

NORTHERN TERRITORY ANTI-DISCRIMINATION COMMISSION

LOCATION: DARWIN

**TRIBUNAL: SIMON RICE
HEARING COMMISSIONER**

DATE OF HEARING: 17 JULY 2009

HEARING NO: 2 of 2009

**COMPLAINANTS: Tony JACK, Bronson DICK, Tommy Lee JACK,
Dean JACK, Clinton DODD**

**RESPONDENT: Northern Territory Police; Jonathon DISCOMBE,
Lenora GILES**

**COUNSEL: O'DONNELL for Complainants
YOUNG for Respondents**

DATE OF DECISION: Written Decision given on 21 August 2009

REASONS FOR DECISION

1. DECISION:

- 1.1. For the reasons I give below, I decline to dismiss the complaints at this stage of proceedings.
- 1.2. In summary, I have decided that it is appropriate for me to decide as a preliminary matter if possible whether the conduct complained can be characterised as the provision of a service and so engage the Northern Territory *Anti -Discrimination Act* ('the Act'). I have approached this task taking the complainants' evidence at its highest.
- 1.3. I have decided that a service for the purpose of the Act is conduct the nature of which is, or would be but for the manner of its provision, beneficial to an individual to whom the conduct is directed. But in circumstances where the conduct is the carrying out of a statutory function, I have decided the question of whether that conduct can be characterised as being, at the same time, the provision of a service cannot be determined without first identifying the statutory function or functions that was or were being carried out.
- 1.4. I have decided that on the facts alleged by the complainant the conduct is likely to have been the carrying out of a statutory function which could be characterised as having been, at the same time, the provision of a service to the complainants.

2. FACTUAL BACKGROUND

- 2.1. The facts are disputed. I set out here the two versions of events as alleged in the material that has been filed. I do not make any findings of fact. What actually happened remains unresolved.
- 2.2. Each of the complainants is a person of aboriginal descent. On their version of events, on Thursday 20 September 2007 they were on their way back to Katherine after attending an Indigenous Cattleman's Workshop. Their car broke down near Jilkminggan, where Sergeant Giles and

other officers happened to drive by, and Sergeant Giles stopped and spoke to them. The complainants arranged for their car to be towed to Mataranka, where they took it to a garage for repairs. That evening they were sitting on a grassed area in Mataranka, waiting for someone to come down from Katherine to pick them up. Nearby in the park was a group of people who were drinking and making a lot of noise. It was dark. Two police cars arrived. One drove to the nearby group and the other, with two officers in it, drove to where the complainants were sitting.

2.3. In a statutory declaration filed with the Commission, the complainant Mr Tony Jack says:

There is a truck parking area and we were sitting under the streetlight in the park on the grass directly opposite the Shell Service Station.

I went over to the Shell and bought some food and drinks and then went back to where we were all sitting down. We were just sitting there having a feed and a drink and cooling down while waiting.

While we were sitting down my Uncle Eric Dodd, came over and sat down and was yarning way with us.

There was another mob of people behind us over towards the bush, they were drinking and making a big racket.

Around 9 o'clock two police cars came out of the police station ... I saw them come out of the police station. The first car came straight towards us and pulled up right near us, the second police car kept going and went to the that group behind us.

The police car ... pulled up around a metre away from where I was sitting down ...

The male officer opened the door and jumped out. As soon as he opened the door he was yelling and going off. He was yelling 'What the bloody hell are you mob doing here, partying eh, go home, piss off now, you mob not supposed to be here'. He was really screaming and pointing to the bush ... The female got out and walked around to where we were and she was yelling out 'Go home, you're not supposed to be

here. Get from here' ... The male officer was walking around amongst our belongings, the female officer was more just standing there. The male was kicking our stuff as he walked around, he kicked everything, our swags, bags of clothes, our books, even my toolbox.

I tried to talk to him when I stood up, I tried to explain I was a sober man, that we had broken down and I was waiting on a car from Katherine. He just ignored me and kept on going so I just shut up and let him keep on going.

After they had finished they went back to their car, they were still screaming and pointing to the scrub. The male said 'You gotta get from here you mob of black bastards, you've gotta get from here now'. They got in the car and drove off towards the other car in the scrub towards Mulgun Camp.

Eric .. was trying to talk to the female officer ... I heard her say to him 'Shut up Eric, go home, you go home now'.

...

After that ... I went over to the Shell and got a room.

I got a cabin and we carried all our stuff over to the cabin and camped there for the night. That car came down the next day and we got a lift back to Katherine.

- 2.4. In an affidavit filed with the Commission, the complainant Mr Dean Jack says:

[The] police car came towards us and slammed on the brakes just before the fence where we were sitting ...

I saw a male police officer jump out of the passenger seat of the police car and then start cursing and swearing at us to move. The male officer was yelling things like 'F off to the scrub' at the same time he was pointing to the scrub. Later the male officer also yelled 'Get from here you mob of black bastards!'.

The female police officer also jumped out of the car and yelled things like 'You have to go. You have to move now!'.

Both police officers kept yelling and cursing at us and were kicking our swags and going through our gear.

...

The whole incident probably went on for 5 to 10 minutes and then the police got into their car. I saw the police get back into their car and drive off towards the bigger mob of people who were about 100m away.

[Tony Jack] then went to the Shell and came back and said he had a room for the night.

...

The next day ... we got a lift back to Katherine ...

- 2.5. In an affidavit filed with the Commission, the complainant Mr Bronson Dick says:

I called my girlfriend ... to try to get her to pick us up but she ended up saying that she would come next morning because they could not get organised to pick us up that night.

...

I saw one police car go up to the mob that was some way away from us

...

