FEDERAL COURT OF AUSTRALIA

Margan v President, Australian Human Rights Commission [2013] FCA 109

Citation:	Margan v President, Australian Human Rights Commission [2013] FCA 109
Parties:	**SIMON MARGAN v PRESIDENT, AUSTRALIAN HUMAN RIGHTS COMMISSION** **SIMON MARGAN v COMMONWEALTH OF AUSTRALIA**
File number(s):	NSD 1203 of 2012 NSD 1205 of 2012
Judge:	JAGOT J
Date of judgment:	21 February 2013
Catchwords:	**ADMINISTRATIVE LAW** – judicial review – abuse of process where statutory appeal available **HUMAN RIGHTS** – discrimination based on sex or marital status
Legislation:	*Administrative Decisions (Judicial Review) Act 1977* (Cth) *Australian Human Rights Commission Act 1986* (Cth) *Federal Court Rules 2011* (Cth) *Federal Court of Australia Act 1976* (Cth) *Marriage Act 1961* (Cth) *Sex Discrimination Act 1984* (Cth)
Cases cited:	*Department of Defence v Human Rights & Equal Opportunity Commission* (1997) 78 FCR 208

	Sasterawan v Morris (2007) 69 NSWLR 547; [2007] NSWCCA 185 *Spencer v Commonwealth of Australia* (2010) 241 CLR 118; [2010] HCA 28 *Wyeth Australia Pty Ltd v Minister for Health and Aged Care* (2000) 61 ALD 372; [2000] FCA 330
Date of hearing:	8 February 2013
Place:	Sydney
Division:	Error: Reference source not found
Category:	Catchwords
Number of paragraphs:	30
Applicant:	The Applicant was self represented
First Respondent:	Mr A Markus
Solicitor for the First Respondent:	Australian Government Solicitor
Counsel for the Second Respondent:	Mr M Spry
Solicitor for the Second Respondent:	Crown Solicitor, Crown Law, State of Queensland
Counsel for the Third Respondent:	Ms K Eastman SC with Mr J Williams
Solicitor for the Third Respondent:	NSW Crown Solicitor, Crown Solicitor's Office

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION NSD 1203 of 2012

BETWEEN: SIMON MARGAN
Applicant

AND: PRESIDENT, AUSTRALIAN HUMAN RIGHTS COMMISSION
First Respondent

COMMONWEALTH OF AUSTRALIA
Second Respondent

JUDGE: JAGOT J

DATE OF ORDER: 21 FEBRUARY 2013

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The name of the second respondent be changed to the Commonwealth of Australia.
2. Pursuant to r 30.01(1) of the *Federal Court Rules 2011* (Cth) the question whether the proceeding be dismissed on discretionary grounds pursuant to ss 10(2)(b) and/or 16 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) be determined as a separate issue.
3. The question whether the proceeding be dismissed on discretionary grounds pursuant to ss 10(2)(b) and/or 16 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) be answered "yes".
4. Pursuant to r 30.02(b) of the *Federal Court Rules 2011* (Cth) the proceeding be dismissed.
5. The applicant pay the second respondent's costs of the proceeding as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION NSD 1205 of 2012

BETWEEN: SIMON MARGAN
Applicant

AND: COMMONWEALTH OF AUSTRALIA
First Respondent

STATE OF QUEENSLAND
Second Respondent

STATE OF NEW SOUTH WALES
Third Respondent

JUDGE: JAGOT J

DATE OF ORDER: 21 FEBRUARY 2013

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The names of the first, second and third respondents respectively be changed to the Commonwealth of Australia, the State of Queensland and the State of New South Wales.

2. Pursuant to s 31A(2) of the Federal Court of Australia Act 1976 (Cth) the proceeding be dismissed.

3. The applicant pay the respondents' costs of the proceeding as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION NSD 1203 of 2012

BETWEEN:

SIMON MARGAN

AND:

