



## AUSTRALIAN HUMAN RIGHTS COMMISSION

### Application for Temporary Exemption by Carnival plc t/as Carnival Australia pursuant to section 44 of the *Age Discrimination Act 2004* (Cth)

#### NOTICE OF DECISION

The Australian Human Rights Commission (Commission) gives notice of its decision regarding an application made by Carnival plc t/as Carnival Australia (Applicant) for a temporary exemption pursuant to s 44(1) of the *Age Discrimination Act 2004* (Cth) (ADA).

#### 1 APPLICATION AND BACKGROUND

- 1.1. The Applicant is the Australian arm of a global leisure company focused on cruising activities in Australia, New Zealand and the Pacific. It represents seven cruise brands, which jointly account for more than 70% of the Australian and New Zealand cruise passenger market.
- 1.2. The Applicant has applied for a 3-year temporary exemption under the ADA which seeks to restrict the number of passengers aged under 19 years of age onboard its vessels departing from an Australian port in the November to January period (Current Application).<sup>1</sup>
- 1.3. It is the fifth application sought by the Applicant on similar grounds since April 2009. Previous Applications, and the Commission's decision in response to each Previous Application, are defined and detailed in section 6 below.
- 1.4. Like Previous Applications, the Current Application seeks to discourage school leavers, aged predominately between 17 and 19 (Schoolies) from celebrating that milestone onboard its vessels. The Applicant cites health, safety and security concerns arising from a history of alcohol-fuelled security incidents and excessive behaviour which, despite implementing a range of security measures, the Applicant indicates it struggled to control until the Commission granted a temporary exemption in 2010.<sup>2</sup>

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<sup>1</sup> [Application for Further Exemption under Section 44\(2\) of the Age Discrimination Act 2004 \(Cth\), Carnival Australia](#), 17 October 2022, including its [Schedules](#).

<sup>2</sup> *Ibid* at [1.2]–[2.4], [2.6], [2.10], and [3.14]–[3.22].

- 1.5. The Current Application relies on materials provided to the Commission in connection with the Previous Applications, as well as the Commission's published reasons for granting a temporary exemption in response to each Previous Application.<sup>3</sup>

## **2 DECISION**

- 2.1. The Commission has decided not to grant the Applicant the temporary exemption sought.

## **3 RELEVANT LAW AND COMMISSION GUIDELINES**

- 3.1. The Commission makes this decision under section 44 of the ADA.
- 3.2. Section 44 of the ADA enables the Commission to grant an exemption from the operation of a provision of Part 4, Division 2 or Division 3 of the ADA, for a specified time not exceeding 5 years. This power is enlivened upon application by a person, or group of people.
- 3.3. Such an exemption may be granted subject to terms and conditions, or may be expressed to apply only in circumstances, or in relation to particular activities. Any such terms, conditions or limitations must be specified in the instrument granting the exemption.<sup>4</sup>
- 3.4. The ADA makes it unlawful to discriminate on the ground of age in a range of areas of public life.
- 3.5. By section 28 in Part 4, Division 3 of the ADA, it is unlawful to discriminate on the ground of age in the provision of goods, services, or facilities.
- 3.6. It is not unlawful for a person to act in accordance with an exemption granted by the Commission under section 44 of the ADA.<sup>5</sup>
- 3.7. In practical terms, the granting of a temporary exemption by the Commission means that the activities or circumstances covered by it cannot be the subject of a successful complaint under the ADA.

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<sup>3</sup> *Ibid* at p.1, [1.7], [2.12], [3.2] and [3.22].

<sup>4</sup> *Age Discrimination Act 2004* (Cth), section 44, available at: [Age Discrimination Act 2004 \(legislation.gov.au\)](https://www.legislation.gov.au).

<sup>5</sup> *Ibid* at section 47.

- 3.8. Notwithstanding the few express limitations referred to above, the Commission's power to grant exemptions from compliance with a provision of the ADA is otherwise unconfined.
- 3.9. 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.<sup>6</sup>
- 3.10. The objects of the ADA include:
- (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, and accommodation; 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.<sup>7</sup>
- 3.11. By conferring the power to grant such exemptions on the Commission, the Australian Parliament has clearly contemplated that some discriminatory conduct might be justified, and in certain circumstances, derogation from the terms of the ADA is permissible.
- 3.12. However, the Commission's exemption power must be interpreted with regard to the objects of the ADA and the legislative scheme as a whole. The ADA defines discrimination, and makes discrimination on the grounds of age unlawful, except in particular circumstances. The grant of a temporary exemption pursuant to section 44 of the ADA, has the effect of taking relevant conduct out of the ADA's prohibitions, and denying redress to a person who is affected by that conduct for the period covered by the exemption. The effect of granting a temporary exemption is to qualify the norms of conduct that the ADA seeks to establish.
- 3.13. The ADA already provides for permanent exemptions and defences that, where applicable, render any alleged discrimination not unlawful. This includes discrimination against a person on the grounds of age if the effect is to reduce disadvantage experienced by persons of that age, if it would meet a particular

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<sup>6</sup> *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].