I saw the second police car come past us and straight at where Tony [Jack] was on the side of the entrance to the truck parking stop ...

I saw a male police officer jump out of the passenger seat straight away, right near Tony, and start yelling.

I saw the male kick our tool-box and Tony's swag while I saw Tony try to stand up and try to explain to the male policeman what we were all doing there.

After that he came past Tony a bit up to our other bags and kicked them around ... I saw him pick up one of our plastic bags which had feed in it and empty it all over the ground.

The police car was shining a spot light on us all and the male policeman was shining a torch, he was shining it around at us in our face and at all our gear.

I heard the male policeman yelling at us to get out of there. He was using the F word a lot. He was saying things like 'what are you F bastards making all this racket for?' and 'get outta here' and 'go back bush'. He was pointing out to the bush all the time.

After the policeman had got out of the car, I saw a policewoman with blonde hair also get out of the car from the driver's side and walk around the front of the car to where we were. I remember that she was also yelling real loud for us to get out of there and kicking things. I saw her pick up one of our bags which had a blanket tied to it and look under it.

...

... I saw Eric Dodd ... try to explain to the female police officer why we were there. She did not seem to listen to Eric and said something like 'shut up, you go home now to your tent or we will lock you up'.

After the police officers got back in their car they drove off towards the other mob that the first car had gone to ... Tony suggested that we go stay somewhere for the night to get away from what just happened.

We stayed at the Motel at Shell that night, and the next morning we got a lift into Katherine.

2.6. In an affidavit filed with the Commission, the complainant Mr Tommy Lee Jack says:

When we all got to Mataranka the car was put into Willy's [garage] and we went over to the grassed area across from the Shell to sit down, have a rest and a feed.

We were sitting on the grass trying to organise a lift, but we were having trouble getting any help. I rang my cousin ... to try to get him to bring a car down but it didn't work out. We were probably sitting there for quite a few hours while it got dark.

We had a load of stuff (all our gear) with us and were sitting back from a streetlight on the grass next to the entrance of the truck parking area

...

We had been sitting on the grass for a while when I heard some other people talking and shouting quite loud about 100 metres away from us.

... I remember seeing two police cars come up from the Mataranka Police Station; one car went past us to that other mob. The second car came towards us really fast.

...

I saw the police car come up to us real fast towards Tony, who was leaning on something facing Katherine way ...

I saw a male policeman jump straight out of the passenger side of the car and start yelling at us like he wanted to fight someone.

I did not hear the male policeman say anything to us or ask us any questions before he got out of the car and started yelling.

I saw him pointing out to the bush the whole time and yelling at us 'you F bastards get out of here, you should not be here!' and 'you go home!'. He was using the F word a lot.

I saw the male policeman start kicking around the Tony's swag and our other gear, and he kicked and shuffled through Tony's tool-box ...

I saw Tony get up and explain to the male police officer when he first got out of the car what we were doing. But the policeman did not listen to him and kept kicking and searching things, and walked a bit towards us to where some of our tother gear was. I saw him kick and search all the other gear too.

After the male officer got out of the car and started kicking everything around, I saw the police woman get out of the car as well. I also saw her kicking all our stuff around and looking through our things. She was yelling really loud, pointing to the bush and telling us to get out of there as well. While she was yelling close to me it was bit hard to hear everything the male policeman was yelling.

I said to the police that we were just waiting for my car to come and pick us up, but they did not pay any attention to me either, they did not say anything and kept yelling and kicking our stuff.

... the police got back in their car and drove off towards the mob about 100m away ...

- 2.7. In an affidavit filed with the Commission, the complainant Mr Clinton Dodd says:

After we dropped the car off at the garage we all went and sat across the road from the Shell Service Station in the park near the road to have a rest and feed.

When it was dark I saw the police coming down the road from the Police station. One of the police cars came up to us and was going really fast, it skidded a bit to a halt right near where Tony was leaning.

I saw a male policeman get out of the car right away and start yelling at us, shining their lights everywhere, abusing us because we were blackfellas, and telling us to get out of there to the bush. He was pointing to the bush while he was yelling all this. I did not hear everything the male policeman was saying because the female policewoman also got out of the car and was yelling a lot.

The policewoman was yelling at us to 'piss off' and 'get out of here', and she was pointing towards the bush.

I saw the male policeman walk through all our stuff and was kicking all of it ... I also saw the female policewoman was doing the same thing.

...

After the police left to go to the other mob, Tony said we should all get out of there into a room for the night, so we stayed at the motel.

- 2.8. The male and female police officers referred to by the complainants were Constable Jonathon Discombe and Sergeant Lenora Giles. Earlier the same day they had seen the complainants when their car had broken down at Jilkminggan and Sergeant Giles had spoken to them. On the evening of 20 September they were with two other officers at Mataranka Police Station.

2.9. In a statutory declaration filed with the Commission, Sergeant Giles says:

I could hear a lot of yelling and screaming coming from near the Banyan Tree which is in the park across from the Shell Roadhouse

I had a conversation with the three other [officers] and requested that they assist ... with conducting a patrol of the park.

I partnered up with ... Constable Discombe ...

I drove with to the area near the Banyan Tree and the other [officers] drove to the other side of the park area ...

On arriving near the Banyan Tree I observed a group of male Aboriginals sitting near the ANZAC memorial leaning up against a number of swags. They were not yelling or carrying on and from where I was sitting I didn't observe any empty cans of alcohol. From this I formed the opinion that they were not the persons causing all the noise.

