



9 August 2016

Mr Alister Henskens SC MP
Chair
Transport and Infrastructure Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

By email: transportinfrastructure@parliament.nsw.gov.au

RE: INQUIRY INTO WORKPLACE ARRANGEMENTS IN THE POINT TO POINT TRANSPORT INDUSTRY

I acknowledge receipt of your recent letter, in respect to questions taken on notice at the hearing on 28 July 2016. Suncorp responds to the questions below.

Definition of 'deemed employee' (transcript page 37)

The CHAIR: I think that is right. Going back to the deemed employee issue, which you raised a while ago, the deeming test for when someone is an employee, at least for tax purposes, is a certain amount or percentage of exclusive employment with that one party. This was to pick-up the situation where people were not really independent contractors but just working effectively full-time for only one party. I think when the GST legislation came in there were deeming provisions around that.

Ms URBAN: Yes.

The CHAIR: Are there any other relevant deeming provisions that would relate to current workers compensation legislation and what are they? What is the test?

Suncorp Response

In determining whether a work relationship can be categorised as an employer/employee relationship or an independent contractor/principal relationship in NSW, consideration must be given to the following:

1. Categorisation of the parties to the contract – determinations as to whether the parties to the contract are natural persons or a company. If the parties are companies, this points to an 'independent contractor' and 'principal' relationship.
2. Type of contract between the parties - a contract **of** service describes an employer/employee relationship. A contract **for** service describes a relationship between an 'independent contractor' and 'principal.'



Several indicia determine the nature of the contract including but not limited to:

- regular or periodic payments;
- who pays tax;
- who pays superannuation;
- provision of sick leave and holiday pay;
- restrictions in performing services for others;
- payment of workers compensation premiums to include a worker;
- control over the work performance; and
- provision of tools and equipment, business cards or advertising under the company name.

If an UberX driver, using his/her own vehicle for fare paying transport services sets his/her own hours; sets the days he/she works; and is paid a gross amount from Uber from which the driver is expected to deal with his/her own tax and superannuation, is arguably an independent contractor working for a principal.

However, if an UberX driver were able to demonstrate any variation in these indicia, by producing evidence used in legal determinations for taxation purposes, or unfair dismissal laws or any other evidence that point to an element of control exerted over the driver's ability to earn an income, has the potential to change the categorisation of the work relationship to that of employer/employee.

Even when a worker is found to be an independent contractor in the NSW scheme, they could still be found to be a deemed worker. Whilst there are a number of criteria to ascertain whether an independent contractor qualifies as a 'deemed worker' one key aspect is whether they are regularly carrying out an incidental business in their own name or under a business or firm name.

Arguably, UberX drivers may be considered a 'deemed worker' if they appear to work only through Uber, have to meet criteria to qualify for work with Uber, use Uber signage on their vehicle when driving or any other evidence of exclusivity of service to Uber.

Variations in employment arrangements may be sufficient to change the nature of the work relationship. NSW WorkCover offers private rulings to determine the status of workers for workers compensation purposes.¹ The criteria considered in the case studies include whether the person:

- is a sole trader;
- has a registered business name;
- advertises his/her services;
- employs others to assist with the work provided;
- sub-contracts any of the work to another party;
- works for anyone else;
- is paid sequentially or not, for over a long period of time or not, for the services
- is paid based on a rate set by the company;
- uses his/her own vehicle and whether that vehicle is insured on a commercial or private basis;
- is required to wear a company uniform or use a company logo;

¹ NSW Government – WorkCover – Case Studies - <http://www.workcover.nsw.gov.au/insurance/workers-compensation-insurance-for-your-business/who-to-insure/workers-status-service>



- is covered by agreement under the company's public liability policy in certain circumstances;
- holds his/her own personal injury insurance cover;
- sets his/her own work practices and hours but needs to complete the services on an allocated day; and
- charges for GST.²

Uber has launched a legal challenge in the Federal Court of Australia seeking to overturn the Australian Tax Office (ATO) guidance that drivers providing 'ride-sourcing' services are required to register for GST.³ If Uber were to be successful, it may have flow on implications for workers compensation. Specifically, it may be a relevant consideration in respect to a legal determination as to whether an injured 'ride-sourcing' driver is a worker.

Work, health and safety and workers compensation (transcript page 37)

Mr RYAN PARK: You might also like to take this question on notice. In your submission you have talked about the need for the Government to create certainty around work, health and safety and the workers compensation arrangement in point to point transport. I am interested in how that uncertainty exists, but probably more importantly for the Committee, what would you recommend as a way to try and create that certainty? This is not the first time this issue has been mentioned by various stakeholders who have given evidence to this Committee.