COMMONWEALTH OF AUSTRALIA

JUDGE: JAGOT J
DATE: 21 february 2013
PLACE: SYDNEY

REASONS FOR JUDGMENT

BACKGROUND

- These reasons for judgment relate to various interlocutory applications in respect of two proceedings. Proceeding NSD 1203/2012 involves an application for judicial review of a decision by the Australian Human Rights Commission (the **AHRC**) to terminate a complaint of sex and marital status discrimination under the *Sex Discrimination Act 1984* (Cth) (the **Sex Discrimination Act**). Proceeding NSD 1205/2012 involves an application under s 46PO of the *Australian Human Rights Commission Act 1986* (Cth) (the **AHRC Act**). In proceeding NSD 1203/2012 the second respondent, the Commonwealth of Australia (the **Commonwealth**), filed an interlocutory application seeking orders that the proceeding be dismissed pursuant to ss 10(2)(b) or 16 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the **ADJR Act**) or r 30.02(b) or r 26.01(d) of the *Federal Court Rules 2011* (Cth) (the **Rules**). In proceeding NSD 1205/2012 the second and third respondents, the Attorney General (NSW) and the Attorney General (Qld), seek orders that the proceedings be dismissed pursuant to s 31A(2) of the *Federal Court of Australia Act 1976* (Cth) (the **Court Act**) or r 16.21(1)(e) or (f) of the Rules.
- Both proceedings arise from a common set of facts. On 17 November 2010 the applicant, Simon Margan, lodged a complaint with the AHRC. The complaint was subsequently amended. In its amended form the complaint was said to be lodged on behalf of a number of homosexual and bisexual men and women and transgender and intersex persons claiming unlawful discrimination based on sex and marital status by reason of the inability of those persons to register same sex marriages in the States of New South Wales, Queensland, Victoria, South Australia and the Australian Capital Territory. On 2 July 2012 a delegate of the President of the AHRC terminated the complaint under s 46PH(1)(c) of the AHRC Act on the ground that the complaint was misconceived and/or lacking in substance.
- As noted, proceeding NSD 1203/2012 seeks judicial review of the decision of the delegate of the President of the AHRC to terminate the complaint. Although not expressed as such, this is an application under the ADJR Act. The relief sought is the setting aside of the decision of the delegate to terminate the complaint, the practical consequence of which would be that the complaint remains

undetermined by the AHRC and must thereafter be determined in accordance with law. Proceeding NSD 1205/2012, in effect, seeks a finding (or declaration) of unlawful discrimination and an order directing the States of New South Wales and Queensland to register same sex marriages.

- The interlocutory application of the Commonwealth in proceeding NSD 1203/2012 arises out of the relationship between that proceeding and proceeding NSD 1205/2012. The interlocutory applications of the Attorney General (NSW) and the Attorney General (Qld) in proceeding NSD 1205/2012 arise out of the substance of the claims of unlawful discrimination.

PROCEEDING NSD 1203/2012

- In order to sustain this proceeding, Mr Margan requires an extension of time. The Commonwealth, for its part, submits that an extension of time would not be granted but solely on the basis that the proceedings are otherwise inappropriate or an abuse of process warranting dismissal under ss 10(2)(b) or 16 of the ADJR Act or r 30.02(b) or r 26.01(d) of the Rules.
- Section 10(2)(b) of the ADJR Act provides that:

…the Federal Court or the Federal Magistrates Court may, in its discretion, refuse to grant an application under section 5, 6 or 7 that was made to the court in respect of a decision, in respect of conduct engaged in for the purpose of making a decision, or in respect of a failure to make a decision, for the reason:

(i) that the applicant has sought a review by the court, or by another court, of that decision, conduct or failure otherwise than under this Act; or

(ii) that adequate provision is made by any law other than this Act under which the applicant is entitled to seek a review by the court, by another court, or by another tribunal, authority or person, of that decision, conduct or failure.

- Section 16 of the ADJR Act provides that the court may, in the exercise of its discretion, make any one or more of a range of orders in respect of an application for review.
- Rule 30.02(b) of the Rules provides that

If a decision on a question substantially disposes of the proceeding or renders any further trial of the proceeding unnecessary, a party may apply to the Court for:

(a) judgment; or

(b) an order dismissing the whole or any part of the proceeding.

