

PARTIES:	NORTHERN TERRITORY OF AUSTRALIA (BY ITS EMANATION THE NORTHERN TERRITORY TREASURY)
	v
	ANTI-DISCRIMINATION COMMISSIONER OF THE NORTHERN TERRITORY
	And:
	SMYTH, Linda
	And:
	CLAYDEN, Kathleen
	And:
	KERR, Doug
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	54 of 2012 (21221197)
DELIVERED:	5 February 2013
HEARING DATE:	29 August 2012
JUDGMENT OF:	BARR J

CATCHWORDS:

ADMINISTRATIVE LAW - STATUTORY INTERPRETATION – APPEAL
– *Anti-Discrimination Act* (NT)

Party aggrieved by “decision or order” of Anti-Discrimination Commissioner may appeal to Local Court – whether decision of Commissioner under s 66 of the Act to accept complaint made out of time against plaintiff is, relevantly, a “decision or order” – s 106 interpreted to mean that an appeal lies only from decision or order after hearing of complaint by the Commissioner – “decision or order” does not include intermediate or ‘interlocutory’ decisions or orders, even those which may finalize a complaint – Commissioner’s decision to accept complaint cannot be the subject of an appeal under s 106 of the Act.

Anti-Discrimination Act (NT), s 106, s 65, s 66, s 67, s 88

Wacando v The Commonwealth (1981) 148 CLR 1, *Minister for Immigration & Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, *Director General of Social Services v Chaney* (1980) 31 ALR 571, *Blue Mountains City Council v Hudson* (1985) 56 LGRA 360, *Hofer v Anti-Discrimination Commissioner* (2011) 28 NTLR 154, considered

REPRESENTATION:

Counsel:

Plaintiff:	T Barrett
First Defendant:	A Wyvill SC
Second Defendant:	M Johnson

Solicitors:

Plaintiff:	Solicitor for the Northern Territory
First Defendant:	Traci Lee Keyes
Second Defendant:	Top End Women’s Legal Service Inc.

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

NTA v Anti-Discrimination Commissioner NT & Ors [2013] NTSC 5
No. 54 of 2012 (21221197)

BETWEEN:

**NORTHERN TERRITORY OF
AUSTRALIA (BY ITS EMANATION
THE NORTHERN TERRITORY
TREASURY)**

Plaintiff

AND:

**ANTI-DISCRIMINATION
COMMISSIONER OF THE
NORTHERN TERRITORY**

First Defendant

AND:

LINDA SMYTH

Second Defendant

AND:

KATHLEEN CLAYDEN

Third Defendant

AND:

DOUG KERR

Fourth Defendant

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 5 February 2013)

- [1] The plaintiff seeks judicial review of a decision of the first defendant (by his delegate) accepting a claim made by the second defendant under the *Anti-Discrimination Act* (NT).
- [2] If the application for judicial review proceeds to a hearing, the availability of an alternative remedy could affect the exercise of the Court's discretion.
- [3] The parties have identified that a possible alternative remedy is an appeal by the plaintiff to the Local Court pursuant to s 106 of the *Anti-Discrimination Act*, which permits a party to a complaint who is aggrieved by a decision or order of the Commissioner to appeal to the Local Court against the decision or order.
- [4] The issue for determination is whether the acceptance by the Commissioner of the second defendant's complaint is a "decision or order of the Commissioner" which is capable of being appealed to the Local Court pursuant to s 106 of the Act.
- [5] The specific question of law formulated by the parties to be tried separately pursuant to r 47.04 Supreme Court Rules is as follows:

Is the acceptance by the Commission of a complaint pursuant to s 65(2) and/or s 66 of the *Anti-Discrimination Act* (NT) after the time referred to in s 65(1) of the Act has expired a "decision or order of the Commissioner" which is capable of being appealed to the Local Court pursuant to s 106 of the Act?

