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Document Lodged:	Submissions
File Number:	VID323/2016
File Title:	Leila Winters v Basil Michael Fogarty
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

Dated: 26/10/2018 1:26:00 PM AEDT Registrar

Important Information

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Reply submissions of the Australian Human Rights Commission

No. VID 323 of 2016

Federal Court of Australia

District Registry: Victoria

Division: General

Leila Winters

Applicant

Basil Michael Fogarty

Respondent

1 Introduction

1. On 23 October 2018, the Australian Human Rights Commission was granted leave to file written submissions in reply to the submissions of the Respondent dated 1 October 2018. These submissions respond to [19]-[30] of the Respondent's submissions.

2 Reconciliation of apparently conflicting authorities

2. In determining whether the Federal Court has jurisdiction to hear allegations of victimisation as a civil matter as part of an allegation of unlawful discrimination under s 46PO of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**), it is necessary to consider whether it is possible to reconcile two apparently conflicting authorities of the Full Court in *Dye v Commonwealth Securities Limited (No 2)* (***Dye***)[1] and *Chen v Monash University*.[2]

3. At [20] of the Respondent's submissions, he says that the Commission's written submission 'fails to pay appropriate regard to the doctrine of precedent', that the

[1] *Dye v Commonwealth Securities Ltd (No 2)* [2010] FCAFC 118 (Marshall, Rares and Flick JJ).
[2] *Chen v Monash University* (2016) 244 FCR 424 (Barker, Davies and Markovic JJ).

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

Court in the present proceeding is bound 'to apply *Chen* as Justice North did … in *Birbilis*' and that 'the conflict between *Chen* and *Dye* is one that can be resolved only by a Full Court'.

4. The position of the Commission is that:

   a. the judgment in *Dye* is binding on this Court

   b. the *ratio* of *Chen v Monash University* is limited to the circumstances in which a discontinued appeal may be reinstated, and the parts of the judgment dealing with the applicant's prospects of success in that case were strictly *obiter*

   c. in any event, the parts of the judgment in *Chen v Monash University* dealing with victimisation can be distinguished from the present proceeding

   d. to the extent that any references were made in *Chen v Monash University* to the jurisdiction of the court to hear allegations of victimisation as a civil matter, those references were also *obiter*, and

   e. the judgment in *Chen v Birbilis*, following *Chen v Monash University*, can also be distinguished from the present proceeding.

2.1 Dye is binding

5. In 2010, the Full Court in *Dye* directly considered the operation of s 46PO of the AHRC Act and held that the section created a private cause of action for unlawful discrimination, including victimisation.[3] This finding was an essential part of the reasoning process in disposing of an application by Ms Dye to amend paragraph 75 of her amended statement of claim. The amendment would have added an allegation that Ms Dye could sue on an action on the case in relation to her pleaded allegations of victimisation. This argument was rejected because s 46PO provided for an exclusive remedy in respect of unlawful discrimination, including victimisation.[4] The finding is part of the *ratio* of the case.

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[3] *Dye v Commonwealth Securities Limited (No 2)* [2010] FCAFC 118 at [43] and [71] (Marshall, Rares and Flick JJ).

[4] *Dye v Commonwealth Securities Limited (No 2)* [2010] FCAFC 118 at [71] (Marshall, Rares and Flick JJ).

6. The judgment in *Dye* is binding on later single instance judges and should not be departed from by a later Full Court unless that Court considered the judgment to be plainly wrong.[5]

7. It does not appear that the Full Court in *Chen v Monash University* was taken to the earlier decision in *Dye*.[6] It did not find that *Dye* was plainly wrong.

2.2 Ratio of Chen v Monash University is limited to circumstances in which a discontinued appeal may be reinstated

8. In *Chen v Monash University*, Dr Chen filed a notice of appeal, followed by a notice of discontinuance. A notice of discontinuance, once filed, has the effect of an order of the Court dismissing the appellant's appeal.[7]

9. The Full Court was required to consider whether it had power to reinstate an appeal once a notice of discontinuance had been filed.[8] It held that either under an implied power, or pursuant to s 23 of the *Federal Court of Australia Act 1976* (Cth), the Court may, in an appropriate circumstance, reinstate a discontinued appeal in order to prevent an abuse of process of the Court or to protect the integrity of those processes.[9] However, this power will only arise where the appellant who filed the notice of discontinuance did not do so as a deliberate and informed act.[10] In this case, Dr Chen did not demonstrate that she discontinued the appeal otherwise than by a deliberate and informed decision on her part.[11] As a result, the power to prevent an abuse of process was not enlivened.[12] This finding was sufficient to entirely dispose of Dr Chen's application.

