QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

Case number: APL302-11

Applicant:	**PETA MICHELLE ATTRILL**
	AND
Respondent:	**STATE OF QUEENSLAND**
	AND
Intervener:	**ANTI-DISCRIMINATION COMMISSIONER QUEENSLAND**

SUBMISSIONS ON BEHALF OF ANTI-DISCRIMINATION COMMISSIONER QUEENSLAND

Background

1. The Anti-Discrimination Commissioner Queensland (Commissioner) has been granted leave to intervene in the appeal proceedings brought by Peta Michelle Attrill (the Applicant) in relation to the decision of the Queensland Civil and Administrative Tribunal made on 5 August 2011 in proceedings ADL041-11 (the Decision).

2. The Decision was made on an application of the Applicant, made under section 144 of the *Anti-Discrimination Act 1991* (the AD Act), for an order requiring the respondent to place on hold a show cause process until her complaint had been heard and determined by the tribunal. At the time of making the application to the tribunal the Applicant's complaint had not proceeded through the processes for dealing with the complaint in the Anti-Discrimination Commission Queensland.

SUBMISSIONS OF ANTI-DISCRIMINATION COMMISSIONER QUEENSLAND

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3. In the appeal, the Applicant seeks to set aside the Decision, as well as other orders.

The role of the First Respondent in the appeal proceedings

4. In performing his complaint handling functions under the AD Act, the Commissioner, while advocating for the legislation and human rights principles, remains impartial as between the parties to the complaint.

5. In the Decision, the tribunal found that there was such inconsistency, contrariety or repugnancy between Chapter 5 part 7 of the *Public Service Act 2008* (the PS Act) and section 15 of the AD Act that part 7 of the PS Act must have impliedly repealed the unlawful discrimination provisions in section 15 of the AD Act.

6. In view of the finding above, the tribunal found that the Applicant did not have valid grounds on which to make a valid complaint. The tribunal ultimately found that the absence of a valid complaint deprived the tribunal of jurisdiction to grant an injunction sought under s.144 of the AD Act.

7. The Decision has wider implications than as between the parties. It effectively means that Queensland public servants are unable to bring a complaint under the AD Act where the employer purports to act under the authority of Chapter 5 part 7 of the PS Act.

8. The Commissioner makes submissions about the interpretation of the legislation in respect of:

   (a) the power of the tribunal under section 144 of the AD Act; and

   (b) the relationship between Chapter 5 part 7 of the PS Act and the AD Act.

Powers of the tribunal under section 144

9. Section 144 of the AD Act provides:

> **Applications for orders protecting complainant's interests (before reference to tribunal)**
>
> (1) At any time before a complaint is referred to the tribunal, the complainant or the commissioner may apply, as provided under the QCAT Act, to the tribunal for an order prohibiting a person from doing an act that might prejudice –
>
> (a) the investigation or conciliation of the complaint; or
>
> (b) an order that the tribunal might make after a hearing.
>
> (2) A party or the commissioner may apply, as provided under the QCAT Act, to the tribunal for an order varying or revoking an order made under subsection (1).
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> (3) If the tribunal is satisfied it is in the interests of justice, an application for an order under subsection (1) may be heard in the absence of the respondent to the application.

10. Before the establishment of the Queensland Civil and Administrative Tribunal (QCAT) the functions and powers of the tribunal in matters under the AD Act were performed and exercised by the former Anti-Discrimination Tribunal.

