

CITATION: *Surtie Enterprises Pty Ltd ATF The Surtie Enterprises Unit Trust* [2017] QCAT 323

PARTIES: Surtie Enterprises Pty Ltd ATF The Surtie Enterprises Unit Trust

APPLICATION NUMBER: ADL049-17

MATTER TYPE: Anti-discrimination matters

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Member Traves**

DELIVERED ON: 19 September 2017

DELIVERED AT: Brisbane

ORDERS MADE: **1. Surtie Enterprises Pty Ltd ATF The Surtie Enterprises Unit Trust is exempt from the application of sections 7(f), 45, 46, 76, 77 and 81, 82 and 83 of the *Anti-Discrimination Act 1991* (Qld) for the period of five (5) years in respect of its activities in relation to the property known as Greenbank Gardens Village situated at 3651 Mount Lindsay Highway, Park Ridge in the State of Queensland.**

CATCHWORDS: HUMAN RIGHTS – DISCRIMINATION LEGISLATION – GROUNDS OF DISCRIMINATION – DISCRIMINATION ON BASIS OF AGE – where manufactured homes park restricted to residents over 50 years – whether exemption necessary given s 104 – whether discretion to grant exemption should be exercised under s 113

Acts Interpretation Act 1954 (Qld), s 14A
Anti-Discrimination Act 1991 (Qld), s 7, s 45, s 46, s 75, s 76, s 81, s 82, s 83, s 104, s 113

Body Corporate for Village Green (Caloundra) [2015] QCAT 101
Commissioner for Equal Opportunity v ADI Limited [2007] WASCA 261

Fraser Coast Regional Council v Walter Elliott Holdings Pty Ltd [2016] QCA 19
J & D Richards Developments Pty Ltd [2005] QADT 13
Opinion re: Lake Sherrin Home for the Aged Pty Ltd [2003] QADT 2.
Re Caloundra Gardens Village Body Corporate Committee [2012] QCAT 98

APPEARANCES:

The hearing took place on the papers under s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

REASONS FOR DECISION

Introduction

- [1] The applicant, Surtie Enterprises Pty Ltd as trustee for the Surtie Enterprises Unit Trust, owns the land on which Greenbank Gardens Village is located.
- [2] Greenbank Gardens is a residential park for manufactured homes operated in accordance with the *Manufactured Homes (Residential Parks) Act 2003* (Qld). Greenbank Gardens is located in Park Ridge and provides housing for persons aged over 50 years. The land is owned by the applicant and the manufactured homes by the residents. The residents enter into site agreements with the applicant which provides them with specific sites in the village. The village currently has 214 sites and approximately 330 residents.
- [3] Restricting the age of residents at Greenbank Gardens is discrimination based on age.¹ It may be an unlawful discrimination in the disposition of an interest in land² and/or the provision of accommodation.³ As Greenbank Gardens provides recreational facilities including, for example, a bowling green and library it may also constitute discrimination in the provision of goods and services.⁴
- [4] Under s 113 of the Act however, the Queensland and Administrative Tribunal can, on application, exempt a person, people or class of people from the operation of a specified provision of the Act.
- [5] Accordingly, Surtie Enterprises Pty Ltd as trustee for the Surtie Enterprises Unit Trust, has applied under s 113 for an exemption from the following provisions:
- a) s 7(1)(f) (Discrimination on the basis of age);

¹ *Anti-Discrimination Act 1991* (Qld), s 7(f).

² *Anti-Discrimination Act 1991* (Qld), s 77.

³ *Anti-Discrimination Act 1991* (Qld), s 82.

⁴ *Anti-Discrimination Act 1991* (Qld), s 46.

- b) s 45 and s 46 (Discrimination on the basis of goods and services);
 - c) s 76 and s 77 (Discrimination on the basis of disposition of land area); and
 - d) s 81 to s 83 (Discrimination on the basis of pre-accommodation and accommodation area).
- [6] The Tribunal has previously provided an exemption to the applicant from the operation of s 7(f), s 45, s 46, s 76, s 77, s 81, s 82 and s 83. The exemption was for a period of five years and expired on 14 August 2017.⁵ At the time of that application, in August 2012, the Anti-Discrimination Commission had no objection to the exemption being granted. This time, however, the Commission has raised a number of concerns.
- [7] Section 113(2) provides that before deciding an application, the Tribunal must give the commissioner a copy of the application and material filed in support of the application and have regard to any submission made by the commissioner on the application, including the process for considering it.
- [8] On 31 May 2017, the Tribunal wrote to the commissioner enclosing the application and supporting material and requested the commissioner advise as to:
- a) whether there are any current complaints before the Commission involving Surtie Enterprises Pty Ltd ATF The Surtie Enterprises Unit Trust and relating to the circumstances of the application for an exemption; and
 - b) whether you wish to make any submissions about the process for considering this application and/or the substance of the application.

