

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Sundale Limited* [2019] QCAT 83

PARTIES: **SUNDALE LIMITED**
(applicant)

APPLICATION NO/S: ADL033-18

MATTER TYPE: Anti-discrimination matters

DELIVERED ON: 6 March 2019

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Gordon

ORDERS:

1. **The following exemption order applies to:-**
 - (a) **Sundale Ltd; and**
 - (b) **other people involved from time to time in providing the services offered by the Better Together Housing Project;**

as a class of people under section 113(1) of the *Anti-Discrimination Act 1991 (Qld)*.
2. **When providing the services offered by the Better Together Housing Project substantially in the form described in the application for exemption to the tribunal, or when doing or omitting to do any act in providing those services, the class is exempt from the operation of section 46 of the *Anti-Discrimination Act 1991 (Qld)* in so far as section 46 would otherwise apply to discrimination on the basis of age or sex.**
3. **This exemption continues for a period of time from the date of this order being the shorter of:-**
 - (a) **the period over which the Better Together Housing Project continues substantially in the form described in the application to the tribunal for exemption; or**
 - (b) **the period of five years.**

CATCHWORDS: HUMAN RIGHTS – DISCRIMINATION LEGISLATION – where the applicant on behalf of a class of people seeks an exemption from the operation of a specified provision of the *Anti-Discrimination Act 1991 (Qld)* in order to operate the ‘Better Together Housing

Project’ – where the Anti-Discrimination Commissioner supports the application – whether the exemption should be granted

Anti-Discrimination Act 1991 (Qld), s 113

Boeing Australia Holdings Pty Ltd & related entities
[2003] QADT 21

CISC Pty Ltd t/as The Construction Training Centre
[2017] QCAT 301

Exemption application re: Palmpoint Pty Ltd [2006]
QADT 12

REPRESENTATION:

Applicant: Julian Porter, solicitor of Suncoast Community Legal Service

APPEARANCES:

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

REASONS FOR DECISION

- [1] The Applicant, Sundale Limited wishes to restrict access to the services of the Better Together Housing Project to women aged 55 and over.
- [2] Sundale has filed affidavit evidence in support of this application.¹ From this evidence it can be seen that Sundale Ltd is a non-profit organisation operating on the Sunshine Coast. It operates four retirement villages, six aged care centres and in-home care programs for older people in locations across the region.
- [3] The evidence demonstrates that the Better Together Housing Project is an attempt to tackle the issue of older women who find themselves with poor housing security.
- [4] It is said that older women are at greater risk of housing insecurity than older men because women tend to be poorer than men in the same age group, and therefore less likely to own their own home and more likely to find it difficult in the private rental market. They are poorer because their earnings are more likely to have been interrupted by childbirth and caring responsibilities, and also because of inequality of pay and their over-representation in lower paid, part-time and casual occupations, and occupations which are less likely to offer overtime. In turn, their superannuation balances are lower than men in the same age group and they are more likely to be dependent on government pensions.
- [5] It was also found in studies that older women were more likely to be in single person households than older men. This was largely explained by the fact that there were more older women due to their longer life expectancy.

¹ Affidavits of Gail Middleton made on 6 July 2018 and 9 January 2019.

- [6] It was found however, that older women were less likely than older men to sleep rough or live in boarding houses. Instead, they were more likely than older men to adopt strategies to provide security, such as continuing with existing but unsatisfactory partners, finding new partners, taking on housekeeping or caring roles, residing with their children or living in sub-standard accommodation. It was found however, that older women were more likely to be victims of financial abuse than older men despite such strategies.
- [7] The evidence suggested that although younger people facing housing affordability issues often naturally enter in sharing arrangements, this is much more difficult for older women to do. The evidence suggested that the reason for this was a mix of fear of perceived risks, lack of mechanisms to achieve sharing, lack of long term workability, and concerns about incompatibility.
- [8] The Better Together Housing Project operates through a website which introduces like-minded older women to each other if they are looking to share a home which they already have, or if they are looking to find a new home which they can share. To achieve sufficient vetting and security there is a lengthy registration process and a police and a reference check is required. In addition to the introduction service, the Project would provide draft co-tenancy agreements to the women concerned, and a dispute resolution service.
- [9] To ensure that the correct group is assisted by the Project it restricts registration to women aged 55 and over. In other words, those declaring themselves as men could not register with the Project nor could those declaring themselves to be below the age of 55. Since these groups would be unable to register with the Project they would be excluded from taking advantage of the introduction service offered by the Project and its ongoing support.
- [10] The reason why registration is restricted to women aged 55 and over is explained in the evidence. It makes it much easier to manage the Project through the website on a technical level. It keeps the numbers of registrations to a manageable level. It encourages those in the correct group to apply because they can see that other groups cannot do so. And I would add that it is obvious that making it clear that registration is only open to women aged 55 and over is likely to result in fewer dashed expectations from those who do not qualify.
- [11] The Project sought funding from the Queensland Government (Department of Communities) under its Advancing Queensland: age-friendly community grants program, and this application was successful.

