

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Terrace-Haven Pty Ltd* [2022] QCAT 23

PARTIES: **TERRACE-HAVEN PTY LTD**
(applicant)

APPLICATION NO: ADL062-20

MATTER TYPE: Anti-discrimination matters

DELIVERED ON: 14 January 2022

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Sammon

ORDERS: 1. **For a period of five years from the date of this decision, under s 113 of the *Anti-Discrimination Act* 1991 (Qld), Terrace-Haven Pty Ltd (Terrace-Haven), is exempt from the following provisions of the *Anti-Discrimination Act* for the purposes described below:**

(a) **Section 7(f), so that Terrace-Haven may lawfully place a restriction on the age of individuals who:**

(i) **purchase a lot in the Terrace-Haven Complex;**

(ii) **rent a unit in the Terrace-Haven Complex; and**

(iii) **reside in a lot in the Terrace-Haven Complex,**

such that only individuals over the age of 50 may purchase a lot, rent a unit or reside in a lot at the Terrace-Haven Complex.

(b) **Sections 45 and 46, so that Terrace-Haven may lawfully place a restriction on the age of individuals who do, and might in the future, receive goods and services at the Terrace-Haven Complex.**

(c) **Sections 76 and 77, so that Terrace-Haven may lawfully place a restriction on the age of individuals who wish to purchase a lot in the Terrace-Haven Complex. That is, a restriction that residents may only sell**

their lot in the Terrace-Haven Complex to a person over the age of 50.

(d) Sections 81, 82 and 83, so that Terrace-Haven may lawfully place restrictions on the age of individuals who:

(i) reside in a unit in the Terrace-Haven Complex; or

(ii) rent accommodation in the Terrace-Haven Complex,

such that only individuals over the age of 50 may reside in or rent a unit at the Terrace-Haven Complex.

CATCHWORDS:

HUMAN RIGHTS – DISCRIMINATION – LEGISLATION – GENERALLY – application for exemption from application of *Anti-Discrimination Act 1991* (Qld) – age limitation on retirement village

Acts Interpretation Act 1954 (Qld), s 14D

Anti-Discrimination Act 1991 (Qld), s 6, s 7, s 45, s 46, s 76, s 77, s 81, s 82, s 83, s 104, s 113, s 174A, s 174C, schedule 1

Body Corporate and Community Management Act 1997 (Qld), s 180

Health and Other Legislation Amendment Act 2019 (Qld)

Housing Legislation (Building Better Futures)

Amendment Act 2017 (Qld)

Housing Legislation Amendment Act 2021 (Qld)

Human Rights Act 2019 (Qld), s 5, s 7, s 8, s 9, s 13, s 15, s 48, s 63, schedule 1

Manufactured Homes (Residential Parks) Act 2003 (Qld)

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 164

Retirement Villages Act 1988 (Qld)

Retirement Villages Act 1999 (Qld), s 5, s 7, s 8, s 10, s 14, s 16, s 26, s 63, s 63A, s 63B, s 70C, s 70D, s 70E, s 84, s 86A, s 111, s 171A

Body Corporate for Village Green (Caloundra) No. 1 CTS [2015] QCAT 101

Burleigh Town Village Pty Ltd [2017] QCAT 161

Downer EDI Mining [2013] QCATA 276

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

Fraser Coast Regional Council v Walter Elliott Holdings Pty Ltd [2016] QCA 19

Ghostgum Developments Pty Ltd [2015] QCAT 500
Miami Recreational Facilities Pty Ltd [2017] QCAT 253
Miami Recreational Facilities Pty Ltd [2021] QCAT 378
Opinion re: Lake Sherrin Home for the Aged Pty Ltd
 [2003] QADT 2
Palmpoint Pty Ltd [2016] QCAT 419
Re Caloundra Gardens Village Body Corporate
Committee [2012] QCAT 98
Savannah FNQ Developments Pty Ltd [2016] QCAT 141
Seachange (Land) Pty Ltd and Others [2016] QCAT 519
Sundale Limited [2019] QCAT 83
Surtie Enterprises Pty Ltd ATF The Surtie Enterprises
Unit Trust [2017] QCAT 323

**APPEARANCES &
REPRESENTATION:**

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

Introduction

- [1] Terrace-Haven Pty Ltd (Terrace-Haven) has applied to the Tribunal for exemption from application of the *Anti-Discrimination Act* 1991 (Qld) ('the AD Act') under s 113 of that Act. The purpose of the exemption would be to allow it to continue to operate a retirement village with an age restriction for residents of the retirement village, for a period of five years.¹
- [2] For reasons which follow, my decision is to grant the exemption sought.

Background – legislative basis for the application

- [3] One of the purposes of the AD Act, contained in s 6(1), is to:
- ... promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity, including work, education and accommodation.
- [4] Section 6(2) provides that the purpose is to be achieved by prohibiting discrimination that is:
- (a) on a ground set out in chapter 2, part 2, in which s 7 lists attributes on which the Act prohibits discrimination, including age;² and
 - (b) of a type set out in part 3 (direct or indirect discrimination); and
 - (c) in an area of activity set out in chapter 2, part 4, which relevantly includes s 45 and s 46 (Discrimination in the goods and services area), s 76 and s 77 (Discrimination in the disposition of land area), and ss 81-83 (Discrimination in the accommodation area);

¹ Annexure A attached to the application to the Tribunal, paragraph 3.1.

² Section 7(g).

unless an exemption set out in chapter 2, part 4 or 5 applies.

- [5] Section 113(1) of the AD Act, contained in chapter 2, part 5 of the AD Act, is one such exemption and it provides that the Tribunal:

may grant an exemption to [an applicant] from the operation of a specified provision of the Act.

- [6] The areas of activity which apply to Terrace-Haven's application are the areas listed in [4](c) above. In more detail, those areas are as follows.

