

**ANTI-DISCRIMINATION COMMISSION
NORTHERN TERRITORY**

COMPLAINANT: MS SUE GAROVIC

RESPONDENTS: MR DAVE MUDGE (1ST RESPONDENT)
PINECOT PTY LTD (2ND RESPONDENT)

TRIBUNAL: MR TOM STODULKA
HEARING COMMISSIONER

COUNSEL ASSISTING: MR COLIN McDONALD QC

ISSUE: VICARIOUS LIABILITY

DATE OF DECISION: 15 SEPTEMBER 2000

DECISION

1. This decision concerns two issues. The first issue is whether the second respondent can be held to be primarily liable for alleged prohibited conduct of its employees under section 27 of the *Anti Discrimination Act* (“the Act”). The second issue is whether the second respondent can be held to be vicariously liable for alleged contraventions of the Act by its employee, the first respondent.

Background

2. The complaint against the first and second respondents was lodged on 4 November 1998. This complaint was accepted by the delegate on 26 November 1998. Subsequently, the complaint was investigated. On 10 November 1999 the delegate made a ‘prima facie’ decision. On 24 March 2000 the complaint was referred to me for hearing.
3. On 11 May 2000, at the request of the parties, I directed that the issue of whether or not the second respondent can be held to be vicariously liable for an alleged contravention of the Act by the first respondent be determined by me prior to a full hearing of the complaint under section 83 of the Act. The issue for resolution goes to my jurisdiction under the Act and will impact upon whether the second respondent can be a respondent to the complaint and potentially have orders directed against it.
4. On 11 May 2000 I also gave leave to the parties to be represented before me by legal practitioners pursuant to section 95 of the Act. In my opinion, the importance of the issue concerning the exercise of my jurisdiction under the Act justified the granting of leave.
5. On 26 July 2000 in Alice Springs I heard counsel and received their submissions on the questions of primary liability and whether I had jurisdiction under the Act

to hold the second respondent vicariously liable for an alleged contravention of the Act by the first respondent. Oral submissions of the parties were made in addition to quite detailed written submissions filed with the Registrar of the Commission prior to the hearing date. Mr Kim Kilvington appeared on behalf of the complainant and Mr Nick Angelopoulos appeared for the second respondent. Mr Colin McDonald QC appeared as counsel assisting the Commission. Mr McDonald QC gave oral submissions summarising a written outline of submissions he provided to the parties and the Commission on 26 July 2000. There was no appearance on behalf of the first respondent, although he was notified of the time and date for submissions and given full opportunity to put any submissions he wished to make on the issue.

6. At the hearing on 26 July 2000, the parties were agreed that, for the purposes of this decision, I could accept that the first respondent was an employee of the second respondent at all material times. I also accept that the second respondent is a corporate body. Otherwise, I make no other finding of fact as there has been no evidence called nor have other facts been agreed upon.
7. I thank counsel for their helpful submissions and proceed to deal with the difficult issue of vicarious liability under the Act. The helpful role played by all counsel in this matter highlights that in appropriate cases (which include a case like this dealing with jurisdictional aspects of the Commission), it is desirable for the Commission to have the assistance of counsel.
8. The issue of whether there is vicarious liability of employers for alleged contraventions of the Act by employers has arisen before in cases in this Commission. I note that the previous Commissioner has held that there is vicarious liability under the Act. However, I accept the submission of Mr McDonald QC that I should approach the issue afresh and not in any way consider myself bound by earlier decisions of the Commission on this point. I proceed to deal with the issue unconstrained by earlier rulings of previous Commissioners.

9. I turn to consider the submissions made by the parties and counsel assisting.
10. At the outset, it is significant to note, as I do, that there is no express provision in the Act dealing with vicarious liability. I now summarise the submissions put to me by the parties and counsel assisting me.

