

AUSTRALIAN HUMAN RIGHTS COMMISSION

AGE DISCRIMINATION ACT 2004 (CTH), S 44(1)

NOTICE OF DECISION ON APPLICATION FOR TEMPORARY EXEMPTION: 7 HOLDINGS PTY LTD, 7-ELEVEN STORES PTY LTD AND CONVENIENCE HOLDINGS PTY LTD

By this instrument, under section 44(1) of the *Age Discrimination Act 2004* (Cth) (Age Discrimination Act), the Australian Human Rights Commission (Commission) grants an exemption to 7 Holdings Pty Ltd and its wholly owned subsidiaries, 7-Eleven Stores Pty Ltd and Convenience Holdings Pty Ltd (together, 7-Eleven), from the operation of section 28 of the Age Discrimination Act.

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

1 THE APPLICATION AND BACKGROUND

- 1.1 7-Eleven is a retail company with approximately 729 convenience stores around Australia with stores in all states and territories. Some stores are operated by 7-Eleven directly while others are operated under franchise arrangements.
- 1.2 7-Eleven plans to introduce a range of non-alcoholic, but alcoholic-like, products into its drinks range. These products include non-alcoholic beer, cider, wine, cocktails and mixers.
- 1.3 On 25 August 2022, 7-Eleven applied for an exemption under the Age Discrimination Act for three years to allow 7-Eleven store operators and staff (whether franchised or directly operated) to:
 - a) place signage near non-alcoholic, but alcohol-like, beverages advising that the products are not for sale to anyone under the age of 18 years
 - b) request photo identification from customers seeking to purchase the non-alcoholic, but alcohol-like, beverages where they have any doubt as to the customer's age
 - c) refuse the sale of non-alcoholic, but alcohol-like, beverages to customers under the age of 18 years

(the Application).

1.4 7-Eleven submits that the exemption is necessary because it is concerned that restricting the sale of non-alcoholic, but alcohol-like, beverages to individuals over 18 years old would constitute a breach of section 28 of the Age Discrimination Act.

2 DECISION OF THE COMMISSION

2.1 The Commission has decided to grant to an exemption to 7-Eleven from the operation of section 28 of the Age Discrimination Act, subject to the terms and conditions outlined below.

3 CONSIDERATION AND REASONS

3.1 In reaching its decision, the Commission considered the following:

- a) 7-Eleven's Application, including the material and articles referenced in its Application
- b) submissions from other interested parties.

3.2 7-Eleven's Application and the submissions received are available on the Commission's website at <https://humanrights.gov.au/our-work/legal/exemptions/exemption-applications-under-age-discrimination-act-2004-cth>.

3.3 In making its decision, the Commission had regard to the following:

- a) the terms and objects of the Age Discrimination Act
- b) the Commission Guidelines: *Temporary Exemptions under the Age Discrimination Act 2004 (Cth)*.

3.4 The history of the application, the Commission's consideration of the above, and the reasons for the Commission's decision are set out below.

4 MEANING OF IMPORTANT TERMS

4.1 Unless the contrary intention appears, any term used in this decision and in the Age Discrimination Act has the same meaning in this decision as it has in the Age Discrimination Act.

5 REVIEW OF FINAL DECISION

5.1 Pursuant to s 45 of the Age Discrimination Act, and subject to the *Administrative Appeals Tribunal Act 1975 (Cth)*, an application may be made to the Administrative Appeals Tribunal for a review of this decision.

6 THE COMMISSION'S PROCESSES

6.1 On 30 September 2022, the Commission commenced a six-week public consultation period (which was extended by a further week upon request by interested parties). The Commission did this by:

- publishing the application on its website and calling for public submissions
- writing to State and Territory anti-discrimination bodies, inviting them to make submissions
- writing to Federal, State and Territory health ministers, inviting them to make submissions, and
- writing to the Foundation for Alcohol Research & Education (FARE) and the Public Health Advocacy Institute, inviting them to make submissions.

6.2 The Commission received four submissions during its public consultation (as outlined at paragraph 9.8). Copies of those submissions were made available on the Commission's website and 7-Eleven was given the opportunity to reply to those submissions.

6.3 The Commission has considered all of the materials referred to above in reaching its decision in relation to the application.

7 PROCEDURAL FAIRNESS CONSIDERATIONS

7.1 The Commission considers that, consistent with fundamental principles of procedural fairness, the process set out above has provided both 7-Eleven and the public with an adequate opportunity to comment on this Application.

