

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

HUMAN RIGHTS LIST

H51/2014

Applicant	Charmaine Tate
Respondent	State of Victoria (Department of Human Services)
Intervener	Victorian Equal Opportunity and Human Rights Commission

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

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Prepared by:

Phone: (03) 9032 3421

Victorian Equal Opportunity and Human Rights Commission

Fax: 1300 286 834

Level 3, 204 Lygon Street

Attention: Jennifer Jones

CARLTON VIC 3053

Email: jennifer.jones@veohrc.vic.gov.au

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 Tribunal dated 17 October 2014.
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. The Applicant's claim raises issues of discrimination and equality of opportunity, as it includes allegations of:¹
 - (a) Direct and indirect discrimination on the basis of status as a parent or carer in the area of employment, in breach of sub-sections 18(a), 18(b) and 18(d) of the EOA 2010;
 - (b) direct discrimination on the basis of employment activity in the area of employment, in breach of sub-sections 18(a), 18(b) and 18(d) of the EOA 2010;

¹ Applicant's Particulars of Claim, [6], [7], [9] and the Applicant's document titled "Exact legal claims", filed 3 November 2014.

- (c) discrimination on the grounds of an unreasonable refusal to accommodate a person's responsibilities as parent or carer in breach of section 19 of the EOA 2010; and
 - (d) victimisation in breach of section 103 of the EOA 2010.
4. The Commission seeks to assist the Tribunal in these proceedings by making written submissions on the history, purpose, interpretation and operation of section 19 of the EOA 2010. In particular, these submissions address:
- (a) The statutory framework of a claim of discrimination under section 19;
 - (b) The preferred approach to interpretation of section 19 in light of the limited case law available for guidance;
 - (c) What it means to accommodate an employee's responsibilities as a parent or carer;
 - (d) What it means to unreasonably refuse to accommodate those responsibilities; and
 - (e) The interaction between section 19 and the right to request flexible working arrangements in the *Fair Work Act 2009* (Cth).
5. As an intervener, the Commission acts as an independent party, exercising its functions under section 155 of the EOA 2010, including to promote and advance the objectives of the EOA 2010 Act, and to act as an advocate for the EOA 2010.

B. STATUTORY FRAMEWORK

6. These proceedings include allegations of discrimination under a number of provisions of the EOA 2010, on the basis of the Applicant's status as a parent of two school-aged daughters, on the basis of her employment activity, or in relation to the accommodation by the Respondent of the Applicant's responsibilities as a parent or carer.² It is important to note, however, that the term "discrimination" has multiple meanings under the EOA 2010.
7. Sub-section 7(1) of the EOA 2010 states that "discrimination" means:
- (a) direct or indirect discrimination on the basis of an attribute; or
 - (b) a contravention of section 17, 19, 20, 22, 32, 33, 40, 45, 54, 55 or 56 of the EOA 2010.
8. The tests for direct and indirect discrimination are set out in sections 8 and 9 of the EOA 2010 respectively. When considering a claim of unlawful direct or

² Particulars of claim, [5]-[7] and the Applicant's document titled "Exact legal claims", filed 3 November 2014.

indirect discrimination in the area of employment, the Tribunal must apply those tests to the Applicant's section 18 claims.³

9. On the other hand, a contravention of one of the provisions listed in sub-section 7(1)(b) is determined by reference to the terms of the relevant section, without regard for the tests for direct or indirect discrimination. In other words, breach of one of the provisions in sub-section 7(1)(b) amounts to a standalone cause of action of unlawful discrimination.⁴ The provisions identified in sub-section 7(1)(b) include obligations not to unreasonably refuse to accommodate the responsibilities of persons as a parent or carer in various circumstances⁵ and the obligation to make reasonable adjustments or alternations for persons with a disability in certain circumstances.⁶
10. Section 19, as relied upon by the Applicant, is one such provision. Sub-section 19(1) of the EOA 2010 provides:

19 Employer must accommodate employee's responsibilities as a parent or carer

- (1) *An employer must not, in relation to the work arrangements of an employee, unreasonably refuse to accommodate the responsibilities that the employee has as a parent or carer.*

Example

An employer may be able to accommodate an employee's responsibilities as a parent or carer by allowing the employee to work from home on a Wednesday morning or having a later start time on a Wednesday or, if the employee works on a part-time basis, by rescheduling a regular staff meeting so that employee can attend.

11. Sub-section 19(2) sets out a non-exhaustive list of relevant facts and circumstances that must be considered by the Tribunal in determining whether a refusal is unreasonable.
12. If the Tribunal finds there has been an unreasonable refusal to accommodate the responsibilities for the purpose of section 19, the Respondent will have unlawfully discriminated against that employee in breach of the EOA 2010, and the Tribunal may consider what remedies are available under section 125 of

³ The Commission will be available at the hearing of this proceeding to make additional oral submissions in relation to this framework, if this would assist the Tribunal.

⁴ Explanatory Memorandum, Equal Opportunity Amendment (Family Responsibilities) Bill 2007 (Vic) 1-3; Explanatory Memorandum, Equal Opportunity Bill 2010 (Vic) 12.