Submissions by the Anti-Discrimination Commissioner

- [9] The commissioner responded on 30 June 2017. The commissioner advised that there were no current complaints against the applicant. No submissions were made regarding the process of the application. However, in relation to the application the commissioner submitted as follows:
- a) Unlike the *Retirement Villages Act* 1999 (Qld), the *Manufactured Homes (Residential Parks) Act* 2003 (Qld) does not provide that it is lawful to discriminate on the basis of age in limiting residence of older members of the community. This indicated it was not the intention of the legislature that the manufactured home park model of housing be restricted by age groups;
 - b) Exemptions under s 113 are temporary and should not be used to circumvent existing legislation or government policy;

⁵ *Re Surtie Enterprises Pty Ltd as trustee for the Surtie Enterprises Unit Trust* [2012] QCAT.

- c) Housing affordability is a national concern and there needs to be strong grounds to limit affordable housing by imposing age restrictions;
- d) Segmenting older people in separate communities is not consistent with the Commission's objective and strategic direction of promoting a fair and inclusive Queensland, where cohesion and diversity flourish;
- e) There are benefits to all age groups in intergenerational engagement, including housing;
- f) The Queensland Housing Strategy 2017-2027 has as a purpose to enhance the safety and dignity of all Queenslanders through a fair and contemporary housing system that provides a diverse range of housing options regardless of age or circumstances;
- g) Manufactured home parks are generally a more affordable housing option and should be available to people under the age of 50 years.
- h) The Tribunal should be satisfied the homes in the complex are sufficiently accessible to allow the residents to age-in-place, and that the facilities are accessible. Homes and facilities intended for older people should be designed and built to universal design standards, or at a minimum, to visitable standards.

Submissions by the applicant

[10] The applicant relied on a report from Norling Consulting Pty Ltd dated 28 September 2017. The report and the applicant's submissions can be summarised as follows:

- a) The village specifically caters for the elderly in providing low care accommodation which permits residents to live relatively independently while still providing some level of security (a resident manager is contactable at all times and there are random security patrols throughout the facility);
- b) The village has facilities which cater for the elderly, for example, a bowls club, putting green, snooker room, library recreation centre and 2 metre high perimeter security gates;
- c) The village caters for a disadvantaged sector of the community with significantly below average income;
- d) There are good social reasons for the exemption because it recognises that seniors have special needs and requirements particularly regarding accommodation;
- e) The village is located in Park Ridge which is an area popular for retiree accommodation;

- f) The exemption is consistent with earlier decisions of the Anti-Discrimination Tribunal.

Consideration

[11] Section 113 is contained within Part 5 of the Act, headed General exemptions for discrimination. Section 103 provides that it is not unlawful to discriminate with respect to a matter otherwise prohibited if an exemption in s 104 to s 113 applies.

[12] Section 104 provides:

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 this Act.

[13] All anti-discrimination legislation contains provisions, equivalent to s 104, that allow for “special measures” to ensure that persons or groups within the recognised grounds of discrimination are not prejudiced by the view being taken that the positive or special measure is discriminatory. Examples of the application of s 104 are provided. They include **restricting special accommodation** to women who have been victims of domestic violence or **to frail, older people**. (emphasis added).

[14] In *Opinion re: Lake Sherrin Home for the Aged Pty Ltd*,⁶ President Sofronoff QC considered the application of s 104 in the context of a retirement village which provided accommodation services only to people eligible for the aged pension contrary to s 81 of the Act. The President held that s 104 applied:

The provision of special accommodation solely for the aged is plainly an act for the purpose of which is to benefit the aged. Is the provision of such accommodation inconsistent with the Act? The intention of the Act is to furnish protection for persons who are vulnerable, on the ground of some attribute, to discrimination in, relevantly, the area of provision of accommodation. There can, of course, be no suggestion that persons of working age are in any way disadvantaged, on the basis of their age, in seeking and obtaining suitable accommodation. Consequently it cannot be inconsistent with the Act to provide accommodation solely for those eligible for the aged pension.⁷

[15] I agree with those observations.

