# Chapter 7
# Damages and Remedies

## Contents

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## 7.1 Section 46PO(4) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)

Section 46PO(4) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('HREOC Act') provides:

> If the court concerned is satisfied that there has been unlawful discrimination by any respondent, the court may make such orders (including a declaration of right) as it thinks fit, including any of the following orders or any order to a similar effect:
>
> (a) an order declaring that the respondent has committed unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination;
>
> (b) an order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant;
>
> (c) an order requiring a respondent to employ or re-employ an applicant;
>
> (d) an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent;
>
> (e) an order requiring a respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by an applicant;
>
> (f) an order declaring that it would be inappropriate for any further action to be taken in the matter.

This chapter discusses the approach taken by the Federal Court and FMC to damages and other remedies under s 46PO(4) in unlawful discrimination cases.

The principles applied to the assessment of damages are first considered. The chapter then sets out tables of damages awarded by the Federal Court and FMC in cases under the RDA, SDA (including a separate table for damages in sexual harassment cases) and DDA since the federal unlawful jurisdiction was transferred to those courts on 13 April 2000. The damages tables distinguish, where possible,

between damages for 'economic loss' (also known as 'special damages', including loss of income and other expenses caused by the discrimination such as medical expenses), damages for 'non-economic loss' (also known as 'general damages' for pain, suffering, hurt, humiliation etc), aggravated and exemplary damages (concepts discussed further at 7.2.1(c) below). Following each of the tables is a short summary of the basis for the damages award in each case.

The chapter then considers apologies, declarations, orders directing a respondent not to repeat or continue conduct and other remedies.

# 7.2 Damages

## 7.2.1 General Approach to Damages

### (a) Torts principles apply

The Full Federal Court discussed the approach to damages under the SDA in the matter of *Hall v Sheiban*.[1] Lockhart, Wilcox and French JJ delivered separate judgments and while there is no clear ratio on the issue of damages, the case has been cited for the proposition that torts principles are a starting point for the assessment of damages under discrimination legislation but that those principles should not be applied inflexibly.[2]

Lockhart J expressed the view that:

> As anti-discrimination, including sex discrimination, legislation and case law with respect to it is still at an early stage of development in Australia, it is difficult and would be unwise to prescribe an inflexible measure of damage in cases of this kind and, in particular, to do so exclusively by reference to common law tests in branches of the law that are not the same, though analogous in varying degrees, with anti-discrimination law. Although in my view it cannot be stated that in all claims for loss or damage under the Act the measure of damages is the same as the general principles respecting measure of damages in tort, it is the closest analogy that I can find and one that would in most foreseeable cases be a sensible and sound test. I would not, however, shut the door to some case arising which calls for a different approach.[3]

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

1 (1989) 20 FCR 217.
2 See, for example, *Stephenson v Human Rights and Equal Opportunity Commission* (1995) 61 FCR 134, 142; *Ardeshirian v Robe River Iron Associates* (1993) 43 FCR 475.
3 (1989) 20 FCR 217, 239.

respondent.[4] This approach has been followed in a number of subsequent cases under the SDA, RDA and DDA.[5]

## (b) Hurt, humiliation and distress

In a number of cases it has been held that in assessing general damages for hurt, humiliation and distress, awards should be restrained in quantum, although not minimal. Such awards should not be so low as to diminish the respect for the public policy of the legislation. In *Hall v Sheiban*,[6] Wilcox J cited with approval (in the context of damages for sexual harassment) the following statement of May LJ in *Alexander v Home Office*:[7]

> As with any other awards of damages, the objective of an award for unlawful racial discrimination is restitution. Where the discrimination has caused actual pecuniary loss, such as the refusal of a job, then the damages referrable to this can be readily calculated. For the injury to feelings however, for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and good sense of the judge and his assessors. Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the results which it seeks to achieve as do nominal awards. Further, injury to feelings, which is likely to be of a relatively short duration, is less serious than physical injury to the body or the mind which may persist for months, in many cases for life.[8]

In *Clarke v Catholic Education Office*[9] ('*Clarke*'), Madgwick J emphasised the compensatory nature of damages, stating:

> It was faintly suggested, on the strength of remarks made in a case decided by the Human Rights & Equal Opportunity Commission, that there were policy reasons why damages for a breach of the DDA should be substantial. It was also faintly suggested that an award should not be so low that it

4 Ibid.

5 *Johanson v Blackledge* (2001) 163 FLR 58, 83 [110]; *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91, [39]; *McAlister v SEQ Aboriginal Corporation* [2002] FMCA 109, [150]; *Escobar v Rainbow Printing Pty Ltd* [2002] FMCA 122, [39]; *Wattle v Kirkland (No 2)* [2002] FMCA 135, [70]; *Borg v Commissioner, Department of Corrective Services* (2002) EOC 93-198, 76,365; *Evans v National Crime Authority* [2003] FMCA 375, [110], [112]; *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209, [89]; *Carr v Boree Aboriginal Corporation* [2003] FMCA 408; *Bassanelli v QBE Insurance* [2003] FMCA 412, [56]; *Darlington v CASCO Australia Pty Ltd* [2002] FMCA 176, [39]; *McBride v Victoria (No 1)* [2003] FMCA 285, [119]-[128]; *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd* [2003] FMCA 160, [89]–[93].

6 (1989) 20 FCR 217, 256. See also *Gilroy v Angelov* (2000) 181 ALR 57, 76 [105]; *Johanson v Blackledge* (2001) 163 FLR 58, 84 [115] citing with approval *Horne v Press Clough Joint Venture* (1994) EOC 92-591, 77, 179; *Wattle v Kirkland (No 2)* [2002] FMCA 135, [71].

7 [1988] 2 All ER 118.

8 Ibid 122.

9 (2003) 202 ALR 340.

> might be eaten up by non-recoverable costs. Both propositions must be rejected. Damages are compensatory and no more.[10]

His Honour awarded $20,000 plus $6,000 in interest for the hurt caused to the student on whose behalf the case had been brought (a sum upheld on appeal and described as 'relatively modest'[11]). The respondent in that matter was found to have indirectly discriminated against a student in requiring him to receive teaching at one of their schools without the assistance of an Auslan interpreter. The basis for the award of general damages was as follows:

> Fortunately, as matters transpired, the injury to [the student] has probably not been great: the injury to his parents' sensibilities may have been acute but the damages are not to compensate them. They are to compensate the 'aggrieved person', namely [the student].
>
> [The student] would have been distressed and confused by the events in question. As a result of the respondents' proscribed conduct, he was effectively removed from the company of his primary school peers and friends on his transition to high school. Further and very significantly, these were friends who had learned Auslan. That would be very distressing. His transition was from a religious to a secular milieu, an added degree of change to cope with. As a child, it is very likely that he would and did register the respondents' attitude as one of rejection of him on account of his deafness, even though the disinterested adult can see that the position was much more complex than that. That would have been hurtful.
>
> In the scheme of things, the harm to [the student] is likely to prove to have been transient and not extreme. There is no warrant to inflate damages. In my view $20,000 together with some allowance for interest on three quarters of that sum would be ample compensation. I assess such interest at $6,000.[12]

Ronalds and Pepper have commented as follows on the issue of general damages:

> The damages in the discrimination arena under this head are relatively modest and amounts between $5,000-$15,000 are common. It appears that the courts have not accorded much weight or significance to the emotional loss and turmoil to an applicant occasioned by acts of unlawful discrimination and harassment. On some occasions, there was not sufficient or any evidence to support a claim for such damages.[13]

In *Shiels v James*,[14] Raphael FM suggested, in the context of a sexual harassment matter, that the authorities indicated a range for damages for hurt and humiliation of $7,500-$20,000. However, Branson J in *Commonwealth v Evans*[15] commented, without expressing a concluded view, that this range seemed 'higher than the authorities fairly support'.[16] The tables at 7.2.2-7.2.5 below set out damages awards in all recent unlawful discrimination cases and may be of assistance in assessing the range of general damages awarded.

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10 Ibid 360 [83].
11 *Catholic Education Office v Clarke* [2004] FCAFC 197, [134] (Sackville and Stone JJ).
12 (2003) 202 ALR 340, 360-61 [84]-[86].
13 Chris Ronalds and Rachel Pepper, *Discrimination Law and Practice* (2nd ed, 2004), 218.
14 [2000] FMCA 2, [79].
15 [2004] FCA 654.
16 Ibid [82].

