Human Rights and
Equal Opportunity
Commission

Change and Continuity:
Review of the Federal Unlawful Discrimination Jurisdiction

Supplement
September 2002 - August 2003

This supplement to 'Change and Continuity: Review of the Federal Unlawful Discrimination Jurisdiction' covers all cases which raise points of jurisprudential interest that have been decided subsequent to the initial review period of September 2000 – September 2002. It is current to 1 August 2003. The supplement follows the original numbering and headings, with additional headings added to cover new topics of interest.

Chapter 2
Jurisprudential Trends

2.2 Racial Discrimination

2.2.1 Matters of Interest

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

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

In *AB v Minister for Education*,[1] Raphael FM cited with approval the decision of Merkel J in *De Silva v Minister for Immigration*,[2] confirming the distinction between 'national origin' and 'nationality' for the purposes of the RDA. In that case an interim injunction was sought against a decision to deny enrolment in a NSW Government school to a child who was not a permanent resident of Australia. One ground for rejecting the application was that the argument of discrimination was unlikely to succeed on the basis of the authorities that established the distinction between 'national origin' and 'nationality'.[3]

(C) Proof of Discrimination – Standard of Proof

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

In *Batzialas v Tony Davies Motors Pty Ltd*,[4] McInnis FM echoed the views expressed in the Federal and Full Federal Courts in *Sharma v Legal Aid Quensland*[5] (although not referring to those authorities nor the contrary Full Court authority in *State of Victoria v Macedonian Teachers Association of Victoria*[6]), stating:

> It should also be remembered that an allegation of racial discrimination is a serious matter, and I accept for the purpose of this Application that the appropriate test to be applied is the *Briginshaw* test.

[1] [2003] FMCA 16.
[2] [1998] FCA 95.
[3] [2003] FMCA 16, [13]-[14].
[4] [2002] FMCA 243.
[5] *Sharma v Legal Aid (Qld)* [2001] FCA 1699, *Sharma v Legal Aid (Qld)* [2002] FCAFC 196.
[6] (1999) 91 FCR 47.

See also the decision in *Daley v Barrington, Wright and NSW Greyhound Breeders, Owners & Trainers Association*[7] in which Raphael FM, in the context of the SDA, noted the application of the *Briginshaw* principle in discrimination cases and cited the comments of Barwick CJ in *Rejfek v McElroy*[8] as follows:

> But the standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused. The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such proceeding to obtain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge.

(E) Section 18C: Racial Hatred

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

(a) Objective Standard

In *McGlade v Lightfoot*,[9] Carr J cited with approval *Hagan v Trustees of the Toowoomba Sports Ground Trust*,[10] *Creek v Cairns Post Pty Ltd*[11] and *Jones v Scully*[12] to the effect that the test of whether a respondent's act was 'reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or a group of people' was an objective one.[13] He agreed with the approach of the Court in *Hagan*[14] and *Jones v Scully*[15] that, whilst evidence of the subjective effect on the applicants of the act in question was admissible, it was 'not determinative in answering the question'.[16]

In *McLeod v Power*[17] Brown FM described the objective test as one of the 'reasonable victim', adopting the analysis of Commissioner Innes in *Corunna & Ors v West Australian Newspapers Ltd.*[18] In that case, the applicant, a Caucasian prison officer, complained that the respondent, an Aboriginal woman, had abused him in terms including 'you fucking white piece of shit' and 'fuck you whites, you're all fucking shit' upon being refused entry to the prison for a visit. Brown FM found as follows:

> The abuse, although unpleasant and offensive, was not significantly transformed by the addition of the words 'white' or 'whites'. These words are not of themselves offensive words or terms of racial vilification. This is particularly so because white or pale skinned people form the majority of the population in Australia… I believe that a reasonable prison officer would have found the words

[7] [2003] FMCA 93 at [28].
[8] (1965) 112 CLR 517 at 521-2.
[9] [2002] FCA 1457.
[10] [2000] FCA 1615.
[11] (2001) 112 FCR 352, [12].
[12] [2002] FCA 1080. The decision of Hely J in *Jones v Scully* was also followed by Branson J in *Jones v Toben* [2002] FCA 1150, [84].
[13] [2002] FCA 1457, [43].
[14] [2000] FCA 1615, [28].
[15] [2002] FCA 1080, [99] – [100].
[16] Ibid [44].
[17] [2003] FMCA 2, [65].
[18] (2001) EOC 93-146, 75,465.

