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COMMISSIONER OF CORRECTIVE SERVICES v ALDRIDGE (NO 2) [2002] NSWADTAP 6

Commentary: *Commissioner of Corrective Services v Aldridge (No 2)* [2002] NSWADTAP 6

Debbie Bargallie and Jennifer Nielsen

*Aldridge v Commissioner of Corrective Services*¹ was a complaint heard by the New South Wales Administrative Decisions Tribunal ('ADT') of discrimination in employment on the grounds of race and disability, and of victimisation under the *Anti-Discrimination Act 1977* (NSW). Mr Richard Aldridge was a senior manager of the Department's Aboriginal Resources Unit ('ARU') who was leading work to implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC'). He complained about his treatment by the Assistant Commissioner, Mr Ronald George Woodham, including that Mr Woodham removed Mr Aldridge from his position. At first instance, the ADT upheld his complaint of direct race discrimination, finding he was removed from his position because he asserted his standpoint as an Aboriginal man. However, the Department successfully appealed this decision in the Administrative Decision Tribunal Appeal Panel ('Appeal Panel').²

Richard Aldridge's case remains one of the few workplace racial discrimination cases litigated by an Indigenous person in Australia, and like most, it was unsuccessful. To legal and other commentators, the lack of success is notorious as complaints of race discrimination are extremely difficult to prove.³ This is a consequence of deficiencies in how anti-discrimination laws are defined and interpreted,⁴ and the lack of public racial literacy—that is, knowledge of what racism is, what racism is not, and how race works.⁵ Mr Aldridge's case exemplifies Indigenous employees' experiences of racism in the public service, which do not emerge in isolation but reflect historical institutional policies, practices, and hierarchical racial power relations.⁶

We chose to rewrite the judgment in *Aldridge* because we are both situated knowers of corrective services and the criminal justice system. Separately, we have experienced the culture and operations of the prison system and been ethical witnesses to its institutional toxicity, especially to Indigenous Australian peoples as prisoners, families, and employees. Additionally, both of us have undertaken research that informs our understanding of this case. Bargallie is an Indigenous Australian critical race theorist. Her research focuses on the experiences by Indigenous employees of everyday and structural racism in workplaces such as the Australian Public Service, finding that racism is normalised in white institutions.⁷ Nielsen is a white Australian researcher who also applies critical race and whiteness theory to critique normative standards in Australian law. Her research on discrimination laws found that they preserve and naturalise racial legacies that structure the workplace in favour of white people and white privilege. Consequently, Indigenous Australian peoples carry the cumulative weight of systemic and everyday race discrimination.⁸

We decided to hear an appeal by Mr Aldridge to the Supreme Court of NSW so that we could critique the Appeal Panel's reasoning. To write our judgment, it was imperative for us as critical race theorists to centre race in our examination. Critical race theory is largely untapped in Australian research⁹—particularly legal research—which is surprising given the significant amount of attention applied to Indigenous legal issues. We used critical race storytelling (a method to understand and interpret people's experiences with racism) and the Indigenous methodology of yarning¹⁰ to exchange our knowledge and stories as Indigenous and non-Indigenous researchers and share the personal and academic context of our understanding of *Aldridge's* case. This allowed us to identify common ground and differences in our perspectives and thus apply a deeper critique to interpreting and reframing the judgment.

As well as our own work, we also drew upon the work of key Indigenous Australian theorists. The work of Distinguished Professor Aileen Moreton-Robinson, a Goenpul woman of the Quandamooka nation, was particularly helpful.¹¹ Her 2007 paper, 'Witnessing the Workings of White Possession in the Workplace: Leesa's Testimony', significantly influenced our approach to rewriting *Aldridge*.¹² It tells the story of Leesa, an Indigenous nurse in Queensland Health. Moreton-Robinson found that Leesa had experienced different treatment from her non-Indigenous colleagues, including alienation and exclusion from training opportunities, and comments by her non-Indigenous colleagues that were 'consistent with racial stereotypes that position Indigenous peoples as inferior'.¹³ Moreton-Robinson identified an 'obvious collaboration of testimonies' in the statements made by white nurses and 'institutional support' for them. Moreover, Indigenous peoples who raised issues of racism within the workforce were typically positioned as 'troublemakers' or represented as being 'too sensitive'.¹⁴ Moreton-Robinson ultimately asks, 'Why do most white people believe that racism does not exist and most Indigenous peoples believe that it does?'¹⁵ These findings prompted us to engage a deep critical analysis of the evidence and

reasoning in the judgments by examining what was said and by whom, *and* what remained unspoken. Thus, our re-interpretation privileged Indigenous voices, thereby changing *whose* voices are central in the narrative, bringing vital attention to what *is* said and to what was *not* said in the original judgments.¹⁶

By centring race in our analysis, we could reinterpret the events in light of Mr Aldridge's knowledge and lived experience of racism—so that his experiences mattered. This necessarily brings attention to Mr Aldridge's experience as an *Aboriginal* employee: he was assertive of his Aboriginality, regularly requesting Mr Woodham to be accountable for the Department's approach to the RCIADIC's recommendations and to address the 'Aboriginal staffing shortages, lack of resources and inmate services'¹⁷ required to implement those recommendations effectively. Mr Woodham appears to have construed Mr Aldridge as the problem to be fixed. This is evident from many facts in the case: Mr Woodham removed Mr Aldridge from the ARU, he did not follow ordinary departmental procedures that would have allowed Mr Aldridge to apply for a new and comparable position, and, ultimately, he removed Mr Aldridge from having *any* role working with Indigenous inmates and programmes. These events would have been dehumanising to Mr Aldridge—particularly as he was the most senior Aboriginal staff member in Corrective Services at that time. Mr Woodham's alienation and silencing of Mr Aldridge is better understood as putting Mr Aldridge in 'his place'.

