

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

SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND  
HUMAN RIGHTS COMMISSION

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Date of document: 28 October 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](mailto:Jennifer.jones@veohrc.vic.gov.au)

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**A. INTRODUCTION**

1. The Victorian Equal Opportunity and Human Rights Commission (**Commission**) intervenes in these proceedings pursuant to section 159 of the *Equal Opportunity Act 2010* (Vic) (**EOA**), section 40 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) and the Orders of the Victorian Civil and Administrative Tribunal (**Tribunal**) dated 18 October 2016.

**Background**

2. This case concerns a planning permit issued to the Applicant on 17 December 2008, and amended on 4 November 2009 with reference number T080477a (the **Permit**). The Permit placed a condition that the Applicant must enter into an Agreement under s173 of the *Planning and Environment Act 1987* (Vic) (**P&E Act**) to specify that certain land currently owned by the Applicant must only be used "for the purpose of a retirement village for persons of an age of 55 years or over..."<sup>1</sup> The Permit was later amended but the Commission understands that the land use requirement remained.
3. The parties entered into the s173 Agreement on 16 December 2010, with clause 2.1 of the agreement providing:<sup>2</sup>

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<sup>1</sup> Statement of Agreed Facts, 4 October 2016 [12]-[13]

<sup>2</sup> Statement of Agreed Facts, 4 October 2016, [24]-[25]

- (a) the land shall only be used for constructing a retirement village (the **Over 55 Use Requirement**), and
  - (b) any dwellings constructed on the land shall only be owned and/or occupied by persons aged 55 years or over, their spouses, or their widows/widowers (the **Over 55 Owner/Occupier Requirement**), and
  - (c) Any future owners be provided with a copy of the Agreement.
4. On 28 November 2011, a second s173 Agreement was entered into following a further permit being issued, with clause 3.1 providing that, except with council's consent, the owner of the lots may only develop the land in accordance with the Permit, and must not later change the nature of the development after construction has been completed. This appears to be referring to the two "over 55s" requirements described above. Both s 173 Agreements were registered on the title to the properties.<sup>3</sup>

***Basis for claim***

5. Relevantly for the Commission's submissions, the Applicant has asked the Tribunal to determine whether the Over 55 Use Requirement and Over 55 Owner/Occupier Requirement contained in the Permit and each s173 Agreement requires discrimination on the basis of age, in the disposal of land (s50) or offering of accommodation (s52).
6. The Applicant has also asked the Tribunal to determine, in issuing the Permit and entering into the s173 Agreements, whether the Respondent has unlawfully "requested, instructed induced or encouraged" discrimination in contravention of s105 of the EOA, and whether there has been a contravention of s38 of the Charter in the Respondent failing to properly consider, or failing to act consistently, with the right to equality in s8 of the Charter.
7. The Respondent denies there is discrimination and says that either the conduct is covered by the exception in s75 of the EOA, or because the conduct is a special measure under s12 of the EOA.

***Summary of submissions***

8. The Commission does not take a position on the jurisdiction of the Tribunal to hear this application, nor does it take a position on whether the declarations sought by the Applicant should be granted. These submissions are to be relied upon in the event that the Tribunal finds it has jurisdiction to determine the application.
9. In summary, the Commission submits:

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<sup>3</sup> Statement of Agreed Facts, 4 October 2016 [32]-[34]

