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Submissions of the Australian Human Rights Commission

No. VID 323 of 2016

Federal Court of Australia

District Registry: Victoria

Division: General

Leila Winters

Applicant

Basil Michael Fogarty

Respondent

1 Introduction

1. On 22 August 2018, the Australian Human Rights Commission was granted leave to intervene in this proceeding for the purpose of making submissions in relation to the following issues:

    a. the jurisdiction of the Federal Court to hear an application under s 46PO of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) alleging unlawful discrimination based on a claim of victimisation

    b. the interpretation of provisions dealing with victimisation under the *Age Discrimination Act 2004* (Cth) (**ADA**) and the *Sex Discrimination Act 1984* (Cth) (**SDA**)

    c. the interpretation of provisions of the AHRC Act dealing with the commencement of proceedings alleging unlawful discrimination.

2. There is conflicting authority about whether a person who makes an application to the Federal Court (or the Federal Circuit Court) under s 46PO of the AHRC Act alleging unlawful discrimination may include, as part of those civil proceedings, an allegation that the respondent engaged in victimisation, including under s 51 of the

Filed on behalf of Australian Human Rights Commission
Prepared by Graeme Edgerton
Tel +612 8231 4205 Fax +612 9284 9611
Email graeme.edgerton@humanrights.gov.au
Address for service Level 3, 175 Pitt Street, Sydney NSW 2000

ADA or s 94 of the SDA.[1] It appears that the conflict has arisen because victimisation under each of the Commonwealth discrimination Acts is a criminal offence.[2]

3. Although victimisation is a criminal offence, the better view is that a person who alleges that they have been victimised should also have the right to bring their own civil action alleging victimisation once a complaint of unlawful discrimination is terminated by the Commission.

4. This result follows from a consideration of the statutory scheme, including its text, context and purpose.

2 Statutory scheme

2.1 Current structure

5. Part IIB of the AHRC Act deals with redress for 'unlawful discrimination'. The Part is divided into two Divisions. Division 1 relates to conciliation of complaints of unlawful discrimination by the President. Division 2 relates to proceedings alleging unlawful discrimination in the Federal Court and the Federal Circuit Court.

6. At the time that the complaint the subject of this proceeding was made to the Commission, s 46P(1) of the AHRC Act provided that a person may lodge a complaint in writing with the Commission alleging unlawful discrimination. Although this section has been subsequently amended to increase the threshold requirements for a complaint,[3] the requirement for an allegation of unlawful discrimination remains.

7. 'Unlawful discrimination' is defined in s 3 of the AHRC to include both: acts, omissions or practices that constitute discrimination under the four Commonwealth discrimination Acts;[4] and any conduct that is an offence under specified provisions of those Acts.[5] In particular, the definition of 'unlawful discrimination' includes

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1 *Dye v Commonwealth Securities Ltd (No 2)* [2010] FCAFC 118; *Chen v Monash University* (2016) 244 FCR 424.

2 ADA, s 51; SDA, s 94; *Racial Discrimination Act 1975* (Cth) (**RDA**), s 27(2); *Disability Discrimination Act 1992* (Cth) (**DDA**), s 42.

3 *Human Rights Legislation Amendment Act 2017* (Cth), Sch 2, item 27. These amendments apply in relation to complaints received on or after 13 April 2017.

4 Part 4 of the ADA, Part 2 of the DDA, Parts II and IIA of the RDA and Part II of the SDA.

5 Div 2 of Part 5 of the ADA, Div 4 of Part 2 of the DDA, s 27(2) of the RDA and s 94 of the SDA.

conduct that amounts to victimisation, including under s 51 of the ADA and s 94 of the SDA.

8. Allegations of victimisation are intimately connected with allegations of discrimination. Victimisation involves subjecting a person to a detriment, or threatening to do so, because the person has taken certain action related to the enforcement of rights under Commonwealth discrimination law. This may involve retaliatory action because the person has made a complaint to the Commission, or proposes to bring court proceedings, alleging discrimination under Commonwealth law.[6] It may involve causing someone a detriment because they participated in the conciliation processes of the Commission by providing information, producing documents or attending a conciliation conference; or because they appeared as a witness in subsequent legal proceedings.[7]

9. At the times relevant to this proceeding, the AHRC Act provided that when a complaint is made to the Commission alleging unlawful discrimination (including victimisation), it must be referred to the President (or to his or her delegate) who must inquire into and attempt to conciliate the complaint.[8] For complaints received on or after 13 April 2017, the President (or his or her delegate) must consider whether to inquire into the complaint (having regard to the matters in s 46PH of the AHRC Act) and either terminate the complaint without inquiry or inquire into and attempt to conciliate the complaint.[9]

10. If a complaint cannot be conciliated, the Commission will terminate the complaint and notify the complainant in writing of the reasons for the termination.[10] Once these two steps have been taken, an 'affected person' (either a complainant or a person on whose behalf a complaint was lodged) may make an application to the Federal Court or the Federal Circuit Court alleging unlawful discrimination by one or more of the respondents to the terminated compliant.[11]

11. Division 2 of Part IIB deals with redress for unlawful discrimination by way of application to the Federal Court or Federal Circuit Court. An application to the Court under this Division will involve an allegation that the respondent engaged in

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6 Eg, SDA, ss 94(2)(a) and (b); ADA, ss 51(1)(e)(i) and (ii).
7 Eg, SDA, ss 94(2)(c), (d) and (e); ADA, ss 51(1)(e)(iii), (iv) and (v).
8 AHRC Act, ss 46PD, 46PF(1); *Reynolds v JP Morgan Administrative Services Australia Limited (No 2)* [2011] FCA 489 (Rares J). Section 19 of the AHRC Act deals with delegation.
9 AHRC Act, s 46PF(1).
10 AHRC Act, s 46PH.
11 AHRC Act, s 46PO(1).

'unlawful discrimination' (which may comprise or include victimisation). If the Court is satisfied that there has been unlawful discrimination, it is empowered to make such orders as it thinks fit, including one of the orders set out in s 46PO(4). One of those orders is an order 'declaring that the respondent has committed unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination'. In determining whether it is satisfied that there has been unlawful discrimination for the purposes of s 46PO of the AHRC Act, the correct approach by the Court to the standard of proof is that for which s 140 of the *Evidence Act 1995* (Cth) provides.[12]

12. This regime of conciliation in the Commission with the potential for legal proceedings to be subsequently brought in the Federal Court was introduced by the *Human Rights Legislation Amendment Bill (No 1) 1999* (Cth). As the Explanatory Memorandum to that Bill noted:

> The Bill …
>
> - centralises complaint investigation and conciliation in the office of the President; …
> - provides that matters which cannot be conciliated will be dealt with in the Federal Court of Australia.[13]

13. There is no suggestion in either the text or structure of Part IIB of the AHRC Act or the extrinsic materials accompanying the Bill that introduced this regime, that 'unlawful discrimination' should have a different meaning in circumstances where a complaint is before the Commission and where it is before the Court.

