



17 February 2012

Fair Work Act Review Panel
Dr John Edwards
The Hon. Mr Michael Moore
Professor Emeritus Ron McCallum

By email only: fairworkactreview@deewr.gov.au

Dear Sirs

Review of the *Fair Work Act 2009* (Cth)

The Victorian Equal Opportunity and Human Rights Commission (the Commission) welcomes the opportunity to make a submission in response to the Commonwealth Government's Review of the *Fair Work Act 2009* (Cth) (the Review). The Commission has reviewed the Background Paper to the Review that was drafted by the Review Panel and published online by the Commonwealth Department of Education, Employment and Workplace Relations on 18 January 2012.¹

The scope of the Commission's submission to the Review is reasonably limited, given its responsibility for administering Victorian anti-discrimination law: the *Equal Opportunity Act 2010* (Vic). However, the Commission would like to take this opportunity to make some observations about the operation of the *Fair Work Act 2009* (Cth) in addressing unlawful discrimination in employment (in the context of the general protections provisions), and the role of State and Territory laws in eliminating and addressing unlawful discrimination, vilification and sexual harassment in a range of areas of public life including; employment, access to premises, accommodation, goods and services and education.

1. Referral of matters to state agencies

The Commission notes that section 27 of the *Fair Work Act 2009* (Cth) makes clear that State and Territory laws dealing with discrimination and equal opportunity are intended to apply to the national system employers and employees. The practical effect of this is that rights and

¹ Fair Work Act Review Panel, *Fair Work Act Review Background Paper*, January 2012, available at: <http://www.deewr.gov.au/workplacerelations/policies/fairworkactreview/pages/home.aspx>;



remedies in relation to termination of employment and other adverse actions taken for reasons which may amount to unlawful discrimination under State and Territory anti-discrimination laws are preserved in their application to national system employers and employees. In terms of jurisdiction, a person whose employment has been terminated or who has been adversely treated in employment because of their race, sex, sexual preference, age or other protected attributes could alternately seek a remedy under either a State or Territory anti-discrimination or equal opportunity law or a remedy for a contravention of the general protections, but not both, as multiple actions are generally precluded by the *Fair Work Act 2009* (Cth).² The Commission notes that the general rule in relation to multiple actions is that the *Fair Work Act 2009* (Cth) prevents a person from 'double dipping' when s/he has more than one potential remedy relating to dismissal from employment by limiting the person to a single remedy. The *Fair Work Act 2009* (Cth) provides limited exceptions to the general rule preventing multiple actions, including where the initial application was either withdrawn or failed for want of jurisdiction.³

The Commission notes that the discretion to refuse to offer dispute resolution under section 116 of the *Equal Opportunity Act 2010* is less confined than the rules about multiple actions in the *Fair Work Act 2009* (Cth). Section 116 relevantly provides that the Commission may decline to provide, or continue to provide, dispute resolution where the matter has adequately been dealt with by a court or tribunal,⁴ where the matter involves subject matter that would be more appropriately dealt with by a court or tribunal,⁵ or where a person has initiated proceedings in another forum.⁶

Section 116 of the *Equal Opportunity Act 2010* (Vic), therefore, does not include a general prohibition against multiple actions being instituted, but rather enables the Commission to make a decision as to whether a remedy has already been sought and/or granted in another jurisdiction, or whether a matter has been finally dealt with in another jurisdiction, in relation to the subject matter of the complaint. This flexibility prevents unreasonable limitation of a complainant's rights to seek a remedy in the most appropriate jurisdiction, and provides a degree of protection to unrepresented complainants who might otherwise inadvertently 'shut off' avenues of redress because of a lack of understanding of the rules governing multiple actions in Commonwealth and State jurisdictions. In the Commission's experience, there are instances where complainants initiate proceedings in one forum, realise that it is not the most appropriate forum in which to obtain a remedy, and then discover that they are prevented from commencing proceedings in another jurisdiction: for example, because of statutory time limits or because of the general rule against multiple actions.

