



Your ref: 2009/107-1

30 June 2009

Ms Sophie Redmond
Lawyer
Legal Section
Australian Human Rights Commission
GPO Box 5218
SYDNEY, 2001

Dear Ms Redmond

**Temporary exemption application under the Age Discrimination Act 2004 (Cth) –
Carnival plc**

Thank you for the invitation to make a submission in respect of the above exemption application.

The Victorian Equal Opportunity and Human Rights Commission (the Commission) notes that the conduct that is the subject of the application may contravene the *Equal Opportunity Act 1995* (EOA) as well as the *Age Discrimination Act 2004* (ADA) if the conduct occurs in Victoria. Like the ADA, the EOA provides a process by which exemptions may be sought from the Victorian Civil and Administrative Tribunal (VCAT) to allow discriminatory conduct that may otherwise be unlawful.

The Commission is taking this opportunity to share developments in the Victorian approach to exemption applications made under the EOA to VCAT. In particular, this submission outlines the way in which the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) would be relevant to such an application.

Background

The Commission is an independent statutory body that has responsibilities under the EOA and the *Racial and Religious Tolerance Act 2001*. Functions undertaken by the Commission include conciliating individual and representative complaints about discrimination, sexual harassment and racial and religious vilification; providing education about equality of opportunity, racial and religious tolerance and human rights; undertaking projects and activities aimed at eliminating discrimination and racial and religious intolerance; conducting research and providing policy advice.

In addition, the Commission undertakes specific functions under the Charter. These include providing an independent yearly report on the operation of the Charter, and intervening as of right in matters before courts and tribunals where a question arises concerning the application of the Charter, or the interpretation of a statutory provision in light of the Charter.

VCAT has discretion under section 83 of the EOA to grant exemptions for up to 3 years. The Commission has a practice of seeking to intervene in exemption applications where significant public interest issues or human rights issues are involved. A number of our interventions have addressed the implications of the Charter for the granting of exemptions from the EOA, and how a human rights framework can assist in ensuring such decisions strike an appropriate balance.

The information provided to the Commission regarding this application indicates that, if the application is granted, all persons between the ages of 18 – 21 years will be restricted from taking part in cruises during the traditional “schoolies” period between 1 November – 30 January unless accompanied by a parent or guardian. The reasons outlined for the exemption appear to relate to concerns about the safety of this group of passengers, alcohol related security risks and isolation from emergency services during periods at sea.

The approach to exemption applications in Victoria

VCAT established a framework for considering and determining exemption applications in *Fernwood Fitness Centres Pty Ltd*¹ (*Fernwood’s case*) and has recently modified this framework in order to incorporate a Charter-based analysis when considering exemption applications. *Fernwood’s case* identified two key questions that were considered in relation to exemption applications:

1. Does the exemption application relate to conduct that might constitute a breach of the EOA?
2. Is the exemption appropriate when considered in light of the objectives and scheme of the EOA? Assessing this broad question can involve specific consideration of the following matters:
 - the reasonableness of a proposed exemption;
 - consistency with the spirit of existing exceptions; and
 - the degree of tension between the objectives and scheme of the EOA and the proposed exception.

The Commission notes similar considerations are identified in the AHRC’s *Temporary Exemption Guidelines for the Age Discrimination Act*.

Since the beginning of 2008, section 32 of the Charter has required that so far as it is possible to do so consistently with their purpose, all Victorian statutory provisions must be interpreted in a way that is compatible with human rights. The decision of Judge Harbison in the *Royal Victorian Bowls Association Inc (Anti-Discrimination Exemption)*² considered the implications of this for the granting of exemptions under section 83 of the EOA. In short, Judge Harbison decided that exemption applications must now be determined by examining whether the proposed exemption constitutes a reasonable, justified and proportionate limitation on the right to equality using the framework set out in section 7 of the Charter.

Section 7 of the Charter provides that human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including:

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

¹ (1996) EOC 92-782.

² [2008] VCAT 2415.

Applying this approach to the exemption application

If this application was made under the EOA, VCAT may consider whether the application is within the spirit, although not necessarily the letter, of some express exception provisions in the Act.³ Section 82 'Welfare measures and special needs' for example, provides an exception for anything done that may be described as special measures to prevent or reduce disadvantage; and to enable restrictions on eligibility for such services. Within this context, section 82(2)(b) allows a person to provide or restrict the offering of holiday tours to people of a particular age or age group. On the basis of the information provided, it does not appear to the Commission that the applicant intends to restrict its services in order to provide some special benefit to meet the special needs of a particular group.

