

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

HUMAN RIGHTS LIST

H141/2013

Applicant Judo Victoria Inc

Intervener Victorian Equal Opportunity and Human Rights
Commission

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

Date of document: 13 November 2015

Filed on behalf of: Intervener

CF/15/16603

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A. INTRODUCTION

1. The Victorian Equal Opportunity and Human Rights Commission (**Commission**) intervenes in these proceedings pursuant to section 159 of the *Equal Opportunity Act 2010* (Vic) (**EOA 2010**) and the Orders of the Victorian Civil and Administrative Tribunal (**Tribunal**) dated 21 September 2015.
2. Section 159 of the EOA 2010 empowers the Commission to seek leave to intervene in and be joined as a party to proceedings that involve issues of equality of opportunity, discrimination, sexual harassment or victimisation.
3. As an intervener, the Commission will act as an independent party, exercising its functions under section 155 of the EOA 2010. These functions include promoting and advancing the objectives of the EOA 2010 Act, and to act as an advocate for the EOA 2010.
4. Judo Victoria Inc (the **Applicant**) made an application dated 22 June 2015 for an exemption under section 89 of the EOA 2010. This application raises issues of age discrimination and equality of opportunity. The Applicant does not have any existing exemptions which apply to its conduct.
5. The Commission makes written submissions in this matter and will attend the hearing to assist the Tribunal and make oral submissions if appropriate.

B. BACKGROUND

6. The Applicant seeks an exemption from the Tribunal in order to discriminate on the basis of age, in relation to its grading policy. In particular, the Applicant has stated that the basis for its application is as follows:

"A dan (black belt) grading in judo is awarded to a fighter to recognise that they have reached a particular level which is above that of lower graded players. A basic requirement is contest proficiency. For this reason dan grades are restricted to over 17 year olds and separate contests are held for males and females. A separate grading system is used for ages up to 17.

As success in a competition is a pre-requisite for Dan grading, wins obtained in contests restricted to older-age competitors are not considered, and a separate process involving knowledge of judo and/or demonstration skills is used. **It is unclear to us that not recognising wins in competitions restricted to older age competitors for the purpose of awarding dan grades is discriminatory.**" (emphasis added)

7. From this description, the conduct sought to be exempted appears to be:
- (a) The exclusion of those under 17 years of age from being awarded Dan (black belt) grades, and
 - (b) Not recognising points for "wins" gained at competitions for older-age competitors (described in the Applicant's materials as "veterans" or "masters" competitions for those aged 30 and above),¹ for the purpose of awarding Dan grades.
- (herein referred to as the **Conduct**).
8. In their additional materials, the Applicant states that it is requesting that the Judo Grading system be exempted from the provisions of the EOA 2010 relating to age.²
9. The Commission notes that in the material lodged by the Applicant in support of its claim, it also appears that a person must be at least 40 years of age to progress to Dan 6th Grade, at least 50 to progress to Dan 7th Grade, and 60 to progress to Dan 8th Grade.³ It ought to be clarified whether this aspect of grading is also part of the application.

¹ Document lodged by the Applicant on 7 August 2015 in support of its application entitled "Competition Pathways". Also see Letter from Neville Sharp, President of Federation of Judo Australia to the Tribunal dated 25 October 2015.

² Document lodged by the Applicant on 7 August 2015 in support of its application entitled "Explanation of Gradings", under the heading "The Request".

³ Document lodged by the Applicant on 7 August 2015 in support of its application entitled "Summary of JFA Dan Grade Application Pre-Requisites"; Judo Federation of Australia Inc *Grading Policy, Procedures and Guidelines Manual*, November 2014, p36

10. Given the confusion over the application of the EOA 2010, the Commission submits that this exemption application may be used to provide guidance to the Applicant about the way that the law applies to their organisation (and similar martial arts organisations), and clarify whether the competitive sporting activity exception in section 72 of the EOA 2010 applies to their conduct. The Commission's submissions therefore focus on these issues.

