

AUSTRALIAN HUMAN RIGHTS COMMISSION
AGE DISCRIMINATION ACT 2004 (Cth)
Section 44(2)

NOTICE OF GRANT OF APPLICATION FOR TEMPORARY EXEMPTION

By this instrument, the Australian Human Rights Commission ('the Commission') grants to Carnival plc, trading as Carnival Australia ('the Applicant') a temporary exemption for two and a half years pursuant to s 44(2) of the *Age Discrimination Act (Cth) 2004* ('the ADA').

1. TERMS OF THE EXEMPTION

- 1.1 The temporary exemption is to commence from [date] and is to continue to for a period of 2.5 years to [date].
- 1.2 The temporary exemption is granted in response to an application made on behalf of the Applicant by Baker & McKenzie, represented by Michael Michalandos and Bryony Binns, contained in a letter to the Commission dated 21 June 2013.
- 1.3 The exemption is granted in recognition of the policy which seeks to prevent events which may be large in scale and are associated with excessive and / or anti-social behaviour, including the abuse of alcohol (**Unauthorised Events**) during the Schoolies period of 1 November to 31 January (**Schoolies Period**).
- 1.4 The exemption will allow the Applicant to impose restrictions on Carnival cruise ships departing an Australian port to:
 - (a) require passengers under the age of 19 to be accompanied by a responsible adult, between 1 November and 7 January annually (**Responsible Adult Requirement**); and
 - (b) permit the Applicant to set a quota of 60 passengers per cruise who are aged under 19 years to take part in the cruise without being accompanied by a responsible adult, between 8 January and 31 January annually. This quota will not include infants and may not, where the Applicant believes there is no risk of participation in an Unauthorised Event, include passengers under the age of 17. Beyond the 60 passenger quota, the Applicant will require persons under the age of 19 years to be accompanied by a responsible adult.

The Applicant may waive this restriction in its absolute discretion and where the Applicant is satisfied that there is no risk that a

particular passenger aged under 19 years will take part in an event which threatens the security, health and safety of other passengers and the cruise generally.

2. BACKGROUND

2.1 The Applicant was granted an exemption under s 44 of the ADA in respect of the policy to prevent Unauthorised Events. Section 44 provides as follows:

44 Commission may grant exemptions

(1) The Commission may, on application by:

(a) a person:

- (i) on that person's own behalf; or
- (ii) on behalf of that person and another person or other persons; or
- (iii) on behalf of another person or other persons; or

(b) 2 or more persons:

- (i) on their own behalf; or
- (ii) on behalf of themselves and another person or other persons; or
- (iii) on behalf of another person or other persons;

by instrument, grant to the person or persons to whom the application relates, as the case may be, an exemption from the operation of a provision of Division 2 or 3, as specified in the instrument.

....

(3) An exemption granted under this section:

- (a) may be granted subject to such terms and conditions as are specified in the instrument; and
- (b) may be expressed to apply only in such circumstances, or in relation to such activities, as are specified in the instrument; and
- (c) is to be granted for a specified period not exceeding 5 years.

2.2 It is likely that the application of the age restrictions in the Applicant's policy would be in breach of section 28 of the ADA:

Section 28 Goods, services and facilities

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.
- 2.3 The Applicant previously applied for and was granted an exemption from the ADA for a period of 2.5 years in order to implement its policy to prevent Unauthorised Events. The exemption commenced on 23 December 2010 and expired on 22 June 2013. The Applicant has applied for an extension to the previous exemption for a further period of 2.5 years.
- 2.4 The Applicant, through its representatives, sent to the Age Discrimination Commissioner, the Hon Susan Ryan AO:
- (a) a letter dated 21 June 2013, setting out its case for extending the previous exemption and attaching
 - (i) three tables of statistical information regarding its passengers during Schoolies Period at Schedule A; and
 - (ii) its letter to the previous Commissioner for the original exemption dated 7 April 2009; and
 - (b) a letter dated 25 June 2013 containing supplementary information regarding the House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry into the Arrangements Surrounding Crimes Committed at Sea ('the Inquiry').
- 2.5 The Inquiry focussed upon the jurisdiction and investigation of crimes against the person, including fatal, non-fatal and sexual offences committed on cruise and merchant ships. The final report for the Inquiry was tabled on 24 June 2013. In its letter, the Applicant highlighted a number of statements made by the Committee in its report on the Inquiry:
- (a) "Carnival Australia's decision to ban schoolies cruises is a responsible one."
 - (b) "The Committee believes that operating 'schoolies cruises' is irresponsible."
 - (c) "...the Committee is fully supportive of Carnival's decision to ban schoolies cruises."

- 2.6 The Applicant submits that these comments from the Inquiry should be taken into account in considering whether to grant an extension to the exemption. The Applicant submits that such statements indicate that the Federal Government is supportive of Carnival's decision to ban its Schoolies cruises and is generally supportive of measures taken by cruise operators which seek to control the irresponsible events commonly associated with Schoolies participants.

3. SUBMISSIONS RECEIVED

- 3.1 The Applicant's correspondence was uploaded to the Commission's public internet website with submissions requested by 12 August 2013. The Commission also circulated the Applicant's correspondence 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.

- 3.2 The Victorian Equal Opportunity and Human Rights Commission responded by email on 14 July 2013 stating that it would not be making a submission. The Commission also received correspondence from:

- (a) Allannah Lucas, Acting Commissioner for Equal Opportunity Western Australia, stating that she would still be statutorily bound to investigate any complaint in Western Australia under the *Equal Opportunity Act 1984* (WA) and referring the Applicant to the exception under section 66ZM of that Act (by letter dated 9 July 2013);
- (b) Stepan Kerkyasharian AO, President of the Anti-Discrimination Board of New South Wales, stating that the Board had previously raised a number of concerns regarding the age discrimination exemption granted to the Applicant and that the exemption appears to be discriminatory towards people of a particular age group and inconsistent with the objectives of the ADA. The Board's main concern is that the age restriction proposed by the Applicant does not provide a bona fide benefit to persons of a particular age, does not meet a need that arises out of the age of a person nor does it reduce disadvantage experienced by people of a particular age. The Board also believes that the ability of the Applicant to vary the application of the exemption in its absolute discretion leaves open the potential for discrimination to occur on other grounds (by letter dated 5 August 2013);

- (c) Kevin Cocks AM, Anti-Discrimination Commissioner Queensland, stating that he has no objection to the granting of the proposed further exemption and that the policy is a reasonable measure for a legitimate public interest (by letter dated 9 August 2013); and
- (d) David Templeman, Chief Executive Officer of the Alcohol and Other Drugs Council of Australia (**ADCA**), stating that the ADCA supports the exemption based on strong evidence against people under the age of 19 drinking in groups. The ADCA refers to the National Health and Medical Research Council guidelines on alcohol consumption which advise that young adults should drink within low risk levels due to the particular risk of harm from alcohol consumption due to a greater risk of accidents and injuries, a lower alcohol tolerance than older adults, and an increased risk of cognitive impairment and alcohol dependence in later life. The risks are compounded by the dangers alcohol may pose in the potentially high-risk marine environment and impact on other passengers' safety and enjoyment. For these reasons the ADCA believes that the Applicant is taking a responsible attitude while trying to keep its business viable (by letter dated 12 August 2013).

3.3 These submissions were also uploaded to the public website for comment.

4. THE APPLICANT'S POLICY

(a) Policy to prevent Unauthorised Events

4.1 The Applicant has applied for a temporary exemption under the ADA in respect of a policy to prevent Unauthorised Events occurring on its cruise ships which are likely to compromise the health, safety and security of passengers and crew. The Applicant'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. The Applicant had previously experienced a large number of alcohol-related security incidents involving large numbers of Schoolies on its cruises during the Schoolies Period.

