'THERE'S ALWAYS AN EASY OUT': HOW 'INNOCENCE' AND 'PROBABILITY' WHITEWASH RACE DISCRIMINATION

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Abstract

This paper analyses the jurisprudence in certain Australian discrimination cases to demonstrate how anti-discrimination laws function discursively to both create and reproduce whiteness through defining how and why race discrimination occurs. It demonstrates that whiteness is not only an embodied practice within mainstream workplaces, but is also embedded in its terrain as a racist ideology that supports the privileged condition of whiteness accorded by colonialism to whites. The operation of whiteness at work is then endorsed by the anti-discrimination jurisprudence because it promotes white interests and uses white standards, attitudes and behaviours to measure what is and is not legitimate. In particular, the jurisprudence constructs the knowledge that race discrimination is an inherently 'aberrant', and thus unlikely, behaviour that is probably not something that 'nice' white people do. Ultimately, these laws function to produce and reproduce the whiteness that protects our society's inequitable distribution of privilege, as yet another legal fiction that perpetuates the violence inherent in Aboriginal peoples' relationships to the colonial present (Watson 1997, 1998 & 2005).

Introduction

I acknowledge and pay respect to the Bundjalung peoples, the owners and custodians of country where this research was completed.

The case of *O'Neill v Steiller* (1994) is one of only six successful complaints[1] litigated by an Aboriginal[2] person in relation to race discrimination in employment. Mr O'Neill's complaint was that he was refused a job because he was Aboriginal, which the Queensland Anti-Discrimination Tribunal agreed constituted unlawful race discrimination.[3] He was awarded a total of $19,082.10 compensation to recognise that racially discriminatory behaviour in employment "strikes at the heart of the desire to live a useful, responsible and self-sufficient life" because a denial of work is a denial of the "basis of independence and self esteem within the Australian community" (77,245). Though I cannot agree that employment is the core of "self-esteem" or of a "useful" existence, I agree that the denial of work in a capitalist economy is an extremely serious matter given that the capital of the Australian nation is not enjoyed equally by those claimed as its citizens, and that most Australians stave off the effects of social marginalisation through access to the wage system.

As each set of national Census data reveals, Aboriginal Australians are confronted by a system of racial bias that impedes their access to the features of social health that white Australians more typically take for granted, which in turn impedes their access to the "rates of human capital" that configure "employability" in mainstream employment (Rowse 2002: 29-35). As Mr O'Neill's case demonstrates, Aboriginal peoples'

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employment opportunities are also affected by a distinct experience of race discrimination, which is promoted by an ideology of racism that produces and reproduces negative stereotypes of their selves and capacities (Collins 1996: 74-77).

However, the success of Mr O'Neill's complaint shows that the law offers a form of redress for this distinct experience, as acts of race discrimination are prohibited by Australian anti-discrimination laws. Indeed, anti-discrimination laws are venerated within Australia's mainstream liberal framework as they are said to serve the "high object of correcting centuries of neglect … discrimination and prejudice" (*Purvis v New South Wales (Department of Education and Training*), 2003: [18]) in the public domain against 'minority' and 'disadvantaged' groups. Nonetheless, the continuity and depth of Aboriginal peoples' social marginalisation calls the efficacy of these laws into question. Thus, this article questions an aspect of the practice of anti-discrimination laws to discern whether they uphold the racialised practices of the mainstream workplace which deny Aboriginal peoples' work opportunities, and thus, whether the laws function to produce and reproduce the whiteness that protects our society's inequitable distribution of privilege. As Moreton-Robinson explains, "white" is not a '"raceless and invisible" social identity because "race" is a construct by which privilege is claimed as much as it is denied (Moreton-Robinson 2004: 139). This is not to say that the privileges of whiteness are enjoyed equally by all whites, but instead that all whites can potentially claim its privileges more readily than those who are constructed as 'other' and non-white. While perhaps obviously "whiteness" refers to colour and biological identity, more fundamentally, it refers to "a colonial cultural condition" (Anderson 1996: 35) that involves a claim of the right to "settle" territory and to receive the privileges attendant upon occupation - a claim based upon the violence of invasion and the falsehood of white sovereignty (Watson 1997). Thus, whiteness is used in this analysis to signify this 'condition' and to reveal that race discrimination in the workplace is founded in the "cumulative privilege" that has been "quietly loaded up on whites" (Fine 1997: 57).

