



This is the author(s) refereed version of a paper that was accepted for publication:

Easteal, P., Judd, K., Saunders, R., & Arnold, B. (2011). Sexual Harassment on Trial: the DJs case. *Alternative Law Journal*, 36(4), 230-235.

This file was downloaded from:

<https://researchprofiles.canberra.edu.au/en/publications/sexual-harassment-on-trial-the-djs-case>

©2011 Easteal et al.

Notice:

This is an Accepted Manuscript of a work that was published in its final form in *Alternative Law Journal* at: <http://search.informit.com.au/fullText;dn=201201764;res=APAFT>

Changes resulting from the publishing process may not be reflected in this document.

# SEXUAL HARASSMENT ON TRIAL

## The DJs case

PATRICIA EASTEAL, SKYE SAUNDERS,  
KEZIAH JUDD and BRUCE ARNOLD

In 2009, following the ABC *Four Corners* story 'Code of Silence' with its suggestion of a brutal culture of sexual violence within rugby league, Richard Ackland commented:

*Like it or not, sometimes in life the media have to be judge and jury. All one can hope for is that the role is carried out carefully and responsibly.*<sup>1</sup>

Indeed, relationships between the media and the legal system are complex. On one hand, journalists play a vital role in bringing important issues such as the 'Code of Silence' culture to public attention. Their investigative work may contribute to overturning wrongful convictions or righting other injustices. On the other hand, 'trial by media' may compromise the integrity of the legal system, colliding with such tenets as the presumption of innocence, jury impartiality and right to a fair trial. Media reporting may also be simplistic, misleading, and overly reliant on clichéd and 'archetypal characters' as 'ancient as they are inflammatory' — the seductress, the victimised man, and the man-hating woman.<sup>2</sup>

The language of the media is limited: 'Feminists' are always 'ideologues'. 'Women in the workplace' invariably 'threaten the place of men'. 'Complaints' of sexual harassment are constantly 'on the rise'. The tone ranges from flattened to melodramatic, often, without that much in between.<sup>3</sup>

Cries of 'trial by media' can be heard every time a high-profile defendant receives unfavourable media coverage. This suggests that the media is the dominant partner in its relationship with the law, with legal practitioners at the mercy of often ludicrously uninformed journalists misrepresenting litigation in the pursuit of circulation, ratings or advertising revenue. However, recent cases suggest a more complex and nuanced relationship.

In the following pages we focus on this complicated Janus-like dyadic relationship by examining a recent dispute accompanied by a veritable frenzy in the mass media. This dispute highlights a third nexus between the press and the law — the use of the former by lawyers to facilitate positive outcomes for their clients. On 8 August 2010, publicist Kristy Fraser-Kirk filed a sexual harassment complaint against her former employer David Jones, the leading upmarket retailer, and its CEO Mark McInnes ('DJs case'). She claimed a massive \$37 million in damages, a sum that was unprecedented and certain to grab media attention in an environment where compensation for fatal injury is less. The Statement of Claim was soon appearing in the inboxes of fascinated legal practitioners, law students, academics and public relations ('PR') specialists.<sup>4</sup> Media reaction was intense. Not since publication of Helen Garner's *The First Stone* in 1995 had sexual harassment so caught popular attention. In fact, the Statement itself listed media representations of Fraser-Kirk at pages 14 to 17. About two months later, the parties agreed on a confidential settlement.

We contrast how this particular 'trial by media' compares to the typical processes and outcomes for those whose complaints are not spotlighted in newspapers or the television news, whether because the complainants lack 'celebrity value' or the litigators are not media-savvy and/or are wary of extrajudicial trial by media release. Did the harassment get major attention simply because of the \$37 million claim, in an environment where reports of harassment are so routine and unglamorous as to be buried on page 11 rather than on the front page?

To understand whether trial by Statement and subsequent PR 'spin' was substantively different from remedies normatively relied upon by complainants, we briefly overview the discrimination law pathway. We assess whether the lawyers' arguments in the Statement of Claim and as portrayed by the media are consistent with the legal lines of reasoning in other matters run under the *Sex Discrimination Act 1984* (Cth) ('SDA'). We see too if media depiction of the sexual harassment allegations and of Fraser-Kirk as the victim matches up with what have been found a credible complainant in studies of court and conciliation decisions. Was the substantial settlement in DJs indicative of a positive portrayal or perhaps the inevitable consequence of the potential for damage to David Jones' reputation?