10. The Full Court also held that the power to reinstate an appeal is discretionary so that, when it is enlivened, the prospects of success of the proposed appeal may also be taken into account in its exercise.[13] As the power had not been enlivened

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5 *New Zealand v Maloney* (2006) 154 FCR 250 at 275 [133]-[137] (Black CJ, Branson, Weinberg, Bennett and Lander JJ).
6 *Winters v Fogarty* [2017] FCA 51 at [33] (Bromberg J).
7 Federal Court Rules, r 36.73(2).
8 *Chen v Monash University* (2016) 244 FCR 424 at 429 [23] (Barker, Davies and Markovic JJ).
9 *Chen v Monash University* (2016) 244 FCR 424 at 432 [41] (Barker, Davies and Markovic JJ).
10 *Chen v Monash University* (2016) 244 FCR 424 at 433 [46] (Barker, Davies and Markovic JJ).
11 *Chen v Monash University* (2016) 244 FCR 424 at 434 [54] and 445 [110] (Barker, Davies and Markovic JJ).
12 *Chen v Monash University* (2016) 244 FCR 424 at 434 [54] (Barker, Davies and Markovic JJ).
13 *Chen v Monash University* (2016) 244 FCR 424 at 433 [48] (Barker, Davies and Markovic JJ).

in this case, the Court's subsequent consideration of Dr Chen's prospects of appeal was strictly *obiter*.[14]

2.3 Chen v Monash University is distinguishable

11. In considering the prospects of Dr Chen's appeal, the Full Court in *Chen v Monash University* made two relevant findings in relation to victimisation:

    a. The Federal Court does not have jurisdiction to hear and determine a criminal prosecution for victimisation.

    b. There was no appealable error in the primary judge treating Dr Chen's civil allegations of victimisation as sex discrimination claims.[15]

12. At first instance, Dr Chen was said to have 'abandoned' her victimisation claims because she 'accepted that the Court could not entertain claims of victimisation because victimisation is a criminal offence and the Court lacks jurisdiction to deal with such charges'.[16] By agreement between the parties, her victimisation claims were dealt with as sex discrimination claims instead. There were no relevant findings at first instance that create a binding precedent. Where a proposition of law is incorporated into the reasoning of a particular court, that proposition, even if it forms part of the *ratio decidendi*, is not binding on later courts if the particular court merely assumed its correctness without argument.[17]

13. Dr Chen sought to revisit this issue on appeal. The Full Court considered at [119] an argument by the applicant that she sought civil remedies and not criminal remedies in relation to her claims of victimisation and that the Court at first instance erred in finding that it did not have jurisdiction to hear her claims of victimisation.[18] The Full Court considered a number of legislative provisions that were relevant to this argument. In particular, it considered ss 13A and 94 of the *Sex Discrimination Act 1984* (Cth) (**SDA**), s 49B of the AHRC Act and s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**). However, it did not identify s 46PO of the AHRC Act as a relevant provision.

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14 *Winters v Fogarty* [2017] FCA 51 at [33] (Bromberg J).
15 *Chen v Monash University* (2016) 244 FCR 424 at 449 [123] (Barker, Davies and Markovic JJ).
16 *Chen v Monash University* [2015] FCA 130 at [11] (Tracey J), citing *Walker v State of Victoria* [2012] FCAFC 38 at [98] (Gray J).
17 *CSR Ltd v Eddy* (2005) 226 CLR 1 at 11 [13] (Gleeson CJ, Gummow and Heydon JJ).
18 *Chen v Monash University* (2016) 244 FCR 424 at 449 [119] (Barker, Davies and Markovic JJ).

14. The Full Court found at [121] that: 'While a claim of victimisation can be made to the AHRC it seems that it cannot, *based on the operation of these sections*, be made to this Court' (emphasis added). The qualification by the Court is important. It is clear from the context of the sections considered in this passage that the Court was only dealing with the question of whether a claim for victimisation could be made to the Federal Court as a criminal claim directly under ss 94 and 13A of the SDA.

