

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
HUMAN RIGHTS DIVISION
HUMAN RIGHTS LIST

H232/2015

Applicant **Waite Group**

Intervener **Victorian Equal Opportunity and Human Rights
Commission**

OUTLINE OF SUBMISSIONS

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A. INTRODUCTION

1. The Victorian Equal Opportunity and Human Rights Commission (the **Commission**) sought leave to intervene in this proceeding pursuant to s 159 of the *Equal Opportunity Act 2010* (Vic) (the **EOA**) by way of a letter dated 19 February 2016. Section 159 of the EOA 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 with leave of the Tribunal.
2. On 22 March 2016, the Victorian Civil and Administrative Tribunal (the **Tribunal**) granted the Commission leave to intervene in the proceeding.
3. Section 155 of the EOA outlines the Commission's functions, which include promoting and advancing the objectives of the EOA and being an advocate for the Act. The objectives of the EOA include enabling the Commission to encourage best practice and facilitate compliance with the EOA by undertaking research, educative and enforcement functions (s 3(e)). As an intervening party, the Commission acts as an independent third party with specialist expertise in the operation of the EOA.

4. The Waite Group (**the Applicant**) has made an application for an exemption under s 89 of the EOA in order to use the business name “WomenSearch” to target women in advertised recruitment sites, and recommend women as candidates, for employer-clients seeking to recruit women into executive and management positions to implement their gender diversity policies (**the relevant conduct**). In the alternative, the Applicant seeks recognition of a “special measure” pursuant to s 12 of the EOA in relation to the relevant conduct. On 4 April 2016, the Tribunal granted the Applicant an interim exemption from ss 44, 107 and 182 of the EOA until 31 July 2016.
5. The proceeding raises the question as to whether the exemption application is unnecessary under s 90(a) of the EOA as the relevant conduct is a “special measure” pursuant to s 12 of the EOA. The Commission seeks to use this opportunity to assist the Tribunal clarify and provide guidance on the requirements necessary to substantiate a special measure.
6. The Commission makes written submissions in this matter and will make oral submissions at the hearing if appropriate and requested by the Tribunal.

B. SUMMARY OF SUBMISSIONS

7. The Commission makes the following principal submissions:
 - Given that conduct amounting to a special measure is an important means of achieving substantive equality under the EOA and does not amount to discrimination for the purposes of the EOA, the requirements for a special measure should be carefully applied and substantiated to ensure that only conduct which meets the criteria is considered a special measure, and if those requirements are not met, an exemption will be required.
 - In the present matter, there is sufficient information to substantiate a finding that the relevant conduct is a special measure.

C. BACKGROUND

The application of Waite Group

8. For over 56 years, the Applicant has been in the business of recruiting people for employer-clients, including recruitment to executive and management levels for government, commercial businesses and not for profit organisations. In 1982, the Applicant established the business name “WomenSearch” to identify and promote suitably qualified and experienced women for board appointments. The Applicant is now seeking to emphasise this registered business name as a specialist service to support its employer-clients reach their goals for gender diversity in board positions and other executive roles¹.
9. The Applicant provided statistics from the Australian Institute of Company Directors showing that women on ASX 200 boards make up only 21%, and 29 boards do not have any women on their boards. The Commission understands this is intended to show that women are significantly under represented on boards or in positions of leadership, and there is a particular need for assistance to address this inequality. The applicant also relies on various materials, including a report of the Business Council of Australia by Meredith Hellicar, “*Increasing the Number of Women in Senior Executive Positions*”². The report advises that compiling female only lists for clients would be allowed under the *Federal Sex Discrimination Act 1984* (Cth) as a special measure to achieve gender parity.³ The Commission does not intend to address the application or relevance of the federal *Sex Discrimination Act 1984* (Cth) in these submissions.

Applications for special measures and exemptions before the Tribunal

10. Although s12 does not require formal recognition of a special measure by the Tribunal, the Commission notes that some exemption applicants seek

¹ Applicant letter to the Tribunal of 14 December 2015, page 2.

