CITATION: *Greg Gedling v Anti Discrimination Commission & Charles Darwin University* [2004] NTMC 034

PARTIES:	GREG GEDLING v ANTI DISCRIMINATION COMMISSION & CHARLES DARWIN UNIVERSITY
TITLE OF COURT:	Local Court
JURISDICTION:	Appellate
FILE NO(s):	20315555
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JUDGMENT OF:	D Trigg SM

CATCHWORDS:

Anti-Discrimination Act ss 66 and 107
Re Waanyi Peoples Native Title Application (1994) 129 ALR 100
Lambe v Anti-Discrimination Commission and Commissioner of Police (2001) NTMC 54
Fiorido v Anti-Discrimination Commissioner and NT (2001) NTMC 38
Martin v McGowan, McCue and Anti-Discrimination Commissioner (2001) NTMC 63
Prasad v Minister of Immigration (1986) 65 ALR 549
Nestle Australia Ltd v Equal Opportunity Board (1990) EOC 92-201

REPRESENTATION:

Counsel:

Appellant:	Mr Tranthem
1st Respondent:	Ms Lisson
2nd Respondent:	Mr Tomkins

Solicitors:

Appellant:	Darwin Community Legal Service
1st Respondent:	Self
2nd Respondent:	Cridlands Lawyers

Judgment category classification:	C
Judgment ID number:	[2004] NTMC 034
Number of paragraphs:	78

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

No. 20315555

BETWEEN:

GREG GEDLING
Appellant

AND:

ANTI-DISCRIMINATION COMMISSION
1ST Respondent
&
CHARLES DARWIN UNIVERSITY
2nd Respondent

REASONS FOR DECISION

(Delivered 30 April 2004)

Mr D TRIGG SM:

1. On the 28th May 2003 the appellant filed a complaint form with the first respondent (page 45 of appeal book). The substance of the complaint was that the appellant asserted that he was:

- impaired;
- treated unfairly by the Northern Territory University;
- treated unfairly because of his impairment (disability);
- was harassed because of his impairment;
- asked questions about himself which were unnecessary and upon which discrimination might be based;

- had a special need because of his impairment, and his special need was not catered for; and

- the unfair treatment happened in education.

2. In question 6 of the complaint form he was asked:

> "Have you tried to talk to who you are complaining about or have you tried to sort out this complaint in any other way? If you did, write what happened here."

In response to this the complainant typed a lengthy response covering pages 47 to 54 inclusive of the appeal book.

3. Question 7 of the complaint form asked whether the things complained of happened within the last six months. The appellant answered this both "yes" and "no". Accordingly he was complaining about matters which occurred during the six months and beyond. He went on to give reasons as to why he had delayed in making a complaint and this was:

> "One of the reasons why I have delayed making any previous complaint is that I was and still am very worried what repercussions this complaint will have on my overall schooling. I was hoping that if I said nothing and did everything my lecturer (Mr Bradbury) and course coordinator (Dr Morris) wanted I would be supplied support. I was also very worried how complaining may affect the marking of my research report and exams."

4. In question 8 the complainant was then asked to give a detailed description of his complaint. The complainant has done this. It became apparent whilst considering these reasons that there may have been pages of the complaint form missing from the appeal book. The first respondent was contacted and four further pages were supplied. These additional pages have been numbered 56(a) to (d). The appellant starts with events in 1999 (at page 54 of the appeal book) and concludes with events in semester 3 of 2003 (at page 56(b) of the appeal book).

5. I will not set out the full details of the complaint as it is extremely lengthy.

6. The complaint was filed with the first respondent in accordance with the *Anti-discrimination Act* (hereinafter referred to as "the Act"). The preamble to the Act states that it is:

> "An act 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".

7. Pursuant to section 3 of the Act:

> "The objects of this Act are -
>
> (a) to promote recognition and acceptance within the community of the principle of the right to equality of opportunity of persons regardless of an *attribute*;
>
> (b) to eliminate discrimination against persons on the ground of race, sex, sexuality, age, marital status, pregnancy, parenthood, breast feeding, *impairment*, trade union or employer association, religious belief or activity, political opinion, affiliation or activity, irrelevant medical record or irrelevant criminal record *in the area of* work, accommodation or *education* or in the provision of goods, services and facilities, in the activities of clubs or insurance and superannuation; and
>
> (c) to eliminate sexual harassment." (italics added)

8. It is therefore benevolent legislation, and any interpretation of the Act should bear that in mind.

9. Pursuant to section 4(1) of the Act, "attribute" means an attribute referred to in section 19. Section 19 of the Act is as follows:

> "(1) Subject to subsection (2), a person shall not discriminate against another person on the grounds of any of the following *attributes*:
>
> (a) race;
>
> (b) sex;
>
> (c) sexuality;

(d) age;

(e) marital status;

(f) pregnancy;

(g) parenthood;

(h) breast feeding;

(j) *impairment*;

(k) trade union or employer association activity;

(m) religious belief or activity;

(n) political opinion, affiliation or activity;

(p) irrelevant medical record;

(q) irrelevant criminal record;

(r) association with a person who has, or is believed to have, an attribute referred to in this section.

