DDA applies to a particular relationship or circumstance, there is no positive obligation to provide for the need of a person with a disability for different or additional accommodation or services.⁵⁶⁰

On remittal to HREOC, Commissioner McEvoy in *AJ & J v A School*⁵⁶¹ interpreted Mansfield J's comments as follows:

... [I]n some circumstances there may be some positive obligation on a respondent to take steps in order to ensure there is no material difference between the treatment accorded to a person with a disability and the treatment accorded to a person in similar circumstances but without a disability. Mansfield J alludes to this in his judgment in this matter. It is my view that without this interpretation of s5(2), it would be difficult to establish direct discrimination under the Act, except in the most blatant circumstances, and a person subjected to discriminatory treatment within the intention of the Act would most often had to rely on section 6 and establish indirect discrimination.
...

It is my view the substantial effect of s5(2) is to impose a duty on a respondent to make a reasonably proportionate response to the disability of the person with which it is dealing the provision of appropriate accommodation or other support as may be required as a consequence of the disability, so that in truth the person with the disability is not subjected to less favourable treatment than would a person without a disability in similar circumstances.⁵⁶²

Commissioner McEvoy's interpretation of s5(2) has not been totally accepted. In *Commonwealth of Australia v Humphries*,⁵⁶³ the complainant, who is visually impaired, alleged that she had been discriminated against on the basis of her disability by her employer as it had, failed to provide her with equipment to perform her job. Kiefel J disagreed that there was an implied obligation on an employer to take such steps as were necessary to enable a disabled employee to fulfil their employment duties. Her Honour stated:

I do not think the stated objects of the DDA go that far. ... The obligation on employers, then, is not to discriminate against disabled employees because of their disability. An unreasonable refusal to assist them may amount to wrongful conduct in a particular case. Section 5 however, does not permit the question, as to whether there is discrimination, to be answered in the affirmative on each occasion where an employer has in some way failed to assist a disabled employee.⁵⁶⁴

So too in the HREOC decision of *Clark v Internet Resources (Australia) Pty Ltd*,⁵⁶⁵ Commissioner Mahoney QC doubted that s5(2) imposed a positive obligation on respondents. In this case, the applicant, who is deaf, sought that the respondent pay half of the costs of an interpreter to enable her to attend one of its seminars. The respondent refused. Mahoney J considered whether the respondent had discriminated against the applicant contrary to s22 of the DDA, that is, by denying or limiting the applicant's access to the seminar. Without referring to the decision of Mansfield J in *A School v HREOC & Anor*,⁵⁶⁶ he found that the respondent had not. Commissioner Mahoney QC stated:

In my opinion, what occurred in the present case did not constitute the treatment of the complainant 'less favourably than' a person without the disability would have been treated. What the respondent

⁵⁶⁰ Ibid 13.

⁵⁶¹ (Unreported, HREOC, Commissioner McEvoy, 10 October 2000).

⁵⁶² Ibid 31.

⁵⁶³ [1998] 1031 FCA.

⁵⁶⁴ Ibid [12].

⁵⁶⁵ (Unreported, HREOC, Commissioner Mahoney QC, 20 July 2000).

⁵⁶⁶ [1998] 1437 FCA

did was to refuse to treat the complainant more favourably than it would have treated a person without the disability. On that basis also the complainant's case fails.

This result follows from the application of the literal terms of the legislation and in particular the concept of discrimination which has been adopted by this legislature. I have indicated, it has not been suggested nor do I find that, in the present case, the operation of that concept has been relevantly altered by other provisions of the Act.

A person with a disability such as the present complainant has may find it difficult to understand why the legislature has proscribed treating a person with a disability 'less favourably' but has failed to prescribe that a person with a disability should be treated in such a manner that she will be in a position equal to that of a person without the disability. But, in my opinion, in dealing with legislation of the present kind, it is important that terms of the legislation enacted be adhered to. No doubt the legislature, or those concerned with the framing of legislation, appreciated the difference between these two approaches. No doubt it saw the difference between, on the one hand, requiring a private individual to spend such monies as will ensure that a person with a disability is not treated 'less favourably' and requiring a private individual to incur the cost of placing a person with a disability on the same level as other persons. The matter is to be judged according to the terms of the legislation. The legislature has limited what it has proscribed to detriment. In saying this I am conscious that, in some provisions, the legislation may be seen to go beyond the mere prevention of detriment. But in the present case, as it had been presented, the distinction has in my opinion been maintained.⁵⁶⁷

Most recently in *State of New South Wales (Department of Education) v HREOC and Purvis*,⁵⁶⁸ Emmett J considered the operation of s5(2). In order to understand the terms 'accommodation' and 'services' in this section, his Honour examined their respective definitions in s4 of the DDA. In section 4:

accommodation includes residential or business accommodation.

services includes:

- (a) services relating to banking, insurance, superannuation and the provision of grants, loans, credit or finance; or
- (b) services relating to entertainment, recreation or refreshment; or
- (c) services relating to transport or travel; or
- (d) services relating to telecommunications; or
- (e) services of the kind provided by the members of any profession or trade; or
- (f) services of the kind provided by a government, a government authority or a local government body.

Emmett J concluded that as the facts of the case before him did not appear to have anything to do with 'accommodation' or 'services' in the sense defined, s5(2) could not have any 'relevant application' to the case.⁵⁶⁹ That an identical argument had been earlier rejected by Kiefel J of the Federal Court in *Commonwealth of Australia v Humphries*,⁵⁷⁰ does not appear to have been drawn to Emmett J's attention. This point was not considered on appeal by the Full Court in *Purvis v State of New South Wales (Department of Education)*.⁵⁷¹

ii. The Law as Interpreted by the Federal Court and FMS

As yet, there has been no first instance decision by the Federal Court or the FMS specifically considering s5(2) of the DDA (the decisions referred to above were all made following an application for administrative review). However, there are two FMS cases where a concept of

⁵⁶⁷ Ibid 7.

⁵⁶⁸ [2001] FCA 1199.

⁵⁶⁹ Ibid [48].

⁵⁷⁰ [1998] 1031 FCA.

⁵⁷¹ [2002] FCA 503.

'reasonable accommodation' has been used, without being named as such, to ground a finding of discrimination in employment under s15(2)(b) of the DDA. Section 15(2) of the DDA provides:

It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against an employee on the ground of the employee's disability or a disability of any of that employee's associates:

- (a) in the terms or conditions of employment that the employer affords the employee; or
- (b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment; or
- (c) by dismissing the employee; or
- (d) by subjecting the employee to any other detriment.

In *McKenzie*⁵⁷² the applicant, who has a physical disability and a stress-related disability, claimed that her employer had failed to provide her with rehabilitation and training (after an absence from work on stress leave) and suitable alternative employment over a two year period. In its defence, the respondent argued that it had regularly supplied Ms McKenzie with copies of the Commonwealth Government Gazette.

Raphael FM found that there had been unlawful discrimination contrary to s15(2)(b) of the DDA.⁵⁷³ His Honour was of the view that more was required to be done by the respondent over such a lengthy period. Raphael FM considered that there was an obligation on the employer to offer Ms McKenzie the opportunity to attend counselling, to guide her into further training, or to find her another temporary placement.⁵⁷⁴ In the circumstances, his Honour drew an inference that the Department wished to terminate her services as soon as possible because it had formed the view that her disability prevented her from ever being a satisfactory employee and found unlawful discrimination.

In *Randell*,⁵⁷⁵ the applicant, who has a mild dyslexic learning difficulty, was employed by the respondent on a traineeship to work in its warehouse sorting and arranging stock for delivery. The applicant was dismissed after seven weeks. Raphael FM found that the applicant 'was discriminated against in breach of s5(1) of the DDA in that he received less favourable treatment than a person without his disability would have received'.⁵⁷⁶ Support services, including support for persons with a disability, were available to the respondent through Employment National if they were having trouble with the performance of a trainee. The respondent had called on these services before, but did not do so in this instance, and that was found to be because of the applicant's disability. Raphael FM stated that:

Nor did the respondent offer Mr Randell the forms of assistance, which it claims it would have offered him had he properly filled in the form. The failure of the company, once it knew of Mr Randell's dyslexia to provide him with the extra training or other benefit associated with employment which it claims was readily available is a breach of s.15(2)(b) of the DDA. The dismissal of

Mr Randell is a breach of paragraph 15(2)(c).⁵⁷⁷

⁵⁷² [2001] FMCA 20.

⁵⁷³ Ibid [53].

⁵⁷⁴ Ibid [71].

⁵⁷⁵ [2002] FMCA 44.

⁵⁷⁶ Ibid [48].

⁵⁷⁷ Ibid.

iii. Conclusion

To date, it would appear that the issue of ‘reasonable accommodation’ pursuant to s5(2) of the DDA has not been directly considered by the FMS or the Federal Court, although a similar concept has been adopted in the context of s15(2) of the DDA. It remains to be seen whether a concept of ‘reasonable accommodation’, such as that propounded in the decision of Commissioner McEvoy in *AJ & J v A School*,⁵⁷⁸ is directly recognised and accepted by the Federal Court and FMS. The most recent indications of the Federal Court are that a narrower approach to s5(2) will be preferred.

(E) Assistance Animals

Section 9 of the DDA provides that a person will be taken to have discriminated against an aggrieved person with a disability, if the aggrieved person is treated less favourably because he or she is accompanied by a guide dog, hearing assistance dog or any other animal ‘trained to assist the aggrieved person to alleviate the effect of the disability’. While the decisions of HREOC involved a literal application and interpretation of this section, the FMS gave a wide interpretation to s9 in *Sheehan v Tin Can Bay Country Club*⁵⁷⁹ (*Sheehan*).

i. The Law under the HREOC Hearing Function

All of the cases that were decided by HREOC pursuant to s9 of the DDA involved persons with visual or hearing disabilities and their appropriately trained guide or hearing dogs. In *Jennings v Lee*⁵⁸⁰ the respondent was found to have discriminated against the applicant, who has a visual impairment, under s9 of the DDA by refusing to permit her to be accompanied by her guide dog while she ate in his restaurant.

Similar findings of unlawful discrimination were made in the context of the refusal to provide accommodation in a caravan park to an applicant with a hearing impairment because he was accompanied by his hearing dog⁵⁸¹ and the refusal to allow an applicant with a visual impairment to enter a store because she was accompanied by her guide dog.⁵⁸²

ii. The Law as Interpreted by the Federal Court and FMS

In the first case to be decided by the FMS or Federal Court on this issue, a wide interpretation was given to s9 of the DDA. In *Sheehan*⁵⁸³ the respondent club was found to have discriminated unlawfully against the applicant, who suffers from an anxiety disorder, pursuant to s9 of the DDA when it refused to permit the applicant’s unleashed dog on the premises. Raphael FM found:

The symptoms of Mr Sheehan's disability include a concern about meeting people and a concern about the way in which people will react to him. He therefore sought, in approximately 1997, to relieve these symptoms by training a dog to be an animal assistant. He thought that utilising the dog to break the ice between himself and people he would meet for the first time would enable him to overcome the concerns which he felt. The use of the dog in this manner would qualify the dog to be an ‘assistance dog’ within s9 of the Act, see s9(1)(f):

⁵⁷⁸ (Unreported, HREOC, Commissioner McEvoy, 10 October 2000).

⁵⁷⁹ [2002] FMCA 95.

⁵⁸⁰ (Unreported, HREOC, Commissioner Nader, 1 October 1996).

⁵⁸¹ *Brown v Birss Nominees Pty Ltd* (Unreported, HREOC, Commissioner Innes, 3 July 1997).

⁵⁸² *Grovenor v Eldridge* (Unreported, HREOC, President Tay, 18 December 1998).

⁵⁸³ [2002] FMCA 95.

‘... any other animal trained to assist the aggrieved person to alleviate the affect of the disability, or because of any matter related to that fact.’

Mr Sheehan trained the dog Bonnie himself and he described to the Court a number of ways in which the dog assisted him, both as I have previously described and also in other matters.⁵⁸⁴

iii. Conclusion

The decision in *Sheehan*⁵⁸⁵ has highlighted the fact that s9 does not prescribe any regime or test to determine whether and when assistance animals come within the scope of that section. In particular, there is no express requirement in s9 that the animal be trained by a recognised agency, or that, as well as the animal being trained to provide assistance, the training extend (as guide dog and hearing dog training does) to appropriate behaviour and health standards in the animal, such that it can be safely admitted where dogs or other animals are not otherwise permitted.

In addition, it is arguable that the interpretation of the concept of ‘assistance’ adopted by Raphael FM is so broad as to entitle any person with a disability to be accompanied by an animal of their choice. This is because it will always be possible to claim that an animal provides companionship, a talking point in social interaction and a greater sense of security, and thereby alleviates the effect of a person’s disability. A person with an anxiety disorder, for example, may well claim that being accompanied by an intimidating dog makes them feel less anxious, although such a dog may not have a similarly reassuring effect for other people (including older people, small children, or other people with disabilities).⁵⁸⁶

(F) Jurisdiction

i. The Law under the HREOC Hearing Function

The ‘limited application provisions’ of the DDA (Divisions 1, 2 and 3 of Part 2 other than ss20, 29 and 30) have effect in the circumstances set out in ss12(7) – (14) of the DDA. HREOC considered the operation of s12(8) of the DDA in *Allen v United Grand Lodge of Queensland*.⁵⁸⁷ Section 12(8) provides that:

12 Application of Act

(1) In this section:

...

(1) limited application provisions' mean the provisions of Divisions 1, 2 and 3 of Part 2 other than sections 20, 29 and 30.

(2) Subject to this section, this Act applies throughout Australia.

...

⁵⁸⁴ *Ibid* [2].

⁵⁸⁵ [2002] FMCA 95.

⁵⁸⁶ See at www.humanrights.gov.au/disability_rights/update/1002.htm comments of the Acting Disability Discrimination Commissioner that *Sheehan* ‘creates an unsustainable position for service providers and other members of the public while not giving surety of access rights to users of appropriate assistance animals’.

⁵⁸⁷ (Unreported, HREOC, Commissioner Carter QC, 12 April 1999). See also *Maguire v SOCOG* (Unreported, HREOC, Commissioner Carter QC, 18 November 1999).

- (8) The limited application provisions have effect in relation to discrimination against a person with a disability to the extent that the provisions:
- (a) give effect to the [*ILO Convention concerning Discrimination in Respect of Employment and Occupation (No.111)*]⁵⁸⁸; or
 - (b) give effect to the Covenant on Civil and Political Rights; or
 - (c) give effect to the International Covenant on Economic, Social and Cultural Rights; or
 - (d) relate to matters external to Australia; or
 - (e) relate to matters of international concern.

In this case, the applicant alleged disability discrimination pursuant to s23 of the DDA. The applicant, who has reduced mobility, complained that he was not able to access the respondent's premises because those premises could only be accessed by stairs.

In considering whether s23 related to 'matters of international concern' Commissioner Carter QC considered the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities which were adopted by a Resolution of the General Assembly of the United Nations in 1994. Rule 5 identifies access to the physical environment as one of the target areas for equal participation by disabled persons. Commissioner Carter QC concluded that as s23 has a 'direct relationship' with this Rule, it relates to a matter of international concern.

He stated:

Clearly the United Nations Resolution and the Rules annexed evidence the joint concern of Member States to promote the equalisation of opportunities for persons with disabilities. The corollary of that proposition is that discrimination by one person against another on the ground of the latter's disability has to be rejected. The equalisation of opportunities for the disabled is the very antithesis of a regime which condones discrimination on the ground of one's disability. Therefore one can only conclude that the equalisation of opportunities for the disabled and the avoidance of discrimination on the ground of disability has become a matter of international concern and one manifestation of that concern is the United Nations Resolution referred to in some detail above.⁵⁸⁹

ii. The Law as Interpreted by the Federal Court and FMS

The operation of the limited application provisions of the DDA was raised in the Federal Court in *Court v Hamlyn-Harris t/as Shearwater Oysters*⁵⁹⁰ (*Court*). In that case, the applicant, who has a vision impairment, alleged that the respondent, his employer, had unlawfully discriminated against him by dismissing him. The respondent, Hamlyn-Harris, was a sole-trader carrying on business in two States.

In support of his application alleging discrimination in the course of employment (s15 is a limited operation provision), the applicant relied upon s12(12) of the DDA. That subsection provides:

- 12(12) The limited application provisions have effect in relation to discrimination in the course of, or in relation to, trade or commerce:
- (a) between Australia and a place outside Australia; or
 - (b) among the States; or
 - (c) between a State and a Territory; or

⁵⁸⁸ *International Labour Organisation Convention (No. 111) concerning Discrimination in respect of Employment and Occupation*, opened for signature 25 June 1958, 1974 ATS 12, (entered into force generally 15 June 1960, and in Australia 15 June 1974) (*ILO Convention (No. 111)*). This Convention is scheduled to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) at Schedule 1.

⁵⁸⁹ (Unreported, HREOC, Commissioner Carter QC, 12 April 1999) 7.

⁵⁹⁰ [2000] FCA 1870.

(d) between 2 territories.

In his decision, Heerey J considered s12(12) of the DDA and, in particular, whether the alleged termination of the applicant's employment was in the course of, or in relation to, trade or commerce. In finding that the alleged termination did not come within the meaning of 'in trade or commerce', his Honour relied upon the decision of the High Court in *Concrete Constructions (NSW) Pty Ltd v Nelson*.⁵⁹¹ Heerey J concluded:

In the present case the dealings between Mr Court and his employer Mr Hamlyn-Harris were matters internal to the latter's business. They were not in the course of trade or commerce, or in relation thereto ...

That being so, I conclude this Court has no jurisdiction to hear the application. I do not accept the argument of counsel for Mr Court that the HR Act [*Human Rights & Equal Opportunity Commission Act 1986* (Cth)] is not confined to the limited application provisions of the DD Act [*Disability Discrimination Act 1992* (Cth)] but applies to 'unlawful discrimination in general'. Being a Commonwealth Act, the DD Act has obviously been carefully drafted to ensure that it is within the legislative power of the Commonwealth.⁵⁹²

iii. Conclusion

It does not appear that Heerey J in *Court*⁵⁹³ was referred to other sub-sections of s12, such as s12(8), or to the decision in *Allen v United Grand Lodge*⁵⁹⁴ to overcome the perceived 'jurisdictional issue' in this case. Furthermore, it does not appear that a line of authority in the Federal Court of Australia following *Concrete Constructions (NSW) Pty Ltd v Nelson*⁵⁹⁵ was drawn to Heerey J's attention in this case. In a series of first instance judgments, Wilcox, Weinberg and Finklestein JJ have held that the negotiations regarding the formation, variation and termination of an employment contract are within the course of 'trade or commerce'.⁵⁹⁶

2.4.2 Case Digest

(A) Intention to Discriminate

A number of cases before the FMS⁵⁹⁷ have affirmed the well established principle that an intention or motive to discriminate is not required to find a breach of the DDA. The seminal statement of this position is found in the judgments of Mason CJ and Gaudron J in *Waters*:⁵⁹⁸

It would, in our view, significantly impede or hinder the attainment of the objects of the Act if [the DDA] were to be interpreted as requiring an intention or motive on the part of the alleged discriminator that is related to the status or private life of the person less favourably treated. It is enough that the material difference in treatment is based on the status or private life of that person, notwithstanding an absence of intention or motive on the part of the alleged discriminator relating to either of those considerations.⁵⁹⁹

⁵⁹¹ [1990] 169 CLR 594.

⁵⁹² [2000] FCA 1870, [14], [15].

⁵⁹³ [200] FCA 1870.

⁵⁹⁴ (Unreported, HREOC, Commissioner Carter QC, 12 April 1999).

⁵⁹⁵ [1990] 169 CLR 594.

⁵⁹⁶ *Barto v GPR Management Services Pty Ltd* (1991) 33 FCR 389; *McCormick v Riverwood International Australia Pty Ltd* [1999] FCA 1640; *Stoelwinder v Southern Health Care Network* (Unreported, Federal Court of Australia, Finkelstein J, 7 April 2000).

⁵⁹⁷ *Arrah v P&O Catering & Services P/L* [2002] FMCA 27; *Darlington v CASCO* [2002] FMCA 176.

⁵⁹⁸ (1991) 173 CLR 349.

⁵⁹⁹ *Ibid* 359.

An example of the application of the principle was in *Travers v State of New South Wales*⁶⁰⁰ (*Travers*) where Raphael FM found that while the respondent did not intend to discriminate against the applicant, and had no malicious motivation, it had misapprehended the needs of the applicant and the facility that was available to meet those needs. The respondent was found to have discriminated against the applicant under ss6 and 22 of the DDA.

(B) The Nexus between the Disability and the ‘Less Favourable Treatment’

A number of cases before the Federal Court⁶⁰¹ and the FMS⁶⁰² have also affirmed the long standing principle that there can be no finding of discrimination unless it is established that there is a causal relationship between the disability of the aggrieved person and any less favourable treatment accorded to them.⁶⁰³

For example, this issue was discussed by Raphael FM in *Maghiar v State of Western Australia*.⁶⁰⁴ Raphael FM emphasised the need for a causal connection between the alleged conduct and the accepted disability rather than ‘mere conjecture’.⁶⁰⁵ The decision was affirmed by French J on appeal.⁶⁰⁶

(C) Direct or Indirect Discrimination?

In *Minns*,⁶⁰⁷ the applicant alleged direct and indirect disability discrimination by the respondent. In response, the respondent submitted that the definitions of direct and indirect discrimination are mutually exclusive and, therefore, that the applicant had to elect whether to pursue his or her claim as a direct or indirect discrimination complaint.

