

FEDERAL MAGISTRATES COURT OF AUSTRALIA

Birch v Wesco Electrics (1966) Pty Ltd

[2012] FMCA 5

Lucev FM

4 October 2011, 9 January 2012

Discrimination — Complaint to Commissioner for Equal Opportunity alleging termination of employment due to age and gender made after application to Federal Magistrates Court alleging adverse action of termination of employment because of age and gender — Application in case by employer to stay Commissioner for Equal Opportunity proceeding with complaint — Whether s 725 of Fair Work Act 2009 (Cth) prohibited Equal Opportunity complaint — Whether Equal Opportunity complaint matter in relation to termination of employment — Section 725 of Fair Work Act 2009 (Cth) acts as personal prohibition on applicant making second complaint including Equal Opportunity Complaint — Statutory purpose of s 725 of Fair Work Act 2009 (Cth) is to limit applicant to single remedy — Equal Opportunity complaint and application have manifest direct link and relationship — Equal Opportunity complaint is “in relation to” dismissal — Injunction issued against applicant permanently restraining her from proceeding with Equal Opportunity complaint — Equal Opportunity Act 1984 (WA), ss 83, 84 — Fair Work Act 2009 (Cth), ss 351, 539, 566, 567, 568, 725, 732.

Jurisdiction — Whether court has jurisdiction under Fair Work Act 2009 (Cth) to injunct proceedings before State commission or tribunal — Court has exclusive jurisdiction in relation to application to court because making of Equal Opportunity complaint is statutorily prohibited — Appropriate to grant injunction in aid of statutory prohibition — Court has power under s 15 of Federal Magistrates Act 1999 (Cth) to issue injunction directed to state administrative decision maker including Commissioner for Equal Opportunity — Federal Magistrates Act 1999 (Cth), ss 14, 15, 16.

Injunction — Complaint to Commissioner for Equal Opportunity alleging termination of employment due to age and gender made after application to Federal Magistrates Court alleging adverse action of termination of employment because of age and gender — Application in case by employer to stay Commissioner for Equal Opportunity proceeding with complaint — Whether s 725 of Fair Work Act 2009 (Cth) prohibited Equal Opportunity complaint — Whether Equal Opportunity complaint matter in relation to termination of employment — Section 725 of Fair Work Act

2009 (Cth) acts as personal prohibition on applicant making second complaint including Equal Opportunity Complaint — Statutory purpose of s 725 of Fair Work Act 2009 (Cth) is to limit applicant to single remedy — Equal Opportunity complaint and application have manifest direct link and relationship — Equal Opportunity complaint is “in relation to” dismissal — Whether court has jurisdiction under Fair Work Act 2009 (Cth) to injunct proceedings before State commission or tribunal — Court has exclusive jurisdiction in relation to application to court because making of Equal Opportunity complaint is statutorily prohibited — Appropriate to grant injunction in aid of statutory prohibition — Court has power under s 15 of Federal Magistrates Act 1999 (Cth) to issue injunction directed to state administrative decision maker including Commissioner for Equal Opportunity — Injunction issued against applicant permanently restraining her from proceeding with Equal Opportunity complaint — Equal Opportunity Act 1984 (WA), ss 83, 84 — Fair Work Act 2009 (Cth), ss 351, 539, 566, 567, 568, 725, 732 — Federal Magistrates Act 1999 (Cth), ss 14, 15, 16.

Words and Phrases — “Must” — “Must not” — “Must not make” — “In relation to” — Fair Work Act 2009 (Cth), s 725.

These proceedings involved an application in a case by Wesco Electrics (1966) Pty Ltd (Wesco) seeking an injunction against the applicant (Birch) proceeding with a complaint to the Commissioner of Equal Opportunity (the EO complaint).

Birch made an application to the Federal Magistrates Court under s 351(1) and s 539(2) of the *Fair Work Act 2009* (Cth) (the FW Act) alleging that Wesco took adverse action against her by dismissing her because of her age and sex. Birch subsequently made a complaint to the Commissioner for Equal Opportunity under s 83(1) of the *Equal Opportunity Act 1984* (WA) (the EO Act) alleging discrimination on the grounds of age, sex and sexual harassment in her employment.

Wesco sought an order that the Commissioner for Equal Opportunity be stayed from proceeding with the EO complaint and that Birch be barred from continuing with the EO complaint.

The court was required to consider s 725 of the FW Act insofar as a dismissed person “must not make” another application or complaint of a kind referred to in ss 726-732 of the FW Act “in relation to the dismissal” unless the initial application has been withdrawn or failed for want of jurisdiction. Birch submitted that s 725 of the FW Act did not apply because the EO complaint was not a matter “in relation to” the dismissal because the allegations in the EO complaint spanned the term of her employment and did not relate exclusively to her eventual dismissal.

On the question of the court’s jurisdiction to issue an injunction in the circumstances, Wesco argued that jurisdiction is conferred on the court in relation to any civil matter arising under the FW Act and s 568 of the FW Act provides that nothing in the FW Act limits the powers of the court under ss 14, 15 and 16 of the *Federal Magistrates Act 1999* (Cth) (the FM Act). In essence, Wesco argued that the capacity to make orders and an injunction available to the court included the capacity to injunct proceedings before a State Commission or Tribunal such as the Commissioner for Equal Opportunity. The Commissioner for Equal Opportunity, the Intervener in the proceedings, argued that the court did not have power to interfere with the functions of a State administrative or investigative authority when exercising its jurisdiction; that under the EO Act the Commissioner was statutorily bound to proceed with the investigation; and the

power to review the Commissioner of Equal Opportunity's decision to accept, dismiss or refer the complaint lay with the Supreme Court of Western Australia. Birch submitted that the Commissioner of Equal Opportunity was investigating ongoing discrimination whilst the matter before the court related solely to her dismissal.

Held (allowing the application in part and otherwise dismissing the application): (1) Section 725 of the FW Act imposes a personal prohibition on a person making a second application of a kind to which one of ss 726-732 of the FW Act apply when there has already been made an application or complaint of a kind to which one other of ss 726-732 of the FW Act apply. Accordingly, s 725 of the FW Act acts as a personal prohibition against Birch making the EO complaint provided that the EO complaint is a "matter in relation to" Birch's dismissal.

(2) The statutory purpose for which s 725 of the FW Act was enacted was to prevent an applicant, having filed an application or complaint of one type in relation to their dismissal, from filing an application or complaint of another type in relation to their dismissal. Applied to the present context, it is to prevent an applicant having filed a general protections court application in relation to their dismissal in the court, from lodging an equal opportunity complaint in relation to their dismissal under a State equal opportunity law. The statutory purpose, put simply, is to limit an applicant to a single remedy.

(3) "In relation to" requires, in this case, a relevant, sufficient or material connection or relationship between the EO complaint and the dismissal which is the subject of the application. There is a direct relationship between the EO complaint and the dismissal subject of the application both as to the general nature of the matters alleged, and the supporting particulars and evidence provided in each. The EO complaint is therefore a matter "in relation to" Birch's dismissal and a complaint of a kind referred to in s 725 of the FW Act. It is therefore a complaint which Birch is statutorily prohibited from making.

(4) The application is a civil matter arising under the FW Act. The question of whether the EO complaint is a complaint of a kind which must not be made is also a civil matter arising under the FW Act. The jurisdiction conferred on the court under the FW Act is to be exercised if an application is made to it, or an injunction is sought from it. The powers of the court under ss 14, 15 and 16 of the FM Act are not limited by the provisions of the FW Act.

(5) To fail to issue an injunction, and thereby allow Birch to proceed with the EO complaint, would be to allow by omission what the Commonwealth Parliament has expressly prohibited by statute. It is appropriate to grant an injunction in aid of the statutory prohibition, having regard to the nature, terms and scope of the relevant provisions of the FW Act, the mischief those provisions are intended to remedy, which confer on Wesco Electrics a right not to be troubled by duplex applications in relation to Birch's dismissal.

(6) An injunction is issued against Birch to permanently restrain her from proceeding with, or taking any further action steps in, or in relation to, the EO complaint.

(7) The court has jurisdiction in respect of civil matters arising under the FW Act, and both the application and the question of whether the EO complaint is a complaint of a kind which must not be made, are civil matters arising under the FW Act. In those circumstances the court has power, under s 15 of the FM Act, to issue an injunction directed to a state administrative decision-maker or investigative body, such as the EO Commissioner, in respect of the civil matter within the jurisdiction of the court.

Cases Cited

Adelaide Company of Jehovah's Witnesses Inc v Commonwealth (1943) 67 CLR 116.

Agriculture and Food, CEO, Department of v Ward [2008] WAIRComm 79.
Aldridge v Booth (1988) 80 ALR 1.
Attorney-General (Cth) v The Queen (1957) 95 CLR 529.
Attorney-General (Vic); Ex rel Black v Commonwealth (1981) 146 CLR 559.
Australian Communications Network Pty Ltd v Australian Competition and Consumer Commission (2005) 146 FCR 413.
Australian Fisheries Management Authority v PW Adams Pty Ltd (1995) 61 FCR 314.
Australian Securities and Investments Commission v Citrofresh International Ltd (2007) 164 FCR 333.
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Tomago Aluminium Co Pty Ltd (unreported, AIRC (FB), PR968591, 13 February 2006).
Board of Fire Commissioners (NSW) v Threlfo [1960] AR (NSW) 349.
Boulton, Re; Ex parte Construction, Forestry, Mining and Engineering Union (1998) 73 ALJR 129; 85 IR 468.
Boumelhem v Commonwealth Bank of Australia [2008] FCA 1121.
Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245; 58 IR 48.
Broad Spectrum Training Pty Ltd v Bidding Buzz Ltd (2010) 244 FLR 335.
Carantinos v Magafas (2008) 6 ABC(NS) 587.
CBFC Ltd v Skea [2004] FMCA 377.
CSR Ltd v Cigna Insurance Australia Ltd (1997) 189 CLR 345.
DJL v Central Authority (2000) 201 CLR 226.
Du v University of Ballarat (2011) 211 IR 382.
Elliott v Nanda (2001) 111 FCR 240.
Fair Work Ombudsman v Wongtas Pty Ltd (2011) 195 FCR 55; 210 IR 102.
Federated Engine Drivers and Firemen's Association of Australasia v Broken Hill Pty Co Ltd (1911) 12 CLR 398.
Fountain v Alexander (1982) 150 CLR 615.
Hall v A & A Sheiban Pty Ltd (1989) 20 FCR 217.
Halwood Corp Ltd v Roads Corp [1998] 2 VR 439.
HP Mercantile Pty Ltd v Federal Commissioner of Taxation (2005) 143 FCR 553.
Hu v Li-Chien Liu [2011] FMCA 21.
Hughes v Mainrange Corp Pty Ltd (No 2) (2009) 190 IR 351.
Huntley Management Ltd v Timbercorp Securities Ltd (2010) 187 FCR 151.
Ilardo v Rail Corp (NSW) (2010) 197 IR 397.
J & G Knowles & Assoc Pty Ltd v Federal Commissioner of Taxation (2000) 96 FCR 402.
James v Sayers (Trustee for Sayers Family Trust) (2006) 46 SR (WA) 241.
Joye v Beach Petroleum NL (1996) 67 FCR 275.
King v Goussetis (1986) 5 NSWLR 89.
Kosovich v Mancini (1982) 31 SASR 272.

Major Crime (Investigative Powers) Act 2004, Application under (2009) 24 VR 415.

New South Wales v Commonwealth (Work Choices Case) (2006) 229 CLR 1; 156 IR 1.

O'Grady v Northern Queensland Co Ltd (1990) 169 CLR 356.

Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3) (1998) 195 CLR 1; 79 IR 339.

Poole v Rod Baker & Co (2011) 207 IR 264.

Posner v Collector for Interstate Destitute Persons (Vic) (1946) 74 CLR 461.

R v Blakeley; Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia (1950) 82 CLR 54.

R v Bolton (1841) 1 QB 66.

R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co (1910) 11 CLR 1.

Rentuza v Westside Auto Wholesale (2009) 190 IR 207.

Risk v Williamson (1998) 87 FCR 202.

Skipworth v Western Australia (No 2) (2008) 218 FLR 16.

Sovar v Henry Lane Pty Ltd (1967) 116 CLR 397.

Thirteenth Corp Pty Ltd v State (2006) 232 ALR 491.

Tooheys Ltd v Commissioner of Stamp Duties (NSW) (1961) 105 CLR 602.

Travelx Ltd v Federal Commissioner of Taxation (2010) 241 CLR 510.

Tristar Steering & Suspension Australia Ltd v Industrial Relations Commission (NSW) (2007) 161 IR 330.

Tristar Steering & Suspension Ltd v Industrial Relations Commission (NSW) (2007) 158 FCR 104; 161 IR 469.

VTAG v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 141 FCR 291.

Wang v Minister for Immigration and Multicultural Affairs (1997) 71 FCR 386.

Welsh v Allblend Holdings Pty Ltd (No 2) (2010) 195 IR 216.

Westpac Banking Corp v Eltran Pty Ltd (1987) 14 FCR 541.

Woodside Energy Ltd v Federal Commissioner of Taxation (2006) 155 FCR 357.

Yao v Zhang [2007] FMCA 1340.

Interlocutory application

C Moss, for the applicant.

M Nazareth, for the respondent.

J Rosales-Castaneda, for the intervener.

Cur adv vult

Lucev FM.

Introduction

1 Rebecca Birch¹ has made an application² to this Court under ss 351(1) and

1 Ms Birch.

2 Application.

539(2) of the *Fair Work Act 2009* (Cth).³ Ms Birch alleges that Wesco Electrics (1966) Pty Ltd⁴ took adverse action⁵ against her by dismissing her because of her age and sex.

