

Application for Temporary Exemption from *Age Discrimination Act 2004* (Cth)

Who is seeking the exemption?

Portier Pacific Pty Ltd, Uber Portier B.V. and their affiliates (together, **Uber**) applies for a section 44 exemption from section 28 of the *Age Discrimination Act 2004* (Cth) (**AD Act**).

Portier Pacific Pty Ltd (**Portier**) is an Australian corporation that provides lead generation services to Australian users of the smartphone application known as “Uber Driver” (**App**).

Uber Portier B.V. is a private limited liability company based in the Netherlands that provides the App to users.

How long is the exemption sought for?

Uber is seeking an exemption for five years.

What circumstances or activities are to be covered by the exemption?

Uber Portier B.V. provides the App to people in Australia. Portier and Uber Portier B.V. enter into a services agreement with people who register to use the App. There is no charge for downloading the App.

The App allows individuals, known as ‘delivery-partners’, who have downloaded the App, to accept requests from restaurants to deliver food and beverages to the restaurant’s customers (as part of Uber Eats). For completeness, the same App is used for ‘driver-partners’, who are independent providers of transportation services, to accept requests from people who have requested rides through the Uber rider smartphone application.

Uber seeks an exemption to allow it to:

- refuse to provide the App to individuals who are under 18 years of age and wish to become delivery-partners; and
- provide the App to individuals who are under 18 years of age and wish to become delivery-partners on different terms.

This will have the effect of preventing or restricting people under the age of 18 years from being able to deliver food for restaurants that make their meals available via Uber Eats.

Uber will be breaching section 28(a) of the AD Act by refusing to provide services to people under the age of 18 years or providing the services on alternative terms to those aged 18 or older.

Who will be affected by the application?

The people who will be affected by the exemption are those individuals under the age of 18 years who wish to receive requests from restaurants to deliver food through the App and thus seek to download the App. Uber is unaware of any particular organisation who will be affected by the exemption.

Is an exemption necessary?

As stated above, refusing to provide the App to individuals under 18 years old is a breach of section 28(a). There is no section-specific exemption to section 28.

The circumstances do not fall within the general exemptions under the AD Act. It is not an act of positive discrimination as it does not provide a benefit, meet a need or reduce a disadvantage suffered by either children or adults, the two categories of people affected by the breach.

Uber is neither a charity, religious or voluntary body and does not provide superannuation, insurance or credit, a Commonwealth employment program or health services.

The circumstances do not fall precisely within any of the specified laws in sections 39, 40, 41 or 43.

Why should an exemption be granted?

Uber submits that the objects of the AD Act, by use of the words “as far as possible” and “as far as practicable”, acknowledge that there are practical and other restrictions on ensuring equality regardless of age.¹ Uber argues that equality in this circumstance should give way to other significant, legislative protections, including protections from risks to health and safety.

Work health and safety

Uber considers that the exemption is currently necessary to facilitate compliance with work health and safety obligations by Portier Pacific.

Under section 19 of the *Work Health and Safety Act 2011* (NSW) Portier may have a duty, as a person conducting a business or undertaking, to ensure “so far as is reasonably practicable, that the health and safety of **other persons** is not put at risk from work carried out as part of the business or undertaking”.

The same or similar duties apply in the other states and territories of Australia,² excepting Western Australia where the duties only apply to employees and other persons at workplaces.³

Uber considers that delivery-partners are likely to fall under the category of “other persons” in relation to the business of Uber Eats. Uber argues that allowing people under the age of 18 years (**minors**) to use the App to receive delivery requests from restaurants currently puts them at a higher degree of risk than people over 18 years, and it is reasonably practicable for Uber to avoid this risk by refusing to provide the App to minors or potentially (in the future) providing access on alternative terms.

Providing delivery services to restaurants involves a number of inherent risks, most importantly the dangers of driving or riding amongst road traffic and the dangers of attending private residences to deliver food (with the risks of encountering poorly maintained paths, steps and structures, unfriendly or dangerous pets and, potentially, unfriendly or dangerous individuals). As delivery-partners primarily operate alone, Uber has no control over the environments in which they perform their work.

Uber points to two factors as evidencing a higher degree of risk for minors acting as delivery-partners:

- most minors will have limited familiarity with and understanding of road safety, both as a cyclist and driver, as a result of age restrictions on obtaining a driver’s licence; and
- most minors will have less experience with unfamiliar environments and with travelling unaccompanied, as well as likely being less physically strong, imposing and capable than adults – as reflected in laws regulating the employment of children.

¹ AD Act s 3(a)-(b).

