

Non-party refused access to an Australian Human Rights Commission complaint lodged with the originating application

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Introduction

1. In a number of decisions, the most recent of which was *Oldham v Capgemini Australia Pty Ltd (No 2)*,¹ Mortimer J of the Federal Court of Australia refused to exercise the discretion under r 2.32(4) of the *Federal Court Rules 2011* (Cth) (“**FCR**”) to grant a non-party access to an Australian Human Rights Commission complaint which had been lodged with the originating application as required by the FCR. The non-party had sought the access on the basis that the contents of the complaint were relevant to criminal appeal proceedings in New Zealand.
2. In refusing the access, Mortimer J said, amongst other things, that the release of the complaint would defeat the purpose and effect of the confidentiality of provisions in the *Australian Human Rights Commission Act 1986* (Cth) (“**AHRC Act**”) and that the principles of open justice had not been engaged because the complaint had not been admitted into evidence.

Relevant provisions

3. Section 46P of the AHRC Act enables a person to lodge a written complaint with the Australian Human Rights Commission (“**Commission**”), alleging unlawful discrimination. However, the complaint may be terminated on a number of grounds by the President of the Commission (see ss 46PE and 46PH of the AHRC Act).
4. Under s 46PO of the AHRC Act, if a complaint has been terminated by the President and notice of the termination given, any affected person in relation to the complaint may make an application to, *inter alia*, the Federal Court of Australia, alleging unlawful discrimination by one or more of the respondents to the terminated complaint. The unlawful discrimination alleged must be the same, or substantially the same, as the unlawful discrimination which was the subject of the terminated complaint, or must arise out of the same, or substantially the same, acts, omissions or practices that were the subject of the terminated complaint.
5. To start a proceeding under the AHRC Act in the Federal Court, r 34.163 of the FCR requires the person to file an originating application in a particular form and to accompany that application with a copy of the original complaint to the Commission and the notice of termination of the complaint given by the President of the Commission.

¹ [2016] FCA 1101.

6. Rule 2.32 of the FCR contains rules enabling both parties and non-parties to inspect documents in a proceeding. In so far as it applies to non-parties, r 2.32 relevantly provides:

“(2) A person who is not a party may inspect the following documents in a proceeding in the proper Registry:

- (a) an originating application or cross-claim;*
- (b) a notice of address for service;*
- (c) a pleading or particulars of a pleading or similar document;*
- (d) a statement of agreed facts or an agreed statement of facts;*
- (e) an interlocutory application;*
- (f) a judgment or an order of the Court;*
- (g) a notice of appeal or cross-appeal;*
- (h) a notice of discontinuance;*
- (i) a notice of change of lawyer;*
- (j) a notice of ceasing to act;*
- (k) in a proceeding to which Division 34.7 applies:*
 - (i) an affidavit accompanying an application, or an amended application, under section 61 of the Native Title Act 1993; or*
 - (ii) an extract from the Register of Native Title Claims received by the Court from the Native Title Registrar;*
- (l) reasons for judgment;*
- (m) a transcript of a hearing heard in open Court.*

...

(3) However, a person who is not a party is not entitled to inspect a document that the Court has ordered:

- (a) be confidential; or*
- (b) is forbidden from, or restricted from publication to, the person or a class of persons of which the person is a member.*

...

(4) A person may apply to the Court for leave to inspect a document that the person is not otherwise entitled to inspect.”

Background

7. In October 2013, the applicant had lodged a complaint with the Commission which alleged disability and sex discrimination in the field of employment against the respondents (“**AHRC Complaint**”).
8. The AHRC Complaint was terminated by the President of the Commission and the applicant made an application to the Federal Court. A copy of the AHRC Complaint was lodged with the originating application in accordance with the requirements of r 34.163 of the FCR.
9. The AHRC Complaint comprised two documents, one of which was a lengthy unsworn statement by the applicant containing details about the background to the complaint and the alleged discrimination. The contents included sensitive and personal information about the applicant and other persons.
10. The applicant’s statement of claim filed in the Court was expressly framed by reference to the unsworn statement included in the AHRC Complaint in that the particulars to various paragraphs of the statement of claim referred to numbered paragraphs of the unsworn statement.