2.2 Alternative interpretation?

14. One suggested basis for reading down the meaning of 'unlawful discrimination' in s 46PO of the AHRC Act was raised by Gray J in *Walker v Cormack.* His Honour said that the fact that s 49B of the AHRC Act only confers civil jurisdiction on the Federal Court and the Federal Circuit Court might evince a legislative intention that the meaning of 'unlawful discrimination' is to be construed in a more restrictive way in s 46PO so as not to include conduct that would constitute an offence.[14]

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[12] *Qantas Airways Limited v Gama* (2008) 167 FCR 537 at 573-577 [122]-[139] (Branson J); French and Jacobson JJ agreeing at 571 [110].

[13] Explanatory Memorandum, Human Rights Legislation Amendment Bill (No 1) 1999 (Cth), p 1.

[14] *Walker v Cormack* (2011) 196 FCR 574 at 587 [41] (Gray J).

15. This suggestion was not expressed as a concluded view and his Honour noted that it was not an issue that was able to be explored fully in argument. With respect, the Commission submits that the defined term 'unlawful discrimination' should not be given a more limited meaning when it appears in s 46PO. This is so for the following reasons:

    a. There is a presumption that defined words in a statute have their defined meanings and this presumption is not to be displaced without good reason.[15] The onus of showing a contrary intention is on the party asserting it.[16]

    b. There is no clear, alternative, ordinary meaning to be given to the term 'unlawful discrimination'. The way in which it is used in s 46PO suggests that it should be given its defined meaning as set out in s 3.

    c. The AHRC Act defines both 'unlawful discrimination' and 'discrimination' and assigns a specific meaning to each. 'Unlawful discrimination' is used only in (or in relation to) Part IIB of the AHRC Act. 'Discrimination' is defined for the purpose of the AHRC Act other than Part IIB to mean 'a distinction, exclusion or preference … that has the effect of nullifying or impairing equality of opportunity or treatment in employment'. This definition is used in Part II, Div 4 of the AHRC Act in relation to equal opportunity in employment. This kind of discrimination is not unlawful under another Commonwealth discrimination Act. Instead, it is subject only to inquiry and possible reporting by the Commission.[17] The Commission's functions in relation to equal opportunity in employment represents Australia's response to International Labour Organisation *Convention No. 111 concerning Discrimination in Respect of Employment and Occupation* that appears at Schedule 1 to the AHRC Act.

    d. The specific meanings assigned to 'unlawful discrimination' and 'discrimination' and the attention given in the AHRC Act to the separate spheres of operation of each, strongly suggests that it was intended that 'unlawful discrimination' should have its defined meaning wherever it appears, including in both Division 1 and Division 2 of Part IIB.

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[15] *Qantas Airways Ltd v Chief Commissioner of State Revenue* [2008] NSWSC 1049 at [38] (Handley AJ).

[16] *Anti-Doping Rule Violation Panel v XZTT* (2013) 214 FCR 40 at 64 [92] (North, Cowdroy and McKerracher JJ).

[17] AHRC Act, ss 31(b), 32 and 32A.

e. Where a defined term in the AHRC Act is intended to have a particular meaning only in certain parts of the AHRC Act, this is stated expressly in the definition. For example, the definitions of 'complaint' and 'discrimination' have their defined meaning only in certain parts of the AHRC Act.

f. The context of s 46PO shows that 'unlawful discrimination' is intended to have the same meaning when it is used in relation to the subject matter of a complaint before the Commission and when it is used in relation to the subject matter of an application to the Court. For example, s 46PO(3) requires the unlawful discrimination alleged in an application to the Court to be 'the same as (or the same in substance as) the unlawful discrimination that was the subject of the terminated complaint' or to arise out of the same acts, omissions or practices. There is no dispute that the subject matter of the terminated complaint may include allegations of victimisation.[18]

g. An assumption underlying the suggested reading down appears to be that if victimisation were included in the definition of 'unlawful discrimination' in s 46PO, it would have to be dealt with as a criminal offence by the Court and this would be contrary to the scope of jurisdiction conferred by s 49B. However, as Gray J noted in the later case of *Walker v State of Victoria*, an alternative available interpretation is that s 46PO is to be 'construed as converting victimisation into a civil cause of action'.[19] This interpretation is open, does not require a defined term to be given different meanings in different sections of the Act, is consistent with the operation of the Act as a whole and is to be preferred.

h. Allowing civil remedies for victimisation is consistent with the way in which victimisation matters under the SDA were dealt with immediately prior to the introduction of s 46PO, when determinations by the Commission that victimisation had occurred could be the subject of civil enforcement proceedings in the Federal Court (see paragraphs [20] to [23] below).

16. Section 6 of this submission seeks to address a number of other concerns raised about the concurrent operation of civil prohibitions and criminal offences in relation to victimisation.

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[18] *Walker v State of Victoria* [2012] FCAFC 38 at [98] (Gray J).
[19] *Walker v State of Victoria* [2012] FCAFC 38 at [99] (Gray J).

2.3 Purposive interpretation

17. To the extent that there is any doubt about the proper construction of s 46PO of the AHRC Act, it should be construed beneficially and not narrowly given its status as remedial legislation designed to prevent discrimination.[20] The principle that an Act must be read in light of its statutory objects is of particular significance in the case of legislation that protects or enforces human rights.[21] Here, relevant statutory objects include the elimination of discrimination as far as possible[22] and the provision of 'effective protection and remedies'[23] for discrimination.

18. A beneficial construction of s 46PO would be one that maximised the potential for people subject to victimisation to obtain an effective remedy. The Commission is not aware of any prosecutions being brought under s 51 of the ADA or s 94 of the SDA.[24] If the Federal Court does not have the jurisdiction to hear victimisation claims as a civil matter, this may substantially deprive people who have been victimised of an effective remedy. It may also have the practical effect of removing a deterrent to engaging in victimisation.

