

SCRUTINY OF ACTS AND REGULATIONS COMMITTEE
Inquiry into exceptions and exemptions in the Equal Opportunity Act

Melbourne — 4 August 2009

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Witnesses

Mr C. James, senior manager public affairs, and
Ms A. Marriott, head of workplace relations, Victorian Employers Chamber of Commerce and Industry.

The CHAIR — The next witnesses are Alexandra Marriott and Christopher James from the Victorian Employers Chamber of Commerce and Industry. Thank you for attending this public hearing. The purpose of these hearings is to report to the Parliament on whether any amendment should be made to the exceptions and exemptions of the Equal Opportunity Act 1995. Anything you say or publish before the committee today is protected by parliamentary privilege. However, once you leave the hearing anything you say or publish outside this room is not so protected.

I invite you now to make a brief statement to the committee on the relevant issues that you consider important to your organisation concerning the inquiry, and we will ask a series of questions afterwards.

Mr JAMES — Thank you for the invitation to appear. We are splitting our evidence into two parts. I am just going to give a general overview and Alex will go into the more technical aspects. We know there has been a lot of activity in this policy area, firstly, with the Gardner review and, secondly, with this particular inquiry. We also note that the Attorney-General sails very close to the wind in potentially pre-empting the results of this inquiry with a piece in the *Sunday Age* of 26 July in which — —

Mr SMITH — Good point.

Mr JAMES — He made the case against gender-based private clubs among other things. In this article the Attorney also observes that equality of opportunity will not always result in the same outcome. We hope he has misspoken somewhat there, because the equality of outcome can sometimes mean a recipe for mediocrity and is not necessarily a principle consistent with a liberal democratic society. Overall we want to create a culture of business excellence, not mediocrity.

Discrimination certainly is not a part of this. In this sense we probably share the overall aims of the Attorney-General, but we probably want to skin the cat in a slightly different way. As such we offer to partner with him, the government and the equal opportunity commission in an appropriate public awareness campaign to reinforce non-discrimination as a tool of business excellence. In this respect getting rid of outmoded exemptions is certainly an aim we share. To some extent this applies to the small business exemption — more of which will be dealt with later.

In terms of this inquiry we are also concerned primarily, but not exclusively, with regard to the exemptions relating to employment; however, sections of the act relating to private clubs also have broader implications as regards freedom of association and also, in terms of religious organisations, the separation of powers between church and state. Alex will cover that in more detail now.

Ms MARIOTT — Thank you to everyone here. As Chris has flagged, I am just going to speak to those issues around employment exemptions. Firstly, and certainly the majority of what I will be commenting on immediately, in relation to that small business exemption. Our core business position is essentially that we have that commitment to business excellence as an organisation, and we see those issues around discrimination flying very close to that, as Chris has just flagged. Our core position there is that discrimination should not occur nor be encouraged in the modern workplace. There is no place for it there. It seems that the exemption relating to businesses with less than five employees is somewhat arbitrary and probably indefensible.

We have supported the harmonisation of legislation on productivity grounds in other spaces. Notably there I can comment on our commitment to that in that OHS space with regard to the OHS model legislation and accordingly is supportive of the harmonisation of the EO legislation also.

National consistency is also a priority for VECCI. Although we are a Victorian organisation, we note there are many jurisdictions that we engage with which are populated by different forms of legislation and different acts. Given that these exemptions do not exist under federal jurisdiction or federal legislation, national consistency is currently lacking in that EO space. That is something we would like to comment on.

We are of course particularly committed to supporting small business, and a closer appraisal of the efficiency of the small business exemption demonstrates that the small business exemption can indeed be misleading, and that is noted in the report. It may indeed increase rather than decrease small businesses regulatory or compliance burden. In the worst case scenario it would also increase legal costs.

As noted in the report, the existence of a small business exemption can indeed be misleading in suggesting there is a complete exemption from compliance for small business. The report also notes that the concerns expressed about regulatory burden, especially in relation to impairment, could be better addressed by adopting an effective unjustifiable hardship defence. The existence of that unjustifiable hardship provision in the federal space, and in the federal legislation and jurisdiction, provides a useful yardstick for business, certainly for small business.

The second option for reform proposed by the repeal of the small business exemption is likely to be the most sensible approach in our view — that is, to repeal and replace the small business exemption at section 21 with a provision allowing exemptions for situations where compliance would result in unjustifiable hardship. That would be accompanied by a restriction of the attributes covered by the exception.