<sup>7</sup> ADA, section 3, accessible *supra* n.4.

need of persons of that age, or if it would provide a bona fide benefit to persons of that age.<sup>8</sup>

- 3.14. In this context, and because the Commission's power to issue an exemption must be interpreted in light of the objects of the ADA, the Commission considers that temporary exemptions should not be granted lightly.
- 3.15. 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.
- 3.16. The Commission has published guidelines, *Temporary exemptions under the Age Discrimination Act 2004 (Cth)*,<sup>9</sup> which explain how the Commission approaches the exercise of its power to grant such exemptions, including the process it may adopt in considering exemption applications under the ADA.
- 3.17. Specifically, the Guidelines identify that in deciding whether to grant an exemption, the Commission will consider:
  - (a) all relevant provisions of the ADA, including to determine:
    - i. if an exemption is necessary, and
    - ii. whether granting an exemption would be consistent with the ADA's objects
  - (b) the appropriateness of granting an exemption subject to terms and conditions
  - (c) the applicant's reasons for seeking an exemption, and
  - (d) submissions by interested parties.
- 3.18. In this decision, any term used that is also used in the ADA has the same meaning in this decision as in the ADA, unless the contrary intention appears.

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<sup>8</sup> ADA, section 33, accessible *supra* n.4

<sup>9</sup> [Temporary exemptions under the Age Discrimination Act 2004 \(Cth\) | Australian Human Rights Commission.](#)

## 4 REVIEW OF FINAL DECISION

- 4.1. Pursuant to s 45 of the ADA, 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.

## 5 CONSIDERATIONS AND PROCESS

- 5.1. In making its decision, the Commission has had regard to:
- (a) the ADA, including its terms and objects;<sup>10</sup> and
  - (b) the Commission Guidelines: *Temporary exemptions under the Age Discrimination Act*.<sup>11</sup>
- 5.2. The Commission has also reviewed and considered the Current Application dated 17 October 2022, including its schedules which contained:
- (a) the Applicant's four Previous Applications (defined below at paragraph 6)
  - (b) supporting material for each of the Second Application, the Third Application and the Fourth Application (defined below at paragraph 6)
  - (c) the Commission's decisions, including the terms and conditions of past exemptions granted and the Commission's reasons for each decision (defined below at paragraph 6.2); and
  - (d) a newspaper article from the website 'Cruise Critic' dated 16 February 2018.<sup>12</sup>
- 5.3. The Commission has also reviewed and considered information it was provided by the Applicant in 2009 in support of the First Application (defined below at paragraph 6). This supporting material was not included as part of the Current Application. The Commission notes that this was the only supporting information to a Previous Application that was not included in the schedules of the Current Application.
- 5.4. The Commission considered it required additional information from the Applicant to make its decision. The Applicant provided further information in

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<sup>10</sup> *Supra* n.4.

<sup>11</sup> *Supra* n.9.

<sup>12</sup> *Supra* n.1.

response to two requests from the Commission. This has also been reviewed and considered in making this decision. It includes information about:

- (a) security incidents onboard the Applicant's cruises since the last exemption was granted in October 2019
- (b) information about third party hospitality providers that advertise 'Schoolies related booking conditions'
- (c) the Applicant's views about whether there remains a demand for Schoolies cruises
- (d) the Applicant's views on the impact of COVID-19 on past, present and future cruise operations
- (e) details about the Applicant's usual policy regarding minors booking on its cruises, and
- (f) details about the Applicant's Teen Club.<sup>13</sup>

5.5. With personal information, the Applicant's confidential information, and information regarding third parties removed, the documents referred to at paragraphs 5.2 and 5.4 were published on the Commission's website.<sup>14</sup>

5.6. Upon publishing the documents, the Commission invited submissions from all interested parties,<sup>15</sup> on its website, and by writing to:

- (a) State and Territory anti-discrimination bodies
- (b) NSW Police Marine Area Command, and Queensland Water Police
- (c) NSW Roads and Maritime Service, and Maritime Safety Queensland and
- (d) Australian Alcohol & Other Drugs Council.<sup>16</sup>

(collectively, Interested Persons).

5.7. No submissions were received in response to the Current Application.

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<sup>13</sup> Available at: [carnival\\_australia - further\\_information\\_1.pdf \(humanrights.gov.au\)](#).

<sup>14</sup> *Supra* n.12 and n.13.

<sup>15</sup> See: [Exemption applications under the Age Discrimination Act 2004 \(Cth\) | Australian Human Rights Commission](#).

<sup>16</sup> Letters not published.

- 5.8. On 26 October 2023, the Commission issued a preliminary view in this matter. The preliminary view was uploaded onto the Commission's website and the Commission gave the Applicant the opportunity to respond to the Commission's preliminary findings.
- 5.9. The Applicant provided its response on 16 November 2023, including a request that the Commission's preliminary view be provided to Interested Persons and for Interested Persons to be offered the opportunity to provide their comments.
- 5.10. On 21 November 2023, the Commission provided Interested Persons a copy of its preliminary view, and invited a response by 6 December 2023.
- 5.11. On 30 November 2023, Anti-Discrimination NSW (ADNSW) made a submission noting that it had opposed the grant of Previous Exemptions, and that its position remained unchanged in that it was concerned that:
- (a) the exemption sought was inconsistent with the ADA's purpose as it does not provide a bona fide benefit to persons of a particular age, nor does it intend to meet a need that arises because of age, nor does it intend to reduce disadvantage to persons of a particular age
  - (b) the exemption sought is discriminatory towards persons of a particular age
  - (c) the discretion afforded to the Applicant in Previous Exemptions to decide whether or not to waive the age requirements left the potential for discrimination on other grounds open; and
  - (d) the *Anti-Discrimination Act 1977* (NSW) prohibits discrimination on the ground of age in the provision of services or accommodation, and it would be obliged to investigate a complaint alleging breach of that state law if received, notwithstanding any exemption granted under the ADA.
- 5.12. ADNSW further submitted that the exemption:
- (a) is sought for reasons unrelated to the ADA's objects
  - (b) appears to be unreasonable and not appropriately targeted towards managing health, safety and security issues for persons onboard cruises in the Schoolies period
  - (c) is ambiguous about the circumstances in which the Applicant decides to waive the age requirements permitted by the exemption; and