Submissions of the complainant

11. The complainant argues that the second respondent is liable for the acts of the first respondent in two ways. The first way Mr Kilvington seeks to sheet home the liability of the second respondent is that it is primarily liable in that it “caused” or “assisted” the first respondent contrary to sub-section 27(I) of the Act. In the alternative, the complainant submits the second respondent is vicariously liable for the acts of the first respondent on the proper construction of the Act.
12. In his oral submissions on 26 July 2000, Mr Kilvington indicated that he was making broader submissions than those contained in his written outline. As I understood him, Mr Kilvington sought to extend his arguments in relation to the alleged primary liability (what he called “extended primary” or “secondary liability”) for acts of discrimination and of sexual harassment even where the employee does not have a management or directing role in the affairs of the company which were discussed in cases like *Tesco Supermarkets Ltd v Natrass* [1972] AC 153; and *H&L Bolton (Engineering) Co Ltd v T J Graham & Son Ltd* (1957) IQ 13 159. In advancing this proposition, Mr Kilvington submitted that he was relying upon the decision of the Equal Opportunity Tribunal of New South Wales in *M v R Pty Ltd and Anor* (1988) EDC 92-229 at p77,167. Mr Kilvington submitted that if the second respondent fell on the facts “within one of the categories enumerated in *M v R*”, then its liability was established. I assume those categories Mr Kilvington referred to are those set out at p77,173 of the judgement where the New South Wales Equal Opportunity Tribunal was referring

to the personal duties and obligations of employers under the *Anti Discrimination Act 1977* (NSW). Mr Kilvington foreshadowed (at p7 of the transcript of hearing) that the complainant would be intending to rely upon at least two of the categories referred to when the matter is determined after a full hearing of the facts. It is unnecessary for me to canvass this last mentioned aspect in advance of having any evidence before me. I refrain from making any findings on this point and whether the decision of *M v R* can be applied in the manner Mr Kilvington submits.

13. Be that as it may, the main thrust of Mr Kilvington's primary liability argument rested on the provisions of section 27 of the Act. He submitted that the second respondent can be said to have "caused" the alleged discrimination on the proper construction of the section. Mr Kilvington submitted that there was an implied duty arising on the second respondent under the Act to take all reasonable steps to prevent discrimination. Mr Kilvington submits that unless there is such an implied obligation on an employer, the Act cannot achieve its purpose or objects. He also submitted that the true meaning of the word "cause" in section 27 of the Act took it beyond accessory liability and the word contemplated an extended primary liability or what Mr Kilvington called secondary liability for breach of implied duties of employers.
14. Mr Kilvington also sought to rely upon two cases which dealt with the issue of vicarious liability, namely, the decision of Judge Duggan in *Kordos v Plumrose (Australia) Limited* (1989) EOC 92 256 and the decision of Commissioner Lawrie in *Romelo v Darwin Port Authority and Others* No. 1 of 1999 delivered on 21 July 1999, both of which accepted there was vicarious liability of employers.
15. Mr Kilvington finally submitted that there was nothing in the Attorney General's Second Reading Speech which indicated the purpose of the Act in respect of the issue of vicarious liability and that the speech was "neutral on the issue" (see transcript page 10)

Submissions of the second respondent

16. Mr Angelopoulos, in very clear and persuasive submissions, sought to strike out the claim against the second respondent. He submitted that having regard to the complainant's complaint at its highest on the materials and accepting everything she says as true, I cannot find the second respondent either primarily liable under section 27 of the Act or the Act generally nor can I hold the second respondent vicariously liable.
17. Mr Angelopoulos submitted, in effect, that in the absence of any express provision imposing vicarious liability, I should not hold that vicarious liability exists under the Act. He traversed, in his comprehensive written submissions, the various State and Commonwealth jurisdictions and the express provisions dealing with vicarious liability in anti-discrimination legislation.
18. Mr Angelopoulos submitted that neither of the cases referred to by Mr Kilvington, *Kordos* nor *Romelo* was helpful in the resolution of the issues at hand. In particular, he points to the lack of analytical detail in Judge Duggan's judgement and cautions me not to be swayed by any "bland statement" there appearing concerning vicarious liability. Mr Angelopoulos says Judge Duggan's judgement contains no analysis supporting this statement. He also seeks to distinguish this case from *Kordos* on the facts. Mr Angelopoulos submits that in *Kordos* the managers were party to the alleged discrimination and were aware of it. He says this case is quite different from *Kordos*. Again, as I have sought to emphasise, because I have made no factual findings I will not be seeking to draw any factual comparisons at this stage with any facts in the numerous cases referred to by counsel.
19. Mr Angelopoulos submits that section 27 of the Act is an accessory liability provision and is narrower than its interstate counterparts. He especially contrasts

