80 A.L.R. 1 FEDERAL COURT OF AUSTRALIA -- GENERAL DIVISION

AUSTRALIAN LAW REPORTS

ALDRIDGE v BOOTH

FEDERAL COURT OF AUSTRALIA -- GENERAL DIVISION

80 A.L.R. 1

17-20 August, 1 September, 15 October 1987, 30 May 1988 -- Brisbane

30 May 1988 -- Brisbane

CATCHWORDS:
Constitutional law - External affairs power - Whether particular provisions of Commonwealth sex **discrimination** legislation a valid exercise of Commonwealth legislative power - (CTH) Commonwealth Constitution s 51(xxix) - (CTH) Sex **Discrimination** Act 1984 ss 9, 28, 81, 82, 106 - **Convention on the Elimination** of All Forms of **Discrimination** Against **Women** Arts 2, 11

Practice and procedure - Federal Court of Australia - Nature of proceedings in Federal Court in respect of enforcing determination of former Human Rights Commission under sex **discrimination** legislation - (CTH) Sex **Discrimination** Act 1984 ss 48, 81, 82

HEADNOTES:
The applicant was employed for just over a year by the four original respondents in their cake shop business. The applicant complained to the Human Rights Commission (the former Commission) that throughout her employment she was subjected to sexual harassment of an unlawful kind under the Sex **Discrimination** Act 1984 (Cth) (the Act).

After inquiry, the former Commission made a determination, pursuant to s 81(1) of the Act, which found the complaint substantiated, declared that the first respondent engaged in sexual harassment of the applicant of a type rendered unlawful under the Act, declared that the first respondent was at all material times the agent of the other three original respondents and that those respondents took no steps to prevent the first respondent from doing the unlawful acts, and declared that the respondents should pay to the applicant the sum of $ 7000 damages by way of compensation for the loss and damage suffered by her.

Following non-payment of the sum, the applicant applied to the Federal Court to give effect to the determination of the former Commission pursuant to s 82 of the Act.

In the course of preparing the matter for hearing, leave to intervene was granted to the Human Rights and Equal Opportunity Commission (the successor Commission), proceedings against all but the first respondent were dismissed by consent, and the Commonwealth intervened in respect of challenges to the constitutional validity of

certain provisions of the Act.

Held: It should be ordered that the first respondent pay to the applicant the sum of $ 7000 damages by way of compensation for the loss and damage suffered by her by reason of the first respondent's conduct.

(A) On the questions of constitutional validity:

(i) Section 28 of the Act is a valid exercise of the external affairs power (Constitution s 51(xxix)) if it gives effect to an international **convention** which Australia has adopted, in this case the **Convention on the Elimination** of All Forms of **Discrimination** Against **Women** **(the Convention)**. It is sufficient to give effect to a **convention** if an Act gives effect to principles stated in the **convention;** it is not necessary that the legislation implement an obligation imposed on Australia by adoption of the **convention.** Section 28 of the Act, as it had effect in relation to the first respondent by s 9(4) and (10) of that Act, did give effect to the **Convention** in the manner described as sufficient.

Commonwealth v Tasmania (1983) 158 CLR 1;46 ALR 625, applied.

(ii) In any event, s 28 of the Act gave effect to the **Convention** in the sense that it implemented an obligation imposed on Australia by Art 11.1 of the **Convention** to take appropriate measures to eliminate **discrimination** against **women** in the field of employment in order to ensure, on a basis of equality of men and **women,** the same rights.

(iii) Sexual harassment by an employer of a **women** employee is **discrimination** against a woman in the workplace on the basis of sex; the employee would not be subjected to the relevant conduct constituting harassment but for the fact that she was a woman. The fact that there are other matters, in addition to the sex of the employee, contributing to the sexual harassment, and as a consequence that not all **women** are subjected to it, does not prevent that conclusion. Moreover, the fact that men, as well as **women,** are possible subjects of sexual harassment does not alter the fact that sexual harassment of **women** involves **discrimination** on the ground of sex. Both forms of harassment will be discriminatory where a similarly situated person of the opposite sex would not be so treated. Section 28 of the Act therefore gave effect to the **Convention** which sought to eliminate **discrimination** on the basis of sex in relation to **women.**

Barnes v Costle (1977) 561 F 2d 983, considered.

(iv) Article 2(b), (c) and (e) of the **Convention** required appropriate legislation sanctions to be adopted, "sanction" being used in its primary sense of penalty. Sections 81 and 82 of the Act were such appropriate sanctions and therefore gave effect to the **Convention.**

(v) Similarly, s 106 of the Act gave effect to the **Convention** by providing an appropriate sanction against the toleration by employers and principals of sexual **discrimination** by their employees or agents.

Commonwealth v Tasmania (1983) 158 CLR 1;46 ALR 625, considered.

(vi) The fact that the Act, as having effect by s 9(10), did not address sexual

harassment of men in the workplace was irrelevant to the question of whether or not the Act gave effect to the **Convention.**

(B) On matters of practice and procedure:

(i) Proceedings in the Federal Court under s 82 of the Act are not an appeal; the Commission's determination is not an exercise of the judicial power of the Commonwealth, not being binding or conclusive between parties to the determination. The court is therefore not concerned only with questions of law, but is required to be satisfied as to matters of fact.

(ii) The satisfaction referred to in s 82(2) imports the civil standard of proof, that is to say, the necessary facts have to be established on the balance of probabilities, taking into account the gravity of the matters alleged.

(iii) How matters of fact are established to the satisfaction of the court will depend upon the nature of the case. Where, as in this case, the dispute requires an assessment of the credibility of the parties and their witnesses, it seems impossible to avoid the conclusion that those issues must be determined on the basis of oral evidence. An agreed statement of facts may be appropriate where the real question is essentially a question of law (eg whether or not a particular body is bound by the Act) or a question of characterisation (eg whether or not a particular work practice is discriminatory).

(iv) Since the court, unlike the former Commission, is bound by the rules of evidence and, independent of that consideration, frequently will have different evidence before it, any findings by the Commission could be of no assistance to the court. What occurred before the Commission may be relevant, for example, in matters of credibility (such as consistency of accounts), but the court must exercise its own mind on material properly before it.

(v) It was appropriate to grant leave to the successor Commisssion to intervene, having regard to the novelty of the application; the statutory recognition of the interests of the intervener under s 48(1)(gb) of the Act and the Commission's entitlement to be a party under s 82 of that Act, and the Commission's indication that it sought not to become a protagonist in the matter, nor to be in any way involved in the merits of the matter (subject to a reservation to resist attacks on the integrity and procedures of the former Commission), but to intervene to enable submissions concerning the practice and procedures to be adopted and any questions of law raised in the application.

Australian Railways Union v Victorian Railways Commissioners (1930) 44 CLR 319;; R v Commonwealth Court of Conciliation and Arbitration; ; Ex parte Hardiman (1954) 90 CLR 55;; R v Australian Broadcasting Tribunal; ; Ex parte Hardiman (1980) 144 CLR 13;29 ALR 289, considered.

