

Citation:	Lau v Moorilla Estate Pty Ltd [2024] TASCAT 58
Division:	General
Stream:	Anti-Discrimination
Parties:	Jason Lau (Complainant) Moorilla Estate Pty Ltd (Respondent)
Hearing Date:	19 March 2024
Hearing Location:	Hobart
Date of Orders:	9 April 2024
Date Reasons Issued:	9 April 2024
Panel:	R Grueber, Deputy President
Orders Made:	<ol style="list-style-type: none">1. Within 28 days from the date of this order Moorilla Estate Pty Ltd is to cease refusing entry to the exhibit known as the Ladies Lounge at the Museum of Old and New Art by persons who do not identify as ladies.2. Any application for an order for costs is to be made in writing with supporting submissions within 21 days.
Catchwords:	Anti-discrimination – Refusal of entry by men to artwork where that refusal is intrinsic to the art – Whether discriminatory – Whether the artwork is an arrangement designed to promote equal opportunity for a group of people who are disadvantaged or have a special need because of a prescribed attribute – Meaning of equal opportunity – Whether equal opportunity is formal or substantive
Legislation Cited:	<i>Anti-Discrimination Act 1998</i> ; <i>Sex Discrimination Act 1984</i> (Cth); <i>Tasmanian Civil and Administrative Tribunal Act 2020</i>
Cases Cited:	<i>Abblitt v The Anti-Discrimination Commissioner</i> [2016] TASSC 12; <i>Cain v The Australian Red Cross Society</i> [2009] TASADT 3; <i>Anti-Discrimination Commissioner v White</i> [2023] TASSC 26; <i>Walker v Cormack</i> [2011] FCA 861; <i>Jacomb v Australian Municipal</i>

Administrative Clerical and Services Union [2004] FCA 1250; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; *Central Northern Adelaide Health Service v Atkinson* [2008] SASC 371; *Kelly v Pensalfini* [2019] TASSC 2; *Ponraj v Wycombe Services Pty Ltd* [2023] FCA 118; *Wilson v The State of Tasmania (Department of Police, Fire & Emergency Management) & Anor* [2021] TASADT 4; *The Registrar v Unnamed Respondent* [1994] ACTSC 24; *Australian Building and Construction Commissioner v Parker (No 2)* [2017] FCA 1082; *Cachia v Hanes* (1994) 179 CLR 403; [1994] HCA 14 at 409-410 and 414; *Zhang v Davidson (No 2)* [2020] NSWLEC 89

Representation:	<i>Appellant:</i>	Self-represented
	<i>Respondent:</i>	C Scott – ConMoto Group
File No:	A/2023/18	
Publication Restriction:	Nil	

REASONS FOR DECISION

Background and the complaint of discrimination

1. From Caravaggio to Jeff Koons, artists and their art have at times had a difficult relationship with the law. This is not surprising. The law is a system of rules regulating behaviour within society, generally for the purposes of good order and safety. Much of the law is directed at protecting property rights and resolving conflict. Art on the other hand may be intentionally derivative, subversive, provocative and anti-authoritarian.
2. This case involves conflict between an artwork which deliberately and overtly discriminates for artistic purpose and legislation which has the objective of prohibiting discrimination.
3. The respondent, Moorilla Estate Pty Ltd (Moorilla), operates the Museum of Old and New Art, known as Mona, a renowned privately owned art museum which is open to the public.
4. Within Mona is an artwork created by Ms Kirsha Kaechele titled the Ladies Lounge. Ms Kaechele is an artist who is also a curator at Mona and is married to Mr David Walsh who established Mona.
5. The Ladies Lounge opened at Mona in 2020 and remains open. It consists of a 6.5m x 7m private lounge enclosed by a curtain and invigilated by a museum attendant. Inside the Ladies Lounge are artworks that may only be viewed within the Ladies Lounge. It is itself an artwork, but it contains other significant artworks. The attendant permits entry to the Ladies Lounge only by ladies. Although the term lady maybe a loaded one, for the purposes of this case it is interchangeable with woman.
6. On 1 April 2023 the complainant, Mr Jason Lau, visited Mona. He paid an entry fee and entered the museum.
7. Mr Lau is male. As he does not identify as a lady he was refused entry to the Ladies Lounge. Mr Lau was not happy with being refused entry. He had paid the full entry price for Mona but was not be able to experience the artwork contained within the Ladies Lounge. He felt strongly enough about this to file a complaint with Equal Opportunities Tasmania. That complaint has been referred to the Tribunal by the Anti-Discrimination Commissioner for inquiry.
8. There are aspects of this case that may seem paradoxical. For the reasons that I have set out below, Mr Lau was discriminated against contrary to the *Anti-Discrimination Act 1998*, and that discrimination was not permitted or excused by any provision in the Act. The Ladies Lounge has a pointedly participatory component that is intentionally discriminatory, for a good faith artistic purpose that many might not only appreciate but sympathise with or endorse. If the Ladies Lounge were a women-only club it might well be able to lawfully function for its members as it functions now for women patrons of Mona. If the Ladies lounge offended, humiliated, intimidated, insulted or ridiculed Mr Lau, or incited hatred, serious contempt or severe ridicule of Mr Lau, rather than discriminating against him, Moorilla might well have a good defence based on good faith

artistic purpose. However, the Act does not permit discrimination for good faith artistic purpose per se.