The DJs case is worthy of analysis and discussion as exemplifying a trend in adversarial dispute resolution — use of PR to foster massive settlements that reflect reputational risk rather than legal niceties. Thus far in 2011, there have been at least two instances of sexual harassment and bullying allegations highlighted in media releases and featuring exceptionally high monetary claims. In April 2011, lawyers for a former IBM employee went to the press about their intention to lodge a \$1.1 million damages claim for sexual harassment and bullying under the SDA.<sup>5</sup> In June 2011, Sally Berkeley, represented by the same law firm as Fraser-Kirk, attracted media attention over her \$9 million unfair dismissal suit.<sup>6</sup>

### 'Trial' along the usual legal path: Discrimination legislation

In theory, a sexually harassed employee has traditionally been able to bring an action against their employer in either contract and/or tort. That is, an employer's failure to fulfil their duty of care can amount to a breach of the employment contract as well as negligence. Importantly though, some feminist legal academics such as Catherine MacKinnon advocate for discrimination legislation as a better response because it addresses the societal injury aspect and is a more effective way of achieving change, while tort merely addresses the individual injury aspect.<sup>7</sup> Indeed, the enactment of the SDA has enabled sexual harassment to be regarded as a form of sex discrimination.<sup>8</sup> Given the vicarious liability provisions discussed next and the relative low cost incurred in going down the discrimination law path as compared to mounting a law suit, it is likely that in practice, the usual pathway for complainants is to file either under the SDA or a state or territory legislative counterpart.

In accordance with employers' common law duty of care to employees, sex discrimination legislation has vicarious liability provisions holding organisations directly responsible for incidents of sexual harassment by their employees or agents.<sup>9</sup> Judicial

officers and discrimination Commissioners appear to be interpreting these statutes rigorously. The circumstances under which employers are held liable for the harassing behaviours of executives and other employees are construed widely. The reasonable steps that employers are required to have taken to prevent harassment are strictly defined.<sup>10</sup> Accordingly, the norm in sexual harassment complaints run under discrimination law is for employers to be named as respondents.<sup>11</sup> It is not surprising then that the employer was named as a respondent in the DJs case. A strong incentive to name the employer is provided by the wariness of large corporations about potential reputational damage, with the cost of repairing sullied corporate profiles perceived as outweighing the cost of a confidential settlement with a complainant.

The usual first step is for a person to make a complaint of sex discrimination to the appropriate agency of the jurisdiction in which the claim is to be instituted: the Australian Human Rights Commission ('AHRC') if filed under the SDA or at a state/territory equivalent agency if lodged under state/territory law. Commissioners, upon receiving complaints, either investigate further, or decline to do so.<sup>12</sup>

Unbound by 'rules of evidence', under legislation such as the *Discrimination Act 1991* (ACT),<sup>13</sup> if the matter is not declined, an inquiry is conducted into whether unfavourable treatment has in fact taken place. In harassment cases, the test of whether it has occurred is described as an objective one. In the ACT for example, a five fold test is used: that conduct occurred; it was of a sexual nature; it was unwelcome; it caused the complainant to feel offended, humiliated or intimidated by reason of the nature of the conduct; and it was reasonable for the person to feel offended, humiliated or intimidated.<sup>14</sup>

Studies of credibility and sexual harassment matters have found that in determining what is reasonable and indeed in assessing whether behaviour was sexual and unwelcome and resulted in humiliation, it is often the complainant's identity, history and behaviour that are scrutinised and evaluated. Youth can enhance credibility if the alleged harasser is older. Also, credible victims fight back, report immediately, are consistent in their evidence, are able to particularise and testify either in a non-aggressive and not too 'smart' manner or make an argumentative presentation coupled with confidence.<sup>15</sup> We will see below how the media and the lawyers' presentation of Fraser-Kirk conformed with or deviated from these characteristics.