(2) It is not unlawful for a person to discriminate against another person on any of the attributes referred to in sub section (1) if an exception under Part 4 or 5 applies." (italics added)

10. Again pursuant to section 4 (1) of the Act "*impairment*" is defined to include:

(a) "the total or partial loss of a bodily function;

(b) the presence in the body of an organism which has caused or is capable of causing a disease;

(c) the presence in the body of organisms impeding, capable of impeding or which may impede the capacity of the body to combat disease;

(d) total or partial loss of a part of the body;

(e) the malfunction or dysfunction of a part of the body;

(f) the malformation or disfigurement of a part of the body;

(g) reliance on a guide dog, wheel chair or other remedial device;

(h) physical or intellectual disability;

(k) psychiatric or psychological disease or disorder, whether permanent or temporary; and

(j) a condition, malfunction or dysfunction which results in a person learning more slowly than another person without that condition, malfunction or dysfunction."

11. The Act goes on to set out in section 20 what is included within the meaning of discrimination and when discrimination occurs. Section 21 deals with discrimination concerning persons who have a guide dog because of a visual, hearing or mobility impairment. Section 22 deals with sexual harassment. Section 23 deals with a prohibition on victimisation.

12. Section 24 deals with accommodating a special need and is in the following terms:

(1) "A person shall not fail or refuse to accommodate a special need that another person has because of an attribute.

(2) For purposes of subsection (1) –

(a) a failure or refusal to accommodate a special need of another person includes making inadequate or inappropriate provision to accommodate the special need; and

(b) a failure to accommodate a special need takes place when a person acts in a way which unreasonably fails to provide for the special need of another person if that other person has the special need because of an attribute.

(3) Whether a person has unreasonably failed to provide for the special need of another person depends on all the relevant circumstances of the case including, but not limited to –

(a) the nature of the special need;

(b) the cost of accommodating the special need and the number of people who would benefit or be disadvantaged;

(c) the financial circumstances of the person;

(d) the disruption that accommodating the special need may cause; and

(e) the nature of any benefit of detriment to all persons concerned."

13. Section 28 of the Act makes it clear that

"This act applies to prohibited conduct in the areas of –

(a) education;

(b) work;

(c) accommodation;

(d) goods, services facilities;

(e) clubs; and

(f) insurance and superannuation."

14. An analysis of the appellants complaint indicates that he was alleging that he had been discriminated against by the second respondent (which fell within the definition of "educational institution" in section 4 (1) of the Act), by them failing to accommodate a special need, which he asserted he had, because of an impairment. The impairment that he alleged was a visual impairment. The nature of the disability apparently is a "retinitis pigmentosa". According to Mario Marchionna from ATM Optometrists he has "problems with his peripheral vision and night vision" (page 58 of the appeal book). According to Dr N Verma Ophthalmology Consultant (page 59 of the appeal book):

> "We examined his fields and found that he has tunnel vision with his fields having shrunk to 10° in both eyes. This would cause him a lot of problems especially when he is referring to books, navigating and also interacting with his peers".

15. A perusal of the complaint would tend to suggest that the main areas of complaint by the appellant were that:

- he was not allowed to tape lectures as he requested; or in the alternative
- he was not provided with a scribe for taking lecture notes;
- overheads were used in the lecture which he had difficulty seeing because of his visual impairment;
- he requested a tutor to assist to make up for what he was missing out on due to his impairment;
- he needed to do his exams in a room which was well lit in order to accommodate his impairment; and
- he needed extra time to complete his exams.

16. On the face of it, the complainant appears to allege a breach of section 24(1) of the Act when read together with section 19(1)(j). Division 1 of Part 3 of the Act deals with "prohibited grounds of discrimination". This Division encompasses sections 19 to 21. Division 2 of Part 3 of the Act deals with "prohibited conduct", and encompasses sections 22 to 27. Accordingly, the complaint herein alleges prohibited conduct.

17. Pursuant to section 60(a) of the Act:

> "Subject to this Act-
>
> (a) a person aggrieved by prohibited conduct;
>
> may make a complaint to the Commissioner."

18. Accordingly, the complaint does disclose an allegation of conduct which is capable of being the basis of a complaint under the Act. Therefore section 67(d) of the Act could not apply.

19. The complaint herein complied with section 64 of the Act. This section states:

> (1) "A complaint shall –
>
> (a) be in writing;
>
> (b) set out in detail the alleged prohibited conduct;
>
> (c) so far as practicable, specify the respondent or each respondent; and
>
> (d) be lodged with, or sent by post to, the Commissioner.
>
> (2) The Commissioner may permit a complainant to amend a complaint at any time."

20. Section 65 of the Act sets out the time limits for lodging a complaint and gives the Commissioner a discretion to accept a complaint after the time has expired. This section is in the following terms:

> (1) "Subject to subjection (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."

21. On 14 July 2003 the first respondent wrote to the appellant (page 17 of the appeal book) through his delegate, Leigh Barnaba. The delegate set out the terms of section 65 and went on to say (at pages 18-19 of the appeal book):

> "You will notice that I have the discretion to accept those parts of your complaint that are out of time if I consider it is appropriate to do so. However, after considering all the material before me, I have formed the view that this matter is not one that I would consider appropriate to accept outside of the time limit. This is because I have formed the view that your complaint including those parts that are within the 6 month statutory time limit, is misconceived or lacking in substance, by which I mean that it is "*a claim which represents no more than a remote possibility of merit and which does no more than hint at a just claim.*" (Nagasinghe v Worthington (1994) 53 FCR 175).

Because I have formed that view that your complaint is misconceived or lacking in substance, I cannot accept it, pursuant to section 66 and 67(c) of the Anti-Discrimination Act 1992 which provide:

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.

