

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

HUMAN RIGHTS LIST

VCAT REFERENCE NO. H232/2015

CATCHWORDS

Equal Opportunity Act 2010 (Vic) ss 12, 89 and 90 – whether proposed conduct is taken for the purpose of promoting or realising substantive equality for members of a group with a particular attribute – whether the proposed conduct is a special measure.

APPLICANT

Waite Group

INTERVENER

Victorian Equal Opportunity and Human Rights Commission

WHERE HELD

Melbourne

BEFORE

A Dea, Member

HEARING TYPE

Hearing

DATE OF HEARING

3 June 2016

DATE OF ORDER

28 July 2016

DATE OF REASONS

28 July 2016

CITATION

Waite Group (Human Rights) [2016] VCAT 1258

ORDER

Under section 75(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) the application is struck out.

A Dea
Member

APPEARANCES:

For Applicant

Ms N Waite AO and Mr P J Waite,
representatives

For Intervener

Ms L Matthews, solicitor

REASONS

- 1 The Waite Group applied to the Tribunal for an exemption under the *Equal Opportunity Act 2010* (Vic) (EO Act) to enable it to, through its 'WomenSearch' business name, advertise for and recommend as candidates only women for specific roles for the purposes of assisting the applicant's clients to meet their diversity goals (the conduct).
- 2 The application was made because, given the conduct is directed at women and excludes men, it might breach sections of the EO Act which prohibit discrimination on the basis of sex in relation to the provision of services, and other prohibitions on seeking discriminatory information and advertising.
- 3 On 4 April 2016, I granted the Waite Group an interim exemption pending the determination of the application. That interim exemption will expire on 31 July 2016.
- 4 The central question in this case is whether a further exemption is necessary and that turns on whether provisions in the EO Act dealing with special measures apply to the conduct.
- 5 For the purpose of assisting the Tribunal to determine that question, the Victorian Equal Opportunity and Human Rights Commission (Commission) applied for and was granted leave to intervene in this proceeding. The Commission provided very careful and helpful submissions on the question and also on the nature of the evidence required to establish whether particular conduct falls within the special measures provisions.
- 6 I have decided that the conduct falls within the special measures provisions and so no exemption is necessary beyond 31 July 2016. In those circumstances, I have ordered that the application for exemption be struck out.
- 7 Before turning to the legal issues in this case, I will discuss the procedural history and the evidence.

Procedural history

- 8 As noted earlier, the Tribunal granted the Commission leave to intervene in the proceeding, under section 159 of the EO Act.¹ The Commission made submissions on this application and also on the general approach to special measure applications.² I will refer to the content of those submissions later.
- 9 Directions were made requiring the Waite Group to give notice of the exemption application on the Australian Institute of Company Directors' website and by circulating a copy of a notice to all prospective candidates and clients on its email circulation list. Those directions were complied with.

¹ Order made on 1 March 2016.

² Submissions dated 26 April 2016.

- 10 The notice advised that submissions for or against the exemption application could be made out to the Tribunal. Some were received, as discussed below.
- 11 A hearing was held on 3 June 2016. The founder of the Waite Group, Ms N Waite AO, and Mr P J Waite attended. The Commission was represented by Ms L Matthews.

