VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

ANTI-DISCRIMINATION LIST **VCAT Reference No: A147/2009**

Re: the Victorian Civil & Administrative Tribunal's consideration of an application by the Victorian Electoral Commission for an exemption from various aspects of the prohibition on discrimination in employment contained in sections 6, 13, 100 and 195 of the *Equal Opportunity Act* 1995 (Vic).

A. BACKGROUND

1. The Victorian Equal Opportunity and Human Rights Commission ("Commission") was originally established under section 6 of the former *Equal Opportunity Act 1984* (Vic) and continues by virtue of section 160 of the current *Equal Opportunity Act 1995* (Vic) ("EOA"). The Commission has the following functions under the EOA[1]:

    (a) to establish policies and issue guidelines and directions on the manner in which conciliation procedures under this Act should be conducted;

    (b) to receive and investigate complaints on the manner in which conciliation procedures under this Act have been or are being conducted;

    (c) to establish and undertake information and education programs;

    (d) any other functions conferred on it by or under the EOA or any other Act.

2. The Commission also performs a range of functions under the *Charter of Human Rights and Responsibilities* ("Charter").[2] In its performance of those functions the Commission always endeavours to promote the principles underpinning the Charter, that are articulated in its preamble, and include:

    - human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;

[1] Section 161 *Equal Opportunity Act 1995* (Vic).
[2] These are listed in section 40 and 41 of the Charter.

- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
- human rights come with responsibilities and must be exercised in a way that respects the human rights of others;
- human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.

3. The Victorian Electoral Commission ("the applicant") has applied to the Victorian Civil and Administrative Tribunal ("the Tribunal") for an exemption from the operation of the EOA that, if granted, would allow the applicant to consider the following criteria in determining whether or not a person should be offered employment or engagement as a contractor with the applicant:
   - current or previous membership of any political party in Victoria, any State or Territory or the Commonwealth;
   - current membership or association with a "lobby group" promoting a political position on an issue before the electorate;
   - whether a person has held the office of "Councillor" for a Victorian Local council; and
   - whether the person has published or publicly expressed (via radio or television) a political opinion on an issue before the electorate.

4. The application is different from previous, similar applications granted to the applicant, as the exemption, if granted, would apply to a broader range of positions. The previous exemptions relate to appointments under section 18 of the *Electoral Act 2002*, and under the *Local Government Act 1989* including election officials. The current application would apply to all permanent, contract and casual staff who work at the applicant's head office and warehouse, as well as appointments to the applicant's Audit Committee.

5. The applicant states that the purpose of this exemption application is "…to ensure that people appointed to these roles have not, or are not, engaged in any activity, political or otherwise, that could bring their impartiality into question…".

6. The Commission is responding to the Tribunal's call for public submissions in response to this application, and seeks to make submissions that draw upon its unique perspective on both the operation of the EOA, as well as the implications of the Charter for this application.

B. PRINCIPLES RELEVANT TO THE DETERMINATION OF EXEMPTION APPLICATIONS

7. Section 83 of the EOA allows the Tribunal to grant an exemption from the provisions of the EOA on the application of a person, whose interests, in the opinion of the Tribunal, are or may be affected by the exemption.

8. Section 83 vests the Tribunal with an extremely broad discretion, and despite the potential impact of any exemption, provides no specific guidance as to what the Tribunal must, should or cannot consider. It simply states:

   (1) The Tribunal, by notice published in the Government Gazette, may grant an exemption—

   (a) from any of the provisions of this Act in relation to—

   (i) a person or class of people; or

   (ii) an activity or class of activities; or

   (b) in the circumstances referred to in section 28; or

   (c) from any of the provisions of this Act in any other circumstances specified by the Tribunal.

9. Like all Victorian statutory provisions, section 83 of the EOA has, since 1 January 2008, had to be interpreted in light of section 32 of the Charter which contains the following direction:

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

10. The recent decision of Judge Harbison in the *Royal Victorian Bowls Association Inc (Anti-Discrimination Exemption)*[3] adopted the approach that given section 83 is effectively a discretionary power to limit the right to equality, then interpreting and exercising that statutory discretion in accordance with the Charter requires consideration or use of the reasonable limitations framework in section 7 of the Charter.

