Human Rights and
Equal Opportunity
Commission

Federal Discrimination Law 2004

Supplement
January - September 2004*

*For future updates see www.humanrights.gov.au/legal/index

This supplement to *Federal Discrimination Law 2004* covers cases of jurisprudential interest that have been decided in the Federal unlawful discrimination jurisdiction since 31 December 2003. It is current to 23 September 2004.

The supplement follows the numbering and headings contained in *Federal Discrimination Law 2004*, with additional headings to cover any new matters of interest. It updates the tables of damages provided in the original publication and also provides corrections.

In light of the commencement of the *Age Discrimination Act 2004* (Cth) on 22 June 2004, the supplement also contains a short summary of the key provisions of that Act. There is currently no jurisprudence in relation to that Act.

Corrections

Page 12, substantive paragraph 1, delete the word 'direct'.

Page 107, paragraph 2, should read (correction in italics):

> The majority of the High Court in *Purvis* took the same approach as that of the Full Federal Court. While accepting that the definition of disability includes its behavioural manifestations (see section 4.1 above), the majority nevertheless held that it was necessary to compare the treatment of the pupil with the disability with *a student who exhibited violent behaviour but did not have the disability*. Gleeson CJ stated…

Page 111, footnote 51, penultimate sentence should read (correction in italics):

> This point was not considered on appeal by the Full Federal Court and the approach of Emmett J *was rejected by McHugh and Kirby JJ ([86]-[89]) and also appears to have been implicitly rejected by Gummow, Hayne and Heydon JJ in their joint judgment ([217]-[218]).* Such an argument…

Page 132, final paragraph, should read (correction in bold italics):

> In *Sheehan v Tin Can Bay Country Club* ('*Sheehan*'), Raphael FM decided that a man with ***an anxiety disorder*** that required…

Page 147, sentence from page 146, delete the words 'and untrained'.

The Age Discrimination Act 2004

The *Age Discrimination Act 2004* (Cth) ('ADA') commenced operation on 22 June 2004.

Structure

The ADA is similar in its structure to the SDA and DDA. Part 3 defines age discrimination as including direct (s 14) and indirect (s 15) discrimination. The ADA then sets out, in Divisions 2 and 3 of Part 4, the areas of public life in which discrimination on the grounds of age is made unlawful. These are:

- Discrimination in employment (s 18);
- Discrimination against commission agents (s 19);
- Discrimination against contract workers (s 20);
- Partnerships (s 21);
- Qualifying bodies (s 22);
- Registered organisations under Schedule 1B to the *Workplace Relations Act 1996* (s 23);
- Employment agencies (s 24);
- Education (s 26);
- Access to premises (s 27);
- Goods, services and facilities (s 28);
- Accommodation (s 29);
- Land (s 30);
- Administration of Commonwealth laws and programs (s 31); and
- Requests for information (s 32).

Division 4 of Part 4 of the ADA sets out general exemptions while Part 5 contains offences.

Distinctive features

'Dominant reason' test

There are a number of distinctive features of the ADA. The first is that the Act requires that if there is more than one reason for an act, age must be the *dominant*

reason (s 16). This differs from the other federal discrimination Acts which specifically provide that it is not necessary to show that the proscribed ground for the decision was the dominant or even substantial reason: only that it was *a* reason.[1]

Overlap with DDA

The ADA seeks to avoid any overlap between it and the DDA, by providing that 'a reference to discrimination against a person on the ground of the person's age is taken not to include a reference to discrimination against a person on the ground of a disability of the person (within the meaning of the [DDA])' (s 6).

Exemptions

The ADA has a much broader range of exemptions than the other Federal discrimination Acts. This includes exemptions for youth wages (s 25); charities (s 34); religious bodies (s 35); voluntary bodies (s 36); superannuation, insurance and credit (s 37); superannuation legislation (s 38); taxation laws (s 40); pensions, allowances and benefits (s 41); and health programs (s 42).

Similar to the DDA, the ADA also provides an 'inherent requirements' defence such that it is not unlawful under the Act to discriminate against someone on the basis of their age where that person is unable to carry out the inherent requirements of a particular employment or position.[2]

Another notable feature of the ADA is the exemption contained in s 33 for 'positive discrimination', which applies to things done to provide a 'bona fide benefit' for, meet a special need of, or reduce a disadvantage faced by, people of a particular age. This exemption would appear to go far beyond the exemption for 'special measures' which exist in the other Federal discrimination Acts.[3]

As with the SDA[4] and the DDA[5] (but not the RDA), the ADA allows for HREOC to grant exemptions from the operation of those parts of the Act that make discrimination unlawful (s 44).

[1] See s 18 RDA; s 8 SDA; s 10 DDA.
[2] See ss 18(4); 19(3); 20(2); 21(4); 22(2); 24(2)).
[3] See, for example, s 8 RDA (discussed in section 2.6 of *Federal Discrimination Law 2004*); s 7D SDA (discussed in section 3.9.4); s 45 DDA.
[4] Section 44.
[5] Section 55.

Chapter 2
The Racial Discrimination Act

2.7 Racial Hatred (s 18C)

2.7.2 Persons to Whom the Provisions Apply

In *Kelly-Country v Beers*[6] (‘*Kelly-Country’*), Brown FM held that, when considering the material of a comedian which circulated throughout the country generally, the appropriate group for the purposes of the assessment required by s 18C(1) was ‘ordinary Aboriginal people within Australian society’. His Honour stated that it was not appropriate to otherwise place any geographical limitation on the group.[7]

2.7.3 Causation and Intention to Offend

In *Kelly-Country*, Brown FM considered the performance of a comedian who portrays an Aboriginal character ‘King Billy Cokebottle’ for the duration of his routine, much of which involves jokes with no specific racial element. In doing so, the respondent applies black stage make-up and an unkempt white beard and moustache as well as ‘what appears to be a white or ceremonial ochre stripe across his nose and cheek bones… [and] a battered, wide brimmed hat, of a kind often associated with Australian, particularly Aboriginal people, who live in a rural or outback setting’.[8]

His Honour noted that ‘the intention of the person perpetrating the act complained of is not relevant… an act that would otherwise be unlawful is not excused if its originator meant no offence by it’.[9] However, his Honour suggested that the portrayal of the character ‘King Billy Cokebottle’ was not an act done ‘because of’ race:

> I have some difficulty in reaching the conclusion that Mr Beers performs his act because of Aboriginal people any more than I could conclude that Barry Humphries assumes the character of Edna Everage because of women in Moonee Ponds… King Billy Cokebottle is a vehicle for his particular style of comedic invention.[10]

2.7.4 Reasonably Likely to Offend, Insult, Humiliate or Intimidate

(a) Objective standard

Kiefel J’s statement in *Creek v Cairns Post Pty Ltd*[11] that conduct must have ‘[p]rofound and serious effects not to be likened to mere slights’ to be caught by the

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[6] [2004] FMCA 532.
[7] Ibid [100].
[8] [2004] FMCA 532, [30].
[9] Ibid [85]. Note, however, that his Honour’s decision suggests that intention *is* relevant to determining the meaning and offensiveness of a particular act: [111], [114].
[10] Ibid [110].
[11] (2001) 112 FCR 352, 356-7 [16].

prohibition in s 18C was cited with approval by French J in *Brohpo v Human Rights and Equal Opportunity Commission*[12] ('*Bropho*').

French J also stated as follows, in obiter comments, in relation to the expression 'reasonably likely' as it appears in s 18C(1):

> The act must be 'reasonably likely' to have the prohibited effect. Judicial decisions on s 18C(1) do not appear to have determined whether the relevant likelihood is a greater than even probability or a finite probability in the sense of a 'real chance'. It might be thought that the threshold of unlawfulness should be defined by reference to the balance of probabilities rather than a lesser likelihood having regard to [the] character of s 18C as an encroachment upon freedom of speech and expression.[13]

(c) Reasonable victim test

In *Kelly-Country*, the applicant, an Aboriginal man, complained of vilification in relation to a comedy performance in which the non-Aboriginal performer portrayed an Aboriginal character 'King Billy Cokebottle' (see 2.7.3 above). The applicant described himself as an 'activist'. Brown FM stated that

> it is possible that such an activist may search out material for the purpose of being offended and so may be regarded as being unduly susceptible or even an agent provocateur in respect of the material complained of… A mere slight or insult is insufficient. This is the so-called "reasonable victim" test.[14]

His Honour also noted that in applying the 'reasonable victim' test it is necessary to be informed by community standards and consider the context in which the communication is made:

> It is also necessary to consider the relative historical or socioeconomic situation of the group of persons to which a complainant belongs. Thus a New Zealander, who takes offence to some of Mr Beers' material, is likely to be in a different position to an Aboriginal person. All communication takes at least some part of its meaning from the context in which it is set…
>
> [The applicant] argues that it is well known that Aboriginal people have suffered and continue to suffer considerable social disadvantage in Australian society. They also suffer a higher level of incarceration and alcoholism than other ethnic groups within Australian society. Accordingly, the community standards about jokes which involve Aboriginal people and say, for example, Caucasian New Zealanders, are likely to be different. In this context, Mr Kelly-Country argues that it is not sufficient for Mr Beers to say that his act is merely a long succession of jokes.
>
> In applying the reasonable victim test, it is obviously necessary to apply a yardstick of reasonableness to the act complained of. This yardstick should not be a particularly susceptible person to be aroused or incited, but rather a reasonable and ordinary person and in addition should be a reasonable person with the racial, ethnic or relevant attributes of the complainant in the matter.

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[12] [2004] FCAFC 16, [70]. See also *Kelly-Country v Beers* [2004] FMCA 532, [88].
[13] Ibid [65].
[14] [2004] FMCA 532, [87].

….

> … a joke about a historically oppressed minority group, which is told by a member of a racially dominant majority, may objectively be more likely to lead to offence. As a result, a joke told by an Aboriginal person about other Aboriginal people may not be so likely to transgress the provisions of the RDA, because the teller of the joke itself and its subject are not in a situation of power imbalance, but are each members of the same subset of disadvantaged people…[15]

His Honour concluded, however, on the evidence that the act complained of was not unlawful as 'no reasonable Aboriginal person, who was not a political activist' would have been insulted, humiliated or intimidated by it (see further below, 2.7.4(d)).[16]

(d) Context

In *Kelly-Country*, considerations of context played an important part in the reasoning of Brown FM who held that the performance of the respondent in the character of 'King Billy Cokebottle' (see 2.7.3 above), did not contravene s 18C of the RDA. His Honour noted the significance of the fact that Aboriginal people had been 'the subject of racial discrimination and prejudice throughout the European settlement of Australia'. He continued:

> However, the setting of the particular communication or act complained of must also be analysed. A statement by an Australian Senator to a journalist employed by a nationally circulating newspaper is clearly different to a joke exchanged between two friends in the public bar of a hotel. The former has a clear political context and the latter is an exchanged act of entertainment. Mr Beers' act and tapes are designed to be entertaining for members of a paying audience, which has a choice whether or not to attend the performances or buy the tapes concerned. They do not have an explicit political content. Clearly, the jokes told by Mr Beers are not intended to be taken literally. However, any joke by its nature, has the potential to hold at least someone up to scorn or ridicule. Accordingly, there may be situations when a joke does objectively incite racial hatred.[17]

His Honour concluded as follows:

> I accept that Mr Beers' act and tapes are vulgar and in poor taste. I also accept that Aboriginal people are a distinct minority within Australian society and so objectively more susceptible to be offended, insulted, humiliated and intimidated because of their disadvantaged status within Australian society. However, Mr Beers' act is designed to be humorous. It has no overt political context and the nature of the jokes or stories within it are intended to be divorced from reality. The act is not to be taken literally or seriously and no reasonable Aboriginal person, who was not a political activist, would take it as such.
>
> King Billy Cokebottle himself does not directly demean Aboriginal people, rather he pokes fun at all manner of people, including Aboriginal people and indeed in many of his stories, Aboriginal people have the last laugh. I do not think that an Aboriginal person, who had paid

[15] Ibid [88]-[92].
[16] Ibid [111].
[17] [2004] FMCA 532, [99].