- (a) There is a real question as to whether the evidence before the Tribunal is sufficient to show that implementation of the Permit condition and s173 Agreements in the Applicant's development at 11 – 15 Vista Court, Gembrook, is a special measure under s12 of the EOA, following the decision of *Waite Group*.<sup>4</sup>
- (b) If the Tribunal finds that special measures do not apply, it must then consider whether there is discrimination under ss 50 and/or 52 of the EOA.
- (c) Previous cases related to limitations on the disposal of land to owners and/or occupiers who are over 55 years of age have generally involved an exemption from the EOA. The Tribunal has not always granted the exemption.
- (d) Direct discrimination under the EOA can take the form of *proposed* unfavourable treatment on the basis of a protected attribute, as well as actual unfavourable treatment. An agreement between parties to discriminate in the future therefore falls within the ambit of the EOA.
- (e) If there is discrimination under ss50 and 52, the Respondent cannot rely on the exception in s75. The Respondent has not identified with sufficient precision the provision in the P&E Act which authorises or necessitates any discrimination.
- (f) In any event, s75(3) is clear that ss50(3) and 63(1) prevail to the extent of any inconsistency with s75. The Commission submits that the Permit, the s173 Agreements [and the Planning Scheme] are each "documents affecting or relating to" the land which create an inconsistency triggering the 'carve out' provisions.
- (g) The Tribunal ought to consider whether the general exceptions in ss87 and 88 apply. While neither the Applicant nor Respondent have raised these exceptions, we consider it the duty of the Commission to bring them to the Tribunal's attention.
- (h) In relation to s105, it is important to separate out the conduct of the Applicant and the Respondent. Where the Respondent has requested, instructed, induced or encouraged conduct which would be lawful (either because it is a special measure, or because an exception would apply to the conduct), any subsequent breach of the EOA by the Applicant does not mean the Respondent is liable under s105.

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<sup>4</sup> *Waite Group (Human Rights)* [2016] VCAT 1258

- (i) Conversely, no discrimination by the Applicant needs to occur for there to be a breach of s105 by the Respondent – liability arises once the instruction, request or authorisation of unlawful conduct is made.
  - (j) Finally, in relation to the Charter claim, the Commission submits that the Applicant, as a body corporate, has no standing to seek a declaration of Charter unlawfulness, as s39 of the Charter only grants this right to human beings.
10. In terms of precedent value, the Commission understands the Tribunal's concern about the effect on the Planning Scheme. However, the Commission submits that the s173 Agreements cannot be used to contract out of the parties' legislative obligations.<sup>5</sup> The focus in this proceeding can be limited to the conduct of the parties, without further examination of the lawfulness of the Planning Scheme.

## **B. EOA STATUTORY FRAMEWORK AND PRINCIPLES**

11. Discrimination is unlawful under the EOA when it occurs:
- (a) directly (defined in section 8) or indirectly (defined in section 9);<sup>6</sup>
  - (b) on the basis of a protected attribute in section 6;<sup>7</sup> and
  - (c) in a protected area of public life.
12. Part 2 of the EOA comprises the definitions and overarching principles for a claim of unlawful discrimination, and Part 4 sets out the protected areas of public life. The provisions in Part 2 and the prohibited areas in Part 4 must be read together for a logical framework for discrimination under the EOA.
13. The EOA also contains a number of exceptions to the rules against discrimination, and provides parties with the opportunity to seek an exemption from the Tribunal for conduct which amounts to discrimination but is not covered by an exception, and which would otherwise amount to a reasonable limitation on the right to equality in the Charter.
14. Exceptions and exemptions, along with special measures (which do not constitute discrimination), provide an important method of balancing competing rights, as well as implementing the objective of the EOA of promoting substantive equality, and recognition that different treatment is sometimes required to allow equality of opportunity.<sup>8</sup>

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<sup>5</sup> *Roulston v Temp Team Pty Ltd* [2001] VCAT 2036 [41]

<sup>6</sup> *Equal Opportunity Act 2010* (Vic) (EOA) s7(1)

<sup>7</sup> See EOA ss8(1) and 9(1)

<sup>8</sup> EOA s3

15. The EOA (and the Charter) are remedial legislation and should be interpreted accordingly. This means that where possible, protections are to be interpreted broadly and liberally, and exceptions which allow discrimination are to be interpreted narrowly.<sup>9</sup>

