Chapter 6
Practice and Procedure

Contents

Practice and Procedure

6.1 Introduction

The procedure for making complaints of federal unlawful discrimination is set out in Part IIB of the *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act'), formerly known as the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('HREOC Act').[1] That procedure can be summarised as follows:

- A person may make a written complaint to the Australian Human Rights Commission ('Commission') alleging unlawful discrimination under the *Racial Discrimination Act 1975* (Cth) ('RDA'), *Sex Discrimination Act 1984* (Cth) ('SDA'), *Disability Discrimination Act 1992* (Cth) ('DDA') or *Age Discrimination Act 2004* (Cth) ('ADA').[2] The President of the Commission inquires into and attempts to conciliate such complaints.[3]
- The President has powers to obtain information relevant to an inquiry[4] and can direct the parties to attend a compulsory conference.[5]
- The President may decide not to inquire, or to discontinue an inquiry, if the President is satisfied that the aggrieved person does not want to the President to inquire, or to continue to inquire, or if the President is satisfied that the complaint has been resolved.[6]
- The President may terminate a complaint on the grounds set out in s 46PH, being:

  (a) the President is satisfied that the alleged unlawful discrimination is not unlawful discrimination;

  (b) the complaint was lodged more than 12 months after the alleged unlawful discrimination took place;

---

[1] *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), Schedule 3. The current procedural regime has operated since 13 April 2000, with the commencement of the *Human Rights Legislation Amendment Act (No 1) 1999* (Cth). Previously, hearings into complaints of unlawful discrimination were conducted at first instance by the Commission, rather than the Federal Court or the Federal Magistrates Court ('FMC') as is now the case. For a discussion of the changes to the federal unlawful discrimination jurisdiction, see 1.4 above and Human Rights and Equal Opportunity Commission, *Change and Continuity: Review of the Federal Unlawful Discrimination Jurisdiction, September 2000-September 2002* (2003), available for download from the Commission's website <http://www.humanrights.gov.au/legal/publications/review2002/index.html>.

[2] AHRC Act, s 46P. The terms of the legislation require a complaint to be in writing, be made by an aggrieved person (see 6.2.1 below) and allege unlawful discrimination. The formal requirements for the making of a valid complaint to the Commission would otherwise seem to be limited: see *Proudfoot v Human Rights & Equal Opportunity Commission* (1991) 100 ALR 557; *Ellenbogen v Human Rights & Equal Opportunity Commission* [1993] FCA 570; *Simplot Australia Pty Limited v Human Rights & Equal Opportunity Commission* (1996) 69 FCR 90, 95 cf *Commonwealth v Sex Discrimination Commissioner* (1998) 90 FCR 179, 187-188; *Price v Department of Education & Training (NSW)* [2008] FMCA 1018, [21]-[29].

[3] AHRC Act, ss 8(6) and 11(aa).

[4] AHRC Act, s 46PI.

[5] AHRC Act, s 46PJ.

[6] AHRC Act, s 46PF(5).

(c) the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance;

(d) in a case where some other remedy has been sought in relation to the subject matter of the complaint—the President is satisfied that the subject matter of the complaint has been adequately dealt with;

(e) the President is satisfied that some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to each affected person;

(f) in a case where the subject matter of the complaint has already been dealt with by the Commission or by another statutory authority—the President is satisfied that the subject matter of the complaint has been adequately dealt with;

(g) the President is satisfied that the subject matter of the complaint could be more effectively or conveniently dealt with by another statutory authority;

(h) the President is satisfied that the subject matter of the complaint involves an issue of public importance that should be considered by the Federal Court or the Federal Magistrates Court; or

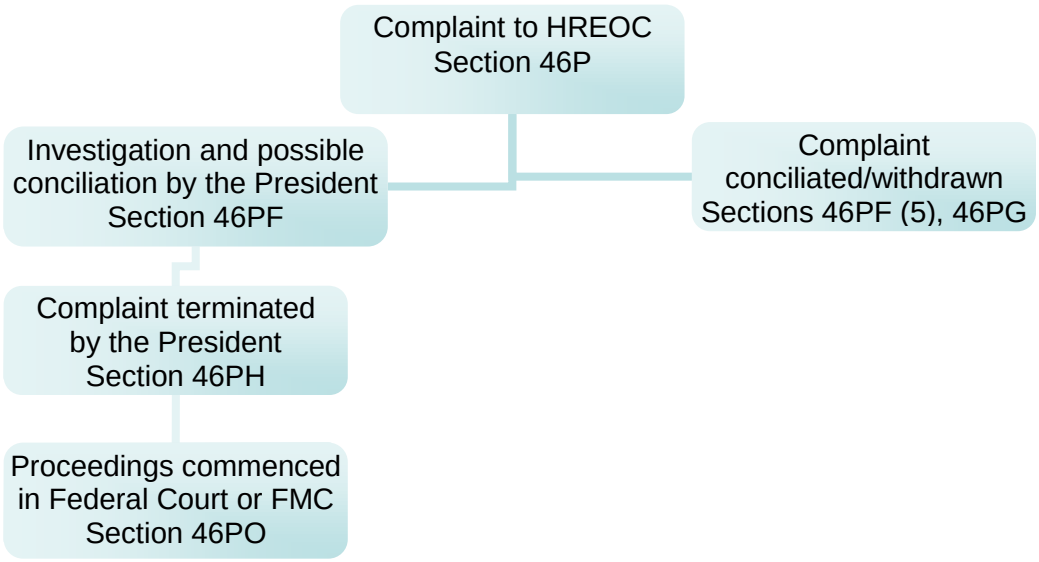
(i) the President is satisfied that there is no reasonable prospect of the matter being settled by conciliation.[7]

- Once a notice of termination has been issued by the President, an 'affected person in relation to the complaint' may make an application to the Federal Court or the Federal Magistrates Court ('FMC') alleging unlawful discrimination by one or more respondents to the terminated complaint.[8] The application may be made regardless of the ground upon which a person's complaint is terminated by the President.
- An application must be filed within 60 days of the date of issue of the termination notice,[9] although the court may allow further time (discussed at 6.9 below).

The *Federal Court Rules 2011* (Cth) ('Federal Court Rules')[10] and *Federal Magistrates Court Rules 2001* (Cth) ('FMC Rules') impose additional procedural requirements in relation to the commencement of applications in unlawful discrimination matters.[11]

[7] Note also the power to terminate a complaint under s 46PE in relation to complaints against the President, the Commission or a Commissioner.
[8] Section 46PO(1).
[9] Section 46PO(2).
[10] The new Federal Court Rules came into effect on 1 August 2011 and involve extensive revision of the former rules. Readers should consult the new Federal Court Rules directly wherever applicable.
[11] See s 46PO of the AHRC Act; Rules 34.163 – 34.167 (formerly O 81 r 5) of the Federal Court Rules; Part 41 of the FMC Rules. The Federal Court Rules provide that a document (including an application by which proceedings are sought to be commenced) is not to be accepted for filing if the document is not substantially complete, does not substantially comply with the Federal Court Rules, is not properly signed, is refused by the Registrar, or the Court has given a direction that the document not be accepted or not be accepted without leave: Rule 2.27 (formerly O 1 r 5A(8)).

Figure 1: Overview of Federal Unlawful Discrimination Law Procedure



6.1.1 Role of the special purpose commissioners as amicus curiae

The Race Discrimination Commissioner, Sex Discrimination Commissioner, Disability Discrimination Commissioner, Human Rights Commissioner and Aboriginal and Torres Strait Islander Social Justice Commissioner are given an amicus curiae function in relation to proceedings arising out of a complaint before the Federal Court or the FMC.[12]

In *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,[13] Collier J considered the principles to be applied in determining an application by a special purpose Commissioner for leave to appear as amicus curiae. Her Honour noted the following view of Brennan CJ in *Levy v State of Victoria*[14] as to the general basis upon which an amicus curiae is heard:

> The footing on which an amicus curiae is heard is that that person is willing to offer the Court a submission on law or relevant facts which will assist the Court in a way in which the Court would not otherwise have been assisted.[15]

---

[12] See s 46PV of the AHRC Act. That function has been exercised in the following cases in which there have been reported decisions: *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2006] FCA 1214 (decision re amicus application) and *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313 (decision re standing of Access For All Alliance (Hervey Bay) Inc); *AB v Registrar of Births, Deaths & Marriages* (2006) 235 ALR 147; *Kenneth Webb v Child Support* Agency [2007] FMCA 1678; *Forest v Queensland Health* [2007] FCA 1236; *Vickers v The Ambulance Service of NSW* [2006] FMCA 1232; *Giblet v Queensland* [2006] FCA 537; *Kelly-Country v Beers* [2004] FMCA 336; *Howe v Qantas Airways Ltd* (2004) 188 FLR 1; *Jacomb v Australian Municipal Administrative & Clerical Union* (2004) 140 FCR 149; *Gardner v All Australia Netball Association Ltd* (2003) 197 ALR 28; *John Morris Kelly Country v Louis Beers* [2004] FMCA 336; *Access For all Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2004] FMCA 915; *Ferneley v Boxing Authority of New South Wales* (2001) 115 FCR 306. Further information about the amicus curiae function, including submissions made in these cases, is available at <http://www.humanrights.gov.au/legal/submissions_court/index.html>.

[13] [2006] FCA 1214.

[14] (1997) 189 CLR 579, 604-605.

[15] [2006] FCA 1214, [5].

Her Honour then referred to the particular position of the special purpose Commissioners by reason of their statutory amicus curiae function under the AHRC Act. Her Honour stated:

> The amicus curiae function conferred on the special purpose Commissioners under the HREOC Act, in my view indicates acknowledgement by Parliament that the Court can obtain useful assistance from the Commissioners as statutory amicus curiae. In the HREOC Act, Parliament also recognises the position, expertise and knowledge of the Commissioners, and I note the duties and functions of the Commission as set out in s 10A and s 11 of the HREOC Act to that effect.[16]

This chapter now considers particular procedural and evidentiary issues that have arisen in federal unlawful discrimination matters. The structure of the chapter mirrors the chronological stages of proceedings, from the initial complaint to the Commission through to the Federal Court and FMC. As noted in Chapter 1, not all relevant aspects of procedure and evidence relevant to federal unlawful discrimination matters are discussed: only those aspects that have been considered in cases decided in the jurisdiction.

6.2 Parties to a complaint to the Commission

6.2.1 Complainants

(a) 'A person aggrieved'

Under s 46P of the AHRC Act a complaint may be lodged with the Commission alleging unlawful discrimination by:

- a person aggrieved by the unlawful discrimination, on that person's own behalf, or on behalf of that person and one or more other persons who are aggrieved by the alleged unlawful discrimination;[17]
- by two or more persons aggrieved by the alleged unlawful discrimination, on their own behalf, or on behalf of themselves and one or more other persons who are also aggrieved by the alleged unlawful discrimination;[18] or
- by a person or trade union on behalf of one or more other persons aggrieved by the alleged unlawful discrimination.[19]

In all cases there must be 'a person aggrieved' before a complaint can be lodged with the Commission. The AHRC Act does not define 'a person aggrieved'.[20]

---

[16] [2006] FCA 1214, [6]. The decision of Collier J was followed in *Vijayakumar v Qantas Airways Ltd* [2008] FMCA 339, [8]-[10] and *Maslauskas v Queensland Nursing Council* [2008] FMCA 216, [9]-[12].
[17] See s 46P(2)(a).
[18] See s 46P(2)(b).
[19] See s 46P(2)(c).
[20] The AHRC Act only defines the term 'complainant' as being: 'in relation to a complaint, a person who lodged the complaint, whether on the person's own behalf or on behalf of another person or persons' (s 3(1)).

The meaning of 'person aggrieved' was considered in *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*[21] ('*Hervey Bay*'). In this case the applicant was a volunteer incorporated association that was established to advance equitable and dignified access to premises and facilities. It alleged that the respondent council was in breach of s 32 of the DDA by maintaining bus stops that failed to comply with the relevant disability standard.[22] Collier J summarily dismissed the application, finding that the applicant was not a 'person aggrieved'.

Collier J outlined the following guiding principles in determining whether an organisation is a 'person aggrieved':

(a) the question is a mixed question of law and fact;[23]

(b) the complainant must show that they have a grievance that is beyond that which will be suffered by an ordinary member of the public to satisfy the test;[24]

(c) the test is an objective, not a subjective one, so the mere fact that a person feels aggrieved or has no more than an intellectual or emotional concern is not sufficient;[25]

(d) the phrase includes a person who has a genuine grievance because the action prejudicially affects their interests;[26]

(e) there is a different jurisprudential basis for identifying whether an applicant has a 'special interest' in the subject of proceedings sufficient to be granted standing under general law, compared with whether an applicant is a person aggrieved for the purposes of a statutory right of action such as under the HREOC Act (as it then was), although in resolving these questions, the matters taken into account are often similar;[27] and

(f) 'person aggrieved' should not be interpreted narrowly and should be given a construction that promotes the purpose of the relevant Act.[28]

Her Honour also identified a number of principles relating to the circumstances in which bodies corporate can be a 'person aggrieved' for the purpose of the AHRC Act: see below.

Collier J noted the view expressed by Ellicott J in *Tooheys Ltd v Minister for Business & Consumer Affairs*[29] that in most cases it would be more appropriate to deal with the question of whether an applicant is a 'person aggrieved' at a final hearing when all of the facts are before the court and the

[21] (2007) 162 FCR 313. For a discussion of this case see Brook Hely, 'Access Denied: Standing of a human rights organisation to commence discrimination proceedings' (2007) 45 *Law Society Journal* 46.
[22] See 5.2.6.
[23] (2007) 162 FCR 313, 327-328 [40]; see also *Cameron v Human Rights & Equal Opportunity Commission* (1993) 46 FCR 509, 515.
[24] (2007) 162 FCR 313, 331 [52].
[25] (2007) 162 FCR 313, 328 [40]; see also *Cameron v Human Rights & Equal Opportunity Commission* (1993) 46 FCR 509, 515.
[26] *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313, 328 [40].
[27] (2007) 162 FCR 313, 328 [42]-[43].
[28] (2007) 162 FCR 313, 329 [44]-[45].
[29] (1981) 36 ALR 64, 78-79 (Ellicott J).

court has the benefit of full argument on the matter. In spite of this, in *Hervey Bay*, her Honour considered it appropriate to deal with this issue at an early stage because the parties had had an opportunity to file evidence in relation to the issue and the applicant was not disputing the appropriateness of her determining the issue at that stage of the proceedings.

Her Honour found that Access For All Alliance (Hervey Bay) Inc was not a 'person aggrieved' as its interest in the proceedings was no greater than the interest of an ordinary member of the public. Justice Collier said:

> Notwithstanding its intellectual and emotional concern in the subject matter of the proceedings, the interest of the applicant is no more than that of an ordinary member of the public; the applicant is not affected to an extent greater than an ordinary member of the public, nor would the applicant gain an advantage if successful nor suffer a disadvantage if unsuccessful.[30]

Justice Collier, in reaching her decision, adopted the reasoning of the Full Court of the Federal Court in *Cameron v Human Rights & Equal Opportunity Commission*[31] ('*Cameron*') and the reasoning of Wilcox J in the *Executive Council of Australian Jewry v Scully*[32] ('*Scully*').[33]

The applicant in *Cameron* had made a complaint to the Commission alleging that a scholarship scheme run by the Australian International Development Assistance Bureau for Fijian students constituted racial discrimination in breach of the RDA. The Commission declined the applicant's complaint on the basis that the complainant was not an 'aggrieved person'.

The applicant sought judicial review of the Commission's decision. In the Federal Court he contended that he was a 'person aggrieved' because:

- he was a legal practitioner who had acted for persons in proceedings concerning racial discrimination and civil rights in Fiji;
- he had received a scholarship as a student and was aware of the privileges and duties associated with such an award;
- he had continuing professional and personal links with Fiji; and
- he had a personal sense of moral duty about matters concerning Fiji and its citizens.[34]

At first instance,[35] Davies J dismissed the application saying that the applicant was not an 'aggrieved person'. His finding was upheld on appeal.[36]

---

[30] *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313, 334 [67].
[31] (1993) 46 FCR 509.
[32] (1998) 79 FCR 537.
[33] Both *Cameron* and *Scully* were complaints brought prior to the amendment of the HREOC Act by the *Human Rights Legislation Amendment Act (No 1) 1999* (Cth) which resulted in the complaint provisions being moved from each of the discrimination Acts to the HREOC Act (now the AHRC Act). The relevant provision in the RDA at the time was, however, substantially similar to s 46P in that it gave a 'person aggrieved' the right to lodge a complaint.
[34] (1993) 46 FCR 509, 512-513.
[35] *Cameron v Human Rights & Equal Opportunity Commission* (Unreported, Davies J, 30 July 1993).
[36] (1993) 46 FCR 509.

Beaumont and Foster JJ held that the question of whether a person is a 'person aggrieved' is a mixed question of law and fact to be determined objectively, and that the mere feeling of being aggrieved will not be sufficient.[37]

In a separate judgment, French J, while also dismissing the appeal, stated that the categories of interest to support *locus standi* should not be considered as being closed:

> It is at least arguable that derivative or relational interests will support the claim of a person to be 'aggrieved' for the purposes of the section. A close connection between two people which has personal or economic dimensions, or a mix of both, may suffice. The spouse or other relative of a victim of discrimination or a dependent of such a person may be a person aggrieved for the purposes of the section. It is conceivable that circumstances could arise in which a person in a close professional relationship with another might find that relationship affected by discriminatory conduct and have the necessary standing to lay a complaint.
>
> The categories of eligible interest to support locus standi under this statutory formula or for the purposes of prerogative relief are not closed. This much was demonstrated in *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27. There the qualifying interest was described as 'a cultural and historical interest …' (at 62). While it will often be the case that such interests or relational interests of the kind referred to above may overlap with intellectual or emotional concerns, the presence of the latter does not defeat the claim to standing. [Therefore] I do not exclude the possibility that a case might arise in which a personal affiliation with a particular individual or group who claims to be the victim of discrimination might support standing to lay a complaint under the [RDA].[38]

In *Scully*,[39] Wilcox J held that the Executive Vice President of the Executive Council of Australian Jewry, Mr Jones, was a 'person aggrieved'. The complaint related to material distributed to members of the public in Launceston which was alleged to constitute racial hatred in breach s 18C of the RDA. Wilcox J found that the Executive Vice President was a 'person aggrieved', despite the fact that Mr Jones lived in Sydney, not Launceston. Wilcox J noted that:

> Mr Jones' claim of special affection did not depend on his place of residence. He offered himself as complainant because he was the Executive Vice President of a body that represented 85% of the Jewish population of Australia. He was a senior officer of the Council with major responsibility for the achievement of its objects. They included representing Australian Jewry, including Jews resident in the Launceston district. To describe Mr Jones' connection with the matter simply as 'a Jewish Australian living in Sydney' was to ignore his representative role.[40]

[37] (1993) 46 FCR 509, 515.
[38] (1993) 46 FCR 509, 519-520.
[39] (1998) 79 FCR 537.
[40] (1998) 79 FCR 537, 549.

His Honour concluded that Mr Jones had a 'special responsibility to safeguard the interests of a group' and was therefore a 'person aggrieved'.[41]

The aforementioned cases suggest that whilst a complainant does not necessarily have to be the victim of discrimination to be a 'person aggrieved', the complainant must show that they have a genuine grievance that goes beyond that of an ordinary member of the public in order to be found to be an 'aggrieved person'.[42]

(b) Bodies corporate

(i)Can a body corporate be a 'person aggrieved'?

In *Koowarta v Bjelke-Petersen*[43] ('*Koowarta*'), Mason J held that 'a person aggrieved' included a reference to a body corporate:

> By virtue of s 22(a) of the Acts Interpretation Act 1901 (Cth) a reference in a statute to a person includes a reference to a body corporate, unless a contrary intention appears. It is submitted that because, generally speaking, human rights are accorded to individuals, not to corporations, 'person' should be confined to individuals. But, the object of the Convention being to eliminate all forms of racial discrimination and the purpose of s 12 [of the RDA] being to prohibit acts involving racial discrimination, there is a strong reason for giving the word its statutory sense so that the section applies to discrimination against a corporation by reason of the race, colour, or national or ethnic origin of any associate of that corporation.[44]

Applying *Koowarta* in *Woomera Aboriginal Corporation v Edwards*,[45] the Commission held that an Aboriginal community organisation was a 'person aggrieved' for the purposes of the complaint provisions which then existed under the RDA (the terms of which are substantially the same as those contained in s 46P of the AHRC Act). The Commission found that the respondents' conduct had prejudicially affected the interests of the organisation in that it had hindered it from carrying out its objects.[46]

In *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,[47] Collier J followed the decision of Mason J in *Koowarta* and held that a body corporate, including entities incorporated pursuant to the *Associations Incorporation Act 1981* (Qld),[48] may be a 'person aggrieved' if, for example, the body corporate is treated less favourably based on the race, disability etc of its members, such as by being refused a lease of premises.[49] However,

---

[41] (1998) 79 FCR 537, 550.
[42] Cf *Cuna Mutual Group Ltd v Bryant* (2000) 102 FCR 270, 280 [42].
[43] (1982) 153 CLR 168.
[44] (1982) 153 CLR 168, 236.
[45] [1993] HREOCA 24 (extract at (1994) EOC 92-653).
[46] [1993] HREOCA 24 (extract at (1994) EOC 92-653).
[47] (2007) 162 FCR 313.
[48] (2007) 162 FCR 313, 330 [49].
[49] (2007) 162 FCR 313, 329-330 [46], [54]. In support of her conclusion, Collier J cited the following decisions in which courts accepted that a body corporate had standing as a 'person aggrieved': *National Trust of Australia (Vic) v Australian Temperance & General Mutual Life Assurance Society Ltd* [1976] VR 592; *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 516; *North Coast*

'merely incorporating a body and providing it with relevant objects does not provide it with standing it otherwise would not have had'.[50]

Her Honour also held that the interests of the members of an incorporated association are arguably irrelevant to determining whether the incorporated association is a 'person aggrieved' because it may sue or be sued in its own name.[51] However, her Honour left open the prospect of an incorporated association being sufficiently 'aggrieved' if **all** of its members were similarly aggrieved by the relevant conduct.[52] Alternatively, an incorporated association may be 'aggrieved' if it is a sufficiently recognised peak body in respect of the relevant issue, although her Honour suggested that this latter point was 'of somewhat debatable significance'.[53]

Her Honour noted that in some cases courts have accepted that an incorporated association may have standing in human rights or environmental matters, although courts have typically applied principles as to standing strictly in such cases.[54]

(ii)Determining whether the 'person aggrieved' is the body corporate, its members or its directors

In *IW v City of Perth*,[55] a case brought under the *Equal Opportunity Act 1984* (WA), the appellant (identified as IW) was a member of an incorporated association (PLWA) which had made an application for planning approval. The withholding of that planning approval was the subject of the complaint. Three members of the High Court held that the appellant was not a person aggrieved for the purposes of that Act. Dawson and Gaudron JJ stated:

> It is clear from the structure of the Act generally … that an 'aggrieved person' is a person who is discriminated against in a manner in which the Act renders unlawful. And when regard is had to the precise terms of the [goods and services section], it is clear that the person discriminated against is the person who is refused the services on terms or conditions or in a manner that is discriminatory … there was no refusal of services in this case. And if anyone was the recipient of treatment which might constitute discrimination, it was the PLWA, not the appellant. Accordingly, the appellant was not an 'aggrieved person' within the meaning of that expression … And that being so, he is in no position to assert that the City of Perth engaged in unlawful discrimination in the exercise of its discretion to grant or withhold planning approval for PLWA's drop-in centre.[56]

Toohey and Kirby JJ, however, held that the appellant was an 'aggrieved person'. Their Honours accepted that the benefit of the application for planning approval, if granted, would have gone to members of the PLWA and

---

Environment Council Inc v Minister for Resources (1994) 55 FCR 492; *Manuka Business Association Inc v ACT Executive* (1998) 146 FLR 464.

[50] (2007) 162 FCR 313, 330 [48].

[51] (2007) 162 FCR 313, 330-331 [49]-[50].

[52] (2007) 162 FCR 313, 333 [60], distinguishing *Manuka Business Association Inc v ACT Executive* (1998) 146 FLR 464.

[53] (2007) 162 FCR 313, 333 [63].

[54] (2007) 162 FCR 313, 331 [51].

[55] (1997) 191 CLR 1.

[56] (1997) 191 CLR 1, 25 (Dawson and Gaudron JJ); see also 45 (Gummow J).

that the refusal was 'in truth a refusal to provide [a service] to the members of PLWA'.[57] Toohey J noted that '[t]here was never any doubt that the application by PLWA was made on behalf of its members including the applicant'.[58]

In an earlier case, *Simplot Australia Pty Ltd v Human Rights & Equal Opportunity Commission*,[59] the complainant had alleged that she had been discriminated against on the basis of her sex because of the respondent's decision to award a contract for transportation services to a male owned and operated business. At first instance the appellant had applied to the Commission for the matter to be struck out on the basis that, *inter alia*, as a company can have no gender, the complainant's complaint was incapable of constituting sex discrimination. However, Commissioner Nettlefold rejected the application on the basis that the aggrieved person was, in fact, the personal complainant and not her company.