19. Further, it is well settled that legislative provisions that are ambiguous are to be interpreted by reference to the presumption that Parliament did not intend to violate Australia's international obligations.[25] Where a construction that is consistent with international law is open, that construction is to be preferred over a construction that is inconsistent with international law.[26] As a result,

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[20] *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359 (Mason CJ and Gaudron J, Deane J agreeing), 372 (Brennan J), 394 (Dawson and Toohey JJ), 406-407 (McHugh J).

[21] *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359 (Mason CJ and Gaudron J); *IW v City of Perth* (1997) 191 CLR 1 at 14 (Brennan CJ and McHugh J), 22-23 (Gaudron J), 27 (Toohey J), 39-42 (Gummow J), 58 (Kirby J).

[22] SDA, s 4(b), (ba) and (c); DDA, s 3(a); ADA, s 3(a).

[23] Article 6 of the *International Convention on the Elimination of All Forms of Racial Discrimination* in the Schedule to the RDA and to which the RDA gives effect.

[24] Affidavit of Emeritus Professor Rosalind Frances Croucher AM sworn 26 June 2018 at [8].

[25] This principle was first stated in the Commonwealth context in *Jumbunna Coal Mine No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363. It has since been reaffirmed by the High Court on many occasions: see, eg, *Zachariassen v Commonwealth* (1917) 24 CLR 166 at 181 (Barton, Isaacs and Rich JJ); *Polites v Commonwealth* (1945) 70 CLR 60 at 68-69 (Latham CJ), 77 (Dixon J), 80-81 (Williams J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ); *Dietrich v R* (1992) 177 CLR 292 at 306 (Mason CJ and McHugh J); *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 (Mason CJ and Deane J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384 (Gummow and Hayne JJ); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 33 (McHugh and Gummow JJ); *Al-Kateb v Godwin* (2004) 219 CLR 562; *Coleman v Power* (2004) 220 CLR 1 at 91 (Kirby J). Despite his stringent criticism of the rule, in *Al-Kateb* at [63]-[65] McHugh J acknowledged that 'it is too well established to be repealed now by judicial decision'.

[26] *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 362 (Mason CJ and Deane J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ).

Commonwealth discrimination Acts should be construed in a way that is consistent with Australia's obligations under the *International Covenant on Civil and Political Rights* (**ICCPR**).[27] In particular, Commonwealth discrimination law should be construed consistently with the obligation in article 26 of the ICCPR for States to prohibit by law any discrimination on a number of grounds including race, sex or other status,[28] and the obligation in article 2(3) of the ICCPR to ensure that people within the jurisdiction of the State whose rights under the ICCPR are violated have access to an effective remedy.

2.4 Previous regime under the Sex Discrimination Act

20. Prior to the 1999 amendments coming into effect, there was provision in the SDA for civil determinations of victimisation to be made by the Commission which could then be subject to civil enforcement proceedings in the Federal Court.
Section 47A of the SDA provided that, for the purposes of Part III of the SDA, 'a reference to an act that is unlawful under a provision of Part II includes a reference to an act that is an offence under section 94'. Part III of the SDA was headed: 'Inquiries and civil proceedings'. Section 47A was headed: 'Part applies to victimisation offences'. The effect of this provision (prior to the 1999 amendments coming into effect) was that:

    a. complaints of sex discrimination and sexual harassment under Part II of the SDA and complaints of victimisation under s 94 of the SDA could be made to the Commission (s 50, SDA as it then stood)[29]

    b. the Commission would notify the Sex Discrimination Commissioner of these complaints and the Commissioner would conduct an inquiry and endeavour to effect a settlement of the complaints by conciliation (s 52, SDA)

    c. if a complaint could not be conciliated, it would be referred to the Commission (s 57, SDA)

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[27] ICCPR, opened for signature 16 December 1966, [1980] ATS 23 (entered into force generally 23 March 1976, except Article 41, which came into force generally on 28 March 1979; entered into force for Australia 13 November 1980, except Article 41, which came into force for Australia on 28 January 1993).

[28] For specific international obligations on Australia to prohibit discrimination on the grounds of disability and age, see: the *Convention on the Rights of Persons with Disabilities* [2008] ATS 12 (entered into force generally 3 May 2008; entered into force for Australia 16 August 2008) and the Political Declaration adopted in Madrid, Spain on 12 April 2002 by the Second World Assembly on Ageing, referred to in s 3(e)(ii) of the ADA.

[29] For example, see the consolidation of the SDA prepared on 16 November 1999.

d. the Commission would hold an inquiry into complaints referred to it by the Sex Discrimination Commissioner (s 59, SDA) and could make determinations about the subject matter of the complaints, including any allegations of victimisation (s 81, SDA)

e. those determinations could be the subject of *de novo* enforcement proceedings in the Federal Court (ss 83A and 115, SDA).

21. This regime was the interim position introduced following the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 and that applied from 1995 to 2000.

22. When amendments were made to the SDA and the AHRC Act in 1999, s 47A of the SDA was repealed. The Explanatory Memorandum noted:

> This item will repeal section 47A of the SDA, which currently specifies what is meant by a reference to an unlawful act under Part II of that Act. With the transfer of the legislative structure for complaint handing to the HRA [the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)], the same result will be achieved by inserting in subsection 3(1) of the HRA a definition of 'unlawful discrimination' which includes those acts which were currently included by virtue of section 47A of the SDA.[30]

23. When the Explanatory Memorandum refers to the 'the same result' being achieved, this is to be understood as meaning that:

a. the expanded definition in the former s 47A of the SDA of an act that is unlawful under a provision of Part II of the SDA; and

b. the new definition of 'unlawful discrimination' in s 3 of the AHRC Act

both of which included victimisation under s 94 of the SDA, would have an equivalent operation, including permitting a complainant to obtain civil remedies for victimisation.

2.5 Proposed consolidation of Commonwealth discrimination laws

24. In 2012, the Australian Government proposed to consolidate the four Commonwealth discrimination Acts. As part of that consolidation, a single victimisation provision was proposed that would involve civil liability only. The

[30] Explanatory Memorandum, Human Rights Legislation Amendment Bill (No 1) 1999 (Cth), p 45.

explanatory notes to the exposure draft Bill observed that victimisation of complainants is a criminal offence under each of the existing Commonwealth anti-discrimination laws and that it is possible to bring a civil complaint about victimisation through the Commission. The purpose of this change was to 'remov[e] the complexity associated with simultaneous civil and criminal liability'.[31] Ultimately, the proposed consolidation did not proceed.