Raphael FM was of the view that the authorities

are clear that these definitions [that is, direct and indirect discrimination] are mutually exclusive (*Waters v Public Transport Corporation* (1991) 173 CLR 349 at 393; *Australian Medical Council v Wilson* (1996) 68 FCR 46 at 55).⁶⁰⁸

His Honour added, ‘that which is direct cannot also be indirect’.⁶⁰⁹

However, Raphael FM asserted that this does not prevent an applicant from ‘pleading’ that the same set of facts constitutes direct and indirect discrimination. His Honour relied upon the reasoning of Emmett J in *State of New South Wales (Department of Education) v HREOC*⁶¹⁰ and that of Wilcox J in *Tate*⁶¹¹ to suggest that ‘the same facts can be put to both tests’.⁶¹²

⁶⁰⁰ [2000] FCA 1565.

⁶⁰¹ *Maghiar v State of Western Australia* [2002] FCA 262.

⁶⁰² *Arrah v P&O Catering & Services P/L* [2002] FMCA 27; *Saddi v Active Employment, Break Thru Personnel Inc, Care Employment and Commonwealth of Australia* [2001] FMCA 73; *Oberoi v HREOC* [2001] FMCA 34.

⁶⁰³ This position was established in cases such as *Commonwealth v Humphries* (1998) 86 FCR 324 and *HREOC v Mt Isa Mines Ltd* (1993) 46 FCR 301.

⁶⁰⁴ [2001] FMCA 98.

⁶⁰⁵ *Ibid* [16].

⁶⁰⁶ *Maghiar v State of Western Australia* [2002] FCA 262.

⁶⁰⁷ [2002] FMCA 60.

⁶⁰⁸ *Ibid* [173].

⁶⁰⁹ *Ibid*.

⁶¹⁰ [2001] FCA 1199.

⁶¹¹ [2001] FMCA 127.

⁶¹² [2002] FMCA 60, [245].

(D) Retrospectivity of the DDA

In *Parker v Swan Hill Police*,⁶¹³ the applicant complained of discrimination against her son as a result of events occurring in 1983. North J held that the DDA, which commenced operation in 1993, did not have retrospective operation. The application was therefore dismissed.

(E) Employment

i. Meaning of 'Employment'

In *Ryan v Presbytery of Wide Bay Sunshine Coast & Presbyterian Church of Queensland*,⁶¹⁴ Baumann FM considered whether the employment provisions of the DDA applied to a Minister of the Church who had been 'demissioned' by his Church. In accordance with established case law, Baumann FM found that the applicant would have 'some difficulty in establishing, as a matter of law, that he was an employee of the Church at the time'.⁶¹⁵ This was because the relationship with the church was a religious one, based on consensual compact to which the parties were bound by their shared faith, based on spiritual and religious ideas, and not based on common law contract.

ii. Inherent Requirements

Section 15(4) of the DDA provides:

Neither paragraph (1)(b) nor (2)(c) renders unlawful discrimination by an employer against a person on the ground of the person's disability, if taking into account the person's past training, qualifications and experience relevant to the particular employment and, if the person is already employed by the employer, the person's performance as an employee, and all other relevant factors that it is reasonable to take into account, the person because of his or her disability:

- (a) would be unable to carry out the inherent requirements of the particular employment; or
- (b) would, in order to carry out those requirements, require services or facilities that are not required by persons without the disability and the provision of which would impose an unjustifiable hardship on the employer.

In *Cosma v Qantas Airways Limited*⁶¹⁶ (*Cosma*) Heerey J applied the test articulated by the High Court in *Qantas Airways Ltd v Christie*⁶¹⁷ to ascertain the 'inherent requirements' of a particular position of employment for the purpose of s15(4) of the DDA. His Honour stated that:

The question whether a requirement is inherent in a particular employment must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation: *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 at [1] per Brennan CJ. An inherent requirement is something that is essential to the position in question: *ibid* at [34]. As Gaudron J said in *Christie* at [36]:

"A practical method of determining whether or not a requirement is an inherent requirement, in the ordinary sense of that expression, is to ask whether the position would be essentially the same if that

⁶¹³ [2000] FCA 1688.

⁶¹⁴ [2001] FMCA 12.

⁶¹⁵ Baumann FM cited with approval a decision of the Full Court of the Supreme Court of South Australia, *Greek Orthodox Community of South Australia Inc v Emogenous*, (unreported decision of 5 October 2000) which had adopted a decision of Wright J, President of the Industrial Relations Commission of New South Wales, in the matter of *Knowles v the Anglican Church Property Trust, Diocese of Bathurst* [1999] 89 IR 47, a case of alleged unfair dismissal by a priest of the Anglican church.

⁶¹⁶ [2002] FCA 640.

⁶¹⁷ [1998] HCA 18.

*requirement were dispensed with.*⁶¹⁸

Heerey J then considered s15(4)(b) and asserted that:

[This] provision does not require the employer to alter the nature of the particular employment or its inherent requirements. Rather it is a question of overcoming an employee's inability, by reason of disability, to perform such work. This is to be done by provision of assistance in the form of 'services', such as providing a person to read documents for a blind employee, or 'facilities' such as physical adjustment like a wheel chair ramp. The 'services' or 'facilities' are external to the 'particular employment' which remains the same. As Gummow and Hayne JJ said in the X Case [*X v The Commonwealth* [1999] HCA 63] at [102]:

*'But the requirements that are to be considered are the requirements of the particular employment, not the requirements of employment of some identified type or some different employment modified to meet the needs of a disabled employee or applicant for work.'*⁶¹⁹

There was no dispute in *Cosma*⁶²⁰ that the applicant, who was employed by the respondent as a porter in ramp services at Melbourne Airport, was not able to perform the 'inherent requirements' of his position due to a shoulder injury. His discrimination complaint was dismissed by Heerey J because the applicant failed to identify any services or facilities which might have been provided by the employer pursuant to s15(4)(b).

The decision in *Cosma*⁶²¹ was distinguished in the case of *Barghouti v Transfield Pty Limited*,⁶²² where Hill J found that an employee had suffered unlawful discrimination when he was constructively dismissed from his employment after advising his employer that he was unable to return to work on account of a back injury. Hill J held that, unlike the position in *Cosma*,⁶²³ there was no evidence that the applicant could not continue in his employment with the respondent working in an office or in some capacity not inconsistent with his disability. His Honour found that:

The failure to explore such possibilities means that the respondent's dismissal cannot fall within the terms of s15(4) and the dismissal amounts to discrimination in employment.⁶²⁴

iii. Unjustifiable Hardship

In *Williams v Commonwealth of Australia*,⁶²⁵ McInnis FM considered whether the provision of facilities to an officer in the Australia Defence Forces with insulin dependent diabetes to enable him to properly treat and regulate this condition whilst deployed for combat duties would impose 'unjustifiable hardship' for the purpose of s15(4)(b) on the respondent. McInnis FM found that in 'this modern age'⁶²⁶ it did not.

⁶¹⁸ [2002] FCA 640, [60].

⁶¹⁹ *Ibid* [67].

⁶²⁰ [2002] FCA 640.

⁶²¹ *Ibid*.

⁶²² [2002] FCA 666.

⁶²³ *Ibid*.

⁶²⁴ *Ibid* [24].

⁶²⁵ [2002] FMCA 89.

⁶²⁶ *Ibid* [149].

(F) Education - Indirect Discrimination

Section 6 of the DDA provides:

For the purposes of this Act a person ('discriminator') discriminates against another person ('aggrieved person') on the ground of a disability of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition:

- (a) with which a substantially higher proportion of persons without the disability comply or are able to comply;
- (b) which is not reasonable having regard to the circumstances of the case; and
- (c) with which the aggrieved person does not or is not able to comply.

i. Section 6(a) – The Choice of a 'comparator'

In *Minns*,⁶²⁷ the respondent submitted that the FMS should follow decisions under the *Sex Discrimination Act 1984* (Cth), such as *Banovic*⁶²⁸ and *Commonwealth Bank of Australia v HREOC*⁶²⁹ when determining the appropriate comparator group or 'pool' for the purpose of s6(a). Although Raphael FM considered that the point was well made,⁶³⁰ he preferred to follow the approach of Emmett J in *State of New South Wales (Department of Education) v HREOC and Purvis*⁶³¹ (the only case dealing with the concept of a comparator in an indirect disability discrimination case) as his Honour 'did not appear to be troubled by fitting the applicant into a pool'.⁶³² Raphael FM quoted Emmett J:

Section 6(a) on the other hand contemplates a situation where discrimination operates indirectly. One example of such indirect discrimination would be requiring a complainant to act in a way that was made impossible by a person's disability. Thus an illustration of conduct that might fall within s6(a), based on the facts in the present case, would be the situation where the school expelled the complainant because he continued to swear and demonstrate violent behaviour.⁶³³

However, Raphael FM did note that 'it is for the applicant to prove his case and if that requires a complex, time consuming and undoubtedly expensive exercise in comparisons then it must be undertaken'.⁶³⁴

ii. Section 6(b) - Reasonable having regard to the Circumstances of the Case

In *Minns*,⁶³⁵ the applicant alleged that a State high school had indirectly discriminated against him on the basis of his disability by requiring that he comply with its disciplinary policies.

Raphael FM approved the test of reasonableness for s6(b) articulated by Bowen CJ and Gummow J in *Department of Foreign Affairs v Styles*⁶³⁶ as follows:

⁶²⁷ [2002] FMCA 60.

⁶²⁸ (1987) 168 CLR 165.

⁶²⁹ (1998) 150 ALR 1.

⁶³⁰ [2002] FMCA 60, [253].

⁶³¹ [2001] FCA 1199.

⁶³² [2002] FMCA 60, [254].

⁶³³ [2002] FMCA 60, [40].

⁶³⁴ [2002] FMCA 60, [253].

⁶³⁵ [2002] FMCA 60.

The test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience. ... The criterion is an objective one, which requires the court to weigh the nature and extent of the discretionary effect on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All of the circumstances of the case must be taken into account.⁶³⁷

His Honour stated that it is not sufficient that this reasonableness test be applied only to the applicant. It must be looked at in the context of all persons to whom it might apply.⁶³⁸ As the FMS found in *Travers*,⁶³⁹ ‘all the circumstances’ includes but was not limited to the circumstances of the disabled student. In that case, whilst it might have been reasonable for a school to require the students in a particular class to utilise the lavatory in another building, it was not reasonable to require a student in that class who had serious incontinence problems to do so where there was an available toilet just outside the classroom door.

In *Minns*,⁶⁴⁰ Raphael FM held that the high school disciplinary policy was reasonable in all of the circumstances. He found that the classes would not have been able to function if the student could not be removed for disruptive behaviour and other students would not be able to achieve their potential if most of the teacher’s time was taken up handling that student.⁶⁴¹

iii. Section 6(c) – Ability to Comply with a Requirement or Condition

In *Travers*⁶⁴² the Federal Court, in hearing an application for summary dismissal by the respondent, considered the test for indirect discrimination. The Federal Court held that a ‘reasonably liberal’ interpretation of the phrase ‘is not able to comply’ in s6(c) is required.⁶⁴³ In the case before it the Court decided it was not literally impossible for the applicant to comply with the condition, but the consequences would have been seriously embarrassing and distressing. The applicant, a 12 year-old girl with spina bifida and resultant bowel and bladder incontinence, claimed that she was denied access to a toilet for disabled students which was near her classroom. Requiring her to use toilets further away from her classroom imposed a condition with which she was unable to comply because she was unable to reach the toilet in time to avoid an accident.⁶⁴⁴

(G) Access to Premises

i. ‘Terms and Conditions’ – Section 23

In *Haar v Maldon Nominees Pty Ltd (t/as McDonalds) & Ors*⁶⁴⁵ (*Haar*), the FMS considered the scope of the expression ‘terms and conditions’ for the purposes of s23 of the DDA which makes it unlawful to discriminate by (amongst other things) imposing terms and conditions on which access to premises or facilities is allowed. The case involved a woman, who was visually

⁶³⁶ (1989) 88 ALR 621.

⁶³⁷ [2002] FMCA 60, [258]. His Honour also approved Harper J in *State of Victoria v Schou* (2001) EOC 93-170, [259].

⁶³⁸ [2002] FMCA 60, [260].

⁶³⁹ [2001] FMCA 18.

⁶⁴⁰ [2002] FMCA 60.

⁶⁴¹ [2002] FMCA 60, [263].

⁶⁴² [2000] FCA 1565.

⁶⁴³ *Ibid* [17].

⁶⁴⁴ Lehane J referred to the line of cases including *Mandla v Lee* [1983] 2 AC 548, *Australian Public Service Association v Australian Trade Commission* [1988] EOC 92-228, 77,162 and *Styles v Secretary, Department of Foreign Affairs and Trade* [1988] EOC 92-239, 77,238 in support of this interpretation of compliance.

⁶⁴⁵ [2000] FMCA 5.

impaired and had a guide dog, being asked to sit outside on her next visit to the respondent's premises. McInnis FM held:

In my opinion the imposition of terms and conditions for the purpose of s23 of the DDA does not have to be in writing or in precise language. So long as the words uttered are capable of meaning and were understood to mean that the Applicant would only be allowed access to the premises in a restricted manner and/or use of the facilities in a restricted manner then in my view that is sufficient to constitute a breach of the legislation.⁶⁴⁶

In *Sheehan*⁶⁴⁷ Raphael FM decided that a man with an anxiety disorder that required him to have an assistance dog in social situations was deemed to have been discriminated against under s23(1)(b) and (e) of the DDA when his local club imposed the condition that his dog not be allowed into the club unless it was on a leash.⁶⁴⁸

(H) Provision of Goods, Services and Facilities

The applicant in *Vintilla v Federal Attorney General*⁶⁴⁹ sought to challenge a Regulation Impact Statement (RIS) prepared by the Attorney-General for Cabinet in relation to draft disability standards for public transport. He argued that the RIS could be viewed as a provision of a service and was thus covered by the DDA.

McInnis FM found that an RIS does not constitute the provision of a service for the purposes of s24, as a proposal set out in a document that is no more than an impact statement or a cost benefit analysis can not fall within the purview of that section.

In *Tate*,⁶⁵⁰ Wilcox J rejected an argument that a person is not discriminated against (contrary to the DDA) by being refused access to goods, services or facilities in circumstances where they have access to goods, services or facilities from another source. His Honour held:

[I]t is no answer to a claim of discrimination by refusal of provision of goods, services or facilities to say that the discriminatee is, or may be, able to obtain the goods, services or facilities elsewhere. The Act is concerned to prevent discrimination occurring; that is why it makes the particular discriminatory act unlawful and provides a remedy to the discriminatee.⁶⁵¹

In *Ball v Morgan & Anor*⁶⁵² McInnis FM had occasion to consider whether, when enforcing rights under human rights legislation, the conduct of the parties should be examined. In this case, the applicant had been at an illegal brothel in Victoria and alleged she had been discriminated against in the provision of the services and facilities at that brothel on the basis of her disability which required her to use a wheelchair.

McInnis FM dismissed her application. His Honour found that there were strong public policy reasons precluding him from granting relief in circumstances where to do so would establish a standard and duty of care owed by the respondents to the applicant in the provision of a service from an illegal brothel. His Honour concluded that 'the refusal to grant relief under the appropriate legislation is not a disproportionate outcome having regard to the nature of the

⁶⁴⁶ Ibid [68].

⁶⁴⁷ [2002] FMCA 95.

⁶⁴⁸ Ibid [24].

⁶⁴⁹ [2001] FMCA 110.

⁶⁵⁰ [2000] FCA 1582.

⁶⁵¹ Ibid [53].

⁶⁵² [2001] FMCA 127.

activity involved'⁶⁵³ as '[i]t would be contrary to the public interest for the courts to simply enforce a right arising out of human rights legislation if indeed that right were not to be enforceable as a contract due to illegality'.⁶⁵⁴

(I) Exemptions to the DDA

i. Section 46(2)

Section 46 of the DDA provides:

This Part does not render it unlawful for a person to discriminate against another person, on the ground of the other person's disability, by refusing to offer the other person:

- (a) an annuity; or
 - (b) a life insurance policy; or
 - (c) a policy of insurance against accident or any other policy of insurance; or
 - (d) membership of a superannuation or provident fund; or
 - (e) membership of a superannuation or provident scheme;
- if:
- (f) the discrimination:
 - (i) is based upon actuarial or statistical data on which it is reasonable for the first-mentioned person to rely; and
 - (ii) is reasonable having regard to the matter of the data and other relevant factors; or
 - (g) in a case where no such actuarial or statistical data is available and cannot reasonably be obtained—the discrimination is reasonable having regard to any other relevant factors.

In *Xiros v Fortis Life Assurance Ltd*⁶⁵⁵ Driver FM considered the provisions of s46(1) of the DDA. In this case, the applicant had been diagnosed HIV positive and it was not disputed that he had been discriminated against on that basis when his claim under an insurance policy which excluded 'all claims made on the basis of the condition of HIV/AIDS' was declined.

Driver FM considered the meaning of the term 'reasonable' in the context of s46(1). His Honour was of the view that what was reasonable should be decided 'in all the circumstances'. In the matter before him, his Honour found that 'it was reasonable, having regard to the anti-selection risk faced by the respondent for it to maintain its exclusionary clause in existing contracts of insurance... and, hence, to maintain its rejection of Mr Xiros' claim under his policies'.⁶⁵⁶

ii. Section 53

Section 53(1) of the DDA provides:

This Part does not render it unlawful for a person to discriminate against another person on the ground of the other person's disability in connection with employment, engagement or appointment in the Defence Force:

- (a) in a position involving the performance of combat duties, combat-related duties or peacekeeping service; or
- (b) in prescribed circumstances in relation to combat duties, combat-related duties or peacekeeping service; or

⁶⁵³ Ibid [61].

⁶⁵⁴ Ibid [56].

⁶⁵⁵ [2001] FMCA 15.

⁶⁵⁶ His Honour found the decisions of the High Court in *Waters v Public Transport Corporation* [1991] 173 CLR 349 and the Federal Court in *Secretary, Department of Foreign Affairs and Trade v Styles* [1989] 23 FCR 251 (although considering 'reasonableness' in a different context) a useful guide.

(c) in a position involving the performance of duties as a chaplain or a medical support person in support of forces engaged or likely to be engaged in combat duties, combat-related duties or peacekeeping service.

The *Disability Discrimination Regulations 1996* (Cth) provide definitions of ‘combat duties’ and ‘combat related duties’.⁶⁵⁷

In *Williams v Commonwealth of Australia*,⁶⁵⁸ McInnis FM emphasised the importance of assessing the ‘reality’ of an applicant’s position in the Australian Defence Forces when applying s53. His Honour stated that:

To apply a ‘blanket’ immunity from the application of the DDA simply on the basis of a general interpretation of combat related duties would be inconsistent with the day to day reality of the Applicant’s inherent requirements of his particular employment ... If that were the case then s53 would only need to say that this part does not render it unlawful for a person to discriminate against another person who is employed, engaged or appointed in the Defence Forces. The section clearly contemplates the distinction between combat and non combat personnel ...⁶⁵⁹

McInnis found that s53 was not applicable in the applicant’s case as he had been employed as a Communications Operator at Base Squadron in Darwin for over ten years and, apart from some training, it could not be said that he had been involved in combat duties or combat related duties.

2.4.3 Damages

(A) Damages Awards under the HREOC Hearing Function

Prior the commencement of the HRLA Act, it appears to have been accepted that the principles discussed in *Sheiban*,⁶⁶⁰ in relation to assessment of damages under the SDA, applied equally to assessment of damages under the DDA: that is, tort principles should be applied, albeit flexibly.⁶⁶¹

Prior to the commencement of the HRLA Act, the amount of \$153,500, awarded by Commissioner Nettlefold in *Garity v Commonwealth Bank of Australia*,⁶⁶² represented the highest amount of monetary compensation awarded in respect of breaches of the DDA.

Consistently with *Sheiban*,⁶⁶³ Commissioner Nettlefold first noted that he intended to take the:

traditional approach to the task of assessing compensation. That is [the Commission] will base itself on the practice of the courts in assessing damages for personal injuries suffered as a result of tortious conduct.⁶⁶⁴

In line with that approach, the Commissioner assessed compensation under the following (tort based) heads:

⁶⁵⁷ Section 53(2) of the DDA.

⁶⁵⁸ [2002] FMCA 89.

⁶⁵⁹ *Ibid* [154].

⁶⁶⁰ (1989) 20 FCR 217.

⁶⁶¹ See, by way of example, *Finney obo Finney v The Hills Grammar School* (Unreported, HREOC, Commissioner Innes, 13 June 2000, extract at (2000) EOC 93-087); *Garity v Commonwealth Bank of Australia* (Unreported, HREOC, Commissioner Nettlefold, 25 January 1999) at [8.3].

⁶⁶² (Unreported, HREOC, Commissioner Nettlefold, 25 January 1999).

⁶⁶³ (1989) 20 FCR 217.

⁶⁶⁴ *Ibid* [8.3].

- Pain and suffering and loss of amenities (for which Commissioner Nettlefold allowed a range of \$25,000 - \$30,000);
- Effects of the unlawful conduct on the physical condition of the complainant (for which Commissioner Nettlefold allowed a range of \$50,000 - \$60,000); and
- Economic loss – incorporating loss wages, loss of opportunity and loss of earning capacity (assessed in the amount of \$68,500).

Commissioner Nettlefold’s use of ranges of figures for non-economic loss reflected his acknowledgement that the heads of damage tended to overlap and represented three aspects of the one question being:

what figure represents fair and just (but not perfect) compensation; what is a fair and just figure for a respondent to pay and a complainant to receive?⁶⁶⁵

(B) Damages Awards under the Federal Court

In the review period, there was only one damages award for unlawful disability discrimination in the Federal Court.