Is the Project discriminatory?

- [12] There is no doubt that restricting access to the introduction services and to the ongoing support offered by the Project to women aged 55 and over is directly discriminatory under section 10 of the *Anti-Discrimination Act 1991* (Qld). Section 10 describes direct discrimination as being when a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different. Hence those below the age of 55 would be discriminated against because of the attribute of age. And men would be discriminated against because of the attribute of sex.

- [13] Merely coming within section 10 is not a contravention of the Act however. It is necessary also for the contravention to be in one of the ‘areas’ covered by the Act.
- [14] The submissions accompanying the application rightly do not suggest that the proposed discrimination comes within the accommodation area. This is because the project merely introduces one person to another – it does not offer or provide accommodation itself nor does it process an application for accommodation. For those who are introduced to each other, section 87 of the Act states that it is not unlawful for a person to discriminate in deciding who they will share with.²
- [15] The submissions accompanying the application suggest that the proposed discrimination might come within the provision of goods and services area. Section 46 of the Act applies to that area. It says that a person (whether or not for reward or profit) must not discriminate against another person (a) by failing to supply services, or (b) in the terms on which services are supplied, or (c) in the way in which services are supplied or (d) by treating the other person unfavourably in any way in connection with the supply of services.
- [16] There is an exemption in section 46(2) for an association that (a) is established for social, literary, cultural, political, sporting, athletic, recreational, community service or any other similar lawful purpose; and (b) does not carry out its purposes for the purpose of making a profit.
- [17] There is also a general exemption in section 104 of the Act with respect to welfare measures. That provides that a person may do an act to benefit the members of a group of people with an attribute for whose welfare the act was designed if the purpose of the act is not inconsistent with the Act. Certain examples are then given, covering travel concessions to pensioners on buses, priority seating to those who are pregnant or frail, provision of special accommodation to women who have been victims of domestic violence or to frail, older people, and restricting a secure car park to women to reduce likelihood of an attack.
- [18] Despite these exclusions it seems to me to be at least arguable that the restriction of the services offered by the project to women over 55 could be a contravention of the Act because of the provisions of section 10 and section 46, despite the exemptions in section 46(2) and section 104 of the Act.

Views of Anti-Discrimination Commission Queensland

- [19] Where an application is made for an exemption, the Act provides for submissions to be made to the tribunal by the Anti-Discrimination Commission (‘ADCQ’). The Commissioner says that there is no objection to the proposed exemption.³
- [20] The Commissioner has made helpful submissions on the question whether, for an application for exemption to be successful, the applicant must show that there would be a contravention of the Act if the exemption were not granted.
- [21] The Commissioner’s view is that this does not have to be shown by an applicant, but instead, it is sufficient if the applicant shows that it is arguable that without the

² This applies to up to four sharers.

³ Submissions of 14 September 2018.

exemption there would be a contravention of the Act. This is because such an applicant needs the protection and security of an exemption. Also potential complainants need certainty as to whether there is or there is not a contravention of the Act.

- [22] The Commissioner has submitted that this has been the approach of the former Anti-Discrimination Tribunal in a number of applications, in particular *Exemption application re: Palmpoint Pty Ltd* [2006] QADT 12. In that case the point was made that section 104 is not a reliable shield against a complaint because it is open to various interpretations and whether it provides an exemption will almost always be arguable.