The evidence

- 12 Mr Waite made an affidavit about the basis on which the application had been made.
- 13 The Waite Group was established in 1959. It specialises in senior executive appointments including board and director appointments with multinational and local corporations. It has been responsible for a number of initiatives to assist with the development of women leaders and in the placement of women into senior executive roles in companies and on boards. In 1982, the Waite Group registered the name 'WomenSearch' to address the need to increase gender diversity in executive and board positions. The Waite Group proposes to make use of its 'WomenSearch' name as a specialist service to support clients who wish to increase their gender diversity.
- 14 Despite the efforts of the Waite Group and others, including the Australian Institute of Company Directors, the percentage of women on Australian Stock Exchange registered boards was only 21% as at 30 September 2015. Further, at that time, 29 of the boards in the ASX's top 200 companies did not include any women. The Australian Institute of Company Directors' website shows that, on its latest research, as at 30 June 2016, 23.4% of board members were women and that 20 of the top 200 ASX listed companies had no women board members.³
- 15 In November 2013, the Business Council of Australia released a report called *'Increasing the Number of Women in Senior Executive Positions – Improving Recruitment, Selection and Retention Practices'*. In addition to discussing the then state of the statistics and progress in increasing female participation, the report concluded that the factors leading to the shortfall in female representation included organisations being inherently gendered, a lack of diversity in organisations and insufficiently inclusive cultures. Reference was also made to pay disparity between men and women, the way the genders approach career planning and development and a lack of female role models for younger female employees.
- 16 I had before me four submissions in support of the application. They all gave absolute support to the Waite Group's past efforts to increase the number of women in senior roles and its intention to take further action to do so. A number of submissions commented on the need to increase gender

³ <http://www.companydirectors.com.au/director-resource-centre/governance-and-director-issues/board-diversity/statistics>

diversity and one noted the commercial benefits that flow from greater diversity. The submissions were made by:

- Ms Merran H Kelsall, Chairman and CEO, Australian Auditing and Assurance Standards Board;
- Mr Brendan O'Brien, Executive Chairman, O'Brien Capital Pty Ltd;
- Mr Peter S Wilson AM, Chairman and National President, Australian Human Resources Institute; and
- Mr Peter Levinge, CEO, Dennis Family Corporation.

17 I accept Mr Waite's evidence and have placed reliance on the submissions in support.

The EO Act

18 The objectives of the EO Act include the elimination of discrimination to the greatest extent possible.⁴ Accordingly, the EO Act, amongst other things, prohibits certain forms of discrimination. Included in those prohibitions is discrimination on the basis of sex.⁵ Section 44 prohibits discrimination on the basis of a protected attribute such as a person's sex in the context of services, such as the recruitment services provided by the Waite Group. Section 107 prohibits requesting discriminatory information that could be used to form the basis of discrimination against the person. Under section 182 it is an offence to publish or authorise the publication of discriminatory advertising.

The exemption power

19 The provisions dealing with exemptions are found in sections 89 and 90 of the EO Act.

20 Section 89 says that the Tribunal may, by notice published in the Government Gazette, grant an exemption from any provisions of the EO Act in relation to a person or classes of persons or an activity or class of activities or any other provision in any other circumstances specified by the Tribunal. An exemption may be granted for any period of not more than five years. An exemption may be renewed from time to time for a period of not more than five years. Exemptions may be granted or renewed subject to any conditions the Tribunal considers fit.

21 Section 90 of the EO Act sets out mandatory considerations for the Tribunal when exercising the power under section 89. Section 90 says:

In deciding whether to grant, renew or revoke an exemption, the Tribunal must consider –

(a) whether the proposed exemption is unnecessary because –

⁴ See section 3(a) of the EO Act.

⁵ See section 6 which sets out the list of attributes on the basis of which discrimination is prohibited.

- (i) an exception or exemption in this Act already applies to the conduct sought to be exempted; or
- (ii) the conduct sought to be exempted would not amount to prohibited discrimination; and
- (b) whether the proposed exemption is a reasonable limitation on the right to equality set out in the Charter of Human Rights and Responsibilities; and
- (c) all the relevant circumstances of the case.

Special measures

22 Section 12 of the EO Act says:

- (1) A person may take a special measure for the purpose of promoting or realising substantive equality for members of a group with a particular attribute.
[Examples omitted]
- (2) A person does not discriminate against another person by taking a special measure.
- (3) A special measure must -
 - (a) be undertaken in good faith for achieving the purpose set out in subsection (1); and
 - (b) be reasonably likely to achieve the purpose set out in subsection (1); and
 - (c) be a proportionate means of achieving the purpose set out in subsection (1); and
 - (d) be justified because the members of the group have a particular need for advancement or assistance.
- (4) A measure is taken for the purpose set out in subsection (1) if it is taken -
 - (a) solely for that purpose; or
 - (b) for that purpose as well as other purposes.
- (5) A person who undertakes a special measure may impose reasonable restrictions on eligibility for the measure.
[Example omitted]
- (6) A person who undertakes a special measure has the burden of proving that the measure is a special measure.
- (7) On achieving the purpose set out in subsection (1), the measure ceases to be a special measure.