I wound the window down to the passenger's side of our vehicle and spoke to the persons sitting there. I asked them where they were from and one of the males told me they were from Borroloola and that their car had broken down. It was at this time that I recognised the male as being the one I had spoken to earlier [at Jilkminggan]. I asked when they were heading back out bush and he told me they were waiting for a car to pick them up.

I then recall informing them so that they were aware that they couldn't drink alcohol in the area. I didn't believe they were drinking, I just wanted to make sure that they knew. I also suggested that with the amount of drunks that were in the park area yelling out that they may want to move to another area to wait so that people didn't accuse them of making all the noise.

Upon speaking to this group of men I observed another group situated on the other side of the Banyan Tree ...

I drove over to where they were ...

2.10. In a statutory declaration filed with the Commission, Constable Discombe says:

I recall hearing loud yelling and screaming coming from the park opposite Mataranka Station ...

Sergeant Giles was driving the police vehicle, whilst I was the passenger. We drove into the park where I observed a large number of persons loitering in the park. Sergeant Giles and I drove up to a group of aboriginals that were sitting at the front of the park close by the road.

I observed that this group had no alcohol around them and were not creating a disturbance. Sergeant Giles and I remained in the police vehicle. Sergeant Giles then spoke with the group asking them if they were from the bush. I recall one of the group saying they were from Borroloola. One of the group then mentioned that they were having troubles with their vehicle and would wait until the morning to get it fixed before returning home. It was then that I recalled seeing this group earlier in the day at Jilkminggan (Ducks Creek), and that Sergeant Giles had already stopped and spoken with them. Sergeant Giles informed the group that it would be safer if they found somewhere to stay instead of the park as it wasn't safe to stay there at night. Sergeant Giles and I then drove away from that group.

Sergeant Giles and I then attended another group of aboriginals who were close by ...

3. PROCEDURAL BACKGROUND

3.1. The complainant Tony Jack lodged with the Anti-Discrimination Commission a complaint under the Act about the officers' conduct. The Commission conveyed the complaint in writing to the Northern Territory Police, identifying the complainants' race as the ground on which the conduct is alleged to have occurred. The Deputy Commissioner of the Northern Territory Police wrote in reply, saying in part that 'the complaint ... does not relate to the provision of services' and that it is therefore 'not [a complaint] of discrimination within the meaning of the [the Act] but a complaint about police conduct during the course of their law enforcement and community policing role'.

3.2. The complainant Tony Jack requested a hearing of his complaint (s84(1)). By consent between the parties, Bronson Dick, Tommy Lee Jack, Dean Jack, and Clinton Dodd were subsequently joined as complainants. At a Registrar's Conference the parties were directed to file written submissions

on the question of whether the complaint relates to the provision of services for the purpose of the Act, and they did so.

- 3.3. At a preliminary hearing on 3 February 2009 counsel for the respondents pressed the then Anti-Discrimination Commissioner to decide, in advance of a full hearing on the merits, what was called the 'jurisdictional' question of whether there had been the provision of a service for the purpose of the Act. The then Anti-Discrimination Commissioner agreed with that approach and indicated that he would decide the question of provision of a service for the purpose of the Act ('the services question') prior to a full hearing of the complaints, which was scheduled to commence on 16 March. Order 7 in his Notice of Orders dated 5 February and published on 6 February directed the parties to attend on 24 February and argue 'the question of the Commissioner's jurisdiction to hear the complaint (being whether the Respondents were providing a service for the purpose of the Anti-Discrimination Act)'. Very sadly the Commissioner died before being able to take any further part in this matter, and the preliminary hearing did not go ahead.
- 3.4. I was appointed as a Commissioner to hear the complaint (s85(1A)) . I agree with the late Anti-Discrimination Commissioner that the services question is a threshold issue, although I am not sure I would describe it as a jurisdictional question. If the conduct complained of cannot be characterised as the provision of a service for the purpose of the Act then the Act is not engaged. Addressing at this stage whether the Act responds to the facts may avoid the inevitable time, expense and inconvenience to parties of engaging in a full inquiry into the merits of the complaints, at the cost of some delay in arriving at that inquiry.
- 3.5. I convened a preliminary hearing, effectively the hearing that the late Anti-Discrimination Commissioner had directed take place on 24 February. The late Anti-Discrimination Commissioner had not had the opportunity to cast the respondents' arguments on services question in terms of the Act. I proposed to the parties, and they agreed, that I treat the question as arising by way of an application by the respondents under s102 of the Act, which empowers the Commissioner to discontinue

proceedings at any stage if the Commissioner reasonably believes that the complaint is any of frivolous or vexatious, trivial, misconceived, or lacking in substance, or it fails to disclose any prohibited conduct.

- 3.6. For purposes of the application under s102, I accept the facts as alleged by the complainants, taking them at their highest – that is, without qualification. When in this decision I refer to the facts alleged by the complainants, or the conduct alleged or complained of by the complainants, I am referring to the complainants’ allegations which I have set out above.
- 3.7. At the directions hearing on 3 February counsel for the complainants objected to the services question being decided in advance of a full hearing of the complaints. It is apparent from the transcript that when he was setting the services question down for preliminary hearing on 24 February, the late Anti-Discrimination Commissioner invited the complainants to renew their objection on that occasion. The complainants renewed their objection before me.
- 3.8. The complainants submit that the services question should not be decided at this stage. They submit that it is not possible to decide the services question without first making findings on the disputed facts.