The evidence

9. The parties filed a statement of agreed facts and issues. The agreed facts sufficiently grounded Mr Lau's case so that he did not go into evidence.
10. The agreed facts are:
 1. The Respondent operates the Museum of Old and New Art (MONA).
 2. MONA includes the Ladies Lounge (on level B1) which is an artwork by Kirsha Kaechele that was opened in 2020 and remains an artwork at Mona today.
 3. The Ladies Lounge artwork is a private lounge enclosed by a curtain and invigilated by a museum attendant who only permits entry into the space to "ladies".
 4. The Ladies Lounge artwork includes the performance of restricting access to the space by men and permitting access to the space to "ladies". The participation by visitors, and the process of being permitted entry or not, is part of the art itself – it is a participatory installation.
 5. Mr Lau is male.
 6. On 1 April 2023 Mr Lau went to MONA. Mr Lau paid the entry fee of (of \$35.00) and attended MONA.
 7. Mr Lau was not permitted entry into the Ladies Lounge when he attended Mona on 1 April 2023.
 8. The reason that Mr Lau was not permitted entry into the Ladies Lounge was because of his gender, specifically because he is a male and is not a "lady".
11. Moorilla called evidence from Mr Jarrod Rawlins, who is the Director of Curatorial Affairs at Mona, and Ms Kaechele.
12. Mr Rawlins gave evidence in respect to the circumstances leading to the creation of the Ladies Lounge. When Mona was closed during the Covid pandemic the curatorial and design staff took the opportunity to reconsider the presentation of the collection at Mona. As part of that process Mr Rawlins decided to create a series of lounges throughout the museum. He also suggested the creation of a section that only displayed the work of female artists. He described that idea as being abandoned quickly because it seemed a hollow gesture to address a common disparity in gender representation within art museums. Instead Mr Rawlins and another male member of the curatorial staff came up with the idea of a ladies lounge. Although this idea was raised ironically, Mr Rawlins' concept did not receive favour from Mr Walsh and he directed Mr Rawlins to have two ladies lounges designed, one by Mr Rawlins and the other by Ms Kaechele. Both lounges were completed and currently form part of Mona. The lounge created by

Mr Rawlins is known as the Ladies Lounge Designed by Men and does not have any restrictions on entry.

13. Mr Rawlins described the Ladies Lounge created by Ms Kaechele as a far more complex structure than his, with an elaborate fantasy interior that is also functional as a high tea venue, complete with a concierge and butlers. Mr Rawlins described the Ladies Lounge as potent and as a conceptual triumph.
14. Ms Kaechele described the Ladies Lounge artwork in the following terms:

The Ladies Lounge is a room enclosed by green silk curtains, watched over by a concierge who welcomes women and denies entry to men. Upon entering the room, the guest immediately notices the opulent black and white marbled floor replete with a bespoke, black mink rug. A custom-designed green velvet lounge—specifically a tethered, rearing, restrained-by-golden-chains-and-then-ultimately-defeated phallus—sits in the centre, with a Venetian murano chandelier overhead. Green silk curtains line the walls, upon which hang a carefully curated selection of paintings by the world’s leading artists, including two paintings that spectacularly demonstrate Picasso’s genius. Also on display is a collection of antique Pacific Island ceremonial spears, attributed to Michael Rockefeller’s 1961 voyage which ended when he disappeared, purportedly eaten by New Guinean cannibals. Gilded wall cases display a collection of antiquities in solid gold, and rare mid-century ceramics. The dining area consists of a Carrara marble table and Italian velvet chair set for serving high tea. A gold jewelled crown, worn by the artist at her wedding, rests in one of the display cases. Another case exhibits precious jewellery belonging to the artist’s great grandmother. The lounge holds a mix of old and new: precious antiquities and priceless modernist works.

15. Ms Kaechele was quite candid in her assessment of the artistic worth of the Ladies Lounge artwork, and the effect on those not permitted entry. She described it as the most significant artwork in the museum having regard to the value of the artworks within it and the conceptual power of the Ladies Lounge artwork itself. In respect to the proposition that, by reason of the relative space occupied by the Ladies Lounge compared to the entire museum, the loss experienced by Mr Lau did not amount to a disadvantage that was more than trivial she acknowledged that the Ladies Lounge was proportionately small in scale, but by reason of its artistic value she considered that Mr Lau had experienced detriment and that the detriment was real.
16. Ms Kaechele referred to historical gender segregation restricting entry to areas by women. She gave the example of women, prior to 1970, being refused entry to public bars in hotels, and being required to sit in a separate ladies lounge. Ms Kaechele did not refer to any legal gender segregation within the past 50 years, except for elite men-only clubs. She acknowledged that women-only clubs existed but considered that they did not represent the same concentration of power. She described her experience on a visit to Flinders Island several years ago when it was suggested to her that she might prefer to sit in the ladies lounge of the local pub.
17. Ms Kaechele described the Ladies Lounge as a response to the lived experience of women forbidden from entering certain spaces throughout history. She considered that over history women have seen significantly fewer interiors, and to equalise that injustice women deserve both equal rights and special privileges in the form of unequal rights, which she termed chivalry, for a minimum of 300 years. She considered that the ladies

lounge was necessary as a peaceful space that women can retreat to, as a refuge exclusively for woman.

18. Ms Kaechele gave evidence of the intuitive process of designing the Ladies Lounge. She described the artwork as having no particular intention in that process and being broad and paradoxical. This intention, or lack of intention, in respect to creation of the Ladies Lounge can be contrasted with the intentions ascribed by both Moorilla and Ms Kaechele to its exhibition.

The issues as framed by the parties

19. The statement of facts and issues filed by the parties identified the issues to be determined by the Tribunal in the following terms:
- 9. The issue to be determined by the Tribunal is whether the Ladies Lounge artwork falls within the exception in s26 of the *Anti-Discrimination Act 1998 (ADA)*.
 - 10. The prescribed attribute for the purposes of s26 is gender pursuant to s16(e).
 - 11. The question for the Tribunal is whether the Ladies Lounge is a program, plan or arrangement designed to promote equal opportunity for a group of people who are disadvantaged or have a specific need because of their gender
20. That formulation presupposes a finding of discrimination.
21. At the commencement of the hearing I asked counsel for Moorilla, Ms Scott, whether Moorilla conceded that Mr Lau experienced discrimination. Ms Scott advised that Moorilla did not oppose a finding of discrimination, but stopped short of actually conceding that point. I therefore need to make a finding in respect to discrimination before considering whether the exception in s 26 applies.

Did Mr Lau experience discrimination?

22. Mr Lau contends that he has experienced direct discrimination. Section 14 of the *Anti-Discrimination Act* sets out the elements of direct discrimination:
- 14. Direct discrimination
 - (1) Discrimination to which this Act applies is direct or indirect discrimination on the grounds of any prescribed attribute.
 - (2) Direct discrimination takes place if a person treats another person on the basis of any prescribed attribute, imputed prescribed attribute or a characteristic imputed to that attribute less favourably than a person without that attribute or characteristic.
 - (3) For direct discrimination to take place, it is not necessary –
 - (a) that the prescribed attribute be the sole or dominant ground for the unfavourable treatment; or
 - (b) that the person who discriminates regards the treatment as unfavourable; or
 - (c) that the person who discriminates has any particular motive in discriminating.

