

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
ADMINISTRATIVE DIVISION
PLANNING AND ENVIRONMENT LIST

P632/2016

Applicant Gembrook Views Estate Pty Ltd
Respondent Cardinia Shire Council
Intervener Victorian Equal Opportunity and Human Rights
Commission

REPLY SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND
HUMAN RIGHTS COMMISSION

Date of document: 2 December 2016
Filed on behalf of: Intervener
Prepared by: Victorian Equal Opportunity and Human Rights Commission
Level 3, 204 Lygon Street
CARLTON VIC 3053

CF/16/18361
Phone: (03) 9032 3421
Fax: 1300 286 834
Attention: Jennifer Jones
Email: Jennifer.jones@veohrc.vic.gov.au

A. INTRODUCTION

1. The Victorian Equal Opportunity and Human Rights Commission (**Commission**) makes these reply submissions in accordance with the Orders of the Victorian Civil and Administrative Tribunal (**Tribunal**) dated 18 October 2016.
2. These submissions are filed in addition to the outline provided to the Tribunal on 28 October 2016. The Commission wishes to make the following submissions in reply to clarify for the Tribunal the principles relating to the application of s 75 of the *Equal Opportunity Act 2010* (Vic) (**EOA**), and in relation to the operation of s 39 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**). Unless stated otherwise below, the Commission continues to press its submissions of 28 October 2016.
3. We adopt the same abbreviated terms in these submissions as in our previous submissions dated 28 October 2016.

Section 75 does not apply

4. The Commission has submitted that s 75 of the EOA did not apply to these proceedings, due to the interaction between ss 50(3), 63(1) and 75. The Respondent has conceded that s 75 does not apply in respect of the allegation of discrimination under s 50 of the EOA, but maintains its reliance on s 75 in

relation to the alleged contravention of s 52 of the EOA, and notes the different construction of s63(3) as opposed to s50(3).¹

5. The Commission acknowledges the different construction but says that it is still open to the Tribunal to find that s 75 does not apply to these proceedings.
6. Because s 75(3) of the EOA refers to both s50(3) (which refers to 'Acts') and s63(1) (which does not refer to 'Acts') the relevant 'inconsistency' can clearly relate to matters arising because of a 'document affecting or relating to land'. Otherwise, the section would not have any work to do.
7. Therefore, the Commission submits that where a document affecting or relating to land is used to give effect to an Act or enactment which is relied upon to justify discrimination for the purposes of s75 of the EOA, there becomes an inconsistency between s 63(1) and s 75 of the kind anticipated in s 75(3) of the EOA.
8. In other words, whilst the Permit and s173 Agreements are not Acts or enactments themselves for the purpose of s 75, they are the mechanisms by which the Respondent is seeking to implement their perceived authority to discriminate in relation to disposal of land or accommodation. Without the Permit and/or s173 Agreement there would be no allegation of discrimination.

General Principles for Interpreting Section 75

9. In the event that the Tribunal considers that s75 of the EOA is still relevant to the proceedings, we make the following submissions to assist the Tribunal determine whether the exception for acts done with statutory authority applies.
10. Section 75 provides that:
 - (1) A person may discriminate if the discrimination is necessary to comply with, or is authorised by:
 - (a) a provision of an Act, other than this Act;
 - (b) an enactment, other than an enactment under this Act.
 - (2) It is not necessary that the provision refer to discrimination, as long as it authorises or necessitates the relevant conduct that would otherwise constitute discrimination.
11. In construing the exceptions in the EOA, the Tribunal should start from the well-established position that exceptions should be construed narrowly and in a manner that least restricts the rights protected by the relevant legislation.² It will

¹ Respondent's Submissions in Reply to the Victorian Equal Opportunity and Human Rights Commission, 6 [14]

² *Waters v Public Transport Corporation* (1991) 173 CLR 349, 369; *H J Heinz Company Australia Pty Ltd v Turner* [1998] 4 VR 872, 882; *Wojcik v Roads Corporation* [1997] VADT 75.

sometimes be necessary to interpret legislation restrictively 'in order to preserve the scope of the beneficial effect of the legislation'.³

12. The effect of s 75 is that any discriminatory conduct authorised or necessitated by another statutory provision will be deemed not unlawful, under s 13 of the EOA. The Respondent bears the onus of establishing that the exception applies based on the evidence.⁴
13. In applying s 75 the Tribunal should apply the guidance of the High Court in *Waters v Public Transport Corporation (Waters)*,⁵ which held:

- (a) it is not enough if a statutory provision gives a broad discretion or simply permits discrimination in a general sense, more is required in the relevant provision for the discrimination to be considered 'necessary to comply with, or... authorised by' the legislative provision;⁶
- (b) it is necessary that any provision purporting to authorise discrimination be framed in sufficiently specific language rather than general language.⁷ Mason CJ and Gaudron J noted (in relation to a similar provision in the *Equal Opportunity Act 1984 (Vic) (EOA 1984)*):⁸

It is one thing to provide that the [EOA 1984] should give way to an express direction contained in an actual provision of another Act or in a statutory instrument. It is quite a different thing to provide, in effect, that the [EOA 1984] shall give way to any subordinate direction, no matter how informal, to which a provision of any other Act requires obedience.

14. The Tribunal should also bear in mind, when considering how s 75 applies to the Respondent's conduct:
 - (a) it is necessary for there to be proportionality between the statutory provision and the means used to achieve what is authorised by that provision. Specifically, the concepts of authority or necessity in section 75 must be construed narrowly, so that the discriminatory conduct exempted by the provision is "appropriately designed to secure" something authorised or made necessary by a statutory provision;⁹
 - (b) the Tribunal is obliged under s 32 of the Charter to interpret any provision relied upon under s 75 compatibly with human rights, if any of the rights

³ Pearce & Geddes, *Statutory Interpretation in Australia* 7th edition at [9.5].

⁴ *Equal Opportunity Act 2010 (Vic)*, s13(2)

⁵ (1991) 173 CLR 349

⁶ *Waters v Public Transport Corporation* (1991) 173 CLR 349, 381 (Brennan J), 389-390 (Dawson and Toohey JJ). Also see *Wojcik v Roads Corporation* [1997] VADT 75.

⁷ *Waters v Public Transport Corporation* (1991) 173 CLR 349, 368-369.

⁸ *Waters v Public Transport Corporation* (1991) 173 CLR 349, 369.

⁹ *Slattery v Manningham CC (Human Rights)* [2013] VCAT 1869 [138] relying on *H J Heinz Company Australia Pty Ltd v Turner* [1988] 4 VR 872.

protected by the Charter are relevantly engaged (including the right to equality);¹⁰ and

(c) where an enactment is relied upon for the purpose of s 75, it must be construed so as not to exceed the power conferred by the Act under which it is made.¹¹

15. The approach outlined above does not call for new rules of statutory interpretation. It calls for discipline when dealing with provisions that remove people's right to equality. In this case, it is the *discrimination* alleged by the Applicant that must be necessitated or authorised by the relevant provisions relied upon. This requires more than permission to undertake or regulate a general activity.

16. *Kuyken v Lay*¹² provides an example of how s 75 applies in relation to both general powers and specific powers granted by statute. In that case, the Tribunal found that the discrimination by the Respondent was permitted under s 75 because it was authorised by both s 5(2)(c) and s 17 of the *Police Regulation Act 1958* (Vic) (**PR Act**).¹³ Section 5(2)(c) of the PR Act specifically provided that the Chief Commissioner of Police had the power to determine:

standards of grooming and acceptable clothing accessories for members of the force, police recruits, police reservists and protective services officers, which may –

(i) differ based on sex, gender identity, physical features or religious belief or activity; and

(ii) provide for certain exceptions based on genuine medical, cultural or religious grounds.

17. Section 17 of the PR Act enabled the Respondent to enforce his power in s 5(2) by way of an employee handbook, the Victoria Police Manual (**VPM**). Enforcement of the grooming standard in the VPM which discriminated on the basis of sex and physical features (in relation to hair and beards) was therefore

¹⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s32; *Victoria Police Toll Enforcement & Ors v Taha & Anor* [2013] VSCA 37 [187].

