VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

HUMAN RIGHTS LIST

H11/2013

Applicant	**Amanda Jayne Collins**
Respondent	**David Donald Smith**
Intervener	**Victorian Equal Opportunity and Human Rights Commission**

OUTLINE OF SUBMISSIONS ON BEHALF OF THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

(Intervening pursuant to an order dated 19 November 2015)

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A. THE ISSUES

1. The principal issue in this proceeding on which the Victorian Equal Opportunity and Human Rights Commission (the **Commission**) makes submissions is as follows:

   (a) The *Equal Opportunity Act 2010* (**EOA**) in terms confers on the Tribunal a broad power to make an order for compensation for loss, injury or damage suffered as a consequence of a breach of the EOA, including in relation to workplace discrimination and sexual harassment. It imposes no significant substantive or procedural limitations on that power.

   (b) Certain provisions of the *Accident Compensation Act 1985* (**ACA**) and/or the *Workplace Injury Rehabilitation and Compensation Act 2013* (**WIRCA**) restrict a person's ability to recover damages in relation to a workplace injury, by imposing a substantive requirement of "serious injury" before a claim for damages can be made and by imposing complex procedural requirements.

   (c) Do the ACA and/or the WIRCA operate to limit or fetter the power of the Tribunal to make an order for the payment of compensation under the EOA? That is, must a person who has suffered discrimination have a serious injury and comply with the procedural requirements of the ACA and/or the WIRCA before the Tribunal is empowered to order a monetary payment?

2. The answer to this question will have significant ramifications for the effectiveness of the EOA in relation to all forms of workplace discrimination and sexual harassment. The Commission thus intervenes and contends that the answer to the question is "no".

B. BACKGROUND: THE COMMISSION'S ROLE AS INTERVENER

3. The Commission sought leave to intervene in this proceeding pursuant to s 159 of the *Equal Opportunity Act 2010* (Vic) (the **EOA**) by way of a letter dated 18 November 2015. Section 159 of the EOA empowers the Commission to seek leave to intervene in and be joined as a party to proceedings that involve issues of equality of opportunity, discrimination, sexual harassment or victimisation.

4. On 19 November 2015, the Victorian Civil and Administrative Appeals Tribunal (the **Tribunal**) granted the Commission leave to intervene in the proceeding. The

Tribunal ordered the Commission file and serve written submissions addressing whether:

(a) ss 134AA[1] and 134AB of the *Accident Compensation Act 1985* (the **ACA**); and/or

(b) ss 326 and 327 of the *Workplace Injury Rehabilitation and Compensation Act 2013*[2] (the **WIRCA**)

can operate to fetter the Tribunal's power to award pecuniary and non-pecuniary loss under s 125 of the EOA, and any other matters relevant to the Commission's functions under s 155 of the EOA.

5. Section 155 of the EOA outlines the Commission's functions, which include promoting and advancing the objectives of the EOA and being an advocate for the Act. The objectives of the EOA include enabling the Commission to encourage best practice and facilitate compliance with the EOA by undertaking research, educative and enforcement functions (s 3(e)). As an intervening party, the Commission acts as an independent third party with specialist expertise in the operation of the EOA.

6. The Commission notes the Tribunal's decision of 10 July 2015 finding the Applicant's complaint of sexual harassment proven in contravention of ss 92 and 93 of the EOA. The Commission does not make submissions regarding that finding; rather the Commission confines its submissions to providing the Tribunal with assistance in relation to:

(a) the effect of ss 134AA and 134AB of the ACA and/or ss 326-327 of the WIRCA (the **relevant provisions of the ACA and/or the WIRCA**) on the Tribunal's power to order payment of an amount under s 125(a)(ii) of the EOA; and

(b) principles relevant to the calculation of amounts ordered to be paid under s 125(a)(ii).

7. The Commission is able to provide oral submissions to the Tribunal on these submissions should the Tribunal consider that course appropriate.

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[1] The orders referred to s 134A of the ACA; however, there is no 134A thus the Commission has assumed that "s 134A" should read "s 134AA" of the ACA.

[2] The orders referred to the *Workplace Injury Rehabilitation and Compensation Act 2014.* However, the WIRCA was enacted in 2013 thus the Commission has assumed that "2014" should read "2013".

C. SUMMARY OF SUBMISSIONS

8. The Commission contends that neither the ACA nor the WIRCA operates to fetter the power conferred on the Tribunal by s 125(a)(ii) of the EOA to make an order for the payment of an amount of money. In summary, the Commission's submissions as to why this is so are as follows:

   (a) Acts of a Parliament are to be construed as operating harmoniously wherever possible. Implied repeal or limitation of one Act by another is not lightly to be assumed.

   (b) Section 125(a)(ii) of the EOA confers an express power on the Tribunal to award a monetary sum to compensate a person for loss, damage or injury suffered in consequence of a contravention of the EOA.

   (c) It is possible to construe the ACA and/or the WIRCA harmoniously with the EOA so that the power conferred by s 125(a)(ii) is able to operate according to its terms and is not fettered by the ACA and/or the WIRCA. As a consequence, s 125(a)(ii) need not be read down or construed as impliedly partially repealed.

   (d) The two regimes operate in different fields. The relevant sections of the ACA and/or the WIRCA preclude the recovery of damages in respect of a workplace injury, other than in accordance with a detailed regime. In contrast, the power conferred on the Tribunal by s 125(a)(ii) is a power to award an amount of money in compensation for contravention of the EOA. That power is not properly construed as one to award "damages in relation to a workplace injury". The power conferred by s 125(a)(ii) of the EOA thus falls outside the terms of the ACA and/or the WIRCA. In effect, the EOA provides an entirely different regime for compensation for breach of the law that is outside the scope of the ACA and/or the WIRCA.

   (e) This approach to the scope and effect of the relevant legislation is supported by the following matters:

      (i) the text, context and purposes of the relevant legislation, which demonstrate that the two regimes are directed at different matters and that the ACA and/or the WIRCA are not directed to claims for contravention of the EOA;

(ii) the proposition that general statutory provisions (such as the relevant provisions of the ACA and/or the WIRCA, which deal generally with the damages for workplace injury) are not to be construed as limiting a specific statutory provision (such as s 125 of the EOA, which deals specifically with compensation for breach of the EOA);

(iii) legislative history and relevant extrinsic materials, which demonstrate that the relevant provisions of the ACA and/or the WIRCA were directed to restoring a worker's right to recover common law damages for workplace injury — and that Parliament gave no consideration to the effect of those amendments on the separate remedies available under the EOA;

(iv) the consequences of a particular construction, which are significant not simply for cases of sexual harassment, but for all cases of discrimination in the workplace; and

(v) the *Charter of Human Rights and Responsibilities 2006* (Vic), which requires a construction be adopted that best ensures protection against discrimination.

9. In relation to the calculation of amounts under s 125(a)(ii), the Commission contends that the Tribunal ought to have regard to contemporary community standards when determining the amount of compensation payable, in accordance with the judgment of the Full federal Court in *Richardson v Oracle Corporation.*[3]

D. RELEVANT LEGISLATIVE PROVISIONS

The EOA

10. The EOA replaced the *Equal Opportunity Act 1995* (Vic).[4]

11. The EOA is directed to protecting people from discrimination on the basis of various attributes (including, for example, race, sex, age, sexual orientation, religious belief, marital status and political opinion) and from sexual harassment and victimisation.

