

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

ANTI-DISCRIMINATION LIST

H54/2015

Applicant Harkaway Public Hall Inc – exemption application (H54/2015)

Intervener Victorian Equal Opportunity and Human Rights Commission

**SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS
COMMISSION**

Date of document: 7 September 2015

Filed on behalf of: Intervener

Prepared by:

Victorian Equal Opportunity and Human Rights Commission

Level 3, 204 Lygon St

CARLTON VIC 3053

CD/15/375289

Phone: 03 9032 3416

Fax: 1300 286 834

Attention: Rowan McRae

rowan.mcrae@veohrc.vic.gov.au

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 2010**) and the Orders of the Victorian Civil and Administrative Tribunal (**Tribunal**) dated 6 June 2015.
2. Section 159 of the EOA 2010 empowers the Commission to seek leave to intervene in and be joined as a party to proceedings that involve issues of equality of opportunity, discrimination, sexual harassment or victimisation.
3. As an intervener, the Commission acts as an independent party, exercising its functions under section 155 of the EOA 2010. These functions include promoting and advancing the objectives of the EOA 2010, and acting as an advocate for the EOA 2010.
4. Harkaway Public Hall Inc (**Applicant**) made an application dated 16 March 2015 for an exemption under section 89 of the EOA 2010. This application raises issues of discrimination and equality of opportunity.
5. The Commission is not generally opposed to the granting of an exemption to the Applicant. The Commission initially sought to intervene in this matter because of its concerns about how the previous exemption (260/2012) was applied in practice. The previous exemption was in the

same terms as the exemption sought in the application dated 16 March 2015.

6. Following further discussions with the Applicant, and having agreed on changes to the terms of the exemption sought, the Commission now wishes to provide assistance to the Tribunal in relation to two further amendments sought by the Applicant.
7. The Commission makes written submissions in this matter and, if it would assist the Tribunal, seeks to make brief oral submissions.

B. BACKGROUND

8. The Applicant made an application dated 16 March 2015 for an exemption under section 89 of the EOA 2010.¹ The application seeks to permit the Harkaway Public Hall Committee of Management to discriminate lawfully on the basis of age in relation to accepting applications to hire the hall.
9. The terms of the exemption sought in the application of 16 March 2015 are the same or very similar to the terms of four exemptions previously granted to the Applicant: (160/2011); (202/2005); (232/2002); (39/1999).
10. On 8 May 2015 the Tribunal made Orders directing the Applicant to file various information including information regarding '[t]he number of occasions on which applications to hire the hall have been refused relying on the last exemption'.
11. Material was filed by the Applicant with the Tribunal pursuant to the Tribunal's Order of 8 May 2015 (by email from Mr Wild to the Tribunal dated 14 May 2015).
12. On the basis of the material filed by the Applicant pursuant to the Tribunal's Order of 8 May 2015, the Commission wrote to the Tribunal on 19 June 2015 indicating that it would seek leave to intervene in the exemption application.
13. At a directions hearing on 6 July 2015 before Member Dea, the Commission was granted leave to intervene in and be joined as a party in this matter.

¹ The application refers to s 83 of the *Equal Opportunity Act 1995* (Vic), which was the exemption provision. The exemption provision under the EOA 2010 is section 89, which is reflective, in the main part, of s 83 of the 1995 Act.

14. At the directions hearing on 6 July 2015, the Tribunal ordered that by 3 August 2015, the parties were to write to the Tribunal to notify it of any agreed change to the wording of the proposed exemption. On 4 August 2015 the Tribunal granted an extension of this deadline to 24 August 2015.
15. On 18 August 2015, the Commission wrote to the Tribunal indicating that the Applicant and the Commission had reached agreement on all but two aspects of the exemption, which are the subject of these submissions. The two disputed aspects as agreed between the Applicant and the Commission are:
 - (a) The Applicant wishes to add a paragraph to the exemption enabling it 'to levy a bond for such functions as detailed in the exemption which is greater than the bond levied against persons wishing to hire the hall for any other purpose'; and
 - (b) In paragraph (c)(iv) of the exemption, the Applicant wishes to insert the word 'all' before 'persons' so that it would read: 'Provide safe and adequate transport for all persons attending away from the Harkaway area within a reasonable time at the end of the function'.
16. On 26 August 2015, the Commission granted the Applicant an interim exemption to operate until 30 November 2015 (**interim exemption**).² That interim exemption is in the same terms as the previous exemption granted to the Applicant (160/2011) which ceased operation on 21 March 2015.