Initial application for access

11. In May 2015, a non-party (“**Non-party**”) made application to the Victorian Registry for access to the AHRC Complaint. The Non-party was serving a sentence of imprisonment in New Zealand, having been convicted of serious criminal offences, and gave as the reason for seeking the access that the contents of the AHRC Complaint were relevant to an appeal against conviction which was scheduled for hearing in July 2015.
12. The application was refused by Mortimer J on an ex parte basis but the Non-party was informed that, if he wished to pursue the matter, he could make an interlocutory application and that the parties would be heard on that application.

September 2015 application

13. In September 2015, the Non-party made an interlocutory application for access to the AHRC Complaint. The respondents did not wish to be heard on the application but the applicant did wish to be heard and opposed the application. The application was dealt with by Mortimer J in October 2015.²

Applicable principles

14. Her Honour began by explaining the reason why a complaint to the Commission was lodged with the Court:

² *Oldham v Capgemini Australia Pty Ltd* [2015] FCA 1149.

- Under s 46PO of the AHRC Act, the making of a complaint and its termination by the President of the Commission was a precondition to the making of the application in the Court.
- Rule 34.163 of the FCR, which required a copy of the original complaint and the termination of the complaint to accompany the originating application, existed because the Court's jurisdiction was limited by the requirement in s 46PO of the AHRC Act that the unlawful discrimination alleged in the application be the same, or substantially the same, as the unlawful discrimination which was the subject of the terminated complaint, or arise out of the same, or substantially the same, acts, omissions or practices that were the subject of the terminated complaint.
- The Court, therefore, needed a copy of the complaint so that it could ascertain the extent of its jurisdiction in a proceeding and deal with any objections to its jurisdiction,³

15. Her Honour then referred to one of the attributes of a court that a court generally administered justice in public, an attribute which was reinforced by the following provisions of the *Federal Court of Australia Act 1976* (Cth) ("**FCA**"):

- s 17, that the Court's jurisdiction should ordinarily be exercised in open court; and
- s 37AE, that in deciding whether to make a suppression order or non-publication order, the Court was to take into account that a primary objective of the administration of justice was to safeguard the public interest in open justice.⁴

16. Her Honour said that the inspection rules in r 2.32 of the FCR gave recognition to the general principle of open justice: "Enabling access to the documents which are the foundation of a proceeding is an important aspect of justice being done in public."⁵

The operation of r 2.32

17. Her Honour then considered r 2.32 itself and said that r 2.32(4), which enabled a person to apply to the Court for leave to inspect a document that the person was not otherwise entitled to inspect, provided a mechanism by which, in the exercise of its discretion, the Court could allow inspection of a document outside the categories in r 2.32(2) which allowed non-parties to inspect certain documents as of right.⁶

18. Her Honour went on to say that it had been held that a complaint to the Commission was not a document which could be inspected as of right under r 2.32(2) because it

³ Above, n 2, at [14]-[17].

⁴ Above, n 2, at [18].

⁵ Above, n 2, at [18].

⁶ Above, n 2, at [22].

did not form part of the originating application⁷ and that r 34.163 of the FCR which required the originating application be “accompanied by” the complaint also made it clear that the complaint should be treated as a document separate from the originating application itself. Accordingly, leave was required under r 2.32(4) to inspect the AHRC Complaint.⁸

