

**CITATION:** National Heart Foundation of Australia [2014] QCAT 39

**PARTIES:** National Heart Foundation of Australia (Applicant)

**APPLICATION NUMBER:** ADL091-13

**MATTER TYPE:** Anti-discrimination matters

**HEARING DATE:** On the papers

**HEARD AT:** Brisbane

**DECISION OF:** **Senior Member Endicott**

**DELIVERED ON:** 22 January 2014

**DELIVERED AT:** Brisbane

**ORDERS MADE:** **1. The application for an exemption is dismissed.**

**CATCHWORDS:** ANTI-DISCRIMINATION – general exemption from liability sought on the attribute of race – where specific exemption already exists – where general exemption is not required

*Anti-Discrimination Act 1991 ss 6(1), 14, 25, 105, 113*  
*Qantas Airways v Christie (1998) HCA 18*

**APPEARANCES and REPRESENTATION (if any):**

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act).

**REASONS FOR DECISION**

- [1] An application has been made to QCAT by the National Heart Foundation of Australia seeking an exemption under section 113 of the *Anti-Discrimination Act 1991* to enable that organisation to engage a senior advisor for its National Aboriginal Health Unit to provide cultural awareness leadership and responsiveness to internal and external stakeholders and to implement strategic and operational plans. The position of senior advisor is to be located in the Brisbane office of the organisation.

- [2] According to the evidence provided by Dr Karen Page, National Manager, Health Equity and Secondary Prevention, the organisation has a commitment to promoting unity and respect between Aboriginal and Torres Strait Islander peoples and non-indigenous Australians. This commitment has led to the creation of the role of Senior Aboriginal Advisor, National Aboriginal Health Unit.
- [3] Dr Page stated that it is essential that the person who holds the position be an Aboriginal or Torres Strait Islander person. In order to achieve the objects of the position, the person selected for the role will need to have the lived understanding of the issues affecting Aboriginal and Torres Strait Islander peoples, and an ability to communicate sensitively and effectively with Aboriginal and Torres Strait Islander peoples.
- [4] Dr Page further stated that the role has specific involvement in issues relating to Aboriginal and Torres Strait Islander peoples. The role will involve the development of policies and programs targeted at Aboriginal and Torres Strait Islander clients and will involve direct interaction with Aboriginal and Torres Strait communities.
- [5] It was stated by Dr Page that under the organisation's Reconciliation Plan there is a recognition that there is inequitable employment outcomes experienced by Aboriginal and Torres Strait peoples as a group and that this situation is not improving. To address that inequity the organisation has undertaken to commit to promoting employment opportunities for Aboriginal and Torres Strait Islander peoples.
- [6] The *Anti-Discrimination Act 1991* prohibits discrimination in certain areas of activity, including work, on the basis of race. One of the purposes of the Act is to promote equality of opportunity for everyone by protecting them from unfair discrimination.<sup>1</sup> An employer must not discriminate in the arrangements made for deciding who should be offered work.<sup>2</sup>
- [7] However it is not unlawful to discriminate in work related decisions if a specific exemption applies under the Act. One specific exemption is found in section 25 of the Act which provides that an employer may impose genuine occupational requirements for a position.
- [8] I accept the evidence of Dr Page that the proposed Senior Aboriginal Advisor must have the lived understanding of the issues affecting Aboriginal and Torres Strait Islander peoples and an ability to communicate sensitively and effectively with Aboriginal and Torres Strait Islander peoples. I accept that the person in the role must have direct interaction with Aboriginal and Torres Strait communities.
- [9] The term "genuine occupational requirement" or very similar wording found in anti-discrimination legislation in Australia has been the subject of

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<sup>1</sup> *Anti-Discrimination Act 1991* s 6(1).

<sup>2</sup> *Ibid* s 14(a).

judicial consideration. In *Qantas Airways v Christie*<sup>3</sup>, Justice Gaudron of the High Court of Australia explained that determining if a requirement is an inherent requirement must involve consideration as to whether a position would be essentially the same in the absence of the requirement.