23 If the conduct in question can be shown to be a special measure, as defined in section 12 of the EO Act, the conduct is not discriminatory. It follows that, as the conduct would not be in breach of the EO Act, an exemption would not be necessary.

- 24 There is a significant body of Australian and international law regarding special measures and their nature.⁶ The objectives section of the EO Act and the part of the Explanatory Memorandum to the *Equal Opportunity Bill 2010*, which deals with clause 12, summarises much of it effectively. These matters have been discussed by me in previous Tribunal decisions.⁷
- 25 As to the broad considerations, the Commission submitted, and I agree:
- Given that conduct amounting to a special measure is an important means of achieving substantive equality under the EO Act and does not amount to discrimination for the purposes of that Act, the requirements for a special measure should be carefully applied and substantiated to ensure that only conduct which meets the criteria is considered a special measure; and
 - If those requirements are not met, an exemption will be required.
- 26 The Commission correctly noted that section 12 does not require recognition of a special measure by the Tribunal, however, from time to time, applicants seek declarations or other orders regarding special measures in order to provide some certainty as to proposed conduct. The Tribunal has developed processes which seek to provide information and assistance to applicants to make their own assessment of whether the conduct in issue falls within section 12. From time to time, applicants ask the Tribunal to make a decision because they are not certain as to the answers to the legal questions special measures pose. Those applications are dealt with as efficiently as possible by the Tribunal, having regard to the available evidence and the mandatory considerations contained in section 90 of the EO Act.
- 27 Referring to some earlier matters before the Tribunal, the Commission suggested that applicants would benefit from greater guidance from the Tribunal to assist in identifying whether proposed conduct is a special measure or whether an exemption is required.
- 28 It is preferable that organisations intending to engage in conduct which may fall within section 12 makes their own assessment of that matter. If the organisation is satisfied that the proposed conduct is a special measure, it is also preferable that it simply gets on with engaging in that conduct. That not only saves the organisation time and resources but ensures that the EO Act's purposes are given effect to without first involving an unnecessary legal process.

⁶ In particular see *Gerhardy v Brown* [1985] HCA 11; (1985) 159 CLR 70; *Jacomb v Australian Municipal Administrative Clerical and Services Union* [2004] FCA 1250; (2004) 140 FCR 149; *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869 which includes a detailed discussion of special measures provisions and Australian and international decisions in the context of the *Charter of Human Rights and Responsibilities Act 2006*; the *International Convention on the Elimination of All Forms of Racial Discrimination* and like conventions.

⁷ *The Ian Potter Museum of Art, The University of Melbourne* [2011] VCAT 2236; *Cummeragunja Housing & Development Aboriginal Corporation* [2011] VCAT 2237; *Parks Victoria* [2011] VCAT 2238; *Georgina Martina Inc* [2012] VCAT 1384.

- 29 As appropriate and to the extent it has been possible, I have indicated below the type of evidence which might be relevant to the assessment of how section 12 might apply to proposed conduct. I have done so by suggesting questions which might assist in a self-assessment process. The questions are broad in nature and will not be relevant in every instance.

Is the proposed conduct a special measure?

- 30 In order to be satisfied that conduct is a special measure, it must fall within the terms of sections 12(1) and 12(3).
- 31 The Commission submitted, and I agree, that the broad matters to consider are as follows:
- Whether the conduct is directed to members of a group with a particular attribute;
 - What the purpose of the conduct is and whether it is for the purpose of promoting or realising substantive equality; and
 - Whether the conduct is to be undertaken in good faith, is reasonably likely to achieve the purpose, is proportionate and is justified.