### C. SPECIAL MEASURES

16. Section 12 of the EOA provides that “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”. If the conduct in question amounts to a special measure, it does not amount to discrimination and does not contravene the EOA.<sup>10</sup>
17. For this reason, special measures should be considered first, as a finding that the conduct amounts to a special measure will mean that no further enquiries as to compliance with the EOA or the Charter are required. There is provision in the Charter for special measures on similar terms.
18. The person undertaking the special measure has the burden of proving that it meets the criteria in s12.<sup>11</sup> However, the focus should be on the “actual intention of the party undertaking that measure, rather than looking to its effect”.<sup>12</sup>
19. The most recent decision of the Tribunal on s12 is *Waite Group*.<sup>13</sup> In that matter, the Tribunal comprehensively outlines how special measures must be analysed under the EOA and the type of evidence required by a party to prove their conduct is a special measure. As noted by the Applicant, the Tribunal in *Waite Group* frames its analysis on three questions:<sup>14</sup>
- a. *Whether the conduct is directed to members of a group with a particular attribute;*
  - b. *What the purpose of the conduct is and whether it is for the purpose of promoting or realising substantive equality; and*
  - c. *Whether the conduct is to be undertaken in good faith, is reasonably likely to achieve the purpose, is proportionate and is justified.*
20. We briefly deal with each below.

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<sup>9</sup> *IW v City of Perth* [1997] HCA 30; 191 CLR 1, 12 (Brennan CJ and McHugh J); *Collier v Austin Health and ors* [2011] VSC 344 [31]. See also *Interpretation of Legislation Act 1984* (Vic) s 35(a); *Mills v Meeking* (1990) 169 CLR 214, 235 per Dawson J.

<sup>10</sup> Equal Opportunity Act 2010, s12(2)

<sup>11</sup> EOA, s12(6)

<sup>12</sup> *The Ian Potter Museum of Art (Anti-Discrimination Exemption)* [2011] VCAT 2236 [29]

<sup>13</sup> *Waite Group (Human Rights)* [2016] VCAT 1258

<sup>14</sup> *Waite Group (Human Rights)* [2016] VCAT 1258 [31]

### ***Conduct directed to members of a group***

21. The first question asks the Tribunal to consider what conduct is under consideration, and whether the conduct specifically targets a group with a protected attribute under the EOA.
22. The Commission submits that the “conduct” in question must be drawn from the formulation of the Applicant’s claim in respect of the conditions contained in the Permit and s173 Agreements, but also informed by what the Applicant has done in practice. This is because the focus in this case is on the lawfulness of the parties conduct with respect to the development at 11-15 Vista Court, Gembrook. It is not a broad-ranging enquiry into the lawfulness of retirement villages or over 55s developments in the context of the Cardinia Planning Scheme more generally.
23. Therefore, the Tribunal must determine whether the *implementation* of the requirements contained in the Permit and s173 Agreements amount to a special measure – not the *content* of the Permit and s173 Agreement.
24. In terms of whether the conduct targets a particular group with an attribute, the Commission submits that the protected attribute of “age” can include an age range.<sup>15</sup>

### ***Purpose of conduct and substantive equality***

25. The second question deals with identifying:
  - a) whether the purpose of implementing the Permit and s173 Agreements is to promote or realise substantive equality for “overwhelming majority” members of retired people over 55 years of age;<sup>16</sup>
  - b) the specific inequality for over 55s that is being addressed by the implementation of the Permit and s173 Agreements, and the cause of the inequality; and
  - c) how the implementation of the Permit and s173 Agreements will promote or realise substantive equality (i.e. is there a rational connection between the purpose and the conduct).
26. Finally, the third question addresses the criteria in s12(3) of the EOA, which relate to good faith, reasonableness, proportionality and justification. It appears that the report by Mr Weston filed by the Respondents targets the criteria primarily in s12(3)(d), whether the conduct is justified “because the members of the group have a particular need for advancement or assistance”.

