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Michael Brett Young
Charter Review Secretariat
Level 24, 121 Exhibition Street
Melbourne VIC 3001

Via email: charter.review@justice.vic.gov.au

Dear Mr Brett Young,

RE: Submission to the Review of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*

1. We write to provide a submission to the eight-year review of the Charter of Human Rights and Responsibilities Act 2006 (Vic) (the **Charter**). The Attorney-General, the Hon Martin Pakula MP, issued the terms of the reference for the review. Our submission will address only one item listed in the terms of reference, namely:

Any desirable amendments to improve the operation of the Charter, including, but not limited to:

...

- b. clarifying the provision(s) regarding legal proceedings and remedies against public authorities.

The need for remedies

2. In our view, it is vital that there are effective remedies for any person who can demonstrate that a public authority has breached the Charter under s38(1) by acting in a way that is incompatible with a human right or, in making a decision, failed to give proper consideration to a human right. Under the current regime, where a breach of the Charter is not a stand-alone cause of action, breaches of the Charter may be argued as part of a tortious claim where damages are available to the plaintiff in any event. In such cases, there is little incentive to include an allegation of a breach of the Charter as it adds very little materially to the claim and may increase costs, adverse costs risk, or both. Moreover, in situations where a plaintiff may not meet a threshold for whole person impairment (in the case of negligence), the matter will most likely

not be litigated at all as there will often be no prospect of an award of damages beyond a nominal amount. This is an unsatisfactory outcome from a human rights perspective as the culture of respecting human rights is degraded in the absence of meaningful enforcement.

3. Such effective remedies should include an amendment to s 19(3) to allow the Court to award remedies, including damages.
4. Breaches of the Charter will give rise to situations where the conduct of the public authority deserves opprobrium however the plaintiff has little incentive to sue or cannot identify a material head of damage. The plaintiff will have low prospects of any firm being prepared to act in the absence of up-front payment of fees, which is especially unappealing when any investment in such fees is unlikely to be recovered from an award of damages or penalties.
5. We submit that the review should consider recommending the introduction of a civil remedies regime that allows pecuniary penalties, in addition to compensatory damages.

Pecuniary penalties – the position of the *Fair Work Act 2009*

6. In our view, the Charter Review should consider recommending remedies in addition to mere damages that provide plaintiffs with some idea of their likely recovery. A civil remedies regime would suit this purpose. We submit that a useful guide for a potential regime can be found in the civil remedy provisions in the *Fair Work Act 2009* (the **Act**).
7. By way of explanation, certain sections of the Act are civil remedy provisions. For example, a breach of a modern award and a failure to keep accurate employee records are both civil remedy provisions. Under s 539 of the Act, both an individual employer and a company can be subject to a civil remedy provision. A court may order a person to pay a pecuniary penalty that it considers is appropriate if it is satisfied that the person has contravened a civil remedy provision under s 546. The penalties are expressed in the form of a maximum number of penalty units.
8. Commonly, it is the regulator that seeks a pecuniary penalty, and any award is made to it. However, individuals and employee organisations also have standing under the Act to bring proceedings seeking a pecuniary penalty order. It is within the Court's discretion to order that the pecuniary penalty be paid to any person or organisation under s 546(3).
9. Under s 557, multiple contraventions may be taken as a single contravention where they are committed by the same person and arose out of a course of conduct by that person.

10. Litigation arising from contraventions of the Act which results in pecuniary penalties is commonplace, initiated by the regulator, employee organisations and individuals. We provide some examples below. In the examples, orders for compensatory damages were made in appropriate cases, but we list only the amounts ordered as pecuniary penalties:

- *United Voice v MDBR123 Pty Ltd (No 2)* [2015] FCA 76 involved contraventions of the Act as a result of an adverse action. Penalties of \$10,000 were awarded and ordered to be paid to the employee.
- *Transport Workers' Union of Australia v Atkins* [2014] FCCA 1553 involved contraventions of the Act as a result of adverse action taken against an employee. Penalties of \$10,000 were awarded and ordered to be paid to the Union.
- *Fair Work Ombudsman v World Gym Sunshine Pty Ltd* [2014] FCCA 2201 involved contraventions of the Act as a result a finding that a dismissal was unfair and a failure to comply with orders of the Fair Work Commission. Penalties of \$47,608.50 were awarded.
- *Kelly v Fitzpatrick* [2007] FCA 1080 involved contraventions of the Act as a result of breaches of the relevant award and underpayment of an employee. Penalties of \$3,660 were awarded.
- *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 involved contraventions of the Act as a result of breaches of the relevant award and underpayment of two employees. Penalties of \$64,000 were awarded.

