



## Workplace Relations & Human Rights Branch



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**THE EDGE** will be a regular newsletter produced by the VGSO's newly-established Workplace Relations and Human Rights Branch. By combining Workplace Relations and Human Rights, our Branch is uniquely placed to provide a multi-faceted service which recognises the complex inter-relationship between the *Victorian Charter of Human Rights and Responsibilities Act*, Employment, Equal Opportunity and Occupational Health and Safety Laws.

### Meet the Branch

**Hayley Petrony**  
**Assistant Victorian Government Solicitor**  
**8684 0462**

Hayley Petrony, the new Assistant Victorian Government Solicitor of the WRHR Branch, brings a depth of experience in dealing with the changing terrain of Workplace Relations, Equal Opportunity and Occupational Health and Safety legal issues. Hayley's broad experience includes advising professional associations in relation to class action under payment claims, through to setting a precedent in a disciplinary proceeding case involving questions of state constitutional powers. With the rise of bullying claims, Hayley has advised both employees and employers on the various options available in this largely untravelled area. Often this involved looking to alternative jurisdictions and areas of law, whether it be regulatory bodies or giving consideration to other avenues including the application of *The Whistleblowers Act*. Hayley also advises on the more traditional aspect of

employment law including employee entitlements; work cover terminations; employment disciplinary proceedings; and the requirements, or not, for natural justice, unfair/unlawful dismissal, adverse actions and issues of breach of employment contracts. This work is buttressed with a discrimination practice involving advising on appropriate policies and representation of both State and Federal legislation in areas of discrimination in employment and the provision of goods and services. Hayley has represented her clients in all courts, particularly the Federal courts and VCAT due to her area of speciality.

In addition, over the past 15 years Hayley has developed her own practice, rising to Partner in her previous firm, and has successfully managed her own team and been part of broader partnership management issues.

**Joanna Davidson**  
**Special Counsel**  
**8684 0899**

Joanna joined the VGSO in 2007. Previously, she spent three years as Crown Counsel in Human Rights at the New Zealand Crown Law Office.

She has previously held a range of roles both in government and private practice across areas of law including Equal Opportunity/Discrimination, Employment, Industrial Relations and Administrative law in the United Kingdom, Canada, New Zealand and Australia.

Joanna currently advises the Attorney-General and Government on significant human rights issues; works closely with the Solicitor-General and has appeared

as Counsel in numerous human rights matters before the High Court of Australia, the Victorian Court of Appeal, the Supreme and County Courts and VCAT.

**Jessica Cleaver**  
**Principal Solicitor**  
**8684 0460**

Jessica commenced her career in government law working as a graduate for a Commonwealth Department in Canberra. She then worked in the employment and administrative law team of the Australian Government Solicitor, the highlights of which included working on the Combet Industrial Relations Advertising matter and the WorkChoices matter.

Jessica joined the VGSO in 2008, where she works on human rights and equal opportunity matters. She recently had the exciting opportunity of instructing the former Solicitor-General in the High Court in the *Momcilovic* case.

**Eve Bignell**  
**Senior Solicitor**  
**8684 0480**

Eve brings a wealth and depth of litigation experience. Eve previously worked in the Health Litigation team of a boutique law firm, where her portfolio included medical negligence, employment disputes and discrimination claims. She was also seconded as a solicitor to the Australian Medical Association (Vic), specialising in employment advice. Eve began her career as a graduate recruit and Project Officer at DIIRD.

**Eleanor Thomas**  
**Solicitor**  
**8684 0431**

Before joining VGSO earlier this year, Eleanor worked as an Advisor within DPC's Legal Branch, working on matters as diverse as climate change, the *Police Integrity Act 2008*, and the Government response to the 2009 Bushfires Royal Commission. She was a VPS Graduate in 2008, during which time she completed rotations through both DOJ and DHS.

Eleanor has previously worked as a Research Associate at the Victorian Court of Appeal, and has provided volunteer assistance in equal opportunity and employment law

matters through the AED Legal Centre.

In the next issue of *The Edge* we will introduce other members of the team including Catherine Dixon (Managing Principal Solicitor), Gudrun Dewey, Hamish McLachlan and Jacob Coppel.



### **Full Bench of Fair Work Australia considers 'inherent requirements' provision**

In the recent decision of *J Boag and Son Brewing Pty Ltd v Allan John Button*<sup>1</sup> the Full Bench of Fair Work Australia held that when an employer relies upon an employee's incapacity to perform the inherent requirements of their position or role, it is the substantive position or role that must be considered and not any modified, restricted duties or temporary alternative position.

This case clarifies the meaning of 'inherent requirements' under the *FWA*. It also illustrates that temporary modification of an employee's role does not alter the inherent requirements of the position, nor remove the employer's right to dismiss for incapacity to perform these requirements provided such dismissal is not harsh, unjust or unreasonable.

### **Equal Opportunity Act**

The *Equal Opportunity Act 2010 (Vic)(EOA)* was passed on 1 April 2010 and comes into effect on 1 August 2011. Major changes under this Act include amendments to the definition of discrimination, and the introduction of a positive obligation on employers to take reasonable steps to eliminate discrimination. These changes have implications for anti-discrimination provisions under Commonwealth and State industrial relations laws and the *Human Rights Charter*.