¹¹ *Interpretation of Legislation Act 1984* (Vic), s 22; Section s32(3)(B) of the Charter provides that s32 does not affect the validity of a subordinate instrument or part thereof that is incompatible with a human right and is empowered to be so by the Act under which it is made. The Explanatory Memorandum to the Charter states that the effect of this is, if a subordinate instrument is incompatible and the authorising enactment does not enable the incompatibility, then the relevant provision will not be valid (As Sent Print Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill 2006 (16 June 2006), 24)

¹² *Kuyken v Lay (Human Rights)* [2013] VCAT 1972

¹³ *Kuyken v Lay (Human Rights)* [2013] VCAT 1972 [166]—[167]

authorised as it was the mechanism by which the s5(2) authority was implemented.¹⁴

18. However, s 5(2)(c) of the PR Act had only been in force since 14 June 2012. Prior to that, s 5(2) did not specifically authorise the Respondent to determine standards of grooming in a discriminatory way. It only provided a general authority to determine the type and design of uniforms and conditions under which the uniform was to be worn. The Tribunal held this general power without the explicit authorisation in s5(2)(c) was insufficient to rely on for the purposes of s75, and any discrimination on the basis of physical features prior to this would have been unlawful.¹⁵

The Planning and Environment Act Regime

19. In response to the Commission's submission that it had not identified with sufficient precision the provision of the *Planning and Environment Act 1987* (Vic) (**P&E Act**) which authorises or necessitates discrimination, the Respondent states in its Reply Submissions that "the whole regime established by the P&E Act authorises the regulation of the use and development of land by way of planning schemes."¹⁶
20. The Commission submits that according to the principles outlined above, it is impermissible to rely on the whole P&E Act as providing authority to discriminate, or necessitating discrimination under s 75. Rather, a specific provision must be identified within the P&E Act.
21. It should not be assumed that Parliament intended to give Responsible Authorities the power to act unlawfully under the P&E Act in the absence of a clear, express direction authorising such conduct or strictly necessitating it.¹⁷ Broad discretion to act in a particular way, or permission to undertake particular activities in relation to regulating land is insufficient to attract the exception contained in s 75 of the EOA.
22. Section 75 says that 'the discrimination' must be 'authorised by' an Act for the exception to apply, or it must be 'necessary to comply' with the Act. This is a more stringent requirement than a broad statutory discretion permitting a range of conduct, like the P&E Act regime confers. While s 75(2) says that the enactment does not need to specifically refer to 'discrimination', it does need to authorise necessitate the relevant conduct, that is, *the discrimination* as alleged by the Applicant.

¹⁴ *Kuyken v Lay (Human Rights)* [2013] VCAT 1972 [167]

¹⁵ *Kuyken v Lay (Human Rights)* [2013] VCAT 1972 [170]

¹⁶ *Submissions of the Respondent in Response to the Submissions of the Victorian Equal Opportunity and Human Rights Commission*, 18 November 2016, p2

¹⁷ *Waters v Public Transport Corporation* (1991) 173 CLR 349, 414 (McHugh J)

23. This cannot be equated with a general permission to perform any act, such as the power to regulate land use, a general obligation to comply with a planning scheme, or implement planning objectives.
24. If taken to its logical conclusion, such reasoning would remove most public sector activity from the operation of Victoria's anti-discrimination laws. For example, councils provide services to the public under legislative authority, schools provide education under legislative authority, and Victorian Public Servants are employed under statutory authority. It would be an absurd reading of s 75 to conclude that any discretion, power or function conferred by legislation can be exercised without reference to anti-discrimination laws and it would make the right to equality in s 8 of the Charter, which applies to public authorities, almost meaningless. This was clearly not the intent of Parliament.
25. The Commission submits that the P&E Act regime does not authorise or necessitate discrimination by a Responsible Authority in relation to planning schemes - just as public servants cannot be employed in a discriminatory way, or education cannot be delivered in a discriminatory way, where that discrimination is not specifically authorised or strictly necessitated.

Planning objectives

26. For completeness the Commission notes that the P&E regime includes a requirement that Responsible Authorities implement the objectives of the planning scheme and comply with the P&E Act and the planning scheme.¹⁸
27. The Commission repeats its submission that the planning objectives contained in the Cardinia Planning Scheme (**Planning Scheme**) are aspirational. There is nothing in the planning objectives referred to in the material filed,¹⁹ which mandates, authorises or necessitates the Responsible Authority to discriminate, to override the EOA, or perform any specific function or activity relating to Retirement Villages or accommodation for those over 55 years of age (in the sense that mandamus would lie to compel the Respondent to perform it).
28. Simply because the definition of 'Retirement Village' in the Planning Scheme implies that older people will benefit from permanent accommodation, it does not authorise or necessitate the Respondent to discriminate in the way that is alleged.