(vi) The power of the court to make orders in proceedings brought pursuant to s 82 of the Act is to be read in the context of the type of determinations that can be made by the Commission under s 81(1)(b) of the Act. It is not right to attach any particular weight to the determination made by the Commission as being that of a "specialist body"; under s 82(2), the court has to make such order as it thinks fit, but s 82(3) indicates that the order is not made in ignorance of the Commission's determination. Here the first respondent had engaged in unlawful conduct which was

serious and over a lengthy period in respect of a young woman of particular vulnerability as to security of a place in the workforce. Damages in this area are not capable of anything like precise estimation. The sum referred to in the Commission's determination was a fair figure, of the order that would have been imposed independent of any earlier Commission determination, and any non-significant departure from that figure either way might be mischievously misinterpreted.

INTRODUCTION:
Application This was an application to the Federal Court pursuant to s 82(1) of the Sex **Discrimination** Act 1984 (Cth) for an order to enforce a determination of the Human Rights Commission, made on 5 November 1986 in respect of a complaint of sexual harassment in the workplace, that the respondents pay to the applicant the sum of $ 7000 as damages. The applicant also sought interest and costs. The facts and course of proceedings appear sufficiently from the judgment of the court.

COUNSEL:
M Foley for the applicant. D R Boughen for the respondent. R Cooper QC and P Applegarth (on 17-20 August 1987), R Cooper QC and R Atkinson (on 1 September 1987), R O'Regan QC and P Applegarth (on 15 October 1987) for the HREOC. G L Davies QC and M White for the Attorney-General (Cth), intervening.

JUDGES: SPENDER J

JUDGMENTS: Spender J. This is an application to the Federal Court of Australia pursuant to s 82(1) of the Sex **Discrimination** Act 1984 (the Act) for an order to enforce a determination of the Human Rights Commission made on a complaint of sexual harassment in the workplace. Serious questions of practice and procedure and a challenge to the constitutional validity of certain sections of the Act have tended to overshadow the factual dispute between the applicant and the respondent.

By an applicant filed in this court on 9 March 1987, Lynette Jane Aldridge sought an order giving effect to the determination of the Human Rights Commission made on 5 November 1986 that the respondents pay to the applicant the sum of $ 7000 damages. She also sought interest and costs.

Section 28 of the Act appears in Pt II Div 3 of that Act, which division is headed "**Discrimination** Involving Sexual Harassment". Section 28 deals with sexual harassment in employment. It provides: (1) It is unlawful for a person to harass sexually --

(a) an employee of that person;

. . .

(3) A person shall, for the purposes of this section, be taken to harass sexually another person if the first-mentioned person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person, or engages in other unwelcome conduct of a sexual nature in relation to the other person, and--

(a) the other person has reasonable grounds for believing that a rejection of the advance, a refusal of the request or the taking of objection to the conduct will disadvantage the other person in any way in connection with the other person's employment or work or possible employment or possible work; or

(b) as a result of the other person's rejection of the advance, refusal of the request or taking of objection to the conduct, the other person is disadvantaged in any way in connection with the other person's employment or work or possible employment or possible work.

(4) A reference in sub-section (3) to conduct of a sexual nature in relation to a person includes a reference to the making, to, or in the presence of, a person, of a statement of a sexual nature concerning that person, whether the statement is made orally or in writing.

Thus, unlike legislation in some other jurisdictions, the Act makes specific provision concerning sexual harassment in employment. The elements constituting sexual harassment in employment are:

(a) unwelcome conduct of a sexual nature; and

(b) (i) the applicant having reasonable grounds for believing that the taking of objection to the conduct would disadvantage her in any way in connection with her employment or work; or

(ii) as a result of her taking objection to the conduct, the applicant was disadvantaged in any way in connection with her employment or work.

By "unwelcome", I take it that the advance, request or conduct was not solicited or invited by the employee, and the employee regarded the conduct as undesirable or offensive: see Michael Rubenstein, "The Law of Sexual Harassment at Work" (1983) 12 Industrial Law Journal 1 at 7 and Henson v City of Dundee (1982) 682 F 2d 897.

It is to be noted that it is not mere unwelcome conduct of a sexual nature which is proscribed: it is such conduct, coupled with reasonable grounds for belief that resistance to that conduct will result in disadvantage in connection with a person's employment or actual disadvantage. The section is concerned with the unlawful exploitation of a position of power and, in the context of unwelcome sexual requests or conduct, prohibits a kind of blackmail. So understood, it does not inhibit non-exploitative amorous or sexually oriented advances.

There were four respondents to the application as commenced in the court.

Miss Aldridge was employed by the first respondent in a cake shop business known as "The Tasty Morsel" cake shop from 21 January 1985 to 24 January 1986. Mr Booth's wife and parents (who were the other respondents), were registered with the office of the Commissioner for Corporate Affairs as the proprietors with him of that business. Miss Aldridge claims that throughout her employment she was subjected to sexual harassment by the first respondent. On 13 February 1986, Miss Aldridge complained of sexual harassment to the Human Rights Commission in Brisbane.

The Human Rights Commission, which I shall call "the former Commission", was established by the Human Rights Commission Act 1981 (Cth). Under the Human Rights Commission Act 1981 and the Sex **Discrimination** Act 1984, the former Commission had the power to hold an inquiry and make a determination in respect of alleged breaches of the Sex **Discrimination** Act 1984. The Human Rights

Commission Act 1981 was repealed by s 4 of the Human Rights and Equal Opportunity Commission (Transitional Provisions and Consequential Amendments) Act 1986 (Cth). The Human Rights and Equal Opportunity Commission Act 1986 established a statutory corporation, the Human Rights and Equal Opportunity Commission (the Commission). The functions of the Commission are conferred by ss 11(1) and 31 of the Human Rights and Equal Opportunity Commission Act 1986, s 48(1) of the Sex **Discrimination** Act 1984, and s 20 of the Racial **Discrimination** Act 1975.

Under powers conferred on the former Commission by s 57(1)(b) of the Act, an inquiry was held on 4 and 5 November 1986 into the complaint lodged by Miss Aldridge.

On 5 November 1986, the former Commission, pursuant to the powers conferred on it by s 81(1) of the Act, made a determination. It was in these terms: The Commission:

(1) finds the complaint substantiated;

(2) declares that the respondent, Grant Booth, engaged in conduct rendered unlawful under the Sex **Discrimination** Act 1984, namely sexual harassment of the complainant;

(3) declares that at all material times the said Grant Booth was the agent of the other three respondents and that those respondents took no steps to prevent the said Grant Booth from doing the acts which were unlawful under the Act;

(4) declares that the respondents should pay to the complainant the sum of $ 7000 damages by way of compensation for the loss and damage suffered by her.

On 6 November 1986, the solicitors for Miss Aldridge wrote to the solicitors for the respondents demanding payment from them of $ 7000 damages by way of compensation. That sum, or any part of it, has not been paid to Miss Aldridge. She now has applied to the Federal Court to give effect to the determination of the Human Rights Commission pursuant to s 82 of the Sex **Discrimination** Act 1984.