(b) Restrictions based on age in the Applicant's policy

4.2 The Applicant wishes to impose the following restrictions based on age on Applicant cruises commencing from Australia:

- (a) for Applicant 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; and

- (b) for Applicant cruise ships departing an Australian port between 8 January and 31 January annually, the Applicant will permit a quota of 60 passengers per cruise who are under 19 years of age to take part in the cruise without being accompanied by a responsible adult. This quota will not include infants and may not, where the Applicant there is no risk of participation in an Unauthorised Event, include passengers under the age of 17. Beyond the 60 passenger quota, the Applicant will require persons under the age of 19 years to be accompanied by a responsible adult.

This particular restriction may be waived by Carnival in its absolute discretion and where Carnival is satisfied that there is no risk that a particular passenger aged under 19 years will take part in an event which threatens the health, safety and security of passengers and crew on board a particular cruise. This particular activity applies regardless of age to cruises which depart at any time during the year.

- (c) The Applicant's proposed general right of refusal in relation to all of its cruises

- 4.3 Where the Applicant forms the view, based on reasonable grounds, that a passenger is planning to participate in an Unauthorised Event, the Applicant may refuse boarding to that passenger or otherwise impose other conditions aimed at eliminating or reducing any risk to the health, safety and security of passengers and crew on board a particular cruise. This particular activity applies regardless of age to cruise which depart at any time during the year.

5. THE APPLICANT'S REASONS FOR REQUESTING AN EXEMPTION

- 5.1 The Applicant is seeking to prevent events occurring on board its cruise ships which compromise the Applicant's ability to ensure the health, safety and security of passengers and crew. The Applicant is particularly concerned about 'Schoolies' celebrations on board its cruise ships and has outlined its ongoing concern about the risk of secondary supply of alcohol on board its cruise ships to passengers under the age of 18.
- 5.2 Until 2007, the Applicant operated 'Schoolies' cruises which catered exclusively for passengers aged 16 to 19 years of age celebrating the end of their high school education. The Applicant states that it discontinued these cruises because of an exponential increase in alcohol-related security incidents during the cruises. While the Applicant discontinued its 'Schoolies' cruises and its marketing towards school leavers, the Applicant states that there has continued to be a high level of school-leavers seeking to book cruises during the summer months.

- 5.3 In 2009, the Applicant made an application to the Commission for a temporary exemption under the ADA to permit it to operate an 'under-21s' policy. The Applicant's under-21s policy was to require all persons under the age of 21 to travel with a parent or guardian on Applicant cruise ships between 1 November and 30 January each year. The Applicant sought the under-21s policy to address its concerns about 'Schoolies' celebrations on board its cruise ships, and submitted that it had tried all other reasonable measures open to it, without success.
- 5.4 The Commission declined to grant that temporary exemption application. One of the Commission's reasons was that the scope of the requested exemption was significantly broader than its intended purpose. The objective of the under-21s policy was to discourage school leavers from taking cruises during the traditional 'Schoolies' period. The effect of the under-21s policy was to exclude all persons under the age of 21, regardless of whether they were school leavers, university students or in full-time employment.
- 5.5 The Applicant submitted a revised temporary exemption application containing restrictions that corresponded more closely with the type of behaviour it was seeking to address. The Applicant reduced the age limit of the exemption being sought to people under the age of 19 years old. This temporary exemption was granted by the Commission on 21 December 2010 for a period of 2.5 years.
- 5.6 The Applicant submits that it is not relying upon negative stereotypes of school leavers and persons under the age of 19 in applying its policy. Rather, it is relying upon its own direct experiences of incidents during the Schoolies Period and the comparison of the number of incidents after the exemption had been granted. The Applicant submits that in order to continue the general decrease in Unauthorised Events during Schoolies Period, a further exemption is necessary.
- 5.7 The Applicant submits that applying the policy is not inconsistent with the objectives of the ADA. The Applicant is not seeking to remove the ability of persons under the age of 19 years to enjoy cruises during the Schoolies Period, merely to ensure that such persons are appropriately supervised to reduce the likelihood of Unauthorised Events.
- 5.8 The Applicant further submits that a further exemption should be granted on the grounds of public policy. The Applicant seeks to ensure the health, safety and security of its passengers during Schoolies Periods and does not wish to provide a forum for a rite of passage that is endemically associated with alcohol, anti-social behaviour and substance abuse.