¹⁸ *Planning and Environment Act 1987* (Vic), s14

¹⁹ Respondent's Statement of Grounds, 23 May 2016, p2, referring to Clause 16.02-3 of the State Planning Policy Framework (which deals with Residential Aged Facilities) and objective 3 of clause 21.03-3 of the Local Planning Policy Framework (which deals with sustainable and functional rural townships).

29. The planning objectives provide general power, discretion or permission to undertake activities with regards to planning and opportunities for Retirement Villages or accommodation for those over 55 years of age. There may be multiple ways that the planning objectives can be achieved which do not involve discrimination.

Section 6 of the P&E Act

30. The Respondent also relies on s 6 of the P&E Act. With respect, s 6 is a general provision setting out things that a planning scheme can provide for.
31. There is nothing in s 6 of the P&E Act which mandates, authorises or necessitates the Responsible Authority to discriminate, override the EOA, or perform any specific function or activity relating to Retirement Villages or accommodation for those over 55 years of age (in the sense that mandamus would lie to compel the Respondent to perform it).
32. In those circumstances, the Commission submits that s 6 of the P&E Act can have no bearing on the case at hand in terms of whether it authorises or necessitates discrimination under s 75 of the EOA.

The Planning Scheme

33. The Respondent relies on the Planning Scheme as an 'enactment' for the purposes of s 75 of the EOA. The Respondent says that the Planning Scheme is an "instrument of legislative character" in the nature of delegated or subordinate legislation.
34. The Commission submits that if the Planning Scheme is found to be an 'enactment', it can only authorise or necessitate discriminate to the extent the P&E Act does, and must be construed so as to not exceed the legislative power of the State, in accordance with s 22 of the *Interpretation of Legislation Act 1984* (Vic).
35. Therefore, unless the P&E Act provides authority to override the EOA and discriminate, it would be beyond power for any enactment made pursuant to the P&E Act to authorise or necessitate discrimination.²⁰ As submitted above, the Commission does not consider the P&E Act provides such authority or strictly requires discrimination to comply.

Section 39 of the Charter

36. Section 39 of the *Charter* provides:

²⁰ Section s32(3)(B) of the Charter provides that s32 does not affect the validity of a subordinate instrument or part thereof that is incompatible with a human right *and is empowered to be so by the Act under which it is made*. The Explanatory Memorandum to the Charter states that the effect of this is, if a subordinate instrument is incompatible and the authorising enactment does not enable the incompatibility, then the relevant provision will not be valid (As Sent Print Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill 2006 (16 June 2006), 24)

If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

37. The Applicant submits that s 39 ‘...*merely provides for additional remedies.*’ With respect, that characterisation is not available. Section 39 sets out the circumstances in which relief or remedies ‘on a ground of unlawfulness arising because of [the] Charter’ are available.’
38. In order to obtain relief or remedy in respect of an act or decision because there was unlawfulness arising **because of** the Charter, it is necessary to comply with the conditions set out in s 39. The fact that the relief or remedy may be a declaration sought under the P&E Act does not alter the fact that it is sought **because of** the Charter.
39. The conditions imposed by s 39 are:
- (a) A **person** must seek the relief or remedy in question;
 - (b) The relief or remedy must be sought on the basis that the act or decision of the public authority was unlawful;
 - (c) The unlawfulness must arise on the grounds of the *Charter* and grounds independent of the *Charter*.
40. The term ‘person’ is specifically defined in the Charter to mean a natural person. This is consistent with the proposition that the Charter is intended to preserve and promote *human* rights. While the Applicant suggests that it is appropriate to broaden accountability for human rights such that they can be the subject of proceedings by corporations, that approach is not supported by either the text, or the authorities. The Court of Appeal in *Sudi* observed:
- Plainly enough, s 39(1) has an operation which is both conditional and supplementary. The condition to be satisfied is that a person be able to seek, independently of the Charter, ‘any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful.’ If – but only if – that condition is satisfied, then s 39(1) enables that person to seek ‘that relief or remedy’ on a supplementary ground of unlawfulness, that is, unlawfulness arising because of the Charter.²¹
41. In the circumstances, the Applicant lacks standing to obtain relief because of the *Charter* because it is not a person.



2 December 2016
Victorian Equal Opportunity and Human Rights Commission
Elizabeth Bennett

²¹ *Director of Housing v Sudi* (2011) 33 VR 559; [2011] VSCA 266 [96], per Maxwell J