



Our Ref: 02/88/0167
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Dear Ms Nandagopal

EXEMPTION APPLICATION UNDER THE 'ADA' – CALOUNDRA GARDENS

Thank you for your email dated 29 June 2011, inviting the Equal Opportunity Commission (EOC) to make a submission in respect to an application by Caloundra Gardens Retirement Village ('the Village') for a temporary exemption under the *Age Discrimination Act 2004* ('ADA').

I have read the attached copy of the Village's application, together with the 2010 AHRC Guidelines. Although the sequence of events leading up to the Village's application is not entirely clear from the included materials, my understanding is that the Village had previously been registered as a scheme under the *QLD Retirement Villages Act 1999*, but this was surrendered and converted to a collection of freehold titles in 1992 (presumably now on a strata plan administered by a body corporate). Again, why that took place is not readily apparent, but it does help to explain how it is now possible for property owners to rent and sell their properties as they please. As the *Retirement Villages Act* no longer applies to the Village, the *QLD Anti-Discrimination Act* has effect in the areas of accommodation and transfer of land, and this is what concerns the current owners.

In my opinion, given the unusual facts of this case, the application should be granted, but with certain conditions. My reasons are as follows.

Firstly, it would seem that the original intention behind the Village was that it was to be registered as a scheme under the *Retirement Villages Act*, which would have enabled it to impose a minimum age for residents, without contravening the *Anti-Discrimination Act*. However, if the unit holders in the scheme, as it was then constituted, subsequently entered into an arrangement whereby the scheme was surrendered in favour of freehold title, then the protection afforded by the *Retirement Villages Act* was lost. Although it could be argued that the current unit holders have no choice but to re-apply to establish a scheme under the *Retirement Villages Act* (about which they have

sought legal advice) the question as to whether or not an exemption under the *Anti-Discrimination Act* or ADA applies to their circumstances remains valid.

In relation to the ADA, there is no exemption that deals specifically with aged care accommodation or retirement villages. Section 33 provides that it is not unlawful for a person to discriminate against another person, on the ground of the other person's age, by an act that is consistent with the purposes of the ADA, if (a) the act provides a bona fide benefit to persons of a particular age, or (b) the act is intended to meet a need that arises out of the age of persons of a particular age. The purpose behind retirement villages needs little by way of explanation, and presumably they would be regarded as complying with section 33.

Retirement villages are, however, legally and conceptually something apart from a collection of strata title units. If the intention of the property owners and/or the body corporate is to exclude residents below a certain age, without reference to any benefit or need that might be covered by section 33, then such exclusion would be unlawful on its face under the ADA. Given the history in this case, it appears that the intent of the owners was to run the Village as a retirement village from the outset, notwithstanding events that have led to the Village losing that status. If the purpose behind retirement villages is taken to be generally consistent with the exceptions under section 33, then that might be where the matter ends, and an exemption would not be required.

However, the states and territories have enacted comprehensive legislation that deals with the establishment and regulation of retirement villages. My concern is that property owners in a strata title complex which is not part of a retirement village scheme might seek to circumvent state laws and obtain an exemption under the ADA, rather than go through the process of registration to become a retirement village. Whilst the Village has received advice that the steps required for registration will be costly, that factor alone should not be regarded as justification for granting an exemption.

In my opinion, given the uncertainty as to whether or not the Village's circumstances fall within the scope of section 33, the Village should be granted an exemption from the ADA for a period of time sufficient to enable the owners to take the necessary steps to register the Village as a scheme under the *Retirement Villages Act*, should they choose to go down that path. Without knowing the registration process in detail, I would have thought two years would be sufficient for that purpose. The exemption should extend only to the age of residents, and not to non-residential owners. That is, the exemption should be limited to the area of accommodation, and not extend to the transfer of land. If an owner intends to reside in a unit, and is 50 years of age or over, then presumably the issue does not arise.

Thank you again for inviting me to make a submission. Should you wish to discuss my submission in more detail, please telephone Pauline Grimley on **(08) 9216 3955** or email yvonne.henderson@eoc.wa.gov.au.

Yours sincerely



Yvonne Henderson
COMMISSIONER FOR EQUAL OPPORTUNITY

15 August 2011