Kowcun v Brenda Monaghan, Information Commissioner & Anor
[2013] NTSC 57

PARTIES:	Kowcun, Veronica v Monaghan, Brenda Information Commissioner and Anti-Discrimination Commissioner
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 2 of 2013 (21304387)
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HEARING DATES:	24 MAY 2013
JUDGMENT OF:	KELLY J
APPEAL FROM:	B MONAGHAN

CATCHWORDS:

ADMINISTRATIVE LAW—STATUTORY INTERPRETATION—APPEAL—Section 129 *Information Act*—Whether appeal incompetent for lack of jurisdiction—Whether s 129 limits appeal to decisions that finally determine a matter following a hearing—Held that s 129 not to be narrowly construed—Held that appeal competent

ADMINISTRATIVE LAW—STATUTORY INTERPRETATION—Appeal from decision of Information Commissioner—Whether *Information Act*

applies to the Anti-Discrimination Commission—Whether Anti-Discrimination Commission's conciliation function a "decision making function"—Held that conciliation within definition of "decision making function"—*Information Act* does not apply.

Anti-Discrimination Act (NT) s 106

Information Act (NT) s 4, s 5(5)(b), s 129, s 154

Northern Territory v Anti-Discrimination Commissioner of the Northern Territory and Smyth [2013] NTSC 5, distinguished

O'Sullivan v Family Court of Australia (1990) 141 FLR 204, referred to

REPRESENTATION:

Counsel:

Appellant:	Self Represented
Respondent:	C Smyth

Solicitors:

Appellant:	Self Represented
Respondent:	Solicitor for the Northern Territory

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

Kowcun v Brenda Monaghan, Information Commissioner & Anor
[2013] NTSC 57
No. LA 2 of 2013 (21304387)

BETWEEN:

VERONICA KOWCUN
Appellant

AND:

BRENDA MONAGHAN, INFORMATION COMMISSIONER
First Respondent

AND:

ANTI-DISCRIMINATION COMMISSIONER
Second Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 13 September 2013)

Background

[1] In 2007 and 2010 Ms Veronica Kowcun lodged complaints with the Anti-Discrimination Commission (ADC) about her treatment by SkyCity Casino Darwin. The complaints were the subject of conciliation and were eventually settled.

[2] Casino management later issued Ms Kowcun with a 'barring notice' pursuant to the *Gaming Control Act 1993* excluding her from the Casino for life.

[3] Because of this, Ms Kowcun became dissatisfied with the agreement pursuant to which she settled her complaint against the Casino, and she blames the ADC for what she now considers to be the unsatisfactory nature of that settlement; she has alleged that the ADC was negligent in the way it dealt with her complaint and that the ADC conciliator did not act in her best interest in the negotiation process.

[4] Ms Kowcun submitted a total of five applications to the ADC for information and three applications for internal review regarding this matter. Initially the ADC accepted FOI requests made by Ms Kowcun under the *Information Act* and, after some misunderstanding resulting from a wrong date provided by Ms Kowcun, she was given a copy of the settlement agreement between herself and SkyCity Casino.

[5] After receiving a copy of this agreement, on 13 February 2012 Ms Kowcun lodged a further application to access information held by the ADC. This application requested the 'time and dates and a copy of all three minutes of the meetings – conference conciliation between SkyCity Darwin and Veronica Kowcun.' It was accompanied by a letter to the ADC in which Ms Kowcun alleged that the ADC conciliator had conspired to 'con' her into signing the settlement agreement and further alleging that the conciliator

was racist and negligent in the performance of her duties by not demanding SkyCity Darwin remove a clause in the agreement which stated that they had the ability to issue a 'barring notice' under the *Gaming Control Act 1993*.

[6] At this point the ADC reviewed its position and formed the view that Ms Kowcun's application was not one to which the *Information Act* applied by reason of s 5(5)(b) of that Act. On 17 February 2012 the ADC wrote to Ms Kowcun, denying her latest application on the ground that s 5(5)(b) provides that the Act does not apply to a tribunal in relation to its decision making functions.

[7] Ms Kowcun wrote a number of letters repeating her request (or making requests for similar information) and attempting to explain how she believed she had been wronged by the conciliation process. These further requests were not acted upon by the ADC.

[8] On 19 March 2012 she submitted an application for internal review of all her previous applications for information on the ground that, "I haven't received the information I requested." This too was not acted upon by the ADC.