3 Early cases on victimisation under the current regime

25. The current regime of inquiry and conciliation by the Commission (without determination) followed by potential legal proceedings in a federal court was introduced by the *Human Rights Legislation Amendment Act (No 1) 1999* (Cth) and commenced on 13 April 2000.

26. In at least 16 cases between 2000 and 2011, the Federal Court and the then Federal Magistrates Court heard and determined applications alleging victimisation as civil claims.[32] In *O'Connor v Ross (No 1)* (one of the first of these cases, which dealt with victimisation under the DDA), Driver FM described the difference between the civil and criminal jurisdictions to hear victimisation claims:

> The jurisdiction of this court is to deal with complaints of discrimination that HREOC has been unable to resolve. The jurisdiction of this court does not extend to the hearing of charges for alleged offences against the DDA or the HREOC Act. It was for that reason that I ordered that the application be amended to delete reference to an offence. That has been done. Mr Abaza submits that the amended application remains objectionable because it continues to assert victimisation contrary to either or both of s 42 of the DDA and s 26 of the HREOC Act. This objection indicates a partial misunderstanding. The DDA provides that it

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[31] Australian Government, *Explanatory Notes, Exposure Draft, Human Rights and Anti-Discrimination Bill 2012*, November 2012, at 54 [250]. At https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/antidiscrimination2012/notes/index (viewed 4 September 2018).

[32] *Plunkett v Silverbrook Research Pty Ltd* [2011] FMCA 1012 at [140]-[141], [149]-[152], [169] and [247]; *Noble v Baldwin* [2011] FMCA 283 at [38]; *Dye v Commonwealth Securities Limited (No 2)* [2010] FCAFC 118 at [71]; *Reynolds v Minister for Health* [2010] FMCA 843 at [30]; *Wylie v McCann Worldgroup Pty Ltd* [2009] FMCA 959 at [122]; *Davidson v McCann Worldgroup Pty Ltd* [2009] FMCA 957; *Huang v University of New South Wales* [2008] FCA 1930 at [6], [109]-[115]; *Penhall-Jones v State of NSW* [2007] FCA 925 at [10]; *Obieta v New South Wales Department of Education and Training* [2007] FCA 86 at [259]; *Lee v Smith* [2007] FMCA 59 at [211]-[213]; *Drury v Andreco Hurll Refractory Services Pty Ltd (No 4)* [2005] FMCA 1226 at [30]-[33]; *Damiano v Wilkinson* [2004] FMCA 891; *Taylor v Morrison* [2003] FMCA 79 at [11]-[13]; *O'Connor v Ross (No 1)* [2002] FMCA 210 at [11]; *Font v Paspaley Pearls* [2002] FMCA 142 at [141]-[153]; *Aleksovski v Australia Asia Aerospace Pty Ltd* [2002] FMCA 81 at [101].

> is an offence for a person to commit an act of victimisation. Where victimisation is dealt with as an offence, it will be prosecuted by the Director of Public Prosecutions in a court of competent jurisdiction other than this court. However, a person may also make a complaint of victimisation to HREOC which the Commission will attempt to resolve by conciliation. Where conciliation is unsuccessful, the matter will then be referred for hearing by this court or the Federal Court if application is made. Section 3(1) of the HREOC Act defines unlawful discrimination as acts, omissions or practices that are unlawful under Pt 2 of the DDA and specifically includes any conduct that is an offence under Div 4 of Pt 2 of the DDA. It follows that the applicant was entitled to make a complaint of victimisation to HREOC and that this court has jurisdiction to consider the claim in respect of victimisation where HREOC has been unable to resolve the complaint by conciliation and the President has issued a notice of termination. This court has dealt with such claims on a number of occasions … . I add, for completeness, that my conclusions on this issue have taken into account s 125 of the DDA. The applicant's right of civil action derives from the HREOC Act, not the DDA.[33]

27. These comments by Driver FM have been referred to with approval in other proceedings, including by Buchanan J in *Penhall-Jones v State of NSW* [2007] FCA 925.[34]

28. In 2010, the Full Court of the Federal Court held that s 46PO of the AHRC Act created a private cause of action for unlawful discrimination, including victimisation. In *Dye v Commonwealth Securities Limited (No 2)*, the Full Court said:

> [T]he purpose of s 46PO of the AHRC Act is to create a private cause of action … for unlawful discrimination including a contravention of s 94 of the *Sex Discrimination Act*. That statutory cause of action attracted the broad range of statutory remedies in s 46PO(4), including a right to damages by way of compensation for any loss or damage suffered because of the conduct of the respondent (s 46PO(4)(f)). Thus, the AHRC Act, read together with s 94 of the

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[33] *O'Connor v Ross (No 1)* [2002] FMCA 210 at [11]. Section 125 of the DDA provides that:

(1) This Act does not confer on a person a right of action in respect of the doing of an act that is unlawful under a provision of Part 2 unless a provision of this Act expressly provides otherwise.

(2) For the purposes of subsection (1), a reference to an act that is unlawful under a provision of Part 2 includes a reference to an act that is an offence under a provision of Division 4 of that Part.

[34] *Penhall-Jones v State of NSW* [2007] FCA 925 at [10] (Buchanan J); *Davidson v McCann Worldgroup Pty Ltd* [2009] FMCA 957 at [120] (Barnes FM); *Reynolds v Minister for Health* [2010] FMCA 843 at [30] (Lucev FM); *Forest v HK & W Investments Pty Ltd* [2014] FCCA 209 at [111] (Burnett J).

Sex Discrimination Act, creates a range of remedies for victimisation that includes damages, being expressly within the definition of unlawful discrimination s 3(1) of the AHRC Act.[35]

29. The Commission submits, with respect, that this is an orthodox approach to the interpretation of s 46PO.

4 Questions raised about the jurisdiction of the Federal Court

30. In four sets of proceedings since 2011, the Federal Court cast doubt on whether either the Federal Circuit Court or the Federal Court has jurisdiction to hear an application under s 46PO of the AHRC Act if the alleged unlawful discrimination is an act of victimisation.