Section 81 of the Act provides: 81(1) After holding an inquiry, the Commission may-
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(a) dismiss the complaint the subject of the inquiry; or

(b) find the complaint substantiated and make a determination, which may include any one or more of the following:

(i) a declaration that the respondent has engaged in conduct rendered unlawful by this Act and should not repeat or continue such unlawful conduct;

(ii) a declaration that the respondent should perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant;

(iii) a declaration that the respondent should employ or re-employ the complainant;

(iv) except where the complaint was dealt with as a representative complaint -- a declaration that the respondent should pay to the complainant damages by way of compensation for any loss or damage suffered by reason of the conduct of the respondent;

(v) a declaration that the respondent should promote the complainant;

(vi) a declaration that the termination of a contract or agreement should be varied to redress any loss or damage suffered by the complainant;

(vii) a declaration that it would be inappropriate for any further action to be taken in the matter.

(2) A determination of the Commission under sub-section (1) is not binding or conclusive between any of the parties to the determination.

(3) The Commission may, in the making of a determination under sub-section (1), state any findings of fact upon which the determination is based.

(4) The damage referred to in paragraph (1)(b) includes injury to the complainant's feelings or humiliation suffered by the complainant.

Section 81(2) is important. The express provision that a determination of the Commission under s 81(1) is ". . . not binding or conclusive between any of the parties to the determination" reflects a recognition of the limitation of the judicial power of the Commonwealth under Ch III of the Constitution. A determination of the Commission is not an exercise of the judicial power of the Commonwealth. This sub-section, it seems to me, reinforces the conclusion that the functions of the Human Rights Commission, and now the Human Rights and Equal Opportunities Commission, under the Act and the other statutes with which it is concerned, are primarily educational and conciliatory. If, as the result of its inquiries and efforts, complaints, for example of sexual harassment, are resolved without the necessity of court proceedings, that is obviously a socially desirable result and conducive to achieving the objects of the Act.

That the Human Rights Commission has been successful in these primary purposes is clear, in that I was informed that of the many thousands of matters referred to the Human Rights Commission and its successor, the Human Rights and Equal Opportunities Commission, this is the first occasion on which an order for "enforcement" pursuant to the Sex **Discrimination** Act 1984 from the Federal Court has been sought.

The jurisdiction and powers of the Federal Court in relation to the Act are set out, very tersely, in s 82, which provides: (1) The Commission or complainant may institute a proceeding in the Federal Court for an order to enforce a determination made pursuant to sub-section 80(1) or 81(1).

(2) Where the Federal Court is satisfied that the respondent has engaged in conduct or committed an act that is unlawful under this Act, the Federal Court may make such orders (including a declaration of right) as the Federal Court thinks fit.

(3) Orders made by the Federal Court under sub-section (2) may give effect to a determination of the Commission.

Some difficulties as to practice and procedure are immediately apparent. Section 82(1) permits the Commission or complainant to institute a proceeding for ". . . an order to enforce a determination made pursuant to sub-section . . . 81(1)". As s 81(2) provides, such a determination is not binding or conclusive between any of the parties to the determination, so that the proceedings in the Federal Court are to "enforce" a non-binding and non-conclusive determination.

To what extent does a determination made by a Commission have any part to play in the Federal Court's being satisfied? To what extent, if at all, can findings of fact made by the Commission have any bearing on the proceedings in the Federal Court? As to the power in the Federal Court to make such orders (including a declaration of right) as the Federal Court thinks fit, what are the limitations, if any, on such a power?

Section 82(2) requires the Federal Court before it makes any order to be ". . . satisfied that the respondent has engaged in conduct or committed an act that is unlawful under this Act". The satisfaction referred to in s 82(2) imports the civil standard of proof, that is to say, the necessary facts have to be established on the balance of probabilities, taking into account the gravity of the matters alleged: Briginshaw v Briginshaw (1938) 60 CLR 336 ; Helton v Allen (1940) 63 CLR 691 and ; Rejfek v McElroy (1965) 112 CLR 517. There was no contention otherwise.

As to the procedure to be adopted, the proceedings in the Federal Court are not expressed to be an appeal. The terms of s 82(2) suggest that the court is not concerned only with questions of law; the court is required to be satisfied as to matters of fact. How matters of fact are established to the satisfaction of the court will depend upon the nature of the case but where, as here, the dispute requires an assessment of the credibility of the parties and their witnesses, it seems to me impossible to avoid the conclusion that those issues must be determined on the basis of oral evidence. In other cases it may be possible to deal with the matter on the basis of an agreed statement of facts. Such a course may be appropriate where the real question is essentially a question of law or a question of characterisation: for example, whether a particular body is bound by the Act, or whether a particular work practice is discriminatory, and so on.

Next, the court is bound to proceed only on evidence properly admitted before it in accordance with the rules of evidence, a stricture that does not necessarily apply to the Commission. Independently of that consideration, the evidence before the court will frequently not be the same as that before the Commission. It seems to me, having regard to the terms of s 81(2), that any findings by the Commission can be of no assistance in the performance of the task entrusted to the Federal Court by s 82(2). That is not to say that what occurred before the Commission is irrelevant; by way of example only it frequently will happen that, in matters of credibility, the consistency of accounts will have significant evidentiary consequences; but the court has to exercise its own mind on material properly before it.

Having regard to these matters, on 26 March 1987, at the directions hearing in respect of the Federal Court proceedings, I indicated that, the determination of the Commission being neither binding nor conclusive between any of the parties to that determination, I considered it proper that, before the Federal Court could be satisfied that the respondent has engaged in conduct or committed an act that is unlawful under the Act, it was necessary that issues be defined and evidence called to

establish the matters of complaint. I directed the applicant file and serve points of claim within seven days and the respondents file points of defence within a further seven days. I set the matter down for hearing on 21 and 22 May 1987.

On 18 May 1987, the Human Rights and Equal Opportunities Commission sought leave to intervene in these proceedings, which was granted. It is to be noted that, pursuant to s 82, the Commission itself has power to institute proceedings in the Federal Court to enforce a determination made pursuant to s 81(1) and, further, s 48(1)(gb) of the Act provides:

(gb) where the Commission considers it appropriate to do so, with the leave of the Court hearing the proceedings and subject to any conditions imposed by the Court, to intervene in proceedings that involve issues of **discrimination** on the grounds of sex, marital status or pregnancy or **discrimination** involving sexual harassment;

This sub-section was introduced into the Act by s 37 of the Human Rights and Equal Opportunity Commission (Transitional Provisions and Consequential Amendments) Act 1986.