- Rule 26.01(d) of the Rules provides that:

(1) A party may apply to the Court for an order that judgment be given against another party because:

…

(d) the proceeding is an abuse of the process of the Court;

- Although different sources of power to dismiss the proceeding are sought to be invoked by the Commonwealth there is but a single reason for the Commonwealth's position. The reason is that Mr Margan has invoked the jurisdiction of the court by filing the application under s 46PO of the AHRC Act, being the subject-matter of proceeding NSD 1205/2012. As the relief which Mr Margan seeks in proceeding NSD 1205/2012 is, in effect, a finding of unlawful discrimination and consequential orders requiring the unlawful discrimination to cease it is inappropriate or an abuse of process for Mr Margan also to seek in proceeding NSD 1203/2012 an order setting aside the AHRC's decision to terminate the complaint. In other words, Mr Margan cannot invoke the court's jurisdiction to seek relief which, on the one hand, aims at the AHRC having to determine whether there is unlawful discrimination (by having that decision set aside in proceeding NSD 1203/2012) and, on the other hand, aims at the court also determining that there is unlawful discrimination (by reason of the application in proceeding NSD 1205/2012). Where, as in this case, the jurisdiction of the court in proceeding NSD 1205/2012 includes the power to decide for itself on the facts which were before the AHRC whether there is unlawful discrimination there cannot also be maintained a judicial review proceeding of the AHRC's decision to terminate the complaint. In any such case, the proceeding under s 46PO of the AHRC Act involves the invocation of the "adequate provision" made by the AHRC Act for review of the AHRC's decision under s 10(2)(b)(ii) of the ADJR Act, thereby rendering the judicial review proceeding unnecessary and, indeed, futile.
- In support of its position the Commonwealth referred to *Sasterawan v Morris* (2007) 69 NSWLR 547; [2007] NSWCCA 185 at [8] in which Basten JA (with whom Grove and Hidden JJ agreed) said:

> There are decisions in the Court of Appeal which suggest that it is an abuse of process to maintain an application for leave to pursue a statutory appeal and to maintain an application for judicial review: see *Meagher v Stephenson* (1993) 30 NSWLR 736 at 739 and *Hill v King* (1993) 31 NSWLR 654. On the other hand, concurrent steps may be thought appropriate where there is uncertainty as to which jurisdiction is properly invoked: see *Fordham v Fordyce* [2007] NSWCA 129.

- The Commonwealth also referred to the statement of Finn J in *Wyeth Australia Pty Ltd v Minister for Health and Aged Care* (2000) 61 ALD 372; [2000] FCA 330 at [44] that, in circumstances where the relevant legislation provided a statutory right of review (akin to s 46PO of the AHRC Act), he saw "no reason why there should be resort to judicial review proceedings to secure what the Act itself accommodates", such a course resulting in dismissal of the judicial review proceeding under s 10(2)(b)(ii) of the AHRC Act.

- Although I accept that Mr Margan commenced the two proceedings on the basis of a genuine belief that the relief he could obtain in each proceeding was different and thus it was appropriate to institute and maintain both proceedings, the Commonwealth's submissions are compelling. The AHRC Act, in s 46PO, provides Mr Margan with a right to apply to this court as a person affected by the AHRC's termination of his complaint. Section 46PO makes "adequate provision" for review of the decision of the AHRC to terminate the complaint. Having appropriately availed himself of the review rights under s 46PO of the AHRC Act, it is inappropriate, being a form of abuse of process, for Mr Margan also to seek judicial review of the AHRC's decision under the ADJR Act. Nothing has been put by Mr Margan explaining why s 46PO does not make adequate provision for review of the decision of the AHRC to terminate his complaint and no reason why that might be so is apparent. To the contrary, it is plain that the legislature has made adequate provision for an alternative remedy to judicial review.
- It necessarily follows that Mr Margan cannot be permitted to maintain his judicial review proceedings, being proceeding NSD 1203/2012. Section 10(2)(b)(ii) of the AHRC Act is thus satisfied and it is an appropriate exercise of discretion to dismiss the proceeding on this basis under r 30.02(b) of the Rules. Orders 1 to 3 sought by the Commonwealth in its interlocutory application, accordingly, should be made. Order 4, referring to r 26.01(d) of the Rules, need not be relied upon, although for the reasons given I am also satisfied that the institution of proceeding NSD 1203/2012, in the face of the remedy provided by s 46PO of the AHRC Act, constituted an abuse of process.

