

HOUSE RULES

The requirements for obtaining an exemption under the *Equal Opportunity Act* have become more stringent since the commencement of the Victorian Charter of Human Rights and Responsibilities. **By Bill Swannie**

The *Equal Opportunity Act* 1995 (*EO Act*) (Vic) prohibits discrimination on the basis of certain personal attributes, such as sex, race or age, in certain areas, such as education, accommodation, employment and the provision of goods and services.

Since its inception, however, the *EO Act* has provided for the granting of temporary exemptions from its operation. Exemptions permit, for example, women-only gyms to operate lawfully, notwithstanding the general prohibition on discrimination. In the Victorian Civil and Administrative Tribunal (VCAT) decision last year in *Lifestyle Communities Ltd (No 3) (Anti-Discrimination) (Lifestyle Communities)*,¹ however, Bell J held that exemption applications will often engage the equality rights in the *Charter of Human Rights and Responsibilities Act* 2006 (the *Charter*). Applicants for an exemption must therefore justify any limitation on human rights, especially where an exemption is sought for a commercial activity.

VCAT'S EXEMPTION POWER

Applications for exemption are heard and determined in VCAT's Anti-Discrimination List. Section 83 of the *EO Act* provides that VCAT may grant an exemption, subject to any conditions it thinks fit, from any of the provisions of the Act. An exemption may be granted to an individual, an organisation or a business (including a company). The maximum period of an exemption is three years, after which it may be renewed. Exemptions are formally granted by the publication of a notice in the *Government Gazette*.

An application for an exemption may be made to VCAT using Form 2 (Application for Order).² An application must clearly describe the activity for which exemption is sought, the reasons for the application and any other relevant information. This information must be provided in affidavit form.

Depending on the nature and scope of the proposed exemption, and the quality of information provided by an applicant, VCAT

may grant an exemption "on the papers". If an application raises significant issues, or if insufficient information has been provided, a hearing may be held. VCAT will usually require the applicant to advertise the application before the hearing, for example by placing a newspaper advertisement describing the application and the hearing date. VCAT will also notify the Victorian Human Rights and Equal Opportunity Commission of the application, so the Commission can attend the hearing and make submissions.³

LIFESTYLE COMMUNITIES' APPLICATION

Lifestyle Communities Pty Ltd operates retirement-type accommodation called Brookfield Village in Melton, Victoria. In 2003, it applied to VCAT for an exemption to restrict access to accommodation in the village to people aged over 55 years. That application was rejected. The company



reapplied in 2004, this time submitting a report detailing the accommodation needs and options of people over 55 years living in the Melton area. VCAT granted an exemption in respect of Brookfield Village, subject to conditions.

In 2008, Lifestyle Communities Ltd applied for an exemption to restrict access in all future villages operated by the Lifestyle group of companies to people over 50 years of age. This included five proposed villages in outer-suburban Melbourne and country Victoria and “any other villages to be established by the group in the future”. In support of the application, the applicant relied on the 2004 report regarding Brookfield Village and evidence of demand for such accommodation in the over-50 age group in the proposed locations.

Sitting as president of VCAT, Bell J held that, in the absence of an exemption, Lifestyle’s proposed activities clearly constituted discrimination under the *EO Act*.

Specifically, it constituted discrimination by Lifestyle on the grounds of age in the provision of accommodation.

APPLICATION OF THE CHARTER

Bell J held that the Charter applies to exemption applications in two ways. First, s32 of the Charter requires all legislation (including the *EO Act*) to be interpreted compatibly with human rights. This effectively constrains the exercise of the discretion to grant an exemption to cases where it would be compatible with human rights to do so.

Bell J also held that VCAT is a public authority when exercising the discretion to grant an exemption. The Charter therefore requires VCAT to exercise the discretion in a way that is compatible with a human right, and in determining an application to give proper consideration to a human right.⁴

His Honour held that exemption applications directly engage the equality rights in s8 of the Charter, which are central to the operation of the Charter as a whole, stating (at [106]) that “Equality permeates every pore of the Charter”.

According to Bell J, s8 of the Charter enshrines the right of every person to:

- recognition as a person before the law;
- enjoyment of their human rights without discrimination;
- equality before the law;
- the equal protection of the law without discrimination; and
- effective protection against discrimination.

