

Update

Issue #1

Public Law



Human Rights Legislation

On 20 July 2006 the Victorian Parliament passed the Charter of Rights and Responsibilities Act 2006 (Vic) (**CRRA**). Australia is the only developed western democracy not to have legislated specifically for the protection of human rights. By enacting the CRRA Victoria is the first Australian State to pass such legislation.

Applies to a 'Public Authority'

The CRRA imposes obligations upon 'public authorities'. A 'public authority' is potentially any organisation (public or private) that is carrying out a 'public function'. Organisations such as government departments, councils, statutory authorities, catchment management authorities, water authorities, health authorities and universities will certainly be caught. For other organisations, such as schools, private hospitals and private contractors the position will need to be examined more closely.

How Does it Work?

You can think about the CRRA operating on three levels.

Level 1: All statutory provisions (Acts, regulations and other statutory instruments) must comply.

Level 2: Any policy that impacts upon a protected right must comply.

Level 3: Any decision that impacts upon a protected right must comply.

An Act that fails to comply will not be invalid but may be declared to be incompatible. This means that ultimately the power to make political decisions that may not comply with the CRRA remains with Parliament and not the courts.

A statutory instrument (e.g. Orders in Council and By-Laws), policy or decision that fails to comply with the CRRA will be invalid.

The only exception arises where the terms of the governing Act mean that non-compliance with the CRRA was inevitable.

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Disclaimer

The information contained in this newsletter is for general information only and should not be construed as legal advice. Formal legal advice relating to the particular circumstances should be sought in all situations.

What Rights are Protected?

The CRRA lists 20 specific rights that are protected. These include rights such as the right to life; freedom of thought; conscience; religion and belief; property rights; privacy and reputation; and the right to a fair hearing.

Application

In the UK the HRA has been used in access to treatment cases; actions about finance allocation decisions, claims relating to environmental nuisance; and to challenge various highly political decisions.

The CRRA could well have a similar impact in Victoria. Decision makers at policy and operational levels will need to have an understanding of the breadth of the protected rights and the scope that exists for derogation. Failure to have proper regard to these matters will leave policies and decisions vulnerable.

When does this apply?

The CRRA is coming into effect in stages. From 1 January 2007 all statutory instruments must be compliant. The remaining obligations come into effect on 1 January 2008.

The purpose of this lead time is to allow those that will need to comply with this legislation to come to terms with what it means in practice.

Termination for operational reasons

After the WorkChoices Reforms to Federal Unfair Dismissal laws much of the media focus and public attention centred on the exclusion of employers who employ less than 100 employees from the laws. Some of the other equally important exclusions from Unfair Dismissal have received far less attention.

Government Authorities, like other large employers, go through periods of change and renewal. With staff cuts and abolition of services still major features of the labour market, redundancy continues to affect employers. Employers need to know what new rights they have and what obligations there are.

Following the WorkChoices reforms, an employee is excluded from bringing an application for unfair dismissal in the Australian Industrial Relation Commission if his or her employment was terminated for genuine operational reasons or for reasons that include "genuine operational reasons". This exclusion is not contingent upon the size of the employer and includes all Victorian employees.

Genuine operational reasons are defined in the *Workplace Relations Act 1996* to include "reasons of an economic, technological, structural or similar nature relating to the employers undertaking, establishment, service or business, or to part of an employers undertaking, establishment, service or business."

Many employee organisations ridiculed these changes stating that they were so broad employers could now unfairly terminate any employee they choose with impunity by simply linking the termination to "operational requirements". Many employers assumed that provided an employee was paid out as redundant, the termination could not be challenged.

Exemption curtailed

However, in its first decision on the operation of this exclusion, the Australian Industrial Relation Commission in *Perry v Savills (VIC) Pty Ltd* held that "the restructuring of positions so that an employee's position is no longer available does not, in itself, establish operational reasons for the termination of an individual employee's employment". Ms Perry's employer, Savills, argued that her employment as a finance manager was terminated following the restructure of her job. In effect, two roles were combined and the new position was filled by another member of staff. As such, Ms Perry's employment was terminated for reasons of redundancy.

Senior Deputy President Watson was not convinced the restructuring was a contrivance but said that Savills had made no attempt to find Ms Perry an alternative job, as promised.

SDP Watson said the appropriate test in these circumstances is whether the employee herself was terminated for general operational

For further information



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The termination must be genuinely related to the employer's operational requirements in the sense that the termination is a logical response to those requirements.

Importantly, although the SDP Watson accepted that the termination was as a result of a restructure, evidence before the Commission established that Savills could have retained the employee as her skills were still useful to the company, and a viable alternative position could have been found for her.

This decision, if it is not overruled, has the potential to significantly reduce the scope of the operational reasons exemption. It can no longer be assumed that, if an employee's position is redundant, that the unfair dismissal laws will not apply.

The redundancy must be objectively genuine and the Australian Industrial Relations Commission has the power to investigate the case in order to determine that it is indeed genuine.