31. Without deciding the issue, doubt was first expressed by Gray J in *Walker v Cormack* (in which victimisation was alleged under s 94 of the SDA)[36] and in *Walker v State of Victoria* (in which victimisation was alleged under s 42 of the DDA).[37]

32. In *Walker v Cormack*, a Federal Magistrate at first instance had dealt with a claim of victimisation under the SDA as a civil matter and dismissed the claim.[38] On appeal to the Federal Court, Gray J raised concerns about whether a claim of victimisation could be brought as a civil matter. His Honour said that it would be an 'unusual situation' for Parliament to permit victimisation to be dealt with either as a civil contravention or a criminal offence. Justice Gray was particularly concerned at the prospect that:

    a. an applicant who was unsuccessful in a civil proceeding may later bring a criminal prosecution in relation to the same conduct; and

    b. a respondent in a civil proceeding may be inhibited in giving evidence in that proceeding because of the possibility that they might be giving self-incriminatory evidence that could be used against them in a later criminal trial.[39]

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35 *Dye v Commonwealth Securities Limited (No 2)* [2010] FCAFC 118 at [71] (Marshall, Rares and Flick JJ).
36 *Walker v Cormack* (2011) 196 FCR 574 at 586-587 [37]-[41] (Gray J).
37 *Walker v State of Victoria* [2012] FCAFC 38 at [98]-[100] (Gray J).
38 *Walker v Cormack* [2010] FMCA 9 at [38] (O'Dwyer FM); see also *Walker v Cormack* (2011) 196 FCR 574 at 586 [40] (Gray J).
39 *Walker v Cormack* (2011) 196 FCR 574 at 587 [41] (Gray J).

33. The issues raised by Gray J are important. In paragraphs [59] to [62] below, the Commission discusses whether Parliament may proscribe the same conduct as both a civil prohibition and a criminal offence. In paragraphs [71] to [75] below, the Commission discusses how courts have traditionally dealt with the prospect that criminal proceedings may be brought in the future relating to the subject matter of current civil proceedings.

34. In *Walker v State of Victoria*, the trial judge (Tracey J in the Federal Court) appeared to deal with the allegation of victimisation as if it were a criminal charge.[40] The trial judge said that the applicant had 'charged the Department [of Education and Early Childhood Development] with victimisation in contravention of s 42 of the DDA'[41] and that the applicant had the onus 'to establish the charge beyond reasonable doubt'.[42] However, it appears that some confusion may have arisen as a result of the way in which the case was pleaded by the applicant. Justice Tracey said that there was a question about whether 'a criminal charge could effectively be laid in a statement of claim' and noted that this issue was not the subject of submissions.[43] Ultimately, Tracey J found that even if the applicant had been able to surmount the multiple hurdles in pursuing a prosecution (including whether this was possible at all in a civil proceeding) the 'charge' could not have been made out and must be dismissed.[44]

35. An appeal in *Walker v State of Victoria* was heard by the Full Court of the Federal Court. One of the judges, Gray J, noted that:

> It is clear that the trial judge had no jurisdiction to deal with victimisation as a criminal offence. Even if such jurisdiction had existed, for very many reasons it would be wrong to exercise it in conjunction with the exercise of jurisdiction in relation to a civil matter.[45]

36. Justice Gray then considered whether s 46PO of the AHRC Act should 'be construed as converting victimisation into a civil cause of action'. In relation to this question, Gray J said:

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40 *Walker v State of Victoria* [2011] FCA 258 (Tracey J).
41 *Walker v State of Victoria* [2011] FCA 258 at [34] (Tracey J).
42 *Walker v State of Victoria* [2011] FCA 258 at [314] (Tracey J). However, at [36], his Honour had referred to the relevant standard for both the discrimination and victimisation aspects of the case as being the 'balance of probabilities'.
43 *Walker v State of Victoria* [2011] FCA 258 at [294] (Tracey J).
44 *Walker v State of Victoria* [2011] FCA 258 at [329]-[331] (Tracey J).
45 *Walker v State of Victoria* [2012] FCAFC 38 at [99] (Gray J).

> It seems strange that Parliament would confer on any court jurisdiction specifically to determine as part of a civil proceeding whether 'conduct that is an offence' under a specified provision has occurred. Courts are used to dealing in civil cases with allegations of conduct that might also be an element of a criminal offence. Trespass to the person is an example. Even so, if the same conduct were to be the subject of criminal proceedings, there would be additional issues, such as the requisite mental element. Courts are also used to dealing with cases in which they may be required to grant certificates pursuant to s 128 of the *Evidence Act 1995* (Cth), or equivalent provisions, so that witnesses may give evidence freely in civil proceedings which, but for such certificates, could be used against them in subsequent criminal proceedings. It would still be an odd step for Parliament to take to require a court to determine in a civil case whether an offence has occurred. If there has been a conferral on this Court and the Federal Magistrates Court in respect of a complaint of victimisation, that would be the task of the Court.
>
> These questions were not argued fully in the present case, and there is no need to answer them. They do need to be the subject of authoritative answer.[46]

37. The Commission's submissions at paragraphs [63] to [70] below are addressed to the issue raised by Gray J about whether Parliament may require a court to determine in a civil case whether an offence occurred.

38. The jurisdictional issues identified by Gray J were not discussed by the other members of the Full Court in *Walker v State of Victoria* (although Reeves J agreed generally with the judgment of Gray J). Because no answer was given to these questions, the comments by Gray J were strictly *obiter dicta* and do not amount to a binding precedent. Nevertheless, the comments were referred to with approval both at first instance and on appeal by the Full Court of the Federal Court in *Chen v Monash University* as though they did amount to binding precedent.[47]

39. The judgment at first instance in *Chen v Monash University* was also given by Tracey J. Dr Chen was not legally represented and appeared in person. Her primary claim was that she had been the victim of sex discrimination or sexual harassment on numerous occasions. Prior to trial, she also alleged that some of the conduct of the University amounted to victimisation under the SDA or the RDA. The judgment records that Dr Chen 'abandoned' her victimisation claims at the

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[46] *Walker v State of Victoria* [2012] FCAFC 38 at [99]-[100] (Gray J).
[47] *Chen v Monash University* [2016] FCAFC 66 at [119]-[124] (Barker, Davies and Markovic JJ).

hearing because she 'accepted that the Court could not entertain claims of victimisation because victimisation is a criminal offence and the Court lacks jurisdiction to deal with such charges'.[48] The authority cited for this proposition was the *obiter* comments of Gray J in *Walker v State of Victoria*. It is not clear from the judgment whether there was any substantive argument about whether the victimisation allegations could be heard as civil claims. In any event, it appears that Dr Chen may not have been prejudiced because the University accepted that the victimisation allegation could be 'dealt with as sex discrimination claims which formed part of a course of conduct on the part of the University'.[49]

