

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

HUMAN RIGHTS LIST

H294/2014

Applicant	Bowls Victoria, Albert Park Bowls Club Inc
Intervener	Victorian Equal Opportunity and Human Rights Commission

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

Date of document: 15 April 2016

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 18 December 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 will act 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 to act as an advocate for the EOA 2010.
4. Bowls Victoria and Albert Park Bowls Club Inc (**the Applicants**) made an application dated 12 December 2014 for various declarations that the 'competitive sporting activities' exception under section 72 applies, or in the alternative, for exemptions under section 89 of the EOA 2010 (**the Application**). The Applicants seek to discriminate on the basis of sex, as well as age (and possibly disability), in conducting single gender lawn bowls events. This application raises issues of discrimination and equality of opportunity.
5. The Commission makes written submissions in this matter and will attend the hearing to assist the Tribunal and make oral submissions. The Commission is

particularly interested in the various declarations and/or exemptions sought by Bowls Victoria, which are the focus of these submissions. Bowls Victoria is the peak State body for bowls in Victoria. The various declarations/exemptions sought by Bowls Victoria have broad application. They relate to lawn bowls events across the State of Victoria at club, division, region and state level.

6. The Tribunal has yet to consider sub-sections 72(1A) and (1B), which were introduced under the *Equal Opportunity Amendment Act 2011 (the 2011 Amendment Act)*. The Tribunal's decision in this matter will provide much needed guidance on the operation of these sections. The Commission's intervention aims to assist the Tribunal in that task.

B. SUMMARY OF THE COMMISSION'S SUBMISSIONS

7. In deciding the Application the Tribunal must firstly determine whether or not the conduct sought to be exempted by Bowls Victoria falls, or only partially falls, within an exception under the EOA 2010. In summary, the Commission submits that:
 - (a) The conduct sought to be exempted by Bowls Victoria does fall within the scope of the EOA 2010 and amounts to direct discrimination in the area of sport under section 71, on the attributes of sex and age.
 - (b) The lawn bowls events which are the subject of this Application, such as 'Singles', 'Pairs', 'Triples' and 'Fours' at club, division, region, and state level presumably involve contests between participants and the placing of participants in an order of excellence or priority, and if so, each of these events constitutes a 'competitive sporting activity' for the purposes of the competitive sporting activities exception under section 72.
 - (c) In relation to Bowls Victoria's reliance on the competitive sporting exception under sub-section 72(1B) (progression to elite level competition), it must provide an explanation of those events and why the exclusion is necessary to enable the relevant progression.
 - (d) In relation to Bowls Victoria's reliance on the competitive sporting exception under sub-section 72(1B) (facilitate participation in the activity by people of a particular sex):
 - (i) Whether an exclusion or restriction is 'intended' to facilitate participation is to be judged by ascertaining the actual intention of Bowls Victoria. Nevertheless, the intention must be genuine and this must be evinced by evidence.

- (ii) Whether the exclusion or restriction is 'reasonable' is an objective test of proportionality. The exclusion or restriction must facilitate participation and not be overly broad. Whether it is reasonable and proportionate must turn on the evidence. The specified factors set out in sub-section 72(1B) facilitate the Tribunal's consideration of whether the exclusion or restriction is reasonable and proportionate.
 - (e) An exemption will be required if the competitive sporting activity exception does not apply, or only partially applies, in relation to the conduct. The Tribunal must then consider whether granting an exemption would be a reasonable limitation on the right to equality set out in section 8 of the Charter, as well as considering all the relevant circumstances of the case, in determining whether to grant an exemption under section 89.
8. The Commission further submits that the following additional information should be provided by Bowls Victoria in order to assist the Tribunal to undertake the assessment it is requested to make.
- (a) In relation to the competitive sporting exception under sub-section 72(1A) (progression to elite level competition):
 - (i) the nature of the 'National Champion of Champions' and 'World Champion of Champions' events, and if relevant, the 'Australian Open' events;
 - (ii) the changes to those events since the exemption previously granted by the Tribunal in 2010; and
 - (iii) why the exclusion is necessary to enable progression to elite national or international level competition.
 - (b) In relation to the competitive sporting exception under sub-section 72(1B) (facilitate participation in the activity by people of a particular sex):
 - (i) While the basis for the exclusion of men/restriction to participation by women is clear, it is less clear on what basis the exclusion of women/restriction to participation by men is intended to facilitate participation in competitive lawn bowls events by males. Bowls Victoria should make the basis of this aspect of the Application clear.
 - (ii) The 'yes'/'no' responses to survey results summarised in the affidavit of Mr Bridge dated 9 December 2015 should be disaggregated by gender. The views of the sex for whom the exclusion or restriction is intended to facilitate participation

should be given particular weight and this is not able to be done with the aggregated results. For example, the views of women will be particularly important where it is their participation that is intended to be facilitated. Given the larger proportion of male members, a large percentage of the women who answered may have been opposed to single sex events.

- (iii) The comments by survey participants should be disaggregated into gender. Bowls Victoria should further explore whether it can ascertain the proportion for which each reason was relied upon in answering 'yes' or 'no'. Some of the reasons may be more prevalent than others, and some are more relevant than others for the purposes of sub-section 72(1B).
- (iv) The proportion of the number of clubs which provide mixed gender competitions could potentially be derived from the survey results. This information is relevant to sub-section 72(1B)(iii).
- (v) The statistical patterns of the times and days of the week single gender competitions and mixed gender competitions are conducted at bowls clubs could potentially be derived from the survey results. This information is relevant to sub-section 72(1B)(iii).

It appears that the above information can be derived from the evidence already obtained by Bowls Victoria, or is otherwise within the knowledge of Bowls Victoria. If so, it would be useful for that information to be put before the Tribunal.

9. The Commission makes submissions below that:

- (a) In relation to the competitive sporting exception under sub-section 72(2)(b) (specified age or age group) for single gender lawn bowls events for bowlers of specified age groups, Bowls Victoria must also rely on sub-sections 72(1A) and/or 72(1B). However, those sub-sections cannot apply to a sporting activity for children under the age of 12 years under sub-section 72(3). For that reason Bowls Victoria should clarify whether children under 12 years are involved in the events for bowlers of specified age groups.
- (b) In relation to the competitive sporting exception under sub-section 72(2)(c) (general or particular disability) for single gender lawn bowls events for bowlers with a disability, Bowls Victoria must also rely on sub-sections 72(1A) and/or 72(1B) (unless it is a special measure under section 12, in which case it is not necessary to rely on the competitive

sporting exception for this aspect of the Application). Bowls Victoria should clarify whether other competitive lawn bowls events are open to bowlers with a disability, in circumstances where bowlers can effectively compete regardless of their disability.