Most sexual harassment matters do not culminate in a tribunal or court hearing but are settled 'out of court' through conciliation.<sup>16</sup> There are undoubtedly often pressures on both sides to reach agreement. Complainants, for instance, may be inclined to agree to a settlement because if the matter does not settle and they apply to the appropriate court or tribunal for resolution, there may be lengthy waits. Further, at the Federal level, if the complaint is not upheld, complainants may be responsible not just for their own legal costs but also for those of the respondent. This can be a disincentive to pursuing the matter to court.<sup>17</sup> On the other side of the table — so to speak — the vicarious liability provisions just described may well encourage large corporate respondents to conciliate as a means of avoiding the publicity of a hearing. Thus, the decision in the DJs case to settle out of court conforms to the norm.

The major difference between the DJs outcome and that of other conciliation settlements and hearings' awards is the relatively large amount of money that Fraser-Kirk sought and what she reputedly received. If the matter is resolved at conciliation, complainants are not routinely walking away from the table with huge windfalls. Although these settlements are confidential, one study of sexual harassment conciliation conferences found that two of 22 complainants in the sample were awarded no money while 13 received \$5000 or less. The average amount was \$9772.<sup>18</sup> In another study that looked at 29 Federal Magistrates Court and Federal Court judgments heard from 2001 through 2007, compensation ranged from \$2000 to the \$387,422 awarded in *Lee v Smith & Ors* [2007] FMCA 59. Follow-up research, focusing on 68 cases run from 2005 through 2010 across all jurisdictions, found that the average payout was \$33,768.<sup>19</sup> These amounts contrast markedly with the media-reported DJs settlement of \$850,000.<sup>20</sup>

## The DJs Statement of Claim

Fraser-Kirk's Statement boldly relied on causes of action under the laws of torts, contract, equity and trade practices, rather than merely on well-established provisions under the Sex Discrimination legislation. In essence the Statement claimed that provisions of the *Trade Practices Act 1974* (Cth) and/or the *Fair Trading Act 1987* (NSW) were breached when, for example, Fraser-Kirk was interviewed by a personal assistant for a temporary role at DJs and, during the interview, misrepresentations were made to her about the environment being a 'very fun, exciting place to work' (paragraph 43).

Contractual damages were also claimed, for breach of both express and implied terms of the complainant's employment contract. For example, McInnes's alleged declaration to the complainant at a work luncheon that the dessert was 'like a fuck in the mouth' (paragraph 11a) and DJs subsequent lack of action 'to address McInnes' inappropriate conduct towards Fraser Kirk' (paragraph 15) were asserted to have breached express terms contained in the David Jones Code of Conduct and implied terms of conditions of employment. Breach of a corporate code and of implied employment terms is a recognised cause, for example in *Goldman Sachs JB Were Services v Nikolich* [2007] FCAFC 120.

The tortious component of the claim was two-fold: that McInnes trespassed upon the complainant when, for example, 'he placed his hand under Fraser-Kirk's clothing on her stomach and moved it under her clothes' (paragraph 75; 78(d)) and that David Jones breached its duty of care to provide a safe working environment.

Fraser-Kirk also filed a complaint at the AHRC; paragraph 85 of the Statement left open the possibility of further proceedings under the SDA being joined to this claim following 'the exhaustion of the processes provided by the Australian Human Rights Commission'.

Each component of the Statement served its own considered purpose. The trade practices component, for example, enabled the matter to proceed directly to the Federal Court of Australia ('FCA'), without the parties having to first attempt formal conciliation. This meant that the Statement was filed on 2 August 2010 and that the matter came before Flick J on 29 September 2010 for an Amended Notice of Motion hearing. The matter again came before Flick J on 30 August 2010 for initial directions. Less than three months later, on 18 October, a week after conciliation at the AHRC, a settlement was announced. This is an exceptionally quick turnaround period when considered in light of, say, *Poniatowska v Hickinbotham* [2009] FCA 680 in which the complainant originally complained to HREOC on 20 August 2006, participated in an unsuccessful attempt to conciliate the matter some 10 months later on 27 June 2007, only to subsequently initiate Federal Court proceedings and receive a final judgment close to three years after the original complaint on 23 June 2009. Speed in the DJs case arguably kept the matter in the media spotlight, rather than it becoming

ancient history and thus not newsworthy as it wound through a slow conciliation process.

