VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

HUMAN RIGHTS LIST

VCAT no: A12/2013

BETWEEN

PAUL CHRISTOPHER SLATTERY

Applicant

and

MANNINGHAM CITY COUNCIL

Respondent

and

VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

Intervener

SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

(filed pursuant to directions of Senior Member Dea on 5 May 2014)

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A. INTRODUCTION

1. The Victorian Equal Opportunity and Human Rights Commission (**Commission**) was granted leave to intervene in these proceedings pursuant to section 159 of the *Equal Opportunity Act 2010* (Vic) (**EOA**) on 28 June 2013.

2. The Commission makes these submissions pursuant to section 159 of the EOA, which empowers the Commission to seek leave to intervene in and be joined as a party to proceedings that involve issues of equality of opportunity, discrimination, sexual harassment or victimisation.

3. As an intervener, the Commission acts as an independent party, exercising its functions under section 155 of the EOA. These functions include promoting and advancing the objectives of the EOA, and to act as an advocate for the EOA.

4. As with its submissions in the substantive proceeding filed 24 June 2013, the Commission does not seek to make submissions on each issue raised by the parties to the proceedings. The Commission seeks to assist the Tribunal by

making submissions only in respect of the operation of the EOA and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) and the relevant provisions of those Acts as they apply to these proceedings.

B. APPLICANT'S APPLICATION FOR FURTHER ORDERS

5. Pursuant to the Orders of Member Dea dated 5 May 2014, the Applicant filed an Application for further orders on 20 May 2014 (**Applicant's Application for Further Orders**).

6. Given the nature of the Commission's role in the proceedings, it does not seek to address the Applicant's Application for Further Orders.

C. REMEDIES

7. The Applicant seeks the following remedies:[1]

   (a) a declaration that the Respondent breached the Applicant's human rights to participate in the conduct of public affairs, to freedom of expression and to enjoy his human rights without discrimination;

   (b) an order that the Respondent revoke the declaration prohibiting the Applicant from attending any building that is owned, occupied or managed by the Respondent;

   (c) an order requiring the Respondent to provide a full day of equal opportunity training for all Councillors and staff, to be conducted by the Commission;

   (d) an order requiring the Respondent pay the Applicant compensation of $100,000 for public humiliation and private hurt;

   (e) an order requiring the Respondent to issue a public apology to the Applicant, published in the Manningham Matters, in prescribed form; and

   (f) an order requiring the Respondent to pay the Applicant's legal costs of $9171.

The Tribunal's powers under section 125 EOA

8. Section 125 of the EOA provides that after hearing the evidence and representations that parties to an application may adduce or make, the Tribunal has the following options available to it:

   (a) find there has been a contravention of Part 4, 6 or 7 of the EOA and make orders for specified remedies;

[1] Applicant's Proposed Orders as to Remedy and Applicant's Submissions: Remedies, dated 20 May 2014.

(b) find that there has been a contravention of Part 4, 6 or 7 of the EOA but decline to take any further action; or

(c) find that there has not been a contravention of Part 4, 6 or 7 and make an order that the application or part of the application be dismissed.

9. If the Tribunal considers that the Applicant has proven (on the balance of probabilities) that a person has contravened a provision of Part 4, 6 or 7 of the EOA, the Tribunal has the power under section 125(a) to make one or more of the following orders:

(a) that the person refrain from committing any further contravention of this Act;[2]

(b) that the person pay to the Applicant, within a specified period, an amount the Tribunal thinks fit to compensate the Applicant for loss, damage or injury suffered in consequence of the contravention;[3] and

(c) that the person do anything specified in the order with a view to redressing any loss, damage or injury suffered by the applicant as a result of the contravention.[4]

10. The onus is on an applicant to make a claim for applicable remedies and to provide evidence of any loss, damage or injury. Such a claim could be supported by an applicant's own testimony or the testimony of medical providers, or by providing evidence of lost income or employment benefits, travel expenses, medical expenses, or copies of relevant medical reports.[5] It is for the Tribunal to determine what weight should be given to the evidence provided by the parties regarding remedies.