> [I]t would be open to the Commission to find at the hearing that the decision to award the contract to a male owned and operated business and to reject the application of the complainant's organisation supported, as it was, by comments arguably wrong in fact and sexist, fall within the definition of 'discrimination' in s 5(1) of the [SDA]. The definition would be applied simply on the basis that the aggrieved person was the complainant *and not her company*. On that basis, the fact that the company does not have a gender is a relevant fact, no doubt, but it is not necessarily a decisive fact. It might be seen as a conduit through which the respondent's discriminatory act flowed to and adversely affected the complainant.[60] (original emphasis)

The respondent sought judicial review of the Commission's decision. On review, Merkel J held that Commissioner Nettlefold had not erred in law in rejecting the strike out application, saying that:

> Whether the act alleged … constituted discrimination against an individual or against a corporation is a question of fact which remains to be determined. [The complainant's] complaint is that *she* was discriminated against in the selection by Edgell of the company which was to perform work under a contract for transportation services. The discrimination alleged by her is that on the ground of her sex a company other than the company offered or nominated by her was engaged to carry out the required transportation services. In his decision the Inquiry Commissioner was conscious of the distinction between treatment of an individual and of a corporation and no error of law was made by him in that regard.[61] (original emphasis)

(a) Unincorporated bodies

In *Executive Council of Australian Jewry v Scully*[62] ('*Scully*'), a complaint was brought to the Commission by the Executive Council of Australian Jewry ('the Council'). The Council is an unincorporated association whose members are Jewish community councils from across Australia and whose affiliates are

[57] (1997) 191 CLR 1, 30 (Toohey J); see also 77 (Kirby J).
[58] (1997) 191 CLR 1, 31; see also 77 (Kirby J).
[59] (1996) 69 FCR 90.
[60] *Di Petta v Edgells-Birdseye* [1996] HREOCA 3 (extract at (1996) EOC 92-820).
[61] (1996) 69 FCR 90, 97-98.
[62] (1998) 79 FCR 537.

national organisations with 'an interest in a particular aspect of Judaism'.[63] The complaint related to the distribution by the respondent of material said to be offensive to Jewish people in breach of s 18C of the RDA which proscribes racial hatred. The impugned act took place in Launceston. Commissioner Nettlefold had dismissed a complaint brought by the Council under the RDA on the basis that the applicant lacked standing.[64]

One issue in the matter was whether a complaint could be brought by an unincorporated association. Wilcox J held:

> I agree with Commissioner Nettlefold that, as Executive Council for Australian Jewry is not a 'person' in the eyes of the law, it is incapable of being a 'person aggrieved' within the meaning of s 22(1) of the *Racial Discrimination Act*. Therefore it is not itself a competent complainant. However, this does not mean its complaint is a nullity. It is necessary to go behind the name and consider whether the juristic persons who constitute the unincorporated association are 'persons aggrieved' by the allegedly unlawful act. If they are, the complaint is competent because in law, though not in name, it was made by them.[65]

His Honour continued:

> Although it is not necessary to reach a firm view about the matter, it is strongly arguable that, considered individually, the constituents of the Council that represent Jewish communities outside Tasmania do not have a sufficient interest to meet the statutory test. However, I think the Hobart Hebrew Congregation clearly has the requisite interest… the constituents of the Council 'are, in each instance, the elected representative organisation of the Jewish communities in each Australian State and the ACT'. It is apparent, therefore, that, despite its name, the Hobart Hebrew Congregation represents the Jewish community throughout Tasmania, including in the Launceston district. If there is truth in the allegations made against Ms Scully, her actions must have had a special impact on members of the Launceston Jewish community. According to the complaint, some of those people received Ms Scully's material in their letter boxes. Probably all of them have come into contact with non-Jews who have received the material and whose attitude to Jews may thereby have been adversely affected. It seems beyond contest that, if the acts occurred, they affected members of the Launceston Jewish community in a manner different in kind to the way they affected non-Jews, or even Jews living outside the Launceston area. Given the recognition in the authorities of the entitlement of representative bodies to obtain relief on behalf of members who have a special interest in a matter, I see no reason to doubt that the Hobart Hebrew Congregation is a 'person aggrieved' by the alleged acts.
>
> If the Hobart Hebrew Congregation could make a competent complaint under s 22(1)(a) of the [RDA[66]] in its own name, it seems to me the Council (through its members) also may do so. As the Hobart

[63] (1998) 79 FCR 537, 538.
[64] *Executive Council of Australian Jewry v Scully* [1997] HREOCA 59.
[65] (1998) 79 FCR 537, 548. Contrast the approach taken by Wilcox J in *Scully* to the approach taken by the Full Federal Court in *Grigor-Scott v Jones* [2008] FCAFC 14 in determining who the respondent to a complaint is in circumstances where the action complained of is committed by an unincorporated body.
[66] The current equivalent provision is s 46P(2)(a) of the AHRC Act.

> Hebrew Congregation is a constituent of the Council, the Council represents at the national level those members of the Launceston Jewish community who were specially affected by Ms Scully's actions. Of course, the Council is not itself a 'person', it is an agglomeration of 'persons', so any complaint is legally the complaint of its members. In their representative role, if not on an individual basis, those persons were 'persons aggrieved' by the alleged unlawful acts. In my opinion, the case falls within para (b) of s 22 (1) of the [RDA[67]].[68]

In *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,[69] Collier J agreed with the view taken by Wilcox J in *Scully* that whilst an unincorporated association cannot itself be an aggrieved person, a complaint brought by an unincorporated association may be valid if the members who comprise the unincorporated association are 'aggrieved persons' for the purposes of the HREOC Act (now the AHRC Act).[70]

(b) Complaints in respect of deceased persons

In *Stephenson (as executrix of estate of Dibble) v Human Rights & Equal Opportunity Commission*[71] ('*Stephenson*'), Wilcox J (Jenkins and Einfeld JJ agreeing) held that a complaint brought under the former complaint provisions of the SDA survived the death of a complainant.[72] A significant reason for the decision was that a contrary view would frustrate the broad societal objects of the SDA.

In *Cuna Mutual Group Ltd v Bryant*,[73] after considering the decision in *Stephenson*, Branson J held that where a person dies before filing a claim, a complaint could not be brought on behalf of the deceased person under the DDA.

While these decisions were determined prior to the complaint provisions being amended and moved from the unlawful discrimination acts to what is now the AHRC Act[74] they may still be relevant to the substantially similar provisions now operating.

6.2.2 Respondents

In *Grigor-Scott v Jones*,[75] the Full Federal Court held that a complaint lodged pursuant to s 46P of the HREOC Act (now the AHRC Act) must be against a person and that a person may be an individual or an entity that has a legal personality. In that case, the complaint was treated by the Commission as having been made against a Church that was an unincorporated body. The Full Court noted, but did not have to decide, that, for this reason, the complaint may not have been competent.[76]

---

[67] The current equivalent provision is s 46P(2)(b) of the AHRC Act.
[68] (1998) 79 FCR 537, 548-549.
[69] (2007) 162 FCR 313.
[70] (2007) 162 FCR 313, 330-331 [50].
[71] (1996) 68 FCR 290.
[72] (1996) 68 FCR 290, 299.
[73] (2000) 102 FCR 270.
[74] The changes were made by the *Human Rights Legislation Amendment Act (No 1) 1999* (Cth).
[75] [2008] FCAFC 14, [20].
[76] [2008] FCAFC 14, 22-23 [71].

6.2.3 Representative complaints to the Commission

The AHRC Act allows a representative complaint to be made pursuant to s 46P(2)(c) of the AHRC Act in the following circumstances:[77]

- the class members have complaints against the same person;
- all the complaints are in respect of, or arise out of, the same, similar or related circumstances; and
- all the complaints give rise to a substantial common issue of law or fact.

'Representative complaint' is defined under the AHRC Act to mean 'a complaint lodged on behalf of at least one person who is not a complainant'.[78] 'Class member' is relevantly defined as 'any of the persons on whose behalf the complaint was lodged, but does not include a person who has withdrawn under s 46PC'.[79]

In making a representative complaint to the Commission, a complainant need not name all the class members, or specify how many members there are to the complaint.[80] Furthermore, the complaint may be lodged with the Commission without members' consent.[81] However, class members may, in writing to the President, withdraw from a representative complaint prior to the termination of a complaint (after which they will be entitled to make their own complaint),[82] and the President may, on application in writing by an 'affected person', replace 'any complainant with another person as complainant'.[83] The President may also, at any stage, direct that notice of any matter to be given to a class member or class members.[84]

Representative proceedings may also be brought in the Federal Court pursuant to the *Federal Court of Australia Act 1976* (Cth) (see 6.6.1(c) below).

6.3 Interim Injunctions

6.3.1 Section 46PP of the AHRC Act

Section 46PP of the AHRC Act empowers the FMC and the Federal Court to grant interim injunctions in respect of a complaint lodged with the Commission upon an application from the Commission,[85] a complainant, respondent or affected person. Section 46PP provides:

> 46PP Interim injunction to maintain status quo etc
>
> (1) At any time after a complaint is lodged with the Commission, the Federal Court or the Federal Magistrates Court may grant an interim injunction to maintain:

[77] See s 46PB(1).
[78] See s 3(1) of the AHRC Act.
[79] Section 3(1).
[80] See s 46PB(3) of the AHRC Act.
[81] See s 46PB(4).
[82] See s 46PC(1).
[83] See s 46PC(2).
[84] See s 46PC(3).
[85] The Commission's guidelines for making applications for interim injunctions are available at <http://www.humanrights.gov.au/legal/guidelines/interim_injunction.html>.

(a) the status quo, as it existed immediately before the complaint was lodged; or,

(b) the rights of any complainant, respondent or affected person.

(2) The application for the injunction may be made by the Commission, a complainant, a respondent or an affected person.

(3) The injunction cannot be granted after the complaint has been withdrawn under section 46PG or terminated under section 46PE or 46PH.

(4) The court concerned may discharge or vary an injunction granted under this section.

(5) The court concerned cannot, as a condition of granting the interim injunction, require a person to give an undertaking as to damages.

The decision by a court as to whether or not to grant an interim injunction under s 46PP has been described as:

> not an easy one because clearly there is a duty to look at the background information, the evidence presented, to determine what the status quo is, whether it should be preserved by the granting of an interim injunction, and to also have regard to the rights of a respondent.[86]

6.3.2 Principles governing determination of whether to grant an injunction

The principles that govern determination of applications under s 46PP are the principles that apply at common law to the granting of interim relief, 'though in applying the principles to the exercise of the court's discretion under s 46PP, the court should not regard itself as constrained solely by those common law principles'.[87] The common law principles that have been adopted in s 46PP cases by the Federal Court and the FMC include the following requirements: [88]

1. that there is a serious issue to be tried between the parties; and
2. that on the balance of convenience it is appropriate for the court to make the order.

(a) Serious issue to be tried

This requirement has been held to involve consideration of whether there is an arguable case.[89] In *De Alwis v Hair*,[90] Bryant CFM refused the application for an injunction because his Honour concluded that there was no arguable

[86] *Gardner v National Netball League Pty Ltd* (2001) 182 ALR 408, 410 [10].
[87] *Rainsford v Group 4 Correctional Services* [2002] FMCA 36.
[88] In *Hoskin v Victoria (Department of Education and Training)* [2002] FMCA 263, Walters FM cited the following decisions as establishing the principles that apply to determining applications made under s 46PP: *Australian Coarse Grain Pool Pty Ltd v Barley Marketing Board of Queensland* (1982) 57 ALJR 425; *Epitoma Pty Ltd v Australasian Meat Industry Employees Union (No 2)* (1984) 3 FCR 55; *Yunghanns v Yunghanns* (1999) 149 FLR 247.
[89] See, for example, *Rainsford v Group 4 Correctional Services* [2002] FMCA 36.
[90] [2002] FMCA 357, [19].

basis on which a Court could grant the substantive relief sought by the applicant.

(b) Balance of convenience

The types of factors considered as relevant to determining where the balance of convenience lies include:

- whether an award of damages would be a sufficient remedy;[91]
- in employment cases where an applicant seeks an injunction to prevent their termination the Court will consider whether the employment relationship has broken down and if it has whether it can be restored,[92] as well as the appropriateness or desirability of reinstatement during the interim period;[93]
- the effect that the granting of an interim injunction under s 46PP is likely to have on the business or operations of the respondent;[94] and
- the necessity of making an order.[95]

6.3.3 Ex parte injunctions

Where an application is made for an interim injunction on an ex parte basis, the applicant would need to establish that there is an element of urgency; and

i) proceeding inter partes would cause irreparable damage; or
ii) notice to the other party will of itself cause harm.[96]

There must be strong evidence, particularly to support an allegation that notice to the other party will of itself cause harm.[97]

Injunctive relief may also extend to persons who are not, or are not yet, party to the complaint before the Commission.[98]

In *Harcourt v BHP Billiton Iron Ore Pty Ltd*,[99] the applicant made an application for an interim injunction on an ex parte basis, prior to the finalisation of the complaint at the Commission. Lucev FM refused the application, taking into account the following factors:

- the respondents had not yet been made aware that the applicant had filed a complaint at the Commission;
- there had not yet been any opportunity for the legal representatives of the parties to see whether an appropriate resolution of the issues could be reached, on either a temporary or permanent basis;

---

[91] *Gardner v National Netball League Pty Ltd* (2001) 182 ALR 408, 417 [56].
[92] *McIntosh v Australian Postal Corporation* [2001] FCA 1012.
[93] *Harcourt v BHP Billiton Iron Ore Pty Ltd* [2008] FMCA 1100, [52]-[55].
[94] *Rainsford v Group 4 Correctional Services* [2002] FMCA 36. See also *Sheaves v AAPT Ltd* [2004] FMCA 225; *Sluggett v DIAC* [2008] FMCA 735.
[95] *AB v New South Wales Minister for Education & Training* [2003] FMCA 16.
[96] See *Harcourt v BHP Billiton Iron Ore Pty Ltd* [2008] FMCA 860, [9].
[97] *Harcourt v BHP Billiton Iron Ore Pty Ltd* [2008] FMCA 860, [9].
[98] *Harcourt v BHP Billiton Iron Ore Pty Ltd* [2008] FMCA 860, [12].
[99] [2008] FMCA 860, [17]-[21].

- there was no immediate danger, in Lucev FM's view, of a relevant change in the status quo; and
- this was a matter which was more appropriately dealt with on an inter partes basis.

6.3.4 Types of orders that the Court can make under s 46PP

The power conferred by s 46PP is limited to orders that maintain the status quo as it existed immediately before the complaint was lodged or the rights of a complainant, affected person or respondent.

The power conferred by s 46PP has been said by the Federal Court to be limited to

> the orders necessary to ensure the effective exercise of the powers of the Commission and the jurisdiction of the Court in the event of an application being made to the Court under the HREOC Act following the determination of a complaint.[100]

In *AB v New South Wales Minister for Education & Training*,[101] Raphael ACFM confirmed that the type of injunction which could be ordered under s 46PP(1)(a) was restricted to one which preserved the status quo immediately before the relevant complaint is lodged with the Commission[102] and that it existed to prevent rights from being taken away, not to create rights.[103]

This case concerned a 12-year-old boy who was the holder of a Bridging E Visa whilst awaiting the outcome of a substantive visa application that would give him permanent residency in Australia. He was offered a place at a selective high school - Penrith High School - subject to his complying with the condition that prior to enrolment he be an Australian citizen or permanent resident. The applicant lodged a complaint with the Commission alleging a breach of the RDA. The applicant applied to the FMC for the following orders under s 46PP:

i) an order preventing the respondent from withdrawing the place offered at Penrith High School pending the determination of his complaint; and

ii) an order directing the respondent to allow the applicant to attend Penrith High School, pending the determination of his complaint.

Raphael ACFM held that 'the status quo consists of the offer to the applicant of a place in the Penrith High School subject to his complying with the condition that prior to enrolment he be an Australian citizen or permanent resident'.[104] His Honour therefore refused to make either order sought by the applicant because both orders sought to achieve more than the maintenance of the status quo.[105]

---

[100] *Li v Minister for Immigration & Multicultural Affairs* [2001] FCA 1414, [36].
[101] [2003] FMCA 16.
[102] [2003] FMCA 16, [10].
[103] [2003] FMCA 16, [15].
[104] [2003] FMCA 16, [15].
[105] [2003] FMCA 16, [15].

In the case of order one it went beyond maintenance of the status quo because it would have the effect of holding open a place to a person who did not comply with the condition that prior to enrolment they be an Australian citizen or permanent resident.[106]

In the case of order two, his Honour held it went beyond maintenance of the status quo because the effect of the order would have been to have required the Minister to allow the applicant to attend a school that he was not attending prior to filing his complaint.[107]

In *Hoskin v Victoria (Department of Education & Training),*[108] the applicant sought orders pursuant to s 46PP(1)(b), inter alia, that the respondent provide to the applicant (or his lawyer) all documents supporting or relating to the decision to place the applicant on sick leave in August 2002 and the decision to maintain that position in October 2002. Walters FM concluded that the orders sought by the applicant could not properly be categorized as interim injunctions as they did not seek to 'maintain' any relevant 'rights' of the applicant.[109] His Honour stated:

> In my opinion, the use of the word 'maintain' in section 46PP(1) emphasizes the temporary nature of the interim injunction referred to in the section and imports a requirement (at least in so far as section 46PP(1)(b) is concerned) that a pre-existing 'right' of a complainant, respondent or other affected person must have been adversely affected, or, alternatively, is likely to be adversely affected in the foreseeable future. The 'rights' of the complainant, respondent or other affected person … must, in my view, be both continuing and substantive.[110]

Walters FM concluded that the orders, if they were to be granted, would do no more than operate to compel the respondent to perform a single, finite act – namely the production of the relevant documents. Accordingly, he dismissed the application.[111]

6.3.5 Duration of relief granted under s 46PP and the time period in which such relief must be sought

By reason of the combined operation of s 46PP(1) and (3), an interim injunction can only be granted under s 46PP during the period between the lodging of a complaint and the termination[112] or withdrawal[113] of a complaint.

A difference of opinion appears to have emerged in the cases as to whether the restrictions in s 46PP(3) mean:

- only that an **application** for an injunction under s 46PP must be made and determined prior to termination or withdrawal; or

[106] [2003] FMCA 16, [15].
[107] [2003] FMCA 16, [15].
[108] [2002] FMCA 263.
[109] [2002] FMCA 263, [60].
[110] [2002] FMCA 263, [53].
[111] [2002] FMCA 263, [59], [60].
[112] Under ss 46PE or 46PH of the AHRC Act.
[113] Under s 46PG of the AHRC Act.

- in addition, that the **actual order** must be limited so as to end upon termination or withdrawal.

In *Rainsford v Group 4 Correctional Services*[114] ('*Rainsford*'), McInnis FM appeared to prefer the latter view, stating:

> In the present case, I have noted that when an injunction is granted then it is only granted in accordance with 46PP(3) up until the date when a complaint is terminated. In the circumstances of this case there is no indication before this court as to when that might occur. Hence, it could hardly be said that any injunction this court might grant would be of a short-term duration. There is simply no guarantee of that fact.[115]

Heerey J stated in *McIntosh v Australian Postal Corporation*,[116] that the expression 'interim injunction' in s 46PP is:

> used in the New South Wales sense so as to include what Victorian lawyers would call an interlocutory injunction, that is an injunction until the trial and determination of an action...[117]

However, despite his Honour's reference to 'the trial and determination of an action', the injunction sought in that matter was expressed so as to operate 'until the Commission has completed an inquiry and conciliation process'.[118]

It would be incongruous if the AHRC Act was construed so as to potentially leave an applicant who obtains relief under s 46PP unprotected for the period between the time of the termination of their complaint by the Commission and the time at which that person was able to approach the Federal Court or FMC for interim relief under s 46PO(6). The better approach might therefore be that of Raphael FM in *Beck v Leichhardt Municipal Council*[119] where his Honour, having first noted the need to be 'mindful that the relief granted [under s 46PP] must not be indeterminate',[120] enjoined the respondent from terminating the applicant's employment until seven days following the termination of his complaint to the Commission. His Honour further ordered that:

> The parties shall have liberty to apply to this court for reconsideration of these orders in the event of a significant change in circumstances, including any significant delay in the procedures before the Human Rights and Equal Opportunity Commission.[121]

That form of order may be seen as a satisfactory means of avoiding the perceived difficulties raised by McInnis FM in *Rainsford* in the passage extracted above.

6.4 Election of Jurisdiction

Federal discrimination legislation does not purport to displace or limit the operation of State and Territory laws capable of operating concurrently with

[114] [2002] FMCA 36.
[115] [2002] FMCA 36, [37].
[116] [2001] FCA 1012.
[117] [2001] FCA 1012, [7].
[118] [2001] FCA 1012, [1].
[119] [2002] FMCA 331.
[120] [2002] FMCA 331, [21].
[121] [2002] FMCA 331, [21]: see order 3.

the SDA, RDA, DDA or ADA.[122] However, the SDA, RDA, DDA and ADA preclude a person from bringing a complaint under the federal legislation where a person has 'made a complaint', 'instituted a proceeding' or (in the case of the SDA and RDA only) 'taken any other action' under an analogous State or Territory law.[123]

In *Elekwachi v Human Rights & Equal Opportunity Commission*,[124] the applicant had initially made a complaint to the Commission under the RDA but had subsequently written to the South Australian Equal Opportunity Commission seeking that his complaint be referred to it. He sought judicial review of a decision by the Commission to decline his complaint under s 6A of the RDA on the basis that he had 'made a complaint' or 'taken action' under the *Equal Opportunity Act 1984* (SA) and hence was precluded from making a complaint to the Commission.

Mansfield J held that the later letter requesting that the matter be determined by the South Australian Equal Opportunity Tribunal did not satisfy the requirements of a 'complaint' for the purposes of the *Equal Opportunity Act 1984* (SA) and, as such, the South Australian Equal Opportunity Commissioner did not have any jurisdiction to inquire into the matter, or refer it for determination.[125] Accordingly, Mansfield J held that the later letter did not constitute 'a complaint or any other action' for the purposes of s 6A of the RDA.

In *Barghouthi v Transfield Pty Ltd*[126] ('*Barghouthi*'), a case under the DDA, the respondent argued that the appellant was not entitled to make a complaint to the Commission as he had brought an unfair dismissal claim in the New South Wales Industrial Relations Commission in relation to the same factual circumstances. Hill J rejected that submission as the matter had not proceeded in the Industrial Relations Commission for want of jurisdiction saying:

> Section 13(4) [of the DDA]…does not operate such that where one forum says that it has no jurisdiction the other ipso facto must be denied jurisdiction. As a matter of policy anti-discrimination legislation should not be read in a way that excludes the rights of claimants to have their cases heard in a court, whether it be State (or Territory) or Federal. Parliament cannot have intended that where a claimant makes a mistake in an application to a court leading to a finding of no jurisdiction in that forum that claimant is then excluded from rights altogether. Section 13(4) operates to ensure that where a claimant elects to bring an action in either the State or Federal jurisdiction that claimant is bound by the consequences of that election but that cannot

[122] Some State Tribunals may not have jurisdiction to hear complaints against the Commonwealth arising under State anti-discrimination legislation: *Commonwealth of Australia v Anti Discrimination Tribunal (Tasmania)* [2008] FCAFC 104.
[123] See s 10(4) of the SDA; s 6A(2) of the RDA; s 13(4) of the DDA and s 12(4) of the ADA. See also ss 725 and 732 of the *Fair Work Act 2009* (Cth) whose combined effect is to require people seeking relief for termination that is allegedly discriminatory to elect whether to proceed under the AHRC Act or the Fair Work Act.
[124] [1997] 79 FCA 271.
[125] [1997] 79 FCR 271, 282-283.
[126] (2002) 122 FCR 19.

> be so if the claim is not in fact heard because the chosen forum lacks jurisdiction.[127]

In *Price v Department of Education & Training (NSW)*,[128] the applicant first made a complaint to the Anti-Discrimination Board ('ADB') in respect of a matter of alleged disability discrimination. The ADB did not accept his complaint for investigation on the basis that 'no part of the conduct complained of could amount to a contravention of a provision' of the *Anti-Discrimination Act 1977* (NSW).[129] The applicant then made a complaint in respect of the same matter to the Commission. The applicant submitted that s 13(4) of the DDA did not apply to his complaint as the ADB had declined his complaint on the basis that there was no contravention of the State Act.

