

AUSTRALIAN HUMAN RIGHTS COMMISSION

AGE DISCRIMINATION ACT 2004 (Cth), Section 44

NOTICE OF DECISION ON APPLICATION FOR TEMPORARY EXEMPTION: PORTIER PACIFIC PTY LTD, UBER PORTIER B.V. AND THEIR AFFILIATES (TOGETHER, UBER)

The Australian Human Rights Commission ('the Commission') gives notice of its decision regarding an application made by Portier Pacific Pty Ltd, Uber Portier B.V. and their affiliates (together, 'Uber') for a temporary exemption pursuant to s 44 of the *Age Discrimination Act 2004* (Cth) ('ADA').

1 THE APPLICATION

1.1 The applicant has sought an exemption for a period of five years from s 28 of the ADA in relation to the smartphone application known as Uber Driver ('the App'):

28 Goods, services and facilities

It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's age:

- (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person; or
- (b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or
- (c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

1.2 Uber has sought an exemption to allow it to:

- (a) refuse to provide the App to individuals who are under 18 years of age and wish to become delivery-partners,
- (b) provide the App to individuals who are under 18 years of age and wish to become delivery-partners on different terms.

1.3 Uber has not identified the different terms and conditions that it proposes could apply.

2 DECISION OF THE COMMISSION

2.1 The Commission has decided that it will not grant Uber a temporary exemption from s 28 of the ADA.

3 CONSIDERATION AND REASONS

3.1 In reaching its decision, the Commission considered the following:

3.1.1 The application and submissions by Uber,

3.1.2 Submissions from other interested parties,

3.1.3 Uber's response to the public submissions received by the Commission, and

3.1.4 Uber's response to the Commission's preliminary view dated 8 October 2018.

3.2 These documents are available on the Commission's website at:

<https://www.humanrights.gov.au/our-work/legal/exemptions/exemption-applications-under-age-discrimination-act-2004-cth>

3.3 In reaching its decision, the Commission had regard to the following:

3.3.1 The terms and objects of the ADA, and

3.3.2 *The Commission Guidelines: Temporary Exemptions under the Age Discrimination Act* (2010).

3.4 The history of the application and the reasons for the Commission's decision are set out below.

4 MEANING OF IMPORTANT TERMS

4.1 Unless the contrary intention appears, any term used in this decision and in the ADA has the same meaning in this decision as it has in the ADA.

5 REVIEW OF DECISION

5.1 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 the decision to which this notice relates by or on behalf of any person or persons whose interests are affected by the decision.

6 BACKGROUND

6.1 On 22 March 2018, Uber made an application for a temporary exemption under s 44 of the ADA in relation to the App.

6.2 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 (a service known as 'Uber Eats').

6.3 There is no charge for downloading the App. Individuals who register to use the App as delivery-partners enter into a services agreement with Portier Pacific Pty Ltd and Uber Portier B.V.

- 6.4 Uber has sought an exemption to allow it to:
- (a) refuse to provide the App to individuals who are under 18 years of age and wish to become delivery-partners,
 - (b) provide the App to individuals who are under 18 years of age and wish to become delivery-partners on different terms.
- 6.5 Uber has not identified or outlined the different terms and conditions that it proposes could apply.
- 6.6 An exemption that allows Uber to refuse to provide the App to individuals aged under 18 will have the effect of preventing people under the age of 18 years from being able to deliver for restaurants via Uber Eats.

7 THE COMMISSION'S PROCESS

- 7.1 On 18 May 2018, the Commission called for submissions about the merits of the application and commenced a six-week public consultation period. The Commission did this by:
- publishing the application on its website, and calling for public submissions,
 - writing to State and Territory anti-discrimination bodies, inviting them to make submissions, and
 - writing to a number of bodies representing children and young persons, inviting them to make submissions.
- 7.2 The Commission received two submissions during its public consultation.
- 7.3 In a brief submission, the Anti-Discrimination Board of NSW stated only that it had ‘no objection’ to the Commission granting the temporary exemption as requested. The other submission, received from the National Children’s and Youth Law Centre (NCYLC), opposed the Commission granting the temporary exemption on a number of grounds, which are discussed further below.
- 7.4 On 9 July 2018, the public submissions were made available on the Commission’s website and the applicant was provided with the opportunity to reply. On 20 July 2018, Uber provided a further written submission to the Commission addressing matters raised in the NCYLC submission. This reply was uploaded onto the Commission’s website on 27 August 2018.
- 7.5 On 8 October 2018, the Commission issued a preliminary view in this matter. It then gave Uber the opportunity to respond to the Commission’s preliminary findings.
- 7.6 On 29 October 2018, Uber provided a response to the Commission’s preliminary view.
- 7.7 The Commission has considered all of the material referred to above in reaching its decision in relation to this application.