C. STATUTORY FRAMEWORK AND PRINCIPLES

11. Section 89 of the EOA 2010 provides that the Tribunal may grant an exemption from any of the provisions of the Act in relation to certain people or activities or in any other circumstances specified by the Tribunal, subject to any conditions the Tribunal thinks fit.

12. Section 90 of the EOA 2010 sets out the factors to be considered by the Tribunal when deciding exemption applications. Section 90 provides:

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

- (a) whether the proposed exemption is unnecessary because—
 - (i) an exception or exemption in this Act already applies to the conduct sought to be exempted; or
 - (ii) the conduct sought to be exempted would not amount to prohibited discrimination; and
- (b) whether the proposed exemption is a reasonable limitation on the right to equality set out in the Charter of Human Rights and Responsibilities; and
- (c) all the relevant circumstances of the case.

13. The Commission submits that the Tribunal is obliged to exercise the exemption powers under section 89 and 90 consistently with the purpose and objectives of the EOA 2010 and in accordance with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**).

14. In *Lifestyle Communities (No 3)*, in relation to the exemption power under section 83 of the *Equal Opportunity Act 1995* (Vic),⁴ Bell J stated:

[O]n 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

⁴ The exemption provision of the EOA 2010 is s 89 which is reflective, in the main part, of s 83 of the 1995 Act.

secondary. The Charter steps in to strengthen the operation of the discretion in these respects by requiring it to be exercised compatibly with human rights.⁵

15. This approach is reinforced by the *Interpretation of Legislation Act 1984* (Vic) which requires the Tribunal to interpret and apply the EOA 2010 in a way which promotes its objects and purpose.⁶ Section 3 provides that the objectives of the EOA 2010 include the following:

- (a) to eliminate discrimination, sexual harassment and victimisation, to the greatest possible extent;
- (b) to further promote and protect the right to equality set out in the Charter of Human Rights and Responsibilities; [...]

16. In *Stevens v Fernwood Fitness Centres Pty Ltd*,⁷ the Equal Opportunity Board (applying the exemption power in section 40 of the *Equal Opportunity Act 1984* (Vic)⁸) said that the Board would not exercise its discretion unnecessarily, and would consider whether the exemption was appropriate 'in the light of the objectives and scheme of the Act'. This approach has been followed by the Tribunal,⁹ including in *Lifestyle Communities (No 3)* as set out above.¹⁰ Applying that line of authority, the discretion to grant an exemption must not be exercised in a way that would defeat the objectives of the EOA 2010.

D. IS THE PROPOSED EXEMPTION UNNECESSARY?

17. As outlined above, section 90(a) of the EOA 2010 requires the Tribunal to consider whether the exemption applied for is unnecessary because the conduct does not amount to unlawful discrimination, or because another exception or exemption applies to the Conduct.
18. The Commission notes for the purpose of determining whether there has been discrimination, the motives of the Applicant are irrelevant.¹¹ Similarly, the fact that the Australian rules are based on International Judo Federation rules is not a complete answer to a claim of discrimination. As an organisation operating within Victoria, it is required to comply with the EOA 2010 and any Federal anti-discrimination legislation such as the *Age Discrimination Act 2004* (Cth) in respect of the way that it treats its members.

⁵ *Lifestyle Communities Pty Ltd (No 3)* [2009] VCAT 1869 [30].

⁶ *Interpretation of Legislation Act 1984* (Vic) s 35(a); *Mills v Meeking* (1990) 169 CLR 214, 235 per Dawson J.

⁷ [1996] EOC 92-782; [1995] VADT 7.

⁸ When the Tribunal was established it took over the jurisdiction of the Board. When the *Equal Opportunity Act 1995* (Vic) was enacted, no material change was made to s 40 which was re-enacted as s 83(1).

⁹ *BAE Systems Australia Ltd* [2008] VCAT 1799.

¹⁰ *Lifestyle Communities Pty Ltd (No 3)* [2009] VCAT 1869; contra *Boeing Australian Holdings Pty Ltd* [2007] VCAT 532.