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[3] (2014) 223 FCR 334.

[4] See ss 1(a) and 191.

This is reflected in the objects of the Act, set out in s 3, which relevantly provides as follows:

> The objectives of this Act are—
>
> (a) to eliminate discrimination, sexual harassment and victimisation, to the greatest possible extent;
>
> (b) to further promote and protect the right to equality set out in the Charter of Human Rights and Responsibilities;
>
> ...
>
> (f) to enable the Victorian Equal Opportunity and Human Rights Commission to resolve disputes about discrimination, sexual harassment and victimisation in a timely and effective manner, and to also provide direct access to the Victorian Civil and Administrative Tribunal for resolution of such disputes.

12. In furtherance of these objectives, the EOA prohibits discrimination and sexual harassment in a variety of areas of life, including in employment and related areas, education, the provision of goods and services, accommodation, clubs, sport and local government. Relevantly to the present case, s 93 of the EOA prohibits sexual harassment by employers and employees.

13. It is not an offence to breach the prohibitions on discrimination or sexual harassment.[5] Rather, the EOA provides mechanisms by which a person subject to discrimination or sexual harassment may seek redress. One mechanism is for a person who claims that another person has contravened the EOA to bring a dispute to the Commission for dispute resolution. An alternative mechanism is for a person who claims that another person has contravened the EOA to make an application to the Tribunal. Where a person makes an application to the Tribunal (as occurred in this case), s 125 confers various powers on the Tribunal:

> **What may the Tribunal decide?**
>
> After hearing the evidence and representations that the parties to an application desire to adduce or make, the Tribunal may—
>
> (a) find that a person has contravened a provision of Part 4, 6 or 7 and make any one or more of the following orders—
>
> (i) an order that the person refrain from committing any further contravention of this Act;
>
> (ii) an order that the person pay to the applicant, within a specified period, an amount the Tribunal thinks fit to compensate the applicant for loss, damage or injury suffered in consequence of the contravention;

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5 See, in particular, s 188.

(iii) an order that the person do anything specified in the order with a view to redressing any loss, damage or injury suffered by the applicant as a result of the contravention; or

(b) find that a person has contravened a provision of Part 4, 6 or 7 but decline to take any further action; or

(c) find that a person has not contravened a provision of Part 4, 6 or 7 and make an order that the application or part of the application be dismissed.

The ACA

14. The ACA was first enacted in 1985. The regime has changed over time, but in summary the ACA (since 1993, together with the *Accident Compensation (WorkCover Insurance) Act* 1993 (Vic) (the **ACWIA**)) provided for a statutory workers' compensation regime.

(a) Under the regime an employer held a WorkCover insurance policy that indemnified it for liability "in respect of an injury to a worker arising out of or in the course of, or due to the nature of, employment"[6] (hereafter, a **workplace injury**).

(b) The ACA also provided for a statutory entitlement to compensation for a worker who suffered a workplace injury.[7]

(c) In addition, the ACA limited the worker's right to recover damages for a workplace injury.

15. In relation to limitations on the right to recover damages, s 134AA currently provides as follows:

> **Actions for damages**
>
> A worker who is or the dependants of a worker who are or may be entitled to compensation in respect of an injury arising out of or in the course of, or due to the nature of, employment on or after 20 October 1999 but before 1 July 2014 shall not, in proceedings in respect of the injury, recover any damages in respect of pecuniary loss except—
>
> (a) in proceedings in respect of an injury or death arising out of a transport accident within the meaning of the Transport Accident Act 1986 on or after 20 October 1999—
>
> (i) otherwise than under Part III of the Wrongs Act 1958 , against the employer or any other person, subject to and in accordance with the Transport Accident Act 1986 ; or

[6] ACA, s 134, repealed in 2004 by Act No 102/2004. Subsequently WorkCover insurance policies were dealt with by ss 7 and 9 of the ACWIA.

[7] ACA, s 82.

(ii) under Part III of the Wrongs Act 1958 against the employer or the employer and any other person, subject to and in accordance with the Transport Accident Act 1986 ; or

(iii) under Part III of the Wrongs Act 1958 against a person other than the employer, subject to and in accordance with the Transport Accident Act 1986 ; or

(b) in proceedings to which the employer is not a party where, by reason of section 83(1), the injury is deemed to have arisen out of or in the course of employment, if the worker's place of employment is a fixed place of employment and the injury did not occur while the worker was present at that fixed place of employment.

16. Section 134AB relevantly provides as follows:

Actions for damages

(1) A worker who is, or the dependants of a worker who are or may be, entitled to compensation in respect of an injury arising out of or in the course of, or due to the nature of, employment on or after 20 October 1999 but before 1 July 2014—

(a) shall not, in proceedings in respect of the injury, recover any damages for non-pecuniary loss except—

(i) in accordance with the Transport Accident Act 1986 and subsections (25)(b), (26) and (36)(b) of this section; or

(ii) in proceedings of a kind referred to in section 134AA(b) and in accordance with subsections (25)(b), (26) and (36)(b) of this section; or

(iii) if subparagraphs (i) and (ii) do not apply, as permitted by and in accordance with this section; and

(b) shall not, in proceedings in respect of the injury recover any damages for pecuniary loss except—

(i) in proceedings of a kind referred to in a paragraph of section 134AA and in accordance with subsections (25)(a), (26) and (36)(a) of this section; or

(ii) if subparagraph (i) does not apply, as permitted by and in accordance with this section.

(2) A worker may recover damages in respect of an injury arising out of, or in the course of, or due to the nature of, employment if the injury is a serious injury and arose on or after 20 October 1999 but before 1 July 2014.

Other sub-sections within s 134AB deal in detail with the assessment of whether a worker has a serious injury and impose various procedural requirements that must be satisfied before a worker can commence proceedings for damages in relation to a workplace injury.

17. The Commission observes that the nature of the ACA's limitation on the worker's right to recover damages has varied over time. In summary:

(a) **Prior to 1 December 1997**, ss 135 and 135A of the ACA precluded recovery of damages for pecuniary or non-pecuniary loss in relation to a workplace injury, with certain exceptions — including an exception for non-pecuniary damages in relation to a serious injury and in accordance with a detailed statutory regime.[8] That is, common law claims for damages in relation to workplace injuries were permitted in relation to a serious injury.

(b) **From 1 December 1997 to 20 October 1999**, ss 135 and 135A were amended to preclude recovery of damages for pecuniary or non-pecuniary loss in relation to a workplace injury, with only a limited exception for certain claims involving transport accidents.[9] That is, all common law claims for damages in relation to a workplace injury were precluded.

(c) **From 20 October 1999 to 1 July 2014** the regime was restored, in general terms, to that applying prior to 1 December 1997. Sections 134AA and 134AB (set out above) were introduced and permitted common law claims for damages in relation to workplace injuries where the injury was a serious injury.

18. Sections 134AA and 134AB were inserted into the ACA by the *Accident Compensation (Common Law and Benefits) Amendment Act 2000* (Vic) (the **Amending Act**). Section 1 of the Amending Act relevantly set out the purpose of that Act as follows:

> The purpose of this Act is to—
>
> (a) provide for the restoration of common law actions for damages with effect from 20 October 1999; ...

