VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

HUMAN RIGHTS LIST

VCAT REFERENCE NO. H206/2016

CATCHWORDS

Equal Opportunity Act 2010 (Vic) ss 4, 13, 44, 45, 46, 56, 75 – claim of discrimination on the basis of disability in the provision of services – whether owners corporation provides a service – whether other sections besides s 56 apply – whether s 75 provides an exception

Owners Corporations Act 2006 (Vic) – ss 4, 40, 45, 49, 52, 53 – whether inconsistent with applying *Equal Opportunity Act 2010* ss 44-46

Building Act 1993(Vic) s 10 – application to buildings no longer under construction

Building Interim Regulations 2017 regulation 116

Disability Discrimination Act 1992 (Commonwealth) ss 13, 31 – effect on operation of *Equal Opportunity Act 2010* (Vic)

Disability (Access to Premises – Buildings) Standards 2010 (Commonwealth) – incorporation in codes and regulations

APPLICANT	Anne Black
FIRST RESPONDENT	Owners Corporation OC1-POS539033E
SECOND RESPONDENT	Owners Corporation OC3-POS539033E
WHERE HELD	Melbourne
BEFORE	Senior Member B. Steele
HEARING TYPE	In chambers
DATE OF FINAL WRITTEN SUBMISSIONS	21 November 2017
DATE OF ORDER AND REASONS	8 February 2018
CITATION	Anne Black v Owners Corporation OC1-POS539033E (Human Rights) [2018] VCAT 185

ORDER

1. The answers to the questions agreed by the parties 1(a) to (f) for the First Respondent and 2(a) to (f) for the Second Respondent are as follows:
   (a) In relation to each Respondent – Yes
   (b) In relation to each Respondent – Unanswered
   (c) In relation to each Respondent – No
   (d) In relation to each Respondent – No
   (e) In relation to each Respondent – No

(f) In relation to each Respondent - Unanswered

2. The principal registrar is directed fix a directions hearing before me as soon as possible, allowing two hours.

B. Steele
Senior Member

REASONS

1. The Applicant lives in an apartment she has owned since December 2013. About 2015, she developed disabilities which require her to use wheelchairs or scooters or sometimes crutches to transfer from one chair to another. Ms Black has difficulty accessing her home, on the fourth floor of an apartment building, because she is unable to operate doors in the building, including entry doors from the street and car park and because a ramp in the car park is unsafe for her.
2. The Applicant seeks orders that the owners corporations responsible for the common property of the building make alterations, so she can access the building independently.
3. The Respondents contend that the adjustments are not the responsibility of the owners corporations, which are each made up of the owners of the apartments in the building, including Ms Black. They are willing to allow Ms Black to make the alterations if she pays for them herself.
4. When it was built, between 2006 and 2008, Ms Black's building complied with the relevant Building Codes, which set standards for disability access. Since then, new Building Codes have been prescribed, incorporating new standards for disability access. If the building was constructed now, it would be required to meet the new standards for disability access.
5. The parties filed an agreed statement of facts and agreed questions of law titled 1(a) to (f) for the First Respondent and 2(a) to (f) for the Second Respondent. The questions are the same for each Respondent and I have called them questions (a) to (f). The parties made written submissions[1] about the issues they had identified, for the Tribunal to decide 'on the papers' or to fix a further hearing if the Tribunal considered necessary.
6. The First Respondent owns and is responsible for the main entry to the building. The Second Respondent owns and is responsible for the exit door to the carpark and rubbish disposal areas, the landing and step ramp at this exit door, access into the rubbish disposal area and the doors leading to the courtyard. For current purposes there is no need to distinguish between the two Respondents.

(a) - Does the Respondent provide a service to the Applicant for the purposes of section 44 of the *Equal Opportunity Act 2010* having regard to Division 5 of Part 4 of the Act (including section 56)?

7. Each division in Part 4 of the *Equal Opportunity Act 2010* (**the EO Act**) addresses an area in which discrimination is prohibited – employment, education, goods and services provision, accommodation, sport, clubs and so on.
8. Section 44 is in Division 4 which deals with discrimination in the provision of goods and services. Section 56 is in Division 5 which deals with discrimination in the provision of accommodation.