⁶ [2003] QADT 2; see also *Opinion re: Senor Frogs Pty Ltd and Miacarla Pty Ltd* [2003] QADT 22; *Exemption application re: Palmpoint Pty Ltd* [2006] QADT 12.

⁷ See also *Opinion re: Senor Frogs Pty Ltd and Miacarla Pty Ltd* [2003] QADT 22; *Opinion re: Centracorp Projects Pty Ltd* [2005] QADT 11.

- [16] However, because there is some uncertainty as to whether s 104 would apply, it is preferable, from the applicant's perspective, to apply for an exemption under s 113.⁸
- [17] The granting of an exemption is discretionary. There are no express criteria for the exercise of the discretion.
- [18] A statutory discretion which has the potential to affect rights is not regarded by the courts as absolute and unfettered.⁹ The general rule is that the extent of a discretionary power is to be determined by reference to the subject matter, scope and purpose of the statute under which it arises.¹⁰
- [19] In *Commissioner for Equal Opportunity v ADI Limited*¹¹ the Western Australia Court of Appeal held:

Where the Parliament has conferred upon an administrative tribunal a discretion which is constrained only by the objects, scope and purpose of the Act conferring that discretion, the interposition by the Tribunal of a framework for the exercise of that discretion by reference to limited and particular questions, which are to be applied to every case is a course fraught with risk of error. Unless the questions posed pursuant to the self imposed framework embrace all considerations which could possibly fall within the objects, scope and purpose of the Act, by restricting itself to those questions, the Tribunal will be imposing upon itself a constraint to the exercise of the discretion which was not imposed by the Parliament and will, to that extent, be at risk of error.¹²

- [20] That having been said, a number of decisions give some guidance to the *considerations* which may be relevant. They include whether the exemption is necessary;¹³ whether it is appropriate and reasonable to grant the exemption;¹⁴ and whether the exemption is in the community interest.¹⁵
- [21] The exercise of the discretion involves balancing the circumstances in which an exemption might be granted against the general intent of the Act, that is, to prevent discrimination. However, it is important to bear in mind that the exemption provisions operate as part of the Act, and proper

⁸ *Exemption application re: J & D Richards Developments Pty Ltd* [2005] QADT 13, [28]-[32].

⁹ *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 368 (Mason J); *Padfield v Minister for Agriculture Fisheries & Food* [1968] AC 997, 1030 (Lord Reid).

¹⁰ *Le v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 875, [58] (French J).

¹¹ [2007] WASCA 261.

¹² *Ibid*, [48].

¹³ *Exemption application re: Boeing Australia Holdings Pty Limited and others* [2003] QADT 21, [13].

¹⁴ *Stevens v Fernwood Fitness Centres Pty Ltd* (1996) EOC 92-782.

¹⁵ *Body Corporate for Village Green (Caloundra)* [2015] QCAT 101; *Exemption application re: Boeing Australia Holdings Pty Limited and others* [2003] QADT 21, [12.2]; *Minister for Education and Commissioner for Equal Opportunity and Ors* (1987) EOC 92-198.

effect should be given to them. As Martin CJ (with whom the others agreed) said in *Commissioner for Equal Opportunity v ADI Limited*:¹⁶

[69] So, when regard is had to the specific exceptions to Pt III of the Act, and the general exceptions to the Act in Pt VI, it is clear that the legislature has taken the view that conduct which would otherwise be prohibited because it is discriminatory should nevertheless be permitted because it can be justified by reference to a variety of considerations which are extraneous to the anti-discriminatory objects of the Act, and in particular the objects specified in s 3 of the Act.

[70] It follows that when the Tribunal comes to consider an application for exemption from the operation of the Act, it can and should take into account the fact that the legislature has recognised that there are some circumstances in which discriminatory conduct can be justified by reference to considerations which are extraneous to the anti-discriminatory objects of the Act, and that it has conferred upon the Tribunal the power to identify circumstances beyond those specified in the Act, in which conduct which is otherwise discriminatory should nevertheless be lawful.

