

From: [REDACTED]

Sent: Sunday, 9 February 2025 12:23 PM

[REDACTED]

Subject: Re: UC2025/1 - Application by Somphong (Em) Thongkhamchanh

Attachments: Unfair Contract Term Remedy 2.pdf; uber terms 2024.pdf

Please see attached

thanks

From: Chambers - Saunders DP <Chambers.Saunders.DP@fwc.gov.au>

Sent: Monday, 3 February 2025 2:21 PM

[REDACTED]

Cc: Chambers - Saunders DP <Chambers.Saunders.DP@fwc.gov.au>

Subject: UC2025/1 - Application by Somphong (Em) Thongkhamchanh

OFFICIAL

Dear parties

I refer to the directions hearing in this matter earlier today.

Deputy President Saunders directs that, by **4pm on 10 February 2025**, the applicant must provide particulars of his unfair contracts claim by completing the following table and sending it to chambers.saunders.dp@fwc.gov.au (cc the respondent and its lawyers):

Unfair contract term alleged by the applicant in section 2.1 of the Application for an unfair contract remedy	Is there a particular term in the Services Agreement that relates to this issue?	If there is a term in the Services Agreement that relates to this issue, identify the term with precision (e.g. clause 5.2 of the Services Agreement).	If there is NOT a term in the Services Agreement that relates to this issue, does the applicant contend that the Services Agreement is unfair because it does not include	Looking at the list of workplace relations matters set out below, is the alleged unfair contract term one which, in an employment relationship, would relate to any workplace relations matters? If so,

			a particular term?	specify which workplace relations matters.
Unfair Contract Term 1: The contract does not hold Uber accountable for ensuring that its platform functions properly, which is essential for fulfilling my role as a contractor				
Unfair Contract Term 2: The contract permits Uber to penalize contractors through metrics such as cancellation rates, even when cancellations are due to app malfunctions beyond the contractor's control				
Unfair Contract Term 3: Uber's contract allows the company to impose restrictions on platform access based on accusations (e.g. failing to report a lost item), even when such accusations are unsubstantiated or incorrect				

Workplace relations matters is defined in s 536JQ of the *Fair Work Act* to mean any of the following matters:

- a. remuneration, allowances or other amounts payable to employees;
- (b) leave entitlements of employees;
- (c) hours of work of employees;

- (d) enforcing or terminating contracts of employment;
- (e) making, enforcing or terminating agreements (not being contracts of employment) determining terms and conditions of employment;
- (f) disputes between employees and employers, or the resolution of such disputes;
- (g) industrial action by employees or employers;
- (h) any other matter that is substantially the same as a matter that relates to employees or employers and that is dealt with by or under:
 - (i) this Act; or
 - (ii) the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* ; or
 - (iii) a State or Territory industrial law;unless the matter is specified in regulations made for the purposes of this paragraph;
- (i) any other matter specified in regulations made for the purposes of this paragraph.

Kind regards

Mia Wetton (she/her)

Relief Associate to Deputy President Saunders



Fair Work Commission

Australia's national workplace relations tribunal

T 02 9308 1827

E Chambers.Saunders.DP@fwc.gov.au

3/237 Wharf Road, Newcastle NSW 2300

At the Fair Work Commission we respect and celebrate the diversity of our communities and we are committed to creating a safe and welcoming space for all.

We acknowledge that our business is conducted on the traditional lands of Aboriginal and Torres Strait Islander people. We acknowledge their continuing connection to Country and pay our respects to their Elders past and present. This email was sent from Jagera, Yuggera and Turrbul Country.

Fair Work Commission Clarification Response and Comprehensive Submission

Section 1: Unfair Contract Terms in Uber's Services Agreement

Unfair Contract Term 1 – Lack of Accountability for Platform Failures

Does the Services Agreement contain a term addressing this issue?

No explicit clause in the agreement covers Uber's responsibility for app failures.

Which clause applies (if any)?

Not specified in the Services Agreement.

Why is the contract unfair?

The contract is unfair as it lacks a clause requiring Uber to ensure its platform functions properly. This creates a significant imbalance in obligations, as drivers depend entirely on Uber's platform to generate income.