The general position in relation to intervention is referred to in Australian Railways Union v Victorian Railways Commissioners (1930) 44 CLR 319 at 331, where Dixon J, as he then was, said: "I think we should be careful to allow arguments only in support of some right, authority or other legal title set up by the party intervening. Normally parties, and parties alone, appear in litigation. But, by a very special practice, the intervention of the States and the Commonwealth as persons interested has been permitted by the discretion of the court in matters which arise under the Constitution. The discretion to permit appearances by counsel is a very wide one; but I think we would be wise to exercise it by allowing only those to be heard who wish to maintain some particular right, power or immunity in which they are concerned, and not merely to intervene to contend for what they consider to be a desirable state of the general law under the Constitution without regard to the dimunition or enlargement of the powers which as States or as Commonwealth they may exercise."

In R v Commonwealth Court of Conciliation and Arbitration; ; Ex parte Ellis (1954) 90 CLR 55, Webb J, at 69, having referred to those observations, said: "If this view be accepted, as I believe it should be, the corollary must follow that leave to intervene, when granted, ought not to be interpreted as a general licence to discuss every interesting question in the case but should be acknowledged as limited to the submission of an argument *pro interesse suo*." See also Corporate Affairs Commission v Bradley [1974] 1 NSWLR 391.

I considered it appropriate in the circumstances of this case, in the light of the novelty of the application and the unchartered waters on which it had to be determined, to grant leave to intervene. Further, the interests of the proposed intervener are statutorily recognised in s 48 of the Act and the desirability of permitting the Commission to intervene is supported by the Commission's entitlement to be a party under s 82 of that Act.

In R v Australian Broadcasting Tribunal; ; Ex parte Hardiman (1980) 144 CLR 13 at 35-6;29 ALR 289 at 306, the High Court (Gibbs CJ, Stephen, Mason, Aickin and Wilson JJ), said: "Mr Hughes was instructed by the tribunal to take the unusual course of contesting the prosecutors' case for relief and this he did by presenting a

substantive argument. In cases of this kind the usual course is for a tribunal to submit to such order as the court may make. The course which was adopted by the tribunal in this court is not one which we would wish to encourage. If a tribunal becomes a protagonist in this court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings which take place if and when relief is granted. The presentation of a case in this court by a tribunal should be regarded as exceptional and, where it occurs should in general, be limited to submissions going to the powers and procedures of the tribunal."

Senior counsel for the Commission indicated that it was not sought by the intervention to become a protagonist in the matter, but to enable submissions to be put concerning the practice and procedures to be adopted and on any questions of law raised in the application. It was indicated that, subject to a reservation to resist any attacks made on the integrity of the former Commission and its procedures, it did not seek to be in any way involved in the merits of the matter.

The Commission indicated it would not be seeking an order for costs.

On 21 May 1987, when the matter was called on for hearing, the applicant sought leave to file amended particulars of claim and particulars of a claim for wages, which was granted. Counsel for the respondents sought leave to file an amended defence. In addition, and for the first time, the constitutional validity of some sections of the Act were sought to be argued by the respondents. No notice pursuant to s 78B of the Judiciary Act 1903 (Cth) having been given by the respondents, the matter was then adjourned, and I ordered the costs thrown away by the necessity to adjourn be paid by the respondents.

Notice pursuant to s 78B was then given. The notice claimed that: The nature of the matters arising under the Constitution or involving its interpretation [sought to be argued by the respondents] are:

(a) whether ss 9(4) and (10), 28, 81(1)(b)(iv), 82(2) and 106 of the Sex **Discrimination** Act 1984 are a valid exercise of the legislative power of the Commonwealth, particularly its power under s 51(xxix) of the Constitution; and

(b) whether s 28 of the Sex **Discrimination** Act 1984 gives effect to the **Convention on the Elimination** of All Forms of **Discrimination** Against **Women**.

On 9 June 1987, the Attorney-General for the Commonwealth of Australia intervened and the matter was set down for hearing on 17 and 18 August 1987. After submissions concerning the constitutional validity of the Act, I indicated on 18 August that, in my view, the Act was within the power of the Commonwealth Parliament and indicated that I would give reasons later. Counsel for the Attorney-General for the Commonwealth of Australia was then granted leave to withdraw.

The hearing proceeded on 18, 19 and 20 August 1987. On 1 September 1987, the application against the second, third and fourth respondents was dismissed by consent with no order as to costs, and the application against the first respondent continued with the calling of further oral evidence. The matter was adjourned for further hearing on 15 October 1987.

The Act is entitled "An Act relating to **discrimination** on the ground of sex, marital status or pregnancy or involving sexual harassment". The objects of the Act are set

out in s 3: The objects of this Act are--

(a) to give effect to certain provisions of the **convention on the Elimination** of All Forms of **Discrimination** Against **Women;**

(b) to eliminate, so far as is possible, **discrimination** against persons on the ground of sex, marital status or pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs;

(c) to eliminate, so far as is possible, **discrimination** involving sexual harassment in the workplace and in educational institutions; and

(d) to promote recognition and acceptance within the community of the principle of the equality of men and **women.**

As indicated, the respondent sought to argue that ss 9(4) and (10), 28, 81(1)(b)(iv), 82(2) and 106 of the Act were *ultra vires* the legislative power of the Commonwealth and, in particular, were not supported by s 51(xxix) of the Constitution, and that s 28 of the Act did not give effect to the **Convention of the Elimination** of all Forms of **Discrimination** Against **Women.** Sections 28, 81 and 82, so far as they are presently relevant, have earlier been set out. Section 9 of the Act deals with the circumstances in which the Act applies. Section 9(2) provides: "Subject to this section, this Act applies throughout Australia." Section 9(3) provides that the Act has effect in relation to acts done within a Territory.

Section 9(4) then provides that certain sections of the Act, including prohibiting sexual harassment in employment, have effect as provided by s 9(3) and the following provisions of s 9 and not otherwise.

There is then set out a series of sub-sections dealing with the application of various sections of the Act in stated circumstances, clearly relying on specific heads of Commonwealth legislative power. By way of example, s 9(5) provides that, inter alia, s 28 has effect in relation to: . . . **discrimination** against, and sexual harassment of--

(a) Commonwealth employees in connection with their employment as Commonwealth employees; and

(b) persons seeking to become Commonwealth employees.

By s 9(8), s 28 has effect in relation to: . . . acts done by a person exercising, by or on behalf of--

(a) the Commonwealth or the Administration of a Territory; or

(b) a body or authority established for a public purpose by a law of the Commonwealth or a law of a Territory,

a power conferred by a law of the Commonwealth or a law of a Territory, being acts done by the person in connection with the exercise of that power.

Other sub-sections rely on other heads of Commonwealth legislative power, including

that relating to foreign corporations, to trading or financial corporations formed within the limits of the Commonwealth, banking, or trade or commerce.

In the factual circumstances of this case, no corporation is involved nor is there any other connection with Commonwealth legislative power except that referred to in s 9(10). Section 9(10) provides: "If the **Convention** is in force in relation to Australia, the prescribed provisions of Part II, and the provisions of Division 3 of Part II, have effect in relation to **discrimination** against **women,** to the extent that the provisions give effect to the **Convention." "Convention**", by s 4, means "the **Convention on the Elimination** of All Forms of **Discrimination** Against **Women**". A copy of the English text of that **Convention** is set out in a Schedule to the Sex **Discrimination** Act 1984.