11. The jurisprudence concerning the former Anti-Discrimination Tribunal was that its jurisdiction, being statutory rather than an inherent, was limited. The effect of section 136 (a complaint must be in writing, set out details to indicate an alleged contravention and be lodged with the Commissioner), section 166 (a complainant is entitled to require the Commissioner to refer a complaint to the tribunal) and section 175 (the Tribunal must accept a complaint referred to it by the Commissioner) was that jurisdiction was founded on the referral of a complaint complying with section 136.[1]

[1] *Hopper v Mount Isa Mines Limited* (1999) 2 QdR 469; *Mt Isa Mines Limited v Hopper* [1998] QSC 287 at para 8, 55 & 59

12. This resulted in a narrow interpretation of the former sections 177 and 178 that gave the tribunal power, respectively, to join a party to a complaint and to amend a complaint.[2]

13. Importantly, those authorities relate to the powers of the tribunal in relation to a referred complaint.

14. Section 144 of the AD Act confers power of a different kind. Section 144 gives the tribunal power to make injunctive type orders to protect a complainant's interest prior to referral of the complaint. The power of the tribunal is not dependent on a referred complaint. To the contrary, the power is exercisable only in the absence of a referred complaint. It is clearly a further power conferred on the tribunal distinct from the powers to hear and determine complaints referred to it by the Commissioner.

15. There are many published decisions of the former Anti-Discrimination Tribunal on applications made under section 144 for orders protecting a complainant's interest before referral of the complaint.

16. Although the AD Act does not prescribe how the tribunal is to exercise the discretion in section 144, the decisions of the former Anti-Discrimination Tribunal determined that the appropriate way to exercise the discretion is in accordance with the way in which the common law treats applications for interlocutory injunctions, that is, by firstly finding

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[2]Decisions of the former Anti-Discrimination Tribunal on section 178 were relied on in the interpretation of section 177 – see for example *Lundbergs v Q-Super* [2003] QADT 8. The amendments made to sections 177 and 178 in 2009 sought to overcome the narrow interpretation of these provisions. The Explanatory Note to the amending legislation, Queensland Civil and Administrative Tribunal (Jurisdictional Provisions) Amendment Bill 2009, relevantly states:

> *The inclusion of a new section 177 is to clarify that QCAT may join a third party to a proceeding where the person is not a complainant or respondent to the complaint to which the proceeding relates. Former decisions of the DAT have narrowly interpreted the former section 177 thus restricting the use of section 177 to join parties to a proceeding. The relevant decisions include Lundbergs v QSuper [2003] QADT 8, Mickelo v Kotlaro&Cellcom Pty Ltd t/a Melbourne Hotel [2004] QADT 31, H v T [2006] QADT 20 and Black and White (Quick Service) Taxis Ltd v Sailor &Anor [2008] QSC 77.*
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> *A new section 178 provides further clarity by providing that QCAT may amend a complaint referred to it by the Commissioner even if the amendment concerns matters not included in the complaint.*

there is a serious issue to be tried, and if so, then determining what is, on the balance of convenience, the most appropriate order to make.[3]

17. The usual purpose of an interlocutory injunction is to protect the applicant by preserving the circumstances that exist at the time of the application until the rights of the parties are finally determined by the proper procedures – see *Heavener v Looms* (1924) 34 CLR 306 at 325 and 326.

18. The former Anti-Discrimination Tribunal had said that the threshold that the applicant needs to clear, the existence of a serious issue to be tried, is not a high one.[4]

19. In *Connor v Evans & Salvation Army* [1998] QADT 14, Member C Holmes (as she then was) stated that it is not necessary for the applicant to establish a prima facie case, but the tribunal must be satisfied of the existence of a serious issue to be tried.

20. The former Anti-Discrimination Tribunal has also noted that having determined the existence of a serious issue to be tried, it is not appropriate for the tribunal to make any further observations[5] or express a concluded view on the issue[6].

21. The power to make an order under section 144 has generally been considered as requiring merely that there is a complaint before the Commission, which complaint gives rise to a serious question to be tried as to whether the act or acts complained of constitute unlawful discrimination, whether or not the complaint has been accepted by the Commission.

