VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

ANTI-DISCRIMINATION LIST VCAT REFERENCE NO. A147/2009

CATCHWORDS

Application for exemption under section 83 Equal Opportunity Act – Victorian Electoral Commission – attribute of political belief or activity- application of Charter of Human Rights and Responsibilities

APPLICANT	Victorian Electoral Commission
INTERESTED PARTY	Victorian Equal Opportunity and Human Rights Commission
WHERE HELD	Melbourne
BEFORE	Her Honour Judge Harbison Vice President
HEARING TYPE	Hearing
DATE OF HEARING	2 September 2009
DATE OF ORDER	30 September 2009 (amended 26 October 2009)
CITATION	Victorian Electoral Commission (Anti-Discrimination Exemption) [2009] VCAT 2191

ORDERS

Pursuant to section 83(1) of the *Equal Opportunity Act* 1995 (VIC) ("the Act"), the Victorian Civil and Administrative Tribunal grants an exemption to the applicant from the operation of sections 13, 15, 100 and 195 of the Act in the following terms:

1. The exemption is granted to enable the VEC to request and consider information pertaining to the following criteria in determining whether or not a person should be offered employment or engagement as a contractor or be appointed as a member of the audit committee of the VEC:

   (i) Current membership or membership within the past 15 years of any political party in any State or Territory or the Commonwealth.

   (ii) A course of conduct within the past 15 years directed to supporting the aims of a political party or an independent candidate in a State, Territory or Federal election.

(iii) A person who has held the office of councillor for a Victorian local council within the past 15 years".

(iv) A course of conduct within the past 15 years directed towards supporting the political aims of a local councillor

(v) A person who has publicly engaged in conduct promoting a political position in respect of an issue currently before the electorate in the election for which that person is to be employed".

(vi) A person who is a member of a lobby group (not being a union or professional association) which promotes a political position in respect of an issue currently before the electorate in the election for which that person is to be employed.

2. For the applicant to take the benefit of the exemption it must:-

(i) Provide all prospective employees with:-

(a) express notice that they may be adversely affected by the exemption;

(b) a reasonable explanation in plain English of the nature of the exemption; and

(c) information regarding their rights under the *Australian Human Rights Commission Act 1986* (Cth) and the *Equal Opportunity Act* (1995) (VIC), and, in particular, the complaints procedure under those Acts and the rights of aggrieved persons to take their complaints to the Victorian Civil and Administrative Tribunal and the (Australian) Human Rights and Equal Opportunity Commission.

(ii) Provide all current employees with ongoing and regular education and training in anti-discrimination, and the internal and external procedures available to receive, investigate and resolve discrimination complaints and grievances.

(iii) Provide to the applicant's contractors:-

(a) express notice that the contractor's prospective employees may be adversely affected by the exemption;

(b) a document containing a reasonable explanation in plain English of the nature of this exemption order that the contractor may provide to the contractor's employees; and

(c) guidance to enable the contractor to conduct training in anti-discrimination.

(iv) Implement comprehensive anti-discrimination policies governing all aspects of the work and workforce, including management.

3. The applicant is required to provide a written report to the Victorian Civil and Administrative Tribunal every six months from the date of this

exemption order, over the three year period specified in the order, detailing:-

(i) the steps it has taken to comply with the above conditions;

(ii) the number of persons affected by this exemption order, the nature of the effects, and the steps taken to redress any adverse effects; and

(iii) implementation and compliance generally with the terms of this exemption order.

The Applicant's compliance with these orders as demonstrated in its reports will be a factor considered by the Victorian Civil and Administrative Tribunal in connection with any future renewal of these orders.

4. This exemption is to remain in force until 3 years from the date of Gazettal.

HER HONOUR JUDGE HARBISON
VICE PRESIDENT

APPEARANCES:

For Applicant	Catherine Dixon, Solicitor
For Interested Party	Matthew Carroll, Solicitor Chelsea Bell, Solicitor

REASONS

INTRODUCTION AND BACKGROUND

1 The Victorian Electoral Commission ("VEC") has made an application for an exemption under s 83 of the *Equal Opportunity Act* 1995. Section 83 gives power to this Tribunal to exempt a person or class of people, or an activity or class of activities from any of the provisions of the *Equal Opportunity Act*. If an exemption is given either to a person or to an activity, then the prohibitions in the *Equal Opportunity Act* do not apply to that person or activity, therefore rendering activity which might otherwise be unlawful to be lawful.

2 The VEC describes the exemption which it wishes to obtain under s 83 as follows:

"The purpose of the exemption is to enable the VEC to request and consider information pertaining to the following criteria in determining whether or not a person should be offered employment or engagement as a contractor–

1) current or previous membership of any political party in Victoria, any State or Territory or the Commonwealth;

2) current membership or association with a "lobby group" (excluding membership of a union or professional association) promoting a political position on an issue before the electorate at an election;

3) a person who has held the office of "Councillor" for a Victorian Local Council; and

4) a person who had published or publicly expressed a political opinion on an issue before the electorate at an election."

3 If the Commission was to require job applicants to provide the information which I have set out above without obtaining this exemption then the Commission would be in breach of sections 13, 15, 100 and 195 of the *Equal Opportunity Act*. This is because it is a breach of s 13 to discriminate against a person in determining who should be offered employment. Section

15 extends this protection to contract workers. It is also illegal under s 100 to request or require another person to supply information that could be used to form the basis of discrimination. Lastly it is an offence under s 195 to publish or display an advertisement indicating that a person intends to engage in discriminatory conduct.

4 One of the protected attributes under the Act is the attribute of political belief or activity.

5 Thus, if any information about a person's political beliefs or activity is requested or considered by the VEC in an application for employment of staff, it would presently be acting illegally unless protected by an exemption.

The principles guiding the exercise of Section 83

6 Section 83 does not give any guidance as to the circumstances in which an exemption should be made by the Tribunal. There have been now many published cases on the ambit of s 83. The principles that have emerged from those cases in the past are that although the giving of an exemption is always a matter of discretion for the Tribunal, that discretion will commonly lead to the grant of the exemption if the applicant can show that the exemption is necessary because the conduct is otherwise prohibited by the Act, and if the exemption can be seen to further the purposes of the *Equal Opportunity Act* itself to eliminate discrimination within our community and to promote recognition and acceptance of everyone's right to equality of opportunity.

7 Thus, exemptions have been given for many disparate activities, from the holding of single sex sporting or social events to the giving of preference to indigenous persons in employment.

8 These principles were looked at afresh when the Tribunal was faced with a series of cases in which companies doing business in the armaments industry sought exemptions. In order to continue their business in Australia, those countries were required by laws of the United States of

America to refuse employment in sensitive projects to persons from specified countries. The companies therefore sought exemption under s 83 to allow them to do this, as such conduct would otherwise be a clear breach of the *Equal Opportunity Act*. Similar applications were made in other states.

9 In support of their various applications, these companies relied upon public interest considerations. They submitted that even though the exemptions sought could in no way be characterised as ultimately promoting equality of opportunity, and in fact were designed to entrench disadvantage, they had another purpose which was just as credible and as needing of protection, which was the public interest of protecting Australian jobs and industry.

10 In various of the armaments cases, reference has been made by this Tribunal to the fact that these arguments would need to be revisited in the light of the *Charter of Human Rights and Responsibilities* Act which came into operation in January of 2008.

Charter of Human Rights and Responsibilities Act

11 There have now been several decisions of this Tribunal in relation to the operation of the *Charter of Human Rights and Responsibilities Act*. It has often been pointed out that the Charter does not create new causes of action. It does, however, require courts and tribunals to analyse existing rights and obligations in accordance with the Charter.