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<sup>15</sup> Equal Opportunity Act 2010 (Vic), s6(a)

<sup>16</sup> *Lifestyle Communities Ltd (No.3)* [2009] VCAT 1896 [273]

27. Each of the matters in ss12(1) and (3) must be met for the conduct to amount to a special measure, as the subsections are joined with “and”, not “or”. The Tribunal must determine whether Mr Weston's report adequately addresses all the criteria.
28. A “retirement village” under the *Retirement Villages Act 1986* (Vic) (**RV Act**), may be a special measure (provided it meets the relevant criteria), but there is a real question as to whether the Applicant's specific development at 11 – 15 Vista Court, Gembrook, is also a special measure under s12 of the EOA. This is ultimately a matter for the Tribunal to determine on the basis of the facts before it, having regard to the legislative requirements, set out above.

#### **D. DISPOSAL OF LAND AND ACCOMODATION**

29. Section 50 of the EOA prohibits discrimination in the disposal of land. This is intentionally broad and refers to any method of distributing land, including by way of sale or gift.
30. Section 52 of the EOA prohibits discrimination in offering “accommodation”, which includes a house or flat, business premises, hotel or motel, mobile home or caravan site.<sup>17</sup>
31. As noted above, the prohibition on discrimination in ss50 and 52 of the EOA must be read in conjunction with the definitions of direct and indirect discrimination in ss8 and 9.<sup>18</sup> The Applicant has not identified which type of discrimination they are referring to.
32. If the Permit and s173 Agreements simply contained conditions that the land use, ownership and/or occupation were confined to a ‘retirement village’, this could potentially amount to indirect discrimination as it is a facially neutral condition or condition of general application that could disadvantage younger people in purchasing land or in an application for accommodation.<sup>19</sup>
33. Crucially, however, the Tribunal would be required to consider whether the condition was reasonable in all the circumstances (as part of the test for indirect discrimination). If the condition was found to be reasonable, the allegations would not meet the definition of indirect discrimination. If the condition was not reasonable, then the Tribunal would need to consider whether an exception or exemption applied.

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<sup>17</sup> EOA, s4

<sup>18</sup> Direct discrimination occurs when a person treats, or proposes to treat, a person with a protected attribute unfavourably because of that attribute. Indirect discrimination occurs when a person imposes, or proposes to impose, an unreasonable condition, requirement or practice, that has the effect or likely effect of disadvantaging a person or group of people with a protected attribute.

<sup>19</sup> *Abela v State of Victoria* [2013] FCA 832 [88]

34. In this case, the Commission submits that the relevant type of discrimination under consideration is direct discrimination, namely proposed unfavourable treatment substantially because of a person's age.
35. The Tribunal must determine whether the Permit and s173 Agreements amount to a proposal to treat under 55s unfavourably by refusing to sell land to them, or in the terms on which land is offered to them, where that proposed conduct is taken substantially because of the purchaser's age.<sup>20</sup>
36. The Commission submits that it is open for the Tribunal to find that *prima facie*:
- (a) the Over 55 Owner/Occupation Requirement proposes that under 55s are treated unfavourably by being refused the opportunity to purchase (without conditions) the Applicant's land (in contravention of s50(1)(a) of the EOA); and
  - (b) both the Over 55 Use Requirement the Over 55 Owner/Occupation Requirement proposes that under 55s are unfavourable terms of sale, because it means that they may not *occupy* any dwelling built on the land they are purchasing (in contravention of s50(1)(b) of the EOA).
37. For example, a person who was 30 may be allowed to purchase the land, on the condition they limit occupation of any dwelling to persons over 55 and cannot personally live in the dwelling. This means that a 30 year old could not own and occupy the land. By contrast, a person over 55 could both own and occupy the land (although their capacity to rent out the land to someone under 55 years of age would be limited).
38. Similarly, it is open to the Tribunal to find that the Over 55 Owner/Occupation Requirement proposes that under 55s should be treated unfavourably by having their applications for accommodation refused because of their age, in contravention of s52(a) of the EOA.
39. For such findings to be made by the Tribunal, the conduct does not need to have occurred as the definition of direct discrimination includes proposed conduct. Therefore, an agreement between two parties to discriminate in the future can lead to proposed discrimination which offends the EOA.
40. The Commission's submission is based on previous Tribunal jurisprudence which has indicated that similar conduct amounts to *prima facie* discrimination. In those cases, exemptions were sought for the conduct – and not always granted:
- (a) Lifestyle Communities Pty Ltd (**Lifestyle Communities**) applied for an exemption in 2003 to provide mobile home accommodation to people