In the *DJs* matter the FCA was able to utilise its powers of accrued jurisdiction to also hear the claims under tort, contract and equity laws which would otherwise normally have been heard at state level. This was strategically important because the FCA is jurisdictionally able to enjoy a high degree of flexibility in awarding damages of a significant quantum.

The tortious component of the claim, while risky, was perhaps the most important tactically. This was because it paved the way for the possible award of punitive damages for breach of the employer's duty of care. It was 'risky' because the amount sought might be perceived by both the court and the media as egregious overreaching. Just as importantly, it was risky because on the facts in the *DJs* matter, some of the alleged harassment incidents took place at work functions which were held away from the workplace or were text messages which were sent to the complainant while she was at home.

Had the claim been drafted under the traditional SDA provisions, precedent suggests that a broad interpretation of the legislative provisions would have been afforded as in *South Pacific Resort Hotels v Trainor* (2005) FCAFC 130. However Hely reminds us that at common law the same generosity in identifying vicarious liability is not extended:

the employer is liable only to the extent that the employee is acting within the scope of his or her authority and is performing employment duties or is otherwise performing acts incidental to the performance of those duties.<sup>21</sup>

Therefore, on the facts, the 'safer' option may have been to rely on precedent under the legislative provisions of the SDA, although the possibility of a punitive damages award — in addition to loss and damage for offence, humiliation, distress, anxiety and loss of reputation — was an important consideration here.

Punitive (or 'exemplary') damages are awarded for 'reprehensible conduct which might perhaps have warranted punishment, rather than findings of the infliction of hurt, insult and humiliation,'<sup>22</sup> and have not been a particular characteristic of Australian sexual harassment matters to date. However, the nature of the award has been commented on in a small number of harassment matters and an amount in punitive damages was actually awarded in one case — *Font v Paspaley Pearls* [2002] FMCA 142. Federal Magistrate Raphael awarded \$7500 in exemplary damages, explaining that while the complainant had claimed aggravated damages,

the Federal Magistrates Court is not a court of strict pleading. ... I do not think that the fact that the conduct which is complained of was described as entitling the applicant to aggravated damages, when in fact a proper description would have included exemplary damages, should prevent the applicant from recovering (at 166).

However, in the matter of *Frith v The Exchange Hotel* Rimmer FM stated that:

it seems clear that the Court does not have power to make an award for exemplary damages in any event, and I respectfully disagree with Raphael FM's conclusion in *Font v Paspaley Pearls* (2002) FMCA 142 that such a power exists.<sup>23</sup>

## On the Media Path: I will not let my Court be used as a stage for public relations<sup>24</sup>

The authors conducted a survey of selected August 2010 print media coverage of the Fraser-Kirk case in two major Sydney newspapers: 26 articles in the broadsheet *Sydney Morning Herald* ('the *Herald*') and 24 in the populist tabloid *The Daily Telegraph* ('the *Telegraph*'). This survey was confined to the print editions of these newspapers.

We found that some of the coverage of the Fraser-Kirk case has been nuanced but a flattened/melodramatic dichotomy<sup>25</sup> was present in much of the media reporting, and ancient sexist stereotypes have continued to appear.

What emerged in our study was a fascinating public relations tournament, as legal practitioners representing Fraser-Kirk, McInnes and *DJs* competed for media attention and sympathetic coverage. Much of the coverage focused on the size of the claim and the credibility of the complainant. In some of the more prominently placed articles, these newspapers provided a platform for the players to make announcements, and argue their cases. Regrettably, both newspapers highlighted the 'scandalous gossip' aspects of the case, with the publication of provocative yet irrelevant comments from fashion designer Alannah Hill in the 'Private Sydney' section of the *Herald*, and speculation from the *Telegraph* about Sydney private investigator Frank Monte shadowing the complainant. In many articles, journalists provided their own critical analysis of the legal and social implications of the case, or its impact on the economic position of the *DJs* brand. In our sample, we found that the most 'flattened,' yet detailed and legally accurate articles were found in the Business Day liftout section of the *Herald*. The *Telegraph* coverage fell predictably into the 'melodramatic' camp, with a focus on the more colourful aspects of the case.