In *Barghouti v Transfield Pty Limited*,⁶⁶⁶ Hill J found that an employee had suffered unlawful discrimination when he was constructively dismissed from his employment after advising his employer that he was unable to return to work on account of a back injury. In accordance with his contract of employment, the employee was awarded one week’s salary as compensation. He was not awarded compensation for the full period of his contract as he was unable to return to work during that period. As there was no evidence before the Court in relation to any pain and suffering by the complainant, Hill J stated that he was not able to award any damages on that basis.

(C) Damages Awards under the FMS

i. General Principles

In the review period there were six damages awards for unlawful disability discrimination in the FMS.

Only one of these cases discussed general principles concerning the assessment of damages. In *Oberoi v HREOC, Johnston, McEvoy & Roberts*,⁶⁶⁷ Raphael FM stated that the correct approach to damages for unlawful disability discrimination is to have regard to:

- the effect of the discrimination that has been found upon the applicant; and then
- to quantify that damage consistently with the authorities.⁶⁶⁸

However, on the later point, the FMS has made it plain that while it may derive guidance from HREOC and State Equal Opportunity Tribunal decisions as to the appropriate quantum of a damages award in a particular case, it is not bound by those authorities.⁶⁶⁹

⁶⁶⁵ Ibid.

⁶⁶⁶ [2002] FCA 666.

⁶⁶⁷ [2001] FMCA 34.

⁶⁶⁸ Ibid [32].

Raphael FM agreed with earlier FMS authority that aggravated damages will only be awarded where the conduct of the respondent in relation to the proceedings is inappropriate, lacking in *bona fides*, improper or unjustifiable.⁶⁷⁰

ii. Damages for Non-Economic Loss

Damages awards in the FMS for non-economic loss for the review period have ranged between \$1,500 and \$18,500.

McInnis FM in *Haar*⁶⁷¹ found that a visually impaired applicant who was accompanied by her guide dog had been discriminated against when she was asked to sit outside on her next visit to the respondent's restaurant. Compensation of \$3000 was ordered for injured feelings, distress and embarrassment. McInnis FM stated that it is important to make due allowance in damages where a disabled person has suffered 'diminished self worth' (in this case confirmed by a medical report) as a result of the discrimination.⁶⁷²

In *Travers*⁶⁷³ Raphael FM 'agreed with the views' of McInnis FM in *Haar*⁶⁷⁴ and awarded Ms Travers \$6250 for hurt, humiliation and distress. Ms Travers, who has spina bifida, had suffered discrimination on the basis that her school had required her to utilise a toilet which was not the nearest and most accessible.

In reaching this assessment, Raphael FM took into account the following factors:

- the applicant had not been entirely happy at the school before the incidents of February 1996 occurred;
- the applicant's removal from the school was caused by a number of factors which contributed to her unhappiness of which the discrimination was only one, albeit an important, factor;
- no medical evidence was called and there was no allegation that the applicant was suffering from any psychiatric disturbance or post traumatic stress disorder;
- there was no intention on the part of the school to deliberately discriminate against the applicant;
- the applicant had suffered no long term damage as she was happy at another school.

In *McKenzie*⁶⁷⁵ Raphael FM found that the applicant had been discriminated against by her employers over a two year period. As a result of the discrimination she had suffered, the applicant had taken a period of leave without pay and ultimately resigned from her employment. His Honour awarded the applicant \$15,000 for hurt, humiliation and distress.

⁶⁶⁹ *Haar v Maldon Nominees Pty Ltd (t/as McDonalds) & Ors* [2000] FMCA 5, [86]; *Travers v State of New South Wales* [2000] FCA 12, [73](ii); *Oberoi v HREOC, Johnston, McEvoy & Roberts* [2001] FMCA 34, [38].

⁶⁷⁰ *Oberoi v HREOC, Johnston, McEvoy & Roberts* [2001] FMCA 34, [44] applying *Elliot v Nanda & Commonwealth* [2001] FCA 418 and *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211.

⁶⁷¹ [2000] FMCA 5.

⁶⁷² *Ibid* [89].

⁶⁷³ [2001] FMCA 18.

⁶⁷⁴ [2000] FMCA 5.

⁶⁷⁵ [2001] FMCA 20.

Raphael FM awarded the applicant compensation of \$18,500 for pain and suffering, hurt, humiliation and loss of employability in the matter of *Oberoi v HREOC, Johnston, McEvoy & Roberts*.⁶⁷⁶ His Honour also ordered the President of HREOC to apologise. However, his Honour rejected a claim for aggravated damages in the absence of any evidence of malice or ill-will towards the applicant.

In *Sheehan*⁶⁷⁷ the respondent club was found to have discriminated unlawfully pursuant to s9 of the DDA in refusing to permit the complainant's 'assistance' dog on the premises. The respondent was ordered to pay damages of \$1,500 for hurt and distress to the applicant.

Raphael FM awarded the complainant \$10,000 for hurt, humiliation and distress following his dismissal from a traineeship with the respondent on the basis of his dyslexia in *Randell*.⁶⁷⁸ He followed his award for such loss in *Song*⁶⁷⁹ as he was of the view that the hurt, humiliation and distress suffered by the applicant in this case was similar to that suffered by the applicant in that case.⁶⁸⁰

iii. Damages for Economic Loss

In *McKenzie*⁶⁸¹ Raphael FM awarded the applicant \$24,000 in lost wages for a period of leave without pay taken by the applicant as a result of the discrimination she suffered in the workplace. Relying on the decision in *McNeil v Commonwealth of Australia*,⁶⁸² and Tax Ruling IT2424, this award of damages was made on a gross basis.

His Honour rejected the applicant's submission for two and a half year's wages for the constructive dismissal element of the claim. His Honour noted that the applicant had received a redundancy payout of approximately nine months wages, and that the maximum damages payable in an unfair dismissal claim under the *Workplace Relations Act 1996* (Cth) was six months and concluded:

In my view before a person can succeed in a claim for future economic loss under s.46PO of HREOC Act they would have to prove that had they not been discriminated against they would have remained in employment and that they made some real attempt to mitigate their loss. None of this appears from Ms McKenzie's evidence and I am therefore not prepared to make an award of this type in her case.⁶⁸³

In *Randell*,⁶⁸⁴ Raphael FM awarded the complainant, who suffers from dyslexia, \$4,701 for past economic loss following his dismissal from a year long traineeship with the respondent. That damages award was the difference between his wage for a year as a trainee and his wage for a year in his new position of employment.

In *Oberoi v HREOC, Johnston, McEvoy & Roberts*,⁶⁸⁵ Raphael FM ordered that the respondent pay the applicant \$1,500 special damages to cover the cost of sporting equipment, and his costs of preparing the case, including for photocopying and legal advice.

⁶⁷⁶ [2001] FMCA 34.

⁶⁷⁷ [2002] FMCA 95.

⁶⁷⁸ [2002] FMCA 44.

⁶⁷⁹ [2002] FMCA 31.

⁶⁸⁰ *Ibid* [55].

⁶⁸¹ [2001] FMCA 20.

⁶⁸² (1995) EOC 92-714.

⁶⁸³ *Ibid* [94].

⁶⁸⁴ [2002] FMCA 44.

⁶⁸⁵ [2001] FMCA 34.

2.5 Conclusion

It is acknowledged that two years is not a sufficient period of time in which to make definite conclusions as to the direction in which unlawful discrimination jurisprudence is being taken by the FMS and Federal Court. Not only does it take longer for general jurisprudential trends to be established but some important issues are yet to be considered in the new jurisdiction,⁶⁸⁶ have only been considered in a very limited number of cases or were not the subject of considerable consideration when the jurisdiction was before HREOC.⁶⁸⁷ The 105 decisions considered in this review, however, do provide a basis for some general comments.

From the above review of decisions, it is possible to conclude, at least in relation to the issues that came before the FMS and the Federal Court during the review period, that the jurisprudence under the RDA and SDA is developing in accordance with the body of principles that were being developed by HREOC before the jurisdiction was transferred in 2000. Furthermore, during the review period, the issue of damages awards under the RDA, SDA and DDA has been dealt with in a similar fashion to the manner in which it was dealt by HREOC.

The position regarding the development of jurisprudence under the DDA is less clear. This is particularly so in relation to the issue of the respondent's knowledge of a complainant/applicant's disability⁶⁸⁸ and the choice of a comparator in direct discrimination.⁶⁸⁹ It should be noted, however, that this difference of approach has occurred in the context of the Federal Court undertaking an administrative law review of HREOC's decision in *Purvis*.⁶⁹⁰ The Federal Court would have been required to do this whether the new jurisdiction had been established or not. It is true that the principles developed in *Purvis* have subsequently been applied by the FMS and the Federal Court in matters heard under the new jurisdiction. However, HREOC would have been equally bound to apply those principles had it retained its hearing function.

These issues will only be determined authoritatively when the appeal from *Purvis v State of New South Wales (Department of Education)*⁶⁹¹ is heard by the High Court on 29 April 2003.

However, regardless of the outcome in those proceedings, any narrowing of the principles to be applied under the DDA should not necessarily be seen as causally connected to so-called 'judicial conservatism' by the FMS and Federal Court.⁶⁹² Rather it will be the application at first instance of the principles yet to be enunciated by the High Court that will truly reveal the tenor of the jurisdiction in respect of these issues. If the High Court holds that the relevant legislative provisions in their present form simply do not permit the beneficial interpretation that was given to them by the HREOC decision makers and this is reflected in their application at first instance then it may be appropriate for consideration to be given to legislative amendment of the DDA so that any anomalies in the application of certain provisions are removed. It would follow that such an outcome would be a reflection on the legislative provisions themselves rather than a comment on the manner of their application by the FMS and the Federal Court.

⁶⁸⁶ For example, the defence of 'unjustifiable hardship' under the DDA is yet to be considered by either the FMS or the Federal Court.

⁶⁸⁷ For example, family responsibilities in [2.3.1(c)] above and maternity leave in [2.3.1(d)] above.

⁶⁸⁸ See [2.4.1(a)] above. See also the difference of approaches in relation to reasonable accommodation ([2.4.1(c)] and assistance animals ([2.4.1(d)]).

⁶⁸⁹ See [2.4.1(b)] above.

⁶⁹⁰ (Unreported, HREOC, Commissioner Innes, 13 November 2000)

⁶⁹¹ [2002] FCA 403.

⁶⁹² See [1.3.2] above.

Chapter 3

Other Applications, Procedural and Evidentiary Matters

3.1 Applications for Interim Injunctions

Section 46PP of the HREOC Act empowers the FMS and the Federal Court to grant interim injunctions upon an application from HREOC, a complainant, respondent or affected person. Section 46PP provides that:

- (1) At any time after a complaint is lodged with the Commission, the Federal Court or the Federal Magistrates Court may grant an interim injunction to maintain,
 - (a) the status quo, as it existed immediately before the complaint was lodged or,
 - (b) the rights of any complainant, respondent or affected person.
- (2) The application for the injunction may be made by the Commission, a complainant, a respondent or an affected person.
- (3) The injunction cannot be granted after the complaint has been withdrawn under section 46PG or terminated under section 46PE or 46PH.
- (4) The court concerned may discharge or vary an injunction granted under this section.
- (5) The court concerned cannot, as a condition of granting the interim injunction, require a person to give an undertaking as to damages.

There were three cases dealing with applications for interim injunctions under s46PP during the review period: two in the FMS¹ and the other in the Federal Court.²

3.1.1 Principles Applied by the FMS and Federal Court

As the principles applied by the Federal Court in relation to s46PP have been adopted by the FMS, it is convenient to consider the jurisprudence of the jurisdictions together.

The process required by s46PP has been described as:

... not an easy one because clearly there is a duty to look at the background information, the evidence presented, to determine what the status quo is, whether it should be preserved by the granting of an interim injunction, and to also have regards to the rights of a respondent.³

Furthermore, the consideration given to this process should be informed by the principles that apply at common law to the granting of interim relief 'though in applying the principles to the

¹ *Gardner v National Netball League Pty Ltd* [2001] FMCA 50 (*Gardner*) and *Rainsford v Group 4 Correctional Services* [2002] FMCA 36 (*Rainsford No.2*).

² *McIntosh v Australian Postal Corporation* [2001] FCA 1012 (*McIntosh*).

³ *Gardner* [10].

exercise of the court's discretion under s46PP, the court should not regard itself as constrained solely by those common law principles'.⁴

The scope of s46PP appears to have the potential to be quite broad with the powers or jurisdiction,

limited to the orders necessary to ensure the effective exercise of the powers of the Commission and the jurisdiction of the Court in the event of an application being made to the Court under the HREOC Act following the determination of a complaint.⁵

3.1.2 'Interim' Nature of Relief

Both the FMS and Federal Court have held that the injunction should be truly 'interim' in nature. As Heerey J stated in *McIntosh v Australian Postal Corporation*⁶ (*McIntosh*):

[t]he expression 'interim injunction' is used in the New South Wales sense so as to include what Victorian lawyers would call an interlocutory injunction, that is an injunction until the trial and determination of an action...[t]o Victorians, an interim injunction is one issued for a very short period, usually a few days and often *ex parte*.⁷

By reason of the combined operation of ss 46PP(1) and (3), an injunction can only be granted under s46PP during the period between the lodging of a complaint and the termination⁸ or withdrawal⁹ of a complaint.

The FMS has indicated that the ability to predict the likely duration of that period may be a factor that determines whether an injunction sought is truly 'interim' in nature. In *Rainsford v Group 4 Correctional Services (Rainsford No.2)*,¹⁰ McInnis FM heard an application for an injunction on 13 February 2002. His Honour expressed the obiter view that the injunction sought was not 'interim' in nature as there was no ability to predict when the complaint (lodged with HREOC on 14 September 2001) would be terminated and therefore what the likely duration of the injunction would be.¹¹

In contrast, McInnes FM expressed no concerns regarding the uncertainty surrounding the likely date of termination in *Gardner v National Netball League Pty Ltd*¹² (*Gardner*). In that matter, the complaint had been lodged with HREOC on 2 July 2001 and the application for the interim injunction brought before the FMS on 18 July 2001, McInnis FM granted the injunction to restrain certain acts of the respondent pending determination of the complaint before HREOC.

⁴ *Rainsford No.2* [35].

⁵ *Li v Minister for Immigration & Multicultural Affairs* [2001] FCA 1414, [36]. Note that this decision was not in relation to a matter before the Court under the HRLA Act but did consider the scope of s46PP.

⁶ [2001] FCA 1012.

⁷ *Ibid* [7].

⁸ Under ss 46PE or PH of the HREOC Act.

⁹ Under ss 46PG of the HREOC Act.

¹⁰ [2002] FMCA 36.

¹¹ *Ibid* [37].

¹² [2001] FMCA 50.

3.1.3 Factors Considered by the FMS and Federal Court in Determining Applications for Interim Injunctions

In *Gardner*¹³ the applicant sought an injunction under s46PP, pending the determination of proceedings before HREOC, to prevent the respondent from imposing a ban or any other limitation on her competing in the National Netball League for reasons relating to her pregnancy. McInnis FM concluded that ‘on the balance of convenience’¹⁴ it was appropriate to grant the interim injunction given the medical evidence presented, that the matter could not be resolved by damages alone and that it appeared that the respondent had given very little, if any, consideration to the SDA when it imposed the interim ban.

The Federal Court considered the issue of interim injunctions in an employment context in *McIntosh*¹⁵ where the applicant sought an injunction under s46PP to prevent the respondent from terminating her employment until the determination of proceedings before HREOC. Although Heerey J found there was an issue to be tried, he decided ‘on the balance of convenience’ not to grant an injunction.¹⁶ Of fundamental importance to his Honour’s decision was a concession, made by the applicant, to the effect that the employment relationship had broken down and was unlikely to be restored, even if a finding on the subject matter of the complaint was made in the applicant’s favour. In those circumstances, his Honour found that the granting of an injunction under s46PP would be unreasonable, stating:

[a]t common law it is firmly established that specific performance will not be granted for a contract of employment except in exceptional circumstances... [i]t is true, as senior counsel for the applicant puts it, that the [HREOC Act] ‘creates a broader concept’... s46PP(1) must be taken to have been drafted in the light of the possibility that, following an inquiry and conciliation before the Commission, an employer and employee might resolve their differences and continue employment as before..[b]ut unfortunately that is not the case in the present matter. I do not think it would be reasonable to impose on the respondent a term that the applicant return to work given it is common ground that the relationship has broken down.¹⁷

His Honour also rejected an argument that the injunction should be granted so as to preserve the applicant’s ‘authority and status and reputation and that this would be important for the purpose of conciliation’¹⁸ and did not consider it a legitimate consideration that the granting of the injunction may give the applicant ‘some leverage or bargaining advantage in relation to the conciliation’.¹⁹

On the other hand, it appears that the Federal Court will have regard to the effect that the granting of an interim injunction under s46PP is likely to have on the business or operations of the respondent. In *Rainsford No.2*,²⁰ an interim injunction was sought that, if granted, would have had the effect of requiring the respondent, the private entity that operated Port Phillip Prison, to deal with applications from the applicant (such as to gain access to rehabilitation programs) in a particular manner. McInnis FM was of the view that such an injunction would ‘effectively pre-empt and seek to interfere with the proper management of the prison’²¹ and should not be granted. His Honour expressly noted that:

¹³ [2001] FMCA 50.

¹⁴ Ibid [56].

¹⁵ [2001] FCA 1012.

¹⁶ Ibid [9].

¹⁷ Ibid.

¹⁸ Ibid [11].

¹⁹ Ibid [12].

²⁰ [2002] FMCA 36.

²¹ Ibid [39].

‘that does not mean, however, that there will never be an occasion when such injunctive relief would not be granted’.²²

3.2 Applications for Summary Dismissal

3.2.1 Background

The HRLA Act removed the provisions of the RDA,²³ SDA²⁴ and DDA²⁵ which provided for internal review by the President of decisions of the Commissioners to decline to continue to inquire into complaints on grounds that included that the complaint was vexatious, lacking in substance, misconceived or out of time. If the President upheld the Commissioner’s decision then the complainant could seek a review of that decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) but (except under the RDA) the complainant had no right to a hearing on the basis that the matter had been declined and that decision upheld by the President.

Under the changes brought about by the HRLA Act, the President may terminate a complaint on a number of grounds which include the grounds that were present in the RDA, SDA and DDA (prior to the commencement of the HRLA Act) as well as the additional grounds that there is no reasonable prospect of the matter being settled by conciliation and that the subject matter involves an issue of public importance that should be considered by the FMS or Federal Court.²⁶

A termination on any of these grounds enables a complainant to commence proceedings in the FMS or Federal Court in relation to the unlawful discrimination alleged in the complaint. The right to commence those proceedings is not dependent upon the complaint being terminated on a particular ground. This means that, even if a complaint is terminated on the ground that it is vexatious, trivial, lacking in substance, out of time or had already been adequately dealt with, the complainant can nevertheless commence proceedings in the FMS or Federal Court under s46PO in respect of that complaint.

3.2.2 Sources of Power

The sources of power for the FMS²⁷ and Federal Court²⁸ to summarily dismiss a matter are in similar terms, empowering the FMS and Federal Court to order that a matter be stayed or dismissed if it appears in relation to the proceeding or claim for relief that:

- (a) no reasonable cause of action is disclosed; or
- (b) the proceeding is frivolous or vexatious; or
- (c) the proceeding is an abuse of the process of the Court.

²² Ibid [40].

²³ Section 24AA of the RDA prior to the amendment by the HRLA Act.

²⁴ Section 52A of the SDA prior to the amendment by the HRLA Act.

²⁵ Section 101 of the DDA prior to the amendment by the HRLA Act.

²⁶ See section 46PH of the HREOC Act.

²⁷ Rule 13.10 of the *Federal Magistrates Court Rules 2001*.

²⁸ Order 20 r 2 of the *Federal Court Rules*.

3.2.3 Principles Applied by the FMS and Federal Court

During the review period, the FMS considered ten applications²⁹ for summary dismissal (with eight applications³⁰ being granted) and the Federal Court considered seven applications³¹ (with four applications³² being granted). Given the similarities between the empowering provisions in each jurisdiction, it is not surprising that the power has been exercised in a similar fashion by the FMS and Federal Court and in accordance with the following principles which mirror the principles applied at common law.

(A) Rationale underlying the Exercise of the Power

The rationale behind exercising the power to summarily dismiss is that a matter should not be permitted to proceed if it is established that ‘the proceedings are so untenable that they could not possibly succeed’³³ and that ‘no reasonable cause of action of unlawful discrimination is shown’.³⁴

Lehane J in *Travers obo Travers v New South Wales*³⁵ (*Travers*) affirmed the view of Sir Ronald Wilson in the HREOC decision of *Assal v Department of Health, Housing & Community Services*³⁶ that:

..it is in the public interest, as well as in the interests of both parties, that the hearing of a complaint which is clearly shown to be lacking in substance should be summarily terminated. Certainly, it is no kindness to a complainant to shrink from the exercise of the power... in circumstances where that exercise is clearly warranted.³⁷

Lehane J added:

That is especially so, perhaps, in this Court where an unsuccessful litigant, if proceedings are protracted, may face what can be the considerable burden of a costs order.³⁸

(B) Exercise ‘Exceptional Caution’

The FMS and the Federal Court have emphasized that the power to summarily dismiss a matter must be exercised with ‘exceptional caution’³⁹ and ‘sparingly invoked’.⁴⁰ In particular, the power should be used with great care when the litigant is unrepresented.⁴¹

²⁹ *Chambers v Darley & Ors* [2002] FMCA 3 (*Chambers*); *Chung v University of Sydney* [2001] FMCA 94 (*Chung*); *Maghiar v State of WA* [2001] FMCA 98 (*Maghiar*); *Miller v Wertheim & Rothman* [2001] FMCA 103 (*Miller*); *Vintila v Federal Attorney General* [2001] FMCA 110 (*Vintila*); *Rainsford v State of Victoria* [2001] FMCA 115 (*Rainsford No.1*); *Barnes v Northern Land Council & Ors* [2002] FMCA 54 (*Barnes*); *Meyer v Holt and Williams* [2002] FMCA 125 (*Meyer*); *Soreng v Victorian State Director of Public Housing* [2002] FMCA 124 (*Soreng*) and *Brusch*

³⁰ *Chung*; *Maghiar*; *Miller*; *Vintila*; *Barnes*, *Rainsford*, *Meyer* and *Soreng*.