the material wording in the section 27(I) (“cause, instruct, induce, incite, assist or promote”) with section 52 of the N.S.W Act which provides a broader accessory liability provision with the inclusion of the word “permit”. In his written submissions, Mr Angelopoulos summarises his submission on the question of whether the second respondent could be held to be primarily liable under section 27 of the Act. He relies upon the natural meaning of each of the words “cause, instruct, induce, incite, assist or promote” and submits that none is sufficient in themselves to hold an employer liable for the conduct of an employee, unless the employer was aware of and participated directly, indirectly or tacitly in the alleged contraventions.

20. Mr Angelopoulos also emphasises the lack of any express provision imposing liability on employers for the contraventions of the Act by their employees. He counters any allegations of unfairness thereby arising if consideration is given to:-
- (a) the express provisions of employer liability for the conduct of their employees appearing in other legislation of a like nature;
 - (b) the failure to include such a provision in the Act;
 - (c) the inclusion of an accessory liability provision;
 - (d) the deeming provisions in section 4 of the Act which are not extended to employers for conduct of employees.

Thus, so Mr Angelopoulos argues, simply because there are a number of remedies directed against employers in the Act, it is not sufficient to hold the employer liable for the conduct of his or her employee. These express provisions are designed to impose obligations when the employer is liable through the accessory provision or the *Tesco Supermarkets* case principle for the conduct of an employee.

21. Mr Angelopoulos made carefully crafted submissions as to why there was not vicarious liability under the Act. He sought to confine the authority of *M v R* to the

jurisdiction of New South Wales. He also drew my attention to the two elements which must exist for there to be vicarious liability. These are:-

- (a) an act done in the course of employment; and
- (b) the acts of the employee when attributed to the employer constitute tortious conduct.

Mr Angelopoulos emphasises that vicarious liability is essentially a common law construct.

- 22. Mr Angelopoulos developed the argument and sought to make the point that in his capacity as a handyman the alleged contraventions by the first respondent were not within the scope of his employment. He submitted, the alleged acts of the first respondent were a frolic or detour of his own. Thus, in the circumstances, Mr Angelopoulos argues the alleged conduct of the first respondent cannot be said to arise in the course of employment. I do not propose to address this factual aspect of his submission as there are no facts established by me to make any findings at this stage.
- 23. Mr Angelopoulos then made a significant submission , namely, that this case before the Commission does not concern a tortious case. It concerns a case arising out of an alleged breach of statute, being the Act. He submits that discrimination law in Australia has no common law roots. Even if the Act creates statutory torts, as *M v R* held for New South Wales, it must be remembered that the tort is statutory in nature and does not derive from the common law. Hence, so Mr Angelopoulos' argument goes, it would be wrong to import principles of vicarious liability into the Act and thereby import common law principles into a scheme of rights and obligations whose existence is purely statutory in nature. In short, he submits there is no basis for importing the common law principles of vicarious liability into a purely statutory scheme.

