

**CITATION:** *Re: Anglo Coal (Grosvenor Management) Pty Ltd & Ors* [2016] QCAT 160

**PARTIES:** Anglo Coal (Grosvenor Management) Pty Ltd  
Anglo Coal (Grosvenor) Pty Ltd  
Anglo American Metallurgical Coal Pty Ltd  
(Applicants)

**APPLICATION NUMBER:** ADL112 -15

**PARTIES:** MRAEL Pty Ltd  
(Applicant)

**APPLICATION NUMBER:** ADL113 -15

**MATTER TYPE:** Anti-discrimination matters

**HEARING DATE:** On the papers

**HEARD AT:** Brisbane

**DECISION OF:** **Senior Member Stilgoe OAM**

**DELIVERED ON:** 23 February 2016

**DELIVERED AT:** Brisbane

**ORDERS MADE:** **1. Because the proposed act is an act to promote equal opportunity within the meaning of s 105 of the *Anti-Discrimination Act 1991 (Qld)*, the application for exemption is refused.**

**CATCHWORDS:** ANTI-DISCRIMINATION – EXEMPTION – DISCRIMINATION ON THE BASIS OF GENDER – where applicants engaged in underground mining – where few females engaged in underground mining – where applicants want to target female applicants for recruitment and training – whether applicants’ proposal an act to promote equal opportunity

Convention on the Elimination of All Forms of Discrimination Against Women  
*Sex Discrimination Act 1984 (Cth)* 7D  
*Anti-Discrimination Act 1991 (Qld)* ss 7(a), 105,

113

*Jacomb v Australian Municipal Administrative Clerical and Services Union* [1984] FCA 1250  
*Minister for Education and Commissioner for Equal Opportunity and Ors* (1987) EOC 92-198  
*City of Brunswick; Re Application for exemption from provisions of Equal Opportunity Act* (1992) EOC 92-450  
*King's International College* [2011] QCAT 231  
*Re: Credit Suisse Management (Australia) Pty Limited* [2012] QCAT 95

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

## REASONS FOR DECISION

- [1] Anglo American Metallurgical Coal Pty Ltd owns the Grosvenor project, a greenfield underground metallurgical coal project in the Bowen Basin. The project, situated about 5km north of Moranbah, has the potential for significant economic benefits for the Queensland community, running for 26 years and creating approximately 1000 jobs.
- [2] The workforce at underground mine sites is almost exclusively male. Until 1980, women were not allowed to work underground. Only one of the applicants' 272 current underground employees is female.
- [3] Anglo American Metallurgical has set an internal target of achieving 15% female representation across its underground operators and trades by 2018. To this end, the applicants want to implement a program to recruit for a female-only intake to complete a RII20309 Certificate II in Underground Coal Mining. They plan to run the project over three years, training eight females each year.
- [4] MRAEL Pty Ltd will be the employing entity but all of the Anglo entities, apparently, will be involved in the marketing, selection of candidates, training after engagement and retention initiatives.
- [5] The applicants want to be able to advertise for females only, engage and train females only and offer the successful females work. Such activities may offend s 7(a) of the *Anti-Discrimination Act 1991* (Qld) ('the Act') – discrimination on the basis of sex. They do not feel they have a defence under s 105 of the Act, so they have applied for an exemption from the operation of ss 14, 15, 15A and 127 of the Act.

[6] Section 113 of the Act gives the Tribunal power to grant an exemption from the operation of specified provisions of the Act. In considering whether to grant an exemption, the Tribunal must consider:<sup>1</sup>

- a) whether any other persons or bodies other than the applicants support the application;
- b) whether the exemption is in the community interest;
- c) the effect of not granting the exemption;

and whether there are other non-discriminatory ways of achieving the objects or purposes for which the exemption is sought.<sup>2</sup>

### **Is there third party support for the application?**

[7] The Anti-discrimination Commissioner of Queensland, in a letter of 12 February 2016, supports the application, subject to each party clarifying their roles in the proposed exemption. The Commissioner considers that:

The proposed program appears to be an appropriate means of increasing the participation of women in the underground workforce, which will have attendant benefits, and is not inconsistent with the *Anti-Discrimination Act 1991*.