- (d) lacks transparency around how the Applicant determines waiver application decisions and appeals.
- 5.13. No other Interested Person provided a response other than to acknowledge receipt of the invitation and to note that they did not wish to comment on the Commission's preliminary view.
- 5.14. In reaching its decision, the Commission has considered the Applicant's response to the preliminary view and the submission made by ADNSW.
- 5.15. Consistent with fundamental principles of procedural fairness, the Commission considers that the process outlined above has provided both the Applicant and the public with an adequate opportunity to comment on this application for a temporary exemption.

## **6 PREVIOUS APPLICATIONS AND EXEMPTIONS**

- 6.1. The Current Application is the fifth application by the Applicant seeking age-based restrictions for persons aged under 19 years of age in the period 1 November to 31 January each year. The previous applications were as follows:
- (a) application dated 7 April 2009 (First Application)
  - (b) application dated 21 June 2013 (Second Application)
  - (c) application dated 28 October 2016 (Third Application)
  - (d) application dated 20 June 2018 (Fourth Application)
- (collectively, Previous Applications).
- 6.2. In response to each of the Previous Applications, the Commission has granted a temporary exemption from section 28 of the ADA as follows:
- (a) in response to the First Application, a temporary exemption was granted on 23 December 2010 for 2.5 years, expiring on 22 June 2013 (First Exemption)
  - (b) in response to the Second Application, a temporary exemption was granted on 15 November 2013 for 2.5 years, expiring on 15 May 2016 (Second Exemption)
  - (c) in response to the Third Application, a temporary exemption was granted on 22 June 2017 for 1 year, expiring on 22 June 2018 (Third Exemption)



- (d) in response to the Fourth Application, a temporary exemption was granted on 17 October 2019 for 3 years, expiring on 17 October 2022 (Fourth Exemption)

(collectively, Previous Exemptions).

- 6.3. The Previous Applications and the Current Application have each been made substantially on the same terms, but for the provision of information that relates to the period since the previous exemption was granted, and reliance on reasons included in the previous grant of an exemption.
- 6.4. In each of the Previous Applications and the Current Application, the Applicant submits that before the First Exemption, between 1 November and 31 January each year, it experienced an increased number of alcohol-related security incidents that were a serious risk to the health and safety of those onboard, involving large numbers of Schoolies, on its cruises.<sup>17</sup> More information about the reasons for each application including the Current Application are set out in section 7 below.
- 6.5. The Applicant refers to the period between 1 November and 31 January as the traditional Schoolies Period. That definition of Schoolies Period is adopted in this decision, but the Commission refers to paragraph 7.34 below.
- 6.6. The Fourth Exemption provided that the Applicant may impose the following restrictions, based on age, in relation to its cruises commencing in Australia:
- (a) Permit a quota of 20 passengers per cruise departing an Australian port between 1 November and 7 January (First Period) who are under 19 years of age and not accompanied by a responsible adult. Once this quota is filled, the Applicant would require passengers who are aged under the age of 19 to be accompanied by a responsible adult (Responsible Adult Requirement).
  - (b) Permit a quota of 60 passengers per cruise departing an Australian port between 8 January and 31 January (Second Period) who are under 19 years of age and not accompanied by a responsible adult, with the Responsible Adult Requirement applying once that quota is filled.<sup>18</sup>
- 6.7. The Fourth Exemption was granted subject to the following terms:

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<sup>17</sup> *Supra* n.1 at [1.2], [3.15]–[3.22].

<sup>18</sup> Commonwealth of Australia Gazette Notices, 29 October 2019, *Australian Human Rights Commission Age Discrimination Act 2004 (Cth), s44(1) Notice of Grant of a Temporary Exemption*, 17 October 2019, at [7.1](a)(1)-(2) on p.9, available at: [notice\\_of\\_decision\\_carnival\\_australia\\_0.pdf \(humanrights.gov.au\)](#).

- (a) The quotas do not include infants, or passengers under the age of 17 if the Applicant considered that the child did not present a risk of participating in a large-scale event associated with excessive or anti-social behaviour, including the abuse of alcohol.
- (b) The Applicant could increase the quotas at any time if it considered it would not cause a risk to the health and safety of others onboard.
- (c) The Applicant could waive the Responsible Adult Requirement where it was satisfied that a specific passenger under the age of 19 would not present a risk of participating in unsafe activities.
- (d) Where the Responsible Adult Requirement was mentioned in the Applicant's advertising or online booking system, the Applicant was required to clearly state that it can decide to waive the Responsible Adult Requirement, and that prospective passengers could apply for a waiver of the Responsible Adult Requirement (Waiver Application), including information on how to lodge a Waiver Application and details about the factors it would consider when determining Waiver Applications.
- (e) The Applicant was required to assess each Waiver Application it received.
- (f) Advertising material was also required to detail the complaint handling process, through which persons could request a review of Waiver Application decisions, and in which the Applicant would participate in good faith.<sup>19</sup>

6.8. The Fourth Exemption differed from each the First Exemption, Second Exemption and Third Exemption, by introducing the 20-person quota for the First Period.