> expecting to hear a ribald comedic performance, would believe that the subject of either the act itself or the recorded tapes was to demean Aboriginal people generally. [18]

2.7.6 Exemptions

(a) Onus of proof

French J in *Brohpo* expressed doubt, in obiter comments, regarding the previously accepted proposition that it was for the respondent to make out an exception under s 18D. While it was not an issue in the matter before his Honour, French J suggested that 'the incidence of the burden of proof' was not 'a question that should be regarded as settled'.[19] This was based on his Honour's view that s 18D was not 'in substance an exemption'[20] (see further below). French J concluded by suggesting that any burden on a respondent may only be an evidentiary one:

> If the burden of proof does rest upon the person invoking the benefit or s 18D, then that burden would plainly cover the proof of primary facts from which assessments of reasonableness and good faith are to be made. But the process of making such assessments is not so readily compatible with the notion of the burden of proof.[21]

In *Kelly-Country*, the issue of the onus of proof was not explicitly raised, but Brown FM appears to have accepted that the onus of proof is on a respondent to satisfy s 18D.[22]

(b) A broad or narrow interpretation?

French J in *Bropho* expressed his agreement with the broad approach to the exemption in s 18D taken by both the Commission and the Court at first instance. His Honour reasoned that s 18C was, in fact, an exception to the general principle recognised in international instruments and the common law that people should enjoy freedom of speech and expression. Section 18D was therefore 'exemption upon exemption'. French J stated:

> Against that background s 18D may be seen as defining the limits of the proscription in s 18C and not as a free speech exception to it. It is appropriate therefore that s 18D be construed broadly rather than narrowly.[23]

However, in *Kelly-Country*, Brown FM (who did not make reference to the decisions in *Bropho* on this issue) held that as part of remedial legislation, the exemption in s 18D should be narrowly construed:

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[18] Ibid [111]-[112]. See also his Honour's comments as to the nature of a comedy performance: 'Humour to be effective must often sting and insult. It would, in my view, be unreasonable and necessary consequence of the Racial Discrimination Act for all humour, especially stand-up humour, to be rendered anodyne and innocuous by virtue of the provisions of the Act' ([93]).
[19] [2004] FCAFC 16, [75].
[20] Ibid [76].
[21] Ibid [77].
[22] See for example [2004] FMCA 532 [125].
[23] [2004] FCAFC 16, [73]. The other members of the Court, Lee and Carr JJ, did not express any view on this issue.

> Essentially, those who would incite racial hatred or intolerance within Australia should not be given protection to express their abhorrent views through a wide or liberal interpretation of the exceptions contained within section 18D. A broad reading of the exemptions contained in section 18D could potentially undermine the protection afforded by the vilification provisions contained in section 18C of the RDA.[24]

(c) Reasonably and in good faith

(i) Objective and Subjective Elements

In *Bropho*, the Full Court considered the requirement that an act be done 'reasonably and in good faith' to fall within s 18D.

Carr J expressed his agreement with the primary judge who had held that 'the focus of the inquiry is an objective consideration of all the evidence, but that the evidence of a person's state of mind may also be relevant'.[25]

French and Lee JJ both suggested that the expression 'reasonably and in good faith' required a subjective and objective test.[26]

Looking first at reasonableness, this clearly requires an objective assessment of the impugned conduct. Questions of proportionality will be relevant to any such assessment. French J stated:

> There are elements of rationality and proportionality in the relevant definitions of reasonably. A thing is done 'reasonably' in one of the protected activities in par (a), (b) and (c) of s 18D if it bears a rational relationship to that activity and is not disproportionate to what is necessary to carry it out. It imports an objective judgment. In this context that means a judgment independent of that which the actor thinks is reasonable. It does allow the possibility that there may be more than one way of doing things 'reasonably'. The judgment required in applying the section, is whether the thing done was done 'reasonably' not whether it could have been done more reasonably or in a different way more acceptable to the court. The judgment will necessarily be informed by the normative elements of ss 18C and 18D and a recognition of the two competing values that are protected by those sections.[27]

Lee J stated that reasonableness can only be judged against the possible degree of harm that a particular act may cause. His Honour cited, with apparent approval, the decision of the NSW Administrative Decisions Tribunal in *Western Aboriginal Legal Service Ltd v Jones*[28] to the effect that the greater the impact of an act found to be otherwise in breach of s 18C, the more difficult it will be to establish that the particular act was reasonable.[29]

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[24] [2004] FMCA 532, [116].
[25] [2004] FCAFC 16, [178].
[26] Ibid [96] (French J), [141] (Lee J). Note that Lee J was in dissent as to the result of the appeal. It appears, however, that his approach to the legal issues in the case is substantially consistent with that of French J. See also *Kelly-Country v Beers* [2004] FMCA 532 in which Brown FM acknowledged that 'reasonableness' has 'an overall objective flavour' while 'good faith' is 'more subjective' ([131]).
[27] Ibid [79].
[28] [2000] NSW ADT 102.
[29] [2004] FCAFC 16, [139].

On the question of 'good faith', French J held that s 18D

> requires a recognition that the law condemns racial vilification of the defined kind but protects freedom of speech and expression in the areas defined in pars (a), (b) and (c) of the section. The good faith exercise of that freedom will, so far as practicable, seek to be faithful to the norms implicit in its protection and to the negative obligations implied by s 18C. It will honestly and conscientiously endeavour to have regard to and minimise the harm it will, by definition, inflict. It will not use those freedoms as a 'cover' to offend, insult, humiliate or intimidate people by reason of their race or colour or ethnic or national origin.
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> ….
>
> … good faith may be tested both subjectively and objectively. Want of subjective good faith, ie seeking consciously to further an ulterior purpose of racial vilification may be sufficient to forfeit the protection of s 18D. But good faith requires more than subjective honesty and legitimate purposes. It requires, under the aegis of fidelity or loyalty to the relevant principles in the Act, a conscientious approach to the task of honouring the values asserted by the Act. This may be assessed objectively.[30]

His Honour continued:

> Generally speaking the absence of subjective good faith, eg dishonesty or the knowing pursuit of an improper purpose, should be sufficient to establish want of good faith for most purposes. But it may not be necessary where objective good faith, in the sense of a conscientious approach to the relevant obligation, is required. In my opinion, having regard to the public mischief to which s 18C is directed, both subjective and objective good faith is required by s 18D in the doing of the free speech and expression activities protected by that section.[31]

Lee J adopted a similar approach:

> The question whether publication was an act done in good faith must be assessed, in part, by having regard to the subjective purpose of the publisher but overall it is an objective determination as to whether the act may be said to have been done in good faith, having due regard to the degree of harm likely to be caused and to the extent to which the act may be destructive of the object of the Act.[32]
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> ….
>
> … Having regard to the context provided by the Act, the requirement to act in good faith imposes a duty on a person who does an act because of race, an act reasonably likely to inflict the harm referred to in s 18C, to show that before so acting that person considered the likelihood of the occurrence of that harm and the degree of harm reasonably likely to result. In short the risk of harm from the act of publication must be shown to have been balanced by other considerations. The words "in good faith" as used in s 18D import a requirement that the person doing the act exercise prudence, caution and diligence, which, in the context of the Act would mean due care to avoid or minimize consequences identified by s 18C.[33]

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[30] Ibid [95]-[96].
[31] Ibid [101].
[32] Ibid [141].
[33] Ibid [144].

In *Kelly-Country*, Brown FM found that the respondent's comedy performance (see 2.7.3 above) was done 'in good faith'. His Honour accepted the evidence of the respondent that he 'personally does not intend to hold Aboriginal people up as objects of mockery or contempt' and means 'no particular spite towards Aboriginal people and, indeed, many people of indigenous background have enjoyed his performances'.[34]

(ii) Context and Artistic Works

In *Bropho*, French J also noted that the context in which an act is performed will be relevant in determining its reasonableness, offering the following example:

> The publication of a genuine scientific paper on the topic of genetic differences between particular human populations might, for one reason or another, be insulting or offensive to a group of people. Its discussion at a scientific conference would no doubt be reasonable. Its presentation to a meeting convened by a racist organisation and its use to support a view that a particular group of persons is morally or otherwise 'inferior' to another by reason of their race or ethnicity, may not be a thing reasonably done in relation to par (b) of s 18D.[35]

Also relevant to questions of context, Lee J considered whether or not the publication of a range of views could effectively counter-balance the publication of an offensive view. His Honour stated:

> Contemporaneous, or prior, publication of anodyne material would not, in itself, make an act of publication done because of race and involving racially offensive material, an act done reasonably and in good faith. A publisher of a catholic range of opinions could not rely upon past publication of diverse material to show that it acted reasonably and in good faith by publishing, because of race, a work or material that is offensive, insulting, humiliating or intimidating to persons of that race, if it acts without regard to whether the act of publication would cause the harm the Act seeks to prevent, and does not attempt to show how the risk of harm from the otherwise prohibited act, was counterbalanced, or outweighed, by matters showing the act to have been done reasonably and in good faith.[36]

In *Kelly-Country*, Brown FM considered the application of the exemption in s 18D to a comedy performance in which the non-Aboriginal respondent portrayed an apparently Aboriginal character 'King Billy Cokebottle' (see 2.7.3 above):

> In the particular context of this case, I bear in mind that Mr Beers was appearing as the character of King Billy Cokebottle, who in many ways is a grotesque caricature. As such, the character has more licence than a politician or social commentator to express views. In the context of a stand-up comedy performance, the offence implicit in much of Mr Beers' material does not appear to me to be out of proportion. I do not believe that there is a high degree of gratuitous insult, given that the comedic convention of stand-up is to give offence or make jokes at the expense of some member or members of the community. In this regard, the character does not use slang terms, which are likely to give particular offence to any particular

[34] [2004] FMCA 532, [131].
[35] [2004] FCAFC 16, [80].
[36] Ibid [142].