11. Section 7 of the Charter articulates the (non-exhaustive) considerations that are relevant to assessing whether a limitation on a human right is or is not reasonable and demonstrably justified. Accordingly, those considerations now form the central test to be applied to the determination of exemption applications. Accordingly, the Commission's submission focuses upon the application of these considerations to the circumstances involved in the applicant's application, hereafter referred to as a "reasonable limitations analysis".

12. In seeking to identify the key elements of a reasonable limitations analysis for this application, the Commission has also taken guidance from the recent decision of the President of VCAT in *Kracke v Mental Health Review Board* ("Kracke's case").[4] Kracke's case included a detailed examination of the intended operation of section 7 of the Charter, and provided practical guidance concerning the thorough and robust analysis that it requires.

13. In Kracke's case Justice Bell emphasised that a reasonable limitations analysis comprises two elements – legality and proportionality, and that when assessing proportionality, while the Charter distils a range of considerations from international human rights jurisprudence, it is not a "tick the box" exercise, and remains a global assessment of whether or not an actual or proposed limitation on a human right (in this instance a proposed exemption from the EOA) is reasonable

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[3] [2008] VCAT 2415
[4] [2009] VCAT 646.

and demonstrably justified.[5] Regarding the specific considerations identified in paragraphs (a) – (e) of section 7(2) of the Charter Justice Bell noted:

- When considering the nature of the rights that may be limited (in this instance by a proposed exemption) this must be understood as a threshold or foundational factor that grounds the reasonable limitations analysis. It is not a balancing factor, furthermore the focus is on the *nature*, not the *importance* of the right.[6]

- It is the underlying values and interests of the purpose of the proposed limitation (presently the proposed exemption) on rights that is the focus of the preliminary analysis. The purpose of the proposed limitation must accord with the values underpinning the Charter, and must be sufficiently important to justify limiting rights.[7]

- Analysis of the nature and extent of the limitation requires a precise examination of both how the limitation will limit rights, as well as how much it will limit them – the focus is upon the proposed limitation (i.e. exemption) as the means by which the previously identified purpose is to be achieved.[8]

- The fourth element of a reasonable limitations analysis is a “means-ends assessment” and is a factual inquiry or assessment of whether or not the limitation (i.e. the proposed exemption) is in fact related to, and will contribute to achieving the intended purpose. In other words, are the two rationally connected?[9]

- Finally, there is a need to consider the mimimum impairment principle. This is not akin to requiring adoption of the least rights-restrictive option for achieving a given purpose. Scrutiny is directed towards whether the chosen approach (i.e. the terms or scope of the proposed exemption) falls within a range of reasonable alternatives.[10]

[5] Paras 107 and 132-35.
[6] Paras 137-38.
[7] Paras 144 and 146.
[8] Paras 149-51.
[9] Para 153.
[10] Paras 156, 158 and 160.

14. Based on the foregoing, the remainder of this submission identifies the specific issues and questions that the Commission believes need to be addressed by the applicant and/or considered by the Tribunal in its determination of this application. These issues and questions have been identified on the basis of what information is necessary to make a determination of whether or not the proposed exemption amounts to a reasonable limit on human rights that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and is thus able to be granted under section 83 of the EOA.

C. SPECIFIC ISSUES REQUIRING CONSIDERATION IN RELATION TO THE CURRENT APPLICATION

15. The Commission is of the view that given the framework and procedures governing the exemption application there are no threshold issues requiring consideration in relation to legality. At paras 22-25 below, the Commission has identified a range of matters that it believes require clarification, in order to prevent an exemption, if granted, being too vague and imprecise. While lack of precision can be relevant to considerations of legality, in this instance we believe they are most effectively considered in the context of the nature and extent of the proposed limitation on rights.

The nature of the rights that may be limited if the exemption is granted.

16. Under section 4(1)(j) of the Charter – read with section 38 – the Tribunal is a public authority when acting in an administrative capacity, and as such, when acting in such a capacity must give proper consideration to all relevant human rights when making a decision. In Kracke's case Justice Bell provided guidance concerning the meaning of "administrative capacity". Justice Bell firstly adopted the approach articulated in *Sabet v Medical Practitioners Board of Victoria,*[11] that the distinction between administrative and judicial capacity was akin to the

[11] [2008] VSC 346.

distinction between judicial and administrative power in established principles of public law[12].