Section 3(1) of the Charter defines discrimination in the same terms as the *EO Act*. However, s8(4) of the Charter provides that “[m]easures taken for the purpose of assisting or advancing persons or groups disadvantaged by discrimination *do not constitute discrimination*”. [*emphasis added*] Bell J held that the Charter seeks to achieve substantive



Applicants for exemption must therefore clearly demonstrate how a proposed exemption would assist persons disadvantaged by discrimination.

equality (equality of outcome), not merely formal equality (equality of treatment). The role of equal opportunity exemptions is to promote substantive equality by assisting those disadvantaged by discrimination.

His Honour held that exemptions must now comply with the Charter. An exemption will be compliant if it is either:

- for the purpose of assisting or advancing persons or groups disadvantaged by discrimination (i.e. the exemption is a special “measure”); or
- justified as a reasonable limitation on human rights.

Special measure

Bell J held that VCAT must first ask whether a proposed exemption is a “measure” under s8(4) of the Charter. This requires that:

- the “purpose” of the exemption must be established by positive, objective proof. The measure must be “reasonably likely to achieve the remedial purpose” and be a proportionate means of achieving that end;⁵
- the persons or group said to be disadvantaged must be properly identified; and
- the cause of the disadvantage must be discrimination within the meaning of the *EO Act*. “Disadvantage” means that a person or group of persons is “unable to act with personal autonomy and realise their worth in ways which are important for the maintenance of their inherent dignity as human beings individually, in family and in society”.⁶

An exemption which meets these criteria does not constitute “discrimination” and therefore does not need to be justified as a reasonable limitation on human rights.

Justified limitation on human rights

If a proposed exemption does not constitute a measure under s8(4) of the Charter, VCAT must ask whether it is justified under s7(2). This provision states that human rights “may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom . . . taking into account all relevant factors”.

Bell J held that s7(2) imposes two separate obligations on applicants for an exemption. First, the terms of the proposed exemption must be clear, publicly accessible and not arbitrary. This is the “legality” requirement.

Second, the exemption must meet the “proportionality” requirement. This is a stringent standard, requiring a “pressing and substantial need” for the exemption. The purpose of the exemption must accord with the values of the Charter and be sufficiently important to warrant the limitation.⁷

Finally, Bell J held that exemptions for purely commercial purposes would be strictly assessed by VCAT. Regarding such applications, the availability of the usual means of commerce to achieve a legitimate business objective would be an important consideration. The onus is on the applicant to demonstrate that ordinary commercial means are not reasonably available.⁸

DISMISSAL OF LIFESTYLE COMMUNITIES’ APPLICATION

Bell J held that the purpose of Lifestyle’s application was to “provide safe, secure and quiet accommodation in gated communities to persons aged over 50 years”. Effectively, Lifestyle sought permission to refuse to offer and supply accommodation services in its communities to people aged under 50 years.

Although Lifestyle argued that this constituted a measure under s8(4) of the Charter, Bell J held that there was no evidence that the exemption would assist in alleviating any disadvantage. Lifestyle had produced no evidence that persons over 50 years experienced disadvantage in finding suitable accommodation in the location of the proposed villages.

The evidence tendered by Lifestyle was lacking in several respects. First, it only showed that there was demand among people over 50 years in the relevant locations for the type of accommodation provided by Lifestyle. This did not prove that the exemption would assist persons or groups disadvantaged by discrimination.

Second, no evidence was produced relating to the location of any villages to be operated by Lifestyle in the future. The proposed exemption was extremely broad in scope, but

the evidence tendered by Lifestyle related to only one location – Brookfield Village.

Third, the evidence tendered by Lifestyle was not sufficiently up to date. Although Lifestyle applied for the exemption in 2008, it relied on a report prepared in 2004. Exemptions granted by VCAT are by their nature temporary and can only be granted on the basis of detailed and current information.

LESSONS FOR FUTURE APPLICANTS

The Victorian Charter became fully operational on 1 January 2008. Since this date, exemption applications must be considered within a human rights framework. Specifically, exemptions must be either a measure under s8(4) of the Charter or a justified limitation on human rights under s7(2).

In *Lifestyle Communities*, Bell J emphasised the importance of the equality rights in the Charter. However, equality does not require equal treatment in all circumstances. The Charter recognises that formal equality can actually entrench situations of disadvantage. The Charter seeks to redress disadvantage, and temporary exemptions play an important role in achieving this goal.

Bell J also emphasised (at [356]) that “it is for the applicant [for an exemption] to substantiate their case”. An applicant must provide detailed and clear evidence supporting all aspects of the proposed exemption; the wider the proposed exemption, the greater the requirement for objective proof. Information provided in support of an application must also be up to date. Where an exemption is being renewed, it will not be sufficient merely to rely on information provided for the previous application.

