Chapter 18

> Other common procedural issues

737. In this section, we will cover:

a. choosing a jurisdiction

b. strike out applications

c. remedies, including damages

d. costs.

Choosing a jurisdiction

738. Complaints of discrimination, sexual harassment, victimisation and racial and religious vilification can be dealt with in a range of jurisdictions.[664] Some jurisdictions require persons to make a choice on their jurisdiction prior to lodging and may prevent them from changing jurisdictions after proceedings have been commenced.

739. Factors that may be relevant to choosing a jurisdiction include:

a. **Time limits and timeframes:** the statutory timeframes for lodging applications vary between jurisdictions. For example, there are strict timeframes for lodging claims under the *Fair Work Act 2009* (Cth) relating to unfair dismissal and general protections where employment has been terminated. By contrast, the Equal Opportunity Act provides the Commission and Tribunal with the discretion to decline a matter that is more than 12 months old.

b. **Multiple different grounds or attributes:** the protection of attributes and areas varies between state and federal jurisdictions. Where an alleged contravention relates to multiple attributes or areas, there may be benefits in using a one-stop-shop statute where all attributes are covered.

c. **Mixed reasons and motive:** Some laws provide that attribute should be the substantial reason for the treatment,[665] while others require that the attribute needs only be one of the reasons for the treatment. Similarly, whether motive or awareness of the discrimination is relevant to discrimination varies between jurisdictions.

d. **Onus or burden of proof:** The onus of proving that behaviour was for the alleged reason may vary depending on the Act or part of the Act. Note for example the difference between the onus for proving general protections under the *Fair Work Act 2009* (Cth) (where the onus is on the respondent) and the onus of proving direct discrimination under the Equal Opportunity Act (and other such acts). Note also that under the Equal Opportunity Act the respondent has the onus of showing that the requirement condition or practice is reasonable. See paragraph 741–749 below for more information on the burden of proof under the Equal Opportunity Act.

664 As at April 2013, these include the *Equal Opportunity Act 2010* (Vic), *Racial and Religious Tolerance Act 2001* (Vic), *Accident Compensation Act 1985* (Vic), *Occupational Health and Safety Act 2004* (Vic), *Age Discrimination Act 2004* (Cth), *Australian Human Rights Commission Act 1986* (Cth), *Disability Discrimination Act 1992* (Cth), *Fair Work Act 2009* (Cth), *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth). Note that all five federal discrimination statutes are currently under review as part of the national consolidation of federal discrimination laws.

665 *Equal Opportunity Act 2010*, s 8.

e. **Forum shopping:** There are some prohibitions on bringing multiple actions under different laws for the same matter.[666] If a dispute is lodged under the Equal Opportunity Act, it cannot then be brought under federal discrimination laws.[667] The Commission has the discretion to accept a matter that has been lodged in the federal jurisdiction.

f. **Parental/carer issues:** Not all jurisdictions have a specific obligation to accommodate the responsibilities of a parent or carer in employment.[668]

g. **Disability issues:** The obligation to make an adjustment for a person with a disability (for example, in employment, education and the provision of goods and services) varies between jurisdictions.[669]

h. **Sexual harassment issues:** Protection from sexual harassment is explicit in some statutes, and implied in others.[670] The protections relating to sexual harassment and volunteers also vary between jurisdictions.

i. **Remedies:** The remedies typically granted[671] and penalties[672] that may arise for unlawful conduct vary markedly between jurisdictions.

j. **Costs:** There are no specific provisions relating to costs in unlawful discrimination proceedings before the Federal Magistrates Court and Federal Court. Rather, the courts have a general discretion to order costs under the provisions of the *Federal Court of Australia Act 1976* (Cth) and the *Federal Magistrates Act 1999* (Cth) (recently amended to be called the *Federal Circuit Court of Australia Act 1999* (Cth)).[673] At VCAT there is a general presumption that parties each bear their own costs.[674]

k. **Definitions:** Given the difference in definitions between state and federal laws may give rise to a complaint in one jurisdiction but not another. Note for example the different definitions of 'disability', 'gender identity' and 'employee'.

l. **Related actions:** Some matters give rise to related actions in a particular forum. For example, breach of contract, adverse action because of workplace rights, breach of a National Employment Standard, breach of the *Competition and Consumer Protection Act 2010* (Cth).

Burden and standard of proof

Burden of proof

740. Under the Equal Opportunity Act it is well established that the burden (or onus) of proof is placed on the complainant to prove their claim.[675] This means that the complainant must provide particularised complaints with sufficient evidence to show that the allegated incidents took place and amount to a breach of the Equal Opportunity Act.

666 See, for example, s 116(b) and (d) of the *Equal Opportunity Act 2010* (Vic), which provides the Commission with the discretion to decline to provide dispute resolution in a matter that has been adequately dealt with by a court or tribunal or where the person has commenced proceedings in another forum.

667 *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth).

668 See, for example, *Equal Opportunity Act 2010* (Vic), s 17 and 19. Compare with the 'inherent requirements' exception under s351(2)(b) of the *Fair Work Act 2009* (Cth).

669 See, for example, *Equal Opportunity Act 2010* (Vic), s 20; *Disability Discrimination Act 1992* (Cth) s 5(3).

670 For example, sexual harassment is specifically prohibited under the *Equal Opportunity Act 2010* (Vic), but may be covered by the general protections provision under the *Fair Work Act 2009* (Cth).

671 For example, note the limits on unfair dismissal cases.

672 See *Equal Opportunity Act 2010* (Vic), s 125; *Australian Human Rights Commission Act 1986* (Cth) s 46PO; and *Fair Work Act 2009* (Cth) s 539, 545 and 546.

673 Some of the factors that have been identified in federal discrimination cases as being relevant to the discretion to order costs include where there is a public interest element to the complaint; where the applicant is unrepresented and not in a position to assess the risk of litigation; that the successful party should not lose the benefit of their victory because of the burden of their own legal costs; that litigants should not be discouraged from bringing meritorious claims and courts should be slow to award costs at an early stage; and that unmeritorious claims and conduct which unnecessarily prolongs proceedings should be discouraged.

674 Note however that VCAT has the discretion to order costs. Costs are discussed in this chapter from paragraph 847.

675 See, for example, *GLS v PLP (Human Rights)* [2013] VCAT 221, [34]; *Pham v Drakopoulos & Ors (Anti-Discrimination)* [2012] VCAT 1198, [23]; *Finch v The Heat Group Pty Ltd (Anti-Discrimination)* [2010] VCAT 802, [956].

741. However, where a respondent seeks to rely on an exception in the Equal Opportunity Act (whether a specific exception under Part 4 or a general exception under Part 5 of the Equal Opportunity Act) or an exemption granted by the Tribunal under section 89 of the Equal Opportunity Act, the burden of proof is placed on them to provide sufficient evidence to show how the exception or exemption applies to their conduct.[676]

742. Similarly, to rely on the exception to vicarious liabiltity for unlawful conduct of employees under section 110 of the Equal Opportunity Act, employers and principals have the burden of proof to show that they took reasonable precautions to prevent their employee or agents from breaching the Equal Opportunity Act.

743. Where a person is alleged to have breached section 107 of the Equal Opportunity Act (requesting or requiring discriminatory information), the burden is on the person who requests or requires the information to prove that the information is reasonably required for a purpose that does not involve prohibited discrimination.[677]

744. For claims of indirect discrimination, the person who imposes a requirement, condition or practice (or proposes to impose one) has the burden of proof to show that the requirement, condition or practice is reasonable.[678]

745. Where a person or organisation wishes to rely on section 12 of the Equal Opportunity Act to say that their conduct is not unlawful on the grounds that it is a special measure, they too have the burden of proof to show that the measure meets the criteria in section 12.[679]

Standard of proof

746. Where a party has the burden of proof in a proceeding, they must meet that burden to the civil standard of proof – the balance of probabilities.[680] This means that the Tribunal must be satisfied that 'overall it is more probable than not that the events occurred as described and that the inferences sought to be drawn can reasonably be drawn from the facts as they have been found'.[681]

747. The level of satisfaction required to be reached for a finding in favour of the complainant is described in *Briginshaw v Briginshaw*.[682] The following comments made by Dixon J are usually relied upon by courts and tribunals in applying this level of satisfaction:[683]

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.[684]

748. This means that the seriousness of the allegations made must be considered when assessing whether the burden of proof has been discharged by the complainant.[685] Where the matters to be considered are very serious, the Tribunal has held that 'clear and cogent evidence may be required before there is reasonable satisfaction that the allegations have been made out on the balance of probabilities'.[686]

Strike-out applications

Strike out and dismissal proceedings

749. Section 75 of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) gives the Tribunal a discretion to dismiss or strike out a proceeding whether or not all the evidence has been heard. It can do this if, in the Tribunal's opinion, all or part of the proceeding is frivolous, vexatious, misconceived or lacking in substance, or is otherwise an abuse of process.

676 *Equal Opportunity Act 2010* (Vic) s 13(2).
677 *Equal Opportunity Act 2010* (Vic) s 108(2).
678 *Equal Opportunity Act 2010* (Vic) s 9(2).
679 *Equal Opportunity Act 2010* (Vic) s 12(6).
680 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 [2]. Also see *Evidence Act 2008* (Vic) s 140.
681 *Drew v Whitehorse City Council (Anti-Discrimination)* [2010] VCAT 372, [18] relying on *Morgan v Austin Health & Anor* [2007] VCAT 2229, [22] per Harbison J.
682 [1938] HCA 34; (1938) 60 CLR 336.
683 See, for example, *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66 [2], *GLS v PLP (Human Rights)* [2013] VCAT 221, [35]-[36], [44]; *Thomas v Alexiou (Anti-Discrimination)* [2008] VCAT 2264, [106]-107].
684 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362.
685 *King v Nike Australia Pty Ltd (Anti Discrimination)* [2007] VCAT 70, [124].
686 *GLS v PLP (Human Rights)* [2013] VCAT 221, [39], relying on *Clark v Stingel* [2007] VSCA 292, [35] and *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 [2].

750. The principles to be followed in these proceedings are set out in *Norman v Australian Red Cross Society*,[687] where Deputy President McKenzie considered this function:

> The Tribunal should exercise caution before summarily terminating a proceeding. It should only do so if the proceeding is obviously hopeless, obviously unsustainable in fact or in law, or on no reasonable view can justify relief, or is bound to fail. This will include, but is not limited to, a case where a complaint can be said to disclose no reasonable cause of action, or where a Respondent can show a good defence sufficient to warrant the summary termination of the proceeding.

751. If the Tribunal is not satisfied that these circumstances exist, then the matter should go to hearing so the evidence can be heard and tested.

752. In *State Electricity Commission of Victoria v Rabel and others*,[688] the Court of Appeal considered the operation of section 44(c) of the Equal Opportunity Act 1984 (Vic) which also at that time provided a power of summary dismissal. The Court said that a complaint could not be dismissed under section 44(c) unless it was clear beyond doubt that the complaint was lacking in substance, and that the complainant had no arguable case which should be allowed to be resolved at a full hearing.

753. In *Forrester v AIMS Corporation*,[689] the Supreme Court has made clear that the onus of establishing a ground for summary termination rests with the party who has made the application. It is a heavy onus. The Tribunal should also generally assume for the purposes of the application that the applicant can prove the allegations made in the application.

754. The Tribunal has applied these principles in a number of cases. Some examples are set out in the following paragraphs.