23. Mr Lau's complaint is that he has been discriminated against on the basis of gender. Section 16 of the Act provides that a person must not discriminate against another person on the ground of any of a list of prescribed attributes in the section. Section 16(e) provides the prescribed attribute of gender.
24. Section 22(1)(c) of the Act provides that, subject to exemptions and exceptions specified in Pt 5, the Act applies to discrimination by or against a person engaged in the provision of facilities, goods and services. It was agreed that Mr Lau's consumption of the experience at Mona fell within that provision. Plainly that is a correct position to adopt, noting that the inclusive definition of 'services' in s 3 of the Act includes services "relating to access to, and the use of, any place that members of the public are permitted to enter": see also *Abblitt v The Anti-Discrimination Commissioner* [2016] TASSC 12 at [32]-[33].
25. Applying s 14(2), a finding of direct discrimination requires that it be shown that Moorilla treated Mr Lau on the basis of the attribute of his male gender, or a characteristic imputed to that attribute, less favourably than a person without that attribute.
26. In *Cain v The Australian Red Cross Society* [2009] TASADT 3 the former Anti-Discrimination Tribunal, in considering the attribute of lawful sexual activity or sexual orientation which are also prescribed in s 16, made a number of observations that I will use as a guide to the application of s 14. At [405] that Tribunal said:
405. The terms of s14 and the cases, as mentioned, give rise to the following issues that need to be determined in order to decide whether conduct amounts to direct discrimination:
1. Whether the reason for the treatment is on the basis of the prescribed attributes of lawful sexual activity or sexual orientation or a characteristic imputed to that attribute.
 2. Whether the treatment of the complainant was less favourable or equal treatment.
 3. The identification of the comparator - the person without that attribute or characteristic.
 4. Whether the complainant suffered a detriment.
27. In respect to the reason for the treatment, the Anti-Discrimination Tribunal said at [410]:
410. The first step for the Tribunal to take is to ascertain the 'true reason' or the 'genuine reason' for the alleged discriminator's act and to answer the question "why was the aggrieved person treated as he or she was?" *Kapoor v Monash University and Anor* [2001] VSCA 247; (2001) 4 VR 483 at 494, see also, *Purvis v New South Wales* [2003] HCA 62; (2003) 217 CLR 92 per Gleeson CJ at 102, McHugh and Kirby JJ at 142, and Gummow, Hayne and Heydon JJ at 163. The true basis for a respondent's conduct is a different enquiry to a person's motive or purpose or the effect of a person's conduct (see section 14(3)). Motive, purpose and effect may have a bearing on the question of the true reason and in certain cases they may even be determinative of the question (see *Human Rights and Equal Opportunity Commission v Mt Isa Mines Ltd* [1993] FCA 535; (1993) 46 FCR 301 per Lockhart J at 321-326) but they are not substitutes: Gummow, Hayne and Heydon JJ in *Purvis* at 163.

28. In respect to the identification of a comparator, the Anti-Discrimination Tribunal said at [437]:

As stated in *Brinkley v Davies Bros Ltd* [2008] TASADT 07 “The other person is simply a notional person similarly placed as the Complainant but without the attribute and in like circumstances enabling identification of whether the reason for the conduct was the attribute” (para 234).

29. In respect to detriment, the Anti-Discrimination Tribunal considered at [442]-[443] that the phrase ‘less favourably’ involves a detriment; that whether a person has experienced a detriment is to be determined objectively; and that detriment requires a disadvantage that must be real, a matter of substance and not trivial.
30. The true reason for Mr Lau being refused entry to the Ladies Lounge was his male gender. The only qualification for entry is gender. A notional comparator who identified as female gendered, and so a lady for the purposes of the Ladies Lounge, would have been permitted entry in circumstances that were otherwise identical to those of Mr Lau. Mr Lau was therefore treated less favourably. I accept Ms Kaechele’s evidence that, given the value of the art works within the Ladies Lounge Mr Lau suffered a disadvantage that was a matter of substance. It is not necessary to determine whether the mere fact of being unable to enter the area closed off by the Ladies Lounge, separate from the art work within, constituted a sufficient disadvantage.
31. The purpose sought to be achieved by Moorilla, and the very *raison d’être* of the Ladies Lounge as described by Ms Kaechele, is discrimination on the basis of gender. Counsel for Moorilla observed that the Ladies Lounge artwork is a participatory installation. The participation by visitors in the process of being permitted or refused entry is part of the artwork itself. Mr Lau experienced the artwork in that his exclusion was an essential aspect of the experience of the Ladies Lounge. This was not advanced by Moorilla as a contention that Mr Lau had not experienced discrimination. Any such contention would be facile. The unfavourable treatment of Mr Lau extended beyond entry to the space, as an artwork in itself, to the inability to experience the artwork within it.
32. I am satisfied that, for the purposes of s 14, s16 and s 22, refusing Mr Lau entry to the Ladies Lounge constituted direct discrimination against him on the ground of gender in the provision of facilities, goods and services.

Exceptions that may nonetheless permit the discrimination

33. Part 5 of the Act sets out exceptions and exemptions in respect to conduct that would otherwise be in breach of the Act. Part 5 includes s 26, which is raised as a defence by Moorilla. Section 26 provides an exception for promoting equal opportunity:

26. Equal opportunities

A person may discriminate against another person in any program, plan or arrangement designed to promote equal opportunity for a group of people who are disadvantaged or have a special need because of a prescribed attribute.

34. Section 26 may be compared with s 55, which expressly refers to artistic purpose:

55. Public purpose

The provisions of section 17(1) and section 19 do not apply if the person's conduct is –

- (a) a fair report of a public act; or
- (b) a communication or dissemination of a matter that is subject to a defence of absolute privilege in proceedings for defamation; or
- (c) a public act done in good faith for –
 - (i) academic, artistic, scientific or research purposes; or
 - (ii) any purpose in the public interest.