6.9. By comparison, the First Exemption, Second Exemption and Third Exemption did not have a quota applied for the First Period, but instead, the Responsible Adult Requirement applied for all passengers aged under 19 years of age not accompanied by an adult aged 19 years or older.

6.10. The First Period quota was introduced in the Fourth Exemption to minimise the discriminatory impact of the age restrictions permitted by the exemption,<sup>20</sup> with the Commission deciding that the parameters established for the adjustable

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<sup>19</sup> *Ibid* at [7.1](a)(3) on pp.9–10.

<sup>20</sup> *Ibid* at [7.2](a) at p.13.

quotas, and the Responsible Adult Requirement as it applied in the Fourth Exemption, to be an appropriately targeted approach.<sup>21</sup>

- 6.11. In granting the Fourth Exemption, the Commission also required the Applicant to report to the Commission by 1 June 2022 whether there remained an ongoing safety need for the exemption from section 28 of the ADA. This included detailing whether, at the expiry of the Fourth Exemption, there were other means to ensure large-scale disruptive events could not occur onboard the Applicant's cruises, including whether there had been a change in the number of such incidents, and whether any other strategies had been tested. This report was to also detail whether the quotas were ever increased or filled, and statistics concerning the number of Waiver Applications, whether any Waiver Applications were referred to complaints handling, and the outcomes (including reasons) of these processes. The report was also to provide details of the publicly available information about the Responsible Adult Requirement.<sup>22</sup>
- 6.12. The report was not received from the Applicant by 1 June 2022, which the Applicant states in the Current Application is because its Australian operations were paused between 14 March 2020 and 31 May 2022 due to the COVID-19 pandemic.<sup>23</sup>
- 6.13. The information required by the report was provided to the Commission as part of the Current Application, including to indicate that:
- (a) In the First Period from December 2019 to January 2020, the Applicant received six Waiver Applications. These predated the Fourth Exemption, and so were assessed under the Third Exemption, which did not include any quota for the First Period.<sup>24</sup>
  - (b) The Applicant approved five of the Waiver Applications referred to in the previous paragraph, and denied one on the basis that it concerned a 17-year-old travelling with an 18-year-old, which involved an inherent risk of secondary supply of alcohol to minors.<sup>25</sup>
  - (c) For a cruise that departed an Australian port on 1 November 2019, the Applicant exercised its discretion to increase the quota from 20 to 30 persons.<sup>26</sup>

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<sup>21</sup> *Ibid* at p.12.

<sup>22</sup> *Ibid* at [7.1](b) on p.10.

<sup>23</sup> *Supra* n.1 at [3.25].

<sup>24</sup> *Ibid* at [3.26](a).

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid* at [3.26](c).

- (d) It exercised that same discretion to increase the quota from 60 to 62 and 64 on two separate cruises that departed an Australian port in January 2020.<sup>27</sup> There were no Waiver Applications for the Second Period in January 2020.<sup>28</sup>
- (e) Where the Applicant increased its quota, it did so based on its assessment of risk.<sup>29</sup>
- (f) Cruising operations were ceased between November and January in each of 2020–21 and 2021–22 due to the COVID-19 pandemic, and so there were no Waiver Applications during this time.<sup>30</sup>

6.14. The provision of such a report was a condition also attached to the Third Exemption.<sup>31</sup> The Second Exemption required a more limited report as to whether the quotas were ever increased or filled, and statistics concerning the number of Waiver Applications and how many of these the Applicant approved.<sup>32</sup>

6.15. Unlike the First Exemption and the Second Exemption, which were each granted for a period of 2.5 years, the Third Exemption was granted for a period of just one year – despite the Third Application seeking a further 2.5-year temporary exemption.<sup>33</sup>

6.16. In reducing the period for which the Third Exemption would apply, and incorporating the requirement for the report, the Commission reasoned in the Third Exemption that there was no current data to show whether the restrictions allowed by the exemptions continued to be the only factor, or the predominate factor, causing a decrease in security incidents onboard cruises in the Schoolies Period.<sup>34</sup>

6.17. In the Third Exemption, the Commission noted that exemptions may be granted to allow time, where necessary, to make changes to comply with anti-

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<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid* at [3.26](b).

<sup>29</sup> *Ibid* at [3.26](c).

<sup>30</sup> *Ibid* at [3.26](b) and *Supra* n.13.

<sup>31</sup> Commonwealth of Australia Gazette Notices 26 June 2017, *Australian Human Rights Commission Age Discrimination Act 2004 (Cth), s44(1) Notice of Grant of a Temporary Exemption*, 22 June 2017, at p.7, available at: [gazette\\_pdf\\_0.pdf \(humanrights.gov.au\)](https://www.humanrights.gov.au/gazette_pdf_0.pdf).