12 This means that when this Tribunal comes to decide any question under the *Equal Opportunity Act*, or any other legislation, it must interpret every word in that legislation against the framework of the *Charter of Human Rights and Responsibilities Act*, because s 32 of the Act 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."*

13 Further, the Charter places significant additional rights on entities which are defined under the Act as public authorities. Specifically, s 38(1) provides that 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.

14 So, in interpreting any section of the *Equal Opportunity Act* the Tribunal needs to consider how to do so in a way that is compatible with human rights. If the Tribunal is acting as a public authority in coming to a decision on a section of the Act, then it is unlawful for the Tribunal to approach that decision-making process in a way that is incompatible with a human right or in making its decision to fail to give proper consideration to a relevant human right.

15 There has been little consideration given as to how these Charter obligations might affect the decision-making framework surrounding s 83. It is clear, however, as I have said, that the previous principles which have applied to s 83 need to now be analysed in the light of the obligations imposed under the Charter.

16 In the *Royal Victorian Bowls Association Inc and Ors* (2008) VCAT 2415, I noted that since the introduction of the Charter, in interpreting the word "*may*" in s 83, I must now interpret it in a way that is compatible with human rights and I cannot use the discretion provided in that section to sanction an exemption if the terms of that exemption cannot be justified taking into account the factors set out in section 7 of the Charter.

17 In *BAE Systems Australia Limited* (2008) VCAT 1799, Deputy President McKenzie pointed out that the Tribunal must take into account that the effect of an exemption is to take relevant conduct out of the Act's prohibitions and deny the redress that the Act otherwise gives to a person who is the victim of discrimination. The protections of the Act should therefore not be lightly overridden.

18 Most recently the President of this Tribunal has painstakingly analysed the history of the grant of exemptions by this Tribunal and its predecessor, the Equal Opportunity Board, both in the period prior to the implementation of the Charter, and also post Charter, in *Lifestyle Communities Ltd (No 3)* (2009) VCAT 1869. This decision has been published since the hearing of this application, so it has not been referred to by the applicant. I will, however, refer to the principles contained in that decision as assistance to me in considering this application.

In considering a s 83 application is the Tribunal acting as a public authority?

19 Section 4 of the Charter specifically names various entities which are deemed to be public authorities. It then goes on to specify that a public authority does not include –

> *"(j) a court or tribunal except when it is acting in an administrative capacity."*

20 Therefore to ascertain the circumstances in which the Tribunal is to be characterised as a public authority I need to decide whether in considering a s 83 application this Tribunal is acting in an administrative capacity.

21 The note to s 4(j) of the Charter suggests that committal proceedings and the issue of warrants by a court or tribunal are examples of when a court or tribunal is acting in an administrative capacity, and that a court or tribunal also acts in an administrative capacity when listing cases or adopting practices and procedures.

22 There are only a few Victorian cases in which s 4(j) has been considered in relation to a decision of a court or tribunal. One is a decision of a single judge of the Supreme Court in *Sabet v Medical Practitioners' Board Victoria* [2008] VSC 346. The latest in time is the *Lifestyle Communities* decision.

23 I do not propose to go into a detailed examination of the principles discussed in either of these cases. This is because in argument before me

both the VEC and the VEOHRC agreed that, in exercising power under s 83, this Tribunal is acting in an administrative capacity and therefore must comply with the provisions of s 38 of the *Charter of Human Rights and Responsibilities.* This has now been confirmed in the *Lifestyle* decision.

24 Whether this application under section 83 is looked at through the prism of section 32, or alternatively section 38, clearly I must determine the Charter rights engaged in the application, and apply the tests of justification and proportionality set out in section 7 (b) of the Charter.

What rights are engaged in this application?

25 The VEC identified the relevant human rights to be as follows:

1) the right to recognition and equality before the law, because the proposed exemption will permit the VEC to use criteria based on political belief or activity in advertising for staff, requesting information from job applicants and determining offers of employment;

2) privacy, to the extent that some of the information that job applicants will be asked to disclose will relate to political memberships, associations and activities that may be personal and are closely connected to individual identity and autonomy;

3) freedom of expression, to the extent that this right also protects the right not to impart information and because the VEC will be able to consider a job applicant's previous activities in publishing political opinions when it determines offers of employment;

4) freedom of association, because the criteria for employment includes past and current membership of political parties as well as current associations with lobby groups that promote political issues;

5) participation in public life, to the extent that the exemption may impact on the applicant's ability to access the Victorian Public Service.

26 The VEOHRC has suggested a further right may also require consideration. This is the right of freedom of thought, conscience, religion and belief. It says that this right is relevant because any restriction on the right of a prospective employee to express a political view must jeopardise that employee's right to hold such a view.

27 The VEC submits that it is not interested in confining a person's right to hold a political view. It does not aim to create a workforce which has no private opinions on political issues. It is the public expression of those political views which is the focus of this exemption.

28 Whilst this may be true, the distinction between what a person may think privately and what he or she may do publicly to support those beliefs is clearly a significant issue to be considered by me in this case. Thus, I propose to identify each of the rights I have outlined above, including the right to freedom of thought, conscience, religion and belief, as being engaged in this application.

The grounds on which the VEC seeks this exemption

29 On 23 July 2009 this application was listed before me for a directions hearing. On that day I required the VEC to publicise this application for an exemption. In particular, I required the VEC to place notices in the Age and Herald Sun newspapers and to place notices on its website and on various locations around its offices so that its staff would be able to understand what was proposed and make representations to the Tribunal if they wished to do so.

30 I also ordered that a copy of the notices be sent to the relevant unions and that a copy of the application be sent to the VEOHRC.

31 In response to this advertising this Tribunal has received three letters from individuals and a written submission from the VEOHRC. The Tribunal has not received any submissions or enquiries about this application from any union, nor from any current staff of the VEC.

32 The Electoral Commissioner for the State of Victoria, Steve Tully, filed an affidavit in support of the application and gave sworn evidence before me.

33 The Commissioner is not a public servant. He is appointed by Governor in Council. He operates independently of government in the same way as statutory appointees such as the Ombudsman and the Office of Police Integrity.

34 He does, however, appoint permanent staff who are classified as public servants. There are at present 83 permanent staff, equivalent to 71.4 full-time positions, who operate at the Commission's head office in Melbourne or at the Commission's warehouse.

35 Those staff are appointed pursuant to s 17 of the *Electoral Act* 2002. That section gives to the Commissioner power to appoint "*any employees that are necessary for the purposes of this Act*". Once appointed, those staff are subject to the *Public Administration Act 2004* and in particular the Code of Conduct which has been issued under that Act.

36 Section 17 does not itself impose any particular requirements of impartiality on those staff, except to require that they must not nominate for election to the Parliament of a State or the Commonwealth.

37 In the past exemptions have been granted by the Tribunal to the VEC concerning these staff. Those exemptions have identified particular staff positions at the Commission.

38 The first exemption was granted to the VEC in 1991, by the predecessor to this Tribunal, the Equal Opportunity Board. It has been renewed several times since, giving the VEC exemption from the Act on a continuous basis since the prohibition on discrimination on the grounds of political beliefs (or previously discrimination in private life) came into operation.

39 In granting this first exemption, restricted to the employment of returning officers, the Equal Opportunity Board said this

“The duties of a returning officer include accepting or rejecting nominations, conducting polling, conducting the count, dealing with complaints, registering or refusing to register how-to-vote cards and making certain rulings and the performance of such duties which require that each returning officer be independent and be seen to be independent.”

40 The exemption was renewed in 1995 after a hearing at which reasons for decision were published. The application for exemption was widely advertised, and only one person objected to the exemption sought. In granting the exemption the Board said:

“From an examination of the legislative provisions governing the electoral commissioner and his staff, it is clear that the State Electoral office is intended to be independent, that its staff is intended to perform their functions impartially, and that its staff should not be directly involved in political affairs (such as membership of a political party or standing for election to Parliament.