4. WHETHER TO DECIDE THE ‘SERVICES’ QUESTION FIRST

- 4.1. In my view it is appropriate, if it is possible, to address the services question without first deciding the disputed facts, for the following reasons.
- 4.2. The complainants argue that the question of whether the conduct can be characterised as a service must be decided as fact. They rely on dicta of Mason CJ and Gaudron J in *Waters v Public Transport Corporation* [1991] HCA 49; (1992) 173 CLR 349, where at paragraph [26], page 361, their Honours said that ‘the identification of the service involved is no more than a determination of fact’. I respectfully agree with that statement, but in *Waters* there was no dispute that a service was being provided. What was in dispute was whether the primary decision-making body had actually made such a determination and, if so, whether it had erred in the way it described the precise nature or scope of the service and, in particular, whether the service had been described so as to include a requirement or condition (at

paragraphs [24]-[27] page 361, and see similarly Brennan J at paragraphs [4]-[5] page 373; McHugh J at paragraphs [16]-[17] pages 404-5).

4.3. Neither the dicta relied on, nor anything else said in *Waters*, is concerned with the issue the complainants have raised in this matter: whether determinations of fact must be made before a decision can be made as to whether alleged conduct can be characterised as a service for the purpose of the Act. The question that the respondents' preliminary application raises is not (as it was in *Waters*) 'how should the service that was provided properly be described?', but 'can the conduct of the police, as alleged by the complainants, be characterised as the provision of a service for the purpose of the Act?'

4.4. In addition, the complainants argue that they have a right to hearing. They rely on dicta in *Bass v Permanent Trustee Co Ltd* [1999] HCA 9; 198 CLR 334 where, in paragraph 56, the Court but for Kirby, J said (footnotes omitted):

Judicial power involves the application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process. And that requires that the parties be given an opportunity to present their evidence and to challenge the evidence led against them. It is contrary to the judicial process and no part of judicial power to effect a determination of rights by applying the law to facts which are neither agreed nor determined by reference to the evidence in the case...

4.5. The complainants explicitly did not rely on this passage to suggest, or to precipitate an argument about whether, this Commission is exercising judicial power. Rather, they are attracted to the general sentiment that parties ought be given an opportunity to present their evidence and to challenge the evidence led against them, and that rights ought not be determined by applying the law to facts which are neither agreed nor determined by reference to the evidence in the case.

4.6. Leaving aside the question of whether that dicta is confined to the exercise of judicial power, and respectfully treating the dicta as stating a desirable practice for fairness generally, the dicta address circumstances where there

are proceedings in which parties can present evidence, and where there are rights that are dependent on the determination of facts. But in this matter the proceedings have not reached that stage. At this stage the issue is whether the conduct complained of actually engages the Act. If, on the facts alleged by the complainants, the conduct cannot be characterised as provision of a service for the purpose of the Act then the Act is not engaged and there is no law available to apply to the facts. The Act only operates when the conduct complained of is within a prescribed area of activity, in this case the provision of a service. The complainants do not have a right to run a case under the Act; the Act gives them that right only in certain circumstances, and the preliminary question is whether those circumstances exist. In *Webster v Lampard* [1993] HCA 57; (1993) 177 CLR 598 at 602 the description by Mason CJ, Deane and Dawson JJ of the situation at first instance in that case seems apt to describe the situation here: the issue is not whether the complainants would probably succeed in their action; it is whether the material demonstrates that that action should not be permitted to go to trial in the ordinary way because it is apparent that it must fail.

- 4.7. As well, the complainants rely on dicta in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16; 216 CLR 515 where, in paragraph 138, Kirby J said (footnotes omitted):

If there is any reasonable prospect that the appellant might be able to make good a cause of action, it is not proper for a court, in effect, to terminate the appellant's action before trial. Where the law is uncertain, and especially where it is in a state of development, it is inappropriate to put a plaintiff out of court if there is a real issue to be tried. The proper approach in such cases is one of restraint. Only in a clear case will answers be given, and orders made, that have the effect of denying a party its ordinary civil right to a trial. This is especially so where, as in many actions for negligence, the factual details may help to throw light on the existence of a legal cause of action – specifically a duty of care owed by the defendant to the plaintiff ...

- 4.8. Similarly, these dicta assume that the complainants have a cause of action. But in this matter at this stage, the issue is whether the conduct complained

of actually engages the Act: there can be no cause of action if the Act is not engaged. The complainants have a 'right to a trial' of a discrimination complaint only if the Act operates so as to give them that right. The question in this matter remains whether the conduct alleged by the complainants engages the Act: on the complainants' version of events, can the conduct they complain of be characterised as the provision of a service for the purpose of the Act? If it cannot then the complainants have no rights to claim under the Act. If it can then the complainants can pursue that claim, and proceed to a determination of those rights by presenting their evidence, challenging the evidence led against them, and applying the law to facts.

- 4.9. The complainants argue that I should not proceed on the basis of hypothetical facts. They rely on dicta in *Bass v Permanent Trustee Co Ltd* [1999] HCA 9; 198 CLR 334 where, in paragraph 49, the Court but for Kirby J, said:

As the answers given by the Full Court and the declaration it made were not based on facts, found or agreed, they were purely hypothetical. At best, the answers do no more than declare that the law dictates a particular result when certain facts in the material or pleadings are established. What those facts are is not stated, nor can they be identified with any precision. They may be all or some only of the facts. What facts are determinative of the legal issue involved in the question asked is left open. Such a result cannot assist the efficient administration of justice. It does not finally resolve the dispute or quell the controversy. Nor does it constitute a step that will in the course of the proceedings necessarily dictate the result of those proceedings. Since the relevant facts are not identified and the existence of some of them is apparently in dispute, the answers given by the Full Court may be of no use at all to the parties and may even mislead them as to their rights. Courts have traditionally declined to state – let alone answer – preliminary questions when the answers will neither determine the rights of the parties nor necessarily lead to the final determination of their rights. The efficient administration of the business of courts is incompatible with answering hypothetical questions which frequently require considerable time and cause

considerable expense to the parties, expense which may eventually be seen to be unnecessarily incurred.