[22] His Honour continued:

[71] This is why I have expressed the view that the concession that the applicants could not 'invoke the spirit' of any of the exceptions in the Act was not properly made or accepted by the Tribunal. In my view, when regard is had to the structure of the Act, and the particular exemption provisions to which I have referred, it is clear that the 'spirit' of those exceptions extends to a broad range of considerations which extend beyond the objects of the Act relating to the discouragement of discrimination. And there is, in my view, a clear parallel between the specific exception provided by s 52 of the Act, and the exemptions sought in this case. At least some of the conduct legitimised by virtue of s 52 of the Act will be conduct undertaken because of a recognition that some rights or functions should only be performed by those who owe allegiance to a Australia as a result of their nationality. The applications for exemption in this case have been made because one of Australia's allies, the United States, takes the view that persons who owe allegiance to a country other than Australia or the United States should not be permitted to access confidential information bearing upon the defence capabilities of Australia and our allies. It follows, in my view, that the exemptions sought in this case are entirely consistent with 'the spirit' of the exception provided by s 52 of the Act. However, it will be apparent from the views I have already expressed that, in my view, it is not necessary for such a particular connection to be identified before the grant of an exemption can be justified.

[72] In summary, in my opinion when exercising the discretion conferred upon it by s 135 of the Act, it is consistent with the objects, scope and purpose of the Act, for the Tribunal to take into account any considerations which it considers would justify the commission of

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[2007] WASCA 261.

conduct which would otherwise be unlawful under the Act. So, provided there is a rational basis for the discriminatory conduct, it will fall to the Tribunal to determine whether the interests to be served by permitting that conduct outweigh the detriment which flows from discriminatory conduct. Often the interests properly considered by the Tribunal in that context will be public interests, but they need not be so. As can be seen, for example, from s 50 of the Act, private interests (such as the interests of the owner of the Chinese restaurant in the example to which I have referred) have been recognised by the legislature as providing a sufficient justification for the permission of conduct which would otherwise be unlawful.

- [23] It follows, in my opinion, that in exercising the discretion the Tribunal may take into account any considerations which it considers relevant to justify conduct which would otherwise be unlawful under the Act, providing these considerations are consistent with its purpose, scope and objects which include the existence of exemptive provisions.
- [24] In order to establish an exemption is necessary, an applicant need only show an arguable case that the circumstances might constitute discrimination to which the Act might apply.¹⁷ I find that the exemption is necessary in circumstances where the application of s 104 in this case has not been argued or determined. In deciding whether to exercise my discretion, including consideration of whether the grant of the exemption is in the community interest, appropriate and reasonable, I make the following observations.
- [25] I commence with the obvious point that elderly people elect to stay at this facility and are not compelled to stay or to remain. I infer from that that they see advantage in living with others of a similar age in a facility designed for persons of that age. The facilities and services at Greenbank Gardens include a gymnasium, two swimming pools, a workshop, tennis court, bowls club house, putting green, bowling green, snooker room, net driving range, recreation centre, library and security gates.¹⁸ They are facilities and services which specifically cater for the needs of elderly people and encourage greater social interaction among residents which, the applicant submits, and I accept, is often desired by older persons.¹⁹
- [26] I also infer that there is a demand from some in the community for facilities of this nature and that this demand will increase. The evidence of the applicant is that the population in the catchment area for Greenbank Gardens which includes Browns Plains, Boronia Heights-Park Ridge, Regents Park-Heritage Park, Hillcrest, Crestmead and Marsden, has grown substantially since 2006.²⁰ Significantly, the evidence also shows a very strong rate of growth in the proportion of the catchment population aged over 50 years, from 21.2% in 2006 to 26.2% in 2016.²¹ This rate of

¹⁷ *Exemption application re: Boeing Australia Holdings Pty Limited and others* [2003] QADT 21, [13.1].

¹⁸ Report by Norling Consulting Pty Ltd dated 27 July 2017, 2.

¹⁹ *Ibid.*, 1.

²⁰ *Ibid.*, 4.

