# Chapter 6
# Procedure and Evidence

## Contents

# Chapter 6

# Procedure and Evidence

## 6.1 Introduction

Part IIB of the HREOC Act sets out the provisions governing the procedure for federal unlawful discrimination matters.[1] That procedure can be summarised as follows:

- A person may make a written complaint to HREOC alleging unlawful discrimination under the RDA, SDA, DDA or ADA.[2] The President of HREOC 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 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;

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1 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 HREOC, rather than the Federal Court or FMC as is now the case. For a discussion of the changes to the federal unlawful discrimination jurisdiction, see Human Rights and Equal Opportunity Commission, *Change and Continuity: Review of the Federal Unlawful Discrimination Jurisdiction, September 2000-September 2002* (2003), available for downloading from the HREOC's website www.humanrights.gov.au.

2 Section 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 HREOC would otherwise seem to be limited: to see *Proudfoot v Human Rights and Equal Opportunity Commission* (1991) 100 ALR 557; *Ellenbogen v Human Rights and Equal Opportunity Commission* (Unreported, Federal Court of Australia, Whitlam J, 30 November 1993).

3 Sections 8(6) and 11(aa).

4 Section 46PI.

5 Section 46PJ.

(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.[6]

Once a notice of termination has been issued by the President, a 'person affected by the complaint' may make an application to the Federal Court or FMC alleging unlawful discrimination by one or more respondents to the terminated complaint.[7] The application may be made regardless of the ground upon which a person's complaint is terminated by the President.

Readers should note that the HREOC Act, the *Federal Court Rules* (Cth) ('Federal Court Rules') and *Federal Magistrates Court Rules 2001* (Cth) ('FMC Rules') impose certain procedural requirements in relation to the commencement of applications in unlawful discrimination matters.[8] In particular, the HREOC Act requires that an application be filed within 28 days of the date of issue of the termination notice,[9] although this limitation period is subject to a discretion vested in the Court to allow further time (discussed at 6.8 below).

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6 Note also the power to terminate a complaint under s 46PE in relation to complaints against the President, HREOC or a Commissioner.

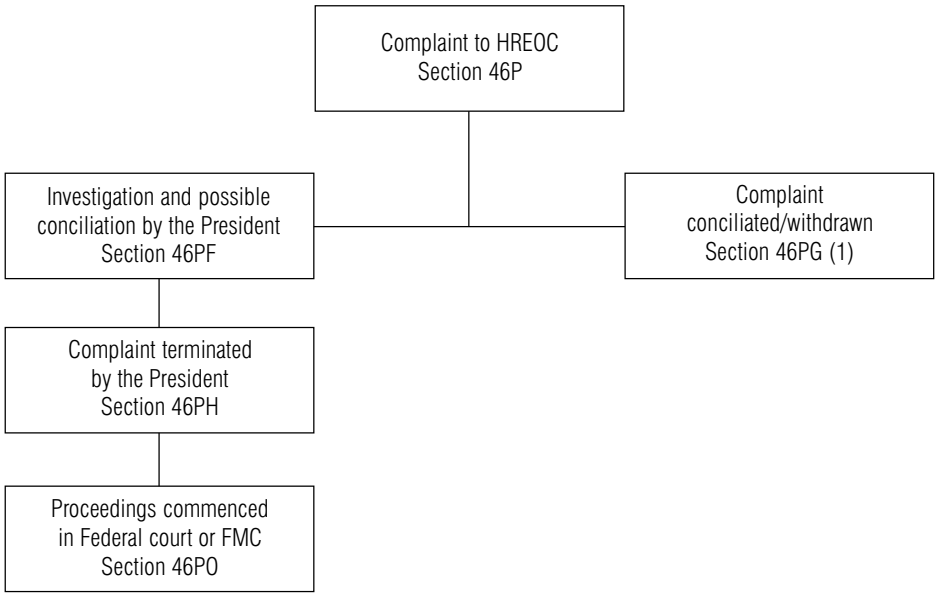
7 Section 46PO(1).

8 See s 46PO of the HREOC Act; O 81, r 5 of the Federal Court Rules; Part 41 of the FMC Rules. The Federal Court Rules also impose a range of general procedural requirements that, where relevant and not inconsistent with O 81, apply in unlawful discrimination proceedings: O 81, r 4(2). It should therefore be noted that a document (including an application by which proceedings are sought to be commenced) is not to be accepted, without the leave of the Court, a Judge or a Registrar, if it appears to a Registrar that the document is not substantially complete, does not substantially comply in form with the Federal Court Rules or is not properly signed or executed: O 1, r 5A(8).

9 Section 46PO(2).

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.[10]

**Figure 1: Overview of Federal Unlawful Discrimination Law Procedure**




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 HREOC through to the Federal Court and FMC. As noted in Chapter One, 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.

10 See s 46PV of the HREOC Act. That function has been exercised in cases such as: *Howe v Qantas Airways Ltd* [2004] FMCA 242; *Jacomb v Australian Municipal, Administrative and Clerical Union* [2004] FCA 1250; *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 www.humanrights. gov.au/legal/amicus_info.html.

## 6.2 Who is Entitled to make a Complaint to HREOC?

### 6.2.1 'A Person Aggrieved'

Under s 46P of the HREOC Act, a complaint may be lodged with HREOC 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;[11]
- 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;[12] or
- by a person or trade union on behalf of one or more other persons aggrieved by the alleged unlawful discrimination. [13]

In all cases there must be 'a person aggrieved' before a complaint can be lodged with HREOC. The HREOC Act does not define 'a person aggrieved'.[14]

In *Cameron v Human Rights and Equal Opportunity Commission*[15] ('*Cameron*'), the Full Federal Court considered the meaning of 'a person aggrieved'.[16] The applicant in that matter had made a complaint to HREOC 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 discrimination was said to arise from the allocation of half the scholarships to indigenous Fijian students and half to Indo-Fijian students.

HREOC declined the applicant's complaint on the basis that it did not have jurisdiction to investigate his complaint because he was not an 'aggrieved person'.

The applicant sought judicial review of HREOC'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;

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11 Section 46P(2)(a).
12 Section 46P(2)(b).
13 Section 46P(2)(c).
14 The HREOC 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)).
15 (1993) 46 FCR 509.
16 The application in this matter was brought under the complaint provisions of s 22(1) of the RDA as existed at that time. These were substantially the same as those now contained in s 46P of the HREOC Act and, relevantly, gave the right to lodge a complaint with HREOC to 'a person aggrieved'.

- 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.[17]

At first instance,[18] Davies J dismissed the application saying that the applicant was not an 'aggrieved person' as he was not 'personally affected' by the policy complained of, either directly or indirectly. His Honour held:

> As Gibbs J in *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR at 530:
>
> > A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.
>
> Dr Cameron's professional links with the Fijian legal system, his concerns and role as a campaigner for the civil rights of Fijian citizens and his awareness of the benefits to be gained by the recipients of educational scholarships confer upon him no relevant interest which would entitle him to challenge the policy of the Australian International Development Assistance Bureau as a 'person aggrieved' by that conduct. He is a person who has a strong emotional and intellectual interest in any matter involving Fiji and racial discrimination, but he does not hold an interest of such a character as would enable him to prosecute a complaint in respect of the policy adopted by the Australian International Development Assistance Bureau.[19]

An appeal to the Full Federal Court was dismissed unanimously. Beaumont and Foster JJ, agreeing with the reasons given by Davies J, 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:

> In our opinion, whether a person is 'aggrieved by (an) act (that is unlawful by virtue of a provision in part II of the Act)' is a mixed question of fact and law. It is well settled that the test is objective, not subjective: A person does not qualify merely because he or she feels aggrieved by the act. He or she, in the judgment of the Court, must, in truth, be aggrieved by that act. We agree with Davies J, for the reasons his Honour gives, that the applicant failed to satisfy that test.[20]

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 dimens-

17 (1993) 46 FCR 509, 512-3.
18 *Cameron v Human Rights and Equal Opportunity Commission* (Unreported, Federal Court of Australia, No WAG 121 of 1991, 30 July 1993).
19 Ibid 13.
20 (1993) 46 FCR 509, 515.

> ions, 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].[21]

In *Executive Council of Australian Jewry v Scully*,[22] Wilcox J cited the decision in *Cameron* as well as cases that had considered the requirements of standing at common law and decisions that had considered the term 'a person aggrieved' in the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[23] Noting in particular *Tooheys Ltd v Minister for Business and Consumer Affairs*,[24] his Honour held that it was necessary 'to show a grievance suffered as a result of the allegedly unlawful acts beyond that which they have as ordinary members of the public'[25] to be a 'person aggrieved'.

In that matter, 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 of the Executive Council of Australian Jewry, Mr Jones, 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.[26]

His Honour concluded that Mr Jones had a 'special responsibility to safeguard the interests of a group' and was therefore a 'person aggrieved'.[27]

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21 Ibid 519-20.
22 (1998) 79 FCR 537. As was the case in *Cameron*, above, the application in this matter was brought under the complaint provisions of s 22(1) of the RDA as existed at that time.
23 Ibid 544-6.
24 (1981) 54 FLR 421.
25 (1998) 79 FCR 537, 544-5, 548.
26 Ibid 549.
27 Ibid 550.