The main argument presented is that the laws function discursively to both create and reproduce whiteness through defining how and why race discrimination occurs. In the first section, I explain how whiteness is embedded in the practices of the mainstream workplace. It draws on semi-structured interviews undertaken for my doctoral thesis,[4] which involved five main groups who each had involvement in mainstream employment and discrimination complaints: 16 Aboriginal people ('Aboriginal participants'), 11 workers based in employment agencies ('Agents'), 15 employers ('Employers'), three groups of staff from the Anti-Discrimination Board of New South Wales ('Complaints-staff'), seven lawyers who practice in the jurisdiction ('Lawyers'), and three Equal Employment Opportunity specialists ('Consultants').[5] The second part of this article analyses the knowledge produced by discrimination tribunals about race discrimination, with particular focus on a trend discerned by which the jurisprudence 'knows' race discrimination as an unlikely behaviour that is the sole domain of the 'guilty'. It is based upon a critique of reported employment discrimination cases that involve Aboriginal peoples' complaints of race discrimination in mainstream

workplaces, that is, workplaces controlled by non-Aboriginal peoples.[6]
I conclude that the 'liberal promise' of equality (Thornton 1990) practiced in the discrimination laws functions to produce and reproduce whiteness and its unearned privileges in Australian society as yet another legal fiction that perpetuates the violence inherent in Aboriginal peoples' relationship to the colonial present (Watson 1997, 1998 & 2005).

The Whiteness of Mainstream Workplace Culture

The Aboriginal peoples who participated in this study reported a range of behaviours that excluded them from mainstream workplaces and/or made them feel isolated and uncomfortable within them, including overt discrimination and negative stereotyping, racist jokes, discussions, and other forms of racial harassment, being socially isolated, and not being supported when they lodged grievances against white colleagues. Similarly, the Agents reported that many employers simply refuse to employ Aboriginal peoples, or stereotype them as "risky" and as "troublemakers" who are unreliable, disinterested, unqualified, or prone to crying "discrimination" if things don't go their way. Conversely, the Employers I spoke with seemed extremely concerned to convince me that they *did not* discriminate against Aboriginal employees or treat them differently to other employees, and thus denied the existence of any 'racial politics' within their workplaces or explained occurrences of race discrimination as an aberration that could be resolved by getting "people thinking" (Employer 4).

While equality requires that everyone receive the 'same treatment', a sound practice of equality also demands that different treatment be afforded to those from particular racial groups to protect their distinct rights and to challenge the legacies of racial inequality (Graycar & Morgan 2004). However, these 'positive' approaches to racial difference were remarkably absent from the workplace practices described by the Employers. Instead, it was extremely important to them that their employees should "not need" anything special, as indicated by Employer 4's description of a former Aboriginal employee who fitted in "like anyone else would" and made "it easier for us" because she did not "wave the flag and say I'm a special needs person"'. Therefore, I gained the impression that the Employers typically "repressed" any difference from white cultural norms and treated any variation to their workplace standards as a "favour" (Gaze 2002: 346). Complaints-staff and Agents supported this impression. For example, one member of the Complaints-staff observed that employers would most likely refuse an Aboriginal worker's request for a "leave of absence … for a funeral" or support for some other type of cultural need, due to a concern that it could be "seen as reverse racism" against other employees. Agent 1 added that employers would refuse these "non-standard" needs because they would perceive them as "personal issues" that did not oblige them to go the "extra yard".

And though none of the Employers articulated explicitly racist attitudes towards Aboriginal peoples, they did express a form of 'worry' when they spoke about them. For instance, Employer 1 talked about an Aboriginal woman who had worked for her for a long time, "but we didn't know she was Aboriginal in the beginning, and it didn't bother us at all, didn't worry us when we found out". Though they were not 'worried' by *this* Aboriginal woman,

Employer 1's comment reveals that the woman's Aboriginality *could* have transformed her from the "gorgeous person" that she was. This 'worry' was also evident in the way the Agents talked about employers who would "even employ Aboriginal people", who "might be kindly disposed towards them", or might even be "comfortable with the idea".

The presence of this 'worry' signifies the 'centrality' of white culture in these workplaces because, as Reitman argues, "white culture [is] *about* white people, their daily relationships and concerns with one another" (2002: 276). Moreover, as Flagg explains, this also affects workplace decision-making because "whites rely … primarily [on] white referents in formulating the norms and expectations that become" the criteria for their decisions (1993: 973).