11. In making any order under section 125, the Commission submits that the Tribunal should have regard to the objects of the EOA as set out in section 3, and in particular the objective to eliminate discrimination, including systemic discrimination, within the covered areas of public life.

12. The Commission submits that the EOA is beneficial legislation designed to promote equality, eliminate discrimination as far as possible and to provide redress for people who have experienced discrimination. When applying its discretion in section 125, the Tribunal should take into account the beneficial and remedial objectives of the Act as equal opportunity legislation. As expressed by Dawson and Gaudron JJ in *IW V City of Perth* (1997) 191 CLR 1:

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[2] Equal Opportunity Act 2010 (Vic) (**EOA**), section 125(a)(i).
[3] EOA, section 125(a)(ii).
[4] EOA, section 125(a)(iii).
[5] See, for example, *Qantas Airways Ltd v Gama* (2008) 167 FCR 537, 569-570.

> In construing legislation designed to protect basic human rights and dignity, the courts 'have a special responsibility to take account and give effect to [its] purpose.' For this reason, the provisions should be construed as widely as their terms permit.[6]

13. The Tribunal's powers to make orders under section 125 sit alongside its powers as provided under the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (**VCAT Act**). Relevantly:

    (a) section 98(1) of the VCAT Act provides the Tribunal is not bound by the rules of evidence and the Tribunal may inform itself of any matter it seems fit, including, for example, the extent of the Applicant's loss.

    (b) section 124 of the VCAT Act, which confers power on the Tribunal to make a declaration concerning any matter in a proceeding, instead of or in addition to any orders it makes in the proceeding.[7]

Orders for remedies not sought in the Application

14. The Respondent submits the Applicant cannot seek relief that was not sought in his application at the hearing in 2013.[8] Specifically, the Respondent objects to the Applicant seeking remedies in relation to claims that it submits were abandoned (such as an order revoking the 2009 declaration and an apology), matters which were never pressed (training), or findings which were not made in relation to matters that were pressed.[9]

15. Section 125 confers on the Tribunal a broad discretion to make orders in relation to an 'application', as set out in sub-sections 125(a) – (c), 'after hearing the evidence and representations' of the parties.

16. Accordingly, the Commission first submits that the Tribunal's discretion to make an order is subject to a Respondent having the opportunity to respond to any application for relief under the EOA.[10]

17. In the present matter, the Respondent had the opportunity at first instance to respond and make submissions regarding the relief claimed by the Applicant. It has now had a second opportunity to respond to the reframed relief sought in response to the Tribunal's findings. Accordingly, there appears to be no

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[6] *IW v City of Perth* (1997) 191 CLR 1,12 per Dawson and Gaudron JJ at 22.
[7] This power is in addition to the Tribunal's power under an enabling enactment: VCAT Act, section 124(3).
[8] Respondent's Outline of Submissions: Remedies (dated 30 June 2014) [6].
[9] Respondent's Outline of Submissions: Remedies (dated 30 June 2014) [11].
[10] *Victorian Civil and Administrative Tribunal Act* 1998 (**VCAT Act**), sections 97 and 98. See for instance, *Rawson v Hobbs* (1961) 107 CLR 466 at 485, per Dixon CJ, referred to in *TM Burke Estates Pty Ltd v PJ Constructions (Vic) Pty Ltd (in liq)* [1991] 1 VR 610 at 617.

prejudice to the Respondent should the Tribunal consider the additional remedies sought.

18. Second, by section 127 of the VCAT Act, the Tribunal may permit amendment of the application (made under section 122 of the EOA) at any time before the Tribunal becomes *functus officio* – that is, before its final orders are made and authenticated in a proceeding. The Tribunal is not yet *functus officio* in this proceeding.[11]

19. It is usually desirable, in the interests of finality of litigation, to allow an amendment which will enable the Tribunal to resolve all of the matters in controversy between the parties.[12] To this end, the courts will allow pleadings to be amended even after judgment,[13] although in this case a final decision has not been given.