² *Work Health and Safety Act 2011* (Qld) s 19; *Work Health and Safety Act 2012* (Tas) s 19; *Work Health and Safety Act 2011* (ACT) s 19; *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) s 19; *Work Health and Safety Act 2012* (SA) s 19; *Occupational Health and Safety Act 2000* (Vic) ss 21 & 23.

³ *Occupational Safety and Health Act 1984* (WA) ss 19 & 22.

Accordingly, Uber contends that the circumstances, while not falling precisely within any of the permanent exemptions to the AD Act, bear a close resemblance to the exception in section 39(4) and thus an exemption is within the spirit and intent of the AD Act. Uber contends that there are circumstances where the objects of one statutory protection must give way to another, and taking steps to ensure, so far as is reasonably practicable, the health and safety of minors is such a circumstance.

Road safety

It is possible for delivery-partners to make deliveries using bicycles, rather than cars or motorbikes. However the vast majority of deliveries will require delivery-partners to ride a bicycle or drive on public roads and obey road rules. Given the process of obtaining a full driver's licence requires an understanding of road rules and experience on the roads, Uber submits that it is reasonable to believe adults are more likely to understand and comply with road safety requirements and to negotiate traffic safely.

Across Australia, the Australian Capital Territory (**ACT**) has the earliest age for obtaining a learner's driver's licence at 15 years and 9 months,⁴ while the rest of the states and the Northern Territory (**NT**) require a learner to be at least 16 years old.⁵ To obtain a motorbike learner licence you have to be at least 16 years or 16 years and 9 months,⁶ or at least 18 years in Victoria and Queensland.⁷

The earliest possible age to obtain a full licence is 18 years in the NT,⁸ with most jurisdictions setting the requirement at 19 or 20 years⁹ and Victoria at 22 years.¹⁰

As a result, people under the age of 18 years are considered by the various states and territories of Australia to have an incomplete understanding and lower capability on those roads.

As a full driver's licence cannot be obtained before a minimum age of 18 years, Uber submits that this is a reasonable age limit to apply to people using the App - irrespective of the transportation method the person intends to utilise while using the App.

Child protection

In relation to Uber's concern about minors attending private residences, Uber submits that this same concern has led to a number of legislative protections across Australia regarding appropriate employment of children.

These legislative protections include:

⁴ *Road Transport (Driver Licensing) Regulation 2000* (ACT) r 16.

⁵ *Road Transport (Driver Licensing) Regulation 2017* (NSW) r 12; *Transport Operations (Road Use Management – Driver Licensing) Regulation 2010* (Qld) r 8-9; 4; *Motor Vehicles Act 2016* (NT) s 9; *Road Safety Act 1986* (Vic) s 22; *Motor Vehicles Act 1959* (SA) s 75A; *Road Traffic (Authorisation to Drive) Regulations 2014* (WA) r 44; *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010* (Tas) s 19.

⁶ *Road Transport (Driver Licensing) Regulation 2017* (NSW) r 12; *Road Transport (Driver Licensing) Regulation 2000* (ACT) r 16; *Motor Vehicles Act 1959* (SA) s 75A; *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010* (Tas) s 19.

⁷ *Transport Operations (Road Use Management – Driver Licensing) Regulation 2010* (Qld) r 8-9; 4; *Road Safety Act 1986* (Vic) s 22; *Road Safety (Drivers) Regulations 2009* (Vic) r 23.

⁸ *Motor Vehicles Act* (NT) s 10, 10A.

⁹ *Road Transport (Driver Licensing) Regulation 2017* (NSW) r 24, 30; *Road Transport (Driver Licensing) Regulation 2000* (ACT) r 28, 30; *Transport Operations (Road Use Management – Driver Licensing) Regulation 2010* (Qld) r 8-9; 4, 16; *Motor Vehicles Act 1959* (SA) s 79A, 81A; *Road Traffic (Authorisation to Drive) Regulations 2014* (WA) r 9; *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010* (Tas) s 19.

¹⁰ *Road Safety (Drivers) Regulations 2009* (Vic) r 49, 51.

- Western Australia and the ACT have a minimum employment age (with limited exceptions) of 15 years,¹¹ while Queensland and Victoria have a minimum age of 13 years.¹²
- In NSW, Victoria and Tasmania there are restrictions on the employment of children under 15 years in 'door to door sales'¹³ or under 14 years in 'sales in a public place'.¹⁴ Uber contends that the work of delivery-partners is potentially analogous to both of these concepts.
- NSW, NT, ACT, Queensland and Western Australia have offences or prohibitions relating to the employment of children which endangers their well-being, a generally broad concept which includes physical, emotional and mental safety.¹⁵

Finally, Uber also has a number of other concerns with minors using the App, including:

- the delivery of liquor when minors are prohibited from possessing liquor;
- the use of the App for navigation in states where minors are prohibited from using mobile phones while driving;
- the requirement for school aged children to be in school and for work to not adversely affect their education; and
- restrictions on hours, requirements for supervision and other obligations applying to the employment of children.