Our reading of the evidence—unlike that of the Appeal Panel—confirms that it offers ample and probative proof that Mr Woodham treated Mr Aldridge less favourably than others. Our judgment also examines the totality of the evidence for proof that Mr Aldridge was treated less favourably *because* he was an Aboriginal person, that is, *because of his race*—an issue the Appeal Panel did not explore. We reinterpreted the events by putting them in context to bring the Department's dynamic of institutionalised racism to the foreground. The RCIADIC was an important part of this context, and a key deficiency of the original and appeal judgments was the failure to consider the significance of the RCIADIC to Mr Aldridge's work in the Department. The RCIADIC's findings and recommendations offer important and relevant historical insight into *Aldridge's* case, as it found that the institutional culture, policies, and practices in corrective services had failed, and continue to fail, Indigenous Australian peoples. Moreover, it also found that the Department's institutional culture and practices were systemically infused by racism. This understanding is vital because racism is *normal* in a racist culture.¹⁸

Mr Aldridge was challenging a historically white hierarchy in a highly racialised environment. He raised concerns that corrective services had no real commitment to implementing the RCIADIC's recommendations. He complained when Mr Woodham failed to respond to his recommendations. In his role on the Aboriginal Justice Advisory Committee, he felt an expectation to say that 'the RCIADIC recommendations were being implemented when they were not'.¹⁹ His Aboriginal knowledge and standpoint were, as the ADT had originally concluded,

‘not welcome’ through being inconsistent with the departmental hierarchy’s preference for more celebratory accounts of its institutional life: symbolic responses, practices, and cultural events—reconciliation action plans and the like—rather than substantive, paradigm-shifting, and meaningful change. Mr Aldridge and his attempts to challenge this institutional culture were silenced and rendered inert, and he was painted as problematic and deviant within the Department.

We brought focus to this context by following the type of purposive and contextual analysis demonstrated in the earlier decision of *Slater v Brookton Farmers Co-operative Company Ltd.*²⁰ Slater’s case is a West Australian decision also involving a complaint of discrimination in employment by an Aboriginal person. It was one of the very first cases litigated by an Aboriginal person about race discrimination in employment—and remains one of the very few that has been successful.²¹ That case is explained in some detail in our judgment (paras 31–34); its reasoning is applied to demonstrate how a contextual analysis allows a tribunal to discern from the totality of the evidence the presence and effect of race within the events examined in the case. Such reasoning gives sharp relief to the racist differentiations applied to Mr Aldridge—the accumulation of daily experiences of disrespect, humiliation, rejections, blocked opportunities, and hostilities—and to the cumulative impact upon him, as an Aboriginal employee, of everyday and structural racism. It also, as explained in our judgment (paras 40–42), allowed us to re-interpret the relevance of evidence given by Mr Aldridge’s non-Indigenous colleagues and read it more accurately.

This reasoning also revealed the *cause* of Woodham’s aggressive rejection of Mr Aldridge’s standpoint as an Aboriginal man. Mr Aldridge was challenging the Department’s dominant white culture; he was bringing Indigenous knowledge and perspectives to the fore on how to design and implement strategies to protect Aboriginal inmates within the corrective services system. That is, all of Mr Aldridge’s actions were ways that he asserted his Indigeneity.²² Mr Woodham persistently responded by applying racial differentiations to Mr Aldridge. Mr Woodham marginalised and alienated him, and sought to represent Mr Aldridge as deficient, ‘the problem’, and deviant within this institutional culture. At every turn, Mr Woodham excluded Mr Aldridge’s attempts to work from his standpoint as an Aboriginal man. *Mr Aldridge’s race—his Aboriginality—was the reason Woodham treated him as he did.*

We note, but could not explore in our judgment, that the ADT regarded Mr Woodham and the respondent’s witnesses as highly unreliable. In particular, three of the respondent’s witnesses—all Indigenous—may have been coerced because they were vulnerable to the power imbalance between them and Mr Woodham as the Assistant Commissioner at the time. It is notable because the Appeal Panel overlooked any problems with credibility, and even regarded the testimony of Mr Aldridge’s white colleague, Mr Danni Mulvany (regarded as highly credible by the ADT), as offering mere opinion.

Despite Mr Woodham’s aggressive behaviour and reputation, and what we interpret as his race discrimination against Mr Aldridge, he was elevated to the

role of the Department's Commissioner—the same year that the Appeal Panel made its final decision. Perhaps this is not surprising as the Appeal Panel's judgments speak to the power of the common law to rewrite/re-narrate a story to uphold dominant interests and privilege white perspectives and power. This gives insight into the significant legal barriers that make it improbable that Indigenous Australian peoples could successfully prove complaints of the race discrimination they experience in white patriarchal institutions.

Indeed, Mr Aldridge, the complainant, became the complaint. For his audacity in making a complaint, he became the recipient of retaliation or racial backlash in forms of alienation, exclusion, over-surveillance of performance, criticism, and abuse. Bargallie's research concludes that Mr Aldridge's experience is not uncommon and that, like Mr Aldridge, Indigenous employees are often rendered disposable by being made redundant or being displaced.²³ It concerns us that Mr Aldridge's complaint of victimisation was not litigated, as there appears to be ample evidence to show that Mr Woodham wanted Mr Aldridge out of the role of working with Indigenous peoples after Mr Aldridge lodged his complaint. Due to space constraints, we could not cover this in our judgment but note its significance to Mr Aldridge's experience.

Mr Aldridge, in his evidence, made clear that his job was not just about the pay, status, and title attached to it but was about making a difference for Indigenous peoples within the system. By marginalising Mr Aldridge and removing him from the work that was most meaningful to him, Mr Woodham prevented Mr Aldridge from making a difference for his mob—Indigenous peoples while they were incarcerated by the justice system. This is significant as our reading suggests he was removed so that he could be silenced and not disrupt the operations of the Aboriginal Resources Unit/Indigenous Services Unit. Notably, it was an important consideration taken into account by the ADT at first instance, in ordering that he be restored to a position in the Department that involved 'direct contact with' Aboriginal peoples. That is, it recognised that Mr Aldridge's removal was dehumanising and the impact was much more than a loss of wages; the ADT's decision sought to remedy the loss and grief he suffered through being removed from working with and for his mob, his community.