¹¹ *Equal Opportunity Act 2010* (Vic), s10.

Direct and Indirect Discrimination

19. The first question for the Tribunal is whether the Conduct falls within the scope of the EOA 2010 and amounts to unlawful discrimination. In the Commission's submission, the Conduct appears to treat or propose to treat people of particular ages unfavourably or adversely substantially because of their age. This meets the definition of direct discrimination.¹²
20. If the Conduct is based on characteristics generally imputed to people of particular ages, such as in relation to their strength or physical capabilities, this will also be considered direct discrimination on the basis of age.¹³ Material provided by the Applicant in support of its application indicates the Conduct may be based on stereotypical views about the capabilities of older judo participants as being "past their prime" and therefore not worthy of progressing through the Judo ranks, which is of concern to the Commission.¹⁴
21. In the alternative, the Tribunal may wish to consider whether not counting "wins" from veterans or masters competitions towards black belt grading, amounts to indirect discrimination.¹⁵ The Commission submits that it could be argued that there is a condition, requirement or practice that the Applicant imposes on judo players (or "judoka") that they may only have points from "open" adult tournaments counted as contest points required for progressing within Dan grades. Whether such a condition is imposed will need to be determined by the Tribunal based on the evidence provided by the Applicant and any other witnesses at the hearing.¹⁶
22. This potential condition, requirement or practice appears to be neutral on its face, as it simply requires that the types of tournaments from which points will be counted must be officially recognised and open to all ages. However, it is likely that this condition, requirement or practice will disadvantage people over 30 who have chosen to participate in veterans or masters competitions which

¹² *Equal Opportunity Act 2010* (Vic), s8.

¹³ *Equal Opportunity Act 2010* (Vic), ss7(2)(b).

¹⁴ Document lodged by the Applicant on 7 August 2015 in support of its application entitled "Explanation of Gradings", under the heading "The Argument".

¹⁵ See *Equal Opportunity Act 2010* (Vic), s9.

¹⁶ The Commission notes that while the Applicant admits this is the practice in its application, it has not identified where in its rules the obligation to not consider "wins" from veterans/masters' tournaments arises. This practice appears to be the result of a requirement that points for black belt grading must be obtained "by means of contest in a [sic] adult division, without other age restriction and against a random selection of competitors" (See Document lodged by the Applicant on 7 August 2015 in support of its application entitled "Explanation of Gradings", under the heading "The Argument"). However, the only guidance in the Judo Federation of Australia Inc *Grading Policy, Procedures and Guidelines Manual* is that points must be gained "within officially recognised competitions sponsored by the relevant JFA Inc State or Territory Association" (p13). We have not been provided with a copy of any policy which specifically states that the only officially recognised competitions will be those open to all ages, but this is the assumption the Commission has made based on our understanding of the materials before the Tribunal and the product of verbal conversations with the Applicant.

are age-restricted (and divided into various age divisions), perhaps in order to fight more safely or for a more equal match, as points from wins at those tournaments are not counted towards their Dan grading.¹⁷

23. The implication of points not counting is where the disadvantage for older judoka can be seen. The Judo Federation of Australia *Grading Policy, Procedures and Guidelines Manual* states that there are three methods of obtaining promotion in the sport of Judo for Dan grading: the “normal way” to seek promotion through Dan grading is by contest points and demonstration of knowledge; the “main alternative” is through demonstration of knowledge and service points (received by taking part in club administration, coaching and refereeing); and the “least common” method of attaining progression is through knowledge only.¹⁸
24. However, the last two pathways only allow the judoka to progress to a certain level, and it appears from the material lodged by the Applicant that these pathways will never allow a judoka to progress to Master Dan grades Sixth Dan and above.¹⁹ This is likely to amount to a disadvantage for judoka over 30 years of age who has participated in Veterans competitions, and does not have “wins” from open tournaments attended prior to attaining the age of 30.
25. The Commission submits that if such a condition, requirement or practice is found to exist, it is likely to amount to indirect discrimination, unless the Applicant shows that requiring competition wins to be gained at “open” tournaments is reasonable in all the circumstances. This will include (but not be limited to) consideration of the nature and extent of the disadvantage to judoka over 30 years of age, and whether the disadvantage is proportionate to the result sought.²⁰
26. Other relevant considerations could be the other criteria imposed for Dan grading such as the requirement to spend a minimum length of time at a particular rank before being allowed to progress;²¹ or a consideration of the reality of veterans tournaments involving the “amalgamation” of age and weight