³¹ *Paramasivam v Wheeler & Ors* [2000] FCA 1559 (*Paramasivam v Wheeler & Ors*); *Paramasivam v Shier & Anor* [2001] FCA 545 (*Paramasivam v Shier & Anor*); *Paramasivam v Grant & Anor* [2001] FCA 758 (*Paramasivam v Grant & Anor*); *Parker v Swan Hill Police* [2000] FCA 1688 (*Parker*); *Travers by her next friend Travers v State of NSW* [2000] FCA 1565 (*Travers No. 2*); *McGlade v Lightfoot* [2002] FCA 752 (*McGlade*) and *Thomson*.

³² *Paramasivam v Wheeler & Ors*; *Paramasivam v Shier & Anor*; *Paramasivam v Grant & Anor* and *Parker*.

³³ *Parker v Swan Hill Police* [2000] FCA 1688, [10].

³⁴ *Paramasivam v Shier* [19].

³⁵ [2000] FCA 1565.

³⁶ (Unreported, HREOC, Sir Ronald Wilson, 26 September 1990). Extract at [1992] EOC 92-409.

³⁷ *Ibid* 4.

³⁸ *Travers* [19].

³⁹ *Paramasivam v Grant* [14] applying *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 129.

⁴⁰ *Chung* [7].

The Federal Court has held though that,

whilst circumspection is appropriate, if the evidence before the Court establishes that if the matter were to go to trial in the ordinary way the application must fail then a case for summary dismissal of the proceedings is made out.⁴²

(C) Onus/Material to be Considered by the Court

Both the FMS and Federal Court have made clear that the onus in a summary dismissal application is on the respondent, who must establish:

a high measure of satisfaction in the Court that the proceedings are of a character that they should be dismissed.⁴³

In determining the issue of whether there is an arguable case, the FMS has held that it is not limited to considering the arguments put before it by the party defending the application but rather will ‘independently consider whether an arguable case based on the material could be made out’.⁴⁴

(D) Examples of Matters where the Power has been Exercised

The FMS and Federal Court have summarily dismissed matters in the following circumstances:

- Where the matter complained of did not involve the provision of a service for the purposes of s24 of the DDA;⁴⁵
- Where it was found that the DDA did not bind the Crown in right of the State in the manner suggested by the complainant;⁴⁶
- Where the subject matter of the application before the FMS was different from the complaint that was made to HREOC and terminated by the President;⁴⁷ and
- Where there was no casual nexus between the alleged acts of discrimination and the complainant’s race or disability.⁴⁸

3.3 Applications for Extension of Time

Section 46PO of the HREOC Act provides that:

The application [alleging unlawful discrimination, made to the Federal Court or FMS under section 46PO(1) of the HREOC Act] must be made within 28 days after the date of the issue of the notice under s46PH(2), or within such further time as the court concerned allows.

The FMS has considered seven applications⁴⁹ for an extension of time to make an application of unlawful discrimination under that provision and granted three of those applications.⁵⁰ The

⁴¹ Ibid [9].

⁴² *Paramasivam v Grant* [14] applying *Webster v Lampard* (1993) 177 CLR 598.

⁴³ *Paramasivam v Wheeler* [8].

⁴⁴ *Chung* [14].

⁴⁵ *Vintila*.

⁴⁶ *Rainsford No.1*

⁴⁷ *Soreng*.

⁴⁸ *Chung*.

⁴⁹ *Low v Australian Taxation Office* [2000] FMCA 6 (*Low*); *Keller v Cth Department of Foreign Affairs and Trade* [2001] FMCA 96 (*Keller*) and *Ryan v The Presbytery of Wide Bay Sunshine Coast* [2001] FMCA 12 (*Ryan*); *Phillips v Australian Girls Choir Pty Ltd* [2001] FMCA 109 (*Phillips*); *Beling v Staples* [2001] FMCA 135 (*Beling*); *Lawton v Lawson & Ors* [2002] FMCA

Federal Court has considered three such applications, granting one application⁵¹ and dismissing two applications.⁵²

3.3.1 Relevance of Nature of Jurisdiction

It is accepted that s46PO gives the FMS and the Federal Court a discretion as to whether or not to grant an extension of time. In *Lawton v Lawson and others*⁵³ Brown FM noted that in the particular circumstances of that case:

...the discretion granted by section 46PO(2) of the HREOC Act does not express any qualifications or set any criteria for the exercise of the discretion.

Accordingly, I bear in mind that the Act itself deals with matters pertaining to Human Rights and discrimination. Accordingly, there exist strong public policy reasons, in my view, that the court should, if possible, entertain bona fide claims made pursuant to the Act and other related Acts, such as the SDA.⁵⁴

McInnis FM in *Phillips v Australian Girls Choir Pty Ltd*⁵⁵ (*Phillips*) emphasised the difference between the principles to be applied in an application for an extension of time for applications filed under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and those which apply in human rights applications:

It is relevant to consider that in the case of human rights applications there may well be different considerations which apply, bearing in mind the remedial and/or beneficial nature of the human rights legislation which unlike ADJR applications goes beyond the mere judicial review of an administrative decision and deals instead with fundamental human rights. In most of the claims made pursuant to that legislation, it is unlikely that an argument would be entertained that strict adherence to the time limit should be observed in order to assist the proper administration of government departments. Further, the wider issue of a degree of certainty in time limits for the public benefit may also have less weight in relation to claims made under the human rights legislation compared with those claims made for judicial review of administrative actions.⁵⁶

3.3.2 Principles to be Applied

McInnis FM in *Phillips*⁵⁷ formulated a list of relevant principles in relation to the exercise of the Court's discretion when considering an extension of time in a human rights application (based upon the principles set out by Wilcox J in *Hunter Valley Developments Pty Ltd v Cohen*).⁵⁸

1. There is no onus of proof upon an applicant for extension of time though an application has to be made. Special circumstances need not be shown, but the court will not grant the application unless positively satisfied it is proper to do so. The 'prescribed period' of 28 days is not to be ignored (*Ralkon v Aboriginal Development Commission* (1982) 43 ALR 535 at 550).

68 (*Lawton*) and *Saddi v Active Employment, Break Thru Personnel Inc, Care Employment and Commonwealth of Australia* [2001] FMCA 73 (*Saddi*).

⁵⁰ *Phillips, Beling and Lawton*.

⁵¹ *Creek v Cairns Post Pty Ltd* [2001] FCA 293 (*Creek No.2*).

⁵² *Michaels v Commonwealth of Australia, Australian Federal Police and National Crime Authority* [2002] FCA 1130; *Pham v HREOC & Ors* [2002] FCA 669.

⁵³ [2002] FMCA 68.

⁵⁴ *Ibid* [30], [31].

⁵⁵ [2001] FMCA 109.

⁵⁶ *Ibid* [8].

⁵⁷ *Ibid* [10].

⁵⁸ (1984) 3 FCR 344.

2. It is a prima facie rule that the proceedings commenced outside the prescribed period will not be entertained (*Lucic v Nolan* (1982) 45 ALR 411 at 416). It is not a pre-condition for success in an application for extension of time that an acceptable explanation for delay must be given. It is to be expected that such an explanation will normally be given as a relevant matter to be considered, even though there is no rule that such an explanation is an essential pre-condition (*Comcare v A'Hearn* (1993) 45 FCR 441 and *Dix v Crimes Compensation Tribunal* (1993) 1 VR 297 at 302).
3. Action taken by the applicant other than by making an application to the court is relevant in assessing the adequacy of the explanation for the delay. It is relevant to consider whether the applicant has rested on his rights and whether the respondent was entitled to regard the claim as being finalised (see *Doyle v Chief of Staff* (1982) 42 ALR 283 at 287).
4. Any prejudice to the respondent, including any prejudice in defending the proceeding occasioned by the delay, is a material factor militating against the grant of an extension (see *Doyle* at p 287).
5. The mere absence of prejudice is not enough to justify the grant of an extension (see *Lucic* at p 416).
6. The merits of the substantial application are properly to be taken into account in considering whether an extension of time should be granted (see *Lucic* at p 417).
7. Considerations of fairness as between the applicant and other persons otherwise in like position are relevant to the manner of exercise of the court's discretion (*Wedesweiller v Cole* (1983) 47 ALR 528).

These principles have found approval with the Federal Court⁵⁹ and other Federal Magistrates.⁶⁰

However, the Federal Court has not endorsed a suggestion made by the FMS that one of the matters to be considered is the 'balance of convenience'.⁶¹ In *Low v Commonwealth of Australia*,⁶² Marshall J considered an appeal against the summary dismissal of the application by the FMS on the basis that it had been filed out of time under s46PO of the HREOC Act.

His Honour cited from the decision of Driver FM at first instance:

In my view, the Court should grant an extension of time where there is a reasonable explanation for the delay in filing the application for relief, where the balance of convenience as between the parties favours the granting of an extension of time and where the application discloses an arguable case.⁶³

Marshall J then stated:

Save for the reference to 'balance of convenience' I agree with His Honour's approach. I believe a more appropriate substitute for balance of convenience would be 'in the interests of justice'. However, it should be acknowledged that the prima facie position is that applications should be lodged within time. Furthermore, as a precondition to granting an application for an extension of time there should be some acceptable explanation for the delay.⁶⁴

⁵⁹ *Pham v HREOC & Others* [2002] FCA 669, [11]. In earlier unrelated proceedings involving the applicant and the second and third respondents to this complaint, the application was dismissed for non-appearance; *Pham v University of the Queensland & Another* [2001] FCA 1044, affirmed on appeal in *Pham v University of Queensland & Commonwealth* [2002] FCA 203. Similarly in *Fu v Westpac Banking Corp* [2002] FCA 1154, Mansfield J affirmed on appeal a decision of Driver FM (unreported) to dismiss an application for non-appearance.

⁶⁰ *Lawton v Lawton and others* [2002] FMCA 68, [33]. See similar principles referred to in *Ryan v Presbytery of Wide Bay Sunshine Coast & Presbyterian Church of Queensland* [2001] FMCA 12.

⁶¹ *Gardner* [56].

⁶² [2001] FCA 702.

⁶³ *Ibid* [11].

⁶⁴ *Ibid*.

These principles were applied by Raphael FM in *Saddi v Active Employment, Break Thru Personnel Inc, Care Employment and Commonwealth of Australia*.⁶⁵

3.3.3 Examples of where Extension of Time has been Granted

The FMS and the Federal Court have granted extensions of time for the filing of an application under s46PO in the following circumstances:

- the applicant had provided a reasonable explanation for her delay, the delay was not of great magnitude (eight days) and the merits of the applicant's claims against the respondent demonstrated that applicant's case was arguable;⁶⁶
- the applicant lived in a remote location, had told the respondent she would be pursuing litigation and the applicant's case could not be said to be lacking merit;⁶⁷ and
- the applicant, who had a disability, was under the age of 18 years, not familiar with the legal process and had an arguable case.⁶⁸

3.3.4 Extension of Time for Filing Appeals

The Federal Court has considered, and dismissed, three applications for extensions of time in which to lodge appeals from decisions of the FMS.⁶⁹

In *Horman v Distribution Group Limited t/as Repco Auto Parts*,⁷⁰ Emmett J considered an application for leave to file and serve a notice of appeal out of time.

Emmett J stated that the delay in filing the applicant's notice of appeal was due to miscommunication between the applicant's Senior and Junior Counsel. His Honour stated that the events surrounding the appeal 'indicate a sorry state of affairs so far as the legal representation of the applicant is concerned.'⁷¹ His Honour said the circumstances went 'well beyond error', suggesting rather 'a lack of diligence on the part of the lawyers representing the applicant'.⁷²

His Honour found that it was not just in all the circumstances to extend the time limit to serve and file the notice of appeal. Of particular concern to his Honour was the absence of any attempt on the part of those advising the applicant to intimate to the respondent an intention to appeal. Nevertheless, his Honour went on to state:

[I]f I were satisfied that there were some reasonable prospect of success on appeal and of the bona fides of the applicant in seeking leave to file the notice of appeal out of time, it may have been appropriate to grant an indulgence to the applicant's lawyers.⁷³

⁶⁵ [2001] FMCA 73.

⁶⁶ *Lawton*.

⁶⁷ *Creek v Cairns Post Pty Ltd* [2001] FCA 293.

⁶⁸ *Phillips*.

⁶⁹ *Horman v Distribution Group Ltd t/as Repco Auto Parts* [2002] FCA 219; *Barnes v Northern Land Council, Australian Agricultural Co, NT Police, ATSIC & Central Australian Aboriginal Legal Service* [2002] FCA 1130 and *Low v ATO* [2001] FCA 702 (*Low No.2*).

⁷⁰ [2002] FCA 219.

⁷¹ *Ibid* [22].

⁷² *Ibid* [24].

⁷³ *Ibid* [25].

3.4 Application for Suppression Order

Section 61 of the *Federal Magistrates Act 1999* (Cth) provides:

The Federal Magistrates Court may, at any time during or after the hearing of a proceeding in the Federal Magistrates Court, make such order forbidding or restricting:

- (a) the publication of particular evidence; or
- (b) the publication of the name of a party or witness; or
- (c) the publication of information that is likely to enable the identification of a party or witness; or
- (d) access to documents obtained through discovery; or
- (e) access to documents produced under a subpoena;

as appears to the Federal Magistrates Court to be necessary in order to prevent prejudice to:

- (f) the administration of justice; or
- (g) the security of the Commonwealth.

In *CC v DD & Anor*,⁷⁴ Brown FM made interim ex parte orders under that provision.

His Honour noted that the Court would exercise the discretion under s61 if it appeared to be necessary to prevent prejudice to the administration of justice to do so.⁷⁵

The applicant argued that publication of her name might cause discomfort and embarrassment to her and might be a reason why she would not pursue any remedies to which she was entitled under the SDA. Brown FM was satisfied that those matters supported the making of an interim order under s61 forbidding publication of the name of the applicant and material that might tend to identify the applicant.⁷⁶

His Honour also stated that he was troubled by the position of one of the respondents who had not been served with the application. His Honour noted that that person knew nothing of the proceedings and was therefore not in a position to put anything before the Court about them. His Honour further noted that there was a possibility that the publication of that respondent's name might render superfluous any order made in respect of the applicant, with whose protection the Court was primarily concerned. On that basis, Brown FM made an interim order suppressing publication of that respondent's name.⁷⁷

3.5 Scope of Applications under s46PO of the HREOC Act to the FMS and Federal Court

3.5.1 Relationship between Application and Terminated Complaint

Section 46PO(3) of the HREOC Act places limitations, related to the terminated complaint, upon the nature and scope of applications that may be made to the Federal Court and FMS. The section provides that:

⁷⁴ [2002] FMCA 221.

⁷⁵ Ibid [5].

⁷⁶ Ibid [4], [6].

⁷⁷ Ibid [7], [8].

- (3) The unlawful discrimination alleged in the application:
- (a) must be the same as (or the same in substance as) the unlawful discrimination that was the subject of the terminated complaint; or
 - (b) must arise out of the same (or substantially the same) acts, omissions or practices that were the subject of the terminated complaint.

In *Charles v Fuji Xerox Australia Pty Ltd*⁷⁸ (*Charles*), the Court heard an interlocutory application concerning the interpretation of s46PO of the HREOC Act. Katz J held that s46PO(3) is only incidentally concerned with those allegations of fact which can be made in an application under s46PO(1) of the HREOC Act.⁷⁹ His Honour said that the section is primarily concerned, not with such allegations of fact, but rather with the legal character which those allegations can be claimed to bear.⁸⁰ His Honour went on to explain the operation of paragraphs (a) and (b) of s46PO(3) in the following terms:

Paragraph (a) of subs 46PO(3) of the [HREOC Act] proceeds on the basis that the allegations of fact being made in the proceeding before the Court are the same as those which were made in the relevant terminated complaint. The provision naturally permits the applicant to claim in the proceeding that those facts bear the same legal character as they were claimed in the complaint to bear. However, it goes further, permitting the applicant to claim in the proceeding as well that those facts bear a different legal character from that they were claimed in the complaint to bear, provided, however, that the legal character now being claimed is not different in substance from the legal character formerly being claimed.

Paragraph (b) of subs 46PO(3) of the [HREOC Act], on the other hand, permits the applicant to allege in the proceeding before the Court different facts from those which were alleged in the relevant terminated complaint, provided, however, that the facts now being alleged are not different in substance from the facts formerly being alleged. It further permits the applicant to claim that the facts which are now being alleged bear a different legal character than the facts which were alleged in the complaint were claimed to bear, even if that legal character is different in substance from the legal character formerly being claimed, provided that that legal character 'arise[s] out of' the facts which are now being alleged.⁸¹

His Honour also held that a construction of the sub paragraphs of s46PO(3) does not permit an applicant to rely on acts of discrimination which occur after the complaint has been lodged with HREOC.⁸² His Honour said that conclusion was consistent with 'the policy of the [HREOC Act] in ensuring that there exists an opportunity for the attempted conciliation of complaints before they are litigated'.⁸³

The provisions of s46PO(3) were further considered in *Travers*⁸⁴ in which Lehane J held that an application to the Federal Court cannot include allegations of discrimination which were not included in the complaint made to HREOC. Nevertheless, his Honour noted that:

the terms of s46PO(3) suggest a degree of flexibility ('or the same in substance as', 'or substantially the same') and a complaint, which usually will not be drawn by a lawyer, should not be construed as if it were a pleading.⁸⁵

His Honour also observed that the initial complaint may be quite brief and the details later elicited during investigation.⁸⁶ Although it was unnecessary for his Honour to express a final

⁷⁸ [2000] FCA 1531.

⁷⁹ Ibid [37].

⁸⁰ Ibid.

⁸¹ Ibid [38]-[39].

⁸² Ibid [43].

⁸³ Ibid [42].

⁸⁴ [2000] FCA 1565.

⁸⁵ Ibid [8].

⁸⁶ Ibid.

view on the issue, his Honour indicated that he disagreed with a submission put by the respondent to the effect that the term ‘complaint’ (in the context of s46PO(3)) was limited to the initial letter of complaint to HREOC. His Honour appeared to prefer the contrary submission put by the applicant, stating:

[I]t may be that the ambit of the complaint is to be ascertained, for the purpose of s46PO(3), not by considering its initial form but by considering the shape it had assumed at its termination.⁸⁷

3.5.2 Validity of Termination Notice

In *Speirs v Darling Range Brewing Co Pty Ltd & Ors*,⁸⁸ two of the respondents sought an order that the proceedings against them be summarily dismissed on the ground that a termination notice issued by HREOC was invalid and/or a nullity. While the initial complaint to HREOC raised allegations against those persons, the President’s notice of termination did not refer to those persons as respondents to the complaint. The President of HREOC subsequently issued a second notice of termination which did name those persons as respondents.

The two respondents submitted that the second notice was a nullity and that accordingly the Court did not have jurisdiction to hear and determine the claims made against them. McInnes FM accepted that submission. His Honour’s reasons were as follows:

In my view there does not appear to be any power given to HREOC in the legislation to issue a further termination notice arising out of the same complaint. Once issued and respondents named then those respondents so named who were given an opportunity to participate in the procedure and the opportunity to at least conciliate the complaint before litigation means that in the circumstance of the present case the denial to the respondents of that opportunity itself would demonstrate a flaw in the process followed by HREOC in this instance. It is not possible in my view for HREOC to simply retrospectively issue a further notice in circumstances where the purported respondents to that notice have not in truth and in fact been able to participate in the conciliation process which the President is bound to follow in accordance with the provisions of the HREOC Act to which I have referred.

There is also no provision in my view for HREOC to issue an amended notice of termination and this is particularly so after the time has elapsed for the first notice to be revoked pursuant to s46PH(4) of the HREOC Act. It would be unusual if a further notice could be issued after proceedings had been commenced in the Federal Court arising out of the same complaint and in circumstances where in s46PF(4) the legislature provides that a complaint cannot be amended after it has been terminated by the President under s46PH. Therefore to issue a second notice simply at the request of solicitors for the complainant in circumstances where all that has been requested is the naming of further respondents who had not been given an opportunity to participate in the inquiry effectively amounts to an amendment of the termination notice to include other parties. If the termination notice itself cannot be revoked then it is difficult to see how either an amendment can occur or a further notice issued once Court proceedings have been commenced in relation to the complaint.⁸⁹

3.5.3 Pleading Claims in Addition to Unlawful Discrimination Claim

In *Thomson v Orica Australia Pty Ltd (No.2)*⁹⁰ an issue arose as to whether a claim for damages for breach of contract was being pursued by the applicant in addition to the unlawful discrimination claim.

⁸⁷ Ibid.

⁸⁸ [2002] FMCA.

⁸⁹ Ibid [36], [37].

