

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

ANTI DISCRIMINATION LIST

VCAT REFERENCE NO. A99/2007

CATCHWORDS

Anti-discrimination – exemption – hotel/social venue designed primarily for male homosexuals – refusal/restriction of entry to others not in that group – relevant considerations - *Equal Opportunity Act 1995* s83

APPLICANT	Peel Hotel Pty Ltd
WHERE HELD	Melbourne
BEFORE	C. McKenzie, Deputy President
HEARING TYPE	Hearing
DATE OF HEARING	24 May 2007
DATE OF ORDER	24 May 2007
CITATION	Peel Hotel Pty Ltd (Anti Discrimination Exemption) [2007] VCAT 916

ORDER

1 Under s74 of the *Victorian Civil and Administrative Tribunal Act 1998*, the Applicant is given leave to re-apply to the Tribunal in respect of this exemption.

2 The principal registrar must arrange for a notice of exemption in the following terms to be published in the *Government Gazette* -

EXEMPTION

APPLICATION NO. A99/2007

The Victorian Civil and Administrative Tribunal has considered an application pursuant to section 83 of the *Equal Opportunity Act 1995* by the Peel Hotel Pty Ltd (ACN: 104 465 143) for exemption from sections 42, 100 and 195 of that Act. The application for exemption is to enable the applicant to engage in the specified conduct.

In this exemption, “specified conduct” means –

- to refuse or restrict entry to the Peel Hotel Pty Ltd at 113 Wellington Street Collingwood to people who do not identify as homosexual males where to allow entry or unrestricted entry would, in the opinion of the applicant, its agent or employee, adversely affect the safety or comfort of the venue for its homosexual male patrons, or the nature of that venue as a venue primarily for homosexual male patrons; and
- to advertise those matters.

UPON READING the material submitted in support of the application, and upon hearing submissions from Mr Rice of Counsel, Sergeant Mercer and Mr McFeely, and for the Reasons for Decision given by the Tribunal on 24 May 2007, the Tribunal is satisfied that it is appropriate to grant an exemption from sections 42, 100 and 195 of the Act to engage in the specified conduct.

The Tribunal hereby grants an exemption to the applicant from the operation of sections 42, 100 and 195 of the *Equal Opportunity Act 1995* to enable the applicant to engage in the specified conduct.

This exemption is to remain in force from the day on which notice of the exemption is published in the Government Gazette until 30 May 2010.

C. McKenzie

Deputy President

APPEARANCES:

For the Applicant Mr G. L. Rice of Counsel

REASONS

Outcome

1 The exemption is granted. It will operate for a period of three years from the date on which it is published in the *Government Gazette*. I now explain my reasons.

The application

2 The Applicant, which I call the company, applies for an exemption to enable it or its agents to refuse or restrict entry to those who do not identify as homosexual males to the Peel Hotel where, if that entry occurred or were not restricted, this would in the opinion of the company or its agent, adversely affect the safety or comfort of the venue's patrons, or the nature of the venue as primarily a venue for gay males. The exemption also authorises the company to advertise these matters.

Background

3 The Peel Hotel is in Wellington Street, Collingwood. Its proprietor first applied for this exemption on 21 December 2006. At the company's request, the Tribunal withdrew the application by order dated 2 January 2007. I accept the evidence of the company's managing director, Mr McFeely, that it withdrew the application so that it could collect more evidence concerning the matters raised in it. The company now re-applies for the exemption. I have given it leave to do so under s74 of the *Victorian Civil and Administrative Tribunal Act 1998*.

4 I first say something about the law. I then consider the material before me. Finally, I state my conclusion.

The law

5 Under s83 of the *Equal Opportunity Act 1995* (the EO Act) the Tribunal has a broad discretion to grant exemptions from the provisions of the Act. In doing so, it follows an earlier case called *Stevens v Fernwood Fitness Centres Pty Ltd*¹. It first asks: is it necessary to deal with the application? If there is no possible prohibited discrimination involved, clearly it is not. In asking whether there is possible prohibited discrimination, the Tribunal looks at whether there is an express exception provision which might apply. If

there is possible prohibited discrimination, it asks: is it appropriate to grant the exemption? In considering this matter, it looks at whether the application will promote one of the objectives of the Act; whether it is within the spirit, although not the letter, of one of the express exception provisions; and any other factors including the public interest that might justify the exemption.

¹
(1996) EOC 92-782

The material

6 I have before me written and oral submissions from the company's counsel, Mr Rice, an affidavit including exhibits from Mr McFeely and oral evidence from Mr McFeely and Sergeant Mercer. Sergeant Mercer is the police officer responsible for licensed premises in the area in which the Peel Hotel is located.

7 At the Tribunal's direction, the application was advertised by placing relevant notices at the entrance and in other parts of the Peel Hotel's premises. I accept Mr McFeely's evidence that a number of the regular patrons of the Peel Hotel responded positively to the application. The Tribunal has received one letter in support of it. Neither Mr McFeely nor this Tribunal has received any submission in opposition to the application.

8 The Peel is a hotel and social venue. It primarily provides (as well as its hotel services) dancing and music. It is very popular. It has many hundreds of patrons on weekend nights (including Fridays). Over a week, it will have thousands of patrons.