> offensive but not specifically offensive because of the racial implication that Mr McLeod says he found in them.[19]

In *Jones v Toben*[20] the Court considered material on the internet which, amongst other things, imputed that there was serious doubt that the Holocaust occurred. Branson J cited with approval the observation of Hely J in *Jones v Scully*[21] that it was not for the Court to determine whether or not the Holocaust occurred in determining whether or not the relevant conduct was rendered unlawful by s 18C of the RDA.[22]

Branson J also considered the view expressed by Kiefel J in *Creek v Cairns Post Pty Ltd*[23] that the words 'offend, insult, humiliate or intimidate' imply 'profound and serious effects, not to be likened to mere slights'. Branson J stated that she did not understand Kiefel J to have intended that a 'gloss' be placed on the ordinary meaning of the words in s 18C:

> Rather, I understand her Honour to have found in the context provided by s 18C of the RDA a legislative intent to render unlawful only acts which fall squarely within the terms of the section and not to reach to '*mere slights'* in the sense of acts which, for example, are reasonably likely to cause technical, but not real, offence or insult (see also *Jones v Scully*[24] per Hely J at [102]). It would be wrong, in my view, to place a gloss on the words used in s 18C of the RDA.[25]

In *Toben v Jones* [2003] FCAFC 137 the appellant argued that the section should be read down to encompass only acts done because of *racial hatred.* This argument was based firstly upon the premise that Part IIA of the RDA implemented only Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* ("ICERD"), which specifically refers to discrimination because of "racial hatred". The Full Court held that Part IIA of the RDA was directed not only at Article 4 of ICERD but also at the other provisions of ICERD and the *International Covenant on Civil and Political Rights*, which dealt with the elimination of racial discrimination in all its forms. Allsop J further noted that Article 4 of ICERD, which dealt with criminal offences, did not require civil provisions to be limited by reference to racial hatred ([at 135]). His Honour also noted that the choice of words in Part IIA of the RDA was clear and unambiguous in this regard and the reference to "Racial Hatred" in the heading of Part IIA should therefore not limit the scope of the Part (at [137]).

The appellant in *Toben v Jones* also challenged the constitutional validity of s 18C to the extent that it went beyond a prohibition on *racial hatred*: see below.

(b) Otherwise than in Private

In *Jones v Toben*,[26] Branson J held that the 'placing of material on a website which is not password protected is an act which, for the purposes of the RDA, is taken not to be done in private'. In that case the respondent had placed material on the internet which was found to be anti-semitic. Her Honour stated that her conclusion as to the public nature of the relevant act was supported by the fact that a search of the World Wide Web using terms such as 'Jew',

[19] [2003] FMCA 2, [69].
[20] [2002] FCA 1150.
[21] [2002] FCA 1080, [176].
[22] Ibid [89].
[23] (2001) 12 FCR 352, [16].
[24] [2002] FCA 1080.
[25] [2002] FCA 1150, [92].
[26] [2002] FCA 1150, [101].

'Holocaust' and 'Talmud', which were likely to be used by a member of the Jewish community interested in Jewish affairs, lead the searcher to one or more of the websites containing the material the subject of the complaint.[27]

Carr J in *McGlade v Lightfoot*[28] found that the respondent had, in giving an 'on the record' interview with a journalist, 'deliberately and intentionally engaged in conduct, the natural consequence of which was the publication of his words' and accordingly that the comments were made 'otherwise than in private'.[29]

In *McLeod v Power*[30] Brown FM cited with approval the decision of Driver FM in *Gibbs v Wanganeen*[31] and the analysis of Commissioner Innes in *Korczac v Commonwealth of Australia (Department of Defence)*[32] in drawing a distinction between the nature of an act and where it takes place.[33] He held that, depending upon the circumstances, an act can occur in a public place but nevertheless be in a context such that it is not 'otherwise than in private'. In that case, abuse delivered by the respondent in a public place (outside a prison in an area where other visitors may have been present) was found not to be covered by s 18C. Relevant to his Honour's decision was the fact that the respondent was not 'playing to the grandstand' and had intended the conversation to be a private one.[34]

(c) Persons to Whom the Provisions Apply

Branson J in *Jones v Toben*[35]cited with approval *Miller v Wertheim*[36]and *Jones v Scully*[37] in holding that Jews in Australia are a group of people with a common 'ethnic origin' within the meaning of s18C of the RDA.

In *McGlade v Lightfoot*,[38] the respondent was reported as stating, in an interview with a newspaper journalist that:

> Aboriginal people in their native state are the most primitive people on earth; and
>
> If you want to pick out some aspects of Aboriginal culture which are valid in the 21st century, that aren't abhorrent, that don't have some of the terrible sexual and killing practices in them, I'd be happy to listen to those.