- [7] Section 45(1) provides that a person must not discriminate in the goods and services area if the prohibition in s 46 applies. Relevantly, s 46(1) is as follows:

46 Discrimination in goods and services area

(1) A person who supplies goods or services³ (whether or not for reward or profit) must not discriminate against another person—

- (a) by failing to supply the goods or services; or
- (b) in the terms on which goods or services are supplied; or
- (c) in the way in which goods or services are supplied; or
- (d) by treating the other person unfavourably in any way in connection with the supply of goods and services.

- [8] Section 76 states that a person must not discriminate in the 'disposition of land area' if the prohibition in s 77 applies. Section 77 is as follows:

77 Discrimination in disposition of land⁴ area

A person must not discriminate against another person—

- (a) by failing to dispose of an interest in land to the other person; or
- (b) in the terms on which an interest in land is offered to the other person.

- [9] Finally, s 81 requires that a person must not discriminate in the 'accommodation⁵ area', relevantly, if a prohibition contained in ss 82-83 applies. The latter provisions are as follows:

82 Discrimination in pre-accommodation area

A person must not discriminate against another person—

- (a) by failing to accept an application for accommodation; or
- (b) by failing to renew or extend the supply of

³ The expression 'goods and services' is not defined in the AD Act. It will have its usual meaning, which as far as this application is concerned, will extend to provision of goods and services for residents in a retirement village.

⁴ The expression 'disposition of land' is also not defined in the AD Act, but its meaning is made clear by the scope of s 77.

⁵ The term 'accommodation' is relevantly defined in the Dictionary (schedule 1) of the AD Act to include a house or flat.

- accommodation; or
- (c) in the way in which an application is processed; or
- (d) in the terms on which accommodation is offered, renewed or extended.

83 Discrimination in accommodation area

A person must not discriminate against another person—

- (a) in any variation of the terms on which accommodation is supplied; or
- (b) in denying or limiting access to any benefit associated with the accommodation; or
- (c) in evicting the other person from the accommodation; or
- (d) by treating the other person unfavourably in any way in connection with the accommodation.

- [10] In its own terms, s 113 does not contain criteria for the exercise of the discretion of the Tribunal to grant an exemption. However, in a decision in an application also under s 113, the President of the then Anti-Discrimination Tribunal considered that there were a number of criteria to be applied in considering an application under that provision.⁶
- [11] Firstly, the Tribunal must be satisfied that the exemption is necessary to achieve the purposes of the proposal for which the exemption is sought.⁷ In the structure of the AD Act, chapter 2, part 5, that means that there are no other general exemptions available that would apply to the proposal concerned. For example, in *Boeing*, the President considered whether the general exemption under s 106 of the AD Act would apply, as to whether the relevant proposal was authorised under statutory authority.
- [12] Secondly, application of the *Boeing* criteria would mean that the Tribunal must be satisfied that it would be appropriate and reasonable to grant the exemption.⁸ Other matters that may be relevant in considering an exemption include:
- (a) whether there are any non-discriminatory ways of achieving the objects or purposes for which the exemption is sought;
 - (b) whether the exemption is in the community interest;
 - (c) whether any other persons or bodies other than the applicant supports the application.

The *Boeing* criteria have been followed by the Tribunal in many cases on s 113.⁹

- [13] Section 174C(1) provides that if the AD Act confers jurisdiction on the Tribunal in relation to a matter, the Tribunal may exercise the powers conferred on it under the AD Act or the ‘relevant tribunal Act’, defined in the relevant sense to mean the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (‘the QCAT Act’).¹⁰

⁶ *Exemption application re: Boeing Australia Holdings Pty Limited and others* [2003] QADT 21, President Sofronoff QC at [12.2]-[13.1].

⁷ *Boeing*, [13.1].

⁸ *Boeing*, [12.2].

⁹ For example, by the QCAT Appeal Tribunal in *Downer EDI Mining* [2013] QCATA 276 and in *Sundale Limited* [2019] QCAT 83.

¹⁰ The Dictionary of the AD Act.

- [14] Since the *Boeing* decision, the *Human Rights Act* 2019 (Qld) ('HR Act') commenced operation, on 1 January 2020. I will consider the application of the HR Act below.

The Terrace-Haven application in more detail

- [15] Terrace-Haven is the 'scheme operator' of Peninsula Terraces and Peninsula Haven Retirement Complex (the Complex) located at Redcliffe. It consists of 44 units. It currently operates as a:

- (a) registered retirement village scheme under the *Retirement Villages Act* 1999 (Qld) ('the RV Act'); and
- (b) body corporate registered as a Community Titles Scheme under the *Body Corporate and Community Management Act* 1997 (Qld) ('the Body Corporate Act').

The Complex has been operating as a retirement village scheme under the RV Act (and the predecessor Act, the *Retirement Villages Act* 1988 (Qld)) for 35 years. All residents at the Complex are over 50 years of age and each resident also owns their own freehold home within the Complex.¹¹

- [16] Section 5(1) of the RV Act defines a 'retirement village' to be:

premises where older members of the community or retired persons reside, or are to reside, in independent living units or serviced units, under a retirement village scheme.

- [17] A 'retirement village scheme' is defined in s 7 of the RV Act, in summary to be a scheme under which a person:

- (a) enters into a 'residence contract';¹² and
- (b) in consideration for paying an 'incoming contribution'¹³ under the residence contract, acquires a right to reside in a retirement village; and
- (c) on payment of the relevant charge, acquires a right to receive services in relation to the retirement village.

- [18] A 'retirement village scheme operator' is the person who controls the scheme's operation.¹⁴

- [19] Importantly for the purposes of this application, s 26 of the RV Act provides that age restrictions on residence in a retirement village is not unlawful under the AD Act, in the following terms:

26 Certain age restrictions on residence not unlawful

Despite the *Anti-Discrimination Act* 1991, it is not unlawful for a scheme operator to discriminate on the basis of age if the discrimination merely limits residence in a retirement village to older members of the community and retired persons.