40. The appeal judgment in *Chen v Monash University* dealt with an application to reinstate an appeal following the filing of a notice of discontinuance. One of the factors considered by the Court was the applicant's prospects of success of the proposed appeal.[50] Dr Chen again appeared in person and sought to argue that the finding by the trial judge that the Court did not have jurisdiction to hear her claims of victimisation was an error of law. She submitted that she sought civil not criminal remedies from the Court and that the primary judge had failed to take into account other cases where civil claims for victimisation had been successful.[51]

41. The Full Court referred to a range of provisions including ss 13A and 94 of the SDA, s 49B of the AHRC Act and s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**).[52] It concluded that: 'While a claim of victimisation can be made to the AHRC it seems that it cannot, *based on the operation of these sections*, be made to this Court' (emphasis added). Significantly, in this part of its reasons, the Court did not refer to s 46PO of the AHRC Act. The Commission agrees that a prosecution for an offence against s 94 of the SDA may not be brought in the Federal Court, including by reason of the provisions referred to by the Full Court. However, the Commission submits that a civil claim of victimisation can be made to the Federal Court based on the operation of s 46PO of the AHRC Act. The relevant statutory basis for the jurisdiction of the Federal Court in respect of civil and criminal proceedings is considered in more detail in paragraphs [46] to [56] below.

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48 *Chen v Monash University* [2015] FCA 130 at [11] (Tracey J), citing *Walker v State of Victoria* [2012] FCAFC 38 at [98] (Gray J).
49 *Chen v Monash University* [2015] FCA 130 at [11] (Tracey J).
50 *Chen v Monash University* (2016) 244 FCR 424 at 446 [111] (Barker, Davies and Markovic JJ).
51 *Chen v Monash University* (2016) 244 FCR 424 at 449 [119] (Barker, Davies and Markovic JJ).
52 *Chen v Monash University* (2016) 244 FCR 424 at 449-450 [120]-[121] (Barker, Davies and Markovic JJ).

42. The Full Court of the Federal Court found that there was no error of law in the approach of the trial judge, saying:

> At the election of the applicant and, without opposition from the respondents, the allegations that would otherwise have made up the applicant's claim of victimisation were dealt with as sex discrimination claims which formed part of a course of conduct on the part of the first respondent. There is no appealable error in the approach of the primary judge to this issue. He properly found that there was no jurisdiction in this Court to hear a claim which amounts to a criminal offence and made reference to the authority that was binding on him: *Walker v Victoria*. The applicant was permitted to lead evidence in relation to the matters that she said amounted to victimisation as part of her sex discrimination claims.
>
> The applicant relies on *Alexander v Cappello*, a decision of Judge Driver in the Federal Circuit Court, in which Judge Driver made a finding that a claim of victimisation pursuant to s 94 of the SD Act had been established. Although Judge Driver refers to the judgment of Gray J in *Walker v Victoria*, he did not consider the issue of whether the Federal Circuit Court had jurisdiction to consider a claim for victimisation pursuant to s 94 of the SD Act. We assume the issue was not raised and his attention was not drawn to the relevant remarks of Gray J on that issue in *Walker v Victoria*. In any event, *Alexander v Cappello* was not binding on the primary judge and, if it was brought to his attention, he properly did not follow it.[53]

43. The first of the paragraphs cited above suggests that, in the view of the Full Court, the trial judge properly found that there was no jurisdiction to hear a criminal charge, and that the civil allegations were dealt with as allegations of sex discrimination which meant that there was no prejudice to the appellant. However, as noted in paragraph [41] above, the Full Court also expressly found that a claim of victimisation cannot be made to the Federal Court (or, at least, could not be made pursuant to a number of identified legislative provisions).[54] With respect, it seems that this finding (if expressed generally) was not correct. The Commission submits that if the Full Court in *Chen v Monash University* is to be taken as saying that a claim of victimisation cannot be made to the Federal Court, it was wrong and this judgment should not be followed. Instead, the judgment of the Full Court in *Dye v Commonwealth Securities Limited (No 2)* should be preferred.

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[53] *Chen v Monash University* (2016) 244 FCR 424 at 450-451 [123]-[124] (Barker, Davies and Markovic JJ).

[54] *Chen v Monash University* [2016] FCAFC 66 at [121] (Barker, Davies and Markovic JJ).

44. The decision of the Full Court in *Chen v Monash University* was followed by North J in *Chen v Birbilis*. Justice North said that the judgments of the Full Court 'make it plain that the claim under s 94 is not within the jurisdiction of the Full Court'.[55]

45. The Commission notes that the Full Court in *Chen v Monash University* was dealing with a case where the trial judge appeared to have assumed that the only way that a victimisation claim could be brought was as a criminal charge. The applicant was not legally represented, either at first instance or on appeal, and the Full Court did not have the benefit of full argument on this issue. It does not appear that the Court was referred to the previous Full Court judgment in *Dye v Commonwealth Securities Limited (No 2)*.

5 Jurisdiction of the Federal Court

46. As the Full Court identified in *Chen v Monash University*, it is necessary to consider the jurisdiction conferred on the Federal Court by statute to hear particular kinds of civil and criminal proceedings. The sources of the Court's jurisdiction and the forums in which civil and criminal claims of victimisation may be brought are discussed below.

5.1 Sources of jurisdiction

47. Section 39B(1A)(c) of the Judiciary Act provides that the Federal Court has original jurisdiction in any matter arising under any laws made by Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

48. While the original jurisdiction vested in the Federal Court by the Judiciary Act does not include criminal matters, the Court may be invested with criminal jurisdiction by another Act of Parliament. The explanatory note to s 39B(1A)(c) provides: 'Paragraph (c) does not prevent other laws of the Commonwealth conferring criminal jurisdiction on the Federal Court of Australia'.

49. Section 19(1) of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) provides that the Federal Court has such original jurisdiction as is vested in it by laws made by the Parliament.

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[55] *Chen v Birbilis* [2016] FCA 661 at [11] (North J).

5.2 Laws made by Parliament

50. The AHRC Act is a law made by Parliament. Pursuant to s 39B(1A)(c) of the Judiciary Act, the Federal Court has original jurisdiction in any matter arising under the AHRC Act, other than a criminal matter.

51. Section 49B of the AHRC Act provides that the Federal Court and the Federal Circuit Court have concurrent jurisdiction with respect to civil matters arising under Parts IIB or IIC. This amounts to a vesting of jurisdiction in the Federal Court for the purposes of s 19(1) of the FCA Act.

52. Section 46PO appears in Part IIB of the AHRC Act. Either the Federal Court or the Federal Circuit Court has jurisdiction to hear, as a civil matter, an application under s 46PO alleging unlawful discrimination (including in relation to conduct that amounts to victimisation).