⁵ See *Equal Opportunity Act 2010* (Vic) (**EOA 2010**) s 17 (person offered employment), s 19 (employee), s 22 (contract workers) and s 32 (partners of firms).

⁶ See EOA 2010 s 20 (persons offered employment), s 33 (persons invited to become or partners of a firm), s 40 s (persons participating in educational program), s 45 (persons obtaining service from a service provider), s 55 (person seeking accommodation). See also EOA 2010 s 54 (discrimination by refusing to allow assistance dogs) and s 56 (discrimination by refusing to allow alterations – owners corporations).

the EOA 2010.⁷ That is so even if the conduct would not amount to direct or indirect discrimination for the purpose of the EOA 2010. In this regard it has been described as a “third form of discrimination”, recognised in Victoria.⁸

C. INTERPRETATION OF SECTION 19

Limited case law for guidance – a third form of discrimination

13. The Commission makes the following submissions to assist the Tribunal in considering a new and novel area of the EOA 2010.
14. Section 19 of the EOA 2010 re-enacts section 14A of the *Equal Opportunity Act 1995 (EOA 1995)* (now repealed). Section 14A was introduced by the *Equal Opportunity Amendment (Family Responsibilities) Act 2008* and took effect from 1 September 2008 (the **2008 Amendments**). It has not yet been the subject of judicial consideration and determination in the Supreme Court.
15. There has only been one decision of this Tribunal considering the application and interpretation of section 14A of the EOA 1995: *Richold v State of Victoria, Department of Justice (Richold)*.⁹ There have been no decisions of the Tribunal concerning section 19 of the EOA 2010 (although noting that section 14A is worded identically to section 19).
16. Ordinarily where there is limited Victorian case law on a provision, the Commission would suggest the Tribunal consider whether there is comparative case law which might assist. However, the Commission considers section 19, as a stand-alone form of discrimination should not be directly compared to other forms of direct or indirect discrimination, either within the EOA 2010 or Federal discrimination laws.
17. For example, there is protection for employees from discrimination on the basis of their status as a parental and carer under the EOA 2010, and protection from discrimination on the basis of family responsibilities under section 7A of the *Sex Discrimination Act 1984* (Cth). However, both these types of discrimination rely on findings of direct or indirect discrimination.
18. Similarly, there is protection from adverse action discrimination claims on the basis of family responsibilities under section 351 of the *Fair Work Act 2009*

⁷ For completeness, the Commission notes that if the Respondent had raised one of the exceptions in the EOA 2010, and the Tribunal found the Respondent to have proven the exception applied, then according to s 13 of the EOA 2010 the conduct would amount to discrimination but would not be unlawful.

⁸ Anna Chapman “Care Responsibilities and Discrimination in Victoria: The Equal Opportunity Amendment (Family Responsibilities) Act 2008 (Vic)”, (2008) 21 *Australian Journal of Labour Law* 202.

⁹ [2010] VCAT 433.

(Cth). However, “adverse action” is a specific industrial law concept with its own definition.¹⁰

19. The Commission therefore submits that the Tribunal should be careful to *not* draw comparisons with:
 - (a) Victorian cases concerning discrimination on the basis of parental or carer status;¹¹
 - (b) Federal case law on discrimination on the basis of family responsibilities under section 7A of the SDA;¹²
 - (c) Adverse action taken on the basis of family responsibilities under the Fair Work Act.¹³
20. Each of these causes of action has their own definitions which are different to section 19,¹⁴ and require reference to be made to the tests for direct or indirect discrimination. The Victorian Parliament deliberately rejected these tests for section 19.¹⁵
21. Rather, the Victorian Parliament adopted a new or “third form” of discrimination which is not dependent upon the principle of *unfavourable* treatment,¹⁶ or *disadvantage*.¹⁷ Likewise, the prohibition on unreasonably refusing to accommodate the responsibilities of a parent or carer does not turn upon the concept of detriment.¹⁸ To the extent that the Tribunal expressed a contrary view in *Richold*,¹⁹ it is respectfully submitted that it was wrong to do so.²⁰

¹⁰ *Fair Work Act 2009* (Cth), s342. Adverse action is defined to include a range of concepts, including “discriminating between the employee and other employees of the employer” which has been interpreted to be a reference to both direct and indirect discrimination; see *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178, [92], [97] [102].

¹¹ See, eg, *Galea v Hartnett-Blairgowrie Caravan Park* [2012] VCAT 1049; *Capes v Nissan Motor Co (Australia) Pty Ltd* [2011] VCAT 1162. In the latter case, Senior Megay upheld a claim of indirect discrimination in employment on the basis of status as a parent or carer, where she found the employer had imposed an unreasonable condition of “100% compliance” of a particular start time, and that the employee could not comply with due to his parental responsibilities (at [48]).

¹² See, eg, *Burns v Media Options Group Pty Ltd and ors* [2013] FCCA 79; *Cincotta v Sunnyhaven Ltd* [2012] FMCA 110; *Howe v Qantas Airways Ltd* (2004) 188 FLR 1.

¹³ See, eg, *Ucchino v Acorp Pty Limited* [2012] FMCA 9; *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056.

