

**Submission
No 1**

WORKPLACE ARRANGEMENTS IN THE POINT TO POINT TRANSPORT INDUSTRY

Organisation: Suncorp Group
Name: Mr Chris McHugh
Position: Executive General Manager - Personal Injury Portfolio and
Products Insurance
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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 refer to the *Inquiry into Workplace Arrangements in the Point to Point Transport Industry*. Suncorp welcomes the opportunity to contribute to the discussion in respect to workplace arrangements within the point to point transport services industry.

Executive Summary

Suncorp supports a simplified and flexible regulatory environment that appropriately covers all forms of point to point transport services, including all new and emerging ride-sharing¹ business platforms. This includes a regulatory environment based on the principle of competitive neutrality.

The application of the work, health and safety laws and workers compensation arrangements requires specific consideration of a number of issues. These include:

1. **Work, Health and Safety Laws** – most Australian jurisdictions have adopted the *Model Work Health and Safety (WHS) Act* (with the exception of Victoria² and Western Australia³). Obligations under the WHS Act is not just confined to employers—it applies to a person conducting a business or undertaking and they have an obligation to ensure the relevant safety policies and procedures are in place and adhered to.⁴
2. **Workers Compensation** – Uber does not consider its registered drivers are employees.⁵ Arguably drivers in New South Wales (NSW) may be found to be a worker depending on the terms of the contract

¹ Point to Point Transport Services is a term interpreted widely in this submission to include taxis, hired vehicle and most forms of ride-sharing services. Ride-sharing and ride-sourcing terms are used interchangeably.

² 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>

³ 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>

⁴ Penny Stevens, Partner Sparke Helmore Lawyers - Can't ignore the sharing economy, 22 February 2016 - <http://www.sparke.com.au/insights/cant-ignore-the-sharing-economy/?sstat=938561>

⁵ Sydney Morning Herald – *Taxi rival Uber admits it's not a top employer, because its drivers aren't employees*, 10 August 2015 - <http://www.smh.com.au/business/workplace-relations/taxi-rival-uber-admits-its-not-a-top-employer-because-its-drivers-arent-employees-20150810-qivggm.html>



of service or deemed worker depending on the working arrangements between the parties. The issue has not been tested in Australia. Certainty on this issue is necessary to avoid burdening the workers compensation scheme with lengthy and expensive legal challenges. If an UberX driver is found to be a worker, an assessment of the financial impact upon the workers compensation scheme would be required. Further, insurers' treatment of input tax credits when processing claims would need to be considered. In any event, a safety net through a no-fault CTP scheme should be in place to capture UberX drivers not considered to be workers.

3. **Workers Compensation Industry coding** – in the event workers compensation insurance is mandatory for owners and/or drivers of point to point transport services, an industry based premium rating system should be applied consistently across Australia. In NSW, Suncorp suggests the point to point transport services industry be aligned with the taxi industry.
4. **Goods and Service Tax (GST) arrangements** – the Australian Tax Office (ATO) has issued Guidelines stating that UberX drivers are considered to be independent contractors providing travel services (as defined) and therefore must register for GST.⁶ The Guidelines are being legally challenged.⁷ It is important to have the matter settled, as any arguments used in that challenge may impact upon insurance operations, specifically legal determinations as to whether an UberX driver is a worker.
5. **A national approach** – Given the national reach of point to point transport services platforms, the regulatory settings should be nationally consistent. A national approach with respect to insurance arrangements, especially those arrangements that go to driver 'remuneration and conditions' is appropriate.

The Suncorp Group

Suncorp Group includes leading general insurance, banking, life insurance and superannuation brands in Australia and New Zealand. The Group has about 14,500 employees and relationships with nine million customers. Suncorp Group Limited is a top 20 ASX-listed company with \$96 billion in assets.

The Group aims to create engaging and simple propositions that focus on meeting customer needs and enabling them to manage their financial journey seamlessly, across their choice of channels and brands. Suncorp Group is led by our Customer Experience and Customer Platform functions which use data, insights and forward looking analytics to inform product innovation and create dynamic and interactive platforms.

Integral to meeting customer needs are three operational business units:

- Banking & Wealth
- Insurance Australia
- Insurance New Zealand

⁶ 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/>

⁷ AFR - *Uber versus the Tax Office: a collision is imminent*, 16 August 2015 - <http://www.afr.com/opinion/uber-versus-the-tax-office-a-collision-is-imminent-20150816-qj02sw>



These are supported by corporate shared services divisions. The Group's goal is to create value for our customers through our portfolio of market-leading brands while benefiting from the efficiencies of scale achievable as a large organisation.