Section 106 is concerned with vicarious liability under the Act. It provides: (1) Subject to sub-section (2), where an employee or agent of a person does, in connection with the employment of the employee or with the duties of the agent as an agent--

(a) an act that would, if it were done by the person, be unlawful under Division 1 or 2 of Part II (whether or not the act done by the employee or agent is unlawful under Division 1 or 2 of Part II); or

(b) an act that is unlawful under Division 3 of Part II,

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

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

In the light of the discontinuance of the application as against the second, third and fourth respondents, this provision is no longer of any direct relevance. It is to be noted that pursuant to sub-s (2), it is for an employer or principal to establish all reasonable steps to be taken by that employer or principal to prevent the acts constituting the unlawful conduct. The discharge of this onus, of course, depends on the particular circumstances of a case, but it is seriously to be doubted that it can be discharged in circumstances of mere ignorance or inactivity. In Tidwell v American Oil Co (1971) 332 F Supp 424 at 436, it was said: "The modern corporate entity consists of the individuals who manage it, and little, if any, progress in eradicating **discrimination** in employment will be made if the corporate employer is able to hide behind the shield of individual employee action."

On 13 July 1983, the Governor-General in Council approved Australia's ratification subject to reservation of the **Convention on the Elimination** of All Forms of **Discrimination** Against **Women** and authorised the Minister of State for Foreign Affairs to draw up, complete and deposit with the Secretary-General of the United Nations, an appropriate instrument for ratification by Australia of that **Convention.** On 20 July 1983, the Minister of State for Trade, for and on behalf of the Minister of State for Foreign Affairs, signed an instrument of ratification of that **Convention,** which instrument was deposited with the Secretary-General of the United Nations. There were two reservations: one dealing with the capacity of the Government of Australia to introduce maternity leave with pay throughout Australia, the second

dealing with the exclusion of **women** from combat and combat-related duties in the defence forces.

On 23 August 1983, the Secretary-General of the United Nations acknowledged Australia's ratification of that **Convention** and, pursuant to Art 27(2) of that **Convention, the Convention** came into force for Australia on 27 August 1983.

In my opinion, s 28 is clearly within the legislative power of the Commonwealth of Australia. It is plain that it is within the competence of the Commonwealth Parliament to prohibit sexual harassment in employment within the Territories, for instance. What is in dispute is the applicability of s 28 to the circumstances obtaining during the period of the employment by Miss Aldridge at The Tasty Morsel cake shop.

The **Convention** being in force in Australia, s 28, by s 9(10), has effect *in relation to* ***discrimination*** *against* ***women*** to the extent that s 28 gives effect to the **Convention** (my emphasis). Section 28 is gender-universal in its terms, but in this context, it prohibits **discrimination** against **women** only. If s 28, as a provision which prohibits **discrimination** against **women** "gives effect" to the **Convention,** it is a valid exercise of the external affairs power under s 51(xxix) of the Constitution.

In my opinion, it is sufficient to give effect to a **Convention** if an Act gives effect to principles stated in the **Convention:** it is not necessary that the legislation implement an obligation imposed on Australia by its adoption of the **Convention,** and s 28, in relation to **discrimination** against **women** in employment, does that. Mason J, as he then was, in Commonwealth v Tasmania (Tasmanian Dams case) (1983) 158 CLR 1 at 123-4;46 ALR 625 at 690, said of a test proposed by counsel for the State of Tasmania: The first of the three tests seeks to express the idea that it is the implementation of an obligation imposed on Australia by a treaty that attracts the external affairs power, that it is the treaty obligation and its implementation that constitutes the relevant subject or matter of external affairs. To my mind this is too narrow a view. As I pointed out in Koowarta v Bjelke-Petersen (1982) 153 CLR 168 at 224-7;39 ALR 417, the treaty itself is a matter of external affairs, as is its implementation by domestic legislation. The insistence in ; R v Burgess; ; Ex parte Henry (1936) 55 CLR 608 that the legislation carry into effect provisions of the **convention** in accordance with the obligation which that **convention** imposed on Australia is not inconsistent with what I have said, though it does raise a question as to the scope of the legislative power in its application to a treaty, a matter to be discussed later. At this point it is sufficient to say that there is no persuasive reason for thinking that the international character of the subject matter or the existence of international concern is confined to that part of a treaty which imposes an obligation on Australia.

He later said (CLR at 131-2; ALR at 696-7): "The extent of the Parliament's power to legislate so as to carry into effect a treaty will, of course, depend on the nature of the particular treaty, whether its provisions are declaratory of international law, whether they impose obligations or provide benefits and, if so, what the nature of those obligations or benefits are, and whether they are specific or general or involve significant elements of discretion and value judgment on the part of the contracting parties. I reject the notion that once Australia enters into a treaty Parliament may legislate with respect to the subject matter of the treaty as if that subject matter were a new and independent head of Commonwealth legislative power. The law must conform to the treaty and carry its provisions into effect. The fact that the power may extend to the subject matter of the treaty before it is made or adopted by

Australia, because the subject matter has become a matter of international concern to Australia, does not mean that Parliament may depart from the provisions of the treaty after it has been entered into by Australia and enact legislation which goes beyond the treaty or is inconsistent with it."

Murphy J (CLR at 171; ALR at 729-30) said: "It is preferable that the circumstances in which a law is authorised by the external affairs power be stated in terms of what is sufficient, even if the categories overlap, rather than in exhaustive terms. To be a law with respect to external affairs it is sufficient that it: (a) implements any international law, or (b) implements any treaty or **convention** whether general (multilateral) or particular, or (c) implements any recommendation or request of the United Nations Organisation or subsidiary organisations such as the World Health Organisation, the United Nations Education, Scientific and Cultural Organisation, the Food and Agriculture Organisation or the International Labour Organisation, or (d) fosters (or inhibits) relations between Australia or political entities, bodies or persons within Australia and other nation States, entities, groups or persons external to Australia, or (e) deals with circumstances or things outside Australia, or (f) things inside Australia of international concern."

Brennan J (CLR at 231: ALR at 781-2) said: "The constitutional authority for the making of these regulations is derived from the obligation imposed upon Australia to protect and conserve the listed property. The extent of the legislative power 'must depend upon the terms of the **convention,** and upon the rights and duties it confers and imposes': per Evatt and McTiernan JJ in R v Burgess; ; Ex parte Henry (1936) 55 CLR 608 at 688. The obligation imposed by the **Convention,** as we have seen, does not condescend to detail in prescribing the steps to be taken, though the taking of appropriate legal measures necessary for the protection and conservation of the property is one of the appropriate steps mentioned in Art 5. It is clear, however, that the selection of the appropriate legal measures is left by the **Convention** to the Party who is to discharge the obligation to protect and conserve the property. It does not follow that the charter of Commonwealth power extends to whatever the Commonwealth thinks appropriate and necessary for the protection and conservation of the property. The obligation being to take appropriate legal measures for the protection and conservation of the property, the power is to make laws which are conducibe to that end rather than to make laws which are thought by the Commonwealth to be conducive to that end."