Cameron FM rejected this argument and held that the fact that the complaint to the ADB was not well-made does not alter the fact that it met the criteria laid down by s 46P of the HREOC Act (now the AHRC Act) and thus s 13(4) of the DDA as well.[130] His Honour referred to the decision in *Barghouthi* and noted that in the present case, the ADB did not lack jurisdiction, it simply concluded that the complaint raised no conduct which could amount to contravention of the State Act. That being so, the applicant was not entitled to institute these proceedings and they must be dismissed'.[131]

In *Ho v Regulator Australia Pty Ltd*,[132] a case under the SDA, the respondent also applied to have the matter dismissed because the applicant had previously made an unfair dismissal and workers' compensation claim to the New South Wales Industrial Relations Commission in relation to the same set of facts. Driver FM dismissed that application and held that those claims did not constitute 'the institution of a proceeding or any other action in relation to a human rights matter' for the purposes of s 11(4) of the SDA, even though the claim 'had the same factual foundation':

> Both arose out of an alleged assault on [the applicant by the respondent]. The proceedings in the New South Wales Industrial Relations Commission related to a claim of unfair dismissal arising out of workplace harassment, but not sexual harassment. The claim for workers' compensation had the same factual foundation. While there are some common facts, there was no claim of sex discrimination or harassment in the workers' compensation claim or the Industrial Relations Commission proceedings (which were discontinued without a decision). Accordingly… s 11(4) of the SDA [does] not apply.[133]

In *Reynolds v Minister for Health & Anor (No. 3)*[134] the applicant sought to adjourn proceedings under the DDA in the FMC until determination of his proceedings before the Western Australia Industrial Relations Commission (WAIRC). He argued that the WAIRC was the appropriate forum to make a

---

[127] (2002) 122 FCR 19, [16]. See also *Alamzeb v Director-General Education Queensland* [2003] FMCA 274 where Baumann FM suggested, in obiter, that the *Industrial Relations Act 1999* (Qld) might similarly constitute a 'law of the State which furthers the objects of' ICERD for the purposes of s 6A(2) of the RDA.
[128] [2008] FMCA 1018.
[129] [2008] FMCA 1018, [36].
[130] [2008] FMCA 1018, [41]-[45].
[131] [2008] FMCA 1018, [44]-[45].
[132] [2004] FMCA 62.
[133] [2004] FMCA 62, [3].
[134] [2010] FMCA 954.

determination on “the substandard performance issue”. Lucev FM dismissed the application. His Honour held that performance issues clearly related to the disability discrimination claims and that the FMC was in a position to deal with the entire matter. His Honour stated:

> Having jurisdiction in relation to the federal disability discrimination claims, the Court also has jurisdiction to hear and determine associated matters, whether federal or not arising from the same factual matrix as the alleged disability discrimination. Indeed, it is the evident policy of the FM Act that all matters in controversy associated with the federal matter within the Court’s jurisdiction should be dealt with as a single matter and determined completely and finally by this Court. This is such a matter. The approach posited by (the applicant) is the antithesis of that that ought to be adopted by this Court, and is contrary to the intent of s 14 of the FM Act.[135]

His Honour also noted that any determination of the WAIRC would not be binding, first because it related to a different respondent and secondly, because it is a non-judicial body.[136]

6.5 AHRC Act is an Exclusive Regime

The procedure for the resolution of complaints of discrimination under the AHRC Act is an exclusive regime: it is clear that Courts will not grant remedies for discrimination unless persons have made a complaint to the Commission in accordance with that regime,[137] that complaint has been terminated[138] and a notice of termination has been issued under s 46PH(2) of the AHRC Act in respect of the complaint.[139]

In *Re East; Ex parte Nguyen*[140] (‘*Nguyen*’), the applicant sought a writ of certiorari and declaratory relief in the original jurisdiction of the High Court in respect of a criminal conviction for armed robbery. In part, the applicant argued that the absence of an interpreter constituted racial discrimination, contrary to s 9 of the RDA. The application was dismissed, the High Court describing the complaint provisions as then existed under the RDA (in substance the same as those now found in the AHRC Act) as an ‘elaborate and special scheme’ that was ‘plainly intended by the Parliament to provide the means by which a person aggrieved by a contravention of s 9 of the [RDA] might obtain a remedy’.[141] The Court held that the RDA ‘provides its own, exclusive regime for remedying contraventions’ and that, having not invoked that regime, the applicant did not have a right that could amount to a justiciable controversy.[142]

---

[135] Ibid [10]-[11].
[136] Ibid [16].
[137] *Carreon v The Honourable Amanda Vanstone* [2005] FCA 865, [10]-[11], *Juries Against Illegal Laws Incorporated v The State of Tasmania* [2010] FCA 578 [41-42].
[138] *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd* [2003] FMCA 160, [69].
[139] *Simundic v University of Newcastle* [2007] FCAFC 144, [18].
[140] (1998) 196 CLR 354.
[141] (1998) 196 CLR 354, 365 [26] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
[142] (1998) 196 CLR 354, 366 [31]-[32] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

In *Bropho v Western Australia*[143] ('*Bropho*'), the applicant had sought a declaration that the enactment of the *Reserves (Reserve 43131) Act 2003* (WA) and actions subsequently taken pursuant to it contravened s 9 of the RDA and, as such, were of no effect. The applicant had *not* made a complaint of unlawful discrimination to the Commission under what is now the AHRC Act, but had commenced proceedings directly in the Federal Court.

Nicholson J accepted that *Nguyen* was binding authority for the principle that the RDA and HREOC Act (now the AHRC Act) provide for an exclusive regime for the remedying of contraventions of the RDA. His Honour therefore struck out those aspects of the claim which sought remedies provided for under the HREOC Act.[144] However, the applicant's argument as to constitutional invalidity based on s 9 of the RDA was able to be litigated without an application first being made to the Commission[145] Applying *Gerhardy v Brown*,[146] his Honour held that 'the issue of constitutional validity precedes the application of any remedy for a contravention'.[147]

The decision in *Nguyen* was also followed in *Williams v Pardoe*.[148] Bignold J dismissed an application to the Land and Environment Court in so far as it alleged racial discrimination under the RDA because, relying upon the decision in *Nguyen*, his Honour held that what is now the AHRC Act provided an exclusive regime for remedying contraventions.[149]

6.6 Scope of Applications Made Under s 46PO of the AHRC Act to the FMC and Federal Court

6.6.1 Parties

(a) Applicants

Section 46PO(1) of the AHRC Act provides that:

> (1) If:
>
> (a)a complaint has been terminated by the President under section 46PE or 46PH; and
>
> (b)the President has given a notice to any person under subsection 46PH(2) in relation to the termination;
>
> any person who was an affected person in relation to the complaint may make an application to the Federal Court or Federal Magistrates Court alleging unlawful discrimination by one or more of the respondents to the terminated complaint.

[143] [2004] FCA 1209.
[144] [2004] FCA 1209, [52].
[145] It could be expected that a similar approach might be taken to an argument challenging a law on the basis of s 10 of the RDA. See further 3.1.3 of the RDA chapter.
[146] (1985) 159 CLR 70.
[147] [2004] FCA 1209, [56].
[148] [2005] NSWLEC 119.
[149] [2005] NSWLEC 119, [179]. See also *Perry v Howard* [2005] FCA 1702, [37].

Accordingly, while a person can bring a complaint to the Commission on behalf of another under s 46P(2)(c) of the AHRC Act, only 'an affected person' is entitled to make an application to the FMC or Federal Court.[150]

The AHRC Act defines an 'affected person' as being 'in relation to a complaint, a person on whose behalf the complaint was lodged'.[151] As noted above, a complaint to the Commission may only be lodged by or on behalf of 'a person aggrieved'. Hence an application made to the FMC or Federal Court pursuant to s 46PO(1) will only be able to be brought by 'a person aggrieved' by the alleged discrimination. Further, the Court can revisit a finding by the Commission that a person is a 'person aggrieved' and can dismiss an application if it determines that the applicant is not a 'person aggrieved'.[152]

In *Stokes v Royal Flying Doctor Service*,[153] Mr Stokes lodged a complaint with the Commission on behalf of the Ninga Mia Christian Fellowship and the Wongutha Birni Aboriginal Corporation. When the matter came to the FMC, McInnis FM permitted Mr Stokes to amend the application by replacing the Fellowship and Corporation as the applicants with Mr Stokes and other named individuals. McInnis FM stated that the amendment 'does no more than to identify, with greater specificity, the individuals who are now said to be part of the group which is said to be the subject of the complaint for discrimination'.[154] He commented that it would be 'unduly technical in my view and inappropriate to impose, in a matter of this kind, particularly arising out of human rights legislation, an unduly technical interpretation of either corporate identity or identity of the group'.[155]

(b) Respondents

In several cases courts have held that an application can only be brought against a person if they were a respondent to the complaint to the Commission.[156] This means that any application that names a person who was not a respondent to a complaint can be summarily dismissed[157] and an application to join such a person will be refused.[158]

This issue was most recently considered by the Full Federal Court in *Grigor-Scott v Jones*[159] ('*Grigor-Scott*'). In this case the Court set aside an order joining Mr Grigor-Scott to the primary proceedings because it found that he was not a respondent to the complaint made to the Commission and should therefore never have been joined.

The original complaint to the Commission did not nominate any person or entity as a respondent but simply alleged that a document described as 'Bible

---

[150] See, for example, *Oorloff v Lee* [2004] FMCA 893, [54]-[55].
[151] See s 3(1) of the AHRC Act.
[152] *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313, 327 [39].
[153] (2003) 176 FLR 66.
[154] (2003) 176 FLR 66, 71 [28].
[155] (2003) 176 FLR 66, 69 [19].
[156] *Jandruwanda v Regency Park College of TAFE* [2003] FCA 1455; *Jandruwanda v University of South Australia* [2003] FMCA 205; *Keller v Tay* [2004] FMCA 182, [19]-[21]; *Lawrance v Commonwealth* [2006] FMCA 1792, [12], [15]-[16].
[157] *Jandruwanda v Regency Park College of TAFE* [2003] FCA 1455, [10]-[11]; *Jandruwanda v University of South Australia* [2003] FMCA 205, [4]; *Keller v Tay* [2004] FMCA 182, [19]-[21].
[158] *Lawrance v Commonwealth* [2006] FMCA 1792, [12], [15]-[16].
[159] [2008] FCAFC 14, [71]-[78].

Believers' Newsletter # 242' published on a website contravened provisions of Part IIA of the RDA but it.

The President of the Commission corresponded with Mr Grigor-Scott, a Minister of the Bible Believers' Church ('the Church'), about the complaint. Mr Grigor-Scott also attended the conciliation conference held by the Commission in relation to the complaint. Despite this, the letter from the President to Mr Jones enclosing copies of correspondence from Mr Grigor-Scott referred to the correspondence as being from Mr Grigor-Scott 'on behalf of the respondent'. Further the termination notice named the Church as the respondent and the President's reasons for decision accompanying the termination notice referred to the Church as the respondent.

When Mr Jones filed his original application with the Court he named the Church as the respondent but he subsequently applied and was granted an order joining Mr Grigor-Scott as a respondent.

Mr Jones argued that when identifying the respondent to a complaint the court should consider the subject matter of the complaint and determine who the complaint in substance is about.

The Full Court whilst noting the complaint was about the website, focussed instead on consideration of whom the complainant, the Commission and the President of the Commission treated as the respondent when determining whether Mr Grigor-Scott was a respondent. On the basis of the evidence the Full Court held that the complainant, the Commission and the President treated the complaint as having being made against the Church not Mr Grigor-Scott and as such Mr Grigor-Scott was never a respondent to the original complaint.[160]

The Full Court also dismissed the proceedings brought against the Church. It did so because, as the Church was not a legal entity, it could not be sued and any proceedings against it were therefore incompetent.[161]

(c) Representative proceedings in the Federal Court

The *Federal Magistrates Act 1999* (Cth) ('Federal Magistrates Act') does not enable representative proceedings to be brought in the FMC. Representative complaints can therefore only be pursued in the Federal Court.

Part IVA of the *Federal Court of Australia Act 1976* (Cth) ('Federal Court Act') enables representative complaints to be commenced in the Federal Court by one or more of the persons to the claim as representing some or all of the other persons, if:

> (g) seven or more persons have claims against the same person;[162]
>
> (h) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances;[163] and

[160] [2008] FCAFC 14, 24 [77].
[161] [2008] FCAFC 14, 27 [89].
[162] See s 33C(1)(a) of the Federal Court Act. Note, however, that s 33L of the Federal Court Act provides that: 'if, at any stage in a representative proceeding, it appears likely to the Court that there are fewer than 7 group members, the Court may, on such conditions (if any) it sees fit order that the proceeding continue'.

(i) the claims of all those persons give rise to a substantial common issue of law or fact.[164]

Note that while a complaint can be lodged with the Commission *on behalf of* a 'person aggrieved' (see 6.2.3 below), representative proceedings can only be commenced in the Federal Court by at least one 'person aggrieved' who has had their claim terminated by the Commission. As noted above, under s 46PO(1) of the AHRC Act, upon termination of a complaint by the President only 'an affected person' may make an application to the Federal Court.[165] Furthermore, s 33D(1) of the Federal Court Act provides that only a person who has 'sufficient interest' to commence a proceeding against the respondent on his or her own behalf has standing to bring a representative proceeding against the respondent on behalf of other persons who have the same or similar claims against the respondent.[166]

6.6.2 Relationship between application and terminated complaint

Section 46PO(3) of the AHRC Act places limitations, related to the terminated complaint, upon the nature and scope of applications that may be made to the Federal Court and FMC. The section provides that:

> (3) The unlawful discrimination alleged in the application:
>
> (a) must be the same as (or the same in substance as) the unlawful discrimination that was the subject of the terminated complaint; or
>
> (b) must arise out of the same (or substantially the same) acts, omissions or practices that were the subject of the terminated complaint.

In *Charles v Fuji Xerox Australia Pty Ltd*,[167] Katz J explained the operation of paragraphs (a) and (b) of s 46PO(3) as follows:

> Paragraph (a) of subs 46PO(3) of the [AHRC Act] proceeds on the basis that the allegations of fact being made in the proceeding before the Court are the same as those which were made in the relevant terminated complaint. The provision naturally permits the applicant to claim in the proceeding that those facts bear the same legal character as they were claimed in the complaint to bear. However, it goes further, permitting the applicant to claim in the proceeding as well that those facts bear a different legal character from that they were

---

[163] See s 33C(1)(b) of the Federal Court Act.
[164] See s 33C(1)(c) of the Federal Court Act. Under s 33N of the Federal Court Act the Court may order that a proceeding no longer continue as representative proceedings if it satisfied that it is not longer in the interests of justice to do so for the reasons specified in that section.
[165] In *Jones v Scully* (2002) 120 FLR 243, a case decided under the now repealed complaint provisions in the RDA, Hely J held that not all class members to a representative complaint made to the Commission needed to be parties to subsequent court proceedings. The terms of s 46PO of the HREOC Act (now the AHRC Act) and the definition of 'affected person' make it clear that under the new complaint provisions in that Act not all of the class members to the representative complaint before the Commission need to be party to the court proceedings, anyone of them can bring proceedings in their own right.
[166] Once a person has commenced representative proceedings they continue to retain a sufficient interest to continue the proceedings and to bring an appeal even though they may cease to have a claim against the respondent (s 33C(2) of the Federal Court Act).
[167] (2000) 105 FCR 573.

> claimed in the complaint to bear, provided, however, that the legal character now being claimed is not different in substance from the legal character formerly being claimed.
>
> Paragraph (b) of subs 46PO(3) of the [AHRC Act], on the other hand, permits the applicant to allege in the proceeding before the Court different facts from those which were alleged in the relevant terminated complaint, provided, however, that the facts now being alleged are not different in substance from the facts formerly being alleged. It further permits the applicant to claim that the facts which are now being alleged bear a different legal character than the facts which were alleged in the complaint were claimed to bear, even if that legal character is different in substance from the legal character formerly being claimed, provided that that legal character 'arise[s] out of' the facts which are now being alleged.[168]

His Honour also favoured a construction of the sub paragraphs of s 46PO(3) that does not permit an applicant to rely on acts of discrimination which occur after the complaint has been lodged with the Commission[169] His Honour held that this conclusion was consistent with 'the policy of the [AHRC Act] in ensuring that there exists an opportunity for the attempted conciliation of complaints before they are litigated'.[170]

The provisions of s 46PO(3) were further considered in *Travers v New South Wales*[171] ('*Travers*'), in which Lehane J confirmed that an application to the Federal Court cannot include allegations of discrimination which were not included in the complaint made to the Commission. Nevertheless, his Honour noted that:

> the terms of s46PO(3) suggest a degree of flexibility ('or the same in substance as', 'or substantially the same') and a complaint, which usually will not be drawn by a lawyer, should not be construed as if it were a pleading.[172]

Lehane J also observed that the initial complaint may be quite brief and the details later elicited during investigation.[173] Although it was unnecessary for his Honour to express a final view on the issue, his Honour indicated that he disagreed with a submission put by the respondent to the effect that the term 'complaint' (in the context of s 46PO(3)) was limited to the initial letter of complaint to the Commission. His Honour appeared to prefer the contrary submission put by the applicant, stating:

> it may be that the ambit of the complaint is to be ascertained, for the purpose of s 46PO(3), not by considering its initial form but by considering the shape it had assumed at its termination.[174]

Although not making reference to the decision in *Travers*, a similar approach to the requirements of s 46PO(3) was taken by Driver FM in *Ho v Regulator*

---

[168] (2000) 105 FCR 573, 580-581 [38]-[39].
[169] (2000) 105 FCR 573, 582 [43]. The decision of Katz J on this issue was cited with approval by Driver FM in *Hinchliffe v University of Sydney* (2004) 186 FLR 376, 437 and *Howe v Qantas Airways Ltd* (2004) 188 FLR 1, 74. Justice Tracey also cited the decision of Katz J on this issue with approval in *Crvenkovic v La Trobe University* [2009] FCA 374.
[170] (2000) 105 FCR 573, 581-582 [42].
[171] [2000] FCA 1565.
[172] [2000] FCA 1565, [8].
[173] [2000] FCA 1565, [8].
[174] [2000] FCA 1565, [8].

Australia Pty Ltd.[175] His Honour ruled that the scope of the proceedings was to be determined by the complaint as terminated by the Commission, including any amendments which may have been made to the complaint while the matter was before the Commission, rather than the original terms of the complaint to the Commission.[176]

Driver FM also took this approach in *Hollingdale v Northern Rivers Area Health Service*,[177] where his Honour stated that:

> The task for the Court is to determine the parameters of the complaint that has been terminated. The documents on which that determination may properly be based include, but are not necessarily limited to, the notice of termination and accompanying letter from the President [of the Commission], and the terms of the document or documents setting out the complaint or complaints to HREOC.[178]

Driver FM upheld the respondent's application to strike out the claim of disability harassment made by the applicant as it had not formed part of her complaint to the Commission. In finding that the applicant had not made a complaint of disability harassment to the Commission, his Honour considered it 'significant that the letter from [HREOC terminating the complaint] makes no reference at all to harassment', saying it indicated that the Commission 'did not regard the complaint as including a complaint of harassment'.[179] In any event, his Honour said that, if he was wrong and the complaint had intended to make a complaint about disability harassment, 'it was not seen as such by HREOC and it has not been terminated'.[180]

In *Gama v Qantas Airways Ltd*,[181] Raphael FM held that in order to satisfy the requirement set out in s 46PO(3)(b):

> it is not enough that it arises out of the same general allegation. There must be a close connection between what was told to the Commission and what is alleged in the court proceedings. A new incident, even if it is an incident of the same type as advised to the Commission, would be unlikely to pass this test because, if unknown at the time of the attempted conciliation, it could not have been part of it. Difficulties will arise where a complaint to the Commission lacks details or is expressed in general forms, eg by saying words to the effect 'frequently during a particular period I was subjected to verbal abuse about my sex/disability/race/age'. What if the applicant identifies four such incidents before the Commission but then recalls another before the court? I think it would be for the court to decide whether the evidence given arises out of the same practice that was the subject of the terminated complaint.[182]

---

[175] [2004] FMCA 62.
[176] [2004] FMCA 62, [4].
[177] [2004] FMCA 721.
[178] [2004] FMCA 721, [10], the 'parameters of the complaint' test was cited with approval in *Vijayakumar v Qantas Airways Ltd* [2009] FMCA 736.
[179] [2004] FMCA 721, [21].
[180] [2004] FMCA 721, [21]. See also *Price v Department of Education & Training (NSW)* [2008] FMCA 1018, [32]-[35].
[181] (2006) 195 FLR 475.
[182] (2006) 195 FLR 475, 480 [9]. This aspect of the decision was not challenged on appeal: *Qantas Airways Ltd v Gama* [2008] FCAFC 69.

In *Bender v Bovis Lend Lease Pty Ltd*,[183] the respondent sought an interim order striking out certain paragraphs of an affidavit supporting the applicant's claim of sexual harassment, on the basis that the discrimination alleged in the paragraphs did not form part of the complaint to the Commission as required by s 46PO(3). McInnis FM held that the Court has a discretion to at least consider whether to strike out certain parts of an affidavit prior to hearing as it is important to ensure that the applicant complies with the requirements of s 46PO(3). Considering this matter at an early stage, as opposed to leaving it to trial ensures that 'issues are properly identified consistent with the obligations of the Court in considering the unlawful discrimination alleged in this application compared with the discrimination which was the subject of the terminated complaint'.[184]

In *Vijayakumar v Qantas Airways Ltd* (No 2)[185] Scarlett FM held that the Amended Application was significantly different to the complaint lodged with the Commission such that it was outside the limits of s 46PO(3) because the Applicant raised the following matters that were not included in his complaint:

- the Applicant claimed to have additional disabilities;
- the Applicant sought to rely on the Conditions of Carriage contract between himself and the Respondent;
- the Applicant claimed discrimination: against a person who uses a therapeutic device, in access to premises and a breach of the Disability Standards for Accessible Public Transport 2002.

Accordingly, his Honour refused the Applicant leave to file the Amended Application and Points of Claim.[186]

In *Dye v Commonwealth Securities Limited*[187], the applicant sought to amend her statement of claim to include an allegation of sexual assault that was not raised in her complaint of sexual harassment and discrimination to Commission. Katzmann J stated:

> To fall within s 46PO(3) it is not enough that an act is similar in kind to the acts complained of in the terminated complaint. Nor is it sufficient that the act is alleged to be the act of the same individual. A new incident is different-not the same or substantially the same-conduct: cf. Gama v Qantas Airways Ltd [2006] FMCA 11; (2006) 195 FLR 475 at [9].
>
> A new incident, even if it is an incident of the same type as advised to the Commission, would be unlikely to pass this test because, if unknown at the time of the attempted conciliation, it could not have been a part of it.[188]

[183] (2003) 175 FLR 446.
[184] (2003) 175 FLR 446, 452-453 [21].
[185] [2009] FMCA 736.
[186] The decision to refuse the Applicant leave to amend his Application was affirmed on appeal to the Federal Court: *Vijayakumar v Qantas Airways Ltd* [2009] FCA 1121.
[187] [2010] FCA 720.
[188] [2010] FCA 720 [105].

Ms Dye argued that the allegation of sexual assault was part of her complaint to the Commission because it occurred in the same episode as an event described in her complaint. Katzmann J noted that Ms Dye claimed to have been sexually assaulted on a different date to the date nominated in her complaint as the date on which the relevant episode occurred. Katzmann J also noted that the alleged sexual assault was not referred to in Ms Dye's description of the episode in question in her complaint to the Commission. Katzmann J considered that these inconsistencies were matters that may impact on Ms Dye's credibility. However, her honour was prepared to accept that the allegation did not relate to a new incident but rather was a new set of allegations about the same incident and therefore fell within the scope of the terminated complaint.[189]

On appeal, the Full Federal Court agreed with Katzmann J's assessment that the allegations of sexual assault were within the scope of the complaint that Ms Dye made to the Commission within the meaning of s46PO(3) of the *Australian Human Rights Commission Act 1986* (Cth).[190]

In *Department of Land & Housing v Douglas*[191] it was argued that the application before the FMC introduced a significantly different set of facts from the original complaint before the Commission, contrary to s 46PO(3), because the applicant sought to plead his case in the FMC in terms of indirect discrimination for the first time. Lloyd-Jones FM stated:

> A self-represented litigant, with limited or no knowledge of the operation of discrimination law, would not be aware of the concept of indirect discrimination and how it should be pleaded in the complaint form. In the absence of any reference of this aspect in the Commission's dismissal letter, it is not unreasonable for a self-represented litigant to not make reference to indirect discrimination in his original Application to this Court.[192]

The applicant was subsequently provided with legal representation and his complaint framed in terms of indirect discrimination. Lloyd-Jones FM held that the factual matrix had not however changed and that the application to dismiss could not be sustained.

6.6.3 Validity of termination notice

In *Speirs v Darling Range Brewing Co Pty Ltd*,[193] two of the respondents sought an order that the proceedings against them be summarily dismissed on the ground that a termination notice issued by the Commission was invalid and/or a nullity. While the initial complaint to the Commission raised allegations against those persons, the President's notice of termination did not refer to those persons as respondents to the complaint. The President of the

[189] Ibid [106]. However, the requested amendment was refused on grounds of significant delay and prejudice to the respondent.
[190] *Dye v Commonwealth Securities Ltd* (No. 2) [2010] FCAFC 118. On appeal the decision not to grant the amendment (on other grounds) was overruled and the amendment allowed.
[191] [2011] FMCA 75.
[192] Ibid [40].
[193] [2002] FMCA 126.

Commission subsequently issued a second notice of termination which did name those persons as respondents.

The two respondents submitted that the second notice was a nullity and that accordingly the Court did not have jurisdiction to hear and determine the claims made against them. McInnis FM accepted that submission. His Honour's reasons were as follows:

> In my view there does not appear to be any power given to HREOC in the legislation to issue a further termination notice arising out of the same complaint. Once issued and respondents named then those respondents so named who were given an opportunity to participate in the procedure and the opportunity to at least conciliate the complaint before litigation means that in the circumstance of the present case the denial to the respondents of that opportunity itself would demonstrate a flaw in the process followed by HREOC in this instance. It is not possible in my view for HREOC to simply retrospectively issue a further notice in circumstances where the purported respondents to that notice have not in truth and in fact been able to participate in the conciliation process which the President is bound to follow in accordance with the provisions of the HREOC Act to which I have referred.
>
> There is also no provision in my view for HREOC to issue an amended notice of termination and this is particularly so after the time has elapsed for the first notice to be revoked pursuant to s 46PH(4) of the HREOC Act. It would be unusual if a further notice could be issued after proceedings had been commenced in the Federal Court arising out of the same complaint and in circumstances where in s 46PF(4) the legislature provides that a complaint cannot be amended after it has been terminated by the President under s46PH. Therefore to issue a second notice simply at the request of solicitors for the complainant in circumstances where all that has been requested is the naming of further respondents who had not been given an opportunity to participate in the inquiry effectively amounts to an amendment of the termination notice to include other parties. If the termination notice itself cannot be revoked then it is difficult to see how either an amendment can occur or a further notice issued once Court proceedings have been commenced in relation to the complaint.[194]

6.6.4 Pleading claims in addition to unlawful discrimination

In *Thomson v Orica Australia Pty Ltd (No 2)*[195] an issue arose as to whether a claim for damages for breach of contract was being pursued by the applicant in addition to the unlawful discrimination claim.

It had not been explicitly stated in the points of claim filed by the applicant that the applicant was arguing the case on any other basis than a breach of the SDA. However at the close of evidence, in answer to a question by Allsop J, counsel for the applicant stated that if no breach of the SDA was found by the Federal Court, her client made a claim for damages for repudiation of the contract of employment.

[194] [2002] FMCA 126, [36]-[37].
[195] [2001] FCA 1563.

In subsequently filed written submissions, counsel for the respondent submitted that the matter had always been 'in the context of Commonwealth legislation'[196] and that the respondent was 'seriously disadvantaged'[197] by the perceived shift in the case presented by the applicant. The respondent further contended that if the applicant had specified at the outset that she was seeking damages for breach of contract, the approach of the respondent would have been different in a number of ways.

Allsop J stated he had 'real difficulty'[198] in seeing what further evidence may have been led, or what further cross-examination of the applicant may have taken place, in the context of an allegation of repudiation in contract and an associated claim for damages as opposed to an allegation of repudiation of the employment contract in the context of the SDA. However, his Honour made orders allowing for the respondent to seek further and better particulars of the points of claim, for additional evidence to be filed by the applicant and for further cross examination.