The key to Suncorp's success in insurance is its portfolio of well-known insurance brands - AAMI, GIO, Suncorp, Vero, Apia and Shannons are some of the brands in the Suncorp Group that have built reputations for insurance innovation and customer service.

This submission is made on behalf of Suncorp's Personal Injury Portfolio and Products division.

The Regulatory Environment for Point to Point Transport Services

The popularity of ride-sharing services has been increasing,⁸ and this is likely to continue. In addition to business platforms, such as Uber, GoCatch and RideBoom, there is anecdotal evidence that private citizens are advertising their private vehicles in their local community on a self-drive hire basis.

The platforms highlight the inability of existing regulatory framework to adapt to a changing environment. The application of compulsory third party insurance, motor vehicle property insurance, work, health and safety laws, and workers compensation laws are an important part of the remuneration and conditions of owners and/or drivers of point to point transport services.

Suncorp supports a simplified and flexible regulatory environment for point to point transport services to allow the industry to innovate in accordance with consumer demands. With respect to insurance arrangements, Suncorp recommends the Government consider creating certainty as to when and how the WHS laws and workers compensation insurance would apply to owners and drivers within the point to point transport services industry. To do so, would avoid lengthy and expensive legal challenges and reduce the risk of divergent legal precedents being set in each Australian jurisdiction.

Workers Compensation Insurance

Whilst Uber Australia has liability insurance cover up to \$20 million for every UberX trip (covering third party bodily injury and property damage) and, drivers have their own insurance cover,⁹ there are no workers compensation arrangements in place.

Uber drivers have challenged the work relationship in the USA. One of the claims has been settled out of court. A full determination on the issue is yet to be made,¹⁰ and Uber's case has recently been made more complicated, where an UberX driver was considered to be a worker for the purposes of claiming unemployment benefits.¹¹

⁸ Sydney Morning Herald - *Taxi rival Uber admits it's not a top employer, because its drivers aren't employees*, 10 August 2015 – reports 1,000,000 + Uber X ridesharing trips in NSW in its first year - <http://www.smh.com.au/business/workplace-relations/taxi-rival-uber-admits-its-not-a-top-employer-because-its-drivers-arent-employees-20150810-givggm.html>

⁹ Penny Stevens, Partner Sparke Helmore Lawyers - *Can't ignore the sharing economy*, 22 February 2016 - <http://www.sparke.com.au/insights/cant-ignore-the-sharing-economy/?sstat=938561>

¹⁰ Reuters - *Uber drivers remain independent contractors as lawsuit settled* - <http://www.reuters.com/article/us-uber-tech-drivers-settlement-idUSKCN0XJ07H>

¹¹ Fortune - *Uber's Employment Fight Just Got More Complicated*, 4 March 2016 - <http://fortune.com/2016/03/04/uber-driver-unemployment/>



Within Australia, complicating the issue is the differing workers compensation arrangements across the nation for these types of work relationships, which would benefit from a harmonised approach. Certainly on this issue is preferred.

To consider if workers compensation coverage is available to those who provide point to point transport services, a number of factors need to be considered.

The categorisation of the parties to the contract

There is ample workers compensation case law on this issue.¹² If an UberX driver makes a claim on Uber, it needs to be determined whether the person entered into a contract of service with particular focus on the entities of the contract. If the contract is between the UberX driver and Uber, it is possible the UberX driver may be found to be either a worker or a “deemed worker” in which case workers compensation coverage would be extended.

Uber does not consider itself to be an ‘employer’ and does not hold a policy of workers compensation insurance for its drivers. If an UberX driver were found to be a worker, a claim would then need to be lodged against the Nominal Insurer with potential recovery against Uber directly. A penalty would also apply for failing to have a policy of insurance in place.¹³

If the contract is a commercial contract and the parties are both companies, it is possible the UberX driver is not a worker or a deemed worker and workers compensation coverage would not be extended. The UberX driver would have to rely on his/her own insurance arrangements. To protect himself/herself, the self-employed driving contractor may opt to take a policy of workers compensation insurance or other forms of insurance such as an income protection, accident and/or disability insurance.

Type of contract between the parties

Determining whether the UberX driver has a contract of service or a contract for service is crucial. 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.