15. The relevant propositions were:

    a. sections 94 and 13A of the SDA establish victimisation as an offence

    b. section 49B of the AHRC Act (and s 39B(1A)(c) of the Judiciary Act) provide that the Federal Court has jurisdiction only with respect to civil matters arising under Part IIB of the AHRC Act

    c. therefore, the Court does not have jurisdiction to hear and determine prosecutions under the SDA for victimisation offences.

16. The Full Court's decision in *Chen v Monash University* can be distinguished from the present proceeding because it did not directly engage with the question of whether the Federal Court had jurisdiction to hear a claim of victimisation as a civil matter by virtue of s 46PO of the AHRC Act.

17. At [122] of the Full Court's decision, the Court set out Gray J's *obiter* comments in *Walker v Victoria* at [99].[19] The Full Court did not set out the following paragraph of Gray J's judgment but there is no reason to think that it was not taken into account by the Court. At [100], Gray J says that the questions raised in [99] were not argued fully in that case, and there was therefore no need to answer them. Justice Gray said that the questions do need to be the subject of authoritative answer.

18. There is nothing to suggest that these questions were fully argued in *Chen v Monash University* either. Dr Chen appeared in person. There is no discussion by the Full Court of the issues raised by Gray J other than extracting his *obiter* comments. In extracting these comments, the Full Court in *Chen* was not proposing to undertake the task that Gray J said needed to be done. This did not

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

amount to an authoritative answer as to whether the court had jurisdiction to hear victimisation allegations as a civil claim.

19. Instead, Dr Chen's claim that she sought civil remedies was addressed in another way. At [123], the Full Court said that there was no appealable error because Dr Chen's claims of victimisation were dealt with as sex discrimination claims, with the result that there was no prejudice to her.[20] As a result, Dr Chen's claim on appeal that she had been denied the opportunity to obtain civil remedies in respect of her allegations of victimisation could not be sustained.

2.4 References to obiter comments in Walker v Victoria

20. In setting out the passage of Gray J's judgment in *Walker v Victoria* at [99], the Full Court in *Chen v Monash University* did no more than observe previously expressed *dicta*. It did not seek to answer the questions posed by Gray J. It did not expressly approve of any part of the passage other than the finding that the Court did not have jurisdiction to deal with victimisation as a criminal offence. The passage did not form part of the reasoning process leading to the finding that Dr Chen's civil claims of victimisation had been adequately dealt with as sex discrimination claims.

2.5 Chen v Birbilis is also distinguishable

21. In *Chen v Birbilis*, Dr Chen again brought allegations against Monash University and two individuals in which she alleged victimisation. She appeared in person. Her originating application was described as lacking a logical progression and arguably containing matters irrelevant to her statutory claims.[21] In terms of those statutory claims, the application contained an allegation of breaches of s 94 of the SDA.[22] It does not appear from the judgment that her pleadings made reference to s 46PO of the AHRC Act and the section is not referred to in the judgment.

22. The Court extracted the passages from *Chen v Monash University* at [120]-[124] discussed above and concluded that it was bound by that judgment and *Walker v*

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[20] *Chen v Monash University* (2016) 244 FCR 424 at 450 [123] (Barker, Davies and Markovic JJ).
[21] *Chen v Birbilis* [2016] FCA 661 at [8] (North J).
[22] *Chen v Birbilis* [2016] FCA 661 at [3] (North J).

State of Victoria to hold that 'a claim under s 94 [of the SDA] is not within the jurisdiction of the Court'.[23]

23. Again, this finding is distinguishable, because it relates only to the ability to bring a criminal proceeding in the Federal Court pursuant to s 94 of the SDA and not a civil proceeding pursuant to s 46PO of the AHRC Act.