¹⁷ See document lodged by the Applicant on 7 August 2015 in support of its application, “Competition Pathways” which sets out the age groups for Veterans competitions. Also see Letter from Neville Sharp, President of Federation of Judo Australia to the Tribunal dated 25 October 2015, which notes that in fact the veterans competitions still have wide age ranges involved and a 35 year old may still be sparring with a 55 year old.

¹⁸ Judo Federation of Australia Inc, *Grading Policy, Procedures and Guidelines Manual*, November 2014, pp13-16.

¹⁹ Judo Federation of Australia Inc, *Grading Policy, Procedures and Guidelines Manual*, November 2014 pp12-16; Letter from Neville Sharp, President of Federation of Judo Australia to the Tribunal dated 25 October 2015.

²⁰ *Equal Opportunity Act 2010* (Vic), s9(3).

²¹ Judo Federation of Australia Inc, *Grading Policy, Procedures and Guidelines Manual*, November 2014, p13, 19.

divisions, resulting in contests between judoka of very different ages (which could potentially be the case in an open tournament).²²

Area of Public Life

27. For the Conduct to be unlawful, it must not only fit within the definitions of direct or indirect discrimination, but fall within one of the areas of public life protected by the EOA 2010. There are three areas which are relevant to the application:
- (a) discrimination in the area of sport under sections 70-72 of the EOA 2010.
 - (b) discrimination in the provision of recreational services under section 44 of the EOA 2010; or
 - (c) discrimination in relation to club membership under section 65 of the EOA 2010.
28. In this respect, the Commission draws the Tribunal's attention to the example given under section 13 of the EOA 2010, in relation to when an exception applies to render otherwise unlawful conduct lawful:

Example

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

29. While an example is not determinative of the issue, it shows that Parliament anticipated that claims relating to exclusion from participation in sport may arise under the three different provisions, depending on the nature of the claim and the alleged treatment.
30. In the absence of any evidence about whether the Applicant meets the definition of "club" (particularly relating to the holding of a liquor license or operation of facilities wholly or partly from its own funds),²³ the Commission will focus its submissions on discrimination in sport and recreational services.

Participation in Sporting Activities

31. Section 71 prohibits discrimination in the area of sport, by:
- (a) refusing or failing to select a person for a sporting team, or
 - (b) excluding a person from participating in a sporting activity.

²² Letter from Neville Sharp, President of Federation of Judo Australia to the Tribunal dated 25 October 2015, p4.

²³ *Equal Opportunity Act 2010* (Vic), s4.