A court will, however, only be able to deal with claims in addition to unlawful discrimination if it falls within its jurisdiction. In *Artinos v Stuart Reid Pty Ltd*,[199] Driver FM refused the applicant's application to join an additional respondent because the claim against the additional respondent was a claim of defamation and the Court did not have the jurisdiction to deal with such a claim.[200]

6.7 Relevance of Other Complaints to the Commission

6.7.1 'Repeat complaints' to the Commission

In *McKenzie v Department of Urban Services*,[201] Raphael FM considered whether or not a person could bring a case before the FMC if the subject matter of the complaint was a 'repeat' complaint. The applicant had made complaints to the Commission in 1997 and 1998, which were dismissed on the basis that there was no evidence or no sufficient evidence of discrimination. The applicant made an application for an order of review pursuant to s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) in relation to the dismissal but subsequently discontinued the proceedings. The applicant then made a further complaint to the Commission in November 1999 which was terminated by the Commission on the basis that, amongst other things, the complaint had already been dealt with. The applicant subsequently made an application to the FMC under s 46PO of the AHRC Act.

The respondent argued that the applicant was estopped from hearing the matter by virtue of the fact that it had already been dealt with by the Commission. Raphael FM considered a number of authorities on the issue of

[196] [2001] FCA 1563, [26].
[197] [2001] FCA 1563, [33].
[198] [2001] FCA 1563, [32], [33].
[199] [2007] FMCA 1141.
[200] [2007] FMCA 1141, [6], [18].
[201] (2001) 163 FLR 133.

estoppel and res judicata in relation to administrative decisions.[202] His Honour concluded that there was nothing to prevent the applicant from having her case heard pursuant to s 46PO of the HREOC Act (now the AHRC Act). His Honour found:

> It may be argued against this finding that it will open the floodgates to applicants who were unhappy about previous decisions of HREOC not to grant them an inquiry into their complaint. Such a person would make a further application to HREOC which would make a finding that it would not proceed because the events in question took place more than twelve months prior thereto and had already been the subject of consideration. That decision would have the effect of terminating the complaint, and upon receipt of the notice of termination the Applicant could proceed to this Court. Although this Court could make an order under s 46PO(4)(f), it could not do so until after it had made a finding of unlawful discrimination, and would therefore be obliged to hear the complaint in its entirety. I was not provided with any authority, either in support of the proposition put by Ms Donohue or by Ms Winters as to why, if I made the finding which I have made, the consequences would not be as I have outlined. I can find no authority either, and it may well be that the Act needs to be amended by the addition of a section similar to s 111(1) of the *Anti-Discrimination Act* (NSW), to prevent a spate of hearings in cases where the Respondent has reasonably thought that its involvement was at an end some considerable time ago.[203]

The relevance of repeat complaints in unlawful discrimination proceedings is different to that of the provisions relating to vexatious litigants or vexatious proceedings.

Note, however, that both the Federal Court Rules and the FMC Rules contain provisions relating to vexatious litigants. Rules 6.02 and 6.03 (formerly Order 21) of the Federal Court Rules and r 13.11 of the FMC Rules enable a court to limit the ability of persons found to have instituted 'vexatious proceedings'[204] to continue or institute further proceedings.

In *Lawrance v Watson*,[205] Cameron FM noted that while the applicant had commenced at least six proceedings in the Federal Magistrates Court against some or all of the respondents in the present case concerning similar allegations of discrimination, this did not necessarily mean that the applicant was a vexatious litigant. In Cameron FM's view, as there had not yet been a judgment in most of the proceedings, the applicant's claims against the various respondents to these proceedings remained, at this point, essentially untested. By contrast, a vexatious litigant was one who repeatedly litigated an issue which had already been the subject of a judgment.

However, in a later decision concerning the same applicant, *Lawrance v Macarthur Legal Centre*,[206] Scarlett FM was satisfied that orders should be

---

[202] *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589; *Yat Tung Investment Co Ltd v Doo Heng Bank* [1975] AC 581; *Stuart v Sanderson* (2000) 100 FCR 150; *Midland Metals Overseas Ltd v Comptroller General of Customs* (1991) 30 FCR 87.
[203] (2001) 163 FLR 133, 153-154 [84].
[204] Note that the definition of 'vexatious proceedings' in Rules 6.02 and 6.03 (see the Dictionary in Schedule 1 of the Federal Court Rules) now differs from the definition used in r13.11 of the FMC Rules.
[205] [2008] FMCA 984, [82]-[91].
[206] [2008] FMCA 1420.

made to prevent the applicant from commencing or continuing proceedings against two of the respondents against whom she had brought six sets of proceedings in the space of two years.[207] His Honour cited *Ramsey v Skyring*[208] in which Sackville J held that the expression 'habitually and persistently' appearing in O 21 r 1 of the Federal Court Rules implies more than 'frequently'. Scarlett FM was satisfied that the test of 'habitually and persistently' had been met. His Honour declined to make an order in relation to another of the respondents who had been a respondent in proceedings commenced by the applicant on only two occasions (although the applicant had sought, unsuccessfully, to have them joined in three other proceedings).

In addition, both the Federal Court Rules and the FMC Rules permit a Registrar to refuse to accept a document which appears to the Registrar on its face to be an abuse of the process of the Court or to be 'frivolous or vexatious' for filing.[209] Under the FMC Rules the Registrar can also refuse to accept a document for filing if it appears on its face to be 'scandalous'.[210]

6.7.2 Evidence of other complaints to the Commission

In *Paramasivam v Jureszek*,[211] the respondent attempted to adduce evidence relating to other complaints made by the applicant of racial discrimination against a number of other parties in differing circumstances. Gyles J refused to admit that material on the basis that it was not probative of any issue in the case, particularly given that the applicant's credit was not in issue. His Honour also indicated that, even if the applicant's credit had been in issue, he would have been reluctant to admit that material, given that the circumstances in which propensity evidence can be given are limited. To be of any value, the Court would have to examine the bona fides and merits of each complaint. The mere fact that a court or another regulatory authority had rejected those complaints would not establish any relevant fact in the proceedings.

6.8 Pleading Direct and Indirect Discrimination as Alternatives

Although the grounds of direct and indirect discrimination have been held to be mutually exclusive,[212] an incident of alleged discrimination may nonetheless be pursued by an applicant as a claim of direct or indirect discrimination, pleaded as alternatives.

In *Minns v New South Wales*[213] ('*Minns*'), the applicant alleged direct and indirect disability discrimination by the respondent. The respondent submitted that the definitions of direct and indirect discrimination are mutually exclusive and that the applicant therefore had to elect whether to pursue her claim as a

[207] [2008] FMCA 1420, [131]-[138].
[208] (1999) 164 ALR 378, [55].
[209] Federal Court Rules, Rule 2.26 (formerly O 46 r 7A(1)) and FMC Rules, r 2.06(1).
[210] FMC Rules, r 2 .06(1).
[211] [2001] FCA 704.
[212] *Australian Medical Council v Wilson* (1995) 68 FCR 46, 55 (Sackville J); *Waters v Public Transport Corporation* (1991) 173 CLR 349, 393 (McHugh J); *Mayer v Australian Nuclear Science & Technology Organisation* [2003] FMCA 209; *Bropho v Western Australia* [2007] FCA 519, [289].
[213] [2002] FMCA 60.

claim of direct or indirect discrimination. In rejecting that submission Raphael FM stated that:

> The authorities are clear that [the] definitions [of direct and indirect discrimination] are mutually exclusive (*Waters v Public Transport Corporation* (1991) 173 CLR 349 at 393; *Australian Medical Association v Wilson* (1996) 68 FCR 46 at 55 ['*Siddiqui's case*']). That which is direct cannot also be indirect …[214]
>
> That statement means that the same set of facts cannot constitute both direct and indirect discrimination. It does not mean that a complainant must make an election. The complainant can surely put up a set of facts and say that he or she believes that those facts constitute direct discrimination but in the event that they do not they constitute indirect discrimination. There is nothing in the remarks of Sackville J in *Sidddiqui's case* which would dispute this and the reasoning of Emmett J in [*State of NSW (Department of Education) v HREOC* [2001] FCA 1199] and of Wilcox J in *Tate v Rafin* [2000] FCA 1582 at [69] would appear to suggest that the same set of facts can be put to both tests.[215]

Similarly, in *Hollingdale v Northern Rivers Area Health Service*,[216] a case under the DDA, the respondent sought to strike out that part of the applicant's points of claim that sought to plead the same incident in the alternative as direct and indirect discrimination. The respondent argued that the complaint terminated by the Commission appeared to only concern direct discrimination. Driver FM rejected the respondent's argument, finding that the applicant is not 'bound by the legal characterisation given to a complaint by HREOC', and stating that '[t]hat is especially so when more than one legal characterisation is possible based on the terms of the complaint'.[217] His Honour continued:

> There is, in my view, no obligation upon an applicant to make an election between mutually exclusive direct and indirect disability claims. If both claims are arguable on the facts, they may be pleaded in the alternative. The fact that they are mutually exclusive would almost inevitably lead to a disadvantageous costs outcome for the applicant, but that is the applicant's choice.[218]

6.9 Applications for Extension of Time

Section 46PO(2) of the AHRC Act provides that applications made to the Federal Court or FMC must be made within 60 days after the date of the issue of a termination notice under s 46PH(2), 'or within such further time as the court concerned allows'.

This time limit not only has to be considered when filing an application, it also needs to be considered when applying to join a person as a respondent to an application. The relevance of the time limit imposed by s 46PO(2) to applications to join a new respondent was considered by the Full Federal Court in *Grigor-Scott v Jones*[219] at a time prior to the amendments brought

[214] [2002] FMCA 60, [173].
[215] [2002] FMCA 60, [245].
[216] [2004] FMCA 721.
[217] [2004] FMCA 721, [14].
[218] [2004] FMCA 721, [19].
[219] [2008] FCAFC 14.

about by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) when the relevant time period was 28 days. In the primary proceedings, the applicant had applied and was granted an order joining Mr Grigor-Scott as a respondent. The application for joinder and the filing of the amended application naming Mr Grigor-Scott as a respondent was filed outside of the 28 day period and no application had ever been made for an extension of time to make an application against Mr Grigor-Scott. The primary judge found in favour of the applicant and the respondent appealed. On appeal the Full Court held:

> No order should have been made to join him [Mr Grigor-Scott] in circumstances where the application had not been brought within the time prescribed in s 46PO(2). It was always open to the applicant to have sought to have time extended but no such application was ever made.[220]

6.9.1 Relevance of nature of jurisdiction

Section 46PO(2) gives a court a broad discretion as to whether to grant an extension of time. In *Lawton v Lawson*[221] Brown FM noted that:

> the discretion granted by section 46PO(2) of the HREOC Act does not express any qualifications or set any criteria for the exercise of the discretion.
>
> Accordingly, I bear in mind that the Act itself deals with matters pertaining to human rights and discrimination. Accordingly, there exist strong public policy reasons, in my view, that the court should, if possible, entertain bona fide claims made pursuant to the Act and other related Acts, such as the SDA.[222]

McInnis FM in *Phillips v Australian Girls' Choir Pty Ltd*[223] emphasised the difference between the principles to be applied in an application for an extension of time for applications filed under the ADJR Act and those which apply in human rights applications:

> It is relevant to consider that in the case of human rights applications there may well be different considerations which apply, bearing in mind the remedial and/or beneficial nature of the human rights legislation which unlike ADJR applications goes beyond the mere judicial review of an administrative decision and deals instead with fundamental human rights. In most of the claims made pursuant to that legislation, it is unlikely that an argument would be entertained that strict adherence to the time limit should be observed in order to assist the proper administration of government departments. Further, the wider issue of a degree of certainty in time limits for the public benefit may also have less weight in relation to claims made under the human rights legislation compared with those claims made for judicial review of administrative actions.[224]

---

[220] [2008] FCAFC 14, [83].
[221] [2002] FMCA 68.
[222] [2002] FMCA 68, [30], [31].
[223] [2001] FMCA 109.
[224] [2001] FMCA 109, [8].

6.9.2 Principles to be applied

McInnis FM in *Phillips v Australian Girls' Choir Pty Ltd*[225] ('*Phillips*') formulated a list of relevant principles in relation to the exercise of the Court's discretion when considering an extension of time in a human rights application (based upon the principles set out by Wilcox J in *Hunter Valley Developments Pty Ltd v Cohen*[226]):

> 1. There is no onus of proof upon an applicant for extension of time though an application has to be made. Special circumstances need not be shown, but the court will not grant the application unless positively satisfied it is proper to do so. The 'prescribed period' of 28 days is not to be ignored (*Ralkon v Aboriginal Development Commission* (1982) 43 ALR 535 at 550).
>
> 2. It is a prima facie rule that the proceedings commenced outside the prescribed period will not be entertained (*Lucic v Nolan* (1982) 45 ALR 411 at 416). It is not a pre-condition for success in an application for extension of time that an acceptable explanation for delay must be given. It is to be expected that such an explanation will normally be given as a relevant matter to be considered, even though there is no rule that such an explanation is an essential pre-condition (*Comcare v A'Hearn* (1993) 45 FCR 441 and *Dix v Crimes Compensation Tribunal* (1993) 1 VR 297 at 302).
>
> 3. Action taken by the applicant other than by making an application to the court is relevant in assessing the adequacy of the explanation for the delay. It is relevant to consider whether the applicant has rested on his rights and whether the respondent was entitled to regard the claim as being finalised (see *Doyle v Chief of General Staff* (1982) 42 ALR 283 at 287).
>
> 4. Any prejudice to the respondent, including any prejudice in defending the proceeding occasioned by the delay, is a material factor militating against the grant of an extension (see *Doyle* at p 287).
>
> 5. The mere absence of prejudice is not enough to justify the grant of an extension (see *Lucic* at p 416).
>
> 6. The merits of the substantial application are properly to be taken into account in considering whether an extension of time should be granted (see *Lucic* at p 417).
>
> 7. Considerations of fairness as between the applicant and other persons otherwise in like position are relevant to the manner of exercise of the court's discretion (*Wedesweiller v Cole* (1983) 47 ALR 528).[227]

The seven principles have been summarised as concerning the following three matters:[228]

- explanation for delay;
- any prejudice to the respondent; and
- whether the applicant has an arguable case.

---

[225] [2001] FMCA 109.
[226] (1984) 3 FCR 344.
[227] [2001] FMCA 109, [10].
[228] *Drew v Bates* [2005] FMCA 1221, [14]. Approved in *Ferrus v Qantas Airways Ltd* [2006] FCA 702, [20].

(a) Need for an acceptable explanation for delay

Whilst the principles identified by McInnis FM in *Phillips* have generally found approval with the Federal Court,[229] Marshall J in *Low v Commonwealth*[230] ('*Low*') has, in contrast to McInnis FM, suggested that an acceptable explanation for delay is a pre-condition to granting an application for an extension of time. In *Low*, Marshall J had to consider whether Driver FM was correct when he said that a Court should grant an extension of time

> where there is a reasonable explanation for the delay in filing the application for relief, where the balance of convenience as between the parties favours the granting of an extension of time and where the application discloses an arguable case.[231]

Marshall J said:

> Save for the reference to 'balance of convenience' I agree with his Honour's approach. I believe a more appropriate substitute for balance of convenience would be 'in the interests of justice'. However, it should be acknowledged that the prima facie position is that applications should be lodged within time. Furthermore, as a precondition to granting an application for an extension of time there should be some acceptable explanation for the delay.[232]

It is relevant to note that in *Low*, Marshall J did not consider the decision of McInnis FM in *Phillips* and therefore was not expressly rejecting the view of McInnis FM. In subsequent decisions, some judges have applied the reasoning of Marshall J in *Low*[233] and some judges have approved the principles identified by McInnis FM in *Phillips*.[234] However, none of these cases have expressly considered whether McInnes FM or Marshall J is correct about this issue. Therefore, it remains open as to whether an acceptable explanation for delay is a precondition to succeeding in an application for an extension of time.

(b) Prejudice arising from the delay

In *Ingram-Nader v Brinks Australia Pty Ltd*,[235] Cowdroy J held that Driver FM had incorrectly applied the test of whether the respondent had been prejudiced by delay. The appellant had made his application to the FMC under s 46PO of the HREOC Act (now the AHRC Act) prior to the amendments brought about by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth). The appellant made his application 58 days after the expiry of the then prescribed 28 day period. In declining leave to file his application out of time, Driver FM took into account the prejudice arising from the period of time which had elapsed since the

---

[229] *Pham v Commonwealth* [2002] FCA 669, [11]; *Ferrus v Qantas Airways Ltd* [2006] FCA 702, [19].
[230] [2001] FCA 702.
[231] [2001] FCA 702, [11].
[232] [2001] FCA 702, [11].
[233] *Saddi v Active Employment* [2001] FMCA 73, [10]-[11]; *Keller v Commonwealth Department of Foreign Affairs & Trade* [2001] FMCA 96, [10]-[11].
[234] *Pham v Commonwealth* [2002] FCA 669, [11]; *Ferrus v Qantas Airways Ltd* [2006] FCA 702, [19]; *Ingram-Nader v Brinks Australia Pty Ltd* (2006) 151 FCR 524, 527 [10]; *Drew v Bates* [2005] FMCA 1221, [13]; *Rainsford v Victoria* [2002] FMCA 266, [42]-[44]; *Forest v City of Sydney* [2011] FMCA 480.
[235] (2006) 151 FCR 524.

alleged conduct had occurred (some five years at the time the complaint was made). The appellant argued that in assessing prejudice to the respondent arising from the delay the only prejudice Driver FM was entitled to take into account was that caused by the 58 day delay in lodging his application with the FMC. Upholding the appeal, Cowdroy J stated that:

> I have not been referred to any authority in which a court has taken into account prejudice caused by delay occurring prior to the commencement of the prescribed period.
>
> …
>
> I agree with the submission of the appellant that Driver FM erred in taking into account the prejudice suffered by the respondent which predated the expiry of the prescribed period. The only relevant period for consideration of prejudice is the 58 days following the expiry of the prescribed period.[236]

In *Wu v University of Western Sydney*[237] the Court considered an application for extension of time where the application was made nearly seven years late. Jagot J accepted the relevant documentary records of the University were no longer complete and the difficulties of locating potential witnesses who were no longer employees or students of the University. Her Honour was of the view that the University would suffer a not insubstantial degree of prejudice from the delay. Further, although the applicant argued that the delay was due to a combination of mental health issues and difficulties in obtaining legal advice, Jagot J did not accept that this adequately explained the entire period of delay. The application was dismissed.

(c) No arguable case

In *Bahonko v Royal Melbourne Institute of Technology*,[238] the applicant had made her application to the Federal Court under s 46PO of the what is now the AHRC Act approximately 11 days after the expiry of the then prescribed 28 day period. Weinberg J refused the application for extension of time even though he found the reason for the delay was acceptable because there was no evidence to support the applicant's claims of unlawful discrimination and '[i]t would therefore be futile to extend time to enable her to pursue a hopeless case'.[239]

In *Forest v City of Sydney*[240] the applicant had made his application six days after the now prescribed 60 day period. The most significant point in the application for extension of time was whether the applicant had an arguable case. Burnett FM noted that in such cases:

> the arguments overall fall to be determined on fine points, often only able to be resolved following a close examination of the evidence and findings of fact.[241]

---

[236] [2006] FCA 624, [17], [19].
[237] [2011] FCA 1143.
[238] [2006] FCA 1325, [24]. Ms Bahonko's application for leave to appeal against the decision of Weinberg J was refused: *Bahonko v Royal Melbourne Institute of Technology* [2006] FCA 1492.
[239] [2006] FCA 1325, [83]. Similarly, in *Keller v Commonwealth Department of Foreign Affairs & Trade* [2001] FMCA 96, Phipps FM rejected an application for extension of time where the delay was 11 days because he found the applicant did not have an arguable case.
[240] [2011] FMCA 480.
[241] Ibid at [42].

Burnett FM was particularly mindful of the observations made in cases considering the Court's approach to summary judgment for a party on the basis of there being no reasonable prospect of success (pursuant to s17A of the FMC Act). His Honour stated:

> It seems to me that when one has regard to the question of whether or not there is indeed an arguable case, one ought to at least allow the applicant to place before the court that material which would enable it to determine whether it meets, as a minimum, the requirements are of s17A which would, of itself, entitle a respondent to have the application dismissed.[242]

Burnett FM was not satisfied that there was no real prospect of the applicant succeeding on a number of contended points. It was held that as there was insufficient evidence to demonstrate no arguable case at this stage of proceedings, the applicant should have leave to proceed.

6.9.3 Examples of where extension of time has been granted

The FMC and the Federal Court have granted extensions of time for the filing of an application under s 46PO(2) in circumstances including the following:

- eight days out of time - the applicant had provided a reasonable explanation for the delay, the delay was not of great magnitude and the merits of the applicant's claims against the respondent demonstrated that the applicant's case was arguable;[243]
- approximately eight months out of time - the applicant lived in a remote location, had told the respondent she would be pursuing litigation and the applicant's case could not be said to be lacking merit;[244]
- seven months out of time - the applicant, who had a disability, was under the age of 18 years, not familiar with the legal process and had an arguable case;[245]
- three months out of time - the applicant was uncertain as to whether his barrister would be able to continue acting for him (as that barrister had been unable to procure a pro bono instructing solicitor), there was no evidence that the respondent would be prejudiced by the delay and the applicant had an arguable case in relation to one of his five allegations;[246] and
- ten days out of time - the reason for the delay (being that the solicitor with carriage of the matter who came from a small firm had been unexpectedly and seriously injured in an accident) was reasonable and there was sufficient merit in the application.[247]
- eight days out of time – the applicant had attended the registry when he was three days out of time and thought that because he

[242] Ibid at [45].
[243] *Lawton v Lawson* [2002] FMCA 68.
[244] *Creek v Cairns Post Pty Ltd* [2001] FCA 293.
[245] *Phillips v Australian Girls' Choir Pty Ltd* [2001] FMCA 109.
[246] *Rainsford v Victoria* [2002] FMCA 266, [55], [110].
[247] *Drew v Bates* [2005] FMCA 1221.

had indicated in his application that he sought an extension of time, he had received an extension of time. Whilst this did not explain the initial three day delay, no substantial prejudice to the respondent resulted from the delay and Driver FM was not satisfied that applicant did not have an arguable case;[248]

- six days out of time – the applicant had provided reasonable explanation for the delay, there was no prejudice to the respondent and on the facts stated to date there was insufficient evidence to demonstrate no arguable case.[249]

6.10 State Statutes of Limitation

The AHRC Act does not provide for any strict time limit for bringing a complaint of unlawful discrimination to the Commission. The President has a discretion to terminate a complaint if it is lodged more than 12 months after the alleged unlawful discrimination took place: see s 46PH(1)(b). Termination on this basis does not, however, prevent a complainant from making an application to the Federal Court or FMC in relation to that alleged discrimination. Such an application must, however, be brought within 28 days of termination or such further time as the court concerned allows.

The applicability of State statutes of limitation to unlawful discrimination proceedings has arisen in a number of cases.[250] Section 79 of the *Judiciary Act 1903* (Cth) provides as follows:

> The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

In *McBride v Victoria*[251] ('*McBride*'), McInnis FM expressed doubt as to whether the terms of the *Limitation of Actions Act 1958* (Vic) applied to proceedings commenced under the HREOC Act (now the AHRC Act). Similarly in *Artinos v Stuart Reid Pty Ltd*,[252] Driver FM rejected an argument based on a State limitation act and ruled that the only relevant limitation period in relation to proceedings under what is now the AHRC Act is the 28 day time limit set by s 46PO(2) of that Act.

By contrast, in *Baird v Queensland (No 2)*[253] ('*Baird*'), and *Gama v Qantas Airways Ltd*[254] ('*Gama*') Dowsett J and Raphael FM respectively formed the view that State limitation acts did apply to proceedings commenced under what is now the AHRC Act although they expressed different views about the date from which the limitation period commences to run.

---

[248] *Zoltaszek v Downer EDI Engineering Pty Limited* [2010] FMCA 100.
[249] *Forest v City of Sydney* [2011] FMCA 480.
[250] For discussion of these recent cases, see Jonathon Hunyor, 'Time limits for unlawful discrimination claims' (2006) 44 *Law Society Journal* 40.
[251] [2001] FMCA 55, [10].
[252] [2007] FMCA 1141, [12].
[253] (2005) 146 FCR 571.
[254] (2006) 195 FLR 475, 477-479 [5]-[8].

In *Baird* the Federal Court assumed that the *Limitation of Actions Act 1974* (Qld) applied to the proceedings and found that its effect is to bar proceedings commenced in court more than six years after termination by the President of the Commission[255] The Court noted that the limitation period established by the Queensland Act was to be calculated from the date on which the 'cause of action' arose.[256] Dowsett J held that a 'cause of action' only existed under what is now the AHRC Act upon termination by the President as before such time there was no right to relief before a court (and the Commission has no power to grant such relief).[257]

In *Gama* Raphael FM expressed the view in obiter that the *Limitation Act 1969* (NSW), which has similar wording to the State limitation act considered in *McBride*, applied to proceedings under the HREOC Act (now the AHRC Act).[258] Raphael FM observed that events taking place more than six years before proceedings were commenced in court would be statute-barred. This suggests that his Honour took the view, contrary to that taken by Dowsett J in *Baird*, that the limitation period commences running from the date on which the alleged act of discrimination occurs and not the date on which the complaint was terminated.[259] His Honour did not, however, in reaching this conclusion consider the decision of Dowsett J in *Baird.* On appeal, the correctness of Raphael FM's approach was not considered by the Full Federal Court, which noted explicitly:

> Nothing that we say in this judgment should be taken as agreeing with his Honour's opinion about the application of the *Limitation Act 1969* (NSW).[260]

It has been suggested that the approach in *Baird* is the preferable one.[261]

6.11 Interim Injunctions Under s 46PO(6) of the AHRC Act

After a complaint is terminated by the Commission and proceedings commenced in the Federal Court or FMC under s 46PO(1), an interim injunction may be granted by the relevant court under s 46PO(6), which provides:

> (6) The court concerned may, if it thinks fit, grant an interim injunction pending the determination of the proceedings.