Complaint to the Information Commissioner

[9] On 19 March 2012, Ms Kowcun lodged a complaint with the Information Commissioner regarding her applications to the ADC for information and internal reviews. The complaint to the Information Commissioner was formally accepted on 23 May 2012 and the ADC provided the Information Commissioner with copies of the relevant applications and correspondence,

together with handwritten notes made during the conciliation process by the conciliator.

[10] In an effort to settle the matter, an officer of the ADC met with Ms Kowcun and her solicitor and actually showed her the notes from the conciliation conference (which were the only documents in existence relating to the conciliation, other than the agreement reached as a result of the conciliation process). This attempt was not successful and Ms Kowcun continued to write letters to the ADC and others re-iterating her claims that she had been unfairly treated.

[11] The Information Commissioner therefore requested submissions from the parties. Submissions were received from the ADC detailing its reasons for refusing to release the notes to Ms Kowcun. The ADC submitted that it is a tribunal under s 5(5)(b) of the *Information Act* and the Act does not apply in relation to its decision making functions, and that the conciliation process formed part of those decision making functions.[1]

[12] The question of whether the Act applied to the request was considered by the Information Commissioner as a preliminary issue and on 2 January 2013, the Information Commissioner dismissed the complaint on the ground that the *Information Act* did not apply to the request. In her reasons for that decision, the Information Commissioner held:

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[1] It also submitted that, if the *Information Act* did apply to Ms Kowcun's request, the conciliation notes would be exempt under s 55(5) or s 53(c) but it was not necessary for the Information Commissioner to make a decision on those submissions and they do not form part of this appeal.

(a) that the ADC was a tribunal within the meaning of s 4 of the *Information Act*, being a body with judicial or quasi-judicial functions; and

(b) that its decision making functions included the whole complaints resolution procedure under the *Anti-Discrimination Act* including the conciliation process.

Hence, the *Information Act* did not apply to Ms Kowcun's application for access to notes made by the conciliator during the conciliation.

[13] Ms Kowcun has appealed to this Court against the decision of the Information Commissioner. The notice of appeal (formal parts omitted) states:

NOTICE OF APPEAL

The proceeding appealed was not heard in the Anti-Discrimination Office or the Information Commissioner's Office in Darwin and was not given the rights to appeal this complaint.

The appellant appeals from the decision of 2nd January 2013.

GROUNDS:

Complaint to the Information Commissioner under Part 7 of the Information Act.

ORDER SOUGHT:

To have a hearing into this complaint with the Northern Territory Anti-Discrimination Commission and Information Commission Office.

[14] As this notice of appeal did not articulate a ground of appeal, Ms Kowcun was given leave to file an amended notice of appeal. The amended notice of appeal was in precisely the same terms as the original and had attached to it a hand written letter from Ms Kowcun headed "TO WHOM IT MAY CONCERN" which repeated complaints against the ADC conciliator. The letter attached a photocopy of a newspaper article which contained a reference to someone else obtaining documents under freedom of information legislation and set out her grievance in the following terms:[2]

> "Why? Can't the Information Commission (under Freedom of the Information legislation) get the EVIDENCE from the NT Anti-Discrimination Commission to verify that … (NTADC-conciliator) of this Settlement Agreement on the 05/03/2010 had did wrong by me in her Racist Act – not giving me my RIGHTS to disagree in what was stated about this clause 5 & 9 of this Settlement Agreement and to have a Hearing at the NTADC office about it.
>
> Yes, Mr F… got the emails from the NT Education Dept so, why can't I get the copies of what was stated in …. (NTADC-Conciliator) of this Settlement Agreement that would verify that she is a liar what she had stated in it."

[15] From this I took it that Ms Kowcun wanted the Information Commissioner to direct the ADC to give her copies of the conciliator's notes of the conciliation conference (which she had already seen). This was not by any means a proper notice of appeal and did nothing to remedy the defects in the

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2 The first page of the letter contained an accusation that the conciliator had lied about Ms Kowcun supposedly agreeing to the settlement agreement in a telephone call, and a request that the acting Information Commissioner and the Deputy Information Commissioner "do a signed statement to verify what was said and done at that meeting", which I take to be a reference to the meeting at which Ms Kowcun was actually shown the documents she had requested. To put these complaints in context, it should be noted that Ms Kowcun herself signed the settlement agreement in question and that she was legally represented during the conciliation process.