[8] The broader issue of increased female participation in the mining industry also has the support of the Mineral Councils of Australia, in its White Paper published June 2013. That document is one in a series of academic papers<sup>3</sup> cited to by the applicants as supporting greater gender diversity in the mining industry.

[9] I am satisfied that there is third party support for the exemption.

### **Is an exemption in the community interest?**

[10] The applicants' Diversity and Inclusion Policy identifies the value of gender diversity to its workplace as:

We believe diversity delivers innovation and enables us to continuously improve the way we work.

[11] The applicants submit that women in non-traditional roles bring a new perspective and creativity to the workplace, which will increase productivity. They submit that women report more hazards and provide more information and data, which creates a safer workplace. They submit that women take more care in operating equipment, which reduces down time and costs.

[12] They submit that, by increasing the number of women in the workforce, the project will build technical capacity, which, in turn, will assist women to progress into leadership roles.

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<sup>1</sup> *Minister for Education and Commissioner for Equal Opportunity and Ors (1987) EOC 92-198.*

<sup>2</sup> *City of Brunswick; Re Application for exemption from provisions of Equal Opportunity Act (1992) EOC 92-450.*

<sup>3</sup> "Women in Mining" a report to the "Women in Mining" Taskforce, the Australasian Institute of Mining and Metallurgy, November 1998;  
 "The Changing Face of Mining" Australian Mining 11 May 2012  
 "Are Women the Mining Industry's Most Undervalued Resource?" Colorado School of Mines Magazine, Spring 2014.

- [13] The applicants submit that having women in leadership roles supports their ability to make good decisions about how to organise and optimise resources. They submit that women in leadership will eliminate structural and cultural barriers to working effectively, deliver strong performance and growth by being able to attract and retain diverse talent, and innovate by drawing on diverse perspectives.
- [14] I accept that the proposal will have significant benefits for the applicants. I must consider whether the community will also benefit.
- [15] Of Australia's total active workforce, 43% are women, yet the participation of women in mineral and mining is only 11%. Most of the 11% are employed in clerical and administrative tasks. The community must have an interest in having the mining industry workforce better reflect the workforce generally.
- [16] The percentage enrolment of women in geology, mining and mineral engineering degrees has increased significantly in recent years but the percentage of women actively employed in those disciplines has not increased. The community has invested in the education of women for which it is not receiving an adequate return.
- [17] Strategies to increase the participation of women in the mining workforce have resulted in community benefits. These include: the provision of childcare in regions where it was previously inadequate; flexible working arrangements to enable mothers to return to work if they choose; scholarships; tailored programs to identify and support talented women to take on leadership roles; working with schools to break down gender stereotypes; and the reduction in harassment and discrimination in the workplace.
- [18] I am satisfied that, properly supported, a program to increase women's participation in the mining sector has the potential for significant community benefits. Therefore, an exemption to support the increased participation of women is in the community interest.

**What is the effect of not granting the exemption?**

- [19] It is clear from the research the applicants' submissions that, without a proactive approach to recruitment, women's participation in the mining industry will remain low. The applicants will not be able to target women in advertising, recruitment and training for the Certificate II in Underground Coal Mining without the risk of breaching the Act.

**Is there a non-discriminatory way of achieving the same result?**

- [20] The proposed program cannot be achieved in a non-discriminatory way. The applicants must target advertising, recruitment and training to women.

**Is an order under s 113 necessary?**

- [21] The Tribunal need not make an order under s 113 if another exemption under the Act applies.
- [22] Section 105(1) states that a person may do an act to promote equal opportunity for a group of people with an attribute if the purpose is not inconsistent with the Act.