[1] Applicant's submissions received 27 October 2017; Respondents' submissions received 21 November 2017

9. The question as framed by the parties asks, in part, why Division 4, aimed at providers of goods and services, should apply to an owners corporation, when the only section mentioning owners corporations is in Division 5.

10. The structure of the EO Act should not be ignored. However, nothing in the EO Act indicates that the divisions in Part 4 were intended to be exclusive, so that if a provision from one division applied to a set of circumstances then the provisions in other divisions should not apply to those circumstances.

11. The divisions in Part 4 appear as loose collections of provisions loosely related to each other. Division 5 includes provisions which could only very loosely be said to deal with accommodation – such as the prohibition of discrimination in access to public places.

12. The structure of Part 4 does not support the argument that section 44 cannot apply to owners corporations on the ground it is in a different division from section 56.

13. In *IW v City of Perth*, the High Court, considering the West Australian equal opportunity legislation, said:

> …beneficial and remedial legislation, like the Act, is to be given a liberal construction. …Nevertheless, the task remains one of statutory construction. Although a provision of the Act must be given a liberal and beneficial construction, a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural. But subject to that proviso, if the term "service", read in the context of the Act and its object, is capable of applying to an activity, a court or tribunal, exercising jurisdiction under the Act, should hold that that activity is a "service" for the purpose of the Act.[2]

14. So the important question is whether the term "services" in the context of the EO Act applies to the activities of the owners corporations.

Do the owners corporations provide services

15. Section 44 of the EO Act provides:

> (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.

16. "Services" is not defined in the *Owners Corporations Act 2006* (**the OC Act**). The responsibilities of an owners corporation are described in section 4 of the OC Act as functions, not services.

17. The Respondents submitted[3] that the only services they provide in relation to the common property are for its repair and maintenance as required by section 46 of the OC Act.

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[2] *IW v City of Perth* (1997) 191 CLR 1, 11-12 ALR at 702(per Brennan CJ and McHugh J)
[3] Respondents' submissions para 29

18. In section 4 of the OC Act, the list of an owners corporation's functions includes the following :

> (a) to manage and administer the common property;
>
> (b) to repair and maintain—
>
> (i) the common property;
>
> (ii) the chattels, fixtures, fittings and services related to the common property or its enjoyment;

19. We must look to the EO Act to see whether what an owners corporation does in relation to common property is to provide services. The definition of services in section 4 of the EO Act is as follows:

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

20. The definition is open and inclusive. As this Tribunal said in *Bayside Health v Hilton*, the definition is "extremely broad" and "covers any act of helpful activity".[4]

21. Submitting that "services" covers the activities of the Respondents in regard to common property, the Applicant[5] relied on decisions of two inter-state Tribunals: *C v A*[6] which concerns the Queensland *Anti-Discrimination Act 1991* and *Helena v Owners Corporation Strata Plan 13672*[7] which concerns the New South Wales *Anti-Discrimination Act 1977*.

22. Each of those inter-state Acts prohibits discrimination in the provision of goods and services[8] and in each of them the definition of services is not materially different to that in the EO Act[9].

23. Each case was generally about access to a building by a person with disabilities and in each case the Respondent was in a similar position to the owners corporations in the present case. In each case, the inter-state tribunal decided that a body corporate, operating under legislation similar to Victoria's OC Act was providing a service for the purposes of the relevant anti-discrimination legislation.

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[4] [2007] VCAT 1483 per Deputy President McKenzie
[5] Applicant's submissions paras 11-12
[6] [2005] QADT 14
[7] [2009] NSWADT119
[8] *New South Wales Anti-Discrimination Act 1977* section 19 and *Queensland Anti-Discrimination Act 1991*
[9] Section 4 of the New South Wales Act and in the Queensland Act the definition Schedule incorporated by section 4

24. In *C v A*, the Queensland Anti–Discrimination Tribunal found that the body corporate was providing a service. The Tribunal said:

> …the essential function of the body corporate "A" is to provide services to the residents of the complex including relevantly, maintaining or improving the access ways to facilities on the common property and access to and from individual apartments within the building to those facilities. That is what "A" has in fact done here.[10]

25. The Respondent submitted[11] *C v A* was distinguishable from the present case on its facts and in regard to the legislation. There were differences of fact and the legislation governing the body corporate was different to Victoria's.