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;

(b) trivial;

(c) misconceived or lacking in substance; or

(d) fails to disclose any prohibited conduct.

(The emphasis is mine).

I have formed this view because, in my opinion, the information and evidence does not support the allegation of prohibited conduct."

22. The delegate goes on in the letter to set out the reasons for the decision. These reasons are detailed and extensive. The decision itself covers some 9 pages of the appeal book.

23. It is against that decision that the appellant appealed on 12 August 2003 to the local court pursuant to section 106(1) of the Act. That section grants a right of appeal to a party to a complaint who is aggrieved by a decision or order of the Commissioner. The appeal was listed to be heard on 24 March 2004. However, on 4 March 2004 Judicial Registrar Fong Lim ordered that:

> "1. The issue of the 1st respondent's process in dealing with the initial complaint pursuant to s.65, 66 and 67 of the Act be referred to a Magistrate as a preliminary issue for 1 hour at 10:00am on 19 March 2004."

24. It was this issue that was argued before me on Friday, 19 March 2004. Presumably it was anticipated I would be able to give a decision immediately or within two days. Such optimism was misplaced. As a consequence, at the completion of the argument herein I adjourned the decision to a date to be fixed and vacated the hearing listed for 24 March. I referred the matter back to the Judicial Registrar to set a new hearing date. I now understand that the hearing has been re-listed for 21 June 2004, and, for some reason it appears that the hearing has been listed specifically before me.

25. The appellant and first respondent have filed written submissions (for which I am grateful) and have spoken to them. Paragraph 3 of the appellant's submission appears to be inconsistent with the argument which was pressed, and I therefore assume that there is a negative missing therefrom.

26. It appears that the "issue" which was referred to me for decision and which I am asked to determine is in fact not singular, and may be stated as follows:

> In order to decide whether to accept or reject a complaint under section 66 of the Act (and prior to making that decision) was it permissible for the Commissioner on the facts of this case:
>
> (a) to contact or notify the second respondent;
>
> (b) to look beyond the complaint itself;
>
> (c) to seek, receive and/or consider any information or documents from the second respondent, or any source external to the complaint document itself; and
>
> (d) if yes to any of the above, in what circumstances and to what extent.

27. These are important questions and the answers may have a serious effect upon the way that the Commissioner carries out his functions under the Act.

28. It was an agreed fact before me that the delegate of the Commissioner did contact the second respondent, and did receive information from them before making a decision under section 66. It appears that this was done with the

knowledge of the appellant. It is apparent from a reading of the decision that documents were received from the second respondent and were considered prior to coming to the decision. Item 29 in the appeal book is a letter dated 2 July 2003 from the second respondent to the first respondent and contains attachments. In total this letter and attachments take up 146 pages of the appeal book. It is clear from the decision that the first respondent read and considered these 146 pages.

29. The appellant says that the first respondent was in error to do so, and says that the second respondent should not have been contacted at all (in accordance with section 70 of the Act) until the complaint was accepted under section 66.

30. Ms Lisson, for the first respondent says that it is their practice to often contact respondents after receiving a complaint, and it has proven helpful in resolving a number of matters quickly and without the need for lengthy investigations. She gave some examples to the court. It appears that the first respondent is keen to continue it's current practices. The question for me to decide is whether the Act permits this or not.

31. Part 6 of the Act deals with "resolution of complaints". It is divided into five different divisions. Division 1 (ss 60-73) is headed "complaints", Division 2 (ss 74-77) is headed "investigations", Division 3 (ss 78-82) is headed "conciliation process", Division 4 (ss 83-89) is headed "hearings" and Division 5 (ss 90-105) is headed "miscellaneous".

32. In the case of *Re Waanyi People's Native Title Application* (1994) 129 ALR 100, President French J considered the various stages of an application under the Native Title Act (Cth), and in particular s 63 of that Act. At page 111 of the decision he observed:

> "The Act imposes an obligation upon the registrar to accept an application unless he or she is of the opinion that the application is frivolous or vexatious or that prima facie the claim cannot be made out. It is to be noted that there is no requirement in the Act that an application be supported by evidence beyond an affidavit stating the

> belief of the applicant that native title has not been extinguished in relation to any part of the area under claim, that none of the area is covered by an entry in the Native Title Register and that all of the statements made in the application are true. The application must include all information known to the applicant about existing interests, a description of the area over which native title is claimed and the name and address of the claimant. There is a further requirement that an application be accompanied by prescribed documents. None of this imposes a requirement upon an applicant to submit evidence in support of the application which would make out a prima facie case in a court of law."

33. In the case of *Lambe v Anti-Discrimination Commission and Commissioner of Police* (2001) NTMC 54 I had cause to consider this passage and in paragraph 15 said "In my view, there is some similarity between this statutory scheme and the Act herein." I still adhere to this view. There is nothing in section 64 of the Act that requires a complainant to submit any documents or evidence in support of his complaint, let alone any evidence which might make out a prima facie case in any subsequent hearing.