¹⁴ By way of comparison, s 4A of the *Sex Discrimination Act 1984* (Cth) contains a definition of “family responsibilities”, whereas the EOA 2010 contains no equivalent definition.

¹⁵ EOA 2010, s 7(1)(b). Also see: Explanatory Memorandum, Equal Opportunity Amendment (Family Responsibilities) Bill 2007 (Vic) 1.

¹⁶ As is an element direct discrimination under the EOA 2010 s 8. See also s 5(1) of the *Sex Discrimination Act 1984* (Cth) referring to “less favourable treatment” and s 351 of the *Fair Work Act* (Cth) referring to “adverse action”.

¹⁷ As is an element of indirect discrimination under the EOA 2010 s 8. See also s 5(2) of the *Sex Discrimination Act 1984* (Cth).

¹⁸ Cf (for example) s 18(a) – (d) of the EOA 2010.

¹⁹ See discussion at [30] and [35].

²⁰ However, it is accepted that implicit in the “accommodation” of the responsibilities of a parent or carer is the existence of a disadvantage arising by reason of those responsibilities. Any detriment or

22. Traditionally, the focus of Australian anti-discrimination legislation has been on ensuring equality of treatment, that is, achieving formal equality. The High Court in *Purvis v State of New South Wales*²¹ (*Purvis*) drew a distinction between the provisions of the *Disability Discrimination Act 1992* (Cth) (**DD Act**) and other, more recent forms of disability legislation emerging in foreign jurisdictions. The majority in *Purvis* specifically noted that:

*the [DD Act] does not explicitly oblige persons to treat disabled persons differently from others in the community. The [DD Act] does not, for example, contain provisions equivalent to ss 5 and 6 and ss 28B-28G of the [Disability Discrimination Act 1995 (UK)] which expressly oblige employers and educational authorities to make "reasonable adjustments" to accommodate disabled persons.*²² (emphasis in original, citations omitted)

23. Put another way, traditional direct and indirect discrimination has been interpreted by the Tribunal as not imposing obligations to accord more favourable treatment because of an attribute.²³ By contrast, section 19 of the EOA 2010 does, in certain circumstances, oblige an employer to treat an employer with family responsibilities differently (and more favourably) than other employees and the objects of the EOA 2010 clearly indicate a focus on achieving substantive equality.²⁴
24. After *Purvis*, the DD Act was specifically amended to provide that failure to make reasonable adjustments could amount to direct or indirect discrimination, with effect from 5 August 2009.²⁵ Similarly, when the EOA 2010 was introduced it included a standalone obligation in section 20 requiring employers to make reasonable adjustments for employees with a disability, with effect from 1 August 2011. Unlike the DD Act, a breach of section 20 of the EOA 2010 can amount to discrimination without reference to the tests for direct or indirect discrimination under section 7(1)(b) of the EOA 2010.
25. However, the Commission submits that interpretation of section 20 of the EOA 2010, and discrimination on the basis of failure to make reasonable adjustments have turned on their specific language and provide little assistance

disadvantage would fall within the Tribunal's assessment of relevant factors under ss 19(2) of the EOA 2010, including consideration of the consequences of the employee of not making such accommodation under ss 19(2)(h).

²¹ (2003) 217 CLR 92 (*Purvis*).

²² *Purvis* at [203].

²³ *McDougal v Kimberly-Clarke Australia Pty Ltd* [2006] VCAT 2211[44] applying *Purvis*.

²⁴ The Commission notes that the EOA 2010 also included a specific obligation on employers in section 20 to provide reasonable adjustments to an employee with a disability.

²⁵ In addition, a new Division 2A was inserted into the *Disability Discrimination Act 1992* (Cth) (**DD Act**) to provide for the creation of standards to provide guidance on matters relating to disability discrimination, including reasonable adjustment. The Commonwealth Attorney-General has formulated various Disability Standards in accordance with ss 31(1) of the DD Act. A breach of those standards is a contravention of the DD Act.

in understanding and applying the obligation under section 19 of the EOA 2010. Accordingly, the Commission submits that the case law relating to the application of those provisions or the Disability Standards is also of little assistance in the interpretation of section 19 of the EOA 2010.²⁶

Preferred approach to interpretation

26. The Commission submits that the task of construing section 19 of the EOA 2010 should begin (and end) with a consideration of the text itself.²⁷ The provision must be considered in its context, including its legislative history and extrinsic materials.²⁸ Having regard to explanatory memoranda or other documents laid before, or otherwise presented to, any House of Parliament to resolve any ambiguity is also consistent with the approach prescribed by the *Interpretation of Legislation Act 1984* (Vic).²⁹ The preferred approach in dealing with any ambiguity in the legislation is that it should be “resolved in favour of the intended beneficiary”.³⁰
27. Being beneficial and remedial legislation, the EOA 2010 is to be given a “fair, large and liberal” construction rather than one which is “literal or technical”.³¹ The Tribunal must also take into account the express objectives in the EOA 2010.³²
28. The express objectives in the EOA 2010 include:
- (a) *to eliminate discrimination, sexual harassment and victimisation, to the greatest possible extent;*
 - ...
 - (c) *to encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation;*
 - (d) *to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that—*
 - ...