² See

http://www.eeotrust.org.nz/content/Increasing_Number_Women_Senior_Exec_Positions_report_FINA_L_5%2011%202013.pdf

³ Report prepared for the Business Council of Australia, *Increasing the Number of Women in Senior Executive Positions - Improving Recruitment, Selection and Retention Practices*, by Meredith Hellicar, November 2013, para 80.

recognition and/or a declaration of a special measure in order to give people certainty in engaging in certain conduct. It is the Commission's view that exemption applicants would benefit from greater guidance from the Tribunal to assist applicants and potential applicants identify whether proposed conduct is a special measure, or whether the conduct requires an exemption under s89 of the EOA.

11. Central to the process of identifying whether proposed conduct is a special measure is the need to (1) address each of the requirements for a special measure (as set out below in Section E at paras 21-47) and (2) provide evidence to substantiate those requirements.
12. With regard to the need the address each of the requirements for a special measure, the Commission has observed that a number of matters have come before the Tribunal where there was insufficient information in the decision to determine whether the applicants had substantiated the requirements of s 12 for a special measure. In the exemption applications of *Yooralla*⁴, *Trafalgar High School*⁵, and *Plenty Valley Community Health*⁶ the Tribunal declared the proposed conduct to be special measures. These matters involved the hiring of gender specific carers and interpreters for groups with a particular attribute as a measure to address inequality for the group. The decisions do not provide details as to whether the applicants were proposing other conduct that might more directly benefit the group experiencing inequality. On the face of the decisions, it is difficult to determine whether there was a sufficient connection between the conduct of hiring gender specific employees (who were not identified as experiencing inequality), with the promotion or realisation of substantive equality for the group with a specific attribute who ought benefit from the conduct. It is unclear whether all the requirements for a special measure were met.
13. With regard to evidence, absent evidence to substantiate the requirements of a special measure, the Tribunal will not be in a position to determine whether conduct is a special measure. In the exemption application of *Cato and Hall*

⁴ *Yooralla (Human Rights)* [2015] VCAT 78, 22 January 2015.

⁵ *Trafalgar High School (Human Rights)* [2015] VCAT 1647, 15 October 2015.

⁶ *Plenty Valley Community Health (Human Rights)* [2015] VCAT 1646, 15 October 2015.

*Pty Ltd*⁷, the Tribunal was not satisfied that the evidence was “sufficient” to show that the conduct of preparing shortlists of women for executive roles by a recruitment agency for employer-clients was a special measure.⁸ Rather, the Tribunal granted an exemption from s 44 (provision of goods and services), s 107 (requesting discriminatory information) and s 182 (offence of discriminatory advertising) of the EOA.

14. By way of comparison, in the exemption application of *Genovate Consulting*⁹, the Tribunal was satisfied on the material filed in support of the application that the conduct of targeting and short listing women for employer-clients who sought to employ women in leadership, management, executive or board level roles, was a special measure under s 12 of the EOA.¹⁰
15. In both *Cato and Hall* and *Genovate Consulting* the applicants were recruitment agencies seeking to target women for employer-clients wanting to implement diversity policies. The Tribunal had evidence to substantiate one as special measure yet the other required an exemption under the EOA.

D. STATUTORY FRAMEWORK

16. In accordance with s 89, the Tribunal may grant an exemption from any provision of the EOA in relation to a person or class of people, or an activity or class of activities, or from any provisions in any other circumstances specified by the Tribunal.¹¹ The exemption remains in force for a period not exceeding 5 years¹² and an exemption may be granted subjected to any condition the Tribunal thinks fit¹³.
17. In deciding whether to grant an exemption, s 90 of the EOA sets out factors which the Tribunal must consider:

- (a) whether the proposed exemption is unnecessary because—

⁷ Victoria Government Gazette G 18, 1 May 2014.

⁸ *Ibid.*, at 810.

⁹ *Genovate Consulting (Human Rights)* [2015] VCAT 633 of 11 May 2015.

¹⁰ *Ibid.*.