## (c) Aggravated and exemplary damages

In *Elliott v Nanda*,[17] Moore J referred to a range of authorities, including discrimination cases, and noted that it is 'generally accepted that the manner in which a defendant conducts his or her case may exacerbate the hurt and injury suffered by the plaintiff so as to warrant the award of additional compensation in the form of aggravated damages'.[18]

His Honour noted that, in the context of anti-discrimination law, 'a wide variety of matters may affect the decision to award aggravated damages in any particular case'.[19] He stated, however, that the stress of litigation is not, in itself, sufficient to attract an award of aggravated damages: 'the defendant must conduct his or her case in a manner which is unjustifiable, improper or lacking in bona fides'.[20]

In that matter, the first respondent was found to be liable to pay the applicant the amount of $5,000 in aggravated damages to compensate her for the additional stress and mental anguish resulting from the considerable delay to the resolution of the complaint caused by him.[21]

In *Font v Paspaley Pearls*,[22] the applicant sought aggravated damages by reason of the conduct of the respondents in the course of the litigation. Raphael FM noted:

> In this case the conduct of the respondents complained of is the putting into evidence, by way of affidavits of the respondents witnesses and cross-examination of the applicant, various matters relating to the way she conducted herself with men, her conversations on sexual matters and her dress. Although the applicant sought to have these matters removed from the affidavits, I was pressed by the respondents to keep them in. I did so reluctantly and subject to their relevance. I found nothing relevant about them. They did not assist me in anyway to form a view about the applicant or the truth of her allegations … I accept the submission by the applicant's Counsel that the former evidence was no more than an attempt to blacken the character of the applicant so that I should think less favourably of her in coming to any conclusions about the truthfulness of her evidence or the quantum of any damage she might have suffered. I think the whole exercise was unjustifiable and inappropriate and must have added to the distress felt by the applicant in giving her evidence and proceeding with the claim.[23]

In considering the appropriate remedy given the respondent's conduct, Raphael FM distinguished between 'exemplary' and 'aggravated' damages. His Honour

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17 (2001) 111 FCR 240.
18 Ibid 297 [180].
19 Ibid 297 [181].
20 Ibid 297-98 [182]. His Honour's decision was applied in *Oberoi v Human Rights and Equal Opportunity Commission* [2001] FMCA 34, [44].
21 *Elliott v Nanda* (2001) 111 FCR 240, 298 [185].The proceedings before Moore J were for enforcement of the decision by HREOC, HREOC having heard the matter as a tribunal at first instance. Particularly relevant on this issue was the first respondent's failure to participate in the HREOC hearing.
22 [2002] FMCA 142, [161]-[166].
23 Ibid [160].

noted that exemplary damages are more punitive than compensatory in character. The type of action which might occasion an award of exemplary damages is

> reprehensible conduct which might perhaps have warranted punishment, rather than findings of the infliction of hurt, insult and humiliation.[24]

His Honour continued:

> The importance of the distinction between compensatory and punitive damages is that an applicant must establish a loss in order to be awarded compensatory damages. Even where that loss is constituted by something as abstract as hurt or humiliation the Courts have striven to measure those feelings and give them a value.

When considering conduct which took place during the course of the trial, Raphael FM suggested that it may be more appropriate to award exemplary, rather than aggravated, damages:

> Is the applicant expected to ask for an adjournment to produce further medical evidence of her distress occasioned by the unwarranted prosecution of the respondent's case? I think not. I think it is safer to recognise… the punitive element in these damages.

His Honour awarded $7,500 in exemplary damages. The fact that the applicant had sought aggravated, rather than exemplary, damages was not, in his Honour's view, a bar to recovery:

> The Federal Magistrates Court is not a court of strict pleading and this is particularly true in matters brought to it under the HREOC Act for breaches of one of the Commonwealth Anti-discrimination Acts. I do not think that the fact that the conduct complained of was described as entitling the applicant to aggravated damages, when in fact a proper description would have included exemplary damages, should prevent the applicant from recovering … All that I propose to do is to give the award which I intend to make its proper nomenclature, and that is 'exemplary damages'.[25]

In *Hughes v Car Buyers Pty Ltd*,[26] the applicant sought and was awarded $5,000 in aggravated damages for the additional mental distress, frustration, humiliation and anger caused by the conduct of the respondent in the course of the proceedings. The respondent had failed to respond to correspondence from HREOC about the complaint made by the applicant and failed to involve themselves in the court proceedings. Walters FM found that the resolution of the

24 Ibid [162], citing *Hehir v Smith* [2002] QSC 92, [42].

25 Ibid [166]. Cf *Hehir v Smith* [2002] QSC 92; *Myer Stores Limited v Soo* [1991] 2 VR 597 where it was held that an absence of a claim for exemplary damages prevented such an award being made.

26 (2004) 210 ALR 645.

applicant's complaint to HREOC was significantly delayed by the refusal of the respondents to involve themselves in the relevant processes in any way. His Honour held that the applicant had suffered additional mental distress because of the delay and because of her perception that the respondents considered her complaint and the subsequent proceedings were not worthy of acknowledgement or response.

While the applicant did not seek exemplary damages, Walters FM stated (in obiter comments) that he disagreed with Raphael FM's conclusion in *Font v Paspaley Pearls* 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)). His Honour went on to state that '[i]t follows, in my opinion, that although the court has power to award aggravated damages, it does not have power to award exemplary damages'.[27]

Walters FM cited[28] the following passage from the judgment of Windeyer J in *Uren v John Fairfax and Sons Pty Ltd*: [29]

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

Walters FM observed that compensatory damages must be approached by considering the effect of the wrongful act on the plaintiff, whereas exemplary damages (being punitive) are to be approached from a different perspective. In considering whether to award exemplary damages, the focus of the inquiry is on the wrongdoer, not upon the party who was wronged.[30]

Note, however, that Walters FM does not appear to have considered the apparently inclusive nature of the list of potential orders that a court may make upon a finding that there has been unlawful discrimination. As Carr J in *McGlade v Lightfoot*[31] observed, 'the list of specified orders in s 46PO(4) is not exhaustive – see the use of the word "including"'.[32] This suggests that the Court may, indeed, enjoy the power to make orders for exemplary damages in appropriate cases.

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27 Ibid 657 [68].
28 Ibid 657 [69].
29 (1966) 117 CLR 118, 149. Walters FM also observed that this passage was quoted with apparent approval in *Gray v Motor Accident Commission* [1998] HCA 70, per Gleeson CJ, McHugh, Gummow and Hayne JJ.
30 [2004] FMCA 526, [71].
31 (2002) 124 FCR 106.
32 Ibid 123 [80].

### 7.2.2 Damages under the RDA

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

**Table 1: Overview of damages awarded under the RDA**

| Case | Damages awarded |
|---|---|
| (a) *Carr v Boree Aboriginal Corp* [2003] FMCA 408 | Total Damages: $21,266.50<br>$11,848.61 (economic loss)<br>$7,500.00 (non-economic loss)<br>$1,917.89 (interest) |
| (b) *McMahon v Bowman* [2000] FMCA 3 | $1,500 (non-economic) |
| (c) *Horman v Distribution Group* [2001] FMCA 52 | $12,500 (non-economic: includes special damages for medication costs) |
| (d) *Gibbs v Wanganeen* (2001) 162 FLR 333 | Nil see obiter comments |

#### (a) *Carr v Boree Aboriginal Corp*

In *Carr v Boree Aboriginal Corp*,[33] Raphael FM made a finding that the respondent employer, through its agents and servants, had unlawfully discriminated against Ms Carr and dismissed her because of her 'race or non-Aboriginality'.[34] In the absence of any evidence to the contrary, his Honour accepted the claimed amount for special damages and awarded the sum of $11, 848.61 for loss of earnings, made up of lost wages, holiday pay and unpaid overtime together with interest. In making an award of $7,500.00 for general damages, Raphael FM took into account that the applicant had 'suffered hurt, humiliation and distress'[35] and the fact that no medical evidence had been adduced.

#### (b) *McMahon v Bowman*

In *McMahon v Bowman*,[36] Driver FM considered the appropriate amount of the award of damages for an act of racial hatred which had taken place as part of a neighbourhood dispute. His Honour did not award damages in respect of the altercation between Mr Bowman and Mr McMahon that had formed part of the

33 [2003] FMCA 408.
34 Ibid [9].
35 Ibid [12].
36 [2000] FMCA 3.

complaint, 'as Mr McMahon should not be twice punished for his actions'[37] and the altercation was the subject of proceedings in the local court where Mr McMahon was defending a charge of assault. His Honour was of the view that the words the subject of the complaint, addressed as they were to an entire family including impressionable children, were insulting and the appropriate amount of compensation was $1,500.

### (c) *Horman v Distribution Group*

In *Horman v Distribution Group*,[38] the applicant partially succeeded in her complaints under the RDA and the SDA. In awarding damages, Raphael FM took into account the medical symptoms the applicant suffered (mainly anxiety and panic attacks, confirmed by medical practitioners and concern over the possibility of miscarriage) and the type of incident to which the applicant was subjected. His Honour awarded $12,500 including special damages for medication costs.[39]

### (d) *Gibbs v Wanganeen*

In *Gibbs v Wanganeen*,[40] Driver FM dismissed the application but went on to consider the relief that he would have awarded had the complaint succeeded. The case involved an allegation of vilification of a prison officer by a prisoner. His Honour noted that there was a procedure within the prison for dealing with racial abuse, or any other abuse, of a prison officer by a prisoner. That procedure was followed and had resulted in a penalty being imposed upon the prisoner. In those circumstances, Driver FM suggested that it 'would be neither necessary nor desirable that this Court impose an additional penalty on the respondent'.[41] However, he accepted that:

> the legislation is not punitive, it is compensatory and there is the possibility that a prison officer, or even this prison officer, may sustain injury, whether to his feelings or otherwise, necessitating some form of compensation. This Court cannot arbitrarily refuse to provide relief where relief is called for: *Hall v Sheiban* (1988) 85 ALR 503. As a general principle, however, my view is that matters such as the present can and should be adequately dealt with in accordance with the rules regulating conditions within the prison.[42]

## 7.2.3 Damages under the SDA Generally

The following table gives an overview of damages awarded under the SDA since the transfer of the hearing function to the FMC and the Federal Court on 13 April 2000. The reasoning underlying those awards is summarised below. Note that sexual harassment matters are not dealt with in this section: they are considered separately in 7.2.4.

