

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S CI 2018 00852

OWNERS CORPORATION OC1-POS539033E

and

OWNERS CORPORATION OC3-POS539033E

Applicants

v

ANNE BLACK

Respondent

and

VICTORIAN EQUAL OPPORTUNITY AND
HUMAN RIGHTS COMMISSION

Amicus Curiae

JUDGE: Richards J
WHERE HELD: Melbourne
DATE OF HEARING: 21 May 2018
DATE OF JUDGMENT: 21 June 2018
CASE MAY BE CITED AS: Owners Corporation OC1-POS539033E v Black
MEDIUM NEUTRAL CITATION: [2018] VSC 337

EQUAL OPPORTUNITY AND DISCRIMINATION - Disability discrimination - Appeal from Victorian Civil and Administrative Tribunal - Member of owners corporations seeking alterations to common property to accommodate her disability - Tribunal found that owners corporations provide 'services' as defined in the *Equal Opportunity Act 2010* - Definition of 'services' - Construction of ss 44, 45 and 56 - Whether s 56 exclusively regulates alterations to common property of an owners corporation- Appeal dismissed - *Equal Opportunity Act 2010* ss 44, 45 and 56 - *Victorian Civil and Administrative Tribunal Act 1998* s 148.

| <u>APPEARANCES:</u> | <u>Counsel</u> | <u>Solicitors</u> |
|---------------------|---------------------|---------------------------------|
| For the Applicants | Ms Catherine Symons | Macpherson Kelley |
| For the Respondent | Ms Penny Harris | Disability Discrimination Legal |

For the Amicus Curiae

Ms Joanna Davidson

Service Inc

Victorian Equal Opportunity and
Human Rights Commission

HER HONOUR:

- 1 Anne Black, the respondent, lives in an apartment in Travancore that she has owned since December 2013. During 2015 Ms Black developed disabilities that affect her mobility, and she now relies on mobility aids such as a wheelchair or a scooter.
- 2 The applicants are owners corporations that own and maintain parts of the building in which Ms Black has her apartment. Ms Black is a member of both applicants and is entitled to access and use the common areas of the building. The first applicant owns and is responsible for the main entry to the building. The second applicant owns and is responsible for the doors to the car park, the rubbish disposal area and the courtyard and garden.
- 3 Ms Black claims that these doors, and the ramp to the car park door, are not suitable to her disabilities, and that various modifications are required so that she can use them. The applicants have not made these modifications.
- 4 Ms Black has applied to the Victorian Civil and Administrative Tribunal (**VCAT**) for remedies under the *Equal Opportunity Act 2010* (Vic) (**EO Act**), including orders that the applicants modify the doors and the ramp to the car park door. She alleges that, as service providers, the applicants have indirectly discriminated against her in breach of s 44 of the EO Act, and have failed to make reasonable adjustments for her disability in breach of s 45 of the EO Act. She also relies on s 56 of the EO Act, which requires an owners corporation to make alterations to common property in certain circumstances.
- 5 The parties are in dispute about the application of the EO Act to these circumstances. The applicants contend that they are not providers of services to which ss 44 and 45 apply, and that s 56 is the only provision of the EO Act under which an owners corporation may be required to make alterations to common property. The parties asked VCAT to answer some preliminary questions about these issues. On 8 February 2018 Senior Member Steele published reasons for decision and made orders answering those questions. One question was answered favourably to Ms Black, with VCAT

holding that the applicants provide services to her for the purposes of ss 44 and 45 of the EO Act.

- 6 The applicants seek leave to appeal against that decision. For the reasons that follow I would grant leave to appeal, but would dismiss the appeal. I agree with VCAT's conclusions that the applicants provide services to Ms Black, and that s 56 does not exclude the application of ss 44 and 45 of the EO Act to an owners corporation.

Equal Opportunity Act 2010

- 7 The EO Act commenced on 1 August 2011, replacing the former *Equal Opportunity Act 1995 (Vic) (1995 Act)*. A main purpose of the EO Act was to 'to re-enact and extend the law relating to equal opportunity and protection against discrimination, sexual harassment and victimisation'.¹ The objectives of the EO Act are set out in s 3, relevantly:

- (a) to eliminate discrimination, sexual harassment and victimisation, to the greatest possible extent;
- (b) to further promote and protect the right to equality set out in the Charter of Human Rights and Responsibilities;
- (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 –
 - (i) discrimination can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society;
 - (ii) equal application of a rule to different groups can have unequal results or outcomes;
 - (iii) the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures;

...

- 8 The EO Act prohibits discrimination on the basis of a range of attributes in specified areas of activity, and also imposes some positive obligations to promote substantive

¹ EO Act, s 1(a).

equality. In this case, the relevant attribute is disability,² and the relevant areas of activity are the provision of services and accommodation.

9 Discrimination is defined in Part 2 of the EO Act. A central aspect of the definition is s 7(1), which provides:

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.

10 The concepts of ‘direct discrimination’ and ‘indirect discrimination’ are defined in ss 8 and 9 respectively. Ms Black alleges indirect discrimination in this case.

11 Indirect discrimination involves the imposition of a requirement, condition or practice that has, or is likely to have, the effect of disadvantaging persons with an attribute, and that is not reasonable. The person who imposes the requirement, condition or practice has the burden of proving that it is reasonable. Whether it is reasonable depends on all the relevant circumstances of the case, including the matters listed in s 9(3).

12 Pt 4; Div 4 of the EO Act deals with discrimination in the provision of goods and services. There is a definition of ‘services’ in s 4:

services includes, without limiting the generality of the word –

- (a) access to and use of any place that members of the public are permitted to enter;
- (b) banking services, the provision of loans or finance, financial accommodation, credit guarantees and insurance;
- (c) provision of entertainment, recreation or refreshment;
- (d) services connected with transportation or travel;
- (e) services of any profession, trade or business, including those of an employment agent;
- (f) services provided by a government department, public authority, State owned enterprise or municipal council –

² EO Act, s 6(e) and s 4 (definition of “disability”).

but does not include education or training in an educational institution;

This definition reproduced the definition of 'services' in s 4 of the 1995 Act.

13 Section 44 is a broad prohibition on discrimination in the provision of goods and services, in the following terms:

- (1) A person must not discriminate against another person—
 - (a) by refusing to provide goods or services to the other person; or
 - (b) in the terms on which goods or services are provided to the other person; or
 - (c) by subjecting the other person to any other detriment in connection with the provision of goods or services to him or her.
- (2) Subsection (1) applies whether or not the goods or services are provided for payment.

14 In addition, s 45 imposes a positive obligation on a service provider to make reasonable adjustments for a person with a disability who requires adjustments to be made to the provision of a service in order to participate in or access the service, or derive any substantial benefit from the service. In that event, s 45(2) provides:

The service provider must make reasonable adjustments unless the person could not participate in or access the service or derive any substantial benefit from the service even after the adjustments are made.

