

Our reference
SBP/CB/UBER24734-9134825

8 Chifley
8-12 Chifley Square, Sydney NSW 2000, Australia
GPO Box 9925, Sydney NSW 2001, Australia
Tel +61 2 9210 6500
Fax +61 2 9210 6611
www.corrs.com.au

**CORRS
CHAMBERS
WESTGARTH**
lawyers

Sydney
Melbourne
Brisbane
Perth
Port Moresby

29 October 2018

By email: [REDACTED]
[REDACTED]
Senior Lawyer
Australian Human Rights Commission

Contact
[REDACTED]
Email: [REDACTED]@corrs.com.au

Partner
[REDACTED]
Email: [REDACTED]@corrs.com.au

Dear [REDACTED]

Response to Notice of Preliminary View

We refer to the Notice of Preliminary View (**Preliminary View**) on the application for a temporary exemption from the *Age Discrimination Act 2004* (Cth) (**ADA**) submitted by Portier Pacific Pty Ltd, Uber Portier B.V. and their affiliates (together **Uber**).

Uber responds with reference to the paragraph numbers of the Preliminary View as follows:

- 1 **Paragraph 5.6:** While it is correct that one of the effects of the exemption sought by Uber *may* (as opposed to *will*) prevent or restrict people under the age of 18 from being able to deliver for restaurants that make food and beverages available via the Uber Eats App (**App**), it is appropriate for the Commission to have regard to the fact that people, under the age of 18, are restricted from many activities for protective reasons by extant laws. These prohibitions are in the circumstances protective to persons under 18 years such that they would then ensure:
 - a. people under the age of 18 years are protected and do not unwittingly engage in personal illegal conduct which could affect their driving statuses and ability to be covered by insurance;
 - b. Uber is able help ensure users of its App act in a manner which does not contravene prohibitions on using mobile phones while driving; delivering or serving alcohol; or working particular hours; and
 - c. that young people are not placed in environments, and are protected from the risks in those environments, which Uber is unable to control, which delivery-partners may find themselves in when using the App.

Uber's application for a temporary exemption is directed to ensuring these protections for people under the age of 18 exist.

- 2 **Paragraphs 9.3 - 9.6:** Paragraph 9.3 of the Preliminary View replicates the submission received from the NCYLC which is premised on the incorrect assumption that Uber is an employer or principal that is able to make use of the legal age of employment / contract workers as a basis to lawfully discriminate against those using the App.

This is incorrect for the reasons stated in Uber's response to the NCYLC submission dated 20 July 2018. Uber's response to the NCYLC submission is not referred to in paragraphs 9.3 – 9.6.

Uber has referred the Commission to the findings of other courts and tribunals that affirm it is not an employer of the delivery partners who use the App, nor does it enter into a contract for services with delivery partners.

To the extent the finding in paragraph 9.4 (that “[c]ompliance 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...”) is premised on NCYLC’s submission, Uber would request this be taken into account.

Uber does not understand the basis on which paragraphs 9.3 – 9.5 have been included in the Preliminary View. The Commission states at paragraph 9.6 that its power is limited to determining the application for a temporary exemption on the basis advanced by Uber. Uber requests that these paragraphs either be deleted from any final decision or that the Commission makes clear that it has placed no weight on these submissions of the NCYLC.

Without these steps, Uber is concerned that the Preliminary View demonstrates that the Commission’s decision-making is the result of the consideration of irrelevant or incorrect material.

- 3 **Paragraph 9.10:** Uber accepts the summary of the ADA’s objects given in the first two sentences of paragraph 9.10 of the Preliminary View. However, and with respect to the Commission, the last sentence overstates the stated aims of the ADA. The preceding sentences acknowledge that the objects are to eliminate discrimination “as far as possible” – the objects of the ADA are therefore qualified to take account of other legal or legislative requirements (for example compliance with work health and safety laws). This is the basis on which the ADA includes a number of legitimate exemptions under which otherwise discriminatory conduct is permitted. Uber refers to the “inherent requirements” exemptions elsewhere in the ADA in this regard.

To the extent the Commission’s Preliminary View has been informed by this assessment of the ADA’s objects, Uber respectfully submits this may demonstrate the Commission has misdirected itself as to the objects of the ADA.

- 4 **Paragraph 9.11:** The Preliminary View refers to the opportunities presented by the “gig economy” to businesses, consumers and workers, and notes the benefits for workers include ease of entry, flexibility and choice.

These are benefits for people who participate in most sections of the economy. The issue is the question of special risk for some participants. The Commission appears to believe that minors are exposed to no greater risks than any other members of the community. This risk appears to be recognised by other participants in the “gig economy”, such as Deliveroo, who also limit access to those who are aged 18 or over.

The special risk is the reason for Uber’s application.

- 5 **Paragraphs 9.13 and 9.14:** The Commission states that Uber’s concerns with “health, safety, wellbeing and education” do not justify the “blanket exclusion” sought as part of the exemption. Uber disagrees.

As set out in Uber’s application, there are a number of risks and regulatory impositions that apply across the various Australian jurisdictions where delivery-partners use the App. These are not limited to the four matters referred to in paragraph 9.13 of the Preliminary View. Uber is concerned that the Preliminary View does not demonstrate the Commission has had appropriate regard to the

various reasons advanced by Uber for the reasons for the exemption. For example, the Commission does not balance Uber's legitimate concern with those who are under the age of 18 attending private residences without supervision. The App does not, nor could it, have the ability to supervise or regulate these interactions.

Uber, with respect, does not consider that the method suggested by the Commission in paragraph 9.14 of providing those under the age of 18 with information is an effective method of managing these risks. The exemption sought by Uber is a more reasonable measure to address these concerns.

6 **Paragraphs 9.17 and 9.19:** The Commission is required to consider the application for the exemption on the basis of the existing circumstances. Uber does not have the functionality referred to by the Commission in paragraph 9.19.

There are no plans for this functionality to be included in the App in the future. This is why it has been necessary for Uber to make its application for an exemption from the ADA to the Commission.

With respect, there are no other reasonable measures that could be implemented by Uber. The options proposed by the Commission are not viable.

Put simply, Uber would offer the App with this functionality if it could. It cannot and therefore it has applied for an exemption from the Commission.

Furthermore, exemptions of the kind sought by Uber are, by their very nature, temporary. If the Commission is concerned about functionality that may arise in the future as a relevant factor in determining whether the exemption is a reasonable measure, Uber submits that the temporary nature of the exemption addresses this concern. It is open to the Commission to consider the functionality that may exist at a later date in the event Uber re-applies for an exemption in the future.

Little weight can be given to speculation of what functionality may exist for the App at a later date. The Commission can only determine the matter with the material available at the time the decision is to be made.

Do not hesitate to contact me on [REDACTED] or my colleague [REDACTED] if you require any further information in relation to the matters outlined above.

Yours faithfully
Corrs Chambers Westgarth

[REDACTED]
[REDACTED]
Partner