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37 Ibid [30].
38 [2001] FMCA 52.
39 Ibid [70].
40 (2001) 162 FLR 333.
41 Ibid 338 [20].
42 Ibid 338 [21].

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

| Case | | Damages awarded |
|---|---|---|
| (a) | *Font v Paspaley Pearls* [2002] FMCA 142 | Total Damages: $17,500<br>$10,000 (non-economic loss)<br>$7,500 (exemplary damages) |
| (b) | *Grulke v KC Canvas Pty Ltd* [2000] FCA 1415 | Total Damages: $10,000<br>$7,000 (economic loss)<br>$3,000 (non-economic loss) |
| (c) | *Cooke v Plauen Holdings* [2001] FMCA 91 | $750 (non-economic) |
| (d) | *Song v Ainsworth Game Technology Pty Ltd* [2002] FMCA 31 | Total Damages: $22,222 (approx)<br>$10,000 (non-economic loss)<br>$244.44 per week from 21.2.01 – 8.3.02 less $977.76 (economic loss) |
| (e) | *Escobar v Rainbow Printing Pty Ltd (No 2)* [2002] FMCA 122 | Total damages: $7,325<br>$2,500 (non-economic loss)<br>$4,825.73 (economic loss) |
| (f) | *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209 | Total damages: $39,294<br>$30,695 (economic loss: includes salary, motor vehicle benefits and superannuation)<br>$5,000 (non-economic loss)<br>$3,599 (interest)<br>*(minus an amount due for income tax, to be paid to the Australian Taxation Office)* |
| (g) | *Evans v National Crime Authority* [2003] FMCA 375, partially overturned on appeal: *Commonwealth v Evans* [2004] FCA 654 | Total damages: $41,488<br>$12,000 (non-economic loss: *reduced from $25,000 on appeal*)<br>$21,994.73 (economic loss: *not challenged on appeal*)<br>$7,493.84 (interest: *subject to recalculation after appeal*) |
| (h) | *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd* [2003] FMCA 160 | $10,000 (non-economic loss)<br>+ Interest |
| (i) | *Kelly v TPG Internet Pty Ltd* (2003) 176 FLR 214 | $7,500 (non-economic loss) |

| | | |
|---|---|---|
| (j) | *Gardner v All Australia Netball Association* (2003) 197 ALR 28 | $6,750 (agreed damages) |
| (k) | *Ho v Regulator Australia Pty Ltd* [2004] FMCA 62 | $1,000 (non-economic loss) |
| (l) | *Howe v Qantas Airways Ltd* [2004] FMCA 242; *Howe v Qantas Airways Ltd (No 2)* [2004] FMCA 934 | Total damages: $27,753.85 + interest<br>$3,000 (non-economic loss)<br>$24,753.85 (gross) (economic loss)<br>+ Interest |

### (a) *Font v Paspaley Pearls*

In *Font v Paspaley Pearls*,[43] in addition to $7,500 in exemplary damages awarded for the 'unjustifiable and inappropriate' manner in which the respondents had conducted aspects of the proceedings,[44] Raphael FM awarded the applicant the amount of $10,000 as general damages. In arriving at that figure, his Honour had regard to a schedule of damages awarded during the period HREOC had its hearing function and to decisions of the FMC. His Honour also noted that he had borne in mind 'what I regard to be a serious failure of the first respondent to put in place any appropriate machinery for dealing with this type of complaint'.[45]

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

In *Grulke v KC Canvas Pty Ltd*,[46] the precise basis of the claim is unclear from the report, although Ryan J noted that he was satisfied that s 14 of the SDA had been contravened. His Honour awarded $7,000 for lost earnings and $3,000 for general damages as compensation for 'psychological harm inflicted by the injury to the applicant's feelings which occurred during the course of employment'.[47] That injury was said to be 'substantially exacerbated by the termination of that employment in the circumstances that she recounted'[48] (the nature of those circumstances is unclear from the report). Ryan J declined to order an apology in light of the fact that the respondent was a corporation and that a pecuniary award of damages had been made.

43 [2002] FMCA 142.
44 See 7.2.1(c) above.
45 [2002] FMCA 142, [155].
46 [2000] FCA 1415.
47 Ibid [2].
48 Ibid.

## (c) *Cooke v Plauen Holdings*

The applicant in *Cooke v Plauen Holdings*[49] failed to make out a claim of sexual harassment. However, Driver FM was satisfied that the applicant had been discriminated against on the basis of her sex in contravention of s 14 of the SDA. His Honour refused the applicant's claim for economic loss. In assessing general damages at an amount of $750, his Honour said:

> Although in recent times there has been a tendency for damages awards for non-economic loss to increase, most of the higher awards of damages in recent years have concerned very serious cases of sexual harassment. I have found that this is not a case of sexual harassment. The conduct complained of in this case was reprehensible in management terms but not otherwise. It was conduct that a reasonable person would have anticipated would be distressing to a young and inexperienced employee.[50]

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

In *Song v Ainsworth Game Technology Pty Ltd*,[51] Raphael FM awarded the applicant $10,000 general damages in respect of a claim that the applicant's dismissal involved discrimination on the ground of family responsibilities in contravention of s 14(3A) of the SDA. His Honour also awarded damages for loss of earnings up to the date of judgment. His Honour further ordered that the applicant be reinstated and made orders varying her employment agreement.

## (e) *Escobar v Rainbow Printing Pty Ltd (No 2)*

*Escobar v Rainbow Printing Pty Ltd (No 2)*[52] ('*Escobar*') also involved a successful claim of discrimination on the ground of family responsibilities. In calculating the applicant's economic loss, Driver FM first reduced the amount claimed to take into account the fact that, if the applicant had not been dismissed, she would have been available for work only two days per week.

His Honour further reduced the amount of damages claimed for economic loss having regard to the applicant's duty to mitigate her loss. The applicant's relationship with her partner broke down after her dismissal. From the time that this relationship broke down, she was unable to work (save for limited casual work) by reason of her family responsibilities. His Honour said that the applicant's inability to work from that time was not something for which the respondent should be held responsible.[53]

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49 [2001] FMCA 91.
50 Ibid [42].
51 [2002] FMCA 31.
52 [2002] FMCA 122.
53 Ibid [40].

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

> … the applicant suffered hurt, humiliation and distress when she was terminated... In *Hickie v Hunt & Hunt* an amount of $25,000 was awarded for non economic loss. In *Song v Ainsworth Game Technology* the sum of $10,000 was awarded. Both of those cases involved a continuing employment relationship in unsatisfactory circumstances and the distress of the applicant was ongoing. In the present case the distress of the applicant was severe initially but would have resolved within a few months when the applicant reconciled herself to her present position. In addition, there was an intervening factor of the breakdown of the applicant's personal relationship with her partner for which the respondent was not responsible. An award of damages for non-economic loss in the present case should be somewhat lower than that awarded in *Hickie* and in *Song*. The award made in *Bogel v Metropolitan Health Services* (2000) EOC Para 93-069 was in the sum of $2,500 which I find to be an appropriate award in the present circumstances.[54]

## (f) *Mayer v Australian Nuclear Science and Technology Organisation*

In *Mayer v Australian Nuclear Science and Technology Organisation*[55] ('*Mayer*'), the applicant was awarded damages in the sum of $39,294, including pre-judgment interest of $3,599, after the applicant was successful in her claim of pregnancy and sex discrimination. As in *Escobar*, Driver FM assessed the damages for economic loss on the basis that the applicant was only able to work for 3 days a week. Entitlements for economic loss suffered in terms of lost salary, motor vehicle benefits and superannuation amounted to $30,695. The applicant received this compensation for the period when she was entitled to receive a full-time income and the three-month notice period. She did not receive any compensation for the period following as the respondent was entitled to terminate her employment from this date. In addition, his Honour found that the applicant did not make any serious efforts to find alternative employment, and therefore failed to mitigate any loss that she may have suffered after that date.