15 Section 45(3) provides that, in determining whether an adjustment is reasonable, all relevant facts and circumstances must be considered, including—

- (a) the person's circumstances, including the nature of his or her disability; and
- (b) the nature of the adjustment required to accommodate the person's disability ; and
- (c) the financial circumstances of the service provider; and
- (d) the effect on the service provider of making the adjustment, including—
 - (i) the financial impact of doing so;
 - (ii) the number of persons who would benefit from or be disadvantaged by doing so; and
- (e) the consequences for the service provider of making the adjustment;

and

- (f) the consequences for the person of the service provider not making the adjustment; and
- (g) any relevant action plan made under Part 3 of the **Disability Discrimination Act 1992** of the Commonwealth; and
- (h) if the service provider is a public sector body within the meaning of section 38 of the **Disability Act 2006**, any relevant Disability Action Plan made under that section.

16 Pt 4, Div 5 deals with discrimination in accommodation. Section 56 is headed 'Discrimination by refusing to allow alterations – owners corporations'. Rather than prohibiting discrimination, it creates a positive obligation for an owners corporation to allow reasonable alterations to common property in specified circumstances:

- (1) This section applies if a person with a disability –
 - (a) owns a lot affected by an owners corporation; or
 - (b) is an occupier of a lot affected by an owners corporation.
- (2) The owners corporation must allow the person to make reasonable alterations to common property to meet his or her special needs if –
 - (a) the alterations are at the expense of the person; and
 - (b) the alterations do not require any alterations to a lot occupied by another person; and
 - (c) the alterations do not adversely affect –
 - (i) the interests of another occupier of a lot affected by the owners corporation; or
 - (ii) the interests of an owner of another lot affected by the owners corporation; or
 - (iii) the interests of the owners corporation; or
 - (iv) the use of common property by another occupier of a lot or an owner of another lot affected by the owners corporation; and
 - (d) the action required to restore the common property to the condition it was in before the alterations is reasonably practicable in the circumstances; and
 - (e) the person agrees to restore the common property to its previous condition before vacating the lot and it is reasonably likely that he or she will do so.

- (3) This section is in addition to, and does not affect or take away from any requirements imposed by or under the **Building Act 1993**.
- (4) This section does not affect anything in—
 - (a) Part 10 or 11 of the **Owners Corporations Act 2006**; or
 - (b) Division 5 of Part 5 of the **Subdivision Act 1988**.
- (5) In this section—

common property and lot affected by an owners corporation have the meanings given in section 3 of the **Owners Corporations Act 2006**.

17 Part 10 of the *Owners Corporations Act 2006* (**Owners Corporations Act**) concerns dispute resolution within owners corporations. Part 11 provides for various applications to VCAT including, in Pt 11, Div 1, in relation to owners corporation disputes. Section 165 of the **Owners Corporations Act** gives VCAT power to make a range of orders determining an owners corporation dispute.

18 Also in Pt 4, Div 5 of the **EO Act**, s 55 obliges a person who provides accommodation to a person with a disability to allow reasonable alterations to the accommodation in the circumstances set out in s 55(1)(a) to (d). The obligation in s 55 is cast in similar terms to the obligation of an owners corporation in s 56, and also applies in addition to the requirements imposed by the *Building Act 1993* (**Building Act**). In addition, s 57 prohibits discrimination against a person on the basis of disability in relation to any premises that the public or a section of the public is entitled or allowed to enter or use, including in relation to the provision of means of access to the premises. However, s 58 allows discrimination that would otherwise be prohibited by s 57 if it could not reasonably be avoided, having regard to all relevant facts and circumstances including those set out in s 58(2).

VCAT's decision

19 The parties agreed on questions of law to be answered by VCAT, which were filed as part of a statement of agreed facts dated 23 October 2017. The questions were, in respect of each owners corporation:

- (a) Does the owners corporation provide a service to Ms Black for the purposes of

s 44 having regard to Pt 4, Div 5 of the EO Act, including s 56?

- (b) If the answer to the s 44 question is yes, has the owners corporation unlawfully discriminated against Ms Black having regard to ss 45(3) and (4), and 46?
- (c) Does s 56 require the owners corporation to make the modifications requested by Ms Black having regard to the fact that it complied with the Building Code then in force at the time that the building permit was issued, the date construction was commenced, and the date that the relevant Partial Occupancy Permit was issued?
- (d) Does s 13(1)(c), together with s 75 of the Act, authorise the alleged discrimination by the owners corporation, on the basis that the building complied with the Building Act by reason of compliance with the Building Code 2005 or 2006?
- (e) Does s 13, together with s 31 of the *Disability Discrimination Act 1992* (Cth), 'cover the field' with respect to matters covered by *Disability (Access to Premises – Building) Standards 2010* in relation to the owners corporation and bar the application of the EO Act in relation to the matters the subject of Ms Black's claims?
- (f) Having regard to (a) to (e) above, has the owners corporation unlawfully discriminated against Ms Black in breach of the EO Act?

20 Senior Member Steele of VCAT determined these questions on the papers, having received written submissions from the parties. On 8 February 2018 she published reasons for her decision³ and made an order answering the questions agreed by the parties, for both owners corporations, as follows:

- (a) Yes;
- (b) Unanswered;

³ *Black v Owners Corporation OC1-POS539033E* (Human Rights) [2018] VCAT 185 (Reasons).

- (c) No;
- (d) No;
- (e) No;
- (f) Unanswered.

21 The applicants seek leave to appeal only in relation to the answer to question (a), and so I need only outline VCAT's reasoning in relation to that question. The question turns on whether Pt 4, Div 4, which is aimed at providers of goods and services, applies to an owners corporation, when the only section in the EO Act that mentions owners corporations is s 56, in Pt 4, Div 5.⁴ Senior Member Steele held that both Div 4 and Div 5 apply to owners corporations because, in summary:

- (a) The EO Act is beneficial and remedial legislation and is to be given a liberal construction.⁵ Nothing in the EO Act, including its structure, indicates that the divisions in Pt 4 were intended to be exclusive.⁶
- (b) The definition of 'services' is to be given a wide meaning, having regard to the beneficial and remedial purpose of the EO Act.⁷
- (c) The term 'services' applies to the activities of the owners corporations. The definition of 'services' in s 4 is open and inclusive, extremely broad and covers any sort of helpful activity.⁸
- (d) In both Queensland and New South Wales the relevant tribunal has held that 'services' in that State's anti-discrimination legislation covers the activities of owners corporations. While these decisions are not determinative they provide guidance.⁹

⁴ Reasons, [9].

⁵ Reasons, [13], citing *IW v City of Perth* (1997) 191 CLR 1, 11-12 (Brennan CJ and McHugh J).

⁶ Reasons, [10]-[12].

⁷ Reasons, [34], again citing *IW v City of Perth* (1997) 191 CLR 1, 11-12 (Brennan CJ and McHugh J).