Carr J held that, for the purposes of s 18C(1)(a), the person or group 'would at least include an Aboriginal person or a group of Aboriginal persons leading a traditional way of life'. [39] Applying the objective test required by the section, the relevant issue was therefore the

[27] Ibid [74].
[28] [2002] FCA 1457
[29] Ibid [38] - [40].
[30] [2003] FMCA 2, [65].
[31] [2001] FMCA 14.
[32] (2000) EOC 93-056.
[33] [2003] FMCA 2, [72] – [73].
[34] Ibid [70] – [73].
[35] [2002] FCA 1150, [101].
[36] [2002] FCAFC 156, [14].
[37] [2002] FCA 1080, [110] – [113].
[38] [2002] FCA 1457.
[39] Ibid [46].

reasonably likely effect on the statement on 'an Aboriginal person or a group of Aboriginal persons who attach importance to their Aboriginal culture'.[40]

In *McLeod v Power*[41] the applicant, a Caucasian prison officer, complained that the respondent, an Aboriginal woman, had abused him in terms including 'you fucking white piece of shit' and 'fuck you whites, you're all fucking shit'. Brown FM stated that the term 'white' did not itself encompass a specific race or national or ethnic group, being too wide a term.[42] Brown FM also found that the term 'white' was not itself a term of abuse and noted that white people are the dominant people historically and culturally within Australia and not in any sense an oppressed group, whose political and civil rights are under threat.[43] He suggested that it would be drawing a long bow to include 'whites' as a group protected under the RDA.[44]

(d) Requisite Causal Relationship

In *Jones v Toben*[45] Branson J adopted the approach of Kiefel J in *Creek v Cairns Post Pty Ltd*[46]to the words 'because of' in s 18C(1)(b), which had previously been cited with approval by Hely J in *Jones v Scully*.[47] Under this approach, the relevant inquiry is whether 'anything suggests race as a factor' in the respondent's decision to publish the relevant material. Branson J found, in relation to the material before her which, amongst other things, conveyed the imputation that there was serious doubt that the Holocaust occurred, that it was 'abundantly clear that race was a factor in the respondent's decision to publish the material':

> The material includes many references to Jews and events and people characterised as Jewish. It is particularly concerned with the Holocaust and with the conduct of German forces during World War II, matters of particular importance to Jewish people. It is, in my view, plainly calculated to convey a message about Jewish people (see *Jones v Scully* per Hely J at [116] – [117]).[48]

Her Honour's approach was approved on appeal in *Toben v Jones* [2003] FCAFC 137.

In *McGlade v Lightfoot*[49] an interview was reported in a newspaper in which the respondent made comments that were claimed to constitute racial vilification. Carr J did not refer to any authority on the issue of causation, but found that 'the evidence establishes that the respondent's act was done because of the fact that the persons about whom the respondent was talking were of the Australian Aboriginal race or ethnic origin… there could be no other reason for the respondent's statements than the race or ethnic origin of the relevant group of people'.[50]

(e) Defences

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[40] Ibid.
[41] [2003] FMCA 2.
[42] Ibid [55].
[43] Ibid [59].
[44] Ibid [62].
[45] [2002] FCA 1150, [98].
[46] (2001) 112 FCR 352, [28].
[47] [2002] FCA 1080, [114].
[48] [2002] FCA 1150, [99].
[49] [2002] FCA 1457.
[50] Ibid [66].

In *Jones v Toben*[51]Branson J cited with approval the view expressed by Hely J in *Jones v Scully*[52] that the onus of proof with respect to an exemption provided for by s 18D rests on the respondent. This approach was also followed in *McGlade v Lightfoot,*[53] Carr J finding that as the respondent had chosen not to put any evidence before the Court he had therefore failed to discharge the onus of proof that any of the statutory exemptions applied.[54]

Before the Full Federal Court on appeal in *Toben v Jones* [2003] FCAFC 137 the appellant did not challenge Branson J's finding that the onus of proof with respect to an exemption rests with the respondent and this was affirmed by the Full Court. The Full Court found that the document the subject of that case, in which statements offensive to Jewish people had been made, was deliberately provocative and inflammatory and that no attempt at restraint had been made by the appellant. In those circumstances the Full Court upheld Branson J's finding that the document was not published reasonably and in good faith.

(f) Constitutional validity

In *Toben v Jones* [2003] FCAFC 137, the appellant argued that to interpret s 18C of the RDA as extending beyond the expression of racial hatred would lead to that section being outside the scope of the external affairs power in s51(xxix) of the Constitution, as Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* ("ICERD") specifically refers to discrimination because of "racial hatred".

The Full Court held that s 18C of the RDA was constitutionally valid (and did not need to be read down), as it was reasonably capable of being considered appropriate and adapted to implement the obligations under ICERD. The failure to fully implement ICERD (which also requires making racial hatred a criminal offence) did not render Part IIA substantially inconsistent with that convention. It was noted that Part IIA of the RDA was directed not only at Article 4 of ICERD but also at the other provisions of ICERD and the *International Covenant on Civil and Political Rights*, which dealt with the elimination of racial discrimination in all its forms.