C. STATUTORY FRAMEWORK AND PRINCIPLES

17. Section 89 of the EOA 2010 provides that the Tribunal may grant an exemption from any of the provisions of the Act in relation to certain people or activities or in any other circumstances specified by the Tribunal, subject to any conditions the Tribunal thinks fit.
18. Section 90 of the EOA 2010 sets out the factors to be considered by the Tribunal when deciding exemption applications. Section 90 provides:

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

 - (a) whether the proposed exemption is unnecessary because—

² Interim exemption application No H54/2015, 26 August 2015 Member Dea.

- (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.

The proper approach to the exercise of exemption powers

19. The Commission submits that the Tribunal is obliged to exercise the exemption powers under section 89 and 90 consistently with the purpose and objectives of the EOA 2010 and in accordance with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**).
20. In *Lifestyle Communities (No 3)*, in relation to the exemption power under section 83 of the *Equal Opportunity Act 1995* (Vic),³ Bell J stated:
21. [O]n my reading of the exemption provisions in the context of the purposes of the *Equal Opportunity Act* and the legislation as a whole, the discretion to grant an exemption must be exercised taking those purposes into account. It could not be exercised in a way that would defeat them. To interpret the provision otherwise is to allow the exercise of the discretion to be directly disobedient of the parent legislation, which I cannot accept on first principles. In the legislative order of things, the human rights purposes are primary and the exemption power is secondary. The Charter steps in to strengthen the operation of the discretion in these respects by requiring it to be exercised compatibly with human rights.⁴This approach is reinforced by the *Interpretation of Legislation Act 1984* (Vic) which requires the Tribunal to interpret and apply the EOA 2010 in a way which promotes its objects and purpose.⁵ Section 3 provides that the objectives of the EOA 2010 include the following:
 - (a) to eliminate discrimination, sexual harassment and victimisation, to the greatest possible extent;
 - (b) to further promote and protect the right to equality set out in the Charter of Human Rights and Responsibilities; ...

³ The exemption provision of the EOA 2010 is s 89 which is reflective, in the main part, of s 83 of the 1995 Act.

⁴ *Lifestyle Communities Pty Ltd (No 3)* [2009] VCAT 1869 [30].

⁵ *Interpretation of Legislation Act 1984* (Vic) s 35(a); *Mills v Meeking* (1990) 169 CLR 214, 235 (Dawson J).

22. In *Stevens v Fernwood Fitness Centres Pty Ltd*,⁶ the Equal Opportunity Board (applying the exemption power in section 40 of the *Equal Opportunity Act 1984* (Vic)⁷) said that the Board would not exercise its discretion unnecessarily, and would consider whether the exemption was appropriate ‘in the light of the objectives and scheme of the Act’. This approach has been followed by the Tribunal,⁸ including in *Lifestyle Communities (No 3)* as set out above.⁹ Applying that line of authority, the discretion to grant an exemption must not be exercised in a way that would defeat the objectives of the EOA 2010.

Reasonable limitation on the right to equality

23. In granting an exemption, the Tribunal is also obliged to consider whether the proposed exemption is a reasonable limitation on the right to equality set out in section 8 of the Charter.¹⁰ Section 8(3) of the Charter provides that:

Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

24. In *Lifestyle Communities (No 3)*, Bell J provided a useful discussion of the nature of the right to equality:¹¹

The human rights of equality and non-discrimination are of fundamental importance to individuals, society and democracy. Any limitations must be subject to a stringent standard of objective justification.

...

To treat somebody differently because of an attribute, such as gender, age or political or religious belief, is to make stereotypical assumptions about them personally and their behaviour. When a difference in treatment is not rationally based on individual worth and merit, but on the basis of such an attribute, the individual is not treated because of who they are. They are treated because of the stigma attached to the attribute.

⁶ [1996] EOC 92-782; [1995] VADT 7.

⁷ When the Tribunal was established it took over the jurisdiction of the Board. When the *Equal Opportunity Act 1995* (Vic) was enacted, no material change was made to s 40 which was re-enacted as s 83(1).

⁸ *BAE Systems Australia Ltd* [2008] VCAT 1799.

⁹ *Lifestyle Communities Pty Ltd (No 3)* [2009] VCAT 1869; contra *Boeing Australian Holdings Pty Ltd* [2007] VCAT 532.

¹⁰ EOA 2010 s 90(b).

¹¹ *Lifestyle Communities Pty Ltd (No 3)* [2009] VCAT 1869 [107]-[109].

