



**AUSTRALIAN HUMAN RIGHTS COMMISSION
AGE DISCRIMINATION ACT 2004 (CTH), S 44(2)
NOTICE OF GRANT OF A TEMPORARY EXEMPTION**

By this instrument, under section 44(2) of the *Age Discrimination Act 2004* (Cth)(ADA), the Australian Human Rights Commission grants an exemption to Carnival plc, trading as Carnival Australia (Carnival), from the operation of section 28 of the ADA.

This exemption is granted for a period of two and half years from the date of this instrument and is subject to the conditions outlined below.

SUMMARY

Carnival is a cruise company which operates cruises to the Pacific Islands from Australia and New Zealand.

On 7 April 2009, Carnival applied for an exemption under the ADA to implement a strategy for managing security issues which were arising on its cruises at the time of the 'Schoolies Period'. The core aspects of this strategy, for which the exemption was sought, were, *inter alia*:

- a) requiring that any passengers under the age of 19 years, travelling in the period 1 November to 7 January, be accompanied by a responsible adult (subject to waiver by Carnival); and
- b) restricting to 60 (subject to any increase at Carnival's discretion) the number of unsupervised passengers under the age of 19 years on-board any cruise in the period 8 January to 31 January.

On 23 December 2010, the Commission granted to Carnival an exemption for two and a half years (Initial Exemption).

On 21 June 2013, Carnival applied to the Commission for an extension of the Initial Exemption, on the same terms, for a further period of two and a half years (Application). The exemption is granted subject to further conditions. The terms of the exemption are set out below.

BACKGROUND

Carnival relies on the same reasons for seeking the further exemption as it relied on in its Initial Exemption application in April 2009.

In support of the further Application, Carnival has also included data relevant to its implementation of the Initial Exemption.

Reasons for initial application

Carnival states that prior to lodging the Initial Exemption application it experienced a high level of alcohol-fuelled and other security incidents on-board its cruises in the traditional 'Schoolies Period', which it defines as 1 November to 31 January (Schoolies Period).

Up until 2006, Carnival operated 'Schoolies' cruises, which were marketed exclusively to passengers aged 16 to 19 years celebrating the end of their high school education. However, these 'Schoolies' cruises became problematic due to the large number of alcohol-related and other security incidents involving a large number of school-leavers (Schoolies). These incidents included serious risks to the health and safety of passengers, crew and the Schoolies participants themselves.

Carnival attempted to reduce the number and severity of these incidents by obtaining the advice of security experts and implementing a range of security measures, such as restricting access to alcohol, increasing security presence on-board its cruises and increasing pre-boarding / on-boarding searches for contraband alcohol. Despite these various measures, Carnival advised that it continued to experience a large number of alcohol-fuelled incidents involving Schoolies.

Sometime in 2006, Carnival made a decision to discontinue promoting its cruises to school leavers. However, Carnival advised that even after this step was taken, there continued to be large numbers of school-leavers booking cruises and it continued to experience alcohol-fuelled and other 'Schoolies' incidents.

Reasons for further Application

Carnival advises that since the Commission granted the Initial Exemption, it has observed a significant decrease in the number of alcohol-related security incidents during the Schoolies Period. Carnival considers that this decrease is attributable to the Initial Exemption granted by the Commission in December 2010.

By way of example, Carnival states that:

- in December 2005, it recorded 457 separate security incidents on one cruise-ship, during one cruise;
- in December 2012, it recorded a total of 67 security incidents, across its four cruise-ships in all cruises for that month.

Carnival also states that the Initial Exemption has served to:

- discourage Schoolies from making bookings for the purpose of engaging in improper behaviour and under-age drinking;
- reduce the likelihood of unmanageable large-scale 'Schoolies' events organised through means such as social networking;

- promote an understanding that Carnival cruises will not tolerate improper behaviour and under-age drinking on its cruise-ships as part of the Schoolies Period celebrations.