> ethnic or racial group. In my view, Mr Beers keeps his performance within the constraints and conventions of stand-up comedy and when viewed objectively, it is reasonable.[37]

(f) Defining 'artistic work'

French J in *Bropho* considered the coverage of the term 'artistic work' in s 18D(a). It was accepted in that case that a cartoon was an 'artistic work'. His Honour noted that the Commissioner who had first heard the matter 'appeared to accept… that the term did not require a distinction to be made between "real" and "pseudo" artistic works'[38] and went on to note that the term 'does seem to be used broadly'.[39] His Honour further stated that '[i]t must be accepted that artistic works cover and infinite variety of expressions of human creativity'.[40]

In *Kelly-Country*, Brown FM had no doubt that a comedy performance fell within the term 'artistic works', noting that the explanatory memorandum makes specific reference to 'comedy acts'.[41]

Chapter 3
The Sex Discrimination Act

3.2 Causation, Intention and Motive under the SDA

In *Ho v Regulator Australia Pty Ltd*,[42] the applicant, who worked for the respondent as an accounts clerk, complained (amongst other things) that she had been discriminated against on the basis of her sex when she was asked to change towels in the men's washroom. Driver FM held that the request was discriminatory (although it was trivial and did not sound in damages[43]):

> It was made because the job needed doing and it was a job that had always been done by 'one of the girls'… The request would not have been made if Mrs Ho had been a man. Appropriate comparators in the circumstances are the male employees in the workplace. They were not and would not have been asked to undertake this menial task. It follows that in making the request to Mrs Ho that she change the towels in the men's washroom, Mrs Kenny treated Mrs Ho less favourably than a man would have been treated in the same circumstances.[44]

[37] [2004] FMCA 532, [127].
[38] [2004] FCAFC 16, [40].
[39] Ibid [104].
[40] Ibid [106].
[41] [2004] FMCA 532, [121].
[42] [2004] FMCA 62.
[43] Ibid [158].
[44] Ibid [151].

3.4 Direct Pregnancy Discrimination

3.4.1 Direct Pregnancy Discrimination

In *Ho v Regulator Australia Pty Ltd*,[45] the applicant alleged, amongst other things, that she had been discriminated against on the basis of her pregnancy. Driver FM found that the applicant's supervisor had made clear to the applicant that her pregnancy was unwelcome and that she would be required to prove her entitlement to maternity leave. She was required to attend a meeting with an independent witness to discuss her request for leave as well as a change in her work performance which had followed the announcement of her pregnancy.

Driver FM held as follows:

> I find that in subjecting Mrs Ho to the meeting on 25 February 2002 the respondents discriminated against Mrs Ho on account of her pregnancy. The appropriate comparators are employees of the first respondent who were not pregnant but who had a condition requiring leave on the production of a medical certificate. It is hard to imagine an employee requiring leave on production of a medical certificate being summoned to a meeting before an independent witness to discuss their need for leave and an asserted decline in work performance and attitude since the medical condition became known. I find that such an employee would not have been subjected to an analysis of their work performance or been summoned to a meeting with an independent witness to justify a request for leave. By subjecting Mrs Ho to the meeting the respondents breached s.7(1)(a) of the SDA.[46]

The applicant was awarded $1,000 in general damages.

3.5 Discrimination on the Ground of Family Responsibilities

An appeal against the decision of Raphael FM in *Evans v National Crime Authority*[47] was decided by Branson J in *Commonwealth v Evans*.[48] Her Honour upheld the finding of discrimination on the ground of family responsibility, holding that it was open on the evidence to conclude that Ms Evans was treated less favourably than an employee who took an equivalent amount of leave that was not, or was not to a significant extent, carer's leave.

[Add to footnote 61] On appeal in *Commonwealth v Evans* [2004] FCA 654, Branson J held that there was no evidence to support the finding of direct sex discrimination (based on the responsibility to care for children being a 'characteristic that appertains generally to women'). There was no evidence before the Federal Magistrate that showed how a male employee who took the same, or comparable, amounts of leave as Ms Evans would have been treated by his employer. Branson J stated that 'it is not illegitimate for an employer, all other things being equal and provided indirect discrimination is avoided, to favour for re-employment an employee who takes limited leave over an employee who regularly takes a lot of leave, albeit that it is

[45] [2004] FMCA 62.
[46] Ibid [155].
[47] [2003] FMCA 375.
[48] [2004] FCA 654.

leave to which he or she is entitled' ([71]). The situation was to be distinguished from *Thompson v Orica Pty Ltd* [2002] FCA 939 (a pregnancy discrimination case - see section 3.4.1), in which there was a family leave policy which required a certain standard of treatment.

3.8 Sexual Harassment

3.8.4 The 'Reasonable Person' Test

In *Beamish v Zheng*,[49] the applicant complained of a range of conduct by the respondent co-worker, including sexual comments, an attempt to touch her breasts and an offer of $200 to have sex with him. In finding for the applicant, Driver FM stated:

> The workplace in which Mr Zheng and Ms Beamish worked was a fairly rough and tumble place in which lighthearted behaviour was tolerated. In the circumstances, a certain amount of sexual banter could have been anticipated. However, Mr Zheng's conduct was persistent and went beyond anything that could be described as lighthearted sexual banter. Ms Beamish's reactions to his conduct should have made clear that it was unwelcome. In the circumstances, a reasonable person would have anticipated that Ms Beamish would have been offended, humiliated or intimidated by Mr Zheng's persistent conduct. In particular, the attempt to touch her breasts was unacceptable and the offer of money for sex was grossly demeaning.[50]

In *Bishop v Takla*,[51] the applicant complained that her co-worker engaged in a range of conduct which constituted sexual harassment, including sexual remarks and physical contact. One such incident involved the respondent telling the applicant that he wanted to come up to a nightclub where she was working in another job, to which the applicant suggested that he come with his girlfriend. He responded that 'maybe I will come on my own'. Raphael FM found that a 'reasonable person may well have anticipated that she might be intimidated by this'.[52]

3.8.5 Sexual Harassment as a Form of Sex Discrimination

The issue of whether ss 14(1) or 14(2) apply in cases where sexual harassment is perpetrated by a fellow employee or a workplace participant, rather than an employer was again canvassed in *Hughes v Car Buyers Pty Limited*.[53] In this case, Walters FM found that the actions of the second respondent, a fellow employee or workplace participant, toward the applicant constituted sexual harassment within the meaning of s 28A of the SDA. Walters FM also found that the first respondent, the employer company, was vicariously liable for the second respondent's acts pursuant to s 106 of the SDA as if the employer company had also done the acts.

It was argued on behalf of the applicant that the actions of the employee constituted not only sexual harassment, but also sexual discrimination. Walters FM accepted this

[49] [2004] FMCA 60.
[50] Ibid [16].
[51] [2004] FMCA 74.
[52] Ibid [34].
[53] [2004] FMCA 526.

submission[54] and found that the employer treated the applicant less favourably than, in the same or substantially similar circumstances, he would have treated a male and that his behaviour imposed a detriment (within the meaning of s 14(2)(d) of the SDA) on the applicant on the ground of her sex. In considering whether the employer was vicariously liable for the acts of the employee and had itself unlawfully discriminated against the applicant, Walters FM considered the decision of Branson J in *Leslie v Graham*,[55] in which her Honour stated:

> while (the SDA) renders unlawful discrimination by an employer on the ground of sex, it does not render unlawful discrimination by a fellow employee on the ground of sex. While I have found that (the employer) is vicariously liable under (the SDA) for (the respondent employee's) sexual harassment of (the applicant employee), nothing (in the SDA) deems an employer found vicariously liable for an act of sexual harassment to have itself engaged in the act of sexual harassment (cf s. 105 of [the SDA]).[56]

In considering this statement of Branson J, Walters FM stated as follows:[57]

> With the greatest respect to her Honour, I must confess to finding the above passage somewhat impenetrable. Section 106 of the SDA deals with vicarious liability…[T]he section clearly states that "where an employee or agent of a person" does a relevant unlawful act, the SDA applies "in relation to that person as if that person had also done the act". The "person" referred to in s.106(1) can only be (in the present circumstances) an *employer.* It follows that, if (the respondent employee) does an act that would, if it were done by (the respondent employer), be unlawful under s.14 of the SDA…then the SDA applies, in relation to (the respondent employer), as if (the respondent employer) had also done the act. Thus, it seems to me that the SDA *does* render unlawful discrimination by a fellow employee…on the ground of sex. Although it is true that (the respondent employee) may not himself have discriminated against (the applicant) on the grounds of her sex within the meaning and contemplation of s.14 (because, after all, he was not her employer in his personal capacity), the effect of s.106 is that (the respondent employer) is deemed to have *also* done the relevant acts – thereby triggering the provisions of s.14.

Accordingly, Walters FM held that the employer company had itself unlawfully discriminated against the applicant on the ground of her sex.

Walters FM did not refer to the decision of Wilcox J in *Gilroy* where his Honour expressed reservations as to whether ss 14(1) or 14(2) apply in cases which involve the sexual harassment of one employee by another.[58] While Moore J in *Elliott v Nanda*[59] expressed some disagreement with the decision in *Gilroy*, it is relevant to note that Moore J did not specifically address the issue of whether different considerations may apply where the sexual harassment is perpetrated by an employee. Rather, Moore J distinguished the decision of Wilcox J in *Gilroy* on this basis stating that 'the circumstances [Wilcox J] was considering differed from the present case, in that the harassment was there perpetrated by an employee, not by the employer.'[60]

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[54] Citing *O'Callaghan v Loder* (1983) 3 NSWLR 89; *Hall v A & A Sheiban Pty Ltd* (1988) 20 FCR 217, 274-277 (French J); *Elliott v Nanda & Commonwealth* (2001) 111 FCR 240, 281-82 [125]-[130] (Moore J); *Leslie v Graham* [2002] FCA 32, [73]; *Font v Paspaley Pearls* [2002] FMCA 142, [136]-[139]; *Wattle v Kirkland (No.2)* [2002] FMCA 135, [67].
[55] [2002] FCA 32.
[56] Ibid [73].
[57] [2004] FMCA 526, [43].
[58] (2000) 181 ALR 57, 75 [102]: see p 83 of the substantive publication.
[59] (2001) 111 FCR 240.
[60] Ibid [127].

Chapter 4
The Disability Discrimination Act

4.2 Direct Discrimination Under the DDA

4.2.1 Issues of Causation, Intention and Knowledge

(a) Causation and Intention

In *Forbes v Australian Federal Police (Commonwealth of Australia)*,[61] the Full Federal Court considered an appeal and cross-appeal from the decision of Driver FM.[62] The appellant's case was that the Commonwealth, through the Australian Federal Police ('AFP') had discriminated against her on the basis of her disability, namely a depressive illness. It was alleged that the AFP had discriminated against her by refusing to re-employ her at the conclusion of her fixed-term contract. It was further argued that the AFP had discriminated against her by withholding information about her medical condition from the review panel which had been convened to consider her re-employment.

