

**AUSTRALIAN HUMAN RIGHTS COMMISSION
AGE DISCRIMINATION ACT 2004 (CTH), section 44(1)
NOTICE OF GRANT OF A TEMPORARY EXEMPTION**

By this instrument, under section 44(1) of the *Age Discrimination Act 2004* (Cth)(ADA), the Australian Human Rights Commission grants an exemption to the Body Corporate Committee of Caloundra Gardens Retirement Village (the Applicant) from the operation of section 29 of the ADA. The exemption is granted for a period of three years from the date of this instrument and is granted subject to the conditions outlined below.

SUMMARY

The Applicant sought an exemption under section 44 of the ADA so that it may impose a requirement that only persons over the age of 50 years can reside at Caloundra Gardens. The Applicant sought an exemption from the ADA for a period of five years.

The Applicant states that the purpose of applying for an exemption is for the Commission to confirm and clarify the legal status of Caloundra Gardens as a retirement village. The Commission does not have the power to declare Caloundra Gardens as a retirement village thereby providing the Applicant the clarity it seeks. Accordingly, the Commission has granted the exemption for a period of three years to allow the applicant time to utilise existing legislative schemes to clarify the status of Caloundra Gardens.

The exemption is granted subject to the following conditions:

1. Within a reasonable time, and in any event by no later than two years from the date of this exemption, the Applicant take all reasonable steps to utilise existing legislative schemes to clarify the status of Caloundra Gardens.
2. The exemption does not apply to current residents under the age of 50 years.

BACKGROUND

Caloundra Gardens is a community title scheme consisting of 75 residential units. Caloundra Gardens contains a community centre with a kitchen, lounges, meeting rooms, library, pool table and a swimming pool. Caloundra Gardens provides a variety of services to its residents and is located next to hospital and medical facilities. As of 16 May 2011 there were 91 residents, 84 of whom are over 50 years of age and seven under 50 years of age. The seven residents under 50 years live in six residences.

The Applicant states that Caloundra Gardens was developed and has operated as a residential facility for older people since 1986. Caloundra Gardens operated as a retirement village scheme where a lease/lease back arrangement applied between each owner and the developer. A restriction upon age was enforced through a covenant that existed between each owner and the developer to comply with the restriction that residents are to be over 50 years. In 2006 the lease/lease back arrangements with the developer ceased and since then Caloundra Gardens has operated on the basis of freehold title rather than under the previous retirement village scheme.

Caloundra Gardens did not seek registration as a retirement village scheme when this scheme was introduced in the *Retirement Villages Act 1999* (Qld) (RVA). The significance of being registered under the RVA is that section 26 provides that it is not unlawful to discriminate on the basis of age if the discrimination merely limits residents in a retirement village to older members of the community and retired persons.

The Applicant states that it does not want to register as a retirement village scheme under the RVA because of the cost of registration and previous bad experiences of operating as a retirement village scheme. The Applicant states that the former scheme operator financially exploited the residents. The Applicant received legal advice that it would cost around \$226 000 to register as a retirement village scheme under the RVA. As there are 75 units this would amount to around \$3000 per unit.

The Applicant states that in 2007 local real estate agents started marketing units at Caloundra Gardens for sale and lease to persons under the age of 50 years because they perceive there to be no legally enforceable age restriction.

The Application

The Applicant seeks an exemption from section 29 of the ADA so that it may impose a requirement that only persons over the age of 50 years can reside at Caloundra Gardens. The Applicant specifically requests the Commission to confirm and clarify the legal status of Caloundra Gardens as a retirement village.

The application for an exemption does not extend to current residents who under 50 years of age.

The Applicant states that having people under the age of 50 years residing at Caloundra Gardens has markedly changed its character, and deprived its over 50s residents of the quiet environment they need and which is appropriate for a retirement village.

Submissions received by the Commission

The Applicant's request for a temporary exemption was posted on the Commission's website and interested parties were invited to comment on the exemption. The Commission received sixteen submissions in response to the Application.

Fourteen submissions received were from residents and owners at Caloundra Gardens who recommended that the Commission grant the exemption. Two petitions signed by a number of residents and owners in support of the exemption were also received.

The Anti-Discrimination Commission of Queensland (ADCQ) made a submission expressing concern about the impact of the proposed exemption on any existing residents who are aged under 50 years and how the proposed exemption could be implemented. In its submission the ADCQ notes the operation of the *Body Corporate and Community Management Act 1997* (Qld) which provides that by-laws cannot restrict the type of residential use and that by-laws must not discriminate between types of occupiers. The ADCQ submits that the Commission should address the above issues when considering whether to grant an exemption.

A submission was also received from the Western Australia Equal Opportunity Commission (EOC). EOC raised the possibility that Caloundra Gardens might be covered by the positive discrimination exemption under s 33 of the ADA so an exemption might not be required. On the other hand EOC expressed concern that the Applicant may be seeking to circumvent existing state laws regulating retirement villages. EOC recommends that given the uncertainty as to whether or not s 33 of the ADA applies, an exemption should be granted for a period of time sufficient to enable the owners to take the necessary steps to register Caloundra Gardens as a scheme under the RVA, should they choose to go down that path. EOC recommends that the exemption be granted for two years and should only extend to the age of residents and not to non-residential owners.

REASONS FOR DECISION

The Commission has considered all of the material that has been placed before it, together with the Commission's Guidelines on Temporary Exemptions under the ADA.

The Commission is of the view that there is an arguable case that imposing a restriction on potential residents less than 50 years of age from residing at Caloundra Gardens constitutes unlawful discrimination under the ADA.

Section 29 of the ADA provides:

- (1) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person's age:
 - (a) by refusing the other person's application for accommodation; or
 - (b) in the terms or conditions on which the accommodation is offered to the other person; or
 - (c) by deferring the other person's application for accommodation or according to the other person a lower order of precedence in any list of applicants for that accommodation.

Section 29(4) of the ADA defines accommodation to include residential or business accommodation. The Commission is of the view that none of the permanent exemptions in the ADA apply.

The Commission understands that the Applicant is seeking an exemption to clarify and confirm the legal status of Caloundra Gardens as a retirement village so that it may impose a requirement that only persons over the age of 50 years can reside at Caloundra Gardens. The Commission does not have the power to declare Caloundra Gardens a retirement village.

The Commission acknowledges that Caloundra Gardens was developed and has operated as a facility for over 50s residents for a number of years. The Commission accepts that Caloundra Gardens provides a bona fide benefit to, and is intended to meet, the needs of people over the age of 50 years. However, there is an existing comprehensive legislative framework for the registration and regulation of retirement villages in Queensland.

The Commission recognises the financial impact registration under state law may have on the owners of units at Caloundra Gardens, many of whom are on a fixed income. The Commission also recognises that Caloundra Gardens has operated as a retirement village for many years, and owners bought into the village on the understanding that it was a facility for over 50s. In light of these factors the Commission considers it appropriate to grant an exemption for a period of three years to allow the Applicant time to utilise existing legislative avenues to confirm the status of the village.

APPLICATION FOR REVIEW

Subject to the *Administrative Appeals Tribunal Act 1975* (Cth), any person whose interests are affected by this decision may apply to the Administrative Appeals Tribunal for a review of the decision.

Dated this 3rd day of May 2012.

A handwritten signature in black ink, appearing to read 'Catherine Branson', written in a cursive style.

Signed by the President, Catherine Branson QC, on behalf of the Commission.