34. President French J went on to say at pages 111 - 113:

> "At the point at which the registrar considers an application, the context of the Act and specifically the terms of s 62 suggest that the applicants are not required to demonstrate a positive case. The condition of non-acceptance by the registrar, namely that `prima facie the claim cannot be made out' therefore does not operate upon a lack of evidence submitted by the applicants. The condition is satisfied if something is disclosed in the application or supporting affidavit to indicate that the applicants could not establish the elements of native title or that native title had been extinguished either wholly or in relation to a part of the area under claim. The notional forum in relation to which it is to be judged that the claim cannot be made out is a court in which the application might be litigated. But, having regard to the absence of any requirement upon the applicants to lodge with the application evidence in support of the existence of native title or evidence of the absence of extinguishing events, the words `prima facie the claim cannot be made' cannot impose the requirement to show a prima facie case in the senses used in criminal or civil litigation.
>
> In my opinion, the words "prima facie" in relation to the registrar's functions under s 63 bear the ordinary or dictionary meaning. The relevant dictionary meanings were identified in the submissions of

the State of Queensland and include “arising at the first sight” “based or founded on the first impression”; “at first appearance”. The question then is whether on this construction the registrar is precluded from making inquiries concerning matters which may fundamentally affect the viability of the claim. Plainly the ordinary sense of the words does not oblige her to undertake any investigation beyond a consideration of the application and the supporting affidavits and documents. However, that ordinary meaning of the words is in some degree metaphorical and does not, in my opinion, preclude some investigation by the registrar for the purpose of determining whether it can be said at the outset that the claim could not be made out. She may, for example conduct a current land tenure search and discover that part of the area under claim is freehold land which has clearly extinguished native title. Having so found, she could rightly conclude that prima facie the application could not succeed. She might also conduct a land tenure history search and discover that some leasehold interests had been granted in the past which, in her opinion, left no room for doubt that native title had been extinguished. Again, she could properly come to the conclusion that, prima facie, the claim could not succeed. Or she might seek some advice on the plausibility, from an anthropological perspective of the native title rights and interests claimed and come to the conclusion, on the basis of such advice, that prima facie the claim could not succeed. No doubt given the ambulatory character of native title and the way in which it derives its content from traditional laws and customs it may well be that such a case would be rare. Nevertheless, it cannot be excluded as logically impossible.

Section 63 of the Act applies, to the process of acceptance of an application by the registrar, a low level negative screening test. It favours the acceptance of applications. It does not contemplate any resolution by the registrar of contested questions of fact or arguable questions of law. But the Act is concerned with the recognition and protection of native title. That means native title that subsists. It does not provide for the recognition of native title which has been lost or which has been extinguished by valid past acts. For the registrar to accept an application which on the face of it or, in the light of the kind of investigations to which I have referred, could not succeed would be a waste of the time and resources of the tribunal. It would encourage ambit claims which would undermine the spirit of the legislation and discredit the processes of the tribunal to the detriment of those who have genuine cases to advance." (underlining added)

35. I respectively agree with these passages (subject to the proviso below) and consider that they are equally applicable to the Act. The words underlined in that judgment would support the proposition that the first respondent can

make some brief preliminary inquiries "for the purpose of determining whether it can be said at the outset that the claim could not be made out." Provided that no investigation is commenced, and provided that the complaint on it's face appears straight forward and possibly capable of quick resolution then I would agree with and adopt this practical process.

36. I considered these passages in the case of *Fiorido v Anti Discrimination Commissioner and Northern Territory of Australia* (2001) NTMC 38. At page 5 of that decision I made the following obiter ex tempore comments:

> "It is clear that under the Act there are various processes to be gone through. The initial decision under section 66 is a very basic screening process, analogous to the screening process referred to by President French in relation to section 63 of the *Native Title Act*. Then there is the investigative process which is an investigation, again nominally conducted by the Commissioner, to look into the matter, obtain material, obtain information and then come to a decision as to whether the matter should proceed further.
>
> That is, in my view, a position somewhat analogous to a decision to prosecute or a decision made under the *Coroners Act* as to whether an inquest is or is not deemed necessary. It is an investigative process. It is not based on evidence. It is not based on the parties having a right to sit down and question or cross-examine the other parties, it is an intelligence gathering exercise to enable a decision to be made…….
>
> The final step, final decision ideally, would be the section 88 decision following a full hearing……..I think the three decision making processes, the primary ones under the legislation, section 66 is the lowest standard base, almost administrative decision; the section 76 is an intermediate decision based on accumulation and assessment of the evidence or material available. And the final decision, section 88, is the most important and the judicial or quasi-judicial decision based on a full hearing."

37. I see no reason to depart from these observations. I further considered them in *Lambe's case* (supra), and concluded in paragraph 16 thereof:

> "In my view, these observations are equally applicable to the consideration of an appeal from a decision under s 66 of the Act, and I respectfully agree with and adopt what President French J had to say above. Therefore, I find that the s 66 decision stage is intended to

> be a low level screening test and that in considering an appeal this Court should apply a low level test as well. Any disputed facts should not be resolved. It is somewhat analogous to considering an application to strike out a statement of claim on the basis that it discloses no cause of action. I consider that the delegate of the Commissioner (and this Court on appeal) at the s 66 stage should presume that each allegation in the complaint can be established."

38. The correctness of my obiter observations in the last sentence calls to be reconsidered in the instant case. Upon reflection, I consider that sentence to be too broad, and a view that I no longer adhere to. Otherwise, I see no reason to depart from these observations.

