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EQUAL OPPORTUNITY ACT 1984

**APPLICATION FOR EXEMPTION
CERTIFICATE**

JUPITER HOLDINGS PTY LTD

Section 136 of the *Equal Opportunity Act 1984* requires the State Administrative Tribunal to publish in the *Government Gazette* a notice of the making of a decision under s135 of the Act, which relates to applications for exemption from the operation of some or all of the provisions of the *Equal Opportunity Act*. The notice must include the Tribunal's findings on material questions of fact, referring to the evidence on which those findings are based, and the reasons for the Tribunal's decision.

The following constitutes the notice published by the Tribunal under s136 of the *Equal Opportunity Act* with respect to an application for exemption by Jupiter Holdings Pty Ltd—

JURISDICTION	:	STATE ADMINISTRATIVE TRIBUNAL
STREAM	:	HUMAN RIGHTS
ACT	:	EQUAL OPPORTUNITY ACT 1984 (WA)
CITATION	:	RE JUPITER HOLDINGS PTY LTD and COMMISSIONER FOR EQUAL OPPORTUNITY [2005] WASAT 202
MEMBER	:	JUDGE J ECKERT (DEPUTY PRESIDENT) MR M SPILLANE (MEMBER)
HEARD	:	14 MARCH 2005
DELIVERED	:	29 JUNE 2005
FILE NO/S.	:	ET 44 of 2004
MATTER	:	RE JUPITER HOLDINGS PTY LTD AND COMMISSIONER FOR EQUAL OPPORTUNITY
BETWEEN	:	JUPITER HOLDINGS PTY LTD AND COMMISSIONER FOR EQUAL OPPORTUNITY

Catchwords—

Exemption application—Sections 66ZE, 66ZF, 66ZG—Equal Opportunity Act 1984—Caravan park—Retirees—Adults—Over 55s—Commercial gain—Commercial advantage over competitors—Children facilities—Tourism

Legislation—

Equal Opportunity Act 1984 (WA) s 3, s 74, s 135, s 66ZE, s 66ZF, s 66ZG, s 66ZM, s 66ZN, s 66ZP, s 66ZQ

Equal Opportunity Regulations 1986 (WA), reg 24

Retirement Villages Act 1992 (WA)

State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004 (WA)

Result—

Application for exemption from s 66ZE, s 66ZF, s 66ZG under s 135 of the Equal Opportunity Act 1984 dismissed.

Category: A

Representation—

Counsel—

Jupiter	:	Ms P Chapman (agent)
Commissioner	:	Mr Rosales-Castaneda

Solicitors—

Jupiter	:	Self-represented
Commissioner	:	Commissioner for Equal Opportunity

Case(s) referred to in decision(s)—

ADI Limited (Exemption) [2004] VCAT 1963

Stefan Tietz application for exemption, unreported decision of the Equal Opportunity Tribunal (G Donaldson, Deputy President, R Keane, Member and Professor C Mulvey, Deputy Member) No 22 of 2000; 10 November 2000

Case(s) also cited—

Nil

REASONS FOR DECISION OF THE TRIBUNAL

Application

- Jupiter Holdings Pty Ltd (Jupiter) applied under the *Equal Opportunity Act 1984* (the Act) to the State Administrative Tribunal (the Tribunal) for an exemption from the requirements of the Act, (in particular from the effect of s 66ZE, s 66ZF and s 66ZG), so that it could restrict its clientele at its Carnarvon caravan park to people who are aged over 18 years and so that it could advertise that market accordingly. The effect of the exemption, if granted, would be to exclude children from staying at the caravan park and to allow Jupiter to advertise that it is authorised to prohibit children from staying at the caravan park.