19. Clause 26 of the Amending Act also inserted new provisions into the ACA that dealt specifically with certain forms of statutory compensation. Section 138B of the ACA (which remains in the current ACA) operates to prevent a court from making an order for payment of compensation for pain and suffering under the *Sentencing Act 1991* (Vic) if the pain and suffering arises from an injury or death in relation to which the person has an entitlement to compensation under the ACA and where the offence related to certain specified Acts.

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[8] See ACA version 71.

[9] See ACA version 83.

The WIRCA

20. The WIRCA was enacted in 2013. Its purposes were relevantly set out in s 1:

> The purpose of this Act is to—
>
> (a) simplify the provisions applying to the rehabilitation of injured workers and compensation in relation to injuries or deaths arising out of accidents and diseases in the workplace on or after 1 July 2014; and
>
> (b) streamline the provisions of the Accident Compensation Act 1985 which continue to apply in respect of injuries or deaths arising out of accidents and diseases in the workplace before 1 July 2014; …

21. Like the ACA the WIRCA provides for a statutory workers' compensation scheme.

    (a) Pursuant to the WIRCA an employer has a statutory contract of insurance (s 435) under which the Victorian WorkCover Authority indemnifies the employer in relation to compensation and damages in accordance with the ACA or the WIRCA for workplace injuries (s 71).

    (b) The WIRCA also provides for a statutory entitlement to compensation for a worker who suffers a workplace injury (s 39).

    (c) In addition, ss 326–338 of the WIRCA limit the worker's right to recover damages for a workplace injury, in a similar manner to s 134AA and 134AB of the ACA.

22. Part 7 of the WIRCA is headed "Actions and proceedings for damages".

    (a) Division 1 of Part 7 deals with choice of law in relation to claims for damages in tort and contract (see s 318).

    (b) Division 2 of Part 7 is headed "Actions for Damages". The first section in Division 2 is s 324, which is headed "Flow-chart 8—common law process". As its title suggests, it sets out a flow chart that shows the processes applicable to a claim for common law damages. The second section in Division 2 is s 325, which contains definitions relevant to the Division.

23. In particular, ss 326 and 327 of the WIRCA are found in Division 2 of Part 7. Those sections provide as follows:

> **326 Actions for damages**
>
> A worker who is, or the dependants of a worker who are, or may be, entitled to compensation in respect of an injury arising out of, or in the course of, or due to

the nature of, employment must not, in proceedings in respect of the injury, recover any damages for pecuniary or non-pecuniary loss except—

(a) if the injury arises from a transport accident—

(i) in accordance with the Transport Accident Act 1986 and sections 343 and 347(1) of this Act; or

(ii) in accordance with Part III of the Wrongs Act 1958, subject to and in accordance with the Transport Accident Act 1986 and section 366(7)(a) and (b) of this Act; or

(b) in proceedings, in accordance with sections 343 and 347(1), to which the employer is not a party if—

(i) by reason of section 46(1), the injury is deemed to have arisen out of, or in the course of, employment; and

(ii) the worker's place of employment is a fixed place of employment; and

(iii) the injury did not occur while the worker was present at that fixed place of employment; or

(c) as permitted by and in accordance with this Division, Division 3 or s 366.

327 Actions for damages—serious injury

Subject to this Division, a worker may recover damages in respect of an injury arising out of, or in the course of, or due to the nature of, employment if the injury is a serious injury.

In addition, ss 328-338 of the WIRCA in effect replicate the various subsections of s 134AB of the ACA. It is unnecessary to set out those sections here.

24. Division 6 of Part 7 is headed "Other actions and rights". Section 371 (found in Division 6) is to similar effect as s 138B of the ACA.[10] It operates to prevent a court from making an order for payment of compensation under certain provisions of the *Sentencing Act 1991* (Vic) if the pain and suffering arises from an injury or death in relation to which the person has an entitlement to compensation under the ACA and where the offence related to certain specified Acts. Section 371 relevantly provides as follows:

Compensation for pain and suffering

(1) Despite anything to the contrary in Subdivision (1) of Division 2 of Part 4 of the Sentencing Act 1991, a court must not exercise the powers conferred by that Subdivision to make a compensation order within the meaning of that Subdivision if the compensation would be for—

(a) a matter arising from discriminatory conduct that constitutes an offence against section 575; or

(b) a matter—

[10] See the Explanatory Memorandum to the Workplace Injury Rehabilitation and Compensation Bill 2013 at p 178.

(i) arising from an injury or death in respect of which it appears to the court that the person has an entitlement to any compensation under this Act; and

(ii) arising from an event that constitutes an offence only against the Dangerous Goods Act 1985 , the Occupational Health and Safety Act 2004 or the Equipment (Public Safety) Act 1994 or any regulations made under any of those Acts.

E. PRELIMINARY ISSUE — ACA OR WIRCA?

25. There is a preliminary question as to which of the ACA and the WIRCA is the relevant statute for consideration in this matter.

    (a) The ACA applies to workplace injuries arising from 1985 to 1 July 2014.

    (b) From 1 July 2014, the WIRCA applies to workplace injuries (see s 5).

    (c) However, s 5(1)(b) provides that the WIRCA applies to a workplace injury "by way of a gradual process over a period beginning before, and continuing on or after 1 July 2014".

26. The applicant suffered sexual harassment in the period from 5 January 2013 to 4 April 2013. In such circumstances, the ACA appears to be the relevant Act. However, if the injury to the Applicant is found to be one arising by way of a gradual process over a period of time beginning before 1 July 2014 and continuing, then ss 326 and 327 of the WIRCA may be relevant.

27. Sections 134AA and 134AB of the ACA and ss 326-338 of the WIRCA are not in identical terms. However, the relevant sections of both acts limit the recovery of damages in respect of pecuniary and non-pecuniary loss in respect of a workplace injury, with some exceptions including a "serious injury"; and "serious injury" is defined in the same way in each Act.[11] As a consequence, the Commission contends that the analysis in relation to the relationship between s 125(a)(ii) of the EOA and the ACA and/or the WIRCA is the same.[12]

28. Thus the Commission does not propose to make submissions on which law may be applicable in the event that the Tribunal finds the ACA and WIRCA operate to fetter the power of the Tribunal to award an amount for pecuniary and non-pecuniary loss under s 125(a)(ii) of the EOA. The Commission views it as beyond the scope of its

[11] See ACA, s 134AB(37) and WIRCA, s 325(1).

[12] The Commission notes that both the Applicant and the Respondent accept that any differences between the laws are not relevant for the present purposes.

intervention to make submissions on whether the Applicant's injuries arose by way of a gradual process. In any case, given the similarity in outcomes in applying either law, the Commission does not view this issue as having a significant bearing on these submissions. The Commission will thus address its submissions to both laws.

F. PRINCIPLES OF STATUTORY INTERPRETATION

Inconsistency between two laws of the same legislature

29. In essence, the dispute between the parties at this point in the proceedings concerns an apparent conflict or inconsistency between two Acts of the Victorian Parliament. On the one hand, s 125(a)(ii) of the EOA confers on the Tribunal a power to make a monetary award in relation to an injury suffered in consequence of discrimination or sexual harassment in the workplace. On the other hand, the relevant provisions of the ACA and/or the WIRCA restrict the ability of a worker to obtain damages in respect of a workplace injury.

30. Before considering how this apparent inconsistency is to be resolved, it is important to set out the relevant principles in relation to the resolution of issues of this kind.