Submission of further evidence regarding remedies

20. The Tribunal has made orders for the Respondent to file and serve an outline of any evidence that it wishes to call in respect of any section 125 orders.[14]

21. The Commission submits that it is open to the Tribunal to consider further evidence regarding remedies, if it assists the Tribunal to determine appropriate remedies.

22. However, the Commission observes that the Tribunal's processes must be conducted with as little formality and technicality as a proper consideration of the matters before it permit.[15] This factor should be borne in mind when considering matters under the EOA, which provides direct access to VCAT for the resolution of disputes about discrimination.

23. In the proceeding *Turner v State of Victoria*, the Tribunal conducted a hearing following which it made findings.[16] The Tribunal held a subsequent directions hearing to determine remedies (the **remedies hearing**).[17] In the Supreme Court, Justice Kyrou noted that 'Both parties presented limited oral and documentary evidence, including expert evidence at the directions hearing. That evidence was principally directed at how Ms Turner was performing at school and her future education plans'.[18] In essence, this further evidence went to the Applicant's position at the time of the remedies hearing.

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[11] *Bailey v Marinoff* (1971) 125 CLR 529, 530-1; *Hill v Baylite Homes* [2000] VCAT 1860.
[12] *Cropper v Smith* (1884) 26 Ch D 700, 710-11 (Bowen LJ); *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.
[13] *Amcor v Australian Corrugated Box Co Pty Ltd* [2013] VSCA 223.
[14] Orders of Member Dea dated 5 May 2014, Order 2.
[15] VCAT Act, section 98.
[16] *Turner v Department of Education and Training (Anti Discrimination)* [2007] VCAT 873.
[17] *Turner v State of Victoria (Anti-Discrimination remedy)* [2008] VCAT 161.
[18] *State of Victoria v Turner* (2009) 23 VR 110 [26].

24. The appropriateness of allowing further evidence may depend on the particular remedies being considered and the particular circumstances of the case before the Tribunal. For instance, in *State of Victoria v Turner* (2009) 23 VR 110 (***Turner***) Kyrou J held that the Tribunal could rely on evidence presented at the remedies hearing to determine whether discrimination was continuing at that time (as this had been part of the applicant's claim) but not for the purpose of awarding compensation for periods of discrimination that were not part of the applicant's claim.[19]

Orders sought by the Applicant

25. The Commission makes the following submissions regarding the orders sought by the Applicant in his submissions dated 20 May 2014.

(a) Charter Declaration

26. The Commission submits that the Tribunal's orders dated 30 October 2013 constitute a declaration of a breach of the Applicant's human rights under the Charter. Order 1 of the Tribunal's orders states:

> I further find that the decision [to maintain the declaration prohibiting the Applicant from attending any building that is owned, occupied or managed by the Responding] was a breach of the *Charter of Human Rights and Responsibilities Act* 2006.

27. The Commission submits that the terms of the declaration should ideally specify the precise Charter rights breached.[20] The Tribunal may make such an amendment to its orders pursuant to the slip rule.[21]

28. In the alternative (and, in the event the Tribunal makes further findings of discrimination regarding the communications ban) the Commission submits that it is open to the Tribunal to make a fresh declaration regarding a breach of the Applicant's Charter rights pursuant to section 124 of the VCAT Act. The Tribunal has made declarations where it has found a breach of a person's human rights under the Charter.[22]

29. The Commission observes that the Tribunal's power to issue a declaration is not exercised lightly and is done only where there is some utility in doing so.[23]

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[19] *State of Victoria v Turner* (2009) 23 VR 110 [83].
[20] See *Kracke v Mental Health Review Board & Ors (General)* (2009) 29 VAR 1 where Bell J ordered that 'the Mental Health Review Board breached Gary Kracke's human right to a fair hearing under s 24(1) of *the Charter of Human Rights and Responsibilities Act* 2006 by failing to conduct the reviews of his involuntary and community treatment orders under s 30(3) and (4) of the *Mental Health Act 1986* within a reasonable time' at [859].
[21] VCAT Act, section 119.
[22] *Kracke v Mental Health Review Board & Ors (General)* (2009) 29 VAR 1.
[23] *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd* [2008] VCAT 482.