8 LEGISLATIVE REGIME AND THE COMMISSION'S POWER TO GRANT EXEMPTIONS

8.1 The Age Discrimination Act makes it unlawful to discriminate against someone on the ground of age in respect of a range of areas. Most relevantly for the present application, the Age Discrimination Act makes discrimination unlawful in relation to the provision of goods and services (s 28).

8.2 Section 28 of the Age Discrimination Act provides that:

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 age:

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

(b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or

(c) 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.

- 8.3 Parliament has conferred broad powers on the Commission to grant exemptions under the Age Discrimination Act (s 44) from the operation of a provision of Division 2 or 3 of the Age Discrimination Act. Section 28 of the Age Discrimination Act is located in Division 3, therefore, the Commission may grant an exemption from the operation of this section.
- 8.4 The effect of an exemption under the Age Discrimination Act is that any discrimination covered by the exemption is not unlawful under the Age Discrimination Act while the exemption remains in force.
- 8.5 Exemptions granted by the Commission may be granted subject to terms and conditions. Failure to comply with such a term or condition does not, of itself, amount to unlawful conduct. However, where the beneficiary of an exemption fails to comply with a condition attached to the exemption, they will be deprived of the benefit of the exemption. They will then be subject to the requirements of the Age Discrimination Act in the usual way.
- 8.6 In practical terms, the granting of a temporary exemption means that the activities or circumstances covered by it cannot be the subject of a successful complaint under the Age Discrimination Act. Situations that might otherwise be unlawful under the Age Discrimination Act cannot be effectively contested through the usual discrimination complaints process, with its consequent legal remedies. A failure to comply with a condition attached to an exemption means that the exemption will no longer apply and complaints of unlawful discrimination under the Age Discrimination Act as a result of the activities or circumstances which had been covered by the exemption may be brought against the beneficiary of that exemption.
- 8.7 Pursuant to s 44(1) of the Age Discrimination Act, the Commission's exemption power is exercisable 'on application' and any exemption is to be granted 'by instrument'. An exemption is to be granted for a period, specified in the instrument, not exceeding 5 years (Age Discrimination Act, s 44(3)(c)).
- 8.8 Notwithstanding the few express limitations referred to above, the Commission's power to grant exemptions from compliance with the Age Discrimination Act is otherwise unconfined. Consistent with established principles of administrative law, the Commission's statutory discretion must be exercised in conformity with the subject matter, scope and purpose of the legislation under which it arises: *R v Australian Broadcasting Tribunal; Ex parte 2*

HD Pty Ltd (1979) 144 CLR 45 at 49; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 368; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40; *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [22], [31].

8.9 The objects of the Age Discrimination Act are stated in s 3 to be:

- (a) to eliminate, as far as possible, discrimination against persons on the ground of age in the areas of work, education, access to premises, the provision of goods, services and facilities, accommodation, the disposal of land, the administration of Commonwealth laws and programs and requests for information; and
- (b) to ensure, as far as practicable, that everyone has the same rights to equality before the law, regardless of age, as the rest of the community; and
- (c) to allow appropriate benefits and other assistance to be given to people of a certain age, particularly younger and older persons, in recognition of their particular circumstances; and
- (d) to promote recognition and acceptance within the community of the principle that people of all ages have the same fundamental rights; and
- (e) to respond to demographic change by:
 - (i) removing barriers to older people participating in society, particularly in the workforce; and
 - (ii) changing negative stereotypes about older people;bearing in mind the international commitment to eliminate age discrimination reflected in the Political Declaration adopted in Madrid, Spain on 12 April 2002 by the Second World Assembly on Ageing.

8.10 By conferring an exemption power on the Commission, Parliament has clearly contemplated that some discriminatory conduct might be justified and that, in certain circumstances, derogation from the terms of the Age Discrimination Act is permissible.

8.11 However, this exemption power must be interpreted in light of the objects of the Age Discrimination Act and the legislative scheme as a whole. The Age Discrimination Act defines discrimination and makes discrimination on the grounds of age unlawful. The grant of an exemption pursuant to s 44 of the Age Discrimination Act has the effect of taking relevant conduct out of the Age Discrimination Act's prohibitions and denying redress to a person who is affected by that conduct for the period covered by the exemption. While the exemption power in the Age Discrimination Act recognises that there might be circumstances where a derogation from its prohibitions is appropriate, the

effect of an exemption is to qualify the norms of conduct that the Age Discrimination Act seek to establish.