26. The Queensland legalisation[12], like Victoria's, imposed limits on the power of the body corporate to spend money (and therefore to require contributions from owners) without the support of owners.[13]

27. Victoria's OC Act does not give an owners corporation "control" of the common property as did the Queensland legislation.[14] The Respondents submitted that the body corporate in the Queensland case had "an entitlement to improve the common property" which is lacking under the terms of the OC Act.

28. The Queensland tribunal said:

> Thus "A" and no other entity was obliged to renew any door or other access way within the common property in the building and was entitled to improve any door or access way on the common property subject to compliance with statutory requirements.[15]

29. Similarly in Victoria no body other than the owners corporation has power to renew or improve access ways on common property. The legislation affecting the Queensland body corporate imposed statutory requirements not dissimilar to those in Victoria, although the power of the body corporate to levy contributions for improvements was wider than that in Victoria's OC Act.[16] .

30. In the New South Wales (NSW) case of *Hulena v Owners Corporation Strata Plan 13672*[17], the NSW tribunal found that the body corporate provided the service of "the provision of accessible entrances and exits from the common property to individual apartments within the complex".[18] It pointed out that the body corporate had power to maintain and repair the common property and that it had power to make changes to the common property by erecting new structures, subject to special resolution. Again there were differences of fact and law, but in a number ways the situation was similar to the present case.

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[10] *C v A* at para [29]
[11] Respondents' submissions para 35
[12] The relevant legislation was the *Southbank Corporation Act 1989* which in schedule 4 applied a modified version of the *Building Units and Group Titles Act 1980*
[13] See for example clauses 45 and 47 of Schedule 4 to the *Southbank Corporation Act 1989*
[14] See clause 37 of Schedule 4 to the *Southbank Corporation Act 1989*
[15] At para [27]
[16] Clause 32 of Schedule 4 to the *Southbank Corporation Act 1989* empowered the body corporate to levy contributions from "lessees" in proportion to lot entitlements; clause 37(1)(a) empowered the body corporate to control, manage and administer the common property; clause 37(2) entitled the body corporate to make improvements to the common property which cost less than a prescribed amount or which were unanimously accepted by the lessees or agreed to by a referee.
[17] [2009] NSWADT119
[18] At para [46]

31. I accept the Respondents' submissions that I should not rely unquestioningly on these decisions as authoritative. However, they do provide some guidance.

32. The functions of an owners corporation under Victoria's OC Act include management, administration, maintenance and repair of the common property. An owners corporation also has power to make improvements to the common property: section 53 empowers the owners corporation to carry out "upgrading works" on the common property with the support of a special resolution. Upgrading works are defined by their cost. By implication, an owners corporation could carry out works which by their lower cost are not "upgrading works" with only the support of an ordinary resolution.

33. The Respondents submitted that section 44 should not apply to the common property of an owners corporation as it is not a public space[19].

34. Nothing in section 44 or in the definition of "services" restricts section 44 to public spaces. The definition lists matters which are included as services but specifically says that the list is not intended to limit the general meaning of the word. It is well known, as the Respondents conceded, that the definition of "services" is to be given a wide meaning, having regard to the beneficial and remedial purpose to the EO Act.[20]

35. The definition of services includes "(a) access to and use of any place that members of the public are permitted to enter". Given the general words in the definition and the principle that the word 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".

36. In summary an owners corporation is to manage, administer, repair and maintain the common property subject to the cost and to the level of support given by its members. These acts of "helpful activity" are services which include the provision of access to the apartments in the building, since they can only be reached via the common property.

Application of provisions of the EO Act in addition to section 56

37. The Respondents submitted that section 56 of the EO Act "exclusively and exhaustively" regulates discrimination in relation to common property of an owners corporation[21]. They said allowing section 44 of the EO Act to regulate discrimination about common property would make section 56 "otiose"[22].

38. Section 56 of the OC Act provides:

> (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

[19] Respondents' submissions para 22
[20] *IW v City of Perth* (1997) 191 CLR 1, 11-12 ALR at 702 (per Brennan CJ and McHugh J)
[21] Respondents' submissions para 23
[22] Respondents' submissions para 23

(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*.

