

**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST**

No. S CI 2018 00852

BETWEEN

OWNERS CORPORATION OC1-POS539033E

First Applicant

OWNERS CORPORATION OC3-POS539033E

Second Applicant

and

ANNE BLACK

Respondent

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

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SUMMARY

1. The Victorian Equal Opportunity and Human Rights Commission (the ‘**Commission**’) seeks leave to appear as amicus curiae pursuant to s 160 of the *Equal Opportunity Act 2010* (the **EO Act 2010**), to assist the Court by making submissions on aspects of the EO Act 2010 raised by the proposed appeal, in particular:

- (a) the meaning of “services” in the EO Act 2010 and whether it extends to owners’ corporations; and
 - (b) the interpretation of ss 44 and 56 of the EO Act 2010 and their application to services provided by an owners corporation.
2. These issues arise under questions of law 1, 2 and 3 of the proposed Notice of Appeal. The Commission does not seek to make any submissions in relation to the adequacy of the reasons of the Tribunal (question of law 4), or whether the Tribunal afforded procedural fairness to the Applicants (question of law 5).
3. If leave is granted, the Commission will submit that:
 - (a) The term ‘services’ has a wide meaning that encompasses the functions of an owners corporation under the *Owners Corporations Act 2006* (the **OC Act**), at least in respect of its functions in respect of common property pursuant to ss 4(a) and 4(b) of the OC Act.
 - (b) Accordingly, s 44 of the EO Act 2010 operates to protect persons from discrimination in the provision of those services by an Owners Corporation. This includes, but is not limited to, owners.
 - (c) Section 56 provides for a specific form of discrimination with respect to owners corporations. It is additional to other forms of discrimination set out in the EO Act 2010. That interpretation is clear from the text of s 7 of the EO Act 2010, and is supported by the purpose expressed in s 1 of the Act to ‘re-enact and extend’ the law relating to equal opportunity and protection against discrimination, as well as s 32 of the *Charter of Human Rights and Responsibilities* (the **Charter**).
 - (d) Section 56 does not operate to limit or exclude protection from other forms of discrimination proscribed by the EO Act 2010, including the general protection against discrimination in the provision of goods and services (s 44), or the general obligations upon service providers to make reasonable adjustments for a person with a disability (s 45). There is no inconsistency between ss 44, 45 and 56 and such an interpretation would be contrary to the purposes of the Act set out in s 1.

SUBMISSIONS

Application for leave to appear as amicus curiae

4. The Commission seeks leave to appear as amicus curiae pursuant to s 160 of the EO Act 2010. The application is supported by the affidavit of Gemma Leigh-Dodds sworn 8 May 2018, which sets out the basis upon which the proceedings are considered by the Commission to fall within the scope of s 160.
5. The Commission submits that leave should be granted because:
 - (a) The questions of law raised in this proceeding have the potential to have significant implications beyond the parties to these proceedings, and for the administration of the Act more generally. This includes:
 - (i) the extent to which persons are protected from discrimination in accessing and using premises administered by owners corporations;
 - (ii) the interpretation of other specific “reasonable adjustments” provisions, and whether they confine or expand the general protections against discrimination provided for in the EO Act 2010.
 - (b) The Commission has a specialist role in promoting and advancing the objectives of the EO Act 2010, and being an advocate for the Act, pursuant to s 155(1); and
 - (c) The submissions to be made by the Commission include matters not contained in the submissions of the parties, and will assist the Court in considering the issues and reaching the correct result.
6. Since the Commission filed its application pursuant to s 160 of the EO Act 2010, the Applicants have filed submissions which raise issues as to the application of s 32 of the Charter to the construction of the relevant statutory provisions. Pursuant to s 40 of the Charter, the Commission is entitled to intervene in any proceeding before a court or tribunal in which a question arises with respect to the interpretation of a statutory provision in accordance with the Charter. The Commission will make submissions on these questions.