The respondent in *Mayer* also claimed that the applicant failed to mitigate her loss prior to that date by not making adequate enquiries about child care. Driver FM rejected this contention, stating:

> It is true that Ms Mayer's efforts to find child care were desultory and limited. She only looked for full-time places. However, Ms Mayer was proceeding (correctly) on the basis that her employer required her to work full-time, and she did not want to. Ms Mayer's efforts to find child care are irrelevant to the issue of mitigation.[56]

54 Ibid [42].
55 [2003] FMCA 209.
56 Ibid [95].

The applicant was also awarded $5,000 for non-economic loss. Driver FM considered it appropriate that the award on this issue should be in excess of the $2,500 awarded in *Escobar* by reason of the fact that the applicant suffered depression requiring treatment. Driver FM found the applicant 'was depressed and her state of mind would have been adversely affected by the respondent's refusal of part time work'.[57] The respondent was ordered to deduct from the damages awarded and remit to the ATO an amount due for income tax calculated on the basis that the damages awarded included an assessable income in the sum of $13,642, and an eligible termination payment in the sum of $9,852.[58]

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

At first instance in *Evans v National Crime Authority*[59] ('*Evans*'), general damages in the sum of $25,000 plus interest in the sum of $7,493.84 were awarded following a finding of discrimination on the ground of family responsibilities. Raphael FM stated:

> In anti-discrimination cases where no medical evidence is called or any serious medical sequelae alleged damages are given for hurt and humiliation…
>
> ….
>
> In this case, medical evidence was produced, the consensus of opinion is that the applicant suffered clinical depression as a result of the actions of the NCA which lasted at least up until the end of 2000 … [T]he appropriate figure for general damages in this case should take into account the effect of the actions of the NCA upon the applicant. I note that it is over 10 years since Wilcox J awarded damages of $20,000 … and that in *Rugema v Gadston Pty Limited* (1997), (unreported Commissioner Webster) the sum of $30,000.00 in non economic losses was awarded for major depressive disorder. It is my view that the sum of $25,000.00 is the appropriate award today for this applicant.[60]

Special damages for economic loss were also awarded in the sum of $21,994.73. This figure includes wage loss, loss of superannuation and interest on both of these amounts.

On appeal from the decision of Raphael FM in *Evans*, Branson J allowed an appeal against the award of $25,000, for non-economic loss for discrimination on the ground of family responsibilities.[61] Her Honour held that the appropriate award for non-economic loss in the circumstances was $12,000.[62]

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57 Ibid [97].

58 Note that because this amount was necessarily unspecified (until calculated by the ATO), it is not reflected in the damages figure stated in the table at the start of this section.

59 [2003] FMCA 375.

60 Ibid [111]-[112].

61 *Commonwealth v Evans* [2004] FCA 654.

62 Ibid [84].

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

In *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd,*[63] the applicant was awarded $10,000 plus interest for non-economic loss after she was found to have been discriminated against on the ground of pregnancy. The first respondent was also ordered to provide the applicant with a personal apology. The non-economic loss suffered was the anger and upset the applicant felt when the position she returned to following her maternity leave was not what had been represented to her. She had suffered a loss of status. She felt she was not being given important work to do and was concerned she would suffer a loss of career opportunity. Driver FM stated:

> Ms Rispoli should receive a substantial sum for her non-economic loss, given the period of approximately 16 months over which it was experienced, given that it was aggravated by the confirmation of Ms Rispoli's loss of status in March 2000 and given the need to enforce respect for the public policy behind the SDA.[64]

The sum awarded for non-economic loss was only awarded for the period until the applicant's voluntary resignation. Although the applicant was clearly distressed when she resigned from her employment, that was found to be 'a problem of her own making',[65] for which the respondent was not liable.

The applicant did not receive damages for economic loss. Although she was placed in a position not comparable in status to the position she held prior to taking maternity leave, she received the same remuneration and therefore suffered no loss during the period up to her resignation. In relation to the period after her resignation, his Honour declined to award damages for economic loss because 'the chain of causation between the discrimination committed by the first respondent and Ms Rispoli's loss of income following her resignation was broken by her own action'.[66] Damages and personal apologies were also sought against the second and third respondents, who were natural persons employed by the first respondent. These proceedings were dismissed on an issue of jurisdiction.

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

The applicant in *Kelly v TPG Internet Pty Ltd*[67] was awarded $7,500 in general damages on the grounds of pregnancy discrimination. No special damages for economic loss were awarded in this case as the respondent had discriminated against the applicant by offering her the position of customer service and billing manager on an acting basis, rather than in a permanent capacity, following a period of maternity leave. As such, it was held that no loss of wages arose out of the discriminatory conduct.

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63 [2003] FMCA 160.
64 Ibid [92].
65 Ibid [91].
66 Ibid [89].
67 (2003) 176 FLR 214.

## (j) *Gardner v All Australia Netball Association*

In *Gardner v All Australia Netball Association*,[68] the respondent was found to have discriminated against the applicant by imposing an interim ban preventing pregnant women from playing in a netball tournament administered by the respondent. Raphael FM found this to be a breach of ss 7 and 22 of the SDA. The applicant was awarded the sum of $6,750 by way of agreed damages. This covered lost match payments, sponsorship and hurt and humiliation suffered by the applicant.

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

In *Ho v Regulator Australia Pty Ltd*,[69] Driver FM found that the respondent had discriminated against the applicant on the basis of her pregnancy in requiring her to attend a meeting with an independent witness to discuss her need for maternity leave. The applicant was awarded $1,000 in general damages. This amount was a sum reduced to take into account the fact that the extreme and unforeseeable reaction which the applicant had in fact experienced was caused by a personality disorder which was not known to the respondent.

## (l) *Howe v Qantas Airways Ltd*

The respondent in *Howe v Qantas Airways Ltd*[70] was found to have unlawfully discriminated against the applicant on the basis of her pregnancy by refusing her access to her accumulated sick leave when she was unable to continue to work as a 'long haul' flight attendant by reason of her pregnancy. This resulted in the applicant taking unpaid leave. The applicant was awarded $3,000 in general damages for non-economic loss (distress)[71] and special damages of $24,753.85 calculated on the basis of the applicant's salary for sick leave purposes for the period when she was entitled to be taking that leave.[72]

In reaching the figure for special damages, his Honour took into account, and offset the award by, an amount equal to the applicant's salary for each day of sick leave accrued while on unpaid leave, stating that the applicant 'was not entitled to have the benefit of the sick leave she accrued during [the] period of unpaid maternity leave as she is receiving damages to compensate her for not being granted sick leave for that period'.[73]

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68 (2003) 197 ALR 28.
69 [2004] FMCA 62.
70 [2004] FMCA 242; see also *Howe v Qantas Airways Ltd (No 2)* [2004] FMCA 934 for further discussion of the calculation of damages.
71 [2004] FMCA 242, [134].
72 Ibid [133], [2004] FMCA 934, [8].
73 [2004] FMCA 242, [133].

### 7.2.4 Damages in Sexual Harassment Cases

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

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

| Case | Damages awarded |
|---|---|
| (a) *Gilroy v Angelov* (2000) 181 ALR 57 | Total damages: $24,000<br>$20,000 (non-economic loss)<br>$4,000 (interest) |
| (b) *Elliott v Nanda* (2001) 111 FCR 240 | Total damages: $20,100<br>$15,000 (non-economic loss)<br>$100 (economic loss: cost of counselling)<br>$5,000 (aggravated damages) |
| (c) *Shiels v James* [2000] FMCA 2 | Total damages: $17,000<br>$13,000 (non-economic loss)<br>$4,000 (economic loss) |
| (d) *Johanson v Blackledge* (2001) 163 FLR 58 | Total damages: $6,500<br>$6,000 (non-economic loss)<br>$500 (economic loss: cost of counselling) |
| (e) *Horman v Distribution Group* [2001] FMCA 52 | $12,500 (non- economic loss, includes cost of medication) |
| (f) *Wattle v Kirkland (No 2)* [2002] FMCA 135 | Total damages: $28,035<br>$15,000 (non-economic loss)<br>$7,600 (economic loss *(reduced from $9,100 on appeal))*<br>$5,435 (interest) |
| (g) *Aleksovski v Australia Asia Aerospace Pty Ltd* [2002] FMCA 81 | $7,500 (non-economic loss) |
| (h) *McAlister v SEQ Aboriginal Corporation* [2002] FMCA 109 | Total damages: $5,100<br>$4,000 (non-economic loss)<br>$1,100 (economic loss) |

| | | |
|---|---|---|
| (i) | *Beamish v Zheng* [2004] FMCA 60 | $1,000 (non-economic loss) |
| (j) | *Bishop v Takla* [2004] FMCA 74 | Total damages: $24,386.40<br>$20,000 (non-economic loss)<br>$13,246.40 (economic loss: includes loss of income, medical expenses and interest)<br>*NB: The award of damages was reduced by $8,860, an amount received in settlement against other respondents.* |
| (k) | *Hughes v Car Buyers Pty Ltd* (2004) 210 ALR 645 | Total damages: $24,623.50<br>$7,250 (non-economic loss (*$11,250 less $4,000 paid by a respondent against whom proceedings were discontinued))*<br>$5,000 (aggravated damages)<br>$12,373.50 (economic loss – $12,086 for loss of income and $287.50 for expenses) |
| (l) | *Trainor v South Pacific Resort Hotels Pty Ltd* [2004] FMCA 374 | Total damages: $17,536.80<br>$6,564.65 (non-economic loss: includes $1,564.65 of interest)<br>$10,972 (economic loss: includes $6,564.65 loss of income and interest, $1,907.50 medical expenses and $2,500 for future loss of income) |

## (a) *Gilroy v Angelov*

The applicant in *Gilroy v Angelov*[74] was dismissed from her employment. However, Wilcox J found that the dismissal was not causally connected to the acts of sexual harassment which his Honour had found to have taken place. Rather, his Honour found that the dismissal was caused by a misunderstanding and jealousy on the part of one of the principals of the respondent employer.

