

**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

**FURTHER REPLY OF THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS
COMMISSION**

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Filed on behalf of: Intervener

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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 2010**) and the Orders of the Victorian Civil and Administrative Tribunal (**Tribunal**) dated 6 June 2015.
2. This further reply is filed pursuant to Order 3 of the Tribunal's Orders dated 6 June 2015. It responds to certain matters raised in the Applicant's Reply filed on 28 September 2015.

B. GENERAL COMMENTS

3. The Commission recognises that in the past, the Tribunal has reached the conclusion that the Applicant should be granted an exemption under section 89 of the EOA 2010 (or its equivalent). The Commission acknowledges that the current application is motivated by legitimate concerns. The Commission is not generally opposed to the granting of an exemption to the Applicant which permits discrimination on the basis of age in the terms as agreed between the Commission and the Applicant.
4. However, the Commission's initial intervention in this proceeding was based on a concern that the Applicant had adopted a literal and technical interpretation of the previous exemption. The Commission submits that the Applicant applied the exemption as if it were, in effect, a blanket ban on all functions for young people. Only if the prospective hirer pressed the issue was the Applicant prepared to provide information about the terms of the exemption.

5. The Commission remains concerned that, having regard to the Applicant's Reply, there is a significant risk that the Applicant will continue to adopt a literal and technical approach to the exemption. This is evident in the Applicant's 'great reservations' about including in the terms of the exemption an obligation to inform prospective hirers of the terms of the exemption and providing prospective hirers with an opportunity to provide relevant information (Reply [8]). The Commission submits that these additional provisions simply clarify the manner in which the exemption was intended to operate. It is submitted that these provisions do not substantially alter the effect of previous exemptions.
6. The Applicant contends that it should not be 'made to "advertise" the ability of a sub-Committee meeting or to in any way "promote" or invite appeals' (Reply [17]). The Applicant's consideration of the matters in paragraphs (i) to (iv) of the agreed terms ought not to be regarded as an 'appeal' but rather as the proper application of the exemption. The concept of an 'appeal' suggests the refusal of an application as a default position. This is not the way in which the agreed terms would operate and is of concern to the Commission. It is a further example of a concerning interpretation of the exemption by the Applicant.
7. The Commission notes that the agreed terms of the exemption do not prescribe the manner in which the Applicant processes applications to hire the hall. However, the agreed clauses (a) and (b) make clear that it may only rely on the exemption where it:
 - a. Has informed the prospective hirer of the terms of the exemption; and
 - b. Has given the prospective hirer a reasonable opportunity to provide information relevant to the exemption.
8. Again, it is of concern to the Commission if the Applicant intends to downplay these requirements.
9. In relation to the Applicant's concerns regarding the procedural burden the exemption may place on the Committee of Management or sub-committee (Reply [9]), the Commission notes that no evidence is produced to support this claim. The Applicant has not provided its rules as part of this application. However, the Commission notes that the Model Rules for incorporated associations, produced by Consumer Affairs Victoria, would provide for:
 - a. The Committee to delegate powers to a member of the Committee, a subcommittee or staff (rule 43); and

- b. Members of the Committee to participate in in a Committee meeting by the use of technology without being physically present at the meeting (rule 62).
- 10. Accordingly, it is submitted that the regulatory burden imposed by the exemption should not be overstated.

C. INCREASED BOND

- 11. In proposing an additional bond from young people, the Applicant seeks to draw an analogy with the exception in section 47 of the EOA 2010 which applies to insurers (Reply [6]-[7]). The Commission distinguishes the exception applied to insurers in section 47 in two ways. First, the exception provided by section 47 is narrowly drawn and applies specifically to insurers. Section 47 does not grant a blanket exclusion for commercial companies, such as insurers, allowing them to treat people differently on the basis of age, as is implied by the Applicant (Reply [6]). Secondly, its application is generally subject to the provision of actuarial or statistical data (section 47(1)(b)). No equivalent data is referred to by the Applicant.
- 12. Moreover, the agreed terms of the proposed exemption recognise and, it is submitted, adequately address the concerns of the Applicant. The increased bond proposed by the Applicant would allow the Applicant to further discriminate against young people. For the reasons discussed in the Commissions submissions filed in this matter dated 7 September 2015, it is submitted that providing for this additional discrimination is unnecessary and inappropriate.
- 13. The Applicant contends that the Commission's submission that persons under the age of 22 may be less likely to be able to pay a bond amounts to a stereotypical assumption (Reply [13]). The Commission responds that the issue at the heart of this application is discrimination as defined in the EOA 2010. Direct discrimination is the *unfavourable treatment* of a person because of a prescribed attribute (EOA 2010, section 8). The Commission submits that, absent an exemption, additional bond for young people would be likely to constitute discrimination. In contrast, acknowledging that young people are less likely to be in a financial position to pay a bond is not discrimination.

D. TRANSPORT FOR 'ALL' ATTENDING

- 14. The Applicant's previous exemption referred to the provision of 'transport for those attending away from the Harkaway area'. Paragraph (c)(iv) of the agreed terms of the proposed exemption refers to provision of 'safe and adequate transport for persons attending away from the Harkaway area within a

reasonable time at the end of the function'. The Applicant seeks to insert the word 'all' before 'persons'.

15. The Applicant states that it considers the words 'those attending' in its previous exemption to be 'all encompassing' (Reply [14]). However, the Applicant also contends that the agreed terms of the proposed exemption ('persons attending'), absent the word 'all', 'gives the hirer an absolute right to convey himself and perhaps one or two other people away from the Harkaway area and then to claim that he has complied with clause iv. of the exemption' (Reply [15]). The Commission contends that these two positions are entirely inconsistent.
16. The Commission agrees with the Applicant's statement that it considers 'the words *those attending* to be all encompassing' (Reply [14]). Absent the word 'all', the exemption would allow the Applicant to refuse a booking where it is satisfied that a prospective hirer (involving a group of young persons) has not or will not take reasonable steps to provide safe and adequate transport for persons attending the function. Although it is a matter for the Applicant, it seems unlikely that this level of satisfaction would be reached if the hirer were to offer transport for themselves and one or two attendees only.
17. The Commission submits that the inclusion of the word 'all' in this sub-clause creates a risk that the applicant would require a hirer to specify, at the point of hiring the hall, how each and every person would be transported home after the function. Although that would amount to a technical, literal and artificial interpretation of the provision, the Applicant's approach suggests that there is a real risk that the exemption would be applied in this way.

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MELBOURNE CHAMBERS

Victorian Equal Opportunity and Human Rights Commission
5 October 2015