- 2 The decision in this application and the reasons for it were delivered orally on 14 March 2005, after several hours deliberation of the materials before the Tribunal. This Reasons for Decision is taken from the transcript of the hearing and the members' notes made at the hearing and during deliberation, and the written reasons reflect the oral reasons delivered on the day. However, the facts and submissions set out in this Reasons for Decision have been added for the purposes of this written document and the "consideration" section has been edited and settled to reflect a proper written, rather than spoken version. However, the reasons and the emphasis placed on aspects of them remain as they were intended by the Tribunal when orally delivering the decision on 14 March 2005.
- 3 The Tribunal had before it the application for exemption made by Jupiter and supporting material dated 30 and 31 August 2004, the affidavit of the directors of Jupiter, Warren James Natt and Phyllis Margaret Chapman dated 10 December 2004, various pieces of correspondence from Jupiter and thirty nine written letters of support from various elderly customers of Jupiter, a letter of support from the Chief Executive Officer of the Shire of Carnarvon, "Further reasons why an Exemption should be granted" dated 22 October 2004, transcripts from directions hearings and the affidavit of the Commissioner for Equal Opportunity (Commissioner). Ms Chapman, on behalf of Jupiter, gave evidence and made submissions at the hearing by video link. Mr Rosales-Casteneda made oral submissions at the hearing on behalf of the Commissioner.
- 4 The application was lodged on 31 August 2004, before this Tribunal came into existence. Up until 31 December 2004, the *Equal Opportunity Regulations 1986* applied to the application. Part 7 of those regulations applied to an application for exemption; and in particular under Regulation 24, the Commissioner for Equal Opportunity became a party to an application for exemption and consequently, the Commissioner is a party to these proceedings.
- 5 The application was advertised as directed by the former Equal Opportunity Tribunal, on Tuesday 12 October 2004 in *The West Australian* and on Wednesday 13 October 2004 in the *Northern Guardian*. The application was served on the Shire of Carnarvon, as required by the former Equal Opportunity Tribunal.
- 6 On 1 January 2005 the functions of the Equal Opportunity Tribunal were assumed by the State Administrative Tribunal by virtue of the *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004*.

Facts

- 7 Jupiter operates a caravan park in Carnarvon, Western Australia, known as "Marloo Caravan Park". There are seven caravan parks, including Marloo Caravan Park, in Carnarvon. Ms Chapman gave evidence that Carnarvon has a season of roughly five months, from April/May to August/September, during which time Marloo Caravan Park, and probably the other caravan parks in Carnarvon, are fully occupied. During the off-season the caravan parks are fairly empty. Ms Chapman gave evidence that, at the time of this hearing, six or seven sites at Jupiter's caravan park were being used.
- 8 Mr Natt and Ms Chapman are the current directors of Jupiter and have been since January 2004. It is since that time that they have been involved in the operation of the caravan park. Ms Chapman gave evidence that since January 2004 there have been perhaps eight or nine families with children who have come to the caravan park with the view to staying at it overnight. She told the Tribunal that three of those families were directed elsewhere with assistance from Ms Chapman; one of the families decided that they would go elsewhere of their own accord and four or five families with children stayed at the caravan park. It seems there were no incidents arising from that.
- 9 Jupiter's stationery and signage says that it is "Marloo Caravan Park" and then underneath, "Retirees/Senior Tourist Caravan Park".
- 10 The caravan park has rules regarding noise after 10.00 pm and those rules seem to be generally enforced, not in a disciplinarian way but by gentle liaison with people. Ms Chapman's evidence was that the only real noise problem that existed at the caravan park in the last year was from an elderly couple watching TV late at night; it seems they were both hard of hearing and had their television turned up very loud. There were another two "incidents"—one outside and one within the caravan park, but they were quite unusual incidents, unlikely to be repeated and not relevant to these proceedings.
- 11 The evidence before the Tribunal indicated that most retirees at the caravan park go to bed around 8 pm; Ms Chapman felt that the 7.00 am or 8.00 am rising time was more critical to guests' enjoyment and the time between dawn and 7.00 am was when toddlers and young children could be very noisy and repeatedly fail to allow their parents or anyone within hearing distance to sleep in or have peace and quiet. It would appear that Ms Chapman's concerns regarding noise were generally limited to this time period.
- 12 Ms Chapman gave evidence that she was concerned about the need for children to be able to run around. Obviously that's very true, particularly if they have had a long journey. The Tribunal noted there is no playground at Marloo Caravan Park and there is no room for a childrens' playground to be built there. Apparently the children, if they want to play ball sports, would have to play on the roadways.
- 13 The primary concerns therefore seemed to be the issue of noise before 7.00 am or 8.00 am and the playing of ball games—cricket etc—around caravans and the consequent breaking of windows and hitting into the sides of caravans, although there was no evidence given of any injury or damage sustained in the last 12 months because of this. There is a covered area, a recreation area, but it seemed from the evidence that it would be unsuitable to use for childrens' games.
- 14 The caravan park has 100 bays. It seems to be quite a substantial caravan park in that sense, but it has no real facilities for children. There is noise apparently from the adjoining land, which is residential on three sides, and that noise comes from neighbours' children, which again is outside of the control of Jupiter.