⁹⁰ [2001] FCA 1563.

It had not been explicitly stated in the points of claim filed by the applicant that the applicant was arguing the case on any other basis than a breach of the SDA. However at the close of evidence, in answer to a question by Allsop J, counsel for the applicant stated that if no breach of the SDA was found by the Federal Court, her client made a claim for damages for repudiation of the contract of employment.

In subsequently filed written submissions, Counsel for the respondent submitted that the matter had always been ‘in the context of Commonwealth legislation’⁹¹ and that the respondent was ‘seriously disadvantaged’⁹² by the perceived shift in the case presented by the applicant. The respondent further contended that if the applicant had specified at the outset that she was seeking damages for breach of contract, the approach of the respondent would have been different in a number of ways.

Allsop J stated he had ‘real difficulty’⁹³ in seeing what further evidence may have been led, or what further cross-examination of the applicant may have taken place, in the context of an allegation of repudiation in contract and an associated claim for damages as against an allegation of repudiation of the employment contract in the context of the SDA. However, his Honour made orders allowing for the respondent to seek further and better particulars of the points of claim, for additional evidence to be filed by the applicant and for further cross examination.

3.6 Dismissal of Application due to Non-Appearance of Applicant

In *Pham v University of Queensland and Commonwealth of Australia (Defence Force)*,⁹⁴ Drummond, Marshall and Finkelstein JJ upheld the decision of Heerey J⁹⁵ dismissing Mr Pham’s application pursuant to Order 32 r 2(1)(c) of the *Federal Court Rules* when he failed to attend at his trial. The appellant argued that, notwithstanding his failure to appear, there was an incorrect exercise of the discretion to terminate the action because there was no evaluation by the trial judge of the merits of his case, something that the trial judge could have done by referring to the evidence filed by the parties, including the appellant, in accordance with the directions given.

The Full Court rejected that argument, stating that Order 32 r 2(1)(c) does not require the trial judge, confronted with the non-appearance of an applicant at trial, to embark upon any investigation of the merits of the absent applicant’s claim. Their Honours stated that the procedure available under Order 32 r 2(1)(c) should be contrasted with that under Order 10 r 7(1)(a) which empowers the Court, if a party fails to comply with an order of the Court directing that a party take a step in a proceeding, to dismiss the proceeding if the default in complying with that order is a default by an applicant. That procedure can be invoked at any stage of an action, even before pleadings have been closed, and it has been held that where a respondent seeks to dismiss an action under that particular rule the respondent has the obligation of going into the merits of the case.⁹⁶

⁹¹ Ibid [26].

⁹² Ibid [33].

⁹³ Ibid [32], [33].

⁹⁴ [2002] FCA 203.

⁹⁵ *Pham v University of Queensland* [2001] FCA 1044.

⁹⁶ Ibid [27].

The appellant also argued that he was unable to attend at trial because of his medical condition. Finkelstein J noted that in order to make that point good, it would have been necessary for the appellant to tender some medical evidence establishing that he was truly unable to attend at trial because of his medical condition. There being no such evidence, it was not possible to say that there had been any injustice occasioned to the appellant.⁹⁷

3.7 Inter-Relationship between the FMS and the Federal Court

3.7.1 Transfer of Matters from Federal Court to FMS

In *Charles*,⁹⁸ the Katz J ordered that the matter be transferred to the FMS. His Honour was satisfied the FMS had the resources to deal with the matter and that it would be heard more quickly than in the Federal Court. Further, the parties would have a reduced exposure to costs in the FMS.

Similarly in *Travers*,⁹⁹ the parties consented to the transfer of the matter to the FMS. The Federal Court was satisfied that the resources of the FMS were sufficient to hear and determine the matter.

3.7.2 Conduct of Appeal to Federal Court from FMS

In *Low v Commonwealth of Australia*,¹⁰⁰ Marshall J stated:

An appeal from a judgment of the Federal Magistrates Court is not conducted de novo, nor is it an appeal in the strict sense. Like appeals from judgments of single judges of this Court, it is conducted as a re-hearing of the initial application in the sense that the parties are able to supplement the evidence before the Court at first instance by seeking to adduce additional material which may be admitted into evidence, having regard to the dictates of justice in the particular circumstances. The Court is also able to draw inferences of fact based on the evidence before the primary judge.¹⁰¹

3.8 Relevance of Other Complaints to HREOC

3.8.1 'Repeat Complaints' to HREOC

Raphael FM in *McKenzie v Department of Urban Services & Canberra Hospital*¹⁰² considered whether or not a person could bring a case before the FMS if the subject matter of the complaint was a 'repeat' complaint. The applicant had made complaints to HREOC in 1997 and 1998, which were dismissed on the basis that there was no evidence or no sufficient evidence of discrimination. The applicant made an application for an order of review pursuant to s5 of the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* in relation to the dismissal but subsequently discontinued the proceedings. The applicant then made a further complaint to HREOC in November 1999 which was terminated by HREOC on the basis (amongst other

⁹⁷ Ibid [40].

⁹⁸ [2000] FCA 1531.

⁹⁹ [2000] FCA 1565.

¹⁰⁰ [2001] FCA 702.

¹⁰¹ Ibid [3].

¹⁰² [2001] FMCA 20.

things) that the complaint had already been dealt with. The applicant subsequently made application to the FMS under s46PO of the HREOC Act.

The respondent argued that the applicant was estopped from hearing the matter by virtue of the fact that it had already been dealt with by HREOC. His Honour considered a number of authorities on the issue of estoppel and *res judicata* in relation to administrative decisions.¹⁰³ His Honour concluded that there was nothing to prevent the applicant from having her case heard pursuant to s46PO of the HREOC Act. His Honour found:

It may be argued against this finding that it will open the floodgates to applicants who were unhappy about previous decisions of the Commission not to grant them an inquiry into their complaint. Such a person would make a further application to the Commission which would make a finding that it would not proceed because the events in question took place more than twelve months prior thereto and had already been the subject of consideration. That decision would have the effect of terminating the complaint, and upon receipt of the notice of termination the Applicant could proceed to this Court. Although this Court could make an order under s46PO(4)(f), it could not do so until after it had made a finding of unlawful discrimination, and would therefore be obliged to hear the complaint in its entirety. I was not provided with any authority, either in support of the proposition put by Ms Donohue or by Ms Winters as to why, if I made the finding which I have made, the consequences would not be as I have outlined. I can find no authority either, and it may well be that the Act needs to be amended by the addition of a section similar to s111(1) of the Anti-Discrimination Act (NSW), to prevent a spate of hearings in cases where the Respondent has reasonably thought that its involvement was at an end some considerable time ago.¹⁰⁴

3.8.2 Evidence of Other Complaints to HREOC

In *Paramasivam v Jureszek*,¹⁰⁵ the respondent attempted to adduce evidence relating to other complaints made by the applicant of racial discrimination by a number of other parties in differing circumstances. Gyles J refused to admit that material, on the basis that it was not probative of any issue in the case, particularly given that the applicant's credit was not in issue. His Honour also indicated that, even if the applicant's credit had been in issue, he would have been reluctant to admit that material, given that the circumstances in which propensity evidence can be given are limited. To be of any value the Court would have to examine the bona fides and merits of each complaint. The mere fact that a court or another regulatory authority had rejected those complaints would not establish any relevant fact in the proceedings.

3.9 Procedural Matters

3.9.1 Request for Copy of Transcript

*Dranichnikov v Department of Immigration and Multicultural Affairs*¹⁰⁶ involved an application to the FMS in relation to a transcript.

The applicant had earlier been unsuccessful in unlawful discrimination proceedings in the FMS, from which she appealed to the Federal Court. The applicant then contacted a Registrar of the FMS and requested production of a transcript of the original hearing before the FMS (at no

¹⁰³ *Port of Melbourne Authority v Anshun Pty Ltd* [1981] 147 CLR 589; *Yat Tung Investment Co Ltd v Doo Heng Bank* [1975] AC 581; *Stuart v Sanderson* 2000 FCA 870; and *Midland Metals Overseas Ltd v Comptroller General of Customs & Ors* [1991] 30 FCR 87.

¹⁰⁴ *Ibid* [84].

¹⁰⁵ [2001] FCA 704.

¹⁰⁶ [2002] FMCA 72.

charge to the applicant). That request was refused, it being noted that no reasonable basis for providing transcripts at the FMS' expense had been provided by the applicant.

The applicant applied to the FMS for review of that decision and another earlier similar decision. Although the Department of Immigration and Multicultural Affairs was named as the respondent, Baumann FM excused the Department's attendance, as the proper respondent was the Registrar.

The applicant's application for review was dismissed. Baumann FM held that the decision to refuse to provide the transcript made by the Registrar was not a decision made pursuant to any delegated power in s102 of the *Federal Magistrates Court Act 1999* (Cth).¹⁰⁷ As a result, his Honour found that the decision was not reviewable under the relevant review provisions.¹⁰⁸

His Honour noted that it is the policy of the FMS to provide a copy of the transcript without charge where an appellant can indicate that hardship would be suffered if required to pay for the transcript.

3.9.2 Unrepresented Litigants

In *Barghouthi v Transfield Pty Ltd*,¹⁰⁹ Hill J considered the duty of the Federal Court when dealing with an unrepresented litigant. The proceedings before Hill J involved an appeal brought by an unrepresented appellant (Mr Barghouthi) from a decision of the FMS. The FMS had dismissed Mr Barghouthi's application alleging unlawful discrimination. Whilst finding that most of the appellant's submissions, both orally and in writing, were 'quite unhelpful',¹¹⁰ not touching on the legal issues relevant to the appeal, his Honour stated:

... This does not, however, mean that the appellant can have no chance of success in these proceedings.

Whilst this Court has a duty not to intervene in matters involving unrepresented litigants to such an extent that the impartial function of the Judge is compromised, a judge may intervene to protect the rights of an unrepresented litigant and to ensure that the proceedings are fair and just: see *Awan v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 594 per North J at [64], and *Minogue v Human Rights and Equal Opportunity Commission* (1999) 166 ALR 129 per Sackville, North and Kenny JJ at [29].¹¹¹

In considering Mr Barghouthi's submissions, Hill J conducted an assessment of whether the Federal Magistrate had made any errors of law that would require the appeal to succeed. The Federal Magistrate had found that there was no evidence which satisfied him that Mr Barghouthi was dismissed from his employment. Hill J disagreed with that conclusion.¹¹² His Honour found that there had in fact been a constructive dismissal, a conclusion that could only be reached 'by looking at all of the circumstances of the case'.¹¹³ On that basis the appeal was allowed. The respondent was declared to have unlawfully dismissed the appellant and was required to pay compensation to the appellant the equivalent to one week's salary.

¹⁰⁷ Ibid [8]-[11]. Section 102 lists all of the powers of the FMS which may be exercised by a Registrar. The provision of a transcript to a party does not form part of that list.

¹⁰⁸ Section 104(2) of the *Federal Magistrates Court Act 1999* (Cth) provides that a party to proceedings in which a Registrar has exercised any of the powers under section 102 may apply to the Federal Magistrates Court for review of that exercise of power.

¹⁰⁹ [2002] FCA 666.

¹¹⁰ Ibid [11].

¹¹¹ Ibid [11], [12].

¹¹² Ibid [16].

¹¹³ Ibid.

3.9.3 Consideration of Fresh Evidence out of Time

In *Hagan v Trustees of the Toowoomba Sports Ground Trust*,¹¹⁴ the Federal Court on appeal declined to receive fresh evidence because it was not filed within the time prescribed by Order 36 r6 of the Federal Court Rules. No explanation was given for the late filing of the evidence and the Full Court was not satisfied that the further evidence would have made any difference to the outcome. The Federal Court held that although s46PR provides that the Court is not bound by technicalities or legal forms, the principles relating to the reception of fresh evidence are designed to aid the administration of justice. Section 46PR was therefore of no use to the appellant in these circumstances.

¹¹⁴ [2001] FCA 123.

Chapter 4

Costs Awards in the FMS and Federal Court

4.1 Introduction

As has been stated above, the fact that the FMS and Federal Court were fora in which costs awards could be made was the subject of considerable comment prior to the unlawful discrimination jurisdiction commencing.¹ This chapter discusses costs awards in the jurisdiction from a statistical and jurisprudential perspective.

4.2 Background

4.2.1 Powers of the FMS and the Federal Court to Award Costs

In the absence of legislative provisions to the contrary, both the FMS and the Federal Court have discretionary powers to award costs in all proceedings before them.² They exercise those powers pursuant to the ‘costs follow the event’ principle.³ Under that principle, an unsuccessful party to a piece of litigation is ordinarily ordered to pay the costs of the successful party. However, the FMS and Federal Court may, in appropriate circumstances, deal with the issue of costs in some other fashion. For example, it has been recognised that the application of the ‘costs follow the event’ principle may be inappropriate where:

- the successful party only succeeds in a portion of her or his claim;⁴
- the costs of the litigation have been increased significantly by reason of the need to determine issues upon which the successful party has failed;⁵
- the successful party has unreasonably or unnecessarily commenced, continued or encouraged the litigation or has acted improperly;⁶ or
- the character and circumstances of the case make it inappropriate for costs to be ordered against the unsuccessful party.⁷

¹ See [1.3.1] above.

² See s 43 of the Federal Court Act 1976 (Cth) and s 79 of the Federal Magistrates Act 1999 (Cth).

³ See *Hughes v Western Australian Cricket Association (Inc) and Others* (1986) ATPR 40-748, 48-136. As will be discussed below, there was initially some doubt as to whether the ‘costs follow the event’ principle applied to Federalunlawful discrimination matters. However, it now appears clear that that principle does apply.

⁴ *Forster v Farquar* (1893) 1 QB 564 (cited with approval in *Hughes v Western Australian Cricket Association (Inc) and Others* (1986) ATPR 40-748, 48-136). In those circumstances, it may be reasonable for the successful party to bear the expense of litigating that portion upon which they have failed.

⁵ *Cretazzo v Lombardi* (1975) 13 SASR 4 (cited with approval in *Hughes v Western Australian Cricket Association (Inc) and Others* (1986) ATPR 40-748, 48-136). In those circumstances, the successful party may not only be deprived of the costs of litigating those issues, but may also be required to pay the other party’s costs of them.

⁶ *Ritter v Godfrey* (1920) 2 KB 47 (cited with approval in *Hughes v Western Australian Cricket Association (Inc) and Others* (1986) ATPR 40-748, 48-136). See also *Jamal v Secretary Department of Health and Anor* (1988) 13 NSWLR 252, 271.

⁷ In *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 the majority of the Full Federal Court (Black CJ and French J) considered it appropriate to make no orders for costs against the two unsuccessful respondents. Their Honours had particular regard to the fact

The Federal Court also has the power pursuant to Order 62A of the Federal Court Rules to, by its own motion or on application of the parties, specify the maximum costs that may be recovered on a party and party basis.⁸ The limit set of recoverable costs under this order applies to both parties.⁹ It has been stated that the order is intended to address a concern that ‘the cost of litigation, particularly for persons of ordinary means, places access to the civil courts beyond their reach and thus effectively denies them justice’.¹⁰ The order has been held to be particularly relevant where there is a public interest aspect to the litigation.¹¹

It does not appear that Order 62A has been raised in any of the cases before the Federal Court during the review period. An application for the order was made to the Federal Court in the pre-HRLA Act jurisdiction in the context of a judicial review.¹² One of the reasons for the order not being granted in that case was that it was sought in terms that would result in only the costs payable by the applicant being limited and not those payable by the respondent.¹³

The corresponding provision in the FMS is Rule 21.02(2)(a) of the Federal Magistrates Court Rules 2001. It appears from the review that Rule 21.02(2)(a) has been applied by the FMS during the review period in relation to one¹⁴ ‘substantive’ decision¹⁵ and three ‘non-substantive’ decisions: that is decisions relating to the extension of an appeal period¹⁶ and applications for summary dismissal.¹⁷ It appears in all cases, the application of Rule 21.02(2)(a) was on the own motion of the Federal Magistrate.¹⁸

In dismissing an application alleging disability discrimination in employment, Driver FM determined that the respondent was entitled to a costs order. His Honour stated:

In the ordinary event the fixed event based regime of costs established by the Federal Magistrates Court Rules 2001 would apply, I note, however, that the respondent has conceded that in the circumstances of this case a modest fixed award of costs of around \$1,000 would be appropriate. This would be substantially less than the costs that would apply under the fixed event based costs regime and I accept that in the circumstances of this case a fixed award of costs of \$1,000 would be appropriate.¹⁹

In *Escobar v Rainbow Printing Pty Ltd (No.3)*,²⁰ Driver FM found that if the costs were not limited, the respondent would be liable for a costs order of \$18,000.²¹ His Honour was of the

that the proceedings raised novel and important questions of law concerning alleged deprivations of liberty, the executive power of the Commonwealth, the operation of the *Migration Act 1958* (Cth) and Australia’s obligations under international law. Other relevant factors listed included that there was no potential for the unsuccessful parties to make financial gain from bringing their actions and that their legal representation was provided on a pro-bono basis.

⁸ ‘Party-party’ costs are those reasonable costs incurred in the conduct of litigation.

⁹ *Maunchest Pty Ltd v Bickford* (Unreported, Federal Court, Drummond J, 7 July 1993).

¹⁰ *Sacks v Permanent Trustee Australia Limited* (1993) 45 FCR 509, 511.

¹¹ *Woodlands and Ballard v Permanent Trustee Co Ltd* (1995) FCR 139, [23]-[31].

¹² *Muller v HREOC* [1997] 634 FCA.

¹³ *Ibid* 6.

¹⁴ *Barghouti v Transfield Services* [2001] FMCA 113 (*Barghouti*). In *Font v Paspaley Pearls & Ors* [2002] FMCA 142, Raphael FM reserved on the issue of costs so that it could be heard at a later time but indicated [at [172]-[173]] that he was minded to limit costs under Rule 21.02(2)(a). There was ultimately no decision as to costs in this matter and it is understood that the parties resolved the issue of costs between themselves.

¹⁵ See [1.1] and [1.2] of Appendix A for a discussion of the distinction between ‘substantive’ and ‘non-substantive’ decisions.

¹⁶ *Escobar v Rainbow Printing Pty Ltd (No.3)* [2002] FMCA 160.

¹⁷ *Chung v University of Sydney* [2001] FMCA 94; *Miller v Wertheim & Anor* [2001] FMCA 103 (*Miller*).

¹⁸ Each of the relevant decisions was heard by Driver FM.

¹⁹ *Barghouti* [14]. His Honour also noted in the decision that he found the applicant to be ‘a sincere and honest witness. He genuinely believes that he has been wronged by the respondent... [a]s will become apparent, however, the applicant misunderstood his position’ [at[6]].

²⁰ [2002] FMCA 160.

²¹ *Ibid* [7].

view that this was an ‘excessive amount to award’ in the context of the proceedings and fixed the amount payable at \$12,000.²² His Honour noted that,

I am satisfied that is a reasonable outcome in terms of the costs that were likely to have been incurred on behalf of the applicant and in terms of the nature and conduct of the proceedings which, while involving a significant body of evidence, dealt with what was ultimately a relatively straight forward issue.²³

The FMS has also identified the category of matters that the proceeding falls into for the purposes of the costs scale in Schedule 1 of the Federal Magistrates Court Rules 2001 and has limited the amount of costs payable to the amount payable for that particular type of proceeding.²⁴

4.3 Summary of Statistics Regarding Costs Awards

4.3.1 Introduction

This section contains an overview of statistical data relating to costs awards made by the Federal Court and the FMS during the review period. A full account of those statistics is at Appendix A.

4.3.2 The FMS

In summary, the FMS ordered that ‘costs follow the event’ in 53% of the decisions handed down in the unlawful discrimination jurisdiction during the review period.²⁵

During the two year review period, the FMS ordered costs in favour of the successful applicant (being the original complainant) in respect of 55% of substantive decisions²⁶. The FMS ordered costs against the unsuccessful applicant in respect of 64% of substantive decisions.²⁷

The FMS ordered that costs follow the event in 41% of non-substantive decisions handed down during the review period.

4.3.3 The Federal Court and Full Federal Court

A review of the decisions of the Federal Court and Full Federal Court (at first instance and on appeal) reveals that ‘costs followed the event’ in approximately 74% of decisions handed down in the review period.²⁸

²² Ibid [8].

²³ Ibid [9].

²⁴ *Miller* [22].

²⁵ One matter that was not considered in the review, was whether there was any correlation between an application to the FMS based on a complaint that had been terminated by HREOC on a ground that reflected on the merits of the complaint (such as it lacked substance, was vexatious or misconceived: see [3.2.1] above) and a costs order being made against that applicant in the event that they were unsuccessful.

²⁶ See [1.1] of Appendix A for a full discussion of the distinction between ‘substantive’ and ‘non-substantive’ decisions.

²⁷ It is interesting to note, however, that this percentage was at 40% in the first year of the review and increased to 78% in the second year of the review period. The increase appears to be related to the shift in approach taken by the FMS that is discussed at [4.4.1(A)] below.

²⁸ The comment made in footnote 25 above also applies to decisions of the Federal Court.

The Federal Court and Full Federal Court ordered that ‘costs followed the event’ in respect of 64% of substantive decisions.²⁹ However, it is interesting to note that, at first instance, unsuccessful applicants in substantive hearings were ordered to pay the respondent’s costs in only 50% of matters. That percentage was the same for both years of the review period.

Costs followed the event in 83% of non-substantive decisions handed down by the Federal Court and Full Federal Court during the review period. If the figures for each year of the review period are considered separately, a trend emerges which may indicate that the Federal Court and Full Federal Court are increasingly prepared to order costs in non-substantive decisions. In the first year of the review period, costs followed the event in 73% of non-substantive decisions. That figure increased to 92% in the second year of the review period.