Relevant Laws:

- **Fair Work Act s 536NB** – Allows the Fair Work Commission (FWC) to review unfair contract terms that place all operational risks on the contractor while protecting Uber.
- **Australian Consumer Law (ACL) Section 54** – Services must be fit for purpose and reliable. Uber's failure to address app issues breaches this legal guarantee.
- **Precedent Case:** *Uber ordered to pay \$10,000 to a banned Sydney driver after failing to prove passenger's complaint (FWC 2024)*. This case demonstrates that Uber's lack of procedural fairness and platform reliability has legal consequences. ([Source](#))

Request: A contract amendment requiring Uber to ensure platform reliability and provide compensation for income lost due to platform failures.

Unfair Contract Term 2 – Arbitrary Performance Metrics and Penalties

Does the Services Agreement contain a term addressing this issue?

Yes. Performance metrics are used to determine account standing.

Which clause applies?

- **Section 5.4 (How Ratings Work)**
- **Section 7.4 (Adjustments to Transportation Fee)**

Why is the contract unfair?

Uber enforces penalties based on performance metrics that do not account for app

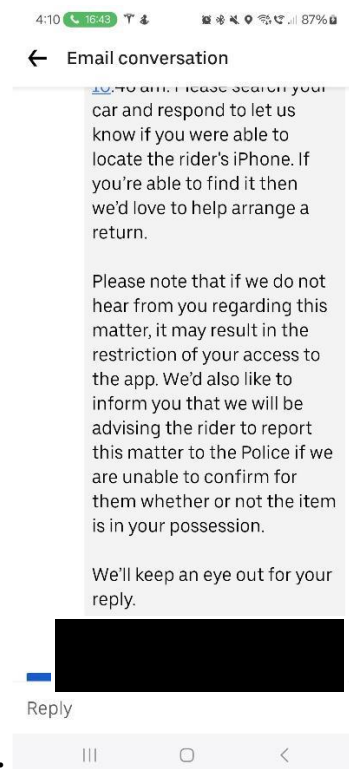
malfunctions or extenuating circumstances, disproportionately disadvantaging contractors.

Relevant Laws:

- **Fair Work Act s 536NB** – Performance metrics tied to penalties must consider fairness. Uber’s approach shifts risks solely onto the contractor.
- **Precedent Case:** Uber’s \$21 million fine for misleading consumers highlights the importance of fairness and transparency in operations. ([Source](#))

Request: A dispute resolution process allowing contractors to challenge penalties caused by app failures or technical issues.

Unfair Contract Term 3 – Threats and Platform Restrictions



Supporting Evidence:

Request: A contract amendment requiring written notice, investigation, and due process before enforcing restrictions.

Does the Services Agreement contain a term addressing this issue?

Yes. Uber reserves the right to restrict platform access.

Which clause applies?

- **Section 15.2 (Termination by Uber)**
- **Section 15.3 (Effect of Termination)**

Why is the contract unfair?

Uber can restrict or terminate platform access based on unverified claims, leaving contractors without recourse or due process. This imbalance in power undermines contractors' rights.

Relevant Laws:

- **Fair Work Act s 342 – Adverse Action Protections** – Employers cannot unfairly penalize contractors without cause.
- **Precedent Case:** Uber ordered to reinstate a driver after wrongful deactivation based on unverified complaints (FWC 2024).

Request: A contract amendment requiring written notice, investigation, and due process before enforcing restrictions.

Section 2: Systemic Failures in Uber's Support System

Issues Identified:

- Numerous support tickets remain unresolved, impacting contractors' income and platform standing.
- Premature ticket closures without resolution, reflecting a lack of accountability.
- The support system is heavily scripted, with responses often repeating the same answers and offering no meaningful resolution. Drivers are forced to wait indefinitely, causing significant financial loss.
- No escalation process for unresolved issues.