- [6] I had cause to summarise the legislative provisions of the *Anti-Discrimination Act* (NT) in *Hofer v Anti-Discrimination Commissioner*¹ at par [6] to par [9], but it would be useful to repeat what I said there as to the scheme established under the Act.
- [7] The process starts with a complaint. A complaint is required to be in writing and to set out in detail the prohibited conduct alleged.² A complaint is to be made not later than six months after the alleged prohibited conduct took place.³ The Commissioner must reject a complaint if the Commissioner reasonably believes that the complaint is frivolous or vexatious; trivial; misconceived or lacking in substance; or that it fails to disclose any prohibited conduct.⁴ The Commissioner may reject or stay a complaint if there are concurrent proceedings in any court or tribunal in relation to the same prohibited conduct alleged in the complaint.⁵ The Commissioner is required to accept or reject a complaint not later than 60 days after receipt of the complaint, and to then notify the complainant of the decision to accept/reject as soon as practicable.⁶ If the complaint is accepted, the Commissioner must notify the respondent of the substance of the complaint.⁷

¹ [2011] NTSC 20; (2011) 28 NTLR 154; (2011) 163 NTR 70, at [6] - [9].

² S 64 *Anti-Discrimination Act*.

³ S 65 *Anti-Discrimination Act*.

⁴ S 67 *Anti-Discrimination Act*.

⁵ S 68 *Anti-Discrimination Act*.

⁶ S 66 *Anti-Discrimination Act*.

⁷ S 70 *Anti-Discrimination Act*.

- [8] Acceptance of the complaint then requires the Commissioner to carry out an investigation of the prohibited conduct alleged.⁸ The Commissioner is required to “make a thorough examination of all matters relevant to the investigation” and, where appropriate, to ensure that each party to the investigation is given a reasonable opportunity to present his or her case.⁹ After completing the investigation, if the Commissioner is satisfied that there is “prima facie evidence to substantiate the allegation of prohibited conduct”, the Commissioner must either proceed to conciliation, or (if the Commissioner believes the complaint cannot be resolved by conciliation) proceed to a hearing.¹⁰
- [9] Even if the Commissioner proceeds to conciliation, a hearing must still be conducted if conciliation does not result in a resolution of the complaint.¹¹
- [10] It can thus be seen that for a complaint to be ultimately substantiated, it must pass through at least three and possibly four stages: acceptance, investigation, conciliation (possibly), and hearing.
- [11] Given the focus of argument by counsel in relation to the question for determination, I set out below s 65 to s 67 of the Act:

⁸ S 74(1)(b) *Anti-Discrimination Act*.

⁹ S 75(3) *Anti-Discrimination Act*.

¹⁰ S 76(1) *Anti-Discrimination Act*. The Commissioner also has power at that stage to dismiss the complaint, presumably if he is not satisfied that there is prima facie evidence to substantiate the allegation of discrimination or prohibited conduct made in the complaint.

¹¹ S 83(b) *Anti-Discrimination Act*.

65 Time limit for making complaint

- (1) Subject to subsection (2), a complaint shall be made not later than 6 months after the alleged prohibited conduct took place.
- (2) The Commissioner may accept a complaint after the time referred to in subsection (1) has expired if the Commissioner is satisfied it is appropriate to do so.

66 Commissioner to accept or reject complaint

The Commissioner shall, not later than 60 days after receiving a complaint, accept or reject the complaint and shall, as soon as practicable thereafter, notify the complainant of the decision.

67 Commissioner to reject frivolous, &c., complaint

The Commissioner shall reject a complaint if the Commissioner reasonably believes that the complaint is:

- (a) frivolous or vexatious; or
- (b) trivial; or
- (c) misconceived or lacking in substance; or
- (d) fails to disclose any prohibited conduct.

[12] I expressed the opinion in *Hofer* at par [39] that the effect of s 67 of the Act is that the Commissioner must consider in every case whether an application is any of the things specified in s 67 par (a) to par (d) inclusive before deciding whether to accept or reject a complaint. In the case of a complaint which is made outside the period of six months referred to in s 65(1) of the Act, the Commissioner must also consider whether it would be “appropriate” to accept the complaint made out of time.

[13] It is implicit in what has occurred to date that, before accepting the second defendant's complaint, the first defendant (or delegate) made a decision that the complaint was not frivolous or vexatious, that it was not trivial, that it was not misconceived or lacking in substance and that it disclosed prohibited conduct. In addition, it is implicit that the first defendant (or delegate) was satisfied that it was appropriate to accept the complaint notwithstanding that it was made out of time.