PROCEEDING NSD 1205/2012

- The first matter to note is that the respondents, the Attorneys General of each of the Commonwealth, New South Wales and Queensland, are not the proper respondents. The proper respondents are the Commonwealth and the States of New South Wales and Queensland. At the suggestion of the respondents, it is proposed to amend the originating application to substitute the Commonwealth and the States of New South Wales and Queensland as the second and third respondents.
- The second and third respondents (supported by the first respondent, the Commonwealth) submit that proceeding NSD 1205/2012 has no reasonable prospect of success on a number of grounds and, accordingly, should be dismissed under s 31A(2) of the Court Act or r 16.21(1)(e) or (f) of the Rules.
- Sections 31A(2) and (3) of the Court Act are in these terms:

> (2) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:
>
> (a) the first party is defending the proceeding or that part of the proceeding; and

(b) the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.

(3) For the purposes of this section, a defence or a proceeding or part of a proceeding need not be:

(a) hopeless; or

(b) bound to fail;

for it to have no reasonable prospect of success.

- Rule 16.21(1)(e) and (f) of the Rules provide that:

A party may apply to the Court for an order that all or part of a pleading be struck out on the ground that the pleading:

…

(e) fails to disclose a reasonable cause of action or defence or other case appropriate to the nature of the pleading; or

(f) is otherwise an abuse of the process of the Court.

- The respondents acknowledged the principles relevant to summary dismissal including under s 31A(2) of the Court Act. They accepted that (as referred to in *Spencer v Commonwealth of Australia* (2010) 241 CLR 118; [2010] HCA 28):

1. "The exercise of powers to summarily terminate proceedings must always be attended with caution" (*Spencer v Commonwealth of Australia* at [24]).
2. "Section 31A(2) requires a practical judgment by the Federal Court as to whether the applicant has more than a "fanciful" prospect of success. That may be a judgment of law or of fact, or of mixed law and fact. Where there are factual issues capable of being disputed and in dispute, summary dismissal should not be awarded to the respondent simply because the court has formed the view that the applicant is unlikely to succeed on the factual issue. Where the success of a proceeding depends upon propositions of law apparently precluded by existing authority, that may not always be the end of the matter. Existing authority may be overruled, qualified or further explained. Summary processes must not be used to stultify the development of the law. But where the success of proceedings is critically dependent upon a proposition of law which would contradict a binding decision of this court, the court hearing the application under s 31A could justifiably conclude that the proceedings had no reasonable prospect of success" (*Spencer v Commonwealth of Australia* at [25]).
3. "In many cases where a plaintiff has no reasonable prospect of prosecuting a proceeding, the proceeding could be described (with or without the addition of intensifying epithets like

"clearly", "manifestly" or "obviously") as "frivolous", "untenable", "groundless" or "faulty". But none of those expressions (alone or in combination) should be understood as providing a sufficient chart of the metes and bounds of the power given by s 31A. Nor can the content of the word "reasonable", in the phrase "no reasonable prospect", be sufficiently, let alone completely, illuminated by drawing some contrast with what would be a "frivolous", "untenable", "groundless" or "faulty" claim" (*Spencer v Commonwealth of Australia* at [59]).

4. "The Federal Court may exercise power under s 31A if, and only if, satisfied that there is "no reasonable prospect" of success. Of course, it may readily be accepted that the power to dismiss an action summarily is not to be exercised lightly" (*Spencer v Commonwealth of Australia* at [60]).

- With these admonitions in mind it is sufficient for the purpose of the present proceeding to say that three of the matters articulated by the respondents satisfy me that the proceeding is indeed doomed to fail and, accordingly, has no reasonable prospect of success. Although reaching this conclusion that the proceeding is doomed is not necessary for an exercise of discretion under s 31A(2) of the Court Act, this conclusion having been reached it follows that it is appropriate to dismiss the proceeding.
- The proceeding depends on the existence of a reasonable prospect that unlawful discrimination may be established on one or other of the identified grounds, being sex and marital status discrimination. Leaving aside all of the other arguments which the respondents put (which may be open to debate and, accordingly, are not a manifestly appropriate basis for an exercise of power under s 31A(2) of the Court Act), it is clear that the facts are legally incapable of satisfying the statutory tests of discrimination on the grounds of sex or marital status.
- First, as to sex discrimination, s 5 of the Sex Discrimination Act provides as follows:

> (1) For the purposes of this Act, a person (in this subsection referred to as the discriminator) discriminates against another person (in this subsection referred to as the aggrieved person) on the ground of the sex of the aggrieved person if, by reason of:
>
> (a) the sex of the aggrieved person;
>
> (b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or
>
> (c) a characteristic that is generally imputed to persons of the sex of the aggrieved person;
>
> the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

- The inescapable fact is that s 5 defines sex discrimination in a manner which depends on a comparison between the treatment of the person of one sex with the treatment of a person of the opposite sex. In the present case, the alleged discriminatory treatment results from the fact that the relevant agencies of the State can register a "marriage" which is defined by s 5(1) of the *Marriage Act 1961* (Cth) (the **Marriage Act**) as the union of a man and a woman to the exclusion of all others, voluntarily entered into for life. It follows that the union of a man and a man or a woman and a woman to the exclusion of all others, voluntarily entered into for life, is not a "marriage" as defined in the Marriage Act and cannot be registered by the State agencies as a marriage. In the terms of s 5 there cannot be discrimination by reason of the sex of a person because in all cases the treatment of the person of the opposite sex is the same. Hence, a man cannot enter into the state of marriage as defined with another man just as a woman cannot enter into the state of marriage with another woman as defined.
- None of Mr Margan's submissions about the relevant comparator being as between a man and a woman wishing to marry a man and a woman and a man wishing to marry a man are available to be made on the terms of s 5. By statutory definition, persons of the opposite sex may marry and persons of the same sex may not. The redress for these circumstances lies in the political and not the legal arena because what would be required is a change to the definition of "marriage" in s 5(1) of the Marriage Act.
- Secondly, as to discrimination based on marital status, s4(1) of the Sex Discrimination Act defines "marital status" as:

the status or condition of being:

(a) single;

(b) married;

(c) married but living separately and apart from one's spouse;

(d) divorced;

(e) widowed; or

(f) the de facto spouse of another person.

- Section 6 of the Sex Discrimination Act provides that:

(1) For the purposes of this Act, a person (in this subsection referred to as the discriminator) discriminates against another person (in this subsection referred to as the aggrieved person) on the ground of the marital status of the aggrieved person if, by reason of:

(a) the marital status of the aggrieved person; or

(b) a characteristic that appertains generally to persons of the marital status of the aggrieved person; or

(c) a characteristic that is generally imputed to persons of the marital status of the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different marital status.

- It is equally apparent that the marital status of a person as defined is irrelevant to the treatment about which Mr Margan complains. It is the definition of "marriage" in the Marriage Act which requires that, to be a marriage (and thus capable of registration as such by State agencies), the union must be "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life". The marital status of a man wishing to enter into a union to the exclusion of all others voluntarily entered into for life with another man or of a woman wishing to enter into a union to the exclusion of all others voluntarily entered into for life with another woman is irrelevant. The facts do not involve any alleged less favourable treatment on this basis.
- For these reasons the alleged discrimination is necessarily outside the scope of the statutory definitions. It follows that the proceeding is doomed and should be dismissed under s 31A(2) of the Court Act.
- The third matter referred to by the respondents is also sufficient, of itself, to found the same conclusion. The jurisdiction of the court concerns unlawful discrimination. Unlawful discrimination is defined in s 3(1) of the AHRC Act as "any acts, omissions or practices that are unlawful under" the nominated statutes which include the Sex Discrimination Act. The reasoning in *Department of Defence v Human Rights & Equal Opportunity Commission* (1997) 78 FCR 208 at 212-216 explains why the existence of a discretion is necessary for there to be an no act or practice within the meaning of the definition of "unlawful discrimination". If, as in this case, the State agencies are able only to register "marriages" as defined under the Marriage Act the State agencies, in not registering same sex unions as marriages, are doing nothing more than applying the definition of "marriage" which the Commonwealth legislation requires. The state agencies are not engaging in any act or practice for the purpose of the definition of "unlawful discrimination". For this reason too, the proceeding is doomed to fail. Again, the statutory regime makes plain that the only redress for Mr Margan, if he or others wish to marry a person of the same rather than the opposite sex, is to be found in the political and not the legal arena, by amendment of the definition of "marriage".

- Accordingly, the orders sought by the second and third respondents in proceeding NSD 1205/2012 must also be made.

I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jagot.

Associate:

Dated: 21 February 2013