- 4.10. That passage has to be read in its context, particularly having regard to the nature of the decision of the Full Court of the Federal Court to which the passage relates. In short, what the Full Court had done was decide whether a party enjoyed immunity from suit. That decision could, however, only have been properly made in the particular circumstances, depending on the facts, and the final determination of facts would affect the availability of the immunity. That is not the case in this matter, where the question of whether conduct complained can be characterised as a service can be decided objectively, and is not dependent on resolving disputed facts.
- 4.11. Finally, counsel for the complainants submitted that the intention of the police officers is relevant to a finding as to the nature of the service that was provided. I reject this proposition. The terms of the Act do not make a person's intention relevant to characterising what they did as a service for the purpose of the Act, and there is no authority for taking such an approach. What a person thought they were doing, or intended to do, has no bearing on the fact-finder's characterisation of the conduct as (or as not) a service. Characterisation of conduct as a service is an objective assessment. For example, there was no suggestion in *IW v City of Perth* (1996-97) 191 CLR 1, discussed in more detail below, that it would have been relevant to receive evidence of the city planners as to whether they thought that what they were doing was providing a service.
- 4.12. In summary, I do not think that the authorities relied on by the complainants compel me to allow the matter to run its full course and to make findings of fact before deciding whether the alleged conduct can be characterised as the provision of a service and so engage the Act.
- 4.13. The Act empowers me to give directions relating to procedure that, in my opinion, will enable costs or delay to be reduced and will help to achieve a prompt hearing of the matters at issue between the parties (s90(1)(c)). The parties agree that a hearing would be likely to last three days. It will require the attendance of perhaps ten witnesses, in Katherine. One of those

witnesses will require the attendance of an interpreter. Some of those witnesses will have to travel to and stay in Katherine, and will have to be absent from other duties. Three of the witnesses are police officers who will have to be on leave from duties in order to attend the hearing, and one of those officers will need to travel from interstate to attend. The parties' legal representatives will have to travel from Darwin to Katherine and stay there, as will Anti-Discrimination Commission staff. The Commission will occupy a Territory Court for the duration of the hearing.

4.14. In those circumstances it is appropriate to take fair procedural steps to avoid the risk that significant inconvenience and cost would be wasted if, at the conclusion of a full hearing of the complaint on its merits, I were to decide that the facts alleged by the complainants do not engage the Act.

4.15. I therefore proceed to consider whether the facts alleged by the complainants can support a characterisation of the police officers' conduct as the provision of a service for the purpose of the Act.

5. THE 'SERVICES' QUESTION

5.1. The terms 'services' and 'service' are used interchangeably in the authorities; in *IW v City of Perth* (1996-97) 191 CLR 1 at 41 Gummow J refers to '[t]he term 'service' and its variants'.

5.2. 'The term 'services' has a wide meaning' (per Brennan CJ and McHugh J in *IW v City of Perth* (1996-97) 191 CLR 1 at 11). In interpreting that term in the Act, regard must be had to a requirement that 'a construction that promotes the purpose or object underlying the Act ... is to be preferred to a construction that does not promote the purpose or object (s62A Northern Territory *Interpretation Act*), and the Act 'is to be given a liberal construction ... 'a fair, large and liberal' interpretation' (per Brennan CJ and McHugh J in *IW v City of Perth* at 12, and to similar effect Dawson and Gaudron JJ at 23). Subject to a construction that is not 'unreasonable or unnatural', 'if the term 'service', read in the context of the Act and its objects, is capable of applying to an activity, a court or tribunal, exercising jurisdiction under the Act, should hold that that activity is a 'service'

for the purpose of the Act' (per Brennan CJ and McHugh J in *IW v City of Perth* at 12).

- 5.3. If, therefore, having regard to the context of the Act and its objects, to s62A of the NT *Interpretation Act*, and to a 'fair, large and liberal' interpretation of the term 'service', the term is capable of describing the conduct of the police alleged by the complainants, I should hold the police conduct to be a service unless that construction is unreasonable or unnatural. The relevant objects of the Act are in s3: '(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; [and] (b) to eliminate discrimination against persons on the ground of race ... in the provision of goods, services and facilities ... '.

6. CONDUCT THAT IS BOTH STATUTORY FUNCTION AND A SERVICE FOR THE PURPOSE OF THE ACT

- 6.1. A 'service' for the purpose of the Act includes 'services provided by a government, statutory corporation, a company or other body corporate in which a government has a controlling interest' Act (definition of 'services': s4(h)). Activities of the police will therefore be covered by the Act if they can be characterised as a service. But before looking at whether it is possible to characterise police activities as a service, it is relevant that the police were undoubtedly carrying out a statutory function. Only in some cases can the carrying out of a statutory function be characterised as well as a service. In *Rainsford v Victoria* [2005] FCAFC 163; (2005) 144 FCR 279, Kenny J said at [54]-[55] (Hill and Finn JJ agreeing):

The question of whether an activity is a service for the purposes of s 24 of the [*Disability Discrimination Act*] is essentially a matter of characterisation. In discharging statutory duties and functions and in exercising statutory powers in the public interest, a body may also be engaged in the provision of services to particular individuals.

- 6.2. There are many cases in which carrying out a statutory function has been, or has not been, characterised as well as the provision of a service for the purpose of anti-discrimination legislation. In *IW v City of Perth* Brennan CJ

and McHugh J decided that Perth City Council officers, in carrying out particular statutory functions, were not providing a service. However, Dawson and Gaudron JJ and, in separate opinions, Toohey J, Gummow J and Kirby J, were all of the opinion that the officers were both carrying out particular statutory functions and providing a service.