Liquor laws

Delivery-partners are sometimes called upon to deliver alcohol.

In all states except Tasmania it is an offence for a person under 18 years to be in possession of alcohol in a public place when not accompanied by a responsible adult.¹⁶ The ACT, Tasmania and the NT instead have an offence of sending a child to collect liquor.¹⁷ Victoria is the only state with an exception for employees of licensed premises who are delivering liquor to an adult off the premises.¹⁸

Public roads are obviously public places and delivery-partners generally work alone. Uber has no way of knowing if a delivery-partner is accompanied by an adult, and has no way of knowing if the adult is a "responsible adult".

It would not be reasonably practicable for Uber to monitor the types of deliveries assigned to minors, or to require minors to be accompanied when delivering alcohol. This is something only the restaurant can monitor.

¹¹ *Children and Community Services Act 2004* (WA) s 190; *Children and Young People Act 2008* (ACT) s 795-797.

¹² *Child Employment Regulation 2016* (Qld) s 4; *Child Employment Act 2003* (Vic) s 10.

¹³ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 223; *Children and Young Persons (Care and Protection) (Child Employment) Regulation 2015* (NSW) r 11, Sch 1, cl 35; *Child Employment Act 2003* (Vic) s 12.

¹⁴ *Children, Young Persons and Their Families Act 1997* (Tas) s 94.

¹⁵ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 222; *Care and Protection of Children Act 2017* (NT) s 203; *Children and Young People Act 2008* (ACT) s 782, 788; *Child Employment Act 2006* (Qld) s 8C; *Children and Community Services Act 2004* (WA) s 193.

¹⁶ *Liquor Licensing Act 1997* (SA) s 110A(2); *Summary Offences Act 1988* (NSW) s 11; *Liquor Control Reform Act 1998* (Vic) s 123; *Liquor Act 1992* (Qld) s 157; *Liquor Control Act 1988* (WA) s 123.

¹⁷ *Liquor Act 2010* (ACT) s 119; *Liquor Act 2018* (NT) s 118; *Liquor Licensing Act 1990* (Tas) s 74.

¹⁸ *Liquor Control Reform Act 1998* (Vic) s 123.

Uber considers it reasonable to mitigate against the possibility of these offences being conducted by delivery-partners by preventing minors from downloading the App.

Road rules

The App must be open during all deliveries. It communicates with the delivery recipient and can provide navigation services or allow the delivery-partner to call the restaurant or delivery recipient. Uber considers the navigation services provided by the App to be a significant reason for Uber Eats's competitive advantage.

In NSW, SA, Victoria, the NT and Queensland learner drivers and some types of provisional licence holders are not permitted to use a mobile phone while driving – either at all, or for purposes which include phone calls.¹⁹

Uber submits that this legal restriction further supports its submission that it be permitted to refuse to provide the App to minors who cannot hold a full licence and thus cannot use the App while on deliveries.

Education

The minimum compulsory school leaving age in Australia varies from 16 to 17 years or the completion of Year 10.²⁰ If under the minimum school leaving age, a child cannot accept employment which would prevent their attendance at school or, in many jurisdictions, adversely affect their attendance. The age at which most students finish school in Australia is 18 years.

Uber has no control over the hours when a delivery-partner uses the App. While Uber is not legally responsible for the choice by a person to use the App during school hours, Uber submits that refusing to provide the App to minors is in the interests of the children and their education.

Employment restrictions

In addition to restrictions on minors (of various ages, up to 17 years) working during school hours,²¹ there are a number of other restrictions which apply to the employment of minors across Australia.

Some jurisdictions have rules on maximum hours of work daily or weekly.²² Some jurisdictions prohibit children (of various ages up to 15 years) working during the night, which is variously expressed as after 6 pm, 9 pm or 10 pm and before 6 am.²³

As noted above, NSW, Victoria and Tasmania have additional restrictions on children under 15 or 14 years working in sales – either in public or door to door – including additional restrictions on working hours and the requirement for the employer to hold a permit.²⁴

¹⁹ *Road Transport (Driver Licensing) Regulation 2017* (NSW) r 40; *Road Rules 2014* (NSW) r 300-1; *Transport Operations (Road Use Management – Driver Licensing) Regulation 2010* (Qld) r 68; *Traffic Regulations 2016* (NT) r 15A; 86B; *Road Safety Road Rules 2017* (Vic) r 300; *Transport Operation (Road Use Management – Road Rules) Regulation 2009* (Qld) s 300; *Road Traffic (Road Rules – Ancillary and Miscellaneous Provisions) Regulations 2014* (SA) r 44.