Identification of the attribute and the group

- 32 In most cases the attribute in issue is readily identifiable from the list of attributes contained in section 6 of the EO Act. From time to time, more than one attribute may be relevant. The Explanatory Memorandum for the *Equal Opportunity Bill 2010* gave as an example special measures taken for the benefit of young hearing-impaired men. Other examples would be conduct directed at men or women who share the same religious beliefs or men or women of a particular race.
- 33 The conduct in question is often directed at people who may be identified as a group by reference to a shared attribute. The following are examples of special measures contained in the EO Act: training programs to increase the employment opportunities of Aboriginal and Torres Strait Islanders in a particular industry, women only swimming sessions directed particularly at Muslim women and counselling services to gay men and lesbian women who are victims of family violence. These all concern services to be accessed by the identified group members.
- 34 The Tribunal has found that, advertising for and employing only a person with a particular attribute may also be a special measure despite it arguably benefitting only the person who is employed. Where the group is at a disadvantage in opportunities for employment or applying for employment, the conduct provides those group members with an opportunity for advancement or assistance. Where the members of the group are disadvantaged in this way, the successful job applicant is advanced and assisted. Conduct may also serve to advance and assist a disadvantaged group where the employment of a person with an attribute will work in a way that meets the broader group's needs and provides opportunities, for

example to obtain better access to health care.⁸ So, in cases where applicants have sought to employ only an Aboriginal or Torres Strait Islander person in a role working with that community, the Tribunal has found that both the person employed and the individuals and community with whom they will work are advanced and assisted.⁹

35 The questions arising include:

- Is the proposed conduct directed at or concerned with a group of people who share one (or more) of the attributes listed in section 6 of the EO Act?
- Does the proposed conduct fall within one of the areas of life in Part 4 of the EO Act?
- How would the group or group members be most accurately described?

36 In this case, the attribute and group are easily discerned – women who wish to apply for board or senior executive positions with clients of the Waite Group.

The purpose of the measure

37 The purpose of a special measure is to be found by considering the actual intention of the applicant, rather than by looking at the effect. Reliance may be placed on any facts which shows what the applicant intends. While strictly the effects of the measure are required to be considered under section 12(3), that might also be relevant to identifying the purpose.

38 The questions arising include:

- What is the purpose of the proposed conduct?
- How is that purpose connected to the identified attribute and group members?
- What process has been undertaken to arrive at the proposed conduct? Are there documents, discussion papers or other materials which explain the development of the proposed conduct?
- If there is more than one purpose, how do the purposes interact or overlap? Is one more important than another?

39 As is made plain by the evidence referred to earlier, the purpose of the conduct here is to provide a means by which more women will have greater opportunities to apply for and be considered for board or senior executive roles.

⁸ *Stawell Regional Health* [2011] VCAT 2423.

⁹ See the cases referred to in footnotes 7 and 8.

Identifying the inequality and its cause

- 40 Section 12(1) shows that, at the heart of special measures is conduct intended to promote or realise equality. Without inequality there will be no work for a special measure to do. The cause of the inequality also needs to be identified.
- 41 Section 12 of the EO Act is worded differently to the special measure provision contained in section 8(4) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter). Section 8(4) of the Charter refers to persons or groups of persons '*disadvantaged because of discrimination*'. That term is defined to mean that the discrimination in issue must arise on the basis of one of the attributes protected under the EO Act. For the purposes of section 12(1) then, it is not necessary to prove a link between the inequality in issue and discrimination based on an attribute. Arguably, section 12 is wider than the special measures contemplated in section 8(4) of the Charter.
- 42 Having identified the relevant inequality, it is also necessary to identify and prove its cause.
- 43 In many cases the cause of the inequality can be readily demonstrated by statistics. In *Cummeragunja Housing & Development Aboriginal Corporation*,¹⁰ Australian Bureau of Statistics information demonstrated the disadvantage experienced by Indigenous people as compared to the non-Indigenous population. In *University of Melbourne (Melbourne School of Engineering)* (MSE),¹¹ the inequality sought to be remedied was that women were underrepresented in the academic workforce. The causes were identified as a lack of female candidates for positions and a lack of female academic staff to act as role models. In other cases, the known circumstances of the applicant disclose the cause of the inequality: for religious and cultural reasons, Muslim women may be unable to swim in mixed-company and so they are unable to access swimming pools in the way other members of the community may.
- 44 The questions arising may include:
- Is the purpose of the proposed conduct to promote or realise equality for the group members?
 - What is the nature of the inequality the group members currently experience and how will the proposed conduct assist in remedying that inequality?
 - How do you know there is the inequality? Are there statistics, studies or reports which explain its nature and cause? Has the organisation seen or had experience which demonstrates the inequality?