The power conferred by that section has been said by the Federal Court to be limited to:

---

[255] (2005) 146 FCR 571, 572 [1].
[256] (2005) 146 FCR 571, 572 [2].
[257] (2005) 146 FCR 571, 575 [9].
[258] (2006) 195 FLR 475, 477-479 [5]-[8].
[259] (2006) 195 FLR 475, 478-479 [6]-[9].
[260] *Qantas Airways Ltd v Gama* [2008] FCAFC 69, [18] (French and Jacobson JJ, with whom Branson J generally agreed, [122]).
[261] See Jonathon Hunyor, 'Time limits for unlawful discrimination claims' (2006) 44 *Law Society Journal* 40. See also the decision in *McBride v Victoria* [2001] FMCA 55 in which the Court's analysis seems to be similar to that in *Baird*, but suggests that it is necessary for an application to be lodged with the Commission within 6 years of the date of the alleged act of discrimination.

> circumstances where the injunction was necessary to ensure the effective exercise of the jurisdiction under s 46PO invoked in the proceeding.[262]

As with injunctions granted under s 46PP, the court cannot, as a condition of granting an interim injunction under s 46PO(6), require a person to give an undertaking as to damages.[263]

Unlike s 46PP, s 46PO(6) has not received significant judicial attention.[264] However, the factors discussed in 6.3 above would seem likely to apply to the exercise of the discretion conferred by s 46PO(6).

6.12 Applications for Summary Disposal

6.12.1 Changes to rules concerning summary disposal of proceedings

For proceedings commenced in the Federal Court or FMC **after** 1 December 2005, new provisions apply in relation to summary judgment and dismissal (the former rules are outlined in *Federal Discrimination Law 2005* at 6.10).[265] The major change to the provisions in the Federal Court Act and the Federal Magistrates Act relating to summary disposal of proceedings is that the Court may now summarily dismiss or stay proceedings or give summary judgment in favour of an applicant if the Court is satisfied that the applicant or respondent has no 'reasonable prospects' of either prosecuting or defending a claim.

(a) Summary dismissal

Under the former rules, the FMC[266] and the Federal Court[267] could summarily dismiss a matter or order that a matter be stayed if it appeared in relation to the proceeding or claim for relief that:

- no reasonable cause of action is disclosed; or
- the proceeding is frivolous or vexatious; or
- the proceeding is an abuse of the process of the Court.

Both the FMC and the Federal Court continue to have the power to summarily dismiss or stay proceedings if the proceedings are frivolous or vexatious or an abuse of process,[268] however, the first basis for summary dismissal has changed. Under the new provision in the Federal Court Act[269] and the Federal Magistrates Act[270] the Court no longer has to be satisfied that there is no reasonable cause of action. Instead, the Court only has to be satisfied that in

---

[262] *Li v Minister for Immigration & Multicultural Affairs* [2001] FCA 1414, [35].
[263] See s 46PO(8) of the AHRC Act.
[264] For an example of an unsuccessful application made under s 46PO(6), see *Li v Minister for Immigration & Multicultural Affairs* [2001] FCA 1414.
[265] The Federal Court Rules, the FMC Rules and the *Judiciary Act* 1903 (Cth) were amended by the *Migration Litigation Reform Act 2005* (Cth). Section 2 of the Migration Litigation Reform Act provides that the changes take effect from 1 December 2005.
[266] FMC Rules, former r 13.10.
[267] Federal Court Rules, former O 20, r 2.
[268] Federal Court Rules, Rule 26.01(1) (formerly O 20, r 5). FMC Rules, r 13.10(b) and (c).
[269] Federal Court Act, s 31A(1).
[270] Federal Magistrates Act, s 17A(1). See also FMC Rules, r 13.10(a).

relation to the whole or any part of a proceeding that the other party has 'no reasonable prospect' of successfully prosecuting the proceeding or that part of the proceeding in order to summarily dismiss or stay part or all of a proceeding.[271]

(b) Summary judgment

Under the former rules, the FMC[272] and the Federal Court[273] could only give summary judgment in respect of part or all of a proceeding, if either:

- there is evidence that the respondent had no answer to all or part of the claim; or
- the defence or reply disclosed no answer to part or all of the claim.

The FMC retains the power to give summary judgment if there is evidence that the respondent had no answer to all or part of a claim,[274] however, in place of the second basis for summary judgment the FMC can now give summary judgment if satisfied that the respondent has 'no reasonable prospect of successfully defending' part or all of the claim.[275]

Under the new provision in the Federal Court Act[276] the Federal Court can now only give summary judgment if the Court is satisfied that the respondent has 'no reasonable prospect of successfully defending' part or all of a proceeding.

(c) Purpose of the changes to the summary disposal provisions

The relevant Explanatory Memorandum to the legislation that effected the changes to the Federal Court Act and the Federal Magistrates Act makes clear that the new provisions were intended to introduce a broader and less demanding assessment of the lack of merits compared with the former general law principles relating to summary judgment:

> Section 31A moves away from the approach taken by the courts in construing the conditions for summary judgment by reference to the 'no reasonable cause of action' test, in *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 and *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125. These cases demonstrate the great caution which the courts have exercised in regard to summary disposal, limiting this to cases which are manifestly groundless or clearly untenable.
>
> Section 31A will allow the Court greater flexibility in giving summary judgment and will therefore be a useful addition to the Court's powers in dealing with unmeritorious proceedings.[277]

---

[271] Federal Court Act, s 31A and Federal Court Rules, Rule 26.01(1); Federal Magistrates Act, s 17A and FMC Rules, r 13.10; *Judiciary Act 1903* (Cth), s 25A. These amendments were all introduced by the *Migration Litigation Report Act 2005* (Cth). Despite this Act's title, the amendments apply to all types of proceedings, not only migration matters.
[272] FMC Rules, former r 13.07.
[273] Federal Court Rules, former O 20, r 1.
[274] FMC Rules, r 13.07(1)(b)(i).
[275] Federal Magistrates Act, s 17A(2).
[276] Federal Court Act, s 31A(2).

This sentiment has been reflected in a number of decisions implementing the new provisions.[278] A number of decisions have, however, suggested that courts may still continue to exercise the power of summary dismissal sparingly.

In *Hicks v Ruddock*,[279] Tamberlin J acknowledged that the standard under the new provisions was less strict compared with the pre-existing general law principles.[280] However, his Honour nevertheless emphasised that such principles remained pertinent to the need for caution in approaching summary dismissal applications:

> As Barwick CJ said in *General Steel* at 129-130, great care must be exercised to be sure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of the opportunity to have his or her case tried by the appointed tribunal. The general principle that a person should not lightly be shut out from a hearing is cogent – the onus on the party applying for summary judgment is heavy.[281]

Similarly, in *Paramasivam v New South Wales (No 2)*[282] Smith FM whilst acknowledging that the new test allowed a broader and in some ways less demanding assessment of the lack of merits of a case, still expressed the view that the FMC needed to exercise caution before summarily dismissing a matter. Smith FM said:

> In this Court, the flexibility and informality of its proceedings which are intended by the legislation and rules setting up the Federal Magistrates' Court, make it particularly important to be cautious at early stages of a proceeding before forming a conclusion that a litigant has 'no prospect of success'. The need for this caution in an application for summary dismissal was referred to by Lander J in *Rana v The University of South Australia* [2004] FCA 559; (2004) 136 FCR 344 under the previous rule allowing summary dismissal. However, in my opinion, the points made by his Honour in support of caution remain equally, if not more, relevant to a consideration of the Court's current power of summary dismissal. His Honour said at [75]:
>
> In my view, because the FMCA Rules do not require pleadings; the parties are not obliged to tender all their evidence when the application and response is filed; there are few, if any, interlocutory processes available; and the Federal Magistrates Court is a low cost court, the Federal Magistrates Court should be very cautious about summarily dismissing an applicant's proceeding. That course should only be adopted when it is clear, beyond any doubt, that the applicant has not, and cannot, articulate in writing a reasonable cause of action. As I have already said, the philosophy of the Federal Magistrates Court is to provide inexpensive justice and a streamlined dispute

---

[277] *Migration Litigation Reform Act 2005* (Cth) Explanatory Memorandum, [22]-[23]. The same comments were made in relation to the equivalent provisions affecting the FMC and High Court, see [27]-[28] and [32]-[33] respectively.
[278] See, for example, *Vans Inc v Offprice.com.au Pty Ltd* [2006] FCA 137, [10]-[12]; *Jewiss v Deputy Commissioner of Taxation* [2006] FCA 1688 [26]-[29]; *Fortron Automotive Treatments Pty Ltd v Jones (No 2)* [2006] FCA 1401, [21]; *Duncan v Lipscombe Child Care Services Inc* [2006] FCA 458, [6]; *Spencer v Commonwealth of Australia* (2010) 241 CLR 118 [24], [58]-[60]
[279] (2007) H156 FCR 574H.
[280] (2007) H156 FCR 574H, 582 [12].
[281] (2007) H156 FCR 574H, 582 [12]-[13]. See also *MG Distribution Pty Ltd v Khan* (2006) 230 ALR 352, 361-362 [38]-[44].
[282] [2007] FMCA 1033.

> resolution process. Litigants will often be self-represented and the documents they rely on as founding their claim will no doubt often be imprecisely articulated. In those circumstances, there is even more reason for the Federal Magistrates Court to be cautious before summarily dismissing an applicant's claim.[283]

In *Cate v International Flavours & Fragrances (Aust) Pty Ltd*,[284] McInnis FM noted the importance of human rights proceedings, stating:

> It is also relevant at the outset to note that human rights proceedings necessarily involve what might be described as significant claims where it is in the public interest for those claims to be the subject of a hearing so that the allegations can be properly tested. It is in the interests of both parties for serious allegations of unlawful discrimination to be fully tested in an open court.
>
> However, balanced against the desire to provide an opportunity for an Applicant to pursue proceedings based upon unlawful discrimination must be the need to ensure a Respondent is not put to the trouble and expense of meeting all allegations which have no reasonable prospect of success.[285]

6.12.2 Principles governing determination of whether there are 'no reasonable prospects'

Section 31A(3) of the Federal Court Act provides the following guidance for determining whether or not a claim or defence has 'no reasonable prospects':

> (3) For the purposes of this section a defence or a proceeding or part of a proceeding need not be:
>
> (a)hopeless; or
>
> (b)bound to fail;
>
> for it to have no reasonable prospect of success.

Section 17A(3) of the Federal Magistrates Act is identical to s 31A(3) of the Federal Court Act.

Additional guidance on determining whether a claim or defence has 'no reasonable prospects' can be found in recent decisions.

In *Boston Commercial Services Pty Ltd v GE Capital Finance Australasia*[286] ('*Boston Commercial*'), Rares J considered the meaning of the phrase 'no reasonable prospects of success' concluding:

> Unless only one conclusion can be said to be reasonable, the moving party will not have discharged its onus to enliven the discretion to authorise a summary termination of the proceedings which s 31A envisages.[287]

---

[283] [2007] FMCA 1033, [11]. See also *Price v Department of Education & Training (NSW)* [2008] FMCA 1018, [17].
[284] [2007] FMCA 36.
[285] [2007] FMCA 36, [74]-[75].
[286] (2006) 236 ALR 720.
[287] (2006) 236 ALR 720, 731 [45]. See also *Commonwealth Bank of Australia v ACN 000 247 601 Pty Ltd (in liq) (formerly Stanley Thompson Valuers Pty Ltd)* [2006] FCA 1416, [30]-[33].

His Honour rejected a submission by the respondents that the new provisions required the court to engage in a predictive assessment of prospects holding that:

> The purpose of the enactment is to enable the court to deal with matters which should not be litigated because there is no reasonable prospect of any outcome but one.[288]

In *Vivid Entertainment LLC v Digital Sinema Australia Pty Ltd*[289] ('*Vivid Entertainment*'), Driver FM followed the approach taken by Rares J in *Boston Commercial*. After extensively reviewing the authorities dealing with the new provisions,[290] Driver FM concluded that the principles to be applied in summary dismissal cases were as follows:

> In assessing whether there are reasonable prospects of success on an application or a response, the Court must be cautious not to do an injustice by summary judgment or summary dismissal.
>
> There will be reasonable prospects of success if there is evidence which may be reasonably believed so as to enable the party against whom summary judgment or summary dismissal is sought to succeed at the final hearing.
>
> Evidence of an ambivalent character will usually be sufficient to amount to reasonable prospects.
>
> Unless only one conclusion can be said to be reasonable, the discretion ... cannot be enlivened.
>
> The Court should have regard to the possibility of amendment and additional evidence in considering whether only one conclusion can be said to be reasonable. In that consideration, the conduct of the parties and the other circumstances of the case may be relevant.[291]

The principles identified in *Boston Commercial* and *Vivid Entertainment* have been applied in summary dismissal applications in unlawful discrimination proceedings.[292]

There has been some discussion, however, as to whether the test in *Boston Commercial* is the correct test to be applied. In *Price v Department of Education & Training (NSW)*,[293] Cameron FM noted that both Finkelstein and Gordon JJ in *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd*[294] ('*Jefferson Ford*') expressed views that differed both from each other and from Rares J's view in *Boston Commercial*. Cameron FM also observed that Edmonds J in *Spiteri v Nine Network Australia Pty Ltd*[295] had noted the differing views of Finkelstein and Gordon JJ in *Jefferson Ford*, although Edmonds J did not reach an express conclusion regarding of their Honours' judgments was to be preferred. Cameron FM concluded that, at this point, in the absence of a clear expression by the Full Federal Court to the contrary, he was bound to follow Rares J's test in *Boston Commercial*.

---

[288] (2006) 236 ALR 720, 731 [47].
[289] (2007) 209 FLR 212.
[290] (2007) 209 FLR 212, 217-222 [18]-[30].
[291] (2007) 209 FLR 212, 222 [30].
[292] See *Paramasivam v University of New South Wales* [2007] FCAFC 176, [4]; *Paramasivam v New South Wales (No 2)* [2007] FMCA 1033, [8]; *Yee v North Coast Area Health Service* [2007] FMCA 1788.
[293] [2008] FMCA 1018, [19]-[20].
[294] [2008] FCAFC 60.
[295] [2008] FCA 905, [11]–[16].

Further guidance has now been provided by the High Court in *Spencer v Commonwealth of Australia.*[296] French CJ and Gummow J stated:

> Section 31A(2) requires a practical judgment by the Federal Court as to whether the applicant has more than a "fanciful" prospect of success. That may be a judgment of law or of fact, or of mixed law and fact. Where there are factual issues capable of being disputed and in dispute, summary dismissal should not be awarded to the respondent simply because the Court has formed the view that the applicant is unlikely to succeed on the factual issue. Where the success of a proceeding depends upon propositions of law apparently precluded by existing authority, that may not always be the end of the matter. Existing authority may be overruled, qualified or further explained. Summary processes must not be used to stultify the development of the law.[297]

In the judgment of Hayne, Crennan, Kiefel and Bell JJ their Honours concluded that "full weight must be given to the expression as a whole. The Federal Court may exercise power under s 31A if, and only if, satisfied that there is "no reasonable prospect of success".[298] The approach in *Spencer,* together with the principles in *Boston Commercial* and *Vivid Entertainment*, have been applied to subsequent applications for summary dismissal in unlawful discrimination proceedings.[299]

In *Ali-Hossaini & Anor v NSW Land & Housing Corporation*[300] Driver FM granted an application for summary dismissal on the basis that there was no evidence to support the claims of either direct or indirect disability discrimination in the provision of public housing.

However, in *Department of Land & Housing v Douglas*[301] Lloyd–Jones FM rejected an application for summary dismissal, despite the "significant deficiencies" in the presentation of the applicant's claim of indirect disability discrimination in the provision of public housing. His Honour relied on *Spencer* and *Boston Commercial* in reaching his decision. Particular emphasis was placed on the statement in *Boston Commercial* that "experience shows that there are cases which appear to be almost bound to fail yet they succeed".[302]

The decision of Walters FM in *Oorloff v Lee*,[303] ('*Oorloff*') suggests that when determining summary dismissal applications in discrimination proceedings brought by an unrepresented litigant certain additional considerations need to be taken into account. In that case Walters FM identified the following principles as being particularly relevant in such cases:

> 4. In the context of discrimination legislation, both the Federal Magistrates Court and Federal Court have emphasised that the power to summarily dismiss a matter must be exercised with 'exceptional

[296] (2010) 241 CLR 118.
[297] Ibid [24]–[25]
[298] Ibid [60]
[299] *Ali-Hossaini & Anor v NSW Land and Housing Corporation* [2010] FMCA 644. See also *Department of Land & Housing v Douglas* [2011] FMCA 75, *Huang v Abayawickrama & Anor* [2011] FMCA 235.
[300] [2010] FMCA 644.

[301] [2011] FMCA 75.
[302] *Boston Commercial Services Pty Ltd v GE Capital Finance Australasia Pty Ltd* (2006) 236 ALR 720, [42].
[303] [2004] FMCA 893, [49].

> caution' and be 'sparingly invoked'. In particular, the power should be used with great care when the litigant is unrepresented.
>
> …
>
> 8. Special considerations apply in applications for summary dismissal with an unrepresented litigant. Sackville J in *Re Morton; Ex parte Mitchell Products Pty Ltd* surveyed the authorities and noted that the Court:
>
> 'must ... have regard not merely to the litigant in person but also to the position of the other party or parties concerned and to what is required, in justice, to prevent the unnecessary expenditure of public and private resources.'
>
> 9. In conclusion, at 514 Sackville J quoted with approval the words of Mahoney JA in *Rajski v Scitec*:
>
> 'Where a party appears in person, he will ordinarily be at a disadvantage. That does not mean that the court will give to the other party less than he is entitled to. Nor will it confer upon the party in person advantages which, if he were represented, he would not have. But the court will, I think, be careful to examine what is put to it by a party in person to ensure that he has not, because of lack of legal skill, failed to claim rights or put forward arguments which otherwise he might not have done.'
>
> …
>
> 11. In determining whether there is an arguable case, the Court is not limited to considering the arguments put before it by the party defending the application, but may look at all the material to assess independently whether an arguable case based on the material could be made out.[304]

Oorloff was determined prior to the changes to the Federal Magistrates Act. However, the principles identified in that case have been applied by Raphael FM in *Yee v North Coast Area Health Service*,[305] when considering an application for summary dismissal against an unrepresented litigant in unlawful discrimination proceedings under the new provision.

In *Cate v International Flavours & Fragrances (Aust) Pty Ltd*,[306] McInnis FM gave as an example of a circumstance in which an allegation of unlawful discrimination will have no reasonable prospect of success as being one that 'does not meet the statutory definition of the discrimination alleged'.[307]

Other principles identified by courts as being relevant to applying the 'no reasonable prospects' test are:

- that the prospects of the claim or defence must be determined according to the claim or defence underlying any pleadings and as such a claim cannot be summarily dismissed simply because the pleadings are deficient;[308] and

[304] [2004] FMCA 893, [17].
[305] [2007] FMCA 1788.
[306] [2007] FMCA 36.
[307] [2007] FMCA 36, [75].
[308] *Fortron Automotive Treatments Pty Ltd v Jones (No 2)* [2006] FCA 1401, [20].

- the court should take into account the stage the proceedings have reached when applying the test.[309]

Further, in *Paramasivam v New South Wales (No 2)*,[310] Smith FM suggested that issues of fairness should be taken into account when determining whether to summarily dismiss part of an application. In this case his Honour rejected an application for dismissal of the part of the applicant's claim based on indirect discrimination and discrimination in the provision of goods and services. His Honour held that even though he might have been inclined to form a view that the applicant had not shown reasonable prospects of succeeding in these claims he was:

> not persuaded that requirements of fairness to the respondent require these claims to be foreclosed, nor that the respondent's ability to prepare for a final hearing would be advanced by my making such orders.[311]

6.12.3 Onus/material to be considered by the Court

The courts have made clear that the onus in a summary dismissal application is on the respondent, who must establish 'a high measure of satisfaction in the Court that the proceedings are of a character that they should be dismissed'.[312]

In determining the issue of whether there is an arguable case, the FMC has held that it is not limited to considering the arguments put before it by the party defending the application but rather will 'independently consider whether an arguable case based on the material could be made out'.[313]

6.12.4 Examples of matters where the power has been exercised

The FMC and Federal Court have summarily dismissed unlawful discrimination matters where:

- the matter complained of did not involve the provision of a service for the purposes of s 24 of the DDA;[314]
- the subject matter of the application before the FMC was different from the complaint that was made to the Commission and terminated by the President;[315]
- there was no causal nexus between the alleged acts of discrimination and the complainant's race or disability;[316]

---

[309] *Paramasivam v New South Wales* [2007] FMCA 1033, [10]. In so far as Smith FM in *Paramasivam* suggests that the summary dismissal test requires a predictive assessment this is contrary to the view expressed by Rares J in *Boston Commercial Services Pty Ltd v GE Capital Finance Australasia* (2006) 236 ALR 720, 730 [42].
[310] [2007] FMCA 1033.
[311] [2007] FMCA 1033, [23].
[312] *Paramasivam v Wheeler* [2000] FCA 1559, [8].
[313] *Chung v University of Sydney* [2001] FMCA 94, [14]; upheld on appeal to the Federal Court in *Chung v University of Sydney* [2002] FCA 186, [45].
[314] *Vintila v Federal Attorney General* [2001] FMCA 110.
[315] *Soreng v Victorian State Director of Public Housing* [2002] FMCA 124; *Price v Department of Education & Training (NSW)* [2008] FMCA 1018.

- the claims made by the applicant were vague and general and failed to show a case to answer;[317]
- the respondent was not the subject of the complaint to the Commission;[318]
- the applicant failed to attend the hearing of the application for summary dismissal and the Court was satisfied that the applicant was aware of the hearing date;[319]
- a deed of release previously entered into by the parties acted as a bar to the employees claim of unlawful discrimination;[320] and
- it was accepted that the applicant (an incorporated association) was not a 'person aggrieved' for the purposes of commencing proceedings, on the basis that it was not itself affected by the relevant conduct but had merely an emotional or intellectual interest in the proceedings.[321]
- The discrimination occurred outside of Australia.[322]

6.12.5 Frivolous or vexatious proceedings and abuse of process

As discussed above in 6.12.1, proceedings in either the Federal Court or the Federal Magistrates Court may be summarily dismissed on the basis that the proceedings are frivolous or vexatious, or are an abuse of process.[323]

In *Lawrance v Watson*,[324] the applicant had initiated several sets of proceedings against the respondents alleging almost identical claims of unlawful discrimination in each case. In Cameron FM's view:

> The duplication in allegations and factual assertions and the requirement placed by the applicant on the various respondents to meet all of these proceedings is vexatious. Consequently, even if they had reasonable prospects of success, the proceedings would be dismissed as against all the respondents other than the first respondent on the basis that they are vexatious.[325]

Cameron FM also held that the multiplicity of proceedings against the same parties raising the same issue was also an abuse of process of the Court.[326]

---

[316] *Chung v University of Sydney* [2001] FMCA 94; *Neate v Totally & Permanently Incapacitated Veterans Association of NSW Ltd* [2007] FMCA 488; *Paramasivam v University of New South Wales* [2007] FCA 875.
[317] *Rana v University of South Australia* [2003] FMCA 525, [15]; *Hassan v Hume* [2003] FMCA 476, [23], [28]; *Croker v Sydney Institute of TAFE* [2003] FMCA 181, [14]-[16], [18]; *Jandruwanda v University of South Australia (No 2)* [2003] FMCA 233, [13]-[15]; *Applicant N v Respondent C* [2006] FMCA 1936.
[318] *Taylor v Morrison* [2003] FMCA 79, [8]-[9]; *Jandruwanda v Regency Park College of TAFE* [2003] FCA 1455; *Jandruwanda v University of South Australia* [2003] FMCA 205.
[319] *Firew v Busways Trust (No 2)* [2003] FMCA 317, [12]-[13].
[320] *Dean v Cumberland Newspaper Group* [2003] FMCA 561; see also *Seidler v The University of New South Wales* [2011] FCA 640 and *Seidler v The University of New South Wales* [2011] FCA 830.
[321] *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313.
[322] *Vijayakumar v Qantas Airways Ltd* [2009] FMCA 736.
[323] Federal Court Rules, Rule 26.01(1) (formerly O 20 r 5); FMC Rules, r 13.10(b) and (c).
[324] [2008] FMCA 984.
[325] [2008] FMCA 984, [80].
[326] [2008] FMCA 984, [81]. See also *Lawrance v Macarthur Legal Centre* [2008] FMCA 1420, [112]-[130].

In *Rana v Commonwealth*,[327] Lander J referred to *Rogers v The Queen*[328] in which Mason CJ had identified three categories within which abuse of process usually falls:

- the court's procedures are invoked for an illegitimate purpose;
- the use of the court's procedures is unjustifiably oppressive to one of the parties; or
- the use of the court's procedures would bring the administration of justice into disrepute.

In the present case, Lander J held that the proceedings constituted an abuse of process on the basis that the proceedings threatened to bring the administration of justice into disrepute.

The applicant had previously challenged a refusal by the Australian Army to grant him a disability pension. The applicant's challenge had been rejected by Mansfield J at first instance and by the Full Federal Court on appeal. The applicant now sought to challenge the Australian Army's refusal on the basis of unlawful discrimination. In Lander J's view, if the applicant wanted to challenge the refusal on this basis, he should have raised it in the proceedings before Mansfield J, and held:

> It is an abuse of process, in my opinion, to proceed in the way in which the applicant has. It could lead to the very unsatisfactory result that, contrary to the decision of Mansfield J, the decisions would be quashed for reasons not considered by him. That would tend to bring the administration of justice into disrepute.[329]

Lander J also held that the applicant was seeking to use these proceedings to secure interlocutory relief which had been sought in other bankruptcy proceedings but had been denied.[330] Lander J held that this was an abuse of process on the basis of the proceedings being brought for an illegitimate purpose.

Finally, Lander J also accepted the submissions of the respondents that the proceeding was vexatious.[331] The respondents had argued that the proceeding would have the effect of re-litigating issues which had already been determined against the applicant by the Administrative Appeals Tribunal and the Federal Court on a number of other occasions.