### 6.2.2 Bodies Corporate

In *Koowarta v Bjelke-Petersen*,[28] 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 words it s 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.[29]

Applying *Koowarta v Bjelke-Petersen* in *Woomera Aboriginal Corporation v Edwards*,[30] HREOC 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 HREOC Act). HREOC found that the respondents' conduct had prejudicially affected the interests of the organisation in that it had hindered it from carrying out its objects.[31]

In *IW v City of Perth*,[32] a case decided by the High Court under the *Equal Opportunity Act 1984* (WA), the appellant (identified as IW) was a member of an organisation (PWLA) which had made an application for planning approval. The withholding of 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 PWLA's drop-in centre.[33]

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28 (1982) 153 CLR 236.
29 Ibid 236.
30 Unreported, HREOC, Commissioner Nettlefold, 22 November 1993.
31 Ibid 27.
32 (1997) 191 CLR 1.
33 Ibid 25 (Dawson and Gaudron JJ); see also 45 (Gummow J).

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 PWLA and that the refusal was 'in truth a refusal to provide [a service] to the members of PLWA'.[34] 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'.[35]

In an earlier case, *Simplot Australia Pty Ltd v Human Rights and Equal Opportunity Commission*,[36] 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 HREOC 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.[37] (original emphasis)

The respondent sought judicial review of HREOC'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 thr 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.[38] (original emphasis)

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34 Ibid 30 (Toohey J); see also 77 (Kirby J).
35 Ibid 31; see also 77 (Kirby J).
36 (1996) 69 FCR 90.
37 *Di Petta v Edgells-Birdseye* (Unreported, HREOC, Commissioner Nettlefold, 19 March 1996), 2.
38 (1996) 69 FCR 90, 97-98.

### 6.2.3 Unincorporated Bodies

In *Executive Council of Australian Jewry v Scully*,[39] a complaint was brought to HREOC 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 national organisations with 'an interest in a particular aspect of Judaism'.[40] 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. HREOC Commissioner Nettlefold had dismissed a complaint brought by the Council under the RDA on the basis that the applicant lacked standing.[41]

One issue in the matter was whether or not 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.[42]

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

39 (1998) 79 FCR 537.
40 Ibid 538.
41 *Executive Council of Australian Jewry v Scully* (Unreported, HREOC, Commissioner Nettlefold, 21 October 1997).
42 (1998) 79 FCR 537, 548.

> 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[43]] in its own name, it seems to me the Council (through its members) also may do so. As the Hobart 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[44]].[45]

## 6.3 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 the SDA, RDA, DDA or ADA. 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.[46]

In *Elekwachi v Human Rights and Equal Opportunity Commission*,[47] the applicant had initially made a complaint to HREOC 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 HREOC 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 HREOC.

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.[48] 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. His Honour went on to conclude that:

> In my view, that expression is intended to be limited to action in the nature of some form of initiating process other than by complaint or institution of proceedings … [and] directed to encompassing within the ambit of the operation of s 6A any step which formally invokes the operation of any … legislation [such as the *Equal Opportunity Act 1984* (SA)]. I am fortified in that conclusion by the desirability of s 6A(2) being construed so as to fulfil rather than inhibit the general objectives of the *Racial Discrimination Act*

43 The current equivalent provision is s 46P(2)(a) of the HREOC Act.
44 The current equivalent provision is s 46P(2)(b) of the HREOC Act.
45 (1998) 79 FCR 537, 548-9.
46 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.
47 [1999] 1183 FCA.
48 Ibid 11-12.

> *1975*, and corresponding State and Territory legislation: *Waters v Public Transport Corporation* (1991-1992) 173 CLR 349 per Mason CJ and Gaudron J at 359. It should be interpreted so that its application to a particular claimant is clear and unequivocal. It would be undesirable in the present circumstances that Mr Elekwachi is obliged to pursue his complaint before the Equal Opportunity Tribunal if that Tribunal were vulnerable to a challenge to its jurisdiction because no proper complaint was made to it within time. The way s 6A(2) operates also assists in that conclusion. It provides a *"choice of law"* rule by removing from those eligible to proceed under the *Racial Discrimination Act 1975* persons who have in some way proceeded under corresponding State or Territory legislation in respect of the subject of the complaint. Once such action is taken, the complainant's right to pursue relief under the *Racial Discrimination Act 1975* is forever lost. Because any action so taken has that consequence, in my view it should apply only if the action of the complainant has the character of clearly showing the adoption by the applicant of the relevant State or Territory legislation as the source of the relief for the matters complained of.[49]

In *Barghouthi v Transfield Pty Limited*,[50] a case under the DDA, the respondent argued that the appellant was not entitled to make a complaint to HREOC 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:

> Section 13(4) [of the DDA] requires that a person has made a complaint under the relevant State law, in this case the *Industrial Relations Act 1996* (NSW). It was accepted by both sides that the proceedings before the Industrial Relations Commission were dismissed for want of jurisdiction. Where there is no jurisdiction it cannot be said that a complaint has been made under the State Act. Section 13(4) of the DDA allows a person to bring an action under State or Federal law but not both. The section 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 be so if the claim is not in fact heard because the chosen forum lacks jurisdiction. Although, as counsel for the respondent submitted, the opposite reading is available on the face of the text it would have absurd consequences and it cannot be accepted.[51]

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49 Ibid 12.

50 (2002) 122 FCR 19.

51 Ibid 24 [14]. See also *Alamzeb v Director-General Education Qld* [2003] FMCA 275 in which, in obiter, Baumann FM suggested 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.

In *Ho v Regulator (No.1)*,[52] 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 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.[53]

## 6.4 HREOC Act is an Exclusive Regime

The procedure for the resolution of complaints of discrimination under the HREOC Act is an exclusive regime: it is clear that courts will not grant remedies for discrimination where persons have not first made a complaint to HREOC in accordance with that regime.

In *Re East; Ex parte Nguyen*,[54] 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 HREOC 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'.[55] 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.[56]

In *Bropho v Western Australia*[57] ('*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 HREOC under the HREOC Act, but had commenced proceedings directly in the Federal Court.

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52 [2004] FMCA 62.
53 Ibid [3].
54 (1998) 196 CLR 354.
55 Ibid 365 [26] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
56 Ibid 366 [31]-[32] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
57 [2004] FCA 1209.

RD Nicholson J accepted that *Nguyen* was binding authority for the principle that the RDA and HREOC 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.[58] However, the applicant's argument as to constitutional invalidity based on s 9 of the RDA (see 3.1.3 above) was able to be litigated without an application first being made to HREOC.[59] Applying *Gerhardy v Brown*,[60] his Honour held that 'the issue of constitutional validity precedes the application of any remedy to a contravention'.[61]

## 6.5 Scope of Applications made under s 46PO of the HREOC Act to the FMC and Federal Court

### 6.5.1 Parties

#### (a) Applicants

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

> (1) If:
>
> (a) a complaint has been terminated by the President under s 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.

Accordingly, while a person can bring a complaint to HREOC on behalf of another under s 46P(1)(c) of the HREOC Act, only 'an affected person' is entitled to make an application to the FMC or Federal Court.[62]

The HREOC Act defines an 'affected person' as being 'in relation to a complaint, a person on whose behalf the complaint was lodged'.[63] As noted above, a complaint to HREOC 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.

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58 Ibid, [52].

59 It could be expected that a similar approach might be taken to the an argument challenging a law on the basis of s 10 of the RDA: see 3.1.3 above.

60 (1985) 159 CLR 70.

61 [2004] FCA 1209, [56].

62 See, for example, *Oorloff v Lee* [2004] FMCA 893, [54]-[55].

63 See s 3(1) of the HREOC Act.

In *Stokes v Royal Flying Doctor Service*,[64] Mr Stokes lodged a complaint with HREOC 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'.[65] 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'.[66]

## (b) Respondents

In *Jandruwanda v Regency Park College of TAFE*,[67] Selway J granted summary dismissal as there was no jurisdiction to hear an application against Regency Park College of TAFE when the initial complaint to HREOC was made against the University of South Australia.[68] Similarly, in *Jandruwanda v University of South Australia*,[69] Raphael FM granted a summary dismissal in respect of the second and third respondents as the applicant had not made a complaint to HREOC about their conduct.[70]

## (c) Representative complaints

### *(i) Representative complaints to HREOC*

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

(a) the class members have complaints against the same person;[71]

(b) all the complaints are in respect of, or arise out of, the same, similar or related circumstances; [72] and

(c) all the complaints give rise to a substantial common issue of law or fact. [73]

'Representative complaint' is defined under the HREOC Act to mean 'a complaint lodged on behalf of at least one person who is not a complainant'. 'Class member' is relevantly defined as 'any of the persons on whose behalf the complaint was lodged'.[74]

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64 [2003] FMCA 164.
65 Ibid [28].
66 Ibid [19].
67 [2003] FCA 1455.
68 Ibid [10]-[11].
69 [2003] FMCA 205.
70 Ibid [4]. See also *Keller v Tay* [2004] FMCA 182, [19]-[21].
71 Section 46PB(1)(a).
72 Section 46PB(1)(b).
73 Section 46PB(1)(c).
74 Section 3(1).