Application of the EO Act to Owners Corporations

7. These proceedings concern the extent to which owners corporations are subject to the provisions of the EO Act 2010.
8. Section 4 of the *Owners Corporations Act 2006* (the **OC Act**) sets out the functions of owners corporations, which include a number of functions in relation to “common property”. What is “common property” is dependent upon the plan of subdivision or plan of strata or cluster subdivision,¹ but can include driveways, stairs, paths, passages, lifts, lobbies, common garden areas and other facilities set up for use by owners and occupiers.²
9. Pursuant to s 4 of the OC Act:

An owners corporation has the following functions—

 - (a) to manage and administer the common property;
 - (b) to repair and maintain—
 - (i) the common property;
 - (ii) the chattels, fixtures, fittings and services related to the common property or its enjoyment;
 - (iii) equipment and services for which an easement or right exists for the benefit of the land affected by the owners corporation or which are otherwise for the benefit of all or some of the land affected by the owners corporation;

...
10. The OC Act sets out various duties of owners corporations, including to repair and maintain common property and chattels, fixtures, fittings and services related to the common property. It provides for the levying of owners in order to perform these functions, which may be based upon the relative benefits to the owners (s 23).
11. The present case is primarily concerned with owners corporations’ functions in respect of maintaining or upgrading³ the physical structure of the common property. However, it is clear from the provisions of s 4 and the model rules,⁴ that the functions

¹ See the definition of “common property” in s 3 of the *Owners Corporation Act 2006*.

² See, for example, the description in the Notice to Prospective Purchasers in Schedule 3 to the *Owners Corporation Regulations 2007*.

³ Section 53 of the *Owners Corporation Act 2006* provides for upgrading of common property.

⁴ See schedule 2 to the *Owners Corporation Regulations 2007*.

of owners corporations with respect to common property are broad and extend well beyond structural matters.

12. The nature of common property is such that decisions by owners corporations can have a significant impact upon whether and how persons (including owners, occupiers, and members of the public) are able to access premises and the facilities within them. Owners corporations are not limited to residential premises, which can range from a small block of units to large apartment complexes and precincts, but can also operate in respect of commercial, retail, industrial and mixed-use properties.
13. While the present case concerns structural issues that impact upon an owner's ability to access common property and waste disposal services in a residential building, decisions and actions of an owners corporations in performing their functions under ss 4(a) and (b) have the potential to discriminate against owners, occupiers or members of the public in a wide variety of ways, such as:
 - (a) by placing furniture, rugs or other items in common areas such as paths, entranceways and hallways in a manner that impacts upon a person with a mobility or visual impairment being able to navigate those areas;
 - (b) by failing to maintain or promptly repair a lift;
 - (c) by imposing rigid standards of behaviour in common areas that are more difficult for persons with certain disabilities to comply with; or
 - (d) by the conduct of employees or contractors engaged by the owners corporation in the provision of cleaning, reception or security services in the common property.
14. That owners corporations' decisions in administering common property can have significant adverse impacts on the ability of persons with disabilities to access and use common property is illustrated by the decision of the New South Wales Administrative Decisions Tribunal in *Sutherland v Tallong Park Association Incorporated* [2006] NSWADT 163, in which the owners corporation prevented the Applicant, who suffered from mobility impairments as a consequence of contracting

polio as a teenager, from driving his vehicle to an area where the swimming pool was located and parking in an area proximate to the pool.

15. The EO Act 2010 includes a number of provisions that potentially apply to owners corporations to protect against discrimination, including:
 - (a) Section 15, which provides for a positive duty to take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible. Section 15 applies to all persons who hold duties under the Act.
 - (b) Section 44, which protects against discrimination in the provision of goods and services. This is a general protection with a broad scope. It protects against both direct and indirect discrimination, on the basis of any of the attributes in s 6.
 - (c) Section 45, which imposes a duty upon service providers to make reasonable adjustments for a person with a disability.
 - (d) Section 53, and in particular paragraph (b), which is concerned with denying or limiting access to benefits associated with accommodation.
 - (e) Section 56, which imposes a specific duty upon owners' corporations to allow an owner or occupier to make alterations at that person's expense.
 - (f) Section 57, which protects against discrimination in access to premises that the public or a section of the public is entitled or allowed to enter.
16. The Applicants contend that:
 - (a) Owners corporations do not provide a "service" so as to fall within the scope of ss 44 or 45; and
 - (b) Section 56 operates exclusively and exhaustively with respect to owners corporations, and other protections in the EO Act have no application.
17. The acceptance of either construction would have a very significant impact upon the extent to which owners, occupiers and members of the public are protected from

discrimination in accessing premises. The narrow constructions advanced by the Applicants do not further the underlying purposes of the EO Act 2010 and are contrary to the principle that anti-discrimination legislation should be given a liberal and beneficial construction.⁵

Provision of “services”