2 Ms Birch has also made a complaint to the Commissioner for Equal Opportunity⁶ under s 83(1) of the *Equal Opportunity Act 1984* (WA)⁷ alleging discrimination on the grounds of sex, age and sexual harassment in her employment,⁸ contrary to ss 11, 24 and 66W of the EO Act.

3 Presently before the Court is an application in a case to:

- a) stay the EO Commissioner from dealing with the EO Complaint, pending further order of this Court;
- b) bar Ms Birch from proceeding with any proceeding concerning the subject matter of the Application and the EO Complaint, other than the Application; and
- c) alternatively, to summarily dismiss the Application.

Application

4 The Application, filed on 4 May 2011, seeks orders for:

- a) lost earnings in the sum of \$2,713.84; and
- b) compensation for loss and damage suffered by reason of Wesco Electrics' alleged contravention of s 351(1) of the FW Act, as the Court considers appropriate.

5 The "Form 2 Claim under the *Fair Work Act 2009* alleging dismissal in contravention of a general protection"⁹ alleges a contravention in the following terms:

1. The applicant alleges a breach by the respondent of section 351(1) of the *Fair Work Act 2009* (Cth), in that the respondent took adverse action against the applicant, who was an employee of the respondent, because of the applicant's age and sex.
2. In particular, the applicant alleges that she was dismissed because she refused to drink alcohol and socialise with the respondent's director Michael Mannion and his friends, and that she would not have been dismissed for that reason if not for the fact that she was young and female.

6 A copy of a certificate issued by Fair Work Australia under s 369 of the FW Act, dated 20 April 2011, is attached to the Claim Form.¹⁰

Response

7 Wesco Electrics opposes the making of orders granting any remedy to Ms Birch, and seeks to have the Application dismissed.

3 FW Act.

4 Wesco Electrics.

5 FW Act, s 342.

6 EO Commissioner.

7 EO Act.

8 EO Complaint.

9 Claim Form.

10 A certificate under s 369 of the FW Act is a jurisdictional prerequisite to a valid general protections application being made to this Court: *Poole v Rod Baker & Co* (2011) 207 IR 264 at [24] per O'Sullivan FM; *Hughes v Mainrange Corporation Pty Ltd (No 2)* (2009) 190 IR 351 at [14] per Lucev FM (*Mainrange Corp (No 2)*).

Background factual matters

8 The EO Complaint was received by the EO Commissioner on 19 May 2011
under cover of a letter from Ms Birch's solicitors.¹¹

9 The EO Complaint form completed by Ms Birch's solicitors identifies
Mr Michael Mannion and Wesco Electrics as those whom Ms Birch believes
discriminated against her, and which she describes (seemingly collectively) as
her "Former Employer". Ms Birch identifies the type of discrimination that she
considers that she has suffered as being discrimination on the basis of sex,
sexual harassment and age. Ms Birch identifies the discrimination as having
occurred at her place of employment or work from early 2010 until early
2011.¹²

10 The EO Complaint form asks that the complainant "attach *copies* of any
documents that may help us with our investigation". In that regard Ms Birch has
attached a letter from Wesco Electrics, being the letter terminating her
employment. In response to the question "[h]ow has this affected you?"
Ms Birch has written:

I was subjected to mental anguish, embarrassment and humiliation during my
employment. My employment was then wrongfully terminated due to my failure
to tolerate and accept the discrimination.¹³

11 The particulars of the EO Complaint are as follows:

The Applicant (Rebecca Birch) was continually subjected to discrimination by the
Respondent (Wesco Electrics (1966) Pty Ltd) during her employment with the
Respondent from early 2010 until termination of her employment on
31 January 2011.

1. The Respondent routinely discriminated against the Applicant because of
her sex and age, and subjected the Applicant to sexual harassment, by
reason of the following:
 - 1.1 causing the Applicant humiliation and embarrassment by sending
her explicit pornographic material by email;
 - 1.2 allowing a friend of Mike Mannion (a director of the Respondent)
to send numerous emails from the Applicant's work email account
to male persons known by the friend, with content such as "Meet
me in the toilet I want to fuck", which caused the Applicant
humiliation and embarrassment;
 - 1.3 treating the Applicant in a demeaning manner and causing her
humiliation and embarrassment by requiring her to fetch beers for
Mike Mannion and his friends when Mr [Mike] Mannion's friends
visited him in the Respondent's workplace;
 - 1.4 requiring the Applicant to drive Mike Mannion after the Applicant
had been drinking alcohol;
 - 1.5 insisting that the Applicant drink alcohol and socialise with Mike
Mannion and his friends;
 - 1.6 causing the Applicant humiliation and embarrassment by sending
sexual text messages such as on 31 January 2011 when she was
directed by an abrupt text message from Mike Mannion to pick

11 Affidavit of Yvonne Daphne Henderson, affirmed 9 September 2011 (EO Commissioner's
Affidavit) at para 2 and Annexure EOC01 (EO Complaint Form).

12 EO Complaint Form.

13 EO Complaint Form.

him up from Coco's, she replied with "Where's the love?" (as in "Why aren't you asking me nicely?") and to which Mr [Mike] Mannion replied "In my pants";

- 1.7 on one occasion during 2010 Mike Mannion's friend told the Applicant to lower her top so that he could see her cleavage when she arrived at Coco's to collect Mr [Mike] Mannion. Mr [Mike] Mannion heard that comment and did nothing to object to it;
- 1.8 on another occasion when the Applicant arrived to collect Mike Mannion from Coco's, he urinated in front of her in the undercover car park of the restaurant;
- 1.9 on numerous occasions both Mike Mannion and Robert Mannion (also a director of the Respondent) told the Applicant to dress for work in a way that would show her cleavage;
- 1.10 on another occasion during 2010 Mike Mannion required the Applicant to collect him from Coco's, take him to the Como Hotel and wait while he had a drink before taking him to the office. While at the Como Hotel Mr [Mike] Mannion placed his hand on the Applicant's thigh. Later that day he pushed her hair behind her shoulders in an affectionate manner while she was driving and when the Applicant dropped Mr [Mike] Mannion at work he hugged her several times;
- 1.11 in March 2010 Mike Mannion started calling the Applicant by the nickname "Mumbles" or "Mumblers", which is urban slang for "a woman wearing clothing that is far too tight for her, often with no underwear, so that you can see the shape and movement of her genitals. Her lips are moving but you can't hear what she is saying" (see www.urbandictionary.com). Mr [Mike] Mannion told numerous people, including the applicant, that he gave the Applicant that nickname after she arrived to help clean the office after the March 2010 hailstorm wearing a pair of gym tights;
- 1.12 Mike Mannion also referred to the Applicant by the name of "Rachael", who was the previous employee who sat in the applicant's chair. While demeaning, the Applicant tolerated the nickname as it was preferable to the alternate nickname of Mumbles;
- 1.13 on another occasion Mike Mannion asked the Applicant's co-worker to prepare a job description for the applicant's role. Mr [Mike] Mannion then required the Applicant to sit in the boardroom with himself, the Applicant's co-worker and Mr [Mike] Mannion's friend while Mr [Mike] Mannion read through the job description. Mr [Mike] Mannion and his friend ridiculed the Applicant as they read through the job description. For example, Mr [Mike] Mannion said "Sending faxes — scrap that she can't do that". The Applicant found that conduct humiliating and embarrassing;
- 1.14 Mike Mannion would regularly make jibes about the Applicant's weight including, for example, an occasion when Mr [Mike] Mannion said "You should be a newsreader and [a female co-worker] should be a weather girl because when you stand up everything looks shit". The Applicant understood Mr [Mike] Mannion to mean that she should sit behind a desk so that she was only seen from the chest up;
- 1.15 Mike Mannion made frequent other references to the Applicant's body including telling her she should not be eating lunch, calling

her fat, telling her that because she was younger than he and her female co-worker she should be slimmer and teasing her about the size of her upper arms; and

1.16 on another occasion during her employment the Applicant attended lunch at the Must Wine Bar with Mike Mannion, Rob Mannion, the Applicant's co-worker and Mike Mannion's friend. The men present brought the subject of sex into the conversation. Mr [Mike] Mannion's friend asked the Applicant whether she liked to place her finger into her partner's anus during sexual intercourse. The Applicant said that was private and refused to answer. Mr [Mike] Mannion's friend then proceeded to call our client "Bridget with a dirty digit" for the remainder of the lunch. That incident, and the reference by Mr [Mike] Mannion's friend to the Applicant as "Bridget with a dirty digit", occurred in the presence of both Mike Mannion and Rob Mannion, neither of whom intervened.

2. In relation to point 1.5 above, the Applicant says that the Respondent discriminated against her by terminating her employment on the first occasion that she refused to drink alcohol and socialise with Mr [Mike] Mannion and his friends.¹⁴

12 On 30 June 2011 the EO Commissioner wrote to Ms Birch¹⁵ requesting that she show "good cause" as to why the EO Commissioner should accept those allegations in the EO Complaint which were outside of the 12 month time limitation.¹⁶

13 On 18 July 2011 the EO Commissioner received a letter from Ms Birch's solicitors making submissions as to why Ms Birch satisfied the "good cause" requirements for the EO Commissioner to consider the out of time allegations.¹⁷

14 Ms Birch's Solicitors' 18 July 2011 Letter includes the following passages:

Ms Birch's employment with the Respondent was terminated on 31 January 2011, following discrimination against her as a result of her age and sex. Ms Birch was unrepresented at that time and filed an application pursuant to the *Fair Work Act 2009* on 9 February 2011 alleging unfair dismissal pursuant to section 394 of the *Fair Work Act 2009*.

Ms Birch retained this firm on 23 February 2011. Efforts were then made to resolve this matter at conciliation conferences on 10 March and 19 April 2011 and during without prejudice negotiations between the parties. On March 23 2011, Ms Birch's original application was discontinued and an application pursuant to the general protection provisions of the *Fair Work Act 2009* was filed in its place (*Fair Work Application*).¹⁸ The allegations contained within the Fair Work Application remained the same.

Unfortunately, the efforts to resolve this matter were unsuccessful. It was considered by this firm that the sexual harassment elements of Ms Birch's allegations also fell within the provisions of the *Equal Opportunity Act 1984* (Act) and that a complaint was appropriate pursuant to section 83 of the Act.

14 EO Complaint Form, Attachment "A".

15 EO Commissioner's Affidavit at para 6 and Annexure EOC04.

16 EO Act, s 83(4) and (5).

17 EO Commissioner's Affidavit at para 7 and Annexure EOC05 (Ms Birch's Solicitors' 18 July 2011 Letter).

18 Fair Work Application.

The Fair Work Application remains ongoing in the Federal Magistrates Court but is not listed for hearing until January 2012.¹⁹

...

Prejudice to Ms Birch

...

Further, Ms Birch is a young person on a limited salary and this firm wishes to avoid the unnecessary expenditure of legal fees. Had the matter brought pursuant to the *Fair Work Act 2009* been resolved through negotiation, the [EO] Complaint would not have been brought. Ms Birch's interests should not be prejudiced for this reason.

Prejudice to the Respondent

It is submitted that there is no prejudice to the Respondent if the entirety of the Complaint is included within the investigation.

Subject to the Commissioner's determination, the Respondent will be required to respond to allegations from Ms Birch in any event. The inclusion of the Pre-19 May Events will add little to the task or to the evidence which the Respondent would need to submit.

Further, the Respondent has been aware of the allegations forming the substance of the [EO] Complaint since, at least, 23 March 2011, when the original application pursuant to the *Fair Work Act 2009* was filed. The Respondent would therefore have been aware of the necessity of gathering any evidence it thought necessary, including proofs of evidence from employees. As far as Ms Birch is aware, the main witnesses, who were employees of the Respondent at the time of her employment, are still employed by the Respondent.

In summary, it is submitted that the reasons for the delay are justifiable, that the delay has not been lengthy and that any prejudice caused to the Respondent by the inclusion of the Pre-19 May 2010 Events is outweighed by the prejudice which would be caused to Ms Birch should only a portion of the incidents comprising the discriminatory behaviour against her be included in the investigation.²⁰

15 On 19 July 2011 the EO Commissioner sent correspondence to Wesco Electrics advising that Ms Birch had alleged in the EO Complaint that she had been discriminated against on the grounds of age, sex and sexual harassment in the area of employment, but that part of her complaint involved allegations outside the 12 month limitation period.²¹ The EO Commissioner sought reasons as to why Wesco Electrics might be prejudiced if the out of time allegations were accepted.²²

16 On 29 July 2011 Ms Birch filed an affidavit in these proceedings affirmed on 28 July 2011.²³ In Ms Birch's 28 July 2011 Affidavit she recounts the following:

- a) that she was employed by Wesco Electrics between 2 February 2010 and 31 January 2011;²⁴
- b) that her "bosses" at Wesco Electrics were Michael and Rob Mannion, and that the other employee who did administrative work with her, and who was her supervisor, was Rhonda Anderson;²⁵

19 EO Commissioner's Affidavit, Annexure EOC05.

20 EO Commissioner's Affidavit, Annexure EOC05.

21 EO Act, s 83(4) and (5).

22 EO Commissioner's Affidavit, Annexure EOC06 (EO Commissioner's 19 July 2011 Letter).

23 Ms Birch's 28 July 2011 Affidavit.

24 Ms Birch's 28 July 2011 Affidavit at para 3.

25 Ms Birch's 28 July 2011 Affidavit at para 8; "Ms Anderson".

- c) that her employment with Wesco Electrics was terminated on 31 January 2011 without notice, and without previous warnings in relation to her employment, other than for very minor issues;²⁶
- d) that in relation to a request by Mike Mannion for her to pick him up from a restaurant called Cocos on 31 January 2011, Ms Birch says as follows:
11. On 31 January 2011, I was doing my work as normal. At about 3.00 pm the boss, Mike, texted me telling me to pick him up from Cocos. He had been having lunch with his mates there. Rhonda had dropped him off there.
 12. I messaged him back "Where is the love?" as in "Why aren't you asking me nicely?" He replied "In my pants".
 13. I messaged back "That is a bit inappropriate".
 14. He messaged back "Be here at 4.30 choppy chop".
 15. After that I did not reply. I did call him to make sure that he still wanted me to pick him up. I got to Cocos at about 4.00 pm. I went inside and found that he was not ready to leave. He was having a drink with one of his mates, Brad Zemek. Brad owns Bentley IGA. They got me a chair and offered me a drink. I said "No I'm fine. I have to drive". They got me a champagne anyway. I sipped it but did not drink it.
 16. Mike left the table to take a telephone call. I waited approximately 5 minutes until Mike came back. I was not happy to be there as I had just broken up with my boyfriend and was feeling upset about that, and I was upset about the text message Mike had sent me earlier.
 17. Mike said to me "What's wrong? You've come to lunch to pick us up and you're not in a happy mood. You are bringing me down". He told me to leave and said that he would get a taxi to the Subi Hotel. I told Mike that I would wait but that we should hurry up and leave because of the traffic. Mike eventually told me that I should just go back to work and he would get a taxi. He said that about four times. I said "Are you sure Mike?" and he said yes and I left. I had been there for about 20 minutes.
 18. Mike was on the phone to Rhonda while I was there. He was telling her to tell me to go home because I was annoying him. He put Rhonda on the telephone to me and I spoke to her. I then left Cocos.
 19. I messaged Mike about 15 minutes after I left and apologised for not being in the right frame of mind. I told Mike that I should have kept my personal life out of my professional life.
 20. He replied with "Yes you need to sort that out. However you are not required on Monday".²⁷
- e) that she attended a meeting at Wesco Electrics' office on the next Monday, at which the following occurred:
27. Mike asked if I wanted to know why I was being fired. I said "Yes, I would love to know". He said that I never want to do things, they have to tell me to do everything twice. An

²⁶ Ms Birch's 28 July 2011 Affidavit at para 9.