<sup>32</sup> No longer published, but see also *Ibid.*

<sup>33</sup> *Supra* n.31.

<sup>34</sup> *Ibid* at p.11.

discrimination legislation, and invited the Applicant to consider whether there were other means of achieving its purpose with a view to the longer term.<sup>35</sup>

- 6.18. In the Fourth Exemption, the Commission noted that there was no current data to show whether the restrictions allowed by the exemptions continue to be the only factor, or the predominate factor, in the decrease of security incidents on board the cruises in the Schoolies Period, and that it is feasible that other factors could be contributing to the results identified by the Applicant. The Commission acknowledged that it was difficult to test whether other factors contributed to the decrease in alcohol-related security incidents.<sup>36</sup>
- 6.19. Like the Third Exemption, the Fourth Exemption required the Applicant to consider whether there remained an ongoing need for an exemption from section 28 of the ADA, and whether there are other means of achieving its purpose at the expiry of the Fourth Exemption.<sup>37</sup>

## **7 DECISION NOT TO GRANT THE EXEMPTION**

- 7.1. The Current Application seeks an exemption on the same terms as the Fourth Exemption, for a further period of three years.<sup>38</sup> Those terms are set out above at paragraphs 6.6 and 6.7.
- 7.2. In the Current Application, the Applicant submits that the age-based restrictions imposed by the Previous Exemptions have been successful in managing incidents of excessive behaviour by school leavers aged between 17 and 19 (Schoolies) over the Australian summer months, enabling it to continue operating in a responsible manner consistent with community expectations.<sup>39</sup>
- 7.3. The Applicant submits that before the First Exemption, it experienced an increased number of alcohol-related security incidents that were a serious risk to the health and safety of those onboard, involving large numbers of Schoolies on its cruises during the Schoolies Period.<sup>40</sup> That period also coincided with a period up to 2006 where the Applicant actively advertised Schoolies cruises.
- 7.4. The Applicant submits that since the Commission granted the First Exemption, it has observed a significant decrease in the number of alcohol-related security

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<sup>35</sup> *Ibid* at p.12.

<sup>36</sup> *Supra* n.18 at p.16.

<sup>37</sup> *Ibid* at pp.16–17.

<sup>38</sup> *Supra* n.1 at p.1.

<sup>39</sup> *Ibid* at p.1 and [3.8].

<sup>40</sup> *Ibid* at [1.2], [3.15]–[3.22].

incidents involving excessive and unacceptable behaviour during the Schoolies Period.<sup>41</sup> The Applicant provides the following information by way of example:

- (a) 457 security incidents on one voyage of a single vessel in December 2005<sup>42</sup>
- (b) 67 security incidents for all cruises by 4 vessels in December 2012<sup>43</sup>
- (c) 18 security incidents for all cruises by 6 vessels in December 2014<sup>44</sup>
- (d) 5 security incidents for all cruises by 6 vessels in December 2015<sup>45</sup>
- (e) 13 security incidents for all cruises by 7 vessels in December 2017<sup>46</sup>
- (f) 35 security incidents for all cruises by 9 vessels in December 2019.<sup>47</sup>

7.5. The Applicant credits the impact of the consecutive Previous Exemptions for this decrease in security incidents.<sup>48</sup>

7.6. The Applicant also notes that the security incidents referred to at paragraph 7.4 are not attributable to large-scale events or excessive behaviour.<sup>49</sup> The Applicant is not aware of any large-scale events involving excessive or anti-social behaviour involving guests aged 17–19 years since the First Exemption was granted in 2010.

7.7. Despite now only experiencing a small number of security incidents on its vessels during the Schoolies Period, and despite it now being 17 years since it advertised designated Schoolies Cruises, the Applicant submits in the Current Application that the health and safety risks to persons onboard its vessels persist, compounded by factors which remain as relevant today as they did in 2009.<sup>50</sup>

7.8. These compounding factors relate to the unique environment onboard a cruise ship, which prevents immediate access to shoreside medical facilities, immediate availability of police presence, and limited police jurisdiction. The Applicant submits that medical services available onboard are more limited

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<sup>41</sup> *Ibid* at [2.1].

<sup>42</sup> *Ibid* at [2.3](a).

<sup>43</sup> *Ibid* at [2.3](b).

<sup>44</sup> *Ibid* at [2.3](c).

<sup>45</sup> *Ibid* at [2.3](d).

<sup>46</sup> *Ibid* at [2.3](e).

<sup>47</sup> *Ibid* at [2.3](f), and *Supra* n.13.

<sup>48</sup> *Supra* n.1 at [2.2], [2.4], [2.5], [2.8].

<sup>49</sup> *Ibid* at [2.9].

<sup>50</sup> *Ibid* at [2.10].

than those available at shoreside hospitals, while onboard security personnel have only limited rights to detain, search, and control or manage violent and improper behaviour. The Applicant points to limited detention facilities on board, and the practical limitations to the number of security personnel it can have onboard.<sup>51</sup> These matters were repeated by the Applicant in its response to the Commission's preliminary view.