687 *Norman v Australian Red Cross Society* (1998) 14 VAR 243.
688 *State Electricity Commission of Victoria v Rabel and others* [1998] 1 VR 102.
689 *Forrester v AIMS Corporation* (2004) 24 VAR 97.

No area of public life

755. The Tribunal may strike an application out where the complaint does not disclose an area of public life covered by the Equal Opportunity Act and the claim is manifestly hopeless. For example in *Tarpey v Victoria*,[690] a father brought a discrimination claim against the primary school his daughter attended. He claimed that the school and the State of Victoria discriminated against him on the basis of sex and physical features in the provision of goods and services, by failing to communicate with him about his daughter's case and development, in circumstances where the school kept in contact with his daughter's mother. The State of Victoria made an application to dismiss his claim, saying that it was misconceived and lacking in substance, as they were not providing any good or services to him. The Tribunal found that although the complainant possessed the relevant attributes, he could not point to an area of activity in the Act where the discrimination occurred. The Tribunal said that the school or State of Victoria was not providing goods or services to him and it dismissed the claim on the ground that it was misconceived, lacking in substance, and manifestly untenable both as to fact and in law.

756. However, in some circumstances a school may well be found to provide services to a parent. For example, in *Murphy v New South Wales Department of Education*[691] the Australian Human Rights Commission upheld a complaint of discrimination by the parents of a student in relation to the provision of services and facilities by the school. In particular, the complaint had alleged that the 'services' provided related to the administration of the public education system and the provision of facilities for the education of their child. This is also discussed at paragraphs 216 and 229 to 231 of this resource.

757. In *Kavanagh v Victorian WorkCover Authority trading as WorkSafe Victoria*,[692] the Tribunal considered a claim of discrimination and victimisation by WorkSafe in the handling of a complaint. The Tribunal found that the alleged services (the power to investigate, the power to issue an improvement notice, the power to charge an offence), were not services within the definition in the 1995 Act because they all require the exercise of a discretion that is quasi judicial in nature. If exercised, none of them would confer

690 [2009] VCAT 410.
691 [2000] HREOCA 14.
692 [2011] VCAT 2009.

any benefit, advantage or welfare on the applicant. The Tribunal also found that the complaints of victimisation could not succeed because they were not supported by evidence. The Tribunal dismissed the complaints.

758. It is important to bear in mind that there is also federal case law which has established that a claim should not be dismissed or struck out simply because the pleadings (or particulars) are deficient, for example by not setting out the area of public life when one may well apply. Rather, in a strike out application it is the prospects and merits of the case itself which should be examined underlying the pleadings, not the pleadings taken on face value as they may be able to be amended to rectify any deficiency.[693]

Exceptions clearly apply

759. In *Garden v Victorian Institute of Forensic Mental Health*,[694] the Tribunal also found that there was no 'service' under the 1995 Act. In this case, the complainant who was a patient at the Victorian Institute of Forensic Mental Health, made a claim of discrimination against the Institute on the basis of impairment in the provision of a service. The complaints related to reports from his psychiatrist to the Adult Parole Board and requirements that he open his mail in front of his psychiatrist. The Institute applied to have the complaints struck out on the basis that they were frivolous, vexatious, misconceived or lacking in substance. The Tribunal found that the complaints relating to the reports from the psychiatrist to the Adult Parole Board were not a service to the patient. The Tribunal struck out this part of the complaint as manifestly hopeless. The Tribunal found that while the requirement that he open his mail in front of his psychiatrist could amount to discrimination, this was also struck out, as it was authorised by an enactment (the Mental Health Act) and the statutory authority exception under the 1995 Act applied. This part of the complaint was also found to be manifestly hopeless.

760. The Tribunal has confirmed that if a respondent relied on an exception under the Act as the basis for striking out a claim, the exception must so completely answer the claim as to satisfy the Tribunal that the complaint is undoubtedly hopeless.[695]

Time delay

761. The Equal Opportunity Act does not set a strict time limit for commencing dispute resolution at the Commission or making an application to the Tribunal.

762. Where the alleged contravention occurred more than 12 months before the application was made:

a. section 116 provides the Commission with the discretion to decline to provide dispute resolution

b. item 18 of Schedule 1, Part 7 of the *Victorian Civil and Administrative Act 1998* (Vic) (VCAT Act) provides the Tribunal with the discretion to make an order under section 76 summarily dismissing an application.

763. Delay in bringing an application may also amount to an abuse of process and therefore be a basis for summary dismissal under section 75 of the VCAT Act. The factors that bear on whether delay does amount to an abuse of process are:

a. whether the delay was inordinate and unreasonable or inexcusable

b. any explanation for the delay and its adequacy

c. the nature of the proceeding

d. whether and to what extent the respondent was responsible for delay

e. prejudice to the respondent if the proceeding were to continue

f. the public interest

g. the effect of the delay on the quality of justice, in particular the ability to conduct a fair hearing.

764. All of these factors must be balanced against each other and no single one is determinative. The primary consideration is the interests of justice.[696]

693 *Fortron Automotive Treatments Pty Ltd v Jones (No 2)* [2006] FCA 1401, [19]-[20].
694 [2008] VCAT 582.
695 *Forrester v AIMS Corporation* (2004) 24 VAR 97 *Dulhunty v Guild Insurance Ltd* [2011] VCAT 2209.
696 *Burrows v State of Victoria* [2002] VCAT 1655, [38]; *Garcia v Miles* [2012] VCAT 262, [16]. These decisions are consistent with the approach taken to abuse of process because of delay in other settings: see for see for example *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27.

765. In *Burrows v Victoria*,[697] the Tribunal dismissed parts of a complaint on the basis that the delay in relation to the claims would prejudice the hearing of the case. In this case, the applicant brought a number of claims of discrimination against the State of Victoria on the basis of impairment in the area of employment, alleging that he had been denied opportunities for promotion, transfer and training, or that they had been limited. A number of the claims related to events that occurred between six to 12 years before the complaint was lodged. The State of Victoria applied to strike out or dismiss the complaints on the ground the delay in lodging the complaint amounted to an abuse of process. The Tribunal held that this length of delay would prejudice the case, because there would be problems with gathering evidence given the delay.[698]

766. This could be compared with *Bligh and Ors v State of Queensland*[699] where there was more than 10 years' delay in issue. In that case, the complainants each initially wrote letters of complaint to the Federal Race Discrimination Commissioner in 1985 and 1986, in relation to their employment on Palm Island in North Queensland between 1975 and 1984. During this period the complainants alleged they had been discriminated against on the basis they were Aboriginal, by being employed in a range of occupations on terms and conditions less favourable than would have applied if they were not Aboriginal. While the Commissioner initially accepted the complaint, it closed the file in 1988 due to a misunderstanding that the complaint had been remedied by a decision of the Queensland government to pay Aboriginals award rates. The complainants sought to reinstate their complaints in 1990, but the matter was considered non-conciliable and referred to the Australian Human Rights Commission in 1995 for determination.

767. In defending the complaint, the state submitted that the matter should be dismissed by the Commission on the basis it was outside the 12 month 'time limit' contained in the federal *Racial Discrimination Act 1975*, and that no extension of time should be granted. The Commission rejected this argument on the basis that the respondent had misconceived the provisions of the Act and was wrong to assert that a complaint 'has no statutory validity unless the Commissioner exercises the "power" to extend the period.' The Commission held that there was no basis for the State to assert that the discretion exercised by the Race Discrimination Commissioner in favour of inquiring into the alleged discriminatory acts was exercised wrongly, and refused to dismiss the complaints on the basis of delay. This shows that what is appropriate in relation to a time delay will depend on the circumstances of the case.

Claim being heard in another forum

768. In *Moloney v Victoria*,[700] a number of claims of discrimination on the basis of impairment were made against the State of Victoria in the area of employment. One of the claims raised an issue that was also currently being considered by the Australian Human Rights Commission under the *Disability Discrimination Act 1992 (Cth)*. The respondent sought to strike out this part of her claim as frivolous, vexatious, misconceived or lacking in substance, or an abuse of process. The Tribunal said that it would be an abuse of process to determine this matter while the AHRC complaint was still on foot. The Tribunal struck out this part of the complaint.

769. An abuse of process may also be established where an applicant has brought repeated applications or is seeking to re-agitate issues that have already been determined by the Tribunal or another body.[701]

697 [2002] VCAT 1655.
698 See also *Garcia v Miles* [2012] VCAT 262.
699 HREOCA [1996] 28.
700 [2000] VCAT 1089.
701 *Fernandez v Insulation Solutions Pty Ltd* [2004] VCAT 125; *Cartledge v Skyway Executive Pty Ltd* [2004] VCAT 2017.

No prospect of success

770. In *Carnegie v Victorian Registration and Qualifications Authority*,[702] the Victorian Registration and Qualifications Authority cancelled the registration of the Carnegie School because of its failure to comply with the minimum standards set out in the *Education and Training Reform Regulations 2007*. Dr Carnegie said that his school catered for emotionally and socially traumatised students and his claim of discrimination was in the area of discrimination, based on the attribute of his personal association with others who had a disability. The respondent applied for the matter to be struck out or dismissed because the claim could not possibly succeed. The Tribunal found that the Authority is not an educational authority and the standards imposed are those set out in the Regulations. The Tribunal found that there was no prospect of success in this case and dismissed the complaint.

Application of immunity provisions and body capable of being sued

771. Judicial immunity from civil liability only applies to persons exercising judicial functions in a court or tribunal, rather than administrative functions.[703] Accordingly, both the individual and State of Victoria are capable of being sued in relation to administrative functions. Note however that in *Towie v State of Victoria & Ors*[704] the complainant made allegations that the treatment he received during the conduct of a hearing at VCAT was discriminatory. The Tribunal found that it would be a fundamental breach of the rules of natural justice for VCAT to be both a named party and a decision-maker in the matter, so it was a matter that must be struck-out under section 77 of the VCAT Act (a matter where the proceeding is more appropriately brought before another court). The Tribunal also found that Tribunal members have the same protection as a judge in the performance of his or her duties and that it was inappropriate to name VCAT as a party, as it is not a body capable of being sued.

Acts took place beyond the territorial reach of the Equal Opportunity Act

772. In *Gluyas v Google Inc*,[705] the complainant alleged that a blog established by a third person (in the United States) containing offensive material amounted to discrimination against him in the provision of goods and services. Google sought to have the matter dismissed because the acts done occurred entirely outside the State of Victoria and where therefore not governed by the provisions of the 1995 Act. The Tribunal found that the alleged conduct in question was Google's assistance in putting the material up and its refusal to take that material down, and that these acts had occurred outside the jurisdiction. The Tribunal distinguished this from cases involving those who actively publish the material on the internet. The Tribunal dismissed the complaint as lacking jurisdiction.

773. In *Tan v McArdle*,[706] the Tribunal considered a claim about an employment decision made in Tasmania while the complainant was living and working in New South Wales. The claim alleged victimisation because of a sexual harassment complaint that had been previously made in Victoria. The Tribunal found that none of the elements of victimisation occurred in Victoria and that there was therefore an insufficient connection to Victoria. The Tribunal dismissed the complaint.

