

**Occupational Health and Safety Amendment
(Employee Protection) Act 2009**

No. 34 of 2009

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Victoria

Occupational Health and Safety Amendment (Employee Protection) Act 2009[†]

No. 34 of 2009

[Assented to 30 June 2009]

The Parliament of Victoria enacts:

1 Purpose

The purpose of this Act is to amend the **Occupational Health and Safety Act 2004** to create a civil cause of action for employees or prospective employees who are discriminated against by an employer or prospective employer on grounds that relate to occupational health and safety.

2 Commencement

- (1) Subject to subsection (2), this Act comes into operation on a day or days to be proclaimed.
- (2) If a provision of this Act does not come into operation before 1 July 2009, it comes into operation on that day.

3 Principal Act

In this Act, the **Occupational Health and Safety Act 2004** is called the Principal Act.

See:
Act No.
107/2004.
Reprint No. 1
as at
23 February
2007
and
amending
Act Nos
97/2005,
28/2007 and
66/2008.
LawToday:
www.
legislation.
vic.gov.au

4 Prohibition on discrimination

- (1) In section 76(2)(c) of the Principal Act, after "an inspector," **insert** "an authorised representative of a registered employee organisation,".
- (2) In section 76(2)(d) of the Principal Act, after "an inspector," **insert** "an authorised representative of a registered employee organisation,".
- (3) For section 76(4)(a) of the Principal Act **substitute**—
 - "(a) in the case of a natural person, a fine not exceeding 500 penalty units; and"

5 New Subdivision heading inserted in Division 9 of Part 7

After the heading to Division 9 of Part 7 of the Principal Act insert—

"Subdivision 1—Criminal offences and proceedings".

6 New Subdivision 2 inserted in Division 9 of Part 7

After section 78 of the Principal Act insert—

"Subdivision 2—Civil actions for discriminatory conduct

78A Prohibition of discriminatory conduct

- (1) An employer or prospective employer must not engage in *discriminatory conduct* for a prohibited reason.
- (2) For the purposes of this subdivision, an employer or prospective employer engages in discriminatory conduct if—
 - (a) the employer of an employee—
 - (i) dismisses the employee, injures an employee in the employment of the employer or alters the position of the employee to the employee's detriment; or
 - (ii) threatens to do any of those things to the employee; or
 - (b) the employer or prospective employer of the prospective employee refuses or fails to offer employment to the prospective employee, or treats the prospective employee less favourably than another prospective employee

would be treated in offering terms of employment.

78B Prohibited reasons

- (1) Conduct referred to in section 78A is for a *prohibited reason* if it is carried out because the employee or prospective employee—
 - (a) is or has been a health and safety representative or a member of a health and safety committee; or
 - (b) exercises or has exercised a power as a health and safety representative or as a member of a health and safety committee; or
 - (c) assists or has assisted, or gives or has given any information to, an inspector, an authorised representative of a registered employee organisation, a health and safety representative or a member of a health and safety committee; or
 - (d) raises or has raised an issue or concern about health and safety to an employer, an inspector, an authorised representative of a registered employee organisation, a health and safety representative, a member of a health and safety committee or an employee of the employer.
- (2) For the purposes of section 78A, an employer or prospective employer may be found to have engaged in discriminatory conduct for a prohibited reason if a reason mentioned in subsection (1) is a substantial reason for the conduct.

78C Prohibition of authorising or assisting discriminatory conduct

A person must not request, instruct, induce, encourage, authorise or assist an employer or prospective employer to engage in discriminatory conduct in contravention of section 78A.

78D Civil action for discriminatory conduct

- (1) An eligible person may apply to the Industrial Division of the Magistrates' Court for an order under this section.
- (2) The Industrial Division of the Magistrates' Court may make one or more of the following orders in relation to an employer or prospective employer who has contravened section 78A—
 - (a) an order that the employer or prospective employer pay (within a specified period) such damages to the employee or prospective employee who was the subject of the discriminatory conduct as the Court considers appropriate to compensate the employee or prospective employee;
 - (b) an order that—
 - (i) the employee be reinstated or re-employed in the employee's former position or, if that position is not available, in a similar position; or
 - (ii) the prospective employee be employed in the position for which the prospective employee had applied or a similar position;

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- (c) any other order that the Court considers appropriate.
- (3) The Industrial Division of the Magistrates' Court may make one or more of the following orders in relation to a person who has contravened section 78C—
- (a) an order that the defendant pay (within a specified period) such damages to the person who was the subject of the discriminatory conduct as the Court considers appropriate to compensate the person;
- (b) any other order that the Court considers appropriate.
- (4) The orders that may be made under subsections (2)(c) or (3)(b) include—
- (a) injunctions; and
- (b) any other orders that the Industrial Division of the Magistrates' Court considers necessary to stop the conduct or remedy its effects.
- (5) For the purposes of this section, each of the following is an *eligible person*—
- (a) a person affected by the contravention;
- (b) another person authorised to represent a person referred to in paragraph (a).
- (6) Nothing in this section is to be construed as limiting any other power of the Industrial Division of the Magistrates' Court.
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78E Procedure for actions for discriminatory conduct

- (1) A proceeding brought for contravention of section 78A or 78C must be commenced not more than 1 year after the date on which the plaintiff knew or ought to have known that the cause of action accrued.
 - (2) In a proceeding for a contravention of section 78A or 78C, if all the facts constituting the alleged discriminatory conduct other than the reason for the defendant's conduct are proved, the defendant bears the onus of proving that the reason alleged in the complaint was not a substantial reason for the conduct.
 - (3) It is a defence to a proceeding for a contravention of section 78A or 78C if the defendant proves that—
 - (a) the conduct was reasonable in the circumstances; and
 - (b) a substantial reason for the conduct was to comply with the requirements of this Act or with the **Accident Compensation Act 1985**.
 - (4) The making of an order in a proceeding for a contravention of section 78A does not prevent the bringing of a proceeding for an offence against section 76 in respect of the same conduct.
 - (5) If the Industrial Division of the Magistrates' Court makes an order under section 78D in a proceeding for a contravention of section 78A, the court cannot make an order under section 78 in a proceeding for an offence against section 76 in respect of the same conduct.
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- (6) If the court makes an order under section 78 in a proceeding for an offence against section 76, the Industrial Division of the Magistrates' Court cannot make an order under section 78D in a proceeding for a contravention of section 78A in respect of the same conduct."

7 Transitional provision

After section 176 of the Principal Act **insert—**

"177 Proceedings for contravention of section 78A or 78C

A proceeding for a contravention of section 78A or 78C must not be brought in respect of conduct that occurred before the commencement of section 6 of the **Occupational Health and Safety Amendment (Employee Protection) Act 2009**."

8 Repeal of amending Act

This Act is **repealed** on 1 July 2010.

Note

The repeal of this Act does not affect the continuing operation of the amendments made by it (see section 15(1) of the **Interpretation of Legislation Act 1984**).

ENDNOTES

† *Minister's second reading speech—*

Legislative Assembly: 4 December 2008

Legislative Council: 4 June 2009

The long title for the Bill for this Act was "A Bill for an Act to amend the **Occupational Health and Safety Act 2004** to create a civil cause of action for employees or prospective employees who are discriminated against by an employer or prospective employer on grounds that relate to occupational health and safety."