In their coverage of Fraser-Kirk, the *Herald* and *Telegraph* used similar techniques to those employed by the Courts in assessing her credibility. In the 'flattened' and 'melodramatic' articles, her identity, history and behaviour were scrutinised and evaluated. At first glance, Fraser-Kirk appeared to fit the stereotype of the credible complainant in the Court discussed above. She was almost twenty years younger than her alleged harasser, and in a clearly subordinate position in the workplace hierarchy. She made a prompt, very vocal complaint of harassment. Her statement of claim documented the allegations of harassment with precision. This was certainly the picture of Fraser-Kirk that her public relations and legal team attempted to paint, when she addressed the media on 2 August 2010. Looking scared but brave, accompanied by her parents and boyfriend, she said, 'I'm a young woman standing here today simply because I said it wasn't OK, because I said that this should never happen to anyone'.<sup>26</sup> The newspapers in our sample expressed some interest in the complainant's relative youth. Thirteen *Herald* articles and eight *Telegraph* articles reported Fraser-Kirk's age. In contrast, there appeared to be less interest in the age of McInnes, which was only reported in three *Herald* articles and one *Telegraph* article.

However, despite Fraser-Kirk possessing many of the attributes of the 'ideal' complainant, there was one aspect that appeared to negate all of these in the eyes of many media commentators, which was arguably the same aspect that piqued the media's interest in the first place: the size of the claim. An overwhelming majority of the articles in both newspapers referred to the \$37 million figure; many in their introductory paragraph. The amount was sufficient to move Fraser-Kirk from one sexist stereotype — the vulnerable wide-eyed ingénue — to another, the gold-digger. This fixation on the size of the claim above any allegations of harm to Fraser-Kirk was demonstrated succinctly in the *Telegraph* 'What's news?' quiz, which tested readers on the headlines of the week: 'What is the name of the David Jones publicist (pictured) suing the company for \$37 million over sexual harassment?'<sup>27</sup> The \$37 million figure became almost a shorthand in the reporting of the case, with headlines such as 'McInnes's 37 million

reasons to come back<sup>28</sup> and 'A \$37m question of tactics'<sup>29</sup> appearing in the *Herald*. One *Telegraph* headline even replaced Fraser-Kirk's name with the figure: 'The \$37m accuser's past case.' The continued focus on the damages figure positioned the case as somewhat absurd, with the DJs/McInnes camp appearing to be the voice of reason, making conciliation and settlement offers.

A critical difference between the melodramatic and flattened commentary in both newspapers was the treatment of the tortious component of the claim. In the melodramatic camp, commentators who chose to position Fraser-Kirk as the gold-digger generally did not concern themselves with the difference between compensatory and punitive damages. Miranda Devine's column for the *Herald* presents a typical example:

Woman (sic) who are raped don't get that kind of money as victims compensation — they're lucky if they receive \$100,000. A woman who was raped by a navy colleague at HMAS Cairns was awarded less than \$500,000 in 2007 in a sexual harassment lawsuit. A David Jones employee who sustained a serious brain injury at work would get less than \$300,000 in compensation under WorkCover. So why does McInnes's conduct qualify for such a grand cash grab?

Although written with a fine rhetorical flourish, this statement fails to grasp the differences between an award of compensatory damages to return complainants to their original positions prior to the wrong suffered, compensation awarded under statutory no-fault schemes, and punitive damages to punish tortfeasors for their conduct. Such a basic error rendered the article very misleading in its analysis of the legal issues involved.