Arguably, the indicia may indicate that the UberX driver would not be considered a worker involved in a contract of service but rather an independent contractor working for a principal, particularly if the driver sets his/her own

¹² *Sarac v Itxcel Pty Ltd* [2015] NSWCCPD 32 (1 June 2015) - <http://www.austlii.edu.au/au/cases/nsw/NSWCCPD/2015/32.html>

¹³ *Workers Compensation Act* 1987, Section 155



hours and days and 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.

When a worker is found to be an independent contractor in the NSW scheme, they can still be found to be a deemed worker.¹⁴ Whilst there is 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, this would point to UberX drivers being considered a 'deemed worker' if they appear to work only through Uber, have to meet criteria to qualify for work with Uber and use Uber signage on their vehicle when driving.

In considering these issues, the NSW Workers Compensation laws are generally interpreted beneficially in favour of an injured person. If enough of the indicia support an argument for being a worker, it is likely they will find that this is the case, particularly if the person is uninsured.

Complicating the issue, is the Australian Tax Office (ATO) treatment of GST for UberX drivers (considered further below), and an unfair dismissal case, where the Fair Work Commission decided that although a taxi driver (similar characterisation as a ride-share driver) is an independent contractor for tax purposes, the driver was found to be an employee for the purposes of unfair dismissal laws.¹⁵

Is workers compensation coverage extended to illegal activities?

This is a grey area that no longer applies in NSW,¹⁶ now that ride-sharing services are legalised. However, it may be an issue in jurisdictions, where these services are not legalised. It is an area that requires greater certainty for those jurisdictions.

The Australian Capital Territory (ACT) approach

The ACT Government has passed laws legalising ride-sharing services,¹⁷ but the provisions are not expected to commence until 2 August 2016. The laws will attempt to extend the ACT workers' compensation regime to some ride-sharing drivers, potentially setting a precedent in Australia.¹⁸

Currently, under ACT workers compensation law, an independent contractor may be entitled to benefits if their engagement is on a 'regular or systemic' basis. The new laws propose to remove this requirement and replace it with another requirement. Specifically, it will require the driver be engaged under a contract that is 'prescribed by regulation.'

This is an important condition. It means their occupation will need to be specified in a regulation approved by the ACT Legislature before the 'regular and systematic' threshold will be completely removed. The ACT Government is yet to clarify the regulations. However, the explanatory statement specifically states –

¹⁴ *Motor Accidents Compensation Act 1999* – Schedule 1, Clause 2

¹⁵ Fouslam & Geddes Lawyers - Are Uber drivers independent contractors or employees – the Australian approach - <http://www.fglaw.com.au/are-uber-drivers-employees/>

¹⁶ Department of Roads & Maritime - *A new transport economy: consumer choice, competition and downward pressure on fares*, 17 December 2015 - <http://www.rms.nsw.gov.au/about/news-events/news/ministerial/2015/151217-ride-sharing.html>

¹⁷ Road Transport (Public Passenger Services) (Taxi Industry Innovation) Amendment Act 2015 (ACT)

¹⁸ Hall & Wilcox - *Uber drivers one step closer to workers' compensation entitlements* - <http://www.lexology.com/library/detail.aspx?q=e22550e1-b3f0-44de-8c58-41b479a9f3d8>



The Government intends that regulations provide for bookable vehicle (taxi, hire car or rideshare) drivers operating under bailment agreements to be considered workers for workers' compensation purposes.

And

Further, drivers under affiliated driver agreements (between a transport booking services and driver) that limit a driver's ability to use multiple transport booking services would also be considered workers for workers' compensation purposes.¹⁹

Accordingly, it is not expected that the regulations will capture ride-sharing drivers who use their own personal vehicle, as employees of a Transport Booking Service (TBS) such as Uber, under the new law, unless the driver commits to an exclusivity clause. It is unlikely that a TBS would request a driver to enter into an exclusivity clause, or to drive a car with their signage, as this would give rise to an argument that, even as independent contractors, the drivers in such arrangements could potentially meet the "deemed employee" requirements.

Based on the explanatory statement, the regulations will attempt to capture drivers who are operating another person's vehicle as being an employee of that other person, and not as an employee of the TBS. Unless they meet the deemed employee indicia, individual owner drivers will be considered sole traders under the ACT workers compensation laws. They would therefore be required to take out Personal Accident and Injury coverage in order to obtain any benefits, in the event that they are injured in the course of undertaking work as a contractor for a TBS. The alternative would be to incorporate as a company and operate as a working director.