In *Seidler v The University of New South Wales*[332] the applicant had instituted new proceedings in the Federal Court concerning claims that were the subject of a Deed of Release and the findings of an earlier decision of the Federal Magistrates Court. Cowdroy J ordered that the respondents be granted summary judgment in the proceedings pursuant to s31A(2) of the Federal Court Act. Cowdroy J was also of the view that the applicant was clearly seeking to challenge the findings of the Federal Magistrates Court. However, the applicant had not sought to appeal the decision and was attempting by

[327] [2008] FCA 907.
[328] (1994) 181 CLR 251 at 286.
[329] [2008] FCA 907, [62]-[63].
[330] [2008] FCA 907, [60].
[331] [2008] FCA 907, [65].
[332] [2011] FCA 640.

these new proceedings to relitigate matters already determined adversely to the applicant. His Honour cited a number of authorities concerning the inherent power of any court of justice to prevent misuse of its procedure as well as the provision in Order 20 r 5 of the Federal Court Rules[333]. Cowdroy J concluded that the institution of these proceedings was an abuse of process[334].

In *Seidler v The University of New South Wales*[335] the applicant had instituted a second set of substantially identical proceedings in the Federal Court as those that had come before before Cowdroy J some weeks earlier. Flick J stated that "the substantial identity between the two proceedings is in itself a further reason to conclude that the present proceeding is a manifest abuse of process"[336].The applicant's request to amend the second set of proceedings was rejected. Flick J held that the proposed amendments had already been resolved by the decision of Cowdroy J and would in any event fall within the terms of the Deed of Release. The proposed amendments had no prospect of success. Flick J ordered that the respondents also be granted summary judgment in these proceedings pursuant to s31A(2) of the Federal Court Act[337].

In *Pitt v OneSteel Reinforcing Pty Ltd,*[338] Gray J refused an application for leave to appeal on the basis that it had been open to the federal magistrate to conclude that there was an abuse of process even though the application to the Federal Magistrate's Court was made within the statutory time limit.[339] Gray J held that the Federal Magistrate was justified in taking into account the very long delays that had occurred between the date of the alleged sexual harassment and the applicant's second complaint to the Commission as well as the material provided by the respondent to the effect that a number of possible witnesses, who might have been called in proceedings had they been commenced earlier, were no longer available to the respondent as witnesses.[340]

6.12.6 Dismissal of application due to non-appearance of applicant

Rule 30.21(1) of the new Federal Court Rules (formerly O32 r2(1)) deals with the non-appearance of a party. This rule provides that if a party is absent when a proceeding is called for trial, another party may apply to the Court for an order that:

> (a) if the absent party is the applicant:
>
> (i) the application be dismissed; or
>
> (ii) the application be adjourned; or
>
> (iii) the trial proceed only if specified steps are taken; or

[333] See now Federal Court Rules, Rule 26.01.
[334] [2011] FCA 640 at [79] – [85].
[335] [2011] FCA 830.
[336] Ibid at [34].
[337] The applicant's application for leave to appeal the decisions of both Cowdroy J and Flick J was dismissed and she was ordered to pay the respondents' costs on an indemnity basis: *Seidler v University of New South Wales* [2011] FCA 1156. Note also that the Federal Court is considering whether, of its own motion pursuant to Rule 6.03(1) of the Federal Court Rules, to prevent the applicant from commencing any further proceedings in the Federal Court without leave.
[338] [2008] FCA 923.
[339] [2008] FCA 923, [14].
[340] [2008] FCA 923, [14].

(b) if the absent party is the respondent:
(i) the hearing proceed generally or in relation to a particular aspect of the application; or
(ii) the hearing be adjourned; or
(iii) the trial proceed only if specified steps are taken.

In *Pham v University of Queensland*[341] ('*Pham*'), Drummond, Marshall and Finkelstein JJ upheld the decision of Heerey J[342] dismissing the appellant's application pursuant to the former Federal Court Rule in regard to non-appearances, being O 32, r 2(1), when he failed to attend at his trial. The Full Court held that O 32, r 2(1)(c) did not require the trial judge, confronted with the non-appearance of an applicant at trial, to embark upon any investigation of the merits of the absent applicant's claim before dismissing an application pursuant to that rule.[343]

6.13 Application for Dismissal for Want of Prosecution

In *Boda v Department of Corrective Services*[344] Driver FM held that the Federal Magistrates Court had an inherent power to stay a proceeding or dismiss an application on the basis that there has been a want of prosecution with due diligence.[345] In that case the applicant had brought an application seeking adjournment of the proceedings for a period of six months in order to enable her to find suitable legal representation and also on account of a range of health problems which impacted on her ability to conduct her case. The respondent brought an application for summary dismissal on the ground that there had been a want of prosecution with due diligence. Driver FM accepted the respondent's submission that there had been a lack of progress in the matter which was likely to continue and on that basis made an interlocutory order that the proceedings be dismissed for want of prosecution.[346] In doing so his Honour accepted that as it was an interlocutory order it would be open to Ms Boda in the future to bring an application under r 16.05 of the FMC Rules for the order to be set aside.[347]

6.14 Application for Suppression Order

Section 61 of the Federal Magistrates Act provides:

> 61 Prohibition of publication of evidence etc
>
> The Federal Magistrates Court may, at any time during or after the hearing of a proceeding in the Federal Magistrates Court, make such order forbidding or restricting:
>
> (a) the publication of particular evidence; or
>
> (b) the publication of the name of a party or witness; or

[341] [2002] FCAFC 40.
[342] *Pham v University of Queensland* [2001] FCA 1044U.
[343] See also *NAET of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 304, [8].
[344] [2007] FMCA 2019.
[345] [2007] FMCA 2019, [7].
[346] [2007] FMCA 2019, [13].
[347] [2007] FMCA 2019, [14].

(c) the publication of information that is likely to enable the identification of a party or witness; or

(d) access to documents obtained through discovery; or

(e) access to documents produced under a subpoena;

as appears to the Federal Magistrates Court to be necessary in order to prevent prejudice to:

(f) the administration of justice; or

(g) the security of the Commonwealth.

In *CC v Djerrkura*,[348] the applicant had filed an application alleging she had been the subject of sexual harassment by the then-Chair of the Aboriginal and Torres Strait Islander Commission, and sought to prevent her name being published in the media or herself being identified. Brown FM applied the principles formulated by courts for determining whether or not to make non-publication orders under s 50 of the Federal Court Act (a provision which is in similar terms to s 61) when determining whether to make an order under s 61. In particular his Honour relied upon the principles identified by Madgwick J in *Computer Interchange Pty Ltd v Microsoft Corporation*[349] as governing determination of applications for non-publication orders, namely, that in deciding whether to make a non-publication order the Court must weigh the public interest of open justice against ensuring justice between the parties and it is only if the latter public interest outweighs the former that the order should be made.

Brown FM accepted that mere embarrassment to an applicant flowing from publication of her name was insufficient. However, he referred to a number of decisions in which the Federal Court had made orders suppressing the identity of the applicants under s 50 because the harm that would flow to the applicant from the publication of their identity was such that it may deter them from bringing or prosecuting their claims.[350]

Brown FM accepted, on the basis of the evidence, before him, that the applicant may suffer harm greater than the normal embarrassment, discomfort and general unpleasantness associated with such proceedings and the media coverage of them. He held that there was a real risk that if her name was published and widely disseminated, and her identity generally known, she would desist from the proceedings.[351]

In the circumstances, Brown FM ordered that identifying details of the applicant be forbidden to be published in any form of media publication in connection with the proceedings, or in relation to the circumstances giving rise to these proceedings.

In *Lawrance v Commonwealth*,[352] Smith FM rejected an application by the applicant for an anonymity order to suppress her name. He held that before he could make an order under s 61 he had to be satisfied that it was necessary for the purpose of preventing prejudice to the administration of

[348] [2003] FMCA 372.
[349] (1999) 88 FCR 438, 442.
[350] *E v The Australian Red Cross Society* (1991) 27 FCR 310; *TK v Australian Red Cross Society* (1989) 1 WAR 335; *A v Minister for Immigration & Ethnic Affairs* (1994) 54 FCR 327.
[351] [2003] FMCA 372, [50]-[51].
[352] [2006] FMCA 172.

justice to do so.[353] In rejecting the application for an anonymity order, Smith FM found that the applicant's claims in the case did not involve confidential dealings or matters of privacy or secrecy which must be preserved in the interests of the administration of justice. His Honour stated that:

> As in many human rights cases in this Court, the applicant seeks vindication in a judicial determination of her claims that she has suffered infringements of her human rights. In my opinion, both the general and particular interests of justice suggest that generally this should be performed in public, once the complaint has passed from the administrative forum of the Human Rights and Equal Opportunities Commission.[354]

In *Lawrance v Watson*,[355] Cameron FM noted that the applicant's submissions seeking a suppression order under s 61 relied principally on the stigma the applicant said she would suffer if her name was published. In His Honour's view, that submission provided no adequate basis to depart from the usual practice of publishing the names of all the parties, including the applicant.[356] His Honour also noted that that the lack of a suppression order had not inhibited the applicant from commencing many proceedings in the Federal Magistrate's Court, and that, in these circumstances, a suppression order was not necessary in order to prevent prejudice to the administration of justice.[357]

In *L v Commonwealth*,[358] Cameron FM granted an application for an anonymity order, despite the applicant having led no evidence to support the application. The application was granted on the basis that the proceedings were unavoidably related to another set of proceedings involving the applicant in which an anonymity order had been granted.

In *Dye v Commonwealth Securities Limited*[359] the Full Court of the Federal Court initially granted an order under s 50 of the Federal Court Act suppressing the name of a female referred to in the applicant's police statement. There was a possibility that she may have been the victim of a sexual offence and the Court was not in a position at that time to assess whether she was entitled to have her identity suppressed under other legislation. However no jurisdictional foundation was provided in this regard. The Full Court subsequently vacated the suppression order.[360] It was noted that "the mere consideration that the evidence is of an unsavoury character is not enough" but rather it must be necessary to prevent prejudice to the administration of justice.[361]

---

[353] [2006] FMCA 172, [48].
[354] [2006] FMCA 172, [52].
[355] [2008] FMCA 984.
[356] [2008] FMCA 984, [95].
[357] [2008] FMCA 984, [96].
[358] [2008] FMCA 658, [85]-[86].
[359] [2010] FCAFC 115.
[360] *Dye v Commonwealth Securities Limited* (No.2) [2010] FCAFC 118.
[361] Ibid [122]- [124]. See also *Seidler v University of NSW & Anor* [2010] FMCA 887.

6.15 Interaction Between the FMC and the Federal Court

6.15.1 Transfer of matters from the Federal Court to the FMC

Under s 32AB of the Federal Court Act, the Federal Court may at any time, by motion of a party[362] or by its own motion,[363] transfer a proceeding or appeal from the Federal Court to the FMC. In determining whether to transfer a proceeding or appeal to the FMC, s 32AB(6) requires the Court to have regard to the following matters:

(a) the matters set out in the Federal Court Rules (now Federal Court Rule 27.12(3), formerly Order 82 r 7), namely:

- whether the appeal or proceeding is likely to involve questions of general importance;[364]
- whether it would be less expensive and more convenient to the parties if the appeal or proceeding were transferred;[365]
- whether the appeal or proceeding would be determined more quickly in the FMC;[366] and
- the wishes of the parties;[367]

(b) whether proceedings in respect of an associated matter are pending in the FMC;

(c) whether the resources of the FMC are sufficient to hear and determine the proceedings; and

(d) the interests of the administration of justice.

In *Charles v Fuji Xerox Australia Pty Ltd*,[368] Katz J ordered that the matter be transferred from the Federal Court to the FMC. Having regard to the matters set out in s 32AB(6) of the Federal Court Act his Honour stated that:

> In particular, I am satisfied that the resources of that Court are sufficient to hear and determine the proceeding and to do so sooner than could be done by me. I am also satisfied that the parties will both benefit by having the proceeding heard by that Court, not only by reason of an earlier determination of the proceeding, but also by reason of reduced exposure to costs in that Court as compared to this Court.[369]

Similarly, in *Travers v New South Wales*,[370] Lehane J ordered that the matter be transferred from the Federal Court to the FMC saying that, having regard to the matters set out in s 32AB(6) of the Federal Court Act, he was satisfied that the resources of the FMC were sufficient to hear and determine the

[362] Federal Court Rules, Rule 27.11 (formerly O 82 r 5).
[363] Federal Court Rules, Rule 1.40 (formerly O 82 r 6).
[364] Federal Court Rules, Rule 27.12(3)(a) (formerly O 82 r 7(a)).
[365] Federal Court Rules, Rule 27.12(3)(b) (formerly O 82, r 7(b)).
[366] Federal Court Rules, Rule 27.12(3)(c) (formerly O 82, r 7(c)).
[367] Federal Court Rules, Rule 27.12(3)(d) (formerly O 82, r 7(d)).
[368] (2000) 105 FCR 573.
[369] (2000) 105 FCR 573, 583 [47].
[370] [2000] FCA 1565.

matter and that the interests of justice would be served by ordering the transfer.[371]

A matter cannot be transferred, however, if the applicant is seeking damages and the order for damages is, or is likely to be, greater than the jurisdictional limit of the FMC.[372]

6.15.2 Transfer of matters from the FMC to the Federal Court

Substantially mirroring s 32AB of the Federal Court Act, s 39 of the Federal Magistrates Act provides that the FMC can, by request of a party or of its own motion,[373] transfer a proceeding to the Federal Court. Rule 8.02 of the FMC Rules provides that, unless the Court otherwise orders, a request for transfer must be made on or before the first court date for the proceeding[374] and, unless the Court otherwise orders, the request must be included in a response or made by application supported by affidavit.[375] Under s 39(3) of the Federal Magistrates Act, in determining whether to transfer a proceeding to the Federal Court, the FMC is required to have regard to the following matters:

(a) the matters set out in r 8.02(4) of the FMC Rules, namely:

- whether the proceeding is likely to involve questions of general importance, such that it would be desirable for there to be a decision of the Federal Court on one or more of the points in issue;[376]
- whether, if the proceeding is transferred, it is likely to be heard and determined at less cost and more convenience to the parties than if the proceeding is not transferred;[377]
- whether the proceedings will be heard earlier in the FMC;[378]
- the availability of particular procedures appropriate for the class of proceeding;[379] and
- the wishes of the parties;[380]

(b) whether proceedings in respect of an associated matter are pending in the Federal Court;

(c) whether the resources of the FMC are sufficient to hear and determine the proceeding; and

(d) the interests of the administration of justice.

In *Nizzari v Westpac Financial Services*,[381] Driver FM ordered that the matter be transferred from the FMC to the Federal Court. In his decision, Driver FM observed that:

---

[371] [2000] FCA 1565, [21].
[372] *Ogawa v Federal Magistrate Phipps* (2006) 151 FCR 311, 313 [4].
[373] FMC Rules, r 8.02(1).
[374] Rule 8.02(2).
[375] Rule 8.02(3).
[376] Rule 8.02(4)(a).
[377] Rule 8.02(4)(b).
[378] Rule 8.02(4)(c).
[379] Rule 8.02(4)(d).
[380] Rule 8.02(4)(e).

> The mere fact that issues of importance are raised does not necessarily mean that the matter should be transferred to the Federal Court.[382]

However, his Honour was satisfied that the issues raised by the respondent were issues of significance that should be 'dealt with by a superior court at first instance'.[383] His Honour further noted that the matter would be heard more quickly if it was transferred to the Federal Court,[384] though there was not likely to be a significant cost difference for the parties.[385]

Similarly, in *Mason v Methodist Ladies College*,[386] Lucev FM was satisfied that the matter should be transferred from the FMC to the Federal Court on the basis that the matter concerned the *Disability Standards for Education 2005* (Cth) and there were no cases on disability discrimination in education relevant to the application of that Act.[387] Federal Magistrate Lucev also noted that was this was a matter in which there were significant human rights issues at stake in relation to disability discrimination and that there were relevant international human rights conventions which may be called in aid to interpret both the AHRC Act and the DDA, read in conjunction with the *Disability Standards for Education 2005* (Cth).[388] For these reasons, Lucev FM was satisfied that the matter involved questions of general importance.[389]

In *King v Office National Ltd*[390] Smith FM transferred the matter from the FMC to the Federal Court for the following reasons:

- the case was going to place a strain on the resources of the FMC – the case was complex, there were likely to be a number of interlocutory hearings and the ultimate hearing was likely to be ten days; and
- his Honour was not persuaded that he would be able to case manage the matter anymore expeditiously than the Federal Court nor that the costs would be any less if the matter remained in the FMC.

Accordingly, Smith FM concluded that the case was better suited for case-management in the Federal Court and it was in the interests of the administration of justice that the matter be transferred.[391]

In *Clarke v West Australian Newspapers Ltd*[392] Raphael FM ordered that the matter be transferred from the Federal Magistrates Court to the Federal Court of Australia.

---

[381] [2003] FMCA 255.
[382] [2003] FMCA 255, [8].
[383] [2003] FMCA 255, [12]. Cf the views expressed by the Federal Court in the cases referred to in 6.15.1 above.
[384] [2003] FMCA 255, [12].
[385] [2003] FMCA 255, [11].
[386] [2009] FMCA 570.
[387] [2009] FMCA 570, [15].
[388] [2009] FMCA 570, [11].
[389] [2009] FMCA 570, [15].
[390] [2007] FMCA 1840, [13]-[14].
[391] [2007] FMCA 1840, [15]. See the decision of Driver FM in *Warner Music Australia Pty Ltd v Swiftel* [2005] FMCA 627 for an example of a case where an application for a transfer of proceedings to the Federal Court was rejected.
[392] [2010] FMCA 502.

Raphael FM considered whether the matter would be heard more quickly or at less cost if transferred to the Federal Court and found that it would not. However, Raphael FM considered the fact that both parties wished for the case to be transferred to be a significant matter weighing in favour of transferring the matter. His Honour stated:

> Courts are provided so that society's disputes can be resolved in a peaceable and effective manner. Governments in Australia and elsewhere have chosen to make very significant charges for the provision of this service. The preferences of parties who are required to pay for that service should be respected, if not always indulged.[393]

Raphael FM also accepted the arguments of the parties that the matter was complex, that it involved issues of law which may not have been thoroughly tested in previous decisions and that those matters of law are of considerable importance to the community. Raphael FM found that these matters weighed very heavily on any decision to transfer the proceedings.[394]

6.16 Appeals from the FMC to the Federal Court

6.16.1 Nature of appeals

Appeals from decisions of the FMC in unlawful discrimination cases are heard either by a single judge of the Federal Court or a Full Court of the Federal Court.[395]

In relation to the conduct of an appeal by the Federal Court from a decision of the FMC, Marshall J stated in *Low v Commonwealth*:[396]

> An appeal from a judgment of the Federal Magistrates Court is not conducted de novo, nor is it an appeal in the strict sense. Like appeals from judgments of single judges of this Court, it is conducted as a re-hearing of the initial application in the sense that the parties are able to supplement the evidence before the Court at first instance by seeking to adduce additional material which may be admitted into evidence, having regard to the dictates of justice in the particular circumstances. The Court is also able to draw inferences of fact based on the evidence before the primary judge.[397]

Despite the broader nature of appeals conducted by way of re-hearing it will only be in exceptional circumstances that an appellant will be permitted to raise a point on appeal that was not raised at first instance. This was confirmed by French J in *WAJR v Minister for Immigration and Multicultural & Indigenous Affairs*.[398] In this case, his Honour found that the circumstances in

---

[393] [2010] FMCA 502 [13].
[394] [2010] FMCA 502 [9].
[395] The Federal Court is given jurisdiction to hear such appeals by s 24 of the *Federal Court Act 1976* (Cth). The Court may be constituted by a single Judge or as a Full Court: s 14(1). Note, however, that there is only one level of appeal available at the Federal Court from decisions of the FMC: s 24 (1AAA) provides that there is no further right of appeal from a judgment of a single judge of the Federal Court exercising the appellate jurisdiction of the Court in relation to an appeal from the FMC.
[396] [2001] FCA 702. This case has been cited with approval in cases involving appeals from the decision of a Federal Magistrate to the Federal Court under the *Migration Act 1958* (Cth): *George v Deputy Commissioner of Taxation* (2005) 212 ALR 495, 497-498 [11]-[12]; *MZWDG v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 497, [29].
[397] [2001] FCA 702, [3]. See also *Chung v University of Sydney* [2002] FCA 186, [40].
[398] (2004) 204 ALR 624, 628-629 [18].

the case before him were exceptional because the appellant was unrepresented and seriously disadvantaged when he formulated his case before the Federal Magistrate and the new grounds that had been formulated by counsel for the appellant were coherent and were not objected to by the respondent.[399] His Honour therefore granted the appellant leave to amend his grounds of appeal to raise factual issues that were not raised before the Federal Magistrate.[400]

6.16.2 Extension of time for filing appeals

(a) Principles to be applied

An appeal against a final decision of a Federal Magistrate to the Federal Court or against a final decision of a single judge of the Federal Court to the Full Court of the Federal Court must be filed within 21 days after the date on which the judgment the subject of the appeal was given.[401] The Federal Court Rules give the Federal Court the power to give leave to file an appeal out of time[402].

In *Gauci v Kennedy*,[403] Collier J applied the principles set out by Wilcox J in *Hunter Valley Developments Pty Ltd v Cohen*[404] when determining an application for extension of time to file an appeal. Collier J summarised the principles as follows:

> 1. applications for an extension of time are not to be granted unless it is proper to do so; the legislated time limits are not to be ignored. The applicant must show an 'acceptable explanation for the delay'; it must be 'fair and equitable in the circumstances' to extend time
>
> 2. action taken by the applicant, other than by way of making an application for review, is relevant to the consideration of the question whether an acceptable explanation for the delay has been furnished
>
> 3. any prejudice to the respondent in defending the proceedings that is caused by the delay is a material factor militating against the grant of an extension
>
> 4. however, the mere absence of prejudice is not enough to justify the grant of an extension
>
> 5. the merits of the substantial application are to be taken into account in considering whether an extension of time should be granted.[405]

Collier J granted the applicant an extension of time to file his notice of motion seeking leave to appeal Jarrett FM's decision to summarily dismiss his discrimination application. Her Honour held that whilst the applicant's reasons

---

[399] (2004) 204 ALR 624, 629 [19].
[400] (2004) 204 ALR 624, 629 [19].
[401] Federal Court Rules 36.01 and 36.03 (formerly O 52 r 15(1)(a)). Section 24(1)(d) of the Federal Court Act gives the Federal Court the jurisdiction to hear and determine appeals against the decision of a Federal Magistrate and s 24(1)(a) of the Federal Court gives the Court jurisdiction to hear an appeal against the decision of a single judge of the Federal Court.
[402] Federal Court Rules, Rule 36.05 (formerly O 52 r15(2))
[403] [2006] FCA 869.
[404] (1984) 3 FCR 344.
[405] *Gauci v Kennedy* [2006] FCA 869, [21].

for the delay were 'barely adequate', the second respondent had not suffered any 'substantial' prejudice as a result of the delay, and the case before Jarrett FM could not be said to be 'so very clear' as to justify summary dismissal.[406]

(b) Examples of cases in which applications for leave to appeal out of time have been made

In *Horman v Distribution Group Ltd*,[407] Emmett J considered an application for leave to file and serve a notice of appeal out of time. His Honour stated that the delay in filing the applicant's notice of appeal was due to miscommunication between the applicant's Senior and Junior Counsel. His Honour stated that the events surrounding the appeal 'indicate a sorry state of affairs so far as the legal representation of the applicant is concerned.'[408] His Honour said the circumstances went 'well beyond error', suggesting rather 'a lack of diligence on the part of the lawyers representing the applicant'.[409]

Emmett J found that it was not just in all the circumstances to extend the time limit to serve and file the notice of appeal. Of particular concern to his Honour was the absence of any attempt on the part of those advising the applicant to intimate to the respondent an intention to appeal. Nevertheless, his Honour went on to state:

> If I were satisfied that there were some reasonable prospect of success on appeal and of the bona fides of the applicant in seeking leave to file the notice of appeal out of time, it may have been appropriate to grant an indulgence to the applicant's lawyers.[410]

In *Kennedy v ADI Ltd*,[411] Marshall J refused to grant the applicant leave to file and serve a notice of appeal out of time on the basis that the applicant had not adduced an acceptable reason for her delay, the length of the delay was not short and it was not in the interests of justice for leave to be granted as the respondent would be forced to defend a proceeding with 'negligible' prospects of success.[412]

However his Honour observed that, although ordinarily there should be some acceptable reason for the delay

> there may … be circumstances in which it will be in the interests of justice to extend time despite the lack of an acceptable reason for the delay … As was said by a Full Court *WAAD v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 399 at [7]: 'where the delay is short and no injustice will be occasioned to the respondent, justice will usually be done if the extension of time is granted'.[413]

In *Jandruwanda v University of South Australia*,[414] Selway J granted the applicant an extension of time in which to file a notice of motion seeking leave to appeal from a decision summarily dismissing the applicant's claim. Selway

[406] [2006] FCA 869, [29]-[30], [44].
[407] [2002] FCA 219.
[408] [2002] FCA 219, [22].
[409] [2002] FCA 219, [24].
[410] [2002] FCA 219, [25].
[411] [2002] FCA 1603.
[412] [2002] FCA 1603, [11], [13].
[413] [2002] FCA 1603, [11]-[12].
[414] [2003] FCA 1456.