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[3]See for example, *Hastie v Ryan & Ors* [2003] QADT 29; and *Transport Workers Union of Australia, Boss & Wood v Boral Resources (Qld) Pty Limited* [2006] QADT 10 at para 16
[4]*Hastie v Ryan & Ors* [2003] QADT 29; and *Transport Workers Union of Australia, Boss &Wood v Boral Resources (Qld) Pty Limited* [2006] QADT 10 at para 17
[5]*Hastie v Ryan & Ors* [2003] QADT 29
[6]*Transport Workers Union of Australia, Boss & Wood v Boral Resources (Qld) Pty Limited* [2006] QADT 10 at para 26

22. In *Brackenreg v Queensland University of Technology* [1999] QADT 11, President Copelin (as she then was), in distinguishing Proust[7], said that acceptance of a complaint by the Commissioner is not a necessary prerequisite under the terms of section 144, however she considered it preferable that the complaint be accepted by the Commissioner, in view of the wide powers of the Tribunal under the section.[8]

23. In an earlier decision, President Copelin said she was of the opinion that before an application for interim relief can be made, the complaint must have been accepted by the Commissioner, and it is then capable of giving rise to an interim order.[9]She referred to an article by Steven Herd *Urgent Relief in the Equal Opportunity Jurisdiction* (1993) 67(3) LIJ 125.

24. In *Transport Workers Union of Australia, Boss & Wood* (supra) in noting that he was unaware of the status of the complaint before the Commission, it having been submitted that the complaint had yet to be accepted, Member Forrest (as he then was) considered that it was irrelevant whether or not the complaint before the Commission had been accepted.[10]

25. In the Decision under appeal, the tribunal erred in its approach to exercising power under s.144. The tribunal incorrectly proceeded on the basis that it had to determine whether the complaint was 'valid', rather than being satisfied that there was a complaint before the Commission that had not yet been referred to the tribunal, which complaint gave rise to a serious question to be tried as to whether there had been unlawful discrimination.

26. Had the tribunal approached the issue on a proper basis, it could not but have found, on the basis of competing contentions as to whether

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[7]*Proust, Secretary to the Attorney General's Department v The President of Equal Opportunity Board &Ors*[1990] VicRp 64; (1990) EOC 92-275
[8]At 4.2.1 b & c
[9]*Dillon v Anti-Discrimination Commission Queensland* [1998] QADT 21 at para 6.1.1.4 b & c
[10]At para 5

there was such inconsistency between Part 7 of the *Public Service Act 2008* and s.15 of the AD Act, that there was a serious question to be tried.[11]

27. In its decision, the tribunal cited the decision of the former President of the QADT in Simpson v Welch and Queensland Police Service as authority for the jurisdiction to grant an injunction under s.144 being dependent upon the existence of a valid complaint. The tribunal erred in its consideration of Simpson which concerned a complaint which, on its face, was clearly prohibited by operation of the then s.15(2) of the AD Act and s.105(2)(c) of the *Industrial Relations Act 1999*.

Relationship between Chapter 5 part 7 of the PS Act and the AD Act

28. In the Decision under appeal, the tribunal has referred to the principles of statutory interpretation enunciated in the decisions of the High Court in *Goodwin v Phillips*[12], *Ferdinands v Commissioner for Public Employement*[13] and *Saraswati v The Queen*[14].

29. In *Saraswati*, Gaudron J said:

> It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other.

30. Even if the tribunal had power to determine the issue of consistency between the two Acts, the tribunal was wrong in deciding that the relevant provisions of the PS Act impliedly repealed section 15 of the AD Act.

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[11] The matters set out at paragraphs [9] to [15] of the Decision would compel the conclusion that there was a serious issue to be tried.
[12] (1908) 7 CLR 1
[13](2006) 80 ALJR 555
[14](1991) 172 CLR 1

31. Where two statutes appear to be in conflict, there is a presumption that the legislature intended that both should operate. Accordingly, a court or tribunal must firstly attempt to reconcile the two statutes.

32. The AD Act is remedial and beneficial legislation. The High Court has recently affirmed the rule of construction that remedial and beneficial legislation is to be given a 'fair, large and liberal' interpretation. Provisions must be read in light of purpose, and courts have a responsibility to take account of and give effect to the statutory purpose.[15]

33. In order to give effect to the statutory purpose of section 15 of the AD Act, it is necessary to consider the Act as a whole. The effect of the AD Act as a whole, in relation to impairment discrimination, is to:

    (a) prohibit treating a worker unfavourably in any way in connection with work, including dismissing a worker;

    (b) impose an obligation on an employer to make reasonable adjustments for a worker's impairment; and

    (c) allow the imposition of genuine occupational requirements for a position.