²⁰ *Education Act 1990* (NSW) s 21B; *Education Act 2017* (NT) s 38; *Education Act 2004* (ACT) s 9, 13D; *Education and Training Reform Act 2006* (Vic) s 2.1.1; *Education (General Provisions) Act 2006* (Qld) s 9; *Education Act 1972* (SA) s 75; *Education Act 2016* (Tas) s 11, 90, 91.

²¹ *Children and Young Persons (Employment) Standards 2011 (No 1)* (ACT) cl 6; *Education Act 2017* (NT) s 163; *Education (General Provisions) Act 2006* (Qld) s 230.

²² *Children and Young Persons (Employment) Standards 2011 (No 1)* (ACT) cl 6; *Child Employment Act 2003* (Vic) s 11, 21; *Child Employment Act 2006* (Qld) s 11.

²³ *Children and Young Persons (Employment) Standards 2011 (No 1)* (ACT) cl 6; *Care and Protection of Children Act 2017* (NT) s 203; *Child Employment Act 2003* (Vic) s 11, 21; *Child Employment Act 2006* (Qld) s 11.

NSW, Victoria and the ACT require children under 15 years to be supervised by an adult while at work – while in Queensland supervision applies to children under 18 years.²⁵

As noted above, Uber has no ability to control the use of its App, for example to ensure delivery-partners are supervised or only work at appropriate times.

New business

Uber also notes that Uber Eats is a new business in Australia, operating for only two years. While it is continuously looking at ways to improve its systems and processes, at this stage it simply does not have sufficient information to confidently allow people under the age of 18 to use the App.

This position may change in the future, as the App develops or as future iterations or initiatives become available. For example, the ability to restrict a certain class of people to use the App during certain times, in certain conditions and in certain locations may become possible.

Burden outweighs discriminatory effect

Uber submits that the discriminatory effect of the exemption, preventing minors from accessing the App to conduct deliveries for restaurants using Uber Eats, is limited when compared to the risks associated with having minors using the App as delivery-partners. Uber also notes that minors have other options to work that are more suited to compliance with the various legal restrictions – such as work which involves set hours and permanent supervision.

Uber submits that preventing people under 18 years from obtaining access to the App is an appropriately targeted restriction.

Conclusion

While delivery-partners are not employees or contractors of Uber, or of the relevant restaurants or their customers, Uber contends that society recognises the vulnerability of minors in undertaking work, particularly with regard to attending other people's homes, and seeks to protect them from that vulnerability. To this end, Uber contends that it should be able to deny use of its services to minors (not just persons 16 years and under) so as not to induce or encourage them to undertake work which involves something akin to door to door sales.

In conclusion, Uber submits that it is reasonable for the exemption to be granted, as the potential risks to minor's health, safety, wellbeing and education if they were permitted to use the App and be delivery-partners outweigh the discriminatory effect of preventing minors who wish to be delivery-partners from downloading the App.

²⁴ *Children and Young Persons (Care and Protection) Regulation 2015* (NSW) Sch 1; *Child Employment Act 2003* (Vic) s 8; *Children, Young Persons and Their Families Act 1997* (Tas) s 94.

²⁵ *Children and Young Persons (Care and Protection) (Child Employment) Regulation 2015* (NSW) Sch 1, cl 37-38; *Children and Young People Regulation 2009* (ACT) r 4; *Child Employment Act 2003* (Vic) s 19; *Child Employment Act 2006* (Qld) s 9.

Proposed terms and conditions of the exemption

Uber proposes the following terms and conditions for the exemption:

1. Uber is permitted to refuse to provide access to the App to anyone under the age of 16 years, without exception.
2. Uber is permitted to refuse to provide access to the App to anyone between the ages of 18 and 16 years, although Uber may provide access to the App to persons between the ages of 18 and 16 on terms and conditions different to those imposed on persons aged 18 or over.

Uber is not currently in a position to provide access to the App to anyone between the age of 18 and 16 on different terms as foreshadowed in 2. However, it proposes that if and when it is, it may provide access to the App on different terms generally only in circumstances where the individual requesting access to the App has left school, is not in an area where alcohol delivery is performed, and has obtained some form of driver's licence, as well as where the legislation in the applicable state or territory would not prevent Uber from offering the services to the individual.

Are there factors that may affect the processing of the application?

Uber has not yet sought an exemption under state or territory discrimination laws, although this is being considered.

Dated: 22 March 2018