Furthermore, any remedy ordered should be balanced, appropriate and proportionate.[24]

30. The Commission submits that the making of a declaration is an important remedy in a proceeding where a breach of an individual's Charter rights has been found.

31. As Bell J observed in *Kracke v Mental Health Review Board & Ors (General)* (2009) 29 VAR 1, 'A formal finding of violation of breach of human rights is a remedy of great importance in jurisdictions where those rights have application.'[25]

32. Justice Bell went on to explain the benefits of a declaration to an individual and to a society:

> When a human right is breached, the individual is injured. Because of the broader role of human rights, society is injured as well. Human rights protect interests and values which society in Parliament considers to be fundamental, both to the individual and to the maintenance of democratic society based on the rule of law. Where human rights are breached, both the individual and society have a strong interest in the remedy of a declaration, in which inheres their final vindication.[26]

33. The Commission submits that these interests are relevant to the Tribunal's consideration of the order sought by the Applicant.

(b) Order to revoke the ban

34. The Applicant seeks an order that the Respondent revoke the declaration prohibiting the Applicant from attending any building that is owned, occupied or managed by the Respondent.[27]

35. The Commission submits that it is within the Tribunal's discretion under section 125(a)(i) EOA, section 125(a)(iii) EOA and (if necessary) section 39 of the Charter for the Tribunal to make such an order.

36. To make such an order under section 125(a)(i), there must be a nexus or correspondence between the contravention found and a risk of contravention in the future. This principle was outlined in *Turner*, where Kyrou J held (when considering section 136(a)(i) of the *Equal Opportunity Act 1995* (Vic) (**EOA 1995**)):

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[24] *Kracke v Mental Health Review Board & Ors (General)* (2009) 29 VAR 1 [822].
[25] *Kracke v Mental Health Review Board & Ors (General)* (2009) 29 VAR 1, [818].
[26] *Kracke v Mental Health Review Board & Ors (General)* (2009) 29 VAR 1, [820].
[27] Subject to further findings of discrimination being made, the Applicant also seeks an order that 'Within 1 month of the date of these Orders, the Manningham City Council must cease to refuse Mr Slattery's communication by phone, post, fax or email with the Manningham City Council'.

> Where an order is made under s 136(a)(i), there must be a nexus or correspondence between the acts constituting the contravention of the EO Act the Tribunal has found has occurred and is continuing and the acts the order prohibits as a means of preventing further contraventions. The nature and degree of the requisite nexus or correspondence will depend on the nature of the discrimination that has been found by the Tribunal, what continuing acts are involved and the other circumstances of the case.[28]

37. Justice Kyrou went on to observe that the nexus or correspondence:

> must be viewed practically having regard to the purposes and objects of the EO Act and its remedial nature. A literal and technical approach requiring exactness would be inappropriate in relation to discrimination in an area such as education where the curriculum changes as students progress through various subjects and year levels. In other areas, such as refusal to permit a person with a particular attribute to use particular accommodation, it would be possible for the past act of discrimination and the ongoing act which is the subject of an order under s 136(a)(i) to be identical.[29]

38. The Commission submits that the Tribunal has identified continuing discrimination.[30] Furthermore, the Respondent admits it has maintained the declaration since the Tribunal's decision of 30 October 2014[31] and, in the event the Tribunal makes further orders of discrimination regarding the communications ban, has limited the terms on which the Applicant is able to contact the Respondent.[32]

39. An order that the Respondent revoke the ban would be linked to the contravention the Tribunal has found has occurred and is continuing.