In those circumstances, there could be no award of special damages for economic loss arising from the dismissal. Nevertheless, Wilcox J found that the conduct that constituted sexual harassment had serious consequences for the applicant. Those consequences were exacerbated by her employer's failure to support her and by her abrupt and unfair dismissal. Wilcox J quoted and adopted his comments in *Hall v Sheiban*[75] in relation to the calculation of general damages for discrimination and awarded the applicant $20,000 plus interest under that head.

74 (2000) 181 ALR 57.
75 (1989) 20 FCR 217.

## (b) *Elliott v Nanda*

In *Elliott v Nanda*,[76] the first respondent, Dr Nanda, was found to have engaged in conduct which amounted to sexual harassment and discrimination on the basis of sex. Moore J awarded $15,000 for general damages as well as $100 as compensation for counselling received by the applicant. Moore J further found that the first respondent (Dr Nanda) was liable to pay the applicant the amount of $5,000 in aggravated damages to compensate her for the additional stress and mental anguish resulting from the considerable delay to the resolution of the complaint caused by him.[77]

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

> This submission fails to give full effect to s.105 which results in a person to whom the section applies being treated as having done the unlawful act of another…the Court has power under s 46PO(4) to make such orders...as it thinks fit [including] an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent.[78]

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

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

76 (2001) 111 FCR 240.
77 Ibid 298 [185]. See 7.2.1(c) above.
78 Ibid 298 [186].

> satisfies the liability then the respondent is to contribute $10,100. Plainly it is only the respondent who is liable to pay the $5000 aggravated damages.[79]

## (c) *Shiels v James*

In *Shiels v James*[80] ('*Shiels*'), Raphael FM awarded general damages and damages for economic loss, after finding that the applicant had been subjected to behaviour including comments of a sexual nature, unwelcome touching and a 'pattern of sexual pressure'.[81] As to the first head, his Honour noted that the sexual harassment cases heard by HREOC and the Federal Court during the time that HREOC had its hearing function indicated a range for general damages of between $7,500 and $20,000.[82] His Honour further noted that the higher awards had been made in cases involving more physical action[83] or more substantial physical sequelae.[84] Bearing these matters in mind, Raphael FM ordered the respondents to pay the applicant $13,000 for hurt and humiliation. His Honour also awarded special damages for economic loss in the amount of $4,000, which he described as a 'cushion for loss of employability'.[85]

## (d) *Johanson v Blackledge*

Driver FM in *Johanson v Blackledge*[86] compared the hurt and distress suffered by the applicant to that suffered by the applicant in *Shiels.* His Honour expressed the view that the sexual harassment in the case before him was substantially less serious than *Shiels*, involving a single event which occurred by accident with none of the consequences involved in *Shiels*. Accordingly, $6,000 was for general damages, reduced by one third in recognition of a voluntary apology made by the respondents. His Honour also allowed the applicant $500 for special damages (being compensation for the cost of three counselling sessions).

## (e) *Horman v Distribution Group*

The applicant in *Horman v Distribution Group*[87] led medical evidence concerning the effect of the conduct which was found to constitute sexual harassment and discrimination in contravention of s 14(2)(b) of the SDA. That evidence indicated that the applicant had suffered from anxiety and panic attacks and that, as a result of a heated argument the applicant had with another employee in September 1997, the applicant nearly suffered a miscarriage. Raphael FM found that the

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79 *Elliott v Nanda* [2001] FCA 550, [14].
80 [2000] FMCA 2.
81 Ibid [62]-[64].
82 Note that Branson J in *Commonwealth v Evans* [2004] FCA 654, [82] suggested, without expressing a concluded view, that 'the range … identified [by Raphael FM in *Shiels*] may be higher than the authorities fairly support.'
83 *Harwin v Pateluch* (Unreported, HREOC, Commissioner O'Connor, 21 August 1995), extract at (1995) EOC 92-770.
84 *Smith v Buvet* (1996) EOC 92-840.
85 [2000] FMCA 2, [79].
86 (2001) 163 FLR 58.
87 [2001] FMCA 52.

applicant's symptoms fell within the 'less serious band', although he specifically noted that he was not underestimating the 'concern that any pregnant woman in the workplace would feel at the possibility of a miscarriage brought about by actions in the workplace'.[88] His Honour awarded the amount of $12,500, which was a global figure to compensate the applicant for general non-economic loss and any special damage for the cost of medication.

### (f) *Wattle v Kirkland*

In *Wattle v Kirkland*[89] ('*Wattle*'), $15,000 was awarded to the applicant in general damages. In arriving at that figure, Raphael FM referred to the applicant's evidence that she suffered hurt and humiliation, fear and concern, which manifested itself in panic attacks and exacerbation of her existing asthma. Despite difficulties with the evidence led by the applicant (who was self-represented), his Honour also awarded $9,100 to compensate the applicant for lost earnings for 26 weeks. Raphael FM found that the lack of evidence of a medical nature meant that he could not extend the period for loss of earnings beyond that time.

Raphael FM's decision in *Wattle* was successfully appealed.[90] Although the calculation of damages was not the subject of the appeal, Dowsett J noted that 'the basis of calculating the award may be suspect'.[91] The matter was remitted and heard by Driver FM, who awarded the same amount as Raphael FM for general damages.[92] However, the applicant claimed a lesser amount for economic loss than that awarded by Raphael FM, to take into account the payment of a disability support pension during the period for which she claimed lost income.[93]

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

In *Aleksovski v Australia Asia Aerospace Pty Ltd*,[94] Raphael FM stated that he was 'prepared to accept that the applicant was seriously offended by the conduct of [the harasser]', however 'the applicant's experiences were not as traumatic as those of many people who come before this court making allegations of sexual harassment'.[95] His Honour ordered that the respondent pay the applicant the sum of $7,500 by way of damages for non-economic loss. His Honour refused the applicant's claim for damages in respect of economic loss incurred as a result of her dismissal. His Honour was not satisfied that there was a causal connection between the applicant's dismissal and the conduct constituting sexual harassment.

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88 Ibid [70].
89 [2001] FMCA 66.
90 *Kirkland v Wattle* [2002] FCA 145.
91 Ibid [3].
92 *Wattle v Kirkland (No 2)* [2002] FMCA 135, [71].
93 Ibid [70].
94 [2002] FMCA 81.
95 Ibid [102].

## (h) *McAlister v SEQ Aboriginal Corporation*

In *McAlister v SEQ Aboriginal Corporation*,[96] Rimmer FM referred to Raphael FM's discussion in *Shiels* of the range for general damages for sexual harassment matters, stating:

> In [*Shiels*] Raphael FM reviewed a number of cases and found that the current range for hurt and humiliation is between $7,500.00 and $20,000.00. He was, however, looking at cases involving overt and sustained sexual harassment. This case is distinguishable from those cases; it was a one-off request for sex by Mr Lamb in return for providing a single service. It was not repeated. Accordingly, the award for non-economic loss should be at least at the lower end of the scale.[97]

Rimmer FM noted that the applicant's hurt and humiliation in the matter before her was initially substantial but that there was no evidence before her to suggest when it was resolved. Her Honour further noted that the applicant's evidence was that she had received counselling for a period of twelve months. In those circumstances, her Honour awarded the applicant $4,000 for general damages.

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

## (i) *Beamish v Zheng*

The respondent in *Beamish v Zheng*[98] 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 offering the applicant $200 to have sex with him.

Driver FM noted the evidence of the applicant that the respondent's conduct had caused her upset, 'made her depressed and socially withdrawn and caused her physical illness, in particular vomiting'.[99] 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.

96 [2002] FMCA 109.
97 Ibid [157].
98 [2004] FMCA 60.
99 Ibid [20].

## (j) *Bishop v Takla*

In *Bishop v Takla*,[100] 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).[101]

Raphael FM found that $20,000 in general damages, as well as amounts for loss of income and medical expenses and interest, were appropriate – amounting to a nominal total of $33,246.40. The applicant's complaint against the second and third respondents 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.

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

The respondents in *Hughes v Car Buyers Pty Ltd*[102] 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'.[103] 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, 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.

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100 [2004] FMCA 74.
101 Ibid [35].
102 (2004) 210 ALR 645.
103 Ibid 656 [60].