2.2.3 Damages

(B) Damages Awards Under the FMS and Federal Court

In *Jones v Toben*[55]the complainant did not seek damages, but sought a declaration that the respondent had engaged in unlawful conduct, orders requiring the removal of vilificatory material from the internet and prohibiting its future publication and an apology. The claim for an apology was not pressed and 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',[56] citing with approval the view of Hely J in *Jones v Scully*[57] that '*prima facie*, the idea of ordering someone to make an apology is a contradiction in terms'.

[51] [2002] FCA 1150, [101].
[52] [2002] FCA 1080, [127] - [128].
[53] [2002] FCA 1457.
[54] Ibid [74].
[55] [2002] FCA 1150.
[56] Ibid [106].
[57] [2002] FCA 1080, [245].

In considering whether or not an order should be made 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.[58] In the case before her Honour 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, she found persuasive the approach of the Canadian Human Rights Tribunal in *Citron v Zundel (No.4)*[59] which had found that there were a number of purposes to a remedy that might be awarded and that what others might choose to do once a remedy has been ordered should not unduly influence any decision. The effects of an order may be prevention and elimination of discriminatory practices, the symbolic value of the public denunciation of the actions the subject of the complaint and the potential educative and preventative benefit that could be achieved by open discussion of the principles enunciated in the decision.[60]

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.[61]

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.[62]

2.3 Sex Discrimination

2.3.1 Matters of Interest

(B) Sexual Harassment

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

Footnote 296 – See also *Daley v Barrington, Wright and NSW Greyhound Breeders, Owners & Trainers Association* [2003] FMCA 93.

[58] [2002] FCA 1150, [108] – [110].
[59] (2002) 41 CHRR D/274, [299] – [300].
[60] [2002] FCA 1150, [111].
[61] Ibid [107].
[62] Ibid [105], [113].

(F) Marital status discrimination (s 6 of the SDA)

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

In *Dranichnikov v Minister for Immigration, Multicultural and Indigenous Affairs (no 2)*[63] French J affirmed Baumann FM's decision in *Dranichnikov v Minister for Immigration, Multicultural and Indigenous Affairs*[64] that there was no evidence of marital status discrimination by the respondent's officers in their processing of her application for a protection visa. Again, the claim was dismissed without significant discussion of the marital status provisions.

2.3.2 Case Digest

(F) Section 39 of the SDA – Voluntary Bodies

Section 39 of the SDA provides:

> **39 Voluntary Bodies**
>
> Nothing in Division 1 or 2 renders it unlawful for a voluntary body to discriminate against a person, on the ground of the person's sex, marital status or pregnancy, in connection with:
>
> (a) the admission of persons as members of the body; or
>
> (b) the provision of benefits, facilities or services to members of the body.

In *Gardner v All Australian Netball Association Limited*[65] the respondent ('AANA') had imposed an interim ban preventing pregnant women from playing netball in the Commonwealth Bank Trophy, a national tournament administered by AANA. The applicant was pregnant when the ban was imposed and was prevented from playing in a number of matches as a result. She complained of discrimination on the basis of her pregnancy in the provision of services under s.22 of the SDA. The service in this case was the opportunity to participate in the competition as a player.

It was not disputed that AANA is a voluntary body for the purposes of the SDA,[66] membership of which consisted of State and Territory netball associations. Individual netballers were not eligible to be members of AANA. AANA accepted that it had discriminated against Ms Gardner, but argued that its actions were protected by that exemption as they were "in connection with" the provision of services to their member associations. Raphael FM decided that exemption in s 39 did not apply. He held that it provided protection for voluntary bodies only in their relationships with their members, but not in their relationships with non-members.[67] Ms Gardner was not, and could not be, a

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[63] [2002] FCA 1463.
[64] [2000]FCA 63
[65] [2002] FMCA 81.
[66] Section 4 of the SDA defines a voluntary body as 'an association or other body (whether incorporated or unincorporated) the activities of which are not engaged in for the purpose of making a profit, but does not include:

(a) a club;
(b) a registered organization;
(c) a body established by a law of the Commonwealth, of a State or of a Territory; or
(d) an association that provides grants, loans, credit or finance to its members.'

[67] [2002] FMCA 81, [26].

member of AANA. Accordingly the actions of AANA constituted unlawful discrimination under the SDA.