To conclude, we acknowledge that our judgment sits within what Professor Irene Watson of the Tanganekald, Meintangk Boandik First Nations exposes as the problematic space of common law reasoning, an inherently violent colonial space that remains disrespectful to and ignorant of Indigenous knowledges, philosophies, and laws.²⁴ This critique raises important questions. How do we deploy reasoning guided by Indigenous knowledges, philosophies, or even perspectives within the context of colonial common law? As we found together through our yarns, there are many ways in which common law reasoning and Indigenous knowledges and philosophies are simply incommensurate. That is a dilemma of this project.²⁵ Can we critique white legalities to see if new legalities are possible? Is it possible to decolonise white Australian law? Is it possible to offer new ways of legal thinking within the colonial legal paradigm? These

are the impossibilities that we are attempting to pursue.²⁶ We offer a judgment that reworks and redeploys common law reasoning through a critique of white legalities, attempting to make new legalities possible.

Notes

- 1 *Aldridge v Commissioner of Corrective Services* [1999] NSWADT 33.
- 2 Decided in two separate judgments: *Commissioner of Corrective Services v Aldridge* [2000] NSWADTAP 5 and *Commissioner of Corrective Services v Aldridge (No 2)* [2002] NSWADTAP 6.
- 3 See e.g. Beth Gaze, 'Problems of Proof in Equal Opportunity Cases' (1989) 63(8) *Law Institute Journal* 731; Margaret Thornton, 'Revisiting Race' in Racial Discrimination Commissioner, Parliament of Australia, *The Racial Discrimination Act—A Review* (Review Paper, December 1995).
- 4 Jennifer Nielsen, 'Whiteness and Anti-Discrimination Law—It's in the Design' (2008) 3(2) *ACRAWSA e-journal*.
- 5 Debbie Bargallie, *Unmasking the Racial Contract: Indigenous Voices on Racism in the Australian Public Service* (Aboriginal Studies Press, 2020).
- 6 Ibid.; Nicholas Biddle and Julie Lahn, *Understanding Aboriginal and Torres Strait Islander Employee Decisions to Exit the Australian Public Service* (CAEPR Working Paper 110/2016, June 2016).
- 7 Bargallie (n 5).
- 8 Jennifer Nielsen, "'There's Always an Easy Out': How "Innocence" and "Probability" Whitewash Race Discrimination' (2007) 3(1) *ACRAWSA e-journal*.
- 9 Bargallie (n 5); Marcelle Burns and Jennifer Nielsen, 'Dealing with the "Wicked" Problem of Race and the Law: A Critical Journey for Students (and Academics)' (2018) 28(2) *Legal Education Review* 1; Juliana McLaughlin and Susan Whatman, 'The Potential of Critical Race Theory in Decolonizing University Curricula' (2011) 31(4) *Asia Pacific Journal of Education* 365.
- 10 Dawn Bessarab and Bridget Ng'andu, 'Yarning about Yarning as a Legitimate Method in Indigenous Research' (2010) 3(1) *International Journal of Critical Indigenous Studies* 37.
- 11 See e.g. Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press, 2015).
- 12 Aileen Moreton-Robinson, 'Witnessing the Workings of White Possession in the Workplace: Leesa's Testimony' (2007) 26 *Australian Feminist Law Journal* 81.
- 13 Ibid., 91.
- 14 Ibid., 86.
- 15 Ibid., 84.
- 16 Bargallie (n 5).
- 17 *Commissioner of Corrective Services v Aldridge (No 2)* [2002] NSWADTAP 6, [32].
- 18 Bargallie (n 5).
- 19 *Aldridge v Commissioner of Corrective Services* [1999] NSWADT 33, [11].
- 20 *Slater v Brookton Farmers Co-operative Company Ltd* (1990) EOC 92–321.
- 21 See Jennifer Nielsen, 'Whiteness at Work' (2013) 26(3) *Australian Journal of Labour Law* 300.
- 22 Bargallie (n 5).
- 23 Bargallie (n 5).
- 24 See e.g. Irene Watson, 'Re-Centring First Nations Knowledge and Places in a Terra Nullius Space' (2014) 10(5) *AlterNative* 508.
- 25 Irene Watson, 'First Nations Stories, Grandmother's Law: Too Many Stories to Tell' in Heather Douglas et al. (eds), *The Australian Feminist Judgments Project: Writing and Re-writing Law* (Hart Publishing, 2014).
- 26 Irene Watson, 'Aboriginal Sovereignties', in Suvendrini Perera (ed), *Our Patch* (Network Books, 2007), 23, 26.

RICHARD ALDRIDGE APPELLANT;

AND

COMMISSIONER OF CORRECTIVE SERVICES RESPONDENT;

[2003] NSWSC 1170

**Anti-Discrimination Act 1977 (NSW)—Racism—Race
discrimination—Employment—Indigenous peoples—Less
favourable treatment—Indigenous knowledges—Standpoint.**