¹¹ Annexure A attached to the application to the Tribunal, paragraph 5.1.

¹² Defined in s 10 of the RV Act.

¹³ Defined in s 14, in summary, to be an amount payable by a person under a residence contract to secure a right to reside in a retirement village, but does not include a recurrent payment for rent, fees or charges.

¹⁴ Section 8 of the RV Act.

- [20] The RV Act does not define a particular age for the term 'older members of the community'. I think it may be accepted that persons aged 50 or older fall within the meaning of the expression 'older members'. On its face, s 26 would have the effect that an application for exemption under s 113 of the AD Act need not be made, and would therefore be unnecessary, if all Terrace-Haven wanted to do, was to continue to operate a retirement village under which residence is limited to persons over the age of 50.
- [21] However, the reason Terrace-Haven seeks an exemption under s 113 is because it contends that amendments made to the RV Act in recent years, especially concerning a 'buyback' scheme will impose a significant financial burden on the residents if the Complex is to continue as a registered retirement village scheme. In summary, Terrace-Haven says that the buyback scheme requires it as scheme operator to buy back a resident's unit if it remains unsold for 18 months from termination of a residence contract. Since Terrace-Haven operates as a body corporate, and is a small-scale operator consisting of 44 residents, a requirement to buy back an unsold unit, would impose a significant financial burden on each resident.¹⁵

The effect of amendments to the RV Act

- [22] I agree with the Terrace-Haven description of the effect of the amendments to the RV Act introducing a buyback scheme. The *Housing Legislation (Building Better Futures) Amendment Act 2017* (Qld) ('the 2017 Amendment Act') amended provisions of the then RV Act about a former resident's 'exit entitlement'.¹⁶ New s 63 provided that the scheme operator must pay the exit entitlement of the former resident to the person entitled to receive it, on or before the earliest of one of three potentially applicable days:
- (a) the day it must be paid under the former resident's residence contract;
 - (b) the day that is 14 days after the settlement day;¹⁷
 - (c) the day that is 18 months after the termination date or any later day fixed by the tribunal by an order under section 171A.¹⁸

Failure to comply with new s 63 is an offence with a maximum penalty of 540 penalty units.

- [23] Terrace-Haven submitted that there was uncertainty about whether the then buyback provisions extended to freehold retirement village units, such as the Complex.¹⁹ Subsequently, the RV Act was amended by the *Health and Other Legislation Amendment Act 2019* (Qld) ('the HOLA Act'). Terrace-Haven submitted that Act amended the RV Act to extend the buyback provisions to freehold retirement village units.

¹⁵ Annexure A, paragraphs 8.2-8.6.

¹⁶ An 'exit entitlement' is defined in s 16 of the current RV Act, to be an amount that a scheme operator may be liable to pay to a former resident under a residence contract arising from the resident ceasing to reside in the unit to which the contract relates, or settlement of sale of the right to reside in a unit. That definition has been unchanged since 2006.

¹⁷ For sale of the relevant entitlement.

¹⁸ Section 171A conferred on this Tribunal the power to extend the time in which the scheme operator must pay the exit entitlement.

¹⁹ Annexure A, paragraph 6. 3.

- [24] The HOLA Act introduced s 63A into the RV Act, which specifically applies to a former resident's residence contract based on a freehold interest in an accommodation unit.²⁰ Section 63A does not use the expression 'buyback', but the essence of what Terrace-Haven describes as the buyback scheme is contained in s 63A(2) which provides that:

- (2) The scheme operator must enter into a contract under this section to purchase the former resident's freehold property, and complete the purchase under this section, unless—
 - (a) the freehold property is sold to a person other than the scheme operator before the day the scheme operator is required to complete the purchase; or
 - (b) the scheme operator has a reasonable excuse.

Again, failure to comply with this requirement is an offence with a maximum penalty of 540 penalty units.

- [25] The required timing of the buyback is contained in s 63B(3), which is that the scheme operator must complete the purchase under the contract by the latest of three possible days:
- (a) 18 months after the termination date;
 - (b) a date under specific circumstances if the former resident has died; or
 - (c) a day fixed by the Tribunal under an extension order.
- [26] Terrace-Haven submitted that the relevant Parliamentary Committee which reported into the HOLA Act amendments estimated that there were only 2,201 freehold retirement village units in Queensland, which represented 7.4% of all units for retirement villages. It submitted that approximately 92.6% of units operate on a licence/lease model (which can be expected to have a lower value of exit entitlement compared to a freehold unit).²¹ Terrace-Haven submitted that of the 7.4% of villages that operate a freehold/ownership model, most of those retirement villages are operated by larger scheme operators. Only a very small number of retirement villages in Queensland, seven villages in all, or approximately 610 units, are resident-owned and operated (as in the case of the Complex).²²
- [27] Terrace-Haven submitted that as one of the seven resident operated retirement villages remaining in Queensland, to meet the buyback obligation it will need to levy each resident an amount relative to the valuation of the unit being sold. It submitted this will impose a significant financial burden on the residents, and is one of the key reasons why remaining as a retirement village scheme has become untenable for residents of the Complex.²³
- [28] An example given by Terrace-Haven of operation of the buyback scheme is as follows:
- (a) if the scheme operator is required to buy back Unit 1 and the operator has obtained a valuation of Unit 1 to the value of \$240,000; and
 - (b) there are 43 units/residents remaining within the Complex; and

²⁰ Section 63A(1).

²¹ Annexure A, paragraphs 6.6 and 6.7.

²² Annexure A, paragraph 6.8.

²³ Annexure A, paragraph 8.4.