In seeking the further exemption, Carnival emphasises the primacy of health, safety and security of its crew and passengers. It states that health and safety risks on its cruise-ships are compounded by the following factors:

- the on-board environment contains inherent risks, including risks associated with confined spaces and falling from heights or into the ocean;
- while at sea, its cruise-ships are isolated from emergency medical services and there are limited on-board medical facilities;
- while at sea, it cannot call upon an immediately available police presence;
- there are practical limitations to security personnel numbers which it can accommodate on its cruises;
- on-board security personnel are limited in terms of:
 - their rights to detain, search and control passengers; and
 - the facilities available for detaining passengers who are a threat to themselves and/or others;
- past experience shows that Schoolies participants have a remarkable ingenuity for circumventing its procedures in relation to restricting access to and the consumption of alcohol;
- past experience shows that Schoolies' celebrations involve large groups organised through school and social networking, and these groups seek to run events/gatherings on-board which are difficult to manage.

Data from the Initial Exemption period

In support of its reasons as to why the further exemption should be granted, Carnival has included relevant data and feedback for the period 2010 – 2013, in relation to the following matters:

- how many Carnival cruises departed from Australian ports in the Schoolies Period;
- how many young people (aged 16-18 years inclusive) were on-board each of the cruise-ships which departed in the Schoolies Period;
- how many young people, on the cruise-ships which departed in the Schoolies Period, were accompanied by an adult and how many were unaccompanied;
- incidents of anti-social behaviour on its cruise-ships during the Schoolies Period;

- how frequently Carnival waived the responsible adult requirement, applicable in the period 1 November to 7 January; and
- how frequently Carnival increased the 60 passenger quota, applicable in the period 8 January to 31 January.

Submissions received by the Commission

Carnival's request for a further temporary exemption was posted on the Commission's website and interested parties were invited to comment on the Application.¹ The Commission also circulated the Application to:

- a) all State and Territory anti-discrimination bodies;
- b) the New South Wales Police Marine Area Command; and
- c) the Alcohol and Other Drugs Council of Australia.

The Commission received four submissions in response to the Application. Each of these has been posted on the Commission's website.²

The Equal Opportunity Commission of Western Australia did not express a view on whether the Commission should grant the exemption, but noted that:

- it would still be statutorily bound to investigate any complaint alleging a breach of the age discrimination provisions of the *Equal Opportunity Act 1984* (WA) (EO Act); and
- if the exception under section 66ZM of the EO Act did not apply to Carnival's circumstances, Carnival should consider making an exemption application under the EO Act through the State Administrative Tribunal of Western Australia.

The Anti-Discrimination Commission of Queensland (ADCQ) advised that it had no objection to the Commission granting the further exemption. ADCQ stated that the material set out in the Application supported Carnival's policy and indicated that it was a reasonable measure for a legitimate public interest.

The Alcohol and Other Drugs Council of Australia (ADCA) made a submission in support of the exemption. The ADCA stated that its support is based on strong evidence which shows that people in the 16-18 age group should not be drinking at levels which are often reached when drinking in groups. It also noted that the general risks associated with young people drinking are compounded by the dangers alcohol may pose in the potentially high-risk marine environment.

The Anti-Discrimination-Board of New South Wales (ADBNSW) made a submission which did not support the grant of the exemption. The ADBNSW stated that the age restriction was discriminatory towards people of a particular age group, whether they are accompanied by a responsible adult or not. Its main concern was that the exemption

¹ <http://www.humanrights.gov.au/notice-application-exemption-carnival-australia>

² Ibid.

appeared to be inconsistent with the purposes of the ADA; in its view, the age restriction does not provide a bona fide benefit to persons of a particular age, does not intend to meet a need that arises out of the age of a person and nor is it intended to reduce the disadvantage experienced by people of a particular age. The ADBNSW also noted that the restrictions in Carnival's Initial Exemption, and the application of the restrictions at the sole discretion of Carnival, leaves open the potential of discrimination under other grounds, and this observation is based on the substance and number of complaints which the ADBNSW receives from young people.

RELEVANT LAW

The Commission may grant an exemption from the operation of a provision of Division 2 or 3 of Part 4 of the ADA.³ An exemption may be granted subject to terms and conditions specified in the instrument and may be expressed to apply only in circumstances, or in relation to particular activities, as specified in the instrument.⁴ Exemptions are to be granted for a specified period not exceeding five years.⁵ It is not unlawful for a person to act in accordance with an exemption.⁶

Pursuant to section 28 of the ADA, it is unlawful to discriminate on the ground of age in the provision of goods, services or facilities. This provision is located in Division 3 of Part 4 of the ADA. Therefore, the Commission may grant Carnival an exemption from the operation of section 28 of the ADA.