34. The obligation to make reasonable adjustments arises from the combined effect of the following provisions of the AD Act:

    (a) section 10(5) – excluding as irrelevant, in determining whether a person treats or proposes to treat a person with an impairment less favourably than another person is or would be treated in the same or similar circumstances, the fact that the person with the impairment may require special services or facilities;

[15] *AB v Western Australia* [2011] HCA 42 at para 24

(b) section 11 – prohibiting imposing a term with which a person with an impairment is unable to comply;

(c) section 15 – prohibiting discrimination by treating a worker unfavourably in any way in connection with work, including by dismissal;

(d) section 25 – permitting a person may impose genuine occupation requirements for a position;

(e) section 35 – permitting discrimination on basis of impairment if special services or facilities are required, the supply of which would impose unjustifiable hardship; and

(f) section 5 – in defining the meaning of unjustifiable hardship.

35. The relevant part of the PS Act provides a mechanism for the employer to identify possible adjustments that can be made to accommodate a worker's impairment, determine whether those adjustments are reasonable, and to establish whether the worker is able to perform the genuine occupational requirements of the job.

36. The AD Act and the relevant part of the PS Act are thereby able to be reconciled. Read in conjunction with the AD Act, the relevant part of the PS Act authorises the unfavourable treatment of the worker only where adjustments would be unreasonable or would create unjustifiable hardship, or the worker is unable to perform the genuine occupational requirements of the position.

37. On the hearing of a referred complaint alleging impairment discrimination relating to treatment and decisions purportedly made pursuant to Chapter 5 part 7 of the PS Act, the issues for the tribunal to examine and determine may include whether the process has been appropriately initiated, and whether any exemptions under the AD Act apply, such as the genuine occupational requirement exemption.

38. This is what occurred in *Toganivalu v Brown & Department of Corrective Services* [2006] QADT 13 on the hearing of a complaint alleging impairment discrimination in requiring the complainant to undergo a medical examination purportedly pursuant to section 85 of the *Public Service Act 1996*[16]and subsequently involuntarily retiring the complainant pursuant to that provision.

39. The genuine occupational requirement exemption in section 25 of the AD Act involves a two stage test, firstly, what are the genuine occupational requirements, and secondly, is the complainant capable of performing the genuine occupation requirements.[17] The determination of what is a genuine occupational requirement is wholly factual.[18]

40. The PS Act authorises the Public Service Commission chief executive to issue guidelines (which are rulings)[19], and the chief executive of an agency is required to have regard to all relevant guidelines in discharging responsibilities under an Act[20].

41. The Public Service Commission chief executive has issued a Guideline titled *Mental or physical incapacity – Part 7 of the Public Service Act 2008*. The stated purpose of the guideline is:

> These Guidelines provide advice on how to apply section 174 of the *Public Service Act 2008* (Qld) (formerly section 85 of the *Public Service Act 1996*) regarding the mental or physical illness or disability of public service employees.

42. It is clear from the Guideline that the Public Service Commission, the authority with responsibility for administering the PS Act, intended the

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[16] The *Public Service Act 2006* was repealed by the *Public Service Act 2008*. Chapter 5 part 7 of the *Public Service Act 2008* is substantially the same as the combined provisions of section 85 of the *Public Service Act 2006* and regulation 10 of the *Public Service Regulation 1997*.
[17] *Toganivalu v Brown & Department of Corrective Services* [2006] QADT 13 at para 95
[18] *Toganivalu v Brown & Department of Corrective Services* [2006] QADT 13 at para 103; Walsh v St Vincent de Paul Society Queensland [2007] QADT 10 at paras 65 & 69
[19] *Public Service Act 2008*, section 53
[20] *Public Service Act 2008*, section 99

relevant part of the PS Act to operate subject to the AD Act. This is demonstrated as follows:

(a) the Guideline states at paragraph 5 that it should be read in conjunction with, inter alia, *Anti-Discrimination Act 1991* (Qld) and *Disability Discrimination Act 1991* (Cwlth).