original. Nevertheless the respondent elected to proceed to a hearing of the appeal on the basis that it was an appeal against the decision of the Information Commissioner made on 2 January 2013 that she had no jurisdiction to hear Ms Kowcun's complaint by reason of s 5(5)(b) of the *Information Act.*

[16] I agreed to hear the appeal on that basis, gave directions for the parties to file and serve written submissions and set the matter down for hearing. Ms Kowcun did not file submissions directed at the issue on the appeal – namely whether the Information Commissioner had erred in law in holding she had no jurisdiction. Instead she filed a number of letters. The first was headed "TO WHOM IT MAY CONCERN" and the second was addressed to my associate. Both letters simply re-iterated the reasons why she believed she had been badly treated by SkyCity Casino and the ADC conciliator, and also stated that she had received an explanation from the former Chief Minister, Mr Terry Mills, as to why there had been no minutes recorded at the conciliation conference. The closest she came to referring to the subject matter of the appeal was in the following paragraphs:

> "Office of the Information Commissioner NT could/would not get the EVIDENCES from the NTADC office for me but, yet they had helped many others complaint-ant get their EVIDENCES from other NT Government Departments – WHY? couldn't they had helped me too.
>
> Yes, why couldn't the other NT Government Departments exempt the EVIDENCES they held in their offices and also state that the case is a TRIBUNAL too."

[17] The respondent filed submissions directed to the correctness of the Information Commissioner's decision and also raising a preliminary jurisdictional point. The respondent contended that the appeal was incompetent because the right of appeal conferred by s 129 of the *Information Act* should be construed so as to confer a right of appeal only against a final decision of the Information Commissioner following a hearing under s 113 of that Act.

The jurisdictional question

[18] Section 129 provides:

> (1) A person aggrieved by a decision of the Commissioner under this Act may appeal to the Supreme Court on a question of law only.
>
> (2) On an appeal, the Supreme Court may:
>
> (a) confirm or vary the decision in whole or in part; or
>
> (b) revoke the decision in whole or in part and substitute another decision that would have been available to the Commissioner; or
>
> (c) remit the matter to the Commissioner for further consideration; or
>
> (d) dismiss the appeal;
>
> and, for that purpose, may make the orders and give the directions that the Court considers appropriate.

[19] In *Northern Territory v Anti-Discrimination Commissioner of the Northern Territory and Smyth*[3] *("Smyth")* Barr J held that a similar appeal provision in s 106 of the *Anti-Discrimination Act* should be construed so as to permit an appeal only against a decision or order of the Anti-Discrimination Commissioner under s 88 of the *Anti-Discrimination Act* after a hearing of a complaint pursuant to s 83 of that Act.

[20] Section 106 of the *Anti-Discrimination Act* is in somewhat different terms to s 129 of the *Information Act*. It provides:

> (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.

[21] Section 107 of the *Anti-Discrimination Act* is in similar terms to s 129(2) of the *Information Act* but refers to the Local Court.

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3 [2013] NTSC 5

[22] Barr J explained his reasoning for a restrictive construction of s 106 in the following terms:

> [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. 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(l)(b)(i); to 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(l); 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(l)(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. 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". A proliferation of opportunities to appeal to the Local Court on questions of fact and law would be counterproductive to the stated purposes and would obstruct and delay access to the remedies for which the Act provides. *(footnotes omitted)*

[23] The respondent contends that the structure of the two Acts is very similar as are the processes for dealing with complaints set out in the two Acts and the same considerations apply. Specifically, the respondent submits that:

(a) as with the proximity of the appeal provisions to the hearing provisions in the *Anti-Discrimination Act* (referred to by Barr J at para [25] set out above) the proximity of Part 8 of the *Information Act* (dealing with appeals) to Part 7 of that Act (dealing with hearings) is indicative that the appeals provisions were intended to apply only to final decisions at hearings; and

(b) as with the procedures in the *Anti-Discrimination Act*, (referred to by Barr J in para [26]) there are many decisions of an interlocutory or purely procedural nature made by the Information Commissioner in the course of handling a complaint, and a construction of s 129 which allowed an appeal against any of these decisions at any of the various stages of the process could have the effect of stifling the efficient resolution of complaints and the remedies which the *Information Act* provides (as explained by Barr J in para [27]).