DECISION AND REASONS

The Commission has decided to grant an exemption to Carnival from section 28 of the ADA on the terms set out below, in order to allow Carnival to implement its age restriction policy which has the aim of preventing 'Unauthorised Events' occurring on its cruise-ships.

Carnival's policy defines an 'Unauthorised Event' as any event which may be large in scale and which is associated with excessive or anti-social behaviour, including the abuse of alcohol (Unauthorised Event). Carnival's policy identifies a 'Schoolies Event' as an example of an Unauthorised Event. The Commission notes that the term 'Schoolies Event' generally refers to celebrations by young people who have just finished their last year of high school, or who are celebrating with other young people who have just finished their last year of high school.

Terms of the Exemption

Carnival may impose the following restrictions, based on age, in relation to its cruises commencing in Australia:

³ Section 44(1) and (2) of the ADA.

⁴ Section 44(3)(a) and (b) of the ADA.

⁵ Section 44(3)(c).

⁶ Section 47 of the ADA.

1. For Carnival cruise-ships departing an Australian port between 1 November and 7 January annually, passengers who are under the age of 19 must be accompanied by a responsible adult (Responsible Adult Requirement).

Carnival may, at its sole discretion, waive the Responsible Adult Requirement where it is satisfied (in its sole and absolute discretion) that there is no risk that a specific passenger under the age of 19 will participate in an Unauthorised Event. Carnival may require any such passenger to sign a code of conduct or provide other commitments as a condition of boarding.

Where the Responsible Adult Requirement is mentioned in Carnival's advertising or online booking system, Carnival will also state that it has retained a discretion to waive the Responsible Adult Requirement.

This discretion may be exercised by Carnival on a case by case basis and Carnival is not required to make an assessment of each and every case, nor is Carnival required to engage in a review process of any decision in relation to its exercise of the discretion.

2. For Carnival cruise-ships departing an Australian port between 8 January and 31 January annually, Carnival will permit a quota of 60 passengers per cruise who are under the age of 19 and not accompanied by a responsible adult. Once this quota is filled, Carnival will apply its Responsible Adult Requirement.

The quota will not include infants and will also not include passengers under the age of 17, where Carnival believes there is no risk that the minor will participate in an Unauthorised Event. Carnival will otherwise determine how the quota is filled.

Carnival may, in its sole and absolute discretion, increase this quota where it decides that the increase will not result in a risk to health, safety and security of the passengers and crew, having regard to the purpose of its policy.

Carnival will retain an absolute discretion to accept or reject any application/request for waiver of the Responsible Adult Requirement (where the quota is filled and it becomes applicable). It will not be required to engage in a review process of any decision in relation to its exercise of the discretion.

Conditions

This exemption is subject to the following conditions:

- a) Carnival will report to the Commission at the end of this exemption period, how many applications/requests for waiver of the Responsible Adult Requirement it receives for the 1 November – 7 January period and how many of these applications/requests it approves.
- b) Carnival will report to the Commission at the end of this exemption period
 - i. how many applications/requests it receives for waiver of the Responsible Adult Requirement during the 8 January – 31 January period, once the quota is filled; and
 - ii. on how many occasions and to what number it increases the quota.

Period of Exemption

The exemption is granted for a period of two and half years from the date of this instrument.

Reasons for Decision

The reasons for the Commission's decision to grant the exemption are as follows.

Carnival's policy pursues a legitimate public policy goal and is appropriately targeted in its approach

The Commission accepts Carnival's health, safety and security concerns regarding Schoolies celebrations on its cruises, including:

- the risk of secondary supply of alcohol to passengers under the age of 18 and the difficulty of preventing this. Considering that the secondary supply of alcohol contravenes Carnival's RSA policies and obligations, and raises a significant risk to the health, safety and security of passengers, the Responsible Adult Requirement is an appropriate response to that concern;
- the ability of Schoolies to organise unmanageable large-scale events through means such as social networking;
- the limited capacity of on-board medical facilities in the event of accidents and the risks of accidents occurring (such as falling from heights on a cruise-ship or into the ocean). The Commission also notes the submission of ADCA that general risks associated with young people drinking are compounded by the dangers alcohol may pose in the potentially high-risk marine environment;
- the inability to call upon a police presence in the management of issues which may arise as a result of Unauthorised Events; and
- the limitations facing on-board security personnel in the management of issues which may arise as a result of Unauthorised Events.