In most exemption applications, VCAT has only the information provided by the applicant. Because there is no contradictor, VCAT must critically assess each application and its evidentiary basis.

EXEMPTION CONDITIONS

In *Lifestyle Communities*, Bell J identified the overriding purpose of granting exemptions under the *EO Act*: exemptions help to achieve real equality of opportunity for all people by assisting those in situations of disadvantage. Applicants for exemption must therefore clearly demonstrate how a proposed exemption would assist persons disadvantaged by discrimination.

Subsequent decisions have described the test propounded by Bell J as “very stringent”. In fact, it appears that exemptions that were

granted in the past may not be granted by VCAT under the new test.⁹

Since the *Lifestyle Communities* decision, VCAT also appears more ready to impose conditions on an exemption. In a recent decision, a co-educational school sought an exemption to give preference to female enrolments, so as to achieve an overall balance between male and female students at the school. VCAT granted the exemption, subject to the condition that the school promptly inform VCAT if an equal gender balance is achieved in each and every year level at each campus of the school.¹⁰

In another recent decision involving an exemption aimed at promoting gender balance at a school,¹¹ VCAT emphasised the temporary nature of exemptions granted under s83. The school applied for a third renewal of an exemption allowing it to give preference to female students. Although VCAT granted the exemption, it stated (at [14]) that “[t]he longer an exemption lasts, the more renewals that have been given, the more likely it may be that what was once a reasonable limit on human rights will become an unreasonable limit”. VCAT admonished the school to think realistically about whether co-education would ever be possible without an

exemption, and also to actively monitor gender ratios at the school.

Importantly, exemptions sought for purely commercial purposes will rarely be granted under the new test. In *Lifestyle Communities*, Bell J held that exemptions should not be granted merely to protect a business operator from market forces. To do so would undermine the purpose of exemptions, which is to assist persons and groups disadvantaged by discrimination.

EQUAL OPPORTUNITY ACT 2010

The *Equal Opportunity Act 2010*, which commences on 1 August 2011, makes three significant changes regarding applications for an exemption.

First, the maximum period for which an exemption may be granted or renewed is extended to five years: s89. Second, the Act sets out factors that VCAT must consider in deciding whether to grant, renew or revoke an exemption. One factor is “whether the proposed exemption is a reasonable limitation on the right to equality set out in the Charter”:


s90(b). Third, an applicant for the grant, renewal or revocation of an exemption must give a copy of the application to the Victorian Human Rights and Equal Opportunity Commission: s91. This alters current practice by requiring the applicant, rather than VCAT, to notify the Commission of an application. ●

BILL SWANNIE is a Victorian barrister, practising in anti-discrimination, administrative law and the Charter of Human Rights. He is a member of the LIV Administrative Law & Human Rights Section executive committee.

The numbers in square brackets in the text refer to the paragraph numbers in the judgment.

1. [2009] VCAT 1869 (22 September 2009).
2. *Victorian Civil and Administrative Tribunal Rules 2008*, Schedule 2.
3. See the information provided under “Exemption applications” on the VCAT website www.vcat.gov.au.
4. Charter, s38(1).
5. Note 1 above, [266].
6. Note 1 above, [270].
7. Note 1 above, [329].
8. Note 1 above, [425].
9. See, for example, *Travel Sisters (Anti-Discrimination Exemption)* [2009] VCAT 2427.
10. *Carey Baptist Grammar School Ltd (Anti-Discrimination Exemption)* [2009] VCAT 2221.
11. *Wesley College (Anti-Discrimination Exemption)* [2010] VCAT 247.

THE ARCHBISHOP'S
Charitable Fund



The Catholic Archbishop's Charitable Fund is called upon to provide financial assistance to the equally important but less known needs in our community. These include:

- Mental disability services
- Pregnancy help
- Services for the blind
- Homes for the elderly
- Hospice and palliative care

ABN 93 484 678 274 DGR 64 047 619 369

Yes, I would like to donate

Name

Address

Telephone

Gift (all gifts of \$2 and over are tax deductible) \$

I would like more information about making a Bequest


Money order Cheque Mastercard

Visa Bankcard

Signature

Expiry Date /

Date



Return to: The Archdiocese of Melbourne, PO Box 2202, Fitzroy VIC 3065 Tel: 03 9654 6953