In making a representative complaint to HREOC, a complainant need not name all the class members, or specify how many members there are to the complaint.[75] Furthermore, the complaint may be lodged with HREOC without members' consent.[76] However, class members may, in writing to the President of HREOC, withdraw from a representative complaint prior to the termination of a complaint (after which they will be entitled to make their own complaint),[77] and the President may, on application in writing by an 'affected person', replace 'any complainant with another person as complainant'.[78] The President may also, at any stage, direct that notice of any matter to be given to a class member or class members.[79]

Note that not all class members to a representative complaint made to HREOC are required to join in later proceedings before the FMC or Federal Court. In *Jones v Scully*,[80] a case under the RDA, the applicant had made a complaint to HREOC on behalf of 'the Committee of Management of the Executive Council of Australian Jewry', in his capacity as Executive Vice-President of that Council. The Hobart Hebrew Congregation had also been named as a complainant. Under the regime that existed at that time, proceedings were commenced before the Federal Court to enforce HREOC's initial determination.[81] However, the respondent argued that the proceedings should be dismissed because the Hobart Hebrew Congregation was not an applicant in Federal Court proceedings, and because the applicant did not commence those proceedings in his capacity as Executive Vice-President of the Committee of Management of the Council. Hely J dismissed that application, stating:

> There is no relevant definition of 'complainant' for the purposes of s 25ZC [of the RDA]. In the case of a representative complaint, s 25ZC(6) defines the 'complainant' as meaning any of the class members. In other sections the complainant is the person or persons aggrieved by the act in terms of s 22(1)(a) or (b) of the Act.[82]
>
> Both Wilcox J and Commissioner Cavanagh proceeded on the basis that each of Hobart Hebrew Congregation and [the applicant] was 'a person aggrieved' by the alleged acts, hence each of them satisfied the definition of the 'complainant' in s 22(1)(a). That being so, each one of them is entitled to commence proceedings to enforce the determination under s 25ZC.[83]
>
> … An interpretation of 'complainant' so as to require all complainants to join in enforcement proceedings where there was more than one complainant, would result in an unacceptably narrow interpretation of the word in the context of the provision and the Act. For example, if there were

75 Section 46PB(3).
76 Section 46PB(4).
77 Section 46PC(1).
78 Section 46PC(2).
79 Section 46PC(3).
80 [2001] FCA 879.
81 For discussion of the earlier regime for the resolution of unlawful discrimination complaints, see Human Rights and Equal Opportunity Commission, *Change and Continuity: Review of the Federal Unlawful Discrimination Jurisdiction, September 2000-September 2002* (2003), available for downloading from HREOC's website <www.humanrights.gov.au>.
82 Ibid [12].
83 Ibid [13].

> two complainants, one only of whom was successful, the unsuccessful party may have no interest in applying to enforce the determination. Yet, on the interpretation advanced by the respondent, the enforcement of the determination by the party in whose favour the determination was made could be frustrated if the unsuccessful party failed to join in enforcement proceedings. The purposes of the Act would not be furthered by the adoption of a construction which produced that result. Beneficial legislation would not ordinarily be interpreted that way. That is particularly so when s 25ZC(6) does not require all members of a class to be parties to enforcement proceedings.[84]

### *(ii) 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:

(a) Seven or more persons have claims against the same person;[85]

(b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances;[86] and

(c) the claims of all those persons give rise to a substantial common issue of law or fact.[87]

Note that while a complaint can be lodged with HREOC *on behalf of* a 'person aggrieved', representative proceedings can only be commenced in the Federal Court by at least one 'person aggrieved' who has had their claim terminated by HREOC. As noted above, under s 46PO(1) of the HREOC Act, upon termination of a complaint by the President, only 'an affected person' may make an application to the Federal Court. 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.

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84 Ibid [15].

85 See s 33C(1)(a) of the Federal Court Act. However note 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'.

86 See s 33C(1)(b) of the Federal Court Act.

87 See s 33C(1)(c) of the Federal Court Act.

### 6.5.2 Relationship between Application and Terminated Complaint

Section 46PO(3) of the HREOC 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*,[88] the Court heard an interlocutory application concerning the interpretation of s 46PO of the HREOC Act. Katz J held that s 46PO(3) is 'only incidentally concerned with those allegations of fact which can be made in an application under s 46PO(1) of the [HREOC Act]'.[89] His Honour held that the section is 'primarily concerned with the legal character which those allegations of fact can be claimed to bear'.[90] His Honour went on to explain the operation of paragraphs (a) and (b) of s 46PO(3) in the following terms:

> Paragraph (a) of subs 46PO(3) of the [HREOC 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 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 [HREOC 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.[91]

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 HREOC.[92] His Honour said that conclusion was consistent with 'the policy of the [HREOC Act] in ensuring that there exists

88 (2000) 105 FCR 573.
89 Ibid 580 [37].
90 Ibid.
91 Ibid 580-81 [38]-[39].
92 Ibid 582 [43].

an opportunity for the attempted conciliation of complaints before they are litigated'.[93]

The provisions of s 46PO(3) were further considered in *Travers v New South Wales*,[94] ('*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 HREOC. 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.[95]

Lehane J also observed that the initial complaint may be quite brief and the details later elicited during investigation.[96] 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 HREOC. 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.[97]

Although not making reference to the decision *Travers*, a similar approach to the requirements of s 46PO(3) was taken by Driver FM in *Ho v Regulator Australia Pty Ltd*.[98] His Honour ruled that the scope of the proceedings was to be determined by the complaint as terminated by HREOC, including any amendments which may have been made to the complaint while the matter was before HREOC, rather than the original terms of the complaint to HREOC.[99]

Driver FM also took that approach in *Hollingdale v Northern Rivers Area Health Service* ('*Hollingdale*'),[100] 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 HREOC], and the terms of the document or documents setting out the complaint or complaints to HREOC.[101]

In that case, 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 HREOC. In finding that the applicant had not made a complaint of disability harassment to HREOC, his Honour considered it 'significant that the

93 Ibid 581-82 [42].
94 [2000] FCA 1565.
95 Ibid [8].
96 Ibid.
97 Ibid.
98 [2004] FMCA 62.
99 Ibid [4].
100 [2004] FMCA 721.
101 Ibid [10].

letter from [HREOC terminating the complaint] makes no reference at all to harassment', saying it indicated that 'HREOC did not regard the complaint as including a complaint of harassment'.[102] 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'.[103]

In *Bender v Bovis Lend Lease Pty Ltd*,[104] 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 HREOC 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'.[105]

### 6.5.3 Validity of Termination Notice

In *Speirs v Darling Range Brewing Co Pty Ltd*,[106] two of the respondents sought an order that the proceedings against them be summarily dismissed on the ground that a termination notice issued by HREOC was invalid and/or a nullity. While the initial complaint to HREOC 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 HREOC 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. McInnes 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.

102 Ibid [21].
103 Ibid.
104 (2003) 175 FLR 446.
105 Ibid 452-53 [21].
106 [2002] FMCA 126.

> 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.[107]

### 6.5.4 Pleading Claims in addition to Unlawful Discrimination

In *Thomson v Orica Australia Pty Ltd (No.2)*,[108] 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.

In subsequently filed written submissions, Counsel for the respondent submitted that the matter had always been 'in the context of Commonwealth legislation'[109] and that the respondent was 'seriously disadvantaged'[110] 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'[111] 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.

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107 Ibid [36], [37].
108 [2001] FCA 1563.
109 Ibid [26].
110 Ibid [33].
111 Ibid [32], [33].

## 6.6 Relevance of other Complaints to HREOC

### 6.6.1 'Repeat Complaints' to HREOC

Raphael FM, in *McKenzie v Department of Urban Services & Canberra Hospital*[112] 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 HREOC 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 HREOC in November 1999 which was terminated by HREOC 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 HREOC 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 HREOC. His Honour considered a number of authorities on the issue of estoppel and res judicata in relation to administrative decisions.[113] His Honour concluded that there was nothing to prevent the applicant from having her case heard pursuant to s 46PO of the HREOC 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.[114]

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112 (2001) 163 FLR 133.

113 *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.

114 (2001) 163 FLR 133, 153-54 [84].

It can be noted, however, that the Federal Court Rules contains provisions relating to vexatious litigants. Order 21 enables a court to limit the ability of persons found to have 'habitually, persistently and without reasonable grounds instituted proceedings in the Court or any other Australian court' to continue or institute proceedings. Order 46, rule 7A allows for a Registrar to refuse to accept a document, including an originating document, presented to Registry, which appears to the Registrar on its face to be an abuse of the process of the Court or to be 'frivolous or vexatious'. A Registrar may also, under that rule, seek a direction from a Judge in relation to such a document.

### 6.6.2 Evidence of Other Complaints to HREOC

In *Paramasivam v Jureszek*,[115] the respondent attempted to adduce evidence relating to other complaints made by the applicant of racial discrimination by 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.

## 6.7 Pleading Direct and Indirect Discrimination as alternatives

Although the grounds of direct and indirect discrimination have been held to be mutually exclusive,[116] 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* ('*Minns*'),[117] 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 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 …[118]

115 [2001] FCA 704.

116 *Australian Medical Council v Human Rights and Equal Opportunity Commission* (1995) 68 FCR 46, 55 (Sackville J); *Waters v Public Transport Commission* (1991) 173 CLR 349, 393 (McHugh J); *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209.

117 [2002] FMCA 60.

118 Ibid [173].

> 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 complaint 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 Raffin* [2000] FCA 1582 at [69] would appear to suggest that the same set of facts can be put to both tests.[119]

Similarly, in *Hollingdale v Northern Rivers Area Health* ('*Hollingdale*'),[120] 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 HREOC 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'.[121] 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.[122]

## 6.8 Applications for Extension of Time

Section 46PO(2) of the HREOC Act provides:

> The application [alleging unlawful discrimination, made to the Federal Court or FMC under section 46PO(1) of the HREOC Act] must be made within 28 days after the date of the issue of the notice under s46PH(2), or within such further time as the court concerned allows.

### 6.8.1 Relevance of Nature of Jurisdiction

It is accepted that s 46PO(2) gives a court a discretion as to whether or not to grant an extension of time. In *Lawton v Lawson*,[123] 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

119 Ibid [245].
120 [2004] FMCA 721.
121 Ibid [14].
122 Ibid [19].
123 [2002] FMCA 68.

> 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.[124]

McInnis FM in *Phillips v Australian Girls' Choir Pty Ltd*,[125] emphasised the difference between the principles to be applied in an application for an extension of time for applications filed under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) 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.[126]

### 6.8.2 Principles to be Applied

In *Phillips v Australian Girls' Choir Pty Ltd*,[127] McInnis FM 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*[128]):

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).