⁸ Reasons, [18]-[20].

⁹ Reasons, [21]-[31], referring to *C v A* [2005] QADT 14 and *Hulena v Owners Corporation Strata Plan 13672* [2009] NSWADT 119.

- (e) The functions of an owners corporation under Victoria's Owners Corporations Act include management, administration, maintenance and repair of the common property. These acts of helpful activity are services that include the provision of access to the apartments in the building via the common property.¹⁰
- (f) The inclusion in the definition of 'services' to 'access to and use of any place that members of the public are permitted to enter' does not exclude access to and use of common property that is not a public space. The definition is inclusive and general, the matters listed do not limit its generality, and the term is to be given a wide meaning given the beneficial and remedial purposes of the legislation.¹¹
- (g) Sections 44 and 56 can both apply to common property of an owners corporation without any adjustment to their meaning. The EO Act is beneficial in nature and, if the text allows, should not be read as confining solutions for persons with disability.
- (h) The fact that the owners corporations are subject to the provisions of the Owners Corporations Act is a relevant factor to be taken into account in determining whether an adjustment is reasonable, under s 45(3) of the EO Act.¹²
- (i) The application of Pt 4, Div 4 of the EO Act to owners corporations does not circumvent the dispute resolution processes in Pt 10 and Pt 11 of the Owners Corporations Act.¹³ VCAT can take into account the principles in the Owners Corporations Act when deciding who should pay the cost of any alterations to common property, and the parties to an EO Act dispute could also seek to have VCAT deal with the dispute under Pt 11 of the Owners Corporations Act.¹⁴

22 Taking all of those matters into account, the learned senior member concluded that

¹⁰ Reasons, [32], [36].

¹¹ Reasons, [33]-[35].

¹² Reasons, [45]-[47].

¹³ Reasons, [57]-[64].

¹⁴ Reasons, [48]-[56].

the answer to question (a) is yes – the owners corporations provide services to Ms Black.¹⁵

23 VCAT was unable to determine, on a preliminary basis, whether the owners corporations had unlawfully discriminated against Ms Black by failing to make reasonable adjustments for her disabilities. The answer to this question requires an assessment of whether the adjustment is reasonable having regard to all relevant facts and circumstances. To progress the determination of this issue, the senior member directed VCAT’s principal registrar to fix a directions hearing as soon as possible. That is the stage the VCAT proceeding had reached when the applicants sought leave to appeal VCAT’s order answering question (a) to this Court, under s 148 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic) (VCAT Act)*.

Amicus curiae application

24 Both the application for leave to appeal and the proposed appeal were listed for hearing on 21 May 2018.

25 Shortly before the hearing the Victorian Equal Opportunity and Human Rights Commission (**Commission**) applied for leave to assist the Court as amicus curiae, under s 160 of the EO Act. The Commission sought to assist the Court by making submissions on aspects of the EO Act raised by the proposed appeal, in particular:

- (a) the meaning of ‘services’ in the EO Act and whether it extends to owners corporations; and
- (b) the interpretation of ss 44 and 56 of the EO Act and their application to services provided by an owners corporation.

26 The Commission submitted that leave should be granted because:

- (a) The questions of law raised in this proceeding have the potential to have significant implications beyond the parties to these proceedings, and for the

¹⁵ Reasons. [65].

administration of the EO Act more generally. The implications include:

- (i) the extent to which persons are protected from discrimination in accessing and using premises administered by owners corporations;
 - (ii) the interpretation of other specific 'reasonable adjustments' provisions, and whether they confine or expand the general protections against discrimination provided for in the EO Act.
- (b) The Commission has a specialist role in promoting and advancing the objectives of the EO Act, and being an advocate for the EO Act, pursuant to s 155(1).
- (c) The submissions to be made by the Commission include matters not contained in the submissions of the parties, and will assist the Court in considering the issues and reaching the correct result.

27 The parties did not oppose the Commission's application. I was satisfied that the Commission could assist the Court and, at the commencement of the hearing on 21 May 2018, ordered pursuant to s 160 of the EO Act that the Commission have leave to appear as *amicus curiae* in the proceeding.

Leave to appeal

28 Section 148(1) of the VCAT Act enables a party to appeal on a question of law from an order of VCAT, with leave.¹⁶ Whether leave to appeal is granted depends on the justice of the particular case. An applicant for leave must identify a question of law for which there is a real or significant argument that VCAT was in error. Also relevant is whether the question of law is one of general or public importance, and whether there is sufficient doubt attending the question of law to justify a grant of leave.¹⁷

¹⁶ On 1 May 2018 the *Justice Legislation Amendment (Court Security, Juries and Other Matters) Act 2017* (Vic) inserted a new s 148(2A) into the VCAT Act, that provides that the Trial Division of this Court may only grant leave to appeal if satisfied that the appeal has a real prospect of success. The new provision applies only to applications commenced on or after 1 May 2018: VCAT Act, s 170. This application was commenced on 8 March 2018 and is not subject to s 148(2A).

¹⁷ *Secretary to the Department of Premier and Cabinet v Hulls* [1999] 3 VR 331, [8]-[16]; see also Garde J's

- 29 Ms Symons for the applicants submitted that leave to appeal should be granted in this case because the proposed appeal identified questions of law that were important to the resolution of the substantive dispute between the parties, in respect of which there was a real and significant argument that VCAT was in error. The identified questions of law have not yet been judicially considered, and their resolution will have consequences beyond the parties in this case.
- 30 While Ms Black did not oppose leave to appeal being granted, I was initially concerned that the application was premature. Generally, it is best to let litigation run its course rather than fragmenting a proceeding with interlocutory appeals.¹⁸ It would have been preferable, in my view, for the applicants to have allowed VCAT to hear and determine the substantive questions of the reasonableness of requiring Ms Black to use the common areas in their current state, and whether the alterations to common property sought by Ms Black are reasonable adjustments. Any appeal from VCAT's final orders could still deal with the questions of law that the applicants seek to agitate in this proceeding, but those questions could have been answered in their final context.
- 31 However, I accept the applicants' submission that the questions of law identified in the proposed notice of appeal are of general and public importance. The construction of ss 44, 45, and 56 of the EO Act, and the application of the EO Act to owners corporations, has not previously been considered by this Court. The Commission's participation as *amicus curiae* confirmed the significance of the questions, beyond the parties to this proceeding.
- 32 Ms Black queried whether VCAT had made orders that could be the subject of an appeal under s 148 of the VCAT Act. She referred to *State of Victoria v Turner*,¹⁹ in which VCAT was found to have made findings rather than a final order under s 136 of the 1995 Act,²⁰ so that the State's appeal was premature. In that case, the relevant

summary in *Zumpano v Banyule City Council* [2016] VSC 420, [10].

¹⁸ *Secretary to the Department of Premier and Cabinet v Hulls* [1999] 3 VR 331, [14].