²⁷ Ms Birch's 28 July 2011 Affidavit at paras 11-20.

example he gave was that they have to tell me to get beers out of the fridge more than once and ask me to pick them up more than once. He did not really give me a specific reason for dismissing me.²⁸

- f) that after a major storm in Perth on 22 March 2010 which had caused damage to Wesco Electrics' office she went to the office to help clean up wearing a pair of gym tights. Mr Mike Mannion referred to her pants as "mumbles" or "mumblers", and thereafter called her "mumbles" or "mumblers" at work. It is said that he did so because of the gym tights worn by Ms Birch to help clean the office. Ms Birch says that she understands the term "to be slang for tight clothing on a woman, which allows a person to see the shape and movement of the women's genitals", and that she found the nickname offensive;²⁹
- g) that she would frequently have to pick up Mr Mike Mannion from lunch, mostly at Coco's Restaurant, and that he would insist that she sit down and have a drink even though she was driving, in work time and had outstanding work to complete, but she was always careful to only have one drink as she had to drive;³⁰
- h) that on one of the occasions on which she came to pick up Mr Mike Mannion from Coco's, one of his friends, Mark Marassis said to her "you should lower your top when you pick Mike up so I can see your cleavage", and that Mr Mike Mannion, who was sitting across from Mr Marassis, said nothing to her and just smiled.³¹ On this occasion, when Ms Birch and Mr Mike Mannion went to the car parked in the undercover car park, Mr Mike Mannion urinated on a pole in the car park;³²
- i) that at a time around the same date as Mr Mike Mannion's friend made a comment about her cleavage, set out above, she had to pick Mr Mike Mannion up from Coco's Restaurant and take him to the Como Hotel. Here Mr Mike Mannion put a hand on her thigh. When Ms Birch was driving him back to the office, he pushed her hair behind her shoulders whilst looking down her top and said "It looks better when it's behind your shoulders", to which Ms Birch responded "No, I like it how it is". When they arrived at work Mr Mike Mannion hugged Ms Birch three or four times, and then after she had walked across the road towards her car, Mr Mike Mannion called her back, and hugged her again;³³
- j) that on another occasion before Christmas 2010 Ms Birch went to Must Wine Bar for lunch with Messrs Mike and Rob Mannion, Ms Anderson and a friend of Mr Mike Mannion called Andrew. The following then occurred:

41. ... The men began talking about sex. I can't remember the exact words of the conversation. At one point, Andrew asked me if I liked to put my finger in my partner's anus during sex. I said that that was private and I refused to answer. Andrew then began calling me "Bridget with the dirty digit" for the remainder of the lunch. Both Mike and

28 Ms Birch's 28 July 2011 Affidavit at para 27.

29 Ms Birch's 28 July 2011 Affidavit at para 31.

30 Ms Birch's 28 July 2011 Affidavit at para 36.

31 Ms Birch's 28 July 2011 Affidavit at para 37.

32 Ms Birch's 28 July 2011 Affidavit at para 38.

33 Ms Birch's 28 July 2011 Affidavit at para 39.

Rob were at the table when this comment was made. Neither of them said anything or tried to stop Mike's friend from making the comment.³⁴

- k) that Mr Mike Mannion would send her rude emails at least a couple of times a week, and follow-up with inquiries as to what Ms Birch thought of the emails;³⁵
- l) that on another occasion in the second half of 2010 Mr Mike Mannion had been out to lunch with Andrew Doig,³⁶ and that Mr Doig had been on her computer, and had sent emails from her email address saying "Meet me in the toilet. I want to fuck" and other inappropriate messages, as a consequence of which Ms Birch had to send an email of apology to the men to whom the messages had been sent. Ms Birch says that Mr Mike Mannion was with Mr Doig when she left the office in the afternoon the message was sent;³⁷
- m) that on numerous occasions comments were made about Ms Birch's appearance, including the following:
 - i) Messrs Michael and Rob Mannion told her on a number of occasions to "dress for work in a way that would show ... cleavage";³⁸
 - ii) that Mr Mike Mannion called her "fat" on a number of occasions, told her that she should not be eating lunch, that she should be slimmer, and described her upper arms along the lines of them being "tuckshop arms";³⁹ and
 - iii) that Mr Mike Mannion said to her that she "should be a newsreader" because "when you stand up, everything looks shit";⁴⁰ and
- n) that towards the end of 2010 a job description was prepared for her, and that she was made to sit in the Wesco Electrics' boardroom with Mr Mike Mannion, Ms Anderson and Andrew Doig as Mr Mike Mannion went through the job description making comments that she could not do basic duties, including a comment where Mr Mike Mannion said "sending faxes — scrap that, she can't do that".⁴¹

17 In a further affidavit affirmed on 5 September 2011⁴² Ms Birch referred to the lunch at Must Wine Bar set out above and says as follows:

In the July Affidavit, I referred to a lunch at Must wine bar. When I swore the July Affidavit, I didn't remember how the conversation that ended in Andrew Doig calling me "Bridget with the dirty digit" started but I now agree that Rhonda said words to the effect that "a man's g-spot is in his anus". I did not say words to the effect of "I stick my finger in my boyfriend's ass all the time" or "I couldn't understand why my boyfriend didn't like it when I put my finger in his arse" or

34 Ms Birch's 28 July 2011 Affidavit at para 41.

35 Ms Birch's 28 July 2011 Affidavit at para 42.

36 Mr Doig.

37 Ms Birch's 28 July 2011 Affidavit at paras 48-51.

38 Ms Birch's 28 July 2011 Affidavit at para 53.

39 Ms Birch's 28 July 2011 Affidavit at para 54.

40 Ms Birch's 28 July 2011 Affidavit at para 56.

41 Ms Birch's 28 July 2011 Affidavit at para 55.

42 Ms Birch's 5 September 2011 Affidavit.

“There’s no problem with that, I do it to my boyfriend all the time”. I consider that sort of information to be private and was very embarrassed at being called “Bridget with the dirty digit”.⁴³

18 An employer association, the National Electrical and Communications Association,⁴⁴ responded to the EO Commissioner’s 19 July 2011 Letter by letter dated 4 August 2011 on behalf of Wesco Electrics.⁴⁵

19 The NECA 4 August 2011 Letter:

- a) objected to the EO Complaint being made on the basis of s 725 of the FW Act, alleging that the Application was an application of a kind described in s 726 of the FW Act,⁴⁶ and that the EO Complaint was a matter of a kind described in s 732 of the FW Act. The EO Commissioner was advised that, if the EO Complaint was not dismissed or stayed, Wesco Electrics would seek a permanent injunction from this Court under ss 14 and 15 of the *Federal Magistrates Act 1999* (Cth);⁴⁷
- b) objected to an extension of time for a variety of reasons, which are not presently relevant; and
- c) argued that the EO Complaint was oppressive because Wesco Electrics had already had to deal with the allegations made in two separate jurisdictions (the unfair dismissal application to Fair Work Australia⁴⁸ and the Application in this Court), and that additional and unreasonable costs were being incurred as a consequence, and that the EO Complaint was therefore an abuse of process.

20 The EO Commissioner wrote to Ms Birch on 17 August 2011 advising that:

I considered the submissions regarding the pre-19 May 2010 allegations being out of time and decided that good cause has been shown for all of events complained of from 2 February 2010 to be investigated.⁴⁹

21 The EO Commissioner wrote to Wesco Electrics on 17 August 2011 advising that:

I have considered the responses from you and Ms Birch regarding the events which occurred prior to 19 May 2010 and decided that good cause has been shown for all events complained of from 2 February 2010 to be investigated.⁵⁰

22 The EO Commissioner’s 17 August 2011 Wesco Electrics and Birch Letters did not address Wesco Electrics’ jurisdictional objection to the EO Commissioner dealing with the EO Complaint, nor did it explain why there was “good cause” to investigate those allegations falling outside the 12 month time limit.

43 Ms Birch’s 5 September 2011 Affidavit at para 33.

44 NECA.

45 NECA letter 4 August 2011, being Annexure WEO2 to Mr Nazareth’s 19 August 2011 Affidavit (NECA 4 August 2011 Letter).

46 It is in fact an application of a kind referred to in s 728(a) of the FW Act: see [32] below.

47 FM Act.

48 FWA.

49 EO Commissioner’s 17 August 2011 Letter, being annexure EOC10 to EO Commissioner’s Affidavit (EO Commissioner’s 17 August 2011 Birch Letter).

50 EO Commissioner’s 17 August 2011 Letter, being Annexure EOC11 to EO Commissioner’s Affidavit (EO Commissioner’s 17 August 2011 Wesco Electrics Letter).

23 The EO Commissioner's 17 August 2011 Wesco Electrics and Birch Letters also advised that a conciliation conference was being convened at the offices of the EO Commissioner on Tuesday 13 September 2011. A similar letter was sent to Mr Mike Mannion.

24 By email dated 18 August 2011 NECA advised the solicitors for Ms Birch that they intended to make an urgent application to this Court for an order to stay the EO Complaint.⁵¹

Application in a case

25 On 19 August 2011 Wesco Electrics filed an application in a case seeking the following orders:

1. The Respondent seeks that the hearing of this application be expedited, pursuant to Rule 5.01 of the *Federal Magistrates Court Rules 2001* (Cth).
2. The Respondent seeks that matter number CIC11/0293 in the Equal Opportunity Commission of Western Australia be stayed, pending further order of the court.
3. In the alternative, the Respondent seeks a declaration that the Equal Opportunity Commission of Western Australia has no jurisdiction in respect of the subject matter contained in matter CIC11/0293 by operation of Sub-division B of Division 3 of Part 6-1 of the *Fair Work Act 2009* (Cth).

Court orders — 25 August 2011

26 The application in a case came on before this Court on 25 August 2011,⁵² at which time the Court made orders, including orders:

- a) for the filing of an amended application in a case; and
- b) for the hearing of:
 - i) the amended application in a case; and
 - ii) an application to join the EO Commissioner as a third party to the proceedings.

Amended application in a case

27 On 26 August 2011 Wesco Electrics filed an amended application in a case in the following terms:

1. The Equal Opportunity Commissioner of Western Australia be stayed from proceeding with matter number CIC11/0293, pending further order of the court.
2. Pursuant to rule 13.11 of the Federal Magistrates Court Rules, the Applicant be barred from continuing with any proceeding other than PEG 110/2011.
3. In the alternative, this matter, PEG 110/2011, be summarily dismissed pursuant to rule 13.10 of the Federal Magistrates Court Rules.

28 Despite the terms of the amended application in a case the matter was argued on the basis that, in addition to the orders sought in the amended application in a case, that:

51 See Annexure WEO5 to Mr Nazareth's 19 August 2011 Affidavit.

52 25 August 2011 Orders.

- a) Ms Birch be barred from proceeding with any other application or complaint relating to the matter the subject of the Application on the basis of abuse of process generally, and not just on the basis of r 13.11 of the *Federal Magistrates Court Rules 2001* (Cth);⁵³ and
- b) an injunction issue against Ms Birch and the EO Commissioner on the basis of an abuse of process arising from the EO Complaint as it was a second application in relation to the same subject matter as the Application.

The Court has therefore considered the matter as if the above issues were part of the amended application in a case. That approach is consistent with the Court's obligation to consider the whole of the matter, and to act informally and with expedition.⁵⁴

Consideration

Section 725 of the FW Act

29 Section 725 of the FW Act provides as follows:

A person who has been dismissed must not make an application or complaint of a kind referred to in any one of sections 726 to 732 in relation to the dismissal if any other of those sections applies.

30 Lest there be any doubt about the meaning of s 725 of the FW Act the *Fair Work Bill 2008* (Cth) Explanatory Memorandum⁵⁵ provides that:

2707 This Subdivision is intended to prevent a person “double-dipping” when they have multiple potential remedies relating to a dismissal from employment by seeking to limit a person to a single remedy.