J took into account that the applicant was unrepresented and may not have been aware that it was necessary to seek leave in order to appeal from the Federal Magistrate's summary dismissal decision.[415]

In *Foster v Queensland*,[416] an application for leave to appeal was made 14 days out of time. Greenwood J held that three important considerations justified granting an extension of time in that case: first that there were a number of applicants; second that the applicants lived in a remote community where 'the orthodoxy of access and communication accepted within concentrated metropolitan communities does not apply'; and third that the issues had to be explained to each applicant and instructions taken from each individual resident in a remote community.[417]

6.17 Approach to Statutory Construction of Unlawful Discrimination Laws

Remedial legislation, such as the RDA, SDA, DDA and ADA, which is designed to prevent discrimination and protect human rights should be construed beneficially and not narrowly.[418] Furthermore, in construing such legislation the courts have a special responsibility to take account of and give effect to the objects and purposes of such legislation.[419] In accordance with this principle, exemptions and other provisions which restrict rights conferred by such legislation are strictly construed by Australian courts.[420]

It is also a well established principle of the common law that statutes are to be interpreted and applied, as far as their language permits, so as to be in conformity with the established rules of international law and in a manner which accords with Australia's international treaty obligations.[421] The courts have also accepted that the meaning of provisions in a statute implementing a convention or conventions is to be ascertained by reference to the relevant provisions of that convention or those conventions.[422] This is particularly

---

[415] [2003] FCA 1456, [13]-[14].
[416] [2006] FCA 1680.
[417] [2006] FCA 1680, [52]. See also *Penhall-Jones v State of NSW (Ministry of Transport)* [2008] FCA 1122.)
[418] *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J, Deane J agreeing), 372 (Brennan J), 394 (Dawson and Toohey JJ), 406-407 (McHugh J); *Australian Iron & Steel v Banovic* (1989) 168 CLR 165, 196-7 (McHugh J); *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 332 [151] (Kirby J); *New South Wales v Amery* (2006) 230 CLR 174, 215 [138] (Kirby J); *Baird v Queensland* (2006) 156 FCR 451, 468 [60] (Allsop J, Spender J agreeing).
[419] *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J); *IW v City of Perth* (1997) 191 CLR 1, 14 (Brennan CJ and McHugh J), 22-23 (Gaudron J), 27 (Toohey), 39 and 41-42 (Gummow J), 58 (Kirby J); *X v Commonwealth* (1999) 200 CLR 177, 223 [147] (Kirby J); *New South Wales v Amery* (2006) 230 CLR 174, 215 [138] (Kirby J). See also s 15AA of the *Acts Interpretation Act 1901* (Cth).
[420] *X v Commonwealth* (1999) 200 CLR 177, 223 [146]-[147] (Kirby J); *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 333 [151] and footnotes 168-169 (Kirby J). This approach has been applied to Part II, Division 4 of the SDA in *Gardner v All Australia Netball Association Ltd* (2003) 197 ALR 28, 32 [19], 34 [23]-[24]; *Ferneley v Boxing Authority of New South Wales* (2001) 115 FCR 306, 325 [89].
[421] *Jumbunna Coal Mine NL v Victorian Coalminers' Association* (1908) 6 CLR 309, 363 (O'Connor J); *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 384 [97] (Gummow and Hayne JJ). See also, D Pearce and R Geddes, *Statutory Interpretation in Australia*, (6th ed, 2006), [5.16].
[422] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 264-265 (Brennan J); *Gerhardy v Brown* (1985) 159 CLR 70, 124 (Brennan J); *Qantas v Christie* (1998) 193 CLR 280, 303-305 [69]-[72] (McHugh J), 332-333 [151] (Kirby J). It has been held that approach is not confined in its application to ambiguous

relevant in the case of unlawful discrimination laws which implement, in part, conventions such as ICERD, CEDAW, the ICCPR and ICESCR.

In interpreting the meaning of relevant convention provisions, it is necessary to refer to the rules applicable to the interpretation of treaties, particularly the *Vienna Convention on the Law of Treaties*[423] ('the Vienna Convention'). Recourse may also be had to their interpretation by expert international bodies responsible for considering States Parties' implementation of human rights treaties.[424] Such bodies are generally responsible for considering reports prepared by States Parties on the legislative, judicial, administrative or other measures adopted to give effect to their obligations and have the power to make 'suggestions and general recommendations' based on that material.[425] The General Recommendations made by those committees are interpretive comments which further develop analysis of the relevant convention provisions and are aimed at guiding States Parties as to the best ways in which to implement their human rights obligations at the domestic level. In addition, some expert committees are also responsible for considering communications from individuals, or groups of individuals claiming to be victims of a violation of their convention rights by a State Party.

While the General Recommendations and decisions made by expert committees are not binding on Australian courts, they are significant, being those of a committee composed of experts from a wide range of countries.[426] It has been suggested that decisions of bodies such as the UN Human Rights Committee in relation to communications brought under the ICCPR are of 'considerable persuasive authority'[427] or 'highly influential, if not authoritative'.[428] Australian courts have accepted that guidance as to the meaning and effect of international conventions may be gathered from the writings and decisions of such bodies.[429]

---

statutory provisions: *X v Commonwealth* (1999) 200 CLR 177, 223 [147] (Kirby J); *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 333 [151] and footnotes 168-169 (Kirby J).

[423] Opened for signature 10 May 1969, 1155 UNTS 331(entered into force 27 January 1980). See D Pearce and R Geddes, *Statutory Interpretation in Australia*, (6th ed, 2006), [2.16] and the cases cited therein. In *AB v Registrar of Births, Deaths & Marriages* (2007) 162 FCR 528, 550 [80] Kenny J (with whom Gyles J agreed) had regard to the Vienna Convention when interpreting s 9(10) of the SDA.

[424] For example, the CEDAW Committee, which considers reports by States Parties on the legislative, judicial, administrative or other measures adopted to give effect to CEDAW and the progress made by States Parties in that respect. The CERD Committee has a similar responsibility for monitoring States Parties' progress in implementing ICERD.

[425] See, for example, in relation to the CEDAW Committee, arts 18 and 21(1) of CEDAW. In relation to the CERD Committee, see art 9 of ICERD.

[426] H Burmester, 'Impact of Treaties and International Standards' (1995) 17 *Sydney Law Review* 127, 145.

[427] *Nicholls v Registrar Court of Appeal* [1998] 2 NZLR 385, 404 (Eichelbaum CJ). See also R Rishworth 'The Rule of International Law' in G Hushcroft and R Rishworth, *Litigating Rights: Perspectives from Domestic and International Law* (2002), 267-279, 275.

[428] E Evatt 'The Impact of International Human Rights on Domestic Law' in Hushcroft and Rishworth above n 388, 281-303, 295. See also S Joseph et al, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, 2004), 24 [1.51].

[429] *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 392 (Mason CJ), 396-397 and 399-400 (Dawson J), 405 (Toohey J), 416 (Gaudron J), 430 (McHugh J); *Somaghi v Minister for Immigration, Local Government & Ethnic Affairs* (1991) 31 FCR 100, 117 (Gummow J); *Commonwealth v Hamilton* (2000) 108 FCR 378, 388 (Katz J); *Commonwealth v Bradley* (1999) 95 FCR 218, 237 (Black CJ). Note also *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 294-295 (Lord Scarman). For references to the jurisprudence of human rights treaty bodies see *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42 (Brennan J, Mason CJ and McHugh J agreeing*); Dietrich v The Queen* (1992) 177 CLR 292, 307 (Mason CJ and McHugh J); *Johnson v Johnson* (2000) 174 ALR 655, 665 [38] (Kirby J); *Commonwealth v Bradley* (1999) 95 FCR 218, 237 (Black CJ); *Commonwealth v Hamilton* (2000) 108 FCR 378, 387

In addition to the decisions of expert committees courts have also had regard to preparatory work in relation to conventions. In *AB v Registrar of Births, Deaths and Marriages*[430] Kenny J (with whom Gyles J agreed) noted that pursuant to the Vienna Convention, recourse may be had to the preparatory work of a treaty and the circumstances of its conclusion and had regard to preparatory work done in relation to CEDAW when considering whether a provision in the SDA gave effect to the Convention for the purposes of s 9(10) of the SDA.[431]

6.18 Standard of Proof in Discrimination Matters

The complainant bears the onus of proof in establishing a complaint of unlawful discrimination. The application of the standard of proof in relation to allegations of discrimination has been the subject of frequent discussion in the case law. In particular, the courts have considered the manner in which the test in *Briginshaw v Briginshaw*[432] (‘*Briginshaw’*) should be applied. In *Briginshaw,* Dixon J stated:

> when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitively developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved. 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 are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters ‘reasonable satisfaction’ should not be produced by inexact proofs, indefinite testimony, or indirect inferences.[433]

The essence of this passage is that, in cases involving more serious allegations (or allegations which are more unlikely or carry more grave consequences), evidence of a higher probative value is required for a decision-maker to attain the requisite degree of satisfaction.[434] It is clear from

---

[36] (Katz J); *Minister for Immigration and Multicultural & Indigenous Affairs v Al Masri* (2003) 126 FCR 54. A number of internet links that may be of assistance in researching international human rights and discrimination material can be found at <http://www.humanrights.gov.au/about/links/index.html#legal>.

[430] (2007) 162 FCR 528.

[431] (2007) 162 FCR 528, 553-554 [88]-[90].

[432] (1938) 60 CLR 336.

[433] (1938) 60 CLR 336, 361-362.

[434] See, for example, *X v McHugh (Auditor-General for the State of Tasmania)* [1994] HREOCA 15 (extract at (1994) EOC 92-623): ‘any allegation requires that degree of persuasive proof as is appropriate to the seriousness of the allegation’.

Dixon J's statement that there is no 'higher standard of proof'.[435] Similarly, it would not appear to be strictly correct to speak of 'invoking', or 'resorting to', the 'principle in *Briginshaw*':[436] the principle is to be applied in all cases.

In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*,[437] Mason CJ, Brennan, Deane and Gaudron JJ, after reviewing the authorities, made the following statement about the *Briginshaw* principle:

> The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains even so where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found'. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.[438]

Varying approaches have been taken to the application of the *Briginshaw* principle in previous RDA,[439] SDA[440] and DDA[441] cases.[442]

However, the application of *Briginshaw* in discrimination matters appears to have now been settled by the Full Federal Court in *Qantas Airways Ltd v Gama*[443] ('*Gama*'). This was an appeal and a cross-appeal against the decision of Raphael FM in relation to a race and disability discrimination

---

[435] See *Rejfek v McElroy* (1965) 112 CLR 517, 521-522 (Barwick CJ). This terminology is, however, sometimes used. See, for example, *Sharma v Legal Aid Queensland* [2001] FCA 1699, [40].

[436] As the Full Federal Court appears to do, for instance, in *Victoria v Macedonian Teachers' Association of Victoria Inc* (1999) 91 FCR 47, 50-51.

[437] (1992) 110 ALR 449.

[438] (1992) 110 ALR 449, 449-450 (footnotes omitted).

[439] *Victoria v Macedonian Teachers' Association of Victoria Inc* (1999) 91 FCR 47; *D'Souza v Geyer* [1996] HREOCA 4; *Ebber v Human Rights & Equal Oppportunity Commission* (1995) 129 ALR 455; *Sharma v Legal Aid Queensland* [2001] FCA 1699, [62]; *Sharma v Legal Aid Queensland* [2002] FCAFC 196, [40] and *Batzialas v Tony Davies Motors Pty Ltd* [2002] FMCA 243, [87].

[440] *Harris v Hingston* [1992] HREOCA 20; *Wiggins v Department of Defence – Navy* [1994] HREOCA 15 (extract at (1994) EOC 92-623); *Correia v Juergen Grundig* [1995] HREOCA 19; *Patterson v Hookey* [1996] HREOCA 35; *Dobrovsak v AR Jamieson Investments Pty Ltd* [1995] HREOCA 32 (extract at (1996) EOC 92-794); *McAlister v SEQ Aboriginal Corporation* [2002] FMCA 109, [39], [70]; *Wattle v Kirkland* [2001] FMCA 66, [34], [35]; *Kirkland v Wattle* [2002] FCA 145, [5]; *Wattle v Kirkland (No.2)* [2002] FMCA 135, [45]; *Font v Paspaley Pearls Pty Ltd* [2002] FMCA 142, [121], [127]; *Daley v Barrington* [2003] FMCA 93, [28]; *Fenton v Hair & Beauty Gallery Pty Ltd* [2006] FMCA 3; *Ilian v ABC* (2006) 236 ALR 168.

[441] *X v McHugh (Auditor-General for the State of Tasmania)* (1994) 56 IR 248; *Penhall-Jones v New South Wales (No 2)* [2006] FMCA 927, [122]; *Applicant N v Respondent C* [2006] FMCA 1936, [28]-[29], [31]; *Wiggins v Department of Defence – Navy* (2006) 200 FLR 438, 451 [52]; *Tyler v Kesser Torah College* [2006] FMCA 1, [100]; *Hollingdale v North Coast Area Health Service* [2006] FMCA 5, [138].

[442] For discussion see L De Plevitz, 'The *Briginshaw* "Standard of Proof" in Anti-Discrimination Law: "Pointing With a Wavering Finger", (2003) 27 *Melbourne University Law Review*, 308; Jonathon Hunyor, 'Skin-deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25 *Sydney Law Review* 537.

[443] [2008] FCAFC 69. The Commission was granted leave to appear as intervener in the appeal and its submissions are available at <Hhttp://www.humanrights.gov.au/legal/submissions_court/intervention/qantas_v_gama.htmlH> and <http://www.humanrights.gov.au/legal/submissions_court/intervention/gama.html>.

complaint. Justice Branson[444] (French and Jacobson JJ agreeing)[445] outlined a number of guiding principles in relation to the application of *Briginshaw* and the standard of proof which, in essence, confirms that discrimination complaints should be approached no differently to other civil matters. In particular, courts should not approach discrimination matters with a presumption that they are of such 'seriousness' that a higher standard of evidence is required.

Her Honour observed that the use of expressions such as 'the *Briginshaw* test' or 'the *Briginshaw* standard' should be avoided 'because of its tendency to mislead'.[446] Rather, s 140 of the *Evidence Act 1995* (Cth) sets out the rules governing the standard of proof in all civil matters, including discrimination cases[447] and confirms that the standard of proof is the balance of probabilities.[448]

Section 140 provides as follows:

> 140 Civil proceedings: standard of proof
>
> (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
>
> (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
>
> (a)the nature of the cause of action or defence; and
>
> (b)the nature of the subject-matter of the proceeding; and
>
> (c)the gravity of the matters alleged.

In deciding the strength of the evidence required to satisfy the court to the requisite standard of proof, the court has to take into account the three matters specifically referred to in s 140(2).

First, the court must have regard to the 'nature of the cause of action'.[449] Her Honour noted that as the gravity of the matters alleged is the third matter referred to in s 140(2) 'it may be assumed that this is not the primary concern of the reference to the nature of the cause of action'.[450]

Second, the court must take account of the 'subject matter of the proceeding'.[451]

Third, the court must consider the 'gravity of the matter alleged'.[452]

In addition to the matters referred to in s 140(2), Branson J stated that the court may also take into account any other matter relevant to determining whether a case has been proven to the requisite standard. Her Honour gave the following examples of other such relevant matters:

---

[444] [2008] FCAFC 69, [122]-[139].
[445] [2008] FCAFC 69, [110].
[446] [2008] FCAFC 69, [123].
[447] [2008] FCAFC 69, [127], [132].
[448] [2008] FCAFC 69, [132].
[449] Evidence Act, s 140(2)(a).
[450] [2008] FCAFC 69, [133].
[451] Evidence Act, s 140(2)(b).
[452] Evidence Act, s 140(2)(c).

- the inherent unlikelihood, or otherwise, of the occurrence of the matter of fact alleged; and
- 'the long standing common law rule that evidence is to be weighed according to the proof which it was in the power of one party to produce and the power of other party to contradict'.[453]

Her Honour summed up the position in respect of the application of the standard of proof as follows:

> in my view, for the reasons given above, references to, for example, 'the *Briginshaw* standard' or 'the onerous *Briginshaw* test' and, in that context, to racial discrimination being a serious matter not lightly to be inferred, have a tendency to lead a trier of facts into error. The correct approach to the standard of proof in a civil proceeding in a federal court is that for which s 140 of the Evidence Act provides. It is an approach which recognises, adopting the language of the High Court in *Neat Holdings*, that the strength of the evidence necessary to establish a fact in issue on the balance of probabilities will vary according to the nature of what is sought to be proved - and, I would add, the circumstances in which it is sought to be proved.[454]

The decision in *Gama* therefore confirms that not all cases of racial discrimination will be of such gravity or seriousness as to require evidence of a higher persuasive value and it is necessary to consider the facts of each case to determine what evidence is necessary to satisfy the court on the balance of probabilities. The decision also confirms that the appropriate starting point for applying the standard of proof is s 140 of the Evidence Act, rather than the decision in *Briginshaw*.

Whilst the reasoning in *Gama* was primarily concerned with a complaint of racial discrimination, the reasoning is equally applicable to complaints of disability, age or sex discrimination. For example, in *Penhall-Jones v State of NSW*,[455] the reasoning of the Full Federal Court was applied by Raphael FM to a disability discrimination case.[456]

6.19 Contempt of Court

If a person disobeys a court order the Federal Court has the power to punish that person for contempt of court. In *Jones v Toben*[457] the Court's power to punish contempt was used to penalise Dr Frederick Toben for repeatedly disobeying court orders not to publish material that contravened s18C of the RDA.

In *Jones v Toben*[458] Justice Lander declared Dr Toben was guilty of wilful and contumacious contempt of court on 24 occasions by publishing anti-Semitic material in contravention of orders made by Justice Branson in 2002 and an

[453] [2008] FCAFC 69, [138].
[454] [2008] FCAFC 69, [139].
[455] [2008] FMCA 832.
[456] [2008] FMCA 832, [5]-[12].
[457] [2009] FCA 354.
[458] [2009] FCA 354.

undertaking by Dr Toben to Justice Moore in 2007 that Dr Toben would comply with Justice Branson's orders.[459]

Section 31(1) of the *Federal Court of Australia Act 1976* (Cth) provides that the Federal Court has the same power to punish contempt as the High Court. In his review of the authorities on contempt, Justice Lander stated:

> The law recognises a distinction between civil and criminal contempts. A civil contempt usually involves disobedience to a court order or a breach of an undertaking. On the other hand, a criminal contempt is committed where there is contempt in the face of the court or an interference with the administration of justice.[460]

His Honour noted that a civil contempt may be classed as a criminal contempt if there has been a contumacious defiance of the Court's order or an undertaking given to the Court.[461]

His Honour stated that Dr Toben's conduct was 'one of publically expressed deliberate and calculated disobedience to the orders made by this Court and the undertakings given to the court'[462] His Honour concluded:

> The Courts have held, but [Dr Toben's] conduct shows he does not accept, that the freedom of speech citizens of this country enjoy does not include the freedom to publish material calculated to offend, insult or humiliate or intimate people because of their race, colour or national or ethnic origin. His conduct has been proved to be wilful and contumacious because he has steadfastly refused to comply with a law of the Commonwealth Parliament and refused to recognise the authority of this court.[463]

In a separate judgment on the question of the appropriate penalty to be imposed for 24 counts of contempt Justice Lander observed that the applicant was entitled to expect that the Court would do what is necessary to require Dr Toben to comply with the orders restraining him from continuing to unlawfully publish material that is likely to offend, insult, humiliate or intimidate people or a group of people because of their race or nationality or ethnic origin.[464] His Honour stated:

> The Court has the duty of ensuring that its orders are complied with. If its orders can be disobeyed with impunity, public confidence in the administration of justice will be undermined. There is therefore not only Mr Jones' private interest that must be considered but the public interest in protecting 'the effective administration of justice by demonstrating that the court's orders will be enforced': *AMIEU v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 107.

---

[459] For a discussion of the decision of Branson J in *Jones v Toben* [2002] FCA 1150 see 3.4.6. It is noted that Justice Lander rejected Dr Toben's argument that the orders of Justice Branson should be read subject to the ongoing application of the exemptions in s 18D of the RDA. This was because the issue in contempt proceedings was whether Dr Toben complied with Justice Branson's orders. Justice Lander found the application of s18D was irrelevant to that inquiry and, in any event, no evidence was tendered to bring Dr Toben within the exemption in s 18D: *Jones v Toben* [2009] FCA 354 [93], [95], [97],[101].

[460] [2009] FCA 354 [68].

[461] [2009] FCA 354,[71] citing *Mudginberri Station* [1986] HCA 46; 161 CLR 98.

[462] [2009] FCA 354, [298].

[463] [2009] FCA 354, [300].

[464] *Jones v Toben* (No.2) [2009] FCA 477 [75].

His Honour concluded that a sentence of imprisonment, although a sentence of last resort, was required because of the seriousness of Dr Toben's conduct and his repeated refusal to recognise the authority of the Court.[465]

Justice Lander made orders that Dr Toben pay the applicant's costs on a party and party basis and be imprisoned for a period of three months.[466] Dr Toben appealed to the Full Federal Court against the orders of Justice Lander. At the time of writing, the outcome of this appeal had not been determined.

6.20 Miscellaneous Procedural and Evidentiary Matters

6.20.1 Request for copy of transcript

In *Dranichnikov v Department of Immigration & Multicultural Affairs*,[467] Baumann FM dismissed an application for review of a refusal by a Registrar of the FMC to provide the applicant free of charge with a transcript of the original hearing of unlawful discrimination proceedings that he had appealed against. Baumann FM held that the decision to refuse to provide the transcript made by the Registrar was not a decision made pursuant to any delegated power in s 102 of the Federal Magistrates Act.[468] As a result, his Honour found that the decision was not reviewable under the relevant review provisions.[469]

His Honour noted that it is the policy of the FMC to provide a copy of the transcript without charge where an appellant can indicate that hardship would be suffered if required to pay for the transcript.

In *Bahonko v Sterjov*,[470] Gordon J made an order that the appellant be provided, at the expense of the Court, with the transcript of the evidence given by certain witnesses in the proceedings at first instance because the Full Court would need the transcript of evidence to determine the appeal and it 'would therefore facilitate the conduct of the Appeal if all participants in the Appeal were provided with a copy of the transcript of the evidence'.[471]

6.20.2 Unrepresented litigants

In *Barghouthi v Transfield Pty Ltd*[472] ('*Barghouthi*'), Hill J considered the duty of the Federal Court when dealing with an unrepresented litigant. The proceedings before Hill J involved an appeal brought by an unrepresented appellant (Mr Barghouthi) from a decision of the FMC. The FMC had dismissed Mr Barghouthi's application alleging unlawful discrimination. Whilst

[465] [2009] FCA 477,[84]-[89].
[466] [2009] FCA 477, [85], [90].
[467] [2002] FMCA 72.
[468] [2002] FMCA 72, [8]-[11]. Section 102 lists all of the powers of the FMC which may be exercised by a Registrar. The provision of a transcript to a party does not form part of that list.
[469] Section 104(2) of the Federal Magistrates Act provides that a party to proceedings in which a Registrar has exercised any of the powers under s 102 may apply to the FMC for review of that exercise of power.
[470] [2007] FCA 1556.
[471] [2007] FCA 1556, [5].
[472] (2002) 122 FCR 19.

finding that most of the appellant's submissions, both orally and in writing, were 'quite unhelpful',[473] not touching on the legal issues relevant to the appeal, his Honour stated:

> This does not, however, mean that the appellant can have no chance of success in these proceedings.
>
> Whilst this Court has a duty not to intervene in matters involving unrepresented litigants to such an extent that the impartial function of the Judge is compromised, a judge may intervene to protect the rights of an unrepresented litigant and to ensure that the proceedings are fair and just: see *Awan v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 594 per North J at [64], and *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438 per Sackville, North and Kenny JJ at [29].[474]

In considering Mr Barghouthi's submissions, Hill J conducted an assessment of whether the Federal Magistrate had made any errors of law that would require the appeal to succeed. The Federal Magistrate had found that there was no evidence which satisfied him that Mr Barghouthi was dismissed from his employment. Hill J disagreed with that conclusion, finding that there had in fact been a constructive dismissal, a conclusion that could only be reached 'by looking at all of the circumstances of the case'.[475] On that basis the appeal was allowed. The respondent was declared to have unlawfully dismissed the appellant and was required to pay compensation to the appellant the equivalent of one week's salary.

The decision in *Barghouthi* and the two cases referred to in *Barghouthi* - *Awan v Minister for Immigration & Multicultural & Indigenous Affairs*[476] and *Minogue v Human Rights & Equal Opportunity Commission*[477] - were cited and considered by Justice Bell in *Tomasevic v Travaglini* ('*Tomasevic*').[478] In *Tomasevic* Justice Bell also reviewed a number of other criminal and civil cases that had considered the level of assistance that judges should provide to unrepresented litigants. After reviewing the relevant authorities his Honour summarised the principles governing the assistance to be provided to unrepresented litigants as follows:

> Every judge in every trial, both criminal and civil, has an overriding duty to ensure the trial is fair. A fair trial is the only trial a judge can judicially conduct. The duty is inherent in the rule of law and the judicial process. Equality before the law and equal access to justice are fundamental human rights specified in the ICCPR. The proper performance of the duty to ensure a fair trial would also ensure those rights are promoted and respected.
>
> Most self-represented persons lack two qualities that competent lawyers possess — legal skill and ability, and objectivity. Self-represented litigants therefore usually stand in a position of grave disadvantage in legal proceedings of all kinds. Consequently, a judge has a duty to ensure a fair trial by giving self-represented litigants due

[473] (2002) 122 FCR 19, 23 [9].
[474] (2002) 122 FCR 19, 23 [9]-[10].
[475] (2002) 122 FCR 19, 25 [16].
[476] (2002) 120 FCR 1.
[477] (1999) 84 FCR 438.
[478] [2007] VSC 337.

> assistance. Doing so helps to ensure the litigant is treated equally before the law and has equal access to justice.
>
> The matters regarding which the judge must assist a self-represented litigant are not limited, for the judge must give such assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends on the particular litigant and the nature of the case. The touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed. The Family Court of Australia has enunciated useful guidelines on the performance of the duty.
>
> The judge cannot become the advocate of the self-represented litigant, for the role of the judge is fundamentally different to that of an advocate. Further, the judge must maintain the reality and appearance of judicial neutrality at all times and to all parties, represented and self-represented. The assistance must be proportionate in the circumstances — it must ensure a fair trial, not afford an advantage to the self-represented litigant.[479]

Although *Tomasevic* was a criminal matter, as Justice Bell's summary of the principles was, in part, based on decisions in unlawful discrimination matters and other civil matters in the Federal Court, the above principles are likely to be relevant to unlawful discrimination proceedings.