¹⁹ (2007) 17 VR 217 (*Turner*).

²⁰ Section 125 of the EO Act is in substantially the same form as s 136 of the 1995 Act.

order was in the nature of findings rather than relief.²¹ In this case, however, it is clear that VCAT made an order answering agreed preliminary questions. As found by Robson J in *Dura (Aust) Constructions Pty Ltd v Victorian Managed Insurance Authority*,²² a decision resolving preliminary issues, ordered to be heard separately, is an order for the purposes of s 148 of the VCAT Act.²³ The analysis in *Dura* applies equally to a proceeding under the EO Act, in which VCAT can make orders in the exercise of its powers under the VCAT Act,²⁴ in addition to making final orders under s 125 of the EO Act.

33 I am satisfied that, in respect of each of the questions of law identified by the applicants, there is a real argument as to the correctness of VCAT's answer to preliminary question (a). The questions are, taken as a whole, questions of general and public importance and the justice of this case warrants leave to appeal being granted.

Question of law 1 – Does s 56 deal exhaustively with alterations to common property of an owners corporation?

34 The first question of law identified in the applicants' proposed notice of appeal is 'Whether s 56 of the EO Act should be construed as exhaustively and exclusively regulating discriminatory conduct under the EO Act concerning alterations to common property for which an owners corporation is responsible?' This question is different from the preliminary question answered by VCAT, which focused whether the applicants provide 'services' to Ms Black for the purposes of the EO Act. In this Court, the applicants took s 56 as their starting point.

35 It is convenient to deal with this question together with the applicants' fourth question of law, which is whether VCAT failed to consider submissions of substance advanced by the applicants. Those submissions were that, in considering the construction of s 56 of the EO Act, VCAT should have regard to the maxim *generalia specialibus non*

²¹ *Turner*, [10].

²² [2012] VSC 34 (*Dura*), [49]-[59].

²³ *Dura*, [56].

²⁴ For example an order for summary dismissal under s 75 or directions under s 80 of the VCAT Act.

derogant,²⁵ and to the principles of statutory construction that permit an interrogation of the consequences of different constructions to avoid one that is productive of inefficiency, absurdity, anomaly or injustice.

Applicants' submissions

36 The applicants submitted that VCAT should have found that s 56 is directed to, and operates upon, the specific subject matter and circumstances of there being a person with a disability, who owns or occupies a lot affected by an owners corporation, and who seeks alterations to common property. Because of the specific, targeted nature of s 56, the applicants submitted, an owners corporation is only obliged to allow alterations to common property if the criteria set out in s 56(2) are satisfied. Section 56 was said to exhaust the obligations of owners corporations in respect of alterations to common property, to the exclusion of other more general provisions in Part 4 of the EO Act. In support of this construction the applicants referred to the text of the EO Act, relevant extrinsic materials, approaches to construing general provisions in light of specific provisions, and the consequences of the competing constructions.

37 Accepting that statutory construction begins and ends with the text, the applicants drew attention to the following features of the text of s 56 of the EO Act:

- (a) Section 56 is expressed as a directive that attaches the discrete factual circumstances specified in s 56(1);
- (b) The obligation to allow alterations only arises if each of the circumstances in paragraphs (a) to (e) of s 56(2) are met. It must follow that if any of those matters is not established, an owners corporation has no obligation (under s 56 or otherwise) to make alterations to common property.
- (c) The matters identified in s 56(2)(a)-(e) reflect the private nature of common property that is owned collectively through an owners corporation, and involve a balancing of the competing interests of persons affected. The

²⁵ That is, where there is a conflict between general and specific provisions, the specific provision prevails.

requirement in s 56(2)(a) that the person with the disability meet the costs of the alteration reflects a compromise of those competing interests.

(d) The operation of the *Building Act 1993* (Vic), Pts 10 and 11 of the Owners Corporations Act and Pt 5, Div 5 of the *Subdivision Act 1988* (Vic) are expressly preserved in s 56(3) and (4). This was contrasted with the absence of any mention of the general provisions in ss 44 and 45 of the EO Act.

(e) The example at the end of s 56(2) was said to provide a useful illustration of how the obligation to allow alterations is intended to operate in practice.²⁶

38 Ms Symons for the applicants referred to the extrinsic materials for the EO Act, as shedding further light on how s 56 was intended by the legislature to operate.

39 The first was the final report of the Equal Opportunity Review conducted for the Department of Justice in 2008 by Julian Gardner,²⁷ which made a number of recommendations that were implemented by the introduction of the EO Act.²⁸ Relevant here are recommendations 43 and 44:

Recommendation 43

The Act should be amended to include an express requirement to make reasonable adjustments for people with impairment in relation to all areas protected by the Act and in public spaces. Reasonableness should be clarified in the legislation.

Recommendation 44

Amend section 51 of the Act to permit reasonable alterations to accommodation to be extended to cover property governed by the rules of an owners' corporation.

40 These recommendations were explained by a discussion in Chapter 5 – Removing Barriers to Eliminating Discrimination, under the heading 'Reasonable

²⁶ Although reference was not made to s 36A of the *Interpretation of Legislation Act 1984* (Vic), which provides that an example at the foot of a provision (a) is not exhaustive; and (b) may extend, but does not limit, the meaning of the provision.

²⁷ Julian Gardner, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report*, State of Victoria, Department of Justice, June 2008 (**Gardner report**).

²⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 10 March 2010 (Rob Hulls, Attorney-General), 783-4.

Adjustments’.²⁹ The recommendation for an express requirement to make reasonable adjustments in relation to disability was made because the existing prohibition against indirect discrimination was not working – people with disabilities continued to experience systemic discrimination.³⁰ The Gardner report recommended that the new EO Act should include a reference to access to the built environment for people with disabilities. In that context, the report specifically addressed the question of alterations to common property of owners corporations:³¹

5.78 Under section 51 of the Act a person who has provided accommodation to a person with an impairment must allow that person to make reasonable alterations to meet their special needs. Such alterations are at the expense of the person with the impairment who must also agree to restore the accommodation to its previous condition before leaving.

5.79 The Queensland Anti-Discrimination Tribunal has held that in relation to common property, a body corporate is a provider of both accommodation and services. In relation to these functions, a body corporate was found to be covered by the provisions of the *Anti-Discrimination Act 1991 (Qld)*. [*C v A* [2005] QADT 14.] This issue has not yet been resolved by VCAT. Specifically incorporating owners’ corporations (previously known as a body corporate) into the Act will provide immediate protection and place the matter beyond doubt.

5.80 It is recommended that the Act be amended so that it covers necessary structural alterations to parts of property or common property governed by the rules of an owners’ corporation.