C. BACKGROUND

10. The Application filed by the Applicants attached an Application for Order. The Application relates to lawn bowls events at club (including club based tournaments and gala days), division, region and state level.
11. On 20 January 2016, the Applicants filed an Amended Application for Order. This clarifies the Applicants' position regarding its reliance on the exception for competitive sporting activities.
12. Bowls Victoria (or its predecessors) have previously applied for exemptions under the *Equal Opportunity Act 1995* (Vic) (**EOA 1995**):
 - (a) In *Victorian Ladies' Bowling Association Inc*,¹ the Tribunal refused to grant the applicant an exemption to continue to require that persons be female in order to be an affiliated member of the applicant or to compete in its competitions.
 - (b) In *Royal Victorian Bowls Association Inc & Victorian Ladies Bowling Association Inc*,² the Tribunal granted an exemption to conduct single gender competitions at state level, but refused to grant an exemption for single gender competitions at club or pennant level. That exemption was granted in 2003, for a period of 18 months.
 - (c) In *Royal Victorian Bowls Association Inc (Anti-Discrimination Exemption)*,³ the Tribunal granted an exemption to conduct single gender competitions at state level. That exemption was granted in 2008, to remain in force until November 2011.
 - (d) In *Middle Park Bowling Club Inc & Anor (Anti-Discrimination Exemption)*,⁴ the Tribunal granted an exemption to conduct single gender competitions at club level. That exemption was granted in 2010, to remain in force until September 2013.
13. In *Victorian Ladies' Bowling Association Inc*, the basis for the exemption application (which was unsuccessful) was that it would otherwise lead to less women participating in lawn bowls competitions and competition management.

¹ [2001] VCAT 1992.

² [2003] VCAT 1301.

³ [2008] VCAT 2415.

⁴ [2010] VCAT 1500.

In the subsequent cases, the basis for the exemption applications (which were successful or partially successful) was that the lawn bowls competitions were part of an 'elite pathway' to national and international competitions, and there would be ramifications for eligibility to compete if there were mixed gender competitions below. These exemptions resemble the exception that was subsequently enacted in s 72(1A).

14. As discussed below, the statutory framework has changed under the EOA 2010 due to the enactment of the 2011 Amendment Act, which now means these issues must be dealt with in a different manner under the EOA 2010.
15. Finally, by way of background, the Applicants have been granted an interim exemption by the Tribunal under the EOA 2010 until 30 May 2015.

D. THE APPLICATION AND AMENDED APPLICATION FOR ORDER

16. Under the Amended Application for Order Bowls Victoria seeks determinations that the 'competitive sporting activities' exception under section 72 applies as follows –
 - (a) Sub-section 72(1A) of the EOA 2010 applies to the advertising and conduct of single gender events of 'Singles' at club, division, region and state level;
 - (b) Sub-section 72(1B) of the EOA 2010 applies to the advertising and conduct of single gender events of:
 - (i) 'Singles (including Novice)', 'Pairs', 'Triples' and 'Fours' at club (including club based tournaments and gala days), division, region and state level;
 - (ii) 'Singles', 'Pairs' and 'Triples' at the 'Victorian Open';
 - (iii) 'Fours' at 'Region sides championship bowls events'
 - (c) Sub-section 72(2)(b) of the EOA 2010 applies to the advertising and conduct of single gender lawn bowls events of 'Singles (including Novice)', 'Pairs', 'Triples', 'Fours' at club (including club based tournaments and gala days), division, region and state level for competitors under 18, 25 and 60 years of age; and
 - (d) Sub-section 72(2)(c) of the EOA 2010 applies to the advertising and conduct of single gender lawn bowls events of 'Singles (including Novice)', 'Pairs', 'Triples' and 'Fours' at club (including club based tournament and gala days), division, region and state level for bowlers with a disability.

17. If a determination is made that the competitive sporting exception does not apply, or only partially applies, Bowls Victoria seeks, in the alternative, exemptions for five years under section 89 of the EOA 2010 from compliance with section 71 (discrimination in sport), section 107 (requesting discriminatory information) and section 182 (discriminatory advertising) in the advertising and conduct of the various single gender lawn bowls events, including for competitors under 18, 25 and 60 years of age, and bowlers with a disability.
18. Bowls Victoria has indicated that it does not seek to rely on the competitive sporting exception under section 72(1), which applies where the strength, stamina or physique of competitors is relevant. This is in light of the Tribunal's previous decision in *South v RVBA*.⁵ In that case, Deputy President Coghlan found that competitive lawn bowls was not a competitive sporting activity in which the strength, stamina or physique of competitors was relevant to the outcome.

E. EVIDENCE FILED BY THE APPLICANTS

19. The Applicants have filed the following evidence in support of their Application:
 - (a) An affidavit of Graeme Andrew Bridge, Chief Executive Officer, Bowls Victoria dated 11 December 2014 (**First Affidavit**), including a summary of an online survey provided to 9,868 members of Bowls Victoria by email (**First Survey**), and exhibiting correspondence in support received in relation to the continuation of single gender lawn bowls events.
 - (b) A letter to the Tribunal dated 13 July 2015, attaching Table 1, titled 'Bowls Victoria – Events', and Table 2, titled 'Events where Participation is Necessary to Progress to Elite National or International Competition'. These tables are relevant to the potential application of the competitive sporting exception under sub-section 72(1A).
 - (c) A second affidavit of Mr Bridge dated 9 December 2015 (**Second Affidavit**), which summarises a further survey provided to 13,518 members of Bowls Victoria by email, and member clubs of Bowls Victoria (**Second Survey**). The link was also available on the Bowls Victoria website. This Second Survey was conducted by Bowls Victoria for the purpose of providing the Tribunal with evidence relevant to the potential application of the competitive sporting activity exception under sub-section 72(1B).⁶ The proposed survey questions were amended,

⁵ [2001] VCAT 207.

⁶ Letter from the Applicants to the Registrar, Human Rights Division, Victorian Civil and Administrative Tribunal dated 26 June 2015, [2.2(3)(b)].

following general feedback from the Commission, to include the ability to provide reasons for answers, rather than only 'yes' and 'no' responses.

- (d) A folder, titled 'Responses to Survey/Raw Data', containing a copy of the survey questions and responses for the Second Survey, under cover letter dated 29 October 2015.
 - (e) A third affidavit of Mr Bridge dated 7 April 2016 (**Third Affidavit**), which provides evidence of advertising the Application, and exhibiting correspondence received by the Tribunal in support of the Application.
20. According to the First Affidavit, as at 30 June 2014 Bowls Victoria had 46,994 members – 68% men, 32% women. The results of the First Survey indicated that:
- (a) In response to the question: "Do you support Bowls Victoria continuing to run championship competitions as Single Gender Events?", 1,614 responses were received, with 95.29% in favour, 4.71% against.
 - (b) Regarding various other lawn bowl events being run as single gender events, the responses ranged from 93.85 – 97.19% in favour, 2.81 – 6.15% against.
21. As to the Second Survey results, they are considered in detail later in these submissions at paragraphs [73] to [86].
22. Four pieces of correspondence were received in response to the First Survey from individual members or bowls clubs in support of single gender lawn bowls events (the First Survey appears to have only called for letters of support for the Application). Eleven pieces of correspondence were received in response to advertising of the Application from bowls clubs and an individual member in support of single gender lawn bowls events.