In *Kowalski v Domestic Violence Crisis Service Inc*,[68] the applicant complained that he had been discriminated against by the respondent. He alleged that employees of the Domestic Violence Crisis Service had spoken only to his wife when they attended their house and refused him their services and that this was by reason of his sex. Driver FM dismissed the application, finding that the applicant had not been given the service of the respondent because the employees of the service had been informed by the police that it was his wife who had complained of domestic violence and was requiring their services. In relation to the issue of s 39 of the SDA, Driver FM's brief comment suggests an approach similar to that taken in *Gardner v AANA*:

> The respondent had raised at the interlocutory stage of these proceedings a defence based on s.39 of the SDA. At trial, Ms Nomchong wisely did not press that defence. Section 39 clearly has no application in these proceedings because Mr Kowalski was not a member of the respondent and was not seeking to join.[69]

(G) Vicarious liability under the SDA for victimisation

In *Joanne Taylor v Australian Federal Police & Commonwealth of Australia*,[70]Phipps FM considered an application for summary dismissal on the grounds that the SDA did not provide for vicarious liability for victimisation contrary to s 94. The Commonwealth argued that s 106, which provides for vicarious liability in relation to some sections of the SDA, did not extend to victimisation as contained in s 94. In dismissing the Commonwealth's application for summary dismissal, Phipps FM found that there were "substantial arguments" that the common law principles of vicarious liability nevertheless applied to claims of victimisation.[71]

2.4 Disability Discrimination

2.4.1 Matters of Interest

(F) Jurisdiction

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

In *O'Connor v Ross & Anor*,[72] Driver FM accepted that the limited application provisions relate to matters of international concern and therefore applied in those proceedings. He adopted the views expressed in *Allen v United Grand Lodge.*[73]

In *Soulitopoulos v La Trobe University Liberal Club*,[74] Merkel J also considered the limited application provisions of the DDA. Merkel J was satisfied that the prohibition of disability

[68] [2003] FMCA 99
[69] Ibid [45].
[70] [2003] FMCA 79.
[71] Ibid [22].
[72] [2002] FMCA 210
[73] (Unreported, HREOC, Commissioner Carter QC, 12 April 1999).
[74] [2002] FCA 1316.

discrimination was a matter of international concern, and that the limited application provisions in Divisions 1, 2 and 3 of Part 2 of the DDA, but in particular s27(2), have effect by reason of s 12(8)(e). Merkel J also approved of the approach in *Allen v United Grand Lodge*.[75]

2.4.2 Case Digest

(E) Employment

ii. Inherent Requirements

Heerey J's decision in *Cosma v Qantas Airways Ltd*[76] was approved by the Full Federal Court in *Cosma v Qantas Airways Ltd.*[77] The Full Federal Court held that the expression 'particular employment' in s 15(4) of the DDA refers to the employment in respect of which the alleged discrimination has occurred. The expression describes the actual employment which the employee is required to perform pursuant to the original contract of employment and any variations. When an employee has been employed to perform specific duties, there may be little difference between, on the one hand, his or her specific employment, described by reference to those duties and, on the other, the inherent requirements of that employment.[78]

The Full Federal Court agreed with Heerey J that at no time was it agreed between the appellant and the respondent, expressly or impliedly, that his duties would be changed, other than in the context of assigning him temporary duties as part of a rehabilitation program. Any other employment undertaken by the appellant was incidental to his attempted rehabilitation and was provided by way of trial or on a temporary basis.[79] The appeal was dismissed.

iii. Unjustifiable Hardship

The decision of the Full Federal Court in *Commonwealth of Australia v Williams*[80] overturned the decision of McInnis FM at first instance that the accommodation of an officer in the Australian Defence Forces with insulin dependent diabetes would not impose an 'unjustifiable hardship' for the purpose of s 15(4) (b) on the respondent.

The Full Federal Court held that the starting point in this case must instead be s 53 of the DDA, which provides that it is not unlawful to discriminate on the grounds of disability in relation to the performance of certain combat and combat-related duties in the Australian Defence Force.[81] The Full Court also noted the distinction between a person's 'job' and their 'position' drawn by McHugh J in *Qantas Airways Ltd v Christie*.[82] The Full Federal Court found that the respondent was not covered by the operation of the DDA due to s 53, and the appeal was allowed.

