

AUSTRALIAN CAPITAL TERRITORY DISCRIMINATION TRIBUNAL

CITATION: JONES AND THE SCOUT ASSOCIATION OF AUSTRALIA,
AUSTRALIAN CAPITAL TERRITORY BRANCH INCORPORATED
& ORS [2007] ACTDT 1 (11 JANUARY 2007)

DT06/389-392

Catchwords: Discrimination in the provision of services – application to strike out complaint on grounds that complaint is misconceived – whether respondent is a “voluntary body” and exempt from the operation of the Act.

Boy Scouts’ Association Act 1924 (Cwth)

Discrimination Act 1991, ss 20, 31, 81, 89

New South Wales Anti-Discrimination Act 1999

Scout Association of Australia (New South Wales Branch) Incorporation Act 1928, s 4

Customs and Excise Commissioners v Bell Concord Educational Trust Limited [1928] 2 WLR 679

Firestone and Legal Aid Office (ACT) [2006] ACTDT 3

Strong v The Hospitals Contribution Fund of Australia Limited [2004] NSWADT 176

Tribunal: Mr G C Lalor, Deputy President

Date: 11 January 2007

AUSTRALIAN CAPITAL TERRITORY)
DISCRIMINATION TRIBUNAL)

NOS: DT06/389-392

RE: **GUY JONES**
Complainant

AND: **THE SCOUT ASSOCIATION
OF AUSTRALIA,
AUSTRALIAN CAPITAL
TERRITORY BRANCH
INCORPORATED**
Also known as **SCOUTS
AUSTRALIA INC. (ACT BRANCH)**
First Respondent (DT06/389)

AND: **SARAH VINE**
Second Respondent (DT06/390)

AND: **AMBER VINE**
Third Respondent (DT06/391)

AND: **COLIN VINE**
Fourth Respondent (DT06/392)

ORDER

Tribunal : Mr G C Lalor, Deputy President

Date : 11 January 2007

Order :

Pursuant to section 79 of the Discrimination Act 1991, I order that the complaint forwarded to this Tribunal on 25 September 2006 be struck out as lacking substance.

.....
Deputy President

AUSTRALIAN CAPITAL TERRITORY)
DISCRIMINATION TRIBUNAL)

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REASONS

11 January 2007

Mr G C Lalor, Deputy President

The application

On 5 March 2006 Guy Kim Jones, in this application described as “the respondent”, made application to the Australian Capital Territory Human Rights Office alleging discriminatory conduct against him by the applicants to this application, referred to hereafter as “the applicants”. He also sought to join several other individuals who were members of the applicant body. By letter dated 5 May 2005 the Australian Capital Territory Human Rights and Discrimination Commissioner declined the complaints alleging disability discrimination.

2. The allegation was that within the Scouting body here in the Australian Capital Territory the applicants discriminated against the respondent and excluded him from a Crew and so treated him unfavourably as to result in his relinquishing his membership of that body.

3. By letter dated 28 June 2006 the respondent advised the Commissioner that he wished his various complaints to be referred to this Tribunal. On 25 September 2006 the matter was so referred.

4. On 24 October 2006 the applicants filed an application under Section 89 of the Discrimination Act 1991 that the complaint against the named respondents to the original application be struck out “on the grounds that the complaint is misconceived”. The applicants filed submissions at the same time. The Discrimination Act was amended effective from 1 November 2006 and Section 89 has been amended and appears in the

amended Act as Section 79. Its terms are not substantially different for the purposes of this application.

5. On 17 November 2006 the respondent filed a response to the applicants' submissions and on 22 November 2006 the applicants filed a reply.

6. The application came on for hearing in the Tribunal on 8 January 2007 and at the hearing the respondent was asked to distil with some particularity exactly what it was that was alleged as the discriminatory conduct of the applicants. He alleged that he was forced out of the Scouting Movement in the Australian Capital Territory by:

1. A decision of February 2005 to remove him from the Loxley Rover Crew Registry; and
2. The conduct of the other applicants who "propagated slanderous conduct" towards him which made it intolerable for him to continue with his desire to rejoin the scouting body in the ACT.