2708 Clauses 726 to 732 set out all of the potential remedies that may apply. Clause 725 is the key operative provision. It provides that if a person has made an application that falls within any of clauses 726 to 732 then they may not bring an application that falls within any of the other clauses.⁵⁶

31 There is no dispute that Ms Birch is a person who has been dismissed for the purposes of s 725 of the FW Act. The question which then arises is whether Ms Birch has made “an application or complaint of a kind referred to in any one of sections 726 to 732 of the FW Act in relation to the dismissal if any other of those sections applies”.

32 The Application is an application to a court under Div 2 of Pt 4-1 of the FW Act for orders in relation to a contravention of Div 5 of Pt 3-1 of the FW Act, in which s 351 of the FW Act, which is alleged to have been contravened, appears. The Application is an application under Div 2 of Pt 4-1 of the FW Act as it is an application under s 539 of the FW Act in relation to a contravention of a civil remedy provision, s 351(1) of the FW Act being a civil remedy provision by reason of s 539(2), item 11 of the FW Act. The Application is not an application which has been withdrawn by Ms Birch or which has failed for want of

53 FMC Rules.

54 *Federal Magistrates Court Rules 2001* (Cth), ss 3 and 14.

55 *Acts Interpretation Act 1901* (Cth), s 15AB(2)(e); *Fair Work Ombudsman v Wongtas Pty Ltd* (2011) 195 FCR 55; 210 IR 102 at [44] per Cowdroy J.

56 The Parliament of the Commonwealth of Australia, House of Representatives, *Fair Work Bill 2008* (Cth), Explanatory Memorandum, cl 2707 and 2708 (FW Bill Explanatory Memorandum).

jurisdiction.⁵⁷ The Application is therefore a general protections court application as defined in s 370(2) of the FW Act, and for the purposes of s 728(a) of the FW Act.

33 Because the Application was made before the EO Complaint the question which then arises is whether the EO Complaint is an “application or complaint” to which “any other of those sections applies”, that is any of ss 726 to 732 of the FW Act, save for s 728 which applies to the Application.

34 Wesco Electrics asserts that s 732 of the FW Act applies to the EO Complaint. Section 732 of the FW Act relevantly provides:

- (1) This section applies if:
 - (a) an application or complaint under another law has been made by, or on behalf of, the person in relation to the dismissal; and
 - (b) the application or complaint has not:
 - (i) been withdrawn by the person who made the application; or
 - (ii) failed for want of jurisdiction.
- (2) An *application or complaint under another law* is an application or complaint made under:
 - (a) a law of the Commonwealth (other than this Act); or
 - (b) a law of a State or Territory.

35 The EO Complaint is a “complaint alleging that a person [Wesco Electrics] has committed a contravention” of the EO Act, which has been “lodged in writing with the [EO] Commissioner”.⁵⁸

36 The EO Act is a law of a State, being a law of the State of Western Australia. It is thus “a law of a State” for the purposes of s 732(2)(b) of the FW Act. That s 732(2)(b) of the FW Act was intended to apply to State anti-discrimination and equal opportunity law is confirmed by the FW Bill Explanatory Memorandum, which provides that:

Clause 732 deals with an application or complaint under another law. This includes an application or complaint made under a law of a State or Territory. This reflects the fact that various State or Territory laws are not excluded by Part 1-3 of the Bill (Application of this Act) and national system employees could therefore seek remedies under those Acts. For example, a person whose employment has been terminated or who has been adversely treated in employment for reasons such as race, colour, sex, sexual preference, age or other discriminatory reasons could seek a remedy under a State or Territory anti-discrimination or equal opportunity law, or a remedy for contravention of protections under Division 5 of Part 3-1 (General Protections), but not both.⁵⁹

37 Because of the use of the disjunctive “or” in the phrase “application or complaint” it is clear that the Commonwealth Parliament intended ss 725 and 732 of the FW Act to apply to any “complaint” made under a law of a State, thereby including a complaint under s 83(1) of the EO Act. The EO Complaint is therefore a “complaint under another law” under s 732(2) of the FW Act.

38 What then is the effect of s 725 of the FW Act in relation to the EO Complaint? To answer that question it is first necessary to look at the proper construction of s 725 of the FW Act.

⁵⁷ FW Act, s 728(b).

⁵⁸ EO Act, s 83(1); EO Commissioner’s Affidavit, para 2 and EO Complaint Form.

⁵⁹ FW Bill Explanatory Memorandum, cl 2715.

- 39 Under s 725 of the FW Act:
- a) first, a person making an application or complaint must have been dismissed;
 - b) second, that dismissed person must have made an application or complaint of a kind referred to in ss 726-732 of the FW Act that has not been withdrawn or failed for want of jurisdiction; and
 - c) third, the dismissed person “must not make” another application or complaint of a kind referred to in ss 726-732 of the FW Act “in relation to the dismissal” unless the initial application been withdrawn or failed for want of jurisdiction.

40 The first and second elements of s 725 of the FW Act are fulfilled in this case, because:

- a) Ms Birch is the person making the Application and she has been dismissed; and
- b) the Application is an application under s 728(a) of the FW Act which has not been withdrawn or failed for want of jurisdiction.

41 What then is meant by the use of the phrase “must not make” in s 725 of the FW Act?

42 The use of “must” is indicative of an imperative command, either positive or negative, depending upon the word or words which follow it in the relevant statutory provision. It expresses necessity in the sense of an obligation or requirement.⁶⁰

43 In *Posner v Collector for Interstate Destitute Persons (Vic)*,⁶¹ one High Court Justice observed that:

Section 56 of the Justices Act (WA) requires, with certain immaterial exceptions, that the summons *must* be served on the defendant personally. “Must” is a word of absolute obligation and occurs in a section which is concerned with a fundamental principle of justice. It is not merely directory. Compliance is essential to an effective hearing of the summons.⁶²

44 In *Kosovich v Mancini*,⁶³ the South Australian Supreme Court was dealing with road transport legislation which provided that the mass of a vehicle “must be determined in accordance with the regulations”.⁶⁴ The South Australian Supreme Court observed as follows:

It seems to me that “must be determined” imposes an obligation which cannot be regarded as directory only. I have looked both in the dictionary and in *Maxwell*. The appropriate meaning of “must” in the Shorter Oxford English Dictionary is:

Expressing necessity: Am (is are) obliged or required to; have (has) to; it is necessary that (“I, you, he, it, etc) should”. “In ordinary usage, ‘may’ is permissive and ‘must’ is imperative” (*Maxwell on Interpretation of Statutes* 12th ed. (1969) p 324),⁶⁵

and:

60 *The Shorter Oxford English Dictionary on Historical Principles*, Vol II (Oxford: Clarendon Press, 1973), p 1376 (Shorter Oxford English Dictionary).

61 *Posner v Collector for Interstate Destitute Persons (Vic)* (1946) 74 CLR 461 (*Posner*).

62 *Posner v Collector for Interstate Destitute Persons (Vic)* (1946) 74 CLR 461 at 490 per Williams J.

63 *Kosovich v Mancini* (1982) 31 SASR 272 (*Kosovich*).

64 *Kosovich v Mancini* (1982) 31 SASR 272 at 275 per Millhouse J.

65 *Kosovich v Mancini* (1982) 31 SASR 272 at 275 per Millhouse J.

If the wish of Parliament had been to make the subsection directory it could easily have done so by using the word “may” instead of the word “must”.⁶⁶

45 In *Australian Fisheries Management Authority v PW Adams Pty Ltd*⁶⁷ the Full Court of the Federal Court was dealing with fisheries management legislation, and in particular a provision which provided that certain objectives “must be pursued by the Minister and the Authority in the administration of the Act, ... and by the Authority in the performance of its functions”. Each of the five objectives were conjoined by the use of the word “and”. The Full Court of the Federal Court held that the use of the word “must”, and the linking of each of the five objectives with the word “and”, meant that each objective must be pursued by the Minister and by the Authority.⁶⁸

46 In dealing with migration legislation which required that applications “must” be lodged within a certain time limit, the Federal Court, having cited *Posner* and *Kosovich* as authority for the proposition that “must” is a word of absolute obligation, went on to observe that:

[s]uch an interpretation also accords with the principle that enactments requiring that a specified procedure be followed in courts are usually mandatory and not merely directory.⁶⁹

47 In *Broad Spectrum Training Pty Ltd v Bidding Buzz Ltd*⁷⁰ this Court, having set out the passages from the authorities cited immediately above, observed that:

The above authorities strongly indicate that the use of the word “must” in the phrase “must advise” imposes an obligation on the Court to exercise the required function, namely, to advise the parties to use the dispute resolution process, being mediation in this case.⁷¹

48 The word “not” is an adverb of negation.⁷²

49 In *Halwood Corp Ltd v Roads Corp*⁷³ in incisive obiter dicta remarks concerning allegedly plain English drafting, the Victorian Supreme Court Court of Appeal observed that “must not” was a “blunt instrument” when used in a statute, and not always appropriate as a substitute for “shall not”,⁷⁴ and went on to say that:

Even so, it may be useful to acknowledge that, whatever can be said of “must” as a preferred manner of designated and personal obligation, “must not” is by no means always logically interchangeable with “shall not”; and it is generally not so unless a personal prohibition is intended.⁷⁵

66 *Kosovich v Mancini* (1982) 31 SASR 272 at 276 per Millhouse J.

67 *Australian Fisheries Management Authority v PW Adams Pty Ltd* (1995) 61 FCR 314 (Adams).

68 *Australian Fisheries Management Authority v PW Adams Pty Ltd* (1995) 61 FCR 314 at 332 per Sheppard J (with whom Tamberlin J at 334 and Lehane J at 336 agreed).

69 *Wang v Minister for Immigration and Multicultural Affairs* (1997) 71 FCR 386 at 391 per Merkel J.

70 *Broad Spectrum Training Pty Ltd v Bidding Buzz Ltd* (2010) 244 FLR 335 (*Bidding Buzz*).

71 *Broad Spectrum Training Pty Ltd v Bidding Buzz Ltd* (2010) 244 FLR 335 at [40] per Lucev FM.

72 Shorter Oxford English Dictionary, Vol II, p 1415.

73 *Halwood Corp Ltd v Roads Corp* [1998] 2 VR 439 (*Halwood Corporation*).

74 *Halwood Corp Ltd v Roads Corp* [1998] 2 VR 439 at 445 per Tadgell JA.

75 *Halwood Corp Ltd v Roads Corp* [1998] 2 VR 439 at 446 per Tadgell JA (emphasis added).

50 The words “must not” appear in s 32AA(1) of the *Federal Court of Australia Act 1976* (Cth),⁷⁶ which provides that:

- (1) Proceedings must not be instituted in the Court in respect of a matter if:
 - (a) the Federal Magistrates Court has jurisdiction in that matter; and
 - (b) proceedings in respect of an associated matter are pending in the Federal Magistrates Court.⁷⁷

51 In *Boumelhem v Commonwealth Bank of Australia*⁷⁸ there were bankruptcy proceedings before this Court that had been adjourned pending the completion of related proceedings in the District Court of New South Wales. An application to the Federal Court sought a stay of the bankruptcy proceedings until an appeal from the judgment of the District Court of New South Wales was heard, and an order that the operation of any sequestration order made in bankruptcy proceedings be similarly stayed.⁷⁹ The Federal Court, having set out s 32AA(1) of the FC Act, observed that:

The application to this Court therefore appears statute barred.⁸⁰

and:

As the application seems statute-barred and no argument was advanced to the contrary and as the orders sought were moot, the application was dismissed.⁸¹

52 In *Carantinos v Magafas*⁸² an order was sought from the Federal Court restraining a creditor from taking steps in this Court to obtain a sequestration order in circumstances where a creditor’s petition had earlier been presented in this Court.⁸³ In *Carantinos* the Federal Court said:

8. It is plain for the reasons given above that the proceeding that Mr Carantinos has purportedly instituted in this Court is in respect of a matter in which the Federal Magistrates Court has jurisdiction. The proceeding in the Federal Magistrates Court in which Mr Carantinos wishes the respondent to be restrained by order of this Court from taking further steps is a proceeding that was initiated in that court by the presentation of the respondent’s creditor’s petition. It is beyond argument, in my view, that that proceeding is in respect of an “associated matter” within the meaning of s 32AA(1)(b). Subject to the provisions of s 32AA(2), Mr Carantinos’s application to this Court is a proceeding that s 32AA(1) provides must not be instituted.
9. The question therefore arises of whether this proceeding should be transferred to the Federal Magistrates Court. The application is in the form of an application for an anti-suit injunction in respect of a proceeding in

⁷⁶ FC Act.

⁷⁷ A similarly worded provision with respect to commencing matters in this Court where a matter has been commenced in the Federal Court appears in s 19(1) of the FM Act: “Proceedings must not be instituted in the Federal Magistrates Court in respect of a particular matter if proceedings in respect of an associated matter are pending in the Family Court or the Federal Court”.

⁷⁸ *Boumelhem v Commonwealth Bank of Australia* [2008] FCA 1121 (*Boumelhem*).

⁷⁹ *Boumelhem v Commonwealth Bank of Australia* [2008] FCA 1121 at [2] and [7] per Buchanan J.

⁸⁰ *Boumelhem v Commonwealth Bank of Australia* [2008] FCA 1121 at [9] per Buchanan J.

⁸¹ *Boumelhem v Commonwealth Bank of Australia* [2008] FCA 1121 at [12] per Buchanan J.

⁸² *Carantinos v Magafas* (2008) 6 ABC(NS) 587 (*Carantinos*).