A handful of commentators in our sample did take pains to clarify the punitive nature of the claim. For example, in the *Sydney Morning Herald*, Kate Lahey commented:

The figure is unusual for two reasons. Its sheer size is light years away from usual payouts in such cases and the nature of the damages sought is equally rare. It is designed as punishment, beyond general compensation damages for actions so egregious they warrant the extra penalty — unheard of in discrimination cases in Australia.<sup>30</sup>

However, such analysis was the exception rather than the rule. Only one of the *Telegraph* articles in our sample referred to the purpose of punitive damages, 'If she wins, it would be the first time any Australian court has awarded punitive damages to punish an employer in a sexual harassment case.'<sup>31</sup>

## Conclusion: Punitive Claims Plus (Even Negative) Media Equals Big Bucks

The DJs case shows that lawyers can certainly try to use the media as a de facto tribunal in an attempt to gain a more successful result for their clients. However, this method is unpredictable, with the media using its own techniques to examine the credibility of the complainant. The dangers of inaccuracy and being misunderstood must not be underestimated. And, trial by media may backfire when the matter reaches Court. In the preliminary hearing, Flick J warned that 'care should be exercised ... not to make statements which were more in the nature of a media release than a submission which provided genuine assistance to the Court'.<sup>32</sup> He is reported as commenting that McInnes was being subject to 'a pretty rough form of justice' and raised the prospect of striking out parts of the claim as they appeared to be an 'abuse of the process of the court'.<sup>33</sup> Therefore, what is persuasive in the court of public opinion may not be so convincing to judges.

These caveats notwithstanding, the size<sup>34</sup> of the claim for damages in the DJs case is *extraordinary* when considered against the backdrop of sexual harassment claims generally in Australian legal history. However, it is critical to understand that:

Fraser-Kirk is not strictly claiming punitive damages for sexual harassment nor for breaches of the Trade Practices Act 1974. Rather, Fraser-Kirk claims that David Jones and Mark McInnes, in breaching their duty to provide her with a safe system of work and trespass, did so in a manner that was in deliberate disregard to her rights.<sup>35</sup>

This is particularly important because, as discussed above, and as a *Good Weekend* journalist wrote:

the distinction between 'punitive' and 'general' damages was largely lost on the public, and the media ... it quickly became '\$37 million for touching a bra strap? People get less for losing both legs'.<sup>36</sup>

Certainly on the face of it, it is little wonder that eyebrows were raised in response to the boldness of the multi-million dollar figure claimed. Even in the recent case of *Lee v Smith & Ors* [2007] FMCA 59 in which the complainant in her Defence job endured ongoing incidents of workplace sexual harassment (such as the passing of offensive notes, discussion of sexually explicit topics and incidents of indecent touching) and was ultimately raped by a colleague, she was awarded general and special damages in the amount of \$387,422.32 which is remarkably small when considered in light of the DJs case. Unlike the DJs matter though, Lee's case was pursued solely under the legislative provisions of the SDA and punitive damages were not sought.

Interestingly, despite the extreme severity of the workplace assault in comparison to that complained of in the DJs matter, the public and media did not embrace Lee's case as being interesting in the way that the DJs matter has been regarded. Perhaps this highlights the effectiveness of Fraser-Kirk's punitive damages claim as '... a way to drive home the point, hard, that corporations are responsible for safe workplaces and need to take sexual harassment seriously'.<sup>37</sup>

For some potential plaintiffs, defendants, practitioners and PR advisers the DJs dispute offers different lessons. Less glamorous employers, with complainants who are less media-savvy, might resist stellar claims for damages. Despite the SDA, sexualised harassment, bullying and discrimination remain features of many workplaces, irrespective of whether the harassed are wearing Chanel or a boilersuit. Would an unphotogenic migrant woman in a dreary western suburbs factory gain the same media attention and thereby exert the same pressure if she claimed victimisation and sought only a small sum? The large ambit claim was critical in harnessing media attention. And, presumably the old adage that any PR is good PR worked for Fraser-Kirk. Media portrayal of her as a gold-digger evidently did not outweigh DJs' concern about turning off the negative PR spotlight.

There is another concern for future litigants. Does the DJs case suggest that lawyers and PR people are watching too much *Boston Legal*, litigating through strategic media campaigns that rely on spectacle rather than legal specifics? It not difficult to envisage a popular backlash against big-ticket claims by people who are at home on the red carpet rather than the factory floor, accompanied by an impatience among judges regarding trial by media release.

This case is indeed a landmark in Australian sex discrimination law. In combining the SDA with trade practices legislation and the law of contract, the statement of claim was a novel approach to addressing sexual harassment in the workplace. The size of the claim pushed sexual harassment onto the front page of the newspapers, and captured the attention of corporate employers and

general public alike. While the individual complainant in this matter achieved a successful out-of-court settlement, the full impact of the DJs case on Australian sex discrimination law remains to be seen.