40. The Commission submits that that section 125(a) confers on the Tribunal a broad discretion to order remedies in the context of the proceeding before it. Further, it is possible for there to be 'a degree of responsive to changing circumstances' in any order made.[33]

41. Section 125(a) of the EOA differs from the remedies provision in the EOA 1995. Under section 125(a)(i) of the EOA, the Tribunal may make 'an order that the person refrain from committing any further contravention of this Act'. Section 136(a)(i) of the EOA 1995 supplied the Tribunal with the power to make 'an order that the respondent refrain from committing any further contravention of this Act *in relation to the complainant*' (emphasis added).

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[28] *State of Victoria v Turner* (2009) 23 VR 110 [172].
[29] *State of Victoria v Turner* (2009) 23 VR 110 [172] -[173].
[30] *Slattery v Manningham CC (Human Rights)* [2013] VCAT 1869 [33]-[34].
[31] Affidavit of Joe Carbone dated 27 June 2014 [5].
[32] Affidavit of Joe Carbone dated 27 June 2014 [19]-[21].
[33] *State of Victoria v Turner* (2009) 23 VR 110 [258].

42. The Respondent correctly identifies that the Explanatory Memorandum for the EOA provides that 'Clause 125 re-enacts section 136 of the Equal Opportunity Act 1995.'[34]

43. However, the Explanatory Memorandum is no substitute for the words of section 125; the function of the Tribunal is to give effect to those words.[35] The Commission submits that on its face, section 125 is clearly different to its predecessor. Section 125(a)(i) does not require an order to be made in relation to a particular applicant, but permits the Tribunal to make 'an order that the person refrain from committing *any* further contravention' of the Act (our emphasis). This construction is supported by the objects of the EOA, which include 'to encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation'.[36] These objects differ from the objects of the EOA 1995, which did not provide for any objects regarding the elimination of systemic causes of discrimination. Rather, a key object of the EOA 1995 was to provide redress for individuals.[37]

44. The Commission submits that as in *Dulhunty v Guild Insurance Limited (Anti-Discrimination)* [2012] VCAT 1651, it is open to the Tribunal to make an order regarding the Respondent's future conduct. In that matter, Member Liden considered that an order regarding the criteria for pricing insurance premiums was necessary to ensure the Respondent did not continue to act in a discriminatory way.[38] An order to revoke the ban could be one way to ensure the Respondent refrains from committing further contraventions of the EOA.

45. The Commission submits that an order to revoke the ban would also provide a measure of redress to the Applicant for the contraventions found by the Tribunal: it would put an end to a continuing injury, and it would also remove any distress the Applicant may have suffered, or may be suffering that arises from the continuation of the ban.

46. The Respondent submits, inter alia, that it is appropriate for the matter of the continuation of the ban to be left to the Respondent to reassess.[39] The Commission submits this is not appropriate, as the ban (or at least the continuation of the ban) has been found to be unlawful. The lifting of the ban will not deny the Respondent flexibility to deal with Mr Slattery in future by taking measures that are lawful under the EOA.

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[34] Explanatory Memorandum, Equal Opportunity Bill 2010 (Vic), Clause 125.
[35] *Re Bolton; ex parte Beane* (1987) 162 CLR 514, 517-518 per Mason CJ, Wilson and Dawson JJ.
[36] EOA, section 3(c). See *Interpretation of Legislation Act 1984*, section 35(a).
[37] EOA 1995, section 3. See also Julian Gardner, *An Equality Act for Victoria* (2008) [1.53].
[38] *Dulhunty v Guild Insurance Limited (Anti-Discrimination)* [2012] VCAT 1651. Note that this matter was determined under the EOA 1995.
[39] Respondent's Outline of Submissions on Remedy, dated 30 June 2014 [23].

(c) Training

47. The Applicant seeks an order requiring the Respondent to provide a full day of equal opportunity training for all Councillors and staff, to be conducted by the Commission.

48. The Commission submits that it is open to the Tribunal to make an order requiring a respondent to undertake training in equal opportunity, anti-discrimination matters and Charter matters. Such an order can be made where it provides redress to an applicant.[40] An order for training can provide redress by setting right or correcting the loss, damage or injury suffered by the Applicant.