3 Jurisdiction and power

24. The Respondent submits at [24] that the Commission's written submissions in relation to s 46PO 'conflate the concepts of jurisdiction and power'. He relies on the following statement from *Minister for Immigration and Multicultural and Indigenous Affairs v B*:

> [A] central question in the appeal concerns the jurisdiction of the Family Court. Jurisdiction is a term used with a variety of meanings. It is often used to describe the amenability of the defendant to the reach of a court's process, which may be limited to certain subject matters or geographical locations. In a legal context the primary meaning of jurisdiction is 'authority to decide'. It is to be distinguished from the powers that a court may use in the exercise of its jurisdiction. Because the Family Court is a federal court created by the Parliament of the Commonwealth, its jurisdiction—its authority to decide—must be defined in accordance with ss 75, 76 and 77 of the Constitution.[24]

25. Like the Family Court, the Federal Court is a court created by statute and has such jurisdiction as is given to it by laws made by Parliament. The Commission's written submissions dated 17 September 2018 describe the sources of the Federal Court's jurisdiction.[25]

26. Section 49B of the AHRC Act provides the Federal Court with jurisdiction in relation to civil matters arising under Part IIB, including s 46PO. Section 46PO(1) provides that an application may be made to the Federal Court alleging unlawful discrimination. By this section, the Federal Court is given authority to decide whether unlawful discrimination has occurred. The section creates a private cause

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[23] *Chen v Birbilis* [2016] FCA 661 at [11] (North J).
[24] *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at [6] (Gleeson CJ and McHugh J).
[25] Submissions of the Australian Human Rights Commission dated 17 September 2018 at [47]-[52].

of action for unlawful discrimination, including victimisation.[26] It is a source of jurisdiction for the Federal Court.

27. If, in the exercise of its jurisdiction, the Court is satisfied that unlawful discrimination, including victimisation, has occurred, s 46PO(4) gives the Court the power to make such orders as it thinks fit.

28. The Commission is an administrative body and not a Court. The 'jurisdiction' of the Commission is set out in its statutory functions. It has the function of inquiring into and attempting to conciliate complaints of unlawful discrimination.[27] It was held in *Brandy v HREOC* that the Commission does not have the authority to decide that unlawful discrimination has occurred because that is an exercise of judicial power (that is, the jurisdiction to determine whether a subject has or has not contravened the law).[28] Since the amendments to the AHRC Act that followed *Brandy*,[29] the Commission does not grant remedies, whether of a civil or criminal nature. If a complaint of unlawful discrimination is unable to be conciliated, the Commission must terminate the complaint[30] and a complainant has the right to make an application to the Court.

4 Previous regime under the Sex Discrimination Act

29. The Respondent submits at [23] that the previous legislative regime under the SDA does not assist in the interpretation of the current regime under the AHRC Act. The Respondent characterises the proceedings provided for by s 83A of the SDA (as it then stood) as proceedings in which a respondent could 'challenge any finding of unlawful discrimination' that had been made by the Commission. However, the moving party in the enforcement proceedings under s 83A was the complainant.

30. For present purposes, the key element of the previous regime under the SDA was the ability of a complainant, following a determination by the Commission, to bring civil enforcement proceedings in the Federal Court.[31] These enforcement

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[26] *Dye v Commonwealth Securities Limited (No 2)* [2010] FCAFC 118 at [43] and [71] (Marshall, Rares and Flick JJ).
[27] AHRC Act, s 11(1)(aa).
[28] *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 269 (Deane, Dawson, Gaudron and McHugh JJ).
[29] Culminating in the *Human Rights Legislation Amendment Act (No 1) 1999* (Cth).
[30] AHRC Act, s 46PH(1B)(b).
[31] SDA, s 83A(1) as in force on 16 November 1999.

proceedings were *de novo* proceedings.[32] It is clear from s 47A that these proceedings could include the enforcement of a determination by the Commission that a respondent had engaged in victimisation.

31. If the Court was satisfied in the civil enforcement proceedings that there had been victimisation, then it had the power to make such orders as it thought fit.[33]

32. It is this structure, which permitted civil actions alleging victimisation, that was preserved with the amendments made to the AHRC Act in 1999.[34]

5 Alternative constructional argument

33. The Respondent puts forward an alternative constructional argument in [25](a) and (e) of his submissions.

34. In [25](a) the Respondent emphasises that the definition of 'unlawful discrimination' includes 'any conduct *that is* an offence' under certain provisions of the four federal discrimination Acts. He submits that 'the conduct must constitute an "offence" under one of those provisions' for it to fall within this limb of the definition of 'unlawful discrimination'. It is necessary to see how this definition is used in the AHRC Act in order to assess this submission.

35. Section 46P of the AHRC Act provides that a person may lodge a complaint with the Commission alleging unlawful discrimination. It is not necessary for the conduct to have been determined to be unlawful discrimination for a complaint to the Commission to be made. That is, there is no requirement for a prior successful prosecution for victimisation, for example, before an allegation of victimisation to the Commission can be made. It is sufficient for a complaint to the Commission to allege that conduct that amounts to victimisation has occurred.