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<sup>20</sup> EOA, s8(2)(b)



over 50 in its community developments, which included common social areas but did not provide medical services or other special accommodation for the aged. Deputy President McKenzie noted that there was a possibility that the conduct involved age discrimination, and that no exception in the *Equal Opportunity Act 1995* (EOA 1995) clearly applied to the conduct.<sup>21</sup> There was no allowance for special measures in the EOA 1995. The Application was dismissed as premature as the applicant had not fully determined how their accommodation would work, nor fully considered what laws (such as the RV Act) would apply.

- (b) Lifestyle Communities applied to the Tribunal for an exemption application again in 2004, in order to provide mobile home accommodation to over 55s. Deputy President McKenzie repeated her view that the proposal would involve possible age discrimination and that no express exception clearly applied.<sup>22</sup> The exemption application was granted for a period of three years from s42 (goods and services), s47 (disposal of land), s49 (offering accommodation), s50 (providing accommodation), s100 (requests for discriminatory information) and s195 (discriminatory advertising) of the EOA 1995.
- (c) Lifestyle Communities' exemption from the same provisions of the EOA 1995 was renewed for a further three years on 19 July 2007 until 11 August 2010.<sup>23</sup> The Commission is not aware on what basis Lifestyle Communities continues to operate as there have been no exemptions granted since this date.<sup>24</sup>
- (d) In 2007, Lifestyle Communities sought a separate exemption to expand their provision of mobile home accommodation to over 50 year olds, rather than over 55s. Justice Bell considered that the conduct. That exemption application was refused by Justice Bell sitting as President of VCAT.<sup>25</sup>
- (e) In 2005, the Members of Owners Corporation on Plan of Subdivision No. 441923W were granted an exemption from the Tribunal under the EOA 1995 to sell or offer to sell units in Upper Ferntree Gully to people aged over 55 years. The units were specially designed for older people with no steps, wider doorways, and with priority status for residents to be placed

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<sup>21</sup> *Lifestyle Communities Pty Ltd* [2003] VCAT 2013 [20]-[24]

<sup>22</sup> *Lifestyle Communities Pty Ltd* [2004] VCAT 1821 [10], [35]

<sup>23</sup> Exemption Application No.A142/2007, Victorian Government Gazette G30, 26 July 2007, 1715-1716

<sup>24</sup> This is based on a search of the Commission's records, as it is notified of every exemption application under the EOA 2010, a search of the Victorian Government Gazette, and a review of the Lifestyle Communities website.

<sup>25</sup> [2009] VCAT 1869.

in an aged care facility if requested. That exemption was renewed in 2008 for three years, expiring 23 February 2011.<sup>26</sup>

- (f) In 2010, the same Owners Corporation Members applied for a different exemption, to allow them to restrict occupation but not ownership of the lot to people aged over 55, and to advertise that fact. Deputy President McKenzie was of the view that the proposal would “unduly interfere with ownership and occupation of a unit”, and there were less restrictive means of achieving the purpose: an exemption to simply advertise the fact that the units were most suitable for those over 55, that would be sufficient without banning occupancy of under 55s. The exemption application was refused with liberty to apply for a more limited exemption in the terms recommended.<sup>27</sup> The Tribunal also noted that the conduct was not a special measure under s8(4) of the Charter, as the members of the owners corporation did not argue that they were disadvantaged because of discrimination nor seek to rely on s8(4).<sup>28</sup>

41. The Commission notes the planning matter of *Rylands Supportive Care v Boroondara CC*<sup>29</sup> does deal with similar planning conditions referred to by the Respondent in its submissions, however it does not consider the lawfulness of the conduct under the EOA. The Commission submits that this case cannot be relied upon as evidence that the conduct of over 55 developments like the Applicants’ are lawful, without proper analysis of the provisions of the EOA as they apply to the facts of the case.