These white referents were made evident by the Employers' stated preference for employing only those who "fit in" by which, Agent 8 explained, they meant, "someone that's going to fit in socially, … come to work everyday, … works to the best of their abilities, not cause any trouble – yeah, it's not rocket science". Indeed, the Employers articulated the 'fit' of their workplace through specific personal traits and attributes – "somebody that you can click with straight away, even if it's not on a deep level", or:

> that warmth in somebody ... a certain level of self-confidence ... you know, that has a good appearance – but that doesn't have to be a conservative appearance, but is presented well, who can look you in the eye, who can converse on that level (Employer 7).

Within a job interview, finding the features of the 'right fit' is likely to be dependent on how employers 'hit it off' with a candidate, so that they can get "close enough … for the candidates strengths to be spotted" (Modood, 1992: 235). In fact, the employers said they often went with "gut feelings" to make their choice. So perhaps "it's not rocket science" to suggest that their choices may be affected by racial prejudice against Aboriginal peoples, and that they often reject Aboriginal job-seekers in order to protect the "team" and to keep their workplace culture pure (Modood 1992: 235; Hunyor 2003: 537-539).

Thus, while the Employers presented their workplace practices as neutral, it was clear they were not, but were instead "fully immersed in white" norms and expectations (Reitman 2006: 268): jobs were advertised solely in white mainstream networks, application procedures followed standards that privileged educational attainments and work histories enjoyed more commonly by non-Aboriginal peoples (whether essential to the job or not), "merit-based" employment procedures were infused with white cultural attributes and characteristics, and the standards of working conditions favoured white cultural norms and expectations, such as when you attend a funeral.

However, what struck me most about the Employers' responses was that they talked about Aboriginal peoples as if they were 'invaders' in the white space of the workplace, because the Employers held such confidence that they rightfully occupied workplaces and rightfully controlled who belonged within them. What this confidence reveals is that whiteness does not simply operate within the mainstream workplace as an embodied form of property (Harris, 1993), because it also functions spatially to normalise the allocation to whites of the privileges attendant upon their occupation (Moreton-Robinson 2004;

Watson 2005). However, this representation of Aboriginal peoples as the usurpers of territory can only be achieved through endorsing the capitalist premise of the rightful servitude of land-less labouring classes, which in this nation, is built upon the falsehood of white sovereignty (Watson 1998; Moreton-Robinson 2000). Accordingly, whiteness is not only practiced by those who occupy the mainstream workplace, but is also embedded in its terrain as a racist ideology that supports the structural privilege accorded by colonialism to whites. The question then is whether discrimination laws give censure or support to the operation of whiteness at work.

Proving it's Discrimination

The Act of Race Discrimination

Complaints of direct race discrimination generally require a complainant to prove an 'act' that amounts to less favourable treatment when compared in the same circumstances to the treatment of a person of a different race (who is invariably white and male), and that this act was 'caused' because of the complainant's race (e.g., s 7(1), *Anti-Discrimination Act 1977* (NSW)). My analysis of the jurisprudence indicates that both aspects of this definition involve inherent difficulties for Aboriginal complainants because the knowledge applied by the discrimination tribunals to determine what racism is and why it happens is built from the condition of whiteness and functions to endorse it.

For instance, in *Riley v Western College of Adult Education* (2003), Ms Riley alleged that her colleagues had made various comments to her to the effect that Aboriginal peoples get it easier than white people and challenged any "special entitlements", and suggested that Aboriginal peoples rort the system, all suffer from substance abuse, and that the need for cultural leave is a nonsense. Despite Ms Riley's clear position that these statements were racially offensive and amounted to less favourable treatment, the NSW Administrative Decisions Tribunal simply concluded that they were "not explicitly insulting or offensive to Aboriginal people" ([36]). Consequently, it is legitimate to make these types of derogatory comments to Aboriginal colleagues, because these acts are 'known' to not be race discrimination.

Similarly, when comparing 'acts' with the treatment of others in the workplace, the comparator chosen is invariably white so that racially-based behaviours can be 'neutralised' through the tribunal's conclusion that the behaviour could have happened to a white person too. This was the reasoning applied in *Commissioner of Corrective Services v Aldridge (No 2)* (2002), which was about Mr Aldridge's claim that he was demoted:

> 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 ([55]).