Vexatious claims

774. The courts have provided some guidance on when an application will be vexatious:

> If it is brought predominantly for a purpose other than obtaining an adjudication of rights under the Equal Opportunity Act, or primarily to annoy, embarrass or place an unfair burden on the respondent, or if it is so untenable as to be manifestly hopeless.[707]

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702 [2012] VCAT 1952.
703 *X v State of South Australia (No 3)* [2007] SASC 125 (5 April 2007) [148]-[159]; *Sirros v Moore* [1975] QB 118 [132]; *Mann v O'Neill* [1997] HCA 28; (1997) 191 CLR 204 [212].
704 [2002] VCAT 1395 (12 November 2002).
705 [2010] VCAT 540.
706 [2010] VCAT 248.
707 *Al-Hakim v Arthur Robinson & Hedderwicks* [2001] VCAT 1767, citing *Cabot v City of Keilor* [1994] 1 VR 220 and *Attorney-General v Wentworth* (1998) 14 NSWLR 481.

Secrecy

775. It is unlawful for any employee or Board member of the Commission, or the Commissioner to disclose, communicate or make a record of any information that concerns the affairs of any person, where that information was provided to the Commission for a purpose under the Equal Opportunity Act.[708] To do so is an offence under section 176(3) of the Equal Opportunity Act.

776. The purpose of the secrecy provision is to ensure that information provided to the Commission is kept confidential, with a view to achieving outcomes in difficult and complex cases where confidentiality is important.

777. There are some limited exceptions to the operation of the secrecy provision set out in sections 176A and 177 of the Equal Opportunity Act. Broadly speaking, these exceptions allow a Commission staff member to disclose information where it is necessary to do so when carrying out another function under the Act, where parties consent to certain information being released, and where disclosure of information is required by a Court in a criminal proceeding (for example sexual assault).

Admissibility

778. Evidence of anything said or done in the course of dispute resolution is inadmissible in proceedings before the Tribunal, or any other legal proceedings.[709]

779. The dispute resolution process starts when a person informs the Commission that they wish to proceed with dispute resolution. In practice, this will be when the Commission receives either a signed letter or a completed online form from a person lodging a complaint. This means that settlement offers and negotiations during dispute resolution process will be inadmissible.

780. The question of what documents or information will be inadmissible in a proceeding is a matter for determination by the Court or Tribunal hearing the matter.

Remedies

781. When a person brings a complaint under the Equal Opportunity Act there are a number of remedies open to them if they are successful.

782. Section 125(a) of the Equal Opportunity Act provides that if the Tribunal finds that a person has breached the Equal Opportunity Act it can make any one or more of the following orders:

    i. an order that the person refrain from committing any further contravention of this Act

    ii. an order that the person pay to the applicant, within a specified period, an amount the Tribunal thinks fit to compensate the applicant for loss, damage or injury suffered in consequence of the contravention

    iii. an order that the person do anything specified in the order with a view to addressing any loss, damage or injury suffered by the applicant as a result of the contravention.

    iv. This forms the basis for the remedies available to a complainant.

783. Section 125 allows the Tribunal to make any order it thinks fit that will either stop the unlawful conduct under the Equal Opportunity Act occurring or continuing, or to address any loss, damage or injury suffered by the conduct.

784. Examples of remedies ordered by the Tribunal which are particular to the circumstances of the complainant include:

    a. equal opportunity training for staff involved in unlawful conduct[710]

    b. written apology[711]

    c. amending a policy to remove discriminatory clauses[712]

    d. reinstating a job application and removing discriminatory assessment criteria from the application process[713]

    e. reassessing a person's insurance premium when the original method of calculation was discriminatory[714]

    f. reinstatement.[715]

708 *Equal Opportunity Act 2010* (Vic), s 176.
709 *Equal Opportunity Act 2010* (Vic), s 117.
710 *Morgan v Dancen Enterprises Pty Ltd (Anti-Discrimination)* [2006] VCAT 2145.
711 *Flekac v Australian Cable and Telephony Pty Ltd* [2003] VCAT 2012 and *Styles v Murray Meats Pty Ltd (Anti-Discrimination)* [2005] VCAT 914.
712 *South v RVBA* [2001] VCAT 207.
713 *Davies v State of Victoria (Victoria Police)* [2000] VCAT 819.
714 *Dulhunty v Guild Insurance Limited* [2012] VCAT 1651.
715 *Tobin v Diamond Valley Community Hospital* (1985) EOC 92-139. Also see *Duma & Mader International Pty Ltd (Anti-Discrimination)* [2007] VCAT 2288 where reinstatement was considered but found not to be appropriate at [93]; *Ilobuchi Peter v Amcor Flexibles* [1999] VCAT 664 (4 June 1999) and *O'Keeffe v Wyndham City Council* [2002] VCAT 17 (21 January 2002) [46]-[48], both relating to interim orders, where the Tribunal's power to order reinstatement was generally discussed.

Examples of conciliated outcomes at the Commission with a range of remedies

Age discrimination in the area of employment and discriminatory information request

The complainant wished to apply for a position as area manager for a retail chain. The application form asked for a qualification and required him to select the year that he obtained his qualification. The drop down list only went as far back as 1995. The complainant completed his degree in 1976 and was therefore unable to complete the application and was denied the opportunity to apply for the position.

The respondent agreed to attend a conciliation conference and stated that the drop down list of when a person obtained their qualification being only from 1995 was an oversight and the application form has been updated, with the drop down box replaced with a free text entry field. The respondents expressed their sincere apologies to the complainant for any inconvenience caused and invited him to apply for the role if he wished.

The complainant was satisfied with the action taken by the respondent and the matter was resolved.

Disability discrimination in the area of goods and services

The complainant was admitted to a psychiatric ward as an involuntary patient. He alleged that staff on the ward did not give him information about his rights, let him make any decisions or let him access his phone or a computer.

The respondent stated to the Commission that it followed its set procedures when admitting the complainant while he was an involuntary patient. However, they did agree to attend a conciliation conference to discuss the complainant's admission and its processes.

Via the conciliation conference, the complainant had the opportunity to raise and discuss his concerns with the respondent. As a result, the respondent committed to reviewing some of their practices. The complainant was happy that he was able to meet with the respondent and considered his complaint resolved.

Marital status in the area of employment

The complainant is employed by an airline and applied under the staff travel policy to travel with her two children. Her application was denied on the basis that she was not legally married to her partner, her children's father. The complainant had to purchase full fare tickets for her and her children.

The respondent agreed to attend a conciliation conference and stated that a staff member had misread the staff travel policy which resulted in the complainant's application being denied. The respondent acknowledged the application should have been approved and expressed its regret at the hurt and inconvenience the complainant experienced and refunded the cost of the tickets purchased by the complainant. The respondent also agreed to change its staff travel policy (which had previously stated that only married spouses of staff were eligible), so that the policy extended to 'common law' spouses (de facto and same sex couples).

Disability in the area of education

The complainant's son has an intellectual disability and wanted to attend school camp. She sought permission from the school to stay near the camp during the day and for her son to stay overnight with her to be dropped back to the camp the following day. This request was based on her son's integration aide not attending the school camp and her concerns about her son bedwetting and having unsupervised access to food at night.

The respondent denied the complainant's request, stating it felt that her son was more than capable of attending the camp independently and that doing so would help his development. The school considered that if the complainant collected her son at night this would highlight his disabilities and differences to other children.

When notified of the complaint by the Conciliator, the respondent agreed to meet the complainant to further discuss her request so that her son could participate in the school camp. Following this meeting, the school agreed to the adjustments sought by the complainant and the matter was resolved.

Examples where conciliation resulted in payment of compensation are set out in paragraph 836.

Damages overview

785. Under the Equal Opportunity Act jurisdiction, a person can seek financial compensation (also known as damages) when they have suffered loss, whether financially or physically, because of unlawful conduct.

786. Damages can be ordered by the Tribunal under section 125(a)(ii) of the Equal Opportunity Act as outlined above 'to compensate the applicant for loss, damage or injury suffered as a consequence of the discrimination'. Importantly, this means there must be a connection between the loss and the unlawful conduct for an award to properly be made by the Tribunal. In assessing damages, each case will be determined on its own merit.

787. The unlawful conduct in question does not need to be the sole cause of the loss or damage, but the loss or damage suffered must be as a consequence of the breaches of the Equal Opportunity Act. The Tribunal has indicated that it may be possible for damages to be awarded where there have been multiple causes of loss or damage, despite some of those causes being unrelated to breaches of the Equal Opportunity Act. However, this is on the proviso that the complainant can demonstrate that the unlawful conduct was a cause of the loss or damage.[716]

788. A complainant may also seek damages at conciliation with the Commission, using decisions of the Tribunal and other jurisdictions to assist with formulating their complaint and negotiating an outcome.

789. *Hall & Ors v A. & A. Sheiban Pty Ltd & Ors*[717] is considered the leading authority in setting out the overarching principles for assessing damages in anti-discrimination claims. In that case, Lockhart J noted that the closest analogy would be with the principles guiding damages for claims in tort, although:

> …it is difficult and would be unwise to prescribe an inflexible measure of damage of cases of this kind and, in particular, to do so exclusively by reference to common law tests in branches of the law that are not the same, though analogous in varying degrees, with anti-discrimination law. Generally speaking, the correct way to approach the assessment of damages in cases under section 81 of the [Sex Discrimination Act 1984] is to compare the position in which the complainant might have been expected to be if the discriminatory conduct had not occurred with the situation in which he or she was placed by reason of the conduct of the respondent. [718]

790. Practically speaking, this means that a complainant should think about what has happened to them as a result of the conduct about which they are complaining, in relation to both financial loss and hurt and humiliation. This approach to damages has been followed in the Federal and Victorian jurisdictions.

791. It is important to note that under the Equal Opportunity Act, there is no upper limit on the amount of damages/compensation as there is in similar jurisdictions, such as unfair dismissal under the *Fair Work Act 2009*.[719] However, any claim of damages will need to be justified with supporting evidence.

Categories of damages

792. As damages in anti-discrimination complaints are considered by the Tribunal and Courts to be 'entirely compensatory' in nature,[720] the two main types of damages are:

   a. 'special damages' which relate to economic or financial losses (past or future). For example, loss of wages or out of pocket expenses such as medical expenses

   b. 'general damages' which relate to non-economic losses (past or future). For example, compensation for hurt, humiliation and injury to feelings or for diagnosed psychological injury or physical illness that have been caused or exacerbated by the discriminatory treatment.

716 *GLS v PLP (Human Rights)* [2013] VCAT 211, [275]-[276], citing *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 128 [56]-[57].
717 [1989] FCA 72.
718 [1989] FCA 72 [72]-[73].
719 *Fair Work Act 2009* (Cth) ss 392(5) and (6).
720 *Graeme Innes v Rail Corporation of NSW (No 2)* [2013] FMCA 36 (1 February 2013) [160], citing with approval *Qantas Airways v Gama* [2008] FCAFC 69 [94].

793. There are other types of damages, but they are not as commonly awarded. For example, 'aggravated damages' may be awarded in circumstances where there is clear evidence that the person who committed the discrimination has been 'high handed, malicious or oppressive', and has been 'calculated to increase the hurt suffered by the complainant'.[721]

794. For example, aggravated damages were claimed in *Delaney v Pasunica Pty Ltd*[722] but the Tribunal refused to order them because the factors raised in support of aggravated damages were factors already taken into account in the Tribunal's award of general damages, and the Tribunal was not satisfied that there had been conduct on the part of the respondent calculated to increase the applicant's hurt and humiliation.[723] *Delaney* is also discussed at paragraphs 592 and 829 to 830.