- 15 The caravan park is not geared towards children, and Ms Chapman's concern was for the safety of caravans and the safety of children playing on roadways, on trikes and on bicycles. Of great importance to Ms Chapman was that, by not allowing children into the caravan park, elderly people, their main clientele, would feel secure, and they could feel secure in their caravans without the fear of balls flying through the air and hitting them; that they could sleep the necessary hours they needed undisturbed by noise.
- 16 Ms Chapman also gave evidence that no caravan park in Australia has an exemption from equivalent legislation. If this exemption were granted it would be a most unique position and it would constitute a great advantage for Carnarvon and for the Carnarvon area. As part of that, Ms Chapman denied that there was any commercial advantage for Jupiter if the application for exemption were granted. There would be no commercial advantage for Jupiter because, according to Ms Chapman, the system is functioning anyway and Jupiter would be required to send potential customers away thereby reducing its business, rather than to take on new customers.
- 17 It is worth noting the submission from the Chief Executive Officer of the Shire of Carnarvon, Mr Strugnell, in support of the application for exemption—

"The primary advantage is that as Carnarvon townsite has seven caravan parks, this application presents an opportunity to exclusively cater for a section of the caravanning market, namely adults only. At present, Carnarvon's tourist demographic comprises a significant portion of seniors who come to Carnarvon for extended periods to escape the southern winter. Anecdotally, there is support for the argument that this demographic prefers a holiday experience without children. Should Marloo Caravan Park be able to cater for adults only, it would provide a holiday product not otherwise available in the Carnarvon community. There are obvious flow on benefits to the broader business community should a new tourism product be successfully established."

Submissions

- 18 The reason for Jupiter making this application was really, in Ms Chapman's words, to dignify the current position with honesty and lawfulness; it would appear that Jupiter could probably continue to carry on in the way it has in the past without breaching the Act.
- 19 The basis of Ms Chapman's application was that s 66ZF(2)(b) contemplates an exemption for holidays. Section 66ZF of the Act provides—

"(1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's age—

 - (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;
 - (b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or
 - (c) in the manner in which the first mentioned person provides the other person with those goods or services or makes those facilities available to the other person

(2) Nothing in subsection (1) applies to or in respect of—

 - (a) bona fide benefits, including concessions, provided to a person by reason of his or her age; or
 - (b) **holiday tours offered or provided to persons who are of a particular age.**" (our emphasis added).
- 20 Ms Chapman argued that because holiday tours targeted at specific age groups were exempt from the unlawful conduct provisions of the Act, the scheme and objective of the Act contemplates that the unlawful conduct provisions in the Act would not apply to holidays. Ms Chapman argues that this leads to the view that matters relating to holidays could and perhaps should be free from the confines of the Act and that discrimination on the basis of age when occurring in relation to any aspect of a "holiday" should therefore be lawful because of the contemplation of holidays in s 66ZF(2)(b). In its application dated 31 August 2004, Jupiter says—

"The Act itself recognises that members of the public may have special age related holiday requirements. Section 66ZF(2)(b) provides that it is not discriminatory to offer holiday tours to persons of a particular age. The reason for this is that many people on holiday prefer to associate with those of their own age, and that a mix of ages is not necessarily appropriate in all circumstances. Younger people may feel inhibited by the presence of older people in certain holiday environments. Older people may feel that the presence of younger people is unsettling.

Our customers are not on organised tours, whether by preference or because of financial restraints. They nevertheless would prefer a holiday environment in which they associate with people their own age, without the distractions of younger people.

We believe that these travellers should have the same options as those on group tours, in particular, the option to associate primarily with those of similar age and outlook while on holiday.