⁸³ *Carantinos v Magafas* (2008) 6 ABC(NS) 587 at [8] per Branson J.

the Federal Magistrates Court. It would be inappropriate for such an application to be made in the Federal Magistrates Court. Moreover, all of the factors on which Mr Carantinos wished to rely before this Court on seeking the anti-suit injunction can be raised by him in the Federal Magistrates Court in opposing the making of the sequestration order sought by the creditor's petition (s 52(2)(b) of the *Bankruptcy Act*). In these circumstances it seems to me to be inappropriate to transfer the proceeding to the Federal Magistrates Court. The application will therefore be dismissed.⁸⁴

The application was dismissed, with indemnity costs awarded.⁸⁵

53 It is apparent from both *Boumelhem* and *Carantinos* that the Federal Court has interpreted the words "must not" in the phrase "proceedings must not be instituted" as imposing a statutory bar on the institution of other proceedings in the Federal Court where there are existing proceedings in the Federal Magistrates Court.

54 The interpretation adopted by the Federal Court of the words "must not" in s 32AA(1) of the FC Act accords with the natural meaning of that phrase. It is difficult to see why those words ought not be given similar meaning, and effect, in s 725 of the FW Act insofar as they purport to prohibit the making of an application of the type set out, where there has already been an application made of another of the types set out.

55 In *Attorney-General (Vic); Ex rel Black v Commonwealth*⁸⁶ the High Court of Australia was concerned with the validity of laws sought to be challenged by reference to s 116 of the *Constitution*, which provides that:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

56 As was the case in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*,⁸⁷ s 116 of the *Constitution*, particularly because of the words "shall not make", was found in *Black* to be a section imposing an absolute prohibition on the Commonwealth Parliament legislating with respect to the matters which followed that phrase in s 116 of the *Constitution*.⁸⁸ How much stronger then is the effect of the "blunt instrument"⁸⁹ that is "must not make" in s 725 of the FW Act.

57 In *Ilardo v Rail Corp (NSW)*⁹⁰ the Full Bench of FWA found that an application for unfair dismissal to FWA under s 729 of the FW Act was

84 *Carantinos v Magafas* (2008) 6 ABC(NS) 587 at [8]-[9] per Branson J.

85 *Carantinos v Magafas* (2008) 6 ABC(NS) 587 at [11] per Branson J.

86 *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559 (*Black*).

87 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 (*Jehovah's Witnesses*).

88 *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559 at 576-577 and 579-581 per Barwick CJ, 605 per Stephen J, 618 per Mason J and 621 per Murphy J; *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 at 123 per Latham CJ and 156 per McTiernan J.

89 *Halwood Corp Ltd v Roads Corp* [1998] 2 VR 439 at 445 per Tadgell JA.

90 *Ilardo v Rail Corp (NSW)* (2010) 197 IR 397 (*Ilardo*).

precluded where the applicant had previously made an application in relation to dismissal to the Transport Appeals Board under the *Transport Appeal Boards Act 1980* (NSW). The Full Bench of FWA found that:

Mr Ilardo's previous appeal to the TAB was an application made under the *Transport Appeals Board Act 1980* (NSW). It was an "application or complaint under another law" being an application or complaint made under a law of a State or Territory (s 732 of the Act). Applying the rule in s 725, Mr Ilardo is barred from making an application of a kind referred to in s 729 (an unfair dismissal application) as s 732 applies.⁹¹

58 In *Du v University of Ballarat*⁹² a Full Bench of FWA was dealing with an appeal in respect of an unfair dismissal remedy application made by a Dr Du against the University of Ballarat.⁹³ The University of Ballarat had objected to the application on jurisdictional grounds asserting that it offended Subdiv B of Div 3 of Pt 6 item 1 of the FW Act.⁹⁴ The Full Bench of FWA observed that:

That subdivision precludes multiple applications in respect of termination of employment except in certain circumstances.⁹⁵

59 Dr Du had made a complaint to the Victorian Equal Opportunity and Human Rights Commission⁹⁶ alleging race discrimination by the University of Ballarat.⁹⁷ The application for an unfair dismissal remedy by Dr Du was made under s 394 of the FW Act.⁹⁸ The Full Bench of FWA held that Dr Du's complaint to the VEOHRC constituted a complaint covered by s 732 of the FW Act, because the complaint alleged that he had had to resign from his employment with the University of Ballarat due to race discrimination by representatives of that university, which complaint was not withdrawn by Dr Du or did not fail for want of jurisdiction.⁹⁹ The complaint made by Dr Du to VEOHRC alleging race discrimination covered a period from February 2009 until his eventual resignation at the end of August 2009.¹⁰⁰

60 The Full Bench of FWA, having considered ss 725 and 732 of the FW Act, and the FW Bill Explanatory Memorandum, concluded that:

24. Accordingly, we consider Dr Du was precluded by the operation of the provisions of Subdivision B of Division 3 of Part 6-1 of the FW Act from making his unfair dismissal remedy application under s 394 of the FW Act

91 *Ilardo v Rail Corp (NSW)* (2010) 197 IR 397 at [23] per Hamberger SDP, Hamilton DP, Simpson C.

92 *Du v University of Ballarat* (2011) 211 IR 382 (*Du*).

93 *Du v University of Ballarat* (2011) 211 IR 382 at [1] per Acton SDP, Hamilton DP and McKenna C.

94 *Du v University of Ballarat* (2011) 211 IR 382 at [2] per Acton SDP, Hamilton DP and McKenna C.

95 *Du v University of Ballarat* (2011) 211 IR 382 at [2] per Acton SDP, Hamilton DP and McKenna C.

96 VEOHRC.

97 *Du v University of Ballarat* (2011) 211 IR 382 at [7] per Acton SDP, Hamilton DP and McKenna C.

98 *Du v University of Ballarat* (2011) 211 IR 382 at [15] per Acton SDP, Hamilton DP and McKenna C.

99 *Du v University of Ballarat* (2011) 211 IR 382 at [16] per Acton SDP, Hamilton DP and McKenna C.

100 *Du v University of Ballarat* (2011) 211 IR 382 at [7] per Acton SDP, Hamilton DP and McKenna C.

on 23 December 2010. This is because he made a complaint to the VEOHRC on 3 June 2009 which, for the reasons we have already given, was a complaint within the meaning of s 732 of the FW Act which has not been withdrawn by him or failed for want of jurisdiction.

25 Dr Du's s 394 application in matter U2010/15460 is therefore dismissed.¹⁰¹

61 Section 725 of the FW Act imposes a personal prohibition¹⁰² on a person making a second application or complaint of a kind to which one of ss 726-732 of the FW Act apply when there has already been made an application or complaint of a kind to which one other of ss 726 and 732 of the FW Act apply. That meaning:

- a) is plain on the face of the statute;
- b) was intended by the Commonwealth Parliament, as confirmed by the extracts from the FW Bill Explanatory Memorandum set out above;¹⁰³ and
- c) is confirmed by relevant case law.

62 A dismissed person may therefore make:

- a) a general protections court application; or
- b) an application under a State or Territory anti-discrimination or equal opportunity law "in relation to" their dismissal,

but not both.

63 Therefore, s 725 of the FW Act acts as a personal prohibition on Ms Birch making a second complaint of a kind to which s 732 of the FW Act applies, that is, from making the EO Complaint, provided that the EO Complaint is a matter "in relation to" Ms Birch's dismissal. It is to that issue the Court now turns.

In relation to

64 Ms Birch submitted that s 725 of the FW Act did not apply because the EO Complaint is not a matter "in relation to" Ms Birch's dismissal. Ms Birch argued that this is so because the allegations in the EO Complaint spanned the term of Ms Birch's employment by Wesco Electrics, and did not relate exclusively, or even predominantly, to Ms Birch's eventual dismissal.

65 That raises the question as to what is meant by the phrase "in relation to the dismissal" in s 725 of the FW Act, it being the second application or complaint that must be "in relation to the dismissal". In this case, the Court has already determined that the EO Complaint was the last made application or complaint, and an application or complaint of a kind referred to in s 732 of the FW Act. The question now becomes whether the EO Complaint is "in relation to" Ms Birch's dismissal.

66 In *Travelex Ltd v Federal Commissioner of Taxation*¹⁰⁴ the majority in the High Court of Australia found that a purchaser of foreign currency obtained rights that attached to, or were constituted by, the ability to use the currency, without which, property in the currency was worthless. Therefore, the supply of foreign currency (on the departure side of the customs barrier at Sydney Airport) was a supply "in relation to" the rights that attended upon ownership of

101 *Du v University of Ballarat* (2011) 211 IR 382 at [24]-[25] per Acton SDP, Hamilton DP and McKenna C.

102 *Halwood Corp Ltd v Roads Corp* [1998] 2 VR 439 at 446 per Tadgell JA.

103 See [30] and [36] above.

104 *Travelex Ltd v Federal Commissioner of Taxation* (2010) 241 CLR 510 (*Travelex*).

that currency, and where it was evident that the currency was to be used overseas, the supply was therefore free from the imposition of the goods and services tax.¹⁰⁵

67 The principal majority judgment in *Travellex* observed that:

It may readily be accepted that “in relation to” is a phrase that can be used in a variety of contexts, in which the degree of connection that must be shown between the two subject matters joined by the expression may differ. It may also be accepted that “the subject matter of the inquiry, the legislative history, and the facts of the case” are all matters that will bear upon the judgment of what relationship must be shown in order to conclude that there is a supply “in relation to” rights.¹⁰⁶

and further that:

What the Act requires is that there be a supply “in relation to” rights; the operation of the Act does not call for attention to be given to the particular content of the rights.¹⁰⁷

68 In *O’Grady v Northern Queensland Co Ltd*¹⁰⁸ it was said that:

The words “in relation to”, read out of context, are wide enough to cover every conceivable connexion. But those words should not be read out of context, which in this case is provided by the ... Act What is required is a relevant relationship, having regard to the scope of the Act. Where jurisdiction is dependent upon a relation with some matter or thing, something more than a coincidental or mere connexion — something in the nature of a relevant relationship — is necessary¹⁰⁹

69 In *O’Grady* the phrase “in relation to” was said to be one which “subject to any contrary indication derived from its context or drafting history, ... requires no more than a relationship, whether direct or indirect, between two subject matters”.¹¹⁰ It has also been said to be a phrase of wide and general import, not to be read down in the absence of some compelling reason to do so.¹¹¹

70 In *HP Mercantile Pty Ltd v Federal Commissioner of Taxation*¹¹² the Full Court of the Federal Court of Australia observed that:

It was common ground that the words “relates to” are wide words signifying some connection between two subject matters. The connection or association signified by the words may be direct or indirect, substantial or real. It must be relevant and usually a remote connection would not suffice. The sufficiency of the connection or association will be a matter for judgment which will depend, among other things, upon the subject matter of the enquiry, the legislative history, and the facts

105 *Travellex Ltd v Federal Commissioner of Taxation* (2010) 241 CLR 510 at [21]-[38] per French CJ and Hayne J; at [46]-[57] per Heydon J.

106 *Travellex Ltd v Federal Commissioner of Taxation* (2010) 241 CLR 510 at [25] per French CJ and Hayne J.

107 *Travellex Ltd v Federal Commissioner of Taxation* (2010) 241 CLR 510 at [32] per French CJ and Hayne J.

108 *O’Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 (*O’Grady*).

109 *O’Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 367 per Dawson J.

110 *O’Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 376 per McHugh J.

111 *Fountain v Alexander* (1982) 150 CLR 615 at 629 per Mason J; see also *Huntley Management Ltd v Timbercorp Securities Ltd* (2010) 187 FCR 151 at [47] per Rares J.

112 *HP Mercantile Pty Ltd v Federal Commissioner of Taxation* (2005) 143 FCR 553 (*HP Mercantile*).

of the case. Put simply, the degree of relationship implied by the necessity to find a relationship will depend upon the context in which the words are found.¹¹³

71 In *Australian Communications Network Pty Ltd v Australian Competition and Consumer Commission*¹¹⁴ the Full Court of the Federal Court held that in determining whether a matter was “in relation to” another matter, “the question is whether there is a relevant, sufficient or material connection or relationship, rather than merely a causal connection or relationship”.¹¹⁵ In *Australian Communications Network* the Full Court of the Federal Court said that the approach set out above in *O’Grady* emphasised “the need for attention to the legislative context and purpose” and was “an example of the primacy of context”.¹¹⁶ In context, one of the matters to be considered here is what mischief s 725 of the FW Act was intended to remedy.

72 That the expression “in relation to” gathers meaning from both the context in, and purpose for, which it appears, is a consistent theme in Federal Court judgments relating to that expression.¹¹⁷ The consideration of context in each case limits the precedential value of prior judgments in considering the proper interpretation and reach of “in relation to” in the specific circumstances presently before the Court.¹¹⁸ Context is also important to a consideration of whether the relationship need be:

- a) direct or substantial;
- b) indirect or less than substantial;
- c) affecting one term of the relationship; or
- d) affecting all of the terms of the relationship.¹¹⁹

73 In *Tooheys* the “vital question” was said to be “whether the instrument ‘relates’ and not whether it may be ‘related’ by an examination of extraneous circumstances”.¹²⁰

74 The phrase “in relation to” does not extend to tenuous or remote

113 *HP Mercantile Pty Ltd v Federal Commissioner of Taxation* (2005) 143 FCR 553 at [35] per Hill J (with whom Stone and Allsop JJ agreed).

114 *Australian Communications Network Pty Ltd v Australian Competition and Consumer Commission* (2005) 146 FCR 413 (*Australian Communications Network*).

115 *Australian Communications Network Pty Ltd v Australian Competition and Consumer Commission* (2005) 146 FCR 413 at [29] per Heerey, Merkel and Siopis JJ, following an earlier judgment of the Full Court of the Federal Court in *J & G Knowles & Assoc Pty Ltd v Federal Commissioner of Taxation* (2000) 96 FCR 402 at [22]-[23] and [26] per Heerey, Merkel and Finkelstein JJ.