49. The Commission can provide further information about its training services to the Tribunal, if it is considered to be of assistance.

(d) Damages

50. The Applicant seeks an order requiring the Respondent pay the Applicant compensation of $100,000 for public humiliation and private hurt.

51. The Tribunal has the power under section 125(a)(ii) of the EOA to award an applicant payment of an amount which the Tribunal thinks fit 'to compensate the complainant for loss, damage or injury suffered in consequence of' the contravention of the EOA.

52. The Commission submits that an applicant must show a causative link between the conduct in contravention of the EOA, and the loss, damage or injury.[41] This is because the purpose of an award of damages is to attempt to measure, in monetary terms, the loss, damage and injury that has been suffered as a result, or 'in consequence of' the unlawful conduct.[42]

53. The Commission further submits that the unlawful conduct need not be the only cause of the loss, damage or injury.[43]

54. The principle method for calculating an award of damages was articulated in *Hall & Ors v A. & A. Sheiban Pty Ltd & Ors* (1989) 20 FCR 217 *(**Hall**)*. In *Hall,* Lockhart J stated that generally speaking, the correct way to approach the assessment of damages in discrimination cases is to compare the position in which the complainant might have been expected to be if the discriminatory

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[40] *Morgan v Dancey Enterprises Pty Ltd (Anti-Discrimination)* [2006] VCAT 2145 cf *Ho v Regulator Australia Pty Ltd & Anor* [2004] FMCA 62 where an application for an order for training was declined.
[41] *Coyne v P&O Ports* [2000] VCAT 657, 35
[42] EOA section 125(a)(ii); *GLS v PLP (Human Rights*) [2013] VCAT 221 [259], [274]
[43] *Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 128 [56]-[57], quoted in *GLS v PLP (Human Rights)* [2013] VCAT 221 [275]-[276]

conduct had not occurred with the situation in which they were placed due to the conduct of the respondent.[44]

55. To assist with this assessment, both Lockhart and Wilcox JJ adopted as a statement of principle, what was said by May LJ in a racial discrimination case before the English Court of Appeal, *Alexander v Home Office* [1988] 2 All ER 118:

> As with any other awards of damages, the objective of an award for unlawful racial discrimination is restitution. Where the discrimination has caused actual pecuniary loss, such as the refusal of a job, then the damages referrable to this can be readily calculated. For the injury to feelings, however, for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and good sense of the judge and his assessors. Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the results which it seeks to achieve as do nominal awards. Further, injury to feelings, which is likely to be of a relatively short duration, is less serious than physical injury to the body or the mind which may persist for months, in many cases for life.[45]

56. The principle from *Hall* has been followed in subsequent discrimination and equal opportunity cases in Victoria and the Federal jurisdiction, and was adopted recently in a decision of the Tribunal, *Galea v Hartnett Blairgowrie Caravan Park (Anti-Discrimination)* [2012] VCAT 1049.[46] The Commission submits that the Tribunal should also adopt the approach of *Hall* in assessing the situation of the Applicant.

57. The Commission further submits that if the Tribunal determines an award of general damages is appropriate, it is appropriate to consider that an applicant's distress in discrimination cases may well arise from the perception if not the reality that the contravention might have exacerbated the 'social and economic disadvantage' otherwise experienced in their lives. The objects of the Act recognise this as a reality.[47]

58. The Commission submits that the Tribunal is entitled to consider awards of general damages in other cases to assist in its assessment of damages for the

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[44] *Hall & Ors v A. & A. Sheiban Pty Ltd & Ors* (1989) 20 FCR 217, 239 (per Lockhart J).
[45] *Alexander v Home Office* [1988] 2 All ER 118, 122 (May LJ), cited in *Hall & Ors v A. & A. Sheiban Pty Ltd & Ors* (1989) 20 FCR 217, 238 (per Lockhart J) and 256 (per Wilcox J).
[46] *Galea v Hartnett - Blairgowrie Caravan Park (Anti-Discrimination)* [2012] VCAT 1049 [83].
[47] EOA, section 3(d)(i); Also see Hansard, *Legislative Assembly*, 10 March 2010, 783.