Driver FM had held that the AFP had discriminated against the appellant by withholding the information from the review panel. A relevant issue for the review panel was the apparent breakdown in the relationship between the applicant and AFP. The information relating to her disability explained the breakdown in the relationship. Driver FM considered that the AFP was under an obligation to put before the review panel information concerning the applicant's illness as its failure to do so left the review panel 'under the impression that [the appellant] was simply a disgruntled employee'.[63] The AFP was found otherwise to have *not* discriminated against the appellant in its decision not to appoint her as a permanent employee, as the decision of the review panel was based on its view that the employment relationship between the appellant and the AFP had irrevocably broken down.

On the cross-appeal by the AFP, the Full Court found that his Honour had erred in finding discrimination as he had not made a finding that the decision of the AFP was 'because of' the appellant's disability. The Full Court stated:

> It is, however, one thing for the AFP to have misunderstood its responsibilities to the Panel or to the appellant (if that is what the Magistrate intended to convey). It is quite another to conclude that the AFP's actions were 'because of' the appellant's depressive illness. The Magistrate made no such finding.
>
> In [*Purvis v New South Wales* (2003) 202 ALR 133], there was disagreement as to whether the motives of the alleged discriminator should be taken into account in determining whether that person has discriminated against another because of the latter's disability. Gummow, Hayne and Heydon JJ thought that motive was at least relevant. Gleeson CJ thought that motive was relevant and, perhaps, could be determinative. McHugh and Kirby JJ thought motive was not

[61] [2004] FCAFC 95.
[62] *Forbes v Commonwealth* [2003] FMCA 140.
[63] Ibid [28].

relevant. All agreed, however, that it is necessary to ask why the alleged discriminator took the action against the alleged victim.

In the present case, therefore, it was necessary for the Magistrate to ask why the AFP had withheld information about the appellant's medical condition from the Panel and to determine whether (having regard to s 10) the reason was the appellant's depressive illness. His Honour did not undertake that task and therefore failed to address a question which the legislation required him to answer if a finding of unlawful discrimination was to be made. His decision was therefore affected by an error of law.[64]

4.2.2 The 'Comparator' under s 5 of the DDA

Relevant background to the decision in *Forbes v Australian Federal Police (Commonwealth of Australia)*,[65] is set out at 4.2.1 above. The appellant contended that the decision of the review panel not to reemploy her was based on her absence from work and that this absence was in turn a manifestation of her depressive illness. It was therefore argued that the decision not to reemploy her discriminated against her on the ground of her disability. The Full Court rejected this argument:

> The Magistrate found that the appellant's absence from work for a period of over two years was 'clearly important in establishing [the] breakdown' of the relationship between herself and the AFP. If the [DDA] makes it unlawful to refuse re-employment to someone because of their lengthy absence from work, where that absence is due to a disability, the appellant's submission would have force. The difficulty is that the appellant must establish that the AFP treated her less favourably, **in circumstances that are the same or are not materially different**, than it treated or would have treated a non-disabled person. The approach of the majority in [*Purvis v New South Wales* (2003) 202 ALR 133] makes it clear that the circumstances attending the treatment of the disabled person must be identified. The question is then what the alleged discriminator would have done in those circumstances if the person concerned was not disabled.
>
> Here, the appellant was not reappointed because the history of her dealings with the AFP, including her absence from work for nearly three years, showed that the employment relationship had irretrievably broken down. There is nothing to indicate that in the same circumstances, the AFP would have treated a non-disabled employee more favourably. On the contrary, the fact that the Panel did not know of the appellant's medical condition indicates very strongly that it would have refused to reemploy a non-disabled employee who had been absent from work for a long period and whose relationship with the AFP had irretrievably broken down.[66]

The Full Court also made the following obiter comments, with reference to the decision of the High Court in *Purvis v New South Wales*,[67] ('*Purvis*') in relation to the appropriate comparator when considering the failure of the AFP to put the evidence concerning the appellant's medical condition before the review panel (see 4.2.1(a) above):

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[64] [2004] FCAFC 95, [68]-[70].
[65] [2004] FCAFC 95.
[66] Ibid [80]-[81].
[67] (2003) 202 ALR 133.

> The circumstances attending the AFP's treatment of the appellant would seem to have included the AFP's genuine belief that the appellant, despite her claims to have suffered from a serious depressive illness, did not in fact have such an illness. That belief was in fact mistaken, but it explains the AFP's decision to regard the information concerning the appellant's medical condition as irrelevant to the question of her re-employment. This suggests that the appropriate comparator was an able-bodied person who claimed to be disabled, but whom the AFP genuinely believed (correctly, as it happens) had no relevant disability. If this analysis is correct, it seems that the AFP treated the appellant no less favourably than, in circumstances that were the same or were not materially different, it would have treated a non-disabled officer.[68]

The decision in *Purvis* was also applied in *Fetherston v Peninsula Health*[69] in which a doctor's employment was terminated following the deterioration of his eyesight and related circumstances. Heerey J identified the following 'objective features' relevant for the comparison required under s 5, noting that 'one should not "strip out" [the] circumstances which are connected with [the applicant's] disability: *Purvis* at [222], [224]':

> (a) Dr Fetherston was a senior practitioner in the ICU, a department where urgent medical and surgical skills in life-threatening circumstances are often required;
>
> (b) Dr Fetherston had difficulty in reading unaided charts, x-rays and handwritten materials;
>
> (c) There were reports of Dr Fetherston performing tracheostomies in an unorthodox manner, apparently because of his visual disability;
>
> (d) Medical and nursing staff expressed concern about Dr Fetherston's performance of his duties in ways apparently related to his visual problems;
>
> (e) In the light of all the foregoing Dr Fetherston attended an independent eye specialist at the request of his employer Peninsula Health but refused to allow the specialist to report to it.[70]

His Honour went on to consider how the respondents would have treated a person without the applicant's disability in those circumstances and held:

> The answer in my opinion is clear. Peninsula Health and any responsible health authority would have in these circumstances treated a hypothetical person without Dr Fetherston's disability in the same way. An independent expert assessment would have been sought. A refusal to allow that expert to report must have resulted in termination of employment.[71]

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[68] [2004] FCAFC 95, 76.
[69] [2004] FCA 485.
[70] Ibid [86].
[71] Ibid [89]. His Honour also held that the applicant must fail because the termination was not *because of* the applicant's disability, but his refusal to allow the report of the specialist to be released to his employer: [92]-[93].

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

In *Forbes v Australian Federal Police (Commonwealth of Australia)*,[72] the details of which are set out at 4.2.1(a) above, the appellant argued that the AFP had refused to act on medical reports in relation to the appellant's disability. The Full Court suggested that this submission may have proceeded on the unstated assumption that ss 5 and 15 of the DDA 'require an employer to provide different or additional services for disabled employees'.[73] The Court commented:

> If this were correct, the failure to provide a seriously depressed employee with appropriate counselling services might constitute less favourable treatment for the purposes of s 5(1). *Purvis*, however, firmly rejects such a proposition. It is true that s 5(2) provides that a disabled person's need for different accommodation or services does not constitute a material difference in judging whether the alleged discrimination has treated a disabled person less favourably than a non-disabled person. However, s 5(2) cannot be read as saying that a failure to provide different accommodation or services constitutes less favourable treatment of the disabled person for the purposes of s 5(1): *Purvis*, at 164 [218], per Gummow, Hayne and Heydon JJ; at 158 [104], per McHugh and Kirby JJ.

Similarly, in *Fetherston v Peninsula Health*,[74] Heerey J applied *Purvis* in holding that a failure to provide aids specifically requested by an employee with a visual disability did not contravene the DDA as the Act 'does not impose a legal obligation on employers, or anyone else, to provide aids for disabled persons'.[75]

In *Catholic Education Office v Clarke*,[76] which, in contrast to *Purvis* was a case argued as indirect discrimination, the Full Federal Court rejected a submission made by the appellants to the effect that the applicant at first instance was seeking 'positive discrimination', something that was not required under the DDA. The Court (Sackville and Stone JJ, with whom Tamberlin J agreed) suggested that the submission 'appears to have been inspired by certain comments made in the joint judgment of Gummow, Hayne and Heydon JJ in *Purvis*.'[77]

The Court noted that *Purvis* was not argued as a case of indirect discrimination under s 6 of the DDA and stated:

> The reasoning in the joint judgment in *Purvis* does not support the proposition that the appellants appeared to be urging, namely that the DD Act should be construed so as to preclude any requirement that an educational authority 'discriminate positively' in favour of a disabled person. The concept of 'positive discrimination' is itself of uncertain scope and does

[72] [2004] FCAFC 95.
[73] Ibid [85].
[74] [2004] FCA 485.
[75] Ibid [77]. His Honour also discussed, in obiter comments, whether or not there was, for the purposes of indirect discrimination under s 6 of the DDA, a 'requirement' that the applicant perform his duties (such as reading medical reports) without aids. Heerey J stated that the mere non-response to the appellant's requests for aids could not be characterised as a 'requirement or condition' within the meaning of s 6: 'That provision is concerned with some positive criterion or test or qualification or activity with which the disabled person is called on to comply' ([81]). See, however, *Waters v Public Transport Corporation* (1991) 173 CLR 349, 393 (Dawson and Toohey JJ), 406-7 (McHugh J).
[76] [2004] FCAFC 197
[77] Ibid [87]-[93].

not provide a sure guide to the construction of the statutory language, in particular to s 6 of the DD Act.[78]

4.3 Indirect Discrimination under the DDA

4.3.2 Defining the 'Requirement or Condition'

In *Vance v State Rail Authority*,[79] the applicant, a woman with a visual disability, complained of indirect disability discrimination in the provision of services by the respondent. The applicant had been unable to board a train because the guard allowed insufficient time to do so and closed the doors without warning while the applicant was attempting to board.

The primary argument pursued under the DDA was that the respondent required the applicant to comply with a requirement or condition defined as follows:

> That in order to travel on the 11.50am train on 8 August 2002 operated by the Respondent any intending passenger at Leumeah Station had to enter the train doors promptly which may close without warning.

Raphael FM found that the guard on the train simply did not notice the applicant attempting to board the train and closed the doors after a period of between 10 and 15 seconds believing that no-one was getting on.[80] His Honour also appeared to find that there was no warning that the doors were to be closed.[81] It did not follow, however, that the respondent Authority (the individual guard was not named as a party) imposed a requirement or condition consistent with that conduct.

The evidence before the Court established that the respondent had detailed procedures for guards which included a requirement that they make an announcement 'stand clear, doors closing' and ensure that all passengers are clear of the doors prior to closing them and prior to giving the signal to the driver to proceed. In these circumstances, Raphael FM asked:

> Can it be said that this requirement was imposed by virtue of what the applicant alleged occurred on this day? In other words does the alleged action of the guard constitute a requirement imposed by his employer. This could only be the case if the employer was vicariously liable for the acts of the employee. Such vicarious liability is provided for in the DDA under s 123. After some discussion about the status of [the respondent] it was agreed that the appropriate section was s 123(2) which is in the following form:
>
> "**[123(2)]** *Conduct by directors, servants and agents*
>
> *(2) Any conduct engaged in on behalf of a body corporate by a director, servant or agent of the body corporate within the scope of his or*

[78] [2004] FCAFC 197, [93].
[79] [2004] FMCA 240.
[80] Ibid [45], [47].
[81] Ibid [44].