- 6.3. In *Director-General, Department of Community Services v Mm and Another* [2003] NSWSC 1241 the Court was asked by the NSW Administrative Decisions Tribunal whether the State of New South Wales was providing 'services' for the purpose of the NSW *Anti-Discrimination Act* when determining a person's application to become a foster parent. Barr J decided that it was, and noted a number of decisions which discussed or decided whether the performance of public function was, as well, in the circumstances, the provision of a service: *Commissioner of Police, NSW Police Service v Estate Edward John Russell and Ors* [2001] NSWSC 745; *Ferneley v Boxing Authority of NSW* [2001] FCA 1740; (2001) 191 ALR 739; *Australian Education Union v Human Rights and Equal Opportunity Commission and State of Tasmania* (1997) 80 FCR 46; *Tejani v Superintendent Registrar for the District of Peterborough* [1986] IRLR 502 (CA); *Attorney General (Canada) v Cummings* [1982] FC 122; *Savjani v Inland Revenue Commissioners* [1981] QB 458; *R v Entry Clearance Officer; ex parte Amin* [1983] 2 AC 818; and *Farah v Commissioner of Police of the Metropolis* [1998] QB 65. In *Amin* the House of Lords decided that a migration officer, performing his function of controlling immigrants, was not providing a service for the purpose of the *Sex Discrimination Act 1975* (UK).
- 6.4. Of particular relevance in this matter are cases that have considered this question of the dual characterisation of conduct – as both carrying out a function and providing a service for the purpose of anti-discrimination legislation – in relation to police.
- 6.5. In *Commissioner of Police, NSW Police Service v Estate Edward John Russell & ors* [2001] NSWSC 745 it was alleged that the police discriminated unlawfully when a man, while under arrest and in police custody, sustained injuries. Sully J was of the opinion that the police had carried out two

functions provided for in s6 of the *Police Service Act 1990* (NSW): in pursuing and arresting Mr Russell they were preventing and detecting crime, which was a service to the community at large but not to Mr Russell, and in holding Mr Russell in custody they were protecting him from injury, which was a service to Mr Russell.

- 6.6. The decision in *Russell* does not refer to the UK Court of Appeal in *Farah -v- Commissioner of Police of the Metropolis* [1997] 2 WLR 824, which was concerned with whether the police conduct towards a victim of crime could be characterised as a service. The court held that ‘those parts of a police officer’s duties involving assistance to or protection of members of the public’ (per the headnote) amount to the provision of a service; it was ‘not suggested that pursuing and arresting or charging alleged criminals is the provision of a service’ (per Hutchison LJ at 78).
- 6.7. Although *Farah* was not referred to in *Russell*, the decision in *Russell* is consistent with it, drawing a distinction between a police officers’ functions that involve pursuing, arresting and charging alleged criminals, which was not a service for the purpose of anti-discrimination legislation, and those that involve assistance to or protection of a member of the public, which was a service for the purpose of anti-discrimination legislation. The *Farah* case has been relied on in numerous cases in Australia where a distinction has been made between police conduct which was the carrying out of a function, and police conduct which, although the carrying out of a function, was as well the provision of a service for the purpose of the anti-discrimination legislation.
- 6.8. In *Meret v State of Victoria: Dept of Human Services* [1999] VCAT 616 it was alleged that the police officers discriminated unlawfully when they did not allow a person to make a statement about the alleged abuse of her granddaughter. Referring to *Farah*, the Tribunal said that ‘[t]he Police fulfil a public duty to investigate crime but they do not provide a service to any individual such as the Complainant in the circumstances of this case where the Complainant is not a victim of crime or where there is a duty owed to protect her’. I believe the last phrase is intended to be read as qualified by the ‘not’ preceding it, so that the Tribunal is saying, reflecting the reasoning in

Farah, that there is no service to a person who is neither a victim of crime nor a person to whom a duty to protect is owed.

- 6.9. In *The Secretary of the Department of Justice and Industrial Relations v The Anti-Discrimination Commissioner* [2003] TASSC 27 it was alleged that the Director of Public Prosecutions discriminated unlawfully when he decided not to prosecute an alleged perpetrator for the commission of an offence against a person. Referring to *Farah*, the Tribunal said that in the circumstances the DPP was performing a statutory function, but was not providing a service to the person for the purpose of the anti-discrimination legislation.
- 6.10. In *Patrick v State of South Australia (No 2)* [2009] SAEOT 1 it was alleged that police officers discriminated unlawfully when a person who had been arrested and detained under outstanding warrants harmed herself while in custody. Referring to *Farah*, the Tribunal said that while the police provide services to the community, they do not provide a service to each individual person who is arrested, charged and held in custody: '[i]t could not be said that [police] were providing a service to Patrick when they arrested, charged and held her in custody'. (The Tribunal's decision does not refer to the factually similar decision in *Russell* which is to opposite effect as to whether police are providing a service to a person in custody).
- 6.11. In *Mohamed & ors v State of NSW (NSW Police Force)* [2009] NSWADT 51 it was alleged that police officers discriminated unlawfully when they did not respond to a family's complaints that the family had been subject to attack and abuse. Referring to *Farah*, the Tribunal said that when police officers investigate a report that a person has been attacked and their property damaged, the police are providing a service to that person: '[i]t may be that concurrently they are providing a service to the community at large and exercising a statutory function but does not prevent 'the activity' from also being characterised as the provision of a service to the complainant. Like many activities, the detection of and investigation into a report of a crime is capable of more than one characterisation'. On appeal (*State of New South Wales (NSW Police Force) v Mohamed* [2009] NSWADTAP 40), the police argued that by analogy from decisions relating to negligence against police officers, services relating to the prevention and detection of crime are not

services for the purpose of the NSW *Anti-Discrimination Act*. The Appeal Panel granted leave to appeal on the basis that sufficient doubt attached to the Tribunal's view that the prevention and detection of crime can be characterised as a service for the purpose of the anti-discrimination legislation; at this stage no decision in that appeal has been published.