31. In *Commissioner of Police v Eaton*,[13] Gageler J referred to the common law principle of construction that requires:

> ....that statutory texts enacted by the same legislature are to be **construed so far as possible to operate in harmony and not in conflict**. That principle of harmonious construction applies to the construction of provisions within different statutes of the same legislature to create "a very strong presumption that the ... legislature did not intend to contradict itself, but intended that both ... should operate".

32. He further observed that application of the principle to the construction of provisions within different statutes "can be difficult where a legislature does not 'state an intention either that the two statutory regimes should both apply ... or that [one] regime should apply to the exclusion of the [other]".[14]

33. Whilst Gageler J was in dissent as to the outcome of the case, his statement of the relevant principles of construction accorded with that expressed by the plurality. [15]

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[13] (2013) 252 CLR 1 at [98] (footnotes omitted, emphasis added).

[14] Ibid at [99] (footnote omitted).

[15] Ibid at [78] (Crennan, Kiefel and Bell JJ); and see *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSC 76 at [130]-[131] (Sloss J); and *Fonteio v Morando Bros Pty Ltd* [1971] VR 658 at 662 (Full Court).

34. However, where there is an inconsistency between the provisions of two statutes, the later enactment will be taken to have impliedly repealed the earlier to the extent of the operative inconsistency. In *Goodwin v Phillips* Griffiths CJ said:[16]

> where the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication ... if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act.

35. In the same case Barton J adopted the following statement from *Hardcastle on Statutory Law*:[17]

> **The Court must...be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together**, before they can from the language of the later implied the repeal of an express prior enactment, ie, the repeal must, if not express, flow from necessary implication.

36. In a similar vein, Gummow and Hayne JJ observed in *Minister for Immigration and Multicultural Affairs and Indigenous Affairs v Nystrom* that:[18]

> The doctrine [of implied repeal as articulated in *Goodwin v Phillips*] requires that **actual contrariety be clearly apparent and that the later of the two provisions be not capable of sensible operation** if the earlier provision still stands.

37. Thus it is not enough that the provisions of two statutes simply appear to be inconsistent in word. They must be inconsistent in operation. The authorities make clear that courts and tribunals must be cautious in their approach to finding an implied repeal. Gaudron J observed in *Saraswati v R* that:[19]

> It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied. There must be **very strong grounds to support that implication**, for there is a **general presumption that the legislature intended that both provisions should operate** and that, to the extent that they would otherwise overlap, one should be read as subject to the other.

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[16] (1908) 7 CLR 1 at 7.

[17] Ibid at 10 (emphasis added).

[18] (2006) 228 CLR 566 at [48] (footnotes omitted, emphasis added).

[19] (1991) 172 CLR 1 at 16–17 (footnotes omitted, emphasis added). And see *Channel Pastoral Holdings Pty Ltd v Commissioner of Taxation* (2015) 321 ALR 261 at [96] (Allsop CJ, Edmonds, Gordon, Pagone and Davies JJ).

38. More recently, in *Ferdinands v Commissioner for Public Employment,* Gleeson CJ adopted the same approach:[20]

> ...[it is] a problem that arises only because the legislature did not state an intention either that the two statutory regimes should both apply in such a case, or that the second regime should apply to the exclusion of the first. The legislature may, by necessary implication, manifest an intention of the latter kind, although **partial repeal of an earlier statute by a later statute will only be inferred on "very strong grounds"**.

39. In *Re Beth*, Osborn J (as he then was) observed that a later Act is not to be interpreted as impliedly withdrawing or limiting a conferral of jurisdiction unless the implication appears clearly and unmistakably.[21]

40. Relatedly, there is a general rule of statutory interpretation that general provisions are not to be taken as derogating from special provisions (encompassed in the maxim *generalia specialibus non derogant*). "It is not to be supposed that the mind of the legislature continuously deliberating and expressing itself in statutes will, after full special deliberation at one time, subsequently alter the result of that deliberation by mere general words not so expressed as to bring the special matter within their purview. It is not to be supposed that the mind of the legislature so operating and expressing itself will take away the rights previously granted to subjects without compensation and without specific statements to that effect."[22]

General principles of statutory construction

41. In determining whether two apparently inconsistent statutes can be construed harmoniously so that both may operate the Tribunal is, of course, undertaking an exercise in statutory construction.[23] Thus general principles of statutory construction are relevant.

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[20] (2006) 225 CLR 130 at [4] (footnotes omitted).

[21] (2013) 42 VR 124 at [88]. His honour referred to *Shergold v Tanner* (2002) 209 CLR 126 at 136 and *Re Applications of Shephard* [1983] 1 NSWLR 96.

[22] *Attorney-General v Exeter Corporation* (1911) 1 KB 1092 at 1100, quoted by Dixon J in *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1948) 77 CLR 1 at 29. And see *Smith v The Queen* (1994) 181 CLR 338 at 348 (Mason CJ, Dawson, Gaudron and McHugh JJ).

[23] *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at [18] (Gummow and Hayne JJ).

42. Accordingly, when construing the legislative regimes in question, it is appropriate for the Tribunal to do so by reference to the text and context of the provisions,[24] including consideration of the statute as a whole.[25]

43. It is also appropriate to have regard to the legislative history of the provisions and extrinsic materials that may shed light on the meaning and intended scope of the provisions.[26]

44. In addition, an interpretation that would best achieve the statutory purpose is to be preferred over other possible interpretations.[27] In this context, it is appropriate to consider the consequences of adopting one construction over another.[28]

45. The principle concerning purposive construction has particular relevance to beneficial or remedial legislation. Anti-discrimination and equal opportunity laws and provisions have been long regarded as beneficial and remedial.[29] Thus they are to be interpreted liberally, having regard to their statutory purposes and objects.[30] French CJ, Gummow, Hayne, Kiefel and Bell JJ summarised this principle of statutory interpretation in *AB v Western Australia*[31] as follows:

> Moreover, the principle that particular statutory provisions must be read in light of their purpose was said in *Waters v Public Transport Corporation* to be of particular significance in the case of legislation which protects or enforces human rights. In construing such legislation "the courts have a special responsibility to take account of and give effect to the statutory purpose". It is generally accepted that there is a rule of construction that **beneficial and remedial legislation is to be given a "fair, large and liberal" interpretation**.

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[24] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41 at [47] (Hayne, Heydon, Crennan and Kiefel JJ).

[25] *Project Blue Sky v ABA* 194 CLR 355 at [69]-[70] (McHugh, Gummow, Kirby, Hayne JJ).

[26] *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55 at [39] (The Court).

[27] *Thiess v Collector of Customs* [2014] HCA 12 (The Court)).

[28] *Project Blue Sky v ABA* (1998) 194 CLR 355 at [78] (McHugh, Gummow, Kirby, Hayne JJ).

[29] See Statutory Interpretation in Australia, 8th edition, Pearce and Geddes, p 361.

[30] See for example *IW v City of Perth* [1997] HCA 30; 191 CLR 1; (1997) 94 LGERA 224; (1997) 146 ALR 696; (1997) 71 ALJR 943 (31 July 1997); *Commonwealth v Anti discrimination Tribunal (Tasmania)* [2008] FCAFC 104; 169 FCR 85; 248 ALR 494; 103 ALD 1 [154] "Heerey J's proposition that because the Anti-Discrimination Act is beneficial legislation, it ought to be given a generous and liberal construction is obviously correct."