In this context we would anticipate that VCAT would examine whether the proposed exemption can be regarded as a reasonable limitation on the right to protection from discrimination enshrined in section 8(3) of the Charter. Depending on the circumstances it might also be argued that the proposed exemption may limit the right to freedom of movement enshrined in section 12 of the Charter, however, it is unnecessary to address this for current purposes. Using the non-exhaustive framework contained in section 7 of the Charter this assessment would include consideration of the following matters:

The nature of the right being limited

While not absolute, the right to protection from discrimination is fundamental. It is critical as both a stand-alone entitlement, as well as an aspect of all other rights. Its importance is reflected in the prominence it is accorded in all the major human rights instruments. Understanding the nature of the right to protection from discrimination in this context also requires an appreciation that young people are particularly vulnerable to discriminatory treatment due to a relative lack of power and influence, as well as widespread acceptance of a range of stereotypes regarding their capacity and conduct.

The importance of the proposed limitation

The purpose of the limitation proposed stated in the application is principally to protect health, safety and well being of passengers and is motivated by a concern that the applicant does not promote or condone cultural rights of passage amongst young Australians which involve drinking to dangerous levels and substance abuse.

The applicant refers to public policy considerations and submits that the exemption sought is consistent with current social research and statistical data. This information appears to have been provided to the AHRC and, in Victoria, would need to support the argument that the purpose of the limitation is sufficiently important to justify the proposed restriction on the right to equality.

The applicant claims an 'exponential increase' in the amount of alcohol-related security incidents. Information stating the proportions of "schoolies" passengers engaging in 'alcohol fuelled incidents' as compared to passengers from the same group who do not participate in these incidents may also be relevant.

The applicant's arguments may also need to be analysed to identify any commercial benefits that might accrue from the exemption for example, reducing its potential public liability and risks to its reputation. This is not to suggest the application is made in bad faith, but seeks to ensure the full impact and possible

³ *Wet on Wellington (Anti Discrimination Exemption)* [2006] VCAT 981.

motivation for the application is appropriately interrogated. We note that this is also foreshadowed in the *Temporary Exemption Guidelines for the Age Discrimination Act*.

The nature and extent of the limitation

It is critical to acknowledge that for a period of time, for young people in the relevant age bracket, the proposed exemption extinguishes the right to equal treatment by this service provider. As such, while this particular service might be regarded as somewhat of a niche area, the proposed exemption constitutes an extreme limitation on rights in that area. It is important that the applicant address this issue and provide extremely powerful material supporting the breadth and scope of the proposed limitation.

The relation between the limitation and its purpose and whether there is a less restrictive means available to achieve the purpose

The proposed exemption will clearly achieve the desired end in that by ensuring no one in the relevant age bracket is present on board during the relevant period, there will be no possibility of them engaging in the relevant conduct. In the Commission's view, however, because such an extreme strategy is being proposed to achieve this objective, there are a range of issues that need to be examined in order to tease out the relationship between the limit and its purpose, and whether there is a less restrictive option. Most importantly, the applicant needs to demonstrate why appropriately robust behaviour policies (with consequences for their breach) applied to *all* passengers, are inadequate to deal with this issue. The capacity to behave inappropriately does not cease upon reaching the age of 21. The Commission assumes the applicant has strategies to deal with inappropriate conduct on the part of any passengers, it needs to demonstrate why if these are being enforced there is an ongoing issue that necessitates a blanket prohibition on a particular group.

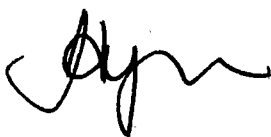
Conclusion

If an analysis of a proposed exemption reveals that an exemption is not a reasonable limitation on the right to protection from discrimination, then the Commission's view would be that the application should not be granted.

We hope that this information provides a useful background regarding the consideration of exemptions in a human rights context.

If you would like to discuss further, please contact Chelsey Bell at the Commission on (03) 9281 7132.

Yours sincerely



Dr Helen Szoke
Chief Conciliator / Chief Executive Officer
Victorian Equal Opportunity & Human Rights Commission