- (c) the 43 unit holders/residents are required to fund the buyback of Unit 1 in accordance with the buyback provisions; and
- (d) it is decided that the cost of buying back the unit will be split evenly between the remaining unit owners,

each resident, under that example, would be required to pay a sum of \$5,581.00 for Unit 1. Terrace-Haven submits that the residents would receive no financial benefit or otherwise for doing so. It does seem to me that in the example, the residents would obtain at least a share in ownership of Unit 1, which then remains able to be sold and the outlay reimbursed. However, I accept the proposition that there would be at least a requirement at a point in time for each resident to outlay the amount given in the example before the unit is again sold.

- [29] I infer from the point made by Terrace-Haven about most freehold retirement villages being operated by larger operators, is that they have the ability to absorb buyback costs to a greater degree than small-scale operators such as Terrace-Haven.
- [30] In addition, Terrace-Haven submits that potential residents may be deterred from buying a freehold unit knowing that they would be required to help fund any future buybacks.²⁴
- [31] Finally, Terrace-Haven submits that one of the additional effects of the amendments to the RV Act (each inserted by the 2017 Amendment Act) is to impose 'significant additional administrative obligations', including:
 - (a) a new obligation requiring the operator to keep its general services charges funds separate from other village funds (for example, other retirement village funds and body corporate funds) as these are statutory funds that are to be held by the village to cover relevant costs associated with the operation of the village;²⁵
 - (b) there is a new obligation on the operator to provide any prospective residents with a suite of 'disclosure documents';²⁶
 - (c) an additional obligation for the operator to establish, maintain and operate a website for the retirement village including so that disclosure materials can be displayed to prospective residents.²⁷
- [32] Terrace-Haven submits that these amendments impose onerous obligations on the residents of the Complex to comply with time-consuming and technical administrative tasks that would ordinarily be performed by a paid retirement village manager. The submissions explain that Terrace-Haven as the scheme operator, operates only through the residents voluntarily nominating themselves as officeholders for a certain term.²⁸ Terrace-Haven submits that the administrative tasks required are not tasks the elderly resident volunteers of the Complex have the time, experience or qualification to perform.

²⁴ Annexure A, paragraph 8.6.

²⁵ Section 111 contained in part 5, division 9. Part 5, division 7 of the RV Act regulates the operation of the general services charges fund generally.

²⁶ Section 84 of the RV Act.

²⁷ Section 86A of the RV Act.

²⁸ Annexure A, paragraph 5.2.

- [33] The submissions go on to say that unlike many of the larger for-profit and not-for-profit retirement village scheme operators in Queensland, Terrace-Haven does not have any paid employees to assist with carrying out its administrative obligations, nor does it have access to significant capital to discharge its financial obligations. The body corporate part of the Terrace-Haven structure does have a paid village manager who manages the body corporate on behalf of the residents. The village manager has provided a quote to Terrace-Haven to manage the operations of the Complex as a retirement village scheme. However, the residents are unable to meet the additional cost and have not engaged the village manager as a retirement village manager.²⁹
- [34] The Terrace-Haven submissions are verified by the affidavits of Susan-Jane McCabe and Marilyn Gearing filed with the application. Ms McCabe is a resident of the Complex and as at the date of the affidavit, volunteered as a board member of Terrace-Haven as scheme operator, and as the secretary of the body corporate committee for the Complex.
- [35] Ms Gearing is also a resident at the Complex and together with her husband has the management rights to the body corporate aspect of the Complex.
- [36] Ms McCabe deposes that the residents of the Complex are older members of the community, most of whom are retired and many of whom receive income only from the aged pension, and in the case of Ms McCabe, the disability support pension.³⁰ In particular, Ms McCabe deposes to the emotional stress caused to the residents by the potential financial imposition of buyback and administrative costs on the residents of the Complex.³¹
- [37] Ms McCabe deposes to the longevity of residents at the Complex as follows:
- There are quite a few residents who have owned a unit at the ... Complex for a long time. Residents in at least three units have been here over 20 years. Overall, the makeup of the village has a majority of longstanding residents with most residents having lived at Terrace Haven for over 10 years.³²
- [38] In her affidavit,³³ Ms McCabe deposes to how, as a result of the amendments to the RV Act, and their effects on the residents, on 19 June 2020, the residents (overwhelmingly) resolved that:
- (a) Terrace-Haven deregister as a retirement village scheme under the RV Act;
 - (b) Terrace-Haven would apply to the Tribunal to seek exemptions for:
 - (i) an 'age exemption', so that the residents can lawfully place age restrictions on who may reside in the units in the Complex;
 - (ii) a 'rental exemption' so that the residents can enforce a requirement that only the owner of a unit (and their spouse) may occupy it.
- [39] That explains why this application was made to the Tribunal. Of course, if Terrace-Haven deregisters as a retirement village scheme, it will lose the protection of s 26 of

²⁹ Annexure A, paragraph 10.3.

³⁰ Paragraph [15] of her affidavit.

³¹ Paragraphs [77]-[83] of her affidavit.

³² Paragraph [69] of her affidavit.

³³ Paragraphs [95]-[103] of her affidavit.

the RV Act, which allows it to discriminate on the basis of age by limiting residence in a retirement village to older members of the community and retired persons.