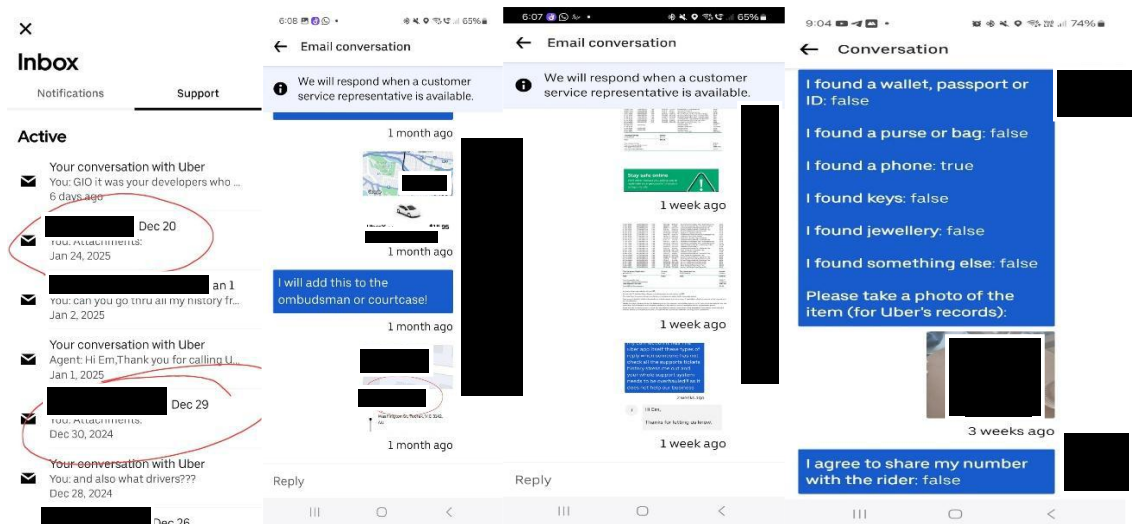
Relevant Laws:

- **Australian Consumer Law (ACL) – Service Delivery Timeframes** – Services must be provided within a reasonable timeframe. ([Consumer Victoria](#))
- **Fair Work Ombudsman – Workplace Communication Guidelines** – Contractors must have access to clear and timely communication channels for resolving disputes.

Request: Uber must:

1. Establish a structured escalation process for unresolved tickets.
2. Provide guaranteed response times for support issues affecting earnings.
3. Investigate and prevent premature ticket closures.

Screenshots: Include unresolved and prematurely closed tickets to support claims.



Section 3: Fatigue Management and Control Over Work Hours

Does Uber have the right to control login/logout times?

Uber imposes restrictions, such as the 24-hour log-off rule after consecutive driving days. While this aligns with fatigue management, **any additional restrictions beyond legal compliance could indicate employer-like control.**

Relevant Laws:

- **Fair Work Act – Independent Contractor Protections** – Contractors must retain control over their schedules unless dictated by legal safety standards.
- **ACCC Unfair Contract Terms Protections** – Contracts must not allow one-sided control over working conditions.

Request: Review Uber’s login/logout restrictions to ensure compliance with independent contractor protections.

Section 4: Compensation Demands

Lost Income Due to App Failures:

Drivers have incurred significant losses due to Uber’s platform issues. Compensation should reflect:

- Lost earnings from unresolved technical issues.
- Additional costs incurred (e.g., fuel, time wasted due to app malfunctions).

Compensation for Threats and Unfair Treatment:

The unjustified threats and lack of procedural fairness warrant compensation for emotional distress and reputational harm.

Ongoing Compensation:

If issues persist, contractors should receive weekly or monthly compensation for continued operational disruptions.

Section 5: Precedent Cases and Regulatory Actions

1. **Uber's \$10,000 FWC Penalty** – Highlighting the need for procedural fairness and accountability. ([Source](#))
 2. **ACCC Fine for Misleading Practices** – Reinforces the importance of fair operations. ([Source](#))
-

Summary of Remedies Sought

- ✓ **Contract Amendments:** Include terms ensuring platform reliability, procedural fairness, and clear dispute resolution.
 - ✓ **Compensation for Financial Losses:** Reimburse income lost due to app failures and procedural errors.
 - ✓ **Overhaul of Support Systems:** Establish response timelines and escalation procedures.
 - ✓ **Review of Uber's Pricing and Commission Policies:** Prevent discretionary changes that exploit contractors.
 - ✓ **Regulatory Review:** Request ACCC investigation into systemic unfair practices.
-

[COPY OF SERVICES CONTRACT REDACTED FROM PUBLISHED DOCUMENT]