25. In *BAE Systems Australia Ltd*,¹² The Tribunal held that the reasonable limitations test in section 90(b) imports into the EOA 2010 the test contained in section 7(2) of the Charter. On this basis, any reasonable limits imposed by an exemption on the right to equality must be ‘demonstrably justified in a free and democratic society based on human dignity, equality and freedom’, taking into account the following factors:
- (a) The nature of the right; and
 - (b) The importance of the purpose of the limitation; and
 - (c) The nature and extent of the limitation; and
 - (d) The relationship between the limitation and its purpose; and
 - (e) Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

D. AGREED TERMS

26. The Applicant and the Commission are agreed on all but two aspects of the exemption. The agreed terms are as follows:

The application for exemption is to enable Harkaway Public Hall Inc to refuse to permit occupation of the hall by any group consisting predominantly of people aged 22 years or under, for the purpose of a party or similar function, if Harkaway Public Hall Inc:

- (a) has informed the prospective hirer of the terms of this exemption; and
- (b) has given the prospective hirer a reasonable opportunity to provide information relevant to this exemption; and
- (c) is satisfied that the prospective hirer has not taken or, in the view of Harkaway Public Hall Inc, is unable to take or does not intend to take, reasonable steps to:
 - i. Ensure that the group is adequately supervised by an adequate number of people whom Harkaway Public Hall Inc considers can supervise the group effectively; and
 - ii. Ensure the adequate provision of security for the function; and
 - iii. Prevent uninvited people (commonly known as ‘gatecrashers’) from attending; and

¹² [2012] VCAT 349 [77].

- iv. Provide safe and adequate transport for persons attending away from the Harkaway area within a reasonable time at the end of the function

(the exempt conduct).

E. ISSUE 1: INCREASED BOND IS UNNECESSARY AND INAPPROPRIATE

27. The Applicant wishes to add a provision to the exemption enabling it 'to levy a bond for such functions as detailed in the exemption which is greater than the bond levied against persons wishing to hire the hall for any other purpose' (the **bond limitation**).
28. The Commission notes that the bond limitation was not proposed in the original application dated 16 March 2015. Nor was it included in any of the four exemptions previously granted to the Applicant: (160/2011); (202/2005); (232/2002); (39/1999). It is not a term of the interim exemption.
29. The Commission submits that the granting of an exemption permitting the Applicant to require additional bond for young persons would defeat the purpose and objectives of the EOA 2010 and would constitute an unreasonable limitation on the right to equality under the Charter.

Objects of the EOA 2010

30. The Commission submits that the Applicant has not demonstrated that the bond limitation is appropriate in light of the objects and purposes of the EOA 2010. An increased bond provision would further discriminate against a young person who has already demonstrated, to the Applicant's satisfaction, that he or she has taken reasonable steps to ensure adequate supervision, security, transport and that uninvited people do not attend. Accordingly, the bond limitation would defeat, rather than promote, the objective of eliminating discrimination to the greatest possible extent. Further, for the reasons discussed below, it would defeat, rather than promote, the objective of protecting the right to equality set out in the Charter.

An unreasonable limitation on the right to equality

31. The Commission submits that the bond limitation would amount to an unreasonable limitation on the right to equality under the Charter. Applying the statutory criteria prescribed by section 7(2) of the Charter,

the Commission submits that the bond limitation cannot be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors.

Section 7(2)(a) – the nature of the right

32. The bond limitation would impose a limit on the human rights of equality and non-discrimination of groups of young persons wishing to use the hall. As noted above, the rights of equality and non-discrimination are of fundamental importance to individuals, society and democracy.

Section 7(2)(b) – the importance of the purpose of the limitation

33. In 2011, the Tribunal noted the purpose of the Applicant's exemption in the following terms:

The applicant does not seek what would effectively have been a blanket ban on all parties to be attended by people aged under 22 years but rather wishes to ensure that the Hall is used in a manner consistent with the interests of the residents of Harkaway and in a way which minimises the risk to the young people attending functions.¹³

34. It appears that the specific purpose of the bond limitation is to provide the applicant with additional financial security in the event of a party or similar function consisting predominantly of people aged 22 years and under. To date, the applicant has provided no contemporaneous evidence about the importance of the purpose of this additional limitation. Indeed, by its application filed 18 March 2015, the applicant indicates that:

The behaviour that was occurring and which gave rise to our original application, and subsequent extensions thereof, has ceased absolutely and completely since the granting of our original application.¹⁴

Section 7(2)(c) – the nature and extent of the limitation

35. The Commission submits that the nature and extent of the bond limitation imposes a significant additional impediment to the hiring of the hall by a group of young persons. Any person or group required to provide a bond must first be in a position to raise the additional money. That person or group then faces the uncertainty that they may not recover their bond in full because of acts of persons outside their group or due to the unreasonable conduct of the person holding the bond. If it is accepted that persons under the age of 22 would be less likely to be in

¹³ Exemption application No A160/2011, 19 March 2012, Member Dea.

¹⁴ Application p 6 of 8 "Reason for the application".

a financial position to pay a bond, the requirement to pay a bond may already disadvantage young persons.