5.3 Criminal matters

53. If a criminal prosecution were to be brought in relation to victimisation, it would be brought directly under the relevant Commonwealth discrimination Act and not as 'unlawful discrimination' under the AHRC Act. For example, if an offence of victimisation under the SDA were alleged, the prosecution would be for a breach of s 94 of the SDA (and not 'unlawful discrimination' under s 46PO of the AHRC Act). Such prosecutions would need to be brought in relevant State or Territory courts.

54. The explanatory note to s 39B(1A)(c) of the Judiciary Act was added by the *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009* (Cth). That Act amended the FCA Act to add Part III, Division 1A which sets out procedures to be followed during criminal proceedings in the Federal Court relating to certain indictable offences.

55. These amendments to the FCA Act did not themselves confer jurisdiction on the Federal Court in relation to indictable offences. Other laws are necessary to do this. For example, the *Competition and Consumer Act 2010* (Cth) (**CCA**) provides that prosecutions for offences under that Act may be brought in the Federal Court.[56]

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[56] CCA, s 163.

56. Neither the AHRC Act nor the four Commonwealth discrimination Acts confers criminal jurisdiction on the Federal Court in relation to the prosecution of victimisation offences. The RDA specifically invests State courts with federal jurisdiction, and confers jurisdiction on Territory courts, to hear and determine criminal proceedings instituted in those courts under the RDA to the extent that the subject matter of the proceeding falls within the jurisdiction of that court.[57] In respect of the other Commonwealth discrimination Acts, jurisdiction to hear and determine criminal proceedings in which victimisation is alleged is conferred on State and Territory courts by the Judiciary Act.[58]

6 Relationship between civil prohibitions and criminal offences

57. In *Walker v Cormack* and *Walker v State of Victoria*, Gray J raised a number of concerns about s 46PO of the AHRC Act and whether on its proper construction it permits a civil action for unlawful discrimination based on an allegation of victimisation. The concerns related to:

    a. whether Parliament could have intended to permit victimisation to be dealt with either as a civil contravention or a criminal offence (see paragraph [32] above)

    b. whether Parliament could have intended to require a court to determine in a civil case whether conduct that amounts to an offence has occurred (see paragraph [36] above)

    c. assuming that victimisation could be dealt with either as a civil contravention or as a criminal offence, how a court might deal with the potential for a person in a civil proceeding giving evidence that may incriminate them in a later criminal proceeding (see paragraph [32] above).

58. In those cases, Gray J did not have the benefit of submissions on these points and his Honour does not appear to have formed concluded views about any of them. The following sections briefly respond to these concerns and suggest why they are not determinative of the issue of the Federal Court's jurisdiction to hear and determine allegations of victimisation as a civil matter.

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[57] RDA, s 44.
[58] Judiciary Act, s 68(2).

6.1 Civil prohibitions and criminal offences for the same conduct

59. In *Walker v Cormack*, Gray J said that it would be an 'unusual situation' for Parliament to permit victimisation to be dealt with either as a civil prohibition or a criminal offence.

60. However, there are other areas of law that seek to prohibit the same conduct by way of both civil prohibitions and criminal offences. For example, under the CCA there are parallel civil prohibitions and criminal offences for cartel conduct:

    a. If a corporation makes a contract or arrangement or arrives at an understanding that contains a cartel provision, this can be the subject of a criminal prosecution under s 45AF(1) or a civil proceeding under s 45AJ(1) of the CCA.

    b. Similarly, if a corporation gives effect to a cartel provision contained in a contract arrangement or understanding, this can be the subject of a criminal prosecution under s 45AG(1) or a civil proceeding under s 45AK(1) of the CCA.

61. Although there will be differences in the standard of proof to be met, and the mental element for the offence, the underlying conduct in each case is precisely the same.

62. There is no reason in principle why victimisation cannot be dealt with as both a civil prohibition and a criminal offence, based on the same conduct.

6.2 Determining in a civil proceeding whether an offence occurred

63. In *Walker v State of Victoria*, Gray J said that:

> It seems strange that Parliament would confer on any court jurisdiction specifically to determine as part of a civil proceeding whether 'conduct that is an offence' under a specified provision has occurred.

And:

> It would still be an odd step for Parliament to take to require a court to determine in a civil case whether an offence has occurred.

64. However, there is a variety of situations in which courts or tribunals are called upon in civil proceedings to determine (to a civil standard of proof)[59] whether an offence has occurred or to determine facts which establish that a person has committed a crime. There is no reason in principle why a court in a civil proceeding should be precluded from making such findings, particularly where there is statutory authority to do so. Such findings are obviously not the same as a finding of criminal guilt following a criminal prosecution.

65. The High Court recently noted in *Australian Communication and Media Authority v Today FM (Sydney) Pty Ltd*, that:

> Not uncommonly, courts exercising civil jurisdiction are required to determine facts which establish that a person has committed a crime. Satisfaction in such a case is upon the balance of probability. In *Helton v Allen*, Mr Helton's acquittal of the murder of the testatrix was no bar, on the trial of the civil suit arising out of the will, to the finding that he had unlawfully killed her.[60]

66. In the course of that passage, the High Court referred to a number of examples of cases where it was necessary for courts hearing a civil claim to make findings about whether a criminal offence had occurred. This included cases where:

    a. criminal conduct was relevant to a common law rule (eg a public policy that a person who commits a homicide should not benefit from the will of the victim);[61]

    b. criminal conduct was relevant to establishing common law duties (eg a duty of care was not owed to a person who was complicit in the commission of an offence at the time of an alleged act of negligence);[62]

    c. statutory regimes required an assessment to be made about whether an offence had occurred, regardless of whether there had been a prosecution (eg statutory regimes dealing with forfeiture).[63]

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59 *Rejfek v McElroy* (1965) 112 CLR 517.

60 *Australian Communication and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at 371 [32] (French CJ, Hayne, Kiefel, Bell and Keane JJ), footnotes omitted.

61 *Helton v Allen* (1940) 63 CLR 691 at 710 (Dixon, Evatt and McTiernan JJ).

62 *Miller v Miller* (2011) 242 CLR 446 at 464 [47], 483 [106] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

63 *White v Director of Public Prosecutions (WA)* (2011) 243 CLR 478; *Olbers v Commonwealth of Australia (No 4)* [2004] FCA 229, upheld in *Olbers Co Ltd v Commonwealth of Australia* [2004] FCAFC 262 at [28]-[30].

