



**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 one year from the date of this instrument and is subject to the conditions outlined below.

Summary

Carnival is a cruise company that 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*:

1. 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) (The Responsible Adult Requirement); and
2. 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 (Quota Restriction).

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 (2013 Exemption). On 15 November 2013 the further exemption was granted subject to the following conditions:

1. Carnival will report to the Commission at the end of the 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; and
2. Carnival will report to the Commission at the end of the exemption period

- a) 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
- b) on how many occasions and to what number it increases the quota.

On 28 October 2016, Carnival again applied to the Commission for an extension of the 2013 Exemption, on the same terms, for a further period of two and a half years.

The Commission notes that the 2013 Exemption expired on 15 May 2016, and further notes that an exemption has not been in place for the most recent 'Schoolies Period' being from 1 November 2016 to 31 January 2017. The Commission asked Carnival to provide a reason for why it did not apply for a further exemption prior to the expiration of the 2013 Exemption. Carnival responded that it did not apply for a further exemption prior to the expiration of the last exemption due to an oversight; however, as soon as it became aware of the error (i.e. in October 2016) it acted to submit an application for renewal of the exemption. Carnival also stated that based on general booking trends over previous 'Schoolies Periods', it expects that a significant number of booking for cruises which were schedule to depart and did depart from 1 November 2016 to 7 January 2017 would have been made prior to the expiry of the 2013 Exemption.

The Commission has decided to grant an exemption, for a period of one year from the date of this notice, subject to the terms and conditions set out below (2017 Exemption).

Background

Carnival relies on the same reasons for seeking this exemption as it relied on in its Initial Exemption application in April 2009 and in its 2013 Exemption application.

In support of the current application, Carnival has included data in accordance with the conditions attached to the grant of its 2013 Exemption and relevant to its implementation of the 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 and the 2013 Exemption, it has observed a significant and continued decrease in the number of alcohol related security incidents during the Schoolies Period. Carnival considers that this decrease is attributed to the Initial Exemption granted by the Commission in 2010 and the further 2013 Exemption granted by the Commission.

By way of an 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 and in all cruises for that month;
- In December 2014, it recorded a total of 18 security incidents across six Australian home-ported vessels and across all cruises on those vessels for that month; and
- In December 2015, it recorded a total of 5 security incidents across six Australian home-ported vessels and across all cruises for that month.

Carnival also states that during the period of the 2013 Exemption, it continued to observe a general decrease in the number of customer service complaints from passengers on-board cruises during Schoolies Periods in relation to excessive behaviour engaged in by passengers under the age of 19 years. Carnival also states that the Initial Exemption and the 2013 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; and
- 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; and
- 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 2013 Exemption period

In support of its 2017 Exemption application, Carnival has provided relevant information for the period 2013 – 2016, 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 many applications were received by Carnival for a waiver of the Responsible Adult Requirement, and how frequently Carnival waived the Responsible Adult Requirement, 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 and on how many occasions and to what number Carnival increased the quota.

The Commission notes that in its 2013 Exemption application, Carnival provided information for the period 2010 – 2013 in relation to the same matters.

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:

1. all State and Territory anti-discrimination bodies;
2. the New South Wales Police Marine Area Command; and
3. the Alcohol and Other Drugs Council of Australia.

The Commission received three submissions in response to the Application. These are available on the Commission's website.²

The Equal Opportunity Commission of South Australia advised that it had no objection to the Commission granting Carnival a further exemption. The Victorian Equal Opportunity and Human Rights Commission did not express a view on whether the Commission should grant the exemption. The Anti-Discrimination-Board of New South Wales (ADBNSW) made a submission, which did not support the grant of the exemption. The ADBNSW noted that it had also opposed the grant of the exemptions in Carnival's previous applications in 2010 and 2013, and that its position on the matter is essentially unchanged. The ADBNSW's view is that the exemption does not appear to give any benefit to the targeted age group, nor does it appear to reduce disadvantage to them and to that extent, it would appear to be inconsistent with the purposes of the ADA. The ADBNSW noted that, notwithstanding any grant of an exemption, should its President receive a complaint against Carnival that alleges a breach of the *Anti-Discrimination Act 1977* (NSW) on the ground of age, the President would be obliged to investigate the alleged breach.