36. In any event, the Commission submits that here, absent the bond limitation forming part of an exemption, the requirement for a group consisting predominantly aged 22 or under to pay a larger bond would amount to unlawful direct discrimination for the purpose of section 44 of the EOA 2010.

Section 7(2)(d) – the relationship between the limitation and its purpose

37. The Commission submits that the effect of the bond limitation is disproportionate to its purpose.

38. In granting the interim exemption the Tribunal noted that:

Arguably, this exemption limits the right to equal and effective protection against discrimination of people aged 22 years and under who would wish to hire the Harkaway Hall and who cannot satisfy the applicant about the matters listed above. I am satisfied that for the purposes of this interim exemption, the limit imposed by this exemption is reasonable and justified under the Charter.¹⁵

39. The Commission submits that terms of the exemption as set out at [26] above clarify rather than substantially alter the effect of the previous exemptions. Further, the Applicant to date has provided no evidence of a different underlying purpose for the exemption it seeks. As such, it is submitted that an exemption in the terms set out at paragraph [26] above would maintain the existing balance between the limitations on rights of equality and non-discrimination and its purpose. The Commission submits that the inclusion of the bond limitation would alter the relationship between the limitation and its purpose such that the limitation would not be reasonable and justified.

Section 7(2)(e) – any less restrictive means reasonably available

40. The terms of the exemption as set out at [26] above offer a less restrictive means to achieve the applicant's purpose.
41. The Commission submits that the Applicant has not demonstrated that an increased bond provision is necessary. The provision goes significantly beyond the terms of the previous exemptions granted to the Applicant and introduces a new element of discrimination. The Commission submits

¹⁵ Interim exemption application No H54/2015, 26 August 2015 Member Dea.

that an exemption in the terms set out in [266] above would be sufficient to achieve the purpose of the Applicant.

D. ISSUE 2: “ALL” PERSONS IS OVERLY PRESCRIPTIVE AND SPECIFIC

42. In paragraph (c)(iv) of the exemption, the Applicant wishes to insert the word ‘all’ before ‘persons’ so that it would read: ‘Provide safe and adequate transport for all persons attending away from the Harkaway area within a reasonable time at the end of the function’.
43. The Commission notes that reference to the word ‘all’ in this context was not proposed in the original application for this exemption dated 16 March 2015. Nor was it included in any of the four exemptions previously granted to the Applicant: (160/2011); (202/2005); (232/2002); (39/1999). It is not included in the interim exemption.
44. The Commission is concerned that the provision as proposed by the Applicant might be taken to permit the Applicant to require that a prospective hirer, at the point of hiring the hall, specify how each and every person attending the function from outside the Harkaway area will be transported home after the function. Given the specificity of such a requirement, a technical and literal application of this requirement may lead the Applicant to apply the exemption as if it were a ‘blanket ban’. A ‘blanket ban’ or an overly technical application of this requirement:
- (a) Would defeat the objectives of the EOA 2010; and
 - (b) Would not constitute a reasonable limitation on the right to equality and is not the least restrictive means available to achieve the Applicant’s purpose.
45. The Commission therefore submits that inclusion of the word ‘all’ in (c)(iv) is too prescriptive and too specific.
46. The Commission submits that the terms of paragraph (c)(iv) of the exemption as set out above at [26] are adequate to ensure that prospective hirers of the hall make arrangements for safe and adequate transport for persons attending from outside the Harkaway area.
47. In having regard to all the relevant circumstances of the case,¹⁶ it is submitted that Tribunal should have regard to the manner in which the previous exemption was applied by the Applicant. In particular, the

¹⁶ As the Tribunal is obliged to do pursuant to s 90(c) of the EOA 2010.

Commission refers to the statement from Mr Wild filed with the application that:

... it is true that we do not volunteer the information to each applicant that they may come before our sub-committee. The reality is that we wish to avoid these functions where possible owing to past history.

48. The applicant took this approach notwithstanding that the terms of the previous exemptions could only be relied upon where the applicant was not satisfied that the group had taken the prescribed steps. Accordingly, it is submitted that the applicant there applied a literal and technical interpretation of the previous exemption. In those circumstances, the terms of the proposed exemption should be framed to avoid ambiguity which might be relied upon by the Applicant to impose a blanket ban.

E. CONCLUSION

49. If the Tribunal decides to exercise its discretion to grant an exemption to the Applicant, the Commission submits that it should be granted on the terms as agreed between the parties at [26] above. The Commission submits that any exemption granted to the Applicant should not include the bond limitation or the word 'all' before 'persons' in paragraph (c)(iv).

JIM MCKENNA
MELBOURNE CHAMBERS

Victorian Equal Opportunity and Human Rights Commission
7 September 2015