35. Section 55(c)(i) provides an express exemption for a public act done in good faith for artistic purposes. This is the only exemption or exception expressly for artistic purposes. However, the exemption only applies in respect to the prohibitions in s 17(1) and s 19 of the Act. Section 17(1) prohibits “any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of” certain of the attributes referred to in s 16, including s 16(e) gender. Section 19 prohibits “incit[ing] hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons” on certain grounds, including gender identity. It does not extend to s 16 discrimination. There is no general exemption or exception permitting discrimination for artistic purpose.
36. Section 27 contains exceptions permitting discrimination on the ground of gender for certain specified purposes connected with religious institutions, education, employment, accommodation, and membership of and the provision of facilities and benefits by clubs:

27. Gender

- (1) A person may discriminate against another person on the ground of gender –
- (a) in a religious institution, if it is required by the doctrines of the religion of the institution; or
 - (b) in education, if it is for the purpose of enrolment in one-gender schools or hostels; or
 - (c) in employment, if it is for the purpose of the residential care of persons under the age of 18 years; or
 - (d) in employment, if it is based on a genuine occupational qualification or requirement in relation to a particular position; or
 - (e) in accommodation, if it is shared accommodation for less than 5 adult persons; or
 - (f) in the provision or use of facilities, if those facilities are reasonably required for use by persons of one gender only.
- (2) A person may discriminate against another person on the ground of gender in respect of the use of any benefit provided by a club if –
- (a) it is not practicable for the benefit to be used simultaneously or to the same extent by both men and women; and
 - (b) the benefit is provided –
 - (i) for the use of men and women separately from each other; or
 - (ii) to men and women in a fair and reasonable proportion.

(3) A person may discriminate against another person on the ground of gender in respect of membership of a club if the membership of the club is available only to persons of one gender.

37. Moorilla did not contend that the Ladies Lounge provides facilities for the purposes of s 27(1)(f) or that it is a club for the purposes of s 27(2) and (3). However, Moorilla did point out that if the Ladies Lounge was a club then s 27 would permit the impugned conduct.

Does s 26 permit the Ladies Lounge to discriminate?

38. Mr Lau carries the onus to establish discrimination: *Kelly v Pensalfini* [2019] TASSC 2 [30]. The onus shifts to Moorilla to establish the exception arising under s 26: *Ponraj v Wycombe Services Pty Ltd* [2023] FCA 118 [67] and *Wilson v The State of Tasmania (Department of Police, Fire & Emergency Management) & Anor* [2021] TASADT 4 [39].
39. Mr Lau submitted that s 26 requires a concrete idea that can be understood, with an identified goal. He contended that Moorilla's goal of addressing gender imbalance is vague and lacking context, and that it is not clear how the Ladies Lounge is intended to address equal opportunity. He submitted that the spirit of the exemption is to permit positive discrimination rather than the negative discrimination he experienced.
40. Moorilla says that the Ladies Lounge is an arrangement to promote equal opportunity, and that for the purposes of s 26 it is the intention or purpose of the arrangement that governs the characterisation of it as non-discriminatory. To be precise, the effect of s 26 is to permit discrimination rather than to make the conduct non-discriminatory. Moorilla says that its intention for the Ladies Lounge is to promote substantive equality for women, as a group which is disadvantaged, and that that disadvantage may be established by past discrimination.
41. The elements of s 26 that must be established to permit discrimination are:
- (a) that there is a program, plan or arrangement;
 - (b) that the program, plan or arrangement is designed to promote equal opportunity for a group of people; and
 - (c) that the group of people are disadvantaged or have a special need because of a prescribed attribute.

Can the Ladies Lounge be a program, plan or arrangement?

42. Moorilla contends that the Ladies Lounge is an arrangement for the purposes of s 26. The Act does not define 'arrangement', nor does it provide any particular assistance in determining what that word means in s 26. The meaning of arrangement must be determined according to the general principles of statutory interpretation. Construing a particular legislative provision will begin with the literal meaning of the text itself, but will be determined with regard to the purpose of the provision read in the context of the surrounding provisions and the legislative scheme, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41 [41] and [47] and *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 [69].

43. The purpose of s 26 is to permit a positive response to inequality. It is found in Div 1 of Pt 5, which includes beneficial exceptions for discrimination to advance charitable purposes and to benefit groups with special needs, and to comply with laws. 'Arrangement' has a wide natural meaning, suggesting that a broad inclusive approach should be taken to what might constitute an arrangement. In *Anti-Discrimination Commissioner v White* [2023] TASSC 26 at [39]-[41] Marshall AJ took a such an approach to what might constitute a "program, plan or arrangement" in s 26:

39. The Explanatory Memorandum accompanying the Bill that led to the Act had this to say about what became of s 20:

"It will not be unlawful discrimination to adopt a measure to reduce the disadvantage or structural inequalities suffered as a consequence of past discrimination and to redress by equal opportunity measures. This exemption is provided in clause 26."

40. The above material shows that s 26 in referring to a "program, plan or arrangement designed to promote equal opportunity" encompassed all equal opportunity measures without the requirement for a formal, written policy document setting out a specific strategy. The same logically applies to "schemes" referred to in s 25 to redress disadvantage. The use of the word "arrangement" in s 26 tells against the need for any formal documented policy. There is no warrant for reading s 26 in a narrow or restricted way just because like provisions in other jurisdictions might be broader on their face.

41. There is no valid basis to limit the operation of ss 25 and 26 of the Act if an organisation considers that action is required to redress disadvantage experienced by a category of persons which has been the subject of discrimination in the past, and in relation to which category the organisation desires to address and redress that disadvantage. The problem with seeking to define special measures narrowly, in the federal context, was addressed by Gray J in the Federal Court in *Walker v Cormack* [2011] FCA 861, 196 FCR 574 at [30]. There Gray J said that:

"Attempts to take such [special] measures ought not to be judged by reference to criteria that are too difficult to comply with."

Although the provision in *Walker* is worded very differently to s 26 of the Act the same caution not to apply a too technical or pedantic approach to measures designed to promote equal opportunity are relevant in this jurisdiction.

44. Marshall AJ referred to the decision of Gray J in *Walker v Cormack* [2011] FCA 861. That case involved consideration of s 7D of the *Sex Discrimination Act 1984* (Cth). Section 7D has a similar purpose to s 26 of the *Anti-Discrimination Act*, although it deems special measures as non-discriminatory, while s 26 is permissive. Section 7D allows special measures for the purpose of achieving substantive equality between persons with different characteristics, including between men and women, which would otherwise constitute discrimination. At [30] Gray J said:

There is a danger in construing s 7D of the *Sex Discrimination Act* in too technical a fashion. That section is designed to encourage, rather than to discourage, the taking of special measures for the purpose of achieving substantive equality. Attempts to take such measures ought not to be judged by reference to criteria that are too difficult to comply with. This is especially the case when such attempts are made by small businesses or other small organisations, lacking the resources to undertake exhaustive research as to the need for a special measure, the capacity of the proposed measure to

achieve the purpose of substantive equality, the identification of correct comparators, the causes of inequality and the proportionality of the special measure.