[31] [2011] HCA 42 at [24] (emphasis added).

Construction consistent with the Charter to be preferred

46. In addition to the general rules of statutory construction, it is appropriate for the Tribunal to construe the relevant provisions in light of the Charter and, in particular, the right to equality and non-discrimination found in s 8(3) of the Charter:

> **Recognition and equality before the law**
> ...
> (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

47. Pursuant to s 32 of the Charter, statutory provisions are to be construed, so far as it is possible to do so consistently with their purpose, in a way that is compatible with human rights.

G. APPLICATION: CONSTRUING THE EOA AND THE ACA/WIRCA HARMONIOUSLY

48. As noted above, the terms of the EOA on the one hand, and the ACA and/or the WIRCA on the other, appear to be inconsistent. As a consequence the Respondent has contended that the EOA is to be "read down" (this is, in substance, an argument for a form of implied partial repeal).

49. However, as the authorities show, inconsistency between two Acts of the same Parliament is not lightly to be presumed. Rather, the Parliament is presumed to have intended that both Acts would operate — and hence this Tribunal should strive to construe each Act so that they may operate alongside one another. It is only if that is not possible that one Act should be read down (and that raises the further question of which Act is to be read down — the EOA, or the ACA and/or WIRCA).

Text and context: the regimes operate in different fields

50. The Commission contends that s 125(a)(ii) of the EOA can be given affect according to its clear terms consistently with the ACA and/or the WIRCA. This is because the two regimes operate in different fields. The ACA and/or WIRCA regulate damages and compensation for injuries and accidents in the workplace. In contrast, the EOA regulates discrimination and includes, as a remedy, monetary compensation for breach of the law.

51. In that regard, the Commission contends that the approach of Stephen J in *Ansett Transport Industries Pty Ltd v Wardley*[32] is instructive. The issue in that case was whether there was an inconsistency between the *Equal Opportunity Act 1977* (Vic), which prohibited dismissal of an employee on the basis of sex, and a Commonwealth industrial agreement that gave Ansett an unqualified right to dismiss its pilots on any ground. The High Court found no inconsistency. Stephen J observed as follows:[33]

> The Airline Pilots Agreement 1978 is a memorandum of the terms agreed on for the settlement of matters in dispute between Ansett Transport Industries (Operations) Pty. Ltd. and the Australian Federation of Air Pilots ... [and] has the same effect as an award of the Commission for all the purposes of that Act.
>
> The *Equal Opportunity Act 1977* (Vict.) is an instrument of a totally different character. An Act of the Victorian Parliament, its long title describes it as making unlawful certain kinds of discrimination on the ground of sex or marital status and as promoting equality of opportunity between men and women. In its attack upon discrimination it concentrates upon the areas of employment, education and the provision of goods, services and accommodation. In each of these areas it makes unlawful various types of conduct which involve discrimination on the ground of sex or marital status.
>
> ...
>
> The question as a whole resolves itself, in the end, into a search for legislative intent. While the Agreement and the Act each deals with aspects of the engagement and dismissal of employees, **they are essentially dissimilar both in character and in general content.** ...
>
> ...
>
> The Victorian legislature has concerned itself quite generally with the social problem of discrimination based upon sex or marital status and occurring in a variety of areas of human activity. It has declared various manifestations of such discrimination to be unlawful. This is a subject matter upon which the Commonwealth's *Conciliation and Arbitration Act* is understandably silent, silent because of its general irrelevance to the subject matter of that Act. That silence will necessarily extend to the factum through which it operates, the present Agreement. The disputes with which *the Conciliation and Arbitration Act* are concerned are disputes as to industrial matters, pertaining to the relationship of employer and employee; they have nothing inherently to do with questions of discrimination on the grounds of sex. No doubt it may happen that in a particular dispute, apparently of an industrial character, some question of discrimination of this sort may appear to be involved. The precise nature of its involvement may then determine whether or not the dispute is indeed an industrial dispute. However in the present case the Agreement gives not the slightest indication of any such involvement and has all the hallmarks of being made in settlement of an entirely orthodox industrial dispute.

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[32] (1980) 142 CLR 237. *Wardley* concerned the effect of s 109 of the Constitution and the question of inconsistency between State and federal laws; but the Commission contends that the reasoning is nonetheless apt to the present case.

[33] (1980) 142 CLR 237 at 244, 249, 251.

52. Stephen J's reasoning may be applied in the present case: the EOA is concerned with the general social problem of discrimination and sexual harassment in various areas, including in the sphere of employment. In contrast, the ACA and/or the WIRCA are concerned with the prevention of and compensation for workplace injuries — and they contain not the slightest indication of concern with discrimination and sexual harassment. The two regimes are essentially dissimilar in character and content.

53. This understanding of the two regimes is supported by consideration of the text of the two regimes, which reveals that the rights and remedies conferred by each regime are quite different.

(a) Section 125(a)(ii) of the EOA provides for the Tribunal to award compensation for loss, damage or injury in consequence of a breach of the EOA (in this case, the unlawful conduct of sexual harassment). That is, the EOA fixes upon contravention of the law as the criterion for an award of compensation. Such a contravention may or may not involve a person's employment and may or may not occur in the workplace.

(b) In contrast, the ACA and/or the WIRCA entitle a worker to compensation in respect of a workplace injury and, correspondingly, limit the worker's right to obtain damages for the same injury. That is, those Acts fix upon an injury in the workplace in the course of employment as the criterion for compensation and the corresponding limits on recovery of damages.

54. Furthermore, the ACA and the WIRCA are directed to proceedings in a court. This is apparent from the text of s 134AB and various sections of the WIRCA.

(a) Section 134AB(22) of the ACA, which provides that "[a] court must not, in proceedings in accordance with this section, award to worker in respect of an injury" pecuniary loss damages if the total damages are less than a specified amount or in excess of a specified amount, or pain and suffering damages if the total damages are less than a specified amount or in excess of a specified amount, or "damages of any other kind". (And see s 340 of the WIRCA.)

(b) Section 134AB(23) refers to a trial and to a jury. (And see s 341 of the WIRCA.)

(c) Section 134AB(27) refers to rules of court. (And see s 344 of the WIRCA.)

(d) Section 134AB(31) refers to a court awarding costs. (And see s 344 of the WIRCA.)

(e) Section 134AB(34) prohibits a court, in relation to an award of damages in accordance with this section, from ordering the payment of interest. (And see s 346 of the WIRCA.)

Section 134AB contains no such prohibitions or provisions directed to the Tribunal, further indicating that it is not directed to the power of the Tribunal to award compensation for breach of the EOA. Nor does the WIRCA contain such provisions.

55. The Commission contends that the two Acts thus operate in different spheres and are not properly understood as inconsistent. The ACA and/or the WIRCA do not, in terms, regulate a statutory action for compensation for breach of the EOA or the Tribunal's power to award monetary compensation in such an action. Each of the two regimes is "capable of sensible operation".[34] There is thus no occasion to read down the EOA. (Nor is it necessary to read down the relevant provisions of the ACA and/or the WIRCA, as they are simply not purporting to regulate the Tribunal's jurisdiction under the EOA.)

56. Thus understanding of the two regimes is supported by *Owens v University of Melbourne*.[35] That case concerned whether the ACA applied to an action for damages under s 19 of the former *Whistleblowers Protection Act 2001* (Vic) (the **WPA**). Judd J observed that "the breadth of the compensable loss and damage under the [WPA] defines the cause of action within an entirely different category to claims under the [ACA], notwithstanding that overlap might occur in the case of injury".[36] So it is here.