18. Section 44 prohibits direct or indirect discrimination in the provision of goods or “services”. Section 45 imposes a duty to make “reasonable adjustments”, if a person with a disability requires adjustments to be made ‘to the provision of a service by another person in order to participate in or access the service or derive any substantial benefit from the service’. The provisions apply whether or not the services are provided for payment.⁶
19. The High Court has recognised that the term “services” has a wide meaning⁷ that should be given a liberal and beneficial construction in the context of anti-discrimination.⁸ Section 4 of the EO Act 2010 contains an inclusive definition of “services”, and expressly states that it does not limit the generality of the word. Accordingly, the term has its ‘ordinary and broad meaning’⁹ except to the extent that the definition in s 4 expressly excludes ‘education or training in an educational institution’.
20. The term “services” in equivalent provisions in New South Wales and Queensland has been interpreted as including functions of owners corporations.¹⁰ Further, it has been held that the provision of services by an owners corporation is not limited to owner members. In *Sutherland v Tallong Park Association Incorporated* [2006] NSWADT 163, the relevant clauses of the Association’s Constitution meant that ‘Association members, associate members and occupiers are all entitled to use the common areas, including the sporting and recreational facilities on these areas’.¹¹

⁵ The relevant principles and authorities are set out in the Respondent’s submissions at [27]-[31].

⁶ See s 44(2) and s 45(1)(b).

⁷ *IW v City of Perth* (1997) 191 CLR 1 at 11 (Brennan CJ and McHugh J), 22-23 (Dawson and Gaudron JJ), 27 (Toohey J), 41 (Gummow J), 69-70 (Kirby J).

⁸ *IW v City of Perth* (1997) 191 CLR 1 at 11-12 (Brennan CJ and McHugh J), 22-23 (Dawson and Gaudron JJ), 69-70 (Kirby J).

⁹ *IW v City of Perth* (1997) 191 CLR 1 at 23 (Dawson and Gaudron JJ), 27 (Toohey J)

¹⁰ See *C v A* [2005] QADT 14 and *Hulena v Owners Corporation Strata Plan 13672* [2009] NSWADT 119, discussed by the Tribunal in this case in its reasons at [21]-[31].

¹¹ *Sutherland v Tallong Park Association Incorporated* [2006] NSWADT 163 at [50].

The Tribunal concluded that ‘the service the Respondent provides is not limited to members of the Association, and that it provides that service to the Applicant in his capacity as an occupier’.¹²

21. The Commission submits that, applying the ordinary and broad meaning of “services”, the exercise of the functions of owners corporations in respect of common property under ss 4(a) and (b) of the OC Act amounts to the provision of services. Those services are provided at the cost of owners, but they are provided **to** and for the benefit of owners and occupiers. Depending upon the particular circumstances, they may also be regarded as services provided to visitors and other members of the public.
22. The Commission further submits that, while the term “services” is not constrained by the inclusive definition in s 4, the express inclusion of “access to and use of any place that members of the public are permitted to enter” is relevant to owners corporations. As set out above, the common property managed, administered, repaired and maintained by owners corporations can include driveways, stairs, paths, passages, lifts, and lobbies. These are areas that the public are permitted¹³ to enter, whether as owners, occupiers or visitors. The management, administration, repair and maintenance of these common areas pursuant to the functions set out in ss 4(a) and (b) of the OC Act are services which are paid for through the levying of owners. They are provided for the direct benefit of owners and occupiers. The Commission submits that they are properly regarded as the provision of a service to such persons by the owners corporation.¹⁴
23. The Commission submits that the broad construction of services advanced above is further supported by s 32 of the Charter, as discussed below.

Effect of s 56

24. The Applicants submit that s 56 of the EO Act 2010 ‘exclusively and exhaustively regulates discrimination in relation to the common property of an owners

¹² *Sutherland v Tallong Park Association Incorporated* [2006] NSWADT 163 at [52].

¹³ The term ‘permitted’, rather than ‘entitled’, is used in s 4.

¹⁴ The issue does not arise for determination in these proceedings, but the Commission is also of the view that, depending upon the circumstances, the owners corporations functions may also involve the provision of a service to other members of the public, such as visitors to the premises.

corporation.¹⁵ The Applicants seek to exclude the operation of the general protection against direct and indirect discrimination in the provision of goods and services (s 44), as well as the obligation upon service providers to make reasonable adjustments for persons with a disability (s 45). It is less clear whether the Applicants assert that the protection against discrimination in respect of access to public premises (s 57) is also excluded in relation to the common property of an owners corporation, but that would appear to follow from the interpretation advanced by the Applicants. Given that owners corporations can operate with respect to residential, commercial, retail, industrial and mixed-use property developments, the interpretation advanced by the Applicants has far-reaching consequences for the extent to which individuals are protected from discrimination.