124 Ibid [30], [31].
125 [2001] FMCA 109.
126 Ibid [8].
127 [2001] FMCA 109, [10].
128 (1984) 3 FCR 344.

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).[129]

These principles have found approval with the Federal Court.[130]

However, the Federal Court has not endorsed a suggestion made by the FMC that one of the matters to be considered is the 'balance of convenience'.[131] In *Low v Commonwealth of Australia*,[132] Marshall J considered an appeal against the summary dismissal of the application by the FMC on the basis that it had been filed out of time under s 46PO(2) of the HREOC Act. His Honour quoted from the decision at first instance, where Driver FM had said:

> In my view, the 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.[133]

Marshall J then stated:

> 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.[134]

These principles were applied by Raphael FM in *Saddi v Active Employment*.[135]

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129 [2001] FMCA 109, [10].
130 *Pham v Commonwealth of Australia* [2002] FCA 669, [11].
131 *Gardner v National Netball League Pty Ltd* (2001) 182 ALR 408, 417 [56].
132 [2001] FCA 702.
133 Ibid [11].
134 Ibid.
135 [2001] FMCA 73.

### 6.8.3 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 the following circumstances:

- the applicant had provided a reasonable explanation for her delay, the delay was not of great magnitude (eight days) and the merits of the applicant's claims against the respondent demonstrated that the applicant's case was arguable;[136]
- 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;[137]
- the applicant, who had a disability, was under the age of 18 years, not familiar with the legal process and had an arguable case;[138] and
- 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.[139]

### 6.8.4 Extension of Time for Filing Appeals

In *Horman v Distribution Group Limited*,[140] 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'.[141] His Honour said the circumstances went 'well beyond error', suggesting rather 'a lack of diligence on the part of the lawyers representing the applicant'.[142]

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:

> [I]f 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.[143]

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136 *Lawton v Lawson* [2002] FMCA 68.
137 *Creek v Cairns Post Pty Ltd* [2001] FCA 293.
138 *Phillips v Australian Girls' Choir Pty Ltd* [2001] FMCA 109.
139 *Rainsford v Victoria* [2002] FMCA 266, [55], [110].
140 [2002] FCA 219.
141 Ibid [22].
142 Ibid [24].
143 Ibid [25].

In *Kennedy v ADI Ltd*,[144] 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.[145]

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'.[146]

In *Jandruwanda v University of South Australia*,[147] 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 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.[148]

## 6.9 Interim Injunctions

### 6.9.1 Sections 46PP and 46PO(6) of the HREOC Act

Section 46PP of the HREOC Act empowers the FMC and the Federal Court to grant interim injunctions upon an application from HREOC,[149] a complainant, respondent or affected person. Section 46PP provides:

> (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:
>
> (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.

144 [2002] FCA 1603.
145 Ibid [11], [13].
146 Ibid [11]-[12].
147 [2003] FCA 1456.
148 Ibid [13]-[14].
149 HREOC's guidelines for making applications for interim injunctions are published at www.humanrights.gov.au/legal/guidelines/injunction.html.

> (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 regards to the rights of a respondent.[150]

Furthermore, the consideration given to this process should be informed by 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'.[151] The common law principles that have been adopted in s 46PP cases by the Federal Court and the FMC include the requirements that there is a serious issue to be tried between the parties and that on the balance of convenience it is appropriate for the court to make the order.

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.[152]

After a complaint is terminated by HREOC 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:

> 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:

> circumstances where the injunction was necessary to ensure the effective exercise of the jurisdiction under s 46PO invoked in the proceeding.[153]

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.[154]

Unlike s 46PP, s 46PO(6) has not received significant judicial attention.[155] However, the factors discussed in 6.9.3 below would seem likely to apply to the exercise of the discretion conferred by s 46PO(6).

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150 *Gardner v National Netball League Pty Ltd* (2001) 182 ALR 408, 410 [10].
151 *Rainsford v Group 4 Correctional Services* [2002] FMCA 36, [35].
152 *Li v Minister for Immigration & Multicultural Affairs* [2001] FCA 1414, [36].
153 Ibid.
154 See s 46PO(8) of the HREOC Act.
155 See, for an example of an unsuccessful application made under s 46PO(6), *Li v Minister for Immigration & Multicultural Affairs* [2001] FCA 1414.

### 6.9.2 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 ss 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[156] or withdrawal[157] of a complaint.

Some difference of opinion appears to have emerged in the courts 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
- in addition, that the **actual order** must be limited so as to end upon termination or withdrawal.

In *Rainsford v Group 4 Correctional Services*[158] ('*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.

Heerey J stated in *McIntosh v Australian Postal Corporation*[159] ('*McIntosh*') 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...[160]

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'.[161]

It would be incongruous if the HREOC 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 HREOC 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*,[162] where his Honour, having first noted the need to be 'mindful that the relief granted [under s 46PP] must not be indeterminate',[163] enjoined the respondent from terminating the applicant's employment until seven days following the termination of his complaint to HREOC.

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156 Under ss 46PE or PH of the HREOC Act.
157 Under s 46PG of the HREOC Act.
158 [2002] FMCA 36, [37].
159 [2001] FCA 1012.
160 Ibid [7].
161 Ibid [1].
162 [2002] FMCA 331.
163 Ibid at [21].

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.[164]

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

### 6.9.3 Relevant Factors

In *Gardner v National Netball League Pty Ltd*,[165] the applicant sought an injunction, pending the 'determination' of her complaint before HREOC, to prevent the respondent from imposing a ban or any other limitation on her competing in the National Netball League for reasons relating to her pregnancy. McInnis FM concluded that 'on the balance of convenience' it was appropriate to grant the interim injunction given the medical evidence presented, the fact that the matter could not be resolved by damages alone and that it appeared that the respondent had given very little, if any, consideration to the SDA when it imposed the interim ban.[166]

The Federal Court considered the issue of interim injunctions in an employment context in *McIntosh* where the applicant sought an injunction under s 46PP to prevent the respondent from terminating her employment until the determination of proceedings before HREOC.[167] Although Heerey J found there was an issue to be tried, he decided 'on the balance of convenience' not to grant an injunction.[168] Of fundamental importance to his Honour's decision was a concession, made by the applicant, to the effect that the employment relationship had broken down and was unlikely to be restored, even if a finding on the subject matter of the complaint was made in the applicant's favour. In those circumstances, his Honour found that the granting of an injunction under s 46PP would be unreasonable, stating:

> [a]t common law it is firmly established that specific performance will not be granted for a contract of employment except in exceptional circumstances… [i]t is true, as senior counsel for the applicant puts it, that the [HREOC Act] 'creates a broader concept' … s 46PP(1) must be taken to have been drafted in the light of the possibility that, following an inquiry and conciliation before the Commission, an employer and employee might resolve their differences and continue employment as before ... [b]ut

164 Ibid at [21]: see order 3.
165 (2001) 182 ALR 408.
166 Ibid 417 [56].
167 See also *Heathcote v Telstra Corporation* [2003] FMCA 118 where the issue of interim injunctions in an employment context was considered by the FMC. In that case the applicant's application for an interim injunction under s 46PP failed because: (i) the applicant had failed to properly articulate the injunctive relief sought; and (ii) the applicant had failed to satisfy the Court that the respondent intended to change the status quo.
168 [2001] FCA 1012, [9].

> unfortunately that is not the case in the present matter. I do not think it would be reasonable to impose on the respondent a term that the applicant return to work given it is common ground that the relationship has broken down.[169]

His Honour also rejected an argument that the injunction should be granted so as to preserve the applicant's 'authority and status and reputation and that this would be important for the purpose of conciliation'[170] and did not consider it a legitimate consideration that the granting of the injunction may give the applicant 'some leverage or bargaining advantage in relation to the conciliation'.[171]

The FMC has indicated that it will be relevant to have regard to the effect that the granting of an interim injunction under s 46PP is likely to have on the business or operations of the respondent. In *Rainsford*, the interim injunction sought would (if granted) have had the effect of requiring the respondent, the private entity that operated Port Phillip Prison, to deal with applications from the applicant (such as to gain access to rehabilitation programs) in a particular manner. McInnis FM was of the view that such an injunction would 'effectively pre-empt and seek to interfere with the proper management of the prison'[172] and should not be granted. His Honour expressly noted, however, that this 'does not mean... that there will never be an occasion when such injunctive relief would not be granted'.[173]

The decision in *AB v New South Wales Minister for Education and Training*[174] focused on the importance of correctly identifying the 'status quo' when considering an application for an interim injunction under s 46PP.[175] 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 HREOC.[176]

In that matter, the applicant was 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 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 HREOC alleging a breach of the RDA and sought an interim injunction under s 46PP to:

- prevent the respondent from withdrawing the place offered at Penrith High School pending the determination of his HREOC complaint; and
- direct the respondent to allow the applicant to attend Penrith High School, pending the determination of his HREOC complaint.

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169 Ibid.
170 Ibid [11].
171 Ibid [12].
172 [2002] FMCA 36, [39].
173 Ibid [40].
174 [2003] FMCA 16.
175 This issue was also considered in *McIntosh v Australian Postal Corporation* [2001] FCA 1012 and *Beck v Leichhardt Municipal Council* [2002] FMCA 331.
176 [2003] FMCA 16, [10].

Raphael ACFM held that the applicant was seeking an injunction which 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. Raphael ACFM held that this was not the status quo and noted that s 46PP 'injunctions exist to prevent rights from being taken away from persons who have made a complaint to HREOC. They do not exist to create rights'.[177] Accordingly, his Honour declined to grant the injunction.