67. Although the issue is not directly raised in the present case, administrative bodies are also occasionally given jurisdiction to make decisions based on their satisfaction about whether an offence has occurred. This is common in bodies responsible for licencing. For example, in *Australian Communication and Media Authority v Today FM (Sydney) Pty Ltd*, the High Court considered provisions of the *Broadcasting Services Act 1992* (Cth) (**BSA**). Commercial radio broadcasting licences are subject to the conditions set out in cl 8 of Sch 2 to the BSA including:

> the licensee will not use the broadcasting service or services in the commission of an offence against another Act or a law of a State or Territory.

68. The majority of the Court said:

> [I]t is not offensive to principle that an administrative body is empowered to determine whether a person has engaged in conduct that constitutes a criminal offence as a step in the decision to take disciplinary or other action. The decisions of this Court in *Attorney-General (Cth) v Alinta Ltd* and *Albarran v Companies Auditors and Liquidators Disciplinary Board* accept so much. There is no reason to suppose that a Commonwealth public housing authority might lack the capacity to terminate a lease on the ground of the tenant's use of the premises for an unlawful purpose notwithstanding that the tenant has not been convicted of an offence arising out of that unlawful use.[64]

69. The High Court held that the condition in the BSA was valid.

70. Further, as Gageler J noted, if a licence were cancelled on this basis and the cancellation decision was subject to judicial review, 'it would thereafter be for the Ch III court undertaking that review to be satisfied for itself whether or not the licence condition had been breached'.[65] This would be a further example of a court in a civil proceeding making a determination about the existence of criminal conduct.

6.3 Addressing concerns about self-incrimination

71. One of the practical issues raised by Gray J in *Walker v Cormack* was that a respondent in a civil proceeding may be inhibited in giving evidence because of the possibility that they might be giving self-incriminatory evidence that could be

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[64] *Australian Communication and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at 371-2 [33] (French CJ, Hayne, Kiefel, Bell and Keane JJ), footnotes omitted.

[65] *Australian Communication and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at 386 [80] (Gageler J).

used against them in a later criminal trial. However, there are ways in which these practical issues can be addressed.

72. As Gray J noted in the later case of *Walker v State of Victoria*, federal courts have the power to grant a certificate under s 128 of the *Evidence Act 1995* (Cth) (**Evidence Act**), which prevents self-incriminatory evidence given in a civil proceeding from being used in a later criminal prosecution.[66] The potential for certificates under s 128 of the Evidence Act being given has been considered in other proceedings involving allegations of unlawful discrimination.[67]

73. Some statutes that contain both civil prohibitions and criminal offences in relation to the same conduct have mechanisms for dealing with the order in which proceedings are brought. For example, the CCA has provisions which ensure that civil proceedings are stayed if criminal proceedings are started in relation to substantially the same conduct. The civil proceedings may be resumed if the person is not convicted of the offence, otherwise the proceedings are dismissed.[68]

74. In proceedings under the CCA, co-operation protocols can also assist in preventing conflicts. For example, in the case of cartel matters, the Australian Competition and Consumer Commission (**ACCC**) and the Commonwealth Director of Public Prosecutions (**CDPP**) have a memorandum of understanding which recognises that some matters may warrant both criminal and civil proceedings. The MOU states that the ACCC and CDPP will ensure that such matters are managed in an integrated manner, including through the adoption of measures to avoid any potential for civil proceedings conducted by the ACCC to adversely affect a related criminal investigation or prosecution.[69]

75. The same result can be achieved through the exercise of judicial discretion. In particular, courts have the discretion to grant a stay of civil proceedings when criminal proceedings involving the same subject matter are anticipated or pending.[70] A stay of civil proceedings will be ordered 'where the interests of justice

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66 *Walker v State of Victoria* [2012] FCAFC 38 at [99] (Gray J).
67 For example, *Ewin v Vergara (No 2)* (2012) 209 FCR 288 (Bromberg J).
68 CCA, s 76B(3).
69 *Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct* (2014) at [6.2]. At https://www.cdpp.gov.au/sites/g/files/net2061/f/MR-20140910-MOU-Serious-Cartel-Conduct.pdf (viewed 4 September 2018).
70 For anticipated proceedings, Dodds-Streeton J in *Websyte Corporation Pty Ltd v Alexander (No 2)* [2012] FCA 562 at [117] applied a test of whether proceedings 'are "on the cards" in the sense that they are reasonably possible'.

require such an order'.[71] In making a decision about whether to grant a stay of civil proceedings, Australian courts regularly refer to the principles in *McMahon v Gould*,[72] and later statements from the High Court in *Reid v Howard*.[73] The Court's discretion to stay proceedings should not be exercised lightly, but each case will be determined on its merits. The overriding principle is balancing the interests of justice between the parties.[74]

7 Conclusion

76. The Commission submits that a person who makes an allegation of victimisation as part of a complaint to the Commission of unlawful discrimination is able, pursuant to s 46PO of the AHRC Act, to make an application to the Federal Court or the Federal Circuit Court that includes the allegation of victimisation once that complaint has been terminated and the Commission has issued a notice of termination. Similarly, if a claim of victimisation arises out of the same acts, omissions or practices as a terminated complaint, the complainant may make an application to the Court of unlawful discrimination that includes the allegation of victimisation.

77. The Federal Court and the Federal Circuit Court have jurisdiction to hear allegations of victimisation under s 46PO as civil matters. If the Court is satisfied that there has been victimisation by any respondent, it may make such orders as it thinks fit, including any of the orders set out in s 46PO(4) of the AHRC Act. In determining whether it is so satisfied, the relevant evidentiary standard is the balance of probabilities.

Date: 17 September 2018

Australian Human Rights Commission

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71 *Commissioner of Australian Federal Police v Zhao* (2015) 255 CLR 46 at 58 [36] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

72 *McMahon v Gould* (1982) 7 ACLR 202 at 206-207. For example, see *Construction, Forestry, Mining and Energy Union v Australian Competition and Consumer Commission* (2016) 242 FCR 153 at 161-162 [26]-[27] (Dowsett, Tracey and Bromberg JJ).

73 *Reid v Howard* (1995) 184 CLR 1. For example, see *Re AWB Ltd (No 1)* (2008) 21 VR 252 (Robson J); *Websyte Corporation Pty Ltd v Alexander (No 2)* [2012] FCA 562 (Dodds-Streeton J).

74 *Websyte Corporation Pty Ltd v Alexander (No 2)* [2012] FCA 562 at [109] (Dodds-Streeton J).