¹¹ EOA, s 89(1).

¹² EOA, s 89(2).

¹³ EOA, s 89(4).

- (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. [Emphasis added]

18. In exercising the power to determine an exemption application, the purposes and objectives of the EOA must be taken into account.¹⁴ The main purposes and objectives of the EOA include the elimination of discrimination; to further promote and protect the right to equality set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter); and to promote and facilitate the progressive realisation of equality by recognising that the achievement of substantive equality may require the taking of special measures.¹⁵ In *Lifestyle Communities (No 3)*¹⁶ Bell J observed that the discretion to grant an exemption could not be exercised in a way that would defeat the purposes of the EOA. It was held:

In the legislative order of things, the human rights purposes are primary and the exemption power is secondary. The Charter steps in to strengthen the operation of the discretion in these respects by requiring it to be exercised compatibility with human rights.¹⁷

19. The *Explanatory Memorandum to the Equal Opportunity Bill 2010* (Vic)¹⁸ (Explanatory Memorandum) confirms the purpose of s 90 of the EOA in outlining factors which the Tribunal must consider in assessing exemption applications, as follows:

These factors reflect the Tribunal's current approach to considering exemption applications.

It is intended that legislating the factors that the Tribunal must consider in assessing exemption applications will assist in improving the consistency of exemption decisions, as well as **providing clearer guidance to applicants about when**

¹⁴ *Lifestyle Communities (No. 3)* [2009] VCAT 1869, at [30].

¹⁵ EOA, s 3.

¹⁶ [2009] VCAT 1869.

¹⁷ *Ibid*, at [30].

¹⁸ See Explanatory Memorandum at

http://www.austlii.edu.au/au/legis/vic/bill_em/eob2010260/eob2010260.html.

exemption applications are required and the information required to support an application.¹⁹ [emphasis added]

20. In order to determine this application in accordance with s 90(a)(ii), the Tribunal must determine whether the application for an exemption is unnecessary because the conduct sought to be exempt would not amount to prohibited discrimination because the proposed conduct is considered a special measure, or whether an exception or exemption already applies.

E. REQUIREMENTS FOR SPECIAL MEASURES

Section 12 of the EOA

21. The test for identifying a special measure is set out at s12 of the EOA. Pursuant to s 12(1):

A person may take a special measure for the purpose of promoting or realising substantive equality for members of a group with a particular attribute.²⁰

22. At s 12(3) of the EOA a special measure must:

- (a) be undertaken in good faith for achieving the purpose set out in subsection (1); and
- (b) be reasonably likely to achieve the purpose set out in subsection (1); and
- (c) be a proportionate means of achieving the purpose set out in subsection (1); and
- (d) be justified because the members of the group have a particular need for advancement or assistance.

23. The requirements to substantiate ss 12(1) and 12(3) are elaborated upon below.

24. A person who undertakes a special measure has the burden of proving that the relevant conduct is a special measure.²¹ If the person taking the measure cannot show it is a special measure, then it may be unlawful discrimination²². By undertaking a special measure, a person may impose reasonable

¹⁹ Ibid, p.46.

²⁰ EOA, s 12(1).

²¹ EOA s 12(6).

²² *Explanatory Memorandum* see

http://www.austlii.edu.au/au/legis/vic/bill_em/eob2010260/eob2010260.html

restrictions on eligibility for the measure²³, for example, restrictions on eligibility to people with the attribute who are of a particular age²⁴. Once a special measure has succeeded in achieving the promotion or realisation of substantive equality, the measure ceases to be a special measure²⁵.

25. A special measure²⁶ is sometimes known as a “temporary special measure”²⁷, “affirmative action”, “positive action”, “reverse discrimination”, and “positive discrimination”²⁸. A person does not unlawfully discriminate against another person by taking a special measure²⁹ and therefore a special measure does not amount to a limitation on the right to equality under s 8 of the Charter.