(I) Exemptions to the DDA

[75] (Unreported, HREOC, Commissioner Carter QC, 12 April 1999).
[76] [2002] FC 640.
[77] [2002] FCAFC 425.
[78] Ibid [20].
[79] Ibid [21].
[80] [2002] FCAFC 435.
[81] Ibid [29].
[82] (1998) 193 CLR 280, [72].

ii. Section 53

As noted above, McInnis FM's decision in *Williams v Commonwealth of Australia*[83] was overturned on appeal by the Full Federal Court in *Commonwealth of Australia v Williams*.[84] The Full Federal Court held that s 53 of the DDA, when read in conjunction with the relevant definitions in the *Disability Discrimination Regulations 1996* (Cth) (the Regulations), covers duties which are likely to require (as distinct from actually require) the commission of an act of violence in the event of armed conflict.[85] The Full Federal Court found that the respondent, who was employed in a position providing 'communications and information systems support to deployed forces', was clearly performing 'work in support of' such forces within the meaning of reg 4(b).[86] Therefore the respondent was not covered by the operation of the DDA due to s 53.

The Full Federal Court noted that s 53 and the Regulations require an element of directness so that perhaps Australian Defence Force staff in a recruiting office or in public relations would not be caught by the section.[87]

[83] [2002] FMCA 89.
[84] [2002] FCAFC 435.
[85] Ibid [32].
[86] Ibid [33].
[87] Ibid [34].

Chapter 3
Other Applications, Procedural and Evidentiary Matters

3.1 Applications for Interim Injunctions

3.1.3 Factors Considered by the FMS and Federal Court in Determining Applications for Interim Injunctions

In *AB v Minister for Education*[88] Raphael FM noted the importance of correctly identifying the status quo before the relevant application to HREOC, citing with approval *McIntosh v Australian Postal Corporation*[89] and noting his earlier decision in *Beck v Leichardt Municipal Council*.[90] In the present case, his Honour noted that the injunction sought would have had the effect of creating a right that did not otherwise exist, rather than preserving the status quo.[91]

In *Hoskin v State of Victoria (Department of Education and Training)*[92] the applicant sought interim orders, pursuant to s 46PP of the HREOC Act, including that subpoenaed documents be released to him or his lawyers and that the respondent be restrained from taking or maintaining any action against him in breach of the DDA or the SDA. In dismissing the application, Walters FM summarised the authorities that have considered or discussed the exercise of the powers conferred by s 46PP of the HREOC Act[93] and applied the principles outlined in them.[94]

Walters FM also discussed the meaning to be given to the terms 'maintain' and 'right' in s 46PP of the HREOC Act.[95] He declined to make orders requiring production of the report of the respondent's psychiatrist and associated documents on the basis that the applicant did not have any such relevant 'right' to be provided with the report of the respondent's psychiatrist which would be 'maintained' through the making of the orders sought:

> In my opinion, the use of the word 'maintain' in section 46PP(1) emphasises the temporary nature of the interim injunction referred to in the section and imports a requirement (at least in so far as section 46PP(1)(b) is concerned) that a pre-existing 'right' of a complainant, respondent or other affected person must have been adversely affected or, alternatively, is likely to be adversely affected in the

[88] [2003] FMCA 16.
[89] [2001] FCA 1012.
[90] [2002] FMCA 331.
[91] [2003] FMCA 16, [15].
[92] [2002] FMCA 263.
[93] *Li v Minister for Immigration & Multicultural Affairs* (2001) FCA 1414 per Emmett J; *McIntosh v Australian Postal Corporation* (2001) FCA 1012 per Heerey J; *Rainsford v Group 4 Correction Services* (2002) FMCA 36 per McInnis FM and *Gardner v National Netball League Pty Ltd* (2001) ALR 408 per McInnis FM.
[94] [2002] FMCA 263, [36] – [41].
[95] Ibid [53] – [61].

> foreseeable future. The 'rights' of the complainant, respondent or other affected person referred to in section 46PP(1)(b) must, in my view, be both continuing and substantive.[96]

Walters FM drew a distinction between a right which may arise under the rules of procedural fairness and the rights that are envisaged in s 46PP(1)(b)[97] and between procedural and substantive rights.[98] He held that it would be inappropriate to make the orders sought as such orders were not necessary to ensure the effective exercise of HREOC's powers. Rather, any order requiring production may 'effectively pre-empt or otherwise interfere with HREOC's powers and functions'.[99]

Walters FM similarly declined to make an order to the effect that the respondent not breach the DDA and RDA as such an order simply sought to impose upon the respondent a legal requirement with which the respondent was already obliged to comply.[100]

In *Beck v Leichardt Municipal Council*,[101] a dispute existed between the applicant and his employer as to whether the applicant was fit to carry out his duties and whether the employer would be entitled to terminate the employment due to the employee's incapacity to perform the inherent requirements of his position. Raphael FM was satisfied that there was a real issue to be tried between the parties and granted the application for an interim injunction pursuant to s 46PP of the HREOC Act. The terms of the injunction restrained the respondent from terminating the applicant's employment until seven days after the applicant's complaint to HREOC had been terminated, and ordered that he remain on sick leave and then leave without pay.