8.12 Consequently, the Commission considers that exemptions should not be granted lightly. In exercising its statutory discretion, the Commission must have regard to the circumstances of each individual case and balance the relevant factors. Given the significant legal consequences for potential complainants, the Commission must be satisfied that a temporary exemption is appropriate and reasonable, and persuasive evidence is needed to justify the exemption.

8.13 The Commission issued guidelines in 2010 (see [3.3(b)]) concerning the way in which it proposes to exercise its power under the Age Discrimination Act. These provide that the Commission will consider:

- whether an exemption is necessary
- the objects of the Age Discrimination Act
- an applicant's reasons for seeking an exemption
- submissions by interested parties
- all relevant provisions of the Age Discrimination Act.

9 DECISION

9.1 Pursuant to 7-Eleven's application, the Commission has decided to grant to an exemption to 7-Eleven from the operation of section 28 of the Age Discrimination Act, subject to the terms and conditions outlined below.

Terms and conditions of the exemption

9.2 7-Eleven, its store operators, and staff (whether the store is franchised or directly operated by 7-Eleven) may:

- a) refuse the sale of non-alcoholic, but alcohol-like, beverages to customers under the age of 18 years
- b) place signage near non-alcoholic, but alcohol-like, beverages advising that these products are not for sale to anyone under the age of 18 years
- c) request photo identification from customers seeking to purchase the non-alcoholic, but alcohol-like, beverages where they have any doubt as to the customer's age.

9.3 The exemption is granted for three years from the date of this instrument.

7-Eleven's reasons for seeking a temporary exemption

9.4 7-Eleven submits that the exemption is necessary because it is concerned that restricting the sale of non-alcoholic, but alcohol-like, beverages to individuals over 18 years old would constitute a breach of section 28 of the Age Discrimination Act.

9.5 7-Eleven submits that an exemption should be granted in circumstances where:

- There is a lack of research on potential harms associated with persons under the age of 18 years consuming non-alcoholic, but alcohol-like, beverages.
- An exemption would facilitate additional time for further research to be undertaken on any adverse impacts caused by the sale and consumption of non-alcoholic, but alcohol-like, beverages (given such beverages have only recently become popular and widely available consumer products).
- It is reasonable in the sense that the disadvantages suffered by persons under the age of 18 years by being denied from purchasing non-alcoholic, but alcohol-like, products are outweighed by avoiding the potential risks associated with having such persons predisposed to alcohol-like products.
- The consequences of the discrimination that the exemption would allow are minimal, in the sense that a person under the age of 18 years is deprived the right to purchase a good, being a particular category of beverage.
- Statistics around consumption of low and zero-alcohol products suggest consumption is expected to increase by 31 per cent by 2024.

9.6 As there is insufficient evidence surrounding the impacts of non-alcoholic, but alcohol-like, beverages, 7-Eleven is concerned it may be irresponsible to allow the sale of these beverages to individuals under the age of 18 years until further research can be conducted into potential harms.

9.7 Relying primarily on a 2022 article (Miller M, Pettigrew S, Wright CJC, 'Zero-alcohol beverages: Harm-minimisation tool or gateway drink?' (2022) 41(3) *Drug Alcohol Review* 546–549), 7-Eleven further submits that an exemption from the Age Discrimination Act is required on the basis that not only is more research required, but the limited research currently available indicates that potential harms may exist in relation to the sale and consumption of non-alcoholic beverages by people under the age of 18. These potential harms include:

- a) Marketing for non-alcoholic beverages is often associated with alcoholic brands and may provide further marketing opportunities for alcoholic brands.
- b) Non-alcoholic beverages are likely to effect norms around alcohol, including perceptions of the prevalence and acceptability of drinking behaviours.
- c) The consumption of non-alcoholic beverages has the potential for a 'gateway effect' as the products could predispose young people to earlier alcohol initiation.

Submissions of interested parties

9.8 The Commission received submissions concerning the Application from the following individual and organisations:

- The Hon Natasha Fyles, Northern Territory Chief Minister, Minister for Alcohol Policy, Minister for Defence, Minister for Health, Minister for Major Projects
- The Hon Chris Picton MP, South Australian Minister for Health and Wellbeing
- Foundation for Alcohol Research & Education
- Cancer Council.