The requirements of ss 12(1) and s 12(3)

26. In order to determine that certain conduct is a special measure, the Tribunal must be satisfied of a number of requirements, namely:

- (a) membership of the group is based on an attribute;
- (b) the purpose of the conduct is to promote or realise substantive equality for the group;
- (c) the s 12(3) factors are met so that the conduct being undertaken is in good faith, is reasonably likely to achieve the purpose, is a proportionate means of achieving the purpose, and is justified because the members of the group have a particular need for advancement or assistance.

²³ EOA, s 12(5).

²⁴ Ibid.

²⁵ EOA, s 12(7).

²⁶ EOA, s 12. It is noted that the *Sex Discrimination Act 1984* (Cth) s 7D also uses the term “special measure”.

²⁷ See article 4(1) the *Convention on the Elimination of All Forms of Discrimination against Women*.

²⁸ General Recommendation No. 25, on article 4, paragraph 1, of the *Convention on the Elimination of All Forms of Discrimination against Women*, on temporary special measures, 2004. See [http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20\(English\).pdf](http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf)

²⁹ EOA, s 12(2).

(a) Identify the attribute

27. The Tribunal must be satisfied that conduct is directed at members of a group with a particular attribute under the EOA. Attributes are those set out at s 6 of the EOA and include sex.³⁰

(b) Purpose of promoting or realising substantive equality for the group

- *Purpose of the measure*

28. Relevant case law has determined that the purpose of the special measure is to be found by considering the actual intention of the applicant rather than by looking at the effect of the measure.³¹ In the matter of *Ian Potter Museum of Art (Anti-Discrimination Exemption)*³² (*Ian Potter*) citing the High Court matter of *Gerhardy v Brown*³³, the Tribunal observed that:

Any fact which shows what the persons who promote the taking of a measure intend, points to the purpose for which it is to be taken, provided that the measure is not obviously incapable of achieving what is so intended. Those intentions must be proven on the facts.³⁴

29. While the effect of the measure is not considered at s 12(1), it will form part of the assessment under s 12(3), in particular in determining whether proposed conduct is reasonably likely to achieve the purpose.

- *Identifying the inequality and its cause*

30. Having identified the purpose of the measure, the Tribunal must determine whether that purpose is to promote or realise substantive equality for members of a group with a particular attribute³⁵.

³⁰ EOA, s 6(o).

³¹ *Lifestyle Communities (No 3)*, at [262].

³² [2011] VCAT 2236.

³³ [1985] HCA 11; (1985) 159 CLR 70 (28 February 1985). See Brennan J at [36] and [135].

³⁴ *Ian Potter Museum of Art (Anti-Discrimination Exemption)* [2011] VCAT 2236 at [29]. See also *Cummeragunja Housing & Development Aboriginal Corporation (Anti-Discrimination Exemption)* [2011] VCAT 2237 at [29].

³⁵ EOA, s 12(1).

31. In the exemption application of *Georgina Martina*³⁶, the Tribunal emphasised the need to identify the inequality and its cause:

In order to consider whether conduct is taken for the purpose of promoting or realising substantive equality for members of a group with a particular attribute, it is necessary to identify the inequality which is being sought to be remedied and its cause and then consider how the proposed measures promotes or realises substantive equality.³⁷

32. Accordingly, to substantiate a special measure, the Tribunal will require information to identify that members of a group with a particular attribute have experienced or may experience inequality and to identify the cause. For example, in *University of Melbourne (Melbourne School of Engineering)* (MSE) the inequality sought to be remedied was that women were underrepresented in the academic workforce of MSE. Causes of this inequality included a lack of female candidates for academic positions, and a lack of female academic staff to act as role models for female students considering a career path in MSE.³⁸

- *Identify how proposed conduct promotes or realises substantive equality for the group*

33. Linking the purpose of the proposed conduct to the promotion or realisation of substantive equality is at the heart of the special measure. As set out in *Georgina Martina*, once the inequality and its cause is identified, the Tribunal should consider how the proposed conduct will remedy the inequality and its cause for the identified group with the attribute.