32. The Commission considers that the most relevant for the current application is exclusion of a person from participating in a sporting activity.
33. "Sport" and "Sporting activity" are defined very broadly as including a game and pastime.²⁴
34. "Participating in a sporting activity" is also broadly defined to include.²⁵
- (a) Coaching people involved in a sporting activity;
 - (b) Umpiring or refereeing a sporting activity; or
 - (c) Participating in the administration of a sporting activity.
35. Given the inclusion in section 71(b) of the specific words "sporting activity", rather than participation in the sport generally, the Commission considers that it is permissible to bring a claim in relation to exclusion from participation in different aspects or activities within a sport.
36. Based on the material lodged by the Applicant to date, readily identifiable aspects of the sport of Judo that are likely to comprise "sporting activity" for the purpose of section 71(b) are gradings, "Judo Kata" and major techniques such as "Go Kyo No Waza",²⁶ training sessions, and competitions or tournaments.
37. The Tribunal must therefore determine whether the Conduct amounts to exclusion of a person from participating in a sporting activity (rather than the sport as a whole). The Commission submits that the ordinary meaning of the words should be used, with guidance taken from the Macquarie Dictionary (online):
- (a) "Exclude" is defined as "to shut or keep out; prevent the entrance of"; "to shut out from consideration, privilege etc"; and "to expel and keep out; thrust out; eject".
 - (b) "Participate" is defined as "to take or have a part or share, as with others; share".
38. In the Commission's submission, placing a minimum age criterion on Dan gradings is clearly shutting or keeping out those under the specified age from taking part in the Dan grading, which may result in unfavourable treatment by preventing judoka from progressing to Dan ranks until they have attained the age of 17.
39. Similarly, having a policy of effectively not counting "wins" from tournaments for older competitors for Dan gradings, appears to prevent judoka over 30 years of

²⁴ *Equal Opportunity Act 2010* (Vic), s70.

²⁵ *Equal Opportunity Act 2010* (Vic), s70.

²⁶ See e.g. Judo Federation of Australia Inc., *Grading Policy, Procedures and Guidelines Manual*, November 2014, pp37-55.

age from entering or taking part in gradings for Sixth Dan and above, thereby disadvantaging them by preventing them from progressing through to the Master Dan ranks.²⁷

40. For completeness the Commission notes a recent New South Wales (NSW) decision *Duggan v Belmont 16 Foot Sailing Club Ltd (Duggan)*.²⁸ This case considered a claim under the *Anti-Discrimination Act 1977* (NSW) in relation to a claim of direct age discrimination in club membership, where the Respondent sailing club changed the rules of a particular competition “to preclude members over the age of 25 from obtaining club championship points when competing in a particular class of race”.²⁹ The applicant, a 51 year old, was successful in claiming that this rule change denied or limited his access to benefits of club membership, being “the opportunity to gain points towards the championship trophy and the fastest time trophy”, and the chance to win those trophies.³⁰ The reason for the less favourable treatment was the applicant’s age, as he was over 25.³¹
41. In *Duggan*, the Respondent sought to rely on an exception to discrimination on the basis of age, which provided “[n]othing in this Part renders unlawful the exclusion of persons of particular ages from participation in any sporting activity”.³² The NSW Tribunal held that the ordinary meaning of this provision was exclusion of people from “physical participation in a sporting activity” and not exclusion in relation to “the way in which such participation is assessed or rewarded”.³³ As the exclusion in this case related to eligibility to compete in particular events and earn points towards trophies,³⁴ the exception did not apply and the claim was successful.
42. Following this reasoning, it might be argued that grading of judoka amounts to the assessment of a person’s participation in the sport of Judo, rather than participation in a sporting activity, and as such the conduct does not fall within the scope of section 71 of the EOA 2010.
43. However, the Commission submits that the Tribunal is not bound to follow this interpretation of “participation in a sporting activity”, given it has been decided in a different jurisdiction. For the avoidance of doubt, should the Tribunal consider *Duggan* relevant to the current application, it should distinguish this

²⁷ Letter from Neville Sharp, President of Federation of Judo Australia to the Tribunal dated 25 October 2015, p2.

²⁸ [2015] NSWCATAD 226.

²⁹ *Duggan v Belmont 16 Foot Sailing Club Ltd* [2015] NSWCATAD 226 [1].

³⁰ *Duggan v Belmont 16 Foot Sailing Club Ltd* [2015] NSWCATAD 226 [27].

³¹ *Duggan v Belmont 16 Foot Sailing Club Ltd* [2015] NSWCATAD 226 [1].

³² *Duggan v Belmont 16 Foot Sailing Club Ltd* [2015] NSWCATAD 226 [34].

³³ *Anti-Discrimination Act 1977* (NSW), s49ZYW.