Workers Compensation Industry coding

In NSW, the industry based premium rating system for workers' compensation insurance is based on the WorkCover Industry Code (WIC) coding system. This coding system is used to identify groups of businesses that engage in similar economic activities for the purposes of attaching an appropriate premium, based on the risk profile of that industry.

If Uber or UberX drivers are obliged to hold worker compensation insurance, the industry needs to be aligned to an appropriate WIC code so that the correct premium is applied. Suncorp suggests the ride-sharing industry be aligned with the taxi industry. A nationally consistent approach to industry based premium rating for point to point transport services is preferred.

Goods and Services Tax (GST)

The ATO has issued guidance that resulted in drivers providing 'ride-sourcing' services being required to register for GST from 1 August 2015.²⁰ It is important to state the legal requirements in respect to GST.

¹⁹ Road Transport (Public Passenger Services) (Taxi Industry Innovation) Amendment Bill 2015 (ACT) - Explanatory Statement - http://www.legislation.act.gov.au/es/db_52959/20151029-62218/pdf/db_52959.pdf

²⁰ 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/>



An entity can voluntarily register for GST if it carries on an enterprise. However, an entity must register for GST if its turnover exceeds the 'GST registration turnover threshold,' which is currently AU\$75,000 or AU\$150,000 for non-profit organisations.²¹

Section 144.5 of the *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act) provides an exception to this rule for entities that provide 'taxi travel' and states that, regardless of GST turnover:

You are required to be registered if, in carrying on your enterprise, you supply taxi travel.

Relevantly, the term 'taxi travel' is defined for GST purposes to mean:

travel that involves transporting passengers, by taxi or limousine, for fares.

The ATO has formed the view that drivers providing point to point transport services supply 'taxi travel' services in accordance with the GST Act. Whilst the ATO acknowledges that 'ride-sourcing' service providers may not necessarily meet State and Territory definitions of a 'taxi', it nonetheless falls within the scope of 'taxi travel' for GST purposes. Relevantly, in these circumstances, the ATO considers 'ride-sourcing' drivers to be independent contractors.

Uber has launched a legal challenge in the Federal Court of Australia seeking to overturn the ATO's Guidelines.²² If Uber were to be successful, it may have flow on implications upon insurance operations. Specifically, it may be a relevant consideration in respect to a legal determination as to whether an injured 'ride-sourcing' driver is a worker.

Even if the legal challenge proves unsuccessful, an UberX driver may be considered a worker for the purposes of unfair dismissal laws with potential flow on implications upon insurance operations.

Conclusion

Suncorp supports a regulatory environment that is simple and flexible, which also promotes healthy competition of safe point to point transport services. The regulatory environment must be able to accommodate emerging business platforms, developed as a result of new technologies that have the capacity to respond to changing customer demands.

Suncorp believes in the creation of a safety net for injuries arising from accidents for workers or motorists, through the establishment of no-fault statutory schemes, particularly if an UberX driver is considered an independent contractor. The safety net should be harmonised nationally, efficient and complement work conditions of owners and/or drivers within the point to point transport industry.

In respect to WHS and workers compensation laws, it is unclear to what extent these laws will impinge upon owners and/or drivers of point to point transport services 'remuneration and work conditions.' Complicating the issue, is the treatment of ride-sharing drivers for the purposes of workers compensation arrangements and unfair dismissal laws.

²¹ Australian Taxation Office – *How GST works* - <https://www.ato.gov.au/Business/GST/How-GST-works/>

²² ABC News - *Uber launches legal challenge to overturn ATO's directive that obliges to pay GST*, 1 August 2015 - <http://www.abc.net.au/news/2015-07-31/uber-launches-legal-challenge-to-overturn-atos-directive/6664234>



Resolution of the treatment of GST for ride-sharing services may assist. In any event it is preferable that there is clarity to avoid burdening the workers compensation scheme with lengthy and expensive legal challenges and reduce the risk of divergent legal precedents being set across Australia. If an UberX driver is found to be a worker, an assessment of the financial impact upon the workers compensation scheme would be required. Further, insurers' treatment of input tax credits when processing claims would need to be considered.

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Yours faithfully

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Chris McHugh
Executive General Manager
Personal Injury Portfolio & Products
Insurance