²⁶ See, eg, *Walker v Victoria* (2011) 279 ALR 284; *Walker v Victoria* [2012] FCAFC 38; *Abela v Victoria* [2013] FCA 832.

²⁷ *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 87 ALJR 98, 107 [39]. Also see *Vergara v Ewin* [2014] FCAFC 100, [78].

²⁸ *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 87 ALJR 98, 107 [39].

²⁹ *Interpretation of Legislation Act 1984* (Vic), s 35(b)(iii).

³⁰ DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (Lexis Nexis Butterworths, 7th ed, 2011) [9.4].

³¹ *IW v City of Perth* (1997) 191 CLR 1 at 12 (Brennan CJ and McHugh J) and 39 (Gummow J).

³² *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J), 394 (Deane and Toohey JJ); Also see *Tanevski v Fluor Australia Pty Ltd* [2008] NSWADT 217 [75]-[78].

(iii) *the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures;*

29. The Commission notes that these objectives are more expansive and detailed than those contained in the EOA 1995 (under which *Richold* was decided), and there is a deliberate focus on the Act providing for an “even playing field” by eliminating all forms of discrimination, including systemic or entrenched discrimination, and the promotion of substantive equality.³³
30. These objectives are reinforced by the introduction of section 15 of the EOA 2010, which places on duty holders (such as employers) an obligation to take all reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible. While section 15 is not able to be the subject of an individual complaint to the Commission (in its dispute resolution capacity) or to the Tribunal,³⁴ it is part of the legislative framework which emphasises that employers must act proactive to comply with the EOA 2010 – including the obligation to not unreasonably refuse to accommodate an employee’s parental or carer responsibilities.³⁵
31. The extrinsic material from the 2008 Amendments show that section 14A (and therefore section 19) had a clear purpose: to expand the range of what constitutes discrimination against parents or carers in employment and employment-related areas,³⁶ and provide workers with parental or carer responsibilities with greater protection from discrimination in the workplace.³⁷
32. Finally, the Tribunal must also have regard to the obligation in sub-section 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) to interpret statutory provisions in a way that is compatible with human rights, so far as possible to do so consistently with their purpose. Sub-section 32(1) of the Charter does not require the Tribunal to depart from the ordinary meaning of section 19 of the EOA 2010, or the intention of Parliament in enacting that provision.

³³ EOA 2010, s 3; Victoria, *Second Reading Speech to the Equal Opportunity Bill 2010*, Legislative Assembly, 25 March 2010, 1110.

³⁴ EOA 2010, ss 15(3).

³⁵ Victoria, *Second Reading Speech to the Equal Opportunity Bill 2010*, Legislative Assembly, 25 March 2010, 1111.

³⁶ Explanatory Memorandum, Equal Opportunity Amendment (Family Responsibilities) Bill 2007 (Vic) 1.

³⁷ Explanatory Memorandum, Equal Opportunity Amendment (Family Responsibilities) Bill 2007 (Vic) 2; Victoria, *Second Reading Speech for the Equal Opportunity Amendment (Family Responsibilities) Bill 2007*, Legislative Assembly, Thursday, 11 October 2007, 3469.

33. Accordingly, the Tribunal must discern the purpose of the provision in accordance with ordinary techniques of statutory interpretation.³⁸ On the application of s 32(1), the Court of Appeal has explained:³⁹

The statute is to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality is applied. The human rights and freedoms set out in the Charter incorporate or enhance rights and freedoms at common law. Section 32(1) thus applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application.

D. DETERMINING WHETHER THERE HAS BEEN A BREACH OF SECTION 19

34. The Commission submits that to determine whether there has here been a breach of section 19, the Tribunal must determine whether:

- (a) there is a request to accommodate the Applicant's responsibilities as a parent or carer;
- (b) the Respondent has refused that request; and
- (c) the refusal was unreasonable in the circumstances.

35. The Commission submissions first consider the circumstances in which the prohibition under section 19 may be engaged. This entails addressing questions of whether a specific request for accommodation is required; what are responsibilities as a parent or carer; and what it means to "accommodate" parental or carer responsibilities. Second, the Commission considers whether section 19 of the EOA 2010 requires a positive act of refusal, or whether inaction might also amount to a refusal. Finally, the Commission will address the factors in section 19(2) of the EOA 2010 and the issue of "unreasonableness".

36. These matters will each be discussed in detail below.

³⁸ *Nigro & Ors v Secretary to the Department of Justice* [2013] VSCA 213 [85].

³⁹ *Nigro & Ors v Secretary to the Department of Justice* [2013] VSCA 213 [85] (citations omitted); *Slaveski v Smith* (2012) 34 VR 206, 215 [23].

(a) In what circumstances can the prohibition under section 19 arise?

Is a request required?