- 7.9. The Commission notes that the compounding factors referred to at paragraph 7.8 apply to all of the Applicant's cruising operations and are not unique to cruises departing during the Schoolies Period. What is relevant is their interaction with matters unique to cruises departing during the Schoolies Period.
- 7.10. The Applicant submits that the ability of Schoolies to connect through their school or social networks, and to organise onboard events which the Applicant found difficult to manage, is also a compounding factor.<sup>52</sup>
- 7.11. 'Schoolies celebrations', generally, are the large-scale events associated with excessive or anti-social behaviour to which the Applicant refers.<sup>53</sup>
- 7.12. Schoolies Week dates to the 1970s.<sup>54</sup> A central booking site now exists offering contemporary information about the event.<sup>55</sup> This is not coordinated by Schoolies themselves but rather is a commercial enterprise.
- 7.13. The Applicant further submits that the remarkable ingenuity of Schoolies themselves is a compounding factor of health and safety risks to persons onboard its vessels, with the Applicant's past experience demonstrating the ability of Schoolies to circumvent procedures the Applicant had implemented to restrict access to, and the consumption of, alcohol.<sup>56</sup>
- 7.14. Before the First Exemption, the Applicant sought to reduce security incidents involving Schoolies through a range of stringent security measures. These measures were informed by security experts and included:
- (a) increasing restrictions to the access and consumption of alcohol, including by refusing service to persons involved in incidents, deactivating alcohol purchasing cards, providing wrist bands to

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<sup>51</sup> *Ibid* at [2.10](a)-(e).

<sup>52</sup> *Ibid* at [2.10](g).

<sup>53</sup> *Ibid* at [3.6](a).

<sup>54</sup> See [www.schoolies.org.au/history-of-schoolies-week.htm](http://www.schoolies.org.au/history-of-schoolies-week.htm).

<sup>55</sup> *Ibid*. See also [www.schoolies.com](http://www.schoolies.com).

<sup>56</sup> *Supra* n.1 at [2.10](f).

passengers above drinking age, and attempting to police the secondary supply of alcohol

- (b) tightening its policies and procedures in relation to the access and consumption of alcohol
- (c) enhancing the training and instruction of its crew in relation to the above procedures
- (d) increasing pre-boarding and on-boarding searches for contraband alcohol; and
- (e) increasing its security numbers and presence.<sup>57</sup>

7.15. The Applicant submits that despite these measures, a high number of security incidents involving Schoolies ensued, with Schoolies drinking excessively and being involved in other violent incidents that were not always fuelled by alcohol.<sup>58</sup>

7.16. The Commission notes that up to and including in 2006, the Applicant actively advertised Schoolies cruises,<sup>59</sup> encouraging Schoolies to access select cruises through the use of the slogan, Why cruising is the ultimate trip, and promoting free entry to an onboard nightclub and a choice of bars.<sup>60</sup> Schoolies cruises were cancelled by the Applicant before the 2006 Schoolies Period, effective from 2007.<sup>61</sup>

7.17. The Applicant submits that even after it made the decision to discontinue promoting and operating Schoolies cruises, in the years immediately following this decision there continued to be high levels of school leavers seeking to book cruises and they continued to experience alcohol-fuelled and other 'Schoolies' incidents.<sup>62</sup>

7.18. In granting the Previous Exemptions, the Commission has accepted the Applicant's submissions in relation to the health, safety and security concerns that may arise at Schoolies celebrations on its cruises, including:

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<sup>57</sup> *Ibid* at [1.3].

<sup>58</sup> *Ibid* at [1.4].

<sup>59</sup> *Supra* n.1 at [1.5], with additional information in each of the Previous Applications. See also [www.schoolies.org.au/history-of-schoolies-week.htm](http://www.schoolies.org.au/history-of-schoolies-week.htm).

<sup>60</sup> *Cruise company drops schoolies trip*, ABC News, published 9 October 2006 at 11:16pm, available at: [amp.abc.net.au/article/1283052](http://amp.abc.net.au/article/1283052).

<sup>61</sup> Article at annexure 2 to the First Application (no longer publicly published, but retained in the Commission's records) *Schoolies cruise axing 'a PR move'*, Steve Larkin and Daniel Price, AAP, published 10 October 2006 at 2:53pm.

<sup>62</sup> *Supra* n.1 at [1.5].



- (a) the risk of secondary supply of alcohol to passengers under the age of 18 and the difficulty of preventing this
- (b) the limited capacity of on-board medical facilities in the event of accidents and the risk of accidents occurring
- (c) the inability to control passengers' behaviour while in port, and the complexities involved in refusing to allow a passenger to re-board a ship where repatriation is involved
- (d) the limitations facing on-board security and the inability to call upon a police presence in the management of security issues
- (e) the ability of Schoolies to organise large-scale events through school and social networking.<sup>63</sup>

7.19. The Commission has also previously accepted that 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 Previous Exemptions and the Responsible Adult Requirement have likely had an impact on bringing about this result.

7.20. In the Third and Fourth Exemptions, the Commission noted that there was no current data to show whether the restrictions allowed by the exemptions continue to be the only factor, or the predominate factor, in the decrease of security incidents on board the cruises in the Schoolies Period, and that it is feasible that other factors could be contributing to the results identified by the Applicant. The Commission acknowledged that it was difficult to test whether other factors contributed to the decrease in alcohol-related security incidents.<sup>64</sup>

7.21. The Commission has progressively limited the scope of the exemptions granted, and imposed conditions on the exemptions that required the collection of data that may assist the Applicant and the Commission in assessing whether there remains an ongoing need for an exemption.