PATRICIA EASTEAL and BRUCE ARNOLD teach law at the University of Canberra; KEZIAH JUDD is a legal policy officer with the ACT government and SKYE SAUNDERS teaches law at the Australian National University. Bruce Arnold, Keziah Judd and Skye Saunders are also all PhD students in Law at the University of Canberra.

© 2011 Patricia Easteal, Skye Saunders, Keziah Judd  
and Bruce Arnold

email: Patricia.Easteal@canberra.edu.au  
Saunderss@law.anu.edu.au  
Keziah.Judd@act.gov.au

#### REFERENCES

1. Richard Ackland, 'Sometimes the Media have to be Judge and Jury', *Sydney Morning Herald* (Sydney), 15 May 2009, 11.
2. Jenna Mead (ed) 'Introduction – Tell it Like it Is,' *Bodyjamming – Sexual Harassment, Feminism and Public Life* (Allen & Unwin, 1997) 6.
3. Ibid. Mead's term 'melodramatic' refers to classic tabloid journalism, with screaming simplistic headlines, highly emotive language, and a focus on scandal and gossip. While Mead herself does not define 'flattened,' we understand the term to refer to media commentary located beyond the front page, offering detailed but dry analysis to those readers who bother to dig for it.
4. The PDF was featured in *The Australian* and *Business Spectator* and other sites on 3 August 2010, eg, 'Original Text: Kristy Fraser-Kirk's statement of claim against David Jones', <[www.businessspectator.com.au/bs.nsf/Article/Original-text-Kirsty-Fraser-Kirks-statement-of-claim-against-David-Jones](http://www.businessspectator.com.au/bs.nsf/Article/Original-text-Kirsty-Fraser-Kirks-statement-of-claim-against-David-Jones)> at 9 November 2011.
5. See, eg, Ben Butler, 'IBM saleswoman in \$1.1m sexual harassment claim', *The Age* (Melbourne), 16 April 2011, 3.
6. See Ben Butler, 'Beacon of female equality in court over accusations of bullying', *Sydney Morning Herald* (Sydney), 20 June 2011, 1; Jason Murphy & Hannah Low, 'Law firm faces its own bullying case', *Australian Financial Review* (Sydney), 11 May 2011, 3.
7. Catharine MacKinnon, *Sexual Harassment of Working Women* (Yale University Press, 1979).
8. See Gail Mason & Anna Chapman, 'Defining Sexual Harassment: A History of the Commonwealth Legislation and its Critiques' (2003) 31(1) *Federal Law Review* 195.
9. For example, s 106 of the *Sex Discrimination Act 1984* (Cth).
10. Patricia Easteal & Skye Saunders, 'Interpreting Vicarious Liability with a Broad Brush in Sexual Harassment Cases' (2008) 33(2) *Alternative Law Journal* 75.
11. In two different case samples about 90% of employers were included as respondents. See Easteal & Saunders, *ibid*, and Patricia Easteal & Susan Priest, 'Employment Discrimination Complaints at the ACT Human Rights Office: Players, Process, Legal Principles and Outcome' (2006) 8(1) *Contemporary Issues in Law*, 62–79.
12. *Australian Human Rights Commission Act 1986* (Cth), ss 46PF (1) and (5). In Easteal & Priest, *ibid*, only nine of 46 harassments were declined. Annual Reports for the Australian HRC, eg, do not disaggregate the outcome by the grounds but in 2009–2010, 160 of 568 of complaints filed under the SDA were terminated by the Commissioner. See <[http://www.hreoc.gov.au/about/publications/annual\\_reports/2009\\_2010/complaint-statistics.html](http://www.hreoc.gov.au/about/publications/annual_reports/2009_2010/complaint-statistics.html)> at 9 November 2011.
13. Section 75(3c) *Discrimination Act 1991* (ACT).
14. *De Domenico v Marshall* [2001] ACTSC 52.