37. Unlike a the right to request flexible working arrangements under section 65 of the *Fair Work Act 2009* (Cth), section 19 of the EOA 2010 does not explicitly require an employee to make a request to change their working arrangements – either verbally or in writing.
38. However, in *Richold*, Deputy President Macnamara found that a request to accommodate parental or carer responsibilities was “necessarily implicit” in the provision.⁴⁰ This, it was said, is because an employer is unlikely to be fully appraised of the employee’s personal or domestic situation, noting:
- ...rights of privacy and autonomy for the employee and the employee’s family would render it inappropriate for an employer to reach a judgment as to what was an appropriate accommodation for a particular employee absent any consideration of the employee’s views.*⁴¹
39. Therefore, the Tribunal must consider the evidence and determine whether the employer has been informed of the employee’s situation and a request made for accommodation in relation to their parental or carer responsibilities.⁴² The Commission submits that such a request may be made by *or on behalf of* the employee, so long as the employer is in a position to reach a judgment giving consideration to the employee’s views.
40. However, the Commission submits that the request by or on behalf of the employee need only articulate the employee’s responsibilities as a parent or carer and a need for the employer to accommodate those responsibilities. There is nothing in the language of section 19 which requires an employee to indicate the particular working arrangements that need to be changed, or articulate a specific proposal for new work arrangements. The nature of the employee’s work arrangements and changes to those arrangements only become relevant for the purpose of determining whether any refusal was unreasonable, as set out in sub-section 19(2)(c) of the EOA 2010. The comments of Deputy President Macnamara set out in paragraph 38 above support this approach.

⁴⁰ *Richold v State of Victoria, Department of Justice* [2010] VCAT 433 [38].

⁴¹ *Richold v State of Victoria, Department of Justice* [2010] VCAT 433 [38].

⁴² The implicit requirement for a request was recognised by Deputy President Macnamara in *Richold v State of Victoria, Department of Justice* [2010] VCAT 433 [38].

41. In this case, the Application alleges that she requested to use her “TIL” (also known as “flexitime”) for the school holiday period in January 2014, and to take one day off per week prior to her transfer from the Response team to the Case Management Team, to accommodate her parental responsibilities.⁴³ The Applicant also requested to permanently reduce her working days from five to four to spend more time with her children.⁴⁴
42. Therefore, in considering whether there has been a request by the Applicant to engage section 19 of the EOA 2010, the Tribunal must therefore consider whether there is evidence that the Applicant’s requests indicated a need for the Respondent to accommodate her parental and carer responsibilities.

What are “responsibilities that an employee has as a parent or carer”?

43. Part of this assessment will also require consideration of the meaning of the phrase “responsibilities that an employee has as a parent or carer”, as it is not defined in the Act.
44. It is submitted that the proper construction of this phrase requires the identification of the “responsibilities” that an employee has as a “parent” or “carer”. “Parent” is defined by section 4 to include a step-parent; an adoptive parent; a foster parent or a guardian. “Carer” is also defined by section 4 to mean a “person on whom another person is wholly or substantially dependent for ongoing care and attention, other than a person who provides that care and attention wholly or substantially on a commercial basis”.
45. The ordinary meaning of “responsibilities” includes the state of being responsible,⁴⁵ and the ordinary meaning of “responsible” includes “involving accountability or responsibility”.⁴⁶ Accordingly, the Commission submits that the phrase “responsibilities that an employee has as a parent or carer” would include an employee’s responsibility or accountability for the physical and emotional care, support and supervision of the children⁴⁷ or dependents.

⁴³ Particulars of claim [6](1) and (c), and the Applicant’s document titled “Exact legal claims”, filed 3 November 2014 at [6],[8].

⁴⁴ Witness statement of Charmaine Tate, p 3, and the Applicant’s document titled “Exact legal claims”, filed 3 November 2014 at [7]. The Respondent admits this request was made but says it was refused on reasonable business grounds: Particulars of Defence [14.8]; Witness statement of Dale Rogers [43]-[44].

⁴⁵ *Macquarie Concise Dictionary* (4th Edn).

⁴⁶ *Ibid.*

⁴⁷ As noted in paragraph [44] of these submissions, “parent” is not defined by reference to the “child” – which is defined in s 4 of the EOA 2010 as a person under 18 years of age. Accordingly, there is no specified age at which a parent would cease to have parental responsibilities for a person. However,

What does it mean to “accommodate” responsibilities?

46. The term “accommodate” is not defined in the EOA 2010. However, “accommodation” is defined by s 4 of the EOA 2010 to include a business premises and various forms of lodging. The Commission submits this definition clearly does not apply to section 19. A similar definition arising under the DD Act was considered by McHugh and Kirby JJ in *Purvis*. It was there noted that the definition was “probably directed to discrimination in the offering of physical accommodation”, an area regulated by the DD Act⁴⁸ (and the EOA 2010).⁴⁹
47. Their Honours went on to state that:
- “Accommodation” is commonly understood to mean “an adjustment or adaptation to suit a special or different purpose” (The Australian Oxford Dictionary (1999), p 8). Once that is accepted, there is no reason, given the objects of the [DD Act], for not extending the notion of “accommodation” to all those things necessary to achieve true equity for the disabled.*⁵⁰
48. The Commission submits that the ordinary meaning and the extended notion of “accommodation” adopted by McHugh and Kirby JJ in *Purvis* is equally applicable to the term “accommodate” as it is used in section 19 of the EOA 2010. Such an interpretation is consistent with the objects of the Act, and gives the phrase a liberal construction.
49. The process of accommodating an employee’s responsibilities as a parent or carer following a request may involve different proposals by the employer or employee in relation to their work arrangements, and discussions about changes to those work arrangements. This could occur at the same time as a request to accommodate those responsibilities has been made, or after.⁵¹
50. To assist employers understand what it means to “accommodate” responsibilities, sub-section 19(1) of the EOA includes examples of work arrangements which may be introduced to accommodate an employee’s responsibilities as a parent or carer. These include the location of work (allowing an employee to work from home) hours of work (having a later start time), and the internal arrangements of the employer (rescheduling staff meetings so that an employee can attend).