In *Bahonko v Sterjov*,[480] the Full Court of the Federal Court held that whilst courts should provide assistance to unrepresented litigants in an attempt to ensure that they are not disadvantaged this does not justify 'lack of proper attention to the interests of other parties'.[481] Further, the Court said:

> It provides no reason to permit procedural or other conduct outside the standards of behaviour reasonably expected when a litigant exercises a right of access to this Court and its processes…[482]

6.20.3 Representation by unqualified person

In *Groundwater v Territory Insurance Office*,[483] the applicant's father made an application to appear in proceedings on behalf of the applicant. The applicant claimed to be unable to attend court by reason of 'multiple chemical sensitivity' (a matter disputed by the respondents). Brown FM noted that s 46PQ of the what is now the AHRC Act allows for a person to be represented by a person who is not a barrister or solicitor 'unless the Court is of the opinion that it is inappropriate in the circumstances for the other person to appear'. His Honour noted that as a matter of general principle, 'the power to grant leave to an unqualified advocate is to be used sparingly' and had regard to the following (citing with approval *P & R (No.1)*[484] and *Damjanovic v Maley*[485]):

---

[479] [2007] VSC 337, [139]-[142].
[480] [2008] FCAFC 30.
[481] [2008] FCAFC 30, [6].
[482] [2008] FCAFC 30, [6]. See also *Bahonko v Nurses Board of Victoria* [2008] FCAFC 29, [10].
[483] [2004] FMCA 381.
[484] [2002] FMCAfam 65.
[485] (2002) 55 NSWLR 149.

- the complexity of the case. With minor or straightforward matters there is less difficulty with a lay person appearing to argue a case. The present matter raised a number of complicated issues;[486]
- the genuine difficulties of an unrepresented party, such as language difficulties or the unexpected absence of a legal adviser. The complication in the present case was that the difficulties faced by the applicant were the subject of dispute between the parties;[487]
- the absence of a duty to the Court and the unavailability of disciplinary measures in relation to lay advocates such that a lay advocate may not be able to provide balanced and informed submissions. Relevantly in this matter, the intended advocate 'fervently' believed his son's case, creating a 'real risk that he will not be able to provide balanced and informed submissions because of the fervour of his belief';[488]
- the need to protect the applicant and respondent from the actions of an unqualified (and uninsured) person, which may lead to expense being incurred as a result of incompetent advice and inept representation;[489] and
- the interests of justice. The general public has an interest in the effective, efficient and expeditious disposal of litigation in the courts and the best way of achieving this is if both parties to an action have qualified lawyers.[490]

In the circumstances, Brown FM granted a limited right of appearance to the applicant's father, for interlocutory matters to advise how the applicant proposed to conduct proceedings.[491]

In *Reynolds v Minister for Health & Anor* [492] the applicant sought leave under s 46PQ to be represented in the whole of the proceedings, including mediation, by an unqualified advocate. Lucev FM applied the principles set out in *Groundwater* and *Damjanovic* above as follows:

- the matter was a complex one, both factually and legally, which required a lawyer to adequately represent the applicant's interests[493];
- there were no genuine difficulties demonstrated by the applicant that were unusual for self-represented litigants and no evidence led in this regard[494];
- the applicant's advocate was not qualified in any relevant sense, was not insured in relation to the conduct of litigation, had no professional

[486] [2004] FMCA 381, [42].
[487] [2004] FMCA 381, [43].
[488] [2004] FMCA 381, [44].
[489] [2004] FMCA 381, [45].
[490] [2004] FMCA 381, [46].
[491] [2004] FMCA 381, [52].
[492] [2010] FMCA 843.
[493] Ibid [45].
[494] Ibid [46]-[56].

duty to the Court and was subject to none of the usual professional disciplinary consequences in the event of any misconduct[495];

- the FMC exercises concurrent jurisdiction with the Federal Court and ought to be "very chary at giving leave"[496];
- the effective litigation of matters as a general rule is best achieved by the parties employing lawyers, and given the complexity of this matter, it was not in the interests of justice to allow otherwise[497];
- the applicant's advocate was a potential witness in the case and could not be both advocate and witness[498].

Accordingly, Lucev FM refused to grant leave.

However, in *Portuguese Cultural Welfare Centre Inc v AMCA*[499]Lucev FM granted leave to the applicant's President to appear in interlocutory proceedings on behalf of the applicant.

In that case Lucev FM noted that although the legal claims were certain to be complex, this did not apply to this stage of proceedings. As to the genuine difficulties of an unrepresented party, the applicant was a voluntary association of limited means and faced difficulties in obtaining legal representation for these proceedings. Those difficulties were such that the applicant was best represented at this stage by its President. In this regard the Court observed that the lack of legal representation of the applicant was somewhat ameliorated by the assistance provided by the legal representation of the respondent. As to the interests of justice, her Honour considered that to deny the President leave to appear would have left the applicant unrepresented and without anyone to put submissions on its behalf. Furthermore, from a case management perspective, allowing the President leave to appear avoided the risk of a significant adjournment of the proceedings. Lucev FM concluded that although the discretion in s 46PQ must be exercised with caution, in all of the circumstances it was appropriate to grant leave.

6.20.4 Consideration of fresh evidence out of time

In *Hagan v Trustees of the Toowoomba Sports Ground Trust*,[500] the Federal Court on appeal declined to receive fresh evidence that the appellant sought to file in court on the first day of the hearing because it was not filed within the time prescribed by the Federal Court Rules.[501] No explanation was given for the late filing of the evidence and the Full Court was not satisfied that the further evidence would have made any difference to the outcome. The Federal Court held that although s 46PR provides that the Court is not bound by technicalities or legal forms, the principles relating to the reception of fresh

[495] Ibid [96].
[496] Ibid [101] citing *Damjanovic.*
[497] Ibid [103]-[105].
[498] Ibid [106]-[107].
[499] [2011] FMCA 144.
[500] (2000) 105 FCR 56.
[501] In *Hagan* the Court refers to O 36, r 6 of the Federal Court Rules as being the rule prescribing a time limit, however, it appears that the Court may have intended to refer to O 52 r 6 instead. Please consult the new Federal Court Rules in this regard.

evidence are designed to aid the administration of justice. Section 46PR was therefore of no use to the appellant in this situation.

6.20.5 Statements made at conciliation

In *Bender v Bovis Lend Lease Pty Ltd*,[502] the Court had to consider whether the applicant could rely upon affidavit evidence referring to statements made during a conciliation conducted by the Commission. McInnis FM concluded that to permit the applicant to rely upon such evidence would be 'inconsistent with the spirit and intent of the HREOC Act' (now known as the AHRC Act) and would:

> set an unfortunate precedent in relation to the conduct of conciliation proceedings to the extent that parties participating as directed in compulsory conference would be less likely to openly contribute to the course of the discussion if it were thought that subsequently affidavit material would be lodged in Court reciting the negotiations and or discussions.[503]

Compulsory conciliation should be held in private. Also, as the President is prohibited from reporting to the court anything said in the course of conciliation proceedings, it would be 'somewhat artificial and inconsistent'[504] to allow parties to refer to what may or may not have been said during a conciliation conference at a subsequent court hearing.

Similarly, in *Treacy v Williams*,[505] Connolly FM ruled that those parts of the applicant's affidavit evidence that raised matters discussed during a conciliation conference conducted by the Commission were inadmissible.[506]

6.20.6 Security for costs

In *Wyong-Gosford Progressive Community Radio Inc v Australian Communications & Media Authority*,[507] Cowdroy J reviewed the authorities in relation to security for costs (including decisions in relation to unlawful discrimination complaints) and summarised the matters considered by courts as follows:

> (1) the chances of success of the applicant and whether the claim is bona fide;
>
> (2) the risk that the applicant could not satisfy a costs order;
>
> (3) whether the application for security for costs has been promptly brought;
>
> (4) whether the application for security for costs is being used oppressively to deny an impecunious litigant access to the court;
>
> (5) whether the applicant's impecuniosity arises out of the act in respect of which relief is sought;

[502] (2003) 175 FLR 446.
[503] (2003) 175 FLR 446, 455 [34].
[504] (2003) 175 FLR 446, 455-56 [33].
[505] [2006] FMCA 1336.
[506] [2006] FMCA 1336, [14].
[507] [2006] FCA 625.

(6) whether there are third parties standing behind the applicant who are likely to benefit from the litigation and if so, whether they have proffered security for the costs of the litigation;

(7) whether an order for security for costs would frustrate the litigation;

(8) whether there are any public interest considerations to be taken into account; and

(9) any matters relevant to the discretion which are distinctive to the circumstances of the case.[508]

Factors 1, 2, 5 and 7-9 were factors first identified by Hill J in *Equity Access Ltd v Westpac Banking Corporation*[509] ('*Equity Access*') and are factors that have been applied by courts in discrimination proceedings.

In *Croker v Sydney Institute of TAFE*[510] ('*Croker*'), Bennett J had regard to the factors identified by Hill J in *Equity Access* and granted an application for security for costs against an appellant to an appeal against a decision involving an unlawful discrimination complaint. Her Honour made the order for security for costs because she found that:

- the applicant had not established good prospects of succeeding in the appeal;
- there was no real prospect that a costs order against him in these proceedings would be satisfied, particularly given the appellant's history of failing to pay costs orders;
- the appellant's financial situation did not arise from any claim he had against the respondent;
- the appellant did not identify any matters of public interest arising from the proceedings;
- the amount sought for security for costs ($5000) was reasonable; and
- the appellant had not provided an address for service that complied with former Order 7 rule 6(1) of the Federal Court Rules (now Rule 11.01).[511]

In *Elshanawany v Greater Murray Health Service*[512] ('*Elshanawany*'), a matter under the RDA, the respondent sought an order for security for costs of $96,000 under s 56 of the Federal Court Act. Jacobson J noted the well-established principle that ordinarily a natural person who has commenced litigation will not be required to provide security for the cost merely because that person is impecunious.[513] His Honour went on to reject the respondent's application for security for costs, applying *Equity Access*.[514] In doing so, his Honour did not identify any particular issues arising from the nature of discrimination proceedings that may require the court to depart from the

[508] [2006] FCA 625, [11].
[509] (1989) ATPR 40-972.
[510] [2003] FCA 942.
[511] [2003] FCA 942, [32], [35], [39]-[43]. See also *Clack v Collins (No. 1)* [2010] FCA 513.
[512] [2004] FCA 1272.
[513] [2004] FCA 1272, [111]. His Honour referred in this regard to the decision of Hill J in *Fletcher v Federal Commissioner of Taxation* (1992) 110 ALR 233, 235-237.
[514] (1989) ATPR 40-972.

approach taken in *Equity Access* when determining an application for security for costs in discrimination cases.

In *Drury v Andreco Hurll Refractory*,[515] Raphael FM declined to award security for costs against an applicant who had not paid costs to the respondent from earlier proceedings. His Honour followed the approach taken in *Elshanawany* and *Croker* and applied standard principles in determining the application.[516] Although dismissing the application for security for costs, his Honour stated, with reference to *Elshanawany* that there was no 'underlying legislative policy' or 'aspects of public interest' that 'weigh in the balance against the making of an order'.[517]

In *Paramasivam v New South Wales*[518] Smith FM made an order that the applicant in proceedings under the RDA provide security for the costs in the amount of $10,000 because he found that based on the applicant's previous litigation history she had a hostility to meeting orders for the payment of costs.[519]

6.20.7 Applicability of s 347 of the *Legal Profession Act 2004* (NSW) to federal discrimination cases

Section 347 of the *Legal Profession Act 2004* (NSW) provides:

> 347 Restrictions on commencing proceedings without reasonable prospects of success
>
> (1) The provision of legal services by a law practice without reasonable prospects of success does not constitute an offence but is capable of being unsatisfactory professional conduct or professional misconduct by a legal practitioner associate of the practice who is responsible for the provision of the service or by a principal of the practice.
>
> (2) A law practice cannot file court documentation on a claim or defence of a claim for damages unless a principal of the practice, or a legal practitioner associate responsible for the provision of the legal service concerned, certifies that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.
>
> (3) Court documentation on a claim or defence of a claim for damages, which has been lodged for filing, is not to be filed in a court or court registry unless accompanied by the certification required by this section. Rules of court may make provision for or with respect to the form of that certification.
>
> (4) In this section:
>
> court documentation means:
>
> (a)an originating process (including for example, a statement of claim, summons or cross-claim), defence or further pleading, or

[515] [2005] FMCA 186.
[516] [2005] FMCA 186, [11].
[517] [2005] FMCA 186, [20].
[518] [2007] FMCA 1033.
[519] [2007] FMCA 1033, [28]-[29].

(b)an amended originating process, defence or further pleading, or

(c)a document amending an originating process, defence or further pleading, or

(d) any other document of a kind prescribed by the regulations.

cross-claim includes counter-claim and cross-action.

There are no reported decisions that have considered whether s 347 applies to federal discrimination proceedings.

In *Fuller v Baptist Union of NSW* ('*Fuller*'),[520] Driver FM considered whether the now repealed s 198L of the *Legal Profession Act 1987* (NSW), which s 347 replaces, required a certificate to be provided in relation to FMC proceedings commenced by way of application. The wording of s 198L was similar to the current s 347 with the only significant difference being the definition of 'court documentation'. In contrast to s 347(4)(a), 'court documentation' had been defined in s 198L(4)(a) as 'a statement of claim, summons, cross-claim, defence or further pleading'.

In *Fuller*, Driver FM held that s 198L did not require a certificate because an application filed with the Court did not fall within the above definition of 'court documentation'.

His Honour noted that s 50 of the Federal Magistrates Act specifically provides that proceedings before the FMC 'may be initiated in the FMC by way of application without the need for pleadings'.[521] Driver FM held that an application was not a pleading and as such did not fall within the definition of 'court documentation' to which the requirement applied.

Given that s 347(4)(a) defines 'court documentation' to mean 'an originating process' it is unlikely that Driver FM would have reached the same conclusion had he been considering s 347.

What may, however, be relevant when considering whether s 347 applies to federal proceedings are the obiter views expressed by Driver FM in *Fuller* as to whether, had an application been 'court documentation' to which s 198L applied, it would otherwise have regulated the conduct of federal proceedings. Driver FM held that whilst it was beyond argument that the Parliament of NSW could not regulate the conduct of federal proceedings directly, it was apparent from the authorities that the Parliament of NSW could indirectly regulate the conduct of federal proceedings by virtue of the operation of s 79 of the *Judiciary Act 1903*.[522] Section 79 provides:

> 79 State or Territory laws to govern where applicable
>
> The laws of each State of Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

[520] [2004] FMCA 789.
[521] [2004] FMCA 789, [9].
[522] [2004] FMCA 789, [6].

His Honour held that it was his preliminary view that s 198L(2) (which is equivalent to s 347(2)):

> is not a law relating to procedure for the purposes of s.79 of the Judiciary Act. In my view, it is a law relating to the conduct of practitioners. It is therefore not a procedural law applicable in proceedings in a federal court exercising federal jurisdiction.[523]

In relation to the applicability of s 198L(3) (which is equivalent to s 347(3)) his Honour stated:

> [S]ubsection (3) is clearly a law relating to procedure. The issue there is whether a registry of the Court would be prevented from accepting for filing a document required by the Court, pursuant to an order made by the Court, for the conduct of proceedings by pleadings.
>
> It would seem to be a strange result if a New South Wales law could prevent the registry of a federal court exercising federal jurisdiction from accepting for filing a document specifically required by the Court pursuant to an order made by the Court. That result is theoretically possible to the extent that the State law is applied as a surrogate law of the Commonwealth law pursuant to s.79 of the Judiciary Act. Once again, although it is not necessary to decide the issue in these proceedings, my preliminary view is that the Commonwealth has 'otherwise provided' for the purposes of s 79 of the Judiciary Act through the enactment of the Federal Magistrates Act and the rules made under that Act by the Court.
>
> Those rules deal comprehensively with the documents that are permitted or required to be filed in the Court for the purposes of proceedings in the court. In my view, it is likely that the Act and rules in combination cover the field to the extent of making 'other provision' sufficient to exclude the operation of s 198L. The final resolution of that issue can, however, wait for another day.[524]

Given there is no relevant difference between the wording of s 347(2) and (3) and s 198L(2) and (3), Driver FM's views are arguably equally applicable to those sub-sections.

6.20.8 Judicial immunity from suit under federal discrimination law

In *Re East; Ex parte Nguyen*,[525] the High Court affirmed that the 'well established immunity from suit which protects judicial officers from actions arising out of acts done in the exercise of their judicial function or capacity' applies to the actions of judicial officers under the RDA, saying that, 'there is nothing in the RDA which suggests that it was the intention of the Parliament to override that immunity'.[526] This would also appear to be the case under the SDA, DDA and ADA, as those Acts similarly contain no provision to suggest Parliament intended to override that immunity.

---

[523] [2004] FMCA 789, [12].
[524] [2004] FMCA 789, [12]-[14].
[525] (1998) 196 CLR 354.
[526] (1998) 196 CLR 354, 365 [30]. Note that the immunity also extends to administrative functions performed by a judge that are 'intimately associated' with judicial functions: *Yeldham v Rajski* (1989) 18 NSWLR 48, 62-63 (Kirby P), 73 (Hope AJA).

In *Paramasivam v O'Shane*,[527] Barnes FM summarily dismissed proceedings commenced against a NSW Magistrate alleging discrimination contrary to the RDA. His Honour was satisfied that the conduct complained of on the part of the Magistrate was conduct that, if it occurred, occurred in the exercise of her judicial function or capacity. The Magistrate was accordingly protected from liability under the RDA by operation of the doctrine of judicial immunity.[528] Following *Re East; Ex parte Nguyen*,[529] Barnes FM held that judicial immunity applied not only to judges of superior courts but also to state magistrates.[530]

6.20.9 Adjournment pending decision of Legal Aid Commission

In *Tsoi v Savransky*,[531] the applicant had appealed a decision to refuse Legal Aid and sought an adjournment pending the outcome of that appeal. Section 57 of the *Legal Aid Commission Act 1979* (NSW) provides that a court shall, in such circumstances, adjourn the proceedings unless there are special circumstances that prevent it from doing so. Applying the decision in *Wilson v Alexander*,[532] Raphael FM held that he was bound by that piece of legislation.[533] His Honour noted, however, that it was for the Court to determine the length of the adjournment and was only prepared to grant an adjournment for a limited time at which stage the case must proceed.[534]

6.20.10 Appointment of litigation guardians under the FMC Rules

In *L v HREOC*,[535] the Full Federal Court considered the appointment of litigation guardians in the FMC.

Under the FMC Rules a person 'needs' a litigation guardian if the person does not understand the nature and possible consequences of the proceeding or is not capable of adequately conducting, or giving adequate instruction for the conduct of, the proceeding.[536] A person who 'needs' a litigation guardian may only start, continue, respond to or seek to be included as a party to a proceeding by his or her litigation guardian.[537] A litigation guardian may be appointed at the request of a party or on the Court's own motion.[538]

The Full Court confirmed that litigants of full age are presumed to be competent to conduct or give adequate instructions for the conduct of proceedings unless and until the contrary is proved, and the onus is on the

[527] [2005] FMCA 1686.
[528] [2005] FMCA 1686, [49].
[529] (1998) 196 CLR 354.
[530] [2005] FMCA 1686, [44]. The immunity from suit of quasi-judicial bodies was considered in *X v South Australia (No 3)* [2007] SASC 125.
[531] [2004] FMCA 879.
[532] [2003] FCAFC 272.
[533] [2004] FMCA 879, [13].
[534] [2004] FMCA 879, [17].
[535] (2006) 233 ALR 432.
[536] FMC Rule 11.08(1).
[537] FMC Rule 11.09(1).
[538] FMC Rule 11.11(1).

person who asserts lack of competency to do so.[539] The Court also observed that

> the fact that a litigant has put forward a case that reveals no reasonable cause of action may say nothing at all about the litigant's capacity to present such a case. The presumption that an adult person is capable of managing their own affairs is hardly likely to be displaced merely because a case has been commenced that has no prospect of success.[540]

In relation to the issue of determining whether a person 'needs' a litigation guardian, the Court stated that '[t]he means by which the court will determine whether a guardian should be appointed can vary from case to case'.[541] While medical evidence will ordinarily be required to be placed before the court, there may be cases where medical evidence is not available, as for example, when a person refuses to submit to a medical examination, or where the lack of capacity is so clear that the medical evidence is not called for. In those cases, 'and perhaps others, the court is entitled to rely on its own observation to make an assessment about the capacity of a party'.[542]

6.20.11 'No case' submission

In *Applicant N v Respondent C*,[543] McInnis FM considered the correct approach to a 'no case to answer' submission and when a party should be put to an election. His Honour cited with approval the decision of the Full Court of the Supreme Court of Victoria in *Protean (Holdings) Ltd (Receivers and Managers Appointed) v American Home Assurance Co*[544] and held that the court should consider:

- the nature of the case;
- the stages reached in the hearing;
- the particular issues involved; and
- the evidence that has been given.[545]

His Honour further held that the public interest is an additional relevant matter in human rights cases:

> There is, in my view, a further public interest element, not addressed in the *Protean* decision, which applies to human rights cases, which, in my view, strengthens the decision in this instance not to put the Respondent to its election. It is relevant in considering the nature of the claim, in my view, that it is not in the public interest to discourage no-case submissions. ...
>
> Respondents may well be exposed to considerable expense defending unmeritorious claims, and, given what are often serious and almost quasi-criminal allegations, it is not appropriate, in my view, to

[539] (2006) 233 ALR 432, 438 [26].
[540] (2006) 233 ALR 432, 440 [34].
[541] (2006) 233 ALR 432, 439 [27].
[542] (2006) 233 ALR 432, 439 [27] citing *Murphy v Doman* (2003) 58 NSWLR 51, [37]; *AJI Services Pty Ltd v Manufacturers Mutual Insurance Ltd* [2005] NSWSC 709, [57].
[543] [2006] FMCA 1936.
[544] (1985) VR 198.
[545] (1985) VR 198, [24].

> put the Respondent to an election. The no-case submission, if successful, may well benefit all parties, by reducing the cost burden significantly, and Respondents should not be discouraged in making a no-case submission in the same manner as normal civil or commercial disputes by putting a moving party to an election.[546]

On appeal, the decision of McInnis FM was upheld with Sundberg J holding that there was no doubt that Federal Magistrates had the power to entertain a no-case submission.[547] Sundberg J further held that there is 'no obligation on a judge determining a no-case submission to view an applicant's case "at its highest"'.[548]

6.20.12 Separate decision of questions

In *Killeen v Combined Communications Network Pty Ltd*[549] Edmonds J agreed to a separate decision of a question prior to the hearing pursuant to the Federal Court Rules[550]. This was despite the contention that it could only give rise to a hypothetical answer as only very limited facts were agreed. His Honour stated that he was prepared to do so for two reasons. First, the making of such a decision had initially been consented to by the third respondent. Secondly, his Honour considered it to be an "exercise in case management" as a substantive answer might bring proceedings to a quicker conclusion[551].

In *Harley v Commonwealth of Australia*[552]Lindsay FM was asked by the applicant to decide his claim of direct discrimination as a separate question from the claims of indirect discrimination prior to hearing[553]. His Honour refused the application. Lindsay FM had regard to the mechanism provided by the AHRC Act for bringing "a complaint" before the Court. It was noted that a complaint may be comprised of one or more causes of action but it is "the one complaint" that is terminated and gets before the Court via this route[554]. Here, the applicant's complaint encompassed different discriminatory acts at different times. One of the concerns was the difficulty in then calculating damages in relation to the alleged direct discrimination separately from the other acts of alleged indirect discrimination.

However, his Honour expressed overall dissatisfaction with the use of a separate question procedure in these circumstances:

> The cases that are set out in the decision of Young J in *AWB Ltd v Honourable Terence of Rhoderic Hudson Cole No 2)[2006] FCA 913* at [27] in dealing with a similar provision in the Federal Court Rules, make clear that the purpose of the use of the procedure is to attempt to quell the controversy between the parties by facilitating a conclusive or final judicial decision based on concrete facts. The facts can be agreed or they can be ascertained as part

[546] (1985) VR 198, [35]–[36].
[547] *Applicant N v Respondent C* [2007] FCA 1182, [35]-[37].
[548] [2007] FCA 1182, [39]-[41].
[549] [2011] FCA 27.
[550] Former Federal Court Rule O29 r 2 (see now Federal Court Rule 30.01).
[551] [2011] FCA 27 [60].
[552] [2010] FMCA 1029; [2011] FMCA 197.
[553] FMC Rules, r 17.
[554] [2010] FMCA 1029 at [1-2].

> of a separate decision or separate question process but the purpose of embarking upon the process is to finally determine the rights of the parties in respect of the controversy before the Court.[555]

The use of the procedure in this case would only have that effect if successful. If unsuccessful, a separate hearing would still be required to consider indirect discrimination. His Honour held that there was no utility in isolating this aspect of the complaint now that it had reached the application stage.

6.20.13 Discovery in the Federal Magistrates Court

In *Harley v Commonwealth of Australia*[556] Lindsay FM agreed to discovery of a range of documents concerning the application and selection process for the appointment of officers in the Royal Australian Airforce Active Reserve. Section 45 of the Federal Magistrates Act provides that interrogatories and discovery are not generally allowed in proceedings in the Federal Magistrates Court unless "in the interests of the administration of justice"[557]. His Honour noted that the interests of justice are not the same as the interests of one party but rather must be 'even-handed' and 'do equal justice'. The Court must consider the management of justice, being the management of the proceedings before it. Further, the Court must have regard to whether allowing discovery would be likely to contribute to the fair and expeditious conduct of those proceedings. Lindsay FM held that the documents sought were potentially relevant to the allegations of age discrimination and it would not be in the interests of the administration of justice for the documents to be kept from the applicant.

[555] [2011] FMCA 197 at [73].
[556] [2011] FMCA 294.
[557] Federal Magistrates Act 1999 (Cth) s 45(1); Federal Magistrates Court Rules 2001 (Cth) r 14.02.