2021 amendments to the RV Act

- [40] After Terrace-Haven made its application to the Tribunal, in 2021 further amendments were made to the RV Act by the *Housing Legislation Amendment Act 2021* (Qld) ('the 2021 Amendment Act').³⁴
- [41] The relevant operative provision inserted into the RV Act by the 2021 Amendment Act for present purposes is s 70E which provides that ss 63(1)(c) and 63A do not apply to the scheme operator of an 'exempt scheme' in relation to a former resident. As I have analysed above, s 63(1)(c) is the provision which requires a scheme operator to pay an 'exit entitlement' within 18 months after the 'termination date'. Section 63A requires a scheme operator to buy back a freehold interest in an accommodation unit if it remains unsold for a period of 18 months.
- [42] An 'exempt scheme' is defined in new s 70C as a scheme to which an exemption under s 70D applies. Section 70D(1) is a head of power to make a regulation that may declare that an exemption under s 70D applies to a 'stated scheme'. Section 70D(2) contains a procedure for the making of a regulation under which the Minister who administers the RV Act may recommend the making of a regulation to the Governor in Council only if the Minister is satisfied:
- (a) each residence contract under the scheme is based on a freehold interest in a resident's accommodation unit; and
 - (b) the exemption would be appropriate because of the extent to which the residents are in a position to control the affairs of the scheme operator, and the scheme operator's assets and ability to generate income are likely to be insufficient to purchase the resident's freehold property.
- [43] The Explanatory Notes for the Bill that became the 2021 Amendment Act refer to the concerns of resident-operated retirement villages about their ability to fund mandatory buybacks required by the RV Act. The Explanatory Notes also acknowledge the concern of residents of those villages that applying to the Tribunal to seek an extension of time for buybacks due to financial hardship would be stressful and intimidating for the resident-operators of these retirement villages.³⁵
- [44] Finally, the Explanatory Notes refer to the interim report by an independent review panel for the RV Act, the terms of reference for which included reviewing the mandatory buyback of freehold units. The interim report recommended that resident-operated retirement villages be exempted from the mandatory buyback requirements because of the financial burden on residents individually and collectively. The Explanatory Notes refer to the government making a commitment to act quickly to exempt resident-operated retirement villages from the mandatory buyback requirements.³⁶ In short, Parliament legislated to deal with part of the problem described by Terrace-Haven in its application to the Tribunal and material in support.

³⁴ The relevant amendments to the RV Act commenced on the date of assent, which was 20 October 2021.

³⁵ Explanatory Notes for the Housing Legislation Amendment Bill 2021, p. 6.

³⁶ Pages 6-7.

- [45] If a regulation was made based on the head of power contained in s 70D of the RV Act, it would avoid the consequences of a buyback requirement on Terrace-Haven. However, a regulation of that kind does not prevent application of the additional administrative requirements imposed by amendment of the RV Act by the 2017 Amendment Act, which Terrace-Haven also submits will cause the residents financial difficulty.
- [46] The Human Rights Commission made a submission dated 15 July 2021 on the effect of the Bill that became the 2021 Amendment Act. That submission was provided to Terrace-Haven, which responded without making specific submissions on the effect of the Bill, but wanting a decision to be made on its application for exemption.
- [47] As at the date of this decision, no regulation has yet been made under s 70D. It would be speculation on my part to assess whether a regulation would be made that would apply to Terrace-Haven. I do not think that it is appropriate for me to make this decision based on speculation of that kind, instead of the law as it currently stands.

Submissions of the Human Rights Commissioner

- [48] Before the Tribunal makes a decision on an application for exemption, s 113(2) of the AD Act requires the Tribunal to give the Human Rights Commissioner a copy of the application and material filed in support of it, and to have regard to any submission made by the Commissioner on the application. The Commissioner filed a written submission dated 3 December 2020. Overall, the Commissioner opposed the grant of an exemption under s 113 of the AD Act.
- [49] The Commissioner's submissions focused on the application of the HR Act to the circumstances of this application.
- [50] The Commissioner submits that s 48 of the HR Act applies to the Tribunal when considering an application for exemption under s 113 of the AD Act.³⁷ I accept that proposition. The relevant provisions of s 48 are as follows:

48 Interpretation

- (1) All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.
- (2) If a statutory provision can not be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.

(added emphasis)

- [51] The meaning of 'compatible with human rights' is set out in s 8 of the HR Act, relevantly that a statutory provision is 'compatible with human rights' if the provision:
- (a) does not limit a human right; or

³⁷ Section 5(2)(a) of the HR Act provides that the Act applies to courts and tribunals to the extent the court or tribunal has functions under part 2 and part 3, division 3 of the Act. Part 3, division 3 includes s 48. The Tribunal is a court of record – see s 164(1) of the QCAT Act.

- (b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with s 13.

[52] It is therefore necessary to identify whether a human right is affected by application of the statutory provision concerned. Section 7 of the HR Act states that 'human rights' for the purposes of the HR Act, mean the rights stated in part 2, divisions 2 and 3 (ss 15-37). For the purposes of working out whether the HR Act has some application, it is first necessary to identify whether a human right under the Act is engaged on the issue concerned. The Commissioner identified the human right contained in s 15 of the HR Act to be potentially engaged. Section 15 is relevantly as follows:

15 Recognition and equality before the law

...

- (2) Every person has the right to enjoy the person's human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination.
- (4) Every person has the right to equal and effective protection against discrimination.
- (5) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination

(added emphasis)

- [53] The Commissioner submits that the effect of the exemption sought would be to allow Terrace-Haven to discriminate on the basis of age in the areas of accommodation, goods and services, and disposition of land.³⁸
- [54] There are a number of linkages between the AD Act and the HR Act, and s 15 is one of them. Whether something is done 'without discrimination' depends on the meaning of the term 'discrimination' contained in the Dictionary³⁹ of the HR Act which relevantly 'includes' (and as the Commissioner submits, is therefore is not confined to) discrimination within the meaning of the AD Act, on the basis of an attribute stated in s 7 of that Act, which includes age.
- [55] I agree that s 15 is engaged on Terrace-Haven's application for an exemption. Equal protection before the law without discrimination in the context of Terrace-Haven's application means that people who would seek accommodation at the Complex should not be discriminated against on the attribute of age, under s 7(f) of the AD Act, if Terrace-Haven was to deregister from being a retirement village under the RV Act, therefore losing the protection of s 26 of that Act. To the extent that a person less than 50 years of age would not be able to buy or rent a unit at the Complex, a person in that category would be discriminated against, on the attribute of age, in the areas covered by the application to the Tribunal.

³⁸ Commissioner's submission at p.8.
³⁹ Schedule 1.

