

Article Information

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Do we need an exemption to only advertise this job to women? VCAT says no

As the pursuit for more substantive equality in society continues, many employers actively seek to employ people from groups that are disadvantaged in what is sometimes called “positive discrimination”.

*A question that frequently arises is whether these proposals require a specific exemption for employers from anti-discrimination legislation, or whether such action is already covered by a legislative exception. The Victorian Civil Administrative Tribunal has recently considered this issue in some detail in *Re Waite Group (Human Rights)* [2016] VCAT 1258.*

The Waite Group is an executive recruitment business. It sought an exemption from the Victorian Civil Administrative Tribunal (VCAT) under the Victorian *Equal Opportunity Act 2010 (EO Act)* to conduct its female-only executive search program ‘*WomenSearch*’. The program sought to increase the number of women in senior executive roles in companies and on boards.

In every State and Territory of Australia, it is illegal to offer employment to only one gender. However, it is possible to seek an exemption from the legislation in certain circumstances.

Also, under the Victorian legislation, section 12 of the EO Act (which is replicated in many of the other states’ anti-discrimination legislation, as well as in the federal suite of anti-discrimination legislation) provides that certain “special measures” will *not* be discrimination for the purposes of the legislation, and in those cases a formal exemption will not be required.

Under section 12, “special measures” are those measures taken for the “purpose of promoting or realising substantive equality for members of a group with a particular attribute”.

In the case of the Waite Group, VCAT Member Dea concluded that the Waite Group’s *WomenSearch* program fell within the definition of a “special measure”, and therefore that no exemption was actually required.

Member Dea acknowledged the difficulty businesses may have in trying to determine whether an exemption is needed, and took the opportunity to spell out in more detail what entities need to consider in determining whether their proposed conduct is a “special measure”. She explained that organisations who wish to implement a special measure should be able to “get on” with it, rather than wasting resources on seeking an unnecessary exemption.

Member Dea set out the questions an organisation needs to ask, in addition to the criteria set out in section 12(3) of the EO Act, to determine whether its conduct is a “special measure”.

These additional questions most relevantly include:

- What process has been undertaken to arrive at the proposed conduct? Are there documents, discussion papers or other materials which explain the development of the proposed conduct?
- Is the purpose of the proposed conduct to promote or realise equality for the group members?
- What is the nature of the inequality the group members currently experience and how will the proposed conduct assist in remedying that inequality?
- How do you know there is the inequality? Are there statistics, studies or reports which explain its nature and cause? Has the organisation seen or had experience which demonstrates the inequality?

- How will the proposed conduct remedy the inequality experienced by members of the group? What are the practical aspects of the conduct and how are they intended to increase equality or reduce disadvantage?
- Is the proposed conduct designed to advance or assist a specific person? If so, is that person a member of the group identified by reference to a shared attribute? Is the conduct of a kind that would assist other group members if made available more broadly?
- Is the proposed conduct the product of research or requests for assistance? If so, provide details.
- Has another entity proposed funding for the proposed conduct?
- Has there been any consultation about the proposed conduct or a pilot program?
- How are the elements or components of the proposed conduct individually or together expected to advance or assist the group members?
- Has the proposed conduct been designed to achieve the purpose only, or will there be other outcomes? How do any other outcomes relate to the purpose?
- How will the applicant measure whether the measure is no longer needed?
- Have any other steps been taken to attempt to remedy the inequality or disadvantage? If yes, why have they not been sufficient?

These additional questions are clearly directed at ensuring that the proposed conduct is in fact designed to remedy particular disadvantage or inequality and not for any other ulterior purpose. For the Waite Group, the lack of female participation at the executive level of business was readily apparent from statistics. The level of inequality was such that the *WomenSearch* program was found to be a proportionate response.

The Tribunal further confirmed that, as an example, advertising for and employing only a person with a particular attribute may also be a special measure “despite it arguably benefitting only the person who is employed”, because it can also provide an opportunity for advancement or assistance to the group of people more broadly.

While this case clearly only concerned the provisions of the *Victorian Equal Opportunity Act*, the explanation provided by Member Dea will be highly relevant for any Australian employer considering implementing any special measures in their own workplace.

Should your organisation need to consider whether it requires any particular equal opportunity-exemptions, please contact a member of Piper Alderman’s Employment Relations team.