An unused potential statutory remedy for spousal guarantors

*By Leslie Katz**

Section 47 of the *Anti-Discrimination Act 1977* (NSW) ('the Act' or 'the NSW Act') provides as follows:[1]

> 47 Provision of goods and services
>
> It is unlawful for a person who provides, for payment or not, goods or services to discriminate against a person on the ground of marital status:
>
> (a) by refusing to provide the person with those goods or services, or
>
> (b) in the terms on which he or she provides the person with those goods or services.

Three of the terms used in s47 of the Act are defined for the purposes of certain provisions of the Act, including s47.

First, s39 of the Act provides as follows:

> 39 What constitutes discrimination on the ground of marital status
>
> (1) A person (the perpetrator) discriminates against another person (the aggrieved person) on the ground of marital status if, on the ground of the aggrieved person's marital status ..., the perpetrator:
>
> (a) treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person of a different marital status....

Secondly, in s4(1) of the Act, the following two definitions appear:

> marital status *means the status or condition of being:*
>
> (a) single,
>
> (b) married,
>
> (c) married but living separately and apart from one's spouse,
>
> (d) divorced,
>
> (e) widowed, or
>
> (f) in cohabitation, otherwise than in marriage, with a person of the opposite sex.
>
> ...
>
> services includes:
>
> (a) services relating to ... the provision of ... credit ...,
>
> ...

Although no decision has been found in which the matter has been discussed, it would appear that the effect of s47 of the Act is that although a credit provider may require, as a condition of providing credit to a married proposed debtor, that the proposed debtor procure a guarantor of the repayment of the proposed debt, the credit provider may not require that the spouse of the proposed debtor himself or herself become that guarantor.[2]

Although s47 of the Act declares certain conduct to be unlawful, that declaration must be understood in the light of s123(1) of the Act, which provides as follows:

> 123 Effect of contravention of Act
>
> (1) A contravention of this Act shall attract no sanction or consequence, whether criminal or civil, except to the extent expressly provided by this Act.
>
> ...

The extent to which the Act 'expressly' (in the sense of plainly, clearly or explicitly)[3] provides sanctions or consequences for contraventions of the Act, in particular, for contravention of s47 of the Act, will next be summarised.

Under s88(1)(a) of the Act, a person may, on that person's own behalf, lodge with the president of the Anti-Discrimination Board[4] a complaint in respect of a contravention of the Act alleged to have been committed by another person. Under s88(3) and (4) of the Act, such a complaint is to be lodged within six months after the date of the alleged contravention, although the president, on good cause being shown, may accept a complaint which is lodged more than six months after the date of the alleged contravention.

It should be noted that the Act does not require that a complainant lodging a complaint on his or her own behalf be a person who claims to have been discriminated against. It would thus appear that a person (for instance, a spousal guarantor) who claimed to have suffered special damage by reason of another person's discriminating against a third person (namely, the spousal debtor) could be a complainant under the Act. Indeed, the New South Wales Law Reform Commission, in its 1999 review of the Act, considered it 'arguabl[e]' that s88 of the Act amounted to an 'open standing' provision, so that even a person who did not claim to have suffered special damage by reason of another person's discrimination against a third person could complain under the Act. That was an outcome which the commission favoured.[5]

Under s89(1) of the Act, the president is required to investigate a complaint lodged under s88. However, that duty is subject to s90(1), which provides that where, at any stage of the president's investigation of a complaint, the president is satisfied that the complaint is frivolous, vexatious, misconceived or lacking in substance or that for any other reason the complaint should not be entertained, the president may decline to entertain the complaint. If, under s90(1) of the Act, the president declines to entertain a complaint for any reason other than that the complaint is vexatious, misconceived or lacking in substance, then, under s90(2) of the Act, the complainant may appeal to the Administrative Decisions Tribunal[6] ('the ADT') for a review of the president's decision.

If the president has declined, under s90(1) of the Act, to entertain a complaint otherwise than on the ground that it

does not disclose any contravention of the Act, then the complainant may, within twenty-one days, require the president to refer the complaint to the ADT and the president must do so.[7]

Where the president has not declined to entertain the complaint and is of the opinion that the complaint may be resolved by conciliation, then the president must try to do so.[8]

Under s94(1) of the Act, where the president either: is of the opinion that the complaint cannot be resolved by conciliation; has tried to resolve the complaint by conciliation, but has failed; or is of the opinion that the nature of the complaint is such that it should be referred to the ADT, then the president must refer the complaint to the ADT.