(b) At the end of paragraph 6.4 it is stated:

> Anti-discrimination legislation makes it possible for agencies to be held liable for unlawful discrimination in the workplace. An agency must not unfairly discrimination against an individual with a disability because of their disability.

(c) Paragraph 6.5 states:

> Section 174 of the Public Service Act 2008 is not focussed on termination of employment.
> It allows workplace solutions to be developed to address the impact of mental or physical illness or disability on an employee and its effect on their attendance or performance. The employer is able to gain an informed understanding of the limits of an employee's abilities, what modifications would assist the employee to continue in their job, and to make a decision regarding ongoing employment in the position or elsewhere in the agency.
> Retirement may be considered for those employees it is not reasonably practicable to transfer or redeploy. Where or not is reasonably practicable to transfer or redeploy the employee depends on the circumstances of each case.

(d) The footnotes to the following sections of paragraph 8.2.3 refer specifically to sections 5, 35 and 25(1) of the AD Act, to the Disability Discrimination Act 1992 and the Frequently Asked Questions for further information:

> In proposing a course of action to be taken, the agency should give particular consideration to:
>
> - whether the provision of special services or facilities to accommodate the employee's mental or physical illness or disability would genuinely impose unjustifiable hardship on the agency, and

- whether the employee can perform the genuine occupational or inherent requirements of their substantive position.

(e) In paragraph 8.2.4 it is stated:

> …..
> Further to the above, the agency should only proceed to transfer, deploy or retire the employee where the agency has evidence, and can argue with confidence, that the provision of services or facilities to accommodate the employee's mental or physical illness or disability would genuinely impose unjustifiable hardship on the agency, or that the employee can no longer perform the genuine occupational requirements of their substantive position for the foreseeable future.
> .....

(f) The Guideline includes 'Frequently Asked Questions'. One of those questions is *What are special services and facilities (or reasonable adjustment) and unjustifiable hardship?*. The answer in the Guideline is:

> Employers are required to make reasonable adjustments to the workplace unless it would cause unjustifiable hardship to do so. Whether the supply of special services or facilities would impose unjustifiable hardship on the agency depends on the circumstances of the case, including:
>
> - the nature of the special services or facilities
> - the cost of supplying the special services or facilities and the number of people who would benefit or be disadvantaged
> - the financial circumstances of the agency
> - the disruption that supplying the special services or facilities might cause, and
> - the nature of any benefit or detriment to the agency and the employee.
>
> For further information refer to the Guide to working with people with diverse abilities available on the Public Service Commission website at www.psc.qld.gov.au

43. Further, it is to be presumed that the legislature did not intend to enact legislation that would be invalid because of inconsistency with Commonwealth legislation.

44. The *Disability Discrimination Act 1992* (Clth) (DDA) prohibits discrimination on the basis of disability in employment[21], subject to the exemptions of inherent requirements[22] and unjustifiable hardship[23].

45. The DDA binds the crown in the right of the Commonwealth, the States and Norfolk Island.[24]

46. To the extent that the PS Act would purport to authorise the detrimental treatment of a worker with disability that is inconsistent with the DDA, the DDA would prevail.

47. In the second reading speech for the Anti-Discrimination Bill 1991, the Minister said, after noting that the Queensland Government was not bound by the Commonwealth Sex Discrimination Act relating to employment, and that the sexual harassment provisions do not apply to Queensland Government workers:

> These problems will be addressed in this legislation. The Crown is bound in its entirety, and Queensland Government employees have all the rights and protections of all other employees.[25]

Kevin Cocks
Anti-Discrimination Commissioner Queensland
31 October 2011

[21] section 15
[22] section 21A
[23] section 21B
[24] section 14
[25] Hansard, 26 November 1991, page 3196