19. Her Honour then made the following observations:

- The power to permit inspection of a document under r 2.32(4) was discretionary and, in the exercise of that discretion, it was appropriate for the Court to first consider the delineation apparent in the terms of r 2.32(2) and other documents which might be on the court file.
- Subject to the operation of ss 37AE to 37AL of the FCA⁹ and r 2.32(3), the delineation was that a non-party was entitled:
 - to know who the parties to a proceeding in the Court were and to have an address (through a notice of address for service) for those parties;
 - to see those documents which would enable the non-party to understand what a proceeding was about, and how the parties’ respective cases were framed: namely, the originating application and the pleadings;
 - to be able to follow the course of the proceedings through processes such as interlocutory applications, appeals and discontinuances; and
 - to be able to see the Court’s reasons for the disposition of a proceeding.
- Any transcript of a hearing held in public on the Court’s file could, by r 2.32(2)(m), be inspected as of right, the rationale for this right appearing to mirror the ability of the public to be present in court and to listen to the evidence and argument in the proceeding.
- The entitlement of the public to be present in court and to listen to the evidence (read with the underlying general principles of open justice apparent in ss 17 and 37AE of the FCA) suggested, subject to any competing discretionary considerations, that an affidavit which was “read” in a proceeding, and thus treated as if that evidence had been given orally in open court, should be available for inspection as it was in no different position to oral evidence-in-chief given by a witness. Permitting inspection of such an affidavit was consistent with the ability to inspect a transcript as of right under r 2.32(2)(m).

⁷ Above, n 2, at [23], referring to *Charles v Fuji Xerox Australia Pty Ltd* [2000] FCA 1531; (2000) 105 FCR 573.

⁸ Above, n 2, at [23].

⁹ These provisions deal with suppression and non-publication orders.

- An affidavit on the court file which had not been “read” was in a different position because it was not a person’s evidence and might never be admitted as the person’s evidence for a variety of reasons. It was a document yet to become part of the process of open justice. However, that did not mean that such an affidavit could never be subject to an order under r 2.32(4) because there might be no objection from the parties and there could be discretionary considerations in a particular case which favoured its inspection.”¹⁰

Whether leave should be granted

20. Her Honour said that the AHRC Complaint generally formed no part of a proceeding in the Court because it was simply “a precondition to, and a constraint on,” the Court’s jurisdiction under the AHRC Act.¹¹

21. Her Honour further said that, under the AHRC Act, proceedings before the Commission were, in general, private and confidential between the parties to the complaint¹² and that the fact that an applicant brought a proceeding in the Court under the AHRC Act did not mean that the complaint should not continue to be given some protection in the Court, subject to the considerations relevant in the particular case.¹³ Her Honour went on to say as follows:

“The Commission deals with complaints of unlawful discrimination under a number of federal statutes. Often, the subject matter of those complaints is intensely personal. Many complainants are not legally represented. They may, to use a colloquialism, ‘pour their hearts out’ in a complaint to the Commission. However they express their complaints, they do so in the confidence of a private process, designed to facilitate resolution of complaints through confidential conciliation. Once a person elects to proceed to this Court, she or he has a fresh choice about the subject matter of the claim made in this Court, and how it is expressed. She or he cannot materially change or exceed the subject matter complained of before the Commission, but it can be narrowed and circumscribed. It can be couched in different language. In my opinion it would generally be inimical to the purpose and structure of the AHRC Act, which is based around confidentiality as between complainants, the Commission and respondents, for an AHRC complaint to be made available for public inspection in this Court.”¹⁴

22. Her Honour considered that this principle was applicable to the case before her but “not without some hesitation”¹⁵ because the statement of claim had relied on the applicant’s statement included in the AHRC Complaint and pleadings were able to be

¹⁰ Above, n 2, at [24]-[27]. For an explanation of what it means to “read” an affidavit, see, for example, *Australian Securities and Investments Commission v Cassimatis (No 4)* [2015] FCA 465 at [8]-[9]. Mortimer J’s observations were cited with approval by Pagone J in *Deputy Commissioner of Taxation v Hawkins (Inspection Application by Matrix Group and Anor)* [2016] FCA 164 at [9].

¹¹ Above, n 2, at [28].

¹² Above, n 2, at [29].

¹³ Above, n 2, at [30].

¹⁴ Above, n 2, at [31].