## **E. EXCEPTIONS**

42. If the Tribunal finds that the conduct falls within the protections of Part 4 of the EOA 2010, as unlawful discrimination, it must then consider whether there is an exception which applies to the conduct. If the Tribunal finds an exception applies, then the conduct, whilst still discriminatory, is not prohibited by the EOA.<sup>30</sup>

### **Section 75**

43. The Respondent has identified s75 of the EOA as a relevant exception, on the basis that the Permit and s173 Agreements give “statutory effect” to the land

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<sup>26</sup> *Members of Owners Corporation on Plan of Subdivision No.441923W (Anti-Discrimination Exemption)* 2010 VCAT 1111 [1]

<sup>27</sup> *Members of Owners Corporation on Plan of Subdivision No.441923W (Anti-Discrimination Exemption)* 2010 VCAT 1111 [22]-[23]

<sup>28</sup> *Members of Owners Corporation on Plan of Subdivision No.441923W (Anti-Discrimination Exemption)* 2010 VCAT 1111 [16]

<sup>29</sup> [2005] VCAT 2128

<sup>30</sup> *Equal Opportunity Act 2010* (Vic), s13.

use term retirement village. However, the Respondent does not identify with sufficient particularity in its written submissions which Act or enactment it relies upon. The Respondent says as an example, that s180 of the P&E Act allows s173 Agreements to contain a broad range of matters, provided they do not breach the Planning Scheme. The Applicant's submissions have focussed on the Planning Scheme as the relevant Act or enactment.

44. The Commission submits in the first instance that s75 does not apply to these proceedings, due to the operation of ss50(3) and 63 of the EOA.

45. Section 50(3) provides:

*The provisions of this section apply despite anything to the contrary—*

- (a) *in any Act, other than this Act or the Charter of Human Rights and Responsibilities; or*
- (b) *in any document affecting or relating to the land; or*
- (c) *if section 97 of the Transfer of Land Act 1958 or the Subdivision Act 1988 applies to the land, in any document created by or in relation to a service company or owners corporation referred to or established under either of those Acts in relation to the land.*

46. Similarly, s63(1) provides:

*The provisions of this Division apply despite anything to the contrary—*

- (a) *in any document affecting or relating to the land on which the accommodation or premises is situated; or*
- (b) *if the relevant accommodation is on land to which section 97 of the Transfer of Land Act 1958 or the Subdivision Act 1988 applies, in any document created by or in relation to a service company or owners corporation referred to or established under either of those Acts in relation to the land.*

47. The effect of s63 is more limited, as it does not refer to Acts. Provision of accommodation is contained within the division to which s63 applies.
48. This 'carve out' is reinforced for the purposes of clarity by s75(3), which provides "Sections 50(3) and 63(1) prevail over this section to the extent of any inconsistency between them."
49. The Commission submits that the Permit and the s173 Agreements are "documents affecting or relating to land", to which s50(3) and s63(1) are directed. Anything contained in those documents or the P&E Act which purports to permit discrimination, and which might be brought under the exception in s75, cannot be used to justify discrimination.
50. A further question is whether the Planning Scheme, is a "document affecting or relating to the land". While the Planning Scheme is commonly referred to as a

statutory instrument, the Commission submits that a broad and liberal interpretation of that term would extend to include a Planning Scheme.