- 41 The applicants submit that these passages of the Gardner report demonstrate that there was a need to extend the existing coverage of the 1995 Act to include owners corporations.
- 42 The applicants also relied on the explanatory memorandum for the EO Act, in particular the explanation of s 7(1)(b). Section 7(1)(b) was described as listing ‘new stand alone duties to make reasonable adjustments for persons with an impairment and to make reasonable alterations to common property’. This was said to support an argument that s 56 provides exhaustively for the obligation to make reasonable alterations to common property.

²⁹ Gardner report, 89-94.

³⁰ Ibid, 89-90.

³¹ Ibid, 93-4.

43 Ms Symons also took me to the second reading speech for the EO Act, and the Attorney-General's explanation of the reasonable adjustments provisions:

Duty to make reasonable adjustments for people with impairments

The current act imposes duties on employers, firms, educational authorities and service providers to make reasonable adjustments for people with impairments.

These duties are implied by the requirement not to indirectly discriminate and by various exceptions allowing discrimination against people with impairments in certain circumstances.

The bill reframes the existing exceptions as positive duties to make reasonable adjustments for a person with an impairment. This approach provides greater clarity and certainty about the obligations of duty-holders under the act and will more effectively address systemic discrimination experienced by people with disabilities.

The new provisions set out a list of factors relevant to determining whether an adjustment is reasonable, which provides guidance about how to balance the action to be taken with the expense or effort involved. If an adjustment requires disproportionately high expenditure or disruption, then it will not be reasonable. The bill continues to allow discrimination where an adjustment is not reasonable or would not be effective.

The second reading speech does not refer specifically to s 56 or to the obligations of owners corporations. However, the applicants submitted that this passage demonstrates that Parliament extended the obligation to make reasonable adjustments to owners corporations in the targeted form set out in s 56.

44 The applicants then submitted that the general words in ss 44 and 45 should be read down in light of the specific provision made for owners corporations in s 56. They relied on two interpretive maxims. The first, as already mentioned, is *generalia specialibus non derogant* (where there is a conflict between general and specific provisions, the specific provision prevails). The second is the maxim *expressum facit cessare tacitum* (what is expressed makes what is implied silent).

45 The latter maxim is to the effect that, where the legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied

upon for the same power.³² The applicants submitted that this interpretive approach should be applied to the obligations to make reasonable adjustments and prohibitions on discrimination in the EO Act, and that s 56 should be read as providing an exhaustive codification of the circumstances in which an owners corporation might be required to make alterations to common property to accommodate a lot owner's disability.

46 While recognising that the EO Act is remedial legislation that is generally to be construed liberally, the applicants submitted that it was too simplistic to treat all provisions of the EO Act as requiring a liberal interpretation. Where remedial legislation is framed so as to strike a careful and practical balance between competing community interests, courts should respect that legislative choice.³³ Such a balance has been struck here, it was submitted, in respect of the obligations of owners corporations.

47 The applicants also relied on the fact that the consequence of the interpretation preferred by VCAT is that an applicant whose circumstances did not come within s 56(2) would be free to proceed under alternative provisions of the EO Act. This would, they submitted, enable s 56 to be sidestepped by an applicant and could not have been intended by the legislature.

Ms Black's submissions

48 Ms Harris, who appeared for Ms Black, submitted that VCAT's construction of ss 44, 45 and 56 was correct, in accordance with an orthodox approach to statutory construction that starts and ends with the text and assumes that legislation is intended to give effect to harmonious goals.³⁴ She relied on s 35(a) of the *Interpretation of Legislation Act 1984 (Interpretation Act)*, s 32 of the *Charter of Human Rights and*

³² *Anthony Hordern and Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1, 7 (Gavan Duffy CJ and Dixon J); *R v Wallis; Ex parte Employers Association of Wool Selling Brokers* (1949) 78 CLR 529, 550 (Dixon J); *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566, 589 [59] (Gummow and Hayne JJ).

³³ *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513, 520-1.

³⁴ Citing *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27, [47] (Hayne, Heydon, Crennan and Kiefel JJ) and *Project Blue Sky Inc v Australia Broadcasting Authority* (1998) 194 CLR 355, [70].

Responsibilities 2006 (Charter) and a number of authorities to the effect that beneficial legislation such as the EO Act should be given a liberal interpretation.³⁵

49 She submitted that the extrinsic materials for the EO Act do not indicate that s 56 covers the field so as to make exhaustive provision for the obligations of owners corporations in respect of common property. There is therefore no question of the general provisions in ss 44 and 45 encroaching upon subject matter exclusively governed by s 56, and no room for the application of the approach in *Nystrom*. VCAT dealt with and rejected³⁶ the submission based on the maxim *generalia specialibus non derogant*, on the basis that there was no conflict between provisions such that one needed to yield to the other. Rather, there is room for all three provisions to apply alongside one another, and there is no conflict or repugnancy between them.

50 Ms Black further submitted that VCAT's construction does not render s 56 otiose, nor does it encroach on the legislature's balancing of rights. Where s 56 does not apply, s 45(3) provides the means for balancing the interests of the collective with those of the individual with a disability.³⁷

Commission's submissions

51 Ms Davidson, on behalf of the Commission, submitted that the analysis should commence with the breadth of the term 'services' in the EO Act, which was said to encompass the functions of an owners corporation in respect of common property. The Commission relied on the inclusive definition of 'services' in s 4 of the EO Act and the High Court's recognition that 'services' has a wide meaning when used in anti-discrimination legislation.³⁸ It also relied on decisions of interstate tribunals that hold that an owners corporation provides services for the purposes of anti-discrimination

³⁵ Including *IW v City of Perth* (1997) 191 CLR 1, 14 (Brennan CJ and McHugh J), 22-23 (Dawson and Gaudron JJ), 27 (Toohey J), 41-2 (Gummow J), 58 (Kirby J) and *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J).

³⁶ Reasons [37]-[41].

³⁷ The same submission could be made about s 9(3), in respect of an allegation of indirect discrimination in contravention of s 44.

³⁸ *IW v City of Perth* (1997) 191 CLR 1, 11 (Brennan CJ and McHugh J), 22-3 (Dawson and Gaudron JJ), 27 (Toohey J), 41 (Gummow J), 69-70 (Kirby J).

legislation, one of which was specifically considered in the Gardner report.

52 Given that breadth, ss 44 and 45 operate to protect persons from discrimination in the provision of those services by owners corporations. Section 56 provides for a specific form of reasonable adjustment, that is additional to and not inconsistent with other more general provisions of the EO Act. That interpretation is clear from the text of ss 7, 44, 45 and 56 of the EO Act and is supported by the purposes expressed in the EO Act, as well as s 32 of the Charter. While there may be overlap, the Commission submitted, there is no inconsistency between ss 44, 45 and 56, and nor would the availability of ss 44 and 45 render s 56 otiose.

53 As to s 32 of the Charter, the Commission submitted that the interpretation preferred by VCAT is more compatible with the right to equality in s 8(3) of the Charter, in particular the right to equal and effective protection against discrimination. The construction advanced by the applicants would, on the other hand, reduce the protections against discrimination under the EO Act, and so is not compatible with the right in s 8(3) of the Charter.