the nature of those parental responsibilities (regardless of the child’s age) is relevant to the Tribunal’s assessment under ss 19(2)(a) of the EOA 2010.

⁴⁸ *Purvis* at [88]. The Court was there considering the term “accommodation” as it arose in respect of direct discrimination at s 5(2) of the DDA which provided, “For the purpose of subsection (1), circumstances in which a person treats or would treat another person with a disability differently are not materially different because of the fact that different accommodation or services may be required by the person with a disability.”

⁴⁹ EOA 2010, Part 4, division 5 “Discrimination in accommodation”.

⁵⁰ *Purvis* at [88].

⁵¹ “Work arrangements” is defined to mean “arrangements applying to the employee or to the workplace”, EOA 2010 s 4.

51. The Explanatory Memorandum for the Equal Opportunity Bill 2010 also explains that there are a number of other ways that an employer can accommodate an employee's parental or carer responsibilities, "such as by allowing an extension of unpaid leave, but this will depend on the circumstances of the case".⁵²
52. Relevant for this proceeding, the Commission submits that using "TIL" or flexitime credits to take time off for parental or caring responsibilities, either on a one-off basis or for a period of time on a regular basis (such as reducing work days from 5 to 4 whether temporarily or permanently), could amount to accommodation of responsibilities that the Applicant has as a parent or carer for the purpose of section 19.

(b) Has there been an unreasonable refusal to accommodate parental or carer responsibilities?

53. The Respondent will be in contravention of section 19 if it has refused to accommodate the Applicant's responsibilities as a parent or carer, and if such a refusal was unreasonable. If the Tribunal finds there is a refusal to accommodate the Applicant's responsibilities, then evidence about the nature of the arrangements required to accommodate the Applicant's parental or carer responsibilities, and evidence about what accommodations were reached, will be relevant to the analysis of whether such a refusal was reasonable.

Has there been a refusal?

54. The first consideration is whether, for the purposes of section 19, the Respondent has in fact refused an employee's request to accommodate their parental or carer responsibilities.
55. The Commission submits that discrimination can occur through the doing of an act or omitting to an act.⁵³ Therefore, in relation to whether there has been a refusal, the Tribunal should include circumstances where there has been inaction or ineffectiveness on the part of an employer, which effectively results in a refusal to accommodate.
56. For example, an employee may consider that a request has been refused in circumstances where it has simply been ignored or remained unanswered, despite the employee's best efforts to bring it to the attention of their employer in a timely way. To permit an employer to avoid liability under section 19 by ignoring a request would frustrate the clear legislative purpose to the provision.

⁵² Explanatory Memorandum, Equal Opportunity Bill 2010 (Vic) 19.

⁵³ EOA 2010, s 11(b).

57. However, to amount to discrimination, a failure to act must be based on more than mere speculation.⁵⁴ Absent a specific request by an employee to accommodate their responsibilities as a parent or carer, an employer would be left to speculate about whether accommodation is required or desired. This is a further reason why a breach of section 19 would be unlikely in the absence of a request by or on behalf of the employee.

When is a refusal to accommodate the responsibilities of a parent or carer unreasonable?

58. Once the Tribunal has found there has been a request to accommodate parental or carer responsibilities, and that request has been refused, the Tribunal must consider whether that refusal was unreasonable. Whether a refusal was unreasonable will depend on the Tribunal's assessment of the evidence provided.
59. Section 19(2) sets out a non-exhaustive list of factors for the Tribunal to take into account, including:
- (a) The employee's circumstances, including the nature of his or her responsibilities as a parent or carer;
 - (b) The nature of the employee's role;
 - (c) The nature of the arrangements required to accommodate those responsibilities;
 - (d) The financial circumstances of the employer;
 - (e) The size and nature of the workplace and the employer's business;
 - (f) The effect on the workplace and the employer's business of accommodating those responsibilities, including:
 - (i) The financial impact of doing so;
 - (ii) The number of persons who would benefit from or be disadvantaged by doing so;
 - (iii) The impact on the efficiency and productivity and, if applicable, on customer service of doing so;
 - (g) The consequences for the employer of making such accommodation; and
 - (h) The consequences for the employee of not making such accommodation.

⁵⁴ *Campagnolo v Benalla and District Football League Inc* [2009] VSC 228 [64]–[66].