There is an overriding public interest in ensuring that State and Municipal elections are conducted by officials who are, and are seen to be, impartial.)

41 However, Tully gave evidence that the terms of those previous exemptions have become less adequate or appropriate. This is because there has been a fundamental change in the structure of staffing at the VEC.

42 The present structure of the VEC is distinctive in that it employs relatively few permanent staff and very many casuals. This is because as well as the 83 permanent staff the Commissioner appoints election managers and officials to assist with the conduct of elections. These appointments are made under s 18 of the *Electoral Act*.

43 As well as conducting State and Council elections, the VEC also tenders for a wide variety of elections of many various descriptions. Examples might be internal public service or union elections, ballots of residents in “dry

areas" as to the grant of a liquor licence, or elections pursuant to the rules of private clubs or sporting associations.

44 The appointments under s 18 are made to correlate with the workload of the Commission in conducting these various elections.

45 To prepare for a State election, the Commissioner initially appoints 200 senior election officials who are recruited and trained for service in that election. Each of the election officials is responsible to establish offices from which they conduct their appointed election, and then to appoint a sufficient number of election casuals to assist them in the election offices.

46 The senior election officials are appointed for a limited period of between 8–14 weeks. The election casual appointments are made from periods of as little as one day to as long as eight weeks.

47 This means that around the time of a state election the Victorian Electoral Commissioner will have, as well as the permanent staff of approximately 83 persons, a further 200 senior election officials and up to 15,000 casual and contract staff.

48 This is a significant workforce. It is important to stress that this workforce is overwhelmingly employed to conduct a particular election event, and the election officials and casual staff so appointed are not subject to the *Public Administration Act* or the Code of Conduct. They are not employed as public servants. They are appointed under the *Electoral Act 2002* or the *Local Government Act* 1989.

49 There is a similar reference in the *Electoral Act* prohibiting staff appointed under section 18 from nominating for election to state or federal parliament whilst holding an appointment.

50 The senior election officials are appointed as either election managers and assistant election managers, or returning officers or deputy returning officers, depending upon whether the appointment is for a state parliamentary election or a local government election. These persons are

responsible to receive nominations of candidates in election, to register how-to-vote cards, to manage candidates, to supervise the issue and counting of votes, to manage telephone enquiries and to perform other administrative duties.

51 In addition to those staff, the VEC has an audit committee. There are presently two members of that committee, both accountants, and a third position is presently vacant. The VEC wishes the exemption sought to also apply to membership of the audit committee.

52 The Electoral Commissioner submits that all of these staff and audit committee members may be required to make decisions of a highly contentious nature from time to time in the course of carrying out their duties. They could be seen to be partisan if they have been engaged in any activity that could be perceived to compromise their independence.

53 Examples that he has given of decisions required to be made by these staff include ruling on acceptance or rejection of nominations, ruling on whether ballot papers are formal or informal, providing information to an elector as to how to complete the ballot material, and dealing with complaints by candidates, or about candidates.

54 The election casuals have similar responsibilities under the supervision of the senior election officials.

55 In giving evidence before me, the Commissioner contrasted the Australian system of electoral supervision with that of countries such as the United States of America. He told me that in the USA all returning officers must be members of a political party and are in fact nominated by their particular party to that role. In contrast, in Australia there is a clear delineation between the scrutineers who are appointed by political parties and who are vitally interested in the outcome of an election, and those administering the election, who are completely disinterested in the outcome of the election.

56 He told me with some pride that when he has visited polling booths during an election, and even polling booths which were regarded during the election as crucial to the outcome, his officers would be acutely aware of and report on administrative issues relating to the count, but would often not be aware at all about the state of the counting in the booth, or the suspense generated in the media or by political supporters by an anticipated close result.

57 He impressed on me that this delineation between those supporting the democratic process by participating in elections, and those supporting the democratic process by administering the elections, was fundamental to the operation of Australian democracy and that he had crafted the proposed exemption to preserve this delineation.

Discussion of the grounds relied upon by the VEC

58 The Commissioner described Australian democracy and its electoral processes as the envy of many countries. In his words –

> *"International observers at both federal and state elections marvel at the orderly way elections are conducted, the absence of violence, the level of trust in results and the orderly transition to government by previous opposition parties. This continued standard is reliant on the legislation and effective operational and personnel practices. A quick review of recent elections in Zimbabwe, Afghanistan, Iran, Papua New Guinea and Fiji demonstrates what can happen when administration is compromised or when public trust is lost. This is not only true in emerging and fragile democracies but in established ones such as the 2007 elections for the Scottish parliament and the 2004 US presidential elections."*

59 Mr Tully urges me to consider this application from the fundamental standpoint that the conduct of elections and of election officials needs not only to be impartial, but to be seen by the entire community to be impartial, in order to maintain the extremely high standards and high level of public trust in the democratic process. He stresses that these considerations apply

not just to state political elections but also to all of the other description of elections conducted by the VEC.

60 The Commissioner especially relies upon the following historical and emergent issues:

(a) Election results can be very close. In the 2008 local government elections, six elections were decided by a margin under 10 votes. In the 2007 federal election for the seat of McEwen the seat was won by a margin of 31 votes. At the last state election, the seat of Ferntree Gully was decided by a margin of 27 votes. The upper house seats that determined whether the government had an upper house majority at the 2006 state election were determined by less than 100 votes. The Commissioner says that this extremely close counting puts particular pressure on electoral officials. This is because particular decisions that they might make, such as conducting the count, rejecting ballot papers as informal, or providing information to a particular voter as to how to complete a ballot paper, might make the crucial differences in the returning of a candidate or, possibly, the return or removal of a government.

(b) The Electoral Commissioner suggests that all election officials, not just those in senior positions, can expect to be closely scrutinised by losing candidates. In his view this trend is an increasing one. Criticism can be trenchant but is not always rational. He gave an example of one losing candidate who challenged the impartiality of an election official because the losing candidate did not accept the accuracy of the count, declaring that he knew that he was more popular in the electorate than his opponent.

(c) The Commissioner points to the emergence of the internet and associated media. He says that this means that election officials' private lives are now under scrutiny in a way that was never the case before. Any activity in which an electoral official has been involved, whether by membership of a private club or association, will be traced by members of the community skilled in using the internet. This means there are potentially more allegations to be made of bias than in the past, when the individual interests and activities of electoral officials were not available to the public.

(d) In addition the Commission says that there have been some significant changes in the way the Commission conducts elections since it was granted a first limited exemption in 1991. He points in particular to the centralised processing of nominations and registration of How-to-vote cards, the centralised counting of votes for the Victorian legislative council, the management of complaints relating to the actions of candidates or parties and the handling and distribution of resources to election officers and voting centres, including used and unused ballot papers.

These changes have been brought about by the increased use of information technology systems. This means that information is now far more accessible via computer applications within the electoral office itself than it has been in the past.

61 The Commissioner particularly emphasises that there are many functions conducted by his staff which are very politically sensitive and could, if misused, compromise the integrity of the electoral process. He nominates these functions to be the maintenance of the Victorian Register of Electors, the registration of political parties which gives access to party membership lists and confirms the legitimacy of members (thereby raising the issue of branch stacking as a potential matter on which statistical information may be accessed by members of staff), the conduct of local government representation reviews, the provision of technical support and information technology – in particular to the Electoral Boundaries Commission – and investigations regarding alleged breaches of the *Electoral Act*.

62 Overall the Electoral Commissioner submits that the VEC has seen an increased level of scrutiny over the past 10 years. He describes the environment in which the Commission must work now to be an extremely transparent environment. It is an environment in which the Commission is concerned more than ever before with not only the actuality of independence, but also the public perception of its independence. The Commissioner welcomes this transparency. He wishes to respond to it by setting out clearly the terms on which his staff will be accepted for appointment.