24. Mr Angelopoulos made similar submissions as to why the common law principles of non delegable duties should not be incorporated into the statutory scheme (see paragraph 17 of his written submissions).
25. In relation to the question of what assistance I might draw from extrinsic materials, Mr Angelopoulos, inter alia, points out in his written submissions in reply at paragraph 2.22 that there was a significant consultative process engaged in by the Government prior to the Act passing in the Legislative Assembly and a number of amendments were made to incorporate the suggestions from the community. He makes the point that this consultation notwithstanding there is no comment or statement as to the liability of employers for the conduct of their employees in the Second Reading Speech. He refers to the Northern Territory of Australia, Legislative Assembly, Sixth Assembly, First Session, Parliamentary Record, Thursday 1 October 1992, 6521-6531. He submits that, if anything the debate in the Legislative Assembly assists me to draw the inference that there was a deliberate intention not to provide for vicarious liability in the Act.

Submissions of Counsel Assisting

26. I propose to summarise the submissions of Mr McDonald QC. Mr McDonald QC submitted that whether corporate bodies, like the second respondent, can be found to be primarily liable under section 27 of the Act is to be determined on a case by case basis.
27. Mr McDonald QC agreed with Mr Angelopoulos that the provisions of section 27 are narrower than the provisions of section 52 of the NSW Act. He submits the words “cause” and “assist” should be interpreted in accordance with their ordinary and current meaning. He further submits that the interpretation of the complainant takes the word “cause” beyond its ordinary and natural meaning in the context of section 27 of the Act. He asks that I not go beyond the stipulated words set out in section 27 of the Act nor give those words any strained meaning.

He notes that facts are yet to be found, but for the Commission to find, after having all the evidence that the second respondent “caused” the alleged acts of the first respondent, some nexus needs to be established between the second respondent, its conduct and its state of knowledge and the first respondent.

28. Mr McDonald QC submits, contrary to the submissions of Mr Angelopoulos, that although there is no express provision in the Act, an employer can be found to be vicariously liable. He makes this submission based upon his reading of the Act as a whole and when considering its scope and objects.
29. Mr McDonald QC submits that the weight of authority favours the proposition that an anti-discrimination piece of legislation, like the Act, creates a statutory tort. He submits that the ordinary principles of tort law ought apply to an employer which is a corporate body and such an employer can be liable for acts of discrimination by employees where those acts are carried out in the course of employment.
30. Mr McDonald QC submits that the structure of the Act supports the view that liability under the Act extends to vicarious liability.
31. In paragraphs 52-55 of his written submissions, Mr McDonald QC refers to the Hansard record and an apparent attempt by the members of the opposition to have a vicarious liability clause inserted in the Act. The terms of the clause were not dissimilar to the vicarious liability provisions in the *Commonwealth Racial Discrimination Act*. This attempt was rejected by the Government. The debate on the issue seems to have not elicited a clear intent of what the Government intended by way of vicarious liability.
32. Mr McDonald QC referred me to a passage in Hansard at pages 6715 to 6716, where the Attorney General, Mr Stone said: “As the Chief Minister said, the appropriate course would be to come back after a period and argue that these

things should be addressed by subsequent amendments. Members opposite should accept the legislation in that spirit. Irrespective of what they say, we will not change our minds on vicarious responsibility. We have weighed it very seriously.

33. In the final analysis, Mr McDonald QC submitted that the parliamentary debates and extensive material did not throw “decisive light” on the intended provisions. They do not assist me in the interpretation exercise under section 62B of the *Interpretation Act*.
34. This completed the submissions. It is convenient before addressing the two main issues that I give my answers concerning the utility of extrinsic materials in this case.
35. Having read through the Legislative Assembly debates and the Second Reading Speech of the Attorney General, I am of the view that I am not assisted by way of extrinsic material as to the intended purpose of the legislature concerning its intention regarding whether there is or is not vicarious liability under the Act. There is no sufficiently clear statement of any intended purpose regarding vicarious liability. I am not prepared to nor should I guess the Legislatures intent from these extrinsic materials for the purpose of section 62B of the *Interpretation Act*. I do not consider that the Hansard helps confirm the meaning of any provision or the ordinary meaning conveyed by the text of the provisions. Thus, I do not consider the extrinsic materials are of assistance to me in all the circumstances.
36. Accordingly, I propose to consider the provisions of the Act as a whole and seek to discern the intended purpose from it in accordance with the proper, purposive approach to statutory interpretation.