Under s96 of the Act, the ADT is required to inquire into a complaint referred to it under secs 91(2) or 94(1).

Under s106 of the Act, the ADT may try to resolve the referred complaint by conciliation and must take all such steps as seem reasonable to it to effect a settlement of the complaint.

Under s111(1) of the Act, the ADT may dismiss a complaint if satisfied that it is frivolous, vexatious, misconceived or lacking in substance or that for any other reason the complaint should not be entertained. In such case, the ADT may order the complainant to pay the costs of the inquiry.[9]

After holding an inquiry, the ADT may, under s113(1)(a) of the Act, dismiss the complaint or, under s113(1)(b) of the Act, find the complaint substantiated. In the latter case it may do one or more of the following:

(i) ... order the respondent to pay to the complainant damages not exceeding $40,000 by way of compensation for any loss or damage suffered by reason of the respondent's conduct,

(ii) make an order enjoining the respondent from continuing or repeating any conduct rendered unlawful by this Act ...,

(iii) ... order the respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant,

(iiia) ...

(iiib) ...

(iv) make an order declaring void in whole or in part and either ab initio or from such other time as is specified in the order any contract or agreement made in contravention of this Act ..., or

(v) decline to take any further action in the matter.

The ADT may also make orders as to costs.[10]

Section 82 of the ADT Act contains a mechanism for converting into a judgment of a court an order made by the ADT that a party before it pay an amount of money.

It will be apparent that the effect of s123(1) of the Act, together with the enforcement mechanism summarised above, is that a spousal guarantor would be unable to rely defensively on a contravention by a credit provider of s47 of the Act in an action brought on the guarantee by the credit provider.[11]

It will also be apparent that a spousal guarantor is given only a relatively short period within which to rely offensively on an alleged violation of the Act, subject to Presidential extension if good cause is shown.[12] It is scarcely conceivable that the president would refuse to extend time in a situation in which the spousal guarantor had, within the preceding six months, been called upon by the credit provider to repay the spousal debtor's debt, even though that call had been made a considerable period of time after the date of the alleged contravention of the Act by the credit provider.

There remains one final question to discuss about s47 of the Act, namely, whether it is inoperative through constitutional inconsistency with s22 of the *Sex Discrimination Act 1984* (Cth) ('the federal Act').

Under the federal Act:

- s22, in so far as it deals with marital status discrimination in the provision of services,[13] is broadly similar to s47 of the NSW Act;
- secs 6, 7B and 7D together are broadly similar to s39 of the NSW Act; and
- the definitions of '*marital status*' and '*services*' in sub-section 4(1) are broadly similar to the definitions of those terms in s4(1) of the NSW Act.

However, by reason of the subject-matter-limited legislative powers of the Commonwealth Parliament, the application of s22 of the federal Act, in so far as it deals with marital status discrimination in the provision of services, is limited. The extent of that application is dealt with in s9 of the federal Act. For present purposes, it is necessary to refer to one subsection only of s9 of the federal Act. Subsection 9(10) of the federal Act provides that if the Convention on the Elimination of All Forms of Discrimination Against Women ('the CEDAW') is in force in relation to Australia, then various provisions of the Act (among which is included s22) have effect in relation to discrimination against women, to the extent that those provisions give effect to the CEDAW.

The CEDAW entered into force for Australia on 27 August 1983.[14] However, s22 of the federal Act, in so far as it deals with discrimination against women on the ground of marital status in the provision of services, does not give effect to the CEDAW, because the CEDAW generally does not deal with discrimination against women on the ground of marital status, but rather generally deals with discrimination against women on the ground of sex, regardless of their marital status: see, for example, Art 1, which defines 'discrimination against women' for the purposes of the CEDAW as meaning (emphasis added),

> any distinction, exclusion or restriction made *on the basis of sex* which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, *irrespective of their marital status*, *on a basis of equality of men and women*, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

See also Art 16(1)(d) of the CEDAW, which requires states parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular to ensure, *on a basis of equality of men and women*, the same rights and responsibilities as parents, *irrespective of their marital status*, in matters relating to their children. An exception to the main focus of the CEDAW is Art 11(2)(a), which provides relevantly that, in order to prevent discrimination against women *on the ground of marriage* and to ensure their effective right to work, states parties must take appropriate measures to prohibit, subject to the imposition of sanctions, discrimination in dismissals *on the basis of marital status*. However, no equivalent exception exists with respect to the provision of, in particular, credit: see Arts 13(b) and 14(2)(g) of the CEDAW, in both of which the focus is on sex discrimination regarding credit, not marital status discrimination regarding credit.