116 *Australian Communications Network Pty Ltd v Australian Competition and Consumer Commission* (2005) 146 FCR 413 at [26] per Heerey, Merkel and Siopis JJ.

117 See, for example, *Woodside Energy Ltd v Federal Commissioner of Taxation* (2006) 155 FCR 357 at [57] per French J (*Woodside Energy*); *Australian Securities and Investments Commission v Citrofresh International Ltd* (2007) 164 FCR 333 at [66] per Goldberg J (*Citrofresh*).

118 *Australian Securities and Investments Commission v Citrofresh International Ltd* (2007) 164 FCR 333 at [67] and [71] per Goldberg J.

119 *Tooheys Ltd v Commissioner of Stamp Duties (NSW)* (1961) 105 CLR 602 at 614 per Dixon CJ and 620-621 per Taylor J (*Tooheys*); *Joye v Beach Petroleum NL* (1996) 67 FCR 275 at 285 per Beaumont and Lehane JJ.

120 *Tooheys Ltd v Commissioner of Stamp Duties (NSW)* (1961) 105 CLR 602 at 622 per Taylor J.

relationships.¹²¹ Rather, a statutory test of relationship requires that the relationship “must lie within the bounds of relevance to the statutory purpose”.¹²²

75 The statutory purpose for which s 725 of the FW Act was enacted was to prevent an applicant, having filed an application or complaint of one type in relation to their dismissal, from filing an application or complaint of another type in relation to their dismissal. Applied to the present context, it is to prevent an applicant having filed a general protections court application in relation to their dismissal in this Court, from lodging an equal opportunity complaint in relation to their dismissal under a State equal opportunity law. The statutory purpose, put simply, is to limit an applicant to a single remedy.¹²³

76 The question, in this matter, is whether the EO Complaint is “in relation to” the dismissal which is the subject of the Application?

77 The Application alleges adverse action by Wesco Electrics against Ms Birch as an employee, “because of” her “age and sex”, and alleges “[in] particular” that Ms Birch “was dismissed because she refused to drink alcohol and socialise with the respondent’s director Michael Mannion and his friends, and that she would not have been dismissed for that reason if not for the fact that she was young and female”.¹²⁴

78 The EO Complaint alleges age and sex discrimination, and sexual harassment, on the bases (amongst others) that:

1.5 [Wesco Electrics insisted] that the Applicant drink alcohol and socialise with Mike Mannion and his friends;

and that:

2. In relation to point 1.5 above, the Applicant says that the Respondent discriminated against her by terminating her employment on the first occasion that she refused to drink alcohol and socialise with Mr Mannion and his friends.

79 The allegations made by Ms Birch in relation to her dismissal are expressed in almost identical terms in the Application and the EO Complaint.

80 Asked to attach documents that may help the EO Commissioner with the required investigation under the EO Act Ms Birch attached her letter of termination of employment. Asked “how has this affected you?” Ms Birch’s response was as follows:

I was subjected to mental anguish, embarrassment and humiliation during [sic] my employment. My employment was then wrongfully terminated due to my failure to tolerate and accept the discrimination.

81 The content of the EO Complaint and the Application make manifest the direct link between them. They both relate to, and seek to have, on the one hand, the EO Commissioner, and on the other, this Court, deal with Ms Birch’s dismissal, and in both instances it is alleged, on essentially the same factual

121 *Australian Securities and Investments Commission v Citofresh International Ltd* (2007) 164 FCR 333 at [66] per Goldberg J; *Woodside Energy Ltd v Federal Commissioner of Taxation* (2006) 155 FCR 357 at [57] per French J.

122 *Woodside Energy Ltd v Federal Commissioner of Taxation* (2006) 155 FCR 357 at [58] per French J.

123 See the extracts from the FW Bill Explanatory Memorandum at [30] and [36] above.

124 Claim Form set out at [5] above.

basis, discrimination on the basis of age and sex resulting in Ms Birch's dismissal from her employment with Wesco Electrics. The EO Complaint also alleges discrimination arising from sexual harassment, and although sexual harassment is not a specified head of discrimination for the purposes of adverse action under s 351 of the FW Act, the Application clearly identifies alleged sexual harassment of Ms Birch, and sexual harassment can constitute sex discrimination where a statute proscribes sex discrimination but does not mention sexual harassment.¹²⁵ Therefore, there is a direct relationship between the Application and the EO Complaint. The directness of that relationship is, having regard to the statutory intent behind s 725 of the FW Act, more than sufficient to establish that the EO Complaint is "in relation to" the dismissal the subject of the Application.

82 There is further evidence that supports the conclusion reached by the Court above that the EO Complaint is "in relation to" the dismissal the subject of the Application. That is contained in Ms Birch's Solicitors 18 July 2011 Letter which indicates that Ms Birch (or at least her solicitors) "considered ... the sexual harassment elements of Ms Birch's allegations also fell within the provisions of the ... [EO Act] and that a complaint was appropriate pursuant to section 83 of the ... [EO Act]".¹²⁶ Thus, allegations of sexual harassment related not only to the Application, but "also" to the EO Complaint, and, insofar as the Application is concerned are clearly intended to be part of the claim of adverse action on the basis of sex.

83 The allegations referred to, that is those of sexual harassment in the EO Complaint, are also the allegations contained within the Application. As can be seen from the following table, each allegation of sexual harassment raised in the EO Complaint is also dealt with in Ms Birch's 28 July 2011 Affidavit which has been filed in support of the Application.

EO Complaint — paragraph no.	Allegation — summary	Ms Birch's 28 July 2011 Affidavit — paragraph no.
1.1	Being sent explicit pornographic material by email.	42-47
1.2	Allowing the sending of emails from email account with content such as "Meet me in the toilet I want to fuck".	48-51
1.3.	Treating in a demeaning manner.	33
1.4	Being required to drive Mike Mannion and drink alcohol.	34, 39 and 40
1.5	Being required to drink alcohol and socialise with Mike Mannion and his friends.	36
1.6	Sending sexual text messages.	12

¹²⁵ *Aldridge v Booth* (1988) 80 ALR 1 at 16-17 per Spender J, and cases there cited; *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217 at 274-276 per French J; *Elliott v Nanda* (2001) 111 FCR 240 at [127] per Moore J.

¹²⁶ See extract from Ms Birch's Solicitors 18 July 2011 Letter at [14] above.

EO Complaint — paragraph no.	Allegation — summary	Ms Birch's 28 July 2011 Affidavit — paragraph no.
1.7	Being told at a restaurant to lower top so that cleavage could be seen.	37
1.8	Mike Mannion urinating in the undercover car park of the restaurant.	38
1.9	Being told to dress for work in a way that would show cleavage.	53
1.10	Mike Mannion placing his hand on her thigh and hugging her several times.	39
1.11	Mike Mannion calling her by the nickname "Mumbles" or "Mumblers" after she arrived to help clean the office after the March 2010 hailstorm wearing a pair of gym tights.	31
1.12	Mike Mannion referring to her by the name of "Rachael", a previous employee.	32
1.13	Mike Mannion and his friend ridiculing her as they read through her job description.	55
1.14	Mike Mannion regularly making jibes about her weight.	56
1.15	Mike Mannion making frequent other references to her body, including telling her she should not be eating lunch, calling her fat, telling her that she should be slimmer, and teasing her about the size of her upper arms.	54
1.16	Being asked at a work lunch whether she liked to place her finger into her partner's anus during sexual intercourse, and after she refused to answer, being called "Bridget with a dirty digit" for the remainder of the lunch.	41

84 It can thus be seen that not only is there a direct relationship between the EO Complaint and the Application in the manner otherwise described above, but also a direct relationship between the particulars of the allegations in support of the EO Complaint and the affidavit evidence in support of the Application. Such is the directness of the relationship that every particular of the EO Complaint is the subject of affidavit evidence in support of the Application. Thus, whilst it is true to say, as Ms Birch does in submissions, that the EO Complaint involves allegations spanning the terms of Ms Birch's employment by Wesco Electrics, it is not true to say, as her submissions also do, that the EO Complaint does not relate exclusively, or even predominantly, to Ms Birch's eventual dismissal. As the above analysis indicates, all of the matters the subject of the EO Complaint

are relied upon as evidence in support of the Application, and therefore must, on Ms Birch's own case, be evidence relevant to, and therefore in relation to, her dismissal, which is the subject of the Application. In any event, the use of the phrase "in relation to" does not require exclusivity or predominance, but rather a relationship, other than a tenuous or remote relationship.¹²⁷

85 The relationship between the Application and the EO Complaint is far from tenuous or remote. Indeed, the relationship here is direct, both as to:

- a) the general nature of the matters alleged, that is discrimination on the grounds of sex (including sexual harassment) and age; and
- b) the supporting particulars and evidence to the EO Complaint and the Application.

86 The EO Complaint is therefore a matter "in relation to" Ms Birch's dismissal. The EO Complaint is therefore a complaint of a kind referred to in s 725 of the FW Act, and, therefore, a complaint which Ms Birch is statutorily prohibited from making.

87 In the present context it is clear that s 725 of the FW Act was intended to have a wide operation so as to restrict a person in the position of Ms Birch to the selection of a single remedy. In this case, that single remedy is the Application.

Jurisdiction of the Court

Wesco Electrics Submissions

88 Wesco Electrics asserts that the Court is a federal court under the *Constitution*, having original jurisdiction vested in it by express provision of a law of the Federal Parliament,¹²⁸ and the capacity to bind the Crown in each of its capacities.¹²⁹

89 Wesco Electrics says that jurisdiction is conferred on this Court in relation to any civil matter arising under the FW Act,¹³⁰ and specifically in the Fair Work Division of this Court in relation to an application under the FW Act, or an application for an injunction,¹³¹ or an application for a declaration, in relation to a matter arising under the FW Act.¹³²

90 Wesco Electrics notes that s 568 of the FW Act provides that nothing in the FW Act limits the powers of this Court under ss 14, 15 or 16 of the FM Act.

91 Wesco Electrics asserts that the capacity to make orders, and to make an injunction, includes the capacity to injunct proceedings before a State commission or tribunal, citing the judgment of the Federal Court of Australia in *Tristar Steering & Suspension Australia Ltd v Industrial Relations Commission (NSW)*.¹³³

127 *Woodside Energy Ltd v Federal Commissioner of Taxation* (2006) 155 FCR 357 at [57] per French J; *Australian Securities and Investments Commission v Citofresh International Ltd* (2007) 164 FCR 333 at [66] per Goldberg J.

128 FM Act, s 10(1)(a).

129 FM Act, s 6.

130 FW Act, s 566.

131 FM Act, s 15.

132 FM Act, s 16.

133 *Tristar Steering & Suspension Australia Ltd v Industrial Relations Commission (NSW)* (2007) 161 IR 330 (*Tristar*).

EO Commissioner's submissions

- 92 The EO Commissioner submitted that:
- a) the Court does not have the power to interfere with the functions of a State administrative or investigative agency when exercising its jurisdiction;
 - b) in *Tristar* neither party questioned the Federal Court's power to grant injunctive relief against the New South Wales Industrial Relations Commission, and in any event:
 - i) those proceedings were before a superior court of record;
 - ii) the issue was not addressed by the Federal Court; and
 - iii) the judgment gives no indication of what this Court's powers are in respect of State agencies when exercising jurisdiction vested in the Fair Work Division of this Court;
 - c) in any event, if there is a prohibition contained in s 725 of the FW Act it is on a person who has been dismissed, and does not impose a prohibition on a State anti-discrimination or equal opportunity agency to receive, accept, investigate, conciliate or refer complaints as required by State legislation;
 - d) Wesco Electrics has not sought, in the amended application in a case, a declaration that the EO Commission does not have jurisdiction to investigate Ms Birch's complaint, and, further, to conciliate that complaint, but rather seek to restrain Ms Birch from proceeding with the EO Complaint, which reflects the EO Commissioner's view that the powers available to the Court in respect of the current proceedings should be applied to Ms Birch, not to the EO Commissioner;
 - e) because s 84 of the EO Act provides that the Commissioner "shall investigate each complaint lodged with the [EO] Commissioner under s 83 [of the EO Act]", the EO Commissioner was statutorily bound to proceed with the investigation, and did not have discretion to suspend or dismiss Ms Birch's complaint based on Wesco Electrics' objections to the EO Commissioner's jurisdiction; and
 - f) the power to review the EO Commissioner's decision to accept, dismiss or refer a complaint lies with the Supreme Court of Western Australia.¹³⁴

Ms Birch's submissions

- 93 Ms Birch submits that cases dealing with the restraint of a tribunal, commission or other administrative body by a court fall into two categories:
- a) those where the court has exclusive jurisdiction;¹³⁵ or
 - b) where parallel proceedings potentially impact upon a person's right not to incriminate themselves.¹³⁶
- 94 Ms Birch distinguishes *Tristar – Full Court* as in that matter it is said that the *Workplace Relations Act 1996* (Cth) was clearly expressed as intended to cover the field of relations between a constitutional corporation, as employer, and

134 Citing *James v Sayers (Trustee for Sayers Family Trust)* (2006) 46 SR (WA) 241 at [46] per Eckert DP and Toohey SenMem (*James*).

135 Citing *Tristar Steering & Suspension Ltd v Industrial Relations Commission (NSW)* (2007) 158 FCR 104; 161 IR 469 (*Tristar – Full Court*).

136 Citing *Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 (*DAS*).

individuals, as employees of that corporation, and because the Full Court of the Federal Court of Australia determined that the Federal Court had exclusive jurisdiction, which meant that the New South Wales Industrial Relations Commission did not have jurisdiction under the relevant State legislation to conduct the inquiry which it intended to conduct.