7. Section 81(2)(c) of the Discrimination Act 1991 prior to its amendments effective on 1 November 2006 provided that any complaint to the Commissioner, in effect, had to be in relation to conduct that occurred within 12 months from the date of complaint or the last in a series of acts complained of occurred within 12 months from the date of the complaint. The decision of February 2005 to remove the respondent from the Loxley Rover Crew Registry was not within the time period but the ongoing conduct alleged was alleged to have been so.

8. The applicants' primary submission was that The Scout Association of Australia, Australian Capital Territory Branch Incorporated (hereinafter referred to as "Scouts") was exempt from the operation of the Act as it was a voluntary body within the meaning of Section 31 of the Act. It was submitted that the conduct of the applicants was not therefore unlawful under the Act.

9. The respondent's submission essentially was that the exemption did not apply to the applicants as Scouts was not a voluntary body within the definition of that phrase in the Act.

10. Ordinarily the Tribunal would be reluctant to entertain an application to strike out an application referred to it where that necessitates the hearing of the complainant's evidence to determine the veracity of the allegations. This is particularly so where the allegation is that the original application lacked substance – the power to dismiss a matter on such grounds must be exercised with "considerable caution" – **Firestone and Legal Aid Office (ACT) [2006] ACTDT 3**.

11. This application is not such a case and it appears to be appropriate and expedient to consider the merit of it as if Scouts is found to be a body exempt from the operation of the Act as being a "voluntary body" within the definition of that term in the Dictionary to the Act the inquiry will not proceed to hearing on its merits and the complaint will be dismissed as against Scouts. In so deciding this application there will be no necessity to make any finding of fact as alleged in the original application referred to the Tribunal by the Commissioner.

The Law applicable

12. Part 3 of the Discrimination Act 1991 relates to unlawful discrimination in various areas of human experience – e.g. in work, whether in an employer/employee relationship, principal/commission agent, principal/contract worker relationship or in a partnership to name but a few.

13. Section 20 of the Act makes it unlawful

*for a person (the **provider**) who (whether for payment or not) provides goods or services, or makes facilities available, to discriminate against another person –*

(a) *by refusing to provide those goods or services or make those facilities available to the other person; or*

.....

14. Section 31 of the Act provides that

Part 3 does not make it unlawful for a voluntary body to discriminate against a person in relation to –

(a) *the admission of people as members of the body; or*

(b) *the provision of benefits, facilities or services to people, whether the people are members of the body or otherwise.*

15. A “voluntary body” is defined in the Dictionary to the Act as meaning:

an association or other body (whether incorporated or unincorporated) the activities of which are not engaged for the purpose of not making a profit, but does not include—

(a) *a club; or*

(b) *a body established by a law of the Territory, the Commonwealth, a State or another Territory; or*

(c) *an association that provides grants, loans, credit or finance to its members.*

Reasons for decision

16. It is clear that Scouting ACT is not a club. Scouting, so far as I can ascertain, was established in England and was established by Royal Charter which is a charter granted by a monarch to give legal efficacy to an incorporated body. Formerly it was the only way in which an incorporated body could be formed. Initially scouting was established in Australia in the same way and each State Branch was responsible directly to Imperial Headquarters in London.

17. In 1922 a Federal Council with nominees from each State Branch was formed in 1922. The ACT was part of the New South Wales Branch. A Commonwealth Act was enacted in

1924 “to afford protection to the Boy Scouts Association”. The preamble to the Boy Scouts’ Association Act 1924 which was assented to on 26 September 1924 states:

Whereas the Boy Scouts’ Association (in this Act referred to as “the Association”) was duly incorporated in the United Kingdom of Great Britain and Ireland by Royal Charter granted on the fourth day of January One thousand nine hundred and twelve:

And whereas the Association has power under the said Charter to form Local Branches and Committees in all parts of His Majesty’s Dominions....

And whereas for providing and maintaining an efficient organization for promoting the objects of the Association, Local Branches have been formed under the power aforesaid of the Commonwealth under the name of “The Australian Federal Council of the Boy Scouts’ Association” and for the several States of the Commonwealth, in New South Wales by the name of the Australian Boy Scouts’ Association, New South Wales Section.....