Act applies to Corporations

37. It is appropriate that I address first the corporate nature of the second respondent and whether the Act applies to it. The Act refers to and applies to “a person” when it refers to prohibitions from engaging in discriminatory acts or conduct: see for example, sections 19 and 22 of the Act.
38. I do not consider there is any doubt that the Act covers and includes a body corporate. Section 19 of the Northern Territory *Interpretation Act* makes it quite clear that where a piece of Northern Territory legislation refers to “a person” this includes a body corporate. There is nothing in the provisions of the Act to rebut the prima facie rule that the reference to “a person” includes a body corporate such as the second respondent. Indeed, when the Act is read as a whole it seems clear the Legislature intended that “a person” includes a corporate body.

Purposive Approach to Statutory Interpretation

39. I accept that I am bound to adopt a purposive approach to the interpretation of the Act. This is made clear by the provisions of sections 62A of the *Interpretation Act* and Justice of Appeal, McHugh’s dissenting judgement in *Kingston v Ke prose Pty Ltd* (1787) NSW LR 404, 421-424 (His Honour’s dissent was on another issue and not on the issue of the correct principles to apply in statutory interpretation); *Mills v Meeking* (1990) 169 CLR 214, 223, 235, 242-243 and in *Newcastle City Council v. GIO General Limited* (1997) 191 CLR 85, 109-110. I also bear in mind what the High Court said in *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 72 ALJR 841 to 855 and the passage referred to paragraph 30 of Mr McDonald QC’s written submissions.
40. Having acknowledged that I am bound to adopt a purposive approach to the construction of the Act, it is also important for me to note that the Act contains an objects provision. Section 3 of the Act provides:

- (a) to promote recognition and acceptance within the community of the principle of the right to equality of opportunity of persons regardless of an attribute;
- (b) to eliminate discrimination against persons on the ground of race, sex, sexuality, age, marital status, pregnancy, parenthood, breastfeeding, impairment, trade union or employer association, religious belief or activity, political opinion, affiliation or activity, irrelevant medical record or irrelevant criminal record in the area of work, accommodation or education or in the provision of goods, services and facilities, in the activities of clubs or in insurance and superannuation; and
- (c) to eliminate sexual harassment.

I will consider the significance of this objects clause later in these reasons. I next deal with Mr Kilvington's submissions concerning extended primary liability under section 27 of the Act.

Primary Liability

41. Section 27 of the Act provides:

- “(1) A person shall not cause, instruct, induce, incite, assist or promote another person to contravene this Act.
- (2) A person who causes, instructs, induces, incites, assists or promotes another person to contravene this Act is jointly and severally liable with the other person for the contravention of this Act.”

42. Section 27 is headed “Prohibition of Aiding Contravention of Act”. I note that by sub-section 55(3) of the *Interpretation Act* the headings to sections are not part of the Act. So, in my construction of section 27 of the Act, I do not take this section heading into account nor have I allowed it to influence my interpretation in any way.