17. Justice Bell went on to examine what functions may fall within the scope of administrative capacity, one specific example being where a court or tribunal "makes orders creating new rights and imposing new liabilities, especially where policy considerations have an important part to play in the determination".[13] This would appear to capture key elements of the function performed by the Tribunal when granting an exemption from the EOA, meaning that, in the course of making such decisions the Tribunal is a public authority and is required to consider the full suite of rights that might be impacted by a proposed exemption, always including, but not necessarily confined to the right to equality.

18. In this particular instance the Commission's view is that if granted, the exemption has the potential to limit the following rights that are protected under the Charter:

    a) Recognition and equality before the law (s 8). The proposed exemption may clearly limit the rights of members of the community to protection from discrimination on the basis of political belief and/or activity.

    b) Privacy and reputation (s 13). The proposed exemption would appear to require job applicants to declare and discuss their personal beliefs and activities – matters they would ordinarily expect to be able to keep private and disclose only at their discretion.

    c) Freedom of thought, conscience, religion and belief (s 14). When the choice to express one's views can lead to consequences for a person's employability then the very freedom to hold those views can become precarious.

    d) Freedom of expression (s 15). The proposed exemption may interfere with rights of job applicants to hold an opinion and to seek, receive and impart information and ideas of any nature.

    e) Peaceful assembly and freedom of association (s 16). In addition to potentially impacting on an individual's right to pursue political

[12] Kracke's case para 270.
[13] Para 290.

activities and memberships, given the high profile of union sponsored campaigns in recent elections, it would seem possible that the right to freedom of association in the form of union membership may also be impacted by the proposed exemption.

f) Taking part in public life (s 18). At least two aspects of public life – engagement with the democratic process, and the pursuit of public sector employment – could be impacted by this exemption.

19. With regard to the nature of the above rights, given the context of this application, the common thread is that they facilitate and protect both individual and collective participation in our democratic processes. As such, they are key to building and sustaining a robust democracy.

<u>The importance of the purpose of the proposed exemption</u>

20. The Commission notes that the applicant's purpose for seeking this exemption – to ensure the impartiality and independence of those employees responsible for administering the Victorian electoral system – is a particularly important one. An independent, transparent and impartial electoral system is part of the bedrock of democracy. As Judge Harbison noted when granting exemption application No A209/2008 to the applicant, '[i]mpartiality is at the centre of the conduct of elections'. The intention behind this proposed exemption clearly goes to the public interest and is of sufficient importance to support reasonable and demonstrably justified limitations on rights.

21. The Commission observes that this exemption application raises a genuine debate about the most effective way to support an effective democracy. It is likely to be generally accepted that the protection of individual rights outlined at paras 18 and 19 above, will form the basis for open democratic society based on human dignity, equality and freedom. At the same time, however, for that group of individuals occupying roles that form part of the democratic machinery itself, there may be compelling reasons to adjust the ordinary balance of these rights, in order to protect the impartiality and integrity of our democratic framework.

The nature and extent of the limitation on rights under the proposed exemption

22. The nature of the proposed limitation is that the applicant may ‘take into account’ whether a job applicant meets any of the ‘criteria’ listed at para 3 above when making offers of employment. It would also preclude a person from obtaining redress through a complaint lodged under the EOA.

23. The Commission notes that the applicant does not appear to seek to *automatically* preclude offers of employment to those who meet any of the criteria; only to take those criteria into account. The extent of the limitation appears to be mitigated in this way.

24. If the exemption were granted in its current form, however, there would remain significant uncertainty about how it would operate and the likely extent of its impact on recruitment decisions by the applicant. Some of the criteria proposed are broad and open to interpretation; furthermore the application does not explain what process selection panels or staff responsible for recruitment would follow in the event a job applicant were to disclose information relevant to any of the identified criteria. In the Commission’s view, this lack of detail about the practical operation of the proposed exemption needs to be resolved to enable a decision on whether it should be granted.