The provision of a "retiree" facility may be beneficial to families with children as well. It is well known that children thrive best in an environment of approval and support. If retirees who choose not to holiday with children are forced to do otherwise, it would be expected that they will express disapproval and other negative emotions. This cannot be a good influence on children on vacation."
- 21 Ms Chapman drew the Tribunal's attention to the above passage advising that it forms the basis of Jupiter's argument.

- 22 In a directions hearing before the former Equal Opportunity Tribunal it was recommended to Jupiter that it seek legal advice. At that hearing on 24 November 2004, Mr Rosales-Castaneda, for the Equal Opportunity Commissioner, expressed concern that the application was “based on popular request or popularity; everybody agrees that this service should be available.” It was pointed out to Jupiter that the grant of an exemption is an important and delicate matter which makes something that is normally unlawful, lawful. Jupiter was advised that there are a series of steps under case law that the Tribunal must consider and that Jupiter needed to address those points to ensure that the application would receive favourable consideration. In fact, Mr Rosales-Castaneda said “the application is going to be unsuccessful because it won’t comply with the legal rigorous requirements that must be observed and proven.” Subsequently, Jupiter obtained legal advice which resulted in the affidavit of 10 December 2004. However, that affidavit in paragraph 6 confirmed the contents of the 22 October 2004 document, it set out the ownership of the land on which the caravan park is based and set out again various issues which in her evidence Ms Chapman advised were more supporting comments rather than actual reasons for an exemption. Unfortunately, the affidavit did not address the legal aspect that the Tribunal must address when considering the application. However, that does not preclude this Tribunal from applying those tests to the facts and evidence adduced by Jupiter.
- 23 Jupiter gave many examples supporting the application and at times it is difficult to discern what are actually reasons for the application and what are supportive comments. The further reasons document of 22 October 2004 suggests many purported reasons why children would benefit from an exemption being granted, and why it would be beneficial to adjacent residents, to guests and future guests of the caravan park, to the Carnarvon township, to other caravan parks and to Marloo itself. It is worth noting that, in that submission and in her evidence, Ms Chapman advised the Tribunal that Jupiter would suffer a financial loss if the exemption were granted because they would be turning away families with children. Numerous other examples of purported benefits to children were cited, such as that they would not embark on unsafe activities, they would be likely to make new friends and that “they would not be blamed for all manner of unfortunate incidents.” Conclusions were also drawn as to boredom and the effect of that boredom which could not necessarily be substantiated.
- 24 In summary, Jupiter’s submissions, therefore, were fundamentally based on the reference to “holidays” in s 66ZF(2)(b) referred to above and a belief that the exemption would be in the public interest as it would allow Jupiter to provide for the special needs of adults, especially those belonging in a “mature age” bracket. Supporting submissions included that—
- (1) the six remaining Carnarvon caravan parks adequately cater for children and families;
 - (2) Jupiter’s caravan park has no accommodation or facilities whatsoever for children;
 - (3) the guests of the Marloo caravan park prefer the peace and quiet of a facility without the disruption of children and they are entitled to have the holiday experience they seek;
 - (4) many of Marloo’s guests are seniors who stay for over three months at a time during the southern winter and often come from retirement villages in Perth and Mandurah. These people are entitled to expect a holiday environment that reflects their permanent living environment;
 - (5) Jupiter undertook to ensure that “if granted the exemption, we would ensure that if any travellers with children were unable to obtain accommodation at any of the other caravan parks in Carnarvon, we would accept such groups as guests to the extent of Marloo’s capacity” (paragraph 8 December 2004 affidavit);
 - (6) Jupiter believes children will be better catered for at Carnarvon’s other caravan parks and that families will therefore have the holiday experience that they are seeking and which they would not obtain at Marloo;
 - (7) the other caravan park owners at Carnarvon were either supportive or not concerned by Jupiter’s application;
 - (8) the granting of the application would be in the best interests of the “existing and prospective guests of Marloo, families including children visiting Carnarvon, the neighbours of Marloo and the people in other caravan parks of Carnarvon.” (paragraph 10 December 2004 affidavit);
 - (9) residents adjacent to the caravan park are entitled to a noise free environment without the noise that would come with the installation of play equipment; and
 - (10) the public interest in non-discrimination is overridden by the public interest of the “special needs and desires of people on holiday and special position of holidays in our culture.” (paragraph 3 application for exemption – 31 August 2004).
- 25 We accept that “it is common knowledge that our population is growing older” (further reasons document 22 October 2004 paragraph 3f) and we note the demographic information provided by Jupiter which indicates that the majority of visitors to the Gascoyne region are over 45 years of age.
- 26 Section 135(1) of the Act provides—
- “The Tribunal may, on application by a person, by order, grant to the person an exemption from the operation of a specified provision of Part II, IIAA, IIA, IIB, III, IV, IVA or IVB.”
- 27 Sections 66ZE, 66ZF and 66ZG come within part IVB of the Act. Section 66ZP sets out some measures intended to achieve equality whereby certain parts of the Act do not render an act unlawful where the purpose of it is, for example—
- “(a) to ensure that persons who are of a particular age have equal opportunities with other persons in circumstances in relation to which provision is made by this Act; or
 - (b) to afford persons who are of a particular age access to facilities, services or opportunities to meet their special needs in relation to employment, education, training or welfare.”