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.

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

² Ibid.

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.

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 and conditions of the Exemption

Terms

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

1. For Carnival cruise-ships departing an Australian port between 1 November 2017 and 7 January 2018, passengers who are under the age of 19 must be accompanied by a responsible adult (Responsible Adult Requirement).

Carnival may, at its sole and absolute discretion, waive the Responsible Adult Requirement where it is satisfied that a specific passenger under the age of 19 does not present a risk of participating 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 state that it has retained a discretion to waive the Responsible Adult Requirement. Carnival will also state that queries/requests for review in relation to a waiver application decision can be made through its complaints handling process and will publish information about this process.

Carnival will assess each application for waiver of the Responsible Adult Requirement that it receives.

Carnival will adopt/amend its current complaints handling mechanism to allow applicants who are dissatisfied with Carnival's initial assessment on a waiver application to further engage with Carnival on the matter, and Carnival will participate in that process in good faith.

2. For Carnival cruise-ships departing an Australian port between 8 January 2018 and 31 January 2018, 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 that the minor does not present a risk of

participating 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 assess each application for waiver of the Responsible Adult Requirement (where the quota is filled and it becomes applicable).

Carnival will adopt/amend its current complaints handling mechanism to allow applicants who are dissatisfied with Carnival's initial assessment on a waiver application to further engage with Carnival on the matter, and Carnival will participate in that process in good faith.

Conditions

This exemption is subject to the following conditions:

Carnival will provide a comprehensive report to the Commission by no later than 30 March 2018, as to:

1. how many applications/requests for waiver of the Responsible Adult Requirement it receives for the 1 November 2017 to 7 January 2018 period and how many of these applications/requests it approves;
2. how many applications/requests it receives for waiver of the Responsible Adult Requirement during the 8 January 2018 to 31 January 2018 period, once the quota is filled;
3. on how many occasions and to what number it increased the quota;
4. how many applicants utilised Carnival's complaints handling process to engage with Carnival further on waiver application decisions;
5. any changes to the number or level of Unauthorised Events;
6. analysis and evidence that any reduction in Unauthorised Events are a direct result of the restrictions based on age;
7. whether, and why, the restrictions continue to be necessary to reduce Unauthorised Events;
8. any alternate methods/strategies to reduce Unauthorised Events that it has implemented or trialed; and
9. the success or otherwise of those methods/strategies.

Period of Exemption

The exemption is granted for one year 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, in the short term. Specifically, the Commission has had regard to the Responsible Adult Requirement being:

1. 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 that the minor does not present a risk of participating in an Unauthorised Event.

2. 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 Commission notes that during the 2013 Exemption period, Carnival received 19 applications for wavier of the Responsible Adult Requirement of which 13 were approved and 6 were denied. The applications denied were based on Carnival's assessment of risk, and Carnival provides the example of cases where it was concerned about the risk of the

secondary supply of alcohol to minors were the bookings included 18 year old guests with 17 year old guests.

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. During the 2013 Exemption period, it was not necessary for Carnival to consider increasing the quota as Carnival did not have more than 60 unaccompanied passengers under the age of 19 make bookings during that period.

3. 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 Commission understands that Carnival's current practices is to consider exercising its discretion in relation to each application for a waiver of the Responsible Adult Requirement that it receives. That is, Carnival does not assess each and every booking by a passenger under the age of 19, but will assess whether to waive the Responsible Adult Requirement for a booking when it is accompanied by an application for a waiver. Carnival has submitted that it is not in a position to assess every booking on a case by case basis, and this become difficult when Carnival's external agents do the booking. However, where a booking is accompanied by a request for a waiver and a passenger has made a request for an exception to the Responsible Adult Requirement policy, Carnival will assess each of those cases. This practice has been reflected in the terms of the exemption granted by this decision.

In the interest of providing the public with a greater level of information on the operation of the Responsible Adult Requirement, Carnival could provide more easily accessible information about how a potential passenger might submit an application for a waiver, and make Carnival's discretion to waive the Responsible Adult Requirement more transparent. For example, Carnival could do this by placing a clear link to a waiver application form on the bookings page of its website so as to allow potential passengers to more easily apply for a waiver of the Responsible Adult Requirement.