795. Damages in anti-discrimination matters are not intended to be punitive. Therefore 'exemplary damages', which are designed as a punishment for the party found guilty of unlawful conduct, are generally not available for claims of discrimination, sexual harassment and victimisation. [724]

796. Note that an award of damages will not include an amount for any legal expenses incurred, which are described as 'costs' (discussed from paragraph 847).

Assessing special damages – financial loss

797. There are a number of factors can be considered in calculating an award of special damages to cover specific financial loss of a complainant as a result of the unlawful conduct. For example:

    a. Compare the past earnings of the complainant before the unlawful conduct with the current earnings or future potential earnings of the complainant. Can any difference in income be attributable to the unlawful conduct? In other words, has the earning capacity of the complainant suffered as a result of the unlawful conduct? Is there total or partial incapacity? How long is the incapacity expected to last?

    b. Were there any other benefits of the job which the complainant is now unable to access which can be measured financially? For example, a promotion, rostered overtime, weekend penalty rates, special bonuses, share benefits, use of a mobile phone or car.

    c. Has the complainant spent their own money on doctors and medical specialists because they have fallen ill or had a medical condition aggravated as a result of the unlawful conduct?

    d. Does the complainant have copies of their pay slips, receipts, invoices and proof of payment which can be provided as evidence of this loss?

798. An example of an itemised award of special damages for medical expenses can be found in *Gama v Qantas Airways Ltd (No.2)*.[725] In that case, Mr Gama was awarded damages to compensate him for breaches of section 9 of the *Racial Discrimination Act 1975* (Cth) and s.15(2)(d) of the *Disability Discrimination Act 1992* (Cth). Mr Gama claimed damages for attendance at medical appointments, travel to medical appointments, and medication costs, each for the past and future. Ultimately, Mr Gama was awarded a 20 per cent contribution towards these costs by way of special damages, comprising:

    a. $1,350 for 20 per cent of the cost of the doctor's appointments and $945 for 20 per cent of the cost of travel to date of hearing

    b. $2,831 for 20 per cent of medication costs taken to date of hearing

    c. $3,150 for future doctor's appointments calculated at 15 visits per year for seven years, again on the 20 per cent basis

    d. $3,603 for 20 per cent of future medication costs for seven years

    e. interest on those amounts (taking into account Mr Gama would have received a medicare rebate).[726]

721 *Hall & Ors v A & A Sheiban Pty Ltd & Ors* [1989] FCA 72 [75] per Lockhard J citing Alexander v Home Office [1988] 2 All ER 118.
722 [2001] VCAT 1870.
723 Ibid [51]-[55].
724 Also see e.g. *Howe v Qantas* [2004] FMCA 242; *Hall v Sheiban* [1989] FCA 72 [78]-[83]; *Phillis v Mandic* [2005] FMCA 330 [26].
725 [2006] FMCA 1767 [129]-[130]. Qantas appealed the decision on a number of grounds, including the award of damages. The ground of appeal relating to damages was dismissed by the Full Court: see *Qantas Airways Limited v Gama* [2008] FCAFC 69 [5], [100]-[104], although the appeal was upheld in part in relation to the disability discrimination aspect at [91].
726 [2006] FMCA 1767 [129]-[130].

799. In support of his claim for the medical expenses (past and future), Mr Gama had provided a sworn affidavit setting out how much he had spent on medication to date, and how long he was required to take the medication for in the future. Mr Gama further provided evidence of his travel costs for attending medical appointments, and the expected period he would need to continue to see his doctor for. Mr Gama's doctor also provided oral evidence of Mr Gama's attendance at her consultancy.[727] Mr Gama also received $40,000 as a 20 per cent contribution towards general damages and 9 percent interest on that amount.[728]

800. If the complainant is claiming economic loss for lost or reduced wages, it is also relevant whether they are currently receiving any salary/wages, leave payments or insurance payments such as worker's compensation, and if so, how much they are receiving. Any damages awarded are likely to be offset and therefore reduced by any income or payments received or even potentially accrued entitlements.[729] Tax is also likely to be payable on any damages awarded as economic loss as it may be considered taxable income or an 'employment termination payment' under section 82-130(1) of the *Income Tax Assessment Act 1997* (Cth) if it is paid as a consequence of termination of employment.

727 *Qantas Airways Limited v Gama* [2008] FCAFC 69 [102]-[103].

728 *Gama v Qantas Airways Ltd (No.2)* [2006] FMCA 1767 [127] and [131]; Also see *Qantas Airways Limited v Gama* [2008] FCAFC 69 [99].

729 See, for example, *Howe v Qantas Airways* [2004] FMCA 242 [133] where the Federal Magistrates Court found that the applicant was not entitled to the benefit of the sick leave accrued during the period of unpaid maternity leave, as her award of damages was intended to compensate her for not being granted sick leave. Therefore, the respondent was entitled to offset the equivalent amount of salary from the calculation of damages for each day of sick leave accrued during her maternity leave.

Mitigation of loss

801. Whether a person is currently earning is also relevant to show they have met their legal obligation to 'mitigate their losses'. A complainant has a duty to take steps to improve their situation and make their financial loss less severe. For example, if the person has left their job because of unlawful conduct in breach of the Equal Opportunity Act, or if they were fired for an unlawful reason, the person still has an obligation to look for another job to 'mitigate' their loss of income. Where a person has been unable to mitigate their loss, for example because of injury or illness, there needs to be evidence of that reason available for the Tribunal to consider.

802. However, if a person is not working because they have chosen to take unpaid leave such as parental leave, and this is the reason they are not earning, the Tribunal and courts are unwilling to order economic damage to cover that period of leave. This is because the loss of earnings of the applicant is not attributable to the conduct of the respondent.[730]

Basis for assessing general damages

803. While economic damages can be calculated by reference to money spent or lost as a result of the unlawful conduct, hurt and humiliation is often harder to calculate. The principle that the Tribunal and the courts will use to assess hurt and humiliation was summarised by Tribunal Member Dea in August 2012 as follows:

> The starting position in relation to awards for prohibited discrimination for injury to feelings (also referred to as non-economic loss), is that the amount should not be minimal, as that would trivialise or diminish respect for the public policy to which the Equal Opportunity Act gives effect. On the other hand, awards ought not be excessive, as that would also damage respect for that public policy.[731]

730 Ibid at paragraph 366.

731 *Galea v Hartnett – Blairgowrie Caravan Park* [2012] VCAT 1049 at paragraph 83, relying on *Hall & Ors v A & A Sheiban Pty Ltd & Ors* [1989] FCA 72.

804. In *GLS v PLP (Human Rights)*[732] Justice Garde has also held that an award of general damages should be made 'as appropriate for the individual case having regard to the facts and circumstances and the contraventions proved.'[733]

805. It is important to remember that unless there is clear evidence of significant psychological or physical injury, the Tribunal (and the courts) have been unwilling to make orders for large sums in the hundreds of thousands of dollars as compensation for hurt and humiliation.

806. The amount awarded for hurt and humiliation will depend on the circumstances. For example the following factors may influence the amount of damages:

    a. whether the perpetrator of the unlawful conduct has a position of power and control over the complainant, by reason of their age or job

    b. if the unlawful conduct occurred in a public place (including a workplace) which resulted in the complainant being humiliated in front of other people

    c. if there are other factors which have made the hurt and humiliation worse for the person, such as a breach of privacy

    d. if the unlawful conduct affected the person's health and particularly their mental health, and the level of seriousness of the mental or physical anguish as supported by medical evidence such as a doctor or specialist's report.

807. Examples of general damages from the Tribunal, the Federal Magistrates Court and the Federal Court, as well as examples of general damages negotiated in conciliated outcomes are set out below from paragraph 834 onwards.

732 [2013] VCAT 221.
733 Ibid [274].

Tax treatment of general damages

808. A complainant seeking compensation for hurt and humiliation may want to seek advice from a financial advisor about the tax implications of the payment or settlement.

809. The Australian Taxation Office (ATO) has previously commented that 'the determination of the character of a compensation payment, and in particular whether it is liable to tax in the hands of an employee, depends upon the nature of the payment'.[734] The ATO ruled that a payment made by an employer to an employee as compensation in anti-discrimination matters for injury to feelings is usually considered a capital payment, and is not subject to income tax or capital gains tax.[735]

810. However, where the payment is made as a consequence of termination of employment, it must meet the requirements of section 82-135(i) of the *Income Tax Assessment Act 1997* (Cth) to be excluded from being a taxable 'employment termination payment'. Generally speaking, the amount must be an identifiable amount paid specifically for or in respect of a personal injury, and be a reasonable amount having regard to the nature and extent of the personal injury.[736]

811. This was the issue in *An Employee v Federal Commissioner of Taxation*.[737] In that case, the applicant claimed that his employer had breached the *Age Discrimination Act 2004* (Cth) in requiring his retirement at the age of 65, as well as a breach of contract claim, and bullying and harassment of the employee by senior officers. The applicant claimed that he had suffered post-traumatic stress disorder as a result. The parties settled the dispute in a settlement agreement for the amount of $395,000. The question considered was how that settlement amount should be classified for taxation purposes.

734 Taxation Ruling No. IT 2424 (2 July 1987).
735 Ibid.
736 *An Employee v Federal Commissioner of Taxation* [2010] AATA 912. Also see Taxation Ruling 2003/13 (22 October 2003).
737 [2010] AATA 912.

812. In a private ruling, the Commissioner of Taxation found the payment was paid as a consequence of termination, and therefore the entire payment was an 'employment termination payment' under section 82-130(1) of the *Income Tax Assessment Act 1997* (Cth). The applicant appealed that decision, submitting that section 82-135 applied as the payment was made in respect of a personal injury suffered as a result of the age discrimination.

813. The Administrative Appeals Tribunal (AAT) affirmed the Commissioner's decision, finding that the payment was made as a consequence of the applicant's termination and was an 'employment termination payment', as the payment would not have been made if not for the termination. Termination need not be the dominant reason, but provided the payment follows as an effect or result of the termination, it will be considered to be a consequence of termination.[738]

814. The ATT further found that section 82-135 did not apply. This was for two reasons. First, the applicant's compensation payment was 'a single, undissected lump sum with no attribution of any portion of it to any of the various heads of relief claimed by the taxpayer'.[739] The AAT relied on *McLaurin v Federal Commissioner of Taxation*[740] in finding that where the amount is a lump sum, it is appropriate to treat the sum as a whole as it was impossible to tell what portion of the compensation was in respect of that personal injury.

815. Second, the ATT considered that even if the hurt and humiliation claimed by the applicant amounted to 'personal injury', given the employer had denied liability in the settlement, there had been no agreement that 'personal injury' had occurred. Therefore, the payment could not genuinely amount to a payment for personal injury under section 82-135.[741]

738 Ibid [12]-[17], relying on *Reseck v Commissioner of Taxation* [1975] HCA 38; *McIntosh v Federal Commissioner of Taxation* (1979) 25 ALR 557, 560; *Le Grand v Commissioner of Taxation* [2002] FCA 1258 [63].
739 *An Employee v Federal Commissioner of Taxation* [2010] AATA 912 [20].
740 [1961] HCA 9.
741 Ibid [22] relying on *Dibb v Commissioner of Taxation* [2004] FCAFC 126.

Eggshell skull rule – taking the person as you find them

816. In assessing damages, a discriminator or wrongdoer must take the complainant as they find them, at the time the unlawful conduct occurs. This is called the 'eggshell skull' rule.