- [56] The Commissioner submits that the purpose of s 15(5) is to promote substantive equality. If the activity concerned is a 'special measure' within s 15(5), the activity would be 'human rights compatible' (meaning that it would not be necessary to apply the balancing test contained in s 13 of the HR Act). If it is not a 'special measure' under s 15(5), then the 'justification test' in s 13 of the HR Act must be applied.
- [57] The Commissioner submits that Terrace-Haven should not be able to satisfy the Tribunal that an age restriction applying to the Complex is a 'special measure' within the meaning of s 15(5) of the HR Act.⁴⁰ In the Commissioner's submission, the Terrace-Haven application does not identify any disadvantage of people over the age of 50 years, that is *caused by discrimination*⁴¹ (which is the focus of s 15(5) of the HR Act).
- [58] The Commissioner recognises that single women over the age of 55 years is a group that is recognised as being at greater risk of homelessness, with discrimination being a cause of, or contributing to, financial disadvantage that can lead to homelessness.⁴² However, the Commissioner continues that this need is not the purpose of the application by Terrace-Haven. I agree with that submission, and that the Complex itself does not exist for the purpose of providing specific housing for single women aged over 55 years.
- [59] The Commissioner's submissions respond to the purposes of the proposed exemption as articulated in Terrace-Haven's application, such as to enable residents to continue to enjoy the right to live together with other similarly aged persons within a 'seniors friendly' environment, and to preserve the existing arrangements. The submission is that none of the purposes articulated by Terrace-Haven is for achieving 'substantive equality' which the Commissioner submits is the purpose of s 15(5), and the proposed age restriction would go further than achieving these purposes.
- [60] In my view, Terrace-Haven has not demonstrated satisfaction of the test which is contained in s 15(5) of the HR Act, of the residents of the Complex being a group of persons *disadvantaged because of discrimination*. Terrace-Haven has not shown that people aged over 55 generally are disadvantaged by discrimination in the housing market.
- [61] Although s 104 of the AD Act ('Welfare measures') is expressed in slightly different terms, it is also my opinion that for the same reasons as my view on application of s 15(5) of the HR Act, the Terrace-Haven application is not a welfare measure under s 104. That is a matter I should consider, given that the application is made under the AD Act. In my opinion, an enduring element of the *Boeing* criteria since the commencement of the HR Act, is whether an application under s 113 of the AD Act is necessary, because an exemption provision already exists in the AD Act, including s 104. That is so as a matter of legal logic, in that it is not necessary to consider the application of s 113 if another exemption provision in the AD Act applies.
- [62] The Commissioner submits that if s 15(5) does not apply, then since grant of Terrace-Haven's application would limit the human rights of people aged less than 50 to equal treatment under s 15 of the HR Act to obtain housing at the Complex, it would be necessary to determine whether the application of s 113 would, on the facts of this case,

⁴⁰ Pages 9-11.

⁴¹ Added emphasis.

⁴² Referring to the Australian Human Rights Commission, 'Older Women's Risk of Homelessness: Background Paper', April 2019.

be compatible with human rights as described in s 13 of the HR Act. Before I do that, it is necessary to consider previous decisions of the Tribunal as referred to by Terrace-Haven and the Commissioner. These decisions may influence the application of s 13.

Previous decisions of the Tribunal

- [63] Both Terrace-Haven⁴³ and the Commissioner⁴⁴ referred to previous decisions of the Tribunal on applications for exemption under s 113 of the AD Act for accommodation exclusively for older people. The decisions reflect some applications being granted, and some being refused. However, the difference in outcome is not without rationale.
- [64] Overall, applications for new exemptions where there had previously been no application for exemption,⁴⁵ or for a new facility with a proposed age restriction⁴⁶ have been refused.⁴⁷
- [65] On the other hand, exemptions have been granted when the application is for a facility where exemptions have already been granted,⁴⁸ the facility had previously been a retirement village,⁴⁹ or for a facility which has existed with an age restriction for a lengthy period.⁵⁰ The common factor in these cases is a history of operation of a facility with an age restriction on accommodation.
- [66] In *Fraser Coast Regional Council v Walter Elliott Holdings Pty Ltd*,⁵¹ Morrison JA of the Court of Appeal identified that the history of the resort in that case, as having been established and operating as a retirement village for many years, was a factor pointing in favour of an exemption under s 113 being granted. That history distinguished it from *Village Green* which never had a legal or operational structure that brought with it a retirement village regime.⁵²
- [67] A factor that has been relevant to the Tribunal exercising its discretion to grant an exemption under s 113 of the AD Act, is fairness to residents who have acquired accommodation on the expectation that there will be an age limitation, or the disrupting effect on the amenity of residents if an age restriction is removed.⁵³
- [68] Special considerations apply to manufactured homes under the *Manufactured Homes (Residential Parks) Act 2003* (Qld). The distinctive element about those cases, is that the facility is operated by the owner of land on which the residents own the

⁴³ Cases referred to by Terrace-Haven where exemptions were granted by the Tribunal - *Miami Recreational Facilities Pty Ltd* [2017] QCAT 253, *Re Caloundra Gardens Village Body Corporate Committee* [2012] QCAT 98, and *Seachange (Land) Pty Ltd and Others* [2016] QCAT 519.

⁴⁴ Cases referred to by the Commissioner where exemptions were refused by the Tribunal - *Body Corporate for Village Green (Caloundra) No. 1 CTS* [2015] QCAT 101, *Ghostgum Developments Pty Ltd* [2015] QCAT 500 and *Savannah FNQ Developments Pty Ltd* [2016] QCAT 141.

⁴⁵ *Village Green* and *Savannah*.

⁴⁶ *Ghostgum*.

⁴⁷ An approach noted by Member Gordon in *Miami Recreational Facilities Pty Ltd* [2021] QCAT 378 at [2].