- [1] NIELSEN AND BARGALLIE JJ.¹ On 15 April 1991, the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') completed its national investigation into the grossly disproportionate rate of incarceration of Aboriginal and Torres Strait Islander peoples. It investigated the cause of the deaths in custody of 88 men and 11 women between 1980 and 1989. The RCIADIC could not identify one 'common thread' to explain these deaths, but it did find that in every death, the person's 'Aboriginality played a significant and *in most cases dominant role* in their being in custody and dying in custody'.²
- [2] The RCIADIC's vital purpose was to formulate recommendations to prevent such deaths in the future. Its reports offer significant commentary on the criminal justice system, including the corrections system and custodial institutions. It is profoundly relevant to the present case as its findings indicate a dynamic of institutionalised racism in the workplace and events to which this matter relates.
- [3] The appellant, Richard Aldridge, is a Kamilaroi man,³ who was a senior Aboriginal employee of the New South Wales Department of Corrective Services, a member of the Aboriginal Justice Advisory Committee, and Aboriginal Project and Policy Officer in the Aboriginal Resources Unit ('ARU'). That role involved advising the Department on implementing the RCIADIC's recommendations within the New South Wales custodial system. Mr Aldridge came to the role with relevant qualifications and significant experience gained through completion of a Corrective Services Welfare Officer Traineeship, a Diploma in Social Welfare, and as a welfare officer at Long Bay Correctional Centre. Imperative to the role was Mr Aldridge's Aboriginal standpoint and cultural knowledge. His standing was recognised by his appointment to the Aboriginal Justice Advisory Committee, a committee formed to advise government on the RCIADIC's recommendations.

- [4] The respondent is the Department of Corrective Services and the Commissioner as its head. Mr Aldridge's complaint relates primarily to actions by one employee—Ronald George Woodham—who at the relevant time was the Department's Assistant Commissioner, but was appointed Commissioner in 2002. During the relevant period, 1995 to 1996, the rate of Indigenous deaths in custody in NSW remained disproportionately high, indicating that the Department needed to act urgently to abate this national disgrace.⁴
- [5] Mr Aldridge was employed in a grade 7/8 position⁵ within the Department. From February 1993 to November 1995, his role was to develop, set up, and work in the ARU (renamed the Indigenous Services Unit ['ISU'] in March 1996). Mr Woodham had Mr Aldridge removed from the ARU in February 1996, and despite the availability of a comparable position in the new ISU, Aldridge was not advised of or appointed to that role. Instead, the Department moved him to various positions, and ultimately to one that had no direct role with Indigenous peoples. Mr Aldridge based his complaint of race discrimination in employment on these events and other interactions with Mr Woodham. The Department denied that any of these actions occurred because of Aldridge's race, but instead occurred due to problems with his work performance within the ARU.
- [6] In March 1996, Mr Aldridge lodged his complaint with the NSW Anti-Discrimination Board, alleging race and disability discrimination, and victimisation under the *Anti-Discrimination Act 1997* (NSW) ('ADA'). The board could not conciliate the complaint, and early in 1997, Aldridge commenced action in the Administrative Decisions Tribunal ('ADT'), which found his complaint of race discrimination had been proved in its 1999 decision ('ADT Decision').⁶ The Department appealed to the Administrative Decisions Tribunal Appeal Panel ('Appeal Panel') which upheld the appeal in two separate judgments. The first judgment in 2000 ('AP Decision 1')⁷ vacated the ADT's original decision and dismissed all but one incident that comprised Mr Aldridge's complaint ('the meeting of 23 August 1995'), remitting it for rehearing. The second judgment reheard and dismissed this complaint in 2002 ('AP Decision 2').⁸ Prior to these hearings, Mr Aldridge withdrew his complaints of disability discrimination and victimisation.
- [7] This Court granted Mr Aldridge leave to appeal against both Appeal Panel decisions. He appeals to this Court on questions of law under s 119 of the *Administrative Decisions Tribunal Act 1997* (NSW). Section 120 of that Act empowers this Court to 'hear and determine the appeal' and 'make such orders' considered appropriate, including (but not limited to) affirming or setting aside the Appeal Panel's decision, or remitting it 'to be heard and decided again'.
- [8] The grounds of Mr Aldridge's appeal are as follows:
1. The Appeal Panel erred in law in failing to take a purposive approach to the interpretation and application of the ADA;

2. The Appeal Panel erred in law in failing to consider the totality of the evidence in determining if Mr Aldridge was treated less favourably when abused at the meeting of 23 August 1995; and
 3. The Appeal Panel erred in law in failing to consider the totality of the evidence in determining if Mr Aldridge experienced other forms of less favourable treatment.
- [9] Mr Aldridge submits that the Appeal Panel should have pursued a purposive interpretation of the *ADA* in accordance with s 33 of the *Interpretation Act 1987 No 15* (NSW). He also submits that the Appeal Panel failed to consider the inferences available on the totality of the evidence, which show that Mr Aldridge was treated less favourably as compared to non-Indigenous employees, on the ground of his race. This includes evidence that:
- Mr Woodham told Mr Aldridge to ‘shut up and stop threatening’ him when Aldridge raised the RCIADIC in a meeting on 10 July 1995;
 - Mr Woodham abused Mr Aldridge at a meeting with his colleagues on 23 August 1995;
 - Mr Aldridge was removed from his role in the ARU in November 1995;
 - Mr Aldridge was removed from the ISU in February 1996;
 - The Department failed to advise Mr Aldridge that ISU positions had been advertised in mid-1996; and
 - The Department appointed Mr Aldridge to a role that did not involve working with Indigenous Australian peoples in July 1996.

The relevant law

- [10] The relevant law is set out in ss 7 and 8 of the *ADA*. Section 7 defines race discrimination, while s 8 defines when race discrimination is unlawful within the employment relationship. Before s 8 applies, proof is required that s 7 has been breached.
- [11] Mr Aldridge’s complaint is that he experienced acts of direct discrimination on the ground of race as defined by s 7(1)(a) that, contrary to s 8(2), affected his employment by subjecting him to ‘other detriment’, tainting the ‘terms or conditions’ of his employment, and causing him to be denied opportunities and benefits associated with his employment. We concur with the Appeal Panel’s view in AP Decision 1 that the Department could be directly liable for its employees’ actions in line with s 53 (‘Liability of principals and employers’).⁹ Relevantly, the former Commissioner Smethurst testified at first instance that he was aware of, but did not intervene to resolve the tension between, Mr Woodham and Mr Aldridge.
- [12] Mr Aldridge’s appeal puts in issue the Appeal Panel’s approach to determining whether the acts complained of amounted to race discrimination under s 7, its approach in law to determining the evidence available to it, and whether the evidence was sufficiently probative to substantiate Mr Aldridge’s claim.