36. Section 46PF(7)(c) requires the Commission to notify a third party if they are the subject of an adverse allegation made by a complainant. These adverse allegations are allegations of unlawful discrimination. Again, the obligation to notify is not contingent on a finding that the third party has, for example, committed an offence of victimisation. It is sufficient for a complaint to the Commission to have alleged that conduct that amounts to victimisation has occurred.

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[32] SDA, s 83A(5) as in force on 16 November 1999.
[33] SDA, s 83A(2) as in force on 16 November 1999.
[34] Submissions of the Australian Human Rights Commission dated 17 September 2018 at [22]-[23].

37. Section 46PO(1) provides that a person may make an application to the Federal Court alleging unlawful discrimination. There is nothing in this section that suggests that it is necessary for the conduct to have been determined to be unlawful discrimination before the application to the Court is made. It is sufficient for an application to allege that conduct that amounts to unlawful discrimination has occurred.

38. In [25](e) of his submissions, the Respondent appears to suggest that when it comes to the determination of a claim of unlawful discrimination by the Court under s 46PO(4) of the AHRC Act, if the alleged unlawful discrimination is victimisation under s 94 of the SDA or s 51 of the *Age Discrimination Act 2004* (Cth) (**ADA**), then it is necessary for the court to 'find the existence of "conduct *that is* an offence"' by reference to the provisions of the *Criminal Code*. He says that s 46PO is part of 'a very specific statutory regime, laid down in the fullness of knowledge and application of the *Criminal Code*'. However, this submission cannot be reconciled with the following paragraph of the Respondent's submissions which notes, correctly, that the Court does not have jurisdiction to hear and determine a proceeding for an offence against s 94 of the SDA or s 51 of the ADA.

39. The alternative construction proposed by the Respondent cannot be accepted. When the Court is deciding whether or not there has been unlawful discrimination, the relevant inquiry is whether or not the Court is satisfied that there has been unlawful discrimination (s 46PO(4)). If the Court is so satisfied, it may make a range of orders. The Commission's written submissions at [11] refer to authority that the standard of proof in these cases is the balance of probabilities.[35]

40. Subparagraphs [25](b) to (d) of the Respondent's submissions broadly make the same point. They say that the Parliament had alternative methods available to it of providing for a civil action for victimisation. The fact that the Parliament could have chosen other ways of expressing its legislative intention does not detract from the effectiveness of s 46PO of the AHRC Act.

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

6 Common law rights

41. The Respondent suggests at [28] that allowing a civil action for victimisation 'would have the consequence of undermining common law rights' of respondents in his position.

42. The Respondent does not identify which common law rights would be undermined. He refers to the High Court's judgment in *X7 v Australian Crime Commission*,[36] but the statute under consideration in that case is very different from s 46PO of the AHRC Act. In *X7*, the *Australian Crime Commission Act 2002* (Cth) gave examiners appointed under that Act the power to issue a summons to a person requiring them to attend a compulsory examination and made it an offence for the person to refuse or fail to answer questions asked by the examiner. The Court applied the principle of legality to hold that the Act did not authorise an examiner to require a person already charged with a Commonwealth indictable offence to answer questions about the subject matter of the charged offence.

43. The prospect of a civil action under s 46PO of the AHRC prejudicing a future criminal prosecution seems to be hypothetical at best. The Commission is not aware of any prosecutions being brought under s 51 of the ADA or s 94 of the SDA.[37]

44. Nevertheless, the Commission's written submissions identify a number of ways in which the rights of people who may be subject to a later criminal prosecution can be protected, including through certificates under s 128 of the *Evidence Act 1995* (Cth) or through a stay of civil proceedings where criminal proceedings are anticipated.[38] The Commission submits that s 46PO does not operate to undermine common law rights under the criminal law.

Date: 26 October 2018

Australian Human Rights Commission

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[36] *X7 v Australian Crime Commission* (2013) 248 CLR 92.
[37] Affidavit of Emeritus Professor Rosalind Frances Croucher AM sworn 26 June 2018 at [8].
[38] Submissions of the Australian Human Rights Commission dated 17 September 2018 at [22]-[23].