In *De Alwis v Hair & Anor*,[102] the applicant, a cricket spectator, made an application to restrain cricket umpire Darrell Hair from umpiring in cricket matches to be played by Sri Lanka in January 2003. The basis for the application was that that the umpire would discriminate against Sri Lankan bowler Muttiah Muralitharan on the basis of the bowler's disability, said to be 'flexion deformity', which caused the bowler's arm to be bent. It was claimed that Mr Hair had formed the view that the bowling action was defective (he was 'throwing') and on this basis had 'no-balled' Mr Muralitharan in the past. Bryant CFM found that there was no arguable case as the applicant was not eligible to bring an application under the DDA, being a third party and not an 'aggrieved person' within the meaning of s 5 of the DDA. The application was accordingly dismissed.[103] A purported appeal to the Federal Court in this matter was also struck out by French J.[104]

3.2 Applications for Summary Dismissal

3.2.4 Appeals from Summary Dismissal

[96] Ibid [53].
[97] Ibid [55].
[98] Ibid [61].
[99] Ibid [59].
[100] Ibid [43].
[101] [2002] FMCA 331.
[102] [2002] FMCA 357.
[103] Ibid [18] – [19].
[104] *De Alwis v Hair* [2003] FCA 10.

In *Pham v Human Rights and Equal Opportunity Commission*,[105] the Full Federal Court held that leave is required to appeal against an order for summary dismissal, being an interlocutory order.[106] However, the Court found that an order refusing to allow further time to commence a proceeding may be a final order, not an interlocutory one, from which an appeal lies as of right.[107]

3.3 Applications for Extension of Time

3.3.2 Principles to be Applied

Footnote 59 – The decision of Gray J in *Pham v HREOC & Others* [2002] FCA 669 was affirmed on appeal in *Pham v Human Rights and Equal Opportunity Commission* [2002] FCAFC 353. The matter is currently the subject of an application for special leave to appeal to the High Court.[108]

In *Rainsford v State of Victoria*,[109] Bryant CFM applied the principles set out by McInnis FM in *Phillips v Australian Girls' Choir & Anor*.[110] Bryant CFM was satisfied that there was a reasonable explanation for the delay, namely Counsel's uncertainty as to whether he could continue to act for the applicant without an instructing solicitor pursuant to the Victoria Bar Rules.[111] She also found there was an arguable case in relation to the first allegation of discrimination and therefore granted the extension of time in relation to the first allegation only (the application in relation to the other two allegations of discrimination was dismissed, as no arguable case was made out and in addition the matters relating to the third allegation had already been the subject of two Supreme Court proceedings).

3.3.4 Extension of time for Filing Appeals

In *Dorothy Joy Kennedy v ADI Limited*[112] the Federal Court considered, and dismissed, an application for an extension of time to file and serve a notice of appeal from a decision of the Federal Court approximately 16 months out of time. Marshall J dismissed Ms Kennedy's application on the basis that although the Court has a flexible discretionary power in O52r15(2) to depart from the prescribed time limits – 'for special reasons' - Ms Kennedy's reason for the delay was not a special reason which justified the delay. Marshall J cited the Full Court in *WAAD v MIMA*:[113] '…where the delay is short and no injustice will be occasioned to the respondent, justice will usually be done if the extension of time is granted'. However, in this case he held that it was not in the interests of justice for leave to be given because of the length of the delay and because of the negligible prospects of success of the appeal. He also noted that there may be exceptional circumstances in which it will be in the

[105] [2002] FCAFC 353.
[106] Ibid [4].
[107] Ibid [5]. See, however, *Bienstein v Bienstein* [2003] HCA 7, 13 February 2003 at [25] per McHugh, Kirby and Callinan JJ: 'orders refusing to set aside a default judgment or refusing to grant an extension of time are not final judgments because the unsuccessful party could make a further application for the same relief, even though such an application might have very little prospect of success [*Carr v Finance Corporation of Australia Ltd [No 1]* (1981) 147 CLR 246 at 248, 256; *Hall v Nominal Defendant* (1966) 117 CLR 423 at 441]'.
[108] *Pham v HREOC, Commonwealth of Australia (Defence) and University of Queensland* M202 of 2002.
[109] [2002] FMCA 266.
[110] (2001) FMCA 109.
[111] Ibid [55].
[112] [2002] FCA 1603.
[113] [2002] FCAFC 399, [7].

interests of justice to extend time despite the lack of an acceptable explanation for the delay (although ordinarily some acceptable reason for the delay should be given).

