Questions on Notice – The Hon Daniel Mookhey

Background information

"Bailees and bailors in the Taxi Industry within the Metropolitan Transport District are not covered by the National Workplace Relations System and the Fair Work Act 2009 and still remain within the NSW Industrial Relations System governed by the provisions of the Taxi Industry (Contract Drivers) Contract Determination, 1984.

Schedule 1 of the Contract Determination prescribes two methods of payment being Commission and Set Pay- in with the method of payment to be determined by the bailee.

Contract Determination
The Contract Determination provides for permanent and casual engagement:

- *Permanent: Regularly takes a taxicab on bailment from the same bailor for five shifts per week or at least 220-night shifts per year. A permanent bailee is entitled to paid annual leave, sick leave and long service leave.*
- *Casual: Is a bailee not being permanent and with no entitlement to any paid leave.*
- *Termination: For permanent bailees one weeks' notice by either party is required. No notice is required for a casual bailee."*

The Bailee – Bailor arrangement creates a relationship between where the driver (the bailee) is an employee of the bailor (taxi operator) resulting in the bailor is responsible to take out worker's compensation insurance.

Under ride share, the arrangement is between the ride share platform and the driver where the driver agrees to have a certain percentage deducted off the price. Both Lyft and Uber have successfully contested in California that that their drivers are not employees.

The Australian Fair Work Ombudsman has concluded Uber drivers are independent contractors. The FWO added the legal test requires that an employee is obliged to perform work when this is demanded by the employer and the explanation was Uber Australia drivers have control over whether, when, and for how long they perform work, on any given day or on any given week.

Uber drivers are not subject to any formal obligation to perform work, there can be no employment relationship. As a result, the FWO will not proceed with any compliance action against Uber.

On the other hand, The Point to Point Transport Act, while acknowledging the existence of a bailee/bailor arrangement, places the responsibility of the Authorised Service Provider to have in place a safety management system that Provider requires the driver to comply.

The Income Taxation Act, furthermore, requires all taxi drivers to register for the Goods and Services Tax (GST). For the purposes of that Act, it would seem to me that the ATO deems taxi drivers and their taxi operators to be separate business entities, by virtue of the taxi operator and the taxi driver having a separate and unique Australian Business Number.

It is rather confusing, as you will no doubt agree, that there are no specific industrial laws that govern the minimum pay of a taxi driver, yet there are other laws that impose the heavy cost burden on the taxi operator to provide for a uniform, long service and annual leave including workers' compensation insurance.

The only time that Drivers will only claim long service and annual leave entitlement from the taxi operator if there is long term relationship is severed because of an estrangement in that relationship.

The taxi industry, for some time, has witnessed a drivers' pool shortage where taxi operators, desperate to have their taxi cabs on the road, are reporting cases where drivers are accumulating significant debts then walking away from the their operator because of the lack of fares to cover their daily shift pay ins.

In my years in the Industry, I have heard a few drivers claiming that they do not make enough money and that their hourly rate is below the minimum wage. The claims do not t

The solution, in my opinion, is to get rid of the bailment arrangement and in its place an agreement that is not dissimilar to a courier or truck driver who after a pay in for the taxi cab earns a sliding percentage commission of all the taxi fares taken taken in a shift.

Geoff Wong