8 PROCEDURAL FAIRNESS CONSIDERATIONS

- 8.1 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.

9 LEGISLATIVE REGIME AND THE COMMISSION'S POWER TO GRANT EXEMPTIONS

The ADA

- 9.1 The ADA makes it unlawful to discriminate on the ground of age in a range of fields. Most relevantly for the present application, the ADA makes discrimination unlawful in relation to the provision of goods, services and facilities (s 28).

The Commission's powers to grant exemptions

- 9.2 The Commission has the power to grant exemptions under the ADA (s 44).
- 9.3 The effect of an exemption is that, where a person fails to comply with a provision of the ADA, but that failure is in accordance with an exemption that has been granted by the Commission, the person does not contravene the ADA (s 47). A person who is affected therefore has no basis upon which to make a complaint of age discrimination under the ADA.
- 9.4 Exemptions granted by the Commission may be granted subject to terms and conditions (s 44(3)). Failure to comply with such a term or condition does not, of itself, amount to unlawful conduct. However, where the beneficiary of an exemption fails to comply with a condition attached to the exemption, they will be deprived of the benefit of the exemption. They will then be subject to the requirements of the ADA in the usual way.
- 9.5 In practical terms, the granting of a temporary exemption means that the activities or circumstances covered by it cannot be the subject of a successful complaint under the ADA. Situations that might otherwise be unlawful under the ADA cannot be effectively contested through the usual discrimination complaints process with its consequent legal remedies.
- 9.6 Pursuant to s 44(1) of the ADA, the Commission's exemption power is exercisable 'on application' and any exemption is to be granted 'by instrument'. An exemption is to be granted for a period, specified in the instrument, not exceeding five years (s 44(3)(c)). Despite this temporal limitation, the Commission is empowered by s 44(2) of the ADA to grant a 'further exemption' on application made before the expiration of the specified period. An exemption or further exemption may be granted 'subject to such terms and conditions as are specified in the instrument' and 'may be expressed to apply only in such circumstances, or in relation to such activities, as are specified in the instrument' (s 44(3)(a) and (b)).
- 9.7 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'.¹

9.8 The objects of the ADA as stated in s 3 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, accommodation, the disposal of land, the administration of Commonwealth laws and programs and requests for information; 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; and
- (c) to allow appropriate benefits and other assistance to be given to people of a certain age, particularly younger and older persons, in recognition of their particular circumstances; and
- (d) to promote recognition and acceptance within the community of the principle that people of all ages have the same fundamental rights.

9.9 By conferring an exemption power on the Commission, Parliament has clearly contemplated that some discriminatory conduct might be justified and that, in certain circumstances, derogation from the terms of the ADA is permissible.

9.10 However, this exemption power must be interpreted in light of 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. The grant of an exemption pursuant to s 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. While the exemption powers in the ADA recognise that there might be circumstances where a derogation from its prohibitions is appropriate, the effect of an exemption is to qualify the norms of conduct that the ADA seeks to establish.

9.11 Consequently, the Commission considers that exemptions should not be granted lightly. 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.

9.12 The Commission has issued guidelines about how it will exercise its power under the ADA. These provide that the Commission will consider:

- Whether an exemption is necessary
- Whether granting an exemption would be consistent with the objects of the ADA
- An applicant's reasons for seeking an exemption
- Submissions by interested parties
- All relevant provisions of the ADA, and
- Any terms or conditions subject to which an exemption might be granted.

10 DECISION TO REFUSE EXEMPTION

- 10.1 The Commission has decided that it will not grant Uber an exemption to s 28 of the ADA to allow it to refuse to provide the App to individuals who are under 18 years of age or to provide the App to individuals who are under 18 years of age on different unspecified terms.
- 10.2 Uber recognises that refusing to provide the App to individuals who are under 18, or providing the App on different terms, is likely to breach s 28 of the ADA. Uber also recognises that its proposal does not already fall within any of the permanent exemptions to the ADA at Part 4, Division 4.
- 10.3 In its submission, the NCYLC said that the application is unnecessary in whole or in part because:

Uber can already directly and lawfully discriminate against any members of the targeted group that fall under the legal age of employment as specified in each state or territory.

Uber can also justify indirectly discriminating against those members of the target group in at least 5 jurisdictions that regulate the ability of learner drivers and provisional licence drivers to drive while using mobile phones for navigational or other purposes.