39. In *Project Blue Sky v ABA*, the High Court said:

> "A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions."[23]

40. To render section 56 "otiose" would not be harmonious, but I do not accept that the operation of section 44 (with sections 45 and 46) would have the effect the Respondents describe.

41. Sections 44 and 56 can both apply to common property without any adjustment to their meaning. Section 56, as the Respondents said, is specific. It places an obligation on the owners corporation to allow adjustments to common property only in a specific set of circumstances.

42. The Applicant seeks that the owners corporations pay for the cost of the alterations to common property. That is inconsistent with section EO Act 56(2)(a).

43. There may well be cases where almost all the requirements of section 56 are met, including an applicant who is willing to pay for alterations, but where, for example, the property could not be easily restored to its former condition as required by section 56(2)(d). In such a case, section 56 would not apply.

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[23] *Project Blue Sky v ABA* [1998] HCA 28 at [70]; 194 CLR 355; 153 ALR 490; 72 ALJR 841

44. The EO Act is beneficial in nature. If the text allows, it should not be read as confining solutions for persons with disability, and who rely on access via common property, to the narrow set of circumstances in section 56. Parliament could easily have made that clear in the EO Act if that was the intention. It did not. Accordingly, there is room here for section 44 to apply.

45. The Respondents rightly submit that section 56 balances the interests (especially the costs involved) of the collective owners corporation and the individual lot owner. Any disharmony between that legislated balance and the general obligations of service providers in sections 44 to 46 can be alleviated by considering whether the proposed adjustment is reasonable, as set out in section 45(3).

46. Section 45 relevantly provides:

> (1) This section applies—
>
> (a) if a person with a disability requires adjustments to be made to the provision of a service by another person (the service provider) in order to participate in or access the service or derive any substantial benefit from the service;
>
> (b) whether or not the services are provided for payment.
>
> (2) 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.
>
> (3) 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.

47. The fact that the Respondents are owners corporations subject to the provisions of the OC Act is a relevant factor for the purposes of section 45(3), to be taken into account in deciding whether an adjustment is reasonable.

The balancing of costs in an owners corporation

48. The OC Act balances the costs each lot owner contributes to repairs, maintenance and other works. The Respondents submitted that they do not provide services for the

purposes of the EO Act because making them subject to sections 44 and 45 would circumvent the provisions of the OC Act which balance costs for lot owners. [24]

49. For example, the Respondents pointed out, section 49(2) of the OC Act says that when an owners corporation carries out works which benefit only some lots, "the lot owner of the lot that benefits more pays more".

50. If the Applicant were seeking alterations to a door on common property which gave access only to her lot, then, applying section 49(2), she should pay the whole cost of the alteration. There would be no benefit to other lots.

51. Applying section 49(2) of the OC Act to the present dispute, it is relevant to ask whether other lots (not necessarily the lot owners) would benefit from the proposed adjustments.

52. The Respondents contend in effect that the existence of section 49, and similar provisions in the OC Act, indicate section 56 must be the only EO Act provision which applies to common property.

53. However, an owners corporation which is required by section 44 (or 45) to make adjustments could expect to apply section 49 to the allocation of the cost of those adjustments. An order made pursuant to section 44 of the EO Act requiring an owners corporation to carry out works should take this into account. Accordingly the existence of section 49(2) and similar provisions in the OC Act does not rule out the application of section 44 of the EO Act to common property.

54. It is not desirable for issues decided in an EO Act proceeding to be later re-litigated under the OC Act. If an EO Act proceeding leaves open questions about which lot owners should pay for adjustments to common property, the Tribunal differently constituted in a later proceeding under the OC Act might hear different evidence or come to different conclusions from the EO proceeding.

55. Such an outcome should be avoided by the Tribunal in the EO Act dispute taking into account the principles in the OC Act when deciding who should pay the cost of any alterations to common property.

56. This could be ensured by a party in the EO Act dispute applying under the OC Act for orders that the Tribunal determine how the cost of any common property alteration will be distributed amongst lot owners. The parties could then seek, or the Tribunal could determine, that the OC Act application be heard and determined with the EO Act proceeding.