39. Mr Luppino SM also had cause to consider the Act in the case of *Martin v McGowan, McCue and Anti-Discrimination Commissioner* (2001) NTMC 63. In paragraph 6 of that decision His Worship observed:

> "The determination of a complaint under the *Anti-Discrimination Act* is essentially a three stage process. The first stage is designed to screen out unmeritorious complaints and to ensure that only matters worthy of investigation proceed further. The second stage requires the Commissioner to fully investigate a complaint. The third stage is the determination of a complaint once the Commissioner, having fully investigated the complaint, decides that it is appropriate to proceed further to a full hearing. Mr Martin's complaint was dismissed at the first stage."

40. I respectfully agree with these observations. Mr Luppino SM set out the factual basis of the complaint and appeal in *Martin's case* at paragraphs 1 and 2 thereof as follows:

> "1. This is an appeal pursuant to the *Anti-Discrimination Act*. The Appellant appeals against a decision of the Delegate of the Anti-Discrimination Commissioner ("the Commissioner") notified by letter to him dated 9 March 2001. The decision was to dismiss the appellant's complaint pursuant to section 67(d) of the *Anti-Discrimination Act* ie. on the basis that no prohibited conduct was disclosed in the complaint.
>
> 2. Mr Martin's complaint names Messrs McGowan and McCue, who, it appears, are respectively the program manager and an announcer at the Australian Broadcasting Corporation ("ABC") in Darwin as the persons who committed the alleged prohibited conduct. He alleges

his "political beliefs" as the sole basis of his complaint. The unfair treatment he alleges is that on 12 November 2000 he was denied the opportunity to participate in one of the ABC's talk back radio programmes. The details he provided in the complaint however suggests that this was an action taken by persons other than Messrs McGowan and McCue. The details provided in the complaint then went on to allege that on or about 17 November 2000 Mr McGowan told him that he had been banned from the relevant talk back programme following a decision taken after a meeting involving Mr Martin, Mr McGowan and a Mr Boden, who was the Manager of the ABC in Darwin. Mr Martin alluded in the complaint to the availability of a tape recording of that meeting. He also said "..It is my firm belief that ABC management are unwilling to put me to air because I pose a political risk...".”

41. His Worship went on to say in paragraphs 8 and 9:

> “8. On the 1st day of August 2001 I made an order in relation to the nature of the appeal. Being in agreement with decisions in the matters of *Trenow* and in *Spires v Anti Discrimination Commissioner* (Wallace SM, 30 May 2001), I ruled that the appeal would proceed essentially based on a reconsideration of the material submitted to the Commissioner (with one exception which I will discuss below), as an appeal by way of rehearing but without being bound by the rules of evidence. In essence, this court was putting itself in the same position that the Commissioner was in when dealing with Mr Martin's complaint at the relevant stage. The one exception I refer to is that I allowed evidence to be brought in relation to the tape previously referred to. That tape, although not having made available to the Commissioner, was referred to in the complaint.
>
> 9. Whether further material should or should not be allowed must be decided on the facts of the individual case. Although the tape in question was not actually provided to the Commissioner, it's availability was alluded to and Mr Martin thereby clearly intended that it form part of his complaint. Its relevance was also established given the reference in the complaint to the allegation that the decision of the ABC was taken following the meeting which was the subject of the tape. “Mr Hutton submitted to me that the obligation is on the complainant to provide all relevant material to the Commissioner for determination of the first stage. His submission was that the structure of the Act does not require the Commissioner to make any investigation or seek out any further material at that stage. Accordingly, Mr Hutton's submission was that the reference in the complaint to the availability of the tape was irrelevant and as it was not actually provided to the Commissioner, the Commissioner had no obligation to have regard to it. That of course all becomes

irrelevant in the context of this appeal given my ruling on 1st August 2001, but in any event I cannot agree with Mr Hutton's submission on this point. I think the fact of the reference to the available material in the complaint requires that an opportunity be given to produce it for consideration at that stage. In support of this view I draw on the authority of *Prasad v Minister of Immigration* (1986) 65 ALR 549 where, in the context of a review of an administrative decision, it was held that **where it is obvious that relevant material is readily available any decision made without an attempt to obtain that material may be regarded as an unreasonable exercise of the decision making power rendering the decision liable to be set aside**"." (emphasis added)

42. The first respondent relies upon this decision and submitted in paragraph 9 of it's written submissions as follows:

> "There are many situations in which a respondent could justifiably argue that their right to natural justice has been abrogated by the Commission accepting a complaint under section 66 **without** first allowing the respondent an opportunity to address the question of whether a complaint should be accepted. This is particularly so in the matter of complaints which appear to be outside of the statutory time limit or where material supplied in support of the complaint appears to be incomplete. (As was the case on both counts with the Appellant's complaint).
>
> For this reason the Commission regularly contacts respondents to seek supplementary information when it appears that a respondent might be prejudiced by the Commission accepting a complaint out-of-time, or when it is readily apparent from the material supplied by the complainant that relevant information is missing. On this issue the Commission has been guided by comments made by Mr Luppino SM in the matter of *Martin v McGowan, McCue and the Anti-Discrimination Commission* (2001) NTMC 63.