95 Ms Birch then argues that the EO Commissioner is charged with investigating alleged ongoing discrimination against Ms Birch on the basis of her age and sex in breach of the EO Act over the period of Ms Birch's employment. That is to be contrasted, Ms Birch says, with the matter before this Court which relates solely to the dismissal of Ms Birch in January 2011 which is alleged to have been adverse action due to Ms Birch's age and sex, and in relation to which evidence of acts or events prior to 28 January 2011 is provided as support for her case that the adverse action for that reason.

96 Ms Birch submits that there is no basis for any argument that this Court has exclusive jurisdiction in relation to discrimination claims, and that there is therefore no basis for an argument that this Court has jurisdiction to restrain the EO Commissioner, as a head of an administrative body created by State legislation, from proceeding with the EO Complaint.

97 It is said that whilst there is some subject matter overlap between the claim before the Court and the EO Complaint the matters to be investigated by the EO Commissioner are predominantly prior to and not directly related to Ms Birch's dismissal.

98 Finally, Ms Birch says that in the cases involving restraint of a State tribunal, commission or other administrative body, those restraints arose from discrete applications against the relevant State body. Therefore, this case can be distinguished, Ms Birch asserts, because it is a civil matter between private parties.

99 In relation to the second category of cases, that is the self-incrimination cases, Ms Birch asserts that they are inapplicable in the circumstances of this case because the EO Commissioner acts administratively and does not make determinations on issues of fact or law, nor make binding orders in relation to the parties' rights, and therefore Wesco Electrics would not suffer prejudice on the basis of self-incrimination through the continuation of the proceedings before the EO Commissioner. Further, the decision in *DAS* is pointed to as authority for the proposition that the mere fact that proceedings are pending in a court does not mean that any parallel or related inquiry, conducted for proper purposes, itself constitutes an interference with the due administration of justice even where the Court is hearing matters based on the subject matter of the administrative inquiries.¹³⁷

Legislation

100 Sections 566 to 568 of the FW Act are relevant to the disposition of this issue. They provide as follows:

Section 566

Jurisdiction is conferred on the Federal Magistrates Court in relation to any civil matter arising under this Act.

137 Citing *Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 at [65] per Warren CJ.

Section 567

Jurisdiction conferred on the Federal Magistrates Court under section 566 is to be exercised in the Fair Work Division of the Federal Magistrates Court if:

- (a) an application is made to the Federal Magistrates Court under this Act; or
- (b) an injunction is sought under section 15 of the *Federal Magistrates Act 1999* in relation to a matter arising under this Act; or
- (c) a declaration is sought under section 16 of the *Federal Magistrates Act 1999* in relation to a matter arising under this Act; or
- (d) proceedings in relation to a matter arising under this Act are transferred to the Federal Magistrates Court from the Federal Court; or
- (e) the High Court remits a matter arising under this Act to the Federal Magistrates Court.

Section 568

To avoid doubt, nothing in this Act limits the Federal Magistrates Court's powers under section 14, 15 or 16 of the *Federal Magistrates Act 1999*.

101 Sections 14, 15 and 16 of the FM Act provide as follows:

Section 14

In every matter before the Federal Magistrates Court, the Federal Magistrates Court must grant, either:

- (a) absolutely; or
- (b) on such terms and conditions as the Federal Magistrates Court thinks just; all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by him or her in the matter, so that, as far as possible:
- (c) all matters in controversy between the parties may be completely and finally determined; and
- (d) all multiplicity of proceedings concerning any of those matters may be avoided.

Section 15

The Federal Magistrates Court has power, in relation to matters in which it has jurisdiction, to:

- (a) make orders of such kinds, including interlocutory orders, as the Federal Magistrates Court thinks appropriate; and
- (b) issue, or direct the issue of, writs of such kinds as the Federal Magistrates Court thinks appropriate.

Section 16

- (1) The Federal Magistrates Court may, in relation to a matter in which it has original jurisdiction, make binding declarations of right, whether or not any consequential relief is or could be claimed.
- (2) A proceeding is not open to objection on the ground that a declaratory order only is sought.

Consideration

102 The Application is a civil matter arising under the FW Act.¹³⁸ The question of whether the EO Complaint is a complaint of a kind which must not be made is also a civil matter arising under the FW Act.¹³⁹ The jurisdiction conferred on this Court under the FW Act is to be exercised if an application is made to it, or

138 FW Act, ss 351 and 539.

139 FW Act, ss 725 and 732.

an injunction is sought from it.¹⁴⁰ The powers of the Court, relevantly under ss 14 and 15 of the FM Act, but also under s 16 of the FM Act, are not limited by the provisions of the FW Act.¹⁴¹

103 Ms Birch submits that this Court does not have exclusive jurisdiction to deal with this type of matter, it being a matter involving elements of discrimination which might equally be brought before a State equal opportunity or anti-discrimination tribunal or body. Whilst that is true, it ignores the effect of s 725 of the FW Act, so that, in the current circumstances, there is a prohibition on the making of the EO Complaint, and therefore the only application or complaint in relation to the subject matter of Ms Birch's dismissal which is validly made is the Application which is before this Court.¹⁴² Effectively, therefore, in relation to the Application this Court does have exclusive jurisdiction because the making of the EO Complaint is statutorily prohibited.

104 The provisions of s 725 of the FW Act were obviously intended to cover the field with respect to applications and complaints of the type presently before the Court in terms of the Application and the EO Complaint, so that, where, as here, a general protections court application in relation to a dismissal is made to this Court, no other application in relation to that dismissal can be made to a State equal opportunity or anti-discrimination tribunal or body.¹⁴³

105 There was no suggestion that the relevant provisions of the FW Act, and in particular ss 725-732 and associated definitional provisions, were invalid.¹⁴⁴

106 The terms of s 725 of the FW Act make the prohibition on Ms Birch making the EO Complaint a matter of personal obligation, because a personal prohibition was intended.¹⁴⁵ Therefore, Ms Birch is personally liable to the injunctive relief sought by Wesco Electrics. To fail to issue an injunction, and thereby allow Ms Birch to proceed with the EO Complaint, would be to allow by omission what the Commonwealth Parliament has expressly prohibited by statute. That is a course of action that the Court cannot countenance. It is appropriate to grant an injunction in aid of the statutory prohibition, having regard to the nature, terms and scope of the relevant provisions of the FW Act, the mischief those provisions are intended to remedy, which confer on Wesco Electrics a right not to be troubled by duplex applications in relation to Ms Birch's dismissal.¹⁴⁶

107 It is unnecessary to deal at length with the submission made concerning whether Wesco Electrics would suffer prejudice on the basis of self-incrimination through the continuation of the conciliation proceedings before the EO Commissioner. It is true to submit, as Ms Birch did, that there is no prejudice to Wesco Electrics by reason of self-incrimination if the EO

140 FW Act, s 567(a)(b), FM Act, ss 14 and 15.

141 FW Act, s 568.

142 Equally, an application might have been made to the Federal Court, with which this Court has concurrent jurisdiction in relation to these matters with this Court: FW Act, ss 562 and 566, and in respect of which the same principles would apply.

143 See [62] and [75] above; see also *Tristar Steering & Suspension Ltd v Industrial Relations Commission (NSW)* (2007) 158 FCR 104; 161 IR 469 at [45] per Buchanan J.

144 And, in reality, nor could there have been having regard to the judgment in *New South Wales v Commonwealth* (2006) 229 CLR 1; 156 IR 1.

145 *Halwood Corp Ltd v Roads Corp* [1998] 2 VR 439 at 446 per Tadgell JA.

146 *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 450 per Kitto J; *King v Goussetis* (1986) 5 NSWLR 89.

Complaint were to proceed,¹⁴⁷ that submission ignores the prejudice arising from the fact that Wesco Electrics would have to take part in an investigative process and conciliation proceedings which ought not be being conducted because the making of the EO Complaint leading to that investigative process and conciliation proceedings is statutorily prohibited.¹⁴⁸ In those circumstances, the injunction is also necessary to protect the integrity of the processes of this Court from being abused.¹⁴⁹ The Court also observes that:

- a) the balance of convenience must weigh heavily, if not inexorably, in favour of an injunction in aid of a statutory prohibition; and
- b) there are serious issues to be tried in the substantive proceedings.

108 There will therefore be an injunction issued against Ms Birch, to permanently restrain her from proceeding with, or taking any further action steps in, or in relation to, the EO Complaint.

109 The Court notes that no declaration as to the validity of the EO Complaint has presently been sought. Because of the personal nature of the intended prohibition under s 725 of the FW Act, such a declaration might be made in the present proceedings because the question of whether the EO Complaint is a complaint of a kind which must not be made is a civil matter arising under the FW Act. There seems little doubt however that the EO Complaint is invalid because of the statutory prohibition. However, in the absence of any application by Wesco Electrics, it is not appropriate for the Court to consider further whether it can make a declaration as to the validity of the EO Complaint.

110 The EO Commissioner submitted that the Court did not have the capacity to grant relief interfering with the functions of a State administrative decision-maker or investigative body exercising jurisdiction under a state statute.

111 Ordinarily, where there are concurrent federal and state proceedings it is open to a federal court, in the exercise of its discretion, to:

- a) stay its own proceedings;
- b) enjoin the continuation of the state proceedings; or
- c) transfer its proceedings to a state court under s 5(4) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth).¹⁵⁰

112 The Court notes that the EO Commissioner dealing with the EO Complaint is not a court,¹⁵¹ and that the process for dealing with the EO Complaint before the EO Commissioner is not judicial.¹⁵² A federal court faced with a choice of having to determine the appropriate course of action would generally take as its

147 EO Act, s 164, save that information may be admissible on the offence of providing false or misleading information to the Commissioner: EO Act, s 159.

148 And thus the judgment in *Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 is of limited assistance, and is distinguishable, because of the nature of the statutory prohibition under s 725 of the FW Act.

149 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 391-392 per Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

150 Cross-vesting Act.

151 See [129] below.

152 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; 58 IR 48.

starting point whether an aspect of the whole controversy is exclusively within the jurisdiction of the federal court or the state court.¹⁵³ The choice to be made is dependent upon an evaluation of all the circumstances.¹⁵⁴

113 In this case it is inappropriate for this Court to stay its own proceedings, because it is those proceedings which were first invoked by Ms Birch and which gave rise to this Court's jurisdiction to deal with the Application, and which, as a direct consequence, statutorily prohibit the making of the EO Complaint. It would be inappropriate for this Court to stay the Application which is within the Court's jurisdiction, and which the FW Act requires the Court to determine, in circumstances where the EO Complaint is statutorily prohibited.

114 The Court has no jurisdiction to transfer proceedings direct to a state court under the Cross-vesting Act,¹⁵⁵ and, in any event, the EO Commissioner is not a state court,¹⁵⁶ so the issue does not arise.

115 In this case, the Court has jurisdiction in respect of civil matters arising under the FW Act, and both the Application and the question of whether the EO Complaint is a complaint of a kind which must not be made, are civil matters arising under the FW Act. In those circumstances this Court has power, under s 15 of the FM Act, to issue an injunction directed to a state administrative decision-maker or investigative body, such as the EO Commissioner, in respect of the civil matter within the jurisdiction of this Court.¹⁵⁷

116 In the present circumstances, to fail to issue an injunction, albeit one directed against Ms Birch, would be to allow the EO Commissioner to continue to investigate and conduct conciliation proceedings in relation to the EO Complaint, the making of which has been statutorily prohibited by the Commonwealth Parliament. As indicated above, that is a course of action that the Court cannot countenance.

117 The EO Commissioner also appears to assert that because this Court is not a superior court of record that it cannot grant injunctive relief against a state administrative decision-maker or investigative body. That submission requires a brief examination of the nature and powers of this Court and the Federal Court.

118 Both this Court and the Federal Court are:
a) courts of records;¹⁵⁸
b) courts with such original jurisdiction as is vested in them by laws made by the Commonwealth Parliament;¹⁵⁹ and
c) courts of law and equity.¹⁶⁰

119 Unlike the Federal Court, this Court is not expressly said to be a "superior"

153 *Westpac Banking Corp v Eltran Pty Ltd* (1987) 14 FCR 541 at 548 per Fox and Burchett JJ (*Eltran*).

154 *Westpac Banking Corp v Eltran Pty Ltd* (1987) 14 FCR 541 at 548 per Fox and Burchett JJ.

155 *Yao v Zhang* [2007] FMCA 1340 at [16]-[17] per Wilson FM; *CBFC Ltd v Skea* [2004] FMCA 377 at [4] per McInnis FM.

156 See [129] below.

157 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1 at 29; 79 IR 339 at 350-351 per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ (*Patrick Stevedores Operations No 2 Pty Ltd*).

158 FM Act, s 8(3); FC Act, s 5(2).

159 FM Act, s 10(1) and (2); FC Act, s 19.

160 FM Act, s 8(3); FC Act, s 5(2).

court of record. Nor would it appear that it was the Commonwealth Parliament's intention that this Court be established as a superior court of record.¹⁶¹

120 As this Court observed in *Skipworth (No 2)* “the superior-inferior distinction may matter little at a federal level”¹⁶² because:

- a) “the declaration of a court as a ‘superior’ court of record may not be intended to confer jurisdiction, but be merely titular”;¹⁶³
- b) “there may be a distinction between an ‘inferior’ court at common law, and an ‘inferior’ court in the Australian federal system, with the Federal Court and Family Court being inferior to the High Court, and this Court being inferior to each of those courts”;¹⁶⁴
- c) the powers of federal courts, established by statute, are always subject to the relevant statutory provisions, and it is to those statutory provisions that attention must be given to determine the powers of federal courts.¹⁶⁵

121 When attention is given to the powers of this Court under the FW Act and the FM Act it can be seen that this Court has power to issue an injunction in relation to this matter as a civil matter within jurisdiction under the FW Act,¹⁶⁶ unaffected by the Court's status as a non-superior court of record.

