

SUPREME COURT OF QUEENSLAND

CITATION: *Fraser v Mission Australia* [2010] QSC 380

PARTIES: **NICOLE ELIZABETH FRASER**
(appellant)
v
MISSION AUSTRALIA
(respondent)

FILE NO: BS14614 of 2009

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 5 October 2010 (ex tempore reasons)

DELIVERED AT: Brisbane

HEARING DATE: 4 October 2010

JUDGE: Mullins J

ORDER:

1. **This appeal is transferred to the Queensland Civil and Administrative Tribunal (QCAT) at Brisbane**
2. **The Registrar of the Court is directed forthwith to provide to the Registrar of QCAT the file in this appeal together with all documents that have been produced to this Court by QCAT relating to the hearing of the appellant's complaint in the Anti-Discrimination Tribunal for the purpose of this appeal**
3. **There is no order as to the costs of the application to transfer this appeal to QCAT**
4. **The costs of this appeal that have been incurred while the proceeding has been in the Court are otherwise reserved to QCAT**
5. **Liberty to either party or the Registrar of this Court to apply on one day's notice to the other parties**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – JURISDICTION AND GENERALLY – GENERALLY – where appellant appealing against decision of Anti-Discrimination Tribunal (ADT) – where appellant seeks transfer of appeal to Queensland Civil and Administrative Tribunal (QCAT) – where decision of ADT against which the appellant appeals was handed down one day before operative provisions of *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (the Act) commenced – where respondent claims appeal must be heard by the court pursuant to s 258 of the Act – where s 252(1) of the Act

	would have permitted the appellant to appeal the ADT decision to QCAT – whether the court should transfer the appeal to QCAT	1
	<i>Queensland Civil and Administrative Tribunal Act 2009, s 53, s 246, s 252, s 258</i>	
COUNSEL	N E Fraser (in person) V Rajanayagam (<i>sol</i>) for the respondent	10
SOLICITORS:	N E Fraser (in person) ClarkeKann as town agents for Macpherson & Kelley Lawyers Dandenong for the respondent	
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HER HONOUR: The appellant's complaint to the Anti-Discrimination Tribunal (ADT) was dismissed on 30 November 2009. The appellant, who was self-represented, wished to appeal. She obtained conflicting information from the registries of the Queensland Civil and Administrative Tribunal (QCAT) and this Court. On 24 December 2009 she filed a notice of appeal in this Court naming Mission Australia as the respondent. There had been another respondent to her complaint to the ADT, but that respondent was not made a party to the appeal in this Court.

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For various reasons that are unnecessary to recite this appeal has not progressed in this Court. The appellant filed an application on 21 September 2009 that seeks to amend the notice of appeal and the transfer of the appeal to QCAT. The solicitors for the respondent oppose the transfer of the appeal to QCAT. That was the issue that was argued before me yesterday. It became apparent that the construction of a number of provisions of the Queensland Civil and Administrative Tribunal Act 2009 (the Act) was required.

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The complication in applying the provisions of the Act arises from the fact that the ADT's decision was given the day before most of the provisions of the Act commenced. The ADT had made a final decision in respect of the appellant's complaint before the commencement of the Act, but the appellant had not had time to institute an appeal against the ADT's decision before the Act commenced.

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In relation to the ADT, the general effect of the Act and the Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009 is to provide for the hearing of complaints under the Anti-Discrimination Act 1991 to be undertaken by QCAT and for the repeal of the appeal provisions that had been previously found in the Anti-Discrimination Act 1991, so that the appeal provisions provided by the Act apply to an appeal from a decision of QCAT in respect of a complaint made under the Anti-Discrimination Act 1991.

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Transitional provisions for the application of the Act are found in chapter 7 of the Act. Section 246 of the Act provides "Subject to sections 255(7) and 267(7), this chapter does not limit the Acts Interpretation Act 1954 section 20." This assists in the interpretation of the transitional provisions, as it makes it clear that the general principle that applies to the amendment of an Act that the amendment does not affect a right accrued or acquired under that Act continues to apply in respect of the Act, subject to the exceptions in section 255(7) and 267(7) which are not relevant to this matter.

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Relevantly, section 252(1) provides that a final decision of a former tribunal in a proceeding made before the commencement is taken to be a final decision of QCAT and the Act and any relevant enabling Act apply to the decision as if it were a final decision of QCAT.

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The ADT is a former tribunal for the purpose of section 252(1) of the Act. This provision appears to allow the decision of the ADT that was given before the commencement of the Act to be treated as a final decision of QCAT, which would make the decision amenable to the appeal jurisdiction conferred under section 26 and section 142 of the Act.

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The respondent seeks to rely on section 258 of the Act as constituting the only means by which the appellant may appeal the decision of the ADT. Section 258 of the Act provides:

"(1) This section applies if -

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(a) immediately before the commencement a person could, under a former Act, have appealed to a Court against a decision of a former tribunal within a particular period (the appeal period); and

(b) at the commencement the person has not started the appeal

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(2) The person may, within the appeal period, appeal to the court against the decision and the court must hear and decide the appeal under the former Act as if it was still in force."

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The position covered by section 258 of the Act appears to apply to the appellant as, on the day before the commencement of section 244 of the Act, the decision of the ADT was made against the appellant, and the appellant could have appealed to the Supreme Court against the decision of the ADT, and as at 1 December 2009 had not started the appeal.

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There is a difference in the constructions urged by the appellant and the respondent arising from the use of the word "may" in section 258(2). The appellant argues that "may" means that it is a possible means of appeal, but it was not the exclusive means of appeal that was open to her. The respondent argues that since the appellant appealed to this Court within the appeal period the Court must hear the appeal against the decision of the ADT.

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The explanatory memorandum for section 258 provides support to the contention of the appellant that section 258 was not the only means of appeal available to the appellant:

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"Clause 258 is a transitional provision for appeals from decisions of former tribunals. It clarifies that if a person had a right under a former Act to appeal to a court against a decision of a former tribunal within a particular period, that at commencement the person may appeal to the court and the court must hear and decide the appeal under the former Act."

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Although the appellant has taken advantage of section 258 in bringing the appeal to the Supreme Court, I am satisfied that the construction of the transitional provisions of the Act as a whole means that there was an alternative means of appeal open to the appellant which was that provided for as a result of section 252(1) of the Act deeming the decision of the ADT to be a final decision of QCAT. The appellant therefore could have appealed to the appeal tribunal of QCAT.

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The respondent has foreshadowed bringing an application to strike out the appeal which has been delayed, because of difficulties in obtaining a copy of the transcript of the hearing before the ADT. The respondent has been proposing since 5 February 2010 that its application to strike out the appeal be heard at the same time as the appellant's application to amend her notice of appeal. That remains the respondent's position.

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Although there are restrictions on the awarding of costs by QCAT under the Act which do not apply to this Court on the hearing of the appeal, there are other advantages offered by the procedures in QCAT, including in relation to appeals, which may benefit both parties in respect of saving of costs, such as the emphasis on alternative dispute resolution processes with consequent savings in actual costs.

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The question of whether the foreshadowed applications by both parties should be heard together and in advance of the hearing of the appeal would be suitable matters for directions in the appeal tribunal of QCAT. Both parties suggested if the appeal were transferred to QCAT that further directions for the conduct of the appeal be left to QCAT.

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On the question of costs, the respondent has been unsuccessful in opposing the transfer of the appeal to QCAT. I am therefore inclined not to make any order as to the costs of the application to transfer the appeal to QCAT, but to otherwise reserve the costs of the appeal that have been

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incurred in this Court to the date of the transfer of the appeal for QCAT to consider at an appropriate stage. 1

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HER HONOUR: The orders that I make are: 10

1. This appeal is transferred to Queensland Civil and Administrative Tribunal (QCAT) at Brisbane.
2. The Registrar of the Court is directed forthwith to provide to the Registrar of QCAT the file in this appeal, together with all documents that have been produced to this Court by QCAT relating to the hearing of the appellant's complaint in the Anti-Discrimination Tribunal for the purpose of this appeal. 20 30
3. There is no order as to the costs of the application to transfer this appeal to QCAT.
4. The costs of this appeal that have been incurred while the proceeding has been in the Court are otherwise reserved to QCAT. 40
5. Liberty to either party or the Registrar of this Court to apply on one day's notice to the other parties. 50

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