The Appeal Panel's reasoning

- [13] Section 7(1)(a) requires proof of two matters, namely that a complainant:
- (i) is treated less favourably than the perpetrator treats or would treat a person of a different race in the same circumstances or those 'which are not materially different' (less favourable treatment found by comparison);
 - (ii) on the ground of the complainant's race (the causal nexus).
- [14] It does not require proof of an intention to discriminate: if there is less favourable treatment because of race, the motives or suggested justifications for this are irrelevant.¹⁰ Moreover, s 4A states that treatment may be discrimination even if done for two or more reasons. Thus, the Department's concerns about Mr Aldridge's work performance—even if credible—would not preclude a finding of race discrimination.
- [15] At first instance, the ADT found that the Department discriminated against Mr Aldridge on the ground of race because it removed him:
- from his position [as leader of the ARU] because he made his views on matters known from an Aboriginal cultural standpoint which was not welcomed by the Department and specifically was not welcomed by Assistant Commissioner Woodham.¹¹
- [16] In AP Decision 1, the Appeal Panel vacated this decision because the ADT failed to state and apply s 7 correctly and did not 'pose and answer the questions of fact...needed to determine' and decide the case correctly.¹² The ADT had not explained the 'causation' element when stating the applicable law and, therefore, failed to make findings of fact (except one, discussed below) that could substantiate its decision that Mr Aldridge had proven his complaint. But the Appeal Panel upheld the ADT's finding of fact that Mr Woodham abused Mr Aldridge at the meeting of 23 August 1995. As this *could* amount to race discrimination as defined by s 7, the Appeal Panel decided to rehear this issue on its merits.
- [17] In AP Decision 2, the Appeal Panel reheard and dismissed Mr Aldridge's complaint about the meeting of 23 August 1995.¹³ It agreed that abusing an employee, 'even if it has no racial content, can constitute a "detriment" within the meaning of s 8(2)(c)' and can amount to race discrimination 'if the employee is treated less favourably than other employees in the same or similar circumstances'.¹⁴ However, it observed that 'a reason or ground for that treatment' must be the employee's race, requiring a distinction between 'racially based abuse' and 'abuse' that occurs *because of* the complainant's race.¹⁵ It concluded that the ADT asked the wrong question on this issue—the *correct* question was whether the abuse was 'directed at Mr Aldridge on the ground of his race' by considering 'whether Mr Woodham did abuse, or would have abused, non-Aboriginal persons in the same or similar circumstances':

If Mr Woodham abused everyone, regardless of their race, the Tribunal would have been forced to conclude that while his employment practices may have fallen well short of the ideal, they did not constitute unlawful racial discrimination.¹⁶

- [18] The Appeal Panel found that Mr Woodham abused two white employees at the meeting and did not directly abuse two Aboriginal employees, persuading it to conclude:

[Mr] Woodham...abused Mr Aldridge, and...Mr Aldridge suffered detriment as a result of that abuse, [but] Mr Woodham did not treat Mr Aldridge less favourably than he treated non-Aboriginal people at the meeting. When Mr Mulvany was advocating for the rights of Aboriginal prisoners to receive family visits when in court or police cells, Mr Woodham became aggressive and said, 'Well, you're not even Aboriginal.'...Mr Woodham also told Ms Sutherland, a non-Aboriginal person, to 'shut-up'. While Mr Woodham was abusive and aggressive towards a number of people in the room, he allowed Mr Aldridge to speak. We are not persuaded that Mr Aldridge was singled out and treated differently from others at the meeting.¹⁷

- [19] Put simply, as the Appeal Panel could not differentiate the abuse of the white employees from that of Mr Aldridge, it concluded that the abuse Mr Woodham directed at Mr Aldridge was not less favourable treatment as required by s 7(1)(a). Consequently, the Appeal Panel found it unnecessary to examine whether Mr Aldridge's race had a 'causally operative effect' upon his treatment by Mr Woodham.¹⁸ It dismissed Mr Aldridge's complaint.
- [20] We conclude that the errors of law asserted in Mr Aldridge's appeal are closed in the Appeal Panel's reasoning.

Errors in the Appeal Panel's judgments

- [21] We agree with Mr Aldridge's submission that the Appeal Panel erred in law in its interpretative approach. It applied a too narrow interpretation of the legislative provisions that did not pursue the Act's purpose adequately. It also erred by ignoring the relevance and probative value of the evidence because it interpreted the events related to Mr Aldridge's complaint as occurring in a race-neutral environment and within a narrow temporal frame. However, the totality of the evidence points to a highly racialised work environment in which Mr Aldridge experienced the cumulative effect of continuous acts of racially based aggressions.
- [22] Section 7(1)(a) requires proof that a respondent treated a complainant less favourably when compared to the treatment that has been or is likely to be

afforded to a person 'of a different race'. The Appeal Panel correctly drew the comparator as Mr Aldridge's white colleagues but did not apply the comparison correctly when it concluded that Mr Woodham did not treat Mr Aldridge less favourably because Mr Woodham also abused Mr Aldridge's white colleagues.

- [23] Their conclusion is wrong because the Appeal Panel failed to discern several material differences in the circumstances between Mr Aldridge and his white colleagues. As it ignored the relevance and probative value of the totality of the evidence, the Appeal Panel also failed to consider the inferences available to it.
- [24] Looking closely at Mr Mulvany's testimony (Mr Aldridge's white colleague in the ARU), he vividly recalled Mr Woodham

storming into the building, sitting down at that table, pointing to [Aldridge] and saying, 'You can get fucked and if you don't like it, you can go somewhere else'. Looking at Ms Sutherland, telling her to shut up and just a tremendous amount of aggression towards the people in that room.¹⁹

Under cross-examination, Mr Mulvany testified that he believed that Mr Aldridge had been

singled out [by Woodham]...because of his aboriginality [sic] and because of his position representing the other aboriginal [sic] people in that team, in that group. ...