57. His Honour went on to observe that:[37]

> To deny to the plaintiff the right to claim the full range of compensation available under the [WPA], merely because the plaintiff is an employee who suffered detrimental action arising out of or in the course of employment would, in my view, offend the legislative purpose by significantly limiting the objects of the [WPA] as an instrument of protection for persons many of whom will be employees. If the defendant's submission is accepted an employee, in the position

[34] *Nystrom* (2006) 228 CLR 566 at 585.

[35] (2008) 19 VR 449.

[36] (2008) 19 VR 449 at [16].

[37] (2008) 19 VR 449 at [18], [22].

> of the plaintiff, must dissect from any "injury" the other compensable detriment which may become difficult when the cause of the collateral damage overlaps with the cause of the injury. The injury may be a by-product of the damage to employment and career prospects.
>
> ...
>
> The purpose of the [WPA] would be frustrated if those who suffered detrimental action in the workplace were denied the full range of remedies available under the Act merely because any injury they suffer arose out of or in the course of their employment. In my opinion **the two legislative schemes are designed to and can co-exist** without the need to read down or imply a proviso to s 134AB. **There is no inconsistency**. Section 134AB of the [ACA] does not prohibit a claim for damages for physical or mental injury (not being serious injury) under s 19 even though the injury arose out of or in the course of employment. Nor is the plaintiff precluded from bringing this proceeding for damages, including exemplary damages under s 19 of the Act. Accordingly, I would answer both questions, No.

The Commission contends that that reasoning can and should be applied in the present case.

58. The Commission observes that the WPA has some textual differences from the EOA — in particular, the EOA has no counterpart to s 19(4) of the WPA, which provided that the remedy conferred by s 19 did not affect any other right or remedy available to the person arising from the detrimental action.[38] The EOA contains no such express statement. However, the Commission contends that this is to be implied in the EOA. It is clear from the objects of the EOA and the broad powers conferred upon the Tribunal by s 125 that it is intended to confer rights additional to other rights an injured person might have (whether under the common law or otherwise).

59. The EOA confers jurisdiction on the Tribunal to award remedies; and the ACA and/or the WIRCA ought not be construed as limiting that conferral of jurisdiction unless the implication appears clearly and unmistakably.[39] It does not.

60. Finally, it is notable that the ACA and the WIRCA each have specific provisions dealing with statutory claims for compensation under the *Sentencing Act*. The *Sentencing Act* provides for a court to award a person injured by the commission of an offence compensation for pain and suffering and various expenses.[40] The ACA and the WIRCA specifically provide that such compensation is <u>not</u> to be awarded in relation to arising from an injury or death in respect of which it appears to the court

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[38] See discussion in *Owens* (2008) 19 VR 449 at [17].

[39] *Re Beth* (2013) 42 VR 124 at [88] (Osborn J).

[40] See Subdivision 1 of Division 2 of Part 4 of the *Sentencing Act*.

that the person has an entitlement to any compensation under the ACA or WIRCA (as the case may be) and the offence is one under certain enumerated Acts.[41]

61. Thus where the Parliament intended, under the ACA and/or the WIRCA, to limit a particular statutory right to compensation, it did so expressly. This was necessary because s 134AA and/or s 134AB (and the corresponding provisions in the WIRCA) did not otherwise achieve that outcome.

62. In contrast, in relation to the EOA there is no such express limitation, indicating that the ACA and/or the WIRCA did not intend to limit the remedies available under the EOA.

Purposive, beneficial construction to be preferred

63. This approach to the EOA is supported by its beneficial nature, which is apparent from its objects and purposes set out in s 3. These purposes and objects make clear that the intention of the legislation is to eliminate discrimination, sexual harassment and victimisation. The EOA is remedial in nature. In construing the provisions of the EOA, regard must be had to the objectives of eliminating discrimination and sexual harassment, protecting the right to equality, eliminating systemic causes of discrimination and sexual harassment, and providing direct access to the Tribunal for resolution of disputes about discrimination and sexual harassment.

64. The statutory purposes and objectives of the EOA evince a clear intention that claimants of sexual harassment have direct access to the Tribunal to seek resolution of a complaint under s 123 of the EOA. Having made a complaint under s 123 of the EOA, s 125 then empowers the Tribunal to grant a remedy. Section 125 should be interpreted beneficially so that it furthers the objects of the Act, including by empowering the Tribunal to award monetary compensation for sexual harassment.

65. The Commission contends that the Respondent's approach to the two regimes — namely that the relevant provisions of the ACA and WIRCA fetter the power of the Tribunal to award damages for loss, damage or injury — fails to give effect to the beneficial purposes of the EOA.

[41] See paragraphs 19 and 24, above, discussing s 138B of the ACA and s 371 of the WIRCA.

General and specific provisions

66. As noted above, as a general principle of statutory construction a specific provision prevails over a general provision. The EOA is properly regarded as a specific regime to deal with discrimination and sexual harassment. In contrast, the relevant provisions of the ACA and the WIRCA that preclude claims for damages are in general terms; and they make no express reference to claims for compensation for discrimination and sexual harassment. These provisions ought not be regarded as intended to override or limit the power conferred on the Tribunal by s 125(a)(ii).

67. The Commission contends that any reading down of a specific law such as the EOA requires the clearest expression of intention. There is no such expression of intention in the ACA and/or the WIRCA.

Legislative history and extrinsic materials

68. The Commission's submissions in relation to the construction of the relevant provisions of the ACA and/or the WIRCA are reinforced by the legislative history and extrinsic materials in relation to those Acts. That material reveals no intention to limit the remedies available in relation to unlawful discrimination and sexual harassment under the EOA.[42]

69. The extrinsic materials reveal that Parliament gave no consideration to the proposition that the relevant provisions of those Acts might limit rights in relation to non-discrimination and sexual harassment arising under a separate statutory regime.[43] Rather, ss 134AA and 134AB of the ACA were introduced in 2000 to "restore access to common-law damages for seriously injured workers".[44] That statement is reflected in the express purpose in s 1 of the Amending Act, which was "to provide for the restoration of common law actions for damages". The corresponding provisions in the WIRCA substantially re-enact ss 134AA and 134AB and should be understood to have the same purpose.

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[42] The Commission notes that Judd J had regard to the legislative history and extrinsic materials in *Owens* (2008) 19 VR 449 at [8].

[43] As was also the case in *Re Beth* (2013) 42 VR 124 at [90].

[44] Parliament of Victoria, *Hansard*, Assembly, Thursday 13 April 2000, p 1001: Accident Compensation (Common Law and Benefits) Amendment Bill 2000, second reading speech.

70. That purpose does not support or require a construction of the relevant provisions of the ACA and the WIRCA that limits the ability of the Tribunal to award compensation to a person who has been injured as a result of unlawful discrimination or sexual harassment in contravention of the EOA.

Consequences of reading down the EOA

71. It is also important to consider the consequences of reading down s 125(a)(ii) of the EOA in the manner proposed by the Respondent.