43. It is readily apparent from the wording of subsection 27(I) of the Act that it is intended to be a provision where direct liability is imposed upon a person who is an accessory to another person contravening the Act. There is a clear correlation between the words “a person” where first appearing in section 27(I) of the Act and the subsequent words “another person”. A plain reading of the subsection leads to the comfortable conclusion that section 27 was intended to be an accessory liability section.
44. The operative words in subsection 27(I) of the Act have not become terms of art or acquired a particular legal meaning. I propose therefore, to read the words in their ordinary and natural meaning. It is permissible to and I do refer to the Macquarie Dictionary meanings of the words cited by Mr Angelopoulos at paragraph 13.4 of his written submissions. In particular, in respect of the verb “cause” I take it to mean: “to be the cause of; to bring about”. In respect of the verb “assist”, I take it to mean “to give support, help or aid to in some undertaking or effort; to be associated with as an assistant; to give aid or help.”
45. However, Mr Kilvington sought to extend the meaning of the words “cause” and “assist” in subsection 27(I) of the Act. He submitted that the words should be interpreted broadly or liberally. He submits that an employer is jointly and severally liable with the primary offender if the employer has “caused” or “assisted” the contraventions of the Act by failing to put in place proper and reasonable systems and safeguards designed to prevent, inter alia, sexual harassment in the workplace. He drew my attention to the objects clause of the Act and the potential unfairness in arriving at a less liberal or broad interpretation.
46. I reject Mr Kilvington’s argument. I do not believe the natural and ordinary meaning of the words “cause” and “assist” allow me to so construe those words in subsection 27(I) of the Act. I do not accept that the proper and ordinary meaning

of the words “cause” and “assist”, where appearing, are a sufficient warrant for me to hold that an employer can be liable for the conduct of an employee except where the employer in some way participated directly or indirectly or tacitly with the alleged contravention. There must be some material nexus between the employer and the person alleged in the section. I do not consider that the words can be extended to embrace the meaning contended for by Mr Kilvington.

47. It is my view that the construction which Mr Kilvington seeks to put on the word “cause” or “assist” stretches impermissibly the natural and ordinary meaning of the words. I do not consider the word “cause” in section 27 of the Act embraces or includes a failure to put in place safeguards and systems at work designed to prevent sexual harassment or other prohibited behaviour. I do not consider this was the intended meaning of the word “cause” or “assist” in section 27 of the Act when read in its proper textual context or its context in the Act.
48. I do not consider the wording of section 27 of the Act creates in the employer an active duty to ensure sexual harassment does not occur in the work place. I do not consider that an employer can, within the meaning of section 27 of the Act, be said to bring about or “cause” the prohibited conduct by failing to have a safeguard system for prevention of prohibited conduct in place. If the word “permit” were present in the section (which it is not) then, this argument advanced by Mr Kilvington would have greater force.
49. I also reject the construction argument that section 27 of the Act creates a duty analogous to the non delegable duty at common law owed by employers to employees. This would be far too strained an interpretation to give to the section and I would not be carrying out what I perceive to be the purpose of section 27. The purpose of section 27 of the Act was to bring about accessory liability of a person where the natural and ordinary meaning of the words of the section are satisfied.

Vicarious Liability

50. As I have already noted, there is no express provision dealing with vicarious liability under the Act. The Northern Territory would seem to be unique in not having such a provision in the state and territory jurisdictions of Australia. The question is whether, when the Act is read as a whole and I adopt a purposive approach to statutory interpretation, there was intended to be vicarious liability imposed under the Act.
51. I consider the specific objects clause of the Act to be very important in looking for an answer to the question. The objects clause sets out the clear purposes the Legislature sought to achieve under the Act. Amongst the objects intended to be achieved by the Act was the elimination of sexual harassment. I accept that if there were no vicarious liability under the Act there would be a significant gap in the range of protection provided to victims under the Act. The Legislature's objects to eliminate discrimination and sexual harassment could be frustrated if there is no vicarious liability under the Act.
52. I also consider it important to consider that the Act applies to companies. I have already found that it does. Overall, I am persuaded that the liability imposed under the Act extends to employers of employees who commit acts in contravention of the Act.
53. It is helpful to consider the structure of the Act. Section 19 thereof provides the prohibition, will contain exemptions, on the basis of an attribute in specified areas of activity. Similarly, section 20(I) of the Act provides that discrimination includes:
- (a) Any distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity; and