122 The EO Commissioner's submissions also suggest that the EO Commissioner was statutorily bound to proceed with the investigation, and that only the Supreme Court of Western Australia has the power to review the EO Commissioner's decision to accept, dismiss or refer a complaint. In this case, the facts indicate that the EO Commissioner did not give any consideration to the jurisdictional objection raised by Wesco Electrics in the NECA 4 August 2011 Letter. The failure to do so was contrary to the duty of any statutory body or person invested with jurisdiction to consider a jurisdictional objection properly made, which this objection clearly was.¹⁶⁷ The ability to

161 *Skipworth v Western Australia (No 2)* (2008) 218 FLR 16 at [36]-[37] per Lucev FM (*Skipworth (No 2)*).

162 *Skipworth v Western Australia (No 2)* (2008) 218 FLR 16 at [38] per Lucev FM.

163 Quick J and Groom L, *The Judicial Power of the Commonwealth* (1904), p 76; discussing “superior court of record” in s 4 of the *Judiciary Act 1903* (Cth); *Skipworth v Western Australia (No 2)* (2008) 218 FLR 16 at [38] per Lucev FM.

164 Quick J and Garran RR, *Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901), p 726; *Constitution*, s 71. See also the discussion in Zines L, *Federal Jurisdiction in Australia* (3rd ed, Federation Press, 2002), pp 106-115. In *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 41 O'Connor J spoke of the High Court being vested by s 71 of the *Constitution* with the “supreme judicial power of the Commonwealth, and it must necessarily include the power to keep inferior Courts of the federal judicial system from exceeding their jurisdiction”; *Skipworth v Western Australia (No 2)* (2008) 218 FLR 16 at [38] per Lucev FM.

165 *VTAG v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 141 FCR 291 at [19]-[20] per Heerey, Finkelstein and Lander JJ; *DJL v Central Authority* (2000) 201 CLR 226 at [43] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; *Skipworth v Western Australia (No 2)* (2008) 218 FLR 16 at [38] per Lucev FM.

166 FW Act, s 567(b); FM Act, s 15, and see [102] above.

167 As to duty of judicial and quasi-judicial bodies to inquire into the existence of jurisdiction, see *R v Bolton* (1841) 1 QB 66; [1835-42] All ER Rep 71 at 73-74 per Lord Denman CJ; *Federated Engine Drivers and Firemen's Association of Australasia v Broken Hill Pty Co Ltd* (1911) 12 CLR 398 at 415 per Griffith CJ, at 428 per Barton J and at 454 per Isaacs J; *Re Boulton; Ex parte Construction, Forestry, Mining and Engineering Union* (1998) 73 ALJR

actually make the EO Complaint, and therefore the valid existence of the EO Complaint, was a condition of the exercise by the EO Commissioner of the power to deal with the EO Complaint.¹⁶⁸ Had the EO Commissioner properly considered the jurisdictional objection, the EO Complaint may not have been further proceeded by the EO Commissioner on the basis that the EO Commissioner lacked jurisdiction. There is no evidence that the EO Commissioner sought any advice with respect to the jurisdictional objection. In any event, and accepting that a relevant power of judicial review resides in the Supreme Court of Western Australia:¹⁶⁹

- a) that does not preclude this Court exercising power given to it by the Commonwealth Parliament to issue injunctions with respect to civil matters within this Court's jurisdiction under the FW Act; and
- b) ignores the likelihood that the "mandatory" provisions of the EO Act requiring the EO Commissioner to consider a complaint lodged with the EO Commissioner¹⁷⁰ are invalid to the extent of any inconsistency with s 725 of the FW Act by reason of s 109 of the *Constitution*.

123 The EO Commissioner also submits that if an injunction is to issue it ought to issue only against Ms Birch, and not against the EO Commissioner. In the Court's view the issue of an injunction, and particularly an injunction with a permanent restraint, ought to be appropriately circumscribed, and if it is not necessary to issue an injunction against a person or party, such an injunction ought not to be issued. In the circumstances of this case where the Court has determined, for reasons set out above, to issue a permanent injunction directed to Ms Birch not to proceed with, or take any further steps with regard to, the EO Complaint, the Court does not consider it presently necessary to issue an injunction against the EO Commissioner. It ought to be sufficient that an injunction has been granted against Ms Birch. If it is not sufficient, and the EO Commissioner seeks to take further steps with respect to the EO Complaint, it is open to Wesco Electrics to make a further application to this Court, there being no other reason why an injunction ought not to issue against the EO Commissioner (subject to what is said below concerning the application to join the EO Commissioner as a party to the proceedings).¹⁷¹

Abuse of process and vexatious litigation

124 Wesco Electrics also sought that Ms Birch be barred from continuing with any proceeding other than the Application, because:

(cont)

129 at 133; 85 IR 468 at 472-473 per Kirby J; *Rentuza v Westside Auto Wholesale* (2009) 190 IR 207 at [23] per Lucev FM. As to the necessity for the National Native Title Tribunal to inquire into the existence of jurisdiction, see *Risk v Williamson* (1998) 87 FCR 202 at 220-221 per O'Loughlin J. As to the necessity for industrial tribunals to inquire into the existence of jurisdiction, see *Fire Commissioners (NSW), Board of v Threlfo* [1960] AR (NSW) 349; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Tomago Aluminium Co Pty Ltd* (unreported, AIRC (FB), PR968591, 13 February 2006) at [56] per Marsh SDP, Ives DP and Whelan C; *CEO, Department of Agriculture and Food v Ward* [2008] WAIRComm 79 at [79]-[85] per Ritter AP.

168 *R v Blakeley; Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1950) 82 CLR 54 at 70 per Latham CJ.

169 *James v Sayers (Trustee for Sayers Family Trust)* (2006) 46 SR (WA) 241 at [46] per Eckert DP and Toohey SenMem.

170 EO Act, s 84.

171 See [136]-[137] below.

- a) of r 13.11 of the FMC Rules; or
- b) because there was an abuse of process in relation to the filing of the EO Complaint.

125 Rule 13.11 of the FMC Rules relevantly provides as follows:

- (1) If the Court is satisfied that a person has instituted a vexatious proceeding and the Court is satisfied that the person has habitually, persistently and without reasonable grounds instituted other vexatious proceedings in the Court or any other Australian court (whether against the same person or against different persons), the Court may order:
 - (a) that any proceeding instituted by the person may not be continued without leave of the Court; and
 - (b) that the person may not institute a proceeding without leave of the Court.

126 There is before this Court only one application, namely the Application, and that cannot be described as vexatious as it is a legitimate general protections court application. There is no other application to this Court which would then trigger the application of r 13.11 of the FMC Rules on the basis that there has been instituted other vexatious proceedings in this Court.

127 The question then arises is whether or not there have been other vexatious proceedings instituted in “any other Australian court” by Ms Birch. For relevant purposes “Australian court” is defined in s 5 of the FM Act to mean “a federal court or a court of a State or Territory”.

128 The other two “applications” in issue in this matter — the FWA Application and the EO Complaint — have been made to FWA and the EO Commissioner. The FWA is not, unlike the Federal Court and this Court, specifically established as a federal court.¹⁷² FWA does not exercise the judicial power of the Commonwealth, but rather industrial relations and dispute resolution functions invested in it by statute.¹⁷³ FWA is the latest in a line of bodies performing non-judicial industrial relations and dispute resolution functions in the Commonwealth sphere following the splitting of the judicial and arbitral functions in relation to federal industrial relations matters after the delivery of the opinion of the Privy Council in *Attorney-General v The Queen* in which it was held that the Commonwealth Parliament could not invest in one body judicial and non-judicial power.¹⁷⁴ As a consequence of the opinion of the Privy Council in *Boilermakers* the Commonwealth Parliament created the Commonwealth Industrial Court in 1956 to deal with the judicial aspects of industrial relations matters, whilst the arbitral and conciliation aspects of industrial relations matters were dealt with by the Commonwealth Conciliation and Arbitration Commission. The bifurcation of judicial and arbitral powers has been maintained ever since.¹⁷⁵ The FWA is not therefore an “Australian court”.

129 The EO Commissioner is a statutory office holder under the EO Act¹⁷⁶

172 FC Act, s 5(1); FM Act, s 8(1).

173 FW Act, ss 576 and 577.

174 *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 (*Boilermakers*).

175 For a brief outline of the history see *Welsh v Allblend Holdings Pty Ltd (No 2)* (2010) 195 IR 216 at [10]-[18] per Lucev FM.

176 EO Act, s 75.

exercising such powers, in this case, investigative and conciliatory, as are invested in the EO Commissioner by the Western Australian Parliament, including, for example, powers to:

- a) investigate complaints;¹⁷⁷
- b) request information and documents;¹⁷⁸
- c) direct attendance at a compulsory conference;¹⁷⁹ and
- d) to endeavour to resolve matters by conciliation.¹⁸⁰

Those are powers typical of the powers of a statutory investigative or conciliatory decision-maker or body. The EO Commissioner does not exercise judicial power, and is not an “Australian court”.

130 The conditions for the exercise of the power to make an order concerning a vexatious litigant under r 13.11(1) of the FMC Rules have therefore not been met in this case.

131 As to abuse of process generally there can be little doubt that it is an abuse of process to start a proceeding contrary to a statutory prohibition, or where statutory pre-requisites have not been complied with. Further, it is well established that it is prima facie abuse of process to agitate in separate fora the same factual matters, between the same parties, seeking the same or very similar relief.¹⁸¹ In this case, the factual subject matter of the EO Complaint and the Application is the same,¹⁸² the same parties are involved, and in both the EO Complaint and the Application Ms Birch seeks compensation for lost earnings and in relation to the effect of Wesco Electrics alleged actions.¹⁸³ Remarkably, there is evidence that the EO Complaint would not have been brought if the Application had been able to be resolved through negotiation between the parties.¹⁸⁴

132 The above matters give rise to an abuse of process which it is appropriate to restrain by injunction, given both the statutory prohibition and the replication of facts, parties and remedies sought.

Summary dismissal

133 In the alternative, Wesco Electrics seeks that the Application be summarily dismissed pursuant to r 13.10 of the FMC Rules. Rule 13.10 of the FMC Rules provides as follows:

The Court may order that a proceeding be stayed, or dismissed generally or in relation to any claim for relief in the proceeding, if the Court is satisfied that:

- (a) the party prosecuting the proceeding or claim for relief has no reasonable prospect of successfully prosecuting the proceeding or claim; or
- (b) the proceeding or claim for relief is frivolous or vexatious; or
- (c) the proceeding or claim for relief is an abuse of the process of the Court.

177 EO Act, s 84.

178 EO Act, s 86.

179 EO Act, s 87.

180 EO Act, s 91.

181 *Hu v Li-Chien Liu* [2011] FMCA 21 at [11] per Jarrett FM (and cases there cited); *Thirteenth Corp Pty Ltd v State* (2006) 232 ALR 491 at [36] per Jessup J.

182 See [84] above.

183 See [4] above and EO Complaint, Attachment A.

184 See Ms Birch’s Solicitors’ 18 July 2011 Letter at [14] above.

134 Because the Court has determined to grant an injunction for reasons set out above it is strictly unnecessary to consider the alternative order for summary dismissal sought by Wesco Electrics. It suffices, however, to observe that:

- a) based on the test for summary dismissal in r 13.10 of the FMC Rules, that is whether the Application has no reasonable prospect of success, the Court is not satisfied, having regard to Ms Birch's Affidavit, albeit untested, that the Application has no reasonable prospect of success as there are clearly serious legal and factual issues to be determined;
- b) the Court does not consider the Application to be frivolous or vexatious, as it appears to be an application based on substantive facts relevant to the issue of age or sex discrimination giving rise to a general protections court application; and
- c) the Application is not an abuse of the process of the Court, particularly in circumstances where the Court has determined that it is the making of the EO Complaint which is statutorily prohibited. The fact of the FWA Application, with respect to unfair dismissal, and which was subsequently withdrawn, does not make the Application an abuse of the process of the Court.

135 Therefore, there will not be an order dismissing the Application under r 13.10 of the FMC Rules.

Joining the EO Commissioner as a party

136 Wesco Electrics sought to join the EO Commissioner as a party on the basis that the EO Commissioner's participation in the proceedings was necessary to achieve a complete resolution of the issues.¹⁸⁵ The resolution of the ultimate issues in dispute in these proceedings do not however involve the EO Commissioner, but only Ms Birch and Wesco Electrics, and in relation to disputed issues of fact there is no evidence that the EO Commissioner has any direct knowledge or involvement in the issues. Further, in circumstances where the Court has determined that it is only necessary, for present purposes, to issue an injunction against Ms Birch in relation to the EO Complaint, the EO Commissioner's involvement is not otherwise required in relation to the proceedings.

137 For the above reasons, there will be no order to join the EO Commissioner as a party to these proceedings.

Conclusions

138 For the reasons set out above, the Court has concluded that:

- a) there will be an injunction issued against Ms Birch, to permanently restrain her from proceeding with, or taking any further steps with respect to, the EO Complaint; and
- b) otherwise, the amended application in a case will be dismissed, save as to costs.

139 The Court will hear the parties and the EO Commissioner as to:

- a) costs, if any;¹⁸⁶ and
- b) further directions.

¹⁸⁵ FMC Rules, r 11.01(1) and (2).

¹⁸⁶ FW Act, s 570; *Hughes v Mainrange Corporation Pty Ltd (No 2)* (2009) 190 IR 351 at [18]-[24] per Lucev FM.

Application granted in part

Solicitors for the applicant: *MDS Legal*.

Solicitors for the respondent: *NECA Legal*.

Solicitors for the intervener: *Equal Opportunity Commission (WA)*.

POLLY LOWING