

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

ANTI-DISCRIMINATION LIST

VCAT Reference: A269/2010

Re: the Victorian Civil & Administrative Tribunal's consideration of an application by the Peel Hotel Pty Ltd (ACN: 104 465 143) for an exemption from various aspects of the prohibition on discrimination in the provision of goods and services contained in the *Equal Opportunity Act 1995* (Vic)

SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY & HUMAN RIGHTS COMMISSION

A. BACKGROUND

1. The Victorian Equal Opportunity and Human Rights Commission ('Commission') has the following functions under the *Equal Opportunity Act 1995* (Vic) ('EOA')¹:
 - (a) to establish policies and issue guidelines and directions on the manner in which conciliation procedures under this Act should be conducted;
 - (b) to receive and investigate complaints on the manner in which conciliation procedures under this Act have been or are being conducted;
 - (c) to establish and undertake information and education programs;
 - (d) any other functions conferred on it by or under this Act or any other Act, including the Charter of Human Rights and Responsibilities.
2. The Commission also performs a range of functions under the *Charter of Human Rights and Responsibilities* ('Charter').² In its performance of those functions the Commission aims to

¹ Section 161 *Equal Opportunity Act 1995* (Vic).

² These are listed in section 40 and 41 of the Charter.

promote the principles underpinning the Charter, that are articulated in its preamble, and include:

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
 - human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
 - human rights come with responsibilities and must be exercised in a way that respects the human rights of others;
 - human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.
3. In accepting the Tribunal's invitation to participate in this matter we seek to assist the Tribunal in its important role of applying and interpreting the Charter and the EOA. Although the Tribunal has extensive experience with the EOA, the Charter is still relatively new legislation and it is vital for courts and tribunals to engage with it and provide guidance to the community on what it means for them in practice.
4. The Peel Hotel Pty Ltd ('the applicant') has applied to the Victorian Civil and Administrative Tribunal ('the Tribunal') for an exemption from the operation of the EOA that, if granted, would allow the applicant:
- to refuse or restrict entry to the Peel Hotel at 113 Wellington Street, Collingwood to people who do not identify as homosexual males where, to allow entry or unrestricted entry would, in the opinion of the applicant, its agent or employee, adversely affect the safety or comfort of the venue for its homosexual male patrons; and
 - to advertise those matters.

It appears that this conduct will involve discrimination in the provision of goods and services on the basis of both sex and sexual orientation.

5. The applicant has previously applied for, and was granted, a similar exemption on 24 May 2007, which expired on 30 May 2010. This exemption was granted because:

Although gay men are now less at risk than they were in the past to various issues and behaviours, there are still instances of sexuality-related violence, insult, ostracism, derision, harassment and hostility. These are directed to gay men by other members of the community. Some of these occur when gay men display towards each other what society would tolerate among heterosexuals behaving as a couple – kissing, hugging, or expressing love, attraction or affection in a physically intimate way. This venue is designed to provide an environment where gay men can do these things, can socialise, can make friends, can meet and find prospective partners without an atmosphere of derision, hostility or insult or even of violence. It provides an atmosphere where they can express themselves physically or sexually in a way that would be acceptable among men and women in a mixed sex venue.³

In granting the exemption, the Tribunal was of the view that although this proposal did not fall within one of the specific exceptions to the EOA it was in the spirit of s 82 which deals with welfare measures and special needs and an exemption was within its power to grant under s 83 (the exemption powers):

There is no express exception provision which clearly applies. However, the application is in the spirit of those express exception provisions which seek to allow special measures to be taken to redress disadvantage suffered by those with a particular attribute. An example of these is s 82.⁴

The exemption also seeks to prevent discrimination against gay men, for whom this venue is designed. The anti-social behaviour which would be at the heart of a decision to refuse or restrict entry to groups of heterosexuals or lesbians is sexuality-based behaviour and includes sexuality-based insults and derision. It would be most unfortunate if at this venue, gay men were subjected to the very behaviour that the venue seeks to protect them from. I would add that I take a similar view of the restriction or refusal of entry to those groups who wish to use the venue for “hens’ nights” and the like, where they wish to use the gay male patrons as a form of entertainment. To regard the gay male patrons of the venue as providing an entertainment or spectacle to be stared at as one would at an animal at a zoo, devalues and dehumanises them.⁵

³ At [10]

⁴ At [17]

⁵ At [20]

B. DEVELOPMENTS IN THE LAW SINCE THE FIRST EXEMPTION

6. Since the 2007 exemption was granted to the Peel Hotel, Justice Bell, when he was President of the Tribunal, undertook a detailed analysis of the interaction between the EOA exemption provision and ss 32 and 38 of the Charter in *Lifestyle Communities (No 3)* [2009] VCAT 1869. Subsequently, the Court of Appeal in *Momcilovic* handed down a further Charter decision, not relating to exemptions but relevant to the interpretation of the EOA using s 32 of the Charter.⁶ The Supreme Court has also provided *obiter* guidance about the obligations of public authorities under s 38 of the Charter, which also post-dates the *Lifestyle Communities* decision and the last exemption decision in relation to this applicant.⁷ The Commission will outline below what these subsequent developments mean for the decision in *Lifestyle Communities*, which remains the leading decision on the interaction between the EOA exemption power and the Charter.
7. *Lifestyle Communities* considered the impact of both the obligations that the Charter imposes on public authorities (s 38) and the Charter's interpretation provision (s 32) on s 83 of the EOA. The President found that both provisions had the effect of requiring proposed exemptions that would limit the Charter's equality right to be decided on the basis of the criterion in s 7(2) of the Charter.
8. Since the *Lifestyle Communities* decision, the Court of Appeal in *Momcilovic* has taken a different approach to applying the s 32 interpretation provision in the Charter.⁸ However, the approach to s 38 (the obligations of public authorities in the Charter) adopted by Justice Bell in *Lifestyle Communities* is not directly affected by *Momcilovic* and appears to be consistent with the only substantive Supreme Court guidance on s 38 provided in the *Castles* decision.⁹

⁶ *R v Momcilovic* [2010] VSCA 50

⁷ *Castles v Secretary of the Department of Justice & Ors* [2010] VSC 310

⁸ *R v Momcilovic* [2010] VSCA 50 at [105]

⁹ *Castles v Secretary of the Department of Justice & Ors* [2010] VSC 310

C. APPLYING S 32 OF THE CHARTER TO S 83 OF THE EOA

9. Section 32(1) of the Charter provides:

So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

10. The interpretive exercise set out in s 32 must now be approached in the manner set out in *Momcilovic*. In that case the Court of Appeal rejected Justice Bell’s “stepped approach”, where the ordinary interpretation of a provision is ascertained first, without recourse to the Charter.

11. In *Momcilovic* the Court of Appeal made the following findings about the application of s 32 of the Charter:

- (a) The meaning of the statutory provision in question must be ascertained by applying s 32 of the Charter at the outset of the interpretive exercise, in conjunction with other relevant principles of statutory interpretation.
- (b) Compliance with the s 32(1) obligation means exploring all ‘possible’ interpretations of the provision(s) in question, and adopting that interpretation which least infringes Charter rights. What is ‘possible’ is determined by the existing framework of interpretive rules, including of course the presumption against interference with rights.
- (c) The presumption against interference with fundamental rights must now be understood to extend to the protection and promotion of the human rights set out in the Charter.
- (d) Whether it is “possible” to give a statutory provision a meaning compatible with human rights does not depend on the presence of ambiguity in the language of the provision being interpreted.
- (e) Justification under s 7(2) of the Charter becomes relevant only if the provision, so interpreted, breaches a right protected by the Charter.
- (f) Section 32 requires consideration of the purpose of the provision itself rather than the statutory scheme as a whole.¹⁰

12. To ascertain the meaning of s 83 of the EOA the Tribunal must apply s 32 of the Charter in conjunction with other relevant principles of statutory interpretation. The Tribunal must explore all *possible* interpretations of s 83 and adopt the one that least infringes Charter rights (bounded by what is possible consistent with the purpose of that section). Whilst the exact methodology for applying s 32 of the Charter proposed in *Lifestyle Communities* no

¹⁰ [2010] VSCA 50 at [35], [103]-[110]

longer applies, many of the interpretative observations and conclusions that came out of that decision are still valid and can be applied when following the *Momcilovic* approach. In particular Justice Bell's observations about the nature and scope of the equality right at international law, and his finding that because 'special measures' are not discrimination within the Charter, exemptions that fall within s 8(4) of the Charter will not limit the Charter right to equality. Section 8(4) of the Charter provides that: '[m]easures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination'.

13. When interpreting s 83 in *Lifestyle Communities* Justice Bell considered the background to the EOA exemption provision as it evolved through various iterations:

Turning to exemptions, from the start the power has been to grant temporary exemptions, subject to review and renewal as part of a scheme for both exceptions and exemptions. In respect of the 1977 Act, the Premier said in the second reading speech it was "intended that these exemptions should be reviewed from time to time so that they conform to changing social mores". In respect of the 1984 Act, the Premier said the re-enacted provision "reiterates the current power of the Equal Opportunity Board to grant temporary exemptions from the provisions of the Act". The 1995 Act widened the exceptions and re-enacted the exemption provision in its current form in s 83(1). It was not mentioned in the second reading speech but the explanatory memorandum described it as "similar to the existing procedure".¹¹

14. Justice Bell also made the following observations about the ordinary meaning of s 83 that are not disturbed by the *Momcilovic* decision:

Putting the Charter to one side, on my reading of the exemption provisions in the context of the purposes of the *Equal Opportunity Act* and the legislation as a whole, the discretion to grant an exemption must be exercised taking those purposes into account. It could not be exercised in a way that would defeat them. To interpret the provision otherwise is to allow the exercise of the discretion to be directly disobedient of the parent legislation, which I cannot accept on first principles. In the legislative order of things, the human rights purposes are primary and the exemption power is secondary.¹²

The function of the exemption power in s 83 can now be appreciated. Without a power of that nature, justifiable differential treatment not covered by an exception would be prohibited and actionable. The potential danger in the power can also be appreciated. If exemptions are granted too liberally and according to inappropriate principles, the profoundly important values expressed in the legislation could be undermined.¹³

With great respect, I would find it difficult to reconcile the expansive view of the exemption power which was adopted in *Commissioner for Equal Opportunity v ADI Limited* and *Boeing Australia Holdings Pty Ltd* with the primary purpose of the equal opportunity legislation which was in issue. As regards the decision of Morris J, I cannot accept that the purpose of our *Equal Opportunity Act* permits the discretion to grant an exemption to be exercised for "achieving convenient, economic and practical outcomes". That is a very wide formulation and seems to allow the discretion to be exercised on grounds

¹¹ At [20]

¹² At [30]

¹³ At [32]

of expedience. That would seem to be inconsistent with the principled purposes of the legislation, even given the provisions for exceptions and exemptions. I am also mindful that the legislation should be interpreted consistently with Australia's international obligations where this is open. Article 26 of the ICCPR requires any differentiation to be objective, reasonable, for legitimate purposes under that Covenant and proportionate to that purpose. If there is ambiguity about the interpretation of s 83(1) in the context of the scope and purpose of the *Equal Opportunity Act*, it seems open to resolve it in favour of such a test, which I would adopt here.¹⁴

15. Justice Bell's ordinary interpretation of the exemption provision would only allow 'justifiable differential treatment not covered by any exception'. 'Justifiable' is determined by Justice Bell on the basis of the requirement in Article 26 of the *International Covenant of Civil and Political Rights* ('ICCPR') that any differentiation be objective, reasonable, proportionate and for legitimate purposes under the Covenant. This requirement is equivalent to the s 7(2) reasonable limits provision of the Charter.
16. The question for the Tribunal in this case then is whether there is any 'possible' interpretation of s 83 that respects Charter rights? The Commission submits that the only interpretation of the exemption provision in the EOA that would prevent *any* limitation of the Charter's equality right is one that is limited to measures to assist or advance groups disadvantaged because of discrimination within s 8(4) of the Charter ('proposed interpretation').
17. Whether this interpretation is 'possible' depends on what the purpose of the provision is, and whether this proposed interpretation is consistent with it. Justice Bell's analysis of the extrinsic materials relevant to the exemption provision indicates that the purpose of the provision was to allow short-term exemptions that would be granted from time to time based on 'changing social mores' about what is acceptable differential treatment. This suggests that the purpose of the exemption provision is broader than the proposed interpretation in the paragraph above.
18. The Commission is not able to propose any other interpretation under s 32 that is more rights protective than that advanced upon ordinary principles in the *Lifestyle Communities* decision. In the absence of this, Justice Bell's ordinary interpretation approach would only allow exemptions where a similar assessment to that required by s 7(2) of the Charter has been undertaken. The Commission will address this assessment in relation to the current application below, after first considering the Tribunal's own obligations under the Charter and what this means for the task at hand.

D. APPLYING S 38 OF THE CHARTER TO TRIBUNAL'S ROLE IN S 83 OF THE EOA

19. Section 38(1) of the Charter provides:

Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

20. The *Lifestyle Communities* decision was based upon both s 32 and s 38 of the Charter.

¹⁴ At [65]

Justice Bell's approach to applying s 38 of the Charter is not affected by the *Momcilovic* decision (which only considered s 32 of the Charter). Since the *Momcilovic* decision, the Supreme Court in *Castles* commented on the judicial task of considering whether a public authority has given 'proper consideration' under s 38, noting that there must be some evidence that 'the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified'.¹⁵ This accords with the approach to s 38 in *Lifestyle Communities*.

21. In *Lifestyle Communities* Justice Bell found that the Tribunal is a public authority within s 4(1) of the Charter when exercising the discretion in s 83, giving it obligations under s 38 of the Charter.¹⁶ Consistent with *Castles*, Justice Bell considered that s 38 requires an assessment of the rights limitation against the countervailing interests under s 7(2) of the Charter.¹⁷ He notes:

The compatibility with human rights of the exercise of the discretion will be determined by reference to what (if any) human rights are engaged and whether any limits on human rights are both under law (legality) and reasonable and demonstrably justified (proportionality) in terms of s 7(2).¹⁸

22. Notably, the obligations imposed by s 38 mirror the non-Charter interpretation of the limits of the discretion in s 83 of the EOA adopted by Justice Bell. The interpretation of s 83 reached in *Lifestyle Communities* would only allow exemptions that pass the ICCPR's version of s 7(2), with the result that any exemption that does not satisfy s 7(2) of the Charter will be both *ultra vires* under the exemption power and unlawful under s 38 of the Charter.

E. THE PEEL HOTEL EXEMPTION

23. In assessing the current application, the Tribunal must first consider whether the proposed exemption limits any Charter rights. This is because the Tribunal is a public authority when considering EOA exemptions and must therefore undertake this role in compliance with s 38 of the Charter. The rights that may be limited by activity under the proposed exemption are the equality right in s 8 of the Charter and the privacy right in s 13.
24. The refusal of potential patrons on the basis of their sex or their sexuality may be 'discrimination' within the Charter's equality right. As we have noted above, s 8(4) of the Charter provides that measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination. In light of the Tribunal's findings in the original exemption application, the exemption might constitute a measure to assist groups of persons disadvantaged because of discrimination. The concepts of 'assisting' or 'advancing' may be interpreted giving consideration to Charter

