

AUSTRALIAN HUMAN RIGHTS COMMISSION

AGE DISCRIMINATION ACT 2004 (Cth), Section 44

NOTICE OF PRELIMINARY VIEW 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 preliminary view 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 5 years from section 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 or outlined the different terms and conditions that it proposes could apply.

2 PRELIMINARY VIEW OF THE COMMISSION

- 2.1 The Commission is of the preliminary view that it will not grant Uber a temporary exemption.

3 CONSIDERATION AND REASONS

- 3.1 In reaching its preliminary view, the Commission considered the following:

3.1.1 The application and submissions by Uber

3.1.2 Submissions from other interested parties, and

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

- 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#current>

- 3.3 In reaching its preliminary view, the Commission had regard to the following:

3.3.1 The terms and objects of the ADA

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 preliminary view are set out below.

4 MEANING OF IMPORTANT TERMS

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

5 BACKGROUND

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

- 5.2 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').

- 5.3 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..

5.4 Uber has sought an exemption to allow it to:

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

5.5 Uber has not identified or outlined the different terms and conditions that it proposes could apply.

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

6 THE COMMISSION'S PROCESS

6.1 On 18 May 2018, the Commission called for submissions about the application's merits 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.

6.2 The Commission received two submissions during its public consultation.

6.3 The Anti-Discrimination Board of NSW 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.

6.4 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 public submissions. This was uploaded onto the Commission's website on 27 August 2018.

6.5 The Commission has considered all of the materials referred to above in reaching its preliminary view in relation to this application.

7 PROCEDURAL FAIRNESS CONSIDERATIONS

7.1 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.

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

The ADA

- 8.1 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

- 8.2 The Commission has the power to grant exemptions under the ADA (s 44).
- 8.3 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).
- 8.4 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.
- 8.5 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.
- 8.6 The Commission's powers to grant exemptions under the ADA are expressed in broad terms. 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. However, in exercising its exemption powers, the Commission must also consider the objects of the ADA.
- 8.7 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.

- 8.8 The Commission has frequently expressed the view that exemptions should not be granted lightly. Given the significant legal consequences for potential complainants, the Commission must be satisfied that a temporary exemption is appropriate and reasonable, and substantial evidence is needed to justify the exemption.
- 8.9 The Commission has issued guidelines about how it proposes to 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.

9 PRELIMINARY VIEW TO REFUSE EXEMPTION

- 9.1 The Commission is of the preliminary view 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 terms.
- 9.2 Uber recognises that refusing to provide the App to individuals who are under 18, or restricting the terms on which it is provided, 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.
- 9.3 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.
- 9.4 Compliance with other laws 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, but is unlikely to capture *all persons* under the age of 18. Accordingly, the Commission accepts that 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.
- 9.5 In its submission opposing the granting of a temporary exemption, the NCYLC queried whether ss 18 ('Discrimination in employment'), 19 ('Discrimination against commission agents'), 20 ('Discrimination against contract workers') and 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 allege that Foodora misrepresented their 'delivery partners' as independent contractors when they are in fact employees.

- 9.6 Uber has applied for an exemption from s 28 of the ADA. This preliminary view does not address the question of whether Uber may require any further exemptions in relation to its proposal to prevent or restrict individuals under 18 accessing the App. The Commission's power in this matter is limited to deciding whether to grant or refuse the temporary exemption requested by the Application.

Reasons why exemption is sought

- 9.7 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.

- 9.8 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.
- 9.9 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

- 9.10 In making a determination on a temporary exemption application under the ADA, the Commission has regard to the objects of the ADA. These 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. The ADA aims to ensure that all Australians – young and old and everyone in between – are treated equally and have the same opportunities as others.
- 9.11 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.

- 9.12 Governments across Australia have however recognised the necessity 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 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.
- 9.13 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.
- 9.14 The Commission notes that many of the dangers to safety identified by Apply equally to all age groups, for example, poorly maintained paths, unfriendly or dangerous pets or individuals. The Commission is not persuaded that this justifies 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.
- 9.15 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.
- 9.16 Again, the Commission is not persuaded by this submission. Uber are 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.
- 9.17 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. 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.
- 9.18 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.
- 9.19 The Commission recognises that the App may not currently have the functionality required to, for example, allocate deliveries involving alcohol only to delivery-

partners aged 18 and over. Uber has said that such functionality *may* become possible, but has not provided any further information. Whether through the App or other means, it is Uber's responsibility to ensure that it complies with all relevant laws in the jurisdictions in which it operates. This may require Uber to ensure, for example, that minors are not involved in the service or delivery of alcohol, or that they only conduct deliveries at certain times of the day.

- 9.20 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.

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive style with a large initial 'R'.

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

8 October 2018