7. DISTINGUISHING THE SERVICES FROM FUNCTIONS

- 7.1. Although these decisions distinguish between a police officer's performance of a statutory function on the one hand and, on the other, their performance of a statutory function which is at the same time a service for the purpose of anti-discrimination legislation, it is not easy to identify determining criteria for this distinction.
- 7.2. Nor does it seem right that government officers could carry out their functions in a manner that would be unlawful under anti-discrimination legislation, without being covered by that legislation. In its 1999 report the NSW Law Reform Commission quoted Margaret Thornton as saying (at [4.301]) 'the government must seek to give the impression that it is non-discriminatory in its own activities in order to ensure its legitimacy as a serious initiator of legislative policy'.
- 7.3. After the decision in *Farah*, and the exposure of racist policing in the 1999 *Stephen Lawrence Inquiry Report*, the UK Government amended the *Race Relations Act* in 2000. To ensure that that Act extended to cover carrying out of a public function, ss19B-F were inserted, making it 'unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination', and including in 'public authority' any person whose 'functions are functions of a public nature'. In its 1999 report on the NSW *Anti-Discrimination Act* the NSW Law Reform Commission recommended that the NSW Act be amended to similar effect, but neither the NSW Act nor any other Australian anti-discrimination law has been amended in this way.
- 7.4. A person who is aggrieved by what they say is the discriminatory carrying out of a public function, in circumstances where the conduct is not at the same time the provision of a service, must seek a remedy elsewhere than under the

Act. It is unsatisfactory that they will not know this to be the case until after they have sought a remedy under the Act and have had a finding made on whether the conduct was a service in the circumstances. This could be avoided if the Act were amended.

- 7.5. However, in the absence of explicit coverage for 'mere' carrying out of a statutory function, the Act requires me engage in this exercise of distinguishing a police officer's performance of a statutory function from their performance of a statutory function which can at the same time be characterised as a service for the purpose of anti-discrimination legislation.

8. IDENTIFYING A FUNCTION THAT CAN AS WELL BE A SERVICE

- 8.1. In the police cases I have noted above, the difference between a statutory function which is not capable of being characterised as a service for the purpose of anti-discrimination legislation and one which is, seems to be an assessment of whether, in carrying out a statutory function, a police officer is directing their efforts to the benefit or advantage of a particular person rather than to the community at large. This is the thread of the reasoning in *Farah* that runs through the cases, explaining why carrying out a function was as well a service in *Russell* and in *Mohammed*, but was not in *Meret* and in *the Department of Justice and Industrial Relations*. The decision in *Patrick* cannot be explained in this way, to the extent that the facts include the police carrying out a statutory function in relation to a person in custody.
- 8.2. There are two features of 'service' in this analysis. One is the idea of a benefit, and the other is the idea that the benefit accrues to an individual rather than to the community at large.
- 8.3. On the question of benefit, the NSW Administrative Decisions Tribunal in *Contreras-Ortiz v Commissioner, Department of Corrective Services* [2008] NSWADT 308 reviewed the authorities relating to the dual characterisation of conduct as statutory function and service, and concluded (at [115(d) and (e)], references omitted) that 'amongst the ordinary meanings of the term 'service' are the action of serving, helping or benefiting; conduct tending to the welfare or advantage of another ... and 'the touchstone for a service is whether is

whether the act is helpful or beneficial to the relevant class of persons to which the person alleging discrimination belongs...’.

- 8.4. Brennan CJ and McHugh J in *IW v City of Perth* (at 15-16) treated the conferring of a benefit as a necessary but not always sufficient indicator of the provision of a service; Kirby J (at 73) could see that conduct may be a service even though adverse to the interests of the person receiving the service.
- 8.5. In the cases concerning police conduct that I have noted above, when carrying out a police function has been characterised as, at the same time, the provision of a service for the purpose of anti-discrimination legislation, the relevant function has not been investigation and arrest, but the protection of an individual. That approach accords with an ordinary meaning of service as doing something that is helpful to or beneficial for person.
- 8.6. On the question of the benefit accruing to an individual rather than to the community at large, it is insufficient for the purpose of the Act to characterise conduct as a service at large, to the community or public. The Act is concerned with conduct that is a service to the person complaining about the conduct, whether or not it is as well a service to the public. This necessary connection with a complainant is apparent from reading sections 19, 41 and 60 of the Act together. In s.19 the Act defines discrimination as one person’s conduct ‘against another person’. In s.41 the Act prohibits a supplier of services from discriminating ‘against another person’ by, for example, ‘failing or refusing to supply ... services’. In s.60 the Act entitles only ‘a person aggrieved’ by discrimination to complain about it, and I take ‘a person aggrieved’ to be a person who claims to have been the subject of discrimination, and not, for example, a sympathetic bystander.
- 8.7. The structure of the Act makes clear that a complaint under the Act about services must be complaint under the Act about services to the complainant, and not to a third party or the community at large. A person has no standing under the Act to complain about the manner in which a service was provided (or not) to another person, or to the community at large. The focus of the Act on the circumstances of an individual means that the characterisation of a

'service' is limited to identifying a service that was provided (or refused) to the particular complainant. In *IW v City of Perth* Brennan CJ and McHugh J make the point (at 16) that the term 'service' has to be given meaning 'for the purposes of the Act', and that 'the aggrieved person must establish that *he or she* has been refused a service...' (my emphasis).