¹⁵ *Castles v Secretary to the Department of Justice* at [286]

¹⁶ At [46], [73] and [304]

¹⁷ At [306]

¹⁸ At [306]

rights such as privacy and liberty so that they are not limited to concrete physical requirements such as ramps or aids, or to workplace measures such as affirmative action programs, but may extend to the emotional and psychological needs necessary for the achievement of human dignity. Arguably the refusal of certain non-male and non-homosexual patrons assists the homosexual patrons to feel comfortable expressing themselves freely in a manner heterosexual people take for granted. The Tribunal would need to consider whether the exemption sought is appropriately tailored to this purpose. If there is no 'discrimination' within the Charter's terms, then the Charter mechanisms will not be engaged insofar as the equality right is concerned.

25. The Charter's privacy right will be limited by any requirement to disclose sexual orientation before entry. The applicant does not explain how people affected by the exemption are identified or how the sexual orientation of prospective patrons is ascertained, so it is difficult to determine whether the privacy right will be limited by activity under the exemption. The impact on the privacy of prospective patrons should be clarified by the applicant before the exemption is decided.
26. If the Tribunal is not satisfied that the proposed exemption falls with s 8(4), or it considers that the privacy right is limited, s 38 requires that the Tribunal assess the exemption using the factors outlined in s 7(2) of the Charter. It will not be possible to assess the reasonableness of the likely limit on the privacy right under s 7(2) without more information.
27. In addition to complying with the requirements of s 38, the Tribunal must act within the power it has been given under the exemption provision, which only allows exemptions that are objective, reasonable, proportionate and for legitimate purposes under the ICCPR (as set out by Justice Bell in *Lifestyle Communities*). Fortunately, the assessment required by the section itself, and the assessment the Tribunal is obliged to undertake by virtue of its Charter obligations, will canvas the same considerations.
28. The Commission submits that the following matters will be relevant to considering whether the requirements of Article 26 of the ICCPR and of s 7(2) of the Charter have been met:
 - The past and current history of discrimination against homosexuals is of such an extent and magnitude that notice may be taken of it without evidence being provided.
 - This history of discrimination has had a significant impact on the private sphere of homosexuals, in which this exemption operates.
 - Under international law the equality right concerns itself with substance and not form – justifiable differentiation is not considered to be discrimination.
 - The proposed discrimination appears to be generally related to its purpose, in that the discrimination will aim to provide a psychologically safe and welcoming environment for homosexual males to socialise. However given the lack of an objective requirement in the exemption, there is nothing in the exemption that currently requires an objective consideration of the necessity of the discrimination for attaining that purpose.

- There are questions about whether there are less restrictive means (Charter factor) or the means are proportionate (ICCPR factor) because of the terms in which the exemption is sought. Rather than allowing refusal of entry to be based on the subjective opinion of the applicant, it would be more proportionate and less rights restrictive to allow refusal on the basis that entry would, for example, “be likely to” adversely affect safety or create a hostile environment – rather than “would, in the opinion of the applicant, its agent or employee, adversely affect ...”. This would require the applicant to consider the matter objectively and avoid personal bias when applying the exemption.
- A significant majority of local venues cater to heterosexual clientele so the exemption is unlikely to significantly affect the ability of heterosexuals to socialise in a local venue.

F. CONCLUSIONS

29. In order for the proposed exemption to fall within the scope of the exemption power and be lawful under s 38 of the Charter it needs to be amended to include an objective reasonableness component in relation to the decision about whether to select a prospective patron for refusal of entry under the protection of the exemption. In this redrafted form, the Tribunal may (after considering the necessary further information in relation to the privacy right) consider that the proposed exemption falls within the scope of the exemption power and would be lawful under s 38 of the Charter. In that case the exemption may be granted.