60. These factors are “common-sense considerations that aim to encompass the needs of both parties”.⁵⁵ Importantly, none of these factors are determinative on their own and there may be other factors that are relevant to a particular case.⁵⁶

61. In the Second Reading Speech to the 2008 Amendments, it was noted that:

*Other factors that could be relevant in a particular case might, for example, include when the arrangements are to commence, how long they are to continue from what information has been provided by the worker in respect of their situation, the accrued entitlements of the worker, and whether there are any legal or other constraints that affect the feasibility of the employer accommodating the responsibilities.*⁵⁷

62. The Commission submits that, as the list of factors in sub-section 19(2) is non-exhaustive, the additional factors identified in the Second Reading Speech may provide additional guidance to the Tribunal in some circumstances.

63. In *Richold*, Deputy President Macnamara stated that the obligation to accommodate:⁵⁸

...does not require an employer to entirely subjugate its own interests to the interests of the employee as a parent or carer. Rather, it requires a reasonable accommodation between the two. This necessarily entails acceptance of the view that matters may be arranged in a manner which is less than ideal from the employer's standpoint and also less than ideal from the employee's standpoint.

64. Further, in *Richold*, Deputy President Macnamara stated that a large employer such as the State of Victoria, with substantial resources, “might be expected to be able to be more accommodating than a smaller employer with fewer resources”.⁵⁹

65. This does not mean that an employer must agree to every request for changes to existing work arrangements by an employee, made in association with a request to accommodate their parental or carer responsibilities. It means that if the refusal of a request to change work arrangements results in a refusal to accommodate an employee's parent or carer responsibilities, there must be a valid basis for that refusal, arrived at after proper consideration of all relevant facts.

⁵⁵ Victoria, *Second Reading for the Equal Opportunity Amendment (Family Responsibilities) Bill 2007*, Legislative Assembly, Thursday, 11 October 2007, 3468.

⁵⁶ Explanatory Memorandum, *Equal Opportunity Bill 2010* (Vic) 20.

⁵⁷ Victoria, *Second Reading for the Equal Opportunity Amendment (Family Responsibilities) Bill 2007*, Legislative Assembly, Thursday, 11 October 2007, 3468.

⁵⁸ *Richold v State of Victoria, Department of Justice* [2010] VCAT 433 [43].

⁵⁹ *Richold v State of Victoria, Department of Justice* [2010] VCAT 433 [41].

66. It is noted that the criterion listed at sub-section 19(2) are generally directed at the objective circumstances or outcome of a refusal to accommodate the responsibilities of a parent or carer. Further, the test of reasonableness, as it arises in relation to indirect discrimination, has been determined to pose an objective test.⁶⁰
67. However, section 19 ultimately requires a determination of the “unreasonableness” of a refusal by a party as distinct from the reasonableness of a “requirement, condition or practice”.⁶¹ Accordingly, the Commission submits that it is open for the Tribunal to have regard to the conduct of an employer in dealing with an employee’s request. For example, if an employer were to act capriciously in dealing with that request, such conduct may contribute to a finding that a refusal by them was unreasonable.
68. Further, the nature and availability of the alternate work arrangements to accommodate the employee’s responsibilities is a relevant and critical consideration for the Tribunal.⁶² The meaning of the term “accommodate” as it arises under section 19 is discussed above. Applying the same definition to sub-section 19(2)(c), the Commission submits that this criteria invites consideration of the nature of the arrangements required “to achieve true equity” for a person with responsibilities as a parent or carer.
69. This again differs from the Tribunal’s task in determining whether a requirement, condition or practice is reasonable for the purpose of indirect discrimination. Indeed, in the *Schou* proceedings,⁶³ it was the Tribunal’s focus on the alternative work arrangements available to Ms Schou which was found to have led the Tribunal into error.⁶⁴
70. The *Schou* proceedings involved an employee who sought to negotiate a change in her working conditions to permit her to work from home so that she could care for her sick child. The proposed changed work arrangements included what was described as “the modem proposal”, essentially having a modem installed at her home to allow her to perform her work on line. She claimed indirect discrimination on the basis that she was unable to comply with her employer’s requirement that she attend work to perform her duties, rather than working on line (the attendance requirement).

⁶⁰ *Waters v Public Transport Corporation* (1991) 173 CLR 349, 395–6 (Dawson and Toohey JJ).

⁶¹ EOA 2010 ss 9(1).

⁶² See EOA 2010 ss 19(2)(c).

⁶³ *Schou v State of Victoria* (2000) EOC ¶93-100 *Schou v State of Vic* [2000] VCAT 1453 (remedies) and *Schou v State of Victoria Melbourne (Department of Parliamentary Debates)* [2002] VCAT 375.

⁶⁴ *State of Victoria v Schou (No. 2)* (2004) 8 VR 120, 129 [26].