[23] The applicants have referred me to previous Tribunal decisions<sup>4</sup> that indicate that an initiative that does not address some form of discrimination or unequal opportunity may not be protected by s 105.

[24] The Act does not define the phrase “equal opportunity”. Although there are no formal objects in the *Anti-Discrimination Act*, the preamble contains a statement of Parliament’s reasons for enacting the legislation. In interpreting the Act, I should have regard to Parliament’s intention, as expressed in the preamble.

[25] Parliament recognised and supported the Commonwealth’s ratification of the Convention on the Elimination of All Forms of Discrimination Against Women. It was satisfied that there was a need to extend the Commonwealth legislation. It considered that:<sup>5</sup>

- a) everyone should be equal before and under the law and have the right to equal protection and equal benefit of the law without discrimination; and
- b) the protection of fragile freedoms is best effected by legislation that reflects the aspirations and needs of contemporary society; and
- c) the quality of democratic life is improved by an educated community appreciative and respectful of the dignity and worth of everyone.

[26] Parliament signalled its intention<sup>6</sup> to:

... make provision, by the special measures enacted by the Act, for the promotion of equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity and from sexual harassment and certain associated objectionable conduct.

[27] Because Parliament expressly referenced the Convention, and it is the rationale for the *Anti-Discrimination Act*, it follows that I should consider the terms of the Convention. Article 3 states:

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

[28] Article 4.1 states:

Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

[29] Article 5 states, in part:

States Parties shall take all appropriate measures:

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<sup>4</sup> *Re: Credit Suisse Management (Australia) Pty Limited* [2012] QCAT 95; *King’s International College* [2011] QCAT 231.

<sup>5</sup> At [6].

<sup>6</sup> At [7].

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women

[30] By reference to the Convention, I consider that s 105 should be read expansively. If an act promotes equal opportunity, if it ensures the full development and advancement of women, if it accelerates de facto equality between men and women, if it assists to eliminate the idea of stereotyped roles for men and women, then it is protected by s 105 and the Tribunal need not exercise its power under s 113.

[31] Section 7D *Sex Discrimination Act* 1984 (Cth) although in slightly different terms (following the wording of the Convention more closely), has the same intention. The Federal Court of Australia took a similar approach to the operation of that section<sup>7</sup>:

The phrase "special measures", and the provision that a "special measure" is not discriminatory (subs 7D(2)), cannot be understood without recognising that the SDA is implementing the express wording of the Convention in this regard or without recognising the context, object and purpose of the Convention. "Special measure", as a phrase construed according to its plain or ordinary meaning means a measure which is exceptional, out of the ordinary or unusual.

...

A "special measure" as referred to in s 7D, and as construed by reference not only to the ordinary meaning of words repeated from the Convention, but also by reference to the context, object and purpose of the Convention is one which has as at least one of its purposes, achieving genuine equality between men and women. The phrase "special measure" is wide enough to include, what is known as, affirmative action. A special measure may on the face of it be discriminatory but to the extent that it has, as one of its purposes, overcoming discrimination, it is to be characterised as non-discriminatory. Without reference to the legislative history and the Convention, it would not necessarily be easy to appreciate the characterisation of a "special measure" as non-discriminatory when s 19 contains explicit prohibitions against discrimination in the workplace.

[32] The applicants' proposal is a step towards the full development and advancement of women. Although, technically, women have an equal opportunity to work in underground mining, the applicants' proposal is designed to address the historical prohibition on women working underground. In that way, the proposal is designed to accelerate de facto equality between men and women and eliminate the idea of stereotyped roles for men and women. The proposal is an act to promote equal opportunity for a group of people with an attribute – females. The proposal is protected by s 105 and I do not need to exercise my discretion under s 113.

[33] The application is, therefore, refused.

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<sup>7</sup> *Jacomb v Australian Municipal Administrative Clerical and Services Union* [1984] FCA 1250 at [42], [44]