4.3.4 Conclusion

A review of the cases decided by the FMS and the Federal Court for the review period reveals that the principle that ‘costs follow the event’ has not been applied as a matter of course in either jurisdiction.

Overall, the FMS applied the principle proportionately less often than the Federal Court in decisions handed down in the unlawful discrimination jurisdiction. The FMS applied the principle proportionately more often in the second year of the review period and this increase can be explained by a change in the FMS’ jurisprudential approach to costs orders that is referred to in paragraph 4.4.1 below.

The most unexpected result from the analysis of decisions of the Federal Court was that the Federal Court at first instance only applied the costs follow the event principle in relation to 50% of decisions in which the applicant was unsuccessful. While the number of cases in this category was not large (being 12 cases in which the complaint was not substantiated) it is still a result that may surprise those who were concerned that the ‘costs follow the event’ principle would be applied with few exceptions by the Federal Court.

²⁹ See [2.1.1] of Appendix A for a full discussion of the distinction between ‘substantive’ and ‘non-substantive’ decisions.

4.4 Analysis of Approach of the FMS and Federal Court on the Issue of Costs

4.4.1 The FMS

(A) Relevance of Nature of the Jurisdiction

As the above statistics reveal, the FMS' application of the 'costs follow the event' principle altered over the course of the two year review period. In the first year of the review, the FMS was generally less inclined to apply the principle. The second year brought a change in this approach and the principle was applied more often than not.

This change in approach is reflected in the jurisprudence of the FMS over the two years.

In the first year of the jurisdiction, there was an acceptance by some Federal Magistrates that the unlawful discrimination jurisdiction presented a set of particular circumstances that may warrant a departure from the application of the traditional 'costs follow the event' rule.

That approach is exemplified by Raphael FM's decision in *Tadawan v State of South Australia*³⁰ (*Tadawan*). On one view, his Honour appeared to suggest that the nature of the unlawful discrimination jurisdiction was such that it warranted a departure from the usual costs principles:

The Court has accepted that these matters were normally considered to be 'no costs' matters, as evidenced by the practice of state tribunals and the fact that there was no power in HREOC to award costs. The Court has recognised that where proceedings are brought a successful party should not have the benefit of his or her victory lost in costs. The Court is also anxious not to discourage litigants from bringing claims which may well have merit because of the fear of an adverse costs order in the event that the applicant is unsuccessful. On the other hand, the Court can use its powers in relation to costs to discourage unmeritorious claims.

Although the applicant has not succeeded in this case the Court is of the view that her claim was justifiable. It was brought against the background of poor communication, which I have attempted to discuss in some detail. I believe that this is a case where the court should acknowledge the 'no cost' nature of the jurisdiction and make no order.³¹

Similarly in *McKenzie v The Department of Urban Services & the Canberra Hospital*,³² Raphael FM stated:

[a]nti-Discrimination matters are generally considered to be a type of dispute which do not attract orders for costs. There was no provision for costs in the inquiry system previously operated by HREOC. In state tribunals there is provision to award costs but this is not often done.³³

His Honour's approach was adopted by other members of the FMS. In *Ryan v The Presbytery of Wide Bay Sunshine Coast and the Presbyterian Church of Queensland*³⁴ (*Ryan*), Baumann FM stated:

³⁰ [2001] FMCA 25.

³¹ *Ibid* [62], [63].

³² [2001] FMCA 20.

³³ *Ibid* [95].

³⁴ [2001] FMCA 12.

Whilst I have the power to award costs, the nature and intent of anti-discrimination legislation could be thwarted if citizens were unreasonably inhibited from prosecuting bona fide, even ultimately unsuccessful claims.³⁵

Baumann FM went on to make the following conditional costs order, which reflected a long history of litigation in a number of fora between the applicant and respondent:

On the undertaking given by the applicant to the Court as set out in the undertaking signed by him, that application number BZ76 of 2001 in this Court be discontinued, and the applicant be ordered to pay costs of \$10,000.00. The execution of such order for costs be stayed unless the applicant breaches his undertaking given to the Court.³⁶

An arguably more conventional (but still flexible) approach to the issue of costs in the first year of the FMS' jurisdiction appeared in the decision of Driver FM in *Xiros v Fortis Life Assurance Ltd*³⁷ (*Xiros*), where his Honour made the following comments regarding the nature of the power to make orders as to costs:

Ordinarily, in this jurisdiction as in others, costs follow the event. But there is no absolute rule to that effect. There is a general principle that, in civil non jury trials, in the absence of special circumstances, a successful party has a reasonable expectation of obtaining an order for costs in its favour unless, for some reason connected with the case, a different order is specifically warranted: *Donald Campbell & Co v Pollack* [1927] AC 732 at 812, cited by McHugh J in *Latoudis v Casey* (1990) 170 CLR 534 at 569. A departure from that general principle cannot be arbitrary or idiosyncratic, but there is no right to an order for costs, notwithstanding success in litigation: *Donald Campbell & Co v Pollack* op cit at 811...³⁸

In the second year of the FMS' jurisdiction, the FMS indicated that *Tadawan*³⁹ should not be considered as authority for the principle that the issue of costs in the unlawful discrimination jurisdiction should be considered differently from other jurisdictions. In *Minns v State of New South Wales (No.2)*⁴⁰ (*Minns*), Raphael FM stated:

The decision in *Tadawan* was always meant to be one made on its own facts and it has not been universally followed in the Federal Magistrates Court. To the extent that it may be considered a precedent for the non-imposition of costs orders in 'deserving cases' this should no longer continue. I am satisfied that the superior courts have now made it clear what the law should be in relation to such applications in the anti-discrimination area and I am content to follow them.⁴¹

To the extent that *Tadawan*,⁴² *Ryan*⁴³ or *McKenzie*⁴⁴ could be read as standing for the proposition that the 'costs follow the event' principle does not apply equally to the federal unlawful discrimination jurisdiction, those decisions now appear unlikely to be followed. In *Ball v Morgan & Anor*,⁴⁵ McInnis FM stated:

In my view the general principle in relation to costs is that the costs should follow the event. I see no reason for departing from that general principle in human rights applications though I

³⁵ Ibid [20].

³⁶ Ibid [2]. See also *Tadawan*.

³⁷ [2001] FMCA 15.

³⁸ Ibid [20].

³⁹ [2001] FMCA 25.

⁴⁰ [2002] FMCA 197.

⁴¹ Ibid [13].

⁴² [2000] FMCA 25.

⁴³ [2001] FMCA 12.

⁴⁴ [2001] FMCA 20.

⁴⁵ [2001] FMCA 127.

acknowledge the cases to which I have been referred by the applicant's counsel provide at least some examples of circumstances where a court has been prepared to exercise its discretion in favour of unsuccessful applicants by not awarding costs.

... In my view in the absence of any amendment to legislation which would seek to interfere with the ordinary discretion exercised by a court in the award of costs it should be stated that in the normal course of events costs follow the event. I can see no legislative or legal basis which would support the proposition that there is any need in human rights matters to alter the law applicable to this court by adopting the practice of the state tribunal or indeed to have regard to the fact that the Commission does not have power to award costs. Unfortunately I therefore find that I am unable to agree with the conclusion in relation to costs set out by the Learned Federal Magistrates in the *Tadawan* Decision and the *Ryan* Decision.

It is not appropriate for courts to exercise a discretion in relation to costs on the basis that it may or may not discourage applicants from making claims. That is a matter for Parliament to decide and if necessary legislation can be amended which, subject to any Constitutional challenge, may direct the court in relation to the issue of an award of costs in human rights applications. In the absence of that legislation as indicated I do not believe there is any need to depart from the normal principles which apply.⁴⁶

It appears that by the end of the two year review period, the FMS accepted that the nature of the jurisdiction alone did not determine whether the costs order that should be made and that 'the general propositions in relation to costs for discrimination matters' include 'the general rule that costs should follow the event apply subject to any statutory modification and to the proper exercise of discretion'.⁴⁷

(B) Factors Considered in Exercising Discretion as to Costs Orders

The FMS has, however, over that two year period, indicated that there are other issues that are relevant to the exercise of the discretion to award costs.

They include:

- the relevance of there being a public interest element to the complaint;
- the relevance of the applicant being unrepresented and not in a position to assess the risk of litigation;
- the successful party should not lose the benefit of their victory because of the burden of their own legal costs;
- the courts should not discourage litigants from bringing meritorious claims and should be slow to award costs at an early stage;
- the courts will discourage unmeritorious claims and will not award costs where the trial is prolonged by either party; and
- self represented applicants are not entitled to any legal costs.

Each of these matters will be considered in turn.

⁴⁶ Ibid [87]-[91].

⁴⁷ *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2002] FMCA 71 (*Dranichnikov*) [5].

i. Where there is a Public Interest Element to the Complaint

In *Xiros*,⁴⁸ Driver FM declined to award costs to the respondent after dismissing the application. His Honour stated:

A further circumstance that may warrant a departure from the general principle is where the proceedings contain a significant public interest element: *Oshlack v Richmond River Council* (1998) 152 ALR 83. All human rights proceedings contain some element of public interest in that the legislation is remedial in character, addressing the public mischief of discrimination. But the legislation confers private rights of action for damages. There will be many human rights proceedings where no sufficient public interest element can be shown: *Physical Disability Council of NSW v Sydney City Council* [1999] FCA 815.

In the present case, the proceedings have called for the interpretation and application of s46(2) of the DDA, a provision on which I have found no previous judicial consideration. The decision of this Court will have some precedent value and will have implications for other insurance policies; and possibly a large number of similar policies. The proceedings therefore contain a public interest element of substance.⁴⁹

Furthermore, it may be that ‘in human rights-type matters there can be examples where the public interest consideration or the interests of justice may persuade a judicial officer to not follow the general rule’.⁵⁰

However, not every case with a public interest element will avoid the application of the costs follow the event principle. This was made clear by Raphael FM in *Minns*,⁵¹ where his Honour stated:

There must be a public interest in the subject of the proceedings and once some exclusively personal benefit is sought the prospects of the proceedings having the necessary quality of public interest is much diminished. Thus in *Ruddock v Vadarlis* [(2001) 188 ALR 143] the public interest was the liberty of individuals who were unable to take action on their own behalf to determine their rights. In *Kent v Cavanagh* (1973) 1 ACTR 43 it was the erection of a communications tower on Black Mountain in Canberra. In *Oshlack v Richmond River Council* [(1998) 193 CLR 72] the subject was a land development at Evans Head. These were cases in which the usual rule as to costs did not apply but in *De Silva v Ruddock*, *Physical Disability Council of NSW v Sydney City Council* [[1998] 311 FCA] and *Sluggett v HREOC* [[2002] FCA 1060] the claims were more personal to the applicants and the appeal to the public interest exception was unsuccessful.⁵²

His Honour also appeared to express views at odds with those expressed by Driver FM in *Xiros*,⁵³ stating:

[i]f public interest is to be used to mitigate the normal order for costs then that public interest must go further than mere precedent value.⁵⁴

ii. Where the Applicant is Unrepresented and not in a Position to Assess the Risk of Litigation

In *Xiros*,⁵⁵ Driver FM declined to award costs to the respondent after dismissing the application. His Honour stated:

⁴⁸ [2001] FMCA 15.

⁴⁹ *Ibid* [24], [25]. See similar views expressed in *Chau v Oreanda Pty Ltd & Others* [2001] FMCA 114 and *Gibbs v Wanganeen* [2001] FMCA 14.

⁵⁰ *Dranichnikov* [5].

⁵¹ [2002] FMCA 197.

⁵² *Ibid* [13].

⁵³ [2001] FMCA 15, [20].

⁵⁴ *Ibid* [13]. Note, however, his Honour did not expressly refer to Driver FM’s decision in *Xiros*.

Another circumstance that may warrant a departure from the general principle is where the unsuccessful party is unrepresented and was not in a position to make a proper assessment of the strength or weakness of his case, and, hence, the risk associated with the litigation. Mr Xiros had the benefit of legal assistance for his complaint to HREOC but he was unrepresented in these proceedings. The issue to be resolved was a technical one: whether there was a sufficient actuarial basis for the exclusion from benefits in the insurance policy of HIV/AIDS derived conditions, an issue on which the respondent bore the onus of proof. That issue could only be resolved by the pursuit of the present application to this Court, and Mr Xiros was not in a position to make a reliable assessment of his prospects of success.⁵⁶

In *Hassan v Smith, Donaldson and The Children's Hospital at Westmead*⁵⁷ Raphael FM noted that the applicant was self-represented and that he had brought the proceedings out of deeply held beliefs. His Honour also noted that 'in this jurisdiction of the Federal Magistrates Court discretion may be exercised more leniently in favour of unsuccessful applicants'.⁵⁸ However, Raphael FM ordered that the unsuccessful applicant pay the respondent's costs as his Honour was of the view that the applicant had been aware of the problems that his case faced and had wished to continue the matter so as 'to have his day in court'.⁵⁹

iii. The Successful Party should not Lose the Benefit of their Victory because of their Legal Costs

The relevance of this factor appears to be closely associated with the suggestion that the 'costs follow the event' principle should not be too readily applied to Federal unlawful discrimination matters.⁶⁰ While that approach may have benefited unsuccessful applicants, it stood to render futile the claims of applicants whose awards of compensation might be 'swallowed up' by legal fees. To ameliorate that potential problem, the Court indicated that it was appropriate to have regard to that issue as a factor weighing in favour of making a costs order in favour of a successful applicant.

In *Shiels v James and Lipman Pty Ltd*⁶¹ (*Shiels*) Raphael FM held that the amount of the award would be totally extinguished if no order for costs was made and in those circumstances costs should follow the event.

In *Travers by her next friend Travers v State of NSW*,⁶² Raphael FM stated:

This matter was originally commenced in the Federal Court. There was a lengthy hearing of Notice of Motion before Justice Lehane and the case before me lasted 2 ½ days. If costs were not awarded Stephanie would lose the benefit of the entire judgment. I order that the respondent should pay the applicant's costs to be taxed on the Federal Court scale if not agreed.⁶³

Similarly in *McKenzie*,⁶⁴ Raphael FM ordered that the respondents pay the costs of the applicant, stating:

Anti-Discrimination matters are generally considered to be a type of dispute which do not attract orders for costs. There was no provision for costs in the inquiry system previously operated by HREOC. In state tribunals there is provision to award costs but this is not often done. The Federal

⁵⁵ Ibid.

⁵⁶ Ibid [23].

⁵⁷ [2001] FMCA 58, [25].

⁵⁸ Ibid [25]. However, note that his Honour cited *Tadawan* in support of that proposition (see the discussion at [4.4.1 (A)] above.

⁵⁹ Ibid [27].

⁶⁰ See [4.4.1(A)] above.

⁶¹ [2000] FMCA 2.

⁶² [2001] FMCA 18.

⁶³ Ibid [74].

⁶⁴ [2001] FMCA 20.

Court and the Federal Magistrates Court are courts of law and not tribunals and the *HREOC Act* does not contain any prohibition on the award of costs. In previous matters which have come before me e.g. *Donna Marie Shiels v Trevor Leighton James & Anor* [2000] FMC 2 and *Stephanie Travers by her next friend, Wendy Lorraine Travers v State of New South Wales* [2001] FMC 18 I have indicated that I think an award of costs is appropriate where otherwise a party may have the benefit of his or her award of damages totally eliminated by the cost of the proceedings.⁶⁵

In *Johanson v Blackledge & Blackledge trading as Michael Blackledge Meats*⁶⁶ Driver FM ordered that costs should follow the event. His Honour agreed with the views expressed by Raphael FM in *Shiels*⁶⁷ concerning the general desirability of an award of costs in favour of a successful applicant in human rights proceedings, so as to avoid an award of damages being swallowed up by the cost of litigation.

Driver FM awarded costs to the successful applicant in *Cooke v Plauen Holdings Pty Limited*⁶⁸ stating:

I agree with the views expressed by Raphael FM in *Shiels v James* at paragraph 80 concerning the general desirability of an award of costs in favour of a successful applicant in human rights proceedings, so as to avoid an award of damages being swallowed up by the cost of litigation.⁶⁹

His Honour made similar comments in *Escobar v Rainbow Printing Pty Limited (No.3)*,⁷⁰ stating:

My general approach to the issue of costs in human rights proceedings where an applicant is successful is set out in my decision in *Cooke v Plauen Holdings Pty Limited* [2001] FMCA 91. In that case I expressed agreement with views expressed by Federal Magistrate Raphael in *Shiels v James* [2000] FMCA 2, in particular at paragraph 80 of his decision. I noted the general desirability of an award of costs in favour of a successful applicant in human rights proceedings so as to avoid an award of damages being swallowed up by the cost of litigation.⁷¹

With the developments in the jurisprudence referred to in [4.4.1(A)] above, it may be that this factor becomes less relevant. Alternatively, it may have some residual relevance as a doctrine supporting the proposition that the FMS should be reluctant to depart from the principle of ‘costs follow the event’ in such cases.

iv. The Courts should not Discourage Litigants from Bringing Meritorious Claims and Should be Slow to Award Costs at an Early Stage

In *Low v Australian Tax Office*⁷² (*Low*) Driver FM dismissed the application on the basis that an extension of time for the filing of the application should not be granted because the application did not disclose an arguable case. His Honour declined to award costs, however, stating:

In my view the Court should be slow to award costs at an early stage of human rights proceedings so that applicants have a reasonable opportunity to get their case in order, to take advice and to assess their position. It would, in my view, be undesirable for costs to be awarded commonly at an

⁶⁵ Ibid [95].

⁶⁶ [2001] FMCA 6.

⁶⁷ [2000] FMCA 2.

⁶⁸ [2001] FMCA 91.

⁶⁹ Ibid [44].

⁷⁰ [2002] FMCA 160.

⁷¹ Ibid [5].

⁷² [2000] FMCA 6.

early stage, as that would provide a deterrent to applicants taking action under what is remedial legislation in a jurisdiction where costs have historically not been an issue.

By disposing of the application now at this relatively early stage the respondent is able to avoid being put to the substantial expense of a full hearing and in those circumstances I do not think it necessary or appropriate to make any order as to costs.⁷³

In *Saddi v Active Employment, Break Thru Personnel Inc, Care Employment and Commonwealth of Australia*,⁷⁴ Raphael FM cited with approval and applied the approach of Driver FM in *Low*.⁷⁵ Although Raphael FM declined to exercise his discretion to allow Mr Saddi to continue with his proceedings out of time (as Raphael FM was not satisfied that Mr Saadi's application had any prospect of success), he made no order for costs.

v. *The Courts will Discourage Unmeritorious Claims and will not Award Costs where the Trial is Prolonged by the Conduct of Either Party*

In *Hassan*,⁷⁶ Raphael FM held that the applicant should pay the party-party costs because although he was told of the difficulties he faced in establishing his claim by HREOC upon termination, and by Raphael FM at two directions hearings, he nevertheless 'wanted his day in court'. However, Raphael FM held that the applicant's conduct was not so unreasonable so as to warrant indemnity costs being awarded.

In contrast, indemnity costs were awarded against the unsuccessful applicant by Driver FM in *Wong v Su & Melyork Pty Limited*,⁷⁷ where his Honour noted:

The applicant has been wholly unsuccessful in these proceedings. The application was pursued in a desultory way by the applicant and in the knowledge that the allegations made by her were untruthful. Accordingly, the application must be dismissed with costs. In addition, it is appropriate in the circumstances that the Court express its strong disapproval, both of the fact that the application was made at all and also the manner in which it was pursued. Applications of this nature, based upon untruthful evidence, are apt to bring anti-discrimination legislation into disrepute, and do a grave disservice to others wishing to pursue a genuine grievance. The respondents should not be out of pocket in having dealt with this application.⁷⁸

*Horman v Distribution Group Limited*⁷⁹ was decided during the period in which it appeared that the 'costs follow the event' principle was to be less readily applied by the FMS in the unlawful discrimination jurisdiction (as compared to other jurisdictions).⁸⁰ The applicant succeeded in that case. Raphael FM indicated that, in those circumstances, the 'usual type of order' that would be made in a jurisdiction where costs did not follow the event would be an order that the respondent pay a limited part of the costs of the hearing (for example, one day's costs).⁸¹ However, his Honour held that the fact that the trial was prolonged by the conduct of the applicant and her untruthfulness and that her Counsel persisted in suggesting a conspiracy between the respondent's witnesses militated against such an order. His Honour therefore ordered that each

⁷³ Ibid [11]. His Honour made similar obiter comments in *Chau v Oreanda Pty Ltd and Others* [2001] FMCA 114, [26].

⁷⁴ [2001] FMCA 73.

⁷⁵ [2000] FMCA 6.

⁷⁶ [2001] FMCA 52.

⁷⁷ [2001] FMCA 108.

⁷⁸ Ibid [19].

⁷⁹ [2001] FMCA 52.

⁸⁰ See the discussion in [4.4.1(A)] above.