[24] The respondent submitted further that it should be borne in mind that s 129 provides for an appeal to the Supreme Court. The *Information Act* provides for a series of reviews of decisions in relation to the disclosure of information, the final such review being a hearing before and decision by

the Information Commissioner. The next logical step in such a hierarchy of reviews would be an appeal to the Supreme Court against the final decision of the Information Commissioner.

[25] I agree with the submission by the respondent that the legislature could hardly have intended that every possible decision of the Information Commissioner could be appealed to the Supreme Court. There are a very great number of potential decisions to be made by the Information Commissioner in performing her or his functions under the Act.

[26] For example, in those parts of that Act that deal with matters other than the handling of complaints (ie all of the Act other than Part 7) there is the potential for the Information Commissioner to make:

(a) decisions under s 73 to recommend (or not to recommend) to the minister responsible for a public sector organisation that a draft code be submitted to the Administrator for approval;

(b) decisions under s 81 to authorise (or not to authorise) a public sector organisation to collect, use or disclose personal information in a manner that would otherwise contravene or be inconsistent with an IPP[4] referred to in that section;

(c) decisions under s 82 to serve (or refuse to serve) a compliance notice on a public sector organisation;

[4] Information Privacy Principle

(d) decisions under s 83 to grant (or refuse to grant) an extension of time to a public sector organisation to comply with a compliance notice;

(e) decisions under s 87 to require (or not to require) access to the records of a public sector organisation or to require (or not to require) a public sector organisation to answer a question or to produce a record;

(f) decisions under s 88 as to the "appropriate assistance" which should be provided to a person to enable the person to exercise his or her rights under the *Information Act*;

(g) decisions under s 89 to apply to the Minister for approval to delegate a function or functions;

(h) decisions under s 96 to engage (or terminate the engagement of) consultants;

(i) decisions under s 97 in relation to the sharing of staff or resources;

(j) decisions under s 98 or 99 about the contents of the annual report or any special report to the Minister; and

(k) decisions under s 156 to waive or reduce (or refuse to waive or reduce) a fee.

[27] Many of these are internal decisions relating to the running of the office of the Information Commissioner. Most are purely administrative decisions.

[28] In addition, there are decisions relating to the other functions conferred on the Information Commissioner under s 86 (developing and issuing guidelines, providing advice and training, examining and assessing proposed legislation and other such matters). Most of these are probably not such as could possibly give rise to "an aggrieved person" who would have a right of appeal under s 129 if broadly construed.

[29] There is also a range of potential decisions to be made in connection with the complaints procedure in Part 7. For example:

(a) decisions under s 106 to accept or reject a complaint applying the criteria set out in that section;

(b) subsidiary decisions under s 106 to require (or not to require) a complainant to attend before the Commissioner to discuss the complaint or to provide records or other information to support the complaint;

(c) decisions under s 108 to refer (or not to refer) a complaint to the Ombudsman or the Health Complaints Commissioner;

(d) decisions under s 110 to dismiss a complaint or refer it to mediation;

(e) subsidiary decisions under s 110 about steps to be taken in the course of an investigation;

(f) decisions under s 111 in relation to directions to be given in relation to the conduct of a mediation;

(g) decisions under s 113 to hold a hearing into a complaint;

(h) decisions under ss 114 or 115 that the matter complained of has been proved (or not proved) in whole or in part, and accordingly to dismiss the complaint or make one or more of the available orders;

(i) decisions under s 117 to deal with (or not to deal with) complaints simultaneously;

(j) decisions under s 118 to "discontinue" (or refuse to discontinue) a complaint for one of the reasons set out in that section (effectively dismissal for want of prosecution or failure to comply with directions);

(k) decisions under s 120 to order (or not to order) a respondent not to repeat or continue the act complained of or similar acts;

(l) decisions under s 121 in relation to the procedures to be followed for conducting a hearing;

(m) decisions under s 122 to join (or not to join) another person as a party to a hearing;

(n) decisions under s 123 that a hearing be open to the public (or refusal to make such a decision);

(o) decisions to make (or refuse to make) a non-publication order under s 123;

(p) decisions under s 124 to require (or not to require) a person to attend to give evidence or to produce documents;

(q) decisions under s 126 to order (or refuse to order) a party to pay another party's costs;

(r) decisions under s 127 to appoint another person (or refuse to appoint another person) to conduct a hearing.