817. However in applying the rule and considering the applicant's physical and mental state in assessing the appropriate quantum of damages, the courts are unwilling to consider notions of 'normal fortitude' of applicants as a threshold to receiving damages, nor notions of 'reasonableness' by reference to a person's psychological make-up, in relation to the resulting compensation awarded.

818. For example, in *South Pacific Resort Hotels Pty Ltd v Trainor*[742] the respondents argued that the applicant was precluded from seeking damages for a complaint of sexual harassment, as she was not of 'normal fortitude' and had not previously disclosed a mental condition to the employer. The respondent considered it was unfair to be ordered to pay compensation when the extent of the applicant's mental injury was unforeseeable and argued that the notion of what a reasonable person would anticipate should be carried through into an assessment of damages.[743]

819. The Magistrates Court at first instance and the Full Federal Court on appeal both rejected this argument. The Full Federal Court considered that the argument ignored the separate statutory schemes for defining and finding discrimination on one hand, and the power to order compensation on the other. The Full Federal Court also warned against the inclusion of the notion of 'normal fortitude' into discrimination law as it was:

> capable of misuse in support of the false idea – perhaps hinted at rather than stated bluntly – that some degree of sexual harassment (or some other form of unlawful discrimination) would and should be accepted by persons of normal fortitude.[744]

742 [2005] FCAFC 130.
743 Ibid [44]-[45].
744 Ibid [46] and [51]-[52].

820. The Full Federal Court dismissed the appeal and the Magistrates' award of $17,536.80 to the applicant was upheld. That award was made up of $5,000.00 general damages; $1,907.50 for medical treatment; $5,000 for past loss of income; $1,564.65 for interest and $2,500 for future economic loss.

821. The application of the 'eggshell skull rule' in Victorian anti-discrimination cases was reinforced by Deputy President McKenzie in *Styles v Murray Meats Pty Ltd (Anti-Discrimination)*[745] *(Styles)* in relation to a complaint of sexual harassment and sex discrimination. In *Styles*, the complainant had been sexually abused by her father and subjected to physical violence by her mother for a number of years as a child and teenager. The evidence provided to the Tribunal was that as a result, she suffered from chronic but fluctuating anxiety, depression, chronic pain disorder, panic disorder and 'a predisposition to react strongly in situations of sexual harassment'.[746]

822. Deputy President McKenzie upheld the sexual harassment complaint and awarded the complainant $8,000 in general damages for embarrassment, loss of self-esteem, stress, and aggravation of previous medical conditions. In doing so, Deputy President McKenzie noted:

> I pause here to say that in my view, in cases under the Equal Opportunity Act, one must take the victim as one finds the victim. Loss is still compensable even though the victim may, because of some earlier condition or event, be more than ordinarily sensitive to the particular conduct.[747]

823. Therefore, where a complainant has a pre-existing condition that makes them more sensitive, vulnerable or pre-disposed them to developing a psychological injury, this cannot be held against them in calculating damages for the unlawful conduct. Instead, the discriminator is liable for the full extent of their injuries even if the injuries are greater than someone with a 'normal' disposition may have suffered.

Examples of damages awards from the Tribunal

824. Case law examples are useful to consider in assessing what level of damages may be appropriate in a particular case, although the Federal Court has warned that care needs to be taken in making such comparisons to ensure that particular acts are not 'rated' and that the complainant's individual circumstances are specifically referred to and considered.[748]

825. The level of damages awarded in the Tribunal and its predecessor, the Victorian Anti-Discrimination Tribunal (VADT) have varied significantly over time. However, the cases do indicate that where there is discrimination, sexual harassment or victimisation between persons with an imbalance of power, where there is the ability for the unlawful conduct to influence the person's ability to gain ongoing employment or reputation, or where that unlawful conduct results in psychological injury supported by medical evidence, the Tribunal is more likely to make a higher award of general damages.

826. For example, in 1998 VADT ordered $125,000 in damages in *McKenna v State of Victoria*[749] for the complainant's exposure to

> …considerable pain and suffering, to debilitating physical symptoms, to mental breakdown, to humiliation, loss of self esteem and of self confidence, and to loss of normal enjoyment of her professional and private life...

caused by sex discrimination, victimisation and sexual harassment in employment. VADT noted the award was relatively large for the Victorian anti-discrimination jurisdiction but that VADT considered the unlawful actions were very serious in nature and had been 'initiated, supported or endorsed at high levels' of the employing organisation.[750]

827. In *Delaney v Pasunica Pty Ltd*[751] the Tribunal upheld a complaint of sexual harassment and sex discrimination, and ordered $25,000.00 in general damages, $3,617.60 in special damages (loss of earnings); $871.50 for medical expenses and that the respondents pay the complainant's costs for one day's hearing on County Court Scale A to be taxed in default of agreement.

745 [2005] VCAT 914 (12 May 2005).
746 Ibid [99].
747 Ibid [100]. Also see *Gordon v Commonwealth of Australia* [2008] FCA 603 [119].
748 *Phillis v Mandic* [2005] FMCA 330 [26].
749 [1998] VADT 83.
750 Ibid [6.1].
751 [2001] VCAT 1870 (13 September 2001).

828. The complainant, Ms Delaney, was 16 years old and in the first few weeks of her first job as a sales assistant and kitchen hand at a roast chicken shop. Ms Delaney alleged that her 40 year-old employer, Mr Daley, made inappropriate sexual comments about her body, made sexual advances on her, kissed her against her will and requested sexual favours from her. Ms Delaney provided evidence about the effects this conduct had on her, from her family doctor, a qualified social worker, a sexual assault counsellor, and a consultant psychiatrist. The Tribunal was satisfied that Ms Delaney had suffered an ongoing adjustment disorder, with associated anxiety, hurt and humiliation, and had been unable to work for periods of time because of this disorder, as a direct result of the conduct. Of particular importance to the Tribunal was the power imbalance between Ms Delaney and Mr Daley, and Mr Daley's intimidation and oppressive behaviour towards Ms Delaney.[752]

829. In *Tan v Xenos (No. 3)*,[753] the Tribunal awarded $100,000 for hurt and humiliation for a complaint of sexual harassment by a neurosurgeon against a neurosurgeon registrar. The level of damages awarded for hurt and humiliation took into consideration the way the respondent had defended the claim which had aggravated the suffering of the complainant (although aggravated damages were not awarded), and the seriousness of the treatment of the applicant by the respondent, who was in a position of great power over the applicant in relation to her training and career progression. However, no evidence was provided that any loss of income had resulted from the conduct, and so no award of special damages was made.

830. By way of contrast, in *Duma & Mader International Pty Ltd (Anti-Discrimination)*[754] the Tribunal upheld a complaint of indirect discrimination in the area of employment on the grounds of impairment and awarded $4,000 for hurt and humiliation, and $418.26 for lost income, comprising $383.72 for three public holidays at an hourly rate of $16.83 and superannuation contributions for those three days. The complainant had been absent from work on long term sick leave due to a work-related injury and depression when his employer wrote to him requiring that he notify the company when he would be returning, and to authorise them to contact his doctor to give the company information about his condition. The Tribunal considered that the complainant could not comply with this condition because neither he nor his doctor knew when he would recover, and that the requirement was unreasonable in the circumstances, which included placing his employment in jeopardy after only three months absence where he was certified unfit for all duties due to the seriousness of his injuries.[755]

831. The Tribunal noted that while it was unreasonable for the employer to terminate Mr Duma at the point it did, the Tribunal was not satisfied he would have ever have worked again because of his injury – not because of the discrimination. Therefore, there would have come a time where it was reasonable for the respondent to terminate, and so the only lost income Mr Duma was only entitled to under the relevant award was three public holidays and superannuation on those days. Mr Duma's chronic pain and depression existed prior to the termination and could not be attributed to it, nor were his injuries exacerbated by the termination. Therefore, the level of general damages could only reflect the hurt and humiliation arising from the embarrassment and upset of the unlawful termination.[756]

832. Between August 2008 and March 2013, of the reported Tribunal anti-discrimination decisions available on Austlii, damages have only been awarded in seven cases. Below is a table outlining these cases in summary.

752 Ibid [50].
753 [2008] VCAT 584.
754 [2007] VCAT 2288.
755 Ibid [85].
756 Ibid [94]-[95].

Table: Damages awarded at the Tribunal since August 2008

Name	Date	Summary	Area	Attribute	Outcome
GLS v PLP (Human Rights) [2013] VCAT 221	13-3-13	Complaint by a mature aged graduate legal student of 14 instances of serious and sustained sexual harassment by her employer during a legal practice placement.	Sexual harassment by employer; sexual harassment in a common workplace	(Not applicable in sexual harassment cases as stand alone provision)	Tribunal upheld 11 of the 14 complaints and awarded the complainant $100,000 for general damages on the basis of the serious psychological damage caused by the employer's conduct. No special damages sought or awarded.
Galea v Hartnett-Blairgowrie Caravan Park [2012] VCAT 1049	18-7-12	Complaint that applicant refused accommodation at caravan park on basis of parental status.	Provision of accommodation	Parental status	Complainant awarded $1000 for the distress caused by the refusal to provide accommodation and $90 for economic loss relating to travel costs.
Cobaw Community Health Services v Christian Youth Camps Ltd [2010] VCAT 1613	8-10-10	Complaint that Christian adventure resort refused to take booking for youth group based on sexual orientation of attendees.	Services and accommodation	Sexual orientation	Complaint successful. complainant awarded $5,000 for hurt and distress caused by the unlawful discrimination of the respondents. Currently on appeal.
Sammut v Distinctive Options Limited [2010] VCAT 1735	14-9-10	Sexual harassment and victimisation complaint.	Employment	N/A	Complaint proven in part. Complainant awarded $2,000 for humiliation, pain and suffering. VCAT accepted the sexual harassment had a significant impact on the complainant, and that he was humiliated as a result. However, VCAT found there was insufficient evidence to link the sexual harassment with any inability the complainant had to work.

Name	Date	Summary	Area	Attribute	Outcome
Laviya v Aitken Greens Pty Ltd [2010] VCAT 1233	3-8-10	Complaint that applicant was dismissed for taking sick leave, requiring applicant to return to work following Kinglake bushfires, and sexual harassment.	Employment	Impairment, sexual harassment	Complainant awarded $3,500 in general damages for extreme distress caused by the unlawful conduct. A further $1,500 general damages were awarded against a person found to have sexually harassed the applicant. Both amounts payable within 14 days. No financial loss was alleged by the complainant. In any event, there was insufficient evidence to support any award to compensate for medical expenses, even though the complainant had undergone counselling.
Stern v Depilation & Skincare Pty Ltd [2009] VCAT 2725	22-12-09	Complaint that employment status changed and employment terminated.	Employment	Pregnancy	Complaint proven in part. $6,607.58 total compensation ordered, made up as follows – (a) $3000 for loss arising from the change of her employment status during her employment; (b) $2807.58 for loss of earnings; (c) $800 for humiliation and emotional distress.
Thomas v Alexiou [2008] VCAT 2264	31-10-08	Complaint of sexual harassment by apprentice against director.	Employment	Sex	Complaint proven. Ordered $35,000 in general damages based on the extent of the repetition and duration of that sexual harassment and the Tribunal's assessment of its effect on the complainant.

833. These examples show that in every case, the level of damages will be assessed on the facts and evidence available as to the person's individual loss.

Conciliated outcomes at the Commission

834. A significant proportion of cases are settled at conciliation at the Commission and do not end up at VCAT. In 2011/12, 58 per cent of complaints where conciliation was held were resolved. Some examples of the outcomes reached during conciliation at the Commission are set out in the following pages.