⁸¹ [2001] FMCA52, [77].

party pay their own costs. On appeal, Raphael FM's approach to costs was affirmed by Emmett J.⁸²

In *Xiros*,⁸³ Driver FM made the following observation in the course of considering the issue of costs after dismissing the application:

One circumstance that might disentitle a successful litigant to an order for costs can be the behaviour of the litigant during the course of the proceedings, for example, by taking unnecessary technical points or otherwise inappropriately prolonging the proceedings. That is certainly not the case here. On the contrary, the respondent, through its legal representatives, has behaved impeccably.⁸⁴

His Honour nevertheless declined to award costs to the respondent for other reasons.⁸⁵

In *Bruch v Commonwealth of Australia*⁸⁶ McInnis FM stated that in the exercise of his discretion on the issue of costs, it was relevant to take into account the fact that the applicant had made an extravagant claim for damages 'solely to demonstrate anger'.⁸⁷ His Honour was of the view that this was not a valid basis for claiming damages or for exaggerating a claim in a human rights application. However, by reason of the fact that the respondent's application for summary dismissal was dismissed, McInnis FM determined that it was appropriate to order that the applicant pay only 80% of the respondent's costs.

vi. Self-Represented Applicants are not Entitled to any Legal Costs

In *Wattle v Raymond Kirkland & Daphne Kirkland (t/as Kirk's Radio Cab)*,⁸⁸ Raphael FM held that the applicant was not entitled to any legal costs by reason of the fact that she was self-represented.

(C) Application of s47 of the Legal Aid Commission Act 1974 (NSW) to Human Rights Cases in the FMS

Section 47 of the *Legal Aid Commission Act 1974* (NSW) provides that:

47 Payment of costs awarded against legally assisted persons

- (1) Where a court or tribunal makes an order as to costs against a legally assisted person:
 - (a) except as provided by subsections (2), (3), (3A), (4) and (4A), the Commission shall pay the whole of those costs, and
 - (b) except as provided by subsections (3), (3A), (4) and (4A), the legally assisted person shall not be liable for the payment of the whole or any part of those costs

- (2) The Commission shall not pay an amount in excess of \$5,000 (or such other amount as the Commission may from time to time determine):

⁸² See *Horman v Distribution Group Limited* [2002] FCA 219, [45]. Note, however, that Emmett J raised some queries regarding Raphael FM's description of a *Calderbank* letter as 'defective'. As Emmett J noted, there are no technical requirements for a *Calderbank* letter ([44]).

⁸³ [2001] FMCA 15.

⁸⁴ [2001] FMCA 15, [22].

⁸⁵ See discussion at [4.4.1(B)(i)] above.

⁸⁶ [2002] FMCA 29.

⁸⁷ *Ibid* [64].

⁸⁸ [2001] FMCA 66.

- (a) except as provided by paragraph (b), in respect of any one proceeding, or
- (b) in respect of each party in any one proceeding, being a party who has, in the opinion of the Commission, a separate interest in the proceeding.

In *Minns*,⁸⁹ Raphael FM found that s 47 does not apply to proceedings in the FMS (and by implication the Federal Court). Raphael FM applied the decision of the Full Bench of the Federal Court and the majority of the High Court in *Bass v Permanent Trustee Co Limited*.⁹⁰ In that case, the majority of the High Court expressed the view that a ‘court or tribunal’ for the purpose of s47 means a State court or tribunal.⁹¹

As a result of this decision, it can no longer be assumed that legally aided applicants are protected against liability by s47 of the *Legal Aid Commission Act 1974* (Cth) for the payment of the whole or part of the costs that might be ordered by the court if unsuccessful in human rights proceedings.

(D) Costs Order Sought in relation to Subpoena

A somewhat unusual costs application was made in *Escobar v Rainbow Printing Pty Limited*⁹² in connection with a subpoena served by the applicant on the solicitors acting for the respondent. A person employed by the respondent’s solicitor sent the subpoenaed documents to the wrong registry. The applicant’s solicitors suggested that those circumstances involved a neglect of duty on the part of the respondent’s solicitor and sought a personal costs order against him. Driver FM declined to make such an order, noting that the address of the registry had not been clearly stated on the subpoena.

4.4.2 Federal Court

(A) Relevance of the Nature of the Jurisdiction

In [4.4.1(A)] above, it was noted that decisions of the FMS in the first year of the review (particularly *Tadawan*,⁹³ *McKenzie*⁹⁴ and *Ryan*⁹⁵) appeared to indicate a view that the nature of the federal unlawful discrimination jurisdiction may warrant a departure from the general application of the ‘costs follow the event’ principle. It was further noted that the FMS appeared to move away from that position in the second year of the review, with Raphael FM stating in *Minns*:⁹⁶

To the extent that [*Tadawan*] may be considered a precedent for the non-imposition of costs orders in ‘deserving cases’ this should no longer continue. I am satisfied that the superior courts have now made it clear what the law should be in relation to such applications in the anti-discrimination area and I am content to follow them.⁹⁷

⁸⁹ [2002] FMCA 197.

⁹⁰ *Bass v Permanent Trustee Co Ltd* [1999] HCA 9 (24 March 1999).

⁹¹ *Ibid* [64].

⁹² [2002] FMCA 22.

⁹³ [2001] FMCA 25.

⁹⁴ [2001] FMCA 20.

⁹⁵ [2001] FMCA 12.

⁹⁶ [2002] FMCA 197.

⁹⁷ *Ibid* [13]. See [4.4.1(A)] above.

The reference to ‘superior courts’ in Raphael FM’s decision in *Minns*⁹⁸ might be taken to mean that the Federal Court has conclusively rejected any suggestion that the issue of costs in the federal unlawful discrimination jurisdiction should be considered differently from other jurisdictions. That is not the case.

The only post-HRLA Act decision of the Federal Court cited by Raphael FM in *Minns*⁹⁹ was the decision of Drummond J in *Sluggett v HREOC*.¹⁰⁰ However, *Sluggett v HREOC* was not an application brought under s 46PO of the HREOC Act. It was an application for review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) of a pre-HRLA Act decision of HREOC and is therefore distinguishable. Indeed, Drummond J made clear that he was not deciding the correctness or otherwise of the *Tadawan*¹⁰¹ line of authority, stating:

It is unnecessary to decide whether the application by the Federal Magistrates Court of such a policy in human rights cases in exercising its statutory discretion as to costs is consistent with the statutory power. The proceeding in this Court is for judicial review under the *Administrative Decisions (Judicial Review) Act* of a decision by the Commission on the applicant's complaint, a decision given, moreover, after an exhaustive hearing on the merits. Even if it were appropriate to adopt the approach of the Federal Magistrates Court with respect to costs in hearings on the merits in human rights cases brought to the Court under s 46PO the *Human Rights and Equal Opportunity Commission Act*, I do not think that applications to this Court under the *Administrative Decisions (Judicial Review) Act* for review of decisions by the Commission should be regarded as a class of case calling for a special rule as to costs.¹⁰²

In *Paramasivam v Wheeler & Ors*,¹⁰³ Moore J appeared prepared to contemplate that special considerations might apply to the issue of costs for federal unlawful discrimination claims by reason of the nature of the jurisdiction. His Honour stated:

An application has been made for an order that the applicant pay the costs of the respondent in each of the proceedings. I am conscious of the fact that the applicant represented herself and, as I indicated a moment ago, holds a genuine belief about the conduct of the people against whom these proceedings have been brought. In the ordinary course successful respondents are entitled to their costs, though in this area of the Court's jurisdiction special considerations may arise in some cases that might warrant some departure from the normal rule.¹⁰⁴

His Honour decided that it was appropriate that a costs order be made in that matter. However he went on to say:

Having so ordered, however, I would invite the parties for whose benefit the order is made to give consideration as to whether, in the circumstances, it is appropriate that all or, indeed, any of the costs ought to be recovered.¹⁰⁵

The Full Court referred to (but expressly declined to decide upon) the issue in *Hagan v Trustees of the Toowoomba Sports Ground Trust*¹⁰⁶ (where the appellant argued that costs should not be awarded as he was not receiving Legal Aid and the proceedings concerned a public rather than a private right). The Full Court stated:

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ [2002] FCA 1060.

¹⁰¹ [2001] FMCA 25.

¹⁰² Ibid [7].

¹⁰³ [2000] FCA 1559.

¹⁰⁴ Ibid [9].

¹⁰⁵ Ibid [10].

¹⁰⁶ [2001] FCA 123.

This is not an appropriate case in which to consider whether there should be some departure in human rights litigation from the ordinary principles governing the court's discretion to order payment of costs. In our view, this appeal should be dismissed with costs because the appeal was without merit, having no realistic prospects of success.¹⁰⁷

However, in a number of decisions (not cited by Raphael FM in *Minns*¹⁰⁸), the Federal Court has made brief statements which appear to indicate that costs will generally be awarded in favour of the successful party in federal unlawful discrimination matters (that is, the principle of costs follow the event will be applied). By way of example, in *Tate v Raffin and Wollongong District Cricket Club Inc*¹⁰⁹ (*Tate*), Wilcox J stated:

Generally speaking, it may be expected an order will be made in favour of the successful party.¹¹⁰

His Honour nevertheless went on to decide that it was appropriate to make no order for costs by reason of the respondent's conduct.¹¹¹

Similarly (although not clearly stated), Keifel J appeared to indicate in *Creek v Cairns Post Office*¹¹² (*Creek*) that the 'costs follow the event principle' should be applied in federal unlawful discrimination matters in the absence of an express legislative provision to the contrary.¹¹³

There have been a number of other decisions indicating that the 'costs follow the event' principle will be applied by the Federal Court to the unlawful discrimination jurisdiction.¹¹⁴ However, none of those decisions include a detailed discussion of the issue.

The absence of a clearly authoritative decision on this issue may, in part, explain the observation at [4.3.4] above that although the Federal Court has awarded costs against the unsuccessful party in the majority of decisions handed down during the review period, it was significantly less likely to do so in respect of substantive decisions where the applicant was unsuccessful (with costs being awarded against the applicant in only 50% of matters in which the applicant was unsuccessful).

(B) Other Matters Relevant to the Issue of Costs Discussed by the Federal Court

Although yet to be conclusively determined, it might be expected that the Federal Court will generally apply the 'costs follow the event' principle to the unlawful discrimination jurisdiction (particularly given that the FMS has now adopted that approach). However, even assuming that is so, the Federal Court has indicated that there are a number of factors that may weigh against an award of costs against an unsuccessful party. Like the FMS,¹¹⁵ the Federal Court has recognised that it may be appropriate not to order costs against an unsuccessful applicant in cases involving or serving the 'public interest'. Wilcox J made reference to that principle in *Ferneley v*

¹⁰⁷ *Ibid* [31].

¹⁰⁸ [2002] FMCA 197.

¹⁰⁹ [2000] FCA 1582.

¹¹⁰ *Ibid* [71].

¹¹¹ See [4.4.2(B)] below.

¹¹² [2001] FCA 1150.

¹¹³ Stating at [1]: 'Neither the *Racial Discrimination Act 1975* nor the *Human Rights and Equal Opportunity Commission Act 1986* provide that costs are not to be awarded in cases of this kind. The applicant was unsuccessful in her application'. Her Honour nevertheless went on to order that the applicant pay only one half of the respondent's costs for reasons discussed in [4.4.2(B)] below.

¹¹⁴ See, by way of example: *Li v Minister for Immigration & Multicultural Affairs* [2001] FCA 1414, [57] and *Paramasivam v Wheeler & Ors* [2001] FCA 231, [24].

¹¹⁵ See [4.4.1(B)(i)] above.

The Boxing Authority of New South Wales.¹¹⁶ Although his Honour reserved his decision on the issue of costs, he made the following preliminary comments:

Although the applicant fails, it is not clear to me that she should be required to pay the respondents' costs. Her case in relation to s 22 was arguable. Her argument in relation to s 42, which was disputed by the respondents, is correct. Perhaps more importantly, the case has served the public interest in clarifying important issues of discrimination law.¹¹⁷

The Federal Court has (like the FMS)¹¹⁸ also indicated that the conduct of the respondent may be a factor which weighs against the application of the 'costs follow the event' principle.

In the decisions of *Tate*¹¹⁹ and *Creek*,¹²⁰ while Wilcox and Kiefel JJ respectively seemed to prefer the view that the 'costs follow the event' principle applies to federal unlawful discrimination matters, their Honours nevertheless had regard to the conduct of the respondent as a factor mitigating against the 'usual order'.

In *Tate*,¹²¹ Wilcox J stated:

Generally speaking, it may be expected an order will be made in favour of the successful party. However, in the present case, I do not think it appropriate to make an order for costs. Although I have determined the proceeding must be dismissed, the respondents bear substantial responsibility for the fact that it was commenced in the first place; generally, because of the way they handled the situation that arose at the training session and, more particularly, because of the misleading impression conveyed by the fifth paragraph of the letter of 20 February 1996 [which suggested that the decision to revoke the applicant's membership was by reason of his disability].¹²²

In *Creek*,¹²³ Kiefel J stated:

The only matter which seems to me to weigh against the applicant being ordered to pay the respondent's costs in the proceedings is the time taken in the hearing on the defence raised by the respondent, which I found would not have been available to it. Indeed it was upon the basis that the provisions of s 18D had not been judicially considered, that the matter remained in this Court when it would otherwise have been transferred to the Magistrates' Court with consequent savings on costs. Taking these matters into account I consider it appropriate to order that the applicant pay one-half of the costs incurred by the respondent in the proceedings, including reserved costs.¹²⁴

It may also be inappropriate to order costs to a successful appellant, where the appeal Court orders a re-hearing of the matter in question. This is implicit in the comments of Dowsett J in *Kirkland v Wattle*¹²⁵ (*Kirkland*). His Honour there allowed an appeal by reason of flaws in Raphael FM's approach at first instance to issue of the credibility of a witness. Dowsett J ordered that the matter be re-heard by another Federal Magistrate. The successful appellant (the respondent in the proceedings before Raphael FM) did not seek an order for costs. Dowsett J indicated that that was the proper course for the appellant to have taken. Although not entirely clear, it may be that his Honour held that view by reason of the fact that neither party had succeeded on a final basis.

¹¹⁶ [2001] FCA 1740.

¹¹⁷ *Ibid* [97].

¹¹⁸ See discussion in [4.4.1(B)(v)] above.

¹¹⁹ [2000] FCA 1582.

¹²⁰ [2001] FCA 1150. See discussion at [4.4.2(A)] above.

¹²¹ [2000] FCA 1582.

¹²² *Ibid* [71].

¹²³ [2001] FCA 1150.

¹²⁴ *Ibid* [2].

¹²⁵ [2002] FCA 145.

(C) Authorisation of Payments by Attorney-General

A further interesting feature of *Kirkland*¹²⁶ related to the *Federal Proceedings (Costs) Act 1981* (Cth).

Dowsett J certified, pursuant to s 6(3) of that Act, that it was appropriate for the Attorney-General to authorise payments to the respondent in connection with her costs of traveling to Sydney to attend the hearing of the appeal. His Honour further certified, pursuant to s 8(3) of that Act, that it would be appropriate for the Attorney to authorise such payments as the Attorney deemed appropriate for the costs of the parties in relation to the new trial ordered by his Honour.

4.5 Summary and Conclusion

As noted above, the statistical and jurisprudential analyses in this chapter were undertaken in the context of concerns expressed by some commentators regarding the fact that the FMS and Federal Court were jurisdictions in which costs awards could be made. Those concerns were discussed in more detail in Chapter 1. It will be recalled that they related, in part, to the possibility that complainants would be deterred from pursuing their rights in the FMS and Federal Courts by reason of fear of incurring costs orders.

Those concerns appear to have been founded upon an assumption that the FMS and the Federal Court would in almost all cases (or at least in a significant number of cases) award costs against the unsuccessful party in federal unlawful discrimination matters. That assumption appears to have arisen from the existence of the ‘costs follow the event’ principle, being the principle that has traditionally been applied by Australian courts in exercising the discretion to award costs.

There is no doubt that costs have been awarded against unsuccessful litigants in the FMS and Federal Court in a significant number of matters in the federal unlawful discrimination jurisdiction. However, as the statistical and jurisprudential analyses in this chapter demonstrate, such an outcome is by no means a foregone conclusion. Indeed, there was initially some suggestion (particularly in the *Tadawan*¹²⁷ line of authority in the FMS), that the principle of ‘costs follow the event’ should not be applied in the federal unlawful discrimination jurisdiction. In the second year of the review period, the FMS moved away from that position. However, in the Federal Court, the question of whether there should be some departure from the ordinary principles governing costs in federal unlawful discrimination matters remains open.

Moreover, the FMS and the Federal Court recognised that there may be a number of factors which weigh in favour of not ordering that the unsuccessful party to a federal unlawful discrimination matter pay costs to the successful party.

It is accepted that jurisprudential and statistical analyses cannot be used to comprehensively evaluate and address all of the concerns discussed in Chapter 1. However, it is important to recognise that the award of costs is governed by factors more complex than the blanket application of a ‘loser pays’ rule. It is also important that practitioners advising their clients be aware of the approach of the FMS and Federal Court to costs in the Federal unlawful discrimination jurisdiction.¹²⁸ This will hopefully ensure that decisions to commence (or not

¹²⁶ [2002] FCA 145.

¹²⁷ [2001] FMCA 25.

¹²⁸ As well as Order 62A of the Federal Court Rules and Rule 21.02(2)(a) of the Federal Magistrates Court Rules: see [4.2.1] above.

commence) Federal unlawful discrimination proceedings are based upon a realistic appreciation of the way in which the costs jurisdiction has operated to date.

Appendix A

Statistics Regarding Costs Awards

1. Decisions in the FMS

The FMS handed down 57 decisions during the review period.¹ The manner in which costs were dealt with in those matters is analysed below.

1.1 Substantive Decisions

During the review period, the FMS handed down 34 decisions in which it decided on a final and non-summary basis whether to uphold or dismiss a claim of unlawful discrimination (those decisions will be referred to as ‘substantive decisions’).² The FMS found the complaint substantiated in 20 of these matters³ (59%).

For each substantive decision, the review considered the manner in which the FMS ultimately exercised its discretion to award costs. For those substantive decisions where costs were reserved, the analysis considered what orders were made in any later decisions of the FMS handed down during the review period.

In respect of the 20 substantive decisions where the applicant succeeded, costs followed the event and were awarded in favour of the applicant⁴ in 11 matters (55%).⁵ At the end of the review period, the issue of costs was still to be determined in five⁶ of those 20 matters.

¹ Three decisions that dealt with the issue of ‘costs only’ that had been reserved have been counted as forming part of the substantive decision to which they relate: see [1.2.5] below.

² *Shiels v James & Lipman Pty Ltd* [2000] FMCA 2 (*Shiels*); *Johanson v Blackledge and Blackledge t/as Michael Blackledge Meats* [2001] FMCA 6 (*Johanson*); *Horman v Distribution Group Ltd* [2001] FMCA 52 (*Horman*); *Wattle v Kirkland and Kirkland (t/as Kirkland Radio Cab)* [2001] FMCA 66 (*Wattle*); *Haar v Maldon Nominees Pty Ltd & Demetrios* [2000] FMCA 5 (*Haar*); *Travers by her next friend Travers v State of NSW* [2001] FMCA 18 (*Travers*); *Xiros v Fortis Life Assurance Ltd* [2001] FMCA 15 (*Xiros*); *McKenzie v Department of Urban Services & Canberra Hospital* [2001] FMCA 20 (*McKenzie*); *Oberoi v HREOC & Ors* [2001] FMCA 34 (*Oberoi*); *McMahon v Bowman* [2001] FMCA 3 (*McMahon*); *Gibbs v Wanganeen* [2001] FMCA 14 (*Gibbs*); *Tadawan v State of South Australia* [2001] FMCA 25 (*Tadawan*); *Williams v Tandanya Cultural Centre & Ors* [2001] FMCA 46 (*Williams*); *Hassan & Hassan v Smith & Ors* [2001] FMCA 58 (*Hassan*); *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91 (*Cooke*); *Song v Ainsworth Games Technology Pty Ltd* [2002] FMCA 31 (*Song*); *Randell v Consolidated Bearing Company (SA) Pty Ltd* [2002] FMCA 44 (*Randell*); *Sheehan v Tin Can Bay Country Club* [2002] FMCA 95 (*Sheehan*); *Aleksovski v Australian Asia Aerospace Pty Ltd* [2002] FMCA 81 (*Aleksovski*); *Williams v Commonwealth of Australia* [2002] FMCA 89 (*Williams*); *McAllister v SEQ Aboriginal Corporation for Legal Services & Lamb* [2002] FMCA 109 (*McAllister*); *Escobar v Rainbow Printing Pty Ltd (No.2)* [2002] FMCA 122 (*Escobar (No.2)*); *Font v Paspaley Pearls Pty Ltd, Purkis and Tropiano* [2002] FMCA 142 (*Font*); *Wattle v Kirkland and Kirkland (No. 2)* [2002] FMCA 135 (*Wattle (No.2)*); *Darlington v Casco Australia Pty Ltd* [2002] FMCA 176 (*Darlington*); *Wong v Su & Melyork Pty Ltd* [2001] FMCA 108 (*Wong*); *Barghouthi v Transfield Services* [2001] FMCA 113 (*Barghouthi*); *Chau v Oreanda Pty Ltd t/as Blue Cross Medical Centre, Gooley and Digby (Chau)* [2001] 114; *Ball v Morgan* [2001] FMCA 127 (*Ball*); *Dranichnikov v Department of Immigration and Multicultural Affairs* [2002] FMCA 72 (*Dranichnikov*); *Arrah v P & O Catering & Services Pty Ltd* [2002] FMCA 27 (*Arrah*); *Bruch v Commonwealth of Australia* [2002] FMCA 29 (*Bruch*); *Charan v Commonwealth Insurance Ltd* [2002] (*Charan*) and *Minns v State of NSW (Dept of Education & Training)* [2002] FMCA 60 (*Minns*).

³ *Shiels*; *Johanson*; *Horman*; *Wattle*; *Haar*; *Travers*; *McKenzie*; *Oberoi*; *McMahon*; *Cooke*; *Song*; *Randel*; *Sheehan*; *Aleksovski*; *Escobar (No.2)*; *Williams*; *McAllister*; *Font*; *Wattle (No.2)* and *Darlington*.