⁴⁸ *Burleigh Town Village Pty Ltd* [2017] QCAT 161, *Palmpoint Pty Ltd* [2016] QCAT 419, *Surtie Enterprises Pty Ltd ATF The Surtie Enterprises Unit Trust* [2017] QCAT 323, *Miami Recreational Facilities*.

⁴⁹ *Re Caloundra Gardens Village Body Corporate Committee*.

⁵⁰ *Miami Recreational Facilities* (40 years).

⁵¹ [2016] QCA 19 at [126]-[135].

⁵² *Fraser Coast* at [130].

⁵³ *Palmpoint* at [13], *Burleigh Town Village* at [19], *Miami Recreational Facilities* at [86].

manufactured home, but on land owned by the operator.⁵⁴ Those facilities are operated on a 'for-profit' basis, meaning that they are unlikely to qualify as a 'welfare measure' under s 104 of the AD Act.

- [69] The Complex operated by Terrace-Haven is analogous to the category of cases where exemptions under s 113 have been granted. It is analogous in the sense that it has had the benefit of a statutory exemption from the AD Act, under s 26 of the RV Act, but Terrace-Haven applies to the Tribunal on the basis that the protection offered by s 26 is about to end, with the same legal effect as the expiry of a temporary exemption under s 113. It has been operating for 35 years with many long-term residents aged over 50.

Consideration

- [70] As I have identified above, the combined effect of s 8, s 13 and s 48 of the HR Act means that an interpretation and application of s 113 of the AD Act which has the effect of limiting a human right is 'compatible with human rights' if it is reasonable and demonstrably justifiable in accordance with the factors contained in s 13.
- [71] Section 13 is as follows:

13 Human rights may be limited

- (1) A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.
- (2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant—
 - (a) the nature of the human right;
 - (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
 - (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
 - (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
 - (e) the importance of the purpose of the limitation;
 - (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
 - (g) the balance between the matters mentioned in paragraphs (e) and (f).

(added emphasis)

⁵⁴ *Caloundra Gardens* at [18]-[23].

Because the factors contained in s 13(2)(a)-(g) are preceded by the word ‘may’, those factors are not exhaustive, but do provide guidance, relevantly to the Tribunal, on whether the relevant limit on the human right in s 15, in this case, is both reasonable and justifiable.

- [72] Comparison of the *Boeing* criteria with the factors contained in s 13(2) reveals that the *Boeing* criteria (apart from the first criterion of necessity for the exemption) can be considered to fall within the scope of the factors contained in s 13(2). It may be that in considering an application for an exemption under s 113, since the commencement of the HR Act, the s 13 factors have replaced or subsumed the *Boeing* criteria. That would be because an application for an exemption under s 113 almost inevitably contemplates that the proposed action involves some discrimination under the AD Act and therefore a limitation to the human right of equal treatment under s 15 of the HR Act.
- [73] Under s13(2)(a), the human right which is potentially limited by s 113 in this case is the right of equality before the law in s 15 of the HR Act. That is a human right of obvious importance, and not easily to be traded away.
- [74] For paragraph (b), the purpose of the limitation of the human right which is the effect of a successful application under s 113, is to grant an exemption from what would otherwise be unlawful discrimination under the AD Act. That is the plain meaning and effect of s 113. Section 113 cannot be interpreted, under s 48 of the AD Act to avoid that potential consequence. However, application of s 113 depends on the exercise of the discretion of the Tribunal. For paragraph (b), of s 13(2), much will depend on the purpose of the exemption applied for. In this case, the purpose is to allow Terrace-Haven to restrict accommodation at the Complex to people over the age of 50.
- [75] I have set out above why Terrace-Haven wishes to seek the exemption under s 113. In summary, this is for two reasons:
- (a) so that the community at the Complex comprising residents all over the age of 50 can continue to live with similarly-aged and similarly-minded people; and
 - (b) to avoid the financial burdens under the RV Act as it has been amended, with the obligations under the buyback provisions, and the new administrative requirements, in a community in which certainly some of the residents cannot afford those additional financial burdens, and in which many receive income only from the aged pension.⁵⁵
- [76] Section 13(1) and s 13(2)(b) include the concepts of human dignity and freedom. On the facts of this application, those concepts find recognition in the freedom of the residents of the Complex to live as they choose, with similarly-aged and similarly-minded people. The concept of dignity is also enhanced in allowing people to live as they choose. These concepts and values have special weight in this case, where there are elderly residents, many of whom have limited financial means, resulting in restriction to make other choices about where to live.
- [77] In this case, part of the balancing process which is the subject of s 13(2), is a balance between some limitation on the right to equality before the law contained in s 15 of the HR Act with promotion of the values of dignity and freedom in s 13.

⁵⁵ Ms McCabe’s affidavit at [15]. See also [33] and [77]-[83].