I think just there's such a power imbalance between the Assistant Commissioner...who has all these responsibilities and...privileges...and then to treat someone else who is not in the same position as him in such an appalling way in front of his peers it was just something that shocked me. That's why I remember it. I was literally shocked and disgusted by that behaviour.²⁰

- [25] Mr Mulvany disagreed when Counsel for the Department suggested that the fact that Ms Sutherland was told to 'shut up' meant that Mr Woodham's aggression at the meeting 'had nothing to do with the race of the persons who were participating but something to do with the policies and the attitudes of the people towards the work'.²¹ Mr Mulvany disagreed because he had

a different perception and a different way of seeing things because I worked in that group for a period of five months. I saw the way people within that group worked, I was a member of that team and...had participated in that group.²²

- [26] The ADT regarded Mr Mulvany as a reliable witness and preferred his evidence about this meeting to Mr Woodham's testimony (which it regarded as

‘unreliable’ and contradictory) and that of the respondent’s other witnesses.²³ The ADT *did not*, as the Appeal Panel asserted,²⁴ simply adopt Mr Mulvany’s opinion about the events as a fact but, instead, followed the inferences his evidence raised. The Appeal Panel failed to discern two of those in particular. First, Mr Woodham singled out Mr Aldridge—as an *Aboriginal* supervisor—by diminishing him in front of his team. Secondly, Mr Aldridge’s white colleagues may have attracted similar treatment *because* they were supporting Mr Aldridge’s position—that is, because of their *association* with him. This accords with the s 7(1) prohibition of treatment caused by ‘the race of a relative or *associate* of the aggrieved person’.²⁵

- [27] Thus, the Appeal Panel failed to consider whether, in totality, the evidence demonstrated that Mr Aldridge was treated less favourably in the full material circumstances. The Appeal Panel also failed to consider whether the abuse directed at the white employees was part of an act of direct race discrimination against Mr Aldridge in that, as members of the ARU, they supported their Aboriginal team leader.
- [28] Consequently, the Appeal Panel did not explore the causal nexus of these events as it had already reached the conclusion that they could *not* establish race discrimination because Mr Aldridge’s white colleagues had experienced ‘equally’ abusive treatment. However, if the Appeal Panel had considered the events through a purposive analysis that placed them within the racial dynamics of this workplace, it may have reached a different conclusion.

The correct approach to interpretation—purposive and contextual

- [29] Section 33 of the *Interpretation Act 1987 No 15* (NSW) states that to interpret any statutory provision a tribunal should prefer the construction that promotes ‘the purpose or object underlying the Act’ whether or not it ‘is expressly stated’.
- [30] The *ADA*’s purpose *is* not expressly stated but can be discerned from its Long Title, which describes it as an Act to render ‘unlawful racial, sex and other types of discrimination in certain circumstances and to promote equality of opportunity between all persons’. Applying s 33, the accurate interpretation—and thus application—of the *ADA*’s provisions should be to promote its purpose of making acts of race (and other forms of) discrimination unlawful to secure Parliament’s intent to promote equality of opportunity between all persons.
- [31] As indicated by jurisprudence in other jurisdictions, the correct way to pursue a purposive approach to interpretation is by locating the events complained of in their context. In *Edmonton Journal v Alberta (Attorney General)*,²⁶ Madam Justice Wilson of the Supreme Court of Canada explains that this is important because:

the contextual approach...recognizes that a particular right or freedom may have a different value depending on the context...The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it.²⁷

- [32] Significant guidance on applying this approach is illustrated in the Western Australian Equal Opportunity Commission's reasoning in *Slater v Brookton Farmers Co-Operative*.²⁸ This case also demonstrates how a contextual interpretation permits a tribunal to pursue appropriate inferences from the evidence. In particular, context can reveal that events and explanations, which initially seem racially neutral, instead are infused with systemically racist antipathies and practices.
- [33] Mrs Slater, an Aboriginal woman living in the small town of Brookton, complained of direct race discrimination by the Co-Operative's bakery when it rejected her job application. The evidence showed that her interview with the Co-Operative's manager 'fell far short of even the most rudimentary standard for any reasonable job interview'—the manager had been 'peremptory to the point of rudeness' and treated her as if 'she almost did not exist'.²⁹ The tribunal found direct evidence that 'overt' racial bias influenced consideration of Mrs Slater's application by the Co-Operative's board, which had discussed it in terms that referred to her being an Aboriginal person. This persuaded the tribunal that the board's decision *was* because of her race, making the Co-Operative liable.³⁰ However, the tribunal could not find overt or direct evidence that the *manager's* behaviour was also because of Mrs Slater's race. Significantly, though, it continued to explore the evidence to test this issue.
- [34] It did so because the sub-par treatment of Mrs Slater indicated that '[o]bviously something was wrong'. Consequently, the tribunal asked whether the manager's behaviour was 'best explained in relation to the institutional (structural) relations between the Aboriginal and non-Aboriginal people in Brookton, as a microcosm of wider Australian relationships'.³¹ Viewed in totality, the witnesses' testimony provided significant evidence about race relations in Brookton, indicating a distance in the town's 'social/cultural relations between Aboriginal and non-Aboriginal people'.³² It also showed that the Co-Operative had consistently failed to employ Aboriginal peoples (apart from several juniors on a temporary basis) though they made up 40 per cent of the town's population. The tribunal concluded that these matters were 'anchored in institutional racism',³³ leading it to understand that race discrimination was *not* an unusual event in Brookton.
- [35] Analysing the 'evidence as a whole' and in context, the tribunal concluded that the reason it did not employ Mrs Slater, 'an Aboriginal senior', was 'likely to lie with the hiring practices of the Co-op'.³⁴ Upon examining these practices, and in particular, how Mrs Slater experienced them, the tribunal concluded that the manager 'just did not see her as she did not cross

his horizons as a serious contender for the job (reflecting the social/cultural distance referred to above)'. Thus, it was

satisfied on the balance of probabilities that the non-selection of the complainant was a decision made by [the manager] and the board advertently on the dominant ground (though not necessarily the only ground) of her Aboriginality and that she was in that way treated less favourably than a non-Aboriginal applicant would have been treated in similar circumstances.³⁵