Consideration

54 As all parties agreed, the process of statutory interpretation begins and ends with the text of the relevant statute.³⁹ The primary object is to construe the relevant provisions so that their legal meaning is consistent with the language used and the legislative purpose of the statute. Legislative purpose is determined by considering the text of the relevant provisions in the context of the entire statute, as well as the existing state of the law, the mischief that the statute was intended to remedy, the history of the legislative scheme and the extrinsic materials.⁴⁰

55 If the literal meaning of a provision accords with the legislative purpose, the literal

³⁹ The applicants relied on *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, [39]; Ms Black relied on *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27, [47].

⁴⁰ *Colonial Range Pty Ltd v CES-Queen (Vic) Pty Ltd* [2016] VSCA 328 (*Colonial Range*), [47]–[48]; *Ian Street Developer Pty Ltd v Arrow International Pty Ltd (Ian Street)* [2018] VSC 14, [52]–[53].

meaning and the legal meaning are one and the same.⁴¹ If more than one literal meaning is available, the meaning to be preferred is the meaning that best achieves the legislative purpose⁴² and that, consistent with that purpose, is most compatible with human rights.⁴³

56 A departure from the literal meaning may be justified if that meaning conflicts with the identified legislative purpose, including where:

- (a) the literal meaning would conflict with other provisions of the statute;
- (b) the literal meaning is inconsistent with the purposes of the statute;
- (c) the literal meaning is incapable of practical application; or
- (d) adoption of the literal meaning would lead to a result which is absurd, unreasonable or anomalous.⁴⁴

57 In addition to these general principles of statutory construction, it was well established before the enactment of the EO Act that equal opportunity statutes are remedial legislation that are to be given a beneficial, liberal interpretation.⁴⁵ While this is not a licence to strain the legislative language or to disregard the balance struck between competing interests,⁴⁶ the EO Act should generally be interpreted to give the widest possible effect to provisions that prohibit discrimination and promote equality. Correspondingly, courts should be slow to read down general provisions in the EO Act by implication, in the absence of express words of limitation.

58 Also well established before the enactment of the EO Act was the breadth of the area of 'services' that is regulated by equal opportunity legislation.⁴⁷ Under the *Equal Opportunity Act 1984 (1984 Act)*, which preceded the 1995 Act in Victoria, the

⁴¹ *Colonial Range*, [50]; *Ian Street*, [54].

⁴² Interpretation Act, s 35(a); *Colonial Range*, [51].

⁴³ Charter, s 32(1); *Slaveski v Smith* (2012) 34 VR 206, [45]; *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, [85].

⁴⁴ *Colonial Range*, [52]-[53]; see also *Ian Street* at [56]-[57].

⁴⁵ *Waters v Public Transport Corporation* (1991) 173 CLR 349 (*Waters*), 359 (Mason CJ and Gaudron J); *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan CJ and McHugh J), 22-23 (Dawson and Gaudron JJ), 27 (Toohey J), 41-2 (Gummow J), 58 (Kirby J).

⁴⁶ *Waters*, 372 (Brennan J); *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513, 520-1.

⁴⁷ *IW v City of Perth* (1997) 191 CLR 1, 11 (Brennan CJ and McHugh J), 22-3 (Dawson and Gaudron JJ), 27 (Toohey J), 41 (Gummow J), 69-70 (Kirby J).

prohibition on discrimination in the provision of services was held to apply to the public transport system⁴⁸ and the public education system in Victoria.⁴⁹ VCAT had applied *IW v City of Perth* in a number of cases involving complaints of discrimination in the provision of services.⁵⁰ The breadth of the term 'services' was accepted in this Court in *Towie v State of Victoria*.⁵¹ In two cases decided in other States, 'services' was held to extend to the functions of owners corporations.⁵² One of these decisions was discussed in the Gardner report, which shaped the EO Act.⁵³

59 Against this background, the definition of 'services' in the 1995 Act was reproduced in the EO Act, with no further qualification or limitation. These are strong indications that the term 'services', the prohibition in s 44 on discrimination in the provision of services, and the reasonable adjustments obligation of a service provider in s 45 were all intended to have the broadest operation that their language permits.⁵⁴

60 I cannot accept the applicants' submission that ss 44 and 45 should be read down so as not to apply to services provided by owners corporations in respect of common property. The literal or ordinary meaning of 'services' and ss 44 and 45 is entirely consistent with the legislative purpose, expressed in ss 1 and 3 of the EO Act, and apparent from the context of the EO Act and the extrinsic materials. It is capable of practical application and does not give rise to absurd, unreasonable or anomalous results. Indeed, the essence of the obligation in s 45 to make reasonable adjustments is to do what is reasonable in all the relevant circumstances of the case.

61 The EO Act was enacted with the express purpose of re-enacting and *extending* the law relating to equal opportunity and protection against discrimination.⁵⁵ Its objectives

⁴⁸ *Waters v Public Transport Corporation* (1991) 173 CLR 349.

⁴⁹ *Sinnappan v State of Victoria* [1995] 1 VR 421. The definition of 'services' in s 4 of the 1984 Act did not exclude 'education or training in an educational institution'. This exclusion appeared for the first time in the definition of 'services' in the 1995 Act.

⁵⁰ See eg *Tassone v Hickey* [2001] VCAT 47, [19]-[31]; *Bayside Health v Hilton* [2007] VCAT 1483, [17]-[22]; *Geddes v Australian Labor Party (Victorian Branch)* (2009) 31 VAR 42, [42]-[52].

⁵¹ (2008) 19 VR 640, [74]-[78].

⁵² *C v A* [2005] QADT 14; *Hulena v Owners Corporation Strata Plan 13672* [2009] NSWADT 119. See also *Sutherland v Tallong Park Association Incorporated* [2006] NSWADT 163.

⁵³ *C v A* [2005] QADT 14, discussed in Gardner report [5.79] 93.

⁵⁴ See *Georgopoulos v Silaforts Painting Pty Ltd* (2012) 37 VR 232, [40] as to the re-enactment of legislation that has been judicially interpreted.

⁵⁵ EO Act s 1(a).

are emphatic: to eliminate discrimination to the greatest possible extent, to encourage the elimination of systemic causes of discrimination and to promote and facilitate the progressive realisation of equality.⁵⁶ This leaves little if any room to read down general words by implication, as the applicants urge must be done.

62 The applicants' principal argument was a contextual one, namely that general words in ss 44 and 45 should be read down in light of the specific obligation in s 56 to allow alterations to common property in the circumstances prescribed in s 56(2). The two maxims of interpretation – *generalia specialibus non derogant* and *expressum facit cessare tacitum* were relied upon to support this argument. Both maxims are of assistance in reconciling some conflict or repugnancy between a general and a specific provision.