Indeed, the evidence made clear that Commissioner Woodham "behaved in an angry and aggressive manner towards several people", including Aldridge, at a particular meeting ([42]). But because those abused included several white people, the NSW Administrative Decisions Tribunal concluded that while "his employment practices may have fallen well short of the ideal'" Commissioner Woodham "abused everyone, regardless of their race" so that his behaviour did not "constitute unlawful racial

discrimination" ([73]). However, one of the Aboriginal participants explained to me that in "a situation where the only people around you are white people I felt very conscious if Black issues were being brought up". Thus, it is doubtful Mr Aldridge had experienced these abusive behaviours in the same way as did the white people who were present. Indeed, it is doubtful that a white person could ever be in *exactly the same circumstances* as an Aboriginal person. Therefore, by 'ignoring' the racialised character of the relationships within the workplace, the tribunal's reasoning instead validated the structure formed by those relationships and the condition of whiteness that they reproduce.

As the decisions in *Aldridge* and *Riley* demonstrate, 'acts' of race discrimination are thus 'known' as something that must be offensive according to white standards of behaviour, and that cannot happen to Aboriginal people when they are treated the same as white people. This is significant because "if there is no relevant differential treatment" it is not even necessary to apply the test of "causation" (Aldridge 2000: [45]) – and the complaint simply stops there. Nonetheless, it is through the test of causation that the tribunals firmly fix whiteness into the knowledge they produce about race discrimination.

The 'Insuperable' Burden of Proof

Most of the Lawyers and Complaints-staff agreed that the test of causation is the point at which most direct race discrimination complaints are likely to fail because, unless "the conduct is unequivocal", the burden of proving that that discrimination occurs *on the ground of* race "is virtually insuperable" (Thornton 1995: 90). Put simply, the classic problem is that an Aboriginal complainant may be able to say "I've been treated less favourably *and* I am Aboriginal", what they have to prove is that they were "treated less favourably *because* I am Aboriginal" (Lawyer 4).

Initially this test is difficult to satisfy because the tribunals tend to require evidence that can act as a race "hook" like the word "black", in order to make the connection between the complainant's race and the way they have been treated. For example, in *Romelo v Darwin Port Authority, Dick Adey & Danny Greig* (1999), the respondent employer had referred to Mr Romelo as that "black bastard" which the tribunal used as a "hook" to connect Mr Romelo's race to the way he was treated, and to thus be convinced that direct race discrimination had occurred.

However, it seems that employers seem to *always* have an "easy out" to these complaints in the form of "a very simple, innocent explanation" that negates the claim that they have behaved in a racially discriminatory way (Lawyer 4). This is either because they are savvy enough to cover themselves when they refuse to hire someone or they sack them so it is not 'obvious' that they have done so because of a person's race (Lawyer 6) or because their behaviour is not patently racist but is unconsciously influenced by race. Thus, it is very unlikely that an employer will offer evidence to a tribunal to form the race hook typically needed to recognise the connection between an act of less favourable treatment and the complainant's race.

Nonetheless, the tribunals regularly state in their decisions that they do not require a race hook to find race discrimination, but can properly establish that race caused an act of less favourable treatment on the basis of an inference built from the whole of the evidence

(*Dutt v Central Coast Area Health Service; Central Coast Area Health Service v Dutt* (EOD) (2003)). Instead, however, the cases indicate that when the race hook is missing, the tribunals tend not to draw an inference of race discrimination because they do not recognise *covert* or *unconscious* influences as amounting to race discrimination.

In part, this non-recognition follows from the application of the test in *Briginshaw v Briginshaw* (1938) ("the *Briginshaw* test"), which is a rule about the quality of evidence that can be used to make legal findings by inference. In deference to the authority of higher courts, the tribunals duly apply this test so as to fix the quality of the evidence required in line with the seriousness of an allegation, how likely it is to occur, and the gravity of the consequences for the person against whom it is made. Commentators note that the tribunals have "routinely" increased their evidential demands, in accordance with *Briginshaw*, on the basis that allegations of race (and other forms of) discrimination are a "serious matter", and that in some cases, the "weight of evidence" appears to have been proportionate "to the status of the respondent", particularly those "highly placed" (de Plevitz 2003: 319-325). This creates an immediate difficulty for complainants, given that most often the evidence needed remains within a respondent employer's control (Hunyor 2003: 542).

However, the tribunals' failure to draw inferences of race discrimination is not simply caused by a lack of quality evidence – in fact in most of the cases, there is a great deal of evidence presented about the workplace (eg *Williams v The State of South Australia & Josephine Tiddy* (1990)). Instead, the main difficulty created by the *Briginshaw* test is that it instils an assumption into the tribunals' reasoning that race discrimination is amongst the most serious of allegations that can be made (de Plevitz 2003; Gaze 2005).