Walters FM also found that the prolongation of the proceedings and the additional mental distress caused to the applicant and the frustration, humiliation and anger that she felt as a result of her complaint being ignored warranted an award in the sum of $5,000 as aggravated damages.[104]

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

Coker FM in *Trainor v South Pacific Resort Hotels Pty Ltd*[105] awarded $5,000 plus interest in general damages after finding that the applicant had been subjected to unwelcome sexual advances and requests for sexual favours by a fellow employee. There were two incidents that took place within a week. On each occasion the perpetrator was present in the applicant's room at the staff accommodation quarters of the hotel. His attendance was not invited or solicited by the applicant. The respondent employer was held vicariously liable for the employee's acts of sexual harassment.

There was unchallenged medical evidence that the applicant suffered from a pre-existing psychiatric condition, albeit one that was exacerbated by the acts of sexual harassment. Coker FM found that the applicant experienced distress and difficulties as a result of the sexual harassment. However, his Honour found that the amount of compensation for general damages should not be at the high end of the range, in light of the fact that the incidents occurred within a short period of time and thereafter ceased upon the dismissal of the perpetrator and in light of the applicant's return to employment of a similar nature within a short period of time. Coker FM considered that the amount of $5,000 reflected the seriousness of the incidents and the effect upon the applicant. The applicant was also awarded $5,000 for past economic loss, $2,500 for future economic loss and $1907.50 for medical expenses.

## 7.2.5 Damages under the DDA

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

104 See 7.2.1(c) above.
105 [2004] FMCA 374.

## Table 4: Overview of damages awarded under the DDA

| Case | | Damages awarded |
|---|---|---|
| (a) | *Barghouthi v Transfield Pty Ltd* (2002) 122 FCR 19 | One week's salary |
| (b) | *Haar v Maldon Nominees* (2000) 184 ALR 83 | $3,000 (non-economic loss) |
| (c) | *Travers v New South Wales* (2001) 163 FLR 99 | $6,250 (non-economic loss) |
| (d) | *McKenzie v Department of Urban Services and Canberra Hospital* (2001) 163 FLR 133 | Total damages: $39,000<br>$15,000 (non-economic loss)<br>$24,000 (economic loss) |
| (e) | *Oberoi v Human Rights and Equal Opportunity Commission* [2001] FMCA 34 | Total damages: $20,000<br>$18,500 (non-economic loss)<br>$1,500 (economic loss) |
| (f) | *Sheehan v Tin Can Bay Country Club* [2002] FMCA 95 | $1,500 (non-economic loss) |
| (g) | *Randell v Consolidated Bearing Company (SA) Pty Ltd* [2002] FMCA 44 | Total damages: $14,701<br>$10,000 (non-economic loss)<br>$4,701 (economic loss) |
| (h) | *Forbes v Commonwealth* [2003] FMCA 140 | Nil |
| (i) | *McBride v Victoria (No 1)* [2003] FMCA 285 | $5,000 (non-economic loss) |
| (j) | *Bassanelli v QBE Insurance* [2003] FMCA 412, upheld on appeal *QBE Travel Insurance v Bassanelli* [2004] FCA 396 | Total damages: $5,543.70<br>$5,000 (non-economic loss)<br>$543.70 (interest) |
| (k) | *Darlington v CASCO Australia Pty Ltd* [2002] FMCA 176 | $1,140 (economic loss)<br>+ Interest |
| (l) | *Clarke v Catholic Education Office* (2003) 202 ALR 340, upheld on appeal *Catholic Education Office v Clarke* [2004] FCAFC 197 | Total damages: $26,000<br>$20,000 (non-economic loss)<br>$6,000 (interest) |
| (m) | *Power v Aboriginal Hostels Limited* [2004] FMCA 452 | Total damages: $15,000<br>$10,000 (non-economic loss)<br>$5,000 (economic loss) |

| | | |
|---|---|---|
| (n) | *Trindall v NSW Commissioner of Police* [2005] FMCA 2 | Total damages: $18,160 (approx)<br>+ interest<br>$10,000 (non-economic loss)<br>$480 per month during the period of discrimination (economic loss)<br>+ Interest |

## (a) *Barghouthi v Transfield Pty Limited*

In *Barghouthi v Transfield Pty Limited*,[106] Hill J found that an employee had suffered unlawful discrimination when he was constructively dismissed from his employment after advising his employer that he was unable to return to work on account of a back injury. In accordance with his contract of employment, the employee was awarded one week's salary as compensation. He was not awarded compensation for the full period of his contract as he was unable to return to work during that period. As there was no evidence before the Court in relation to any pain and suffering by the complainant, Hill J stated that he was not able to award any damages on that basis.

## (b) *Haar v Maldon Nominees*

McInnis FM in *Haar v Maldon Nominees*[107] ('*Haar*') found that a visually impaired applicant who was accompanied by her guide dog had been discriminated against when she was asked to sit outside on her next visit to the respondent's restaurant. Compensation of $3,000 was ordered for injured feelings, distress and embarrassment. McInnis FM stated that it is important to make due allowance in damages where a disabled person has suffered 'diminished self worth' (in this case confirmed by a medical report) as a result of the discrimination.[108]

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

In *Travers v New South Wales*,[109] Raphael FM 'agreed with the views'[110] of McInnis FM in *Haar* and awarded Ms Travers $6,250 for hurt, humiliation and distress. The applicant, who has spina bifida, had suffered discrimination when her school had required her to utilise a toilet which was not the nearest and most accessible. In reaching this assessment, Raphael FM took into account the following factors:

- the applicant had not been entirely happy at the school before the incidents of February 1996 occurred;
- the applicant's removal from the school was caused by a number of factors which contributed to her unhappiness of which the discrimination was only one, albeit an important, factor;

106 (2002) 122 FCR 19.
107 (2000) 184 ALR 83.
108 Ibid 97 [89].
109 (2001) 163 FLR 99.
110 Ibid [73].

- no medical evidence was called and there was no allegation that the applicant was suffering from any psychiatric disturbance or post traumatic stress disorder;
- there was no intention on the part of the school to deliberately discriminate against the applicant; and
- the applicant had suffered no long term damage as she was happy at another school.

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

Raphael FM in *McKenzie v Department of Urban Services*[111] found that the applicant had been discriminated against by her employers over a two year period. As a result of the discrimination she had suffered, the applicant had taken a period of leave without pay and ultimately resigned from her employment. His Honour awarded the applicant $15,000 for hurt, humiliation and distress.

Raphael FM also awarded the applicant $24,000 in lost wages for the period of leave without pay. Relying on the decision in *McNeill v Commonwealth of Australia*,[112] and Tax Ruling IT2424, this award of damages was made on a gross basis.

His Honour rejected the applicant's submission that she was entitled to two and a half year's wages for the constructive dismissal element of the claim. His Honour noted that the applicant had received a redundancy payout of approximately nine months' wages, and that the maximum damages payable in an unfair dismissal claim under the *Workplace Relations Act 1996* (Cth) was six months. Raphael FM concluded:

> In my view before a person can succeed in a claim for future economic loss under s.46PO of HREOC Act they would have to prove that had they not been discriminated against they would have remained in employment and that they made some real attempt to mitigate their loss. None of this appears from Ms McKenzie's evidence and I am therefore not prepared to make an award of this type in her case.[113]

### (e) *Oberoi v Human Rights and Equal Opportunity Commission*

In *Oberoi v Human Rights and Equal Opportunity Commission*,[114] Raphael FM awarded the applicant compensation of $18,500 for pain and suffering, hurt, humiliation and damage to employment prospects. His Honour also ordered that the respondent pay the applicant $1,500 special damages to cover the cost of sporting equipment and his costs of preparing the case, including for photocopying and legal advice. Raphael FM further ordered the President of HREOC to apologise on behalf of HREOC.

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111 (2001) 163 FLR 133.
112 (1995) EOC 92-714.
113 (2001) 163 FLR 133, 155 [94].
114 [2001] FMCA 34.

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

The respondent club in *Sheehan v Tin Can Bay Country Club*[115] was found to have discriminated unlawfully pursuant to s 9 of the DDA in refusing to permit the complainant's 'assistance' dog on the premises. The respondent was ordered to pay damages of $1,500 for hurt and distress to the applicant.

## (g) *Randell v Consolidated Bearing Company (SA) Pty Ltd*

Raphael FM in *Randell v Consolidated Bearing Company (SA) Pty Ltd*[116] awarded the applicant $10,000 for hurt, humiliation and distress following his dismissal from a traineeship with the respondent on the basis of his dyslexia. He followed his award for such loss in *Song v Ainsworth Game Technology Pty Ltd*,[117] as he was of the view that the hurt, humiliation and distress suffered by the applicant in this case was similar to that suffered by the applicant in that case.[118]

Raphael FM also awarded the applicant, $4,701 for past economic loss following his dismissal from a year long traineeship with the respondent. That damages award was the difference between his wage for a year as a trainee and his wage for a year in his new position of employment.