18. The Act goes on to effect protection to the Association in the use of its name and uniform. The Act does not establish the Association.

19. In New South Wales the Scout Association of Australia (New South Wales Branch) Incorporation Act 1928 is said to be:

An Act to incorporate the Executive Committee of the Boy Scouts Association, New South Wales Branch; to confer and impose upon that body certain powers, duties, rights and liabilities, to vest in it the property of the said Association in New South Wales; and for purposes connected therewith.

20. Section 4 of that Act provides that the Corporation “constituted by this Act shall be known as ‘The Boy Scouts Association, New South Wales Branch’.” The powers of the Corporation are set out in the Act.

21. The scouting Home Page on the internet states that:

For more than 30 years, Scouting was co-ordinated by the Australian Federal Scout Council, which functioned as a Branch of the British Boys Scout Association. In 1958 the adjuration of the Australian Boys Scout Association took place and in 1967 the National Organization was incorporated by Royal Charter. The name of the Association was changed to the Scout Association of Australia in 1971.

22. As I have said initially the ACT was originally part of the New South Wales Branch of the Association. On 1 April 1980 the Australian Capital Territory Branch was formed. It became a Branch separate to the New South Wales Branch. The prelude to the Constitution of the Scout Association of Australia, Australian Capital Territory Branch Incorporated sets out the history of the Branch in the following terms:

The National Council of the Scout Association of Australia incorporated by Royal Charter on the 23rd day of August 1967 in exercise of its powers under Clause 9(ii) of the Royal Charter resolved that the Australian Capital Territory Branch of the Scout Association of Australia be formed on the 1st day of April 1981.

The constitution approved at that time has been amended and the Branch shall be governed by the following Constitution as from the 1st day of January 1996.

The Branch has been incorporated under the Australian Capital Territory Associations Incorporation Act 1991.

23. Osborn's Concise Law Dictionary in its ninth edition defines incorporation as:

Merging together to form a single whole; conferring legal personality upon an association of individuals, or the holder of a certain office, pursuant to Royal Charter or Act of Parliament.

24. The respondent submitted that the establishment of the New South Wales Branch in 1928 with the ACT being part of that Branch meant that the ACT Branch had been established by statute.

25. I am satisfied that the Scout Association of Australia, Australian Capital Territory Branch Incorporated is not an association established by a law of a State or Territory. It is a body established by Royal Charter and incorporated under a law of the Australian Capital Territory. It is a body that has had legal personality conferred upon it by statute after it has been established by Royal Charter.

26. The respondent has further submitted that the applicant Scouts is not entitled to rely upon the exclusion contained in the definition of "voluntary body" in the Dictionary to the Act if it were not to be found to be an "association or other body (whether incorporated or unincorporated) the activities of which are not engaged in for the purpose of making a profit".

27. To support his contention the respondent has referred the Tribunal to the powers of the Scouts as set out in paragraph 7.23 of the Constitution which provides:

.....the Branch shall have power to enter into contracts and to do all such other acts and things whatsoever as are incidental or conducive to the attainment of any of the objects or purposes of the Branch or to the exercise of any of its said powers.

28. The respondent has submitted that this provides "significant power to undertake a wide range of activities, including activities for the purpose of making a profit". Without commenting on the legal accuracy of this assertion it is qualified in the paragraph by the words "as are incidental or conducive to the attainment of any of the objects or purposes of the Branch".

29. The purpose of the Scout Movement generally is set out in paragraph 4 of the constitution and provides:

The purpose of the Scout Movement is to contribute to the development of young people in achieving their full physical, intellectual, social and spiritual potentials as individuals, as responsible citizens and as members of their local, national and international communities.

30. The objects and purposes of the Branch are set out more specifically in paragraph 5 and provide *inter alia*:

.....to instruct young people in the principles of discipline, loyalty and good citizenship.....

31. Paragraph 7.23 only empowers the Scouts to undertake activities of whatever nature that are incidental to or conducive to the attainment of its objects or purposes. It is not a paragraph that entitles the Scouts to engage in any activity at large.