72. Such a reading down in matters of workplace sexual harassment injuries will mean that the complex and detailed requirements of the ACA and/or the WIRCA will need to be followed in relation to all such claims where monetary compensation for injury is sought — including a determination of whether the person concerned has a "serious injury"[45] and the potential involvement of the County Court or the Supreme Court.[46] If the person subject to sexual harassment has not suffered a serious injury, no compensation will be payable under the EOA. Yet the EOA itself contains no limitation of that kind.

73. This outcome directly contradicts the statutory objectives of the EOA to provide effective protection against, and remedies for, sexual harassment and discrimination and for the effective resolution of disputes of sexual harassment matters. Further, the choice of the Tribunal as the forum for resolution of such disputes, with limited procedural requirements, demonstrates a legislative intention that access to a remedy for discrimination ought to be non-technical, timely, cost effective and efficient[47] — not complex and involving the superior courts. To paraphrase Judd J in *Owens*,[48] to require a plaintiff to confront such complexity when formulating a claim under the EOA would act as a very great disincentive.

74. In addition it is important to note that the approach for which the Respondent contends is not confined to sexual harassment — it will apply to all forms of discrimination in the workplace. That is, a person who claims injury by reason of race or sex discrimination by an employer will be unable to obtain a monetary award

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[45] ACA, s 134AB(2); WIRCA, s 327.

[46] ACA, s 134AB(16)(b); WIRCA, s 335(2)(d).

[47] VCAT Act, s 98.

[48] (2008) 19 VR 449 at [19].

under s 125(a)(ii) if they have not suffered "serious injury". Such a significant consequence — consideration of which is entirely absent from the extrinsic materials and the Parliamentary debates — are unlikely to have been intended when the Parliament enacted ss 134AA and 134AB of the ACA and ss 326-338 of WIRCA.

75. In the absence of some textual indication that such broad-reaching consequences for workplace discrimination were intended, the Tribunal ought to conclude that s 125(a)(ii) of the EOA operates according to its terms to provide effective redress for unlawful discrimination.

Operation of s 125(a)(ii) of the EOA supported by the Charter

76. Finally, the Commission contends that the construction for which it contends is supported by ss 8 and 32 of the Charter. Section 8 provides that every person has "the right to equal and effective protection against discrimination". Section 32 of the Charter requires that legislation be interpreted, where possible, compatibly with human rights. In *Slaveski v Smith*[49] Warren CJ, Nettle and Redlich JJ explained s 32 as follows: "If the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question."

77. Further, s 3(b) of the EOA provides that one objective of the EOA is to "further promote and protect the right to equality" found in s 8 of the Charter.

78. In this case, the EOA provides for equal and effective protection against discrimination — and part of that protection is achieved through the power conferred on the Tribunal to award a monetary remedy for loss or injury. A construction of the relevant provisions of the ACA and/or the WIRCA that limits the available remedies in relation to discrimination occurring in the workplace undermines the right to effective protection against discrimination and ought not be accepted. Rather, a construction of the two regimes that enables each to operate along side the other best accords with the right to equality found in s 8(3).

[49] (2012) 34 VR 206 at [24].

Cases relied upon by the Respondent do not assist

79. In support of his approach to the relationship between the EOA and the ACA and/or WIRCA, the Respondent relies upon two cases: *Doughty v Martino Developments Pty Ltd*[50] and *Murphy v State of Victoria.*[51] Neither case assists the Tribunal in relation to the present issue.

(a) *Doughty* concerned an action for damages "*per actione servitum amisit*" for the loss of services of an employee. This is a common law claim. Further, *Doughty* concerned the operation of the *Transport Accident Act 1986* (Vic), not the ACA or the WIRCA. In particular, *Doughty* did not require the court to resolve any question of inconsistency between two Acts. Rather, the question was whether s 93 of the *Transport Accident Act* had extinguished the right of an employer to obtain damages at common law *per actione servitum amisit*. The Court held that it had.

(b) *Murphy* concerned actions for deceit, intentional infliction of injury, negligence and breach of contract arising out of a workplace injury. All were common law claims. Again, this did not require the court to resolve any question of inconsistency between two Acts. Rather, the question was whether s 134AB applied to the claims. The Court held that it did (save for the claim in contract).

80. In neither case does the conclusion or the reasoning compel any conclusion that the relevant provisions of the ACA and/or the WIRCA have limited a person's ability to obtain monetary compensation under the EOA for breach of that Act.

Conclusion

81. In conclusion, the Commission contends that, in accordance with the general authorities on inconsistency of legislation, and with the approach adopted in *Wardley* and *Owens*, the power conferred by s 125(a)(ii) of the EOA "can comfortably co-exist" with the relevant provisions of the ACA and the WIRCA. There is no inconsistency — each operates in a different field. Thus it is not necessary to read down the EOA.

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[50] (2010) 27 VR 499.

[51] [2012] VCC 2025.

H. RELEVANT PRINCIPLES FOR AN AWARD OF COMPENSATION

82. Under s 125(1(a)(ii) of the EOA the Tribunal may order a respondent to pay an amount the Tribunal thinks fit to compensate the applicant for loss, damage or injury suffered in consequence of the respondent's contravention of s 92 and 93 of the EOA. The Commission contends that the following principles apply in relation to the exercise of that power.

Construction of "in consequence of"

83. The Tribunal's power to make an order for compensation is in relation to an injury suffered "in consequence of" the contravention. In *Insurance Commission of Western Australia v Container Handlers Pty Ltd,* McHugh J explained the phrase "a consequence of" as follows:[52]

> The word "consequence" is an ordinary English word and should be interpreted as such. *The Australian Oxford Dictionary* defines "consequence" as "the result or effect of an action".
>
> ... [T]he expression "a consequence of" emphasises the result or effect of the driving rather than the driving causing the result. This distinction is important in an insurance context where cause is frequently — perhaps usually — equated with "proximate" or "dominant" cause. Although "consequence" involves notions of causation, the term "consequence" — with its emphasis on effect — places less emphasis on the proximity of cause and effect than the term "cause" may do in various contexts.

84. Thus in the EOA the term "in consequence of" the contravention is not to be construed as meaning loss caused *only* by the sexual harassment contravention. Rather, the expression emphasises loss as the result or effect of the contravention. The contravention does not need to meet the test for legal causation or be the sole or dominant reason for the loss. This is consistent with the approach of Garde J in *GLS v PLP (Human Rights)*,[53] concerning a monetary award for sexual harassment.[54]

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[52] (2004) 218 CLR 89 at [43]

[53] [2013] VCAT 221.

[54] The case concerned s 136(a)(ii) of the *Equal Opportunity Act*, which was in materially the same terms as s 125(a)(ii) of the EOA.

Principles for calculating damages

85. The principal method for calculating an award of damages in discrimination cases was articulated in *Hall v A & A Sheiban Pty Ltd.*[55] Lockhart J held that, generally speaking, the correct way to approach the assessment of damages in discrimination cases is to compare the position in which the complainant might have been expected to be if the discriminatory conduct had not occurred with the situation in which they were placed due to the conduct of the respondent.[56]

86. Lockhart and Wilcox JJ adopted as correct what was said by May LJ (of the UK Court of Appeal) in a racial discrimination case, *Alexander v Home Office*:[57]

> As with any other awards of damages, the objective of an award for unlawful racial discrimination is restitution. Where the discrimination has caused actual pecuniary loss, such as the refusal of a job, then the damages referrable to this can be readily calculated. For the injury to feelings, however, for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and good sense of the judge and his assessors. Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the results which it seeks to achieve as do nominal awards. Further, injury to feelings, which is likely to be of a relatively short duration, is less serious than physical injury to the body or the mind which may persist for months, in many cases for life.