Applicant if his case is proven. However, we note that the level of general damages awarded in successful discrimination cases in Victoria has varied significantly from case to case.

59. The Commission acknowledges care needs to be taken in drawing comparisons to ensure that particular acts of discrimination are not "rated" or ranked against each other.[48] Similarly, the Commission is not seeking to encourage the Tribunal to find a "norm or standard" award of general damages arising out of this group of decisions.[49]

60. The Commission refers to paragraph 88 – 100 of its submissions in the substantive proceeding regarding particular awards of damages for unlawful discrimination on the grounds of disability.[50]

(e) Apology

61. The Applicant seeks an order requiring the Respondent to issue a public apology to the Applicant, published in the Manningham Matters, in prescribed form.

62. The Tribunal can order an apology pursuant to section s 125(a)(iii) of the EOA as a means of redress for an applicant.[51]

63. It is also open to the Tribunal to order publication of material, or indeed, corrective advertising, pursuant to its power to order redressing loss, damage or injury.[52]

(f) Costs

64. The Applicant has sought the payment of costs from the Respondent.

65. The general rule in matters before the Tribunal is that each party bears their own costs,[53] subject to the Tribunal's discretion to order costs having regard to the factors in section 109(3) of the VCAT Act.

66. Ordinarily, the general rule will apply in anti-discrimination matters.[54] The Tribunal has been concerned to ensure that the redress provided by the EOA and its predecessors is not made less accessible by the making of costs

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[48] *GLS v PLP(Human Rights)* [2013] VCAT 221 [273]-[274]; *Phillis v Mandic* [2005] FMCA 330 [26].
[49] *Gama v Qantas Airways Ltd (No.2)* [2006] FMCA 1767 [126]-[127].
[50] Submissions of the Victorian Equal Opportunity and Human Rights Commission, 24 June 2013.
[51] See *Flekac v Australian Cable and Telephony Pty Ltd [*2003] VCAT 2012 and *Styles v Murray Meats Pty Ltd* [2005] VCAT 914. In each of these cases the Tribunal did not make orders for the exact form of the apology but left this to the parties.
[52] *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 206 FLR 56, 94 per Nettle JA.
[53] VCAT Act, section 109(1).
[54] *GLS v PLP (Human Rights)* [2013] VSCA 221.

awards.[55] Applicants are likely to be deterred from bringing a claim by a fear that, if they lose, they must pay their own costs and the costs of the other side.[56]

67. The Commission acknowledges 'there are powerful contrary arguments'[57] regarding the award of costs in this jurisdiction. There may be circumstances where consideration of the matters in section 109(3) of the VCAT Act warrant departure from the general rule. The case of *Tan v Xenos* [2008] VCAT 1273 was one such instance, where the Tribunal stated that:

> The basis for the generally cautious approach to awarding costs is to preserve access to the Tribunal for claimants. The Tribunal is also concerned not to discourage litigants from presenting their claims in person, without legal representation. If costs were generally awarded for successful claims, or against unsuccessful claimants, the issue of costs would become a significant barrier to issuing in this forum. In this case, it is the successful claimant who stands to lose if costs are not awarded, but this will not always be the case. If costs orders were made as a matter of course, to "follow the event" as is the case in the Courts, a significant advantage of access to this Tribunal would be neutralised.[58]

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[55] *Styles v Murray Meats Pty Ltd (Anti-Discrimination)* [2005] VCAT 2142, *Tan v Xenos* [2008] VCAT 1273 [16].
[56] *Deckert v Victoria* (2006) 24 VAR 217.
[57] *Tan v Xenos* [2008] VCAT 1273 [20].
[58] *Tan v Xenos* [2008] VCAT 1273 [19]