[14] For the purpose of answering the question for determination, it does not matter whether the complaint was made out of time or not. Nor does it matter just how far out of time the complaint was made. There is only one section under which a complaint may be accepted, and that is s 66 of the Act. Subsection 65(2) has no operation independently of s 66. Therefore, the issue is whether a decision to accept the complaint under s 66 of the Act can be the subject of an appeal under s 106 of the Act.

[15] I have reached the conclusion that an appeal under s 106 of the Act lies only after the hearing of a complaint by the Commissioner or other appointed person.¹²

¹² Under s 85 *Anti-Discrimination Act*, there are two situations in which someone other than the Commissioner will conduct the hearing. If the Commissioner has personally conducted the investigation of a complaint or taken part in the conciliation process of a complaint, the Commissioner is not permitted to conduct the hearing of the complaint – see s 85(1) of the Act. The Minister is then required to appoint a person to conduct the hearing of the complaint. The second situation is where the Minister considers it reasonable to appoint a person to conduct the hearing of a complaint instead of the Commissioner – see s 85(1A) of the Act.

- [16] In order to explain my reasons, I return to my discussion of the scheme established under the Act.¹³
- [17] The Commissioner is required to conduct a hearing of a complaint if the Commissioner determines under s 76 that the complaint cannot be resolved by conciliation; or if the Commissioner has attempted to resolve the complaint by conciliation but has not succeeded in so doing; or if the Commissioner believes that the nature of the complaint is such that it should be dealt with by a hearing.¹⁴ A complaint may also proceed to hearing as a result of a request by either the complainant or the respondent where the Commissioner has not finished dealing with the complaint within a period of six months after accepting the complaint.¹⁵
- [18] After hearing the complaint, the Commissioner must decide whether the prohibited conduct alleged in the complaint is substantiated or not. If the conduct is not found substantiated, the Commissioner must make an order dismissing the complaint.¹⁶ If the conduct is found substantiated, the Commissioner may (inter alia) make one or more of the following orders by way of remedy in favour of the successful complainant: an order requiring the respondent to cease the prohibited conduct; an order requiring the respondent to pay compensation for loss or damage caused by the prohibited conduct; and an order requiring the respondent to do specified things to redress loss or damage suffered by the complainant or any other person

¹³ See par [8] to par [10] above.

¹⁴ S 83 *Anti-Discrimination Act*.

¹⁵ S 84 *Anti-Discrimination Act*.

¹⁶ S 88(4) *Anti-Discrimination Act*.

because of the prohibited conduct.¹⁷ The “specified things” which may be ordered include employing, reinstating or re-employing a person; promoting a person; and moving a person to a specified position.¹⁸

[19] Depending on the decision as to whether a complaint is substantiated or not, the Commissioner also has power to order a respondent to apologize to a complainant or a complainant to apologize to a respondent and make such retractions as the Commissioner considers appropriate.¹⁹

[20] The Act does not expressly require the Commissioner, as a matter of course, to give reasons for any orders of the kind referred to in par [18] made under s 88 of the Act after a hearing.²⁰ However, s 103 provides that a complainant or respondent may, not later than 28 days after the Commissioner makes an order under s 88, request the Commissioner to give written reasons for the order. The Commissioner is then required to give written reasons within a further 28 days.

[21] The provisions relating to hearings, and the orders which can be made after hearings, are set out in Part 6 Division 4 of the Act. Additional provisions in relation to the conduct of proceedings (including evidentiary matters, the powers of the Commissioner, burden and standard of proof, and legal representation of the parties) are set out in Part 6 Division 5 of the Act,

¹⁷ The definition of “damage” includes personal offence, embarrassment, humiliation, and intimidation which a person has suffered – see s 88(3) *Anti-Discrimination Act*.

¹⁸ S 88(2) *Anti-Discrimination Act*.

¹⁹ S 89(1) *Anti-Discrimination Act*.

²⁰ This may be contrasted with s 69(a) *Anti-Discrimination Act* which requires the Commissioner to give written reasons for the rejection of a complaint under s 66 of the Act.

which is headed “Miscellaneous”. The provisions in relation to appeals then follow, and are contained in Part 7 of the Act.