43. The facts in the case of *Prasad* were that the applicant and his wife were Fijian citizens and were married in Fiji. The applicant's wife had a permanent entry permit into Australia and on the day after the marriage she left Fiji for Sydney. Subsequently the applicant was granted a temporary entry permit and upon his arrival in Australia applied for a permanent entry permit. The applicant and his wife were interviewed by departmental officers on a number of occasions, The first interview revealed by the evidence took place on 17 December 1981. In August 1983 the applicant

was notified that his application had been refused. The applicant sought a departmental review of the refusal and material, including eight statutory declarations and the personal observations of a community worker, concerning the applicant's marriage was submitted to an Immigration Review Panel. In it's report to the Minister the Panel recommended that the departmental decision be maintained. The Minister allowed the refusal to stand. The applicant requested, under s13 of the Administrative Decisions (Judicial Review) Act, a statement of the minister's findings on material questions of fact and reasons for the decision. The panel's report and the Minister's statement under s 13 did not refer to the report of the interview on 17 December 1981 or to the material, referred to above, submitted to the Immigration Review Panel. The applicant sought a review of the minister's decision.

44. It was upon those facts that Wilcox J held that:

> "The minister failed to take relevant matters into account contrary to s 5(2)(b) of the Act. In the circumstances of this case where the whole history of the relationship was being examined it was erroneous to ignore an assessment of that relationship made by a competent officer in December 1981. In addition there was nothing to indicate that the panel or the minister took any notice of the eight statutory declarations or the observations of the community worker submitted in support of the applicant's marriage."

Section 5 of the Administrative Decisions Judicial Review) act (where relevant to understand this decision) is in the following terms:

> "(1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Magistrates Court for an order of review in respect of the decision on any one or more of the following grounds:
>
> (a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
>
> (b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;

(c) that the person who purported to make the decision did not have jurisdiction to make the decision;

(d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;

(e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;

(f) that the decision involved an error of law, whether or not the error appears on the record of the decision;

(g) that the decision was induced or affected by fraud;

(h) that there was no evidence or other material to justify the making of the decision;

(j) that the decision was otherwise contrary to law.

(2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:

…….

(b) failing to take a relevant consideration into account in the exercise of a power;"

45. The facts in the *Prasad case* are clearly very different to the matters under consideration here or before Mr Luppino SM. The legal proposition to be extracted from *Prasad* is, in my view, quite narrow. That case is not, in my view, authority for any proposition that in an appeal to the local court from the first respondent the court may (or must) seek and consider material that was not before the first respondent. It simply stands for the proposition that if a decision is being reviewed then all the material available to the original decision-maker should be considered. Otherwise as a matter of logic it would not be a complete review.

46. In *Martin's case* Mr Luppino SM noted that the complaint itself referred to a particular document (namely a tape of an alleged offending conversation) and sought that document in order to fully understand the complaint, and to

assist in a decision to be made under section 66 of the Act. His Worship went on to note in paragraph 12 of his decision:

> "The decision in *Nestle Australia Ltd v Equal Opportunity Board* (1990) EOC 92-201 also provides some direction as to how an initial complaint should be treated. It was held in the latter case that the written complaint is not to be treated as a formal document or pleading. It must however on its face raise a question of possible discrimination else the Commissioner's jurisdiction is not invoked. It was also held that a lack of particularisation in the complaint on its own does not indicate a lack of jurisdiction, but that it is necessary that the acts alleged to be discriminatory in the complaint to at least justify preliminary recognition of jurisdiction. It was held that the complaint was not to be interpreted by any unduly restrictive or pedantic interpretation. This then allows me to proceed further notwithstanding the rather confused allegations and lack of particularisation in the complaint."

47. I respectfully agree with and adopt this passage.

48. The decision in *Martin's case* appears to stand for the proposition that in making a decision under section 66 of the Act the first respondent might request from the complainant and in some cases the second respondent, and consider, documents or material referred to in the complaint. This decision is not binding upon me, but is persuasive. Nevertheless, in the instant case I need to consider the correctness, or otherwise, of this proposition. In my view, an answer to the problem commences with a consideration of section 74 of the Act.

49. Section 74 of the Act is in the following terms:

> "(1) The Commissioner shall carry out an investigation under this Division of alleged prohibited conduct if –
>
> (a) requested to do so by the Minister; or
>
> (b) the Commissioner accepts a complaint under section 66.
>
> (2) The Commissioner may carry out an investigation under this Division if, during the course of carrying out the Commissioner's functions, it appears that prohibited conduct has occurred.

(3) An investigation carried out under subsection (1)(a) or (2) shall, for the purposes of this Act, be deemed to be an investigation of a complaint and this Act shall apply to and in relation to –

(a) the investigation;

(b) any other proceedings under this Act in relation to the prohibited conduct; and

(c) the Commissioner,

as if a complaint had been made."

50. I consider that a number of things are apparent from a consideration of this section. Firstly, it is mandatory for the Commissioner to carry out an investigation under Division 2 if he accepts a complaint under section 66. Secondly, the Commissioner has discretion to carry out an investigation under Division 2 if subsection (2) applies. Thirdly, if the Commissioner does carry out an investigation under subsection (2) then it "shall….be deemed to be an investigation of a complaint and this Act shall apply…..as if a complaint had been made".

51. In my view, it follows from this that subsection (2) is referring to a function of the Commissioner other than his functions under section 13(1)(a) of the Act. If this was not the case then there would be no need for the deeming. This is further supported by the wording of subsection (2) itself. If in the course of deciding whether to accept a complaint under section 66 "it appears that prohibited conduct has occurred" then it would seem that the complaint should simply be accepted. If it were the intention that the first respondent could carry out an investigation in order to decide whether to accept or reject a complaint, then the Act could easily have said so. However, an investigation under Division 2 "shall" be "thorough" (section 75(3)(a)). I do not accept that it was intended that the first respondent would make a "thorough" investigation prior to the section 66 stage, and then make another "thorough" investigation after that stage as well.