³⁴ *Duggan v Belmont 16 Foot Sailing Club Ltd* [2015] NSWCATAD 226 [54].

³⁴ *Duggan v Belmont 16 Foot Sailing Club Ltd* [2015] NSWCATAD 226 [34].

particular interpretation on the basis it is an exception to discriminatory conduct, not a prohibition as contained in section 71 of the EOA 2010. Substantive protections against discrimination should be construed broadly and beneficially, in accordance with the objects of the EOA 2010.

44. In the event that the Tribunal does consider it should follow this interpretation, and it follows that the conduct of the Applicant falls outside section 71 of the EOA 2010, the Commission submits that the Tribunal should also consider whether the conduct falls within the prohibition of age discrimination in the provision of recreational services.

Provision of Recreational Services

45. Section 44 of the EOA 2010 prohibits discrimination in the provision of goods and services by:
- (a) Refusing to provide goods and services;
 - (b) In the terms on which goods or services are provided; or
 - (c) By subjecting the other person to any other detriment in connection with the provision of goods or services to him or her.
46. "Services" is defined to include the provision of recreational services.³⁵ However, the term 'services' is given an open definition in section 4 of the EOA 2010 by reference to a number of examples of what a service is. The examples in the Act are not an exhaustive list. This means that 'services' are not limited to those falling within the categories listed in the definition of s 4 of the EOA 2010. 'Services' should be given its ordinary, literal meaning.³⁶
47. *IW v City of Perth*³⁷ considered the meaning of services and cited with authority the Macquarie Dictionary definition of 'services':

The term "services" has a wide meaning. The Macquarie Dictionary relevantly defines it to include "an act of helpful activity"; "the providing or a provider of some accommodation required by the public, as messengers, telegraphs, telephones, or conveyance"; "the organised system of apparatus, appliances, employees, etc., for supplying some accommodation required by the public"; "the supplying or the supplier of water, gas, or the like to the public"; and "the duty or work of public servants".³⁸

48. The EOA 2010 is beneficial legislation designed to promote equality, eliminate discrimination as far as possible and provide redress for people who have been discriminated against.³⁹ When interpreting the word services, the Tribunal

³⁵ *Equal Opportunity Act 2010* (Vic), s4.

³⁶ *IW v City of Perth* (1997) 191 CLR 1, 23.

³⁷ *IW v City of Perth* (1997) 191 CLR 1, 11, per Brennan CJ and McHugh J.

³⁸ *Ibid.*

³⁹ *Equal Opportunity Act 2010* (Vic), ss3(b)-(c).

should take into account the beneficial and remedial objectives of the EOA 2010.⁴⁰

49. In their joint judgment in *IW v City of Perth*, Dawson and Gaudron JJ said the following about the breadth of the definition of 'services' in the context of equal opportunity legislation:

In construing legislation designed to protect basic human rights and dignity, the courts "have a special responsibility to take account of and give effect to [its] purpose". For this reason, the provisions of the Act concerned with discrimination in the provision of goods or services, including s 66K(1), should be construed as widely as their terms permit. **In particular, "services", a word of complete generality, should not be given a narrow construction** unless that is clearly required by definition or by context.⁴¹ (emphasis added).

50. Since this time, "services" has been generally defined as any act which is helpful or beneficial to the relevant class of people alleging discrimination.⁴²
51. The Commission submits that if Judo gradings are not considered a sporting activity, then they could be characterised as a service provided by the Applicant to its members. The Tribunal will need to determine whether the evidence of the Applicant or other witnesses shows that grading is a helpful and beneficial activity for judoka, and whether it is arguable that the Conduct amounts to a breach of section 44.
52. By way of comparison, in *Williams v Victorian Athletics League Incorporated (Williams)*,⁴³ the Tribunal refused to strike out a claim of discrimination on the basis of age in the provision of services against an athletics club, in respect of the way its "handicapping system" worked for foot running races for those who were under the age of 21. Handicapping involved assessing an athlete's race times and determining whether they should be given a staggered starting position. This evens the playing field and ensures that strongest and best runners run the furthest.⁴⁴
53. In *Williams*, the Tribunal advised the applicant that he needed to consider whether his claim that the handicapping system disadvantaged him was in fact discrimination in the terms on which services by the athletics club were being provided.⁴⁵ While no findings were made by the Tribunal, the fact the services claim was not struck out indicates that it was at least arguable that a method of

⁴⁰ *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 per Mason and Gaudron JJ.

