**QUEENSLAND INDUSTRIAL RELATIONS COMMISSION**

NUMBER: AD/2018/58

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| Applicant: (Complainant) | **MICHAEL CAMPBELL** |
|  | AND |
| Respondents: | **JUSTICE HENWOOD** and **RACING QUEENSLAND BOARD** |
|  | AND |
| Intervener: | **ANTI-DISCRIMINATION COMMISSION QUEENSLAN** |

**ANNEXURE**

**SUBMISSIONS OF THE ANTI-DISCRIMINATION COMMISSION QUEENSLAND**

1. The *Anti-Discrimination Act 1991* (the Act) provides a mechanism for dealing with complaints of unlawful discrimination, sexual harassment, other unlawful behaviour, and reprisal associated with a public interest disclosure. Complaints that are unresolved through conciliation may be referred to a tribunal for hearing and determination. For work-related complaints the tribunal is the Queensland Industrial Relations Commission, and for all other complaints the tribunal is the Queensland Civil and Administrative Tribunal.
2. In these submissions the Anti-Discrimination Commission Queensland is referred to as the Commission, and the Queensland Industrial Relations Commission is referred to as the tribunal.

**Background**

1. The Applicant/Complainant lodged a complaint with the Commission on 23 January 2018. The complaint material included a copy of a Deed of Release dated 8 March 2017 between the complainant and Racing Queensland Board (the Deed). The Deed included provisions to the effect that its terms were in full settlement of all claims and that it may be pleaded as a bar to proceedings.
2. The Act enables the Commissioner to accept a complaint notwithstanding a prior agreement not to complain, if the Commissioner considers it is fair to do so. Section 137 of the Act provides:

**137 Unfair agreements not to complain are not binding**

* 1. The commissioner may accept a complaint from a person who had previously agreed with another person not to complain, if the commissioner is of the reasonable opinion that it is fair to accept the complaint.
  2. In assessing whether it is fair to accept the complaint, the commissioner is to consider all the relevant circumstances of the case including—

1. the knowledge of the parties who made the agreement; and
2. what the person who wishes to complain received in return for the agreement.
3. On 8 May 2018, a delegate of the Commissioner acting under section 137 of the Act, decided that it was fair to accept the complaint, and the complaint was accepted.
4. The complaint was not resolved through conciliation and was referred to the tribunal pursuant to section 166 of the Act. The referral includes a copy of the decision dated 8 May 2018 made under section 137 of the Act.

**Functions and powers of the tribunal**

1. The jurisdiction of the tribunal is statutory.
2. The words of a statute must be read in the context of the statute as a whole. The process of statutory construction begins with examining the context of the provision that is being construed.[[1]](#footnote-1) There is also a presumption that the legislature has not intended to interfere with basic rights, freedoms and immunities, unless there is unmistakable and unambiguous language to the contrary.[[2]](#footnote-2) Further, the *Acts Interpretation Act 1954* requires that the interpretation of a provision that will best achieve the purpose of the Act is to be preferred to any other interpretation.[[3]](#footnote-3)
3. The Preamble describes Parliament’s reasons for enacting the Act by reference to international human rights instruments, a need to extend the Commonwealth human rights legislation, and the intention to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity and from sexual harassment and other objectionable conduct.
4. The Act sets out the conduct that is prohibited, establishes the Anti-Discrimination Commission, and provides for enforcement. Enforcement begins with a complaint to the Commission that may be referred to the tribunal if it is not resolved through conciliation. Specific functions and powers are ascribed to the Commission and to the tribunal.
5. The functions and powers of the tribunal include a power to review, on application of the complainant, a decision of the Commissioner made under section 169 of the Act that the complainant has lost interest in continuing with a complaint. Section 169 provides:

**169 Complaint may lapse if complainant loses interest**

1. If the Commissioner is of the reasonable opinion that a complainant has lost interest in continuing with a complaint, the commissioner must tell the complainant in writing that —
   1. the complaint will lapse unless the complainant indicates that the complainant wishes to continue with it; and
   2. if the complaint lapses, the complainant can not make a further complaint relating to the act or omission that was the subject of the complaint.
2. If the complainant does not give the indication within 28 days, the complaint lapses, and the commissioner must write to the complainant and the respondent as soon as practicable to tell them that the complaint has lapsed.
3. Within 28 days of being notified that the complaint has lapsed, the complainant may apply to the tribunal to review the commissioner’s decision.
4. If the tribunal is satisfied that the complainant has a genuine interest in continuing with the complaint, the commissioner must resume dealing with the complaint.
5. The complainant can not make a further complaint relating to the act or omission that was the subject of the complaint.
6. The tribunal’s function under section 169 is to consider afresh the complainant’s interest in pursuing the complaint, not whether the Commissioner’s decision was justified.[[4]](#footnote-4)
7. Section 169 contains an explicit right of review. In contrast, section 137 does not contain a power for the tribunal to review the Commissioner’s decision.
8. The Act does not provide any mechanism for or right of review in respect of any other decisions of the Commissioner. The functions of the tribunal are those set out in section 174B of the Act. The functions do not include review of decisions, other than decisions made under section 169.
9. This was confirmed by the present tribunal in *McAllister v Anti-Discrimination Commission Queensland* [2018] QIRC 120 at [23].

**The meaning and effect of section 137**

1. The meaning and effect of section 137 of the Act was considered by the former Anti-Discrimination Tribunal in *Diggles v Heery and Australian Laboratory Services Pty Ltd* [2009] QADT 22.
2. In *Diggles*, the tribunal said that section 137 was a means of over-riding the common law with respect to accord and satisfaction and estoppel based on a Deed of Release [17], having said at [15]:

… Parliament has expressly given the Commissioner power to consider deeds of compromise before accepting the Complaint. Parliament has not given the Tribunal an express power to revisit that decision, or to apply the common law with respect to accord and satisfaction or estoppel. The Tribunal’s prescribed function is to consider whether the Act has been contravened on the facts before it.

1. Once a complaint is considered and accepted under section 137 of the Act, it is that complaint that is referred to the tribunal.

**Conclusion**

1. The tribunal does not have the power to review the Commissioner’s decision to accept the complaint under section 137 of the Act, and it is not open for the respondents to agitate issues about accord and satisfaction and estoppel, or that the Commissioner’s decision was wrong.
2. The appropriate course to challenge the Commissioner’s decision was by way of judicial review under the *Judicial Review Act 1991*.[[5]](#footnote-5)

**Intervener**

29 October 2018

1. *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, [1998] HCA 28 (28 April 1998). [↑](#footnote-ref-1)
2. *Coco v The Queen* (1994) 179 CLR 427, [1994] HCA 15 (13 April 1994). [↑](#footnote-ref-2)
3. *Acts Interpretation Act 1954*, section 14A. [↑](#footnote-ref-3)
4. *Kelly v Harris, Madigan, Head & Qantas Airways Pty Ltd* [2002] QADT 9; *Monion v Baronia, Louanda Enterprises & Jasak Holdings Pty Ltd* [2006] QADT 28. [↑](#footnote-ref-4)
5. See *Diggles v Heery and Australian Laboratory Services Pty Ltd* [2009] QADT 22 at [22]; *McAllister v Anti-Discrimination Commission Queensland* [2018] QIRC 120 at [20] and [40]. [↑](#footnote-ref-5)