¹⁰ [2011] VCAT 2237.

¹¹ [2014] VCAT 887.

- 45 Here the inequality in issue is a lack of female representation on boards and in executive positions in Australian companies, particularly those listed on the ASX. On the basis of the Business Council of Australia report, it is apparent that the underrepresentation is the result of a range of societal and organisation specific factors.

How is the proposed conduct intended to promote or realise substantive equality for members of the group?

- 46 Having identified the inequality and its cause, it is next necessary to consider how the proposed conduct will promote or realise substantive equality by remedying the inequality and its cause. The remedial or compensatory aspect of a special measure is crucial. The conduct may have more than one purpose.¹² It is sufficient that one of those purposes is demonstrably to promote or realise substantive equality for members of the group.
- 47 The cases before the Tribunal have tended not to concern sweeping social changes which are designed to eliminate entrenched inequalities for all members of the groups in issue. They have been smaller scale efforts to promote or realise substantive equality for individual or small numbers of the members of groups. Conduct of that kind may still meet the requirements of special measures because section 12 refers to conduct directed at '*members of a group*' rather than requiring the conduct to in fact assist every member of that group.
- 48 The questions arising may include:
- How will the proposed conduct remedy the inequality experienced by members of the group? What are the practical aspects of the conduct and how are they intended to increase equality or reduce disadvantage?
 - Is the proposed conduct designed to advance or assist a specific person? If so, is that person a member of the group identified by reference to a shared attribute? Is the conduct of a kind that would assist other group members if made available more broadly?
- 49 Here, it is apparent that, by targeting women to apply for board or executive positions, there will be an increased chance of their selection for those roles, particularly by companies and other entities who wish to increase diversity within their organisations. There is the required link between the proposed conduct and the purpose.

¹² Section 12(4) of the EO Act.

Will the proposed conduct be undertaken in good faith for achieving the purpose?

- 50 The term 'good faith' is not defined in the EO Act. The Commission submitted that the dictionary meanings '*honesty or sincerity of intention*' and '*an act carried out honestly*' ought to be applied.¹³ I agree.
- 51 In assessing whether the proposed conduct is to be undertaken in good faith, reliance will be placed on the evidence of the relevant organisation and its representatives. Where a program is established or designed to achieve the purpose, good faith will usually be readily apparent. An example is the decision in *Life Experience Enterprises Ltd*. That entity was established as a not for profit company with the key purpose of reducing the rate of youth unemployment in Victoria and increasing the connectedness and inclusion of older people in the Victorian community by proposing to employ people aged between 18 and 25 years to provide a number of support services to older people in the community.¹⁴
- 52 There is an open question whether it is necessary for there to be evidence of consultation with or the involvement of the group in designing or establishing the proposed conduct. While those steps might not be necessary, it is imperative that the proposed conduct is something sought or wished by the group. As noted by Brennan J in *Gerhardy v Brown* at paragraph 37, '*The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.*'¹⁵
- 53 In *Life Experience Enterprises Ltd*, prior to proposing the ongoing program, a pilot program had been run and evaluated as having been successful for the young and older people involved.
- 54 The questions arising may include:
- Why has the proposed conduct been developed? What motivated the plans to engage in the proposed conduct?
 - Is the proposed conduct the product of research or requests for assistance? If so, provide details.
 - Has another entity offered funding for the proposed conduct? If yes, describe who has provided the funding, any relevant limits on how it may be used and information about why that entity has offered the funding with those limits.
 - Has there been any consultation about the proposed conduct with the group members or representative bodies? Has there been a pilot program? Have community groups or other stakeholders said they support or do not support the proposed conduct?