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.

4. Allows for a process of review

Under the terms of the exemption granted by this decision, Carnival will facilitate and engage in a review process that allows a potential passenger, who has applied to be exempt from the Responsible Adult Requirement policy, to further engage with Carnival if they are dissatisfied with Carnival's initial assessment of their waiver application.

Carnival will adopt/amend its current complaints handling mechanism to allow applicants who are dissatisfied with Carnival's initial assessment on a waiver application to further engage with Carnival on the matter, and Carnival will participate in that process in good faith.

In the interest of making this review mechanism transparent, Carnival will state in its advertising materials and online booking system, that queries or requests for review in relation to a waiver application decision can be made through its complaints handling process and will publish information that is easily and readily accessible about this process.

The Commission understands that Carnival has current complaint handling processes in place more generally, and that Carnival does not foresee any major difficulties in facilitating reviews and further engagement with passengers in relation to decisions concerning the waiver of the Responsible Adult Requirement.

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:

1. 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
2. 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:

1. 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;
2. Carnival's submissions regarding the effectiveness of the Initial Exemption and 2013 Exemption in reducing security incidents on-board its cruises;
3. 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;
4. Carnival's application of the Responsible Adult Requirement during the Initial Exemption period and 2013 Exemption period shows that Carnival has:

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

- a) in relation to the 1 November – 7 January period, exercised its discretion to waive the Responsible Adult Requirement for people under the age of 19; and
- b) 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;

5. The terms of this 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; and
6. The terms of this exemption, that:
 - a) Carnival will facilitate a process of review to allow potential passengers who are dissatisfied with an initial assessment on a waiver application to further engage with Carnival on the matter; and
 - b) Carnival will publish information about this process in its advertising and online booking system

will further reduce the discriminatory impact of the exemption as young people will be able to engage with Carnival, in good faith, which will promote a more transparent and flexible operation of Carnival's age restriction policy.

The period of exemption

The Commission notes that Carnival's Responsible Adult Requirement and Quota Restriction, have been in place since the grant of the Initial Exemption in 2010, and has captured six Schoolies Periods so far.

As outlined above, Carnival has provided convincing data showing that over the course of the Initial Exemption period and the 2013 Exemption period there has been a significant decrease in alcohol-fuelled and other security incidents on board Carnival cruises during the Schoolies Period. The Commission accepts that the Responsible Adult Requirement has had a significant impact on bringing about this result, and this may be particularly so in the early years of its operation.

However, there is no current data to show whether the restrictions allowed by the exemptions continue to be the only factor, or the predominant factor, in the decrease of security incidents on board the cruises operating in the Schoolies Periods. Especially in more recent years, there could feasibly be other factors contributing to the results provided by Carnival.

The Commission understands that Carnival has not thus far been required to test whether factors outside of the Responsible Adult Requirement and Quota Restriction have contributed to the decrease in alcohol-related security incidents.

The Commission notes that exemptions are commonly granted to allow time, where necessary, to make changes to comply with anti-discrimination legislation. As an exemption has been in place since 2010, the Commission has decided to limit the grant of the 2017 Exemption to a period of one year. This is to allow Carnival to consider whether there is an ongoing necessity for an exemption from section 28 of the ADA, and whether there are other means of achieving its purpose with a view to the longer term.

In light of the above and in the event that Carnival does wish to apply to the Commission for a further exemption upon the expiry of the 2017 Exemption, the Commission will require Carnival to provide a comprehensive report as to:

1. any changes to the number or level of Unauthorised Events;
2. analysis and evidence that any reduction in Unauthorised Events are a result of the restrictions based on age;
3. whether, and why, the restrictions continue to be necessary to reduce Unauthorised Events;
4. any alternate methods/strategies to reduce Unauthorised Events that it has implemented or trialled; and
5. the success or otherwise of those methods/strategies.

Conclusion

The Commission concludes that Carnival's policy is a reasonable measure which should be permitted for a period of one year, 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 22nd day of June 2017.

A handwritten signature in black ink, appearing to read 'Gillian Triggs', with a stylized flourish at the end.

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