Obviously, I agree that race discrimination is serious, as made evident by two HREOC studies that demonstrate how race discrimination significantly affects many Aboriginal peoples in their daily lives and interaction with mainstream society (HREOC 1992; HREOC 2001). Moreover all of the Aboriginal people I interviewed had experienced race discrimination in every job they had held with a mainstream employer.

However, the interpretation given to the *Briginshaw* test promotes a different type of 'seriousness' in that it casts race discrimination as a serious allegation because it holds potentially grave consequences for the person against whom it is made, and thereby prioritises the interests of the employer in the legal proceedings, as compared to the interests of an Aboriginal complainant. Moreover, it instils the assumption that – being so 'serious' – race discrimination is unlikely to occur, an assumption clearly contradicted by the HREOC studies.

Nonetheless, these are the assumptions that the tribunals typically follow, reflecting what Flagg describes as a "white confidence" that the prevailing practice in the workplace is race-neutral decision making so that the law should approach race discrimination as occurring only as an "occasional deviation"(Flagg 1993, 981).[7]

This supposed 'improbability' that race discrimination happens is then deepened as a result of the legal principle that discrimination cannot be inferred when more probable and innocent explanations are available in the evidence (*Dutt v Central Coast Area*

Health Service (2002): [70]) because this principle instils the additional assumption that race discrimination is a "guilty and aberrant" behaviour (Gaze 2005). Therefore to conclude it happened, the tribunals require some evidence of the respondent employer's "guilty" motivation or something that supports a notion of fault before a positive finding or race discrimination will be made (Gaze 1989: 732;[8] Gaze 2005).

This, then, is the particular problem inherent in the test causation because, combining the idea of unlikelihood and the evidential demands made by the *Briginshaw* test, this search for guilt and fault automatically creates an uneven competition about 'probability' and plausibility; that is, it creates an uneven competition between an Aboriginal complainant's (improbable) explanation that they were discriminated against, and the broad range of 'rational explanations' that a white employer can typically provide. Indeed, the kinds of explanations an employer might provide are 'known' to the tribunals as such a 'normal' part of workplace practice, that they automatically hold a weight of 'innocence' and 'probability' that is almost impossible for a complainant to overcome (Thornton 1995: 92).

The Probability of Innocence

The cases verify that employers commonly assert a claim to 'innocence' as part of their defence, for instance, through evidence that their best friends are Aboriginal or that they are "friendly" in their contacts with people in the Aboriginal community, or that they lack "racist attitudes" and treat "all people equally regardless of race" (*Slater v Brookton Farmers Co-operative Company Ltd* (1990): 78,185). Similarly, many employers offer evidence to explain how great and successful they are in employing *other* Aboriginal people (e.g., *Eade v Commissioner of Police, New South Wales Police Service* [2002]).

The conventional logic of the adversarial legal system is that these kinds of evidence should not be admitted because "the only relevant issue is the allegation of an unlawful act" (Ronalds & Pepper 2004: 184). By this logic, evidence of "similar conduct" cannot be admitted into evidence to *prove* a complaint. However, the cases demonstrate that these types of "similar conduct" evidence are commonly admitted to assist the *defence* of a discrimination complaint, with the reward that employers can 'invest' innocence into their defence through presenting a 'non-racist' character. This investment reflects what Moreton-Robinson calls the "moral position" by which we "put distance between ourselves" and those "who are evil and racist" because "racism is perceived as racial hatred, not as racial supremacy in which all members of the dominant group are systemically implicated" (2000: 143). And the cases demonstrate that the investment in this "distance" is likely to pay off.

Civil Relations' at Work

A claim to innocence can be successfully made when employers provide evidence that shows that every one got along, because civil relationships are 'known' to be inconsistent with the occurrence of race discrimination. This was the reasoning followed by Sir Ronald Wilson in *Howson v Telecom Australia* (1990), who concluded that the employer's "description of [Ms Howson] as 'a very pleasant person with good tone and manner'" and other "evidence to the effect that [Ms Howson] fitted in well with the other members of staff" was

"hardly consistent with a racially discriminatory approach" (78,210).

This innocence was reinforced by Sir Ronald's conclusion that Ms Howson's claims lacked credibility because he could not accept her explanation that she had risen "above the discrimination" which was why she had not complained earlier to anyone about the discrimination she suffered (78,210). Though he believed she "was sincere in lodging her complaint", he also concluded that she was so disappointed by the termination of her employment "that it led her in retrospect to invest some of the incidents which had occurred with racist implications" (78,211).