51. If the Tribunal finds that a Planning Scheme is not a “document affecting or relating to the land”, and that it is an enactment for the purposes of s75, the Commission submits that there is nothing in the Planning Scheme which would specifically authorise or necessitate the discrimination to occur. The objectives of the Planning Scheme are aspirational and do not provide any obligation on the Respondent which would strictly require discrimination.

***Other exceptions to consider***

52. Instead, the Commission draws to the Tribunal’s attention the general exceptions in ss87 and 88 of the EOA and invite the Tribunal to consider whether these provisions render the conduct of the Applicant and/or the Respondent lawful. The Commission acknowledges that neither party has raised these exceptions but it is considered appropriate that they be raised in the context of a complete analysis of the relevant provisions. These provisions are raised on the basis that each of the parties has the opportunity to provide further submissions to the Tribunal in response.<sup>31</sup>

*Section 87: Benefits and concessions for the aged*

53. Section 87 exempts “benefits, including concessions” based on age. Arguably this exemption relates to age-based financial benefits or concessions. “Concession” is defined in the Oxford Dictionary as including “A preferential allowance or rate given by an organization.”<sup>32</sup> This is reflected in the Statement of Compatibility for the EOA, which noted that an example of conduct covered by the s87 exception was travel concessions to senior citizens, or discounted museum entry to children.<sup>33</sup>
54. The Commission submits that it is open to the Tribunal to interpret the term ‘benefit’ broadly to include non-financial benefits such as the use of land for building retirement villages for people of particular ages (where that use of land did not also amount to a service). This is consistent with the dictionary definition of ‘benefit’, which relevantly includes “an advantage or profit gained from something”.<sup>34</sup> For example, the Tribunal appears to have accepted that a nursing home fell within the EOA 1995 equivalent exception.<sup>35</sup>

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<sup>31</sup> Orders of VCAT dated 10 October 2016 permits the applicants and the responsible authority to file submissions by 18 November 2016.

<sup>32</sup> Oxford English Dictionary Online, <https://en.oxforddictionaries.com/definition/concession>

<sup>33</sup> Victoria, Hansard, Equal Opportunity Bill Statement of Compatibility, 10 March 2010, 768; Also see SARC Options Paper on Exemptions and Exceptions, 141

<sup>34</sup> Oxford English Dictionary Online <https://en.oxforddictionaries.com/definition/benefit>

<sup>35</sup> *E. Reeves on behalf of B.Arundell v Colac Community Health Services* [1999] VCAT 643 [14]

## Section 88: Special needs services

55. Section 88(1) provides:

A person may establish special services, benefits or facilities that meet the special needs of people with a particular attribute and may limit eligibility for such services to people with the particular attribute.

56. To rely on s88, a person or organisation would need to identify a group with a particular attribute with special needs, and establish services, benefits or facilities that meet those needs.
57. Examples of services that have fallen within this exception are a 24 hour women's refuge program,<sup>36</sup> a Men's Shed,<sup>37</sup> and potentially a Chinese Community Engagement Officer focusing on culturally appropriate services for Chinese people in Whitehorse.<sup>38</sup>
58. In *Central Estate Properties Pty Ltd v Manningham CC*,<sup>39</sup> Senior Member Wright QC observed that a retirement village is a "community facility, something which cannot be said of an ordinary multi-dwelling development."<sup>40</sup> Ordinarily, it would be associated with the provision of communal facilities, which create a sense of community for the residents.<sup>41</sup> This common understanding is reflected in both the Cardinia Planning Scheme definition of 'retirement village'<sup>42</sup> and the RV Act.<sup>43</sup>
59. Arguably, if there were evidence of specific housing needs for people of a particular age within a particular local government area, and a person established a retirement village facility to meet those identified needs, it is open to the Tribunal to find that the conduct might fall within the exception in s88. However, an ordinary multi-dwelling development which is not established to meet identified needs of retired or older people will not fall within this exception (regardless of how the development is described in its planning permit documentation).