Suncorp Response

In respect to the model work, health and safety (WHS) laws, these have been adopted in all Australian jurisdictions, except for Victoria⁴ and Western Australia⁵ where reviews are still to be completed.

There is a fairly consistent approach in monitoring the taxi and hire car industries across Australia through accreditation and registration processes which include criminal, driving and medical history checks. Vehicles must pass roadworthy inspections and taxis must be fitted with duress alarms, cameras, and GPS locators. Many states require taxi network companies to maintain trip records.

Ride-sharing has been legalised in the ACT and NSW, with SA and WA to follow. Most of the relevant safety regulations are being consistently extended to the ride-sharing industry but the principle of competitive neutrality does need to be considered.

² NSW Government – WorkCover – Case Studies - <http://www.workcover.nsw.gov.au/insurance/workers-compensation-insurance-for-your-business/who-to-insure/workers-status-service>

³ Australian Taxation Office - *Providing taxi travel services through ride-sourcing and your tax obligations* - <https://www.ato.gov.au/Business/GST/In-detail/Managing-GST-in-your-business/General-guides/Providing-taxi-travel-services-through-ride-sourcing-and-your-tax-obligations/>

⁴ WorkSafe Victoria - National harmonisation of work health and safety laws - <http://www.worksafe.vic.gov.au/laws-and-regulations/occupational-health-and-safety/national-work-health-and-safety-reform>

⁵ Government of Western Australia, Department of Commerce - *Update on Work Health and Safety laws consultation* - <https://www.commerce.wa.gov.au/worksafe/update-work-health-and-safety-laws-consultation>



It is noted that in NSW, Chapter 6, *Industrial Relations Act* 1996 applies to the taxi industry but does not apply to the hire car industry⁶ or the ride-sharing industry. Chapter 6 establishes a system of award-style regulation into the industry.

Similar provisions apparently do not exist outside of the Sydney Metropolitan Transport District or outside of NSW. Arguably this situation infringes the principle of competitive neutrality between point to point transport service providers and this needs to be considered.

In any event, Suncorp recommends that Regulators monitor the emerging safety record of ride-sharing services and adjust the regulations as required.

In respect to workers compensation laws, whether UberX drivers would be considered independent contractors will not always be certain. Every case would come down to the individual circumstances of each driver, after considering the relevant criteria that go to the nature of the work relationship between the parties.

As stated previously, the ATO considers Uber drivers to be independent contractors and has issued Guidelines stating they must be registered for GST. Uber Australia is challenging these Guidelines. Arguments used in this challenge may have an impact on legal determinations as to whether an UberX driver is a worker under workers compensation law.

We believe that the Fair Work Commission decision (reference in our submission on page 5) which found a taxi driver, who is not the taxi plate owner (similar characterisation to a bailee in a bailment arrangement) to be an employee for the purposes of unfair dismissal laws, notwithstanding the driver is an independent contractor for tax purposes is consistent with the intention of the application of the *Road Transport (Public Passenger Services) (Taxi Industry Innovation) Amendment Act 2015* in the ACT, which will commence on 1 November 2016.

Uber Australia retains the right to remove individual drivers from its digital platform. There is no visibility, oversight or apparent right of appeal in respect of these decisions. Regulatory oversight may be required. Exercising that right may give rise to challenges under unfair dismissal laws.

In unpacking the work relationship between Uber Australia and its drivers to determine if an employment relationship exists under workers compensation laws, the level of control Uber exerts on its driver's would be considered.

Any evidence that Uber is committing its drivers to an exclusivity clause may point to an employment relationship. Evidence that Uber does not permit cross-promoting of rival ride sharing platforms during a fare paying service, may muddy the debate and point to an employment relationship.⁷ Ultimately an assessment of the level of control exerted by Uber would need to be considered on a case by case basis.

If Uber is found to be an employer under workers compensation laws, a claim would need to be lodged against the Nominal Defendant with potential recovery against Uber directly. A penalty would also apply for failing to have a policy of insurance in place.⁸

⁶ *Point to Point Transport (Taxis & Hire Vehicles) Act, 2016; Schedule 7.*

⁷ Uber cracks down on drivers using GoCatch, 18 May 2016 - <http://www.news.com.au/finance/business/travel/uber-cracks-down-on-drivers-using-gocatch/news-story/77f24d95ac6e06d44a74cd86da97148a>

⁸ *Workers Compensation Act* 1987, Section 155



As stated in our submission, UberX drivers have challenged the work relationship in the USA, but currently there are no legal determinations. In the event that the work relationship between Uber and its drivers is challenged in Australia, whatever the final determination is, the impact of that decision needs to be considered in light of:

- competitive neutrality principles as they apply to the taxi and other transport industries;
- competitive neutrality principles as they apply to other industries where there is an increasing casualisation of the workforce (construction industry, disability services under NDIS, other service industries impacted by digital disruption);
- fair and consistent eligibility rules to access personal injury statutory schemes;
- the financial impact upon personal injury statutory schemes, without reform on scheme design; and
- reporting of accidents whether they be work or motor vehicle accidents to identify emerging risks.