This same reasoning was applied in *Riley's* case, which (as noted above) involved Ms Riley's complaint that she had been subjected to what she described as constant "ignorant, inquiring, provocative, intolerant, and offensive" questioning about Aboriginal peoples and culture by her colleagues ([33]). One of Ms Riley's co-workers, Palmer, extended a claim to 'innocence' through her explanation that she had "asked Ms Riley a great number of questions, including questions about funerals" because she was "interested in understanding these types of things" ([19]). As already noted, the tribunal did not concur with Ms Riley's view that these questions were "offensive" to Aboriginal people ([36]), and concluded further that:

> Ms Riley was not unhappy in her work. She enjoyed her work, she wanted to do her work, she went willingly to work, and her work was unaffected by the conduct. She enjoyed civil relations with her colleagues ([37]).

This conclusion is particularly difficult to understand given that Ms Riley made clear in her evidence to the tribunal that she was quite affected by this behaviour and put a lot of time and effort into responding to her colleagues' offensive questions. But perhaps it is because, like Ms Howson, Ms Riley had 'failed' to make a formal complaint with her employer, so that her claim that the conduct affected her was 'known' by the tribunal to lack credibility.

However, her case also illustrates that the tribunal's inquiry does not simply raise a question about an employer's innocence, because the question of causation also seems to involve consideration about who – as between the complainant and the respondent – is *truly* at fault for the events that have occurred. This is again illustrated in Ms Riley's case.

The tribunal described Ms Riley as:

> a co-worker who challenged the attitudes, assumptions and in some cases the established patterns of the workplace. … a strong advocate for Aboriginal people; she was articulate, passionate, and politically aware ([22]).

It also noted that her colleagues reacted "defensively" to her manner and to the "heightened awareness of Aboriginal issues" which she introduced to the workplace ([22]). However, in assessing this "defensive" reaction – which of course Ms Riley recognised as race discrimination – the Tribunal concluded, "*no blame* attaches to anyone for this state of affairs" ([24]). Strictly this is not true, because the Tribunal *did* find someone to blame for what had taken place, because it concluded that the result of Ms Riley's efforts to enlighten her colleagues about Aboriginal culture was not the "increased level of interest or

constructive awareness" she intended, but instead "an adverse reaction to [her] *as the person responsible for raising"* it ([23]; emphasis added). That is, the tribunal concluded Ms Riley was the person at fault and thus was responsible for the "adverse reaction" she experienced from her colleagues. Therefore, she could not have suffered race discrimination.

The Importance of Being Earnest

Another form of innocent – and thus, it appears, race-neutral – behaviour is accepted when an employer has made great 'efforts' to employ Aboriginal peoples. For instance, in *Eade v Commissioner of Police, New South Wales Police Service* (2002), the Tribunal noted that "the Police were making *every effort* to employ indigenous people, but … on this occasion *their efforts were in vain* and did not work out" ([24]). Indeed the tribunal readily accepted the Police Services' reasons for dismissing Mr Eade ([24]), though it did not apply any significant analysis to those reasons.

That such a cursory analysis was made of the Police Services' behaviour tends to suggest the tribunals 'understand' that there is something so 'difficult' about employing Aboriginal peoples that employers who are 'earnest' in their attempts will not stray into the guilty realms of race discrimination. However, as explained in the first section of this article, mainstream workplace practices are unlikely to be racially neutral environments. Conversely, the tribunals' reasoning reiterates the logic that race discrimination is an 'aberrant' and isolated behaviour, rather than a systemic practice. Consequently, the tribunals see little reason to scrutinise these 'earnest efforts' to determine in whose interests they are better designed to serve.

Indeed, Thornton has pointed out that the tribunals deem employers "to know best the requirements of the job" and deem them best placed to judge a person's ability to perform a job, which accord employers "a position of structural superiority" (Thornton 1995: 92) that privileges their knowledge of the workplace and its (lack of) racial dynamics.

This is particularly well illustrated in *Williams v The State of South Australia & Josephine Tiddy* (1990). Ms Williams was employed by the SA Equal Opportunity Commission (the EOC) as its first Aboriginal conciliator, and not long after, left the position because she claimed that her needs as an Aboriginal woman were not supported by the conditions of her employment. Commissioner O'Connor acknowledged in his decision that even "well-motivated action" can constitute racial discrimination ([23]), and he noted that the EOC "recognised" that Ms Williams:

> would possibly feel unsure about her ability to fit in to the office and to a bureaucratic environment. As the job itself was a new one, she had no role model or past experience on which to rely and this would also present special difficulties ([37]).