The Commission considers that the parameters Carnival has set in relation to the Responsible Adult Requirement make it an appropriately targeted approach. Specifically, the Commission has had regard to the Responsible Adult Requirement being:

- a) Appropriately targeted in terms of age.

The Responsible Adult Requirement is limited to passengers under the age of 19 years and, in respect of the restrictions in the period 8 January – 31 January, it does not include passengers under the age of 17 where Carnival believes there is no risk that the minor will participate in an Unauthorised Event.

- b) Appropriately targeted in terms of its periods of application.

The Responsible Adult Requirement is applied more strictly in the period 1 November – 7 January, where passengers under the age of 19 are not able to

travel unless accompanied by a responsible adult. This period closely resembles the traditional period for 'Schoolies' celebrations.

The Responsible Adult Requirement is applied less strictly in the period 8 January – 31 January, during which time Carnival applies the adjustable quota restriction. The Commission notes that during the Initial Exemption period, Carnival has on one occasion increased the quota of 60 to 68 and that it has not been necessary to consider increasing the quota on other occasions as Carnival has not had more than 60 passengers under the age of 19 seek to make bookings during the relevant period.

- c) Appropriately targeted in terms of its flexibility in application.

Carnival's policy provides for a waiver (at its discretion) of the Responsible Adult Requirement. Carnival will state in its advertising and online booking system that it has retained this waiver discretion.

The ability to waive the Responsible Adult Requirement recognises that there will be passengers under the age of 19 who do not present a risk of participating in an Unauthorised Event and thus should not be subject to the limitation.

Carnival's policy is a reasonable measure having regard to the objects of the ADA

In making a determination on a temporary exemption application under the ADA, the Commission has regard to the objects of the ADA. The objects of the ADA include seeking to eliminate, as far as possible, discrimination against persons on the ground of age in a range of areas, including provision of goods, services or facilities.

The Commission recognises that Carnival's policy allows conduct which is inconsistent with the objects of the ADA. While this is a factor weighing against the grant of the exemption sought,⁷ it does not mean that the Commission cannot grant the exemption. In line with the Commission's Guidelines on the granting of a temporary exemption under the ADA, the Commission has assessed:

- the reasonableness of Carnival's policy, weighing up the nature and extent of the discriminatory effect against the reasons advanced in favour of the exemption; and
- whether the exemption could be granted subject to terms and conditions which further the objects of the ADA.

In undertaking this assessment, the Commission has considered the following:

- a) Carnival's legitimate concerns about controlling the consumption of alcohol on-board its cruises and its previous difficulties in managing the health, safety and security issues associated with 'Schoolies' celebrations;
- b) Carnival's submissions regarding the effectiveness of the Initial Exemption in reducing security incidents on-board its cruises;

⁷ Australian Human Rights Commission, *Temporary Exemptions Under the Age Discrimination Act: Commission Guidelines* (2010), section 3(b).

- c) Carnival has minimised the discriminatory impact of its policy by making it appropriately targeted in its application (noting the parameters of the Responsible Adult Requirement, discussed above) and has thereby limited its discriminatory effect;
- d) Carnival's application of the Responsible Adult Requirement during the Initial Exemption period shows that Carnival has:
 - i. in relation to the 1 November – 7 January period, at least in one case exercised its discretion to waive the Responsible Adult Requirement for people under the age of 19; and
 - ii. in relation to the 8 January – 31 January period, increased the quota in one case.

This indicates that Carnival has at least in some cases accommodated the individual circumstances of particular young people and this contributes to the reasonableness of the policy;

- e) The additional terms of this further exemption, that Carnival will state in its advertising and online booking system the existence of its discretion to waive the Responsible Adult Requirement, will further reduce the discriminatory impact of the exemption as young people will be aware of the flexible operation of Carnival's age restriction policy.

The Commission concludes that Carnival's policy is a reasonable measure which should be permitted, having weighed up the nature and extent of the discriminatory effect against the reasons in favour of the exemption.

APPLICATION FOR REVIEW

Subject to the *Administrative Appeals Tribunal Act 1975* (Cth), any person whose interests are affected by this decision may apply to the Administrative Appeals Tribunal for a review of the decision.

Dated this 15th day of November 2013.

Signed by the President, Professor Gillian Triggs, on behalf of the Commission.