52. It therefore follows, in my view, that the Act does not envisage any "investigation" of the complaint (as envisaged in Division 2 of Part 6) until after a decision to accept a complaint has been made. This is consistent with section 70 of the Act, as any investigation should involve the relevant parties.

53. "Investigation" is defined in The Macquarie Dictionary (third edition) to mean "the act or process of investigating; a searching inquiry in order to ascertain facts; a detailed or careful examination". This is consistent with how it has been interpreted by the courts, where it has been held to mean an inquiry or examination to ascertain facts; the act or process of investigating: *Taciak v Cmr of Australian Federal Police* (1995) 59 FCR 285.

54. I therefore adhere to the view that the Act does not contemplate or permit the first respondent to instigate or commence any "investigation" of the complaint unless and until a decision to accept the complaint under section 66 has first been made.

55. I am loathe to suggest that the first respondent must never contact a possible respondent until after a complaint has been accepted. In my view, this could place too great a restriction upon the first respondent and frustrate the operation of the Act. Accordingly, I consider that in cases where the complaint appears to be relatively straight-forward, such that it is possibly capable of quick resolution (either by deciding it is without merit, or by obtaining a result satisfactory to all parties) after a couple of phone calls, then in those instances I see nothing in the Act which would prohibit the first respondent seeking to resolve the complaint expeditiously. On the contrary, such a quick common sense approach would sit well with the general philosophy of the Act, and allow the more structured and time consuming processes to be applied to the more substantive complaints. In some cases a quick facilitated settlement might be reached with the assistance of the first respondent such that a withdrawal of the complaint under section 71(1) of the Act may occur. However, in my view, contact

with a potential respondent should only occur in limited circumstances. I do not consider it appropriate to lay down any hard and fast rules. A decision will need to be made based on the facts in each case. However, if contact is made and a quick resolution does not occur then, in my view, the first respondent should cease further contact at that stage and revert to making a decision under section 66. In doing that the first respondent might be obliged to ignore what transpired after the initial contact was made.

56. A perusal of the complaint herein leads me to conclude that this was not an appropriate matter to contact the second respondent prior to a decision under section 66 being made. It was not on it's face a simple or straight forward matter.

57. Further, the large volume of information and documents that were obtained from the complainant and the second respondent had taken the inquiry well beyond the section 66 stage. It is clear, and I find, that the first respondent had embarked upon an investigation of the complaint. I further find that this was not permitted under the Act until after a decision to accept the complaint had been made.

58. Section 90 of the Act states as follows:

> "(1) In the conduct of proceedings under this Act, the Commissioner –
> (a) is not bound by the rules of evidence and *the Commissioner may obtain information on any matter as the Commissioner considers appropriate*;
> (b) shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms;
> (c) may give directions relating to procedure that, in the Commissioner's opinion, will enable costs or delay to be reduced and will help to achieve a prompt hearing of the matters at issue between the parties;
> (d) may draw conclusions of fact from any proceeding before a court or tribunal;
> (e) may adopt any findings or decisions of a court or tribunal that may be relevant to the proceedings; and

(f) may conduct proceedings in the absence of a party who was given reasonable notice to attend but failed to do so without reasonable excuse."(italics added)

59. The word "proceedings" is not defined in the Act. In *the Concise Oxford Dictionary (eighth edition)* it means "…… 2 (in pl.) (in full legal proceedings) an action at law; a lawsuit." *Stroud's Judicial Dictionary (sixth edition)* considers the word in the singular and plural and refers to a number of cases. In some, "proceeding is used as meaning a step in an action" (*Houlston v Woodall* 78 L.T. Jo 113; *Smalley v Robey & Co* (1962) 1 QB 577). In others it "is equivalent to any action and does not mean any step in an action (*Pryor v City Offices Co* 10 QBD 504). And in others "proceedings commence when the accused comes to the court to answer the charge, and not the time the charge is made" (*R v Elliott* (1985) 81 CrAppR 115). It seems to follow therefore that the meaning of "proceedings" in section 90(1) of the Act will depend upon it's context and a consideration of the Act as a whole.

60. With respect, I therefore find that I would only agree with the proposition in *Martin's case* (above referred to) in the limited circumstances above referred to (namely the first respondent can make some brief preliminary inquiries "for the purpose of determining whether it can be said at the outset that the claim could not be made out" provided that no investigation is commenced, and provided that the complaint on it's face appears straight forward and possibly capable of quick resolution) to make a proper and informed decision under section 66, but not to investigate the complaint. This would be in accordance with the decision of President French J in *Re Waanyi Peoples case*.

61. In my view, once the first respondent looks beyond the matters referred to in the complaint or supporting documents from the complainant then he may have moved beyond what is envisioned in Division 1 of Part 6 of the Act, and may have commenced to investigate the complaint.

62. Whilst, I can see some practical merit in the way that the first respondent has proceeded to deal with complaints, as advised by Ms Lisson, this may not necessarily be in accordance with the Act. In effect, the first respondent appears to have rolled together the different steps contemplated in the Act.

63. In the instant case the first respondent has in effect embarked on a partial investigation of the merits of the complaint in order to decide whether to accept or reject the complaint under section 66 of the Act. I find that this is not permissible. A problem with this approach is that whereas a complaint might be rejected based upon a partial investigation at the section 66 stage, there remains the risk (which cannot be dismissed as slight) that a full investigation at the Division 2 stage might have led to a different result.