45. The Ladies Lounge has been created in an orderly manner with the intention of achieving a desired outcome and is capable of being characterised as an arrangement for the purposes of s 26. The arrangement cannot sensibly be divorced from its purpose, but I accept that, if in fact the Ladies Lounge was designed to promote equal opportunity, it is an arrangement for the purposes of s 26.

Are women a group of people who are disadvantaged or have a special need because of gender?

46. It may be artificial to identify disadvantage separately from the relevant equal opportunity intended to be promoted by the arrangement. The purpose of s 26 is to promote equal opportunity for a group that is disadvantaged in respect to the relevant opportunity. However, it is convenient to consider the issue of disadvantage before turning to the issue of whether the Ladies Lounge is designed to promote equal opportunity.
47. The relevant group of people who are identified as disadvantaged are women, or women artists.
48. Moorilla tendered the 2024 Status of Women Report Card published by the Commonwealth Department of Prime Minister and Cabinet Office for Women, which details broad categories of disadvantage experienced by women in respect to matters such as gender-based violence, unpaid work, barriers to paid work, gender pay gap, workplace gender discrimination, workplace sexual harassment, homelessness and under-representation in private industry leadership roles.
49. Mr Rawlins gave evidence that art by female artists is less displayed in art museums and galleries than that by male artists, both at Mona and more broadly. Mr Rawlins did not provide any analysis or basis for this conclusion, but expressed it as if it were self-evident. Given Mr Rawlins' senior curatorial position at an art museum of renown and his role in the development and delivery of artwork presentations at Mona, and given that his opinion was not challenged, I accept his evidence as to disparity.
50. I accept that women, as a group, experience some broad societal disadvantage, and that women artists as a group experience disadvantage in respect to display of artworks.

Is the Ladies Lounge designed to promote equal opportunity?

The claimed opportunity

51. The relevant opportunity that the Ladies Lounge is intended to promote to achieve equality is not readily apparent from Ladies Lounge itself, in the way that, say, a gender based scholarship or a quota system for the appointment of women to particular positions or a women-only medical clinic might self-evidently point to purposes of addressing systemic gender based inequality of opportunity in education, employment or access to medical services.

52. Moorilla contends that the relevant opportunity is represented by the lack of the display of artwork by female artists, the artwork itself, the historical exclusion of women from spaces and the provision of a space for women.

What is equal opportunity in s 26?

53. The Act does not define ‘equal opportunity’. Moorilla submitted that equal opportunity means the situation or principle of providing the same opportunities to everyone without regard to, in this case, gender; that substantive or factual equality of opportunity is different to formal or legal equality of opportunity; and that s 26 addresses substantive equality of opportunity. Moorilla points to the description of this concept by Gray J in *Central Northern Adelaide Health Service v Atkinson* [2008] SASC 371 at [109] (with footnotes added):

109. The *Equal Opportunity Act* seeks to achieve equality of treatment. The legislation recognises, however, that not all persons are equal, and so permits positive discrimination in order to achieve “effective, genuine equality”: See *Gerhardy v Brown* [1985] HCA 11; (1984) 159 CLR 70, 130 (Brennan J); see also ss 47, 82 and 85P of the *Equal Opportunity Act*. As Brennan J noted in *Gerhardy v Brown*:

A means by which the injustice or unreasonableness of formal equality can be diminished or avoided is the taking of special measures. A special measure is, ex hypothesis, discriminatory in character; it denies formal equality before the law in order to achieve effective and genuine equality: [1985] HCA 11; (1984) 159 CLR 70, 130.

54. Section 26 clearly provides for substantive rather than formal equality of opportunity. Formal or legal equality of opportunity is achieved by the prohibitions on direct and indirect discrimination and prohibited conduct in Pt 4 of the *Anti-Discrimination Act*. Section 26 addresses substantive equality of opportunity by permitting the positive discrimination referred to in *Central Northern Adelaide Health Service v Atkinson* to achieve the purpose of promoting equal opportunity.
55. In this sense equal opportunity in s 26 is not simply the absence of discrimination, it contemplates the attaining of something where there might otherwise be an impediment. It is commonly seen in competition for limited opportunities, such as positions of employment and in higher education and access to health and other services where members of under-served or marginalised groups require more than mere formal equality of opportunity to achieve equity with more privileged groups. Achievement of that equity justifies the discrimination underpinning substantive equality of opportunity.
56. This was described by the American legal and moral philosopher John Rawls in his seminal work on justice and social class *A Theory of Justice: Revised Edition* (1999, Harvard University Press) as fair equality of opportunity. Rawlsian fair equality of opportunity requires not only that positions be open to all on a meritocratic basis but that all should have a fair chance, in the sense that “those who have the same level or talent and ability and the same willingness to use these gifts should have the same prospects of success regardless of their social class of origin”. Section 26 extends the basis of disadvantage beyond social class to any prescribed attribute listed in s 16. This may require steps to address inequality systematically rather than merely at a single point in time relative to a particular opportunity.

Intention or consequence?

57. Section 26 requires that the arrangement is 'designed' to promote equal opportunity. The use of 'designed' imports concepts of purpose or intention. Moorilla submits that for the purposes of s 26, it is the intention that is important, not the outcome. In *Jacomb v Australian Municipal Administrative Clerical and Services Union* [2004] FCA 1250 Crennan J considered whether rules of a union imposing inflexible quotas for the election of women to executive positions of the union, so discriminating against male members, were permitted under s 7D of the *Sex Discrimination Act* as a special measure for the purpose of achieving substantive equality between men and women. Considering an equivalence with the use of special measures in s 8 of the *Racial Discrimination Act 1975* (Cth) his Honour said at [47]:

Such measures may be ostensibly discriminatory but a person taking a special measure is not discriminating against others because such measures are designed to ensure genuine equality. Thus, it is the intention and purpose of the person taking a special measure, which governs the characterisation of such a measure as non-discriminatory, not the necessary effect of the measure in disadvantaging any group.

