



Our Ref: 02/88/0167
Your Ref: 2009/107-1
Enquiries: Allan Macdonald

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Dear Ms Redmond

EXEMPTION APPLICATION UNDER THE 'ADA' – CARNIVAL CRUISES

Thank you for your letter dated 29 May 2009, inviting the Commission to make a submission in respect to an application by Carnival Cruises ('Carnival') for a temporary exemption under the *Age Discrimination Act 2004* ('ADA').

I have read the attached copy of Carnival's application, together with the 2009 AHRC Guidelines. I note the observation in the Guidelines that the ADA does not state how the AHRC should exercise its power to grant exemptions. This is also the case in Western Australia under the *Equal Opportunity Act 1984* ('EOA'). Under the EOA, applications for exemptions are made to the State Administrative Tribunal ('SAT'). The SAT does not issue guidelines like the AHRC, but publishes decisions after considering evidence and submissions from the applicant and any interested parties. Under the SAT Regulations, I am automatically joined as a party to every exemption application, unless I advise the SAT that I do not wish to remain a party.

Recently, the matters to be taken into account when deciding upon an application for an exemption under the EOA were considered by the WA Court of Appeal, in *Commissioner for Equal Opportunity & Ors v ADI Ltd & Ors* [207] WASCA 261. In 2005, the SAT received an application from defence contractor, ADI Ltd ('ADI') and its related entities, seeking an exemption from the race discrimination provisions of the EOA, so as to permit the company to lawfully discriminate against employees, job applicants, and contract workers, on the ground of their nationality, where it was considered necessary in order for ADI to undertake defence projects in compliance with the laws of the United States. In my view, the conduct proposed by ADI was clearly discriminatory on its face and would be unlawful under the EOA, as no relevant exceptions applied. Accordingly, I opposed the granting of an exemption in any form.

The SAT granted the exemption, subject to conditions. In its decision, the SAT summarised its role in the following way:

“The discretion vested in us is very broad and flexible although not entirely unfettered; this application for exemption does not fit squarely within the objects of the EO Act. But Parliament cannot have intended us to look at these applications completely in isolation with only the scope and purpose of the EO Act to guide us and to qualify an application. To be able to deal sensibly and realistically with this application, we must consider it in its broader context, looking at the ramifications not just on anti-discriminatory or discriminatory conduct, if it is granted. This is not to say that economic considerations should or could be paramount; they are not. Rather, we need to look to the total combined effect of the consequences if the exemption is or is not granted. We must consider all of the interests that can be pointed to that would justify the granting of the application, against a framework of the public interest – *ADI Ltd v Commissioner for Equal Opportunity* [2005] WASAT 259, at [131]– [132].

As a result of this decision, I lodged an appeal in the Court of Appeal. The main issue before the Court was whether or not the SAT erred by taking into account the public interest when it granted the exemption to ADI. My view is that the SAT should only grant exemptions in circumstances where there is uncertainty as to whether or not the applicant’s proposed conduct is covered by one of the specific or general exceptions under the EOA, and it is reasonably clear that the conduct is consistent with objects of the EOA, irrespective of public interest considerations. The public interest in exemption applications is, in my view, a matter for the Parliament to address through legislation or specific regulations. In any event, the Court dismissed the appeal and made the following observations, at [70] and [72], per Martin CJ:

“When regard is had to the specific exceptions to Pt III of the Act (Discrimination on the ground of Race), and the general exceptions to the Act in Pt VI, it is clear that the legislature has taken the view that conduct which would otherwise be prohibited because it is discriminatory should nevertheless be permitted because it can be justified by reference to a variety of considerations which are extraneous to the anti-discriminatory objects of the Act, and in particular the objects specified in s 3 of the Act. It follows that when the Tribunal comes to consider an application for exemption from the operation of the Act, it can and should take into account the fact that the legislature has recognised that there are some circumstances in which discriminatory conduct can be justified by reference to considerations which are extraneous to the anti-discriminatory objects of the Act, and that it has conferred upon the Tribunal the power to identify circumstances beyond those specified in the Act, in which conduct which is otherwise discriminatory should nevertheless be lawful.

In summary, in my opinion when exercising the discretion conferred upon it by s 135 of the Act, it is consistent with the objects, scope and purpose of the Act, for the Tribunal to take into account any considerations which it considers would justify the commission of conduct which would otherwise be unlawful under the Act. So, provided there is a rational basis for the discriminatory conduct, it will fall to the Tribunal to determine whether the interests to be served by permitting that conduct outweigh the detriment which flows from discriminatory conduct. Often the interests properly considered by the Tribunal

in that context will be public interests, but they need not be so. As can be seen, for example, from s 50 of the Act (Genuine Occupational Qualification), private interests have been recognised by the legislature as providing a sufficient justification or the permission of conduct which would otherwise be unlawful.”

Obviously, the Court’s decision is binding on the SAT, but not on the AHRC, or the AAT, which can review a decision made under s 44 of the ADA. I note also that the objects of the ADA are in many respects similar to those of the EOA, and the Guidelines accord with my own view regarding the principles that should be followed when deciding whether or not to grant an exemption. Putting aside the Court’s decision for the time being, I believe that if one follows the Guidelines, an exemption should not be granted to Carnival, for the following reasons.

Firstly, the exemption would permit conduct that would otherwise be unlawful under the ADA, and clearly so. As Carnival point out, none of the exceptions under the ADA appear to apply in this instance. Further, Carnival’s claim that the granting of the exemption is consistent with the objects of the ADA is unconvincing. Carnival’s desire to reduce the likelihood of excessive alcohol consumption and unacceptable behaviour amongst young people may be valid from a public policy point of view, but that does not mean that measures put in place to achieve such an outcome are consistent with the objects of the ADA.


Secondly, despite its claim to the contrary, Carnival, in seeking this exemption, *is* stereotyping all school leavers, indeed all young people under the age of 21, as persons who require parental or guardian supervision, regardless of their individual circumstances. This is so even where statistics and social research examine the link between excessive alcohol consumption and the behaviour of young people.

And thirdly, Carnival does not explain why it believes it necessary to impose the guardian condition on persons up to the age of 21 years, when the application concerns the behaviour of school leavers, the great majority of whom will be no older than 17 or 18 years of age when they are on a cruise. The condition appears to exceed the purpose for which it is proposed.

Carnival submits that it is appropriate to grant an exemption on public policy grounds, to ensure the security and safety of its passengers and because “it does not wish to provide a forum for a rite of passage that is endemically associated with alcohol and substance abuse”. This brings me back to the ADI decision. The reasoning of the Court of Appeal is, arguably, just as applicable to Commonwealth discrimination legislation as it is to the EOA. Should the AAT or Federal Court in future be called upon to review the factors to be taken into account when deciding whether or not to grant an exemption, matters of broad public interest, and even private interests, are likely to be regarded as significant as the objects and purpose of the legislation, and will be weighed accordingly, as the case requires. And to use the Court’s words, provided there is a “rational basis” for the discriminatory conduct, the AHRC will need to determine whether the interests to be served by permitting that conduct, even when it would otherwise be unlawful under the ADA, outweighs the detriment that flows from it.

Thank you again for inviting me to make a submission. Should you wish to discuss my submission in more detail, please telephone Pauline Grimley or Debra Balasubramaniam on (08) 9216 3955 or email yvonne.henderson@eoc.wa.gov.au.

Yours sincerely



Yvonne Henderson
COMMISSIONER FOR EQUAL OPPORTUNITY

26 June 2009