

Submission
to the Senate Standing Committee on
Legal and Constitutional Affairs' Inquiry
into the Effectiveness of the Commonwealth *Sex Discrimination
Act 1984* in eliminating discrimination and promoting gender
equality

Prepared by the



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INTRODUCTION

The Victorian Automobile Chamber of Commerce ('VACC') acknowledges the importance of policy makers and Federal Parliaments' efforts in eliminating sex discrimination and promoting sexual harassment free workplaces. While VACC understands the purpose of the *Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984* ('Inquiry'), VACC is committed to ensure that as a consequence of the Inquiry, the coverage of the *Commonwealth Sex Discrimination Act 1984* ('Act') is not increased, new obligations for employers are not created, a greater alignment between Federal and Victorian State legislation is developed and problems relating to the application of the notion of indirect discrimination are addressed.

The first part of this submission defines the Retail Motor Industry, and introduces the Victorian Automobile Chamber of Commerce.

The second part of the submission contains the comments of the Victorian Automobile Chamber of Commerce on the effectiveness of the *Commonwealth Sex Discrimination Act 1984* ('Act') in particular reference to the multiple regulatory jurisdictions, difficulties with the interpretation and application of the concept of indirect discrimination, and that the Act should focus on education and awareness – raising.

1. Background Material

The Retail Motor Industry

- 1.1. The Retail Motor Industry comprises car retail, wholesale, distribution, repair, maintenance and service of motorcars, motorcycles, trailers, caravans and the like and equipment or parts or components thereof, the supply of running requirements for the above mentioned vehicles and the like, fuel retail, automotive electrical services, smash repair, tyre retail (including repair and manufacture of retreads), automotive repair and service, and automotive parts and component manufacture, and special vehicles manufacture.

The Victorian Automobile Chamber of Commerce

- 1.2. The Victorian Automobile Chamber of Commerce (VACC) is a federally registered employer association representing approximately 5,200 Retail Motor Industry employers operating in Victoria and Tasmania. Membership of VACC includes individuals, companies and affiliated associations. VACC was established in 1918 after a group of motor garage proprietors from Ballarat, Geelong and Melbourne met to form an association for their mutual benefit.
- 1.3. In its early years the VACC, then known as the Retail Motor Dealers Association, was registered under the *Companies Act*. In 1940, VACC became a registered employer association under the *Commonwealth Conciliation and Arbitration Act (1904)*. Since that time VACC's size and organisational rules have changed, but it has maintained its role as the registered peak representative body for the retail motor industry in Victoria. VACC merged with the Tasmanian Automobile Chamber of Commerce in 1998.
- 1.4. Approximately 90% of VACC members have 20 or fewer employees. Members of the VACC are divided into 15 divisions; Australian Automotive Dealers Association [Victorian Division], Automotive Electrical Division,

Automobile Repairers Division, Body Repair Division, Commercial Vehicle Body Manufacturers Association, Commercial Vehicle Industry Association (Vic), Engine Reconditioners Association (Vic), Farm Machinery Dealers Association (Vic), Motorcycle Industry Division, Radiator Service Division, Service Station & Convenience Store Division, Towing Operators Division, Used Car Traders Division, the Victorian Tyre Dealers Association and general membership which includes specialists e.g. motor trimming, auto dismantling, windscreen repair, parts retail and/or distribution etc. The membership is almost equally represented in the rural and metropolitan area.

- 1.5. VACC was instrumental in establishing Women In Automotive Network ('WINA') in 2006 and has retained a similarly important role in administering WINA since its establishment. The aims of WINA include providing a forum for women in the Retail Motor Industry where their concerns can be openly discussed and they can contribute towards policy development.

2. General Comments

During the past decade, VACC has regularly reviewed its practices in the dissemination of information and delivery of training to its members on how to create and maintain discrimination and sexual harassment free workplaces.

In the past ten years, each time an act or legislative instrument relating to Equal Employment Opportunity was reviewed by State or Federal legislators, VACC made submissions that were based on its own and its members' experiences in terms of working with and under the particular Equal Employment Opportunity legislation, and the current occasion is no exception.

- Since the inception of the sex discrimination legislation, employers in the Victorian and Tasmanian Retail Motor Industry ('Industry') accepted the policy considerations underpinning the Act and have sought to comply with its regulatory implications.
- Employers in the Victorian and Tasmanian Retail Motor Industry are subject to both Federal and State sex discrimination prevention laws. In addition,

VACC members need to comply with anti-discrimination provisions of non-discrimination statutes and subordinate legislation at the Federal level, including the *Workplace Relations Act 1996* (in the form of prohibition on termination of employment on unlawful grounds, and award provisions on parental leave and part-time work). VACC believes that the current differences between the Federal and State sex discrimination legislation impose a myriad of regulatory obligations that can be challenging and confusing for small and medium size businesses. The existence of multiple regulatory jurisdictions and the inconsistencies in State and Federal legislation encourage forum shopping and create uncertainties.

- While the concept of direct discrimination is accepted, the application of the principles of indirect discrimination is poorly understood and may result in inadvertent non-compliance in staffing decisions.
- In our view any reform to the Act should result in a greater emphasis on education and promotion.
- When members are required to defend complaints from aggrieved employees, they often feel prejudiced by the current administration of the complaint through the conciliation system. Employees' poor knowledge about what unlawful discrimination actually is, makes aggrieved employees argue that they have been discriminate against.
- The time involvement and the costs associated with defending a complaint against a business are significant. As employers are often compelled to make pay-outs because of commercial considerations, they believe that the complaint based system of dispute resolution, rewards employees who are 'out to make trouble'.
- There should be statutory ceilings on compensatory damages awarded to complainants who are successful in proving that they endured "pain, humiliation and suffering" associated with sex discrimination.
- The Act should be amended to specify criteria for assessing the level of compensation when ordering monetary remedies.