Examples of conciliated outcomes at the Commission - damages

Parental/carer discrimination in employment

The complainant worked as a dental nurse for three years. She had been on 12 months maternity leave and asked to return to work part-time. Her employer refused her request for part-time employment stating she had to return to her substantive position working full-time hours.

The complaint was resolved at conciliation for compensation of $15,000 and a letter of apology.

Disability impairment discrimination in employment

The complainant is an administrative officer and has an impairment. She alleged her manager refused to allow her to work from home or to negotiate timelines for completion of work. When the complainant returned to work from sick leave she was removed from her position and excluded from her team. She became ill again and took sick leave and when she was ready to return to work her employer informed her it was not ready for her return and terminated her employment.

The respondent stated that the complainant's employment was terminated for failure to meet the inherent requirements of her position. She was provided with the opportunity to improve her performance and this did not occur.

The complaint was settled for $17,000.

Sex discrimination in employment

The complainant was employed as an engineer with an international company. She stated her employer paid her less and refused her the same benefits of employment as male engineers, such as a company car and corporate card.

The complainant was also overlooked for particular projects as males were considered to be more reliable.

The complainant resigned from her employment as she felt she could not progress in her field of expertise. The complaint was settled at conciliation for $45,000, a statement of regret and equal opportunity training.

Disability discrimination in the provision of goods and services

The complainant has a hearing impairment and is assisted by a hearing dog. He attended a restaurant with his hearing dog and was told he could only sit outside the restaurant and was refused entry into the restaurant due to his hearing dog.

The complaint was settled at conciliation for a change of policy permitting assistance animals into the restaurant, signage placed at the entrance to the respondent's premises welcoming assistance animals, a written apology and $500 compensation.

Age and employment activity discrimination in the area of employment

The complainant is in her late 60's and worked in car sales. She alleged her manager talked about wanting a younger workforce and asked her several times when she was going to retire. The complainant felt bullied by her manager when she made several enquiries clarifying conflicting information she was receiving about salary increments.

At conciliation, the complainant informed the respondent she wished to resign from her employment. The respondent agreed, without admission of liability, to pay the complainant $10,000 compensation, transfer ownership of the complainant's company car to her, and provide a written apology and statement of service.

Disability, parental/carer status and personal association discrimination in goods and service.

The complainant and her adult daughter who has Asperger's Syndrome applied for a loan through a finance broker to purchase an investment property. They had an appointment to sign the loan documents. The daughter did not realise that she would have to answer questions from the respondent at this meeting. She became overwhelmed with anxiety and could not appropriately respond even though she understood what they were asking. The respondent made the decision that the daughter was incapable of understanding the nature of the loan and business transaction. The purchase of the property did not proceed.

The respondent disputed the allegations of discrimination but agreed to attend a conciliation conference.

At conference, the respondent acknowledged that it could have handled the situation better and has implemented policies to guide its staff where finance applicants have a disability. The respondent offered apologies to the complainant and her daughter. The respondent agreed, without admission of liability, to pay $3,000 compensation to both the complainant and her daughter.

Disability discrimination in the area of employment

The complainant suffered a workplace injury and needed to undertake his duties by rotating between standing and sitting. He alleged that he was not provided with a chair to facilitate this and was issued with a warning for checking the time (for rotations) on his phone. The complainant considered his employer did not provide him with suitable alternative duties and alleged he was directed not to return to the workplace until appropriate duties were found. His employer made no further contact with him.

The respondent stated to the Commission that the complainant was assessed for alternative duties and these were implemented. The complainant was provided with a chair. The complainant was given a first and final warning for using his phone while on duty and using inappropriate language. The respondent also stated it had explored several options for alternative duties for the complainant. These were approved by doctors, but the complainant did not want to perform them and walked off the job. The complainant was sent several warnings and there were a number of attempts made to contact him. The complainant's WorkCover claim was terminated.

At conciliation, the respondent agreed, without admission of liability, to pay $10,000 compensation and $3,900 for counselling services the complainant had undertaken.

Pregnancy and disability discrimination in the area of employment

The complainant is a store manager for a retail company. She was pregnant and developed high blood pressure. Her doctor advised her to take a week's leave to rest. The complainant contacted her manager to advise of her absence and sought information about potentially modifying her hours/role given her health concerns and her progressing pregnancy. When the complainant returned to work, she received 'counselling and corrective' action effectively disciplining her for not opening the store when she was on sick leave. The complainant had a heated argument with her manager and resigned which meant she would not be entitled to paid parental leave.

The respondent agreed to attend a conciliation conference. The respondent stated that the 'counselling and corrective action' was a tool to implement the change in the complainant's hours/role sought by her due to her pregnancy and ill health.

The parties reached resolution as the respondent agreed to provide a written apology to the complainant, pay $800 lost wages, treat the complainant's employment as continuing, withdraw the 'counselling and corrective action' and alter work arrangements to enable the complainant to work four hours per week in a customer service role.

Sexual harassment in the area of employment

The complainant alleged she was sexually harassed over a number of years by the senior manager of her employment organisation. She stated her manager made numerous unwelcome advances including hugging, kissing and neck rubbing and he forced her to have a sexual relationship with him.

The respondent denied the allegation of sexual harassment claiming they were engaged in a consensual sexual relationship. The matter settled for $50,000.

Sexual harassment in the area of employment

The complainant worked in a warehouse and alleged two co-workers subjected him to verbal and physical conduct of a sexual nature. The employees made comments on a regular basis that referred to the complainant performing sexual acts with them. The harassment was brought to the attention of management on a number of occasions.

The respondent agreed to attend a conciliation conference and acknowledged that the company had failed to handle the issue appropriately, deeply regretted the pain and suffering caused by the behaviour of the co-workers and apologised for the failure to properly assist him to remedy the situation. The respondent agreed to provide the complainant with a written apology and pay $25,000 compensation.

Examples of damages under federal discrimination law

835. Examples of damages awards from the federal jurisdiction can also be a useful reference point, given the larger number of cases decided in that jurisdiction.

836. One recent case illustrates the approach of the federal courts to damages calculations.

837. In *Graeme Innes v Rail Corporation of NSW (No. 2)*[757], the Federal Magistrates Court found that the NSW Rail Corporation (RailCorp) indirectly discriminated against Commonwealth Disability Commissioner Graeme Innes (in his personal capacity) in the provision of goods and services, on the grounds of disability, in breach of sections 24 and 32 of the *Disability Discrimination Act 1992* (Cth).[758]

838. The court found that requiring Mr Innes to travel on trains without clear and audible 'next stop' announcements amounted to provision of services subject to an unreasonable condition that Mr Innes make himself aware of where he was, by utilising his sight.[759] Clearly, neither Mr Innes nor any other blind person could comply with this condition, but those who were not blind could comply. Further, making clear and audible station announcements would have amounted to reasonable adjustments to the provision of the service to assist Mr Innes.[760] RailCorp were also found to have breached the *Disability Standards for Accessible Public Transport*, which provided that all passengers 'must be given the same level of access to information on their whereabouts during a public transport journey'.[761]

839. Mr Innes was awarded $10,000 in general damages plus interest of $881.99, as compensation for the conduct as a whole, as opposed to each instance where RailCorp failed to provide audible announcements.[762] While Mr Innes had given unchallenged evidence as to his personal experience of stress and anxiety caused by the failure to provide announcements, he had not provided medical evidence in support. Raphael FM noted that in a case where there was 'paucity of medical evidence', this should be taken into consideration in assessing damages.

840. In setting the level of damages, Raphael FM considered the case of *Evans v National Crime Authority*,[763] where the court had originally awarded the complainant $25,000 for general damages and special damages of $16,197.60 for lost wages and $1,295.81 for loss of superannuation (plus interest) arising out of discrimination on the grounds of family responsibilities. The Commonwealth appealed, including on the basis that the award of general damages was excessive.[764]

841. Raphael FM noted that in deciding the *Evans* appeal, Branson J had given 'detailed consideration' to the issue of quantum of general damages, and had reduced the award from $25,000 to $12,000 because the complainant's emotional damage (proven through medical evidence) was not as great as that suffered by other complainants who had received lower awards of damages than *Evans* at first instance.[765]

842. In support of this reduction, Branson J referred to:

a. *Shiels v James*,[766] where the Federal Magistrate offered the view that the authorities 'indicate a range for damages for hurt and humiliation of between $7,500 and $20,000', where the higher range was awarded in cases where the complainant was more substantially affected by the conduct.[767] Branson J considered this range may be higher than the authorities support, but did not provide a concluded view on the issue

b. *Leslie v Graham*[768] where $16,000 was awarded for non economic loss for sexual harassment

c. *Elliot v Nanda*[769] where $15,000 was awarded in general damages for sex discrimination and sexual harassment.[770]

757 [2013] FMCA 36.
758 Ibid [142].
759 Ibid [47].
760 Ibid [142] and [147].
761 Ibid [156].
762 Ibid [158]-[160].
763 [2004] FCA 654.
764 Ibid [41].
765 *Graeme Innes v Rail Corporation of NSW (No. 2)* [2013] FMCA 36 [162].
766 [2000] FMCA 2.
767 *Commonwealth v Evans* [2004] FCA 654 [82], citing *Shiels v James* [2000] FMCA 2 [79].
768 [2002] FCA 32.
769 [2001] FCA 418.
770 *Graeme Innes v Rail Corporation of NSW (No. 2)* [2013] FMCA 36 [161]-[163] citing *Commonwealth v Evans* [2004] FCA 654 [81]-[84].

Other examples under federal law

843. More examples or information about damages awards in the federal courts for similar complaints under the Sex Discrimination Act, Age Discrimination Act and Racial Discrimination Act can be found in the Australian Human Rights Commission's resource 'Federal Discrimination Law' available online here.

844. The Australian Commission also has a complaints register with examples of cases that have settled at conciliation under federal law. The register is available at www.humanrights.gov.au/complaints_information/register

Costs

845. When a complaint of unlawful conduct is made under the Equal Opportunity Act, the parties involved may need to engage a lawyer or advocate to assist them. Unless the lawyer or advocate is acting on a 'pro bono' basis (for free), each party will be accumulating costs.

846. 'Costs' is the term used to describe the legal fees a party incurs in making a complaint and taking it to a court or tribunal. 'Costs' can also include other expenses, charges or 'disbursements' that the party's lawyer has incurred in preparing, presenting or defending a case, such as application fees, barristers' fees, photocopying, expert witness fees, or other costs involved in calling witnesses. When costs are awarded against a party, this means they have to pay the costs of the other party or parties in accordance with the order of the court or tribunal.

847. Costs are different to damages or financial compensation for loss caused as a result of unlawful conduct. Damages are discussed above commencing at paragraph 787.

When can a party recover costs?

848. At conciliation with the Commission under the Equal Opportunity Act, a complainant can seek costs as part of their negotiated settlement, if they are able to agree this with the other party. There are no rules in the Equal Opportunity Act to restrict a complainant seeking to recover their costs during dispute resolution facilitated by the Commission.

849. When the complaint is before the Tribunal, the general rule is that the Tribunal will not award costs and the parties must therefore bear their own costs in the proceeding. This rule is set out in section 109(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) which governs the Tribunal's procedure.

850. However, the Tribunal has a discretion under section 109(2) of the VCAT Act to award that a party pay all or part of the other party's costs at any time in the proceeding, having regard to a list of factors set out in section 109(3) of the VCAT Act. These factors are discussed in more detail below.