⁴¹ *IW v City of Perth* (1997) 191 CLR 1, 22 per Dawson and Gaudron JJ.

⁴² *Rainsford v Victoria and Another* (2007) 167 FCR 1; *Bayside Health v Hilton* [2007] VCAT 1483. [17]; *Kavanagh v Victorian WorkCover Authority trading as WorkSafe Victoria (Anti-Discrimination)* [2011] VCAT 200 [47]; *Slattery v Manningham City Council* [2013] VCAT 1869 [29].

⁴³ [2009] VCAT 476.

⁴⁴ *Williams v Victorian Athletics League Incorporated (Anti-Discrimination)* [2009] VCAT 476 [22].

⁴⁵ *Williams v Victorian Athletics League Incorporated (Anti-Discrimination)* [2009] VCAT 476 [43].

ranking or assessing athletes could amount to provision of services, and was not manifestly hopeless.

Does an exception apply?

54. If the Tribunal finds that the conduct falls within the protections of Part 4 of the EOA 2010, as unlawful discrimination, it must then consider whether the exemption is nevertheless unnecessary because there is an exception which applies to the conduct. This is because the EOA 2010 does not prohibit discrimination when an exception applies to the conduct.⁴⁶
55. The Commission has identified the exception for discrimination on the basis of age in competitive sporting as potentially relevant. Section 72(2)(b) of the EOA 2010 provides that a person may restrict participation in a competitive sporting activity to people of a specified age or age group. This allows fair competition in sport.⁴⁷
56. "Competitive sporting activity" is defined as including any exhibition or demonstration of a sport, but does not include—
- (a) the coaching of people engaged in a sporting activity; or
 - (b) the umpiring or refereeing of a sporting activity; or
 - (c) the administration of a sporting activity; or
 - (d) the non-competitive practice of a sport.
57. In *Robertson v Australian Ice Hockey Federation*,⁴⁸ President McKenzie considered the predecessor of this exemption contained in section 66(2) of the *Equal Opportunity Act 1995* (Vic). President McKenzie stated that section 66(2) "clearly permits age restrictions to be placed on participation in competitive sporting activities", and that "competitive sporting activity" involved "contest between participants and the outcome normally involves the placing of participants in an order of excellence or priority". In that case, President McKenzie confirmed that this applied to the Australian Ice Hockey Federation's competitions.
58. There is therefore a question as to whether grading itself involves contest against other people, with a ranking of those participants in order of excellence, or whether the competitive aspect is only in relation to gaining points at tournaments prior to seeking progression through grading.
59. Judo Victoria's explanation of grading provided in its additional material (but not in the Judo Federation of Australia Inc. grading policy) states that part of the

⁴⁶ *Equal Opportunity Act 2010* (Vic), s13.

⁴⁷ Explanatory Memorandum to the Equal Opportunity Bill 2010, p40.

⁴⁸ [1998] VADT 112.

Dan grading can involve entering “an examination against other judoka of the same grade and, by demonstrating superiority over a cross-section of judoka at the same level, can win promotion to the next rank”.⁴⁹ This competition appears to only be one part of the grading process and it is unclear to the Commission whether the whole grading process is competitive in this way.