F. RELEVANT STATUTORY FRAMEWORK

23. Division 7 of Part 4 (sections 70-72) deals with discrimination in sport. Section 71 of the EOA 2010 relevantly provides that a person must not discriminate against another person by excluding the other person from participation in a sporting activity. Section 72 provides an exception for competitive sporting activities:

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

- (1) A person may exclude people of one sex or with a gender identity from participating in a competitive sporting activity in which the strength, stamina or physique of competitors is relevant.

- (1A) A person may exclude people of one sex from participating in a competitive sporting activity if —
 - (a) participation in the activity is necessary for progression to an elite level competition; and
 - (b) the exclusion is necessary to enable participants in the activity to progress to national or international elite level competition.
- (1B) A person may exclude people of one sex from participating in a competitive sporting activity or restrict participation in a competitive sporting activity to people of one sex if —
 - (a) the exclusion or restriction is intended to facilitate participation in the activity by people of a particular sex; and
 - (b) the exclusion or restriction is reasonable having regard to —
 - (i) the nature and purpose of the activity; and
 - (ii) the consequences of the exclusion or restriction for people of the excluded or restricted sex; and
 - (iii) whether there are other opportunities for people of the excluded or restricted sex to participate in the activity.
- (2) A person may restrict participation in a competitive sporting activity —
 - (a) to people who can effectively compete; or
 - (b) to people of a specified age or age group; or
 - (c) to people with a general or particular disability.
- (3) Subsections (1), (1A) and (1B) do not apply to a sporting activity for children under the age of 12 years.

24. "Sport" and "sporting activity" are defined very broadly as including a game and pastime.⁷ "Participating in a sporting activity" is also broadly defined to include.⁸

- (a) Coaching people involved in a sporting activity;
- (b) Umpiring or refereeing a sporting activity; or
- (c) Participating in the administration of a sporting activity.

25. "Competitive sporting activity" is defined as including any exhibition or demonstration of a sport, but does not include—

- (a) the coaching of people engaged in a sporting activity; or
- (b) the umpiring or refereeing of a sporting activity; or
- (c) the administration of a sporting activity; or
- (d) the non-competitive practice of a sport.⁹

⁷ EOA 2010, section 70.

⁸ EOA 2010, section 70.

26. Section 89 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.

27. Section 90 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—
 - (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.

28. Section 8(3) of the *Charter of Human Rights and Responsibilities (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.

29. Section 7(2) of the Charter provides that:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including -

- (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.

G. THE RELEVANT CONDUCT

30. In this instance, the 'conduct' sought to be exempted can be summarised as:

⁹ EOA 2010, section 70.

- (a) Advertising and conducting single gender lawn bowls events for men, to the exclusion of women;
 - (b) Advertising and conducting single gender lawn bowls events for women, to the exclusion of men;
 - (c) Advertising and conducting single gender lawn bowls events for:
 - (i) Men, to the exclusion of women; and
 - (ii) Women, to the exclusive of men,
 who are under 18, 25 and 60 years of age;
 - (d) Advertising and conducting single gender lawn bowl events for:
 - (i) Men, to the exclusion of women; and
 - (ii) Women, to the exclusion of men,
 who are bowlers with a disability
- (herein referred to as the **Conduct**).

31. As outlined above, section 90(a) of the EOA 2010 relevantly requires the Tribunal to consider whether the exemption applied for is unnecessary because the conduct sought to be exempted would not amount to prohibited discrimination, or because an exception already applies to the conduct. The Commission therefore submits that it is proper in the circumstances for the Tribunal to consider whether to grant an exemption under section 89 only where it firstly determines that the Conduct does not wholly, or only partially, falls within an exception.
32. These submissions now consider whether the Conduct does not amount to prohibited discrimination, and whether the competitive sporting exception applies to the Conduct.

H. IS THE CONDUCT DISCRIMINATION?

33. The first question for the Tribunal is whether the Conduct falls within the scope of the EOA 2010 and amounts to discrimination. In the Commission's submission, the Conduct appears to treat or propose to treat:
 - (a) people of particular sexes unfavourably substantially because of their sex;
 - (b) people of particular ages unfavourably substantially because of their age;
 This meets the definition of direct discrimination.¹⁰

¹⁰ EOA 2010, section 8.

34. For the Conduct to be unlawful, it must not only fit within the definition of direct (or indirect) discrimination, but it must also fall within one of the areas of public life protected by the EOA 2010. Discrimination in the area of sport under sections 70-72 has already been identified as a relevant area of public life. Two other areas which are potentially relevant to the Application are:
- (a) discrimination in the provision of recreational services under section 44 of the EOA 2010; or
 - (b) discrimination in relation to club membership under section 65 of the EOA 2010.
35. In this respect, the Commission draws the Tribunal's attention to the example given under section 13 of the EOA 2010, in relation to when an exception applies to render otherwise unlawful conduct lawful:

Example

A football club refuses to register a 15-year-old girl to participate in a football competition that is restricted to boys only. Section 72 contains an exception from discrimination on grounds of sex in relation to competitive sporting activity. If that applies to the competition, the club's refusal to register the girl will not be unlawful, regardless of whether any dispute about the refusal is brought as a dispute about discrimination in sport (Division 7), discrimination by a club (Division 6) or discrimination in the provision of services (Division 4).

36. While an example is not determinative of the proper interpretation of legislation, in this case the example indicates that Parliament anticipated that claims relating to exclusion from participation in sport may arise under the three different provisions, depending on the nature of the claim and the alleged treatment.
37. Section 13(1)(b) relevantly provides that the EOA 2010 does not prohibit discrimination to which a Division of Part 4 applies if the Conduct constituting discrimination under a Division of Part 4 also constitutes discrimination under another Division of Part 4 and an exception in the other Division applies.
38. As such, regardless of whether the Conduct constitutes discrimination in the provision of recreational services (Division 4 of Part 4) or discrimination in relation to club membership (Division 6 of Part 4), if the Conduct constitutes discrimination under section 71 (being another Division of Part 4 – namely, Division 7) *and* falls within the competitive sporting activities exception (being an exception in that other Division – Division 7), it will not be unlawful for the purposes of the EO Act 2010.
39. In light of Bowls Victoria's reliance on the competitive sporting activities exception, the Commission will focus its submissions on Division 7 of Part 4.