- (b) harassment on the basis of an attribute.
54. Section 22 deals expressly with sexual harassment and section 23 of the Act deals with victimisation. There is also provision in Division 2 of Part 3 of the Act (specifically, section 24 of the Act) for failing or refusing to accommodate a special need that a person has because of an attribute.
55. Part 4 Division 2 of the Act sets out the areas of activity where discrimination is prohibited. Section 28 of the Act provides that the Act applies to prohibited conduct in the areas of:
- (a) education;
 - (b) work;
 - (c) accommodation;
 - (d) goods, services and facilities;
 - (e) clubs; and
 - (f) insurance and superannuation.
56. In the area of work, the Act is framed to impose a prohibition on “a person”: see subsection 31(I) of the Act. Section 32 of the Act prohibits:
- “An organisation of workers, employers or people who carry on an industry, profession, trade or business ...”
- from discriminating in determining who may join the organisation and the terms on which they may join.
57. Section 34 of the Act prohibits discrimination in the area of introducing people to employment.

58. The Act provides for certain exemptions from discrimination. The exemptions apply to “a person”: see Part V of the Act.
59. Division 4 of the Act deals with prohibiting discrimination in accommodation. Again, the prohibition is on “a person”. Division 5 provides for discrimination in the supply of goods, services and facilities. The prohibition is on “a person”.
60. Likewise, section 46 deals with discrimination by clubs, management committees of clubs or club members. Section 48 of the Act deals with discrimination in the area of insurance and superannuation. Again, the prohibitions in the provision of insurance and superannuation are in respect of “a person”.
61. The contents of the Act itself, reinforce the provisions of section 19 of the *Interpretation Act* that the prohibitions were intended to apply to bodies corporate as well as natural persons. Thus, complaints can be made in respect of companies as well as natural persons. Given that corporate bodies only act through their servants and agents, I consider it anomalous that the ordinary principles of vicarious liability would not apply under the Act given the extensive range of prohibitions covered by the Act and the areas, including the workplace, where such prohibitions were intended to apply. The objects of the Act would not be advanced if there were no application of the principles of vicarious liability in the prohibition sections of the Act.
62. This view is supported further by the contents of the various penalty provisions under the Act. For example, section 79 of the Act deals with the penalty for failing to comply with a direction to attend a conciliation proceeding. The penalty provision specifically recognises and treats separately bodies corporate (a fine of \$5,000) and a natural person (a \$1,000 fine).
63. The provisions of section 88 of the Act provide for what a Commissioner can do at the end of a hearing. If a complaint is substantiated, a respondent to a complaint

may be required to employ, reinstate or re-employ a person or to promote or move a person to a position within a specified time. It seems to me strange and unintended by the Legislature to provide for an employer to do any of these actions where a complaint is substantiated unless the employer, including corporate employers, can be made a respondent to a complaint by reason of the conduct of its employees.

64. There are other penalty provisions in the Act which expressly refer to both corporate bodies and natural persons in terms of the penalties that can be imposed. These provisions include subsections 92(5), 98(2), 99(2), 100(3) and 101(3) and section 104 of the Act. These penalty provisions help confirm the intent of the Legislature that it did intend for there to be vicarious liability under the Act.
65. The text of the Act suggests to me that it was intended there be vicarious liability under the Act.
66. I now seek to consider the conceptual issues raised in submissions to see if they support the inference I have drawn from the structure of the Act. There is no authority binding on me on the point, but the balance of authority does suggest quite strongly that the civil right of action created under the Act is that of a statutory tort.
67. In an obiter statement of opinion in *Australian Postal Commission v Dao and others* (1985) 3 NSWLR 565, Justice McHugh, when sitting in the New South Wales Court of Appeal, was of the opinion that an action under the *Anti-Discrimination Act 1977* of NSW was an action in tort: see page 604, letter G of the judgement. His Honour cited in support of this opinion Halsbury, 4th edition, volume 45, paragraph 1201 at page 558. The passage referred to by his Honour at paragraph 1201 provides:

“Those civil rights of action which are available for the recovery of unliquidated damages by persons who have sustained injury or loss from acts, statements or omissions of others in breach of duty or contravention of right imposed or conferred by law rather than by agreement are rights of action in tort.”