Suncorp prefers a consistent approach in insurance outcomes for drivers in point to point transport industry and the workforce more broadly as digital disruption, automation and the way business will be conducted in the future redefine employment arrangements. Greater certainty in understanding the nature of the work relationship is preferred.

If workers compensation insurance cover is not available, it is important to understand when CTP cover is available for those who are injured as a result of a motor vehicle accident. In NSW, CTP covers the first \$5,000 on a no-fault basis. If a person suffers catastrophic injuries, they would be entitled to care and support under the Lifetime Care Scheme on a no-fault basis. The cover for the at-fault driver does not extend beyond these circumstances.

The situation as it currently stands in NSW is an injured UberX driver would not be covered, if he/she is held at fault for the accident. This is because the NSW CTP scheme is currently a fault-based scheme, as are CTP schemes in WA, SA, QLD and the ACT. NSW is looking to introduce a no-fault, defined benefits scheme, which will effectively act as a safety net for injured drivers, in these circumstances.

In respect to insurances generally, Uber's Australian driver agreement requires that drivers hold CTP insurance and third party property damage insurance. Uber states it holds liability insurance cover up to \$20 million for every UberX trip covering third party bodily injury and property damage.

There does not appear to be a publicly available product disclosure statement for the coverage, but Uber reportedly states that the policy covers drivers during an UberX trip in the event that the driver's own insurance has been exhausted or is not valid.⁹ It is unclear if the policy would cover an at-fault injured Uber driver.

The gap as we see it, is protection for the driver when they are injured in the course of engaging in an Uber trip and they are involved in an "at-fault" accident.

⁹ Grattan Institute - *Peer-to-peer pressure, Policy for the Sharing Economy*, Jim Minifie, April 2016 at page 16 - http://apo.org.au/files/Resource/j_minifie_grattan_peer_to_peer_pressure_report_2016.pdf



There are a number of options to address this:

- Option 1 - providing first party, no-fault, defined benefits CTP coverage. This is not going to happen quickly in QLD, ACT, SA and WA, even if NSW is considering adopting this approach.
- Option 2 - drivers to incorporate and take out workers compensation coverage – this option creates competitive neutrality (as well as increased premium pool). However, it does increase the cost for drivers and is likely to be resisted by Uber and its drivers. There may be practical barriers in legislating for this requirement and the amended ACT legislation does not require this.
- Option 3 - personal accident coverage to be mandated and verified by the Transport Booking Service (TBS), including Uber.

If competitive neutrality is the driving principle, option 2 would be preferable. If ensuring all drivers who engage with a TBS are covered for medical expenses and income support, option 3 would be the easiest path, where the current CTP scheme is a fault-based scheme.

Additional Question

If a taxi operator bails a cab to a driver, and the operator has workers compensation insurance and liability insurance – does this insurance provide cover to drivers who, while bailing the cab, also take on jobs through a ridesharing app? Please explain your determination.

Suncorp Response

It is unclear if workers compensation coverage would extend to bailee drivers who, while bailing the cab, also take on jobs through a ride-sharing app. This is a matter that would require legal assessment of the facts of the case and may require a legal determination. A starting point is whether a bailee under a bailment agreement is able to accept jobs through another TBS, such as Uber, and the flow on impacts for workers compensation insurance.

This is an example where legal uncertainty would arise. With digital disruption and automation redefining employment arrangements more broadly, increasing uncertainties are likely to emerge in respect to workers compensation. Creating greater certainty would avoid burdening personal injury statutory schemes with lengthy and expensive legal challenges and reduce the risk of divergent legal precedents being set in each Australian jurisdiction.



Conclusion

Suncorp trusts the responses assist the Committee members. Ensuring insurance arrangements provide consistent outcomes for Australians nationally, is a matter of interest for Suncorp in supporting its customers in protecting their wealth and wellbeing. Changing employment arrangements will continue to challenge current personal accident statutory schemes, especially as digital disruption and automation becomes more widespread.

Suncorp is happy to collaborate with the relevant stakeholders to develop the regulatory environment for WHS laws and workers compensation insurance for the point to point transport services industry.



Yours faithfully



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