32. The respondent has submitted that prior to late 2005 Scouts conducted a business known as “Snowgum Adventure” which had previously been known as “The Scout Outdoor Centre” which was a retail business and was conducted for the sole purpose of making a profit and “with the sole purpose of injecting profits into Scouts ACT”. It was submitted that in the 2003 year an amount of \$62,423 was contributed from that venture to Scouts. Further, evidence was put before the Tribunal that Scouts had \$400,000 in a cash management account, \$1.2million in short term deposits which resulted in an interest yield of \$68,051 for the 2004 calendar year. These amounts increased for the 2005 calendar year. Other incidents of money-making ventures by Scouts were put before the Tribunal.

33. The respondent’s submission is that the statutory exclusion does not apply where one of the activities of the body is engaged in to make a profit. In support of this submission the Tribunal was cited the New South Wales Administrative Decisions Tribunal in its Equal Opportunities Division matter of **Strong –v- The Hospitals Contribution Fund of Australia Limited [2004] NSWADT 176**. In that matter the applicant had complained that the respondent had discriminated against her because of her marital status in that when she had been married her contributions provided health insurance coverage for herself, her husband and her son but following her divorce coverage for herself and her son was provided at the same rate of contribution as it had previously been when she had been married.

34. In an application to have the original application struck out prior to the hearing of the case on its merits the respondent submitted that its activities were conducted otherwise than for profit and so it was exempt from the operation of the New South Wales Anti-Discrimination Act 1999. The issue was whether the “activities of HCF are carried on otherwise than for profit”. HCF had, the Tribunal said, pursuant to its Memorandum and Articles of Association “members” who were signatories to its Memorandum and Articles of Association and “contributors” who paid monthly contributions and received health care coverage. The Tribunal was prepared to accept for the purpose of this case that both classes of people were members of HCF in the broader sense that they were “people who are allowed, on an exclusive or privileged basis, to take part in the regular activities of the Association”.

35. The Tribunal considered the case of **Customs and Excise Commissioners –v- Bell Concord Educational Trust Limited [1989] 2 WLR 679** in which Brown-Wilkinson VC “cited (at 683E) Lord Denning in *National Deposit Friendly Society Trustees –v- Skegness Urban District Council [1959] AC 293*, who said at page 319:

The fact that the society has made profits does not mean that it is ‘conducted for profit’, which I take to mean ‘conducted for the purpose of making profit’. Many charitable bodies such as colleges and religious foundations have large funds which

they invest in interest in stocks and shares, or purchase land which they let at a profit. Yet they are not established or conducted for profit. The reason is that because their objects are to advance education or religion, as the case may be. The investing of funds is not one of their objects properly so called, but only a means of achieving those objects. So it here seems to me that if the making of profit is not one of the main objects of an organisation, but is only a subsidiary object – that is to say if it is only a means whereby its main objects can be furthered or achieved – then it is not established or conducted for profit.”

36. The Tribunal in the HCF matter considered that “being engaged in business is not inconsistent with its being carried on otherwise than for profit” (para 90). The Tribunal at para 108 said:

But in our view the term ‘carried on otherwise than for profit’ does not identify a body by reference to its actual financial results each year. It identifies a body by reference to its character.. Whether it has a profit or a loss, and whether it calls a profit and surplus and a loss and deficit, the question is ‘what is its character? Does it have the character of a relatively small voluntary body, the activities of which could be carried on by an unincorporated association of people for purposes of pursuing a common interest? The exception provided for in s57 is, in our view, directed towards such bodies, and it is bodies with that character that are identified by the term ‘carried on otherwise than for profit’.

37. The Tribunal held that HCF was not a body that carried on business otherwise than for profit within the above sense and was not therefore entitled to take advantage of the exception provided for in the NSW Act.

38. The respondent in this application submitted that Scouts were not a “small voluntary body, the activities of which could be carried on by an unincorporated association of people for the purpose of pursuing a common interest”. He submitted that a group of ten people with an interest in model trains who met regularly to discuss them was such a body. The difficulty with this example is when the number of members increase and the numbers of those with the similar interest of fostering an understanding of model trains and an interest in them are such that they cannot meet in a suburban home and a hall is rented. To defray the cost of rental a shop is opened to sell model trains and the accoutrements desired by adherents to this past time. The profits are used to rent the hall and provide other benefits. It may not any longer be a “small voluntary body”, paying a cleaner for the hall, paying the rent etc. At a later date a hall may be bought. It is inconceivable that because of its size the body would lose its character.