¹³ Respectively, the *Oxford Dictionary* and *Osborn's Concise Law Dictionary*, Eleventh Edition 2009.

¹⁴ (Unreported, VCAT Proceeding H86/2016, Member Dea, 14 June 2016).

¹⁵ [1985] HCA 11; (1985) 159 CLR 70.

- 55 In this case, having regard to the evidence about the Waite Group's long involvement in this issue and the support offered by those in the field, I am satisfied that the proposed conduct will be undertaken in good faith.

Will the proposed conduct be reasonably likely to achieve the purpose?

- 56 I accept the Commission's submission that the assessment of whether the proposed conduct is reasonably likely to achieve the purpose requires consideration of the purpose, how the conduct will address the inequality, whether the conduct is appropriately tailored to achieve a remedial purpose and whether the applicant is capable of undertaking the conduct.
- 57 In cases where the measure is to establish a new service or modify an existing service – for example running women only swim sessions on a particular day during specified hours – provided that there is the intention to implement the change, required resources are available and there are no impediments to doing so, this question can likely be answered affirmatively. That is in large part because the purpose is so specific and self-evidently directed towards remedying the inequality in issue and the conduct itself has been designed entirely with the purpose in mind.
- 58 It is not possible to proscribe or anticipate every form of conduct which would amount to a special measure, as that will depend on many factors. Similarly, whether or not it is likely to achieve its purpose will depend on the nature of the inequality or disadvantage and how the proposed conduct will address that matter.
- 59 In *Lifestyles Communities Ltd (No 3)*,¹⁶ Bell J described the disadvantage with which section 8(4) of the Charter is concerned as follows:
- A person is so disadvantaged when their normal participation in society and in social and political institutions is impaired. The disadvantage could come from limitations on access to goods or services of all kinds, including accommodation, transport, health and education, or to work on equal terms. It could be due to restrictions on spiritual, cultural or sexual expression and on accessing leisure and sporting facilities. Obviously this is not an exclusive list, and there could not be such a list. Anything which stands in the way of someone living as a dignified human being, as envisaged by the Charter, whether individually or in family and society, could place them in a position or condition of disadvantage.
- 60 Where the proposed conduct is intended and designed to address the relevant disadvantage it may meet the descriptor of a special measure. The likely result of the proposed conduct and how it will remedy the identified disadvantage or inequality is what is important. The particular means taken to achieve that goal may involve adapting an existing service or arrangement or providing specific assistance or a device or a tool of some kind which is a necessary step to achieving the relevant goal. The means

¹⁶ [2009] VCAT 1869 at paragraph 271.

may need to be managed flexibly for the particular group members or their particular circumstances.

61 The questions arising may include:

- How can the elements or components of the proposed conduct be described?
- Keeping in mind the identified purpose of the proposed conduct, how are those elements or components individually or together expected to advance or assist the group members?
- Has a pilot been run by the applicant or similar conduct been engaged in by another organisation which shows that the proposed conduct is likely to achieve the purpose?

62 Whether the proposed conduct in this case is reasonably likely to be achieved can be ascertained from the nature of the conduct and also the evidence. As discussed earlier, there is the extensive experience of the Waite Group in seeking to promote women in senior roles. Further, the letters of support I mentioned above indicate that the proposed conduct is known to and supported by the companies who are likely to offer women opportunities on boards and in executive positions. It is likely that, when presented with suitably qualified and experienced female applicants, companies and other entities with an interest in increasing diversity will appoint more women to board positions and other senior roles.

Is the proposed conduct proportionate?

63 In order to be a proportionate means of achieving the purpose of realising substantive equality for the group members, the proposed conduct must demonstrate a reasonable relationship between the real purpose and the means sought to achieve it. The proposed conduct must match the purpose and ought to go no further than necessary to achieve that purpose.