However, he concluded that the EOC had not treated Ms Williams less favourably because of her race ([33]) because its explanations of events indicated that it had taken "r*easonable* account of her needs and took *reasonable* measures to meet them" ([37]; emphasis added). Instead, the 'real reason' Ms Williams did not succeed in this workplace was because she had suffered "culture shock" – *not* race discrimination[9] – as *she* could not reconcile her needs as an Aboriginal woman with the expectations of the 'public service environment'. As in *Riley*,

no fault could be attributed to 'reasonable' behaviours of the employer or its white employees, because Ms Williams was the person truly at fault, and thus was not the victim of race discrimination.

The Tribunals Are Well Versed In Their Culture

As these cases illustrate, the practice of these laws places no obligation upon mainstream workplace culture to reconcile itself to the needs and expectations of Aboriginal workers; indeed, as *Williams'* case shows, it is quite the opposite, in that it is the Aboriginal worker who must reconcile themselves to white workplace culture because their failure to adopt or adapt to it is simply an experience of "culture shock" – not race discrimination (Williams 1990: [68]). Similarly, *Riley's* case demonstrates that tribunals are unlikely to consider it possible that a workplace's practices are designed to prefer one set of cultural values over another, and thus, that these practices may have caused an Aboriginal worker, like Ms Riley, to have been treated less favourably because of her race. Clearly, they had evidence to consider this, because the testimony provided to them made clear that Ms Riley's colleagues engaged in their constant questioning because Ms Riley was challenging the cultural assumptions, "attitudes" and "established patterns" of their workplace – things that worked in favour of Ms Riley's white colleagues. Nonetheless, the tribunal would not see the racially offensive character of this 'ignorant, inquiring, provocative, and intolerant' questioning, and thereby endorsed its racially discriminatory effect. The same criticism can be applied to the decisions in *Eade and Williams*. Given that tribunals decisions function either to legitimise or to outlaw particular practices and behaviours, this body of jurisprudence imbeds and promotes white interests in the mainstream workplace because it uses white standards, attitudes and behaviours to measure what is and is not legitimate.

Ultimately, however, the reasoning demonstrated in these decisions appears astounding, given that the discrimination tribunals are said to be "specialist" tribunals, "well versed in the culture of anti-discrimination complaints" (Lawyer 4). Because, of course, it simply does not follow that an employer's 'civil', 'rational' and 'reasonable' behaviours are racially benign, but are instead mostly likely to be infused with the condition of whiteness expressed through "organisational and institutional antipathy towards 'otherness'" (Thornton 1995: 92). However, this antipathy really only becomes apparent through following non-white knowledges of how and why race discrimination occurs.

But clearly non-white knowledges are not followed in these cases, as the knowledge built from Aboriginal peoples' life experiences of race discrimination is absent from the reasoning applied by the tribunals, even though it is a feature of Aboriginal peoples' life experience that the tribunals are required to judge. For instance, the knowledge of both Ms Howson and Ms Riley of their experience was disregarded by the tribunals because these two Aboriginal women were perceived as so 'hypersensitive' that they used race discrimination as their excuse for why certain things didn't happen, rather than being regarded as women who had a sophisticated knowledge of race discrimination through being "amongst the nation's most conscientious students of whiteness and racialisation" (Moreton-Robinson 2004: 142).

Instead, these cases demonstrate how this jurisprudence acts discursively to create an operative white 'knowledge' about racism. And what they 'know' is that race discrimination is an inherently 'aberrant', and thus unlikely, behaviour as they 'know' it only when it occurs in an 'uncivilised' or 'unreasonable' form. In other words, if race discrimination is the domain of the aberrant and guilty, it is probably not something that 'nice' white people do. This helps to explain the search for the "race hook", because calling someone a "black bastard" is easily recognised as a patent symbol of individual guilt, and thus offers a 'rational', 'logical' and 'sensible' way to find that less favourable treatment was caused by the complainant's race.