[22] I set out below s 106 and s 107, noting that they are the only two sections in Part 7 of the Act:

106 Appeals against decision of Commissioner

- (1) A party to a complaint aggrieved by a decision or order of the Commissioner may appeal to the Local Court against the decision or order.
- (2) An appeal may be on a question of law or fact or law and fact and shall be made:
 - (a) not later than 28 days after the day on which the decision or order was made; or
 - (b) if the Commissioner did not give written reasons at the time the decision or order was made, and the party making the appeal subsequently requests the Commissioner to do so, not later than 28 days after the day on which the party received the reasons in writing.
- (3) An appeal under this section shall be made in accordance with the rules of the Local Court.

107 Powers of Local Court

The Local Court, on hearing an appeal under this Part, may do one or more of the following:

- (a) affirm or vary the decision or order appealed against;
- (b) quash the decision or order appealed against and substitute any decision or order that the Commissioner may make under this Act;
- (c) remit the matter to the Commissioner for further hearing or consideration, or for rehearing;

- (d) make such other orders (including as to costs) as the Court considers appropriate.

[23] An aggrieved party may thus appeal on a question of fact or law or both fact and law. The Local Court does not have jurisdiction to receive further evidence on appeal, and the function of the Local Court is therefore to determine whether the decision or order of the Commissioner in question was right or wrong on the evidence and the law as it stood when the decision or order was given or made. Statutory provisions conferring appellate powers are construed on the basis that, unless there is something to indicate otherwise, the power is to be exercised for the correction of error.²¹ Even though the appeal permitted by s 106 of the Act can appropriately be characterised as an appeal in the strict sense, the appeal may nonetheless be lengthy and exhaustive in terms of the exploration of factual matters and the applicable legal principles (depending on the errors of fact and law asserted by the appellant).

[24] If I have misconceived the nature of the appeal to the Local Court, and if that appeal were a rehearing or a hearing de novo (with fresh evidence permitted), then the appeal would, potentially, be even more lengthy and exhaustive than postulated in the previous paragraph. I say more about the nature of the appeal and its effect on the interpretation of s 106(1) in par [27] below.

²¹ *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission and others* [2000] HCA 47; 203 CLR 194 at [11] - [14].

“Decision or order” of the Commissioner

- [25] I interpret the words “decision ... of the Commissioner” in s 106(1) to refer to the decision made under s 88(1) as to whether or not the prohibited conduct alleged in the complaint is substantiated. I interpret the words “order ... of the Commissioner” in s 106(1) to refer to any order made under s 88 and its various sub-sections.²² My interpretation is in part because of the proximity of the appeal provisions to the ‘hearing provisions’ in the Act. Moreover, the provision for extended time specified in sub-paragraph (b) of s 106(2) appears to be directly referable to s 103, (the provision which enables a party to request written reasons), and s 103 is expressly related to s 88 and to no other section. Hence, I conclude the reference to “decision or order of the Commissioner” is to a decision or order under s 88 of the Act.
- [26] The construction I favour takes into account the structure of the Act as a whole and gives effect to the interlinking (as I discern) of s 88, s 103 and s 106(2)(b) of the Act. Further, it avoids the mischief identified by senior counsel for the first defendant, Mr Wyvill SC, that if *any* decision or order of the Commissioner might be appealed under s 106(1) of the Act, then a vast number of potential appeals would lie against decisions made at each of the three or four stages mentioned in par [10] above, including decisions to accept a complaint, having regard to the s 67 matters; to reject or stay a complaint under s 68; to join a person as a party under s 73; to carry out an investigation under s 74(2); to proceed to conciliation under s 76(1)(b)(i); to

²² In respect of which see par [18] above.

proceed to a hearing under s 76(1)(b)(ii) because the Commissioner believes the complaint cannot be resolved by conciliation; to direct a person to take part in a conciliation under s 79(1); to proceed straight to a hearing under s 83(c) because of the nature of the complaint; and to not conduct a hearing in public, pursuant to s 86. Another decision which could be appealed is as to whether (or not) there is prima facie evidence to substantiate a complaint alleging prohibited conduct under s 76(1)(b). An aggrieved party could appeal against decisions or orders which might well prove irrelevant to the ultimate decision, for example, an interim order under s 101(1)(a) to preserve the status quo between the parties.