- [78] On application of s 13(2)(c), there is a direct relationship between the limitation of the human right to equality before the law and the purpose of the limitation in this case, which is to continue an age restriction on accommodation in the Complex. The age restriction cannot be continued without an exemption under s 113 of the AD Act if Terrace-Haven deregisters as a retirement village under the RV Act.
- [79] For paragraph (d), I am satisfied that there is no less restrictive and reasonably available way of achieving the age restriction. The Human Rights Commission in a submission dated 15 July 2021 referred to the then Bill which has become the 2021 Amendment Act. No regulation has yet been made under that Act which would allow Terrace-Haven to be exempted from the buyback regime. However, even that exemption will not relieve the residents of the cost of the other administrative requirements introduced into the RV Act, and which Ms McCabe's affidavit states cannot be afforded by many of the residents of the complex.
- [80] The Commissioner's main submission dated 3 December 2020 contends that the purpose of providing a safe environment that appeals to older people can be achieved through alternate legitimate means such as the types and style of dwelling, the provision of facilities and activities, and targeted marketing. Those means will have little application where, in this case, the units were constructed many years ago and any marketing would be limited to only those units which need to be sold because of the individual circumstances of the aged residents.
- [81] The importance of the purpose of the limitation of the human right to equal treatment in in this case for paragraph (e) is to enable the residents of the Complex to live as they have done for many years under the RV Act as it was prior to the recent amendments, and as set out in [78] above. In this case, the purpose of the exemption will help the residents achieve the values of human dignity and freedom, which in the particular circumstances of this case, should be given considerable weight.
- [82] The importance of the limitation to allow exemptions to the age discrimination ground under the AD Act is something that has, in effect, been recognised by the past decisions of the Tribunal analysed above. Those cases also consider the reasonableness of the limitation of application of the AD Act, which will be relevant for the purposes of the 'reasonable limits' on a human right for that expression in s 13(1) of the AD Act. Those cases recognise the reasonableness of allowing the continuation of an age restriction on accommodation for older people, where that limitation has been in existence for an appreciable period of time.
- [83] Section 13(2)(f) requires an assessment of the importance of preserving the human right in s 15 of the HR Act, taking into account the nature and extent of the limitation on the human right. The exemption under s 113 applied for in this case is limited to Terrace-Haven, which consists of only 44 units. The limitation of the human rights of equality under the law will only be impacted in a small way by any exemption granted under s 113. This application depends very much on its own specific facts.
- [84] Paragraph (g) requires a balance between the matters mentioned in paragraphs (e) and (f). In carrying out that balance, in my opinion, grant of an exemption to the AD Act to allow an age restriction limited to the Complex would amount to a confined limitation on the right to equality before the law contained in s 15 of the HR Act, against the importance of the purpose of the application, which will allow similarly-aged and similarly-minded people to enjoy the human dignity and freedom of choice they have made to live at the Complex with an age restriction that has existed for many years.

- [85] In my opinion, the age limitation applied for by Terrace-Haven under s 113 can be reasonably justified in a free and democratic society based on human dignity, equality and freedom under s 13(1). My order will be to grant the application sought by Terrace-Haven, in terms set out below.
- [86] It may be that after this decision, which appears to be a pre-requisite for Terrace-Haven to deregister as a retirement village, that a regulation is made under the 2021 Amendment Act which is applicable to the Complex. That might prompt Terrace-Haven to remain a retirement village under the RV Act. It may be then that it would not be necessary for Terrace-Haven to rely upon the exemption from the AD Act granted by this decision, and that would be a decision for Terrace-Haven to make depending on the entirety of the factors relevant to it. Otherwise, if Terrace-Haven wished to continue to deregister as a retirement village, then the considerations relevant when the exemption granted by this decision expires, would need to be considered at that time, if an application is made by Terrace-Haven for a fresh exemption.

Other matters raised by the Commissioner

- [87] The Commissioner makes the point⁵⁶ that if the Complex is deregistered as a retirement village, it would become only a community title scheme under the Body Corporate Act. If so, the Commissioner contends, then s 180(4) of that Act states that a by-law of a community titles scheme cannot prevent or restrict a transmission, transfer, mortgage or other dealing with a lot. An example given in s 180(4) is that a by-law can not prevent the sale of a lot to a person under or over a particular age.
- [88] All that an exemption under s 113 of the AD Act can do is exempt application of that Act, not another Act such as the Body Corporate Act. It would therefore be a matter for Terrace-Haven about how it manages (contractually or otherwise) the requirements of s 180(4) of the Body Corporate Act. Section 24 of the RV Act provides that if there is an inconsistency between that Act and the Body Corporate Act in relation to the rights of a person under a retirement village scheme, the RV Act prevails to the extent of the inconsistency. The importance of that factor in the decisions ultimately to be made by Terrace-Haven will also be a matter for it. Nonetheless, it is necessary for Terrace-Haven to obtain the exemption from the AD Act to achieve its intended purpose, at least as a starting point.
- [89] Finally, the Commissioner says that the application by Terrace-Haven and the affidavit of Ms McCabe refer to a rental exemption to allow Terrace-Haven to enforce a requirement that only an owner of a unit (and/or their spouse) may occupy it. The Commissioner contends that this is not a matter within the power of the Tribunal under the AD Act. I agree. Whether an owner or their spouse may occupy a unit is not a matter within the scope of the AD Act. However, in the orders sought by Terrace-Haven, there is no order sought to that effect. There is no order that I make in his decision that has that effect. How Terrace-Haven may wish to lawfully implement any such concept is a matter for itself.

Orders

⁵⁶ Page 12 of the submissions dated 3 December 2020.

[90] For a period of five years from the date of this decision, under s 113 of the AD Act, Terrace-Haven, is exempt from the following provisions of the AD Act for the purposes described below:

- (a) Section 7(f), so that Terrace-Haven may lawfully place a restriction on the age of individuals who:
 - (i) purchase a lot in the Terrace-Haven Complex;
 - (ii) rent a unit in the Terrace-Haven Complex; and
 - (iii) reside in a lot in the Terrace-Haven Complex,
 such that only individuals over the age of 50 may purchase a lot, rent a unit or reside in a lot at the Terrace-Haven Complex.
- (b) Sections 45 and 46, so that Terrace-Haven may lawfully place a restriction on the age of individuals who do, and might in the future, receive goods and services at the Terrace-Haven Complex.
- (c) Sections 76 and 77, so that Terrace-Haven may lawfully place a restriction on the age of individuals who wish to purchase a lot in the Terrace-Haven Complex. That is, an order that residents may only sell their lot in the Terrace-Haven Complex to a person over the age of 50.
- (d) Sections 81, 82 and 83, so that Terrace-Haven may lawfully place restrictions on the age of individuals who:
 - (i) reside in a unit in the Terrace-Haven Complex; or
 - (ii) rent accommodation in the Terrace-Haven Complex,
 such that only individuals over the age of 50 may reside in or rent a unit at the Terrace-Haven Complex.