- 28 Ms Chapman advised that previous owners relied on paragraph (b) above to justify their signage and stationery and other marketing approaches targeting the seniors market. In its application Jupiter also queried whether the provisions of the *Retirement Villages Act 1992* might apply. However, as no further submissions were made on that, the Tribunal has not considered it (see paragraph 3 (e) of the further reasons document of 22 October 2004 where Jupiter asks “Can any section of the “retirement villages” Act 1992 be drawn upon to assist our seniors in their request for a child free caravan park?”).
- 29 The Commissioner for Equal Opportunity objected to the grant of the exemption on the basis that to grant the application would be outside of the power of the Tribunal, because it was not an application for exemption that could properly be said to further the objects of the Act and on that basis could not be granted by the Tribunal.
- 30 The Commissioner’s submissions therefore were primarily that the application is contrary to the objects of the Act as it seeks to allow Jupiter to discriminate against people seeking accommodation at the caravan park based on their age, or the age of the children accompanying them. The Commissioner submitted that the object of the Act relevant to this application is the “elimination of discrimination against persons on different grounds, including age” (paragraph 5 affidavit of Yvonne Daphne Henderson). The Commissioner was concerned that the granting of an exemption would in fact further Jupiter’s commercial interest and would set an “unacceptable precedent in this jurisdiction, as it would sanction conduct which is clearly contrary to the objects of the Act” (paragraph 9 of the Affidavit).