[30] Many of these decisions are interlocutory in nature; some are in the nature of administrative decisions (for example decisions about what steps to take in the course of an investigation); others involve the exercise of a discretion and so could only give rise to an appeal on a question of law if it were alleged that there had been a failure to properly exercise the discretion applying the principles set out in *House v R.*[5]

[31] Others, however, involve the final determination of a complaint, for example a decision under s 106 to reject a complaint; a decision under s 118 to "discontinue" a complaint; or a decision under s 114 or s 115 either dismissing or upholding a complaint following a hearing. If the respondent's submission is accepted, the only right of appeal would be against decisions under s 114 and s 115 following a hearing under s 113.

5 (1936) 55 CLR 499

[32] I do not think s 129 should be so narrowly construed. There are a number of significant differences between the relevant provisions of the *Anti-Discrimination Act* which was the subject of Barr J's decision in *Smyth* and the *Information Act*.

[33] First, as already mentioned, appeals under the *Information Act* are to the Supreme Court, not to the Local Court as is the case under the *Anti-Discrimination Act*. Second, appeals under the *Information Act* are available on a question of law only;[6] under the *Anti-Discrimination Act*, appeals may be on a question of law, a question of fact or a mixed question of law and fact.[7] This significantly narrows the range of potential appeals under the *Information Act*.

[34] The appeal provision in the *Information Act* does not fix the time for an appeal by reference to the giving of reasons for a decision following a hearing as Barr J noted was the case in the *Anti-Discrimination Act*.[8] Also, while in both Acts the appeal provisions are immediately following the provisions relating to hearings, in both Acts they are in a separate Part, so (in both cases) it would be equally true to say that the Part of the Act relating to appeals (Part 8 in the *Information Act* and Part 7 in the *Anti-Discrimination Act*) follows immediately after the Part of the Act relating to

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6 Section 129(1)

7 Section 106(2)

8 *Smyth* para [26]

the complaints procedure as a whole (Part 7 in the *Information Act* and Part 6 in the *Anti-Discrimination Act*).

[35] Finally, as Barr J noted in *Smyth*, a person who is aggrieved by a decision under the *Anti-Discrimination Act* which is not a decision to which the appeal provision in s 106 of that Act applies can, in appropriate circumstances, apply to the Supreme Court for judicial review of that decision, which would provide an alternative remedy in cases where the right of appeal is not available.[9] By contrast, s 154 of the *Information Act* provides:

> **No review or other proceedings outside this Act**
>
> Despite any other Act and except as provided by this Act:
>
> (a) no person or body is entitled to investigate, inquire into, review or otherwise call into question an act or decision of a public sector organisation or the Commissioner under this Act; and
>
> (b) no proceedings for an injunction, a declaration or an order for prohibition or mandamus are to be brought in relation to an act or decision of a public sector organisation or the Commissioner under this Act.

[36] How effective this provision would be in excluding judicial review for jurisdictional error is not for me to determine here. It does not on the face of it extend to decisions of the Commissioner purportedly made under the Act. Moreover, there must be a real question about the extent to which the

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9 *Smyth* para [28]

legislature can exclude judicial review of a quasi-judicial body by the Supreme Court.[10] However, for present purposes, s 254 indicates an intention by the legislature to limit to the extent possible the alternative remedy of judicial review, which would be a factor weighing in the balance against construing s 129 in the severely limited way contended for by the respondent.

[37] It is not necessary for me to decide in this case precisely what decisions under the Act fall within the right of appeal conferred by s 129, and I do not think it appropriate for me to attempt to do so, particularly as the appellant in this case was unrepresented and I did not have the benefit of considered argument on both sides of the issue. There are a number of possibilities: it might be construed to apply only to decisions under Part 7;[11] only to decisions that finally determine a matter; or only to decisions of a quasi-judicial nature. There may well be other possibilities, or a combination of these possibilities.

[38] Whatever the full scope of s 129 may be, it seems to me that this decision is one to which the legislature must have intended it to apply.

(a) Although it states on its face that it is made pursuant to the Commissioner's general powers under s 87,[12] the decision clearly

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[10] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531

[11] This is the view to which I incline but am not prepared to determine for the reasons already stated.

[12] Section 87 is in Division 1 of Part 6 of the Act which deals with the establishment, functions and powers of the Information Commissioner. It provides that, in addition to the specific powers

relates to a complaint being dealt with under Part 7. It is a decision that finally disposed of the appellant's complaint.

