

EQUAL OPPORTUNITY TRIBUNAL  
OF WESTERN AUSTRALIA

Matter Number No. 9 of 1997

IN THE MATTER OF A COMPLAINT BY:

BRIAN SOARES

Complainant

- against -

COMMISSIONER OF STATE REVENUE

First Respondent

- and -

STATE OF WESTERN AUSTRALIA

Second Respondent

---

REASONS FOR DECISION

---

BEFORE: Mr N.P. Hasluck, QC                      President  
          Mrs R. Kean                                Member  
          Mr K. Wyatt                                Deputy Member

Counsel for the Complainant                      Mr A. McDonald

Counsel for the Respondents                      Mr A. Sefton

HEARD: 17 JUNE 1997

REASONS FOR DECISION

DELIVERED 22 AUGUST 1997

The Complainant, Brian Soares, claims that the Respondents discriminated against him on the ground of marital status. The complaint arises out of an assessment of stamp duty upon documents submitted to the State Taxation Office by the Complainant in order to effect a transfer of an interest in land.

The parties recognised at an early stage that resolution of the dispute turned upon narrow points of statutory interpretation and therefore a Statement of Agreed Facts was brought into existence. It then became apparent that it would be necessary to supplement the Statement by further evidence. Accordingly, the materials before the Tribunal for the purpose of these Reasons for Decision, are the Statement of Agreed Facts, the affidavit of Brian Henry Soares sworn the 6th day of June 1997, the verbal testimony given by the Complainant at the hearing including the related exhibit and the Commissioner's Report. Nonetheless, the Statement of Agreed Facts continues to be the most significant point of reference.

#### **The Domestic Situation**

The Complainant met Kerrie Loveridge in March 1988. For a period of approximately 2 years, from February 1989 until June 1991, they were in a de facto relationship. At the hearing the Complainant confirmed that during the 2 year period just mentioned they were living together "effectively as man and wife" and that they shared the household expenses, making use of a joint bank account for that purpose. There were no children of the relationship, but Ms Loveridge's daughter lived with them for a period and the Complainant's son came over on weekends from time to time. The property they lived in was purchased by them in February 1989 and registered in their names as joint proprietors with each holding a one half share.

Following the breakdown of their relationship, the Complainant and his former partner agreed to terms of

settlement in respect of the subject property. The terms of the settlement were expressed by consent in an order of the Supreme Court of Western Australia in proceeding CIV1552 of 1992 dated 25 September 1995. The order provided, in effect, that on payment by the Complainant to his former partner of \$7000 there would be a declaration that his former partner held the one half share in the property, which was then registered in her name, in trust for the Complainant and that upon request by the Complainant his former partner would transfer into the name of the Complainant her one half share of the property.

The Complainant had received legal advice before the order was made that the transfer of his former partner's share in the property would be exempted from full stamp duty because it was to be done pursuant to a court order. He understood that nominal duty of only \$5 would be assessed on the transfer. Under cross-examination, the Complainant confirmed that this advice did not come from anyone associated with the State Taxation Office and there is nothing in any of the materials before the Tribunal to suggest that the Complainant received advice or assistance of any kind from the State Taxation Office.

The Complainant subsequently paid to his former partner \$7000 and at his request his former partner, on 15 December 1995, executed in his favour a transfer of land in relation to the property. The transfer of land and court order ("the instruments") were duly lodged on behalf of the Complainant with the Commissioner of State Revenue. On 15 January 1996, an assessment of the duty chargeable under the Act in respect of the instruments was issued on behalf of the Commissioner to the Complainant. Stamp duty chargeable under the Act in respect of the Supreme Court order was \$962.50. No duty was chargeable under the Act in respect of the transfer of land. The duty chargeable under the Act in respect of the order was paid on 22nd January 1996 and the instruments were thereafter duly

stamped on behalf of the Commissioner. The Complainant confirmed in evidence that at all material times subsequent to the breakdown of the relationship mentioned earlier, he maintained his status as a single person. It therefore follows, put simply, that he is aggrieved by the fact that had he been married to his former partner and had the court order effecting a disposition of the property been made by the Family Court, he would have been liable for nominal duty only. He therefore submits that, contrary to section 9 and section 20 of the Equal Opportunity Act 1984, he has been treated less favourably than a person who was married to the other party to the relationship would have been treated in the same or similar circumstances.

#### Issues

Section 9 of the Equal Opportunity Act provides that a person discriminates against another person on the ground of marital status of the aggrieved person if on the ground of the marital status of the aggrieved person the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different marital status. By section 20 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 marital status "in the terms or conditions on which" or "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.

Section 6 provides that the Act binds the Crown. Section 3 sets out the objects of the Act which include the elimination, so far as is possible, of discrimination against persons on the ground of marital status "in the areas of work, accommodation, education, the provision of

goods, facilities and services and the activities of clubs." Section 4 deals with interpretation of the Act and attributes meanings to various terms. In that regard the term "services" includes:

- "(a) services relating to banking, insurance and the provision of grants, loans, credit or finance;
- (b) services relating to entertainment, recreation or refreshment;
- (c) services relating to transport or travel;
- (d) services of the kind provided by members of any professional trade; and
- (e) services of the kind provided by government, a government or public authority or a local government body."

Against this background, the parties submitted to the Tribunal a list of issues for determination in the following terms:

"1. Is the assessment and collection, in accordance with the Stamp Act 1921, of duty chargeable under the Act the provision of a service within the meaning of section 20 of the Equal Opportunity Act 1984 and, if so, does the First and/or Second Respondent provide that service?

2. If the answer to issue 1 is 'yes', did the assessment and collection, in accordance with the Stamp Act 1921, of duty chargeable under the Act, in respect of the court order and transfer of land, constitute discrimination by the First and/or Second Respondent against Mr Soares on the ground of his marital status and the terms or conditions on which or the manner in which Mr Soares was provided with the service?

3. If the answer to issue 2 is 'yes', was that assessment and collection of duty lawful, as a matter of statutory interpretation, notwithstanding the Equal Opportunity Act 1984?"

The Tribunal pauses to note that there was some discussion at the hearing as to the proper identity of the respondents to the complaint. Mr Sefton, as counsel instructed by the Crown Solicitor's Office, was clearly in a position to represent both the Commissioner of State

Revenue and the State of Western Australia. He did not suggest that the complaint could not be proceeded with for lack of a proper respondent. His position was, rather, that the proper respondent was the Commissioner of State Revenue having regard to the fact that under the provisions of the Stamp Act, the Commissioner of State Revenue was in a position to recover duty and penalties and to enforce the provisions of the Act. In the light of this submission the Tribunal will proceed upon the basis that the proper respondent is the Commissioner of State Revenue.

### The First Issue

In order to determine whether the assessment and collection of duty chargeable under the Stamp Act can be regarded as the provision of a "service" one must begin by looking closely at certain provisions of the Stamp Act 1921. According to the short title, it is an Act to amend and consolidate the law relating to stamp duties upon instruments and to impose certain stamp duties, and for other relative purposes. The structure of the Act, generally described, reveals that it is a taxing Act whereby the State Government, via the agency of the Commissioner of State Revenue, requires persons who bring written instruments into existence to submit the instruments to the Commissioner for assessment as a result of which duties will become payable having regard to the nature of the instrument and often by reference to the value of the transaction reflected in the instrument. Penalties can be imposed for non-compliance with certain provisions of the Act and, in addition, instruments chargeable with duty shall not be admitted in legal proceedings unless the instrument is duly stamped.

By section 5 the Commissioner of State Revenue shall have the general administration of the Act. By section 16 the duties to be charged for the use of the Crown (emphasis added) on or in respect of the instruments specified in

the Second Schedule shall be the duties specified opposite to those instruments in that schedule subject to exemptions specified elsewhere in the Act. By section 17 the duties are to be paid and denoted by the use of impressed stamps or the issue of receipts which appear on the face of the instrument.

By section 31 the Commissioner shall, if required by any other person, or may, of his own volition, express his opinion with reference to any executed instrument on whether or not that instrument is chargeable with any duty. If he is of the opinion that the instrument concerned is chargeable with duty then he shall issue an assessment of duty and endorse on the instrument the amount of duty chargeable or that the instrument is not chargeable with duty. A person liable is required to pay the amount of the assessment and will commit an offence if he or she fails to do so. One should also note that by an earlier provision, section 28, any person who is required to receive or register any instrument shall not perform that task unless he is satisfied that the original instrument has been duly stamped. A person of that kind may refer any question concerning the liability to duty to the Commissioner for determination. There are also provisions in the Act relating to appeals against assessments.

Part III B of the Act deals with conveyances and transfers. Provisions falling within that Part, including especially section 63A, provide that ad valorem duty will be imposed on certain court decrees and orders which have the effect of a conveyance on sale. When one refers to the Second Schedule where the amounts payable in respect of various categories of instrument are set out either specifically or by reference to a formula which allows for determination of the relevant amount one finds that conveyance or transfer on sale of property is dealt with by item 4. In the circumstances of the present case the application of various provisions concerning a court order

results in the figure of \$962.50 which the Complainant was required to pay, as mentioned earlier, having regard to the value of the subject property. On the other hand item 8 of the Second Schedule which deals with deeds or declarations of any kind not otherwise chargeable with duty provides for a nominal amount only.

This brings us to the key provisions of the Stamp Act in regard to the circumstances of this case, namely, Part IVD concerning maintenance agreements and orders. This was introduced in 1982, that is to say, prior to the enactment of the Equal Opportunity Act.

Section 112UC provides that:

"Notwithstanding anything in this Act but subject to section 112UB -

- (a) A maintenance agreement that is entered into for the purposes of the Family Court Act or the Family Law Act; or
- (b) an order, except a sale, shall be charged with duty in accordance with item 8 of the second schedule."

By section 112UA an "order" means a sealed copy of an order made by a court exercising Federal or non-Federal jurisdiction in any proceeding under the Family Court Act or the Family Law Act with respect to one or both of the following, namely, the conveyance or transfer of real or personal property or the vesting of property. By section 112UB the key provisions of Part IVD of the Act do not apply in relation to a maintenance agreement between parties unless the parties to the agreement are separated or divorced from each other. By section 112UD an instrument of conveyance or transfer that is effected pursuant to an order that has been duly stamped in accordance with the Act is not to be charged with any duty higher than the duty set out in item 6 of the Second Schedule.



It emerges, then, in essence, that if a party who might otherwise be charged with ad valorem duty on an instrument effecting a transfer of an interest in land produced a sealed copy of an order made in any proceeding under the Family Court Act then the order operating as a conveyance will be subject to nominal duty only. It follows, and this was common ground at the hearing of the present case, that Mr Soares, as the transferee, and the party liable to be charged with duty, could only obtain the exemption if he had been married, because it was only by being married that he would be able to obtain an order made by the Family Court. The order made by the Supreme Court effecting a disposition of the property jointly owned by he and his former partner was not an order of that description. Thus, the Complainant argued, he was discriminated against on the ground of his marital status because the Commissioner of State Revenue by his officers at the Stamp Office were providing "services" when the relevant document (in this case the court order) was assessed and stamped. Having regard to the terms and conditions on which or the manner in which the services were provided the Complainant was treated less favourably than a person who had been married because he was not allowed the exemption which was allowed to those parties to written instruments who had been married.

Counsel for the Respondents argued to the contrary, saying that Part IVD of the Stamp Act exempts from ad valorem duty certain conveyances effected pursuant to a maintenance agreement or order between persons who are or have been married and are now separated or divorced, but not between those persons who were previously in a de facto relationship. The Commissioner was performing his duty to issue assessments and collect revenue and this could not be described as the provision of a service. The taxation process was a coercive process and was fundamentally different in character to what would ordinarily be regarded as a service according to ordinary

usage and the meaning attributed to the term "services" by section 4 of the Equal Opportunity Act.

### Legal Principles

Section 18 of the Interpretation Act 1984 (WA) requires preference to be given to the construction of a written law that would promote the purpose or object underlying that law rather than to a construction that would not promote that purpose or object. Consequently, the provisions of the Equal Opportunity Act should as far as possible be given a construction that would eliminate discrimination on the ground of marital status. The decided cases establish that the Equal Opportunity Act is to be regarded as one which is beneficial and remedial and therefore a beneficial interpretation should generally be preferred as a means of promoting the underlying purpose of the Act. Nonetheless, it is apparent from a recent decision of the High Court that such an approach cannot be taken too far.

This emerges from the recently decided ruling of the High Court in IW v The City of Perth (unreported 31 July 1997). Brennan CJ and McHugh J, as members of the majority, had this to say about that aspect of the matter:

"Those legislatures have also deliberately confined the application of anti-discrimination legislation to particular fields and particular activities within those fields. No doubt most anti-discrimination statutes are legislative compromises, resulting from attempts to accommodate the interests of various groups such as traders, employers, religious denominations and others to the needs of the victims of discrimination. As the evils of discrimination in our society have become better understood, legislatures have extended the scope of the original anti-discrimination statutes. Many persons think that anti-discrimination law still has a long way to go. In the meantime, courts and tribunals must faithfully give effect to the text and structure of the statutes without any preconceptions as to their scope. But when ambiguities arise they should not hesitate to give the legislation a construction and application that promotes its objects. Because of the restricted terms of a particular statute,

however, even a purposive and beneficial construction of its provisions will not always be capable of applying to acts that most people would regard discriminatory."

In regard to the first issue, concerning the meaning of "services", counsel for the Complainant placed considerable emphasis upon the decision of the Court of Appeal in Savjani v Inland Revenue Commissioners (1981) 1 AER 1121. In that case the plaintiff was born in India and had come to England where his son was born. He was entitled to claim tax relief in respect of a child but was advised by the local tax inspectors office that as he came from India he had to produce a full birth certificate for the child. This seemed to be more stringent than the usual requirements with the result that the plaintiff complained of discrimination. The Court of Appeal held that the Inland Revenue was providing "services" to the public in carrying out a statutory duty to determine whether a taxpayer was entitled to a deduction for the dependant child and in disseminating and giving advice to taxpayers to enable them to claim that tax relief.

Similar but slightly different considerations arose in the subsequently decided case of R V Entry Clearance Officer Ex Parte Amin (1983) 2 AC 818. In that case a United Kingdom passport holder resident in Bombay applied to an entry clearance officer for a special voucher to enable her to settle in the United Kingdom. The officer refused to entertain her application on the ground that not being a head of household she was not eligible to apply for a special voucher. The House of Lords held that although the special voucher scheme was in its essence discriminatory against women, since it assumed that, where a household consisted of or included a married couple, the husband would normally be the head of it, the complaint could not succeed since, on its true construction, the relevant statutory provisions did not involve the provision of facilities or services. The entry clearance officer was not providing a service for would-be

immigrants but was only performing his duty of controlling them. The House of Lords noted that the Savjani case was treated as turning on the finding that the Inland Revenue performed two distinct functions, first a duty of collecting revenue and secondly a service of providing taxpayers with information. Relief was available in the circumstances of the Savjani case because the particular act complained of fell within the second category, that is to say, it involved a service of providing taxpayers with information.

Subsequently, in Farah v Commissioner of Police (1997) 1 AER 289 a citizen of Somalia alleged that she was attacked by some white teenagers but when she summoned police assistance the police charged her with assault instead of helping her and seeking to detain her attackers. The Court of Appeal held that the plaintiff was entitled to relief because those parts of a police officer's duties involving assistance to or protection of members of the public entailed the provision of services to the public and accordingly fell within those provisions of the relevant statute prohibiting racial discrimination. The Court of Appeal seemed to accept, however, that the activities of public officials might fall into different categories. Thus, in the case of the police, the pursuing and arresting or charging of alleged criminals was not likely to be regarded as the provision of a service. In dealing with views expressed by Lord Fraser in articulating the position of the majority in Amin's case, Otton LJ noted that Lord Fraser drew a distinction between acts done on behalf of the Crown which are of a kind similar to acts that might be done by a private person and acts done by a person holding statutory office in the course of formulating or carrying out government policy, the latter being quite different in kind from any act that would ever be done by a private person. He then went on to say in regard to the facts of the case before him:

"These acts (or services) which the plaintiff sought from the police were, to my mind, acts which might

have been done by a private person. The second category envisaged by Lord Fraser covers those acts which a private person would never do and would normally only ever be performed by the police eg. gaining forcible entry into a suspected drugs warehouse. Here the officers would be carrying out government policy to which the (Racial Discrimination) 1976 Act would not apply. Moreover, they would be performing duties in order to prevent and detect crime and exercising their powers to enable them to perform those duties."

Counsel for the Complainant also placed considerable reliance upon the decision of the Full Court in this State in City of Perth v DL (Representing People Living with Aids) (1996) EOC 92-796. In that case the complainant organisation applied to the Town Planning Committee of the City of Perth for approval for the use of premises as a drop-in centre for persons who were HIV infected. Approval for such a use was required under the relevant zoning scheme. By 13 votes to 12, the council rejected the application without giving reasons for its decision but in circumstances which suggested that a group of councillors were biased against those with the relevant impairment. This Tribunal held that in administering a town planning scheme regulating the use of land and enforcing measures directed to the amenity of the area the City of Perth was providing a service to residents. The Full Court approved that view of the matter, especially Ipp J, but refused relief on other grounds. Subsequent to the hearing of this present case concerning an alleged act of discrimination by the Commissioner of State Revenue, the High Court has overruled the Full Court on this issue in IW v The City of Perth (supra). Accordingly, it is to the latter decision that the Tribunal must now turn.

The High Court reviewed the previously-decided English cases including Savjani's case and Amin's case. The majority of the High Court seemed to accept that in Amin's case Lord Fraser, in dealing with the earlier decision in Savjani, had properly noted that the Inland Revenue performed two separate functions, being first a duty of collecting revenue and secondly a service of providing

taxpayers with information. In applying that view of the matter to the facts before them, two members of the majority, Brennan CJ and McHugh J, said that when a council is called on as a deliberative body to exercise a statutory power or to execute a statutory duty, it may be acting directly as an arm of government rather than as a provider of services and its actions will be outside the scope of the Act. Similarly, when a council is required to act in a quasi-judicial role in exercising a statutory power or duty, it may be inappropriate to characterise the process as the provision of a service for the purpose of the Act even in cases where the product of the process is the provision of a benefit to an individual.

Three other members of the majority, namely, Dawson J, Gaudron J and Gummow J, were of a similar view and seemed to accept that if an assessment was accompanied by the provision of advice then this could be a service. They also seemed to allow for the possibility that if the alleged service in issue allowed for the exercise of a discretion then a refusal to exercise the discretion might arguably amount to refusal of services. They went on to indicate, however, that such a finding was not open in circumstances where there was a refusal to grant approval but without it being shown that there had been a refusal to consider whether or not approval should be granted.

When the decision of those members of the High Court comprising a majority are looked at in overview, then the decision strongly weighs against the contention of the Complainant in the present case because the reasoning of the High Court seems to establish that where a governmental duty is carried out in a manner prescribed by the statute without being accompanied by any advice or activity of a kind that could conceivably be performed by a private body or person, especially where there is a degree of coercion involved, then this cannot be regarded as the provision of a service.