851. If the Tribunal decides to order costs, it is usually the successful party who has their costs paid for by the unsuccessful party. However, because VCAT has a discretion in ordering costs, it is possible for a successful party to have to pay some or all of the costs of the unsuccessful party if VCAT considers it fair to do so considering the factors outlined below.

On what basis will the Tribunal order costs against a party?

852. At any time during the proceeding, the Tribunal can make orders for one party to pay all or part of another party's costs if the Tribunal is satisfied it would be fair to do so, having regard to the factors in section 109(3) of the VCAT Act.

853. Generally speaking, if the Tribunal exercises its discretion to award costs against a party, it will be on the application of the other party, and in relation to poor conduct during proceedings, such as causing delay, lying or leading the other party or the Tribunal, or for bringing a claim with no basis in law or fact.

854. As the Tribunal noted in *Tan v Xenos*[771]:

> Most costs orders appear to have been made against unsuccessful Complainants whose cause of action has been hopeless from the start. Costs orders against Respondents have usually been made where the Respondent has not complied with interlocutory orders, or to take into account the manner in which the Respondent has conducted the defence, or the maintaining of any clearly hopeless defence.

771 [2008] VCAT 1273, [7].

855. In determining whether to award costs, the Tribunal may have regard to a number of factors under section 109(3) of the VCAT Act:

1. whether a party has conducted the proceeding in a way that unnecessarily disadvantaged the other party, including:
   a. failing to comply with the Tribunal's directions or orders without reasonable excuse
   b. failing to comply with the VCAT Act or rules
   c. asking for an adjournment as a result of failing to comply with directions or rules
   d. causing an adjournment
   e. attempting to deceive another party or the Tribunal
   f. vexatiously conducting the proceeding.
2. whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding
3. the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law
4. the nature and complexity of the proceeding
5. any other matter the Tribunal considers relevant.

856. The Tribunal may also order costs under section 74(2)(b) of the VCAT Act where a party withdraws their application, or under section 75(2) of the VCAT Act where the Tribunal makes an order summarily dismissing or striking out all or part of a proceeding that it considers is frivolous, vexatious, misconceived, lacking in substance or an abuse of proceedings.

857. In the costs decision *Styles v Murray Meats Pty Ltd (Anti-discrimination)*[772] Deputy President McKenzie provided some guidance on how section 109 will be interpreted and applied by the Tribunal:

> As the Victoria Court of Appeal pointed out in *Pacific Indemnity Underwriting v Maclaw* [2005] VSCA 165, the position under section 109 of the VCAT Act is different from that applying in the courts. The general rule is that costs lie where they fall unless the Tribunal considers it fair to award otherwise. Whether it is fair to award otherwise must be determined on a case by case basis. Some of the factors taken into account may be of a more general nature. Other factors will relate only to the case in question. It is difficult to argue by reference to analogy in other cases. Each case must be considered on its merits and will be different from each other case.
>
> I accept that it is important that the redress provided by the Equal Opportunity Act should not be undermined or made less accessible because potential complainants fear orders for costs against them if they lose. This is a good reason for not applying an automatic rule that costs follow the event. Section 109 does not do this. It requires each case to be considered on its own circumstances.[773]

858. Deputy President McKenzie further noted that a party will not be entitled to costs in every case, simply because they have legal representation or the matter has been 'vigorously contested'. The latter may be a 'decisive factor' in one case, but not in every case. The question will be, whether in a particular case it is fair to award costs.[774]

859. In *Styles*, the complaint was of sexual harassment and sex discrimination. The complainant was successful only in relation to sexual harassment. In assessing the complainant's costs application, Deputy President McKenzie considered the relative strengths of the parties cases, and found that the complainant's sexual harassment case was strong, whereas the respondent's sex discrimination complaint was also strong. Taking these into account, and the fact the complaint was strongly contested, Deputy President McKenzie considered it fair to award 50 per cent costs in favour of the complainant, calculated on Scale B of the County Court Scale awarded on a party-party basis.[775]

Quantum of costs

860. In conciliation, the amount of costs a complainant might recover will depend on the negotiations. Any amount negotiated between the parties should be based on what the party has been charged by their lawyer or advocate.

772 [2005] VCAT 2142.

773 Ibid [15]-[16].
774 Ibid [17]-[19].
775 Ibid [21]-[24].

861. If the Tribunal makes an order for costs, it may set the amount of costs itself, such as by reference to an existing court costs scale[776] or by simply setting an amount payable.[777] Alternatively, the Tribunal can order that the Costs Court assess, settle, tax or review the costs of the proceedings (section 111 of the VCAT Act). Taxation of costs may be ordered in the first instance, or can be ordered in default of agreement.

862. The Costs Court is a specialist court established by section 17C of the *Supreme Court Act 1986* (Vic). If the Tribunal orders an assessment or taxation of costs by the Costs Court, this will involve filing a detailed bill of costs for the Costs Court to ascertain whether the costs were reasonably incurred and have been billed at a reasonable rate. The rules contained in Order 63 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) govern this process.

863. If the matter goes to the Costs Court for assessment, costs can be 'taxed' and awarded on three bases:[778]

- 'Party-Party basis' which are the necessary and proper costs incurred in relation running a case and the attainment of justice[779]
- 'Solicitor-Client basis' which are the costs reasonably incurred and of a reasonable amount as between the solicitor and their client arising from their professional legal services, such as the solicitor giving the client advice, taking instructions, and preparing the complaint or defence[780]
- 'Indemnity basis' which are all costs, except those which were unreasonably incurred or are of an unreasonable amount.[781]

864. Costs are usually awarded and assessed on a party-party basis, whether taxed by the Costs Court or ordered by VCAT.

865. Parties should make sure they retain their tax invoices and receipts so there is an accurate record of costs.

Rejecting an offer of settlement

866. The VCAT Act does contain a provision that a party who makes an offer of settlement will be entitled to have their costs reimbursed where the offer is rejected.[782] However, these sections do not apply to complaints under the Equal Opportunity Act.[783]

867. Instead, in exercising its discretion to order costs under section 109(3) of the VCAT Act, the Tribunal may take into consideration the fact a party has rejected an offer of settlement or compromise (including a 'Calderbank letter' where the offer is said to be 'without prejudice save as to costs'). This is usually relevant where the party rejecting the offer is the unsuccessful party in the proceedings, or the less likely situation where an unsuccessful party seeks costs against a successful party, where the offer of settlement was more favourable than what the Tribunal awarded.[784]

868. Rejecting an offer of settlement may therefore be relevant to whether costs are awarded. However, the Tribunal has noted that rejecting an offer will not automatically result in an award of costs against an unsuccessful party.[785]

Examples of costs awarded by the Tribunal

869. This is not an exhaustive table of all costs awards by the Tribunal but provides a sample of the type and amount of costs ordered and the reasons why they are so ordered. It also does not cover cases where costs were sought and refused.

776 Previous cases have used either Scale B, C or D of the County Court Costs Scale. See for example Scale B: *Styles v Murray Meats Pty Ltd (Anti-discrimination)* [2005] VCAT 2142; Scale C: *Gonsalves v MAS National Apprenticeship Services Costs* [2007] VCAT 64; Scale D: *Finch v The Heat Group Pty Ltd* (Unreported, Victorian Civil and Administrative Tribunal, Harbison VP, 31 January 2011) noted in costs appeal decisions: *Finch v The Heat Group and Ors* [2011] VSCA 100, [1], [10]-[12] and *Finch v The Heat Group Pty Ltd & Ors* [2012] VCAT 223, [5].

777 See for example *Morros v Chubb Security Personnel Australia (Anti-Discrimination)* [2009] VCAT 1845 where the complainant was ordered to pay a contribution of $8,000 towards the costs of Chubb Security.

778 Rule 63.28 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).

779 Rule 63.29 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).

780 Rule 63.30 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).

781 Rule 63.30.1 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).

782 VCAT Act ss 112, 113, 114 and 115.

783 VCAT Act, schedule 1, clause 22.

784 See, for example, *Morros v Chubb Security Personnel Australia* [2009] VCAT 1845, [21]-[25].

785 Ibid [21]; *Coomans-Harry v Direct Mobile Conveyancing Pty Ltd* [2012] VCAT 143, [26].

Table: Examples of costs awarded by the Tribunal

Name	Grounds for seeking costs	Outcome and basis for orders
Singh v RMIT University and Ors (Anti-Discrimination) [2011] VCAT 1890 (4 October 2011)	The respondents sought orders for costs under section 109(3)(b) and (c) of the VCAT Act on the basis that: • the complainant was responsible for unreasonably prolonging the time taken to complete the proceeding; and • the claim had no tenable basis in fact or law. In particular, the respondents relied on the following conduct: • the complainant produced two additional folders of email material during the hearing, which the respondents had to review and decide whether any should be tendered. This resulted in a loss of at least one day's hearing time. • the complainant was evasive and non-responsive manner during cross examination, which took almost three days. In particular, she refused to answer many questions asked of her, and instead the respondent argued that she used cross-examination as a platform to 'ventilate'. • the complainant decided to get married mid-hearing which caused the matter to be adjourned.	**Orders** Complainant ordered to pay the respondent's party/party costs on County Court Scale D for five full days of hearing. **Reasons** The specified circumstances set out in section 109(3)(b) and (c) had been made out and that, in all the circumstances, the Tribunal considered it fair that an order for costs be made. While the complainant did not intend to deliberately prolong the hearing, the manner in which she conducted herself (particularly during cross examination and despite warnings about her conduct) resulted in the hearing being delayed. The very serious complaints against the respondent were found to be baseless, the complainant 're-invented history' in her evidence. As a result, the hearing took nine days.

Name	Grounds for seeking costs	Outcome and basis for orders
Finch v The Heat Group Pty Ltd (Unreported, VCAT, Harbison VP, 31 January 2011)[786]	Not available.	**Orders:** Complainant ordered to pay two-thirds of the respondent's costs, 'taxed at County Court Scale D and do not include professional costs otherwise the subject of an order of costs previously made in this proceeding'.[787] **Reasons** Costs awarded on the basis of the extent to which the conduct of the complainant and her insistence on exploring irrelevant matters extended the length of the trial and complicated the pre-trial process. In particular, the Tribunal was concerned that the complainant's conduct had significantly prolonged the hearing of the proceeding over 20 days when it should have only run for five days. Time was lost because the complainant: • did not appear to have read or know what was in her particulars of claim, or any of the witness statements (including her own); • insisted on exploring at trial matters of no relevance or marginal relevance; • had not properly drafted the particulars of complaint and complainant's witness statements; and • failed to comply with VCAT orders.
Morros v Chubb Security Personnel Australia (Anti-Discrimination) [2009] VCAT 1845 (25 August 2009)	The successful respondent sought costs on the basis that: • the complainant's claim had no tenable basis in fact or law • the claim was not one in which complainant could reasonably have believed would succeed; and • because the complainant unreasonably rejected offers made by respondent to settle the complaint.	**Orders:** Complainant ordered to pay respondent $8,000 as a contribution towards its costs. **Reasons:** The complainant rejected several offers of settlement and failed to identify an attribute on which her complaint was based. Also relevant was the fact the case was strongly contested. Note that this complaint and costs application were heard at the same time as another, *Sagris v Chubb Security Australia Ltd (Anti-Discrimination)* [2009] VCAT 1786 (25 August 2009). While Ms Morros had costs awarded against her, the Tribunal did not consider it fair in the circumstances to award costs against Mr Sagris because he had an arguable case, whereas Ms Morros' case was 'doomed from the start'.