How should the Tribunal's discretion be applied?

- [23] There is no guidance in the Act about when it is right to grant an exemption, but case law has established that when considering an application for exemption it is normally right to consider:-
- (a) whether it is appropriate and reasonable;
 - (b) whether there are any non-discriminatory ways of achieving the objects or purposes for which the exemption is sought, in other words whether the exemption is necessary to avoid contravening the Act;
 - (c) whether the exemption is in the community interest;
 - (d) whether any persons or bodies other than the applicant support the application;
 - (e) whether an exemption can be granted to ensure maximum consistency with the legislation.⁴
- [24] When considering these questions regard may be had to the preamble of the Act which gives its aims and objects. Of relevance is paragraph 1 which recognises the need to protect and preserve the principles of dignity and equality for everyone, and paragraph 7 which says that the Act intends to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity.
- [25] The reference to 'unfair discrimination' in paragraph 7 of the preamble suggests that in this case, one approach would be to consider the respective positions of the two groups, that is the under 55s and those 55 and above, and men and women, upon the granting of the exemption or the refusal to grant it. Each group may be advantaged or disadvantaged depending on the outcome of that decision, and it would be relevant to consider whether the discrimination which would result from an exemption would be disproportionately unfair between the two groups.
- [26] In a nutshell, it is necessary to decide whether the objects or purposes for which the exemption is sought are in the community interest and not disproportionately unfair, and if so whether an exemption is necessary to achieve those objects or purposes.

⁴ These tests were identified from the cases by Walter Sofronoff QC, then President of the Queensland Anti-Discrimination Tribunal in *Boeing Australia Holdings Pty Ltd & related entities* [2003] QADT 21, and approved by the QCAT Appeal Tribunal in *Downer EDI Mining* [2013] QCATA 276.

- [27] There is no doubt from the evidence there is a need for this type of project to help older women with housing insecurity which is more prevalent in that group. When looking at the question of community interest, not only will the promotion of the safety and welfare of the women concerned benefit their families and friends but it will also benefit the wider community by reducing the resources required to achieve the same result. There will also be the added effect of optimising the use of available housing and providing reliable tenants. The Project has had wide support.
- [28] And there is no doubt that there are advantages to the Project and to its intended beneficiaries if it can legitimately be targeted at that group, and in order to do this an exemption will be needed. In the particular circumstances of this project, this is not unfair to men nor to those under 55. This is because the Project is not generally intended or designed, or funded, or able, to assist either men or those under 55.
- [29] The submissions ask for an exemption despite any possible defence that might apply. This is to achieve certainty despite a possible defence.
- [30] As mentioned above it seems to me there is a possible defence either under section 46(2) or under section 104 of the Act but that it is as least arguable that the project would contravene the Act. In such circumstances I agree with the submissions made by the Anti-Discrimination Commissioner of Queensland that where there is only a possible defence rather than a certain defence, an exemption should be granted in an appropriate case.
- [31] In *CISC Pty Ltd t/as The Construction Training Centre* [2017] QCAT 301 there was sufficient certainty about a defence and I was able to declare that the proposal was lawful. Upon that basis I dismissed the application for an exemption because it was unnecessary. That is not the case here.

Who should be covered by the exemption?

- [32] The services of the Better Together Housing Project are provided by a number of different organisations in collaboration. Although Sundale Ltd and Coast2Bay Housing are its promoters, they currently work in providing its services with Purpose Real Estate, Sunshine 60, Better, Suncoast Community Legal Service Inc and also the University of the Sunshine Coast.
- [33] In the nature of such projects it is likely that these entities will vary over the lifetime of the Project. It is suggested in submissions made by Sundale, that it may be appropriate to exempt a class of such entities, something which can be done under section 113(1) of the *Anti-Discrimination Act 1991* (Qld). I agree with this submission. Since section 113 refers to ‘people’ rather than entities that is the word I have used in my order.
- [34] Since this exemption has considered the Project in its current form, I have provided in the order that the exemption will expire if the project changes substantially from the form as submitted to the tribunal. In any case the exemption must expire after five years, although it is possible to apply for a renewal.⁵

⁵ Section 113(7) of the Act.