- 8.8. The authorities suggest, therefore, that the distinction between performance of a statutory function on the one hand and, on the other, performance of a statutory function which is at the same time a service for the purpose of anti-discrimination legislation, is made on the basis of whether police officer, when carrying out a statutory function is, in doing so, acting helpfully or beneficially towards the relevant person.
- 8.9. On the facts alleged by the complainants it is difficult to see the police officers' conduct as beneficial or helpful to the complainants, whatever function they were performing. But that is to focus on the manner of conduct, not on the nature of the conduct itself. The exercise of characterising conduct must focus on its essential nature, rather than on the way in which it is performed in the circumstances. The activities that are prescribed by the Act, such as 'services', are of a general or generic type; once they have been identified the Act is engaged, and it is in the consequent inquiry that the way in which the conduct occurred in the circumstances.
- 8.10. In matters such as this one it is difficult to separate the alleged manner of the conduct from the exercise of deciding whether the conduct can be characterised as a service. But the conduct must be characterised independently of the manner of its provision in the circumstances: it cannot be the case that a service which is performed in a discriminatory fashion loses its character as a service and therefore avoids the *Anti-Discrimination Act*. By definition, discriminatory conduct is conduct that causes detriment (cf s.20), so whether conduct can be characterised a service to a person must be decided by asking not whether the way the conduct was performed in the circumstances was beneficial to the person, but whether the conduct was – or would have been but for the discriminatory manner of its provision – beneficial to the person.

8.11. In this matter, it may be that the police officers' conduct in carrying out a function was a service, even if their manner of doing so was, as is alleged, aggressive and abusive. It is necessary to look past the way in which the police are alleged to have carried out their function, and to ask whether the nature of the statutory duty they were carrying out was a service for the purpose of the Act.

9. THE STATUTORY FUNCTION

9.1. As is clear from the cases I noted above, not all police officers' statutory functions will be, or in some cases perhaps even can be, directed to an individual for their benefit. To decide whether a police officer's carrying out of a statutory function could at the same time be characterised as a service, it is necessary to identify the function that they were carrying out at the relevant time.

9.2. When they engaged in the conduct that is complained of the police officers were therefore carrying out at least one of their statutory functions. Police in the Northern Territory carry out the core functions set out in s5(2) of the *Police Administration Act*:

(a) to uphold the law and maintain social order; and

(b) to protect life and property; and

(b) to prevent, detect, investigate and prosecute offences; and

(d) to manage road safety education and enforcement measures; and

(e) to manage the provision of services in emergencies.

9.3. A person who is arrested is the object of the police officer's carrying out of a statutory function, and could not usually be said to be receiving a benefit. In light of the approach taken in other cases I would be slow to characterise the prevention, detection, investigation and prosecution of an offences as a service. I have in mind the approach taken in both *Farah* and *Russell*.

9.4. In certain circumstances, however, a police officer who detains a person could at the same time be providing a service to the person, such as where the person is rescued from a dangerous situation or is restrained from harming themselves. In detaining the person a police officer could be

carrying out their function of protecting life and property rather than, or as well as, their function of preventing an offence. In such a case the police officer's performance of their function would be directed towards a person, to be beneficial for that person.

- 9.5. On the facts alleged by the complainants, the police officers may have been performing one or a number of their prescribed functions. It may be that the police officers were carrying out the function of upholding the law, maintaining social order, or preventing an offence; counsel for the police officers submitted that what they were doing at the time was 'dealing with disturbances and probable offences'. If the evidence shows that that was the case, then it seems likely that their carrying out that function was not a service to the complainants, in which case the Act would not respond to the facts alleged. I note however that the complainants do not allege that the police officers attempted to restrain or detain them, or to seize any of their belongings, any of which I would have taken as an indication that the officers were acting to uphold the law, maintain social order and prevent an offence.
- 9.6. But it seems more likely to me, as the complainants submit, the police officers were, instead or as well, carrying out the function of protecting life and property. If the evidence shows that that was the case, then it seems likely that their carrying out that function was at the same time a service to the complainants, even though one that, the complainants allege, was provided in a discriminatory manner causing detriment. I note that the complainants allege that the police officers attempted to get them to leave the area with a suggestion of urgency, which I take as an indication that the officers were acting to protect life and property.

10. CONCLUSION

- 10.1. I cannot at this stage say that the conduct of the police officers was not the provision of a service to the complainants. On the material available to me at this stage, it is likely that their conduct was in performance of their function of protecting life and property, in which case I would be of the view that their conduct could reasonably and not unnaturally be characterised as a service to the complainants.

10.2. The question of statutory function was not argued in the application before me, and evidence from the police officers and of the circumstances that led them to attend the park would inform my judgment as to what statutory function or functions they were performing. I note as well that Constable Discombe was present as a Special Constable under s29, of the *Police Administration Act*, and I am unaware of what if any particular functions he may have been carrying out pursuant to the terms and conditions of his appointment.

10.3. Because on the material available to me at this stage it is likely that the police officers' conduct was in performance of their function of protecting life and property, I am not satisfied at this stage that their conduct cannot be characterised as the provision of a service to the complainants. Accordingly, I decline to dismiss the complaints at this stage. I will request the Registrar to convene a directions hearing to prepare the matter for a full hearing.

Simon Rice
Hearing Commissioner
21 August 2009