In *Hoskin v State of Victoria (Department of Education and Training),*[178] the FMC considered the types of orders that could properly be categorised as interim injunctions within the meaning of s 46PP. The applicant sought orders, 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. The applicant stated that in making that application he relied solely upon s 46PP(1)(b). Walters FM concluded that the orders sought by the applicant could not properly be categorized as interim injunctions and nor did they 'maintain' any relevant 'rights' of the applicant.[179] His Honour also 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.[180]

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 concluding that the orders sought were not necessary to ensure the effective exercise of HREOC's powers.[181]

As noted above, in making a decision as to whether or not to grant an injunction under s 46PP, the courts have held that the principles that apply at common law to the granting of interim relief will be relevant. Those principles include the requirement to consider whether there is an arguable case and in the event there is, the requirement to consider the balance of convenience.[182] *De Alwis v Hair*[183] is an example of an application for injunctive relief under s 46PP that failed on the basis that there was 'no arguable case'.[184] Bryant CFM considered in some detail the application made by the applicant to HREOC under the DDA and

177 Ibid [15].
178 [2002] FMCA 263.
179 Ibid [60].
180 Ibid [53].
181 Ibid [59], [60].
182 See for example *Rainsford v Group 4 Correctional Services* [2002] FMCA 36.
183 [2002] FMCA 357.
184 Ibid [19].

concluded that there was no arguable basis on which a court could grant relief to the applicant once the complaint was terminated by HREOC.[185] Accordingly, Bryant CFM dismissed the application.

## 6.10 Applications for Summary Dismissal

The sources of power for the FMC[186] and Federal Court[187] to summarily dismiss a matter are in similar terms and empower the FMC and Federal Court to order that a matter be stayed or dismissed if it appears 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.

### 6.10.1 Principles Applied

#### (a) Rationale underlying the exercise of the power

The rationale behind exercising the power to summarily dismiss is that a matter should not be permitted to proceed if it is established that 'the proceedings are so untenable that they could not possibly succeed'[188] and that 'no reasonable cause of action of unlawful discrimination is shown'.[189]

Lehane J in *Travers v New South Wales*[190] affirmed the view of Sir Ronald Wilson in the HREOC decision of *Assal v Department of Health, Housing & Community Services*[191] that:

> it is in the public interest, as well as in the interests of both parties, that the hearing of a complaint which is clearly shown to be lacking in substance should be summarily terminated. Certainly, it is no kindness to a complainant to shrink from the exercise of the power … in circumstances where that exercise is clearly warranted.[192]

Lehane J added:

> That is especially so, perhaps, in this Court where an unsuccessful litigant, if proceedings are protracted, may face what can be the considerable burden of a costs order.[193]

185 Ibid [18].
186 Rule 13.10 of the FMC Rules.
187 Order 20, r 2 of the Federal Court Rules.
188 *Parker v Swan Hill Police* [2000] FCA 1688, [10].
189 *Paramasivam v Shier* [2001] FCA 545, [19].
190 [2000] FCA 1565.
191 Unreported, HREOC, Sir Ronald Wilson, 26 September 1990, extract at [1992] EOC 92-409.
192 Ibid 4.
193 [2000] FCA 1565, [19].

## (b) Exercise 'exceptional caution'

The High Court has said that a case must be:

> very clear indeed to justify the summary intervention of a court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without the jury… once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the Court to dismiss the action as frivolous and vexatious and an abuse of process.[194]

In addition, the courts have emphasised that the power to summarily dismiss a matter must be exercised with 'exceptional caution'[195] and 'sparingly invoked'.[196] In particular, the power should be used with great care when the litigant is unrepresented.[197] It has been noted, however, that:

> whilst circumspection is appropriate, if the evidence before the Court establishes that if the matter were to go to trial in the ordinary way the application must fail then a case for summary dismissal of the proceedings is made out.[198]

In *Rana v University of South Australia*,[199] Lander J, in allowing an appeal against the summary dismissal of the appellant's application noted that:

> the philosophy of the Federal Magistrates Court is to provide inexpensive justice and a streamlined dispute 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.[200]

His Honour further noted that the 'true inquiry' in considering an application to strike out an applicant's claim is not whether the claim 'lacked merit', but whether the claim 'failed to disclose a reasonable cause of action'.[201]

## (c) 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'.[202]

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194 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62, 91, applied in *Stokes v Royal Flying Doctor Service (No 2)* [2003] FMCA 177, [13]; *Firew v Busways Trust (No 2)* [2003] FMCA 317, [17].

195 *Paramasivam v Grant* [2001] FCA 882, [14], applying *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 129.

196 *Chung v University of Sydney* [2001] FMCA 94, [7], upheld on appeal to the Federal Court in *Chung v University of Sydney* [2002] FCA 186, [45]. See also *Taylor v Morrison* [2003] FMCA 79, [5] applying *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125.

197 Ibid [9].

198 *Paramasivam v Grant* [2001] FCA 882, [14], applying *Webster v Lampard* (1993) 177 CLR 598.

199 [2004] FCA 559.

200 Ibid [75].

201 Ibid [79].

202 *Paramasivam v Wheeler* [2000] FCA 1559, [8].

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'.[203]

## (d) Examples of matters where the power has been exercised

The FMC and Federal Court have summarily dismissed matters where:

- the matter complained of did not involve the provision of a service for the purposes of s 24 of the DDA;[204]
- it was found that the DDA did not bind the Crown in right of the State in the manner suggested by the complainant;[205]
- the subject matter of the application before the FMC was different from the complaint that was made to HREOC and terminated by the President;[206]
- there was no casual nexus between the alleged acts of discrimination and the complainant's race or disability;[207]
- the claims made by the applicant were vague and general and failed to show a case to answer;[208]
- the respondent was not the subject of the complaint to HREOC;[209]
- 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;[210] and
- a deed of release previously entered into by the parties acted as a bar to the employees claim of unlawful discrimination.[211]

203 *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].
204 *Vintila v Federal Attorney General* [2001] FMCA 110.
205 *Rainsford v Victoria* [2001] FMCA 115.
206 *Soreng v Victorian State Director of Public Housing* [2002] FMCA 124.
207 *Chung v University of Sydney* [2001] FMCA 94.
208 *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].
209 *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.
210 *Firew v Busways Trust (No 2)* [2003] FMCA 317, [12]-[13].
211 *Dean v Cumberland Newspaper Group* [2003] FMCA 561.

## 6.11 Dismissal of Application due to Non-Appearance of Applicant

The provisions of the Federal Court Rules relating to the non-appearance of a party were considered in *Pham v University of Queensland*[212] ('*Pham*').

Order 32, r 2(1) of the Federal Court Rules provides:

> If, when a proceeding is called on for trial, any party is absent, the Court may:
>
> (a) order that the trial be not had unless the proceeding is again set down for trial, or unless such other steps are taken as the Court may direct;
>
> (b) adjourn the trial;
>
> (c) if the party absent is an applicant or cross-claimant dismiss the action or the cross-claim; or
>
> (d) proceed with the trial generally or so far as concerns any claim for relief in the proceeding.

In *Pham,* Drummond, Marshall and Finkelstein JJ upheld the decision of Heerey J[213] dismissing the appellant's application pursuant to O 32, r 2(1)(c) when he failed to attend at his trial. The appellant argued that, notwithstanding his failure to appear, there was an incorrect exercise of the discretion to terminate the action because there was no evaluation by the trial judge of the merits of his case, something that the trial judge could have done by referring to the evidence filed by the parties, including the appellant, in accordance with the directions given.

The Full Court rejected that argument, stating that O 32, r 2(1)(c) does 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. Their Honours stated that the procedure available under O 32, r 2(1)(c) should be contrasted with that under O 10, r 7(1)(a) which empowers the court, if a party fails to comply with an order of the court directing that a party take a step in a proceeding, to dismiss the proceeding if the default in complying with that order is a default by an applicant.[214] That procedure can be invoked at any stage of an action, even before pleadings have been closed, and it has been held that where a respondent seeks to dismiss an action under that particular rule, the respondent has the obligation of going into the merits of the case.[215]

212 [2002] FCAFC 40.
213 *Pham v University of Queensland* [2001] FCA 1044.
214 See for example, *Ugur v Police Service of NSW* [2004] FCA 1032.
215 [2002] FCAFC 40, [27].

## 6.12 Application for Suppression Order

The FMC considered an application for a suppression order in *CC v Djerrkura.*[216]

Section 61 of the Federal Magistrates Act provides:

> 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
> (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*, 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 held that it is an exceptional course to restrain the publication of the identity of a party to proceedings,[217] referring to *Computer Interchange Pty Ltd v Microsoft Corporation*.[218] He also referred[219] to *TK v Australian Red Cross Society*,[220] in which the applicant acquired HIV from the contamination of the blood supply, and the similar case of *E v Australian Red Cross Society*,[221] as well as the matter of *A v Minister for Immigration and Ethnic Affairs*.[222]

The applicant argued that the orders sought provided a proper balance between the public's right to know about the nature and content of these proceedings and the particular susceptibility of the applicant. 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.[223]

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216 [2003] FMCA 372. This matter was previously considered in *CC v DD* [2002] FMCA 221, in which Brown FM made interim ex parte orders under s 61 forbidding publication of the name of the applicant and respondent and material that might tend to identify the applicant. The order in relation to the respondent was subsequently set aside.
217 Ibid [42].
218 (1999) 88 FCR 438.
219 [2002] FMCA 372, [45]-[47].
220 (1989) 1 WAR 335.
221 (1991) 27 FCR 310.
222 (1994) 54 FCR 327.
223 [2003] FMCA 372, [50]-[51].