786 Upheld on appeal in *Finch v The Heat Group Pty Ltd & Ors* [2011] VSCA 100 (8 April 2011).

787 As reproduced in later proceedings *Finch v The Heat Group Pty Ltd and Ors* [2012] VCAT 223, [5].

Name	Grounds for seeking costs	Outcome and basis for orders
Tan v Xenos (Anti-Discrimination) [2008] VCAT 1273 (30 June 2008)	The complainant sought costs on the basis of sections 109(3)(b) through to (e), which includes • the nature and complexity of proceedings • that the respondent unreasonably prolonged proceedings • whether a party has made a claim that has no basis in fact or law • any other relevant matters. Solicitor-client costs sought rather than party-party costs.	**Orders:** Respondent ordered to pay one third of the complainant's party-party costs of this proceeding to be taxed on County Court Scale D. **Reasons:** Costs were awarded against the respondent on the basis that the respondent had introduced irrelevant evidence that unnecessarily lengthened the hearing: • material led by the respondent had not properly been evaluated before being led in evidence • often the same points were made repeatedly, but unnecessarily • cross examination of witnesses by the respondent appeared to have no 'forensic purpose' • the irrelevant evidence had been deliberately included and 'magnified out of proportion' to support the respondent's claim that the applicant had fabricated her complaint. Approximately one-third of the proceedings were affected by this conduct. In making such orders, her Honour Judge Harbison, Vice President noted that each application must be judged 'on its merits and in the light of the raison d'etre of the Tribunal, which is to promote affordable and timely access to justice.'[788] Judge Harbison noted the proceeding was 15 days, and was strongly contested with neither side willing to make any concessions to the other.[789] However, her Honour noted that a long complex commercial dispute is very different to a long complex anti-discrimination dispute and further considerations apply.[790] Solicitor client costs were rejected in favour of party party costs, on the basis that 'gross behaviour' during the case was required to justify an award of solicitor client costs.[791]

788 *Tan v Xenos* [2008] VCAT 1273, [10].

789 Ibid [15], quoting *Bryce v City Hall Albury Wodonga Pty Ltd t/a City Hall Hotel (Costs)* [2004] VCAT 2013.

790 Ibid [15].

791 Ibid [41].

Name	Grounds for seeking costs	Outcome and basis for orders
Mangan v Melbourne Cricket Club (costs) (Anti-Discrimination) VCAT 792 (8 May 2006)	The complainant sought indemnity costs, claiming that there was 'an element of public interest in the proceeding, the absence of personal gain for the complainant, a disparity in the relative means of the two parties, and the respondent's conduct of the proceeding'.	**Orders:** Respondent ordered to pay the costs of the complainant, to be assessed by the Principal Registrar on County Court Scale 'A'. **Reasons:** The matter was serious, but was at the lower order of things. It was fair in all the circumstances to award a 'modest' amount of costs. The Tribunal was not satisfied that the respondent conducted the proceeding in a manner which was in any way improper or unnecessarily imposed costs on the complainant. Nor was the Tribunal satisfied that the disparity in the means of the parties is a relevant consideration. There was no basis for any order for indemnity costs, and the Tribunal noted that indemnity costs are rare. The Tribunal did not accept that the complaint was 'wholly public spirited' as part of the relief sought provided a personal benefit to the complainant.

Name	Grounds for seeking costs	Outcome and basis for orders
Beasley v Department of Education and Training (Anti Discrimination) [2006] VCAT 2044 (12 October 2006)	The complainant sought costs in relation to a strike out application by the respondent, and the substantive hearing. For each, the complainant relied on section 109(3)(c),(d) and (e). The arguments focussed primarily on section109(3)(c) – strengths of the respective cases.	**Orders:** Respondent ordered to pay 80 per cent of the complainant's total costs of and incidental to the respondent's application to strike out or dismiss the complaint under section 75 of the VCAT Act. Costs payable on a party/party basis on Scale A of the County Court Scale. Respondent also ordered to pay seven per cent of the complainant's costs of and incidental to the rest of the substantive proceeding. Costs include disbursements to the advocate for interpreting services provided in connection with the proceeding. Those costs are to be on a party/party basis and on Scale C of the County Court Scale. In default of agreement, costs are to be settled or assessed by the Principal Registrar. **Reasons:** The respondent was 80 per cent unsuccessful as to their strike out application, and their arguments in seeking to strike out the complaint were very weak. In relation to the substantive proceedings, the parties should bear their own costs except in relation to a small part of the complainant's claim, which Deputy President McKenzie considered equalled seven per cent of the total claim. In that case, the case was extremely weak, and the complaint extremely strong, and so the respondent should pay a proportion of the costs. Otherwise, there was no improper, unreasonable, vexatious or oppressive conduct by the respondent.
Kelly v Catholic Education Office (Anti-Discrimination) [2006] VCAT 2367 (24 November 2006)	The respondents, in the course of a strike out application, sought costs against the complainant under section 109(3)(b), (c) and (d): • the complainant was responsible for unreasonably prolonging the time taken to complete the hearing • the claim had no tenable basis in fact or law • the nature and complexity of the proceeding warranted costs to be ordered.	**Orders:** Complainant ordered to pay the costs of the respondent on County Court Scale D. **Reasons:** Rejected claim under section 109(3)(b) – while the complainant spent considerable time addressing the Tribunal the hearing still finished within the dates scheduled. Took into account nature and complexity of proceedings under section 109(3)(c) and (d): there was no tenable basis for the complaint and could not be supported by the evidence she put before the Tribunal; further, the proceedings were complex in law and fact – 10 witness statements filed by the respondent and two large volumes of additional material to be relied upon.

Name	Grounds for seeking costs	Outcome and basis for orders
McDougall v Kimberly Clark (Anti-Discrimination) [2006] VCAT 2604 (19 December 2006)	The respondents had sought orders for costs under section 109(3)(c) and (e) of the VCAT Act on the basis that: • complaint had no tenable basis in fact or law despite complainant having legal representation who could give her advice as to merits of her complaint • complainant failed to provide sufficient evidence to support case • respondent required to raise evidence on particular issues even though the onus was on the complainant to prove those matters • the complainant's cross examination of the respondent's expert witness was irrelevant.	**Orders:** Complainant ordered to pay respondent's costs as follows: • $14,162 for disbursements • $5,000 towards the respondent's solicitor client costs. **Reasons:** Fair in all the circumstances to order costs. The Tribunal agreed with the reasons for ordering costs as put forward by the respondents. The Tribunal noted that the complainant had been on notice of the deficiencies in her case by the member hearing the application, but had taken no steps to address them.
Khalil v Wallace (Anti Discrimination) [2006] VCAT 10 (2 February 2006)	The complainants sought costs on the basis that the respondents had: • conducted the proceeding in a way which unnecessarily disadvantaged them, by: • failing to comply with a direction or order of the Tribunal without reasonable excuse • failing to comply with the Victorian Civil and Administrative Tribunal Rules 1998 ('the VCAT Rules') • causing an adjournment • prolonging unreasonably the time taken to complete the proceeding.	**Orders:** Respondents ordered to pay the complainants' costs, fixed at $3,334.58. **Reasons:** In the view of the Tribunal it was fair to do so. The respondents failed to comply with orders to file or serve particulars of defence and did not advise the Tribunal of changes to addresses for service, as required by the VCAT Rules require. The respondents failed to explain their failure to comply. As a result of their conduct, the hearing had to be adjourned but the respondents continued to disobey the Tribunal's directions. The respondents' conduct in this respect was found by the Tribunal to have 'unnecessarily disadvantaged the complainants and has prolonged unreasonably the time taken to complete this case'. *Note this was a complaint under the Racial and Religious Tolerance Act.*

Protective costs orders

871. A protective costs order is where a court orders that any costs awarded are capped at a particular level. For example, in *King v Jetstar Airways Pty Ltd*[792] the Federal Court capped the costs able to be awarded against the applicant in the appeal proceedings at $10,000, noting that 'the point of this cost-capping order is to avoid the stifling of what is potentially an important appeal.'[793]

872. The position in Victoria as to whether the courts and tribunals have jurisdiction to make protective costs orders is unclear. Unlike the Federal Court[794], there are no specific legislative provisions setting out the ability to make cost capping orders. Rather, the *Supreme Court Act 1986*, and the VCAT Act 1998 provide for a wide discretion in what orders to make in respect of costs.

873. The issue was recently canvassed by the Victorian Supreme Court in an application for leave to appeal in an anti-discrimination matter, *Aitken & Ors v State of Victoria*[795]. In that case, the applicants sought a protective costs order on public interest grounds, wishing to limit their potential costs liability to $10,000 if leave to appeal was granted. The applicants argued that the wide discretion in section 24(1) of the *Supreme Court Act 1986* (Vic), combined with rule 64.24(1) of the *Supreme Court (General Civil Procedure Rules) 2005* (Vic) and section 65C of the *Civil Procedure Act 2010* (Vic) gave the Supreme Court the power to make protective costs orders.[796]

874. The applicants in *Aitken* relied upon *R (Corner House Research) v Secretary of State for Trade and Industry*[797] which set out criteria for awarding a protective costs order as follows:

> (1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
>
> i. the issues raised are of general public importance
>
> ii. the public interest requires that those issues should be resolved
>
> iii. the applicant has no private interest in the outcome of the case
>
> iv. having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order
>
> v. if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
>
> (2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a [protective costs order].
>
> (3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.[798]

875. The respondent in *Aitken* opposed the making of a protective costs orders on the basis it would not facilitate the overarching purposes of the *Civil Procedure Act* and it was doubtful whether the courts had the ability to make such orders under the legislative regime.

876. Ultimately, the Court considered it was unnecessary to decide whether it had jurisdiction to make a protective costs order, on the basis that it refused leave to appeal. However, the Court noted that even if the jurisdiction exists, it would not make a protective costs order as the public interest issues raised by the applicant had been resolved prior to hearing.

792 [2012] FCA 413.
793 Ibid [21].
794 See, for example, Rule 40.51 of the Federal Court Rules 2011.
795 [2013] VSCA 28 (22 February 2013).
796 Section 65C(2)(d) states that without limiting a courts power to order costs to further the overarching purpose in the Civil Procedure Act 2010, it is able to fix or cap recoverable costs in advance.
797 [2005] 1 WLR 2600.
798 Ibid [74].

Chapter 19

> Offences

Discriminatory advertising

877. Section 182 of the Equal Opportunity Act makes it a criminal offence to publish, display or authorise the publication or display an advertisement that could be reasonably understood as indicating that any person intends to engage in any conduct that would amount to discrimination, sexual harassment or victimisation.[799] For example, an employer, recruiter and publisher may be criminally liable for posting a discriminatory job advertisement seeking people of a particular race, age or sex for a position, without being able to rely on an exception or exemption.

878. It is a defence to a charge of discriminatory advertising that a person took reasonable precautions and exercised due diligence to prevent the publication and display.[800]

879. Proceedings may be brought by the Commission, a member of the police force, or any other authorised person.[801]

799 The penalty is 60 units for a person and 300 penalty units for a body corporate: *Equal Opportunity Act 2010* (Vic) s 184.
800 *Equal Opportunity Act 2010* (Vic) s 183.
801 *Equal Opportunity Act 2010* (Vic) s 180.