Deane J (CLR at 258-9; ALR at 805) said: "It is . . . relevant for present purposes to note that the responsible conduct of external affairs in today's world will, on occasion, require observance of the spirit as well as the letter of international agreements, compliance with recommendations of international agencies and pursuit of international objectives which cannot be measured in terms of binding obligation. This was recognised by Evatt and McTiernan JJ in *Burgess*' case when, in the sentences following the extract of their judgment set out above, (1936) 55 CLR at 687, they commented that 'it is not to be assumed that the legislative power over "external affairs" is limited to the execution of treaties or **conventions'** and illustrated the comment by adding that 'the Parliament may well be deemed competent to legislate for the carrying out of "recommendations" as well as the 'draft international **conventions**" resolved upon by the International Labour Organisation or of other international recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations'. Circumstances could well exist in which a law which procured or ensured observance within Australia of the spirit of a treaty or compliance with an international recommendation or pursuit of an

international objective would properly be characterised as a law with respect to external affairs, notwithstanding the absence of any potential breach of defined international obligations or of the letter of international law."

In any event, in my view, Art 11.1 of the **Convention** does impose a relevant obligation upon all the parties to the **Convention** to take appropriate measures to eliminate **discrimination** against **women** in the field of employment. Article 11.1 commences: "States Parties shall take all appropriate measures to eliminate **discrimination** against **women** in the field of employment in order to ensure, on a basis of equality of men and **women,** the same rights . . .".

The first four articles of the **Convention** provide:

Article 1

For the purposes of the present **Convention,** the term '**discrimination** against **women'** shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by **women,** irrespective of their marital status, on a basis of equality of men and **women,** of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2

States Parties condemn **discrimination** against **women** in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating **discrimination** against **women** and, to this end, undertake:

(a) To embody the principle of the equality of men and **women** in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all **discrimination** against **women;**

(c) To establish legal protection of the rights of **women** on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of **women** against any act of **discrimination;**

(d) To refrain from engaging in any act or practice of **discrimination** against **women** and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate **discrimination** against **women** by any person, organisation or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute **discrimination** against **women;**

(g) To repeal all national penal provisions which constitute **discrimination** against **women.**

Article 3

States Parties shall take in all field, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of **women,** for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4

(1) Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and **women** shall not be considered **discrimination** as defined in the present **Convention,** but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

(2) Adoption by States Parties of special measures, including those measures contained in the present **Convention,** aimed at protecting maternity shall not be considered discriminatory.

Two arguments were advanced by the respondents why s 28 of the Act cannot validly apply to them. First, the conduct made unlawful by s 28 does not involve **discrimination** "against **women" or discrimination** "on the basis of sex" and, accordingly, s 28 does not give effect to the **Convention.** It was said sexual harassment under s 28 is not **discrimination** on the basis of sex (ie gender), but rather the exercise of power by virtue of the employer-employee relationship (which power may be exercised without any **discrimination** between the sexes). Alternatively, if there is any **discrimination,** it is on the basis of a willingness to provide sexual favours. Secondly, because the application of s 28, by virtue of s 9(10), confers protection upon **women** but not upon men, the Act fails to ensure "on the basis of equality with men" the same rights and, accordingly, it does not give effect to the **Convention.** The basis of "equality of men and **women**" is referred to, inter alia, in Art 1, 3 and 11 set out above.

In my opinion, sexual harassment by an employer of a woman employee is **discrimination** against a woman in the workplace on the basis of sex. Section 9(10) applies s 28 ". . . in relation to **discrimination** against **women**". That sexual harassment under s 28 is a form of **discrimination** is implicitly recognised in one of the objects of the Act, set out in s 3(c): The objects of this Act are--

. . .

(c) to eliminate, so far as is possible, **discrimination** involving sexual harassment in the workplace and in educational institutions; . . .

Similarly, Div 3, Pt II of the Act is headed "**Discrimination** Involving Sexual Harassment" and s 13(1) of the Acts Interpretation Act 1901 (Cth) provides:-- "The headings of the Parts Divisions and Subdivisions into which any Act is divided shall be deemed to be part of the Act."

it seems to me plain that sexual harassment is a form of **discrimination,** as a

matter of analysis. Basal though the reasoning may be, the observation in Barnes v Costle (1977) 561 F 2d 983 at 990, where it was said, "But for her womanhood . . . her participation in sexual activity would never have been solicited. To say then that she was victimised in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman subordinate to the inviter in the hierarchy of agency personnel. Put another way, she became the target of her superior's sexual desires because she was a woman, and was asked to bow to his demands as the price for holding her job", is unanswerable.

In jurisdictions where sexual harassment in employment is not proscribed as such, courts and tribunals have held that sexual harassment in employment, of the kind formulated in s 28, constituted **discrimination** against **women** within the field of employment on the ground of sex. In Australia, the matter was considered by the Equal Opportunity Tribunal of New South Wales in O'Callaghan v Loder [1983] 3 NSWLR 89 and ; Hill v Water Resources Commission (1985) EOC 92-127. In Victoria, it has been considered in ; R v Equal Opportunity Board ; ; Ex parte Burns [1985] VR 317 a judgment of Nathan J of the Victorian Supreme Court, and ; Orr v Liva Tool & Diemakers Pty Ltd (1985) EOC 92-126, in the Victorian Equal Opportunity Board; and in New Zealand, in ; H v E (1985) EOC 92-137. The position in Canada is reflected in cases like ; Brennan v R [1984] 2 CF 799 at 821 et seq; ; Re Janzen and Platy Enterprises Ltd (1985) 24 DLR (4th) 31 at 38; ; Re Mehta and MacKinnon (1985) 19 DLR (4th) 148, particularly at 156-8; so too, in the United States, in ; Barnes v Costle (1977) 561 F 2d 983 ; Bundy v Jackson (1981) 641 F 2d 934; ; Henson v City of Dundee (1982) 682 F 2d 897, particularly at 902; ; Katz v Dole (1983) 709 F 2d 251 at 254. A similar conclusion was reached in Scotland, in ; Porcelli v Strathclyde Regional Council [1986] ICR 564 at 565.

In my opinion, when a woman is subjected to sexual harassment as defined in s 28, she is subjected to that conduct because she is a woman, and a male employee would not be so harassed: the **discrimination** is on the basis of sex. The woman employee would not have been subjected to the advance, request or conduct but for the fact that she was a woman.

The fact that there are other matters, in addition to the sex of the recipient, contributing to the sexual harassment, and as a consequence that not all **women** are subjected to it, does not prevent the conclusion that sexual harassment is **discrimination** on the ground of sex. Moreover, the fact that men, as well as **women,** are possible subjects of sexual harassment, does not alter the fact that sexual harassment of **women** involves **discrimination** on the ground of sex. Both forms of harassment will be discriminatory where a similarly situated person of the opposite sex would not be so treated. Homosexual harassment and sexual harassment of men by **women** can be characterised as **discrimination** on the basis of sex.