6. EFFECT OF THE EXEMPTION

- 6.1 The Applicant believes that the exemption has served to:
- (a) discourage Schoolies' participants from making bookings for the purpose of engaging in improper behaviour and under-age drinking;
 - (b) reduce the likelihood of unmanageable large-scale Schoolies events organised through, for example, social networking; and
 - (c) promote an understanding that the Applicant's cruises will not tolerate improper behaviour and under-age drinking on its cruise-ships as part of Schoolies celebrations.
- 6.2 The Applicant states that it has observed a significant decrease in the number of alcohol-related security incidents during the Schoolies period since the granting of the exemption. For instance, in December 2012 a total of 67 security incidents were recorded across all cruises for that month whereas 457 separate security incidents were recorded on one vessel during one cruise in December 2005. The Applicant has also supplied a number of statistical tables showing an increasing number of Unaccompanied Young Passengers on cruises during the Schoolies Period from 2010/2011 to 2012/2013.
- 6.3 The Applicant believes that the presence of a responsible adult acting as an authority figure has served as an effective control mechanism to minimise incidents of underage drinking and other inappropriate behaviour. The Applicant wishes to continue to prioritise the health, safety and security of its passengers generally and notes that the on-board environment poses challenges due to the confined space, proximity from land and limitations on security personnel.

7. FINDINGS ON MATERIAL QUESTIONS OF FACT

- 7.1 Based on the evidence referred to in paragraphs 5.1 – 6.3 above, the Commission makes the following findings on material questions of fact in relation to this application:
- 7.1.1 The policy to prevent Unauthorised Events has been successful in reducing the incidents of accidents occurring during the Schoolies Period.
 - 7.1.2 The policy and exemption required under the policy has the support of the ADCA and Anti-Discrimination Commissioner Queensland. The President of the Anti-Discrimination Board of New South Wales has raised concerns about the exemption.

7.1.3 The exemption has been in place for a period of 2.5 years to allow the Applicant to place restrictions upon persons under the age of 19 years old on its cruises during Schoolies Period.

7.1.4 The findings of the Inquiry support the banning of Schoolies cruises and are generally supportive of measures taken by cruise operators which seek to control the irresponsible events commonly associated with Schoolies participants.

8. REASONS FOR GRANTING AN EXEMPTION

- (a) The Applicant's policy pursues a legitimate public policy goal and is appropriately targeted in its approach

- 8.1 The Commission accepts the Applicant's health, safety and security concerns regarding 'Schoolies' celebrations, including the risk of secondary supply of alcohol to passengers under the age of 18, and the difficulty in preventing this as the number of people involved in the celebration increases. Considering that the secondary supply of alcohol contravenes the Applicant'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.
- 8.2 The Commission also considers that the Applicant's proposal to introduce an adjustable quota of unaccompanied passengers under the age of 19 on cruises between 8 January and 31 January narrows the application of the Responsible Adult Requirement to a period which more closely resembles the traditional period for 'Schoolies' celebrations.
- (b) Having regard to the objects of the ADA, the Applicant's policy is a reasonable measure
- 8.3 In making a determination on a temporary exemption application under the ADA, the Commission has regard to the objects of the Act. 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 and facilities and accommodation.
- 8.4 The previous exemption granted to the Applicant took into account the reasonableness of the Applicant in applying the policy to persons under the age of 19. Although the Commission was of the view that the policy was potentially inconsistent with the objects of the ADA, this was not of itself a reason for the Commission to deny the exemption application. The Commission weighed up the nature and extent of the discriminatory effect against the reasons advanced in favour of the exemption.
- 8.5 The current application for the further exemption similarly requires such a balancing approach. The Commission has taken into account the Applicant's legitimate concern about controlling the consumption of alcohol on board its cruises and its previous experience of 'Schoolies' celebrations. The Applicant has sought to minimise as far as possible the discriminatory effect of its policy by limiting both the age range and the time period of the policy and by making it subject to exceptions in appropriate cases.
- 8.6 The Applicant is of the view that the further exemption is necessary to enable it to ensure, as far as is reasonably practicable, the health, safety and security of its passengers during Schoolies Periods. The Applicant has previously attempted to reduce the risks associated with Unauthorised