> *her actual or apparent authority is taken, for the purposes of **this Act**, to have been engaged in also by the body corporate unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct."*

> Although I accept the applicant's submission that the conduct engaged in by the guard was engaged in within the scope of his actual or apparent authority and therefore was conduct engaged in by the respondent that is not the end of the matter. It ignores the proviso. I am satisfied that the SRA did take reasonable precautions and exercise due diligence to avoid the guard conducting himself in the manner in which it is alleged he conducted himself by Mr and Mrs Vance…
>
> If the respondent has no liability under s 123(2), which I have found it does not, and if all the evidence is that the respondent itself did not impose the alleged requirement or condition, then I cannot see how there can be any liability upon it. [82]

Raphael FM accordingly dismissed the application under the DDA.[83]

The Full Federal Court in *Catholic Education Office v Clarke*[84] upheld the finding of the primary judge, Madgwick J,[85] that the terms or conditions upon which the College was prepared to admit the student constituted a 'requirement or condition' for the purposes of s 6 of the DDA, namely that he participate in and receive classroom instruction without the assistance of an Auslan interpreter.[86]

In *Hinchliffe v University of Sydney*,[87] a case involving a complaint brought by a student with vision impairment, Driver FM did not accept the applicant's characterisation of the relevant requirement or condition as a requirement or condition that,

> [the applicant] undertake her university studies without all of her course materials being provided in an alternative format, either at all or at the same time as other students received their course materials.[88]

His Honour noted that the relevant requirement or condition must be one imposed upon not only the applicant but also on the class of other persons to whom the applicant is to be compared.[89]

Nor did His Honour accept that the relevant requirement or condition was the requirement or condition as proposed by the respondent that:

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[82] Ibid [54].
[83] His Honour did, however, find liability for negligence under the Court's accrued jurisdiction, applying the different test for vicarious liability at common law (ibid [64]). Raphael FM awarded compensation of $5,000 ([71]).
[84] [2004] FCAFC 197.
[85] *Clarke v Catholic Education Office* (2003) 202 ALR 340, 351 [44]-[45].
[86] [2004] FCAFC 197, [107].
[87] [2004] FMCA 85. Note that an appeal against this decision has been lodged.
[88] Ibid [105].
[89] Ibid [106].

> [the applicant] achieve a pass grade in the subjects in which she was enrolled in order to meet the requirements to graduate with a Bachelor of Applied Science (Occupational Therapy).[90]

Driver FM stated:

> it is also a mistake to restrict consideration to formal or absolute requirements such as the requirement that students enrolled in the occupational therapy course complete course requirements by achieving a pass grade.[91]

His Honour held the relevant requirement or condition to be:

> the requirement or condition imposed by the university that students deal with course materials provided by the university in a single or standard format that the university chose to provide to all students. In other words, students were generally expected to either read course materials in the format that they were given to them or seek themselves to convert those materials into a different format which was preferred by them.[92]

Driver FM noted that, as in the case of *Waters v Public Transport Corporation*,[93] this was a requirement that was facially neutral and was imposed upon the applicant and a class of persons who are not disabled, as well as the applicant. His Honour also noted that, as with *Waters*, it was a requirement which potentially might impact adversely upon the applicant by reason of her disability.

4.3.3 Comparison with Persons without the Disability (s 6(a))

The Full Federal Court in *Catholic Education Office v Clarke*[94] upheld the approach of the primary judge, Madgwick J,[95] to the 'base group' in assessing whether or not a 'substantially higher proportion' of people without the disability could comply with the requirement or condition. The Court rejected the submission that it was not possible to make such a comparison 'simply because the alleged discriminator claims to have provided a benefit or service not generally available to non-disabled persons.' Once an aggrieved person established that they were required to comply with a 'requirement or condition', the Court is required to make the appropriate comparison against an appropriately defined base group.[96]

4.3.4 Reasonableness (s 6(b))

The Full Federal Court in *Catholic Education Office v Clarke*[97] upheld the finding of the primary judge, Madgwick J,[98] in relation to the unreasonableness of the requirement or condition and set out the established principles for determining that issue.[99]

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[90] Ibid [105].
[91] Ibid [106].
[92] Ibid [108].
[93] (1991) 173 CLR 349.
[94] [2004] FCAFC 197.
[95] *Clarke v Catholic Education Office* (2003) 202 ALR 340, 352 [46]-[48].
[96] [2004] FCAFC 197, [113].
[97] [2004] FCAFC 197.
[98] *Clarke v Catholic Education Office* (2003) 202 ALR 340, 353-360, [50]-[82].
[99] [2004] FCAFC 197, [115].

In *Hinchliffe v University of Sydney*,[100] Driver FM held that, with the exception of certain course material that could not be reformatted by the applicant or those assisting her, the applicant could comply with university's condition that she use the course materials provided to her. He held that the existence of the position of disability services officer who was available to deal with occasional problems in reformatting course materials was sufficient and adequate and, accordingly, rendered the university's requirement reasonable. He said he found it impossible to believe that had the disability services officer or her successors been informed that the applicant had been provided with course material which could not be reformatted into an acceptable format that they would not have taken steps to ensure better quality material was provided.[101]

4.3.5 Ability to comply with a Requirement or Condition (s 6(c))

In *Hinchliffe v University of Sydney*,[102] Driver FM, following *Catholic Education Office v Clarke*,[103] noted that the standard necessary to establish an inability to comply with the university's requirement or condition 'requires that the applicant prove a "serious disadvantage" with the result that the applicant could not "meaningfully participate" in the course of study for which she had been accepted.' His Honour held that to the extent that the applicant and those assisting her were able to reformat the course materials she was able to comply with the university's condition that she use the course materials provided to her. He held that the inability to comply with the university's requirement was limited to certain material that was not capable of being reformatted into an acceptable format[104] (a requirement which his Honour found was 'reasonable' in all of the circumstances of the case: see above 4.3.4).

4.4 Disability Discrimination in Employment

4.4.3 Inherent Requirements

In *Power v Aboriginal Hostels Ltd,* [105] on remittal from the Federal Court, [106] Brown FM considered whether, in conducting the investigation for the purposes of s 15(4), the Court should consider the imputed disability or the actual disability of the applicant.[107] The applicant had been dismissed on the basis of a disability (depression) that he did not have: he did, however have another disability (adjustment disorder) which had 'resolved' prior to his dismissal. Brown FM found that it was the actual disability that was to be considered, stating that 'it would be absurd if the exculpatory provisions of section 15(4) were to be implied to the imputed disability per se'[108] such

[100] [2004] FMCA 85. Note that an appeal against this decision has been lodged.
[101] Ibid [122].
[102] [2004] FMCA 85. Note that an appeal against this decision has been lodged.
[103] [2004] FCAFC 197.
[104] [2004] FMCA 85, [115]-[116].
[105] [2004] FMCA 452.
[106] [2003] FCA 1475.The matter had been remitted by Selway J to Brown FM for further consideration and determination consistent with his reasons.
[107] [2004] FMCA 452, [18]-[22].
[108] Ibid [65].

that an employer could lawfully dismiss an employee on the basis of a disability that they did not have.

Applying *X v Commonwealth*[109] Brown FM referred to the distinction that needed to be drawn between 'inability' and 'difficulty' exhibited by the person concerned in the performance of the inherent requirements of the employment.[110] His Honour noted that whilst the applicant may have found it difficult to perform the tasks of the position of assistant manager of the hostel, 'difficulty' is not sufficient for the purposes of s 15(4): '[r]ather it must be shown that the person's disability renders him or her incapable of performing the tasks required of the position'.[111]

Again applying *X v Commonwealth*, Brown FM noted that 'such inability must be assessed in a practical way'.[112] In his view in this case the only practical way to make the assessment was to examine the medical evidence.[113] Having made that assessment he accepted that the applicant was not incapable of performing the inherent requirements of his position of assistant manager, regardless of the workplace environment, and thus s 15(4) had no application.[114]

4.4.4 'Arrangements made for the purposes of determining who should be offered employment' (s 15(1)(a))

In *Y v Human Rights and Equal Opportunity Commission*,[115] the applicant complained of disability discrimination after having been unsuccessful in his application for a job. The applicant sought to characterise the discrimination as being discrimination 'in the arrangements made for the purpose of determining who should be offered employment', contrary to s 15(1)(a) of the DDA, for which it is *not* a defence under s 15(4) that a person would be unable to carry out the inherent requirements of the particular employment. Finkelstein J rejected the applicant's argument, finding that the section

> seeks to outlaw the established ground under which persons with a disability will not even be considered for employment. It is not apt to cover the situation where a particular individual is refused employment, or an interview for employment, because of that person's particular disability.[116]

[109] (2000) CLR 177 at 208.
[110] [2004] FMCA 452, [23].
[111] Ibid [57].
[112] Ibid [58].
[113] Ibid [58] and [68].
[114] Ibid [65] and [68]-[69].
[115] [2004] FCA 184.
[116] Note that such a situation is covered by s 15(1)(b) which makes it unlawful to discriminate 'in determining who should be offered employment'. Section 15(4) makes a defence of 'inherent requirements' defence available in such cases.