Participation in Sporting Activities

40. Section 71 prohibits discrimination in the area of sport by:
- (a) refusing or failing to select a person for a sporting team, or
 - (b) excluding a person from participating in a sporting activity.
41. Both sub-sections 71(a) and (b) may be potentially relevant here. In relation to sub-section 71(a), a woman seeking selection to a sporting team for single gender lawn bowls events for men would presumably be refused selection, and likewise for a man seeking selection to a sporting team for single gender lawn bowls events for women. In relation to section 71(b), given the inclusion of the specific words "sporting activity", rather than referring to the sport generally, the Commission considers that this section prohibits exclusion from participation in different aspects or activities within a sport. In this instance, men and women are clearly not excluded from participation in lawn bowls generally, but rather in relation to certain lawn bowls activities – that is, the events referred to in the Application.
42. Bowls Victoria appears to accept that the Conduct amounts to discrimination under section 71. This is consistent with the approach previously taken by the Tribunal under the EOA 1995 in respect of single gender lawn bowls events.¹¹

I. DOES THE COMPETITIVE SPORTING ACTIVITIES EXCEPTION APPLY?

43. If the Tribunal finds that the Conduct falls within the protections of Part 4 of the EOA 2010 and constitutes discrimination in the area of sport, it must then consider whether the exemption is nevertheless unnecessary because the competitive sporting activities exception under section 72 applies to the Conduct.
44. The competitive sporting activities exception, like all exceptions under the EOA 2010, must be construed strictly and in the light of the objectives of that Act,¹² which are remedial and beneficial. A strict construction of the exception is also required by section 32 of the Charter, since the exception limits the right to equality under section 8. As the Tribunal said in *Georgina Martina Inc (Anti-Discrimination Exemption)*:

Given the objectives of the EO Act and the need to interpret legislation consistently with the Charter, the interpretation given to and

¹¹ See *Royal Victorian Bowls Association Inc (Anti-Discrimination Exemption)* [2008] VCAT 2415, [5]; *Middle Park Bowling Club Inc & Anor (Anti-Discrimination Exemption)* [2010] VCAT 1500, [11]; *South v RVBA* [2001] VCAT 207, [12]-[13].

¹² *Robertson v Australian Ice Hockey Federation* [1998] VADT 112 in relation to the predecessor section 66 of the EOA 1995.

application of the exception provisions ought to be approached with care. The construction that would promote the elimination of discrimination to the greatest extent possible, is to be preferred.¹³ An interpretation which is, so far as is possible without straining the meaning or re-writing the provision, consistent with Charter rights is also preferable. The legislature has included the exceptions as a means of limiting the effect of the broad prohibitions in the EO Act in certain circumstances. However, the words of the exception provisions ought to be read and applied in a limited rather than expansive way. *Evidence proving the factual matters which underlie the exceptions must be produced.*¹⁴ (emphasis added)

45. The onus is on Bowls Victoria to satisfy the Tribunal that the Conduct falls within the competitive sporting activities exception.¹⁵ It must provide evidence of the factual matters upon which it relies in order to discharge this onus.
46. In *Robertson v Australian Ice Hockey Federation*,¹⁶ President McKenzie considered the predecessor of this exception contained in section 66 of the EOA 1995. President McKenzie stated that “competitive sporting activity” involved “contest between participants and the outcome normally involves the placing of participants in an order of excellence or priority”. This was recently accepted by the Tribunal in the context of section 72 of the EOA 2010.¹⁷
47. In *Robertson*, President McKenzie confirmed that this applied to the Australian Ice Hockey Federation’s competitions. The exception applied to ‘senior grades A B and C’ and ‘junior grade A’ competitions, and so a claim of sex discrimination was struck out as misconceived to the extent that it related to those competitive sporting activities.
48. In *South v RVBA*, it did not appear to be in dispute that a competition run by the Royal Victorian Bowls Association – the ‘Saturday afternoon pennant competition’ – was a ‘competitive sporting activity’ for the purposes of section 66 of the EOA 1995.
49. The Commission proceeds on the basis that lawn bowls events which are the subject of the Application, such as ‘Singles’, ‘Pairs’, ‘Triples’ and ‘Fours’ at club, division, region, and state level involve contests between participants and the placing of participants in an order of excellence or priority. If that is the case,

¹³ Section 35 *Interpretation of Legislation Act 1984*.

¹⁴ [2012] VCAT 1384, [52].

¹⁵ *Taylor v Moorabbin Saints Junior Football League and Football Victoria Ltd* [2004] VCAT 158, [13]; *South v RVBA* [2001] VCAT 207, [25] in relation to the predecessor section 66 of the EOA 1995.

¹⁶ [1998] VADT 112.

¹⁷ *Judo Victoria Incorporated (Human Rights)* [2016] VCAT 535, [33].

each of those lawn bowls events constitutes a competitive sporting activity for the purpose of section 72.

Sub-sections 72(1A) and 72(1B)

50. Sub-section 72(1A) provides that people of one sex may be excluded from participating in a competitive sporting activity if participation in the activity is necessary for progression to an elite level competition; and the exclusion is necessary to enable participants in the activity to progress to national or international elite level competition. Sub-section 72(1B) provides that people of one sex may be excluded from participating in a competitive sporting activity or restricted from participation in a competitive sporting activity if the exclusion or restriction is intended to facilitate participation in the activity by people of a particular sex; and it is reasonable to do so having regard to certain specified factors.
51. As noted above, sub-sections 72(1A) and 72(1B) were introduced into the EOA 2010 by the 2011 Amendment Act. Under the EOA 1995, the competitive sporting activities exception could only be relied upon to exclude people of one sex or with a gender identity where the strength, stamina or physique of competitors was relevant, or to restrict participation to people who can effectively compete, people of a specified age or age group, or people with a general or particular impairment.
52. The Second Reading Speech to the 2011 Amendment Act states:¹⁸

The bill ... amends the exception for discrimination in competitive sport, which is contained in both section 66 of the 1995 act and section 72 of the 2010 act. This exception currently allows the exclusion of a person from competitive sporting activities on the basis of their sex if the strength, stamina or physique of competitors is relevant. This exception does not, however, recognise that overall participation in the sport may dwindle unless single sex-competitions are allowed.

For example, lawn bowls has been held not to be a sport where strength, stamina or physique is relevant, with the consequence that single-sex competitions are generally not permitted. Mixed-sex competitions are welcomed by many, but the needs of those who only want to play with members of their own sex are not able to be addressed. This has led to participants leaving the sport.

In response to these issues, the bill includes two new categories of exception for competitive sporting activities. Single-sex competitions will be an exception to the prohibition against discrimination in competitive sporting activities if they are intended to facilitate participation in the sport and are otherwise reasonable (having regard to specified criteria) or are a pathway to elite national or international competitions. There may be circumstances in which a restriction on participation, rather than exclusion, of the opposite sex

¹⁸ Victoria, Parliamentary Debates, Legislative Assembly, 5 May 2011, 1365-6 (Robert Clark).

may be sufficient to encourage increased participation or prevent a decline in participation, and the new exception also allows for this option.

53. The Explanatory Memorandum for the 2011 Amendment Act further states in relation to section 72(1B):¹⁹

The new exception is intended to be only available where it is designed to work in favour of participation by the non-excluded or non-restricted sex. Hence, the exception would not be available to allow, for example, male-only competitions in sports where continuing male participation has not been an issue.