¹⁵ Above, n 2, at [32].

inspected by non-parties as of right under r 2.32(2) of the FCR. However, in her Honour's view:

- a document referred to in a statement of claim did not form part of the statement of claim for the purposes of the inspection rules because a statement of claim could refer, especially when giving particulars, to a wide range of documents, even documents which had been created by third parties, and these documents did not become part of the statement of claim itself;¹⁶ and
- given that a proceeding in the Court could be commenced by originating application and affidavit and the affidavit would not be available for inspection as of right under r 2.32(2), a document referred to in a statement of claim should not be in any more vulnerable position as it might not be admitted into evidence and so was not yet fully within the principles of open justice.¹⁷

23. Her Honour also had regard to the reason access was being sought to the AHRC Complaint in deciding whether to grant leave to inspect. As there were suppression orders in place in New Zealand applying to the criminal proceedings, her Honour did not disclose the offences involved or the substance of how the AHRC Complaint was said to be relevant to the offences and the appeal.

24. However, her Honour did make the following points:

- There was no evidence before her as to, amongst other things, whether the appeal which had been scheduled to be heard in July 2015 had been heard or disposed of and whether a ground of appeal existed which was capable of bearing a relationship to the AHRC Complaint.¹⁸ In these circumstances, the relevance of the AHRC Complaint to the Non-party's interests was no more than hypothetical.¹⁹
- The Non-party could determine from the contents of the statement of claim itself the basis of an appeal ground and, if the matter was to be pursued, it could be pursued in the New Zealand courts by various processes.²⁰

25. Therefore, her Honour did not consider that the Non-party's reason for access outweighed the considerations against the grant of access.²¹

26. In conclusion, her Honour said that the Court had to be guided in the exercise of its discretion in r 2.32(4) by the interests of the administration of justice "in this Court"²² and that the interests of the administration of justice in the Court as between the

¹⁶ Above, n 2, at [36].

¹⁷ Above, n 2, at [37].

¹⁸ Above, n 2, at [41].

¹⁹ Above, n 2, at [44].

²⁰ Above, n 2, at [41]-[44].

²¹ Above, n 2, at [39].

²² Above, n 2, at [45].

parties, the public who were the beneficiaries of the open justice principle and the interests of other litigants in the Court (if relevant) did not favour allowing access to the AHRC Complaint by the Non-party.²³ Accordingly, her Honour refused the application.

August 2016 application

27. In August 2016, another application for non-party access to the AHRC Complaint was made. By this time, the proceeding in the Court had been settled by agreement of the parties and a notice of discontinuance filed.
28. The application was now supported by further material which showed that there was an appeal which was pending, that the AHRC Complaint had potential relevance to that appeal and that all reasonable efforts had been made in New Zealand to obtain the information sought. Once again, Mortimer J did not disclose the details of the criminal proceedings in New Zealand because of suppression orders in effect there.
29. Although her Honour accepted that the new material provided greater certainty about the use to which the AHRC Complaint was to be put,²⁴ her Honour refused the further application.
30. Her Honour referred to *Reynolds v JP Morgan Administrative Services Australia Ltd (No 2)* (“**J P Morgan**”),²⁵ a case in which a similar application had been made by a media organisation under a predecessor provision to r 2.32. Prior to the access application being made, the proceedings had been settled by consent, the terms of settlement including confidentiality clauses. Rares J had held that a complaint to the Commission and notice of termination were not part of the originating process or the pleadings and so could not be inspected by the non-party as of right. His Honour had also refused to grant leave to inspect, finding that the principle of open justice had not been engaged because the documents had not played any role in the conduct of the proceedings in open court. His Honour had also found that there was a very significant public interest in the settlement of litigation and that the parties would lose the benefit of the confidentiality and non-disclosure provisions of their settlement if the media organisation was to be granted access.²⁶
31. Mortimer J made the following observations about the circumstances of the case before her and those of *JP Morgan*:
 - Unlike in *JP Morgan*, the AHRC Complaint had been extensively cross-referenced in the statement of claim but the only function of the cross-references was to give particulars of the allegations as a matter of fairness to the respondents and, ultimately, the contents of the cross-references would have had to be proved by admissible evidence. However, that had not

²³ Above, n 2, at [45].