We feel those kinds of measures would meet VECCI's view that discrimination should not occur nor be encouraged in workplaces. It would also provide all businesses, including small businesses, with a more effective, more easily interpreted and more meaningful and substantive framework relating to employment discrimination and employment decisions.

As Chris has noted, we did also just want to briefly touch on the exemptions relating to private clubs and religious organisations. We do feel that their suggestion of the removal or a view of the private clubs exemption is an issue of concern. In so doing, we would like to affirm the fundamental right of freedom of association, as Chris has flagged. Accordingly, we do not support the repeal of that exemption.

We also feel that such changes could have unintended consequences, such as consequences for single-sex clubs that cater for women. On that point, in our view market forces will really determine the future of single-sex clubs. Certainly a positive example of that currently operating in the marketplace is the RACV Club which reports massively increased membership and a steady increase of that membership. We think that is a positive example of the right of a club to make decisions about membership.

Similarly, our support of the separation of the powers of church and state informs our view that exemptions and the exceptions relating to religious organisations should not be repealed or modified. We certainly think that does flag some broader issues around the secular state that we enjoy and that the church does not interfere in state matters. The trade-off there is that perhaps a state that intervenes in such measures is failing to keep that distance and that separation maintained.

The CHAIR — First I want to follow up the issue of freedom of association and private clubs. Are you saying that it should be market forces or are you saying that there ought to be freedom of association without restrictions? I am just trying to nut out a bit where you want to go with that issue.

Ms MARRIOTT — I think those are two separate arguments. I think there is a right of freedom of association that is fundamental, and in this context we are seeing that right operating in that marketplace as well, so it seems that those are two separate arguments, not necessarily a single proposition.

Mrs PEULICH — It is called choice.

Ms MARRIOTT — Yes.

The CHAIR — The other part is in terms of this partnership with government, yourselves and possibly others, with an appropriate PR campaign.

Mrs PEULICH — And with the Attorney-General — that was a scary thought.

The CHAIR — Could you just elaborate a bit on what your thinking on that is?

Mr JAMES — I think that if there is demonstrated to be a problem with discrimination against certain groups — we are not quite sure what the Attorney-General has in mind — if there is employment discrimination there, or apparent, we are quite happy to partner with the government to talk to our members and the business community more broadly to try to redress that. That has not been demonstrated to us at this stage.

Mrs PEULICH — But you do support the removal of the exemption that applies to small business?

Mr JAMES — Yes.

Mrs PEULICH — Given that, could you tell me what is the composition of your membership and what proportion of your members would fall under the category of that particular exemption?

Ms MARRIOTT — The exemption relates to businesses that have five or less employees. We would consider that to be a microbusiness, rather than a small business. We do have some microbusinesses that operate. Certainly we have that large tourism component as a result of bringing VTIC under our — —

Mrs PEULICH — Percentage?

Mr JAMES — I probably could not give you that on the spot, but at least 90 per cent of our members would have less than 20 employees, so they would fit into that small business category.

Mrs PEULICH — But they would not be microbusinesses?

Mr JAMES — Yes, not necessarily microbusinesses.

Mrs PEULICH — So about 10 per cent would be under five employees?

Ms MARRIOTT — We could not give you a percentage at this stage, but anecdotally, certainly with a lot of those microbusinesses that have five or less employees, generally their employment falls within their own family.

Mrs PEULICH — So you do not believe that families should have the freedom or the opportunity of being exempt from these provisions?

Mr JAMES — There is a family business exemption in the act and we do not think that there is a case for repealing that. In terms of five employees, that is probably somewhat arbitrary and in most cases it does conflict with federal legislation anyway.

Mrs PEULICH — Not according to what we have just heard earlier, which was that basically as at 1 July any exemption or exception in state legislation forms the basis of an exemption or exception under the new federal act. Obviously it is new, so people may not have got their minds around it as yet.

On a further question — and I hope you do not see this as hostile because I actually do value your evidence — do you receive federal government funding for any of your programs, and what would be the amount of that?

Mr JAMES — We would. We have received federal government funding for some time, for running an apprenticeship program.

Mrs PEULICH — State, federal, other levels — could you give us just a ballpark figure as to how much government funding, state or federal, you may have received for various programs?

Mr JAMES — I probably could not give you a figure on the spot, but we do run certain programs on behalf of the federal government and have for some time, under governments of all shades, and we run some programs on behalf of the state government as well.

Mrs PEULICH — Is that reported in your annual report?

Mr JAMES — We do not do an annual report as such — we are not required to — but we do a financial statement and it is covered in that.

Mr LANGUILLER — Thanks for your submission. I had a wonderful dinner last night and I believe that the restaurateur is a member of your organisation. Importantly, I had a good discussion in relation to section 21. He would not know that it was about section 21 but the subject matter was section 21. He is a restaurateur of a particular cuisine which I will not name because I do not think it is necessary.

Ms MARRIOTT — If it was a good meal, I think you should tell us.

Mr LANGUILLER — The person put to me that it added to the value and authenticity of his business to employ persons of a particular background with particular and authentic knowledge of the cuisine, culture and language. What do you say to that? I know his staff enough to know that he evidently has shaped his business

into a brand. Most of us have had meals in that particular restaurant, I am sure. He says, 'In what way am I different from Adidas, which employs people of a particular type because that fits in with the brand?'

Mr JAMES — He fits in with the best person for the job requirement.

Ms MARRIOTT — And I think that employment decision would be defensible upon the ground that that is a genuine requirement of the role. The distinction that is drawn is: is that requirement genuine or is that requirement arbitrary? In that situation, where his business requires that, I think that would be demonstrated to be genuine. Obviously if someone rocked up to a table and said, 'I eat only McDonald's; I don't understand and I can't answer your questions about the meal', that is going to have distinct disadvantages for the practice of the business — for example, where someone had a German beer hall and they wanted to have the archetypal German beer waitress, that might not be such a genuine requirement. I do not mean to be facetious or anything, but I think that really is where that distinction comes from. In the instance of this restaurateur, I think that that is a genuine requirement of his business and accordingly could be defended upon those grounds.

Mr SMITH — Are you saying that the example of the German beer hall would not be defensible?

Ms MARRIOTT — I think so.

Mr SMITH — Because you would want to promote that brand as well.

Ms MARRIOTT — I am actually citing a recent example that one of my staff engaged with, where it was found that they did not actually require the kinds of people they thought they needed and that they could supplement the potential employees with artifice, like wigs, rather than actually forward those requirements as such. Again, that is where you get that kind of distinction and that is the kind of distinction you will see in employment. I am using that because it is an extreme example, as counterpoint to this more legitimate example.

Mrs PEULICH — Your criticism of the five-person exemption for businesses employing fewer than five people, that it should be removed because it is an arbitrary line and your suggestion of moving to a regime where people can justify an exemption, am I correct in reaching that — —

Mr O'DONOHUE — Unjustified hardship.

Mr JAMES — Yes, unjustified hardship.

Mrs PEULICH — Would that constitute greater cost and greater compliance difficulties for your businesses? I would imagine, having been in small business, where my husband still is, that clear rules provide a fairly easy mechanism for compliance — it is not easy, but it is clear — whereas one that may be taken to a tribunal, say VCAT, and your having to justify your case is going to be much more burdensome and much more costly in terms of compliance for your members. Are you actually advocating a regime that would impose greater compliance difficulty and cost to some of your membership base; am I correct in that?

Ms MARRIOTT — I do not think that is what we are advocating. If that is one interpretation that is made of the recommendation, then that is obviously somewhat unfortunate.

Mrs PEULICH — You can correct it.

The CHAIR — I want to pick that issue up. One of the things that we noted in the discussion paper, and that you picked up as well, is that small businesses have to meet the equal opportunity requirements in everything other than recruitment. One of the problems created by giving that exemption is the possibility that they do not actually comply or think they do not have to comply with the act, whereas they only have a tiny fraction of the act from which they are exempted. You picked that up as well, and I am just wondering if maybe you could talk a little about that. We may in fact be increasing the compliance burden by maintaining that exemption for small businesses.

Ms MARRIOTT — Again this kind of goes to those points about consistency and harmonisation, where business is having to grapple with different jurisdictions that effectively deal with the same subject matter and where those jurisdictions provide different requirements, obligations and responsibilities, and certainly this is something that we have discussed and considered closely and whether that is indeed likely to complicate matters. Is it useful to have an exemption at this level but not at the federal level?

Mrs PEULICH — But if it has been picked up in the federal act, then surely that would provide for your requirement for harmonisation.

Mr JAMES — We are saying both acts should be as consistent as possible. We made a similar point to the chairman earlier, that some businesses might think they do have a broad exemption under the current state act, but it is probably not as broad as they think it might be; it only covers recruitment. So in a sense that is a complicating factor.

The CHAIR — Alexandra and Christopher, thanks very much for coming in, spending the time in writing a submission and engaging in what I thought was very interesting dialogue.

Mr JAMES — Thank you.

Ms MARRIOTT — Thank you very much.

Witnesses withdrew.