54. The Second Reading Speech generally indicates that sub-sections 72(1A) and 72(1B) are intended to address issues arising from the prohibition of single gender competitions such as in the sport of lawn bowls. Nevertheless, it remains the role of the Tribunal to interpret the provisions themselves and apply them to the present Application. The Second Reading Speech is just one source of interpretive guidance when undertaking that task.
55. The chapeau of sub-section 71(1A) refers to exclusion from participating in a 'competitive sporting activity'. Sub-sections 71(1A)(a) and (b) refer to participation in 'the activity' and participants in 'the activity'. Similarly, the chapeau of sub-section 72(1B) refers to exclusion from participating in or restriction from participating in 'a competitive sporting activity'. Sub-section 72(1B)(a) applies where the exclusion or restriction is intended to facilitate participation in 'the activity' by people of a particular sex. Sub-section 72(1B)(b) also makes references to 'the activity'.
56. The location of the words, 'the activity', in sub-sections 72(1A)(a) and (b) and 72(1B)(a) and (b) – following the words, 'a competitive sporting activity' – must mean that 'the activity' is a reference to the 'competitive sporting activity' identified in the chapeau.²⁰ This provision is concerned with facilitating participation in the particular competitive sporting activity by people of a particular sex, rather than in the sport as a whole.

Progression to national or international elite competition (sub-section 72(1A))

57. Under the Amended Application for Order, Bowls Victoria is now seeking a determination that sub-section 72(1A) applies to 'Singles' at club, division, region and state level. The basis for Bowls Victoria seeking this determination presumably is that participation in 'Singles' at club, division, region and state

¹⁹ Explanatory Memorandum, Equal Opportunity Amendment Bill 2011 (Vic) 7.

²⁰ This is a grammatical meaning of section 72(1B). The legal meaning of a provision will ordinarily correspond with its grammatical meaning: *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 284 [78].

level (each being a competitive sporting activity) is necessary for progression to elite level competition (in 'Singles'), and the exclusion is necessary to enable participants in the category of 'Singles' to progress to national or international elite level competition.

58. The term 'elite' is not defined by the EOA 2010. The Macquarie Dictionary (online) relevantly defines 'elite' as 'the choice or best part, as of a body or class of persons'; 'persons of the highest class'.
59. According to Table 2 attached to the Applicants' letter to the Tribunal dated 13 July 2015, the 'Singles' competitions at national and international level are the 'National Champion of Champions' and 'World Champion of Champions' respectively.
60. The Tribunal has previously granted exemptions to Bowls Victoria and its predecessors at state and club level on the basis that they were part of an 'elite pathway' to national and international competitions.²¹ However, with the enactment of the 2011 Amendment Act, this issue may now be dealt with by way of the exception in sub-section 72(1A), rather than requiring an exemption.
61. The most recent exemption²² granted by the Tribunal to Bowls Victoria in 2010 for lawn bowls events at club level was subject to a condition that if Bowls Victoria becomes 'aware that, at a national or state level, Champion of Champions competitions open to both men and women are to be conducted, it must advise this to the Tribunal in writing as soon as possible'. The reasoning for this condition was that Senior Member McKenzie had:

explored with the representative of Bowls Victoria whether there was any less restrictive alternative. I suggested an open competition with a possibility of two winners, one a man and one a woman. This would mean that two winning champions could then be sent to compete at the state level in the Champion of Champions competition. After considerable discussion, I am satisfied that this in fact is not a feasible alternative without the whole of the clubs' championship competitions having to be restricted. This is because competitions are run on an open draw basis, that is, players are drawn without reference to their gender. A man might be drawn to play a man, a man a woman, or a woman a woman. In finals and even semi-finals there may well be a prospect that there will be only one sex playing, and so there might still be people of one gender only who progress to the state champion of champions competition.²³

62. The Application and the Applicants' evidence states that since the previous exemption was granted, changes have been made to the format of 'National

²¹ See *Middle Park Bowling Club Inc & Anor (Anti-Discrimination Exemption)* [2010] VCAT 1500, [5]-[8], [11]; *Royal Victorian Bowls Association Inc (Anti-Discrimination Exemption)* [2008] VCAT 2415, [13]-[14], [35]-[36]; *Royal Victorian Bowls Association Inc & Victorian Ladies Bowling Association Inc* [2003] VCAT 1301, [20]-[21], [28] where the Tribunal granted an exemption for state level events, but see [22], [25]-[27], [31], where the Tribunal refused to grant an exemption for club and pennant level events, on the basis that the claimed 'elite pathway' 'commenced at too low a level'.

²² *Middle Park Bowling Club Inc & Anor (Anti-Discrimination Exemption)* [2010] VCAT 1500.

²³ *Middle Park Bowling Club Inc & Anor (Anti-Discrimination Exemption)* [2010] VCAT 1500, [8].

Champion of Champions' events and qualification requirements for entry into the 'Australian Open'.²⁴ However, they do not specify the particular changes made. The Commission submits that the nature of the National Champion of Champions and World Champion of Champions events, and if relevant, the Australian Open events, and the changes to them since the previous exemption should be explained by Bowls Victoria, to assist the Tribunal in determining:

- (a) To what extent the changes affect the present Application;
- (b) Whether those events amount to an 'elite' national or international competition;
- (c) Whether the exclusion is necessary to enable participants in 'Singles' events at club, division, region and state level to progress to such elite national or international level competition (the observations made by Senior Member McKenzie in granting the previous exemption are equally applicable to this question).

Facilitating participation in the activity by women (sub-section 72(1B))

63. Under the Amended Application for Order Bowls Victoria is seeking a determination that sub-section 72(1B) applies to:

- (a) 'Singles (including Novice)', 'Pairs', 'Triples' and 'Fours' at club (including club based tournaments and gala days), division, region and state level;
- (b) 'Singles', 'Pairs' and 'Triples' at the 'Victorian Open'; and
- (c) 'Fours' for 'Region sides championship bowls events'.

Sub-section 72(1B)(a): "intended to facilitate participation"

64. As submitted above, each of these lawn bowls events constitutes a competitive sporting activity, provided they involve contests between participants and the placing of participants in an order of excellence or priority. Therefore, under sub-section 72(1B)(a):

- (a) Men may be excluded from participating in (for example) 'Singles' at club level, or participation in 'Singles' at club level restricted to women, if the exclusion or restriction is intended to facilitate participation in 'Singles' at club level *by women*.
- (b) Women may be excluded from participating in (for example) 'Pairs' at division level, or participation in 'Pairs' at division level restricted to men, if

²⁴ Application page 4, First Affidavit, paragraphs [34]-[35].

the exclusion or restriction is intended to facilitate participation in 'Pairs' at division level *by men*.