63 The Commissioner gave several examples of concerns that have been raised in the past with him as to the partiality of staff. The examples were given not to show examples of actual bias but to show how careful his staff must be to avoid any possibility at all of a perception of partiality.

(a) One example he gave was of a person who was employed by him as a returning officer in a municipal electoral council election. The staff member had been employed by that council as a casual receptionist over 10 years before. An allegation was made that this period of employment had compromised the independence of her role as a returning officer.

(b) Another example was given that in a municipal election the brother of a candidate was employed by the Commission as a programmer during the development of the Commission's computer count application. The complaint was made that this may potentially have compromised the independence of the count.

(c) In a local government review panel established by the Commission there was a complaint that a member of the panel was a resident of the municipality under review.

(d) And, lastly, in a local government election an allegation was made that a returning officer had recently been a school council president for a school which had lobbied that council, and that this had compromised that officer's impartiality. The conduct complained of had occurred many years prior to his appointment as a returning officer.

64 Mr Tully gave evidence of another significant change in staffing at the VEC. He said that although staff were recruited to particular and often specialised tasks, his policy was that all staff, no matter how senior or how specialised, may potentially be involved in the functions of vote counting or the processing of very sensitive electoral information.

65 In part this policy has developed out of necessity. It is impossible to anticipate the actual workforce needed for an election, because it is never possible to tell whether a vote will be very close and require a recount. If a recount is required it must be conducted as quickly as possible, to give certainty to the election result. In such circumstances the Commissioner draws upon all of his staff, executive or not, to assist.

66 But in part this is also a philosophical commitment of the VEC so that all staff know and understand the functions performed by the Electoral Office, and thus are a workforce of optimal flexibility and efficiency.

How these criteria would be applied

67 Mr Tully suggested that if the exemption was approved, the Commission would proceed with its normal process of interviewing and assessing applicants for its positions without reference in the first instance to these criteria. Once an applicant was determined to be otherwise qualified to be employed, the Commissioner would then require that person to be employed to disclose whether or not any of the proposed exemption criteria applied to him or her.

68 The Commissioner would himself then personally evaluate whether the employment of that person was reasonable, based upon the nature of the role being sought, the nature of the activity disclosed and the potential for the disclosed activity to compromise the independence and impartiality of the Commission.

69 Different considerations would apply depending upon whether that person was to be employed, for example, in a state election or a local council election, or an election of a private nature such as a union election.

70 If the Electoral Commissioner had doubts about the employment because of past disclosed political activity he might then employ the applicant but consider the allocation of tasks or projects to that applicant based upon the nature of the activity disclosed. If employment was offered it may be on a limited basis.

71 The hypothetical example the Commissioner gave was that of a job applicant for a role as a communications officer responsible for preparing advertising schedules and media releases. If the applicant disclosed having had been a member promoting a particular issue for the Port Phillip City Council elections 10 years ago, the Commissioner may in those circumstances choose to employ the person but ensure the person was not allocated to projects associated with any Port Phillip City Council elections.

72 If the Commissioner decided not to employ that person at all, he would notify the applicant that his application for employment was to be rejected on the basis of one or other of the criteria and allow that employee to make submissions to a panel to be established within the office of the Electoral Commissioner as to why that decision should be overturned.

73 Mr Tully gave evidence that his overriding purpose in assessing all of these applications would be to ensure that staff selected are politically neutral in respect of each election in which they are engaged, not only in the way they carry out their duties, but so that there was a clear perception of their neutrality within the community.

74 I asked Mr Tully to explain how he would apply each of the suggested criteria if this application was successful. The Commissioner suggested that he would take the following approach:

1) Current or previous membership of any political party in Victoria, any state or territory or the commonwealth

Firstly he would expect that current or previous membership of any political party in Victoria, any state or territory or the Commonwealth would normally totally preclude employment within the Commission. He acknowledged that this would not be an inflexible rule but said he could not conceive of any situation in which current or past membership of a political party, carrying with it the obligation of a member to advance the interests of that party, could be consistent with the impartiality required of his staff.

He suggested that if a time limitation was to be imposed between membership of a political party and the application for employment, there may be some situations where activities that have taken place quite a long time ago may compromise impartiality, where others may not.

He gave a hypothetical example of a person who might be a well known campaign director of a political party but who had retired from that role and from the party over 10 years ago, and then applied for employment at the Commission. Such a person would be potentially well qualified in the operation of elections, but with such a previous high profile would be a highly undesirable appointment for the VEC because of the potential for perception of political bias regardless of whether the person involved did in fact act in a partisan manner in carrying out his or her responsibilities.

2) Current membership or association with a lobby group (excluding membership of a union or professional association) promoting a political position on an issue before the electorate at an election.

The Commissioner emphasised that this criterion was to apply to the promotion of a political position on an issue which was squarely before the electorate at the election in which the person was to be employed. He would not be using this criterion in relation to lobby groups a person may have been involved with at any previous elections.

He acknowledged that the rationale of this prohibition was not easy to define. It may be that a lobby group exists over many successive elections to lobby for the same or similar issues. He did not give an example but examples come readily to mind – *Save Our Suburbs,* or the *Right to Life* lobby are but two of them. A staff members past membership of a controversial high profile lobby group may in some circumstances significantly impact on perceptions of impartiality, even if that membership had ceased prior to his or her employment.

In the Commissioner's view it would be too arduous to require disclosure of membership of all lobby groups during a person's life. The privacy implications of such a requirement would be enormous. He had therefore confined the second requirement to concern itself only with issues arising in the election for which that person was employed.

3) A person who has held office of councillor for a Victorian local council

The third requirement – a person who has held the office of councillor for a Victorian council election – should, he thought, attract the same approach as that for a member of a political party. That is, it should be an absolute bar. He described the office of councillor as being an extremely political position and a position inconsistent with the perception of impartiality.

4) A person who has published or publicly expressed a political opinion on an issue before the electorate at an election

The Commissioner stressed that this criterion was designed to apply only to the election for which that employee was employed. The example he gave was of writing a letter to a newspaper on a current issue squarely raised before the electorate in that election.

Mr Tully acknowledged that this criterion would potentially disqualify all persons from employment who had written a letter to the newspaper or spoken on talk-back radio, or been interviewed in any way about any matter affecting government policy in the lead-up to the election. He also acknowledged that it would be difficult to identify the commencement to this period. Should it apply only after the election date was announced? Or should the exemption cover a fixed period of time before an election? Mr Tully acknowledged that fine distinctions might need to be made by him in interpreting this part of the proposed exemption.

75 When Mr Tully was giving evidence before me, I asked him to comment on the submissions made by three private individuals who had responded to the advertising of the exemption.

76 Cynthia Pilli had submitted that the Commission had assumed that employing people who kept their opinions secret would assist in reducing the perception of political bias, but that this assumption was naïve. She argued that citizens who were active participants in a democracy were much more likely to respect and protect the democratic election processes than those who have not been so engaged, or those who deliberately keep their individual political views hidden.

77 Further, she suggested that the Commission would not be able to apply the proposed exemption consistently, as the criteria were far too subjective. She wondered whether or not a person such as herself might be rejected because she had been an advocate for children with an intellectual disability and for inclusive mainstream education and services for such children, whereas a person who had been uninterested in social issues would be preferred for employment.

78 Mr Tully suggested that cases such as hers showed that flexibility would be needed in interpreting exemption criteria.

79 Another objector was Ruth Gstrein. She described herself as being the current mayor of Corangamite Shire Council and having been a councillor since March 2002. She complained that her involvement in running elections, which had spanned almost 30 years, would be brought to an end if the exemption was granted.