- [27] The mischief avoided by my preferred construction is even greater when the potential width of the appeal permitted by s 106(1) is taken into account.²³ That is particularly so when one has regard to the purposes of the Act, which are stated in the preamble: "... to promote equality of opportunity in the Territory by protecting persons from unfair discrimination in certain areas of activity and from sexual harassment and certain associated objectionable conduct, to provide remedies for persons discriminated against and for related purposes".²⁴ A proliferation of opportunities to appeal to the Local Court on questions of fact and law would be counterproductive to the stated

²³ In respect of which see par [23] and par [24] above

²⁴ I adopt the reasoning of Mason J in *Wacando v The Commonwealth* (1981) 148 CLR 1 at 23 as to the appropriate approach to the use of preambles for interpretation purposes: "It has been said that where the enacting part of a statute is clear and unambiguous it cannot be cut down by the preamble. But this does not mean that a court cannot obtain assistance from the preamble in ascertaining the meaning of an operative provision. The particular section must be seen in its context; the statute must be read as a whole and recourse to the preamble may throw light on the statutory purpose and object."

purposes and would obstruct and delay access to the remedies for which the Act provides.

[28] I acknowledge that my interpretation restricts a party to only one opportunity of challenge by way of appeal, and that is at the end of the hearing (if there is a hearing), upon the making of final orders. There would be no ‘interlocutory’ or intermediate stage appeals. My interpretation also has the effect that, if a complaint were disposed of without proceeding to a hearing, a party to that complaint would have no appeal rights. However, depending on the facts, the party or a person may still be able to invoke the supervisory jurisdiction of the Supreme Court to seek prerogative relief, although that would be limited to judicial review of the legality of any decision made by the Commissioner, and there would be no consideration of asserted errors of fact or of the factual merits of the decision.²⁵

[29] The first defendant has contended for a construction of the expression “a decision or order of the Commissioner”, in effect a middle ground, which is not as confined as the construction adopted by me, but which would still avoid or substantially avoid the identified mischief referred to in par [26] and par [27]. The first defendant submits that a “decision or order” means a decision or order “which constitutes the effective decision or determination”

²⁵ See, for example, *Minister for Immigration & Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [73] and the cases cited in the footnote to that paragraph, including *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 61.

of the complaint, or which “disposes of the proceedings”.²⁶ If this construction were adopted, then the right of appeal would extend to an appeal from the decision of the Commissioner under s 66 of the Act to reject a complaint (but not from a decision to accept a complaint).

[30] I have rejected the first defendant’s ‘middle ground’ construction, attractive though it may at first seem, because I do not find sufficient warrant for it in the *Anti-Discrimination Act* (NT). In my view, the meaning of the expression “decision or order of the Commissioner” can be legitimately confined in the way described in par [27] above by specific reference to the Act, whereas the ‘middle ground’ construction involves a more extensive re-work of the legislation to produce the dual result contended for: limiting the right of appeal to an appeal from those decisions or orders which bring the matter to finality, and excluding a right of appeal from decisions – perhaps significant decisions, such as in the present case – which do not bring the matter to finality.

Conclusion

[31] For the reasons given, my answer to the question for determination is “No”. The Commissioner’s decision to accept the complaint under s 66 of the Act cannot be the subject of an appeal under s 106 of the Act.

²⁶ These were references respectively to *Director General of Social Services v Chaney* (1980) 31ALR 571 per Deane J at 593.5, and *Blue Mountains City Council v Hudson* (1985) 56 LGRA 360. In *Hudson* at 362.5, Hope JA found no explicit language in the NSW *Land and Environment Court Act* to indicate that the word “decision” should not be given its prima facie meaning, but nonetheless adopted a construction requiring finality in the order or decision appealed from in order to give effect to the purpose and intent of the Act.

[32] If I have wrongly rejected the first defendant's 'middle ground' construction, the answer to the question for determination would still be "No", since the Commissioner's decision to accept the complaint under s 66 of the Act is not a decision or order "which constitutes the effective decision or determination" of the complaint, or which "disposes of the proceedings". It therefore could not be the subject of an appeal under s 106 of the Act.

[33] I will hear the parties on any consequential matters.