64. Having further had cause to consider the role of the first respondent in making a decision under section 66 I see no reason to depart generally from what I had to say in the cases of *Fiorido* (supra) and *Lambe* (supra), although I may have said it better.

65. Upon a reading of the complaint in the instant case I find that the first respondent should not have contacted the second respondent at all unless and until a decision to accept the complaint had been made under section 66.

66. In *Martin's case* all the parties were before Mr Luppino SM and the tape was available. I can therefore understand why His Worship took the practical step of listening to it. However, on reflection, I am not sure that I would have done so. If the result of what Mr Luppino SM did led to a general proposition that it was permissible for the first respondent to seek, obtain and have regard (at the section 66 stage) to material outside of the complaint itself, then I would respectfully not agree with this on the facts of the instant case.

67. If the first respondent were permitted to seek documents generally at the section 66 stage then it would be likely that a second respondent might seek to produce other documents not referred to in the complaint at all. In

addition, it would be almost inevitable that a second respondent would seek to put their side of the matter. Because of the risk of contamination in this way then, in my view, a second respondent generally should not be contacted at all unless and until a decision to accept a complaint under section 66 had been made (except in those limited circumstances referred to above).

68. As soon as the first respondent sought or received any documents or information from the second respondent in this matter they had commenced an investigation of the merits of the complaint. This, I find, they were not permitted by the Act to do unless and until a decision to accept the complaint under section 66 had been made and communicated to the second respondent in accordance with section 70 of the Act.

69. A decision at the section 66 stage is not a weighing up process. It is simply to separate the grain from the chaff. An assessment of the type of grain or the quality of it (if any) occurs at a later stage. Only those matters which appear from the complaint itself and documents referred to in the complaint to clearly fall within sections 67 or 68 of the Act should be rejected. All other complaints should be accepted.

70. In my view, Part 6 of the Act sets up a structured procedure for dealing with complaints. The Parliament appears to have done that deliberately. If the Parliament had intended otherwise then it could have left the procedures for dealing with complaints at the complete discretion of the first respondent. However, Parliament has chosen not to. If the first respondent is unhappy with the structure, then his remedy is to seek a statutory amendment.

71. I had been troubled by the existence of section 65(2) in Division 1 of Part 6 of the Act. I was concerned that a decision to accept a complaint out of time made without considering possible prejudice to a second respondent might result in a denial of natural justice. However, when the true nature of an "acceptance" under section 66 is borne in mind the concern dissipates. As noted above, an "acceptance" under section 66 is not a decision on the

ultimate merits (whereas a "rejection" under section 66 is). It is merely a decision that enables the complaint to proceed further as one which warrants further investigation. That investigation could also look into prejudice arising from a complaint made out of time. There is nothing in the Act that precludes the first respondent taking into account prejudice to a second respondent from a late complaint after a decision to accept under section 66 has been made. Indeed, pursuant to section 90(1)(b) of the Act "in the conduct of proceedings under this Act, the Commissioner shall act according to equity".

72. Accordingly, in answer to the questions I posed in paragraph 21 hereof I would answer (on the facts of this case):

(a) No, as the matter was not on it's face straight-forward and did not appear capable of quick resolution such that a withdrawal under section 71(1) might occur;

(b) No, unless further information from the complainant was required such that the complaint might be rejected without that further information being provided;

(c) No.

73. Based upon these reasons it would appear that I have two options available. I could quash the decision to reject the complaint and remit (pursuant to section 107(c)) the matter back to the first respondent to reconsider, but having regard only to the matters in the complaint and ignoring any material or information from the second respondent. The alternative is that I could quash the decision to reject the decision and substitute (pursuant to section 107(b)) my own decision. I consider that the second option is the better one in the circumstances of this case.

74. Upon a full reading of the complaint it cannot, in my view, be said that the complaint should have been rejected at the early section 66 screening stage. It does disclose a possible breach under the Act, albeit that a strong case may not be made out. I am unable to conclude that the complaint falls within either of sections 67 or 68 of the Act. It therefore follows that the complaint

should have been accepted. In reaching that conclusion I have intentionally not considered the material provided by the second respondent. To do so would have been to "investigate" the complaint and this would require some judgment calls which, in my view, are not required (or permitted) at the section 66 stage.

75. That is not to say that the complaint will or might not be ultimately found to be without merit. It may be the case that no further investigation is needed beyond the documents contained in the appeal book. I do not know. It may be the case that the same result may flow, but it may not. But these are only decisions that can be made after the investigation stage. It is not permissible, in my view, to roll up the section 66 screening stage with a partial investigation. Pursuant to section 75(3)(a) of the Act "in carrying out an investigation under this Division, the Commissioner shall make a thorough examination of all matters relevant to the investigation". Therefore, any investigation should only occur after a section 66 decision has been made, and such investigation must be "thorough".

76. As a result of my decision herein there is no need for the hearing date to be retained. There is nothing left to be litigated in this court at this time. The matter will return to the first respondent to be dealt with in accordance with the Act.

77. I therefore Order as follows:

1. The first respondent's decision dated 14 July 2003 to "not accept" the appellants complaint is quashed.

2. Pursuant to sections 107(b) and 66 of the Act the complaint is accepted.

3. The hearing date of 21 June 2004 is vacated.

78. I will hear the parties on any further or consequential orders that may be sought.

Dated this 30th day of April 2004.

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D. TRIGG SM