3. Sex discrimination complaints against VACC members

- 3.1. VACC's Industrial Relations Department ("VACC IR") regularly provides advice and delivers training to its members on matters relating to Equal Opportunity in the area of employment, and in the provision of goods and services. The same Department represents members of the VACC in proceedings in the Victorian Equal Opportunity and Human Rights Commission and ("VEOHR Commission"), the Victorian Civil and Administrative Tribunal ("VCAT"), the Human Rights and Equal Opportunity Commission of the Commonwealth, the Federal Court, Federal Magistrates Court of Australia and the Australian Industrial Relations Commission.

- 3.2. Disgruntled employees of VACC members, rarely file complaints against their employers in the Human Rights and Equal Opportunity Commission ('HREOC') on the ground of discrimination or sexual harassment ('Complaints'). The majority of sex discrimination complaints (around 85%) against VACC members are filed in the VEOHRC. Around 50% of the above mentioned complaints relate to sexual harassment, and around 25% of the complaints relates to sex discrimination. Approximately 17% of the sex discrimination complaints filed against VACC members relate to discrimination allegations on the ground of pregnancy.

- 3.3. In the past ten years there were very few unlawful termination claims on the ground of sex discrimination filed in the Australian Industrial Relations Commission ('AIRC'). During the above mentioned period, only two aggrieved employees of VACC members filed an unfair termination of employment claim in the AIRC alleging that the termination of their employment on the ground sexual harassment activity was unfair. Both of these matters proceeded to arbitration before the AIRC and were determined in favour of the employer.

- 3.4. During the past five years, VACC members increasingly sought the assistance of VACC's Industrial Relations Department in resolving sexual harassment disputes in which both complainant and alleged offenders were males.

4. Multiple regulatory jurisdictions

- 4.1. Employers in the Industry are subject to both Federal and State sex discrimination laws which create uncertainty and confusion. Multiple anti-discrimination legislation is perceived to be difficult to understand and comply with.
- 4.2. In addition, VACC members need to comply with anti-discrimination provisions of non-discrimination statutes and subordinate legislation at the Federal level, including the *Workplace Relations Act 1996* (in the form of prohibition on termination of employment on unlawful grounds, and award provisions on parental leave and part- time work).
- 4.3. The existence of multiple regulatory jurisdictions and the inconsistencies in State and Federal legislation encourage forums shopping and create uncertainties.
- 4.4. At present the same set of facts might enable an employee to make a workplace sexual harassment complaint under Federal legislation but not under the Victorian Equal Opportunity legislation. That is so because under section 28B of the Act for the purposes of making a sexual harassment complaint "*workplace means a place at which a workplace participant works or carries out functions **in connection with** being a workplace participant*" , while under the section 87 of the *Equal Opportunity Act 1995 (Vic)* ('Vic Act') "*workplace means any place where a person attends **for the purpose** of carrying out any functions in relation to his or her employment, occupation, business, trade or profession and need not be a person's principal place of business or employment*". The above seemingly small difference in the definition of the term workplace might render an inappropriate conduct that takes place after hours and away from the workplace sexual harassment under the Act but not under the Vic Act.

- 4.5. While both the Federal and the Victorian anti-discrimination legislation have statutory time limits of 12 months in which to lodge a complaint, there is discretion to accept a complaint out of time. *“This discretion is not properly exercised when the complaint covers a period of several years and a pattern of conduct during that period forms the complaint. It is arguable whether any events before the cut off time period can form part of the complaint without the specific exercise of the statutory discretion to accept an out –of time complaint. The approach to this issue varies between jurisdictions”*.¹

5. Direct and indirect discrimination

- 5.1. VACC members accept the underpinning principles of direct discrimination. However, the definition of indirect discrimination is complex and it requires employers to examine in detail the facts and potential impact of their business decisions to determine whether those decisions do not disadvantage a particular group of persons.
- 5.2. It is our experience that the application of the principles of indirect discrimination is poorly understood amongst many members of VACC and may result in inadvertent non-compliance in staffing decisions.
- 5.3. Employers in the Industry often perceive sex discrimination legislation requires management to treat employees unequally to ensure equal opportunity.
- 5.4. Small and medium size businesses often view some decision of tribunal and court decisions applying discrimination law to conduct not originally intended to be covered, and that erodes employers’ confidence in the jurisdiction.

6. Focus should be on education by the Human Rights and Equal Opportunity Commission

- 6.1. VACC members believe that Federal sex discrimination legislation focuses on sanctions and complaints resolution. While VACC members seek to comply

¹ Ronalds, C. and Pepper, R. *Discrimination Law and Practice*, 2nd Ed., Federation Press, Sydney 2004 p 184

with their obligations under the Act, the key focus should be on early education and awareness -raised by the Sex Discrimination Commissioner.

- 6.2. Employers in the industry also believe that the federal sex discrimination legislation imposes a disproportionate onus on employers in terms of educating employees about equal opportunity and discrimination.
- 6.3. In our view any reform to the Act should focus on education. Rather than rely on employers to change the culture of individuals, in most cases adults, the responsibility of education in the area of equal opportunity should be collaboratively borne by HREOC, employers and the education system. Based on the experiences of VACC, we believe that focussing education on younger members of our community is more likely to successfully result in greater tolerance and understanding of equal opportunity principles.