² See: *Fair Work Act 2009* (Cth) Part 6.1 – Multiple Actions

³ *Fair Work Act 2009* (Cth), sections 732, 734

⁴ *Equal Opportunity Act 2010* (Vic), subsection 116(b)

⁵ *Equal Opportunity Act 2010* (Vic), subsection 116(c)

⁶ *Equal Opportunity Act 2010* (Vic), subsection 116(d)



The Commission recommends that the current balance between the jurisdiction of the *Fair Work Act 2009* (Cth) and State and Territory anti-discrimination laws be maintained, on the proviso that sufficient flexibility be given to ensure people can 'choose' the most appropriate forum and are not prevented from doing so at an early stage of the dispute resolution process, where necessary. Further, the Commission recommends that the general rule against multiple actions in the *Fair Work Act 2009* (Cth) should not be tightened or narrowed further. The Commission makes this recommendation on the basis that it is important to ensure the interaction between the jurisdictions does not unreasonably limit people's right to choose the most appropriate forum to bring their discrimination complaint. It is important that the right balance between the rule against 'double dipping' for remedies, and the right of employees to raise issues of unlawful discrimination and be afforded a chance to resolve these issues be struck.

Recommendation: that sufficient flexibility be provided in the *Fair Work Act 2009* (Cth) to enable people to choose the most appropriate jurisdiction for making a complaint of unlawful discrimination, and that a person's right to make a complaint not be unreasonably limited by the strict application of statutory timeframes and the general rule against multiple actions.

2. Burden of proof

The Commission helped to develop and supports the recent submission of the Australian Council of Human Rights Agencies (ACHRA)⁷ to the Commonwealth Attorney-General's Department (AGD) Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper; an initiative under Australia's Human Rights Framework.⁸ One of the recommendations made in this submission was that any definition of direct discrimination in a Commonwealth Consolidated Anti-Discrimination Act (a Consolidated Act) should be consistent with that in section 361 of the *Fair Work Act 2009* (Cth),⁹ as this provision appropriately reflects the reality

⁷ Australian Council of Human Rights Agencies, *Submission, Consolidation of Anti-Discrimination Laws*, 1 February 2012 (ACHRA submission)

⁸ Commonwealth Attorney-General's Department (AGD), *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper* (Discussion Paper); an initiative under Australia's Human Rights Framework (the Discussion Paper), 22 September 2011, available at:

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(689F2CCBD6DC263C912FB74B15BE8285\)~Consolidation+of+Commonwealth+Anti-Discrimination+Laws-Discussion+Paper.doc/\\$file/Consolidation+of+Commonwealth+Anti-Discrimination+Laws-Discussion+Paper.doc](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(689F2CCBD6DC263C912FB74B15BE8285)~Consolidation+of+Commonwealth+Anti-Discrimination+Laws-Discussion+Paper.doc/$file/Consolidation+of+Commonwealth+Anti-Discrimination+Laws-Discussion+Paper.doc);

⁹ Which relevantly provides: Reason for action to be presumed unless proved otherwise

(1) If:

(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and
(b) taking that action for that reason or with that intent would constitute a contravention of this Part;
it is presumed, in proceedings arising from the application, that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.



that the burden of proof in establishing that an action was not a contravention of the general protections provisions should rest with the party who is best able to produce the evidence to demonstrate the true basis and intent of an action.

The Commission considers that the 'rebuttable presumption' approach taken in the *Fair Work Act 2009* (Cth) properly requires a court or tribunal to directly address the substantive issue of the basis for an action and consider whether a justification for the action existed; rather than focusing first on procedural or onus of proof issues which do not deal with legal obligations. The purpose of establishing a rebuttable presumption is to encourage parties to focus on substantive issues; such as what was the basis of the action, if there was a prohibited attribute and whether there is any acceptable justification for the action. This approach also enables and encourages a respondent to volunteer all information relevant to the issues raised in the complaint. The Commission further notes that very few, if any, comparable international jurisdictions impose the full burden of proof on the complainant in discrimination law.¹⁰

The Commission considers that framing the burden of proof as a rebuttable presumption with the onus for discharging that presumption resting with the respondent, satisfies the general aim of the general protection provisions in the *Fair Work Act 2009* (Cth), and the overarching aims of anti-discrimination laws more generally: in that it requires an employer to provide evidence of why they took the particular action that has been challenged, and so enabling a court or tribunal to make an assessment of whether it was taken on an unlawful basis.

Recommendation: that the *Fair Work Act 2009* (Cth) retain the rebuttable presumption provision contained in section 361 of the Act.

The Commission thanks the Review Panel for the opportunity to contribute a submission to the Review. The Commission may provide a supplementary submission to the Review, after reviewing other submissions provided as part of this public consultation process.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Karen Toohey'.

Karen Toohey
Acting Commissioner

¹⁰ See: list of comparable jurisdictions and differing models of shifting onus of proof provisions in UK, Canada, European Union and United States in the Discussion Paper, p. 15, at [50]