4.9 Other Exemptions to the DDA

4.9.1 Annuities, Insurance and Superannuation (s 46)

The decision of Raphael FM in *Bassanelli v QBE Insurance*,[117] was upheld on appeal by Mansfield J, sitting as a single judge, in *QBE Travel Insurance v Bassanelli*.[118] Mansfield J commented that the exemptions in ss 46(1)(f) and 46(1)(g) of the DDA are 'not simply alternatives'[119] – only one can apply in any particular case. His Honour stated:

> I consider that, on its proper construction, the exemption for which s 46(1)(g) provides is only available if there is no actuarial or statistical data available to, or reasonably obtainable by, the discriminator upon which the discriminator may reasonably form a judgment about whether to engage in the discriminatory conduct. If such data is available, then the exemption provided by s 46(1)(g) cannot be availed of. The decision made upon the basis of such data must run the gauntlet of s 46(1)(f)(ii), that is the discriminatory decision must be reasonable having regard to the matter of the data and other relevant factors. If the data (and other relevant factors) do not expose the discriminatory decision as reasonable, then there is no room for the insurer to move to s 46(1)(g) and thereby to ignore such data. If such data were not available to the insurer but were reasonably obtainable, so that its discriminatory decision might have been measured through the prism of s 46(1)(f), again there would be no room for the insurer to invoke the exemption under s 46(1)(g).
>
> Hence, if the exemption pathway provided by s 46(1)(f) ought to have been followed by the insurer, whatever the outcome of its application, the exemption pathway provided by s 46(1)(g) would not also be available. It is only if there is no actuarial or statistical data available to, or reasonably obtainable by, the insurer upon which it is reasonable for the insurer to rely, that s 46(1)(g) becomes available. The legislative intention is that the reasonableness of the discriminatory conduct be determined by reference to such data, if available or reasonably obtainable, and other relevant factors. That conclusion is consistent with the Explanatory Memorandum to the Disability Discrimination Bill 1992 (Cth) concerning the superannuation and insurance exemption.[120]

In the circumstances of the case, however, the parties conducted the application at first instance as if the exemption provided under s 46(1)(g) of the DDA was available to the appellant insurer and Mansfield J was of the view that the respondent was bound by that conduct.[121]

Nevertheless, Mansfield J upheld the decision of the Federal Magistrate at first instance, confirming that the onus of proof is on an insurer to qualify for an exemption under s 46 of the DDA.[122] He further held that the assessment of what is 'reasonable' is to be determined objectively in light of all relevant matters, citing with

[117] [2003] FMCA 412.
[118] [2004] FCA 396.
[119] Ibid [28].
[120] Ibid [33]-[34].
[121] Ibid [36].
[122] Ibid [37].

approval[123] the decisions in *Waters v Public Transport Corporation*[124] and *Secretary, Department of Foreign Affairs v Styles*.[125]

4.9.4 Special Measures (s 45)

Section 45 of the DDA provides:

> **45 Special measures**
>
> This Part does not render it unlawful to do an act that is reasonably intended to:
>
> (a) ensure that persons who have a disability have equal opportunities with other persons in circumstances in relation to which a provision is made by this Act; or
>
> (b) afford persons who have a disability or a particular disability, goods or access to facilities, services or opportunities to meet their special needs in relation to:
>
> (i) employment, education, accommodation, clubs or sport; and
> (ii) the provision of goods, services, facilities or land; or
> (iii) the making available of facilities; or
> (iv) the administration of Commonwealth laws and programs; or
> (v) their capacity to live independently; or
>
> (c) afford persons who have a disability or a particular disability, grants, benefits or programs, whether direct or indirect, to meet their special needs in relation to:
>
> (i) employment, education, accommodation, clubs or sport; or
> (ii) the provision of goods, services, facilities or land; or
> (iii) the making available of facilities; or
> (iv) the administration of Commonwealth laws and programs; or
> (v) their capacity to live independently.

In *Catholic Education Office v Clarke*[126] the primary judge had found that the 'model of learning support' put forward by a school as part of the terms and conditions upon which an offer of admission to a deaf student, Jacob, indirectly discriminated against the student on the ground of his disability.[127] The appellants' challenged this finding, arguing that their acts were reasonably intended to afford the student, as a person with a particular disability, access to services to meet his special needs in relation to education. The Court viewed this submission as seeking to rely on s 45(b).[128]

The Court stated that two points should be made about s 45. First, the section 'should receive an interpretation consistent with the objectives of the legislation'.[129] The Court noted, in this regard, Finkelstein J's observation in *Richardson v ACT Health and Community Care Service*,[130] that 'an expansive interpretation of an exemption in anti-discrimination legislation may well threaten the underlying object of the legislation'. Secondly, s 45 'refers to an act that is "reasonably intended" to achieve

[123] Ibid [51]-[54].
[124] (1991) 173 CLR 349.
[125] (1989) 88 ALR 621.
[126] [2004] FCAFC 197.
[127] *Clarke v Catholic Education Office* (2003) 202 ALR 340.
[128] [2004] FCAFC 197, [127].
[129] [2004] FCAFC 197, [129].
[130] (2000) 100 FCR 1, 5 [24].

certain objects'. The Court agreed with the observation of Kenny JA in *Colyer v State of Victoria*[131] that s 45 'incorporates an objective criterion, which requires the Court to assess the suitability of the measure taken to achieve the specified objectives'.

In rejecting the appellants' submission, the Court said that the 'act' rendered unlawful by the DDA was not the offer of a 'model of support' which provided benefits to Jacob, but the appellants' offer of a place subject to a term or condition that Jacob participate in and receive classroom instruction without an interpreter. This could not be said to be 'reasonably intended' to meet Jacob's special needs for the purposes of s 45.[132]

In any event, the test of whether or not something is 'reasonably intended' to achieve the purposes set out in s 45 is an objective one. The primary judge had found that 'any adult should have known that the withdrawal of Auslan support would cause Jacob distress, confusion and frustration and that, in the absence of an Auslan interpreter, Jacob would not have received an effective education'. Sackville and Stone JJ concluded:

> Whatever the subjective intentions of the appellants' officers, it could not be said that the particular act otherwise rendered unlawful satisfied the objective standard incorporated into s 45.[133]

4.11 Other Issues

4.11.1 Limited Application Provisions and Constitutionality

In *Souliotopoulos v Latrobe University Liberal Club*,[134] Merkel J held that, when considering 'matters of international concern' to which the limited application provisions of the DDA purport to give effect, the relevant date at which to consider what matters are of international concern is the date of the alleged contravention of the DDA, not the date of commencement of the DDA (March 1993). His Honour stated:

> The subject matter with which s 12(8) is concerned is, of its nature, changing. Thus, matters that are not of international concern or the subject of a treaty in March 1993 may well become matters of international concern or the subject of a treaty at a later date. Section 12(8) is ambulatory in the sense that it intends to give the Act the widest possible operation permitted by s 51(xxix).[135]

The decision of Merkel J was cited with approval and the same approach taken by Raphael FM in *Vance v State Rail Authority*.[136]

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[131] [1998] 3 VR 759, 771.
[132] [2004] FCAFC 197, [131].
[133] Ibid [132].
[134] (2002) 120 FCR 584.
[135] Ibid 592 [31].
[136] [2004] FMCA 240.

4.11.4 Vicarious Liability (s 123)

In *Vance v State Rail Authority*.[137] Raphael FM considered s 123(2) of the DDA which provides as follows:

> Any conduct engaged in on behalf of a body corporate by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority is taken, for the purposes of this Act, to have been engaged in also by the body corporate unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct

Raphael FM noted that the section was similar in its operation to similar provisions in the SDA (s 106), the RDA (s 18A) and State legislation. His Honour held:

> Case law in this area emphasises the importance of implementing effective education programs to limit discriminatory conduct by employees and the necessity of such programs for employers to avoid being held vicarious liable for the acts of their employees. Cases such as *McKenna v State of Victoria* (1998) EOC 92-927; *Hopper v Mt Isa Mines* [1999] 2 Qd R 496; *Gray v State of Victoria and Pettiman* (1999) EOC 92-996; *Evans v Lee & Anor* [1996] HREOCA 8 indicate that the test to be applied is an objective one based upon evidence provided by the employer as to the steps it took to ensure its employees were made aware of what constituted discriminatory conduct, that it was not condoned and that effective procedures existed for ensuring that so far as possible it did not occur.[138]

Raphael FM also cited with approval the decision under the RDA in *Korczak v Commonwealth of Australia*,[139] to the effect that what is required is proactive and preventative steps to be taken, but not perfection – only reasonableness.[140] In the circumstances of the case before him (see details in section 4.3.2 above), His Honour found that the respondent had exercise due care and was not liable under s 123(2) for the actions of its employee.

[137] [2004] FMCA 240.
[138] Ibid [56].
[139] (2000) EOC 93-056.
[140] [2004] FMCA 240, [56].

Chapter 5
Damages and Remedies

5.2 Damages

5.2.1 General Approach to Damages

(c) Aggravated and exemplary damages

In *Hughes v Car Buyers Pty Ltd*,[141] Walters FM stated (in obiter) that he disagreed with Raphael FM's conclusion in *Font v Paspaley Pearls*[142] that the court has a power to award exemplary damages. Walters FM expressed the view that under s 46PO(4) of the HREOC Act, a respondent can only be ordered to pay to an applicant 'damages by way of compensation for any loss or damage suffered because of the conduct of the respondent' (s 46PO(4)(d)). Walters FM went on to state that '[i]t follows, in my opinion, that although the court has power to award aggravated damages, it does not have power to award exemplary damages'.[143]

Walters FM cited[144] the following passage from the judgment of Windeyer J in *Uren v John Fairfax and Sons Pty Ltd*: [145]

> aggravated damages are given to compensate the plaintiff where the harm done to him by a wrongful act was aggravated by the manner in which the act was done; exemplary damages, on the other hand, are intended to punish the defendant, and presumably to serve one or more of the objects of punishment – moral retribution or deterrence.

Walters FM went on to state that compensatory damages must be approached by considering the effect of the wrongful act on the plaintiff, whereas exemplary damages (being punitive) are to be approached from a different perspective. In considering whether to award exemplary damages, the focus of the inquiry is on the wrongdoer, not upon the party who was wronged.[146] Although the applicant in *Hughes* did not seek exemplary damages, Walters FM stated that the court does not

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[141] [2004] FMCA 526.
[142] [2002] FMCA 142.
[143] [2004] FMCA 526, [68]. Note, however, that his Honour does not appear to consider the apparently inclusive nature of the list of potential orders that a court may make upon a finding that there has been unlawful discrimination. Section 46PO(4) provides that a court may make 'such orders… as it thinks fit', *including* those matters subsequently listed.
[144] Ibid [69].
[145] (1966) 117 CLR 118, 149. Walters FM observed that this passage was quoted with apparent approval in *Gray v Motor Accident Commission* (1998) HCA 70, per Gleeson CJ, McHugh, Gummow and Haine JJ.
[146] [2004] FMCA 526, [71].

have power to make an award for exemplary damages in any event. The applicant in *Hughes* sought and was awarded aggravated damages.[147]

5.2.3 Damages under the SDA Generally

Table 2: Overview of damages awarded under the SDA

Case	Damages awarded
Font v Paspaley [2002] FMCA 142	$7,500 (exemplary damages) $10,000 (general damages)
Grulke v KC Canvas Pty Ltd [2000] FCA 1415	$7,000 (loss of earnings) $3,000 (general damages)
Cooke v Plauen Holdings [2001] FMCA 91	$750
Song v Ainsworth Game Technology Pty Ltd [2002] FMCA 31	$10,000 (general damages) $244.44 per week from 21 February 2001 until the date of judgment, less $977.76 already paid (special damages)
Escobar v Rainbow Printing Pty Ltd (No.2) [2002] FMCA 122	$2,500 (non-economic loss) $4,825.73 (economic Loss)
Mayer v Australian Nuclear Science and Technology Organisation [2003] FMCA 209	$39,294 (minus an amount due for income tax, to be paid to the Australian Taxation Office)
Evans v National Crime Authority [2003] FMCA 375, partially overturned on appeal: *Commonwealth v Evans* [2004] FCA 654.	$12,000 (general damages – reduced from $25,000 on appeal) $7,493.84 (interest – subject to recalculation after appeal) $21,994.73 (special damages for economic loss – not challenged on appeal)
Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd [2003] FMCA 160	$10,000 plus interest (non-economic loss)
Kelly v TPG Internet Pty Ltd [2003] FMCA 584	$7,500 (general damages)
Gardner v All Australia Netball Association (2003) 197 ALR 28	$6,750
Ho v Regulator Australia Pty Ltd [2004] FMCA 62	$1,000 (general damages)
Hughes	

In *Ho v Regulator Australia Pty Ltd*[148] (the facts of which are set out at 3.4.1 above) Driver FM found that the respondent had discriminated against the applicant on the basis of her pregnancy in requiring her to attend a meeting with an independent witness to discuss her need for maternity leave. The applicant was awarded $1,000 in general damages. This amount was a sum moderated to take into account the fact that the extreme and unforeseeable reaction which the applicant had in fact experienced was caused by a personality disorder which was not known to the respondent.