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.

## 6.13 Interaction between the FMC and the Federal Court: Transfers and Appeals

### 6.13.1 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[224] or by its own motion,[225] 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 O 82, r 7 of the Federal Court Rules, namely:

- whether the proceeding or appeal 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;[226]
- whether, if the proceeding or appeal is transferred, it is, in the opinion of the Court, likely to be heard and determined at less cost and more convenience to the parties that if the proceeding or appeal is not transferred;[227]
- whether the proceeding or appeal is, in the opinion of the Court, likely to be heard and determined earlier in the FMC;[228] and
- the wishes of the parties;[229]

(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*,[230] 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 sooner than could be done

224 See O 82, r 5 of the Federal Court Rules.
225 Ibid O 82, r 6.
226 Ibid O 82, r 7(a).
227 Ibid O 82, r 7(b).
228 Ibid O 82, r 7(c).
229 Ibid O 82, r 7(d).
230 (2000) 105 FCR 573.

> 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.[231]

Similarly, in *Travers v New South Wales*,[232] 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 matter and that the interests of justice would be served by ordering the transfer.[233]

## 6.13.2 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,[234] 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[235] and, unless the court otherwise orders, the request must be included in a response or made by application supported by affidavit.[236] 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:

- 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;[237]
  - 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;[238]
  - whether the proceedings will be heard earlier in the FMC;[239]
  - the availability of particular procedures appropriate for the class of proceeding;[240] and
  - the wishes of the parties;[241]
- whether proceedings in respect of an associated matter are pending in the Federal Court;

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231 Ibid 47.
232 [2000] FCA 1565.
233 Ibid [21].
234 See r 8.02(1) of the FMC Rules.
235 Rule 8.02(2).
236 Rule 8.02(3).
237 Rule 8.02(4)(a).
238 Rule 8.02(4)(b).
239 Rule 8.02(4)(c).
240 Rule 8.02(4)(d).
241 Rule 8.02(4)(e).

- whether the resources of the FMC are sufficient to hear and determine the proceeding; and
- the interests of the administration of justice.

In *Nizzari v Westpac Financial Services*,[242] Driver FM ordered that the matter be transferred from the FMC to the Federal Court. In his decision, Driver FM observed that:

> The mere fact that issues of importance are raised does not necessarily mean that the matter should be transferred to the Federal Court.[243]

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'.[244] His Honour further noted that the matter would be heard more quickly if it was transferred to the Federal Court,[245] though there was not likely to be a significant cost difference for the parties.[246]

## 6.13.3 Appeals from the FMC to the Federal Court

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.[247]

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 of Australia*:[248]

> 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.[249]

242 [2003] FMCA 255.
243 Ibid [8].
244 Ibid [12]. Cf the views expressed by the Federal Court in the cases referred to in 6.13.1 above.
245 Ibid.
246 Ibid [11].
247 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.
248 [2001] FCA 702.
249 Ibid [3]. See also *Chung v University of Sydney* [2002] FCA 186, [40].

## 6.14 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.[250] 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.[251] In accordance with this principle, exemptions and other provisions which restrict rights conferred by such legislation are strictly construed by Australian courts.[252]

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.[253] 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.[254] This is particularly relevant in the case of unlawful discrimination laws which implement, in part, conventions such as CERD, 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*.[255] Recourse may also be had to their interpretation by expert international bodies responsible for considering States

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250 *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J with whom Deane J agreed), 372 (Brennan J), 394 (Dawson and Toohey JJ), 406-407 (McHugh J); *Australian Iron and Steel v Banovic* (1989) 168 CLR 165, 196-7 (McHugh J); *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 331 (Kirby J).

251 *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 (Kirby J). See also s 15AA of the *Acts Interpretation Act 1901* (Cth).

252 *X v Commonwealth* (1999) 200 CLR 177, 223 (Kirby J); *Qantas Airways Limited v Christie* (1998) 193 CLR 280, 333 and footnotes 168-169 (Kirby J). This approach has been applied to Part II, Division 4 of the SDA in *Gardner v All Australian Netball Association Limited* (2003) 197 ALR 28, [19], [23]-[24] (Raphael FM); *Ferneley v Boxing Authority of New South Wales* (2001) 115 FCR 306, 325 [89] (Wilcox J).

253 *Jumbunna Coal Mine NL v Victorian Coalminers' Association* (1908) 6 CLR 309, 363 (O'Connor J); *Minister for Immigration and 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, Pearce and Geddes, *Statutory Interpretation in Australia*, (5th Ed, 2001), [5.14].

254 *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 (McHugh J), 332-3 (Kirby J). It has been held that approach is not confined in its application to ambiguous statutory provisions: *X v Commonwealth* (1999) 200 CLR 177, 223 (Kirby J); *Qantas Airways Limited v Christie* (1998) 193 CLR 280, 333 and footnotes 168-169 (Kirby J).

255 Opened for signature 10 May 1969, 1155 UNTS 331(entered into force 27 January 1980). See Pearce and Geddes, above n 253, [2.16] and the cases cited therein.

Parties' implementation of human rights treaties.[256] 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.[257] 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.[258] 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'[259] or 'highly influential, if not authoritative'.[260] 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.[261]

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256 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, which similarly has responsibility for monitoring States Parties' progress in implementing CERD.

257 See, for example, in relation to the CEDAW Committee, articles 18 and 21(1) of CEDAW; and, in relation to the CERD Committee, see article 9 of CERD.

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

259 *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.

260 E Evatt 'The Impact of International Human Rights on Domestic Law in G Hushcroft and R Rishworth above n 258, 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].

261 *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 392 (Mason CJ), 396-7 and 399-400 (Dawson J), 405 (Toohey J), 416 (Gaudron J), 430 (McHugh J); *Somaghi v Minister for Immigration, Local Government and 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, 294-5 (Lord Scarman). See as examples of references to the jurisprudence of human rights treaty bodies *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42 (Brennan J with whom Mason CJ and McHugh J agreed*); 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 [36] (Katz J); *Minister for Immigration and Multicultural and 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 www.humanrights.gov.au/legal/links.html.

## 6.15 Standard of Proof in Discrimination Matters

The complainant bears the onus of proof in establishing a complaint of unlawful discrimination. The standard of proof required to be met has been the subject of frequent discussion in the cases, predominantly in the context of the RDA and SDA. In particular, the courts have considered the manner in which the test in *Briginshaw v Briginshaw*[262] ('*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.[263]

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.[264] It is clear from Dixon J's statement that there is no 'higher standard of proof'.[265] Similarly, it would not appear to be strictly correct to speak of 'invoking', or 'resorting to', the 'principle in *Briginshaw*':[266] the principle is to be applied in all cases.[267]

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262 (1938) 60 CLR 336.

263 Ibid 361-62.

264 See, for example, *X v McHugh (Auditor-General of Tasmania)* (Unreported, HREOC, Sir Ronald Wilson, 8 July 1994), 9, (extract at (1994) EOC 92-623): 'any allegation requires that degree of persuasive proof as is appropriate to the seriousness of the allegation'.

265 See also *Rejfek v McElroy* (1965) 112 CLR 517, 521-22 (Barwick CJ). This terminology is, however, sometimes used: see, for example, *Sharma v Legal Aid Queensland* [2001] FCA 1699, [40].

266 As the Full Federal Court appears to do, for instance, in *Victoria v Macedonian Teachers' Association of Victoria* (1999) 91 FCR 47, 50-1.

267 Note also that s 140 of the *Evidence Act 1995* (Cth) applies to unlawful discrimination proceedings, and provides that 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. Without limiting the matters that may be taken into account, the court is to take into account the nature of the cause of action or defence, the nature of the subject-matter of the proceeding and the gravity of the matters alleged in deciding whether it is so satisfied.

In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*,[268] 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.[269]

The cases suggest that not all complaints made under the RDA, SDA or DDA are properly to be considered of such 'seriousness' as to require evidence of a 'higher persuasive value'.[270]

## 6.15.1 Cases under the RDA

This issue was considered by HREOC in the context of the RDA in *D'Souza v Geyer*.[271] The Commissioner considered earlier HREOC decisions on the application of the *Briginshaw* principle and stated:

> … where an allegation is serious, one requires 'persuasive proof' of the complainant's allegation. Most allegations of racial discrimination are likely to be serious in nature and require the Commissioner hearing the matter to be persuaded by the evidence.[272]

A similar approach was taken in *Australian Macedonian Human Rights Committee Inc v Victoria.*[273] The complaint related to a directive issued by the Victorian Government, requiring all departments and agencies to 'refer for the time being to the language that is spoken by people living in the Former Yugoslav Republic of Macedonia, or originating from it, as Macedonian (Slavonic)'. It was claimed that this impaired the recognition, enjoyment or exercise of a number of human rights and fundamental freedoms and accordingly constituted racial discrimination. Sir Ronald Wilson held:

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268 (1992) 110 ALR 449.
269 Ibid, 449-50 (footnotes omitted).
270 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.
271 Unreported, HREOC, Commissioner Keim, 25 March 1996.
272 Ibid 18.
273 Unreported, HREOC, Sir Ronald Wilson, 8 January 1998.