- [10] The proposed position of Senior Aboriginal Advisor has inherent requirements that the person fulfilling the role must not only understand issues affecting Aboriginal and Torres Strait Islander peoples but must also have lived experience of those issues. This is important as the person must have a commonality of experience in order to communicate effectively on health issues with Aboriginal and Torres Strait Islander communities. The role arises from positive action taken under the organisation's Reconciliation Plan. It would defeat one of the purposes of the role, to promote equality of opportunity, for a non-indigenous person to be appointed to the role and undermine the Reconciliation action undertaken by the organisation. In other words, the role would not be essentially the same in the absence of the requirement for the person to be an Aboriginal or Torres Strait person.
- [11] In order to fulfil the requirements of the role and to perform the functions effectively I am satisfied that the Senior Aboriginal Advisor must be an Aboriginal or Torres Strait person.
- [12] I am able to conclude from the evidence that it is a genuine occupational requirement for the role Senior Aboriginal Advisor to be filled only by an Aboriginal or Torres Strait person. Once that conclusion is reached that a specific exemption exists that renders lawful conduct that would otherwise be unlawful discrimination, the need for a general exemption under section 113 of the Act does not arise. I conclude that section 25 would be available to the organisation as a defence to complaints of discrimination based on the attribute of race in the arrangements for the role.
- [13] Section 113 of the Act provides discretionary power to QCAT to grant an exemption against liability when conduct is engaged in that would otherwise constitute unlawful discriminatory conduct. If the conduct is not unlawful due to specific provisions in the Act, then a general exemption would have no purpose or effect.
- [14] One precondition to the exercise of the power in section 113 requires QCAT to give to the Anti-Discrimination Commissioner a copy of the exemption application and supporting material filed with that application. The Commissioner in this case queried, quite reasonably, whether a general exemption was necessary as the evidence appeared to satisfy the specific exemption of a genuine occupational requirement.
- [15] QCAT and the former tribunal have in earlier cases determined that a general exemption is not necessary if an applicant would have a valid defence against complaints of discriminatory behaviour based on the attribute in question. Quite apart from the defence available in section 25,

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<sup>3</sup> *Qantas Airways v Christie* (1998) HCA 18, [36].

I have considered whether any other specific exemption would be available to the organisation.

- [16] Section 105 of the Act provides that a person may do an act to promote equal opportunity for a group of people with an attribute if the purpose of the act is not inconsistent with the *Anti-Discrimination Act 1991*. The evidence given to QCAT is that one of the purposes of the position of Senior Aboriginal Advisor is to facilitate understanding and respect of Aboriginal or Torres Strait Islander peoples' culture and cardiovascular health issues to ensure that the National Aboriginal Health Unit and the organisation as a whole can value cultural diversity and promote better health outcomes for Aboriginal or Torres Strait Islander peoples.
- [17] I am satisfied that providing employment targeted at a person from the Aboriginal or Torres Strait Islander community for the purpose of improving understanding and respect for Aboriginal or Torres Strait Islander peoples and focused on promoting better health outcomes for Aboriginal or Torres Strait Islander peoples is an equal opportunity initiative for the benefit of Aboriginal or Torres Strait Islander people (i.e. for a group of people identified by the attribute of their race).
- [18] I am also satisfied that providing that opportunity is not inconsistent with the *Anti-Discrimination Act 1991*. I accept the evidence that inequitable employment outcomes as well as inequitable health outcomes are being experienced by Aboriginal and Torres Strait peoples as a group and that the organisation has undertaken to commit to promoting employment opportunities for Aboriginal and Torres Strait Islander peoples as well as contributing to improvement in their health.
- [19] The Act recognises that the protection of fragile freedoms is best effected by legislation that reflects the aspirations and needs of contemporary society.<sup>4</sup> I am satisfied that the Act does seek to reflect the aspirations and needs of our current society by providing specific exemption in section 105 to organisations such as the National Heart Foundation from liability for conduct that promotes and furthers the employment of Aboriginal and Torres Strait Islander people and promotes better health outcomes as well.
- [20] In my view, the Advisor role carried out by an Aboriginal and Torres Strait Islander person will be one essential step in the Reconciliation process put into place by the National Heart Foundation reflecting the aspirations of contemporary Australian society. I am satisfied that an exemption exists under section 105 in this case.
- [21] I conclude that a specific exemption, bringing with it a valid defence, would remove any liability that the National Heart Foundation would otherwise encounter in making arrangements for deciding that the Senior Aboriginal

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<sup>4</sup> Prologue 6(b) of the *Anti-Discrimination Act 1991*.

Advisor position must be filled by an Aboriginal and Torres Strait Islander person. I am satisfied that a general exemption from liability under section 113 is not necessary.

[22] I accordingly dismiss the application for a general exemption.