[147] See 5.2.4 below.
[148] [2004] FMCA 62.

In *Commonwealth v Evans*,[149] Branson J allowed an appeal against the award of $25,000, for non-economic loss for discrimination on the ground of family responsibilities, made by Raphael FM in *Evans v National Crime Authority*.[150] Her Honour held that the appropriate award for non-economic loss in the circumstances was $12,000.

5.2.4 Damages in Sexual Harassment Cases

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

Case	Damages awarded
Gilroy v Angelov (2000) 181 ALR 57	$24,000.00
Elliott v Nanda (2001) 111 FCR 240	$15,000 (general damages) $100 (compensation for counselling) $5,000 (aggravated damages)
Shiels v James [2000] FMCA 2	$13,000 (hurt and humiliation) $4,000 (economic loss)
Johanson v Blackledge (2001) 163 FLR 58	$6,000 (general damages) $500 (special damages)
Horman v Distribution Group [2001] FMCA 52	$12,500
Wattle v Kirkland (No 2) [2002] FMCA 135	$28,035
Aleksovski v Australia Asia Aerospace Pty Ltd [2002] FMCA 81	$7,500 (non-economic loss)
McAlister v SEQ Aboriginal Corporation [2002] FMCA 109	$4,000 (general damages) $1,100 (special damages)
Beamish v Zheng [2004]FMCA 60	$1,000 (general damages)
Bishop v Takla [2004] FMCA 74	$20,000 (general damages) $13,246.40 (loss of income, medical expenses and interest) Note that the award of damages was reduced by an amount received in settlement against other respondents. Total damages awarded: $24,386.40.
Hughes v Car Buyers Pty Ltd [2004] FMCA 526	$7,250 (general damages – being $11,250 less $4,000 paid by a respondent against whom proceedings were discontinued) $5,000 (aggravated damages) $12,373.50 (special damages) Total damages awarded:$24,623.50

In *Beamish v Zheng*,[151] the respondent was found to have engaged in a range of conduct towards the applicant, including making sexual comments, attempting to touch the applicant's breasts and an offering the applicant $200 to have sex with him.

[149] [2004] FCA 654.
[150] [2003] FMCA 122.
[151] [2004] FMCA 60.

Driver FM noted the evidence of the applicant that the respondent's conduct had caused her upset, 'made her depressed and socially withdrawn and caused her physical illness, in particular vomiting'. This was corroborated by the applicant's mother. However, there was no medical evidence of any condition suffered by the applicant and Driver FM was not persuaded that she had suffered any ongoing psychological trauma. Driver FM noted that her bouts of vomiting might have had a physical cause, rather than resulting from the respondent's conduct. He awarded $1,000 in general damages for hurt and upset.

In *Bishop v Takla*,[152] the respondent was found to have engaged in a range of conduct which constituted sexual harassment, including sexual remarks and physical contact. Raphael FM found that the applicant was suffering from the effects of Post Traumatic Stress Disorder which affected her employability for a period and required ongoing medical assistance (although it was clear that her condition had improved since her initial depression).[153]

Raphael FM found that $20,000 in general damages was appropriate, as well as amounts for loss of income and medical expenses and interest – amounting to a nominal total of $33,246.40. The applicant's complaint against the second and third respondents to the complaint had been settled in mediation prior to the hearing. It was agreed between the parties that in the event of a finding against the first respondent, any award of damages should have deducted from it the amount the subject of the settlement, so that the applicant was not over compensated. Raphael FM had therefore been given a sealed envelope with the particulars of the settlement which he opened upon finding liability. His Honour accordingly deducted the sum of $8,860 (being that amount of the settlement which represented damages - a further $7,640 had also been paid by way of costs) from the total of the damages and interest, leaving an award of $24,386.40.

In *Hughes v Car Buyers Pty Limited,*[154] the respondents were found to have engaged in a range of conduct which constituted sexual harassment, including sexual remarks and physical contact. The first respondent, the employer company, was also found to have unlawfully discriminated against the applicant on the ground of sex. Walters FM found that the conduct of the respondents had a significant and negative impact on the applicant and that this impact continued until trial. Walters FM commented that '[t]here appears to be no doubt that [the applicant] has suffered depression (or a form of depression), anxiety, loss of motivation and loss of enjoyment of life'.[155] Walters FM also found that the applicant's relationship with her partner had been adversely affected by the respondents' conduct.

Walters FM found that the amount of $11,250 was the appropriate award for (general) non-economic loss in the circumstances of this case. The award for general damages was reduced by the amount of $4,000, being the monies paid by the third respondent to the applicant pursuant to a settlement agreement. The applicant had discontinued the proceedings in so far as they related to the third respondent prior to trial. Walters FM also awarded the applicant the amount of $12,373.50 for special damages,

[152] [2004] FMCA 74.
[153] Ibid [35].
[154] [2004] FMCA 526.
[155] Ibid [60].

comprising $12,086 for loss of income and $287.50 for out of pocket expenses. The claim for loss of income arose as the applicant was unable to find employment for 12 weeks after she ceased working for the respondent company.

Walters FM also considered that an award for aggravated damages was appropriate in this case. This was because the respondents failed to respond to correspondence from the Human Rights and Equal Opportunity Commission in respect of the complaint made by the applicant, and failed to involve themselves in the court proceedings. Walters FM found that the resolution of the applicant's complaint to the Commission was significantly delayed by the refusal of the respondents to involve themselves in the relevant processes in any way. Walters FM also found that the applicant suffered additional mental distress because of the delay, and because of her perception that the respondents considered her complaint and the subsequent proceedings were not worthy of acknowledgement or response. Walters FM found that the prolongation of the proceedings, the additional mental distress caused to the applicant and the frustration, humiliation and anger that she felt as a result of her complaint being ignored warranted an award in the sum of $5,000 as aggravated damages.

5.2.5 Damages under the DDA

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

Table 4: Overview of damages awarded under the DDA

Case	Damages awarded
Barghouthi v Transfield Pty Ltd (2002) 122 FCR 19	One week's salary
Haar v Maldon Nominees (2000) 184 ALR 83	$3,000
Travers v New South Wales (2001) 163 FLR 99	$6,250
McKenzie v Department of Urban Services and Canberra Hospital (2001) 163 FLR 133	$15,000 (hurt, humiliation and distress) $24,000 (lost wages)
Oberoi v Human Rights and Equal Opportunity Commission [2001] FMCA 34	$18,500 (pain and suffering, hurt, humiliation and loss of employability) $1,500 (special damages)
Sheehan v Tin Can Bay Country Club [2002] FMCA 95	$1,500
Randell v Consolidated Bearing Company (SA) Pty Ltd [2002] FMCA 44	$10,000 (hurt, humiliation and distress) $4,701 (economic loss)
McBride v Victoria (No. 1) [2003] FMCA 285	$5,000
Bassanelli v QBE Insurance [2003] FMCA 412	$5,000 $543.70 (interest)
Darlington v CASCO Australia Pty Ltd [2002] FMCA 176	$1,140 (lost wages; plus interest to be calculated at 9.5%)
Clarke v Catholic Education Office (2003) 202 ALR 340	$20,000 $6,000 (interest)

Power v Aboriginal Hostels Limited [2004] FMCA 452	$10,000 (injury to feelings) $5,000 (economic loss)

In *Power v Aboriginal Hostels Limited*,[156] Brown FM found that the respondent unlawfully discriminated against the applicant when it dismissed him from his employment on the basis of an imputed disability. In considering damages for non-economic loss Brown FM noted that it was conceded the applicant did not suffer a specific psychiatric or psychological illness following his dismissal.[157] His Honour was of the view that *Randell v Consolidated Bearing Company SA Pty Ltd*,[158] *Song v Ainsworth Game Technology Pty Ltd*[159] and *X v McHugh*[160] were comparable cases to *Power*. He regarded that $10,000, the amount awarded in each of those cases for injury to feelings, was the proper amount to award in this case.[161]

The applicant was also awarded $5,000 for economic loss. In considering economic loss Brown FM noted that according to the usual principles that apply in assessing damages in cases of tort, the applicant was under an obligation to mitigate his damages which followed from the unlawful dismissal. He noted that the applicant's employment prospects were not materially affected by his dismissal and that he did not attempt to find work after his dismissal but chose to pursue educational opportunities. Accordingly, it was not reasonable to make an award of damages on the basis of a period of eighteen months as the applicant had sought. But a period of six months which coincides with the time when the applicant was able to obtain employment [on a part-time basis as a drug and alcohol counsellor] was a more reasonable period.[162]

In *Catholic Education Office v Clarke*[163] the Full Federal Court upheld the damages awarded by the primary judge, Madgwick J,[164] ($20,000 for general damages plus $6,000 interest), which was described by Sackville and Stone JJ as 'relatively modest'.[165]

5.5 Declarations

In *Commonwealth v Evans*,[166] Branson J considered the power to make declarations under s 46PO(4) of the HREOC Act and found that it was appropriate to apply general law principles.[167] At general law it is established that a trial judge should not

[156] [2004] FMCA 452.
[157] Ibid [73].
[158] [2002] FMCA 44.
[159] [2002] FMCA 31.
[160] (1994) EOC 92-623.
[161] [2004] FMCA 452, [74]-[76].
[162] Ibid [81]-[82].
[163] [2004] FCAFC 197.
[164] *Clarke v Catholic Education Office* (2003) 202 ALR 340, 360-361 [86].
[165] [2004] FCAFC 197, [134].
[166] [2004] FCA 654.
[167] Ibid [57]-[60].

make a declaration which is not tied to proven facts.[168] Branson J also cited the following passage from *Warramunda Village Inc v Pryde*:[169]

> The remedy of a declaration of right is ordinarily granted as a final relief in a proceeding. It is intended to state the rights of the parties with respect to a particular matter with precision, and in a binding way. The remedy of a declaration is not an appropriate way of recording in a summary form, conclusions reached by the Court in reasons for judgment.