## F. AUTHORISING AND ASSISTING DISCRIMINATION

60. The EOA creates a type of accessory liability offence for those who do not commit discrimination themselves, but who take steps to authorise, assist or encourage discrimination.

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<sup>36</sup> *Georgina Martina Inc (Anti-Discrimination)* [2012] VCAT 1384; Anglicare Victoria (Human Rights) [2015] VCAT 79

<sup>37</sup> *Pines Community Men's Shed declaration (Human Rights)* [2013] VCAT 1878

<sup>38</sup> *Whitehorse Community Health Centre Exemption (Human Rights)* [2014] VCAT 1040 [34] [2014] VCAT 343

<sup>40</sup> *Central Estate Properties Pty Ltd v Manningham CC* [2014] VCAT 343 [25]

<sup>41</sup> *Central Estate Properties Pty Ltd v Manningham CC* [2014] VCAT 343 [24]

<sup>42</sup> Cardinia Planning Scheme, clause 74, p20

<sup>43</sup> *Retirement Villages Act 1986* (Vic), s3



61. Section 105 provides that a 'person must not request, instruct, induce, encourage, authorise or assist another person to contravene a provision of Part 4 or 6 or this Part'. Section 106 of the EOA 2010 sets out that where there has been a contravention as a result of the person authorising or assisting the discrimination, an applicant can initiate proceedings against either the person who directly commits the act or the 'authoriser'.
62. In relation to s105, the Commission submits that the focus should be solely on what the Respondent has done when issuing the Permit and entering into the s173 Agreements, separate from the conduct of the Applicant. In this respect, it is open to the Tribunal to differentiate the implementation of the Permit and s173 Agreement from the original intention of the Permit and s173 Agreements.
63. This is because s105 directs the Tribunal's attention to conduct that occurred before the alleged discrimination took place, and covers requesting, instructing, and encouraging a person even if no breach of the EOA occurs.<sup>44</sup> The ordinary meanings of 'request, instruct, induce or encourage' should be applied, with reference to the dictionary definitions if necessary.
64. It may therefore be open to the Tribunal to find that the Respondent has requested, instructed, induced or encouraged conduct which would be lawful (either because it is a special measure, or because an exception would apply to the conduct), and any subsequent breach of the EOA by the Applicant does not mean the Respondent is liable under s105.
65. The Commission notes that a different view was taken by the Tribunal in *Belyea v Brodie* and *Weber v Deakin University*,<sup>45</sup> but that those decisions are not binding on the Tribunal. The Commission submits that the correct approach is that ss105 and 106 can operate independently, and that s106 is not relevant to these proceedings, as it simply provides guidance about who can named as Respondent in proceedings under the EOA when discrimination does occur as a result of an instruction or request.

#### **G. THE CHARTER - SECTION 38**

66. The Applicant seeks a declaration under s39 of the Charter on the basis that the Respondent has failed to properly consider and has acted inconsistently with the right to equality in s8 of the Charter, in contravention of s38.
67. A declaration in s 39 is only available to a "person" where that *person* may seek any relief or remedy in respect of the act or decision of a public authority on a ground other than the Charter.

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<sup>44</sup> *Beseley v National Aikido Association Inc* [2005] VCAT 245 [59]; *Brooks v State of Victoria* [1997] VADT 13

<sup>45</sup> *Belyea v Brodie (Anti-Discrimination)* [20120 VCAT 1978 [57]; *Webb v Deakin University (Human Rights)* [2014] VCAT 1440 [233]

68. The word "person" is specifically defined in the Charter to mean "a human being."<sup>46</sup> In this case, the Applicant is a corporation, not a human being.
69. It follows that s 39 does not permit the Applicant to receive any relief or remedy arising because of the *Charter*.

*Victorian Equal Opportunity & Human Rights Commission*

**28 October 2016**

**Victorian Equal Opportunity and Human Rights Commission**

**Elizabeth Bennett**

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<sup>46</sup> Charter, s 3.