3.4 Application for Suppression Order

In *CC v DD and Anor*[114] the applicant obtained orders prohibiting both the publication of her name in any media publication and any information likely to enable the identification of her identity, pursuant to s61 of the *Federal Magistrates Act* 1999 (Cth). In the matter, the applicant apprehended that an article regarding her complaint of sex discrimination was going to be published the next day in a newspaper. Brown FM made an interim suppression order after accepting that there was a possibility that the publication of any information about her complaint in the media might compound the applicant's mental distress and because of the possibility that the applicant might discontinue her action if the publication occurred and it caused discomfort and embarrassment to her. Although the first respondent was not represented at the hearing of the application, Brown FM also ordered, 'in the best interests of the administration of justice' that the name of the first respondent not be published in any media publication, as that respondent had not been served.

3.5 Scope of Applications under s46PO of the HREOC Act to the FMS and Federal Court

3.5.1 Relationship between Application and Terminated Complaint

In *Murphy v Loper & Anor*[115] the applicant sought to bring proceedings against a respondent not named in the complaint before HREOC. The applicant argued that HREOC had made an error in incorrectly naming the respondent and that the Court should correct that error. Mead FM dismissed the complaint as against that respondent as they were not a respondent to the terminated complaint as required by s 46PO of the HREOC Act.[116] Mead FM noted that as a general rule, where a procedural error has been made, the appropriate course of action is to go back to HREOC and lodge a fresh complaint. This is not a request that HREOC issue a fresh determination as there is no power under the HREOC Act to do so and the legislation is based upon the ability of the parties to have their disputes mediated. If the complaint is filed against a person or an entity different to the person or entity in the first proceedings, then there is not the proper opportunity to mediate or conciliate.[117]

[114] [2002] FMCA 221.
[115] [2002] FMCA 310.
[116] The same was done by Raphael FM in *Jandruwanda v Univerity of South Australia and Others* [2003] FMCA 205.
[117] Ibid [16].

Chapter 4
Costs Awards in the FMS and Federal Court

4.4 Analysis of Approach of the FMS and Federal Court on the Issue of Costs

4.4.1 The FMS

(A) Relevance of Nature of the Jurisdiction

Footnote 45 – McInnis FM referred to this passage and adopted the same approach in *Batzialas v Tony Davies Motors Pty Ltd* [2002] FMCA 243, [110]. He found in the circumstances that it was appropriate that Order 23 of the Federal Court Rules should apply to human rights applications, entitling the respondent in that matter to party-party costs from the date of an offer of compromise which had been made and rejected by the unsuccessful applicant (at [118]). See also *Murphy v Loper & Anor* [2002] FMCA 310, adopting the same approach and applying it to the question of indemnity costs.

(B) Factors Considered in Exercising Discretion as to Costs Orders

i. Where there is a Public Interest Element to the Complaint

In *McLeod v Power*,[118] in which the applicant was unsuccessful, Brown FM noted the general rule that costs follow the event. However, he found that the respondent was 'not without blame' for the matter the subject of the application and that the issue was a matter of some public interest.[119] In the circumstances costs were not awarded.

ii. Where the Applicant is Unrepresented and not in a Position to Assess the Risk of Litigation

In *Ingui v Ostara & Anor*,[120] the respondents sought costs following the filing of a notice of discontinuance by the applicant. Brown FM noted the ordinary rule that costs follow the event where an applicant has discontinued proceedings and suggested that the position 'may be somewhat different in proceedings which relate to Human Rights legislation'.[121] He cited the views of Driver FM in *Low v Australian Tax Office*[122] to the effect that the Court should be slow to award costs at an early stage of Human Rights proceedings as it may deter applicants under what is remedial legislation. Brown FM noted, however, that Driver FM took a contrary view in *NAGY v Minister for Immigration and Multicultural and Indigenous*

[118] [2003] FMCA 2.
[119] Ibid [76] – [77].
[120] [2003] FMCA 132.
[121] Ibid [32] - [33].
[122] [2000] FMCA 6 at 11.

Affairs.[123] On the case before the Court, Brown FM noted that the applicant had been represented throughout the proceedings and the respondents were private individuals funding their own litigation who had indicated clearly throughout the proceedings that they contested the allegations made against them. There was not a matter of legal principle at stake. In those circumstances it was reasonable that the applicant should 'make some contribution to the costs incurred by the respondents in the proceedings'[124]. The parties were therefore invited to make submissions to the Court on the question of the quantum of costs.

iv. The Courts should not Discourage Litigants from Bringing Meritorious Claims and Should be Slow to Award Costs at an Early Stage

Footnote 73 – The view that 'the Court should be slow to award costs at an early stage of human rights proceedings' was also cited with approval by Baumann FM in *Alamzeb v Director-General Education Queensland & Anor* [2003] FMCA 274 at [36].

[123] [2002] FMCA 189
[124] [2003] FMCA 132 at 37.