Even though it is clear that the knowledge of race discrimination the tribunals apply is derived from the life experiences of those who benefit from race discrimination as opposed to those against whom it operates, they claim this capacity to produce knowledge on the basis that they are 'impartial' to the matters being judged. Indeed, this stance of impartiality functions as the tribunals' claim to be 'innocent' and 'distant' from the condition of whiteness, so that they need not acknowledge that they are implicated within it. Because of course, they can only maintain the "veneer of [racial] neutrality" (Thornton 1995: 92) claimed through "impartiality" by denying their own location within the "system of advantage and disadvantage" (Gaze 2002: 339) formed by the condition of whiteness, and by obscuring the fact that they are more likely to have experienced the upside of colonialism and racism, rather than its downside (Purdy 1996: 406-408). That is, as Flagg suggests, the whiteness inherent in their reasoning is camouflaged through "the tendency of whites not to think about whiteness, or about norms, behaviours, experiences or perspectives that are white-specific" (Flagg 1993: 957). So perhaps it is little wonder that their decisions fail to adequately grasp the racial dynamics of conflict between Aboriginal and non-Aboriginal people in the workplace, and that they rarely see the 'flaws' in employer's explanations.

These cases illustrate only a small number of the many ways in which white thinking is produced and applied by discrimination tribunals' decision-making. Nonetheless, they tend to explain why in its 30 years of operation, "Australian anti-discrimination legislation has not disturbed existing social power relations" (Gaze 2002: 328) and why the laws prove such a poor vehicle by which to challenge race discrimination. Indeed, they offer a glimpse as to why race discrimination complaints offer little in 'practical terms' to Aboriginal peoples as part of a strategy that challenges Australia's system of white "racial supremacy" (Moreton-Robinson 2000 143), nor enable society to engage in the process of decolonisation (Watson 1998). Instead, the environment of sameness fostered by the laws' white thinking will perpetuate the violence inherent in Aboriginal peoples' relationship with mainstream society and law (see Watson 1997, 1998 & 2005) because it denies Aboriginal knowledge and re-asserts the force of white colonialism and its "perceived and imposed regimes of thought" (Watson 1998: 28; Watson, 2005).

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Successful 'Aboriginal employment' complaints

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Baird v State of Queensland [2006] FCAFC 162
Bligh & Ors v State of Queensland (1996) EOC ¶92-848
O'Neill v Steiller (1994) EOC ¶92-607
Romelo v Darwin Port Authority, Dick Adey & Danny Greig [1999] NTADC 1
Slater v Brookton Farmers Co-operative Company Ltd (1990) EOC ¶92-321

Unsuccessful 'Aboriginal employment' complaints

Atkinson v State of Victoria [2000] VCAT 406
Baird v State of Queensland [2005] FCA 495
Commissioner of Corrective Services v Aldridge (No 2) [2002] NSWADTAP 6
Eade v Commissioner of Police, New South Wales Police Service [2002] NSWADT 130
Howson v Telecom Australia (1990) EOC ¶92-325
Riley v Western College of TAFE (2003) EOC ¶93-253; [2002] NSWADT 210
Williams v The State of South Australia & Josephine Tiddy (1990) EOC ¶92-283

Other decisions

Briginshaw v Briginshaw (1938) 60 CLR 336
Dutt v Central Coast Area Health Service [2002] NSWADT 133
Dutt v Central Coast Area Health Service; Central Coast Area Health Service v Dutt (EOD) [2003] NSWADTAP 3
Purvis v New South Wales (Department of Education and Training) [2003] HCA 62

Notes

[1] See 'Successful "Aboriginal employment complaints" in the Reference List.

[22] Referring to the First Nations Peoples of Australia. I am aware that this term is criticised (e.g., Melissa Lucashenko 2000), but I use it because it was preferred by most of the Aboriginal peoples interviewed for this research.

[3] O'Neill was experienced labourer who was referred by the CES for the job with Steiller, who advised him the job was already filled. When the CES checked, Steiller advised the job was not filled and would *never* be filled by an Aboriginal person.

[4] My thesis investigates the endurance of race discrimination in the mainstream workplace. Its focus was a qualitative analysis of the scope and practice of the *Anti-Discrimination Act 1977* (NSW) to determine whether law treats the practices of whiteness in the mainstream workplace with censure or support.

[5] These interviews were numbered sequentially, and are signified by the descriptors noted. E.g., 'Employer 1'.

[6] See 'Successful' and 'Unsuccessful' "Aboriginal employment" complaints in the Reference List.

[7] 'This faith, for example, views [Ku Klux] Klan and other overtly white supremacist

attitudes as extreme, perhaps pathological, deviations from the norm of white racial thinking, as if those attitudes can be comprehended in complete isolation from the culture in which they are embedded' (Flagg 1993: 981).

[8] Even though many actions in Tort law, such as the tort of negligence, are formed 'without a notion of actual fault' (Gaze 1989: 732).

[9] Mr Eade was also noted to have suffered 'culture shock': *Eade* (1999).