65. The Commission submits that whether an exclusion or restriction is 'intended' to facilitate participation is to be judged by ascertaining the actual intention of the person excluding people of one sex from participating (ie. Bowls Victoria). Nevertheless, the intention of the person must be genuine. Whether the intention is genuinely held must be evinced by, for example, evidence by a person in a position of governance in a sporting association or club; policy and position statements of a sporting association or club; or statistics (including trends) on male and female participation in the sporting activity itself.
66. It appears from the evidence of the Chief Executive Officer of Bowls Victoria that Bowls Victoria's position is that single gender lawn bowls events are intended to 'facilitate participation in the sport by women in Victoria', and to 'prevent a decline in participation in competitive bowls by women', 'who form the minority of the membership base of Bowls Victoria'.²⁵ There is no reason to doubt that Bowls Victoria's intention to prevent a decline in participation by women in competitive lawn bowl events is genuinely held.
67. However, it is less clear on what basis the exclusion of women from competitive lawn bowls events, or participation in competitive lawn bowls events being restricted to men, is intended to facilitate participation in those competitive lawn bowls events *by males*. While there is no reason that the exception cannot apply to male participation in competitive sporting activities of a sport, the evidence provided by the Applicants indicates that men are not generally underrepresented in the sport of lawn bowls. The Second Survey evidence indicates that on average, there are about 73 male members and 33 female members for each bowls club which participated in that Survey.²⁶
68. There is presently no evidence filed by Bowls Victoria that men are generally underrepresented in their participation in competitive lawn bowls events. It may be that men are underrepresented in their participation in competitive lawn bowls event at particular lawn bowls clubs, but evidence of this would need to be provided on a club-by-club basis, rather than on a broad scale.
69. As the Explanatory Memorandum indicates, the exception 'would not be available to allow ... male-only competitions in sports where continuing male participation has not been an issue'. The Commission submits that Bowls Victoria ought to make clear the basis for conducting competitive lawn bowls events for men, to the exclusion of women.

²⁵ First Affidavit, paragraphs [45]-[46].

²⁶ Second Affidavit, paragraph [11].

Sub-section 72(1B)(b): "reasonable"

70. If sub-section 72(1B)(a) is satisfied, the Tribunal must further consider whether the exclusion or restriction is 'reasonable', having regard to:
- (a) The nature and purpose of the activity;
 - (b) The consequences of the exclusion or restriction for people of the excluded or restricted sex; and
 - (c) Whether there are other opportunities for people of the excluded or restricted sex to participate in the activity.
71. Whether the exclusion or restriction is 'reasonable' is an objective test of 'proportionality'.²⁷ The Commission submits that for an exclusion or restriction to be 'reasonable', an objective person in the applicant's position must consider (for example) that the exclusion or restriction will facilitate participation in that event by women. An exclusion or restriction cannot be 'reasonable' if it is unlikely to facilitate participation. Otherwise, it would defeat the clear purpose of sub-section 72(1B). Alternatively, an exclusion or restriction that will facilitate participation by women, but is nevertheless overly broad and bears heavy consequences for men, cannot be regarded as 'reasonable'. The three specified factors set out in sub-section 72(1B) facilitate consideration of whether an exclusion or restriction is reasonable and proportionate.²⁸
72. Whether an exclusion or restriction will have the effect of facilitating participation of people of a particular sex in the competitive sporting activity will turn on the evidence provided by an applicant. This could include survey results and statistics (including trends) on male and female participation. The Commission submits that where surveys are undertaken by members of a sporting club or association, the views of the sex for whom the exclusion or restriction is intended to facilitate participation should be given particular weight, and it is necessary to explore the underlying reasons for such views. For this reason it is imperative that the results of such surveys be provided for men and women separately.
73. The Second Survey conducted by Bowls Victoria was for the purpose of providing evidence relevant to sub-section 72(1B). According to the Second Affidavit
- (a) A total of 3,312 responses to the Second Survey were received.²⁹

²⁷ Statement of Compatibility, Equal Opportunity Amendment Bill 2011, Parliament of Victoria, Legislative Assembly, 5 May 2011 (Robert Clark) 1362.

²⁸ See Statement of Compatibility, Equal Opportunity Amendment Bill 2011, Parliament of Victoria, Legislative Assembly, 5 May 2011 (Robert Clark) 1362.

²⁹ Second Affidavit, paragraph [6].

- (b) Survey participants were from 347 bowls clubs (out of 523 member clubs of Bowls Victoria).³⁰
- (c) Approximately 64.3% of the survey participants were male, approximately 35.7% were female.³¹

74. The substantive questions asked of individual members of Bowls Victoria were:

- (a) "Do single-gender events increase your interest in participating in events and tournaments?" 3,100 responses were received, with 65.6% saying yes, 34.4% saying no.³²
- (b) "Do single-gender events mean you are more likely to enter events and tournaments?" 3,093 responses were received, with 60.8% saying yes, 39.2% saying no.³³
- (c) "Do single-gender events mean that you are more likely to participate in events and tournaments?" 3,028 responses were received, with 60.4% saying yes, 39.6% saying no.³⁴
- (d) "If single-gender events were not available at your Bowls Club, would you be less likely to participate in events at your Club?" 2,945 responses were received, with 63.5% saying yes, 36.5% saying no.³⁵
- (e) "Does having a combination of mixed-gender and single-gender events increase your interest in participating in events at your Bowls Club?" 3,030 responses were received, with 62.2% saying yes, 37.8% saying no.³⁶
- (f) "Does having a combination of mixed-gender and single-gender events increase your level of participation in events at your Bowls Club?" 2,960 responses were received, with 57.4% saying yes, 42.6% saying no.³⁷
- (g) "Do you prefer to participate in your gender division in your Club's events?" 2,968 responses were received, with 67.7% saying yes, 32.3% saying no.³⁸

For these survey questions, the Second Affidavit categorises the accompanying comments made by survey participants under several common themes, providing examples of those comments.

³⁰ Second Affidavit, paragraphs [12]-[13].

³¹ Second Affidavit, paragraphs [8]-[9].

³² Second Affidavit, paragraph [14].

³³ Second Affidavit, paragraph [17].

³⁴ Second Affidavit, paragraph [20].

³⁵ Second Affidavit, paragraph [22].

³⁶ Second Affidavit, paragraph [26].

³⁷ Second Affidavit, paragraph [30].

³⁸ Second Affidavit, paragraph [34].