15. See Deb Tyler & Patricia Easteal, 'Sexual Harassment in the Tribunals: The Credibility Gap' (1998) 23(5) *Alternative Law Journal* 211; Patricia Easteal & Keziah Judd, '“She Said, He Said” Credibility and Outcome in Sexual Harassment' (2008) 31(5) *Women's Studies International Forum* 336; Patricia Easteal & Skye Saunders, 'The (Un)Successful Rural Workplace Sexual Harassment Complainant' (2011) 10(2) *Canberra Law Review* 84–96.
16. Easteal & Priest, above n 11, the complainant was successful in 59% of the 37 sexual harassment conciliations.
17. Beth Gaze & Rosemary Hunter, *Enforcing Human Rights in Australia: an Evaluation of the New Regime* (OUP, 2011).
18. Easteal & Priest, above n 11.
19. Easteal & Saunders, above n 10.
20. Some media outlets referred to a statement by David Jones, which purportedly named the figure. See Jane Lee & Edmund Tadros, 'Kristy Fraser-Kirk and Mark McInnes declare truce in \$37 million lawsuit,' 18 October 2010 <<http://www.news.com.au/business/worklife/kristy-fraser-kirk-and-mark-mcinnis-declare-truce-in-37-million-lawsuit/story-e6frfm9r-1225940020333>> at 9 November 2011.
21. Brook Hely, 'Open All Hours: The Reach of Vicarious Liability in "Off-Duty" Sexual Harassment Complaints' (2008) 36(2) *Federal Law Review* 174.
22. *Font v Paspaley Pearls Pty Ltd* [2002] FMCA 142, [162], citing *Hehir v Smith* [2002] QSC 92, [42].
23. [2005] FMCA 402, [105].
24. In coverage of the initial Directions Hearing, journalist Kate Lahey observed, 'In a case that is being fought through media managers as well as in the courtroom, Justice Geoffrey Flick warned he would not let his court be used as a stage for public relations, and lawyers should confine themselves to legal submissions.' Kate Lahey 'McInnes hits back at new allegations of harassment', *Sydney Morning Herald* (Sydney), 31 August 2010, 5.
25. Mead, above n 2.
26. Belinda Kontominas and Simon Mann, 'Are you being sued? Sordid details of \$37 million DJs sex claim,' *Sydney Morning Herald* (Sydney), 3 August 2010, 1.
27. 'What's news?', *The Daily Telegraph* (Sydney), 9 August 2010, 26.
28. Kate Benson, 'McInnes's 37 million reasons to come back,' *Sydney Morning Herald* (Sydney), 16 August 2010, 3.
29. Andrew Horner, 'A \$37m question of tactics', *Sydney Morning Herald* (Sydney), 7–8 August 2010, 20.
30. Kate Lahey, "'No" gets no firmer than a \$37 million lawsuit', *BusinessDay*, *Sydney Morning Herald* (Sydney), 4 August 2010, 1.
31. Janet Fife-Yeomans, '\$37m sex suit: Inside Australia's biggest harassment case', *The Daily Telegraph* (Sydney), 3 August 2010, 2.
32. *Fraser-Kirk v David Jones Limited* [2010] FCA 1060 at 4.
33. Susannah Moran, 'Key part of Kristy Fraser-Kirk's case against former David Jones boss Mark McInnes in doubt', *The Australian* (Sydney), 23 September 2010, 5.
34. \$37 million. David Jones punitive damages were calculated as '5% of the profit generated by David Jones during the regime from 2003 to 2010 during which McInnes served as Executive Officer'. The claim against McInnes was to be '5% of the total remuneration and benefits earned by him during his regime as Chief Executive Officer of David Jones' (paras 83 and 84, Statement of Claim).
35. Millen Lo, 'Taking DJs to the Cleaners', *Business Spectator*, 1 September 2010 <<http://www.businessspectator.com.au/bs.nsf/Article/david-jones-DJS-Kristy-Fraser-Kirk-mark-mcinnis-pd20100831-8UBJQ?OpenDocument#>> at 9 November 2011.
36. Fenella Souter, 'The Damage Done,' *Good Weekend*, *Sydney Morning Herald* (Sydney), 4 December 2010, 21.
37. *Ibid*.