



## Précis Paper

### United Firefighters' Union v VEOHRC [2018] VSCA 252

A discussion on the recent decision of United Firefighters' Union v VEOHRC [2018] VSCA 252.

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## United Firefighters' Union v VEOHRC [2018] VSCA 252

In this edition of BenchTV, Michael Pearce SC (Barrister – Owen Dixon Chambers West, Melbourne) and Ian Benson (Solicitor – AR Conolly and Company Lawyers, Sydney) discuss the recent decision of *United Firefighters' Union v VEOHRC* [2018] VSCA 252.

### The grounds of the Union

1. Victorian firefighting is carried out by two statutory authorities; the Country Fire Authority (CFA) in rural and regional areas and the Metropolitan Fire Brigade (MFB) in the Metropolitan area of Melbourne.
2. Each of those two organisations is a statutory authority set up by an Act of Parliament. Each of them has a fair degree of autonomy under their respective Acts, however each is subject to Ministerial direction.
3. For many years, the control and management of the Fire Services in Victoria has been a highly contested political issue regarding the role of volunteers in the CFA, the Union as well as the management and performance of the fire services. There have been allegations of bullying, harassment and sexism in the fire services and in response to these allegations, the then Minister for Emergency Services requested the Victorian Equal Opportunities and Human Rights Commission perform a review of the two fire services to see if there was discrimination under the *Equal Opportunity Act 2010* (Vic).
4. The United Firefighters Union was invited by the Human Rights Commission to participate in the review, however it refused to do so. Its reasons for doing so was that it felt that the Commission was not impartial. This was due to the fact that the Commission had earlier been involved in a review of a proposed Enterprise Bargaining Agreement and in accordance with some opinions expressed by the Commission at this stage, the Union believed that the Human Rights and Equal Opportunities Commission was not the appropriate organisation to undertake the review.
5. The Union initially expressed the view that the review was not properly constituted under section 151 of the *Equal Opportunity Act 2010* (Vic), however the Commission responded by stating that it also had power under section 157 of the *Equal Opportunity Act 2010* (Vic).
6. In the early part of 2017, the Union instituted a proceeding in the Fair Work Commission to try and restrain the Commission from completing the review.
7. This was unsuccessful and the Union then commenced proceedings in the Supreme Court seeking an injunction to restrain the Commission from completing the review and publishing the report of the review.

### First Instance

8. At first instance the Union was unsuccessful. They initially sought an interlocutory injunction in June 2017. This was resolved by an agreement between the parties that the Commission would not publish a report until the proceeding was concluded.
9. The Commission also sought to be excused from full participation at the proceeding due to being subject to the Hardeman Principle and therefore it should not take an active role as the main contradictor in the proceeding. The Secretary of the Department of Justice intervened with leave of the court to become the main contradictor.
10. The matter was then heard in the second half of 2017 by Justice Ginnane, who dismissed the Union's case.

### The Court of Appeal's view

11. The Union then appealed and the Appeal was heard in the 2018.
12. The Appeal succeeded by a majority of two to one. President Maxwell and Justice Priest were in the majority holding that the review was not properly constituted.
13. Justice Tate accepted an alternative argument.
14. There was a unanimous finding that the review was not properly constituted under section 151 of the *Equal Opportunity Act 2010 (Vic)* however Justice Tate accepted that there was an alternate power under section 157 that gave sufficient power for the Commission to conduct the review.
15. The primary ground the Union relied upon was that the review was not properly constituted under section 151 of the *Equal Opportunity Act 2010 (Vic)* which provides that a person may request that the Victorian Equal Opportunity and Human Rights Commission undertake a review of that person's programs and practices to see if they comply with the Act.
16. The person under section 151 who makes the request for the review must be the same person whose programs and practices are the subject of the review.
17. In this case, the request for the review did not come from either of the two fire agencies, the CFA or the MFB, the request came from the Secretary for the Department of Justice on behalf of the Executive Government.
18. The Union's principal argument was that the Executive Government is a different body to the two fire agencies whose programs and practices were the subject of the review and therefore the review was not properly constituted.
19. Section 151 is a clear statutory provision conferring specific powers subject to specific conditions. When a statute confers a specific power subject to certain conditions, those conditions must be complied with to exercise that power and other general powers under the same statute cannot be relied on.

20. The trial judge accepted the argument made on behalf of the secretary of the Department of Justice at First Instance to move the focus away from the person stated in Section 151 and focus instead on the programs and practices.
21. The Secretary made the argument at first instance and again on appeal that firefighting is an essential function of the Executive Government. The Executive Government of Victoria discharges its responsibility of containing and fighting fires by creating two statutory authorities and vesting them with the power to do firefighting.
22. Therefore, the programs and practices of these two statutory authorities is essentially programs and practices of Executive Government. This argument found favour with the judge at first instance, however none of the judges at Appeal.
23. The shortcoming in the argument is that it did not accord with the facts of the case. The facts make clear that the review being conducted by the Commission into the two firefighting agencies was into recruitment and personnel practices of the two firefighting agencies and not into their wider programs and practices in regard to firefighting.
24. It is hard to say that these are programs and practices of the Executive Government. The Executive Government has created two relatively independent statutory authorities with a large degree of autonomy that control their own personnel and recruitment processes independent of the executive government and not subject to direction by the Executive Government.