7.22. In granting the Third and Fourth Exemptions, the Commission required the Applicant to report to the Commission whether there remained an ongoing safety need for the exemption from section 28 of the ADA. This included detailing whether, at the expiry of the Exemption, there were other means to ensure large-scale disruptive events could not occur onboard the Applicant's cruises, including whether there had been a change in the number of such incidents, and whether any new strategies had been implemented and tested.

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<sup>63</sup> *Supra* n.18 at [7.2](a) on p.11.

<sup>64</sup> *Supra* n.18 at p.16 and *Supra* n.31 at p.11.

This report was to also detail whether the quotas were ever increased or filled, and statistics concerning the number of Waiver Applications, whether any Waiver Applications were referred to complaints handling, and the outcomes of these processes.<sup>65</sup>

- 7.23. In granting the Fourth Exemption, the Commission limited the scope of the previous exemption by introducing the 20-person quota for the First Period. The First, Second and Third Exemptions did not have a quota applied for the First Period, but instead, the Responsible Adult Requirement applied for all passengers aged under 19 years of age.
- 7.24. Prior to the Fourth Exemption, the Commission agreed to grant exemptions that amounted to a complete ban on passengers aged under 19 travelling without a responsible adult during the First Period unless a waiver was granted, in order to ensure the health, safety and security of passengers and crew. However, having introduced a quota for the First Period to permit up to 20 people who are under 19 years of age and not accompanied by a responsible adult, the Applicant has found no evidence of increased harm by allowing these groups of young people on-board. The Applicant extended the quota to 30 on one cruise and has reported no concerns in relation to excessive behaviour or the management of security incidents during this period.
- 7.25. This and other data provided by the Applicant, pursuant to the reporting conditions the Commission imposed on the Previous Exemptions, suggests that there may not be an ongoing safety need for the exemption.
- 7.26. The Applicant disagrees, stating in its response to the Commission's preliminary view that rather, these matters demonstrate the prudence of the quota and waiver process by allowing it to proactively consider the risks associated with increased numbers of guests aged between 17-19, and judiciously manage the risks associated with a higher number of Schoolies aged persons onboard. The Applicant expresses concern that without the exemption in place it will not have a mechanism to prevent a large-scale unauthorised Schoolies event.
- 7.27. As set out above at paragraph 6.13, the Applicant has confirmed that, since 2019:
- (a) in respect of the First Period – the Applicant received only six Waiver Applications and it increased the quota on one cruise from 20 guests to 30 guests. The six Waiver Applications were received under the

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<sup>65</sup> *Supra* n.18 at [7.1](b) on pp. 11-12, and *Supra* n.31 at p.6.

Third Exemption when there was no applicable quota of 20 guests for the First Period.

- (b) in respect of the Second Period – there were no requests for a waiver of the Responsible Adult Requirement and the Applicant increased the quota by two and four on two separate cruises based on its assessment of risk.

7.28. Waiver Applications following Previous Exemptions were similarly low. In the period following the Third Exemption, the Applicant received 15 Waiver Applications, and following the Second Exemption, the Applicant received 19 Waiver Applications.<sup>66</sup> In the 2018–2019 Schoolies Period, there were an average of 21 unaccompanied passengers aged 17–19 per cruise during the Second Period.<sup>67</sup> The 60-person quota applied to the Second Period was not reached during the period of either the Second or Third Exemptions.<sup>68</sup> These figures do not indicate widespread demand by Schoolies to celebrate on cruise ships.

7.29. In granting the Fourth Exemption, the Commission stated:

The Commission notes that, since 2010, during the Initial Exemption period, Carnival has on one occasion increased the quota [during the Second Period] 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 8 January to 31 January period. It appears that in practice, the restriction in the 8 January to 31 January period has little to no discriminatory impact. The restriction remains in place as a precautionary measure.<sup>69</sup>

7.30. The most recent data provided by the Applicant also shows relatively moderate levels of demand from people in this age group. Further, when the 60-person quota was met and extended by the Applicant on two cruises during the 2019 period, there were no reported incidents regarding excessive behaviour engaged in by groups.

7.31. It appears that there may no longer be a widespread ongoing demand for Schoolies cruises. The Commission notes in this regard that it is now 17 years since Carnival ceased promoting and operating summer voyages to school leavers during the Schoolies period.

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<sup>66</sup> *Supra* n.18 at p.12.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid* at p.14.