87. This principle has been followed in subsequent discrimination and equal opportunity cases, both in Victoria and under federal anti-discrimination law.[58] The Commission contends that the Tribunal should adopt the same approach in exercising its power under s 125(a)(ii) in relation to the Applicant.

Relevant factors in assessing special damages

88. Special damages are calculated by reference to the economic loss suffered by an applicant as a consequence of the unlawful conduct. In the employment context, special damages usually focuses on lost wages (both past and future), as well as other

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[55] (1989) 20 FCR 217.

[56] *Hall & Ors v A. & A. Sheiban Pty Ltd & Ors* (1989) 20 FCR 217, 239 (Lockhart J)

[57] *Alexander v Home Office* [1988] 2 All ER 118, 122 (May LJ), cited in *Hall & Ors v A & A Sheiban Pty Ltd & Ors* (1989) 20 FCR 217, 238 (Lockhart J) and 256 (Wilcox J).

[58] See, eg, *Spencer v Dowling* [1997] 2 VR 127 at 144; *Richardson v Oracle Corp Australia Ltd* (2014) 223 FCR 334 at [83]; *Ewin v Vergara (No 3)* (2013) 307 ALR 576 at [607]

employment benefits the employee would have been entitled to such as a redundancy payment, expected pay rises, loss of superannuation payments, overtime payments or allowances.

89. Special damages can also cover other non-employment related financial loss, including past and future medical expenses (cost of appointments and medication), travel expenses or other expenses for attending the hearing.[59]

90. An amount of economic loss may be set off against other income or benefits that an applicant may have received in the relevant period.[60]

91. The Commission makes no submissions on the facts of this case, but contends that relevant factors for assessing special damages include whether an applicant is currently working, and if so, whether she is earning less than she did when working for the respondent. If an applicant is not working, then the Tribunal should consider any evidence of her capacity to work, and whether she has reduced capacity by reason of the conduct found to be unlawful by the Tribunal under the EOA.

Relevant factors in assessing general damages

92. The Commission contends that the starting point for assessing general damages is as stated by Garde J in *GLS v PLP*: that each case must be assessed on its own merits and that an award of general damages should be appropriate for the individual case, having regard to the facts and circumstances and the contraventions proved.[61]

93. However, the difficulty in assessing non-economic loss was acknowledged by Wilcox J in *Hall*:

> Where it appears that a claimant has incurred particular expenditure or lost particular income as a result of the relevant conduct, that economic loss may readily be calculated. But damages for such matters as injury to feelings, distress, humiliation and the effect on the claimant's relationships with other people are not susceptible of mathematical calculation.[62]

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[59] See, eg, *Gama v Qantas Airways Ltd (No.2)* [2006] FMCA 1767 [129]-[130]

[60] See, eg, *Howe v Qantas Airways* [2004] FMCA 242 [133]

[61] *GLS v PLP (Human Rights)* [[2013] VCAT 221 [273]-[274]

[62] *Hall & Ors v A. & A. Sheiban Pty Ltd & Ors* (1989) 20 FCR 217, 256 (Wilcox J)

94. The Commission contends that, in relation to a breach (or breaches) of the EOA, the Tribunal should consider the following factors to assist in its assessment of the quantum of damages:

(a) how severe the impact of the conduct has been on the applicant;

(b) whether the unlawful conduct was repeated and ongoing over a period of time;

(c) whether the employer knew about the unlawful conduct and failed to act or take steps to prevent the conduct, as required by the positive duty in s 15 of the EOA;

(d) whether the perpetrator of the unlawful conduct is in a position of power over the applicant by reason of their age or their job;

(e) whether a psychological injury has been suffered as a result of the conduct, how severe that injury is and whether it is short-term or long-term;

(f) whether there is medical evidence of any psychological injury (although the Commission contends that failure to provide medical evidence is not fatal to a claim for compensation); and

(g) whether the conduct occurred in front of others, so as to worsen any hurt or humiliation suffered.

Calculating general damages — prevailing community standards

95. In a recent decision of the Full Federal Court, *Richardson v Oracle Corporation,* Kenny J noted concerns among academic commentators that courts and tribunals had adopted a cautious approach in fixing appropriate amounts for general damages for sexual harassment matters.[63] She observed that in making an award of general damages regard is to be had to the general standards prevailing in the community.[64] Kenny J concluded that "community standards now accord a higher value to compensation for pain and suffering and loss of enjoyment of life than before".[65]

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[63] *Richardson v Oracle Corporation* (2014) 223 FCR 334 at_[84]–[87]. Besanko and Perram JJ agreed with Kenny J on inadequacy of damages (ground 20 of the appeal): at [119].

[64] Ibid at [95].

[65] Ibid at [96].

96. Kenny J considered recent awards for damages in various comparable cases: *Swan v Monash Law Book Co-operative*,[66] where a victim of workplace harassment and bulling was awarded $300,000; *Willett v Victoria*,[67] where a victim of workplace harassment and bulling was awarded $250,000; *Tan v Xenos (No 3)*,[68] where a victim of sexual harassment was awarded $100,000; *Nikolich v Goldman Sach JBWere Services Pty Limited*,[69] where a victim of workplace bullying and harassment was awarded $80,000; and *Walker v Citigroup Global Markets Australia Pty Ltd*[70] where $100,000 was awarded for breach of contract.

97. Kenny J observed that damages awards have historically been higher for loss of enjoyment of life and pain and suffering outside the anti-discrimination legislation field. But she concluded that this was wrong in principle.[71] She was "unable to discern any in-principle difference between the compensable value of the pain and suffering and loss of enjoyment of life suffered by a victim of sexual harassment (in this case, in the workplace) and of a victim of (workplace) bullying and harassment lacking a sexual element". In her view the disparity between the level of awards for damages in other fields and the typical compensatory damages provided to victims of sexual discrimination and harassment revealed that today an award for sexual harassment, though within the accepted historical range for such cases, "may be manifestly inadequate as compensation for the damage suffered by the victim, judged by reference to prevailing community standards".[72]

98. Kenny J set aside the trial judge's order for damages of $18,000, which she found to be "manifestly inadequate" and "out of step with the general standards prevailing in the community" regarding the monetary value of the loss and damage of the kind in that matter. She awarded the victim the sum of $100,000 general damages.[73]

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[66] [2013] VSC 326.

[67] [2013] VSCA 76.

[68] [2008] VCAT 584.

[69] [2006] FCA 784.

[70] (2006) 233 ALR 687.

[71] *Richardson v Oracle Corporation* (2014) 223 FCR 334 at [108]-[109].

[72] Ibid at [117].

[73] Ibid, [118].

99. The Commission contends that when determining an amount the Tribunal thinks fit to compensate the Applicant for her loss, damage and injury, the Tribunal should have regard to the general standards prevailing in the community for loss of enjoyment of life, and the experience of pain and suffering. In doing so, the Commission contends that the Tribunal is not limited by historically low levels of such awards. To the contrary, the Tribunal should follow the approach explained by Kenny J to ensure that any award is in step with current general standards in relation to awards for loss of enjoyment of life and pain and suffering.

KRISTEN WALKER QC
Owen Dixon Chambers West

VEOHRC

Victorian Equal Opportunity and Human Rights Commission
10 December 2015