- 10.4 In its response to the NCYLC submission, Uber said:

The NCYLC's submission is premised on the misunderstanding that Uber employs or engages delivery partners who use the Uber App. It does not. This was acknowledged by the Fair Work Commission in *Kaseris v Rasier Pacific V.O.F.* [2017] FWC 6610.

Uber is unable to make use of the provisions of *Age Discrimination Act* that would allow it to lawfully discriminate against persons based on the legal age of employment.

Uber is similarly unable to predicate a restriction based on the holding of a driver's licence. Delivery partners often use bicycles to complete orders for their customers.

Uber maintains that the Application is necessary.

- 10.5 The Commission accepts that the application is necessary. There is an exemption in s 39 of the ADA that provides that anything done in direct compliance with State or Territory laws is not unlawful under the ADA. The Explanatory Memorandum for the Age Discrimination Bill 2003 explains that the purpose of this section was to ensure that acts done in compliance with specific State and Territory laws dealing with, for example, liquor licensing, tobacco sales and driving licences, would not be unlawful.²
- 10.6 Putting to one side the differing views of Uber and the NCYLC as to the issue of the characterisation of delivery-partners as employees or not, compliance with laws (not related to the legal age of employment) *may* allow Uber to prohibit *some* persons under the age of 18 from downloading and/or using the App to become an Uber Eats delivery-partner. However, it is unlikely to capture *all* persons under the age of 18. Accordingly, there is an arguable case that, in refusing to provide services (or

providing the services on alternative terms) to any person under the age of 18 years, Uber will be breaching s 28(a) and (b) of the ADA.

- 10.7 In its submission opposing the granting of a temporary exemption, the NCYLC also queried whether s 18 ('Discrimination in employment'), s 19 ('Discrimination against commission agents'), s 20 ('Discrimination against contract workers') and s 39 ('Direct compliance with laws, orders etc') were also applicable to Uber's application. In support of this proposition, it referred to recent Fair Work Ombudsman legal action against Foodora Australia Pty Ltd. The NCYLC said that, in those proceedings, the Ombudsman alleged that Foodora misrepresented their 'delivery partners' as independent contractors when they are in fact employees.
- 10.8 Uber has applied for an exemption from s 28 of the ADA. The Commission's power in this matter is limited to deciding whether to grant or refuse the temporary exemption requested by an applicant.

Reasons why exemption is sought

- 10.9 In its application, Uber said that, insofar as the App allows individuals to become Uber Eats delivery-partners, ensuring age equality 'should give way to other significant, legislative protections, including protections from risks to health and safety'. These legislative protections, and some of the relevant concerns raised by Uber, include:

Work health and safety

Providing delivery services to restaurants involves a number of inherent risks, most importantly the dangers of driving or riding amongst the 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.

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 ... 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.

[P]eople 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 provisions across Australia regarding appropriate employment of children.

Liquor laws

Delivery-partners are sometimes called upon to deliver alcohol.

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.

Road rules

The App must be open during all deliveries.

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.

Education

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, there are a number of other restrictions which apply to the employment of minors across Australia.

Some jurisdictions have rules on maximum hours or work daily or weekly. Some jurisdictions prohibit children (of various ages up to 15 years) working during the night.

- 10.10 In light of such concerns, Uber said that it is reasonable for the exemption to be granted, as the potential risks to a minor's health, safety, well-being 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.
- 10.11 Uber submitted that 'at this stage' it simply does not have sufficient information to confidently allow people under the age of 18 to use the App. It said that:

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.

Is the exemption a reasonable measure having regards to the objects of the ADA

- 10.12 In making a determination on a temporary exemption application under the ADA, the Commission has regard to the objects and terms of the ADA. The objects 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.
- 10.13 In the Explanatory Memorandum for the Age Discrimination Bill 2003, the Government stated that it 'recognises the need for Australians of all ages to be able

to participate fully in our society, particularly in light of the fiscal and economic impact of the aging population'.³ It also stated:

A key objective is to promote attitudinal change across society. This attitudinal change is needed so *that people are judged on their actual capacity* rather than age being used as a blunt proxy for capacity. Attitudinal change is also needed so *that people are not unfairly excluded from access to the whole range of social goods and activities*.⁴