²¹ *Ibid.*

growth has been predicted to continue to increase, reaching 31.6% by 2036.²²

- [27] The applicant submits, and I accept, that Greenbank Gardens specifically caters for the elderly, providing low care accommodation while providing for a range of services and a level of security which, I infer, might not be so readily provided if the facility was to cater for persons of all ages. The evidence of the applicant was that the aged population is a disadvantaged sector of the community with significantly below average income levels.²³ Further, that more than half of persons aged over 55 years have a weekly income of less than \$500 a week.²⁴ I accept that the aged community is a community that has a particular need for low cost accommodation and this facility responds to that need.
- [28] Greenbank Gardens is also an established facility catering specifically for persons over 50 years. It has been operating on that basis at least since 2012 when the previous exemption was granted. It was suggested by Morrison JA in *Fraser Coast Regional Council v Walter Elliott Holdings Pty Ltd*²⁵ that this was a basis for distinguishing the decision in *Re Body Corporate for Village Green (Caloundra) No 1 CTS 22630*²⁶ where the facility in question had never been established or operated as a retirement village.
- [29] I find that the provision of this facility only for the elderly facilitates the provision of accommodation and services at low cost, and recognises the special needs of elderly people. In all of these manners it performs and constitutes a community benefit: the provision of accommodation and services at relatively low cost for a sector of the community with significantly below average income and with special age related needs.
- [30] I have considered the submissions of the Commission. I note that, unlike the *Retirement Villages Act 1999 (Qld)*,²⁷ the *Manufactured Homes (Residential Parks) Act 2003 (Qld)* does not provide that it is lawful to discriminate on the basis of age. However, that does not, in my view, lead to a conclusion that the legislation intended manufactured homes could never be restricted by age group. The Act is simply silent on the point. Whether there should be an exemption depends on the proper effect of the *Anti-Discrimination Act 1991 (Qld)*.
- [31] The Commission submits that exemptions under the Act are “temporary” and should not be used to circumvent existing legislation or government policy. An exemption may be granted for up to five years.²⁸ Following that, a further exemption may be sought.²⁹ The legislative intention is to

²² Ibid, 5.

²³ Ibid, 6.

²⁴ Ibid.

²⁵ [2016] QCA 19, [127] - [135].

²⁶ [2015] QCAT 101.

²⁷ *Retirement Villages Act 1999 (Qld)*, s 26.

²⁸ *Anti-Discrimination Act 1991 (Qld)*, s 113(6)(c).

²⁹ *Anti-Discrimination Act 1991 (Qld)*, s 113(7).

have the exemption effectively reviewed at least every five years. This does not mean the exemption is “temporary” in the way suggested. The provisions permitting an exemption are part of the legislation and should be read in a manner consonant with the legislation as a whole. I do not find that “government policy” should decide the outcome of the application for exemption; the proper interpretation of the Act should not depend on government policy as it may be from time to time.

[32] The affordability of housing is of course a matter of national concern but I am not prepared to find that there needs to be “strong grounds” to limit affordable housing by imposing age restrictions. To do so would be to inappropriately constrain the discretion which must be exercised in accordance with the intention and objects of the Act. Moreover, the facility does provide affordable housing albeit for the elderly, and therefore plays its part in achieving such an objective.

[33] The Commission made submissions against the application on grounds generally concerning the desirability of integration of all age groups in housing, particularly low cost housing. I accept that there may be benefits in the integration of age groups in low cost housing. However, that there may be so does not preclude there being advantages also in having some facilities in which elderly people alone are permitted. There is, in my view, a community benefit in providing low cost housing for elderly people who, I am prepared to find, may find comfort in sharing specifically designed facilities with other people of like age. The Act in s 104 refers by example expressly to special accommodation for “frail, older people”; a facility such as the subject facility provides for elderly people and I find the grant of the exemption pursuant to s 113 to be consistent with the purpose and objects of the Act.³⁰

[34] Finally, I note the observations of President Sofronoff QC in *Opinion re: Lake Sherrin Home for the Aged Pty Ltd*³¹ and observe that if such a facility would fall within the defence provided by s 104, it is not a surprising or illogical step to find that a like facility should be entitled to an exemption.

Conclusion

[35] The exemption is sought for a period of five years.

[36] I am of the opinion that it would be appropriate and reasonable to grant the exemption in the terms set out above and I hereby do so.

³⁰ *Acts Interpretation Act 1954* (Qld), s 14A.
³¹ [2003] QADT 2.