⁴ An example of a case in which a successful applicant was not awarded costs in her favour is *Horman*.

⁵ *Shiels*; *Johanson*; *Travers*; *Haar*; *McMahon*, *Cooke*, *Song*, *Randell*, *Sheehan*, *Aleksovski* and *Escobar*.

⁶ *Williams* (is currently on appeal); *McAllister*; *Font*; *Wattle (No.2)* and *Darlington*.

In respect of the 14 decisions where the application was dismissed, costs were awarded against the applicant in nine⁷ of those matters (64%).⁸ There were no orders as to costs made in relation to four matters.⁹ In the remaining matter, the issue of costs was still to be determined at the conclusion of the review period.¹⁰

The above figures reveal that, at least for the review period, the traditional principle that ‘costs follow the event’ was only applied in 60% of the substantive matters determined by the FMS.

Table A: Substantive decisions of the FMS

	Application substantiated	Application dismissed	Totals
Number of decisions	20	14	34
Number of decisions in respect of which costs followed the event	11 (55%)	9 (64%)	20 (59%)
Number of decisions in respect of which no costs were ordered	4 (20%)	4 (28%)	8 (23%)
Number of decisions in which the Court was still to determine costs at the end of the review period.	5 (25%)	1(7%)	6 (18%)

1.2 Non-Substantive Decisions of the FMS

For the ‘non-substantive’ decisions of the FMS, discussed in sections 1.2.1 to 1.2.5 below,¹¹ the analysis was limited to the manner in which costs were dealt with in the decisions themselves. As would be expected, costs were reserved in a significant number of those decisions. It was beyond the scope of the analysis to consider how costs were finally disposed of in those instances.

1.2.1 Applications for Summary Dismissal

There have been ten¹² decisions regarding applications for summary dismissal made by the FMS: all in the second year of review period. The applications were granted in eight of those decisions (89%) with costs ordered in favour of the applicant seeking summary dismissal in five of those decisions (63%).¹³ No costs were awarded in two decisions¹⁴ and in one of the decisions there was no reference made to the issue of costs.¹⁵

⁷ *Williams; Hassan; Wong; Bargouthi; Chau; Dranichnikov; Bruch; Charan and Minns.*

⁸ It should be noted that in the first year of the review (being 13 September 2000 to 13 September 2002), costs were awarded against an unsuccessful applicant in 40% of matters and this percentage increased to 78% in the second year of the review period.

⁹ *Ball; Gibbs; Xiros and Tadawan.*

¹⁰ *Arrah.*

¹¹ Decisions that do not determine on a final and non-summary basis whether to uphold or dismiss a claim of unlawful discrimination but rather deal with applications for summary dismissal, applications for extension of time, an application for disqualification of a Magistrate, applications for interim injunctions and other procedural issues.

¹² *Chambers v Darley & Ors* [2002] FMCA 3 (*Chambers*); *Chung v University of Sydney* [2001] FMCA 94 (*Chung*); *Maghiar v State of WA* [2001] FMCA 98 (*Maghiar*); *Miller v Wertheim & Rothman* [2001] FMCA 103 (*Miller*); *Vintila v Federal Attorney General* [2001] FMCA 110 (*Vintila*); *Rainsford v State of Victoria* [2001] FMCA 115 (*Rainsford No.1*); *Barnes v Northern Land Council & Ors* [2002] FMCA 54 (*Barnes*); *Meyer v Holt and Williams* [2002] FMCA 125 (*Meyer*); *Soreng v Victorian State Director of Public Housing* [2002] FMCA 124 (*Soreng*) and *Bruch*.

¹³ *Chung; Maghiar; Miller; Vintila and Barnes.*

¹⁴ *Soreng and Rainsford No.1.*

¹⁵ *Meyer.*

Of the two decisions in which the application for summary dismissal was dismissed, the issue of costs was reserved in one decision.¹⁶ In the other decision, the application for summary dismissal was dismissed but as the substantive application of the applicant was also dismissed in the same decision, the Federal Magistrate held it was appropriate to order that the applicant pay only 80% of the respondent's costs.¹⁷

¹⁶ *Chambers*.

¹⁷ *Bruch*.

Table B: Applications for Summary Dismissal of the FMS

	Application dismissed	Application granted	Totals
Number of decisions on summary dismissal applications	2	8	10
Number of decisions on summary dismissal applications in which costs followed the event	1	5 (63%)	6 (60%)
Number of decisions on summary dismissal applications in which no costs were ordered		2 (25%)	2 (22%)
Number of decisions on summary dismissal applications in which costs were reserved	1		1 (11%)
Number of decisions on summary dismissal applications in which there was no mention as to costs		1 (12%)	1 (11%)

1.2.2 Applications for Extensions of Time

During the review period, the FMS decided seven applications for an extension of time to make a complaint of unlawful discrimination.¹⁸ Three of those applications were granted¹⁹ with the decision on costs being reserved in all three decisions. In the four decisions in which an extension of time was not granted, no order for costs was made in three decisions²⁰ and costs were awarded against the unsuccessful applicant in the other decision.²¹

1.2.3 Disqualification of Magistrate

There was one decision during the review period where the FMS determined an application to disqualify a magistrate from hearing a matter. The application was successful and no order was made as to costs.²²

1.2.4 Interim Injunctions

During the review period, the FMS dealt with two applications for an interim injunction.²³ In one decision, the interim injunction was granted and costs were awarded in favour of the successful

¹⁸ *Low v Australian Taxation Office* [2000] FMCA 6 (*Low*); *Keller v Commonwealth Department of Foreign Affairs and Trade* [2001] FMCA 96 (*Keller*); *Ryan v The Presbytery of Wide Bay Sunshine Coast* [2001] FMCA 12 (*Ryan*); *Phillips v Australian Girls Choir Pty Ltd* [2001] FMCA 109 (*Phillips*); *Beling v Staples* [2001] FMCA 135 (*Beling*); *Lawton v Lawson & Ors* [2002] FMCA 68 (*Lawton*) and *Saddi v Active Employment, Break Thru Personnel Inc, Care Employment and Commonwealth of Australia* [2001] FMCA 73 (*Saddi*).

¹⁹ *Phillips*; *Beling* and *Lawton*.

²⁰ *Low*; *Saddi* and *Ryan*.

²¹ *Keller*.

²² *McKenzie v Department of Urban Services* [2001] FMCA 5.

²³ *Gardner v National Netball League Pty Ltd* [2001] FMCA 50 (*Gardner*) and *Rainsford v Group 4 Correctional Services* [2002] FMCA 36 (*Rainsford No.2*).

applicant²⁴ and in the other decision the application was dismissed with costs awarded against the applicant (in default of an agreement between the parties).²⁵

1.2.5 Other procedural matters

There have been six decisions relating to other procedural matters. Three of these decisions relate to the issue of costs subsequent to a substantive decision.²⁶ Rather than count those ‘costs only’ decisions separately for the purposes of this part of the review, the FMS’ orders as to costs were treated as having been made in the original decision in which costs were reserved.

The three remaining procedural decisions dealt with delivery of documents to the court²⁷ (with no order as to costs made), an application for a review of the decision of the registrar which was found to be a decision that was not reviewable²⁸ (with costs ordered against the unsuccessful applicant) and one decision relating to a challenge by the respondent of the second termination notice issued by HREOC, which was found to be void²⁹ (no mention as to costs).

1.3 All Decisions of the FMS

The review also considered the overall approach of the FMS to costs by combining the figures in all categories of decisions handed down during the review period.

Applying that methodology, ‘costs followed the event’ in 52%³⁰ of the decisions handed down during the two year review period.

2. Decisions in the Federal Court

The Federal Court handed down 47 decisions at first instance and on appeal during the review period.³¹

2.1 Federal Court Decisions at First Instance

The methodology applied to the decisions of the FMS discussed above was also applied to the analysis of decisions of the Federal Court. That is, substantive decisions were considered to be those in which it was decided on a final and non-summary basis whether to uphold or dismiss a claim of unlawful discrimination. The analysis considered the ultimate disposition of costs in all substantive decisions. In relation to non-substantive decisions, the analysis was again limited to the manner in which costs were dealt with in the decisions themselves. The final disposition of reserved costs for those decisions is beyond the scope of this analysis.

²⁴ *Gardner*.

²⁵ *Rainsford No.2*.

²⁶ *Escobar v Rainbow Printing Pty Ltd (No.3)* [2002] FMCA 160 (*Escobar (No.3)*); *Dranichnicov v Department of Immigration and Multicultural Affairs* [2002] FMCA 71 (*Dranichnicov (costs)*) and *Minns v State of New South Wales (No.2)* [2002] FMCA 60 (*Minns (No.2)*).

²⁷ *Escobar v Rainbow Printing Pty Ltd (No.1)* [2002] FMCA 22.

²⁸ *Dranichnicov v Department of Immigration & Multicultural Affairs* [2002] FMCA 23.

²⁹ *Speirs v Darling Range Brewing Co & Ors* [2002] FMCA 126.

³⁰ Being 29 of 57 decisions (as stated in [1.2.5] above, the ‘costs only’ decisions of *Escobar (No.3)*; *Dranichnicov (costs)*) and *Minns (No.2)* have not been included in the total number of decisions).

³¹ One decision that dealt with the issue of ‘costs only’ that had been reserved has been counted as forming part of the substantive decision to which it related: see [2.1.5] below.

2.1.1 Substantive Decisions

In the review period, the Federal Court handed down 16 substantive decisions.³² The applicant was successful in four of those matters (25%)³³ and costs were awarded in favour of the applicant in every case. In the twelve cases where the applicant was unsuccessful, costs were awarded against the applicant by the Federal Court in six cases (50%),³⁴ no costs order was made in five matters³⁵ and there was no mention as to costs (and no subsequent decision by the Court on costs during the review period) in the other matter.³⁶

³² *Tate v Rafin & Wollongong District Cricket Club* [2000] FCA 1582 (*Tate*); *Court v Hamlyn-Harris t/as Shearwater Oysters* [2000] FCA 1870 (*Court*); *Grulke v KC Canvas Pty Ltd* [2000] FCA 1415 (*Grulke*); *Gilroy v Angelov and Botting and Botting t/a C&T Botting Cleaning Co* [2000] FCA 1775 (*Gilroy*); *Elliott v Prem Nanda and Commonwealth of Australia and Elliott v Commonwealth of Australia* [2001] FCA 418 (*Elliott*); *Kennedy v ADI Limited* [2001] FCA 614 (*Kennedy*); *Worsley-Pine v Kathleen Lumley College Inc* [2001] FCA 818 (*Worsley-Pine*); *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 (*Hagan*); *Paramasivam v Tay* [2001] FCA 758; *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 (*Creek*); *Paramasivam v Jureszek* [2001] FCA 704; *Thomson v Orica Australia Pty Ltd* [2001] FCA 1563 (*Thomson*)(this decision also dealt with an application for summary dismissal which was not granted); *Sharma v Legal Aid Queensland* [2001] FCA 1699 (*Sharma*); *Fernley v The Boxing Authority of NSW and State of NSW* [2001] FCA 1740 (*Fernley*); *Cosma v Qantas Airways Limited* [2002] FCA 640 (*Cosma*) and *Micheals v Commonwealth of Australia, Australian Federal Police and National Crime Authority* [2002] FCA 1130 (*Micheals*) (also dealt with an application for an extension of time).

³³ *Grulke*; *Gilroy*; *Elliott and Thomson*.

³⁴ *Court*; *Worsley-Pine*; *Paramasivam v Jureszek*, *Creek*, *Cosma* and *Michaels*.

³⁵ *Tate*, *Hagan*, *Kennedy*, *Paramasivam v Tay* and *Fernley*.

³⁶ *Sharma*.

Table C: Substantive Decisions of the Federal Court at First Instance

	Application substantiated	Application dismissed	Totals
Number of decisions	4	12	16
Number of decisions in respect of which costs followed the event	4 (100%)	6 (50%)	10 (63%)
Number of decisions in respect of which no costs were ordered	-	5 (42%)	5 (31%)
Number of decisions in which there was no mention as to costs (and no subsequent decision of the Court on costs during the review period)	-	1 (8%)	1 (6%)

2.1.2 Applications for Summary Dismissal

During the review period, the Federal Court considered seven applications for summary dismissal.³⁷ The applications were granted in four of those decisions (57%)³⁸ with costs ordered in favour of the applicants seeking summary dismissal. In the three decisions where the application for summary dismissal was not granted, costs orders were made against each of the unsuccessful applicants.³⁹

Table D: Decisions on applications for summary dismissal of the Federal Court of Australia at first instance

	Application dismissed	Application granted	Totals
Number of decisions	3	4	7
Number of decisions in which costs followed the event	3	3	6 (86%)
Number of decisions in which there was no mention as to costs		1	1 (17%)

2.1.3 Applications for Extension of Time

Three applications for an extension of time to make a complaint of unlawful discrimination were considered by the Federal Court in the review period, with one being granted (with the issue of costs being reserved)⁴⁰ and the other two being dismissed (with costs ordered against the applicants).⁴¹

³⁷ *Paramasivam v Wheeler & Ors* [2000] FCA 1559; *Paramasivam v Shier & Anor* [2001] FCA 545; *Paramasivam v Grant & Anor* [2001] FCA 758; *Parker v Swan Hill Police* [2000] FCA 1688 (*Parker*); *Travers by her next friend Travers v State of NSW* [2000] FCA 1565 (*Travers No. 2*); *McGlade v Lightfoot* [2002] FCA 752 (*McGlade*) and *Thomson*.

³⁸ *Paramasivam v Wheeler & Ors*; *Paramasivam v Shier & Anor*; *Paramasivam v Grant & Anor* and *Parker*.

³⁹ *Travers, McGlade* and *Thomson*.

⁴⁰ *Creek v Cairns Post Pty Ltd* [2001] FCA 293 (*Creek No.2*).

⁴¹ *Michaels v Commonwealth of Australia, Australian Federal Police and National Crime Authority* [2002] FCA 1130; *Pham v HREOC* [2002] FCA 669.

2.1.4 Interim Injunctions

The Federal Court dealt with one interim injunction application during the review period and the application was dismissed.⁴² Costs were awarded against the applicant for the interim injunction.

2.1.5 Other Procedural Matters

The Federal Court handed down five decisions⁴³ of a procedural nature during the review period. One of those decisions related to the issue of costs subsequent to a substantive decision.⁴⁴ As in relation to the FMS decisions in [1.2.5] above, rather than count this ‘costs only’ decision separately for the purposes of this part of the review, the Federal Court’s orders as to costs were treated as having been made in the original decision in which costs were reserved.

The other decisions related to procedural issues such as the scope of the complaint before the Court, the non-appearance of an applicant at a hearing and an issue of interlocutory relief. There was no order for costs in one of those decisions,⁴⁵ no mention as to costs in one decision⁴⁶ and orders for costs against an unsuccessful applicant and an absent applicant in the remaining two decisions.⁴⁷

2.2 Decisions on Appeal to a Single Judge of the Federal Court

2.2.1 Substantive Decisions

During the review period the Federal Court (sitting as a single judge) heard two matters on appeal from substantive decisions of the FMS.⁴⁸ The first of these matters was an appeal by the respondent of a decision of the FMS in relation to the definition of the term ‘unlawful discrimination’.⁴⁹ The appeal was allowed and the matter was remitted back to FMS for rehearing. The Court recommended that the Attorney-General (in accordance with s6(3) and s8(3) of the *Federal Proceedings (Costs) Act 1981* (Cth)) authorise the payment of \$300 to the respondent and the payment of costs of the new trial for both parties.

The second matter was an appeal of a decision of the FMS to dismiss an application (on a non-summary basis).⁵⁰ The appeal was successful with the decision below being set aside and a finding made of unlawful discrimination. No orders as to costs were made in relation to this matter at first instance or on appeal.

⁴² *McIntosh v Australian Postal Corporation* [2001] FCA 1012.

⁴³ *Charles v Fuji Xerox* [2000] FCA 1531 (*Charles*); *Elliott v Prem Nanda & Commonwealth of Australia* [2001] FCA 550 (*Elliott No.2*); *Pham v University of Queensland & Anor* [2001] FCA 1044 (*Pham*); *Thomson v Orica Australia Pty Ltd* [2001] FCA 1563 (*Thomson*) and *Li, Chen & Ors v Minister for Immigration & Multicultural Affairs & Australian Correctional Management* [2001] FCA 1414 (*Li*).

⁴⁴ *Elliott No.2*.

⁴⁵ *Charles*.

⁴⁶ *Thomson*.

⁴⁷ *Pham and Li*.

⁴⁸ *Kirkland v Wattle* [2002] FCA 145 (*Kirkland*) and *Barghouthi v Transfield Pty Ltd* [2002] FCA 666 (*Barghouthi*)

⁴⁹ *Kirkland*.

⁵⁰ *Barghouthi*.

2.2.2 Appeal of Summary Dismissal

During the review period, the Federal Court (sitting as a single judge) heard and decided two applications for leave to appeal from summary dismissal decisions of the FMS.⁵¹ Leave to appeal was refused in both decisions with costs ordered against the appellant.

2.2.3 Applications for Extensions of Time

During the review period, the Federal Court (sitting as a single judge) handed down decisions in relation to three applications for extensions of time in which to lodge appeals from decisions of the FMS.⁵² All were refused with costs against the applicant.

2.3 Decisions on Appeal to the Full Federal Court

The Full Federal Court handed down nine appeal decisions in Federal unlawful discrimination matters during the review period.⁵³ All of the appeals were dismissed with costs awarded against the unsuccessful appellant.

Four of those matters were appeals from a substantive decision of the Court below.⁵⁴

Four decisions related to orders at first instance to summarily dismiss applications⁵⁵ and the other was an appeal against a decision dismissing an application for non-attendance at the date of hearing.⁵⁶

2.4 All Decisions of the Federal Court and Full Federal Court

A review of the 47 decisions of the Federal Court, at first instance and on appeal, during the review period reveals that ‘costs followed the event’ in 35 matters (74%).

2.4.1 Substantive Decisions

Combining the above figures, there were 22 substantive decisions handed down during by the Federal Court and Full Federal Court during the review period.⁵⁷ The principle of ‘costs follow the event’ was applied in 14 of those matters (64%).

⁵¹ *Chung v University of Sydney, Maxwell, Grove and Marshall* [2002] FCA 186 and *Maghiar v State of Western Australia* [2002] FCA 262.

⁵² *Horman v Distribution Group Ltd t/as Repco Auto Parts* [2002] FCA 219; *Barnes v Northern Land Council, Australian Agricultural Co, NT Police, ATSIC & Central Australian Aboriginal Legal Service* [2002] FCA 1130 and *Low v ATO* [2001] FCA 702 (*Low No.2*).

⁵³ *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2001] FCA 123 (*Hagan*); *Paramasivam v Wheeler & Ors* [2001] FCA 231 (*Paramasivam v Wheeler & Ors No.2*); *Pham v University of Queensland and Commonwealth of Australia* [2002] FCA 203 (*Pham*); *Paramasivam v Jurszek* [2002] FCAFC 141; *Paramasivam v Shier & Anor* [2002] FCAFC 142; *Paramasivam v Tay* [2002] FCAFC 143; *Paramasivam v Grant & Anor* [2002] FCAFC 144; *Miller v Wertheim and Rothman* [2002] FCAFC 144 (*Miller*) and *Sharma v Legal Aid Queensland* [2001] FCAFC 196 (*Sharma*).

⁵⁴ *Hagan, Paramasivam v Jurszek, Paramasivam v Tay* and *Sharma*.

⁵⁵ *Paramasivam v Wheeler & Ors No.2, Paramasivam v Shier, Paramasivam v Grant* and *Miller*.

⁵⁶ *Pham*.

⁵⁷ For the purposes of this part of the analysis, the ‘substantive decisions’ category includes decisions in appeals to the Federal Court or Full Federal Court from substantive decisions of the FMS and first instance Federal Court judges.

Table E: Substantive Decisions of the Federal Court

	Application substantiated	Application dismissed	Totals
Number of decisions	6	16	22
Number of decisions in respect of which costs followed the event	4 (67%)	10 (63%)	14 (64%)
Number decisions in respect of which no costs were ordered	2 (33%)	5 (31%)	7 (32%)
Number of decisions in which there was no mention as to costs and no later decisions regarding costs	-	1 (6%)	1 (4%)

2.4.2 Non-Substantive Decisions

There were 23 non-substantive decisions handed down by the Federal Court and Full Federal Court during the review period (including applications for summary dismissal, extension of time applications and other procedural matters). The Court ordered that ‘costs follow the event’ in 19 of those decisions (83%).

Table F: Non-Substantive Decisions of the Federal Court

Number of decisions	23
Number of decisions in which costs followed the event	19 (83%)
Number of decisions in which no costs were ordered	0
Number of which decisions in which there was no mention as to costs	1
Number decisions in which costs were reserved	1

2.4.3 All Decisions

The overall approach of the Federal Court and Full Federal Court to costs, in all categories of decisions handed down during the review period, may be considered by combining the figures for substantive and non-substantive decisions.⁵⁸

Applying that methodology, ‘costs followed the event’ in 74%⁵⁹ of the decisions handed down during the two year review period.

⁵⁸ As stated in [2.1.5] above, the Federal Court’s orders as to costs in the one ‘costs only’ decision handed down during the review period (*Elliott No.2*), have been treated as having been made in the original decision in which costs were reserved.

⁵⁹ Being 35 of 47 (as stated in footnote 56 above, the ‘costs only’ decisions of *Elliott* has not been included in the total number of decisions).