39. I am of the view that the character of the body in question is to be taken from its purpose as a whole and not from individual purposes. The purposes for Scouts are as set out above and I am of the view that those purposes bring it within the exclusion as being a body “the activities of which are not engaged in for the purpose of making a profit”. Its money-making ventures are to support and foster those purposes and are not purposes for which Scouts was established.

40. The respondent further submitted that Scouts was not a “voluntary body” as it was an association “that provides grants, loans, credit or finance to its members” as provided for in the exclusion to the definition of a voluntary body in the Dictionary to the Act. He submitted

that it lent equipment to its members and made small grants to some of its members. Scouts acknowledged that it made small grants to some of its members to enable them to attend functions interstate consistent with the purposes of Scouting. The respondent submitted that the Act did not set out any genus to be applied to “grants” and that this admission was sufficient to exclude it from the definition of a voluntary body.

41. I am unable to accede to this. In my view the words import a genus of commercialism – the word “grant” must be considered in the same genus as the other three words, “loan”, “credit” or “finance” which carry with them the import of commercial dealings. An example of this might be a friendly society set up to assist members to purchase homes and the like. The fact that a small grant is made to a person to enable him or her to participate in or in fact produce an activity of a voluntary body within the meaning of that term in the Dictionary does not render it not a voluntary body. To do so would mean in effect that most voluntary bodies would lose their status as such as any re-imbursement for travelling for the body’s purposes would strip it of its character of a voluntary body. This cannot be what the legislature intended.

42. I am of the view that, for the purposes of the Discrimination Act 1991, The Scout Association of Australia, Australian Capital Territory Branch Incorporated is a voluntary body within the definition of that phrase in the Dictionary to the Act and that under Section 31 of the Act Part 3 of the Act does not make it unlawful for a voluntary body to discriminate against a person in relation to the provision of benefits, facilities or services to people.

43. The respondent submitted that if I was to so find it was still open to me to find that the individuals he has joined to his original application as respondents with the Scouts could be still found to complicit in discrimination by Scouts. As I understand his submission the conduct may be discriminatory but is exempt under Section 31 of the Act but this exemption does not extend to individuals who were complicit in the conduct which is per se discriminatory. The effect of Section 31 is, it was submitted, apposite to the case where a child who is *doli incapax* cannot be convicted of a crime but a person may be convicted of aiding and abetting the commission of the crime. The rationale behind the doctrine of *doli incapax* is that knowledge of wrongfulness of the crime must be proved. That is a very different situation from a position where there is a statutory provision that says that the conduct of a party is an exception to prohibited conduct – i.e. it is not unlawful for a voluntary body to discriminate against a person.

44. I am of the view that given my finding in para 42 above the other respondents to the original complaint cannot be said to be complicit in any discriminatory behaviour.

**AUSTRALIAN CAPITAL TERRITORY
DISCRIMINATION TRIBUNAL****APPEARANCE DETAILS**

To be completed by Member's Staff

FILE NO: DT06/389-392

COMPLAINANT: GUY JONES
RESPONDENTS: THE SCOUT ASSOCIATION OF AUSTRALIA,
AUSTRALIAN CAPITAL TERRITORY BRANCH
INCORPORATED Also known as SCOUTS AUSTRALIA INC.
(ACT BRANCH); SARAH VINE; AMBER VINE; COLIN
VINE

COUNSEL APPEARING: **COMPLAINANT:**
RESPONDENTS: MR C CHENOWETH

SOLICITORS: **COMPLAINANT:**
RESPONDENTS:

OTHER: **COMPLAINANT:** SELF
RESPONDENT:

TRIBUNAL MEMBER: MR G C LALOR, DEPUTY PRESIDENT

DATE OF HEARING: 8 JANUARY 2007 **PLACE:** CANBERRA

DATE OF DECISION: 11 JANUARY 2007 **PLACE:** CANBERRA

COMMENT:
