

**COURT:** SUPREME COURT OF TASMANIA

**CITATION:** *Moorilla Estate Pty Ltd v Lau* [2024] TASSC 49

**PARTIES:** MOORILLA ESTATE PTY LTD  
v  
LAU, Jason

**FILE NO:** 1157/2024

**DELIVERED ON:** 27 September 2024

**DELIVERED AT:** Hobart

**HEARING DATE:** 17 September 2024

**JUDGMENT OF:** Marshall AJ

**CATCHWORDS:**

Administrative law – Judicial Review – Grounds of Review – Error relating to facts – Whether the tribunal erred in finding that the Ladies Lounge was direct discrimination and does not fall within exemption in s 26 of *Anti-Discrimination Act* 1998 – Whether the Ladies Lounge is an arrangement designed to promote equal opportunity for a disadvantaged group – Whether it was reasonable for the appellant to believe that such a purpose could promote equal opportunity – Tribunal mischaracterised evidence – Properly read evidence demonstrates arrangement's purpose was to promote equal opportunity for women who experience ongoing general society disadvantage – Appeal allowed.

Aust Dig Administrative Law [1031]

Legislation:

*Anti-Discrimination Act* 1998 (Tas)

*Tasmanian Civil and Administrative Tribunal Act* 2020

*Sex Discrimination Act* 1994 (Cth)

Cases:

*Durston v Anti-Discrimination Tribunal* [2018] TASSC 48

*Anti-Discrimination Commissioner v White* [2023] TASSC 26

**REPRESENTATION:**

**Counsel:**

**Appellant:** C Scott

**Respondent:** G Barnes SC, B Coyne

**Solicitors:**

**Appellant:** ConMoto Group

**Respondent:** Bold Lawyers

**Judgment Number:** [2024] TASSC 49

**Number of paragraphs:** 42

**MOORILLA ESTATE PTY LTD v JASON LAU**

**REASONS FOR JUDGMENT**

**MARSHALL AJ**  
**27 September 2024**

1           The Museum of Old and New Art ("MONA") is an iconic Tasmanian tourist attraction. It is the largest privately funded museum in the Southern Hemisphere. It exhibits a wide variety of art from the private collection of Mr David Walsh. It is owned by the company which is the appellant in this appeal.

2           In 2020, MONA opened an exhibition of art work created by Ms Kirsha Kaechele, the wife of Mr Walsh. It was known as the "Ladies Lounge". The Ladies Lounge was a private lounge enclosed by a curtain. Entry to the lounge was supervised by an attendant employed by MONA who did not permit into the lounge anyone who did not identify as female.

3           The Ladies Lounge is a participatory installation. The process of being admitted or refused admission and the participation in the Ladies Lounge is part of the art itself. So much was agreed in an agreed statement of facts between the parties.

4           An extremely important part of the concept of the Ladies Lounge is that it restricts access to those who identify as females and excludes others, who are male or identify as male.

5           On 1 April 2023, Mr Lau (the respondent in this appeal) attended MONA. He paid the \$35 entry fee and then was admitted into the museum. He sought entry into the Ladies Lounge but was denied entry by an attendant because he is a male.

6           On 5 April 2023, Mr Lau complained to Equal Opportunity Tasmania about MONA's refusal of his entry into the Ladies Lounge. He said he was discriminated against thereby on account of his gender, contrary to the *Anti-Discrimination Act 1998* (Tas).

7           Section 60 of the Act enables a person to complain to the Anti-Discrimination Commissioner about alleged discrimination. Under s 78, the Commissioner can refer a complaint to the Tasmanian Civil and Administrative Tribunal ("the Tribunal"). That is what occurred in this case. The Tribunal commenced an inquiry under the Act into the matters raised by Mr Lau's complaint.

8           In its decision of 9 April 2024, the Tribunal held that the refusal of the appellant to permit Mr Lau entry into the Ladies Lounge was direct discrimination which is prohibited by the Act and not permitted by s 26 of the Act. The Tribunal found Mr Lau's complaint substantiated. It ordered the appellant to "cease refusing entry to the Ladies Lounge to persons who did not identify as ladies".

9           The appellant has appealed from the decision of the Tribunal to this Court under s 136(1)(a) of the *Tasmanian Civil and Administrative Tribunal Act 2020*. After hearing the appeal under s 138 of that Act, the Court is empowered to affirm, vary or set aside the decision of the Tribunal. It may return, in an appropriate case, a matter to the Tribunal in accordance with any direction given by the Court in accordance within the Court's reasons for judgment. The appeal is conducted by way of a rehearing in which the Court redetermines the issues raised by the parties at the date of the rehearing in reliance on the evidence that was before the Tribunal; see *Durston v Anti-Discrimination Tribunal* [2018] TASSC 48 at 6 per Brett J.

10 The evidence before the Tribunal consisted of an agreed statement of facts (to which reference has been made above) as well as oral evidence and witness statements from Ms Kaechele and Mr Rawlins, a director of curatorial affairs at MONA.

11 It was not in dispute ultimately before the Tribunal or before this Court that, absent consideration of s 26 of the Act, the exclusion of Mr Lau from the Ladies Lounge involved direct discrimination against him on the basis of his gender contrary to s 16(e) of the Act.

12 Section 26 of the Act provides that:

"Any person may discriminate against another person in any project, plan or arrangement designed to promote equal opportunity for a group of people who are disadvantaged or have a special need because of a prescribed attribute."

13 In *Anti-Discrimination Commissioner v White* [2023] TASSC 26, this Court held that s 26 is not to be read in a narrow or restrictive way. See at [40]. At [39] the Court referred to the Explanatory Memorandum accompanying the Bill regarding s 26. It had the following to say in that respect:

"It will not be unlawful discrimination to adopt a measure to reduce disadvantage or structural inequalities suffered as a consequence of past discrimination and to redress equal opportunity measures..."

Reference to past discrimination in the Explanatory Memorandum provides an example of how s 26 may operate. Nothing in s 26 confines its operation to discrimination that is only past. It would make no sense to have it not operate in respect of present and likely future discrimination given past relevant discrimination in any particular area. Discrimination today is tomorrow's past discrimination.

14 It is noteworthy that the Explanatory Memorandum refers to *reducing* disadvantage and structural inequality and not their elimination. The section is directed to an amelioration of disadvantage and structural inequality. To the extent that counsel for Mr Lau (Mr Barns SC and Mr Coyne) submitted to the contrary, that submission is rejected. There is no need to import into s 26 a requirement that the purpose of the arrangement must be for achieving substantive equality between men and women. That is a requirement of a similar but not identical provision to s 26 contained in s 7D(1)(a) of the *Sex Discrimination Act 1994* (Cth) ("SDA"). It is sufficient that the arrangement promotes equal opportunity for women who as a gender are disadvantaged in society because of that gender. The Tribunal did not conflate s 26 with s 7D of the SDA but submissions which seek to import a requirement contained in s 7D of the SDA into s 26 ignore the fact that it was not the intention of the appellant in establishing the Ladies Lounge to achieve substantive equality. Its intention was to promote equal opportunity by drawing attention to present and past societal disadvantage to women by providing them with the concept of a "flipped universe" as is discussed later in these reasons.

15 The parties agreed, at the conclusion of their agreed statement of facts, that the issue to be determined by the Tribunal was whether the Ladies Lounge fell within s 26 of the Act. In this context they agreed that "prescribed attribute" for the purposes of s 26 was gender under s 16(e). The parties agreed that:

"The question for the Tribunal is whether the Ladies Lounge is a preparation, plan or arrangement designed to promote equal opportunity to a group of people who are disadvantaged or have a specific need because of their gender."

16 There was no dispute that the Ladies Lounge was an arrangement for the purposes of s 26. The Tribunal identified the group of people disadvantaged as women or women artists at [46] of its decision. The Tribunal accepted at [50] that "women" as a group, experience some broad societal disadvantage, and women artists as a group experience disadvantage in respect to display of artworks.

17 The primary focus of the evidence and submissions of the appellant before the Tribunal was that the Ladies Lounge was designed to promote equal opportunity in the context of broad societal disadvantage experienced by women specifically, and not only with respect to women artists or only with regard to female access to spaces or a combination of both. In her oral submissions to the Tribunal at page 36 of the transcript, counsel for the appellant, Ms Scott referred to the Ladies Lounge as not just providing a formal arrangement but "it can make us [as in women] think, it can make us feel, it can provide an example and it can help us participate in things that are foreign to us". The Tribunal had before it the 2024 Status of Women Report Card ("the Report Card") as evidence in the proceedings. It was relied upon by the appellant. The description of the relevant disadvantage given by Ms Scott, together with the societal disadvantage referred to in the Report Card, permits Ms Scott's submission to be understood as the Ladies Lounge providing an environment where female disadvantage is not present but male disadvantage is present. This involves females participating in a concept which is ordinarily foreign to them, thereby experiencing female advantage and witnessing male disadvantage.

18 The appellant, in its submissions before the Court did not take issue with the finding of the Tribunal, that the Ladies Lounge was not designed to promote equal opportunity for women artists. It was not the contention of the appellant even before the Tribunal that the Ladies Lounge was so designed. The concept of the Ladies Lounge, according to the evidence of Mr Rawlins, had in its genesis in MONA recognising that it had a lack of artwork by women. The artwork that ultimately appeared in the Ladies Lounge was not selected based on the gender of the artist. The artwork itself, in its display, did not discriminate as to gender. The Ladies Lounge, however, did discriminate as to who could be admitted to it and as Ms Scott submitted before the Tribunal at page 36 "gave Ms Kaechele an opportunity to actually provide something that was born out of her own experience as a ..woman". The idea for the Ladies Lounge was a response to the historical exclusion of women from spaces by excluding men from this space and thereby giving women a different experience whereby they are the ones benefiting from exclusivity for a change. But there was more to the concept, it was also designed, according to the evidence of the appellant before the Tribunal, to draw attention to the past and current societal discrimination against women as evidenced by the Report Card as well as Ms Kaechele's evidence about past exclusion from certain spaces.

19 As Ms Kaechele said in her evidence at page 14, the Ladies Lounge provided her with an opportunity "to create a space for the gathering of women for the very special thing that happens when women come together to exclusively as women". She then clarified that "women includes as people who identify as women". She referred to the "intentional rejection of men" and "the moment of excitement" for women when a male is excluded as being, in effect, unusual because men usually "hold the power."

20 Ms Kaechele's evidence in that regard should be considered in the context of the Report Card which is a publication of the Australian Government. An annual Report Card is released every International Women's Day on 8 March.

21 The 2024 Report Card refers to several examples of structural discrimination in Australian society against women. They include the following:

- An average woman aged 15 to 64 does 55.4 hours of work a week, two hours more than men;
- About one in three Australians hold a negative bias about women's ability to participate economically, politically or in education;
- In couple families where the youngest dependent is 0-4 years old, 90.6% of male partners were employed compared to 69.5% of female partners;

- One in five women and one in 16 men have experienced sexual violence since the age of 15;
- One in six women and one in 13 men have experienced economic abuse by a current or previous cohabiting partner since the age of 15;
- One in four women and one in seven men have experienced emotional abuse by a current or previous cohabiting partner since the age of 15;
- 83% of one parent families include single mothers;
- Women do over nine hours a week more unpaid work than men do;
- 35.7% of women have caring for children as the main reason for not being available to work, or work more hours, compared to 7.3% of men;
- 43.5% of women work part-time compared to 19.5% of men;
- Men working in the care economy workforce earn \$104.40 a week more than women, an average pay gap of 8%;
- The national pay gender gap based on full time average weekly earning is 12% (\$238 per week). Women would need to work an estimated 44 days a year to earn the same as men; and
- The average out of pocket expense for assisted reductive technologies is \$7,555 for women.

22 The Report Card demonstrates, even in the handful of examples shown, that women currently suffer and have suffered historical disadvantage (given that these disadvantages did not suddenly arise last March) in many aspects of life and in significant measures. It was this disadvantage that the appellant sought to highlight, as well as exclusion from certain spaces over the years and to provide a space for the reversal of the commonly prevailing power imbalance between the sexes in Australia. It was also intended to provide a space where women were given an advantage and men a disadvantage in the context of admission and refusal of entry to the Ladies Lounge. The appellant correctly referred to the Ladies Lounge in this context as providing a "flipped universe". The very name "Ladies Lounge" evokes commonly held memories of a time in which such a place existed in many Australian "pubs", where women went because they were excluded from the public bar. It is common knowledge, as a matter of Australian history, that it was not until the mid 1970's or the early 1980's in various jurisdictions, that women were permitted to be in the public bar and not confined to the Ladies Lounge or the beer garden outside.

23 Mr Rawlins gave evidence before the Tribunal about how the Ladies Lounge came into being. At first the idea was to display only artwork by women artists, but he said that idea "did not get real traction, ultimately, two lounges were developed". In one men were permitted to enter and in the other men were not permitted to enter. One was designed by Mr Rawlins and the other, by Ms Kaechele. There was nothing in the evidence of either Mr Rawlins and Ms Kaechele to suggest that the purpose of the Ladies Lounge was to provide a space for female artists to display their work.

24 The appellant is uniquely placed to know what it intended the Ladies Lounge to represent. The central idea of the appellant was that the Ladies Lounge was something designed to promote equal opportunity by providing an experience for women which could challenge societal gender bias, which still exists.

25 At [60] the Tribunal referred to the inconsistency in the views of Ms Kaechele and Mr Rawlins as to what the Ladies Lounge was designed to promote and as to the identified imbalance. It also said that "no particular disadvantage identified in the Status of Women Report Card was

advanced". It should be noted immediately that the entirety of the Report Card was in evidence and its entire contents illustrate the point of societal disadvantage. The areas of disadvantage go further than the several highlighted at [21] above. The identification of any particular disadvantage in the Report Card by the appellant was unnecessary. It only had to be read in its entirety to make the obvious point that it was making crystal clear to the reader about female disadvantage in society.

26 At [61] the Tribunal discussed the evidence of Mr Rawlins concerning the original idea for the Ladies Lounge. None of that evidence suggested a different view held by Mr Rawlins as compared to Ms Kaechele concerning what the Ladies Lounge was designed to promote. The appellant's consistent position contained in the evidence of Ms Kaechele and in submissions was that the Ladies Lounge was designed to promote gender equality by highlighting gender inequality which constituted the relevant imbalance. It was to provide women with a "a flipped universe" where the imbalance was in one rare instance in their favour.

27 At [65] the Tribunal said "Mr Rawlins' evidence is consistent with an intention to address or highlight the disparity in the display of art by female artists compared to male artists. The opportunity identified by Mr Rawlins is having artwork displayed". The Tribunal then noted a lack of evidence by Mr Rawlings about historical exclusion of women from spaces.

28 Two points need to be made about that reasoning. With the greatest respect to the Tribunal, it is a mischaracterisation of the evidence. Mr Rawlins made it clear in his evidence that ultimately the Ladies Lounge had nothing to do with providing an art space for female artists. Second, Mr Rawlins did not identify the "opportunity " (in the context of s 26) as having artwork displayed. There is nothing in his witness statement to support that finding. The same applies to his very brief oral evidence. Nothing he said contradicted the cogent evidence of Ms Kaechele as to the opportunity being provided by the Ladies Lounge as one to highlight societal gender discrimination and thereby promote equality of opportunity by women engaging in a rare experience where they have the privilege of discrimination in their favour. The Tribunal's findings at [65] were not open on the evidence and revealed thereby an error of law.

29 The idea that the Ladies Lounge would only display artwork by women was rejected by the appellant before the Ladies Lounge was established. There is no evidence about the proportion of artwork in the Ladies Lounge which is the work of men rather than women. With the greatest respect to the Tribunal, it allowed itself to be distracted by extraneous considerations such as ideas, subsequently discarded which preceded the establishment of the Ladies Lounge. This deflected from what was the essential claimed disadvantage which is starkly shown in the evidence of Ms Kaechele, and the Report Card which is general societal disadvantage currently and historically experienced by women.

30 In that way, the Ladies Lounge can be seen as an arrangement to promote equal opportunity by highlighting the lack of equal opportunity, which generally prevails in society, by providing women with a rare glimpse of what it is like to be advantaged rather than disadvantaged by the refusal of entry to the Ladies Lounge by men.

31 The Report Card shows the entrenched disadvantage experienced by Australian women compared with men. Read as a whole it amply demonstrates current societal disadvantage. Reliance on it by the appellant contradicts the erroneous finding of the Tribunal at [74] that:

"Ms Kaechele's intention was to clearly address past wrongs of access by advancing women generally as opposed to addressing or redressing current substantive inequality of opportunity."

32 Ms Kaechele's evidence about disadvantage in the course of s 26 applying "*now* to equalise gender imbalance" (emphasis added) contradicts the above finding of the Tribunal. The appellant's

evidence, properly read, supports the case that intention was to address past and current wrongs regarding gender imbalance and not just in respect of access. So much is so, especially in the context of the Report Card relied on in a hearing that was conducted shortly after the Report Card was produced. The Report Card is dated 8 March 2024. The Tribunal hearing was held on 19 March 2024. The decision of the Tribunal was delivered on 9 April 2024. In failing to take into account the significance of the Report Card in the context of current disadvantage, the Tribunal failed to take into account a relevant consideration and thereby erred in law.

33 The Tribunal asked itself the wrong question by considering whether the relevant disadvantage for the purposes of s 26 was the disadvantage experienced by women artists in the context of work displayed and made an error of fact by categorising the disadvantage claimed as past disadvantage only and also past disadvantage merely about access to spaces. The disadvantage addressed by the arrangement was ongoing gender disadvantage. Equal opportunity was promoted by highlighting the disadvantage by providing women with a rare reverse experience where they were advantaged and men disadvantaged.

34 At [70] the Tribunal referred to being satisfied that the disadvantage by women artists as a group in having artwork displayed at MONA and other art museums "inspired and precipitated the Ladies Lounge". The Tribunal then said:

"I am not satisfied that it is an arrangement designed to promote equal opportunity for that group".

35 The Ladies Lounge, as ultimately established and as distinct from what may have been originally proposed, was not designed to provide equal opportunity to female artists. To the extent that such concept had any relevance to the appellant's case, it was but one minor example of overall societal disadvantage experienced by women.

36 By focussing on a group in respect of which the appellant did not rely on to promote equal opportunity the Tribunal asked itself the wrong questions when considering whether s 26 was satisfied and thereby made an error of law.

37 The Court has already referred to the error committed by the Tribunal for failing to consider that the claimed disadvantage was current and ongoing. In the context of that error, the Tribunal committed an additional error at [74] by couching the claimed disadvantage in the context of exclusivity of spaces entirely. On the contrary, the appellant highlighted general societal disadvantage and not merely lack of access to spaces. The Tribunal noted that the appellant was able to apply under s 56 of the Act for an exemption to allow the Ladies Lounge to operate. That observation was beside the point and irrelevant. No exemption is required when s 26 is satisfied on the facts. So much is so especially when s 56 is focused on past discrimination where here past discrimination is not the sole focus of the arrangement. Current discrimination is just as important because of its continuing adverse effect.

38 The correct approach to s 26 is to ask first whether the arrangement's purpose was to promote equal opportunity. On the evidence, the unequivocal answer is yes because the Ladies Lounge was designed to provide women with an exclusive space where they receive positive advantage as distinct from the general societal disadvantage they experience as evidenced by the Report Card.

39 Then one asks whether it was reasonable for the appellant to believe that such a purpose could promote equal opportunity. Having regard to the evidence referred to above, it was objectively reasonable for the appellant to believe that equal opportunity could thereby be promoted. The answer to that question is also yes.

40           The last question raised by s 26 is whether the group of people sought to be advantaged have a special need because of a prescribed attribute. The answer to that question is also yes. The attribute concern is gender (see s 16(e)). The special need is the need to have disadvantage redressed and addressed on an ongoing basis by having the Ladies Lounge open to women only and those who identify as women.

41           It follows that, having regard to the foregoing, there are several errors of fact and law in the decision of the Tribunal. Those errors included the mischaracterisation of what the Ladies Lounge was designed to promote and how that was intended to be achieved.

42           Consequently the appeal is allowed and the following orders are made:

- 1   The decision of the Tribunal dated 9 April 2024 is quashed.
- 2   The matter is remitted to the Tribunal for reconsideration in accordance with the accompanying reasons for judgment.