It is noteworthy that the Commonwealth Parliament did not purport to justify the enactment of any of the provisions of the federal Act, such as s22, in so far as it deals with marital status discrimination in the provision of services, as an implementation in domestic law of Art 26 of the International Covenant on Civil and Political Rights ('the ICCPR'): see s3 of the federal Act, which sets out the Act's objects. Paragraph (a) of that section states, as the federal Act's first object, 'to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women'. No reference is made in the list of the federal Act's objects to the object of giving effect to any provision of the ICCPR.

The ICCPR, except for Art 41 thereof, entered into force for Australia on 13 November 1980 and Art 41 entered into force for Australia on 28 January 1993.[15] There are also two optional protocols to the ICCPR. The second entered into force for Australia on 11 July 1991,[16] while the first entered into force for Australia on 25 December 1991.[17] Article 26 of the ICCPR provides as follows:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of the ICCPR is not gender-specific, as is the CEDAW, while no good reason appears to think that the reference in Art 26 of the ICCPR to 'other status' would not include marital status. For instance, the Human Rights Committee, established under Art 28(1) of the ICCPR, in dealing, under the first optional protocol to the ICCPR, with communications from individuals claiming to be victims of violations of any of the rights set forth in the ICCPR, appears to have proceeded on the basis that marital status is within the term 'other status' in Art 26 of the ICCPR.[18] Further, an officer of the Commonwealth Attorney-General's Department, when giving evidence before the Senate Legal and Constitutional Legislation Committee in connection with the *Sex Discrimination Amendment Bill (No 1) 2001*, stated,[19]

> In terms of our international obligations, the government considers that in a sense it really is not significant whether CEDAW extends to marital status discrimination or not because the question of marital status discrimination is also covered under other international obligations that the government has undertaken, particularly under the International Covenant on Civil and Political Rights.

Presumably, the officer had in mind Art 26 of the ICCPR when giving that evidence. Therefore, the Commonwealth Parliament could have purported to justify the enactment of (relevantly) s22 of the federal Act, in so far as it applies to marital status discrimination against both women and men in the provision of services, as an implementation in domestic law of Art 26 of the ICCPR. However, as already mentioned, it did not do so.

The fact that s22 of the federal Act, in so far as it applies to marital status discrimination in the provision of services, does not have effect by virtue of subs 9(10) of the federal Act has significance for the matter of the operation of state laws.

Two sections of the federal Act deal with the operation of state laws. Section 10 deals with the operation of state laws generally, while s11 deals specifically with the operation of state laws which further the objects of the CEDAW. Each of those sections begins by giving a meaning to subsequent references in the section to the federal Act. Subsection 10(1) of the federal Act provides that a reference in that section to the Act 'is a reference to this Act as it has effect by virtue of any of the provisions of section 9 other than subsection 9(10)', while sub-section 11(1) of the federal Act provides that a reference in that section to the federal Act 'is a reference to this Act as it has effect by virtue of subsection 9(10)'. In light of what has been written above about the relationship between s22 of the federal Act, in so far as it applies to marital status discrimination in the provision of services, and subs 9(10) of the federal Act, it will be apparent that it is s10, rather than s11, which is the relevant provision in the present context for determining the operation of state laws. Turning then to

sub-secs (2) and (3) of s10 of the federal Act, they provide as follows:

> 10. Operation of state ... laws
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> ...
>
> (2) A reference in this section to a law of a state ... is a reference to a law of a state ... that deals with ... discrimination on the ground of marital status....
>
> (3) This Act is not intended to exclude or limit the operation of a law of a state that is capable of operating concurrently with this Act.

It is obvious that s47 of the NSW Act is a law of a State that deals with marital status discrimination within the meaning of sub-section 10(2) of the federal Act. One therefore turns next to sub-section 10(3) of the federal Act to determine the operation of state laws.

In accordance with accepted principles,[20] sub-section 10(3) of the federal Act:

- excludes any indirect (or 'covering the field') constitutional inconsistency which might otherwise have arisen between, on the one hand, s22 of the federal Act, in so far as it applies to marital status discrimination in the provision of services, and, on the other hand, s47 the NSW Act; but
- is incapable of excluding any direct constitutional inconsistency which arises between the two provisions.