²⁴ Above, n 1, at [16].

²⁵ [2011] FCA 489; (2011)193 FCR 507.

²⁶ Above, n 1, at [17]-[18]; [24].

occurred because the proceeding had settled by agreement between the parties. Therefore, there was no aspect of the principles of open justice which favoured the release of the AHRC Complaint.²⁷

- In the case before her, access was being sought by a private individual to advance his own interests in an unrelated proceeding in another jurisdiction but, as noted in the previous reasons, it was the interests of the administration of justice “in this Court” which were of principal importance to the exercise of the Court’s discretion.²⁸
- There was no evidence about the terms of the settlement between the parties in the case before her and whether they included confidentiality clauses, but the fact of settlement meant that there had not been, and now would never be, any evidence led in open court of the matters to which the applicant referred in her statement of claim, with its references to the AHRC Complaint.²⁹

32. Her Honour then decided, for the following reasons, that access to the AHRC Complaint should be refused:

- *Confidentiality of the AHRC process* - As stated in the previous reasons, lodgement of the AHRC Complaint and its associated documents were required by the Court rules as proof of the termination of the complaint by the Commission, because that termination was a precondition to the Court’s jurisdiction. Otherwise, the AHRC Complaint formed no part of a proceeding in the Court and, in general, the allegations made in such a document had to be proved in the usual way at trial. Allowing access to the AHRC Complaint by a stranger to the proceeding, one whom the applicant strongly objected to seeing the document, would defeat the purpose and effect of the confidentiality provisions in the AHRC Act and the implied undertaking as to confidentiality of documents produced by compulsion of court requirements.³⁰
- *The proceeding had been settled* - Even in the absence of evidence about the precise terms of the settlement of the proceeding, it would be inimical to the negotiation process which had led to the settlement, its discontinuance without judicial pronouncement and the closing of the Court’s file with no further proceedings in open court, for access to be given to the AHRC Complaint over the applicant’s objection. It was not unusual for parties in these kinds of proceedings to have as one of their motivations for agreeing to settle a desire to keep private the matters contained in the complaints made to the Commission and the Court should be careful not to frustrate this.³¹

²⁷ Above, n 1, at [19].

²⁸ Above, n 1, at [20].

²⁹ Above, n 1, at [25].

³⁰ Above, n 1, at [27]-[29]. See also at [14].

³¹ Above, n 1, at [30].

- *The principles of open justice had no direct application* - As had been stated in *Hogan v Australian Crime Commission*,³² it was the admission of material into evidence which engaged the principles of open justice and it was at that stage that material, even if sensitive, embarrassing and previously confidential, could be made available to the public. While the applicant had been compelled to attach her AHRC Complaint in order to engage the Court's jurisdiction, once that was done, the function of the AHRC Complaint in the Court's exercise of jurisdiction had been spent, subject to any forensic deployment of the document (if permitted) at trial. As the proceeding had not reached the stage of any material being admitted into evidence, the AHRC Complaint had not lost the confidential character given to it by the AHRC Act.³³
- *The subject matter of the AHRC Complaint had been sufficiently revealed* - The pleadings to which the Non-party's legal representatives had always had access sufficiently revealed the subject matter of the AHRC Complaint and there was no sufficient further detail in the AHRC Complaint about those issues which outweighed the other matters already considered. If the applicant was a compellable witness under New Zealand law, then that course could be pursued by the Non-party. If she was not a compellable witness, then her non-compellability should not be effectively circumvented by access being given to the AHRC Complaint which had been made in confidence in a different jurisdiction for entirely different purposes and which included sensitive information about the applicant that was irrelevant to the circumstances of the Non-party's appeal, as well as information about third parties.³⁴

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³² [2010] HCA 21; (2010) 240 CLR 651 at [41]-[43].

³³ Above, n 1, at [31].

³⁴ Above, n 1, at [32]-[33].