#### Findings of the Commission

25. The Commission's report detailing its finding, if any remains to be unpublished.

#### The minority argument

26. At first instance, the Commission argued that the power under Section 157 was sufficient power for the Commission to conduct the review.
27. The trial judge at first instance found that the Commission had the power to conduct the review under section 157 of the *Equal Opportunity Act 2010* (Vic), but not the power to publish a report of the review.
28. This had no consequence for the outcome as the trial judge held that the review was authorized under Section 151.
29. The Union appealed under his holding that under Section 151 that the review was authorised.
30. The Secretary argued on appeal, that it is not just the 157 power, but there are other general powers to do all things necessary and convenient for the furtherance of the objections of the Act.

31. On Appeal, the majority judges rejected the argument. They upheld the Union's argument based on authorities such as *Anthony Hordern and Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 CLR 1* that since the specific power under 157, which the Commission clearly purported to act under was the only specific power under the Act to conduct a review of the kind, as its conditions had not been met the Commission could not rely upon other more general powers under the Act.
32. The minority view of Justice Tate was to accept the argument and distinguish *Anthony Hordern and Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 CLR 1* by stating that the principles contained in the case only apply where the specific power is somehow irreconcilable or repugnant to the other general powers and there was no such repugnancy or irreconcilability in this case as per the case of *Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCA 32*

#### Other grounds for appeal

33. The focus of the argument both at first instance and on Appeal was on Section 151 and to a lesser extent, 157 of the *Equal Opportunity Act 2010* (Vic), the Union also challenged the view on some other grounds.
34. One such ground was that the review was in to matters beyond the powers of the Commission. The Commission is set up to further the objectives of the *Equal Opportunity Act 2010* (Vic) and the Act is concerned with proscribe unlawful discrimination based on various attributes ; race, sex, religion and those are the powers of the Commission.
35. There were materials before the court in which the Union said that the Commission was conducting a wider review into whether there is a respectful and safe workplace without bullying in the two fire agencies.
36. Whilst bullying based on a protected attribute is proscribed under the *Equal Opportunity Act 2010* (Vic), bullying for other reasons is not and the Union made the argument that based on these materials they were conducting a general workplace review rather than a specific review within their power into compliance or non-compliance with the *Equal Opportunity Act 2010* (Vic).
37. This argument was lost both at first instance and at Appeal on the basis that these matters which may have gone beyond their strict powers was peripheral to the main exercise which was within the Commission's power and therefore did not invalidate the review.
38. There was another ground of appeal which had to do with a survey which was conducted as part of the review. The Commission sent out emails to all employees and volunteers of both fire agencies and invited them to conduct a survey. This was subject to some expert evidence given on behalf of the Union by a Professor of Statistics. He said that there were some fundamental flaws in the methodology including that;

- i. The link to the survey was accessible to anybody and could be forwarded to anybody to complete and
  - ii. Any single person could complete the survey multiple times
- 39. These two flaws against the background against the hotly contested political issues around the organization and management of the fire agencies, the Union believed that the survey results would be totally unreliable.

#### Wednesbury unreasonableness

- 40. The Union made an argument based on Wednesbury unreasonableness that the decision by the Commission to conduct the survey and to rely upon its results in its report was so unreasonable that no reasonable authority could do this.
- 41. This argument was unsuccessful however the Judge at first instance issued the Commission a clear warning to be careful in how they use the results due to the survey methodology issues uncovered in the trial.

#### Outcome of the proceedings

- 42. There has been no Application for Special Leave to Appeal so the Commission and Government have accepted that no report will be published coming out of the review.

#### Lessons for practitioners

- 43. Practitioners need to read the legislation carefully and make sure they understand what powers their clients are acting under.
- 44. They also need to ensure that the conditions for the exercise of the power have been fulfilled prior to the exercise of the same.

## **BIOGRAPHY**

### **Michael Pearce SC**

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Before Michael Pearce SC joined the Victorian Bar in 1991, he worked for a number of years as a banking and finance solicitor. He also worked for a year in the Federal Attorney-General's Department and as a research assistant at Hamburg University in Germany and at a law firm in New York. He is currently consulting editor of the Victorian Reports and was editor from 1995-2003. He was Sessional Ombudsman with the Financial Ombudsman Service between 2013-2015.

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Ian Benson is a solicitor at AR Conolly and Company and holds a First Class Honours degree in law.

## **BIBLIOGRAPHY**

### **Legislation**

***Equal Opportunity Act 2010 (Vic) s 151, 157***

### **Cases**

***Anthony Hordern and Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1**

***Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32**