58. Section 26 therefore provides a deontological rather than a teleological approach, focussed on intention rather than outcome. However, given that the object of the Act is to prohibit discrimination and the purpose of the section is to permit discrimination that would otherwise be unlawful, the program, plan or arrangement must be one which Moorilla could reasonably consider was capable of promoting the relevant equal opportunity. Like s 26, s 7D of the *Sex Discrimination Act* does not expressly require a special measure to be reasonable, however in *Jacomb v Australian Municipal Administrative Clerical and Services Union* Crennan J considered whether the evidence in that case established that the intention was reasonably held, saying at [34]:

34 It needs to be observed that the type of evidence proffered by the respondent (which was similar in nature to some of the evidence relied on by the applicant) is not the same as evidence on ordinary questions of fact which arise between parties. The evidence is information, which the Court needs, and may rely upon, to answer the question of whether or not union rules 5 and 9 are special measures within the meaning of s 7D of the SDA. That involves determining whether the union's purpose in proposing the special measure was to achieve substantive equality. Such evidence also enables the Court to assess whether it was reasonable for the union to conclude the measure would further that purpose: see *Gerhardy v Brown* (1984 – [1985] HCA 11; 1985) 159 CLR 70 ("*Gerhardy v Brown*") at 87/88 per Gibbs C.J. and at 105 per Mason J. See also *Proudfoot v Australian Capital Territory Board of Health* [1992] EOC 92-417 ("*Proudfoot v ACT*") and *Western Australia v Commonwealth (Native Title Act case)* (1994 – [1995] HCA 47; 1995) 183 CLR 373 ("*WA v Commonwealth*").

59. Section 26 is not directed at simply responding to past or existing disadvantage generally, but rather specifically at promoting equal opportunity where that opportunity is affected by disadvantage. The relevant opportunity needs to be identified and linked to the relevant disadvantage. The issue is whether as a question of fact the design or intention for the Ladies Lounge formed by Moorilla is to promote equality of an identified opportunity, and whether it is reasonable for Moorilla to consider it capable of doing so.

The evidence

60. The evidence as to the equal opportunity that the Ladies Lounge was designed to promote was somewhat inconsistent. No particular disadvantage identified in the Status of Women Report Card was advanced. Although Ms Kaechele's description of the artistic process of creating the artwork included it having no particular intention, it was clear from Mr Rawlins' evidence, and Ms Kaechele's evidence more broadly, that the Ladies Lounge was designed with the intention of responding to gender imbalance. The relevant imbalance identified by them was, however, different.
61. Mr Rawlins gave evidence in respect to disadvantage, or disproportion, experienced by women artists in having artworks displayed at Mona and in art museums generally. Mr Rawlins' evidence as to the genesis of the commissioning of the Ladies Lounge included the following:

The period in which Mona was closed during the Covid pandemic we (the curatorial and design staff) took the opportunity to rethink and redesign the presentation of Mona's collection display. It is a rare opportunity to have a museum closed and available for a complete rehanging of the artwork.

Myself and Mona's designer, Adrian Spinks, were designing a variety of lounges, after we had received an informal brief from David Walsh to 'make it weird, like you are visiting the house on the hill that your weird aunt lives in'. As part of this weirdness we decided to make a series of lounges throughout the museum - we had been criticised by the public over many years for not having enough places to sit while they looked around the museum, so we thought we would invert that and put in so many places to sit that it just seemed weird.

At one point I suggested to Adrian that we create a section of the museum that only displayed the work of women artists, because we are also often accused of not showing enough women artists. This idea didn't get much traction because, well, it's not a good idea, it's a commonly used hollow gesture made by men in the arts to make us feel like we are doing the right thing and showing how aware we are of the common disparity in gender representation within art museums and gallery presentations and programs. So we canned that idea quickly and started on the idea of making a 'ladies lounge' where 'ladies' could sit; this was of course a tongue-in-cheek joke at our own expense, and an excuse for me to try and get Adrian to make a space that was all pink (as we had just finished designing a space that was all blue).

In our next design discussion with David Walsh we told him about this idea, an idea he mocked and ridiculed us for having, so much so that he gave us a direction that was to have two ladies lounges designed—one was to be designed by myself, the other by David's wife and co-curator Kirsha Kaechele. The final part of his brief was that I should not talk with Kirsha about what she was designing, and she was not to know what I was designing, and Adrian would be in the middle providing design support to both of us.

This gave me the opportunity to make my all pink lounge, which you can still visit today.

Kirsha and her producer Nat created a far more complex structure than me, with an elaborate fantasy interior that was also functional as a 'high tea' venue and came complete with a concierge and butlers. (I know because I have snuck in there to take a look on the days the museum has been closed.) Once finished Kirsha told me 'it's done and you can't go in there'. It is a conceptual triumph in my opinion. But even if I wanted to, I wouldn't have been able to intervene in any aspect of her lounge—she's completely out of control (completely beyond David's control), and any attempt to do so would

have resulted in an hysterical outburst. Still, her artwork is very potent and has really given reason for my adjacent lounge to exist, because mine now provides non-ladies who have to wait for their 'lady' friends or partners to visit Kirsha's lounge somewhere to sit and wait. It is a perfect pairing.

62. Mr Rawlins provided a description from a Mona staff briefing note prepared for the post-Covid re-opening:

On BI are twin lounges, who started life as one: specifically as a desire to acknowledge or augment the male bias in our collection and display. Jarrod had tentatively suggested a female-only hang, which I said was a bad idea (for earnest, bio-cultural themed reasons)—but then the boss gave the new direction about irreverence, Disneyland and so on, and Jarrod and Adrian began to think about what a 'ladies lounge' might look like. David, observing their progress, was amused by this ladies lounge dreamed up by two men. Alongside it, he said, should be an actual ladies lounge designed by actual ladies—specifically, Kirsha. Naturally KK has gone to town on the notion (which both is, and is not, inherently ridiculous) and plans to make a space (women only) framed with curtains, gold- and green-themed, serving tea and dispensing massage, where you can buy personalised stationery and indulge in other ladylike pleasures.