> Applying the test enunciated in *Briginshaw*... if a finding in support of the complainant means that the Government must be found to have deliberately discriminated against one section of the community in order to favour another section and therefore be deserving of wide condemnation for such a lack of probity in office, then such a finding would surely call for proof based on more than a mere balance of probabilities.[274]

An application for review of this decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) was considered by Weinberg J in *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission*[275] (*'Macedonian Teachers'*). The approach taken by HREOC was initially upheld by Weinberg J, who stated:

> In my view, it was open to the Commissioner to conclude that the nature of the complaint made against the second respondent was such that, at least in its final form, it called for the application of the *Briginshaw* principles when making findings of fact. It is no badge of honour for any government to be found to have contravened a provision of an anti-discrimination statute. The fact that such a contravention may be found to have occurred without any intent on the part of that government to discriminate, and for laudatory motives, does not significantly diminish the gravity of any such finding.
>
> As for the contention that the Commissioner erroneously construed the *Briginshaw* principle by treating it as though it sanctioned the adoption of a third standard of proof, mid way between the civil and criminal standards of proof, I do not accept that this was what the Commissioner intended to convey when he said that 'such a finding would surely call for proof based on more than a mere balance of probabilities'. In my view, this statement was no more than a convenient shorthand method of articulating the *Briginshaw* principle ...[276]

His Honour cited with approval[277] the decision of Drummond J in *Ebber v Human Rights and Equal Oppportunity Commission*[278] in which it was held that 'a finding of unlawful conduct could only be made against the respondent if it was proved to the standard referred to in *Briginshaw*'.[279]

Weinberg J's application of the *Briginshaw* principle was, however, rejected by the Full Federal Court on appeal.[280] The Full Court cited Deane, Dawson and Gaudron JJ in *G v H*[281] in which their Honours had noted that due regard must be had to the nature of the issue involved because not every case involves issues of importance and gravity envisaged by *Briginshaw. G v H* concerned the paternity of a child and it was held that the principle had no application. As to the present case, the Full Court stated:

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274 Ibid 7.
275 (1998) 91 FCR 8.
276 Ibid 44.
277 Ibid 43.
278 (1995) 129 ALR 455.
279 Ibid 467-8.
280 *Victoria v Macedonian Teachers' Association of Victoria* (1999) 91 FCR 47. The Court otherwise upheld the decision of Weinberg J which had focused primarily on the meaning of the expression 'based on' race (see section 2.2 on the RDA) and dismissed the appeal.
281 (1994) 181 CLR 387, 399.

> In this case the complainants did not make, and did not need to make, any '*serious allegations*' against the respondent, and they submitted to the Commission that it should confine itself in its determination to an examination of the effect of the directive given by the respondent in the terms of s9 of the Act without considering the motives of the government.
>
> In the present case it is not necessary to make a finding of '*deliberate*' discrimination against one section of the community in order to favour another section, and the probity of the Victorian government is not in issue. The mere finding that a government has contravened a provision of an anti-discrimination statute without considering the circumstances in which the contravention occurred is not, in our view, sufficient to attract the *Briginshaw* test. We disagree with his Honour's conclusion that the absence of intention to discriminate does not significantly diminish the gravity of any such finding. As the first respondent submits, there are many examples of governments being held to have discriminated unlawfully against individuals or groups of individuals without resort to the principle in *Briginshaw*. They referred to the case of *Bacon v Victoria* (unreported, Supreme Court of Victoria, 7 November 1997, Beach J) where the issue was whether the education policy of the Victorian government was discriminatory. Beach J held that it was, but his Honour did not invoke the *Briginshaw* principle. That case was similar, in principle, to this one. No issue of fraud or impropriety was raised or needed to be determined.[282]

In *Sharma v Legal Aid Queensland*[283] ('*Sharma*'), the applicant complained of racial discrimination in recruitment decisions made by the respondent. The applicant contended that the only explanation for the failure of his application for the positions was his race, as he was otherwise qualified adequately for them. Kiefel J noted, without reference to the Full Federal Court's decision in *Macedonian Teachers*, that:

> It was accepted by Counsel for the applicant that the standard of proof for breaches of the *Racial Discrimination Act 1975* is the higher standard referred to in *Briginshaw*...[284]

The decision in *Macedonian Teachers* was also not referred to on appeal,[285] the Full Court stating:

> It was common ground at first instance that the standard of proof for breaches of the RDA is the higher standard referred to in *Briginshaw*... Racial discrimination is a serious matter, which is not lightly to be inferred: *Department of Health v Arumugam* [1988] VR 319, 331. No contrary argument was put on the hearing of the appeal, apart from the comment that there is no binding authority on this Court that *Briginshaw* should be applied in cases of this nature.[286]

282 (1999) 91 FCR 47, 50.
283 [2001] FCA 1699.
284 Ibid [62].
285 *Sharma v Legal Aid (Qld)* [2002] FCAFC 196.
286 Ibid [40].

In *Batzialas v Tony Davies Motors Pty Ltd*[287] ('*Batzialas*'), McInnis FM echoed the views expressed in the Federal and Full Federal Courts in *Sharma* (although not referring to those authorities nor *Macedonian Teachers*), stating:

> It should also be remembered that an allegation of racial discrimination is a serious matter, and I accept for the purpose of this Application that the appropriate test to be applied is the *Briginshaw* test.[288]

The absence of any consideration by the Federal Court or the Full Federal Court in *Sharma* (or the FMC in *Batzialas*) of the reasoning of the Full Federal Court in the *Macedonian Teachers* leaves unresolved the issue of when the circumstances of a case under the RDA will be such as to require evidence of a higher probative value as contemplated by the *Briginshaw* principle.[289]

## 6.15.2 Cases under the SDA

Discussion of the standard of proof required and the application of the *Briginshaw* principle under the SDA has taken place almost exclusively in cases involving allegations of sexual harassment.[290]

In those cases, it has been accepted that not all allegations of sexual harassment will be of such 'seriousness' that the applicant is required to lead evidence of a 'higher probative value' in order to establish his or her complaint. In *Correia v Juergen Grundig*,[291] Sir Ronald Wilson stated that:

> Although there may be those that would characterise the allegations in this case as being at the lower end of the scale of harassment, I do not believe it is helpful to engage in comparisons of that kind. Any level of harassment is demeaning and humiliating to a woman and is to be condemned. This is not to say that the standard of proof required of a complainant may not vary according to the seriousness attaching to the complaint: *Briginshaw v Briginshaw*.[292]

In that case, Sir Ronald Wilson also noted that he was mindful of the issues faced by complainants in proving allegations of sexual harassment, especially self-represented complainants:

> I bear in mind the vulnerability of a woman in relating to an employer in a small office where there are seldom any witnesses to the attitudes and behaviour of the one toward the other and vice versa … I bear in mind also that the task that confronts an unrepresented complainant in the presentation

287 [2002] FMCA 243.
288 Ibid [87].
289 For discussion, see Jonathon Hunyor, 'Skin-deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25 *Sydney Law Review* 537.
290 In *Harris v Hingston* (Unreported, HREOC, Commissioner Nettlefold, 2 November 1992), 16, reference was made to *Briginshaw* in a case alleging discrimination on the basis of sex under s 14(2) of the SDA, but there was otherwise no discussion of its application.
291 Unreported, HREOC, Sir Ronald Wilson, 31 July 1995.
292 Ibid 8.

> of her case is a daunting one. I have sought to ensure that the evaluation of the complainant's evidence does not suffer by reason of that fact.[293]

In *Patterson v Hookey*,[294] Commissioner Rayner acknowledged that in cases of sexual harassment the evidence required to make out an allegation will necessarily vary given the breadth of the definition of 'sexual harassment' in the SDA, which covers 'a very broad range of unwanted sexual conduct including a sexual advance or request for sexual favours and a statement of a sexual nature to or in the presence of a person'.[295] This was also the approach taken by Raphael FM in *Font v Paspaley Pearls*.[296]

In *Wattle v Kirkland (No.1)*,[297] Raphael FM stated that while allegations of the type made in that case should be proved to the '*Briginshaw* standard',[298] the court was entitled to start from the presumption that 'a person is unlikely to make up and bring to prosecution' allegations of sexual harassment:

> Considering whether or not to accept the applicant's evidence I started from the base that a person was unlikely to make up and bring to prosecution allegations of this nature against a businessman of some profile in a small country town. There is nothing novel about this assumption and it is one that can be easily rebutted if the complainant is shown to have a motive for making his or her complaints. In this case the respondent has attempted to show as a motive the dismissal of the applicant. The difficulty which I have in accepting this submission is that the applicant attended upon her doctor and complained of sexual harassment before she was dismissed. Furthermore, the evidence relating to the unsatisfactory nature of the applicant's driving put forward as a reason for her dismissal was only put forward very late in the day and not contained in any of the original affidavits.[299]

On appeal to the Federal Court,[300] Dowsett J overturned Raphael FM's decision on the basis that his Honour had erred in applying such a presumption:

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293 Ibid. Compare, however, *Patterson v Hookey* (Unreported, HREOC, Commissioner Rayner, 9 December 1996), 5-6, in which Commissioner Rayner appeared to consider the 'unobserved nature' of the alleged incident of sexual harassment as a factor contributing to the 'seriousness' of the allegation.

294 Unreported, HREOC, Commissioner Rayner, 9 December 1996.

295 Ibid 5-6. Note, however, that the Commissioner in that matter suggests that the *Briginshaw* principle will only apply in cases of greater seriousness. As observed above, such an approach appears, with respect, to be incorrect.

296 [2002] FMCA 142, [121], [127]. It is again noted that while his Honour suggests that the *Briginshaw* principle will only apply in cases of greater seriousness, it is preferable to consider the principle as applicable in all cases, with only those more serious cases requiring a higher standard of evidence. See also *Dobrovsak v AR Jamieson Investments Pty Ltd* (Unreported, HREOC, Commissioner Keim, 15 December 1995), 16 [4], extract at (1996) EOC 92-794. Other recent cases have confirmed that the '*Briginshaw* standard' is applicable in cases involving sexual harassment, but have only done so in general terms: see *McAlister v SEQ Aboriginal Corporation* [2002] FMCA 109, [39]; *Wattle v Kirkland* [2001] FMCA 66, [34]; *Wattle v Kirkland (No.2)* [2002] FMCA 135, [45]; *Daley v Barrington* [2003] FMCA 93, [28].