On the question of whether ss 81 and 82 "give effect to the **Convention", the Convention** requires appropriate legislative measures to be adopted, including sanctions where appropriate: Art 2, paras (b), (c) and (e). In my view, "sanction" is used in its primary sense of penalty and the measures selected by the legislature in ss 81 and 82 in my opinion are appropriate measures. Similarly, s 106 in my opinion "give[s] effect to the **Convention**" in that the section provides an appropriate sanction against the toleration by employers and principals of sexual **discrimination** by their employees or agents. In this conclusion, I have noted the caution expressed by Brennan J in the *Tasmanian Dams* case, *supra*, where he said (CLR at 231; ALR at

782): The obligation being to take appropriate legal measures for the protection and conservation of the property, the power is to make laws which are conducive to that end rather than to make laws which are thought by the Commonwealth to be conducive to that end.

Adopting the test of Deane J in the same case (CLR at 259; ALR at 805-6) in my view, s 106 is a provision-- ". . . capable of being reasonably considered to be appropriate and adapted to achieving what is said to impress it with the character of a law with respect to external affairs".

The second argument of the respondents involves a degree of circularity. The argument is that s 28, as applied by s 9(10), is inconsistent with or contrary to the terms of the **Convention.** I accept that the words in s 9(10) ". . . in relation to **discrimination** against **women**" confine the operation of s 28 by virtue of s 9(10) to sexual harassment against **women.** The argument was that the consequence was that it was unlawful for an employer sexually to harass a female employee, but not unlawful for an employer sexually to harass a male employee. This provision cannot therefore be said to be a law to eliminate **discrimination** against **women** as defined in Art 1 of the **Convention,** nor is it a provision to promote the recognition, enjoyment or exercise by **women** of human rights and fundamental freedoms "on a basis of equality of men and **women**". Rather, **women** are thereby given a greater status than or superior rights to men. It was submitted: "It is not a case of . . . eliminating **discrimination** to the extent that the rights of **women** are less than the rights of men, it is conferring on them an advantage not enjoyed by men."

It was further submitted that s 28 as so applied by s 9(10) is inconsistent with Art 15(1) of the **Convention,** which states: "States Parties shall accord to **women** equality with men before the law."

To give effect to the **Convention,** the legislation must be directed at the **elimination of discrimination** against **women.** Legislation which was directed at the **elimination of discrimination** generally could not fairly be characterised as legislation "giving effect to the **Convention**". The argument of the respondents assumes that one cannot promote the exercise and enjoyment of rights "on the basis of equality with men" by prohibiting **discrimination** against **women.** There is implicit in this argument a necessity for a legislative prohibition of sexual harassment of men to be in existence.

I reject this argument. It would seriously restrict the operation of the **Convention,** and its implementation. It puts an unwarranted premium on the existence of legislation, which may or may not reflect the true position in fact.

If this argument of the respondent be right, legislation prohibiting the killing of young girls would be inconsistent and contrary to the terms of the **Convention,** unless there was in existence legislation prohibiting the killing of young boys, even though, in fact, the killing of young girls was widespread, and the killing of young boys non-existent or rare.

The fact that the legislation, as having effect by s 9(10), does not address sexual harassment of men in the workplace is irrelevant, in my view, to the question of whether the Act gives effect to the **Convention.**

I turn now to the facts of the case.

Lynette Aldridge was employed at The Tasty Morsel cake shop at 259 Stafford Road, Stafford, from 21 January 1985 to 24 January 1986. At the time of commencing that employment, she had been unemployed for one year. This employment was her first full-time job. She was born on 13 April 1965, and was thus 19 when she commenced work. She had contacted Mr Booth through the Commonwealth Employment Service. The applicant says that when he interviewed her at her home prior to employing her, he asked her, "What would you say if I slapped you on the bum? She was offered the job a few days later and she accepted. Generally, throughout the period of her employment, they were the only persons working in the shop. The cake shop was approximately 4 metres by 13 metres in total, the front two-fifths consisted of public area and the vending portion behind a counter and refrigerator, which was separated from the cooking area by a narrow doorway. The cooking area included a sink, refrigerator and various working benches as well as racks, bins and ovens. The area in that rear section of the shop was approximately 6 metres long with 1.5 metres clearance across between the work bench and the ovens, and passing room, because of bins and other objects, something a little under half that.

The applicant claims that during the year of her employment Mr Booth made repeated unwelcome sexual advances by touching her on the bottom, on the breasts, both inside and outside her clothing, rubbing his hand up and down her leg and kissing her on the neck and lips, by pulling her hair, by requesting sexual intercourse and threatening the termination of her employment on her resisting these advances by saying "How would you like a holiday on the Government?", and by engaging in acts of sexual intercourse at the cake shop. She says that, because of the conduct of Mr Booth, she tendered her resignation on 20 January 1986 by giving one week's notice, and her employment was terminated by Mr Booth's wife on 24 January 1986. In addition to the humiliation and injury to her feelings, pain and suffering and discomfort caused by this conduct, she claims loss of wages for the period from 31 January until she was able to obtain other employment, in the sum of $ 382.40.

Mr Booth denied the allegations of sexual harassment and that Miss Aldridge had suffered the loss and damage that she claimed. The solicitors for the respondent sought particulars from Miss Aldridge of the specific dates, times, places and numbers of occasions of the various acts of sexual harassment she alleged. In response, the solicitors for Miss Aldridge indicated that the general acts of sexual harassment alleged by her occurred on numerous and diverse occasions between 21 January 1985 and 24 January 1986 on a regular and constant basis. The letter said: "The applicant is unable to provide full details of all of those occasions but is able to say that one or more of the events referred to in paragraph 3(a) to (f) occurred on the following dates: . . .", and there is set out 31 specific dates.

With respect to the acts of intercourse alleged to have occurred between the applicant and Mr Booth in the cake shop, 19 specific dates are set out. Shortly after that letter, a further letter was sent correcting two of the dates and including a third as days on which acts of harassment other than intercourse occurred.

In her evidence, Miss Aldridge said that she kept a diary which was the source of the information contained in the particulars supplied. Quite surprisingly, in my view, no request to refer to the diary was made by her in the course of her evidence nor was any inspection requested of the diary by counsel for Mr Booth. She was neither examined nor cross-examined in respect of it. The credibility of the complainant as to the occasions of specific acts was clearly advanced, yet neither side really grasped

the nettle in this respect.

The evidence of the applicant generally supports the particulars of her claim. She says that the first act of intercourse occurred after trading on Saturday, 27 April 1985. On that occasion, Miss Aldridge said that, after the shop had closed on the Saturday, she was icing a cake and Mr Booth came behind her and was trying to kiss her: ". . . he started mucking around, and I started to push him away saying, 'Leave me alone'. And I ended up falling on the floor, and he got on top of me, and got his penis out of his shorts, and I said, 'OK, OK, I'll do it with you then'. And then he got off me and he went to the chemist . . ." After the first respondent had purchased some condoms, intercourse occurred on the floor of the baking section of the cake shop.