25. The Commission submits that the Applicants' interpretation ignores the text of s 7, which clearly provides that a contravention of s 56 is a form of discrimination that is in addition to other forms of discrimination proscribed by the EO Act 2010.

26. Section 7 is contained in Part 2, which is headed 'What is discrimination?'. Subsection (1) provides:

(1) Discrimination means –

(a) direct *or* indirect discrimination on the basis of an attribute; *or*

(b) a contravention of section 17, 19, 20, 22, 32, 33, 40, 45, 54, *or* 56.

(emphasis added)

27. Each of the provisions listed in paragraph (b) involve the imposition of duties to accommodate or make reasonable adjustments for persons with particular attributes in specified circumstances. They are expressed in s 7 as alternatives to each other, as well as to the general definitions of direct and indirect discrimination.

28. That the specific provisions in respect of reasonable adjustments are in addition to other provisions protecting against discrimination is supported by the main purposes of the EO Act 2010, which are stated in s 1 to include:

(a) to re-enact *and extend* the law relating to equal opportunity and protection against discrimination, sexual harassment and victimisation... *(emphasis added)*

¹⁵ Applicants' submissions at [16].

29. It is apparent from the legislative history and extrinsic material that the addition of specific provisions requiring accommodation or reasonable adjustments for persons with disabilities, including ss 45 and 56, were part of the extension of the protections against discrimination, as referred to in s 1(a) of the EO Act 2010.
30. The EO Act 2010 replaced the *Equal Opportunity Act 1995* (the **EO Act 1995**) which, in turn, replaced the *Equal Opportunity Act 1984*. Until 2008, discrimination was defined as meaning ‘direct or indirect discrimination on the basis of an attribute’.¹⁶
31. In 2008, the EO Act 1995 was amended by the *Equal Opportunity Amendment (Family Responsibilities) Act 2008*. The purpose of the Act was ‘to expand the range of what constitutes discrimination against parents or carers in employment or employment-related areas’.¹⁷ This expansion was effected through:
- (a) the introduction of express obligations upon employers, principals and firms to accommodate workers’ responsibilities as a parent or carer (ss13A, 14A, 15A and 32A of the EO Act 1995, re-enacted in ss 17, 19, 22 and 32 of the EO Act 2010); and
 - (b) amendment of the meaning of discrimination in s 7 of the EO Act 1995 to add ‘or a contravention of section 13A, 14A, 15A, 31A, 51 or 52’, thereby making clear that contravention of the duties to accommodate parental or carer responsibilities, allow reasonable alterations to accommodation,¹⁸ and to allow guide dogs in accommodation,¹⁹ were additional to other duties and protections against discrimination in the EO Act 1995.
32. The reasonable adjustment provisions in the EO Act 1995, together with the expanded meaning of discrimination in s 7, were largely re-enacted by the EO Act 2010. However, using the same mechanism of s 7, the EO Act 2010 further expanded the meaning of discrimination and enacted specific obligations upon:

¹⁶ See s 7 of the *Equal Opportunity Act 1995* as originally enacted.

¹⁷ Section 1 *Equal Opportunity (Family Responsibilities) Act 2008*.

¹⁸ Section 51 of the EO Act 1995, re-enacted as s 55 of the EO Act 2010.

¹⁹ Section 52 of the EO Act 1995, re-enacted with some amendments in s 54 of the EO Act 2010.

- (a) Employers making reasonable adjustments for person offered employment or employee with a disability (s 20);
 - (b) Firms making reasonable adjustments for partners or prospective partners with a disability (s 33);
 - (c) Educational authorities making reasonable adjustments for a person with a disability (s 40)
 - (d) Service providers making reasonable adjustments for a person with a disability (s 45); and
 - (e) Owners corporations allowing reasonable adjustments by owners/occupiers with a disability (s 56).
33. The interpretation advanced by the Applicants that would have s 56 limit the meaning of discrimination, rather than expand it, should be rejected. The explanatory memorandum makes clear that the reasonable adjustments provisions referred to in s 7(b) are separate, stand alone provisions,²⁰ and they have been consistently treated as such by the Tribunal.²¹ They can be relied upon without having to prove direct or indirect discrimination, but it does not follow that a complainant is precluded from also making those claims.
34. While there may be overlap, there is no inconsistency between ss 44, 45 or 56. Nor would the availability of ss 44 and 45 render s 56 otiose. Section 56 imposes separate and distinct obligations upon owners corporations to allow reasonable adjustments to common property at the owner's expense, even though the owners corporation may not be required to make those adjustments under ss 44 or 45 at its

²⁰ Explanatory memorandum in respect of the *Equal Opportunity Bill 2010* at p 12. See also the discussion of clauses 44 and 45 at p 32.