297 [2001] FMCA 66.

298 See also, *Beamish v Zheng* [2004] FMCA 60, [14]; and *Ho v Regulator (No.1)* [2004] FMCA 62, [125].

299 Ibid [35]. See also *McAlister v SEQ Aboriginal Corporation* [2002] FMCA 109, [70], in which Rimmer FM appeared to apply a similar presumption.

300 *Kirkland v Wattle* [2002] FCA 145.

> It is clear … that a relevant tribunal cannot start with the presumption that one party is unlikely to make up and bring to prosecution the allegations in question unless they are justified. The magistrate was obliged to determine which evidence was to be accepted in the case. That obligation could not be discharged by making an assumption of that kind and placing the onus of rebutting it upon the other party. In this respect the magistrate has misunderstood his function. The matter should be remitted to the Magistrates Court for re-hearing.[301]

The case was re-heard by Driver FM who held that the first respondent sexually harassed the applicant, and both respondents discriminated against the applicant, contrary to the SDA.[302]

### 6.15.3 Cases under the DDA

There has been little substantive consideration of the *Briginshaw* principle in cases under the DDA.

In *X v McHugh (Auditor-General of Tasmania)*,[303] Sir Ronald Wilson noted that the approach taken in *Briginshaw* was applicable to cases under the DDA, suggesting that 'these principles may be described summarily as being that any allegation requires that the degree of persuasive proof as is appropriate to the seriousness of the allegation'.[304] Sir Ronald did not, however, expand upon the application of the *Briginshaw* principle in the case before him.[305]

## 6.16 Miscellaneous Procedural and Evidentiary Matters

### 6.16.1 Request for Copy of Transcript

*Dranichnikov v Department of Immigration and Multicultural Affairs*[306] involved an application to the FMC in relation to a transcript.

The applicant had earlier been unsuccessful in unlawful discrimination proceedings in the FMC, from which she appealed to the Federal Court. The applicant then contacted a Registrar of the FMC and requested production of a transcript of the original hearing before the FMC (at no charge to the applicant). That request was refused, it being noted that no reasonable basis for providing transcripts at the FMC's expense had been provided by the applicant.

The applicant applied to the FMC for review of that decision and another earlier similar decision. Although the Department of Immigration and Multicultural Affairs was named as the respondent, Baumann FM excused the Department's attendance, as the proper respondent was the Registrar.

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301 Ibid [5].
302 *Wattle v Kirkland (No.2)* [2002] FMCA 135.
303 Unreported, HREOC, Sir Ronald Wilson, 8 July 1994, extract at (1994) EOC 92-623.
304 Ibid 9.
305 See also *Arrah v P & O Catering Services Pty Ltd* [2002] FMCA 27, [32] in which McInnis FM found it unnecessary to decide the 'appropriate standard of proof' which would apply in that case.
306 [2002] FMCA 72.

The applicant's application for review was dismissed. 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.[307] As a result, his Honour found that the decision was not reviewable under the relevant review provisions.[308]

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 they were required to pay for the transcript.

## 6.16.2 Unrepresented Litigants

In *Barghouthi v Transfield Pty Ltd*,[309] 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 finding that most of the appellant's submissions, both orally and in writing, were 'quite unhelpful',[310] not touching on the legal issues relevant to the appeal, his Honour stated:

> [T]his 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].[311]

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'.[312] 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.

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307 Ibid [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.

308 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.

309 (2002) 122 FCR 19.

310 Ibid 23 [11].

311 Ibid 23 [11], 23-4 [12].

312 Ibid.

### 6.16.3 Representation by Unqualified Person

In *Groundwater v Territory Insurance Office*,[313] 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 HREOC 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)*[314] and *Damjanovic v Maley*[315]):

- 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.[316]
- 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.[317]
- 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'.[318]
- 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.[319]
- 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.[320]

313 [2004] FMCA 381.
314 [2002] FMCAfam 65.
315 Unreported, Supreme Court of NSW Court of Appeal, 19 July 2002.
316 [2004] FMCA 381, [42].
317 Ibid [43].
318 Ibid [44].
319 Ibid [45].
320 Ibid [46].

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.[321]

## 6.16.4 Consideration of Fresh Evidence out of Time

In *Hagan v Trustees of the Toowoomba Sports Ground Trust*,[322] the Federal Court on appeal declined to receive fresh evidence because it was not filed within the time prescribed by O 36, r 6 of the Federal Court Rules. 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 of the HREOC Act provides that the Court is not bound by technicalities or legal forms, the principles relating to the reception of fresh evidence are designed to aid the administration of justice. Section 46PR was therefore of no use to the appellant in this situation.

## 6.16.5 Statements made at HREOC Conciliation

In *Bender v Bovis Lend Lease Pty Ltd*,[323] the Court had to consider whether the applicant could rely upon affidavit evidence referring to statements made during a HREOC conciliation. 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' 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.[324]

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'[325] to allow parties to refer to what may or may not have been said during a conciliation conference at a subsequent court hearing.

## 6.16.6 Security for Costs

In *Elshanawany v Greater Murray Health Service*,[326] 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 rejected the respondent's application for security for costs, applying *Equity Access Limited v Westpac Banking Corporation* (*Equity Access*).[327] In doing so, his Honour did not identify any particular issues arising

321 Ibid [52].
322 (2000) 105 FCR 56.
323 (2003) 175 FLR 446.
324 Ibid 455 [34].
325 Ibid 455-56 [33].
326 [2004] FCA 1272.
327 (1989) ATPR 40-972.

from the nature of discrimination proceedings that may require the court to depart from the approach taken in *Equity Access* when determining an application for security for costs in discrimination cases.

### 6.16.7 Applicability of s 198L of the *Legal Profession Act 1987* (NSW) to Federal Discrimination Cases

In *Fuller v Baptist Union of NSW*,[328] the respondent sought a ruling as to whether a certificate pursuant to s 198L of the *Legal Profession Act 1987* (NSW) was required for the purposes of that case. Section 198L of the *Legal Profession Act 1987* (NSW) is headed 'Restrictions on Commencing Proceedings Without Reasonable Prospects of Success' and provides that:

> (1) The provision of legal services without reasonable prospects of success does not constitute an offence but is capable of being professional misconduct or unsatisfactory professional conduct.
>
> (2) A solicitor of barrister cannot file court documentation on a claim or defence of a claim for damages unless the solicitor or barrister 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 is not to be accepted for lodgement 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) a statement of claim, summons, cross-claim, defence or further pleading; or
> (b) an amended statement of claim, summons, cross-claim, defence or further pleading; or
> (c) a document amending a statement of claim, summons, cross-claim, defence or further pleading; or
> (d) any other document of a kind prescribed by the regulations.
>
> "cross-claim" includes counter-claim and cross-action.

Driver FM held that it was beyond argument that the Parliament of NSW could not regulate the conduct of federal proceedings directly. However, his Honour said that 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* (Cth),[329] which provides that:

> 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.

328 [2004] FMCA 789.
329 Ibid [6].

Driver FM accepted the respondent's submission that s 198L of the *Legal Profession Act 1987* (NSW) was intended to apply to originating processes and other documents in the nature of pleadings.[330] As such, in his Honour's view, where a proceeding is commenced by an originating process which is not a pleading or one identified as a pleading by s 198L(4) of the Act, s 198L is 'incapable of applying in its own terms to that process'.[331]

Driver FM held that s 198L did not apply to the present proceedings. The proceedings had been instituted by way of an application which is not a pleading for the purposes of proceedings before the FMC. His Honour noted that s 50 of the FMC Act specifically provides that proceedings before the FMC 'may be initiated in the FMC by way of application without the need for pleadings'[332] and that an application is not a 'court document' within the meaning of s 198L(4) of the *Legal Profession Act 1987* (NSW):[333]

> It necessarily follows, in my view, that an application should not be regarded as a pleading in a proceeding in this Court and that the Court proceeds in the absence of pleadings except by order. The documents identified in subsection (4) are all pleadings. I conclude that s.198L is only capable of applying to proceedings in the Court to the extent that the Court decides that the proceedings are to be conducted on the basis of pleadings and to the extent that the Court requires the filing of a pleading of the kind identified in s 198L(4).[334]

Although it was not necessary to decide the issue in this case, Driver FM stated that, if a proceeding did arise in the FMC in which 'court documentation' as defined by s 198L(4) of the *Legal Profession Act 1987* (NSW) had been filed:

> my preliminary view that s.198L(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. On the other hand, subsection (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.[335]
>
> 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.[336]

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330 Ibid [8].
331 Ibid.
332 Ibid [9].
333 Ibid.
334 Ibid [10].
335 Ibid [12].
336 Ibid [13].

> 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.[337]

## 6.16.8 Judicial Immunity from Suit under Federal Discrimination Law

In *Re East; Ex parte Nguyen*[338] 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'.[339] 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.

## 6.16.9 Adjournment pending Decision of Legal Aid Commission

In *Tsoi v Savransky & Anor*,[340] 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*,[341] Raphael FM held that he was bound by that piece of legislation.[342] 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.[343]

337 Ibid [14].
338 (1998) 196 CLR 354.
339 Ibid 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, 62-3 (Kirby P), 73 (Hope AJA).
340 [2004] FMCA 879.
341 [2003] FCAFC 272.
342 [2004] FMCA 879, [13].
343 Ibid [17].