Would an order under the EO Act circumvent processes in the OC Act

57. The Respondents argued that allowing for sections of the EO Act other than section 56 to affect common property would inappropriately circumvent the processes in Part 10 and 11 of the OC Act for resolving owners corporation disputes. [25] Section 56 specifically provides that it does not affect those processes

[24] Respondents' submissions para 25
[25] Respondents' submissions para 2

58. If a dispute has been dealt with in one division of VCAT, and someone applies under another Act about the same issues, it is likely a party in the first proceeding would seek that the later application be dismissed as already decided. It is open to the parties to avoid such possible events by applying for orders to be made under the OC Act in conjunction with this EO Act proceeding.

59. The Respondents contended any order under the EO Act to alter common property would be inconsistent with section 52 of the OC Act. That section prevents the owners corporation making significant alterations to common property without a special resolution by the members.

60. Section 52 protects members from having to pay costs for significant works not supported by special resolution[26]. A special resolution requires a vote of seventy-five per cent in favour.[27]

61. Section 52 does not prohibit the making of alterations to the common property. For example, by implication of section 52, non- significant alterations can be made if they are supported by an ordinary resolution of the owners corporation.

62. In addition, an owners corporation is obliged to comply with other laws affecting the common property. For example, it would be obliged to comply with an order made under section 106 of the *Building Act 1993* requiring it to take action because work had been carried out without a permit. That obligation would apply whether or not any works required to the common property amounted to a significant alteration.

63. The agreed facts do not reveal whether the owners corporations in this case have a maintenance fund as described in section 40 of the OC Act. Under section 45(2)(a) of that Act, an owners corporation with a maintenance fund may use it to comply with an order of a court or VCAT. The decision to spend money in this way is subject to the decisions of the owners corporation – section 45(3). However, the provision shows that decisions made by outside bodies under laws other than the OC Act can affect the finances of an owners corporation.

64. In summary, making an order under the EO Act would not circumvent processes under the OC Act.

65. Taking all these issues into account, the answer to question (a) is yes – the Respondents provide services to the Applicant as set out in the question.

(b) - If the answer to the section 44 question is yes, have the Respondents unlawfully discriminated against the Applicant having regard to sections 45(3) and (4) and 46?

66. Section 45(2) requires that a service provider make reasonable adjustments if a person with a disability requires them in order to participate in or access the service or derive benefit from it.

67. Section 45(3) says that in determining whether an adjustment is reasonable all relevant facts and circumstances must be taken into account.

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[26] See *Martin & Ors v Owners Corporation* [2009] VCAT 2699 at paras 29 to 34
[27] See section 96 of the OC Act

68. Section 46 provides that a service provider may discriminate against a person with a disability if it has complied with section 45 and the adjustments are not reasonable.

69. Since the Respondents have specifically reserved their position on whether additional evidence was required to demonstrate that the proposed adjustments are not reasonable[28], I will take this issue no further until there has been a directions hearing to determine the next steps in the proceeding.

70. Section 45(4) provides:

> (4) A service provider is not required to make an adjustment under subsection (2) to the extent that the service provider has complied with, or has been exempted from compliance with, a relevant disability standard made under the *Disability Discrimination Act 1992* of the Commonwealth in relation to the subject matter of that adjustment.

71. No party made submissions about the effect of section 45(4). However, the Respondents contended that the Disability (Access to Premises - Building) Standards 2010, which are a relevant standard concerning the proposed adjustments, apply only to building work on new buildings and new parts of buildings (both as defined in the standards). Accordingly, it appears the Respondents do not seek to rely on section 45(4).

72. I will direct that a directions hearing be fixed to determine next steps in regard to any further evidence about whether the proposed adjustments are no reasonable. Question (b) remains unanswered.

(c) - Does section 56 require the Respondents to make the modifications requested by the Applicant having regard to the fact that it complied with the Building Code then in force at the time that its building permit was issued, the date construction was commenced, and the date that the relevant Partial Occupancy Permits was issued?

73. It is not in dispute that the Applicant has a relevant disability and owns a lot affected by an owners corporation, so her situation is within the parameters set by section 56(1).

74. By section 56(2), the owners corporations must allow her to make reasonable alterations to common property if each of paragraphs (a) to (e) in sub-section (2) applies.

75. Each paragraph of sub-section (2) is followed by the word "and". They are cumulative. The Applicant does not propose to bear the cost of the alterations, so paragraph (2)(a) does not apply. Accordingly, section 56(2) places no obligation on the owners corporations.