75. However, the Commission submits that the following further information would assist the Tribunal to consider the issues relevant to the Application.
- (a) The 'yes'/'no' responses to questions should be disaggregated, so as to make clear the frequency/proportion of *men* who responded in favour and against, and the frequency/proportion of *women* who responded in favour and against.
 - (b) The comments by survey participants should be disaggregated into those made by men and women (it is often not evident from the comments themselves). Bowls Victoria should further explore whether it can ascertain the frequency/proportion for which each reason was relied upon in answering 'yes' or 'no'. At present, there is no clear sense as to what extent some common themes were more prevalent than others.
76. According to the Second Affidavit, one common theme in support of the continuation of single gender lawn bowls competitions and mixed gender lawn bowls competitions is that it "[e]ncourages participation".³⁹ Many of the examples of the comments provided appear to be directed at participation by women. The Commission submits that this is particularly relevant to the question of whether an exclusion or restriction will facilitate participation in the competitive lawn bowls event. The views of women on this issue will be particularly important since it is their participation which is intended to be facilitated. However, the extent to which women consider that, in their view, excluding men/restricting participation to women facilitates their participation is unclear. This could be made clearer if Bowls Victoria can ascertain the frequency or proportion for which this reason was given by women in survey responses.
77. The Commission also notes from the Second Affidavit that in response to the question "Do single gender events increase your interest in participating in events and tournaments", some comments in support of the answer "yes" referred to women feeling intimidated. For example:
- (a) "Aggressive male opposition is more intimidating to women".⁴⁰
 - (b) "I find the atmosphere so much better and am not intimidated by some males who are rude".⁴¹
 - (c) "Ladies only tournaments and competitions are much more enjoyable and less threatening for social bowlers".⁴²

³⁹ Second Affidavit, paragraph [15(8)], [18(6)], [37(1)].

⁴⁰ Second Affidavit, paragraph [15](1)(v)].

⁴¹ Second Affidavit, paragraph [15(1)(xi)].

⁴² Second Affidavit, paragraph [15(1)(xiv)].

- (d) "I never feel safe on the green because the men play very aggressively. I think it is an occupational health and safety issue".⁴³
- (e) "I feel that women sometimes feel intimidated when men are playing against them."⁴⁴

The Commission submits that to the extent that such comments refer to the way in which men competitors conduct themselves generally (as opposed to their style of bowling) this can be relevant to the question of whether an exclusion of men/restriction of participation to women will facilitate participation and is reasonable. If women feel intimidated by male behaviour, then the exclusion of men/restriction of participation to women will remove that element of intimidation. Such behavioural issues can also be further addressed under sporting rules or a code of conduct.

78. Some other common themes in favour of allowing single gender events are:

- (a) "Different style of play between male and female bowlers (including greater strength, stamina and aggression in male players)"⁴⁵
- (b) "Desire to compete on level playing field"⁴⁶
- (c) "Differences in size of bowls (and therefore male players are at an advantage)"⁴⁷

However, to the extent that such comments relate to any purported advantage in strength, stamina or physique of male lawn bowls competitors, such views must be discounted for the purposes of sub-section 72(1B). This is in light of the Tribunal's previous decision in *South v RVBA*, and Bowls Victoria's non-reliance on the competitive sporting exception under sub-section 72(1).

79. The Commission now turns to the factors the Tribunal must have regard to when determining reasonableness under sub-section 72(1B)(b). The onus is on Bowls Victoria to satisfy the Tribunal that the exclusion or restriction is reasonable, having regard to the following factors.

Nature and purpose of the activity

80. This factor focuses on the nature and purpose of the competitive sporting activity, rather than the exclusion or restriction. Regard must be had to the nature and purpose of 'Singles', 'Pairs', 'Triples' and 'Fours' at club, division,

⁴³ Second Affidavit, paragraph [15(1)(xx)].

⁴⁴ Second Affidavit, paragraph [15(1)(xxiii)].

⁴⁵ Second Affidavit, paragraph [15(1)], [18(1)].

⁴⁶ Second Affidavit, paragraph [15(2)], [18(3)].

⁴⁷ Second Affidavit, paragraphs [15(3)], [18(2)].

region and state level, and at the 'Victorian Open'. The Commission considers that Bowls Victoria is best placed to make initial submissions on this factor.

Consequences of the exclusion or restriction for people of the excluded or restricted sex

81. The focus under this factor is *not* on identifying the consequences generally if single gender competitive lawn bowls events cannot be conducted. The focus is also *not* on the consequences for men if competitive lawn bowls events for men cannot be conducted, nor the consequences for women if competitive lawn bowls events for women cannot be conducted. Rather, this factor requires the identification of:
- (a) The consequences for men, being the excluded or restricted sex, from participating in competitive lawn bowls events for women.
 - (b) The consequences for women, being the excluded or restricted sex, from participating in competitive lawn bowls events for men.
82. This factor prompts consideration of whether the consequences for the excluded or restricted sex are too broad, and if so, whether a less restrictive exclusion or restriction could be adopted to achieve facilitation of participation by the other sex.

Other opportunities for people of the excluded or restricted sex to participate in the activity

83. The exclusion of men/restriction of participation to women for competitive lawn bowl events does not amount to a total exclusion for men from competitive lawn bowls events (and vice versa). There are other opportunities for men and women to participate in mixed gender competitive lawn bowls events (to what extent is the subject of exploration below). Bowls Victoria has not suggested that mixed gender competitive lawn bowls events will cease if the Application is successful. The Commission submits that provision of mixed gender competitive events is integral in lawn bowls and sport generally – in fostering respect between men and women within that sporting culture, and this contributes to respect between men and women in greater society.
84. The following results from the Second Survey summarised in the Second Affidavit are relevant:
- (a) One common theme in support of the continuation of single gender lawn bowls competitions is "[o]pportunities for mixed events (benefit of choice)".⁴⁸ Such comments are relevant to this factor.

⁴⁸ Second Affidavit, [15(7)].

(b) In response to the question to club secretaries: "What proportion of total days that the green is available, is the green available to members on a mixed-gender basis?", 284 responses were received. A majority of 259 responses said the green was available on a mixed gender basis on a proportion of 51% or more (188 responses said that it was available on a mixed gender basis on a proportion of 91-99% to All). A minority of 25 responses said the green was available on a mixed gender basis on a proportion of 50% or less (8 responses said it was not available on a mixed gender basis at all).⁴⁹

(c) In response to the question to club secretaries: "Does you Club conduct carnival/commemorative events?" and "Please list the mixed-gender carnival/commemorative events conducted at your Club", 90.8% said they conduct mixed gender carnival/commemorative events.⁵⁰

85. The Commission submits that the following question in the Second Survey, which was not summarised in the Second Affidavit, is also of relevance: "Please list your Club's mixed gender tournaments". The Commission suggests that Bowls Victoria could potentially derive a proportion of the number of clubs which provide mixed gender tournaments from the Second Survey data.

(a) Another relevant issue under this factor is the days on which the competitive sporting activity for men and women are conducted. For example, if competitive lawn bowls events for men are generally conducted on weekends, and mixed gender competitive events are run during the week, the exclusion of women/restriction of participation to men could have the effect of limiting opportunities for women to participate in competitive lawn bowls events due to work commitments (and potentially vice versa depending on the circumstances). It would provide broader opportunity if mixed gender competitive events were run during weekends, so that both men and women can compete.