- [36] Two features of this reasoning are very important. First, the tribunal examined the discrete event complained of—Mrs Slater's experience with the Co-Operative's recruitment process—within its broader temporal frame, namely the history of the Co-Operative's practice in (not) employing Aboriginal peoples. Secondly, it accepted that race discrimination was a normal and systemic practice within the town of Brookton. Putting the specific events in this context, the tribunal could conclude by inference that the town's institutionalised racism against Aboriginal peoples informed the manager's rude and peremptory treatment of Mrs Slater during her interview (albeit unconsciously). Therefore, it was satisfied that Mrs Slater's treatment was causally connected to her race as required to prove her complaint.
- [37] Importantly, this approach aligns with the evidential standard applied to such complaints. Recently, in *Dutt v Central Coast Area Health Service; Central Coast Area Health Service v Dutt*,³⁶ the Appeal Panel stated that a tribunal must only find discrimination if it is convinced 'on the balance of probabilities' by evidence that is 'logically probative and relevant to the issues before' it.³⁷ That is correct. It also said that to avoid an error of law,³⁸ tribunals must always apply Dixon J's considerations in *Briginshaw v Briginshaw* to assess the relevance and probative value of evidence—the 'seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding'.³⁹ That is not correct. The applicable law—which commenced after Mr Aldridge's complaint—is s 142(2) *Evidence Act 1995* (NSW) which requires tribunals to assess evidence in light of its importance in proceedings and the 'gravity of the matters alleged'. The approach applied to the evidence in *Slater* meets these requirements.

Reasons and decision

- [38] The less favourable quality of treatment in discrimination cases is often obvious. At other times, that quality is only found by examining seemingly neutral events and material circumstances within their racial context. The existence of a racial dynamic by itself does not prove an individual act of less favourable treatment. However, to evaluate the quality and the

cause of the details of a complaint, a prudent tribunal must examine them in the context of the racial dynamic, to consider how racism may have influenced the culture, policies, and practices of the workplace. Otherwise, it may fail to detect the systemic, subtle, and sometimes casual habits of racism, which would undermine the *ADA* because these invidious and injurious behaviours are within the scope of its prohibition on race discrimination. The Act's purpose will not be achieved if these 'subtle' behaviours are not detected, named, and remedied.

- [39] Section 144(1)(b) of the *Evidence Act 1995* (NSW) permits tribunals to take judicial notice of common knowledge, including that contained in documents whose authority 'cannot reasonably be questioned'. The RCIADIC's Reports are such documents and, as already stated, obviously relevant to the events in this complaint. The RCIADIC's findings and recommendations were integral to Mr Aldridge's former role within the Department and propelled his efforts to lead organisational change to stop Indigenous men and women from dying in NSW custodial institutions.
- [40] The RCIADIC's observations give insight into the Department of Corrective Services' institutional dynamics. For example, it explains that a comment by one NSW prison superintendent—that no Aboriginal inmate had ever come to him 'with a complaint about problems with racism'—fails to appreciate that aggrieved Aboriginal prisoners are unlikely to complain to non-Aboriginal prison authorities, as the power differential puts them at risk of retaliatory action.⁴⁰ Commissioner Wootten also observed that this comment failed 'to distinguish between acts or expressions of racial prejudice and the racism embedded in institutional practices'.⁴¹ Like the town of Brookton in *Slater's* case, the RCIADIC's observations offer the Appeal Panel relevant and reliable evidence about the context of this case. Read in totality, the RCIADIC's insights show that the Department of Corrective Services was *not* a race-neutral environment, as racism and race discrimination were a normal part of its everyday operations and institutional practices.
- [41] Examining the events in Mr Aldridge's case in this context foregrounds the racial dynamic of the Department of Corrective Services' work environment—it would not be surprising to detect racist attitudes and antipathies in this workplace. This is the context within which Mr Aldridge and Mr Woodham engaged and related to one another. Mr Aldridge was an Aboriginal leader working to challenge and transform a prison culture not attuned to the 'racism embedded in [its] everyday institutional practices'. In a setting where race discrimination was normal/everyday, it is highly doubtful that the dominant white hierarchy welcomed Mr Aldridge's challenge.
- [42] Read in this context, the evidence reveals a more nuanced set of circumstances that become material and relevant to the events under consideration, and two in particular. First, Mr Aldridge was undertaking his role in materially different circumstances to those of his white colleagues. As the ARU's senior Aboriginal leader, he was responsible for applying Aboriginal

knowledge and perspective to critique and transform the Department's organisational practice. Mr Aldridge had challenged Mr Woodham on several occasions before the meeting of 23 August 1995. At that meeting, Mr Woodham abused Mr Aldridge as an *Aboriginal* team leader—bringing Mr Aldridge's leadership capacities and skills into the spotlight and trying to diminish him in front of his team. Mr Aldridge's white co-workers supported his leadership and his initiatives.