## (h) *Forbes v Commonwealth*

In *Forbes v Commonwealth*,[119] Driver FM found that the applicant's employer, the Australian Federal Police ('AFP'), had discriminated against her by withholding relevant information from a review committee which was considering a decision not to appoint her as a permanent employee. A relevant issue for the review committee was the apparent breakdown in the relationship between the applicant and the AFP. The information withheld related to her disability and explained the breakdown in the relationship. Driver FM considered that the AFP was under an obligation to put before the review committee information concerning the applicant's illness, as its failure to do so left the review committee 'under the impression that [the applicant] was simply a disgruntled employee'.[120]

His Honour declined, however, to award damages for non-economic loss, stating:

> Ms Forbes clearly went through a great deal of emotional trauma following her departure from work on 17 December 1997. However, the only discriminatory conduct of the AFP was its withholding of relevant information from the review committee. Ms Forbes was undoubtedly distressed by the loss of her career in the AFP, but even if there had been no discrimination, the result would probably have been the same. Moreover, given the nature and causes of Ms Forbes' depressive illness and the reasons for the subsequent improvement of it, Ms Forbes actually benefited emotionally

115 [2002] FMCA 95.
116 [2002] FMCA 44.
117 [2002] FMCA 31.
118 [2002] FMCA 44, [55].
119 [2003] FMCA 140.
120 Ibid [28].

> from the cessation of her employment. That episode in her life was resolved and she could move forward. In addition, the disclosure of Ms Forbes' medical details to the Review Committee would no doubt have been distressing for her. The withholding of that information, though discriminatory, protected her from that distress. I find that Ms Forbes has not suffered any non-economic loss meriting the award of damages by reason of the discriminatory conduct of the AFP.[121]

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

The applicant in *McBride v Victoria (No 1)*[122] had complained to a supervisor about rostering for duties which were inconsistent with her disabilities (resulting from work-related injuries). The supervisor was found to have responded: 'What the fuck can you do then?'[123] McInnis FM found that this constituted unlawful discrimination contrary to ss 15(2)(b) and (d) of the DDA. His Honour found that the incident caused 'significant upset and hurt' to the applicant and awarded $5,000 in damages.

### (j) *Bassanelli v QBE Insurance*

Raphael FM in *Bassanelli v QBE Insurance*[124] found that the respondent had discriminated against the applicant when it refused her travel insurance by reason of her disability, namely metastatic breast cancer. His Honour awarded $5,000 for the distress caused by the discrimination (relevantly, she was able to find other insurance and was not prevented from travelling). Raphael FM noted that the applicant was motivated by a 'personal campaign for fair treatment of cancer sufferers' and that while she was entitled to bring a claim for these reasons, 'she should not personally benefit because their outrage has been assuaged'.[125]

### (k) *Darlington v CASCO Australia Pty Ltd*

In *Darlington v CASCO Australia Pty Ltd,*[126] Driver FM found the respondent had unlawfully discriminated against the applicant by reducing his hours of work to one shift per week on account of his disability. The period of the detriment was found to span two working weeks only, and Driver FM awarded the applicant $1,140 (plus interest to be calculated at 9.5%) in damages for economic loss. This amount represented an award of $180 a day for eight days' lost wages in the relevant fortnight.

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121 Ibid [33]. Note that the matter was appealed, and cross-appealed in *Forbes v Australian Federal Police (Commonwealth of Australia)* [2004] FCAFC 95 and Driver FM's finding of discrimination was overturned: ([68]-[70]).
122 [2003] FMCA 285.
123 Ibid [48].
124 [2003] FMCA 412, affirmed on appeal: *QBE Travel Insurance v Bassanelli* [2004] FCA 396.
125 Ibid [56].
126 [2002] FMCA 176.

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

The respondent in *Clarke v Catholic Education Office*[127] was found to have indirectly discriminated against a student by requiring him to receive teaching at one of their schools without the assistance of an Auslan interpreter. Madgwick J awarded damages of $20,000 (and interest of $6,000) for the distress caused by the discrimination. This was upheld by the Full Federal Court in *Catholic Education Office v Clarke*,[128] the damages awarded by the primary judge being described by Sackville and Stone JJ as 'relatively modest'.[129]

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

In *Power v Aboriginal Hostels Limited*,[130] Brown FM found that the respondent unlawfully discriminated against the applicant when it dismissed him from his employment on the basis of an imputed disability. Brown FM noted that it was conceded the applicant did not suffer a specific psychiatric or psychological illness following his dismissal.[131] His Honour was of the view that *Randell v Consolidated Bearing Company SA Pty Ltd*,[132] *Song v Ainsworth Game Technology Pty Ltd*[133] and *X v McHugh*[134] 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.[135]

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. His Honour held instead that a period of six months which coincided with the time when the applicant was able to obtain employment [on a part-time basis as a drug and alcohol counsellor] was a more reasonable period.[136]

127 (2003) 202 ALR 340.
128 [2004] FCAFC 197.
129 Ibid [134].
130 [2004] FMCA 452.
131 Ibid [73].
132 [2002] FMCA 44.
133 [2002] FMCA 31.
134 (1994) EOC 92-623.
135 [2004] FMCA 452, [74]-[76].
136 Ibid [81]-[82].

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

The applicant in *Trindall v NSW Commissioner of Police*[137] was found to have suffered 'a very significant injury to his feelings and emotional and psychological distress, hurt and humiliation'.[138] This injury caused depression, anxiety and sleeplessness, required medication and contributed to his failure to complete a development programme in which he enrolled. An annual award of $10,000 in general damages was made.

Driver FM found that the discrimination against the applicant by his employer had also resulted in him losing the opportunity to work overtime and perform some shift work. Damages for economic loss were awarded on that basis, with the amount of the loss to be calculated by the parties.[139] Interest was also awarded.[140]

## 7.3 Apologies

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

In *Creek v Cairns Post Pty Ltd*,[141] although the complaint was not upheld, Kiefel J noted that a short apology would have been ordered had the complaint been made out, as it may have helped vindicate the applicant in the eyes of her community. Her Honour further noted that the failure of the respondent to acknowledge that it had acted for racist reasons and the withholding of an apology would have been taken into account in assessing the extent of the injury and corresponding compensation to redress it.[142]

In *Forbes v Commonwealth of Australia*,[143] Driver FM stated:

> I accept that not all of the emotional wounds that [the applicant] has suffered have healed. She will benefit from achieving final closure of this aspect of her life. That closure is best achieved, in my view, by providing relief in the form of a declaration that the [respondent] discriminated against her and an order requiring the [respondent] to provide an apology.[144]

In *Cooke v Plauen Holdings*,[145] the applicant's entitlement to an apology was taken into account by Driver FM in assessing the appropriate award of damages:

> I have also taken into account in assessing what is an appropriate award of damages that Ms Cooke should receive an apology. She has received an oral expression of regret but she is entitled to a formal apology. An apology

137 [2005] FMCA 2.
138 Ibid [185].
139 Ibid [187].
140 Ibid [189].
141 (2001) 112 FCR 352.
142 Ibid 360-61 [35].
143 [2003] FMCA 140.
144 Ibid [34]. His Honour also ordered an apology in *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd* [2003] FMCA 160, [95]. See also the decision of Raphael FM in *Oberoi v Human Rights and Equal Opportunity Commission* [2001] FMCA 34 in which an apology was ordered.
145 [2001] FMCA 91.

> is frequently worth more to an applicant than money. In this case I am satisfied that a written apology would go a long way to compensating the applicant for the distress and loss of confidence that she suffered.[146]

In *Escobar v Rainbow Printing Pty Ltd (No 2)*,[147] Driver FM found that the applicant was entitled to an apology. His Honour noted that the respondent had 'offered to provide an apology should liability be found',[148] and ordered that the respondent provide the applicant with a written apology in terms to be agreed between the parties.

In *Jones v Toben*,[149] however, Branson J expressed the view that it was not appropriate to 'seek to compel the respondent to articulate a sentiment that he plainly enough does not feel', citing with approval the view of Hely J in *Jones v Scully*[150] that '*prima facie*, the idea of ordering someone to make an apology is a contradiction in terms'.

A similar view was expressed by Raphael FM in *Travers v New South Wales*:[151]

> An apology is something that should be freely given and arise out of an understanding by one party that it was at fault in relation to its actions as they affected the aggrieved party. Whilst I would like to think that these reasons indicate to the respondent why it was at fault and that so realising, it voluntarily expresses its apologies… I am not prepared to force it to do so.[152]

And again by his Honour in *Evans v National Crime Authority*:[153]

> I do not believe there is much utility in forcing someone to apologise. An apology is intended to come from the heart. It cannot be forced out of a person. If a person does not wish to give one it is valueless. I suggested to the respondent that, subject to an appeal it may well feel after examining these reasons that its EEO procedures had failed in the particular circumstances of this case and that it should express its apology to the applicant. These cases are not just about the recovery of damages. They serve an educational purpose. In this case the educational purpose would include the respondent coming to a realisation that howsoever important the activities of the NCA may be, they should not be conducted in such a way that they breach both the contract entered into between the organisation and its staff and the SDA.[154]

In *Grulke v KC Canvas*,[155] Ryan J declined to order an apology from a corporate respondent that was found to have discriminated against the applicant on the basis of her sex. His Honour stated:

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146 Ibid [43].
147 [2002] FMCA 122.
148 Ibid [43].
149 [2002] FCA 1150, [106].
150 (2002) 120 FCR 243, 308 [245].
151 (2001) 163 FLR 99.
152 Ibid 116-17 [73].
153 [2003] FMCA 375.
154 Ibid [115]. See also *Carr v Boree Aboriginal Corp* [2003] FMCA 408, [14]; *Trindall v NSW Commissioner of Police* [2005] FMCA 2, [190].
155 [2000] FCA 1415.