64 A relevant matter might be how the proposed conduct relates to the existing circumstances, including in respect of non-group members. For example, where a company aims to increase the number of its Aboriginal and Torres Strait Islander employees and so intends to target that group for a number of positions, it might be relevant to consider the number of positions in the context of the overall number of employees. The reasonableness of the proposed conduct can then be considered in the light of the actual circumstances of the case.

65 The questions arising may include:

- Has the proposed conduct been designed to achieve the purpose only or will there be other outcomes? How do any other outcomes relate to the purpose?

- Is the proposed conduct likely to achieve more than the stated purpose? If so, is it necessary to go that far? How will the applicant determine whether the measure is no longer needed?
- As relevant, how will non-group members be affected by the proposed conduct? Is any impact able to be justified taking into account the circumstances of the members of the group and the non-group members?

66 Given the low representation of women in board and executive positions, the conduct is likely to improve the position and so provide advancement and assistance to women applicants. Taken together with the currently very low proportion of women in the target roles, it is clear the proposed conduct is proportionate.

Is the proposed conduct justified because the members of the group have a particular need for advancement or assistance?

- 67 The starting point is to be satisfied that there is a need for the group members to be assisted in order to be advanced or assisted. Without such a need, a special measure could not be required as there would be nothing to remedy. The circumstances of the group members and the proposed conduct will ordinarily readily disclose the nature of the need.
- 68 It is not necessary for the whole group to be disadvantaged. It is sufficient if the overwhelming majority are disadvantaged.¹⁷
- 69 Because a special measure authorises what would otherwise be discrimination, the proposed conduct must be able to be justified in the context that others may be disadvantaged. The proportionality assessment might be relevant to determining if, taking into account all who might be affected, the proposed conduct can be justified because it is directed at remedying proven inequality or disadvantage. Also relevant might be evidence about steps the party has taken previously to ameliorate the inequality and the degree to which they have been effective.
- 70 The questions arising may include:
- Taking into account all of the other factors, what is the good reason (or reasons) for engaging in the proposed conduct?
 - Given the proposed conduct would otherwise amount to unlawful discrimination, what factors justify the conduct and how are they connected to addressing inequality or disadvantage?
 - Have other steps been taken to attempt to remedy the inequality or disadvantage? If yes, why have they not been sufficient?
- 71 The justification for the proposed conduct here is self-evident from the statistics. The commercial and other benefits which are likely to flow from more diverse board membership and staff in companies is discussed in the

¹⁷ *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1896 at paragraph 273.

Business Council of Australia report. The currently very low numbers of women on boards and holding executive positions means that the conduct is unlikely to go beyond achieving greater parity. I am satisfied that the proposed conduct is justified.

Evidence generally

- 72 It is preferable for evidence in support of applications to be provided on affidavit by people who have actual knowledge of the relevant organisation, the background to the decision to engage in the proposed conduct and knowledge of other matters of the kind discussed above. Applicants often provide statistical information, publications and other supporting documents, directing the Tribunal's attention to relevant parts.
- 73 As many applicants are not for profit or community based organisations with limited funds and staff, they are encouraged to provide the relevant evidence in this way so as to avoid expending resources on hearings. However, from time to time a hearing is necessary and the Tribunal seeks to make those arrangements in a manner which takes into account the applicant's location and convenience.
- 74 It remains the case, however, that applicants ought to make their own assessment of the proposed conduct and seek advice about that, including from the Commission or relevant peak bodies, so as to avoid being required to engage in Tribunal processes at all.

Conclusion

- 75 For the above reasons I am satisfied that the proposed conduct meets the requirements of a special measure under section 12 of the EO Act and I so find. In those circumstances, under section 12(2) of the EO Act the Waite Group will not discriminate contrary to the EO Act by taking that special measure. As a consequence of section 90(a)(ii) of the EO Act, the proposed conduct would not amount to discrimination and so no exemption under section 89 is required.
- 76 Section 75(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* empowers the Tribunal to strike out an application where it is misconceived. To the extent that no exemption is required, the application is misconceived and so an order will be made striking it out.

A Dea
Member