9.9 All submissions received supported granting the temporary exemption to 7-Eleven. The concerns raised in these submissions reflected those raised in 7-Eleven's application, including:

- a) the evidence regarding the potential harms of non-alcoholic, but alcoholic-like products, is inconclusive and further research is needed
- b) the potential 'gateway' effect of these products to alcohol consumption by children and young people
- c) the exposure of children and young people to the marketing of alcoholic brands through these products
- d) the need for a precautionary approach to be taken given the potential harms until further research is undertaken.

9.10 FARE and Cancer Council also raised broader concerns regarding the lack of specific regulation in relation to the sale of non-alcoholic, but alcohol-like, beverages. Given their zero or low alcohol levels, these products are not covered by state and territory liquor licensing laws. These products can be and are currently sold without restriction in many supermarkets, convenience

stores and other retailers. The Commission notes that FARE and the Cancer Council object more broadly to the sale of non-alcoholic, but alcohol-like, beverages to any person in unlicensed retail premises. However, as recognised by these parties, these objections are beyond the scope of the Commission's powers in relation to exemptions under the Age Discrimination Act.

- 9.11 As indicated above, the Commission wrote to the Federal, State and Territory health ministers to invite submissions in response to 7-Eleven's application. The Commission only received responses from the health ministers of South Australia and the Northern Territory. The Commission intends to write again to all relevant health ministers to inform them of its decision to grant this exemption to 7-Eleven and raising its concerns regarding the sale of non-alcoholic, but alcohol-like, beverages to people under 18, highlighting this as an area where further research into the potential impact of these products is required, and where appropriate regulatory changes may also need to be considered in light of such research.

Consideration and reasons for the decision

- 9.12 The Commission accepts that there is limited evidence regarding the risks of potential harms of non-alcoholic, but alcohol-like, beverages to people under the age of 18 years, and that further research into this issue is needed. The Commission further accepts that the limited evidence currently available into this issue indicates that such products may pose potential harms for people under the age of 18 years, particularly the potential 'gateway effect' to alcohol consumption, impacting their views towards alcohol, and the marketing of alcohol brands towards this group. The Commission shares these concerns regarding the sale of these products to people under 18.
- 9.13 As noted above, when deciding on exemption applications under the Age Discrimination Act, the Commission has to have regard to the objects of this legislation, which include seeking to eliminate, as far possible, discrimination against person on the ground of age in a range of areas, including provision of goods, services, or facilities.
- 9.14 The Commission accepts that refusing to sell these goods to people under 18 may constitute a breach of section 28 of the Age Discrimination Act, and that the exemption sought by 7-Eleven is therefore necessary.
- 9.15 The Commission similarly recognises that 7-Eleven's proposed policy would be inconsistent with the above object of the Age Discrimination Act. However, this does not prevent the Commission from granting the exemption. The nature and extent of the discriminatory effect must be weighed against the reasons advanced in favour of the exemption.

- 9.16 The Commission considers that the discriminatory impact of the exemption is limited. People under 18 are being denied the sale of a particular class of beverages by 7-Eleven which may cause potential harm to them. As 7-Eleven notes, there are regulatory restrictions placed on the sale of other products (e.g. alcohol, tobacco products, e-cigarettes) to people under 18 due to the harms they pose. Furthermore, people under 18 are able to purchase a range of other beverages (e.g. soft drinks, juices, etc.) from 7-Eleven. The Commission also notes that whilst these products will not be sold to people under 18 by 7-Eleven, they nonetheless can still purchase them at other retailers.
- 9.17 The Commission also notes that, in making this application, 7-Eleven is acting responsibly and has carefully considered the potential harms of these products to its customers and the community, as well as the discriminatory impact of restricting the sale of these products. This is commendable.
- 9.18 Ultimately, the Commission considers that any discriminatory impact on people under the age of 18 years is outweighed by the need to take a precautionary approach with these products in light of their potential harms.
- 9.19 The exemption has been sought for a period of three years. The Commission considers that this is an appropriate period to allow time for further research to be undertaken into the potential consequences of the sale of these products to people under the age of 18 years and any possible regulatory changes.
- 9.20 The Commission notes that any further exemptions would need to be justified by evidence of the need for such exemptions.

Conclusion

- 9.21 The Commission concludes that 7-Eleven's policy in relation to the sale of non-alcoholic, but alcohol-like, beverages is an appropriate and reasonable measure, and the requested exemption should be granted for a period of three years.



Emeritus Professor Rosalind Croucher AM

President

on behalf of the Commission.

7 March 2023