86. Responses to the following questions in the Second Survey, which were not summarised in the Second Affidavit, are relevant: "What times and days of the week are single-gender competitions conducted at your Bowls Club?" and "What times and days of the week are mixed-gender competitions conducted at your Bowls Club?" The Commission suggests that Bowls Victoria could potentially derive statistical patterns from the Second Survey data. This has been raised as an issue in some responses in the Second Survey. The Second Affidavit says that in response to the question: "Do single gender

⁴⁹ Second Affidavit, paragraphs [38]-[39].

⁵⁰ Second Affidavit, paragraph [44(3)].

events increase your interest in participating in events and tournaments?", examples of comments made which accompanied the response "no", include:

- (a) "As I work, I find I am unable to participate in female events as they are primarily run during the week. The events which are not gender specific are usually more accessible to me."⁵¹
- (b) "Single gender events prevent me from participating in as many events as most mens events are weekends which is when I can compete due to work commitments."⁵²

The extent of this issue for women is unclear. It could be made clearer if Bowls Victoria can ascertain the frequency or proportion for which this reason was given.

87. The Commission submits that with further information from Bowls Victoria as set out in these submissions, the Tribunal will be better placed to determine whether an objective person in Bowl's Victoria's position would consider that:

- (a) the exclusion of women/restriction of participation to men in competitive lawn bowls events for men is reasonable; and
- (b) the exclusion of men/restriction of participation to women in competitive lawn bowls events for women is reasonable.

In the event that Bowls Victoria provides further information, the Commission may provide additional submissions on this issue, either in submissions in reply or at the hearing.

88. If the Tribunal finds that the Conduct does not fall, or only partially falls, within sub-section 72(1B), it remains open to the Tribunal to consider whether to grant an exemption under section 89.

Sub-section 72(2)

89. Sub-section 72 of the EOA 2010 re-enacts section 66 of the EOA 1995. Section 72 is intended to allow for fair competition in sport.⁵³

People of a specified age or age group (sub-section 72(2)(b))

90. Sub-section 72(2)(b) of the EOA 2010 provides that participation in a competitive sporting activity may be restricted to people of a specified age or age group. Under the Amended Application for Order, Bowls Victoria seeks to rely on sub-section 72(2)(b) in respect of 'Singles (including Novice)', 'Pairs',

⁵¹ Second Affidavit, paragraph [16(5)(a)(i)].

⁵² Second Affidavit, paragraph [16(5)(a)(ii)].

⁵³ Explanatory Memorandum to the Equal Opportunity Bill 2010, p40.

'Triples' and 'Fours' at club (including club based tournaments and gala days), division, region and state level for competitors under 18, 25 and 60 years of age.

91. Bowls Victoria seeks to advertise and conduct the above single gender lawn bowls events for bowlers of specified age groups. This involves discrimination on the basis of both the attributes of sex and age.
92. However, the Commission notes that sub-section 72(2)(b) provides an exception for discrimination on the basis of the attribute of age only. The Commission submits that if Bowls Victoria wishes to advertise and conduct single gender lawn bowls events for bowlers of specified age groups, it must also rely on the competitive sporting activities exception under sub-sections 72(1A) and/or (1B).
93. However, the Commission notes that those sub-sections cannot apply to a sporting activity for children under the age of 12 years.⁵⁴ The Commission has asked the Applicants, in relation to lawn bowls events for competitors under 18 years of age, whether children under 12 years of age are involved⁵⁵ (or indeed, in the events for competitors under 25 and 60 years of age). This information has not yet been provided.

People with a disability (sub-section 72(2)(c))

94. Sub-section 72(2)(c) provides that participation in a competitive sporting activity may be restricted to people with a general or particular disability. Bowls Victoria seeks to rely on sub-section 72(2)(c) in respect of 'Singles (including Novice)', 'Pairs', 'Triples' and 'Fours' at club (including club based tournaments and gala days), division, region and state level for bowlers with a disability.
95. Bowls Victoria seeks to advertise and conduct the above single gender lawn bowls events specifically for bowlers with a disability. This may amount to a special measure under section 12 of the EOA 2010.
96. If this conduct is not a special measure, then sub-section 72(2)(c) provides an exception for discrimination on the basis of the attribute of disability. Along similar lines to the above, the Commission submits that Bowls Victoria, if relying on sub-section 72(2)(c), must also rely on the competitive sporting activities exception under sub-sections 72(1A) and/or 72(1B).
97. The Commission has asked the Applicants whether other lawn bowls events held by Bowls Victoria are open to bowlers with a disability.⁵⁶ The Commission

⁵⁴ EOA 2010, s 72(3).

⁵⁵ Letter from the Commission to the Principal Registrar, Human Rights Division, Victorian Civil and Administrative Tribunal dated 13 July 2015.

⁵⁶ Letter from the Commission to the Principal Registrar, Human Rights Division, Victorian Civil and Administrative Tribunal dated 13 July 2015.

notes that sub-section 72(2)(a) provides that participation in a competitive sporting activity can be restricted to people who can 'effectively compete'. However, in circumstances where a bowler has a disability which does not impair their ability to effectively compete, the Commission submits that they should not be restricted from participating. Whilst the Application does not seek to exclude people with disabilities under section 72(2)(a) it should not be presumed that people with disabilities can be restricted to participation in events that specifically cater for people with disabilities.

J. IS THE PROPOSED EXEMPTION A REASONABLE LIMITATION ON THE RIGHT TO EQUALITY?

98. Finally, if the Tribunal finds that an exemption is required to some extent because no exception applies or an exception only partially applies to the Conduct then it must consider whether it would be a reasonable limitation on the right to equality set out in section 8 of the Charter, as well as consider all the relevant circumstances of the case, in determining whether to grant an exemption under section 89.

99. In *Lifestyle Communities (No 3)*, Bell J provided a useful discussion of the nature of the right to equality:⁵⁷

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.

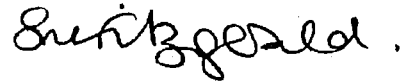
100. In *BAE Systems Australia Ltd*,⁵⁸ the Tribunal held that the reasonable limitations test in section 90(b) imports into the EOA 2010 the test contained in section 7(2) of the Charter. On this basis, any reasonable limits imposed by an exemption on the right to equality must be 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom', taking into account the factors in that section.
101. The onus is on the Applicant to identify the purpose of the limitation and demonstrate its importance to the Tribunal, as well as the other aspects of the

⁵⁷ *Lifestyle Communities Pty Ltd (No 3)* [2009] VCAT 1869 [107]-[109].

⁵⁸ [2012] VCAT 349 [77].

section 7(2) test. There is a "stringent standard of justification which be satisfied only when there is a pressing and substantial need for limitation".⁵⁹

102. In the event that the Tribunal finds that an exemption is required the Commission may provide additional submissions on the application of the test in section 7(2) of the Charter at the hearing.



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Victorian Equal Opportunity & Human Rights Commission

15 April 2016

⁵⁹ *Lifestyle Communities Pty Ltd (No 3)* [2009] VCAT 1869 [324].