### Findings

Against the background of the decided cases, the Tribunal now returns to the circumstances of the present case. The definition of "services" in section 4 of the Equal Opportunity Act clearly embraces "services of a kind provided by a government, a government or public authority or a local government body." Thus, it is immediately apparent, that a wide range of governmental activities will be subject to the provisions of the Act concerning discriminatory conduct.

The Tribunal pauses to note that this is consistent with other provisions of the Act which suggest that the Act is to apply to government activities. The Act is expressly said to bind the Crown. In addition, one notices that exclusion or exemption from the operation of the Equal Opportunity Act is the exception rather than the rule. Section 69 granted an immunity in respect of steps taken under other statutes but only for a 2 year period after introduction of the Equal Opportunity Act. Section 135 provides the Tribunal may grant exemptions from the operation of the Act in certain circumstances and, likewise, section 169 allows the Governor to make regulations exempting certain activities. In section 66XS concerning discrimination on the ground of age one finds a specific provision stating that in regard to certain aspects of that subject matter acts done under statutory authority or industrial awards will not be unlawful. All these provisions strongly suggest that the Equal Opportunity Act was intended to be generally applicable and governmental activities were not exempted from the operation of the Act.

Nonetheless, although the definition of "services" is broad, and expressly embraces a range of governmental activities, the essence of the concept still requires that the activities shall be in the nature of a "service."

Further, as noted by Brennan CJ and McHugh J (supra), notwithstanding the obligation to give a beneficial construction to the words of the Equal Opportunity Act, the Tribunal has to keep in mind that the rules concerning discriminatory conduct are limited to certain specific areas, mostly concerning the workplace or activities in the public domain, and do not effect a blanket prohibition upon conduct which might be regarded as discriminatory. These constraints upon the meaning of the term "services" have been carefully considered in the previously-decided cases and as appears from Amin's case and the decision of the High Court in the City of Perth Case, it does seem that in the field of governmental activities, a distinction will continue to be drawn between governmental activities in the nature of a "service" and governmental activities which represent the strict performance of a government purpose or governmental duty of control, backed up by penalties, such as refusal of entry to an intending immigrant or the refusal of an approval in accordance with a zoning scheme.

It is true, when one looks at the provisions of the Stamp Act, that the Act includes reference to the Commissioner forming an opinion, and on occasions providing what seems to be an advisory opinion to registrars or other governmental agencies. Thus, there may be circumstances in which it could be argued that the Commissioner was providing something in the nature of advice which might bring circumstances of a particular case within the result achieved by the plaintiff in Savjani's case. It is important to note, however, that in the usual case, if a Commissioner forms an opinion that an instrument is dutiable, then he and his officers are required to issue the assessment and impose the duty. The opinion is not formed for the purpose of giving advice but as a preliminary to the assessment, and nor is it open to the party liable to be charged to act in one way or another in response to the outcome of the opinion. Accordingly, in the circumstances of the present case, the Tribunal does



not consider that any of the steps preceding the subject assessment and imposition of duty can be regarded as an advisory service of the kind that applied in Savjani's case.

The Tribunal considers that the effect of the reasoning in Amin's case and in the recent decision of the High Court in the City of Perth case is that where the activity in question can be characterised as the performance of a coercive statutory duty for what is clearly a governmental purpose, in this case the collection of revenue "for the use of the Crown" as appears from section 16 of the Stamp Act, then the activity cannot be regarded as the provision of a service. The Tribunal therefore holds, in response to the first issue submitted to it for determination, that the assessment and collection, in accordance with the Stamp Act 1921, of duty chargeable under the Act is not the provision of a service within the meaning of section 20 of the Equal Opportunity Act 1984 and that the Commissioner of State Revenue does not provide a service within the meaning of the latter Act.

The consequence of this finding is that the Tribunal is not required to answer the two further questions submitted to it. The Tribunal will therefore dismiss the complaint with no order as to costs.

---

