

FOCUS

CORPORATE RESPONSIBILITY



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VICTORIAN CHARTER OF HUMAN RIGHTS

In July 2006 the Victorian Parliament passed the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*. Although the Victorian Charter imposes new responsibilities on State Parliament, the courts and public authorities, its impact will also be felt by the private sector in a number of ways. Partner Peter O'Donahoo and Lawyer Emily Howie consider the implications for the private sector.

What the Victorian Charter of Human Rights means to the private sector

BACKGROUND

The purpose of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (the **Victorian Charter**) is to protect and promote the civil and political rights set out in the Charter. Only persons have the benefit of the human rights set out in the Victorian Charter - corporations do not enjoy those rights (section 6).

However, a breach of the rights set out in the Victorian Charter does not sound in damages. The rights in the Victorian Charter include the right to life; freedom of movement, association and religion; freedom from forced work; freedom from torture and cruel, inhuman or degrading treatment; and the right to privacy and reputation.

The Victorian Charter also protects families as the fundamental group unit of society and children's right to protection.

The rights in the Victorian Charter are not absolute. However, they are only to be subject to 'reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom', taking into account all relevant factors including:

- the nature of the rights;
- the importance of the purpose of the limitation;
- the nature and extent of the limitations;
- the relationship between the limitation and its purpose; and
- any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The Victorian Charter places new obligations on Parliament, the courts and public officials to act in accordance with the human rights set out in the Charter. However, it is the provisions about statutory construction and the actions of public officials that are of most relevance to the private sector.



STATUTORY CONSTRUCTION

From 1 January 2008, Victorian courts will be required to interpret all statutory provisions, 'so far as is possible consistently with the purpose of the statute', in a way that is compatible with the human rights set out in the Charter (s32). International human rights law and the judgments of domestic, foreign and international courts and tribunals relevant to human rights may now be taken into account when interpreting a statutory provision.

The extent to which this will affect statutory construction is yet to be seen. Currently, where legislation is ambiguous, recourse may be had to international human rights to interpret the legislation (*Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, at 287 (Chief Justice Mason and Justice Deane)).

Where the Supreme Court is of the opinion that a statutory provision is unable to be interpreted consistently with the human rights set out in the Charter, the court is now empowered to make a declaration that the statutory provision is unable to be interpreted consistently with a human right (s36). Importantly, the declaration of inconsistent interpretation does not affect the validity of the statutory provision or create in any person any legal right or give rise to any civil cause of action (s36(5)).

However, it is where a provision is capable of being construed consistently with human rights that the Victorian Charter might affect corporate activity. For example, where an Act creates rights or duties, those rights or duties, from 1 January 2008, are required to be construed, so far as is possible, consistently with the human rights set out in the Victorian Charter. It is foreseeable that this could change the substantive content of those rights or duties.

THE ACTIONS OF 'PUBLIC AUTHORITIES'

From 1 January 2008, the Victorian Charter makes it unlawful for 'public authorities' to act in a way that is incompatible with a human right or, where making a decision, to fail to give proper consideration to a relevant human right.

This will affect corporations:

- that are considered to be public authorities under the Victorian Charter; and
- that rely on, or are affected by, decisions of public authorities in the course of their business.

DEFINITION OF A PUBLIC AUTHORITY

Where a corporation is a public authority, it will be subject to the new obligations under the Victorian Charter.

'Public authority' is defined broadly in the Victorian Charter, and includes:

- an entity, established by a statutory provision, that has functions of a public nature; or
- an entity whose functions are, or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (s4(b) and (c)).

The Victorian Charter provides the example of a private school, which, although exercising functions of a public nature, is not considered to be doing so on behalf of the State and is therefore not a public authority.

Factors to be taken into account when determining whether the public authority is performing a function 'of a public nature', include:

- that the function is conferred under a statute;
- that the function is connected to, or generally identified with, functions of government;
- that the function is regulatory in nature;
- that the entity is publicly funded to perform that function; and
- that the entity that performs the function is a company, all of the shares of which are held by, or on behalf of, the State.

The corporations operating public transport fall within the definition of public authority as the *Transport Act 1983* (Vic) confers powers of arrest on authorised officers. Retail suppliers of water in Melbourne may also be public authorities as they are entities in which all of the shares are held by the State. Private prisons may also be public authorities if they exercise a function (such as managing a prison) that is connected to, or generally identified, with the functions of government.

INDIRECT EFFECT OF PUBLIC AUTHORITY PROVISIONS ON CORPORATIONS

Even where a corporation is not a public authority, the obligations on public authorities may affect the conduct of business in Victoria. Where business relies on the approval of a statutory decision maker, the decision maker, as a public authority, will be required to take into account the human rights set out in the Charter in respect of that decision.

For example, if a Victorian government department is required to issue a lease or a licence for a project, the statutory decision maker will be required to consider whether that project will infringe any of the human rights set out in the Charter. It is therefore in the interests of business to ensure that its projects comply with the rights set out in the Charter.

Further, the Victorian Charter effectively provides for a new substantive ground of judicial review (s39). The Charter states that a person may seek any relief or remedy in respect of an act or decision of a public authority that it may otherwise have been able to seek on the grounds of unlawfulness, on the basis of unlawfulness arising because of the Victorian Charter. Therefore, although damages may not be available, judicial review may result in the issue of prerogative writs and injunctions in order to enforce the rights set out in the Victorian Charter against decisions of public authorities.



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