²¹ In relation to ss 44 and 45 see, for example: *Eroglu v Royal Dental Hospital of Melbourne (Human Rights)* [2015] VCAT 757 (24 October 2014) and *Slattery v Manningham CC (Human Rights)* [2013] VCAT 1869 (30 October 2013) at [141]. In relation to claims of discrimination in employment and reasonable adjustments for disability see, for example: *Tate v Department of Human Services* [2015] VCAT 507 (17 February 2015); *Bevilacqua v Telco Business Solutions (Watergardens) PL* [2015] VCAT 269 (28 May 2015); *Harrison v Department of Education and Training* [2017] VCAT 1128 (24 January 2017); *Dziurbas v Mondelez Australia Pty Ltd* [2015] VCAT 1432 (9 September 2015); *Walker v Heathcote Health* [2017] VCAT 171 (8 February 2017); *Weber v Deakin University* [2014] VCAT 1440 (6 November 2014); *Butterworth v Independence Australia Services* [2015] VCAT 2056 (22 December 2015).

own expense. The fact that owners corporations are expressly referred to in s 56 does not preclude them from also falling within the scope of s 44 and 45.

Application of the Charter

35. The Respondent has pointed out that s 32 of the *Charter of Human Rights and Responsibilities* applies to the interpretation of the EO Act 2010, as it does to all Victorian legislation.²²
36. The relevant right is the right to equality in s 8 of the Charter, which provides:
- (1) Every person has the right to recognition as a person before the law.
 - (2) Every person has the right to enjoy his or human rights without discrimination.
 - (3) 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.
 - (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.
37. The term “discrimination” is defined in s 3 of the Charter as:
- in relation to a person, means discrimination (within the meaning of the **Equal Opportunity Act 2010**) on the basis of an attribute set out in section 6 of that Act.
38. The Charter therefore picks up the meaning of discrimination in the EO Act 2010, including s 7 which defines discrimination, including by reference to s 56.
39. However, while the Charter picks up the meaning of discrimination in s 7 of the EO Act 2010,²³ it does not pick up the provisions of Part 4 of the EO Act 2010 or confine the meaning of discrimination to the areas set out in Part 4 (including the provision of goods or services in s 44). Accordingly the right to equality protected by the Charter includes the right to effective protection from direct or indirect discrimination in respect of access to and use of common property, whether against an owner or other person, and irrespective of whether it amounts to a service to a person under s 44.
40. Application of s 32 of the Charter to the interpretation of s 44 therefore supports the proposition that ‘the provisions of the Act concerned with discrimination in the

²² Respondent’s submissions at [29].

²³ It would also pick up the definitions of direct and indirect discrimination in ss 8 and 9 of the EO Act 2010.

provision of goods and service ... should be construed as widely as their terms permit. In particular, “services”, a word of complete generality, should not be given a narrow construction unless that is clearly required by definition or by context’.²⁴ Clear language would be required in order to exclude owners corporations from the protections in s 44.

41. The Commission further submits that the interpretation of s 56, inserted into Victoria’s equal opportunity legislation in 2010, so as to ‘exclusively and exhaustively regulate discrimination in relation to the common property of an owners corporation’, would amount to a reduction in the protections against discrimination. It would clearly interfere with the aspect of the equality right in s 8(3) of the Charter to ‘equal and effective protection against discrimination’. Section 32 of the Charter would require that clear language be used to effect such an interference. No such words appear in s 56 or elsewhere in the EO Act 2010, and there is no mention in the Statement of Compatibility that s 56 was intended to have such an effect. To the contrary, the terms of s 7 and the extrinsic material make plain that the obligations in s 56 are additional to other protections in the EO Act 2010.

JM Davidson
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²⁴ *IW v City of Perth* (1997) 191 CLR 1 at 22-23 per Dawson and Gaudron JJ.