Her Honour appeared to reject the submission that s 46PO(4)(a) of the HREOC Act intended to authorise the making of a declaration in terms such as 'the respondent has committed unlawful discrimination', such a declaration being too general in its terms.[170] In the decision under appeal, Raphael FM had declared 'that the respondent unlawfully discriminated against the applicant contrary to s 14(2) of the *Sex Discrimination Act* by its actions in connection with the applicant's taking of carer's leave prior to 30 June 2000'. Branson J commented:

> A declaration in such terms is open to objection on two grounds. First, the declaration does not identify the 'actions in connection with the applicant's taking of carer's leave' upon which it is based. In this case, the relevant uncertainty as to the action to which the declaration refers is exacerbated by the fact that his Honour's reasons for judgment fail clearly to identify the actions intended to support the making of the declaration. Secondly, it may be assumed that amongst the actions taken within the NCA in connection with the applicant's taking of carer's leave would have been entirely lawful conduct such as the maintaining of leave records, the reallocation of duties etc. Yet the declaration is so widely drawn that actions of these kinds fall within its terms.[171]

Without deciding the issue, Branson J further noted that the power to make a declaration is discretionary and expressed doubt that a case for the grant of declaratory relief in addition to an award of damaged had been demonstrated.[172]

Chapter 6
Procedure and Evidence

6.4 Applications for Summary Dismissal

6.4.1 Principles Applied

(b) Exercise 'exceptional caution'

In *Rana v University of South Australia*,[173] Lander J, in allowing an appeal against the summary dismissal of the appellant's application noted that:

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[168] *Rural Press v Australian Competition and Consumer Commission* (2003) 203 ALR 217, [89]-[90] (Gummow, Hayne and Heydon JJ).
[169] (2001) 105 FCR 437, [8].
[170] [2004] FCA 654, [60].
[171] Ibid [61].
[172] Ibid [88].
[173] [2004] FCA 559.

> the philosophy of the Federal Magistrates Court is to provide inexpensive justice and a streamlined dispute resolution process. Litigants will often be self-represented and the documents they rely on as founding their claim will not doubt often be imprecisely articulated. In those circumstances, there is even more reason for the Federal Magistrates Court to be cautious before summarily dismissing an applicant's claim.[174]

His Honour further noted that the 'true inquiry' in considering an application to strike out an applicant's claim is not whether the claim 'lacked merit', but whether the claim 'failed to disclose a reasonable cause of action'.[175]

6.7 Scope of Applications under s 46PO of the HREOC Act to the FMS and Federal Court

6.7.1 Relationship between Application and Terminated Complaint

Although not making reference to the decision of Lehane J in *Travers v New South Wales*,[176] a similar approach to the requirements of s 46PO(3) was taken by Driver FM in *Ho v Regulator Australia Pty Ltd*.[177] His Honour ruled that the scope of the proceedings was to be determined by the complaint *as terminated by HREOC*, including any amendments which may have been made to the complaint while the matter was before HREOC, rather than the original terms of the complaint to HREOC.[178]

6.8 Dismissal of Application due to Non-Appearance of Applicant

Add footnote to end of penultimate sentence:

> See for example, *Ugur v Police Service of NSW* [2004] FCA 1032.

6.12 Miscellaneous Procedural and Evidentiary Matters

6.12.5 Representation by unqualified person

In *Groundwater v Territory Insurance Office*,[179] the applicant's father made an application to appear in proceedings on behalf of the applicant. The applicant claimed to be unable to attend court by reason of 'multiple chemical sensitivity' (a matter disputed by the respondents). Brown FM noted that s 46PQ of the HREOC Act allows for a person to be represented by a person who is not a barrister or solicitor 'unless the Court is of the opinion that it is inappropriate in the circumstances for the other person to appear'. His Honour noted that as a matter of general principle, 'the power

[174] Ibid [75].
[175] Ibid [79].
[176] [2000] FCA 1565.
[177] [2004] FMCA 62.
[178] Ibid [4].
[179] [2004] FMCA 381.

to grant leave to an unqualified advocate is to be used sparingly' and had regard to the following (citing with approval *P & R (No.1)*[180] and *Damjanovic v Maley*[181]):

- The complexity of the case. With minor or straightforward matters there is less difficulty with a lay person appearing to argue a case. The present matter raised a number of complicated issues.[182]

- The genuine difficulties of an unrepresented party, such as language difficulties or the unexpected absence of a legal adviser. The complication in the present case was that the difficulties faced by the applicant were the subject of dispute between the parties.[183]

- The absence of a duty to the Court and the unavailability of disciplinary measures in relation to lay advocates such that a lay advocate may not be able to provide balanced and informed submissions. Relevantly in this matter, the intended advocate 'fervently' believed his son's case, creating a 'real risk that he will not be able to provide balanced and informed submissions because of the fervour of his belief'.[184]

- The need to protect the applicant and respondent from the actions of an unqualified (and uninsured) person, which may lead to expense being incurred as a result of incompetent advice and inept representation.[185]

- The interests of justice. The general public has an interest in the effective, efficient and expeditious disposal of litigation in the Courts and the best way of achieving this is if both parties to an action have qualified lawyers.[186]

In the circumstances, Brown FM granted a limited right of appearance to the applicant's father, for interlocutory matters to advise how the applicant proposed to conduct proceedings.[187]

Chapter 7
Costs Awards

7.2 Relevance of Nature of the Jurisdiction

In *Fetherston v Peninsula Health (No.2)*,[188] Heerey J explicitly rejected the argument that normal costs principles should not apply to cases brought under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) and affirmed the general

[180] [2002] FMCAfam 65.
[181] Unreported, Supreme Court of NSW Court of Appeal, 19 July 2002.
[182] [2004] FMCA 381, [42].
[183] Ibid [43].
[184] Ibid [44].
[185] Ibid [45].
[186] Ibid [46].
[187] Ibid [52].
[188] [2004] FCA 594.

rule that 'a wholly successful defendant should receive his or her costs unless good reason is shown to the contrary'.[189] His Honour stated:

> While the Disability Discrimination Act is without doubt beneficial legislation, its characterisation as such does not mean that this Court is to apply any different approach as to costs. In conferring jurisdiction under a particular statute Parliament may conclude that policy considerations warrant a special provision as to costs, for example that there be no order as to costs or that costs only be awarded in certain circumstances, such as, for example, where a proceeding has been instituted vexatiously or without reasonable cause: Workplace Relations Act 1996 (Cth) s 347. The absence of any such provision applicable to the present case confirms that the usual principles as to costs are to apply. [190]

7.3 Factors Considered in Exercising Discretion as to Costs Orders

7.3.1 Where There is a Public Interest Element to the Complaint

In *Gluyas v Commonwealth (No.2)*,[191] the applicant was ordered to pay costs following summary dismissal of his claim of disability discrimination in employment.[192] Phipps FM rejected the submission of the unsuccessful applicant to the effect that there was a public interest element in his case, 'namely the difficulty people suffering from Asperger's syndrome have in engaging in employment'. His Honour held that '[t]here could only be a public interest element if there was some evidence that the applicant was discriminated against in employment because of his disability'.[193]

7.3.4 The Courts Should Not Discourage Litigants from Bringing Meritorious Claims and Should be Slow to Award Costs at an Early Stage

Driver FM reconsidered his decision in *Low v Australian Tax Office*[194] in *Drury v Andreco-Hurll Refractory Services Pty Ltd*,[195] in which his Honour awarded costs to the respondent following summary dismissal of the complaint. His Honour Driver FM stated:

> In the matter of *Low v Australian Taxation Office* [2000] FMCA 6, I declined to make a costs order noting that at that time I was dealing with relatively new legislation and that I considered that applicants should have a reasonable opportunity to take advice and assess their position before being subjected to a costs order. Conversely, in *Chung v University of Sydney* I did make a costs order in accordance with the scale of costs applicable generally to proceedings in this Court. Some three

[189] Ibid [8].
[190] Ibid [9].
[191] [2004] FMCA 359.
[192] [2004] FMCA 224.
[193] [2004] FMCA 359, [8].
[194] [2000] FMCA 6.
[195] [2004] FMCA 398.

> years have passed since I made the decisions in *Low* and *Chung*. We are no longer dealing with new legislation.[196]

Relevant to the matter before his Honour, the applicant was 'attempting to relitigate matters he was litigating in the [Australian Industrial Relations Commission]' and had been notified by the respondent of their intention to seek summary dismissal and the possible costs implications.

7.3.6 The Courts Will Discourage Unmeritorious Claims and Will Not Award Costs Where the Trial is Prolonged by the Conduct of Either Party

In *Ho v Regulator Australia Pty Ltd (No.2)*,[197] Driver FM rejected an argument by the applicant that the conduct of the respondent during the investigation and attempted conciliation of the matter by HREOC was relevant to the question of costs:

> I do not regard the conduct of the parties to a complaint to HREOC as relevant to a consideration of a costs order in proceedings before the Court consequent upon the termination of a complaint by HREOC. In the first place, the proceedings before HREOC are in the nature of private alternative dispute resolution proceedings. The Court only has jurisdiction to deal with a matter where conciliation fails before HREOC. It is entirely inappropriate for the Court to take into account what may or may not have occurred in the attempts at conciliation before HREOC for the purposes of costs in the court proceedings. No costs apply to conciliation proceedings before HREOC and there should be no costs implication arising subsequently in respect of those conciliation proceedings.[198]

The applicant had succeeded in relation to her claim of direct sex discrimination (see 3.2 above), although this did not sound in damages, and also in her claim of direct pregnancy discrimination (see 3.4.1 above), for which Driver FM awarded $1,000 in general damages. However, the majority of her application, which alleged sexual harassment, was rejected by the Court, Driver FM finding that the applicant had a genuine but delusional belief in her claims. With some adjustments for discrete interlocutory matters, Driver FM awarded the applicant 50 per cent of her costs, stating that

> although the issues upon which the applicant succeeded occupied less than 50 per cent of the hearing time (and presumably less than 50 per cent of the preparation time) the assessment of costs is not a strict mathematical exercise in circumstances where the parties were both partially successful and the issues between them are not readily severable.[199]

It was also held that the conduct of the respondent is not relevant to costs in *Hughes v Car Buyers Pty Limited*.[200] In that case the respondents ignored the HREOC

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[196] Ibid [13].
[197] [2004] FMCA 402.
[198] Ibid [6].
[199] Ibid [17].
[200] [2004] FMCA 526.

conciliation process and did not enter appearances in the proceedings in the Federal Magistrates Court. Walkers FM awarded the applicant $5,000 aggravated damages for the additional mental distress caused by the respondents' conduct. The applicant also sought costs on indemnity basis in reference to the respondents' behavior. Walkers FM held that it was appropriate for costs to be awarded on a party-party basis:

> In my opinion, to award costs on an indemnity basis in the present circumstances would be to inappropriately punish the respondents. It seems to me that the attitude that they adopted to the HREOC complaint is irrelevant insofar as costs in this court are concerned — although I recognise that the application in this court may not have had to be filed at all if the respondents had responded to the HREOC complaint. Whilst the respondents' refusal to participate in the proceedings in this Court has obviously upset and frustrated Ms Hughes, the fact of the matter is that the respondents have not sought to justify their actions or made inappropriate or unfounded allegations against Ms Hughes. They did not prolong the proceedings by making groundless contentions or filing unmeritorious applications. They simply let the proceedings run their course.[201]

[201] Ibid [96].