- 7.32. The Commission sought further information from the Applicant as to whether there remains an ongoing demand for Schoolies cruises. The Applicant submits that there is. It refers to a newspaper article dated 16 February 2018, which reported a third-party travel supplier advertising and promoting a cruise operated by a major cruise line brand as a 'Schoolies Cruise'. The Applicant says this was done without the knowledge or authorisation of that cruise line brand.<sup>70</sup> It states that the advertisement emphasises its continuing concern that large group bookings could turn certain cruises during the Schoolies Period into de facto Schoolies cruises impacting the safety and enjoyment of other guests.<sup>71</sup> The Applicant also submitted that it has no control over the promotion of its cruises by third parties, such as travel agents. However, the Applicant provides no information about what demand existed in response to that advertised cruise, whether it proceeded, and if so, what health, safety or security issues ensued. No additional information was supplied when requested.<sup>72</sup>
- 7.33. Information published on Schoolies websites also suggests that there is now no widespread ongoing demand for Schoolies cruises. The websites notes that Schoolies cruises ceased in 2006,<sup>73</sup> or make no reference to cruise ships as a current Schoolies destination.<sup>74</sup> Instead, the websites inform Schoolies (and their parents) that 'Schoolies takes place in many different destinations across Australia and internationally'.<sup>75</sup> At least 13 Official Schoolies Destinations across Australia and the Pacific are promoted.<sup>76</sup>
- 7.34. These websites also note that 'Schoolies Week' or 'Schoolies Festival' occurs over a three-week period from mid-November to mid-December, the festival spanning across three weeks only because Queensland school leavers finish their school term earlier than those in other Australian states.<sup>77</sup> This raises questions about whether 'Schoolies' persists for the three-month Schoolies Period identified by the Applicant.<sup>78</sup>
- 7.35. The Applicant states in its response to the Commission's Preliminary View that unmet quotas and fewer Waiver Applications do not necessarily demonstrate reduced demand for Schoolies cruises, noting that large scale Schoolies events continue to exist on land. Rather, the Applicant's view is that the measures

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<sup>70</sup> *Supra* n.1 at [3.28](a), [3.29], and Schedule E.

<sup>71</sup> *Ibid* at [3.30].

<sup>72</sup> *Supra* n.13.

<sup>73</sup> See: [www.schoolies.org.au/history-of-schoolies-week.htm](http://www.schoolies.org.au/history-of-schoolies-week.htm).

<sup>74</sup> See: [www.schoolies.com](http://www.schoolies.com).

<sup>75</sup> *Ibid* and *Supra* n.73.

<sup>76</sup> *Ibid*.

<sup>77</sup> *Ibid*.

<sup>78</sup> *Supra* n.1 at [1.2].

implemented under the Previous Exemptions have been effective in moderating demand for large scale Schoolies celebrations onboard its ships.

- 7.36. The Commission accepts that the Previous Exemptions may have actively discouraged Schoolies from making bookings on cruise ships,<sup>79</sup> and may have helped to promote an understanding that the Applicant will not tolerate improper behaviour and under-age drinking on its cruise ships as part of Schoolies celebrations.<sup>80</sup> The Commission considers, however, that the unmet quotas and low number of Waiver Applications is a factor that suggests there may no longer be a widespread ongoing demand for Schoolies cruises.
- 7.37. The Applicant has submitted that it considers the Responsible Adult Requirement, as defined in paragraph 6.6, a key feature of its broader package of measures designed to minimise excessive behaviour during the Schoolies Period, especially in relation to guests aged 17 to 19 years.<sup>81</sup> It is not clear what broader package of measures the Applicant refers to.
- 7.38. As explained at paragraph 3.14 above, the Commission considers that temporary exemptions should not be granted lightly. It has the effect of taking relevant conduct out of the ADA's prohibitions and denying redress to a person affected by that conduct. It qualifies the norms of conduct that the ADA seeks to establish.
- 7.39. In exercising its statutory discretion to grant a temporary exemption, the Commission must have regard to the circumstances of each individual case and balance the relevant factors at the relevant time. Persuasive evidence is needed to justify the exemption, and the Commission must be satisfied that an exemption is appropriate and reasonable.
- 7.40. The Commission is not persuaded that there is a demonstrated ongoing widespread demand for cruises as a Schoolies destination, and notes that the Applicant does not intend to reinstate designated Schoolies Cruises. The Commission considers that the Applicant has been able to effectively manage the health, safety and security risks associated with the existing demand for its cruises from peoples aged 17–19. The Commission notes that there have been no security incidents involving large groups of 17–19 years olds despite the Applicant relaxing the ban on 17–19 years olds travelling without a Responsible Adult during the First Period of the Schoolies Period since 2019.

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<sup>79</sup> *Supra* n.1 at [2.4](a).

<sup>80</sup> *Ibid* at [2.4](c).

<sup>81</sup> *Ibid* n.1 at [2.8] and *Supra* n.13.

- 7.41. For these reasons, the Commission does not accept that a further temporary exemption is required to prioritise the health, safety and security of persons onboard cruises in the Schoolies Period.
- 7.42. The Commission notes the Applicant's submission that without an exemption in place it will not have a mechanism to prevent a large-scale unauthorised Schoolies event. In the Commission's view, the Applicant may wish to consider implementing safeguards that may be necessary and appropriate in response to any increased security risks during the Schoolies period. The Commission notes in this regard that the Applicant trialled some additional security measures in the period before the First Exemption (as set out in 7.14 above). The Commission also notes that it has been a condition of the exemptions granted by the Commission since 2017 that the Applicant consider whether there are other means to ensure large-scale disruptive events do not occur onboard the Applicant's cruises, including whether any other strategies have been tested.
- 7.43. The Commission received only one submission from an interested party in relation to this application. This submission from ADNSW opposed the exemption for the reasons set out in paragraphs 5.11 and 5.12 above.
- 7.44. On balance, for the reasons outlined above, the Commission is not persuaded that it is appropriate or reasonable to grant a further exemption to the Applicant, and has made a decision not to grant the exemption.

Dated: 21 December 2023.

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive, flowing style.

Signed by the President  
Emeritus Professor Rosalind Croucher, AM  
on behalf of the Commission