**The Equal Opportunity Act 2010 will come into effect on 1 August 2011. Changes include amendments to the definition of discrimination and the introduction of a positive obligation on employers to take reasonable steps to eliminate discrimination.**



1. [2010] FWA FB



### **Fair Work Act 2009: General Protections**

The general protections provisions of the *Fair Work Act 2009* address workplace rights and freedom of association and provide protection from workplace discrimination. Under s340 of the Act a person must not take any adverse action against another person because the other person has a workplace right, has exercised a workplace right or proposes to exercise such a right. s351, which is known as the discrimination section, provides protection from adverse action because of certain characteristics.

While the general protections provisions widen the avenues through which victims of employment-related discrimination may exercise their rights, the subtle differences between provisions under the *EOA* and the *FWA* mean that clients will need to be carefully informed when selecting the best jurisdiction in which to initiate and pursue proceedings.

One of the new concepts under the Fair Work regime is that the general protections provisions extend to both pre and post-employment behaviour. This has the potential to widen the categories of conduct in discriminatory behaviour which will be prohibited and actionable, and claimants may find that they are able to access a remedy or avenue for redress not otherwise provided for under the *EOA*.

Like its WorkChoices predecessor, the *Fair Work Act* does not provide a statutory definition of discrimination. A court dealing with a dispute involving a Victorian employee and/or employer under *FWA* may draw upon definitions of discrimination within the State jurisdiction. In the context of Victoria the inextricable relationship between the *Charter* and the *EOA* in the defining discrimination could result in a Federal Court considering the *Charter*.

We envisage that the extent to which definitions under State and Commonwealth discrimination laws are applicable for the purposes of defining discrimination under the *FWA* will continue to be a matter of debate. However, it should be noted that the absence of any statutory definition under the *FWA* may work in favour of complainants by allowing an allegation of adverse action to apply to a situation of disadvantage associated with discrimination without the need to navigate the tests circumscribed by the *EOA*.

### **The VGSO Human Rights Conference takes place on 20 & 21 April 2011.**

**Speakers include:**

**Sir Anthony Mason**

**Prof. David Mullan**

**Joanna Davidson**

### ***EOA* and the *Charter***

The *EOA* has close links to the *Charter*. The concepts of equality and non-discrimination are at the heart of human rights and the *EOA*. Both legislative frameworks recognise that every person has the right to equal and effective protection against discrimination.

As the term 'discrimination' is defined in the *Charter* by direct reference to the *EOA*, any amendment to the definition of discrimination in the *EOA* may change the scope of the *Charter*. The *EOA 2010* contains amendments to the definition including the removal of the technical requirement of differential treatment in relation to direct discrimination, and clarification of the factors to be considered in determining whether indirect discrimination has occurred.

Both the *EOA* and the *Charter* have special measures exceptions to accommodate positive discrimination in relation to disadvantaged groups. In addition the *EOA* provides for the granting of exemptions from any provisions of the Act in relation to a person or a class of persons or an activity or class of activities. The following decision under the *EOA (1995)* evidences the interplay between the *Charter* and the *EOA* in this area.

In *Lifestyle Communities Ltd [2009] VCAT 1869*, Bell J held that as a public authority VCAT was obliged to exercise its jurisdiction in a way which was compatible with and took into consideration the equality and non-discrimination rights under the *Charter*.

These rights were held to be substantive and supervening unless limited by contrary legislation. Bell J went on to consider a wide range of Australian and international jurisprudence on the equality and non-discrimination rights in s8 of the *Charter* noting that 'the equality rights in section 8 are the keystone in the protective arch of the *Charter*.' His conclusion was, that in order to be compatible with the *Charter* an exemption under the *EOA* must be justified by the reasonable limits enquiry under s7(2) of the *Charter*. This has been codified in the new *EOA*. Section s90(b) of the *EOA* 2010 requires the Tribunal to consider whether a proposed exemption is a reasonable limitation on the right to equality as set out in the *Charter*.



### **NSW Occupational Health and Safety Case Raises the *Charter***

The New South Wales Industrial Relations Commission ('NSWIRC') was recently confronted with the task of considering a decision made under the *Charter of Human Rights and Responsibilities*. The defendants in this case<sup>2</sup> made reference to the Victorian *Momcilovic* decision to argue that a deeming provision under the *OH & S Act* violated the presumption of innocence. While the Commission was quick to point out the absence of any 'legislation akin to the *Charter*' in NSW, this judgement does demonstrate the relevance of the *Charter* in Industrial Relations and its possible significance for deeming and other onus of proof provisions in Victorian legislation.



### ***Charter* to be Considered by the High Court**

On 3 September 2010, the High Court granted leave to appeal the decision of the Court of Appeal in *R v Momcilovic*<sup>3</sup>. The appeal raises a number of important issues about the application of the *Charter*, including the role of the reasonable limits provision (s 7(2)) in determining whether legislation is 'compatible' with human rights and how far courts may go in 'reading down' or 'reading in' words in legislative provisions in order to make them compatible.

The High Court also indicated that it would consider the constitutional validity of the interpretive direction under s32 and of declarations of inconsistency under s36 of the *Charter*.

### **Coming Events...**

The VGSO Human Rights Conference is scheduled for **20 & 21 April 2011**. We have secured pre-eminent speakers including Sir Anthony Mason, Professor David Mullan, and our very own Joanna Davidson to speak to the public sector about the everyday relevance of human rights. We will bring you more details in future editions of *The Edge*.

### **COMING SOON...**

**Watch out for our Creative Solution Workshops offering advice and guidance in relation to workplace relations, equal opportunity and the *Charter of Human Rights*.**

2. *Morrison v Chevally [2010] NSWIRCom 116*

3. *R v Momcilovic [2010] 265 ALR 715*