63. The thrust of Ms Kaechele's evidence was that the Ladies Lounge is a response to historical disadvantage experienced by women in respect to entering spaces reserved for men. Her evidence was that:

To equalise this injustice, it is my assertion that women deserve both equal rights *and* special privileges (in the form of unequal rights, or chivalry) for a minimum of three hundred years (to be refined by esteemed legal minds specialising in such matters). I'm deeply disappointed by Australia's abandonment of chivalry alongside the introduction of equal rights, and would like to see its reinstatement as a central element of any reparations. Nuanced arguments aside, it is my assertion that in the case of the Ladies Lounge at Mona, section 26 applies in spades.

64. Ms Kaechele explained her view as to the need for the Ladies Lounge:

We are so deeply embedded in the dominion of man that we do not even see the myriad ways in which we adhere to and multiply his reign. And for this reason we need the Ladies Lounge: a peaceful space women can retreat to; a haven in which to think clearly, and relish the pure company of women without the overwhelming supremacy of men—to escape the invisible story woven through history into every moment. From this insidious rule, we find refuge in the Ladies Lounge, a space exclusively for women, excepted only by a retinue of male butlers who live to serve women, attending to their every wish and showering them with praise and affection (in chivalry—the unequal rights component of the reparations equation). The Ladies Lounge is an essential space for perspective and reset from this strange and disjointed world of male domination. There should be more of them.

Consideration and conclusion in respect to the exception in s 26

65. Mr Rawlins' evidence is consistent with an intention to address or highlight the disparity in the display of art by female artists compared to male artists. The opportunity identified by Mr Rawlins is having artwork displayed. The Ladies Lounge is advanced by Moorilla as an arrangement to promote equality of that opportunity. His evidence and

the briefing note did not refer to the historical preclusion of women from spaces or make reference to the restriction of entry to women to spaces.

66. Ms Kaechele, on the other hand, did not raise disparity in the display of artwork by female artists as a reason for the Ladies Lounge, and focussed on the issue of access to spaces.
67. It is Moorilla's design, or intention, that is relevant for the purposes of s 26, but determination of Moorilla's intention in this case may be informed by the expression of Ms Kaechele's intention as the commissioned artist, given her role as a curator, her close association with Moorilla and Mona, the fact that the art work was commissioned or created specifically in response to a request by Moorilla through Mr Walsh, and Mr Rawlins' comments concerning her absolute control of the creation of the Ladies Lounge.
68. Mr Rawlins' evidence establishes that the concept for a ladies lounge or lounges formulated by him and extended by Mr Walsh, and carried into being by Mr Rawlins and Ms Kaechele, was in response to the disparity identified by him. However, he did not refer to the function of promoting equal opportunity in his evidence in respect to the genesis of the concept. He explained it as "a desire to acknowledge or augment the male bias in our collection and display". He did not explain how the concept was intended to promote equal opportunity for the purposes of s 26. Any historical exclusion of women from spaces did not form a precipitating factor in the concept by Moorilla.
69. Given that the Ladies Lounge is an artwork by a woman it could be said to positively respond to the disparity between the display of art by male and female artists, to make a statement in that regard, and to publicise it, but it does not itself promote the opportunity for art by women to be displayed, whether preferentially or at all. It cannot in this instance be both the arrangement and the end to be achieved by the arrangement. It will not assist any female artist to be displayed at Mona or elsewhere, and will not preference the display of art by female artists over that of male artists. The exclusion of men will not promote the opportunity for women artists to have their art displayed. It is not simply that the Ladies Lounge may not achieve the purpose identified as Moorilla's defence, Moorilla cannot reasonably consider that it is capable of promoting equal opportunity for the display of art by women. It is not apparent how preventing men from experiencing the art within the space of the Ladies Lounge, which is Mr Lau's principle complaint, promotes opportunity for female artists to have work displayed, whether the art in the space is by male or female artists. It is not apparent how restricting appreciation of the art within the space to women promotes opportunity for female artists to have their work displayed.
70. I am satisfied that the disadvantage experienced by women artists as a group in having artwork displayed at Mona and other art museums inspired and precipitated the Ladies Lounge. I am not satisfied that it is an arrangement designed to promote equal opportunity for that group. In particular, I am not satisfied that the discrimination experienced by Mr Lau is designed to promote equal opportunity for that group.
71. That might well dispose of the matter. However, even though it is Moorilla's intention that is relevant, for the reasons already stated related to her intimate association with

Moorilla and Mona, Ms Kaechele's intended purpose for display of the Ladies Lounge as an artwork may be imported or attributed to Moorilla and should be considered.

72. Ms Kaechele's intention is that Ladies Lounge address or redress the historical experience of women being excluded from spaces, particularly spaces associated with power. She contends that the Ladies Lounge promotes equal opportunity to access to spaces by women. The disadvantaged group contemplated by her is therefore much broader than women artists.
73. There was no evidence of any relevant existing or contemporary exclusion of women from spaces, either formally or substantively, other than bare reference to men-only clubs, and Ms Kaechele's experience on Flinders Island. There was no evidence of spaces that are, by reason of the general disadvantage disclosed by the Status of Woman Report Card, systemically more difficult for women to access than men. There was no evidence of spaces that the Ladies Lounge might facilitate entry of women to, other than the Ladies Lounge itself.
74. I accept that past disadvantage may lead to ongoing systemic disadvantage that will not be remedied by formal equality of opportunity and must be addressed by substantive equality of opportunity. However, Ms Kaechele's intention was clearly to address past wrongs of access by advantaging women generally as opposed to addressing or redressing current substantive inequality of opportunity. Ms Kaechele may be justified in her view that past disadvantage warrants for women "special privileges (in the form of unequal rights, or chivalry) for a minimum of three hundred years" and that "the insidious rule of men" justifies the Ladies Lounge as "a space exclusively for women, excepted only by a retinue of male butlers who live to serve women, attending to their every wish and showering them with praise and affection" and as "an essential space for perspective and reset from this strange and disjointed world of male domination", or that may simply be hyperbole. That view does not, however, promote a relevant equal opportunity. It might be that Moorilla could obtain an exemption from the Anti-Discrimination Commissioner under s 56 of the *Anti-Discrimination Act* to redress the effect of past discrimination, but I am not aware of any such application.
75. I am not satisfied that the evidence establishes a disadvantage experienced by women in respect to access to spaces. Even if there is such a disadvantage, the discrimination experienced by Mr Lau will not promote equal opportunity for access by women to spaces or any other purpose within the meaning of s 26. I am not satisfied that Moorilla may reasonably conclude that the Ladies Lounge might achieve that purpose.
76. The Ladies Lounge exists for its own purpose. It may have a valid moral or ethical or pedagogical purpose, but it cannot reasonably be intended to promote equal opportunity. I am not persuaded that the Ladies Lounge is an arrangement designed to promote equal opportunity for a group of people who are disadvantaged or have a special need because of the prescribed attribute of gender. Indeed, I am satisfied that it is not. The discrimination experienced by Mr Lau was not excused or permitted by s 26.