34. In *Lifestyle Communities (No 3)*, Bell J reinforced the remedial purpose of a special measure: “A special measure for a non-remedial purpose is a contradiction in terms.”³⁹ In *Ian Potter*, the Tribunal observed: “In *Gerhardy v*

³⁶ *Georgina Martina Inc (Anti-Discrimination Exemption)* [2012] VCAT 1384 (12 September 2012).

³⁷ *Ibid*, at [41].

³⁸ *University of Melbourne (Melbourne School of Engineering) special measure declaration (Human Rights)* [2014] VCAT 887.

³⁹ *Lifestyle Communities (No 3)*, at [268].

Brown special measures are described as being compensatory. At other times, including in the Explanatory Memorandum, they are described as being remedial.”⁴⁰

35. The purpose of conduct may, therefore, be recognised as conduct promoting substantive equality for members of the group where the conduct is to remedy the identified inequality and its causes. For example, in *University of Melbourne (Melbourne School of Engineering)* (MSE), the conduct to remedy the inequality (the underrepresentation of women in the academic workforce of MSE) and the cause (the lack of female candidates and a lack of female academic staff) was ‘to advertise for and employ only women in up to 20 academic roles with the MSE over a period of 5 years.’

- *More than one purpose*

36. It is not necessary that there be only one purpose for the relevant conduct⁴¹ or that the purpose be the dominant or substantial purpose. In *Ian Potter*, the Tribunal observed that:

There is no requirement that [the purpose] be a dominant or substantial purpose but it must be proven. It must be a real purpose.⁴²

37. A real purpose is one that remedies the inequality and its cause.

(c) Application of s 12(3) factors

38. While the requirements for determining a special measure are set out at s 12(1) of the EOA, s 12(3) contains further criteria, which must be satisfied in order for the proposed conduct to be a special measure.⁴³ Consideration of how the Tribunal may approach the four factors is set out below.

⁴⁰ *The Ian Potter Museum of Art (Anti-Discrimination Exemption)* [2011] VCAT 2236.

⁴¹ EOA, s 12(4).

⁴² *Ian Potter Museum of Art (Anti-Discrimination Exemption)* [2011] VCAT 2236 [30]. See also *Cummeragunja Housing & Development Aboriginal Corporation (Anti-Discrimination Exemption)* [2011] VCAT 2237 at [33].

⁴³ *Ian Potter*, at [14]. *Explanatory Memorandum to the Equal Opportunity Bill 2010* (Vic).

39. The EOA does not define what constitutes “good faith”. The Commission submits that its ordinary use should first be considered by reference to the Oxford Dictionary definition: *honesty or sincerity of intention*⁴⁴. This is similar to the legal definition of “good faith”: *an act carried out honestly*⁴⁵. In effect, the person seeking to carry out the conduct must do so in an honest and sincere manner to achieve the purpose of promoting or realising substantive equality for the group.
40. While there is a question as to whether the consultation, involvement or consent of members of a group with a particular attribute is a requirement for a special measure, the participation of the targeted group may be an indication of good faith. In *Gerhardy v Brown*⁴⁶, Brennan J stated that the wishes of beneficiaries were of great importance in determining whether a special measure, under the *Racial Discrimination Act 1975 (Cth) (RDA)*, was taken for the purposes of securing their advancement. His Honour observed:

A special measure must have the sole purpose of securing advancement, but what is ‘advancement’? To some extent, that is a matter of opinion formed with reference to the circumstances in which the measure is intended to operate. ‘Advancement’ is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries. The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.⁴⁷

41. While further decisions on special measures under the RDA have not followed His Honours views⁴⁸, the Commission is of the view that evidence of consultation, involvement or consent of the beneficial group may be evidence

⁴⁴ See <http://www.oxforddictionaries.com/definition/english/good-faith?q=good+faith>

⁴⁵ *Osborn's Concise Law Dictionary*, Eleventh Edition 2009.

⁴⁶ (1985) 159 CLR 70.

⁴⁷ *Ibid*, at [135].