Consideration

- 31 The Act does not include any guidance for the Tribunal when dealing with an exemption application, or criteria that must be met by Jupiter for it to succeed in an application for exemption under s 135 of the Act. However, previous decisions of the former Equal Opportunity Tribunal can provide some guidance and there is a body of case law from around Australia that provides some assistance. The effect of the exemption power is to make lawful what would otherwise be unlawful. “It is wrong to describe the process of exercising the power under section 135 of the Act as only arising in rare and limited circumstances or some such other glib appellation. The power is properly and lawfully exercised where to do so enhances the objects of the Act.” *Stefan Tietz application for exemption*, unreported decision of the Equal Opportunity Tribunal (G Donaldson, Deputy President, R Keane, Member and Professor C Mulvey, Deputy Member) No 22 of 2000; 10 November 2000 p 6.
- 32 On the face of it, Jupiter’s application is meritorious, but the Act, again on the face of it, prohibits this sort of discriminatory activity, and does so for good reason. The whole structure or scheme of the Act is, in fact, to promote equality of opportunity and to stop discriminatory behaviour against any particular group or class of people which could entrench any sort of inequality.
- 33 In the case of *ADI Limited (Exemption)* [2004] VCAT 1963 at [12] the Victorian Civil and Administrative Tribunal (whilst not binding this Tribunal), provided guidance to us as to how we might exercise our powers on an exemption application. The general body of Australian law that has built up with respect to applications for exemption make it clear that the process that the Tribunal should go through is three-fold. First, the Tribunal should ask whether the conduct sought to be exempted falls broadly within the spirit of one of the express exception provisions in the Act; second, the Tribunal should consider the scheme of the objectives of the Act; and finally, the Tribunal should consider what interests might be pointed to in the application that would justify the granting of the exemption. We would add that these three steps should be tested against a framework of the “public interest”.
- 34 First, we need to look at whether the conduct sought, that is, the exemption providing that persons under the age of 18 years are not permitted in Marloo Caravan Park thereby effectively discriminating against children, falls broadly within the spirit of one of the express exceptions in the Act.
- 35 Ms Chapman told the Tribunal that the basis of the application was that s 66ZF(2)(b) provided an express exception for holidays, however, that exception is for group holidays. Ms Chapman submitted that Jupiter’s senior citizen guests should be entitled to the same preferential treatment as they would receive on a group tour. The argument seems to be that as Parliament took the trouble to specifically refer to holidays in that section, it opens the gates to enable the Tribunal to give similar rights and privileges to other aspects of holidays.
- 36 We can see how, to a lay person, a provision in the Act referring to holidays could be seen to imply that anything to do with holidays can validly found an application for exemption. On that basis, retirees accessing a caravan park should be allowed the benefit of s 66ZF(2)(b) so that s 66ZF(1) does not make the provision of a senior/retirees only caravan park a breach of the Act.
- 37 The Tribunal therefore needs to look at whether s 66ZF(2)(b) gives rise to an implied exception which would make lawful the conduct applied for or whether it is within the spirit of an expressed exception. The Tribunal accepts that the directors of Jupiter may well have thought that a provision such as s 66ZF(2)(b) could provide an indication that Parliament wished the Tribunal to take into consideration people on holidays other than those expressly provided for. However, the rules of statutory interpretation require quite the opposite interpretation. The existence of s 66ZF(2)(b) tells the Tribunal that the Parliament had the opportunity to specifically address the issue of holidays and in fact did expressly consider it. This provision was included in 1992. Parliament specifically turned its mind to the issue of holidays and decided to allow only what would otherwise be discrimination for holiday tours as expressly provided in s 66ZF(2)(b). Parliament could have included whatever it wished in the section—Parliament could have allowed an exception to any aspect of the holiday or tourism industry. But it didn’t. It thought about this. It went through the process and decided to include only holiday tours. There is no scope for the Tribunal to expand s 66ZF(2)(b) to apply to other aspects of holidays. There is therefore no express or implied exception in s 66ZF that is relevant to this application.