However, no direct inconsistency exists between s22 of the federal Act, in so far as it deals with marital status discrimination in the provision of services, and s47 of the NSW Act. It is not impossible for a person to obey both provisions simultaneously, nor can it be said that s47 of the NSW Act denies to a person engaging in conduct declared unlawful by that section any right conferred on that person by s22 of the federal Act.21 Therefore s47 of the NSW Act is not rendered inoperative through constitutional inconsistency with s22 of the federal Act, in so far as that section deals with marital status discrimination in the provision of services, and s47 of the NSW Act operates according to its tenor.

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* Leslie Katz resigned from the Federal Court in March 2002, after having been diagnosed as suffering from non-Hodgkin's lymphoma. He underwent treatment during most of 2002 and, by the end of March 2003, was well enough to begin working as a part-time volunteer at the New South Wales Law Reform Commission. His lymphoma appears to continue in remission and he continues to work as a part-time volunteer at the commission. He is presently involved in the commission's reference on the operation of the Evidence Act.

1 The use of the phrase 'he or she' in s47(b) implies, as a matter of ordinary language, that the first-mentioned 'person' in the *chapeau* of s47 must be a natural person. The same comment applies to many (but by no means all) of the other declarations of unlawfulness of various types of discriminatory conduct appearing in the Act: see secs 33(1)(b), 34(1)(b), 38N(1)(b), 48(1)(b), 49M(1)(b), 49ZP(b) and 49ZQ(1)(b); and see also secs 38B(1)(a), 49ZG(1)(a) and 51(4). It would have been better to use, in the provisions themselves, terminology which made it plain that those provisions all encompassed legal, as well as natural, persons. However, s8 of the *Interpretation Act 1987* (NSW) would appear to achieve the same result.

2 In July 1995, the Anti-Discrimination Board (constituted under s71 of the Act) published (non-binding) 'Guidelines for Providers of Financial Services'. Those guidelines dealt with all forms of discrimination declared unlawful by the Act at that date, in so far as those forms of discrimination were relevant to financial services providers. The matter of spousal guarantors was not specifically mentioned. However, on p.5 of the guidelines, it was noted that it would constitute unlawful marital status discrimination for a financial services provider to refuse financial services to a married woman unless she had her husband's consent. No doubt the same would have been thought to be the case if a financial services provider were to require, as a condition of providing credit, that a proposed debtor who was a married man have the consent of his spouse. No difference in principle exists between requiring a spouse who is seeking credit to have the consent of his or her spouse and requiring a spouse who is seeking credit to have the guarantee of his or her spouse.

3 See, eg, *Donnelly v Edelsten* (1992) 34 FCR 556, 560-61 (Ryan J).

4 Appointed under s 80 of the Act.

5 See LRC 92, pars 8.12-8.18.

6 Established under s11 of the *Administrative Decisions Tribunal Act 1997* (NSW).

7 Section 91(1)-(2) of the Act.

8 Section 92(1) of the Act.

9 Section 111(2) of the Act.

10 Section 114(2) of the Act.

11 It should be noted that the commission, in its 1999 review of the Act, recommended (see par 8.186) that 'no one should be precluded from relying upon a contravention of the ADA in circumstances where ... the claim [scil, the contravention] is relied upon by way of a defence or set off to proceedings brought by another....' However, that recommendation has not yet been implemented.

12 Section 88(3) and (4) of the Act. In the commission's review of the Act, it recommended that the six month period be extended to twelve months: see pars 8.48-8.53. However, that recommendation has not yet been implemented.

13 Section 22 of the federal Act, as well as dealing with marital status discrimination in the provision of services, deals also with sex, pregnancy and potential pregnancy discrimination in the provision of services.

14 See [1983] ATS No 9.

15 See [1980] ATS No 23 (1998 reprint).

16 See [1991] ATS No 19.

17 See [1991] ATS No 39.

18 See *Danning v The Netherlands* (1987) CCPR/C/29/D/180/1984 and *Vos v The Netherlands* (1989) CCPR/C/35/D/218/1986.

19 Commonwealth, *Parliamentary Debates*, Senate, Legal and Constitutional Legislation Committee, 13 February 2001, L&C 253.

20 See *The Queen v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563-64 (Mason J; Barwick CJ and Gibbs, Stephen and Jacobs JJ concurring).

21 On the latter issue, see *Grace Bros Pty Ltd v Local Courts of NSW* (1989) 23 FCR 68 (Lockhart, Beaumont and Hill JJ), which makes plain (by analogy) that s22 of the Commonwealth Act confers no right on such a person.