25. Accordingly, the Commission suggests the Tribunal request the following further information from the applicant:

    a) any proposed guidelines that will assist the applicant’s recruitment panels or others with selection duties, in relation to the handling and consideration of relevant disclosures by applicants;

    b) any information or explanation that will be provided to applicants regarding why the relevant information is being sought and how any disclosures will be used;

    c) any information available as to how the exemption would be applied across position descriptions, for example, whether there would be different weight applied to a relevant disclosure depending on the nature of the job on offer;

d) confirmation regarding whether the applicant does or does not intend to automatically preclude all job offers to any person applying for a position with the applicant who meets one or more of the criteria;

e) what officers within the VEC will be authorised to decide to preclude a job applicant from a position on the basis of the exemption; and

f) how the applicant intends to monitor its use of the exemption, if granted.

Relationship between the exemption and its purpose

26. In the Commission's view, analysis of whether the proposed exemption actually contributes to achieving the applicant's stated objective, as well as the question of whether it may "go too far", (dealt with below under the minimum impairment principle) requires a distinction to be drawn between perceived and actual bias. Both are important – the Commission acknowledges that it is essential that the applicant not only be impartial, but be seen to be impartial. That being said, however, there are two issues to bear in mind. Firstly, dealing with perceived bias does little, if anything, to address actual bias; however, if there are comprehensive strategies in place to prevent and deal with actual bias, might they be sufficient to deal with any reasonable perception of bias?

27. The Commission notes that the exemption, if granted, would appear to target the issue of perceived bias in the administration of the applicant's functions, but of itself does not address actual bias. Specifically, the exemption would not remove the risk that staff of the applicant may be partial, this is because public declarations of one's political beliefs etc, is not akin to an inability to be able to approach one's employment impartially and in a manner that meets the demands and expectation of your employer. Similarly, a past reluctance to declare one's political and other views publicly does not equate to a greater capacity to approach one's employment or other issues impartially.

28. While the proposed exemption clearly can contribute to the effective management of perceived bias, it arguably only does so in a relatively blunt and incomplete way. This is an abstract assessment and one that would clearly benefit from testing based on the applicant's actual experience.

Minimum impairment principle

29. As noted at para 13 above, the applicant is not required to demonstrate to the Tribunal that the proposed exemption is the least rights-restrictive option that is available, only that it is one of a reasonable range of alternatives. In the present circumstances, the Commission's view is that this aspect of the reasonable limitations analysis requires consideration of the effectiveness of alternative strategies to realise the applicant's objectives.

30. The first alternative is quite specific. The Commission notes that in the course of a previous exemption application, the then Electoral Commissioner of Victoria indicated to the Equal Opportunity Board that it was unnecessary to extend the exemption to cover public servants. The Board made the following observation in its decision:

> *We were asked by Dr Lyons not to apply the exemption to public servants, since the appointment and conduct of public servants is already strictly regulated by the* Public Sector Management Act 1992 *and the code of conduct prepared under that Act.*[14]

31. Given public servants employed by the applicant continue to be covered by the Code of Conduct derived from what is now the *Public Administration Act 2004*, the Commission's view is that the applicant does need to answer the very specific question – why that Code of Conduct is no longer regarded as sufficient for addressing these issues?

32. More generally, and particularly in relation to those who are applicants for positions that do not fall under the *Public Administration Act 2004,* in order to clarify whether there are less restrictive means to ensure an impartial electoral system, the Commission believes the applicant needs to identify what policies and practices it currently has in place to ensure appropriately impartial conduct by all staff once employed; and, if these are properly implemented, adhered to and monitored, why these policies and procedures are insufficient to deal with perceived as well as actual bias?

[14] Electoral Commissioner of Victoria [1995] VADT 11.

CONCLUSION

33. The Commission's view is that the Tribunal will be assisted by further information from the applicant. Once this information is available, the Tribunal will be in a position to determine whether the proposed exemption is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

34. The Commission finally suggests that any exemption granted be precise in its terms to avoid uncertainty. Specifically, the Tribunal may wish to state the relevant criteria able to be taken into account by the applicant, which positions the exemption will apply to, the relevant attributes protected by the EOA affected and the sections of the EOA from which the applicant would be exempt.