In all the circumstances, while I have reservations as to the black and white nature of the applicant's assertion that the conduct of the first respondent was invariably and entirely unwelcome, I formed a favourable view of the applicant as to the general truthfulness of her account of the relationship over that 12 month period.

Miss Aldridge gave evidence that she believed that to reject the advances would disadvantage her in connection with her employment. She was effectively the sole employee at the cake shop. She said that Mr Booth had asked her if she belonged to a union and, on being told that she didn't, said that was good because he didn't like unions. On a number of occasions, Mr Booth admitted that he said words to Miss Aldridge to the effect of "How would you like a holiday on the Government?" He said that by this he meant to communicate that she would be out of a job. He says that these statements were made by way of rebuke when she had failed to do her work properly or was moody, and not by way of a threat.

Miss Aldridge says that on Friday, 15 November 1985, in the rear section of the shop, Mr Booth came behind her and tried to get her to kiss him, that he twisted her arm behind her back forcefully, and then, after words were exchanged, Mr Booth said to her "It's going to be an employer-employee relationship from now on". This comment is corroborated by a friend of Miss Aldridge, Marion McLachlan, a comment in respect of which Mr Booth said "I honestly do not remember saying that, I am sorry".

As to the threats implicit in the statement "Do you want a holiday on the Government?", Miss Aldridge was asked:

Q.-- You were asked by my learned friend whether Mr Booth ever said to you these words, "If you don't grant me these sexual favours you have lost your job". And you indicated that he did not say that?

A.-- No, he did not.

Q.-- Did he say anything to you which led you to that conclusion?

A.-- Only the holiday on the Government.

Q.-- Yes. In what way, if at all, was that connected with the sexual favours? A.-- Well, when he used to stop what -- he stop his work and come over and harass me, I used to have to be sarcastic and say to him "Look, just leave me alone. Get lost," and then he would say, "How would you like a holiday on the Government?" And I

just thought that he thought that I could not speak to him like that and if I did, then I would get the sack.

Miss Aldridge said that intercourse occurred "at least 20 times". She was asked:

Q.-- Why did you have sex with him on those occasions? A.-- I did not agree to have sex with him. He made me have sex with him.

Q.-- Yes, well, what did you think would happen if you did not have sex with him? A.-- I did not have much choice.

The accounts of the applicant and the first respondent are quite inconsistent. Mr Booth asserts that, while there may have been some accidental or unintended touching because of the confines of the shop and particularly the baking area, there was no deliberate touching by him of Miss Aldridge's body. He admits that there was one act of intercourse, on 27 April 1985, but while there was horseplay from time to time, there was no activity of a sexual kind by him, either before or after that act of intercourse. On Mr Booth's account, the act of intercourse was "reasonably spontaneous".

Quite simply, I do not believe the account of the first respondent. I am satisfied that there was a course of conduct engaged in by Mr Booth that constituted sexual harassment. It was, in the main, unwelcome. I am sure that it continued for as long as it did, and went as far as it did, because of the fear of Miss Aldridge of losing her job. There is, in addition, some evidence corroborating Miss Aldridge's account.

Mr Booth's account of their relationship is inherently improbable. Moreover, his account to this court is, in a number of serious and significant respects, inconsistent with the evidence he gave before the Human Rights Commission. He told the Commission: "I never slapped her on the actual behind or anything like that at all." He admitted to having slapped the applicant on the behind on a number of occasions while she was in his employment, an inconsistency he was "at a loss to explain". He had told the Commission his recollection of events, including important events, was poor. He told the Commission that he had told his wife of the admitted act of sexual intercourse in the latter part of 1985. Mrs Booth, who generally was an impressive witness, gave evidence that she was told of that act of intercourse approximately a week after the applicant had ceased working at the cake shop in 1986.

I think Miss Aldridge's account is much the more probable than the evidence of Mr Booth. That view is consistent with the account of Mrs Booth of what occurred on the afternoon of Monday, 20 January 1986. Mrs Booth said: "I said to her, 'Grant told me you were wanting to leave', and she said, 'Yes'. I said, 'It is not suitable for either you or for us -- if you want to leave, fine, but we are not giving you holidays first', and she said, 'Will Friday week be all right?' And I said, 'That is fine with me'. I then said to her, 'We were thinking -- it is for the best, really -- we were thinking of sacking you, anyway', and she said to me, 'Did your husband tell you why I wanted to leave?' And I said, 'No, why?' And she said, 'I am sick of him touching me'. Then I asked her, 'Why would he want to touch you for?' And she did not respond."

Christine Day, who was called by the respondent, was a singularly unimpressive witness. It was difficult to avoid reaching the conclusion that she was tailoring her evidence in an attempt to assist the first respondent.

As to the order that should be made, s 82(2) refers to the court making "such orders (including a declaration of right) as the Federal Court thinks fit". In my view, the power of the Federal Court to make orders on proceedings brought pursuant to s 82 is to be read in the context of the type of determination that can be made by the Commission, which is referred to in s 81(1)(b).

Notwithstanding submission made to the contrary, I do not think it right to attach any particular weight to the determination made by the Commission as being that of a "specialist body": cf Re Gem Exploration & Minerals NL and the Companies Act [1975] 2 NSWLR 584. In matters of this kind, the Federal Court pursuant to s 82(2) has to make such order as the Federal Court thinks fit. The terms of s 82(3) indicate that the court's order is not made in ignorance of the determination that had previously been made.

I am clearly satisfied that Mr Booth has engaged in conduct that is unlawful under the Sex **Discrimination** Act 1984. I regard the s 28 conduct found in this case to be serious and over a lengthy period in respect of a young woman of particular vulnerability as to security of a place in the workforce.

The damages that I would award are of the order of $ 7000, the sum referred to in the determination of the Commission. Damages in this area are not capable of anything like precise estimation. The sum of $ 7000 is a fair figure, and of the order I would have imposed independently of any earlier determination by the former Commission. In those circumstances, I think it appropriate to fix damages in that sum. Any non-significant departure from that figure either way might be mischievously misinterpreted.

I order that the respondent, Grant Rodney Booth, pay the sum of $ 7000 damages by way of compensation to the applicant for the loss and damage suffered by her by reason of his conduct.

I will hear the parties on costs.

ORDER:
Order (1) The respondent, Grant Rodney Booth, pay the sum of $ 7000 damages by way of compensation to the applicant for the loss and damage suffered by her by reason of his conduct.

(2) The question of costs be adjourned to a date to be fixed to be brought on at seven days' notice.

SOLICITORS:
Solicitors for the applicant: F K Brown and Brown. Solicitors for the respondent: Trilby Misso & Co. Solicitor for the HREOC: A Fieldhouse. Solicitor for the Attorney-General (Cth): Australian Government Solicitor.