Conduct during the hearing

77. There is one further matter that I should address. Ms Kaechele was accompanied to the Tribunal by a group of about 20 supporters, all of whom were dressed similarly to her

in a conservative business style of similar colour. They sat in the back of the hearing room during the hearing, largely very still. Although not observed by me during the hearing, I understand that that stillness was punctuated every few minutes by the group shifting their posture in common and in unison in a coordinated manner. The electronic edition of *The Age* newspaper on 19 March reported that one of the group was pointedly reading feminist texts. After I retired at the conclusion of the hearing the group left the Tribunal in a single line in a slow march led by Ms Kaechele to the sounds of a Robert Palmer song. I understand that attempts were made to film that procession, contrary to s 11 of the *Court Security Act 2017*. The conduct was widely reported in the press.

78. This conduct was not observed by me or, I expect, by Mr Lau who attended the hearing remotely. Counsel for Moorilla subsequently advised the Principal Registrar, and I accept without reservation, that she too was unaware of the conduct. It therefore did not disrupt or influence the hearing. However, at the very least it was inappropriate, discourteous and disrespectful, and at worst contumelious and contemptuous. It is not necessary that conduct actually disrupt a hearing in order for it to constitute contempt: *The Registrar v Unnamed Respondent* [1994] ACTSC 24 [24]. If observed by Mr Lau it might well have been perceived by him as harassing and intimidatory.
79. Given the appropriate comportment of Ms Kaechele while giving her evidence and in the course of the hearing generally I expect that the conduct of the group was some form of performance art rather than being calculated to influence Mr Lau or the determination of his complaint. While it might have seemed to the participants to have been an amusing escapade or an expression of support for Ms Kaechele, had I formed the view that it was in fact intended for either of the latter purposes, or had the effect of influencing Mr Lau, I would have been obliged to refer the conduct to the Director of Public Prosecutions to consider prosecution under s 128 of the *Tasmanian Civil and Administrative Tribunal Act 2020*: see *Australian Building and Construction Commissioner v Parker (No 2)* [2017] FCA 1082 at [89] for the obligation to refer.
80. I have not taken the conduct of the group into account in my determination. I may well have done so had Ms Kaechele been a party rather than a witness, or if her evidence had been contradicted.

Determination and remedy

81. The refusal to permit Mr Lau entry to the Ladies Lounge was direct discrimination which is prohibited by ss 14, 16(e) and 22 of the Act. The discrimination experienced by Mr Lau is not permitted by s 26 of the Act. Mr Lau's complaint is substantiated.
82. The orders that may be made if a complaint is substantiated are set out in s 89 of the Act. Section 89(1) provides:
89. Orders
- (1) If the Tribunal finds after an inquiry that a complaint is substantiated, it may make one or more of the following orders:
- (a) an order that the respondent must not repeat or continue the discrimination or prohibited conduct;

- (b) an order that the respondent must redress any loss, injury or humiliation suffered by the complainant and caused by the respondent's discrimination or prohibited conduct;
- (c) an order that the respondent must re-employ the complainant;
- (d) an order that the respondent must pay to the complainant, within a specified period, an amount the Tribunal thinks appropriate as compensation for any loss or injury suffered by the complainant and caused by the respondent's discrimination or prohibited conduct;
- (e) an order that the respondent must pay a specified fine not exceeding 20 penalty units;
- (f) an order that a contract or agreement is to be varied or declared void in whole or in part;
- (g) an order that it is inappropriate for any further action to be taken in the matter;
- (h) any other order it thinks appropriate.

83. Mr Lau seeks an order that the discrimination cease, either by the Ladies Lounge being removed or by men be permitted entry to it. Mr Lau has not sought compensation or other remedy, although at the conclusion of the hearing he raised as an alternative remedy the establishment of two classes of ticket with different fees for men and women. Moorilla opposed this. It would address Mr Lau's concern that men pay a full entry fee but are unable to experience all the art displayed at Mona, but it would not address the fundamental discrimination occasioned by the Ladies Lounge.
84. Moorilla says that refusal of entry to men is an intrinsic aspect of the Ladies Lounge artwork and that it therefore cannot be modified to permit entry by men. If an order is made requiring Moorilla to permit entry by men then Mona would cease to exhibit the artwork. I accept that the Ladies Lounge would cease to have the artistic character that defines it if men are permitted entry.
85. The discriminatory conduct is ongoing. There is nothing about the conduct that warrants a remedy beyond requiring that it cease. I am satisfied that an order under s 89(1)(a) is appropriate. Moorilla may cease the discrimination in a number of ways, such as by closing the exhibit, removing it, reforming it or permitting entry by men. The appropriate order is simply that Moorilla cease the discrimination. It may then choose the manner in which it does so.
86. Moorilla contended that Mona would require four weeks to comply with an order to remove the artwork. This is to enable redeployment of staff, rather than for structural reasons. It is not clear to me why the Ladies Lounge could not immediately be closed as an exhibit, but Mr Lau did not raise any issue with the time sought.
87. The default position in respect to costs under Div 10 of Pt 8 of the *Tasmanian Civil and Administrative Tribunal Act* is that parties bear their own costs, subject to a discretion to award costs if the Tribunal considers that it is appropriate to do so. Mr Lau was self represented and so I do not anticipate an application for costs: *Cachia v Hanes* (1994) 179 CLR 403; [1994] HCA 14 at [409]-[410] and [414] and *Zhang v Davidson (No 2)* [2020] NSWLEC 89 [64]-[67]. However, I will make an order requiring that any application be made promptly.

88. The following orders are made:

1. Within 28 days from the date of this order Moorilla Estate Pty Ltd is to cease refusing entry to the exhibit known as the Ladies Lounge at the Museum of Old and New Art by persons who do not identify as ladies.
2. Any application for an order for costs is to be made in writing with supporting submissions within 21 days.