It seems to me that the civil right of action provided to complainants in section 88 of the Act fits within this passage.

68. Justice McHugh was not alone in coming to this conclusion as to the nature of the civil right created by a piece of anti-discrimination legislation like the *New South Wales Anti-Discrimination Act 1977*. Justice Lee, an experienced Supreme Court judge, in *Allders International Pty Ltd v Anstee & Others* (1986) EOC 92-157 followed what Justice McHugh said in *Australian Postal Commission v Dao* (supra). At p76,556 of the reported judgement, Justice Lee concluded in respect of the *NSW Anti-Discrimination Act*:

“It seems to me that there are sound reasons for treating an action under the Act as an action in tort...”

Earlier in his reasons he referred to the *Sex Discrimination Act 1995* (UK) section 66(1) as permitting a claim alleging discrimination to be “made the subject of civil proceedings in like manner as any other claim in tort or (in Scotland) in reparation of statutory duty”. Justice Lee also referred to the definition of a tort provided in Strouds Judicial Dictionary 4th edition, page 2,789 as:

“...an act or omission giving rise, in virtue of the common law jurisdiction of the court, to a civil remedy which is not an action in contract”.

69. In *M v R* (supra) the New South Wales Equal Opportunity Tribunal concluded as to the legal classification of the civil right vested in victims of unlawful discrimination in the following terms at p77,173:

“The trend of authorities is by no means clear but, on balance, appears to favour the proposition that the Act creates a statutory tort”.

70. I am inclined to follow this line of authority for the purposes of the Act. On the balance of authority, it is my opinion that the correct legal classification given to the civil right vested in victims of unlawful discrimination is that it is a statutory tort.

71. Despite Mr Angelopoulos’ argument to the contrary, I consider that where a complainant establishes liability in “a person” under the Act the principles of vicarious liability apply as a matter of logic and principle. This conclusion would be consistent with the approach in the general law of tort. Contrary to the submissions put to me on behalf of the second respondent, I do not draw a distinction that the statutory torts created by the Act, having statutory roots, do not allow the logical and consistent application of the principles of vicarious liability. I follow the general approach established in *Australian Postal Commission v DAO* (supra), *Allders International Pty Ltd v Anstee & Others* (supra) and *M v R Pty Ltd* (supra) at pp 77, 172-77, 173) and I consider that an employer, including a corporate employer, can be held to be vicariously liable under the Act.

72. I note that this conclusion is consistent with the finding of Judge Duggan in *Kordos v Plumrose (Australia) Limited* (1989) EOC 92-256 at page 77,513 and the conclusion of Commissioner Lawrie in *Romelo v Darwin Port Authority and others* (supra). In *Kordas*, at the time of judgement, there was no vicarious liability section in the Commonwealth *Racial Discrimination Act 1975*. To that extent it is somewhat confirmatory of my approach in request of the Act.

Although, I accept Mr Angelopoulos' submission that there is a paucity of reasoning in the *Kordos* judgement leading to the conclusion that there was vicarious liability. I was not influenced by the *Romelo* decision.

73. I was referred to the "Guidelines for Preventing Sexual Harassment in the Workplace" published by the Northern Territory Chamber of Commerce Inc. I allowed the tender of the document against the objection of Mr Angelopoulos. Upon reflection, Mr Angelopoulos' objection was a proper one. These guidelines provide no assistance to me as a document which can be taken into account in reaching the conclusions I have.
74. Therefore, I consider that the second respondent is capable of being held vicariously liable under the Act. It remains to be seen at the continuation of the hearing, when the facts are presented by the parties whether or not the second respondent is vicariously liable for the alleged acts of the first respondent.
75. I will hear the parties upon any further directions that should be given.
76. It is appropriate that a date be set for the hearing of the facts and further submissions of the parties. It is desirable this matter proceed as soon as possible and I am prepared to accommodate the parties as much as I can.

TOM STODULKA