⁴⁸ See for example *Bropho v Western Australia* [2007] FCA 519.

of good faith on part of the person proposing the conduct for the purposes of s 12(3)(a) of the EOA.

S 12(3)(b) - reasonably likely to achieve the purpose

42. A special measure must also be reasonably likely to achieve the purpose of promoting or realising substantive equality⁴⁹. This requires critical consideration of the reason for the measure, whether the proposed conduct is reasonably related to the inequality identified, whether the proposed conduct is appropriately tailored to achieve a remedial purpose, and whether an applicant has the ability to undertake the proposed conduct.
43. For example, in the matter of *Trafalgar High School*⁵⁰, the Tribunal recognised the conduct of employing a one-to-one male carer for a male student with a disability as a special measure. It is unclear how the proposed conduct (of employing a gender specific carer) was reasonably likely to achieve the purpose of remedying inequality for students with disabilities.
44. A person relying on a special measure should provide an analysis of the likely effectiveness of the proposed conduct. It is not necessary for a person to provide evidence that the measure will, in all circumstances, in fact promote or realise substantive equality for a group. It is sufficient that it is reasonably likely to do so.

Section 12(3)(c) - proportionate means of achieving the purpose

45. To be considered a special measure, the proposed conduct must be a proportionate means of achieving the purpose of promoting or realising substantive equality⁵¹. The principle of proportionality requires a reasonable relationship between the real purpose of the proposed conduct and the means sought to achieve that objective. The proposed conduct must “secure no more

⁴⁹ EOA, s 12(3)(b).

⁵⁰ [2015] VCAT 1647.

⁵¹ EOA, s 12(3)(c).

than adequate advancement”.⁵² It must be appropriate and adapted to achieving the purpose. In other words “the need must match the purpose”.⁵³

Section 12(3(d)- justified because the members of the group have a particular need for advancement or assistance

46. A special measure must be justified because the members of the group have a particular need for advancement or assistance. Without evidence of a need for advancement, there would be no justification for a special measure, as there would be no evidence of an inequality to compensate or remedy⁵⁴.
47. It is not necessary that the whole group of members have a particular need for advancement. It is sufficient if the overwhelming majority are disadvantaged.⁵⁵

F. APPLICATION OF REQUIREMENTS TO THE CURRENT MATTER

48. The Commission submits that, on the basis of evidence provided or referred to by the Applicant, the Tribunal may be satisfied that the relevant conduct meets the requirements of s 12 of the EOA:
 - the Applicant is seeking to assist women based on the attribute of sex under s 6 of the EOA;
 - the actual or real purpose of the relevant conduct is to promote or realise substantive equality for women;
 - the applicant has provided various materials, including independent and authoritative reports, that identify inequality on the basis of sex in appointments of women to senior management and board positions and that indicate its cause;

⁵² *Lifestyle Communities (No 3)*, at [240].

⁵³ *Ibid.*

⁵⁴ *Ian Potter Museum of Art (Anti-Discrimination Exemption)* [2011] VCAT 2236 at [33].

⁵⁵ *Ibid.*, at [37].

- there is a sufficient link between the proposed conduct and the purpose of promoting and realising substantive equality for women;
- while there is no evidence of the participation of women in the Applicant's formulation of the relevant conduct, the Applicant appears honest and sincere in its intention to address inequality;
- by focusing on women candidates, the measure is reasonably likely to achieve the purpose of increasing the number of women in executive roles to promote and realise substantive equality;
- the relevant conduct is a proportionate means of achieving the purpose as it is unlikely to secure more than adequate advancement.
- the conduct is justified because there is evidence that women have a particular need for advancement or assistance into senior management or executive roles.

49. If the relevant conduct is not considered a special measure, s 90 of the EOA requires the Tribunal to consider whether an exemption is unnecessary because an exception or exemption in the Act already applies to the conduct sought to be exempted. The Tribunal has already been satisfied that an interim exemption should be granted from ss 44, 107 and 182 of the EOA.

VEOHRC

Victorian Equal Opportunity and Human Rights Commission
26 April 2016