11. From the above examples, it is clear that the orders for pecuniary penalties are varied. However, in almost all of the cases, the outcome will have justified the time and cost of bringing the proceeding for the individual, as well as serving the public interest in providing a deterrent against breaches of the Fair Work Act..

Potential application of pecuniary penalties to breaches of the Charter

12. We submit that a similar regime that exists under the Act could be introduced into the Charter. Ideally it would be pursuant to a reform which would create a stand-alone cause of action for a breach of the Charter. But even in the absence of such a cause of action, it would still be desirable to reform the Charter to include such a civil remedies regime. This would create an incentive to plead a breach of the Charter in addition to any extant cause of action.

13. An appropriate civil remedies regime would allow organisations and individuals to be the beneficiaries of any pecuniary penalty that may result. The Ombudsman could be given a similar role in any civil remedies regime, as it does under the Act, but we do not consider this necessary at this point.

14. A course of conduct provision could also be included in any reform.
15. A range of factors could also be listed in any reform for determining the amount of pecuniary penalties to be awarded. A set of non-exhaustive criteria for the *Fair Work Act* regime was provided by Tracey J in *Kelly v Fitzpatrick* [para 14] drawing on the reasoning of Mowbray FM in *Mason v Harrington Corporation Pty Ltd* (both referred to in paragraph 10 above):
- The nature and extent of the conduct which led to the breaches.
 - The circumstances in which that conduct took place.
 - The nature and extent of any loss or damage sustained as a result of the breaches.
 - Whether there had been similar previous conduct by the respondent.
 - Whether the breaches were properly distinct or arose out of the one course of conduct.
 - The size of the business enterprise involved.
 - Whether or not the breaches were deliberate.
 - Whether senior management was involved in the breaches.
 - Whether the party committing the breach had exhibited contrition.
 - Whether the party committing the breach had taken corrective action.
 - Whether the party committing the breach had cooperated with the enforcement authorities.
 - The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and
 - The need for specific and general deterrence.
16. A similar list of criteria could be included in the Charter to indicate that the regime is designed to deter breaches by public authorities, especially repeated breaches.
17. We submit that it should be made clear that the standard of proof for awarding pecuniary penalties be on the balance of probabilities. Making this express would avoid any potential issues arising as a result of *Briginshaw v Briginshaw* (1938) 60 CLR 336.

Enhancing the effectiveness of the Charter and improving its operation

18. We submit that a regime that permits penalties to be payable to an individual who brings a case alleging breach of the Charter would enhance the effectiveness of the Charter and improve its operation.
19. Reducing the barriers to justice is a necessary step in this direction. It means that remedies for breach are more accessible by those who need it the most. It also means that public authorities have an incentive to treat their Charter obligations seriously.
20. It would also mean that Charter rights enjoy the same status as a range of workplace rights, currently protected under the *Fair Work Act*. The rights protected by the Charter are at least as fundamental to human dignity, yet they are not afforded the same status in respect of remedies.
21. To that end, the introduction of compensatory damages would be a significant step forward. The introduction of a civil remedies regime would provide plaintiffs with incentives with greater certainty and allow the court to award a remedy that is specifically directed to the conduct of the public authority, rather than just the damage suffered by the plaintiff.
22. Private enforcement has a central role to play in creating a human rights culture, especially among public authorities. Harnessing the power of the private legal profession to agitate claims arising from breaches of the Charter will be invaluable to ensuring human rights are genuinely respected and enforced. This will not happen until the Charter offers plaintiffs the opportunity to seek damages, and in situations where that would not address the conduct of the public authority, pecuniary penalties.
23. Such a reform would ensure that the conduct of public authorities is subject to serious scrutiny to ensure that the Charter is effective in promoting a culture that respects human rights and operates to censure conduct that breaches those rights.

Yours faithfully,



Elizabeth O'Shea