9 The Peel aims to provide its facilities primarily for gay men. While it has marketed itself primarily to the gay male community, it has not hitherto sought exemption from the EO Act because it was believed that it could operate in a way that welcomed all, excluded none, but focused on or was aimed primarily at gay male patrons. It has this focus because it seeks to provide a safe, non-threatening, comfortable and enjoyable social environment for the gay male community.

10 I accept Mr McFeely's evidence that providing such an environment is important for a number of reasons. Although gay men are now less at risk than they were in the past to various issues and behaviours, there are still instances of sexuality-related violence, insult, ostracism, derision, harassment and hostility. These are directed to gay men by other members of the community. Some of these occur when gay men display towards each other what society would tolerate among heterosexuals behaving as a couple – kissing, hugging, or expressing love, attraction or affection in a physically intimate way. This venue is designed to provide an environment where gay men can do these things, can socialise, can make friends, can meet and find prospective partners without an atmosphere of derision, hostility or insult or even of violence. It provides an atmosphere where they can express themselves physically or sexually in a way that would be acceptable among men and women in a mixed sex venue.

11 The venue aims to provide gay men with the same opportunities as mixed sexes have in the venues to which I have referred. There are many thousands of these venues across the Melbourne CBD.

12 The company is careful to ensure that its venue is not used for illegal purposes (for prostitution or unlawful drug activity). In conjunction with

the Victorian AIDS Council it provides to its patrons pamphlets and other written material about men's health issues and safe-sex issues.

13 The venue has operated without difficulty for many years. It is an all-night venue, operating from 9pm until dawn. It has live music and no cover charge. Perhaps because of these factors, increasing numbers of heterosexual men and women and lesbians have particularly over the past year asked to enter the venue. A number of difficulties have arisen. I accept Mr McFeely's evidence and Sergeant Mercer's evidence about these.

14 If heterosexual men and women and lesbians come to the venue in large groups, then their numbers may be enough to "swamp" the numbers of gay male patrons. This would undermine or destroy the atmosphere which the company wishes to create. Sometimes, heterosexual groups and lesbian groups insult and deride and are even physically violent towards the gay male patrons. In doing these things, they use sexually-based insults. Sometimes, groups seek to use the venue for parties and it is clear from Mr McFeely's affidavit that these groups wish to look at the behaviour of the gay male patrons as a kind of spectacle or entertainment for the group's enjoyment. Entry of these groups would undermine or destroy the unique atmosphere which aims to foster and not frighten or discomfit its gay male patrons.

15 I accept Mr McFeely's evidence that there are a large number of alternative venues which provide similar kinds of services to that provided at the Peel Hotel. These venues can be attended by people of any sex, any sexual orientation or any gender identity. I also accept his evidence that there are a very significant number of venues which market their services to lesbians. The Glasshouse, which is a venue close to the Peel Hotel, is one of these.

16 The Peel does not wish to have an all-male or all-gay male environment. It simply wishes to preserve its primarily gay male environment and its non-threatening atmosphere in which gay males can feel comfortable to express affection, physical intimacy or sexuality in a way that will not make them a target of derision, hostility or criticism and where that behaviour might, if expressed in a mixed sex venue, lead to that hostility, derision or criticism.

Should the exemption be granted?

17 In my view, it should. In my view, there is possible prohibited discrimination here on the possible grounds of lawful sexual activity, sexual orientation or gender identity. There is no express exception provision which clearly applies. However, the application is in the spirit of those express

exception provisions which seek to allow special measures to be taken to redress disadvantage suffered by those with a particular attribute. An example of these is s82.

18 The exemption promotes that objective of the Act which is to promote the recognition and acceptance of everyone's right to equality of opportunity. It seeks to give gay men a space in which they may, without inhibition,

meet, socialise and express physical attraction to each other in a non-threatening atmosphere, in a way that heterosexual couples have in mixed sex venues.

19 It is also consistent with the scheme of the Act. The Act now includes attributes of sexual orientation and gender identity. It has always included the attribute of lawful sexual activity. The objective concerning the recognition and acceptance of equality of opportunity applies equally to all attributes, including these three. Just as it is consistent with the Act's objective to provide special measures to redress disadvantage suffered by, for example, women or those with disability, so also is it consistent with that objective to provide this venue for those with a particular sexual orientation.

20 The exemption also seeks to prevent discrimination against gay men, for whom this venue is designed. The anti-social behaviour which would be at the heart of a decision to refuse or restrict entry to groups of heterosexuals or lesbians is sexuality-based behaviour and includes sexuality-based insults and derision. It would be most unfortunate if at this venue, gay men were subjected to the very behaviour that the venue seeks to protect them from. I would add that I take a similar view of the restriction or refusal of entry to those groups who wish to use the venue for "hens' nights" and the like, where they wish to use the gay male patrons as a form of entertainment. To regard the gay male patrons of the venue as providing an entertainment or spectacle to be stared at as one would at an animal at a zoo, devalues and dehumanises them. It is, although subtle, another form of sexuality-based humiliation or discrimination. In my view, it is appropriate to grant the exemption.

C. McKenzie
Deputy President