80 In her view staff should be employed by VEC on their ability to carry out their duties and not be excluded just because they might hold a position as a councillor in local government. She repeated the view expressed by Ms Pilli that citizens should be encouraged to take on roles in their local communities and that the exemption, if granted, would discourage community involvement. She suggested that the application questioned her integrity for no reason and was an assault to her human rights.

81 Mr Tully expressed the view that this submission took no account of the potential conflicts which could arise in the role of election official. He particularly emphasised that it took no account of the fundamental difference in Australian democracy between those participating in the election process and those administering the election process.

82 Alan Brownrigg also responded to the application. He said that he had applied for a temporary position with the VEC in March and was rejected because he had been a member of the ALP for a short time more than 35 years ago. He thought it inappropriate that he could not erase his membership of a political organisation so long ago and was thus permanently barred from obtaining a job at the VEC as a result. He suggested that if an exemption was to be granted there should be a time limitation.

83 He also suggested that the VEC would not be able to provide any evidence that people who are, or have been, members of a political party were likely to be less honest or have less integrity than the general population.

84 In response Mr Tully reiterated his view that the community would not regard a person who had at one time been a member of a political party as impartial, no matter how long ago the membership had ceased.

85 Mr Tully gave evidence before me that over the last five years VEC has employed approximately 15,000 staff, and in that time he had only refused an application for employment twice on the grounds of the political activities of the applicant.

86 He later clarified that answer in correspondence to the Tribunal. Although he has only been called upon to consider political activity as a ground for exclusion twice in that time, the Recruitment Coordinator of the VEC had, relying on the previous exemption, recently disqualified 19 out of 238 applicants because those applicants had previously been members of a political party.

How should the Charter be applied to the facts set out so far in this application?

Section 7 factors

87 I must now consider the proposed exemption in the light of the factors set out in s 7(2) of the Charter. That section provides as follows:

> *"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."*

88 The Charter rights which are engaged by the proposed exemption are not absolute. This is clear from the wording of s 7(2) of the Charter. The VEC says that when I consider the factors which are set out in that section and all other relevant factors I should come to the conclusion that the proposed exemption is a reasonable limit on the human rights which I have identified and which can be demonstrably justified in our democracy.

89 Section 7 of the Charter requires me to consider its various elements within the context of living in a free and democratic society. Not all societies are free or democratic. I take it from these words that in dealing with a human right, I must place great emphasis on the fact that Victorians live in a society in which free and democratic elections are conducted, and that the Charter directs me to interpret all legislation in a way which preserves and protects those free and democratic elections.

90 I accept the VEC's argument that it would be a body blow to our free and democratic society if those administering the electoral process did so from the standpoint of partiality. I accept that impartiality in those administering elections at all levels in our society, whether they be state elections, council elections or special purpose elections, is vital to the protection of freedom and democracy.

The nature of the right

91 The rights which are engaged by this application are of the highest importance. The right to recognition and equality before the law is one of the touchstones of our democracy. The right to privacy, freedom of expression, freedom of association and participation in public life are also fundamental building blocks of our democracy. The VEOHRC suggests that the common thread of those rights is that they facilitate and protect both individual and collective participation in our democratic processes. The VEOHRC suggests, and I agree, that they are "*the key to building and sustaining a robust democracy*".

The importance of the purpose of the proposed exemption

92 It is clear that the purpose of the exemption, being to ensure that the VEC is, and is seen to be, truly independent and impartial in the conduct of elections is a very important public purpose.

93 This case differs from that of many other applications for exemption in that the exemption is not sought for any commercial purpose, nor for any financial gain.

94 In *Lifestyle Communities*, Justice Bell considered that the exemption power could not be exercised in a way which would defeat the purposes of the *Equal Opportunity Act*. He specifically declined to follow the reasoning of a former President of this Tribunal, Justice Morris (as he then was) in *Boeing Australia Holdings Pty Ltd*, (2007) VCAT 532, that an exemption could be granted even if it was contrary to the purposes of the Act if it was "*necessary or desirable to avoid an unreasonable outcome*".

95 This is not a case which can be likened to the armaments industry cases, where the acknowledged effect of the exemption is to perpetuate disadvantage, and the only justification is to be found elsewhere in an unrelated public purpose.

96 I accept that it is also not a case such as the many exemptions which are given to various racial groups, and especially in respect of indigenous Australians, where the discrimination authorised by the exemption plainly promotes the interests of minorities within our community in recognition of past disadvantage, and is thus directed to achieving real equality in our community.

97 But equally this should not be regarded as a case in which the ultimate purpose of the Act will not be achieved by reason of the exemption. In this case the purpose of the exemption is intrinsically bound up with, and reinforces, the rights which are sought to be limited.

98 The VEOHRC submitted that there may be compelling reasons for the group of individuals who occupy roles that form part of the democratic

machinery itself (that is, the machinery responsible for administering democratic elections) be restricted in the exercise of rights they would otherwise clearly have, in order to protect the impartiality and integrity of our democratic framework.

99 Here, by giving up the right to express their own political views or to engage in conduct of a political nature, the employees of the VEC may be seen as making the free expression of political views via the ballot box possible for all Australians. Thus, rather than defeating the purposes of the *Equal Opportunity Act*, this exemption is a means of protecting the democratic framework within which all citizens rights to equal opportunity can be exercised.

The nature and extent of the limitation

100 The first thing to note about the exemption claimed is that the VEC does not intend to automatically exclude job applicants who come into the above four categories. What it wants to do is to be able to take this information into account when deciding whether or not to employ candidates who have already shown themselves to be otherwise suitable for employment by progressing past the first stage of interview with the Commission.

101 The Commissioner also acknowledged the impossibility of adequately exploring or monitoring relationships between employees and other persons. In discussing the example outlined previously, of the employee having a brother who was a candidate, the Commissioner acknowledged that there was no way that the VEC could successfully monitor those family relationships and that it did not apply to do so.

102 The VEC thus submitted that the extent of the limitation was essentially to require disclosure, and not to enforce a complete prohibition. The disclosure was not to be required of all job applicants, but only of otherwise successful job applicants, whose disclosure would be treated in confidence, and who would be provided with an opportunity to argue the case before a decision was made to use the criteria to bar employment.

The relationship between the limitation and its purpose

103 In *Lifestyle Communities*, Justice Bell considered that the terms of any exemption must be "*clear, publicly accessible and not arbitrary.*"

104 There are aspects of the proposed exemption which are not clear and which appear to be arbitrary. I am concerned at how the various limitations which would be imposed, should this exemption be granted, can be demonstrably justified. It has been exceedingly difficult for me to conceptualise how the limitations sought will completely achieve the purpose for which they are intended.

105 The proposed exemption concerns itself only with the stage of job recruitment. It will not apply to already-employed staff, although it is true that once employed the Code of Conduct will cover permanent staff, and that casual staff are typically employed for only short periods of time.

106 Further, as the VEOHRC and the submission of Pilli points out, the proposed exemption identifies only perceived bias and not actual bias. The criteria will identify those who have acted in a manner supportive of a political party, even though such a person may in fact strongly support the impartiality of the electoral process, and conduct his or herself with complete integrity if employed. The exemption will have no effect in respect of a person who has not overtly supported a political party, but is prepared to act from a standpoint of bias. As the VEOHRC points out, a past reluctance to publicly declare one's political sympathies does not demonstrate impartiality.

107 However, the fact that this exemption cannot solve every one of the problems faced by the VEC in ensuring the impartiality of its staff should not be determinative. I have found it impossible to conceive of criteria which could be used by the VEC to identify actual bias. I have concluded that the proposed criteria are relatively blunt instruments, but may be better than no instrument at all.

108 As Tully points out, the fact that actual bias may not be known or declared does not provide an excuse for not acting on what is known and declared. The VEC submits that the perception of political bias can be just as damaging to the independence of the VEC as any detection of actual bias in the performance of an election officials duties.