- [43] Secondly, this context offers a proper basis to explore the inferences available in the evidence to explain the relational dynamic between Mr Woodham and Mr Aldridge. As Mr Mulvany observed, there was a clear power differential between Mr Woodham and Mr Aldridge. At the meeting of 23 August 1995, Mr Woodham singled Mr Aldridge out *because* Mr Aldridge was an Aboriginal leader challenging Mr Woodham in front of a group of Mr Woodham's subordinates. Mr Woodham subsequently took steps to remove Mr Aldridge from his position but did not act against any other staff. Read as a whole, Mr Woodham's antipathy towards Mr Aldridge was not discrete or isolated but was persistent.
- [44] The reasoning in *Slater* provides a method to reveal the cause of Mr Woodham's antipathy towards Mr Aldridge and his recommendations by interpreting his antipathy in the context of the racial dynamics evident in this workplace. It is evident that Mr Woodham clearly did not appreciate Mr Aldridge's challenges to his authority and 'right way' of managing the Department; this is made evident by Mr Aldridge's evidence that in conversation with Mr Woodham, Mr Woodham made statements such as, 'don't threaten me' and 'You can get fucked and if you don't like it, you can go somewhere else'.⁴² Mr Woodham's authority and knowledge of the 'right way' to manage the Department is not racially benign—it is sourced in the power and privilege he holds as a white man and executive manager in the Department. Mr Aldridge's testimony about the statements made to him by Mr Woodham suggests that Mr Woodham felt threatened by Mr Aldridge and his recommendation that significant change was needed in the Department's practices. Read, then, in the context of the Department's institutionalised habits of race discrimination (subtle or otherwise), the best explanation for this, Mr Woodham's persistent antipathy, is that he regarded Aboriginal leadership—Mr Aldridge and his Aboriginal ways of knowing, being, and doing—as having no valid place in the Department.
- [45] Thus, these events *are* causally connected to Mr Aldridge being an Aboriginal person.⁴³ On the balance of probabilities, the totality of the evidence supports the inference that Mr Woodham's antipathy towards Aldridge was because he was an Aboriginal leader, that is, because of his race.
- [46] For these reasons, we conclude that the Appeal Panel erred in law. It failed to apply a purposive approach when interpreting and applying the *ADA*. It failed to test the available evidence in the context of the Department's institutionalised racial dynamic to determine if it established, including by

inference, that the treatment afforded to Mr Aldridge by Mr Woodham was less favourable than the treatment that was or would be afforded to his white colleagues in the materially same circumstances. Thus, it should have examined whether the treatment was causally connected to Mr Aldridge being an Aboriginal person, that is, his race.

[47] We allow Mr Aldridge's appeal. He has waited far too long for a just outcome to his claim; we restore the ADT's decision dated 25 May 1999.

Orders

[48] We make these orders:

1. The appeal is allowed;
2. Set aside the decisions of the Appeal Panel made on 18 April 2000 and on 25 March 2002;
3. The ADT's judgment dated 25 May 1999 is reinstated; and
4. Costs are reserved and listed for hearing on a date to be fixed.

Notes

- 1 Jennifer Nielsen and Debbie Bargallie.
- 2 *Royal Commission into Aboriginal Deaths in Custody* ('RCIADIC') (National Report, 15 April 1991) vol 1, [1.1.1] (emphasis added).
- 3 The Kamilaroi are the First Peoples of an area in the northwest of New South Wales.
- 4 Vicki Dalton, *Australian Deaths in Custody and Custody-Related Police Operations, 1995–96* (Australian Institute of Criminology, 1996).
- 5 New South Wales public service positions range from Grade 1–8, Grade 9/10, Grade 11/12SEB 1–3.
- 6 *Aldridge v Commissioner of Corrective Services* [1999] NSWADT 33 ('ADT Decision').
- 7 *Commissioner of Corrective Services v Aldridge* [2000] NSWADTAP 5 ('AP Decision 1').
- 8 *Commissioner of Corrective Services v Aldridge* (No. 2) [2002] NSWADTAP 6 ('AP Decision 2').
- 9 AP Decision 2 [2002] NSWADTAP 6, [29].
- 10 *Haines v Leves* (1987) 8 NSWLR 442, 471.
- 11 ADT Decision [1999] NSWADT 33, [7], [55].
- 12 AP Decision 1 [2000] NSWADTAP 5, [34].
- 13 AP Decision 2 [2002] NSWADTAP 6, [44].
- 14 *Ibid.*, [37].
- 15 *Ibid.*
- 16 *Ibid.*, [7].
- 17 *Ibid.*, [42].
- 18 *Ibid.*, [44].
- 19 ADT Decision [1999] NSWADT 33, [32].
- 20 *Ibid.*
- 21 *Ibid.*
- 22 *Ibid.*
- 23 *Ibid.*, [40], [26].
- 24 AP Decision 2 [2002] NSWADTAP 6, [43].
- 25 Emphasis added. See e.g. *Dowie v Northey & Anor* [2000] VCAT 823.
- 26 *Edmonton Journal v Alberta (Attorney General)* [1989] 2 SCR 1326.

- 27 Ibid., 1355.
- 28 *Slater v Brookton Farmers Co-Operative* (1990) EOC 92–321, 78, 187.
- 29 Ibid., 78, 181 and 78, 186.
- 30 Ibid., 78, 188.
- 31 Ibid., 78, 186.
- 32 Ibid.
- 33 Ibid., 78, 186.
- 34 Ibid., 78, 184–78, 188.
- 35 Ibid., 78, 188.
- 36 *Dutt v Central Coast Area Health Service; Central Coast Area Health Service v Dutt* [2003] NSWADTAP 3.
- 37 Ibid., [20], [12].
- 38 Ibid., [28].
- 39 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361.
- 40 *RCIADIC* (National Report, 15 April 1991) vol 3, [25.6.3].
- 41 *RCIADIC* (Regional Report of Inquiry in New South Wales, Victoria & Tasmania, 30 March 1991) ch 7, 74.
- 42 ADT Decision [1999] NSWADT 33, [14] and see [40]–[47].
- 43 ‘Race’ includes a characteristic that ‘appertains generally’ to Aboriginal peoples; *Anti-Discrimination Act 1997* (NSW) s 7(2).