63 Here, however, there is nothing to be reconciled. Sections 44, 45 and 56 can all apply to an owners corporation in respect of its common property, without any adjustment to their meaning. In the circumstances set out in s 56(2), the owners corporation *must* allow the alterations to be made. Sections 44 and 45 may apply to an owners corporation in respect of services provided by it whether or not the circumstances in s 56 exist. Section 56 is not the only provision in the EO Act that balances competing interests. Section 45 in particular requires a careful and comprehensive balancing of interests in the assessment of whether an adjustment is reasonable in all of the relevant circumstances.

64 Both maxims are merely aids to construction that must be applied subject to the particular text, context and purpose of the statute being construed.⁵⁷ There is nothing in the language of ss 44 and 45 on the one hand, and s 56 on the other, to suggest that they are to be construed as mutually exclusive protections. The statutory context, discussed further below, suggests that they form part of a set of overlapping

⁵⁶ EO Act s 3(a), (c), (d); see also the Attorney-General's second reading speech for the EO Act at Victoria, *Parliamentary Debates*, Legislative Assembly, 10 March 2010 (Rob Hulls, Attorney-General), 783-4.

⁵⁷ In relation to the maxim *generalia specialibus non derogant*, see *Purcell v Electricity Commission of New South Wales* (1985) 60 ALR 652, 657 (Mason ACJ, Wilson, Brennan and Dawson JJ). In relation to the maxim *expressum facit cessare tacitum*, see *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566, 589 [2] (Gleeson CJ), [54], [69]-[70] (Gummow and Hayne JJ), [162]-[169] (Heydon and Crennan JJ); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 [50] (French CJ), [84]-[85] (Gummow, Hayne, Crennan and Bell JJ), [236] (Kiefel J).

protections, designed to achieve the express purpose of eliminating discrimination and promoting equality.

65 Further, there are several contextual factors that support the conclusion that ss 44 and 45 of the EO Act apply according to their terms, and are not to be read down in light of s 56.

- (a) The first is the express exclusion of 'education or training in an educational institution' from the definition of 'services' in s 4. This exclusion first appeared in the definition of 'services' in the 1995 Act, which was re-enacted in the EO Act in 2010. This indicates that Parliament turned its mind to whether any area of activity should be excluded from the wide and inclusive definition of 'services' and, having done so, confined itself to excluding education or training.
- (b) Second, s 7(1) includes a contravention of s 56 as a form of discrimination - in addition to the other forms of discrimination listed in the definition. Discrimination is defined to include direct or indirect discrimination or a contravention of any of the stand-alone obligations to make reasonable adjustments, including both s 45 and s 56.
- (c) Third, s 56 is but one of a number of provisions in Pt 4, Div 5, all of which must be read consistently and on the assumption that they are intended to give effect to harmonious goals. Section 55 is a companion provision to s 56. It requires a person who provides accommodation to another person with a disability to allow the other person to make reasonable alterations if specified conditions (similar to those in s 56(2)) are met. If s 56 has the effect of limiting ss 44 and 45, and ss 55 and 56 are to be given a consistent operation, it would follow that s 55 should also have the effect of limiting ss 44 and 45 - although, unlike education or training, accommodation is not excluded from definition of services. Further, if s 56 is to be construed as an exhaustive code, then so should s 55 - despite the general prohibitions on discrimination in accommodation in

ss 52 and 53. These consequences of the applicants' construction would not be harmonious with the express legislative purpose of the EO Act.

(d) Finally, Pt 4, Div 5 also contains a prohibition, in s 57, against discrimination on the basis of disability in relation to any premises that the public may enter or use.⁵⁸ The definition of 'services' includes, in paragraph (a), 'access to and use of any place that members of the public are permitted to enter'. There is a clear and apparently intentional overlap between ss 44 and 45 in Pt 4, Div 4, and ss 57 and 58 in Pt 4, Div 5 – both sets of provisions apply to public places. It would be anomalous if a visitor to the public parts of common property of an owners corporation has greater protection under the EO Act than does an owner or occupier. That would be the result of the construction urged by the applicants, a result that is avoided by the construction preferred by VCAT.

66 Moving to the broader context, the applicants' careful analysis of the extrinsic materials reveals no indication that Parliament intended s 56 to be an exclusive code governing the obligations of owners corporations in respect of common property. To the contrary, all of the indications are to the effect that Parliament intended to extend the protections against discrimination in the 1995 Act, in particular by including in the EO Act a suite of positive obligations to make reasonable adjustments for people with disabilities.

67 In my view, the text, context and legislative purpose all support construing ss 44, 45 and 56 (and other provisions in Part 4) as overlapping provisions designed to eliminate discrimination to the greatest possible extent and to promote the progressive realisation of equality. I consider that the meaning is clear and that there is no ambiguity to be resolved, or conflict between provisions to be reconciled.

68 However, if there were a choice to be made between giving ss 44 and 45 their ordinary meaning, and reading them down so as not to impinge on s 56, s 32(1) of the Charter would support the former. The right to equality in s 8 of the Charter includes, in s 8(3),

⁵⁸ Subject to the exception in s 58 that permits discrimination that a person could not reasonably be expected to avoid, considering all of the relevant facts and circumstances.

the right to equal and effective protection against discrimination. The Charter picks up the meaning of discrimination in the EO Act,⁵⁹ defined in s 7 to include direct and indirect discrimination on the basis of an attribute, as well as contravention of the positive obligations such as ss 45 and 56. I accept the Commission's submission that the right to equality protected by the Charter includes the right to effective protection from direct or indirect discrimination in respect of access to and use of common property of an owners corporation. The statement of compatibility for the EO Act does not reveal any intention to reduce that protection, which would be the effect of reading down ss 44 and 45 in the way submitted by the applicants.

69 Turning to the applicants' fourth question of law, that VCAT failed to consider two submissions of substance, I am not persuaded that there was any failure to consider those submissions. Nor, for the reasons I have already given, do I consider that the submissions were capable of affecting VCAT's construction of ss 44, 45 and 56 of the EO Act.

70 In relation to the 'conflict submission', based on the maxim *generalia specialibus non derogant*, the senior member's Reasons demonstrate that she understood the argument and rejected it because she did not find any conflict between s 56 and s 44.⁶⁰ Given that conclusion – with which I agree – there was no conflict to resolve, and no need to resort to the maxim.⁶¹

71 As to the 'efficiency submission', again it is apparent from the Reasons that the senior member considered and rejected the applicants' arguments that there was disharmony between s 56 and s 44,⁶² and that s 56 would be otiose if s 44 applied to the common property of owners corporations.⁶³ She did not accept, and nor do I, that overlapping provisions create disharmony, or that s 56 has no work to do if ss 44 and 45 also apply to owners corporations.

⁵⁹ Charter, s 3(1) – definition of 'discrimination'.

⁶⁰ Reasons, [37], [40]-[44].