76. It is unnecessary to look beyond the meaning of these plain words. In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* , the High Court said:

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intentionhttp://www.austlii.edu.au/cgi-

[28] Respondents' submissions para 40

bin/viewdoc/au/cases/cth/HCA/2009/41.html - fn71. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischiefhttp://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2009/41.html - fn73 it is seeking to remedy.[29]

77. In regard to purpose, section 35(a) of the *Interpretation of Legislation Act 1984* (Vic) says "a construction that would promote the purpose or object underlying the Act or subordinate instrument shall be preferred to a construction that would not promote that purpose or object".

78. However, to read the words of the section in a way which is inconsistent with their ordinary meaning is to impose a meaning rather than to construe one. Section 35(a) does not require such an interpretation to be preferred.

79. The Applicant referred to the legislative history of section 56 to argue that section 56(3) creates an ongoing obligation for owners corporations to meet standards for access to buildings as the standards are updated.[30] None of the references produced indicated that the EO Act as drafted and as passed by Parliament was intended to meet exactly the recommendations in the report, if that was a recommendation. However, it is unnecessary to pursue that further.

80. Looking at the text itself, section 56(3) does not create any obligation. It simply refers us to obligations under the *Building Act 1993* (**the Building Act**). Obligations under the Building Act are created by that Act itself and by Regulations made under it. Section 10 of the Building Act indicates that the Act and its regulations do not require continual updating of a building as regulations are updated. Section 10 relevantly provides:

> (1) A building regulation or an amendment to a building regulation, does not apply to the carrying out of any building work in accordance with a building permit existing immediately before the building regulation or amendment commences. …
>
> (3) Subject to any determination of the Building Appeals Board, building work referred to in subsection (1) or (2) must be carried out in accordance with the provisions of any regulations, by-laws, local laws or enactments in force at the material times as if the building regulation or amendment had not come into operation.

81. These provisions are accepted as indicating that the building regulations apply to the period of construction of a building, so that when new regulations are made the building is not required to be updated to comply with the new regulations.[31]

82. Regulation 116 of the Building Interim Regulations 2017 relevantly provides:

> (1) Subject to sub regulation (4), if an existing building is to contain a new part that must comply with an access provision, any affected part of the building must be brought into conformity with that access provision.
>
> (2) An access provision that was not in force immediately before 1 May 2011 does not apply to building work carried out under a building permit in respect of which an application was made before 1 May 2011, whether the permit was issued before or after 1 May 2011.

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[29] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41 at [47]; (2009) 239 CLR 27, 46-7
[30] Applicant's submissions paras 21 to 30
[31] See for example *Lewis v Threadwell* [2004] VCAT 547 at paras 58 to 60.

83. According to the note about the definition of "Access Code" in those regulations, this provision aligns operation of the Building Regulations, which incorporate the Building Code of Australia, with the Disability (Access to Premises - Buildings) Standards 2010 of the Commonwealth which are made under the Commonwealth *Disability Discrimination Act 1992*.

84. Without examining the detail of the various provisions in the Building Act, and its Regulations, the Building Code of Australia and the Disability Standards (as incorporated in the Building Code), it is obvious that they are organised to apply to the process of construction, not to existing buildings which are not either under construction or being altered. Thus the new access provisions will only apply to a new part of a building.

85. Similarly, the Disability (Access to Premises - Buildings) Standards 2010 provide in clause 2.1 that the standards apply to a new building or a new part of a building. A new building is defined as one for which a permit was sought after May 2011.

86. Accordingly the answer to question (c) posed by the parties is no – section 56 does not require either Respondent to make the modifications requested by the Applicant.

(d) - Does section 13(1)(c) together with section 75 of the EO Act authorise the alleged discrimination by the Respondents on the basis that the building complied with the *Building Act 1993* by reason of compliance with the Building Code 2005 or 2006

87. Section 13 (1)(c) of the EO Act relevantly provides:

> (1) This Act does not prohibit discrimination to which a Division of Part 4 applies if— (c) a general exception under Part 5 applies; or…

88. Section 75, which appears in Part 5 of the EO Act, provides:

> (1) A person may discriminate if the discrimination is necessary to comply with, or is authorised by, a provision of—
>
> (a) an Act, other than this Act; or
>
> (b) an enactment, other than an enactment under this Act.
>
> (2) For the purpose of subsection (1), it is not necessary that the provision refer to discrimination, as long as it authorises or necessitates the relevant conduct that would otherwise constitute discrimination.