Events by significantly enhancing security and alcohol control measures. However, these have not been successful. The Applicant's policy has been devised upon obtaining advice from security experts and has the support of the ADCA.

- 8.7 In considering the last application, the Commission accepted the Applicant's health, safety and security concerns regarding Schoolies celebrations. The Commission considered the reasonableness of the Applicant's policy and weighed up the nature and extent of the discriminatory effect against the reasons advanced in favour of the exemption.
- 8.8 The same factors are in play again and we consider the policy to be a sufficiently targeted reasonable policy which should be permitted. The Applicant has sought to minimise the discriminatory effect of the policy by limiting the age range and the time period of the Responsible Adult Requirement.
- 8.9 However, the Commission does have concerns that the exemption may become entrenched and as a result, encourages the Applicant to consider other initiatives to reduce the occurrence of Unauthorised Events that are not discriminatory in nature. The Applicant will be required to report upon such alternative options when making any future application for an exemption under the ADA.
- 8.10 In addition, the Commission requires the Applicant to provide ongoing updates of any applications to waive the policy by cruise passengers. The Commission will use this information to monitor the discriminatory effect of the Applicant's policy and consider the number of applications made to waive the policy in any future application for exemption made by the Applicant.
- 8.11 Regardless, the Commission reiterates the reasons upon which the previous exemption under the ADA was granted to the Applicant. The Commission finds that the measures implemented under the Applicant's policy are reasonable measures taken in pursuance of an importance public policy objective. The desire of the Applicant to curb behaviour that may lead to Unauthorised Events during Schoolies Periods is endorsed by the Parliamentary Committee in its findings under the Inquiry, the ADCA and the Anti-Discrimination Commissioner Queensland.
- 8.8 In balancing the benefits of applying the policy against the potential for the policy to counter the objectives of the ADA, the Commission finds that the intent of the Applicant to reduce the number of incidents of Unauthorised Events on board its cruises outweighs the discriminatory effect of the policy. The Commission also notes that the Applicant may waive the

requirement of the quota in cases where there is no risk that a particular passenger may take part in an event which threatens the security, health and safety of other passengers. The Commission believes that the discretion of the Applicant to waive the quota restriction diminishes the discriminatory effect of the policy. For the reasons set out above, the Commission grants the Applicant a further exemption to the ADA upon terms identical to its previous exemption on the condition that the Applicant notify the Commission of any applications made to waive the policy.

9. TERM OF EXEMPTION

- 9.1 The Commission grants Carnival an exemption for a term of 2.5 years on the same term and conditions as the previous exemption. The exemption extension will be for the period from [date] to [date]. During this period, the Applicant must comply with the condition of the exemption to notify the Commission, on an ongoing basis, of any applications made by cruise passengers for the policy to be waived.

10. APPLICATION FOR REVIEW

- 10.1 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 st day of September 2013

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

Please note

Subject to the *Administrative Appeals Tribunal Act 1975*, application may be made to the Administrative Appeals Tribunal for a review of a decision to which this notice relates by or on behalf of any person or persons whose interests are affected by the decision.