60. If the Tribunal finds that the Conduct amounts to restricting participation in grading, and that grading as a sporting activity involves a contest between judoka and placing of participants by rank according to excellence, then the exception in section 72 will apply. However, if only part of the grading process involves such a contest, the Commission submits that the exception does not apply, and an exemption is required for the conduct.
61. For completeness, the Commission recognises that even if part or all of the Conduct for which an exemption is sought is found to fall within the exception in section 72 of the EOA 2010, there may still be policy reasons – such as the interests of clarity and certainty – for the Tribunal to nevertheless consider granting the exemption. The Commission would not oppose the granting of an exemption in these circumstances if the Tribunal considered it was a reasonable limitation on the right to equality.

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

62. Finally, if the Tribunal is satisfied that the Conduct falls within the scope of the EOA 2010, that it could amount to unlawful discrimination and that an exemption is required because no exception applies to the Conduct, then it must consider whether it would be a reasonable limitation on the right to equality set out in section 8 of the Charter.⁵⁰

63. Section 8(3) of the Charter provides that:

Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

64. In *Lifestyle Communities (No 3)*, Bell J provided a useful discussion of the nature of the right to equality:⁵¹

The human rights of equality and non-discrimination are of fundamental importance to individuals, society and democracy. Any limitations must be subject to a stringent standard of objective justification.

...

⁴⁹ Document lodged by the Applicant on 7 August 2015 in support of its application, under the heading “Explanation of Gradings”.

⁵⁰ *Equal Opportunity Act 2010* (Vic), s 90(b).

⁵¹ *Lifestyle Communities Pty Ltd (No 3)* [2009] VCAT 1869 [107]-[109].

To treat somebody differently because of an attribute, such as gender, age or political or religious belief, is to make stereotypical assumptions about them personally and their behaviour. When a difference in treatment is not rationally based on individual worth and merit, but on the basis of such an attribute, the individual is not treated because of who they are. They are treated because of the stigma attached to the attribute.

65. In *BAE Systems Australia Ltd*,⁵² The Tribunal held that the reasonable limitations test in section 90(b) imports into the EOA 2010 the test contained in section 7(2) of the Charter. On this basis, any reasonable limits imposed by an exemption on the right to equality must be 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom', taking into account the following factors:
- (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.
66. The onus is on the Applicant to identify the purpose of the limitation and demonstrate its importance to the Tribunal, as well as the other aspects of the section 7(2) test. There is a "stringent standard of justification which be satisfied only when there is a pressing and substantial need for limitation".⁵³
67. In relation to whether there are any less restrictive means available to achieve the purpose of the limitation, the Commission draws to the Tribunal's attention the "time in rank" requirements already in place under the existing rules which are unrelated to age, and asks the Tribunal to consider whether these requirements combined with competition wins from any officially recognised competition would be a less restrictive option available to the Applicant.
68. In addition, the Commission again highlights the comments of Mr Sharp, President of the Federation of Judo Australia about the true nature of the masters tournaments, in that the age sub-divisions are "amalgamated" to such an extent that "[i]t is not uncommon to have a 30 year age difference". The Tribunal should consider whether the purpose of the limitation is genuinely being met in these circumstances, particularly in light of the subsequent

⁵² [2012] VCAT 349 [77].

⁵³ *Lifestyle Communities Pty Ltd (No 3)* [2009] VCAT 1869 [324]

comments of Mr Sharp that it is "not a fair test of judo skills to have a 35 year old beating a 55 year old in competition".⁵⁴

69. In order to grant the exemption application, the Tribunal must be satisfied that the Conduct is a reasonable limitation on the right to equality. The Applicant must therefore ensure that it demonstrates that both aspects of the Conduct are a reasonable limitation on the right to equality – for those under 17 and those over 30. If this is not demonstrated, the Commission submits that it is open to the Tribunal to make different findings in relation to each aspect of the claim.
70. In the event that the Applicant provides further information or material at the hearing, the Commission may provide additional oral submissions on the application of the test in section 7(2) of the Charter at the hearing.



Victorian Equal Opportunity and Human Rights Commission
13 November 2015

⁵⁴ Letter from Neville Sharp, President of Federation of Judo Australia to the Tribunal dated 25 October 2015, p3