> In my view, having regard to the fact that the respondent here is not a natural legal person but is a corporation, and the fact that I have endeavoured to compensate for loss or damage suffered by the applicant by making a pecuniary award of damages, it is inappropriate to exercise the discretion reposed in the Court by additionally ordering the making of an apology.[156]

## 7.4 Declarations

In *McGlade v Lightfoot*,[157] the primary relief sought by the applicant was a declaration that the conduct of the respondent was unlawful by virtue of s 18C of the RDA. Carr J found that it:

> would be fit to grant the declaration sought. It is a useful and appropriate way of recording publicly the unlawfulness of the making by the respondent of comments which received considerable publicity and were reasonably likely to offend and insult the relevant persons identified above.[158]

In *Commonwealth v Evans*,[159] Branson J considered in detail the power to make declarations under s 46PO(4) of the HREOC Act and found that it was appropriate to apply general law principles.[160] At general law it is established that a trial judge should not make a declaration which is not tied to proven facts.[161] Branson J also cited the following passage from *Warramunda Village Inc v Pryde*:

> 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.[162]

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.[163] 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

156 Ibid [4].
157 (2002) 124 FCR 106.
158 Ibid 123 [78].
159 [2004] FCA 654.
160 Ibid [57]-[60].
161 *Rural Press v Australian Competition and Consumer Commission* (2003) 203 ALR 217, [89]-[90] (Gummow, Hayne and Heydon JJ).
162 (2001) 105 FCR 437, [8].
163 [2004] FCA 654, [60].

> 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.[164]

Without deciding the issue, Branson J further noted that the power to make a declaration is discretionary and expressed doubt that a case for the grant of declaratory relief in addition to an award of damages had been demonstrated.[165]

## 7.5 Orders Directing a Respondent not to Repeat or Continue Conduct

Orders directing a respondent not to repeat or continue conduct have been made pursuant to s 46PO(4)(a) of the HREOC Act in a number of cases.

In *Jones v Scully*,[166] for example, the respondent was found to have breached the racial hatred provisions of the RDA by distributing material in letterboxes and at markets. Hely J made a declaration that specified the unlawful conduct found to have been engaged in by the respondent and ordered that the respondent be restrained from repeating or continuing such conduct.[167] His Honour also made an order that the respondent be 'restrained from distributing, selling or offering to sell any leaflet or other publication which is to the same effect' as the material listed in the declaration.[168]

In *Jones v Toben*,[169] the complainant sought a declaration that the respondent had engaged in unlawful conduct by publishing anti-Semitic material on a website and orders requiring the removal of offending material from the internet and prohibiting its future publication.

In considering whether or not to make an order requiring the removal of the material and prohibiting its further publication, Branson J noted that futility is a factor to be taken into account when exercising a discretion to grant relief.[170] In the present case there was a risk that the practical effect of an order might be undermined by others who may choose to publish the same material at another location on the World Wide Web or elsewhere. However, her Honour found persuasive the approach of the Canadian Human Rights Tribunal in *Citron v Zündel (No 4)*,[171] which had found that there were a number of purposes to a remedy that might be awarded and that what others might choose to do once a remedy has been ordered should not unduly influence any decision. The effects of an order may be prevention and elimination of discriminatory practices, the symbolic value of the public denunciation of the actions the subject of the complaint and the potential

164 Ibid [61].
165 Ibid [88].
166 (2002) 120 FCR 243.
167 Ibid 308-9 [247].
168 Ibid 309 [247].
169 [2002] FCA 1150.
170 [2002] FCA 1150, [108]-[110].
171 (2002) 41 CHRR D/274, [299]-[300].

educative and preventative benefit that could be achieved by open discussion of the principles enunciated in the decision.[172]

In the course of considering what relief was appropriate in the case, Branson J also considered the respondent's characterisation of the proceedings as raising important issues concerning free speech. Her Honour declined to be influenced by such considerations, stating:

> The debate as to whether the RDA should proscribe offensive behaviour motivated by race, colour, national or ethnic origin, and the extent to which it should do so, was conducted in the Australian Parliament by the democratically elected representatives of the Australian people. The Parliament resolved to enact Part IIA of the *Racial Discrimination Act* which includes s 18C. Australian judges are under a duty, in proceedings in which reliance is placed on Part IIA of the *Racial Discrimination Act*, to interpret and apply the law as enacted by Parliament.[173]

Her Honour made a declaration that the respondent had engaged in conduct rendered unlawful by Part IIA of the RDA and ordered that the respondent remove the relevant material or material with substantially similar content from the website and be restrained from publishing or republishing the material or other material with substantially similar content.[174]

Note that it has been held in other contexts that it is necessary to ensure that orders made directing conduct are sufficiently precise. For example, in *World Series Cricket v Parish*,[175] a case concerning a contravention of the *Trade Practices Act 1974* (Cth), the Full Federal Court overturned an order that the appellant be restrained from engaging in 'any conduct that is misleading or likely to mislead or deceive' as being too wide and unqualified in its terms and not clearly and directly related to the impugned conduct.[176] Similarly, orders capable of restraining lawful as well as unlawful conduct have been criticised by the courts.[177]

## 7.6 Other Remedies

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

In *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,[178] Baumann FM found that the placement of wash basins on the outside of toilet blocks constituted indirect disability discrimination as some persons with disabilities reasonably required the use of wash basins out of public view as part of their

172 [2002] FCA 1150, [111].
173 Ibid [107].
174 Ibid [105], [113]. Her Honour's decision was upheld on appeal: *Toben v Jones* (2003) 199 ALR 1.
175 (1977) 16 ALR 181.
176 Ibid 204-5 (Brennan J), 195-6 (Franki J).
177 *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1. The injunction in question would have restrained the use of particular words in contexts different from those in which a contravention had been established and at future periods (when what was said might, depending on scientific knowledge at that time, have ceased to be false); *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181, 204-5 (Brennan J), 195-6 (Franki J).
178 [2004] FMCA 915.

toileting regime.[179] His Honour ordered that the respondent construct and install internal hand basins in those toilet blocks within nine months.[180]

Raphael FM in *Sheehan v Tin Can Bay Country Club*[181] ordered that the respondent club permit the applicant to attend its premises with his dog (an 'assistance animal') unleashed.

In *Song v Ainsworth Game Technology Pty Ltd*,[182] Raphael FM found that the applicant had been constructively dismissed when the respondent had changed her conditions of employment from full-time to part-time (and in doing so had discriminated against her by reason of her family responsibilities). His Honour ordered the applicant's reinstatement, noting that 'there does not appear to be any other criticism of her work nor are there present any factors which in an industrial law context would militate against an order for reinstatement'.[183] Raphael FM also ordered that the applicant's employment agreement be varied so that she would be permitted to take her lunch break from 2.55pm to 3.25pm during each working day. This arrangement would enable her to pick up her child from school each afternoon and transfer him to child care.

In *McGlade v Lightfoot*,[184] as noted above (see 7.4), the primary relief sought by the applicant was a public declaration that the conduct of the respondent was unlawful by virtue of s 18C of the RDA. The applicant had also sought an order that the respondent make a donation to the Aboriginal Advancement Council, submitting that s 46PO(4)(b) of the HREOC Act would be the source of the Court's power to make such an order. Carr J disagreed with the applicant's construction of s 46PO(4)(b) but nevertheless indicated that the Court was not limited to the orders specified in s 46PO(4):

> I do not think that is the case in this matter because the order sought is not sought for the purpose referred to in that sub-paragraph. However, the list of specified orders in s 46PO(4) is not exhaustive – see the use of the word "including".[185]

However, his Honour declined to make any order requiring a donation to the nominated body, on the basis that '[n]othing specific was put before me on behalf of the applicant to demonstrate why such an order would be a fit one,' and '[n]o authority was cited to me in which such an order had been made'.[186]

179 Ibid 81.
180 Ibid 94. A similar order was made in *Cooper v Holiday Coast Cinema Centres Pty Ltd* (Unreported, HREOC, Commissioner Keim, 29 August 1997).
181 [2002] FMCA 95.
182 [2002] FMCA 31.
183 Ibid [87].
184 (2002) 124 FCR 106.
185 Ibid 123 [80].
186 Ibid 123 [81].