⁶¹ Cf *Ferneley v Boxing Authority of New South Wales* (2001) 115 FCR 306, [61]-[66], decided in a different statutory context.

⁶² Reasons [45]-[56].

⁶³ Reasons [40]-[44].

72 I grant leave to appeal in relation to the first and fourth questions of law in the applicants' proposed notice of appeal. However, I find that VCAT's decision involved no error of law in relation to either question.

Question of law 2 – Does 'services' extend to common property of an owners corporation?

73 The second question of law identified in the applicants' proposed notice of appeal is 'whether the definition of services in s 4 of the EO Act, as applied to ss 44, 45 and 46 of the EO Act, extends to or comprehends acts or omissions of an owners corporation in respect of common property for which an owners corporation is responsible?' VCAT concluded that it does, at [34] to [36] of the Reasons.

74 The applicants contended that VCAT should have found that the definition of 'services' in s 4 does not extend to acts or omissions of an owners corporation in respect of common property that is not public space. They submitted that the EO Act regulates discrimination in specified areas of public life, and that the public/private distinction is reflected in the definition of 'services' that expressly includes 'access to and use of any place that members of the public are permitted to enter'.

75 Ms Black submitted that VCAT correctly concluded that 'services' as defined in s 4 of the EO Act includes the activities of an owners corporation in managing, administering, repairing and maintaining common property, whether or not the common property may be used by the public. She disputed the applicants characterisation of the EO Act as regulating only public life, giving the example of s 50, which prohibits discrimination in the disposal of land. Ms Black pointed out that the examples given in the definition of 'services' are expressed not to limit the generality of the word, and relied on *IW v City of Perth* as authority for giving 'services' a broad meaning to encompass any 'helpful activity'.

76 The Commission supported Ms Black's submissions. It further submitted that the express inclusion in the definition of 'services' of 'access to and use of any place that members of the public are permitted to enter' supports the conclusion that an owners corporation provides services in relation to common property. This is because

common property can include areas that the public is permitted to enter – such as driveways, stairs, paths, passages, lifts and lobbies. Access to and use of those areas of common property falls within the first specific example given in the definition of ‘services’. Because it is an inclusive definition, to be construed liberally, it follows that access to and use of all common property is a service to, at least, owners and occupiers.

77 Contrary to the applicants’ submission, there is no clear public/private demarcation in the EO Act. Many intrinsically private areas of activity, such as employment, partnerships, and provision of accommodation, are the subject of the prohibitions against discrimination and positive obligations to make reasonable adjustments. In some areas the legislature has provided for exceptions that exclude aspects of private life from the prohibitions in the EO Act – such as the exception for domestic or personal services in s 24, or the exception for shared accommodation in s 59. There are no such exceptions applicable in this case.

78 I accept the submissions of Ms Black and the Commission in relation to this question of law. I find no error in VCAT’s conclusion that the applicants provide ‘services’ in respect of common property, specifically managing, administering, repairing and maintaining it. I agree with the senior member’s analysis at [35], in which she considered paragraph (a) of the definition of services, and concluded:

Given the general words in the definition and the principle that the words should be read widely, even if paragraph (a) does not describe the entrance areas and car park of a building containing apartments, access to and use of those areas falls within the definition of ‘services’.

79 There is one more matter to note in relation to the second question of law. It is clear, as the Commission submitted, that common property of an owners corporation can include areas that members of the public are permitted to enter. The statement of agreed facts before VCAT did not distinguish between public and private areas of the relevant common property in this case. Ms Black seeks modification of parts of the building – such as the main entry door to the building – that may well be in areas that the public is permitted to enter. If that is so, access to and use of those areas would clearly fall within paragraph (a) of the definition of ‘services’ in the EO Act.

Question of law 5 – Did the Tribunal fail to identify a dispositive issue?

- 80 The final question of law raised by the applicants is whether VCAT failed to accord them procedural fairness by failing to identify for them a dispositive issue.⁶⁴
- 81 This question relates to VCAT's reference, at [62]-[63] of the Reasons, to the obligation of an owners corporation to comply with other laws affecting common property, which can affect the finances of the owners corporation. VCAT gave a specific example of an order made under s 106 of the Building Act, requiring action to be taken because work had been carried on without a permit. The applicants submitted that VCAT did not identify this 'finance issue' for them, and denied them an opportunity to make submissions about it, leading to practical injustice.
- 82 In oral submissions, Ms Symons for the applicants accepted that there are other laws that affect common property. She also accepted that an owners corporation would have to comply with an order to perform remedial work under s 106 of the Building Act. The argument that the applicants say they were denied the opportunity to make is that this circumstance was not relevant to the construction of ss 44, 45 and 56 of the EO Act. That argument was not developed before me in any detail.
- 83 Ms Black submitted that VCAT's reference to other laws that might require an owners corporation to spend money, such as the Building Act, was a direct response to the applicants' submission that s 44 of the EO Act should not be allowed to circumvent the Owners Corporations Act. The issue was identified by the applicants themselves and so VCAT did not need to raise it with them again. Ms Black further submitted that the example of the Building Act merely reinforced a conclusion already reached, so that no practical injustice could have resulted.
- 84 I agree with Ms Black's characterisation of the discussion at [62]-[63] of the Reasons. The paragraphs appear after the heading 'Would an order under the EO Act circumvent processes in the OC Act' and towards the end of the senior member's consideration of the applicants' argument that allowing for sections of the EO Act

⁶⁴ The applicants did not press the third question of law in their proposed notice of appeal.

other than s 56 to affect common property would inappropriately circumvent the dispute resolution processes in Part 10 and 11 of the Owners Corporations Act. They simply make the point that there are a range of laws that might oblige an owners corporation to spend money on common property independently of the processes in the Owners Corporations Act. Those are not controversial propositions, and the applicants did not dispute them before me.

85 In any event, the applicants did not persuade me that they had suffered any practical injustice because they were not able to make submissions about this particular aspect of VCAT's reasoning. Indeed, I was not able to discern what additional submissions they would have made. The discussion appears right at the end of the consideration of whether the applicants provide services to Ms Black for the purposes of s 44 of the EO Act. By that point the senior member had already concluded that owners corporations provide 'services' as defined in the EO Act, that ss 44 and 56 can both apply to common property without any adjustment to their meaning, and that the fact that the applicants are owners corporations is a relevant factor to be taken into account under s 45(3), in assessing whether an adjustment is reasonable. The brief discussion at [62]-[63] merely reinforced conclusions already reached on other grounds.

86 There was no error established in relation to question of law 5.

Disposition

87 I will make orders granting leave to appeal, and dismissing the appeal. I will hear the parties as to the costs of the proceeding.

CERTIFICATE

I certify that this and the 29 preceding pages are a true copy of the reasons for Judgment of Justice Richards of the Supreme Court of Victoria delivered on 21 June 2018.

DATED this twenty first day of June 2018.