- 38 So the basis of Jupiter's application founders at that point. The express exceptions to which Mr Rosales-Castaneda referred and which we considered are s 66ZG(3)(d), s 66ZM(2), s 66ZN, s 66ZP, s 66ZQ and s 74. The conduct sought by Jupiter in this application for exemption does not fall within the spirit of any one of those express exceptions in the Act.
- 39 The second hurdle facing Jupiter is that the application must be seen to enhance the objectives of the Act. Discrimination against children must be an exception that furthers the objects of the Act and that fits within the scheme of the Act. In essence, the conduct needs to be a discrimination that is positive. Those objects are found in the long title to the Act—
- “An Act to promote equality of opportunity in Western Australia and to provide remedies in respect of discrimination on the grounds of sex, marital status, pregnancy, sexual orientation, family responsibility or family status, race, religious or political conviction, impairment, or age, or involving sexual or racial harassment, or, in certain cases, on gender history grounds.”
- 40 The application for exemption, and the conduct sought to be made lawful, does not further the promotion of equality of opportunity in Western Australia. It has no element of positive discrimination. Ms Chapman argued that the exemption would allow senior people and retirees to obtain the holiday experience they seek; and that it would do likewise for families, by not burdening them with the perceived grumbling of the elderly. Even if that contention were proved to be correct, it does not have an element of promoting equality of opportunity in Western Australia. Rather it would provide access to different opportunities than are currently available.
- 41 Section 3 of the Act sets out the objects of the Act. It refers to the elimination of a range of discriminatory conduct and practices. Section 3(a) is the only object that would be relevant; that is, to eliminate discrimination against persons on the grounds of age in the area of accommodation. Although the conduct of the subject of the exemption, if authorised, might work favourably for the elderly, it would not work favourably for others; not just for people under 18 who are children against whom it discriminates, but it would discriminate against people with family responsibility or family status. An object of the Act set out in s 3(a) is to eliminate discrimination on the grounds of family responsibility or family status. The conduct does not assist that. Children under 18 do not as a rule travel alone to a caravan park, therefore it is appropriate that we look at the impact on family if the application were granted and that impact would in most cases be negative as they would be denied the choice of staying at the Marloo Caravan Park. The Tribunal does not accept Ms Chapman's submission that granting the exemption would necessarily result in an improved quality of holidays for families.
- 42 We could not find any clear guide that pointed to us where this application could further or enhance the objects of the Act, and, in fact, the onus was on Jupiter to show that to us, as was pointed out to Jupiter in the directions hearings, and there was no evidence or statements put before us to satisfy us of that. There were merely Ms Chapman's assertions that everyone would have better holidays if segregated by age.
- 43 The Tribunal's view is that if we allowed this exemption, the effect would be to open the floodgates. We could have every caravan park in Western Australia applying for exemptions from various provisions in the Act. In light of the recent publicity that has been given to the retiree market, the “wandering retiree market”, and what it is worth and the enormous amount of money being spent by retirees around Western Australia, many caravan parks would see this as a competitive edge and we would be inundated with applications. That, of course, does not finally determine Jupiter's application but it does cause the Tribunal serious concern as to the precedent value that would be set if we granted this application. Mr Rosales-Castaneda took it even further by asking us to consider the implications if the Tribunal were then asked to consider excluding people not only on the grounds of age, but on the grounds of race or religion or gender or on any of the other matters that are provided for in the Act. It would logically follow that the effect of granting this application could lead to a flow on of applications for different groups to be excluded from or given exclusive access to, a wide range of areas in work, accommodation, education and the provision of services. Ultimately, it would negate the Act entirely.
- 44 Thirdly, the ADI case suggests that we look at what interests can be pointed to, to justify the granting of the exemption. The interests that the Tribunal considered to be relevant were the public interest, tourism in Carnarvon, the safety of all of the residents in the car-park, or prospective residents, the safety of children, the safety of families, as well as safety of the elderly. The Tribunal looked at the interests of children and at the interests of the elderly.
- 45 Whilst we acknowledge that there might be some benefits in tourism for Carnarvon, that did not outweigh, in our view, the public interest that the objectives of the Act be continued and enforced, and also the public interest that would allow freedom of choice to any visitor to Carnarvon as to which caravan park they choose to stay in. The Tribunal is of the view that there are two important factors to the public interest in this case and those public interest considerations outweigh any real or perceived benefits to a combination of all of the other interests mentioned above.
- 46 The needs of this market (elderly and retiree travellers) are already being adequately met, and Ms Chapman gave evidence that if the exemption were not granted, she would continue to operate the caravan park in the same way as it has been operating to date, which appears to be quite successfully meeting this market with very few children applying to take up residence in the Marloo Caravan Park.
- 47 That conclusion led the Tribunal to the next conclusion, that whilst the Tribunal accepts Ms Chapman's altruistic intentions that she is motivated by a desire to help the aged, and despite her assertion that the granting of the application would result in financial loss to Jupiter, we cannot help but reach the inescapable conclusion that the main purpose of the application is to obtain a commercial advantage over its competitors. There would be, in our view, major commercial advantage and it would be wrong for this Tribunal to exercise a very powerful function with the result of giving one player in a market a definite and clear commercial advantage over their competitors, particularly where there is no overriding public interest which would outweigh that competitive effect.

- 48 The Tribunal is not convinced that good reason exists to grant the exemption as the Tribunal is of the clear view that to do so would not enhance the objects of the Act and would result in a commercial advantage over Jupiter's competitors, the effect of neither of which, on these facts, is diluted by a consideration of the relevant public interest.

Orders

- 49 The Tribunal dismisses the application for exemption from s 66ZE, s 66ZF and s 66ZG of the *Equal Opportunity Act 1984*.

I certify that this and the preceding [49] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

JUDGE J ECKERT,
Deputy President.