- 10.14 Drawing on the considerable experience of age discrimination legislation in the States and Territories, the ADA contains specific and limited exemptions and allowances that strike a balance between competing considerations.
- 10.15 The ‘gig economy’, exemplified by services such as Uber Eats, is an increasingly significant portion of the service economy, and provides opportunities for businesses, consumers and workers. The benefits for workers include ease of entry, flexibility and choice. The Commission considers that these benefits apply equally to young people.
- 10.16 The Commission accepts, as Uber points out, that governments across Australia have recognised the need to enact laws, regulations and rules relating to the employment, safety and education of persons under the age of 18 that potentially limit their participation in some activities. Uber refers to a number of these laws in its application, and submits that in seeking to comply with various legislative protections that already apply to minors and to reduce the potential risks to their health and safety, its exemption is within the spirit and intent of the ADA. In its response to the Commission’s preliminary view, Uber emphasised that the ‘special risk’ faced by minors is the reason for Uber’s application.
- 10.17 The Commission acknowledges, as Uber submits, that minors face different, and in some circumstances, increased risk when participating in public life. However the Commission also recognises that as a society we allow minors—especially 16 and 17 year olds—to engage in a number of activities that involve elements of risk (such as driving, working and contact sports). In considering this application for a temporary exemption, the Commission must therefore not only take into account Uber’s legitimate concerns, but also the rights and interests of minors to participate meaningfully in public life,⁵ and give due regard to their autonomy, capacity and agency.
- 10.18 The various legislative protections that have been enacted in relation to minors, and the permanent exemptions found in the ADA, are the result of deliberative processes by federal, State and Territory parliaments. A further exception to the ADA and its concomitant complaint process, via a temporary exemption, must be carefully assessed. Uber advances a number of broad considerations of public interest, but has provided limited evidence to support its propositions.
- 10.19 Preventing (or restricting, on different terms, presently unknown) all individuals under the age of 18 years from being able to download and become a delivery-partner via Uber Eats deprives them of an opportunity to participate in the economy. The Commission notes the health, safety, wellbeing and education concerns advanced by Uber, but does not regard the terms of its proposed exemption—a blanket exclusion of all individuals under 18—as appropriately targeted.

- 10.20 The Commission notes that many of the dangers to safety identified by Uber apply to other age groups, for example, attending private residences alone, poorly maintained paths, unfriendly or dangerous pets or individuals. The Commission is not persuaded that these concerns justify excluding access to the App and the opportunity to be a delivery-partner to all individuals aged under 18. In recognition of the particular needs and vulnerabilities of minors, Uber may consider making information, including regarding potential risks, clearly available so that individuals aged under 18 can make informed choices and decisions appropriate to their particular circumstances.
- 10.21 Uber also raises road safety as a particular issue of concern and says:
- 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.
- 10.22 Again, the Commission is not persuaded by this submission. Uber is not proposing to refuse access to the App to anyone who holds a provisional licence, only to individuals aged under 18 years. Uber is also not proposing to distinguish between individuals riding a bicycle and individuals driving a car.
- 10.23 Some of the concerns Uber advances are adequately, and appropriately, covered by State and Territory legislative provisions, for example, restrictions on the use of mobile phones while driving. As set out above, there is a permanent exemption in the ADA for compliance with these laws. Individuals who drive, ride or cycle are personally responsible for ensuring that they comply with all relevant road rules, including rules that relate to mobile phones, speed limits and wearing a seatbelt or helmet while driving, riding or cycling. Other concerns, like driving inexperience, could be addressed in other, more proportionate ways, such as by limiting the App to those who have held a licence for a particular period of time.
- 10.24 In addition to an exemption allowing it to refuse to provide the App, Uber has applied for an exemption to provide it to individuals aged under 18 on different unspecified terms. Providing the App on different terms may address some of Uber's concerns about the risks posed to individuals aged under 18 being Uber Eats delivery-partners, however Uber did not provide any information in its application as to what those terms might be.
- 10.25 Accordingly, in the Commission's view, the exemption currently sought by Uber is not a reasonable measure as the discriminatory effect is disproportionate to the intended public policy goal.
- 10.26 In these circumstances, the Commission is not persuaded that the reasons advanced by Uber in favour of the exemption outweigh the impact on persons under the age of 18 who are likely to experience discrimination for the period of the proposed exemption, and to suspend their rights to make a complaint under the ADA.

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

18 December 2018

¹ *Le v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 875 [58]. See also *R v Australian Broadcasting Tribunal; Ex parte 2 HD Pty Ltd* (1979) 144 CLR 45 at 49.

² Explanatory Memorandum, Age Discrimination Bill 2003 (Cth), 53 [7].

³ Explanatory Memorandum, Age Discrimination Bill 2003 (Cth), 2.

⁴ Explanatory Memorandum, Age Discrimination Bill 2003 (Cth), 9 (emphasis added).

⁵ Explanatory Memorandum, Age Discrimination Bill 2003 (Cth), 10.