89. The Building Act and its Regulations come into play when a building is being constructed or altered in certain ways. Once a building is completed, the Regulations, at least as far as they set standards for disability access, have played their part. They require nothing more because there is no more construction occurring. That is not the same as authorising discrimination.

90. The Respondents submit[32] that if the alleged discrimination is not authorised by section 75 of the EO Act then the EO Act must be read as requiring every private building owner to constantly and expensively update their buildings whenever a new Building Code is declared. That is of course not true.

[32] Respondents' submissions para 45

91. In the present case, approaching the statute logically, a person with a disability alleges that the Respondent owners corporations which provide services regarding common property in her apartment building are discriminating against her in breach of section 44 of the EO Act. The discrimination, she alleges, is that the owners corporations have not made reasonable adjustments which would allow her to use the services they provide. If it turns out that the adjustments she requires are not reasonable, then, as described in section 46, the owners corporations may discriminate against her.

92. In the face of those specific and logical provisions, there is no need to read section 75 as authorising discrimination in every completed building.

93. The answer to question (a) is No.

(e) - Does section 13, together with section 31 of the *Disability Discrimination Act 1992* 'cover the field' with respect to matters covered by Disability (Access to Premises – Building) Standards 2010 in relation to the Respondents and bar the application of the EO Act in relation to the matters the subject of the Applicant's claims?

94. Section 13 of the Commonwealth *Disability Discrimination Act 1992* (**the DDA**) relevantly provides:

> (3) This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.
>
> (3A) Subsection (3) does not apply in relation to Division 2A of Part 2 (Disability standards).
>
> (4) If:
>
> (a) a law of a State or Territory relating to discrimination deals with a matter dealt with by this Act (including a matter dealt with by a disability standard); and
>
> (b) a person has made a complaint or initiated a proceeding under that law in respect of an act or omission in respect of which the person would, apart from this subsection, have been entitled to make a complaint under the *Australian Human Rights Commission Act 1986* alleging that the act or omission is unlawful under a provision of Part 2 of this Act;
>
> the person is not entitled to make a complaint or institute a proceeding under the *Australian Human Rights Commission Act 1986* alleging that the act or omission is unlawful under a provision of Part 2 of this Act.

95. The Respondents relied on sub-section (3A) to argue that the Commonwealth DDA excludes the Victorian EO Act with respect to regulating access to premises for persons with disabilities.[33]

96. This argument cannot succeed. Section 13(4), which specifically includes disability standards, would be unnecessary if section 31 (which provides for the setting of disability access standards) of the DDA covered the field.

97. Further, if section 31 and the standards made under it were intended to operate to the exclusion of State laws, then the Building Interim Regulations 2017 (and their predecessors and successors) would be excluded from operation in regard to disability access standards.

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[33] Respondents' submissions para 47

98. That would be inconsistent with the arrangements between the States and the Commonwealth which result in the current incorporation of the Disability Standards into the Building Code of Australia, which in turn is incorporated into State regulations. See regulation 116 of the Building Interim Regulations 2017.

99. Finally, Victoria's Building Interim Regulations 2017, which incorporate the standards set under the DDA, apply to the constructing of buildings or new parts of buildings, not to the ongoing state of buildings. Accordingly the operation of the EO Act in relation to access to buildings not under construction is not excluded by the DDA or the standards made under it.

100. The answer to question (e) is no – the DDA does not bar the application of the EO Act to the Applicant's claims.

(f) - Having regard to the questions above, has the First Respondent unlawfully discriminated against the Applicant in breach of the Act?

101. The answer to this question depends on whether the adjustments required by the Applicant are reasonable, applying section 45(3) of the EO Act. If they are not reasonable, then any discrimination by the Respondents in not making the adjustments is lawful, as provided by section 46. Since the Respondents have reserved their right to make submissions about reasonableness, this question is yet to be answered.

102. This question will be decided in the manner to be determined at a directions hearing.

B.Steele
Senior Member