(b) It was clearly a decision of a quasi-judicial nature.

(c) The decision appears to have been made following written submissions rather than an oral hearing, but the complaint had reached the stage where it had not been resolved by mediation and so, if the Information Commissioner had jurisdiction, she would have been obliged by s 113 to hold a hearing. Arguably then, the preliminary decision that she had no jurisdiction was a preliminary part of a hearing pursuant to s 113, from which, even on the respondent's case there is an appeal under s 129.

The Appeal

[39] I will therefore proceed to determine whether the Information Commissioner was correct to decide, as she did, that she had no jurisdiction to deal with Ms Kowcun's complaint by reason of s 5(5)(b) of the Act. In my view that decision was correct.

[40] There can be no doubt that the ADC is a tribunal within the meaning of that section. Section 4 of the Act defines a tribunal as a body (other than a court) established by or under an Act that has judicial or quasi-judicial functions. The ADC was established under the *Anti-Discrimination Act* and

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provided elsewhere under the Act or under any other Act, the Information Commissioner has the powers that are necessary and convenient for the performance of his or her functions under the Act.

it has quasi-judicial functions including carrying out investigations and hearings into complaints.[13] The processes for investigation, conciliation and (if necessary) hearing of a complaint are set out in Part 6. Hearings are to be public unless the Commissioner orders otherwise,[14] the Commissioner may order a person to attend proceedings, give evidence on oath and produce documents;[15] the Act specifies the burden and standard of proof;[16] at a hearing witnesses may be examined, cross- examined and re-examined;[17] and the Commissioner may allow parties to be legally represented.[18] Typically at a hearing the Commissioner hears evidence from witnesses, makes findings of fact and applies the law as set out in the *Anti-Discrimination Act* to the facts so found. In carrying out this process the Commissioner is not bound by the rules of evidence,[19] but does have a duty to accord natural justice to the parties.

[41] The more difficult question is whether conducting a conciliation is part of the ADC's decision making functions. Ordinarily one would not refer to a mediation or a conciliation as a decision making function of the mediator or conciliator. Notwithstanding that a conciliator takes a more active role in

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13 Section 13(1)(a)

14 Section 86

15 Section 92(1)

16 Section 91

17 Section 92(3)

18 Section 95

19 Section 90

the process of reaching an agreement than a mediator, the process of conciliation is not one in which the conciliator reaches a decision; it is one in which the conciliator assists the parties to reach an agreement.

[42] However, in my view, the Information Commissioner was correct to take a broader view of the meaning of "decision making functions". The function that the ADC was carrying out when the Commissioner's delegate carried out the conciliation in question was that conferred on it by s 13(1)(a) "to carry out investigations and hearings into complaints and endeavour to effect conciliation" utilising the procedures set out in Part 6 of the ADC Act. As the Information Commissioner correctly pointed out in her reasons for decision, conciliation can occur at any stage of the quasi-judicial process referred to above, even during the hearing, and the Anti-Discrimination Commissioner has a duty to consider whether conciliation is appropriate in each case.[20] In those circumstances, it would be artificial to separate the activities involved in conciliation from those involved in the rest of the decision making process in Part 6.[21]

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[20] Section 76

[21] There have been no cases to date which have considered the scope of s 5(5)(b). I was referred by the respondent to *O'Sullivan v Family Court of Australia* (1990) 141 FLR 204 in which the AAT was called on to interpret s 5(a) of the Commonwealth *Freedom of Information Act*. That section provides that the *FOI Act* "does not apply to any request for access to a document of the court unless the document relates to matters of an administrative nature", and it was held that the provision of "conciliation counselling" was not an administrative function. It may be that a convenient way of looking at the Territory legislation would be to adopt an expansive approach to the nature of "decision making functions" by holding that Tribunals have two broad kinds of functions, "decision making" and "administrative", an approach contended for by the respondent. However, I do not think that this case is an appropriate one for me to enunciate general principles or to go any further than necessary to decide the instant case, for reasons I have already articulated in relation to the jurisdictional issue.

[43] I therefore consider the Information Commissioner was correct in determining as she did that the Act did not apply to the ADC in relation to the conciliation carried out by the Anti-Discrimination Commissioner's delegate between Ms Kowcun and SkyCity Casino and that, therefore, she had no jurisdiction to entertain Ms Kowcun's complaint.