109 However, it still concerns me that there is a lack of clarity in the terms of the exemption proposed. The VEOHRC originally suggested in its submission that the exemption as proposed was far too uncertain. It pointed out that some of the criteria proposed were broad and open to interpretation, and the application did not identify the process selection panels or staff responsible for recruitment would need to follow in the event of a disclosure. The Commission took the view that the lack of detail about the practical operation of the exemption needed to be resolved before a decision was made on the application on its merits.

110 The Commission therefore suggested that the VEC formulate proposed guidelines to assist recruitment panels, and explanatory material to applicants regarding the reason why the information was being sought and how any disclosures would be used. The VEOHRC also suggested that the VEC provide information as to how the exemption will be applied across position descriptions – that is, whether the criteria would be applied in any different way according to the job to be undertaken by the applicant. Finally, the Commission stressed that the applicant would need to monitor its use of the exemption carefully.

111 Those matters of concern were addressed in the submissions filed by the VEC in the following way:

1) The VEC indicated that it would modify its present job application form to explain why it was necessary to request the disclosure of political activities and identify the particular exemption provided by this Tribunal so that applicants were aware of its terms.

2) The determination would be made by the Electoral Commissioner.

3) The information would be kept private pursuant to the VEC's privacy policy.

4) All necessary steps would be taken to restrict access to information about disclosure to those in the organisation who needed to see it.

5) An applicant would have the option of making the disclosure directly to the Electoral Commissioner if an applicant chose to do so.

112 Further, the VEC suggested that it was prepared to agree to a condition that the use of the exemption be monitored by the Tribunal on a regular basis, in the same way that monitoring has been ordered in relation to exemptions granted in the armaments industry.

113 At the time of this hearing the representatives of the VEOHRC indicated that they were satisfied following discussions with the VEC, and in particular by the evidence of Mr Tully, that the concerns that they had raised regarding the uncertainty of the nature and extent of the exemption had been resolved.

114 It is true that sufficient detail has now been provided by the VEC as to the manner in which the exemption will be implemented. However I remain concerned that it remains difficult for either a job applicant or the Commissioner to know exactly what activity should be disclosed, and to predict whether it will preclude employment.

115 The purpose of the grant of an exemption under s 83 is to allow everyone in the community to know where they stand in respect of the conduct which is exempted. Without an exemption a prospective employee of the VEC could be certain that his or her rights identified in this application would be protected. That employee would know that he or she may express any political belief at all and may join any lawful organisation and not thereby be excluded from employment at the VEC.

116 It is not to the point that the Commissioner intends that the criteria not be an automatic prohibition, but just represent factors which he is entitled to take

into account in offering employment. The exercise of discretion by the Commissioner adds to the uncertainty, rather than justifying it.

117 I have reached the conclusion that any exemption which is granted must be an exemption which is precise enough for both the VEC and the prospective employee to know as far as possible what the terms of the exemption are, and the circumstances in which the *Equal Opportunity Act* is not to apply.

Any less restrictive means reasonably available to achieve the purpose

118 The VEOHRC suggested that the VEC should be required to demonstrate why it was that the Code of Conduct derived from the *Public Administration Act* 2004 was not sufficient to address any issue of partiality or bias by its staff, and that the VEC needed to identify what policies and practices it currently has in place to ensure appropriately impartial conduct by all staff once employed. The VEOHRC asked the Tribunal to consider why, if these are properly implemented, adhered to and monitored, these policies and procedures would be insufficient to deal with perceived as well as actual bias.

119 Each public sector employee is bound by a Code of Conduct issued under the *Public Administration Act 2004*. The Code is widely publicised within each government department. The Code requires employees to demonstrate impartiality by -

"*making decisions and providing advice on merit and without bias, caprice, favouritism or self interest, and*

acting fairly by objectively considering all relevant facts and fair criteria, and

implementing Government policies and programs equitably."

120 A public sector employee is bound by the Code to respect and promote the human rights set out in the Charter, and is bound to require contractors and consultants to comply with the Code.

121 The Code specifically deals with political activity by public sector employees. Under the heading "Remaining Apolitical" it provides -

"Public sector employees conduct themselves in an apolitical manner. They implement and administer the policies and programs of the elected government. They avoid in the course of their work, any participation in activities which support a political party or independent candidates including attendance at fundraising or similar events"

122 The Code also provides for the circumstances in which public sector employees may make public comment as follows -

"Public sector employees only make public comment when specifically authorised to do so in relation to their duties, a public sector body, or government policies and programs. Such comment is restricted to factual information and avoids the expression of personal opinion. Public comment includes providing information or comment to any media (electronic and print), the internet and speaking engagements.

When making a comment in a private capacity, public sector employees ensure their comments are not related to any government activity that they are involved in or connected with as a public sector employee and make it clear they are expressing their own view. They ensure personal comments do not compromise their capacity to perform their public sector role in an unbiased manner, and that their comments are not seen or perceived to be an official comment."

123 In 1995, when the Equal Opportunity Board decided to grant a previous exemption, it considered that the existence of the obligations under the *Public Administration Act* and the Code of Conduct were a sufficient reason to not extend the exemption to apply to the employment of permanent public servants.

124 Although the Code is comprehensive, it is primarily directed to maintaining a separation between the private political views and the public functions of

a public sector employee. It does not directly inhibit the expression of private political views except in circumstances where they may be mistaken for the views of government. The Code does not prohibit public servants from being members of a political party, or actively supporting the aims of a party, or from lobbying on election issues. Neither it should, for the Code applies to all public servants, and public servants are as entitled as the rest of the community to actively participate in our democratic and social processes in these ways.

125 The VEC submitted that if it was forced to rely only on the Code of Conduct once the applicant was employed, it would not have any grounds to screen prospective employees to enable it to manage the risks that were identified in the affidavit of Mr Tully.

126 Mr Tully also pointed out that casual staff would not be subject to the *Public Administration Act 2004*. Casual staff can be employed for as little as one day or as long as fourteen weeks.

127 In addition to relying on the Code, the VEC presently requires its staff to sign a Statement of Impartiality before appointment. That statement reads as follows:

> "*I declare that I am not, and have not, engaged in any activity that would compromise my impartiality, or which could be seen to compromise my impartiality, in the exercise of the duties of an election official.*"

128 Further, election officials (not all staff) are required to abide by the VEC Code of Conduct for Election Officials. The Code requires appointed election officials to (inter alia) treat everyone fairly, "*not associate with political parties/candidates/lobby groups*", refrain from comment on political matters, and disclose interests that may impact on impartiality.

129 Although I did not hear argument on this issue, it appears to me that this Code and the Statement of Impartiality do not appear to have any statutory basis, except for the sections of the *Electoral Act* to which I have previously

referred. Thus the VEC may not presently have the power to require disclosure under the Statement or adherence to Code of Conduct for Election Officials.

130 The VEC submitted that the fact that one could point to the existence of less intrusive means of regulating staff did not mean that the Tribunal was obliged by the Charter to rule out more comprehensive measures of ensuring the impartiality of VEC staff.

131 In making this submission, the VEC relied upon the observation of Justice Hollingworth in *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 246 at paragraph 188 where she stated this:

"As far as s 7(2)(b) is concerned, it is common ground that, in considering whether there is any less restrictive means available, there is no obligation on a public authority to choose the least intrusive means possible. Rather, the court is required to consider whether the chosen measure falls within a range of reasonable alternatives."

132 The VEC submitted that the exemption did fall within the range of reasonable alternatives for all the reasons relied upon in its affidavit. The VEOHRC agreed.

133 I also agree that I should not necessarily opt for the least restrictive means available to achieve the purpose of ensuring a free and impartial election process. Given the high profile of the VEC within the community, and the importance of its public role, the appropriate course is to formulate an exemption which spells out as clearly as possible the way in which a job applicant's political beliefs and activities will be taken into account in deciding whether or not to offer employment.

My conclusions as to the application of s 7 of the Charter to this application

134 I must decide if the granting of the exemption on the terms sought represents a reasonable limitation on the rights identified, a limitation which can be demonstrably justified in a free and democratic society based on

human dignity and freedom and having regard to all relevant factors, including those specified in section 7(2) of the Charter.

135 In my view the exemption should be granted, but on more limited terms than those proposed by the VEC.

136 The terms of the 1995 exemption, which have been repeated in subsequent exemptions until now, were as follows:

> "*This exemption is granted only for the purpose of enabling the respective employer of electoral officials to take into account the fact that those seeking employment as electoral officials hold or do not hold political beliefs or views or engage refuse or fail to engage in political activities.*"

137 Each exemption granted has expressly nominated several categories of employment positions to which the exemption related.

138 I accept the Commissioner's submission that this form of exemption is now insufficient, and that any exemption granted should not now focus on individual positions, for the reasons explained in the Commissioner's evidence.

139 The original exemption allowed the VEC to take into account political views as well as political activity in assessing potential employees. As I have outlined, the Commissioner does not now seek to ascertain the private views of potential employees. I agree that it is not necessary or desirable that an exemption allow account to be taken of political views in themselves. Any such criteria would in my view be unenforceable. It is simply too difficult to visualise how the VEC could ascertain the real political views of intended employees. But more importantly there is insufficient connection between the scope of such a limitation and its avowed purpose.

140 I do consider it appropriate that the VEC take into account demonstrated political activity when considering the employment of staff. Such activity

is, in my view, inconsistent with the requirement of actual impartiality of an employee, and the community perception of impartiality.

Membership of a political party or the holding of a political office

141 Firstly it can be clearly demonstrated that membership of a political party is inconsistent with employment at the VEC, as membership is conduct which necessarily involves commitment to advancing the political objectives of that party. This is because one cannot be a member of any political party and refuse to actively support its political aims.

142 It can also be clearly demonstrated that the holding of any political office in the community, at any level of government, including local government, involves conduct supporting express commitment towards supporting the political platform of that office. One cannot hold public office and refuse to actively support the political aims of that office. No exemption is needed in respect of the holding of office as a member of the federal or a state parliament, as this prohibition is already contained in the *Electoral Act*. A prohibition is however required in respect of local government.

Past holding of political office or membership of a political party

143 I find it harder to decide whether past membership of a political party or holding of political office should be a bar and, if so, for how long. The further in the past, the less clear is the link between the purpose of the limitation and the limitation proposed.

144 There are well known examples of public figures who have completely changed their political allegiances over time. A person may lose interest in politics altogether. A young person may join a party and then become apathetic on maturity. One would normally expect that failure to renew membership would be a good indicator of loss of political convictions or interest.

145 For these reasons, I do not agree with the Commissioner that a lifetime ban on a person who has been a member of a political party is warranted. There

is too tenuous a link between such a severe limitation and the purpose of the exemption.

146 I do agree that a lifetime ban should be imposed on a person who has sought preselection for state, federal or local government. This is because preselection for political office of any kind represents a fundamentally more intense commitment than membership of a political party, and it is, in my view, less likely that political views declared in this public way will dissipate over time. Even if in fact such a person was to disavow any political predilections, it is also more likely that the perception of bias would remain in the public mind than would be the case if the person had simply at a past time joined a political party.

147 I agree with Mr Brownrigg that a lifetime ban on a person who has been a member of a political party is unreasonable. The question is, what time limitation is reasonable in respect of past membership of a political party?

148 I have considered whether I should use the yardstick in several states which applies to spent convictions. This period is generally ten years, although there are many variations on the circumstances in which it comes into effect.

149 I appreciate that this legislation does not exist in Victoria, and that where it does exist in other states and at the federal level it was created for completely different purposes, but it does provide some assistance to me in that it represents acceptance by at least some Australian parliaments that in some contexts it is accepted that behaviour and attitudes can change over time, and that past behaviour does not necessarily predict future conduct.

150 For all the reasons outlined by the Commissioner, I think a longer period than 10 years is required. A person may retain strong political sympathies and yet not act on them. A perception of bias may remain long after any actual political sympathies have evaporated. There being no satisfactory guideposts, I make my own estimate. I think the community would expect that past members of a political party should be excluded from employment

at the VEC for a substantial period of time. I fix that time at fifteen years from the lapse of membership.

A course of conduct supporting a political party or independent candidate

151 I am conscious that if membership of a political party was the only criterion, there may be instances in which a person who was clearly aligned with and identified as a supporter of a political party may not be excluded from employment by operation of the exemption.

152 Clearly it would not be appropriate for a person to manipulate the terms of the exemption by eschewing party membership, but publicly engaging in activity supportive of a party or candidate’s aims. Similarly, there may be persons who have engaged in conduct supporting the political aims of a candidate for local council. For the same reasons as I have expressed above, the Commissioner should be entitled to exclude such a person.

153 This issue has not been directly raised by the Commissioner, but the documents which he has filed, particularly the Code of Conduct, the Code of Conduct for Electoral Officials, and the Statement of Impartiality raise this as a significant issue to be covered in this exemption application.

154 I have therefore decided to extend the exemption to cover a person who has engaged in a course of conduct within the past 15 years directed to supporting the aims of a political party or independent candidate in the federal, state, or local council arena. I do not intend by these words to catch a person who has been involved in isolated instances, such as a one-off attendance of a fundraising dinner, but to authorise refusal to employ persons who have regularly engaged in conduct supportive of a political party or independent candidate.

155 In each case it will be a question of fact for the Commissioner to decide as to whether the conduct disclosed amounts to a course of conduct, and whether therefore refusal of employment of such a person is justified by the exemption.

Conduct promoting a political position on an issue in an election

156 I now come to the most difficult question. It is relatively simple to define membership of a political party, and to decide whether a person has engaged in a course of conduct supportive of a political party. But how should I decide what other conduct or activity of a political nature should be the subject of an exemption?

157 I have already expressed the view that I should not grant an exemption which is so uncertain in its application that neither the VEC nor an intending employee can know in advance what is prohibited conduct.

158 There have been several Victorian decisions which have considered what activity is encompassed by the words "*political belief or activity*". In *CPS Management v Equal Opportunity Board* (1991) Vol 2 VR 107 Marks J considered that the word political should be given its ordinary dictionary definition. He considered it to refer to an issue which "*bears on government*". He said it concerned the "*form, role, structure, feature, purpose, obligations, duties, or some other aspect of government*".

159 His Honour suggested at page 112 of the judgment that political beliefs were beliefs -

> "*of a political kind which differ in kind from beliefs which underpin the existing social structure, such as beliefs in honesty, an assumption on which our social structures including government are erected.*"

160 Deputy President McKenzie considered this possible distinction between *"political"* activity and *"ethical"* activity in determining whether a belief in social reform was properly to be included in the definition of political activity in *Moloney v State of Victoria* (2000) VCAT 1089. Similar questions were also posed in *Boase* (VCAT Case No 14,267 and 188 of 1988 19 August 1999 – an unreported strike out application).

161 Both *Moloney* and *Boase* were cases in which the various Complainants had been active in pressing for reform to child protection policies, promoting the platform of the Australian Association of Social Workers. The Tribunal

held in both cases that it was arguable that participation in a campaign of opposition to government child protection policies could be described as political activity.

162 In *CPS Management*, Marks J referred to and applied a decision of Vincent J (as he then was) in *Nestle v Equal Opportunity Board* (1991) VR 805. In that case several complainants alleged they had been dismissed or not reemployed by Nestle because of their membership of a union or participation in union activities. The question in that case (decided in relation to the now defunct "private life" attribute,) was whether membership of a union could be described as political activity. His Honour decided that the concept of political activity was not wide enough to include this industrial activity, and thus each complainants claim failed.

163 It is clear from an examination of the above cases that there is significant uncertainty in characterising particular activity as political, as opposed to ethical or perhaps humanitarian activity. I find it particularly unsatisfactory to characterise political activity as activity that "*bears on government*" as opposed to conduct bearing on ethics. I agree with the observation of Deputy President McKenzie in *Boase* that the social mores of the time may play a significant part in determining whether a particular issue is to be characterised as political.

164 It is therefore hard to give an answer to Cynthia Pilli's question as to whether her activism for the rights of the disabled would be characterised as political activity so as to disentitle her to employment at the VEC. In *Moloney,* a critical aspect of the case was that the government had become extensively involved in the issue of child protection reform because of intense public scrutiny of the child protection service, particularly official enquiries, parliamentary reports and media publicity.

165 I empathise with the observation of Vincent J in *Nestle* that –

> *"Personally rewarding and satisfying as it undoubtedly would be for me to resolve for philosophers and political scientists alike the problem of*

defining the nature and ambit of politics in present day society, it is not by reason of a thoroughly justified sense of humility that I do not propose to embark upon such an enterprise."

166 In the case before Vincent J, he thought it unnecessary to define political activity in the abstract as his task was to interpret the statute under which the claim had been brought.

167 In the application before me, I do not consider it necessary to precisely define political activity because for the purposes of application of this exemption I think it is likely that the definition of what is political changes with the fact situation of each election. An election for a liquor licence in a dry area might raise highly controversial issues- completely different, yet just as "*political*" within the context of that election as any issue that might arise in, for example, a state government election.

168 The answer to Pilli's question thus seems to be – it depends on an analysis of all the circumstances.

169 The real question which the Commissioner should be allowed to consider seems to me to be whether the issue identified is a current issue which might bear on the outcome of the election for which that employee is employed. Although in *CPS Management* Marks J appears to have rejected the suggestion that political activity could be defined as "*putting pressure on government*", in my view this formulation is of great assistance in defining the type of activity which the Commissioner should be able to take into account in deciding whether or not to employ staff.

170 This is because the exerting of pressure of any kind to achieve an election outcome is completely inconsistent with the role of the VEC in administering, but not participating in an election. Whether or not the job applicant has engaged in such conduct is unavoidably a question of fact to be considered taking into account the nature of the particular election.

171 I accept the submission of the VEC that conduct which promotes a political stance on an issue which is currently before the electorate (no matter what

the character of that electorate – state, municipal, internal) is inconsistent with employment with the VEC to conduct that election. This is so even if the particular issue before the electorate is not party political in the usual sense. It is the attempt to influence the result which gives the conduct its political character, not the content of the debate.

172 The conduct may be of any character. It may consist of writing a letter to a newspaper. It may consist of various means of lobbying in relation to the issue before the electorate. It may also consist of being a member of a lobby group which is actively campaigning on an issue in the media in that election. It may consist in giving financial support to such an organisation.

173 In considering conduct in respect of a particular election, it is not necessary for the exemption to require evidence of a course of conduct. One action may be enough, because the conduct is directed to one particular event – the outcome of the election for which the person is to be employed.

174 The VEC has specifically stated that in applying the proposed exemption criteria it does not want to be told of or take into account membership of a union or professional association. It is hard to make a logical distinction between membership of a union or professional association which is raising political issues in an election campaign and membership of a lobby group of a different historical background which is doing the same.

175 However, I have determined that an exemption should be framed in the least intrusive manner possible. It should not be broader than what is requested or required to give effect to its purposes. It is possible that the lack of opposition to this application from the relevant unions is in part because the VEC has made it clear that it will not seek this information. It is because of this, and not because of any distinction clear in principle, that I have decided to restrict disclosure in the manner requested.

Conclusion

176 I take into account that this application has been widely advertised, and that I have had only three submissions in opposition. It is true, as observed by

Bell J in *Lifestyle Communities*, that it is often the case that there are few submissions in opposition to an exemption application, and lack of numbers is not conclusive. But I have heard evidence that this application has been widely discussed within the VEC, and an email has been sent to all staff by the relevant union representative canvassing views. Given this, I consider that I am entitled to see the lack of response from staff or the union as indicating that staff agree in broad terms that an exemption is required.

177 Although the VEC does not wish the current exemption which was granted in file no 209/2008 to be affected by this application, in my view it is inevitable that this exemption, otherwise in force until 2011, should be revoked. This exemption is expressed to affect employment of election officials for state and municipal councils.

178 The existence of two exemptions allowing the VEC to impose different criteria on different staff positions would be confusing and is unwarranted on the material presented by the Commissioner in this case.

179 There is also a more fundamental difficulty. The last exemption, granted on the papers, does not identify the conduct in respect of which the exemption was granted. This omission makes the exemption a nonsense.

180 Even had this omission not occurred it is my view that having reviewed the justification for exemption in a comprehensive way, the logical analysis outlined in these reasons should apply to all positions.

181 In the end, it is not, as Bell J observed in *Kracke v Mental Health Review Board &Ors*, (2009) VCAT 646, a matter of ticking each box in section 7 of the Charter and adding up the ticks, but the making of a global assessment as to whether or not the proposed limitations on the human rights I have identified are both reasonable and demonstrably justified. In my view, with changes to take into account the factors identified above, the proposed exemption fulfils both these aspects of section 7.

182 The terms on which I propose to grant the exemption are as follows:

"The exemption is granted to enable the VEC to request and consider information pertaining to the following criteria in determining whether or not a person should be offered employment or engagement as a contractor or be appointed as a member of the audit committee of the VEC:

(i) Current membership or membership within the past 15 years of any political party in any State or Territory or the Commonwealth.

(ii) A course of conduct within the past 15 years directed to supporting the aims of a political party or an independent candidate in a State, Territory or Federal election.

(iii) A person who has held the office of councillor for a Victorian local council within the past 15 years".

(iv) A course of conduct within the past 15 years directed towards supporting the political aims of a local councillor.

(v) A person who has publicly engaged in conduct promoting a political position in respect of an issue currently before the electorate in the election for which that person is to be employed".

(vi) A person who is a member of a lobby group (not being a union or professional association) which promotes a political position in respect of an issue currently before the electorate in the election for which that person is to be employed.

183 I realise that the terms of the exemption are still not precise, and so there will inevitably be some uncertainty about its application.

184 The advantage in expressing the exemption criteria broadly is that it allows the Commissioner to take a flexible approach directed towards individual circumstances.

185 The disadvantage of such an approach is that it is potentially productive of injustice.

186 I therefore propose to require the VEC to report to this Tribunal every six months on the operation of the exemption. The exemption will be granted for the maximum period of three years, and when it comes to be renewed the content of the reports, together with the content of any individual complaints, will be assessed to determine whether the exemption should continue and, if so, in what form.

187 As the VEOHRC notes, this exemption application raises a genuine debate as to the most effective way to support an effective democracy. As far as I am aware, no other State Electoral Office has asked for, or received, a similar exemption. Mr Tully, who has previously served as electoral commissioner in another state and who has worked in various capacities in electoral administration for over 35 years, told me that he is not aware of any other jurisdiction in which the issues raised in this exemption application have been adequately resolved.

188 Under current equal opportunity legislation, this exemption will need to be renewed every three years. In the long term, rather than fashioning an exemption based on concepts illsuited to dealing with the particular challenges faced by the VEC in protecting our democracy, it may be more sensible for the VEC to be given a statutory exemption which addresses the particular unique characteristics of its office.

HER HONOUR JUDGE HARBISON
VICE PRESIDENT