71. The Tribunal initially upheld Ms Schou's claim for indirect discrimination. On appeal to the Supreme Court, Harper J upheld an appeal from that decision, finding:

*A term of a contract of employment, compliance with which is reasonably adapted to ensure that the employee provide to the employer that standard of service which the employer reasonably requires and the employee is paid to provide, will not be caught by [the prohibition against indirect discrimination]. It is not the aim of the legislation to deny employers the rights given to them by a lawful and reasonable contract of employment. If workers who are disabled, or who are parents or carers, or who carry some other relevant attribute, cannot do the job, the Equal Opportunity Act does not require their employment in spite of their inability to fulfil those terms of their contract of employment which govern the performance of the very tasks which they are employed to carry out.*⁶⁵

72. The matter was remitted to the Tribunal which again found Ms Schou to have suffered indirect discrimination.⁶⁶ On appeal from the decision in the Court of Appeal, Phillips JA, with whom Buchanan JA agreed, noted:⁶⁷

... It may well be that Ms Schou, in the circumstances which she found herself had a strong case for some departure from the general rule in her case, but the mistake was then to conclude that, if she had such a case that made the [attendance requirement] not reasonable .

73. By contrast, in this case, the Tribunal can and should consider the nature of the arrangements required to accommodate the applicant's responsibilities. The Commission submits that this will be directly and immediately relevant to determining whether any refusal to accommodate her responsibilities as a parent or carer was unreasonable.
74. The Tribunal must here consider the particular circumstances and weigh the evidence of the Applicant and Respondent, to determine whether there has been an unreasonable refusal. Either as part of the Tribunal's assessment under the listed factors in sub-section 19(2) or as additional factors, the Tribunal may also wish to consider evidence regarding:

- (a) whether the Respondent had adequate workplace policies or procedures in place which related to accommodation of parental or carer responsibilities and provided workplace flexibility in practice;

⁶⁵ *State of Victoria v Schou* (2001) 3 VR 655 at 621 [22].

⁶⁶ For a discussion of Ms Schou's situation in the context of s 19 of the EOA 2010 see Anna Chapman, "Reasonable Accommodation, Adverse Action and the case of Deborah Schou" (2010) 33 *Adelaide Law Review*, 39.

⁶⁷ *State of Victoria v Schou* (No. 2) (2004) 8 VR 120, 132 [31].

- (b) whether the Applicant and her supervisors were adequately trained in those policies. In particular, did they understand what was required to make a request, to approve that request, to whom the Applicant should speak to if her supervisor was not available, and how to address any grievance or concern about that process;
 - (c) whether the Respondent's policies and procedures were followed, and whether there was an effective means for the Applicant to exercise her rights under those policies;
 - (d) the broad circumstances in which any refusal was made;
 - (e) the likely impact on the Applicant's work units would have been if her requests were granted, including the impact on those units financially and on staffing; and
 - (f) if it is not possible to accommodate the Applicant in the way requested, whether there are any alternative arrangements available.⁶⁸
75. The Commission will be available to provide oral submissions on the application of sub-section 19(2) at the hearing of this proceeding, after the close of evidence, if that would assist the Tribunal.

E. INTERACTION BETWEEN SECTION 19 OF THE EOA 2010 AND THE RIGHT TO REQUEST FLEXIBLE WORKING ARRANGEMENTS

76. Finally, the Commission notes that the policy imperative of creating more flexible work places to facilitate the economic participation of parents has been recognised nationally. The right for parents to request flexible working arrangements is recognised in section 65 of the *Fair Work Act 2009* (Cth) (**Fair Work Act**).
77. This framework gives parents the right to ask for flexible working arrangements to help them to care for a child. Employers must respond to a request in writing within 21 days and provide reasons for a refusal. Employers can only refuse the request on "reasonable business grounds".
78. However, section 66 of the Fair Work Act provides that the right to request flexible working arrangements is *not* intended to apply to the exclusion of laws of a State or Territory that provides employees with flexible working entitlements, to the extent that those entitlements are more beneficial to employees than under section 65.

⁶⁸ See also the list of other relevant factors and questions, listed in the Victorian *Second Reading for the Equal Opportunity Amendment (Family Responsibilities) Bill 2007*, Legislative Assembly, Thursday, 11 October 2007, 3468-3469.

79. The Commission submits that section 19 of the EOA 2010 is a more beneficial provision than section 65 of the Fair Work Act, and so the proviso in section 66 applies. A refusal of a request for flexible working arrangements on reasonable business grounds, in accordance with sub-section 65(5) and (5A), will not necessarily mean a refusal to accommodate parental and carer responsibilities will also be reasonable under section 19 of the EOA 2010.
80. The Commission submits it is neither sufficient nor reasonable under the EOA 2010 for an employer to refuse a request for flexible work arrangements simply because it would be too costly, or is impractical.⁶⁹ Although there may be an overlap between considerations under section 65 of the Fair Work Act and section 19 of the EOA 2010, section 19 creates a separate and distinct obligation on an employer consider the employee's situation and not unreasonably refuse to accommodate an employee's responsibilities as a parent or carer, in all the circumstances.
81. In the Commission's submission, workplaces like that of Respondent with "front line" staff, as well as any workplace where long or unpredictable hours are the norm, or fast-paced workplaces with demanding workloads, are not exempted from this obligation.

JIM MCKENNA
MELBOURNE CHAMBERS

Victorian Equal Opportunity & Human Rights Commission

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7 November 2014**

⁶⁹ *Fair Work Act 2009* (Cth), section 65(5A)(a) and (c).