

**INQUIRY INTO IMPACT OF TECHNOLOGICAL AND  
OTHER CHANGE ON THE FUTURE OF WORK AND  
WORKERS IN NEW SOUTH WALES**

**Organisation:** Rideshare Drivers Association of Australia

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**Rideshare Drivers Association of Australia (RSDAA)**  
[www.rsdAA.org.au](http://www.rsdAA.org.au)

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Submitted October 2020 by RSDAA President on behalf of RSDAA 2020 Committee

The Rideshare Drivers Association of Australia is the key independent representative body for Rideshare drivers across Australia. Our members are rideshare drivers and those who operate independent point to point businesses.

RSDAA advocate for fair Point to Point Transport legislation and aim to provide policy makers with a balanced and reasoned view from a small business perspective whilst advocating for improved conditions for drivers throughout Australia.

The Rideshare Drivers Association of Australia (RSDAA) was incorporated in 2016 this Submission has been written with the assistance of our Law & Policy Officer, Laurence Heywood, who previous to completing his Law degree, worked in the transport sector for 30 years.

The Rideshare Drivers Association of Australia appreciates the opportunity and would like to contribute to the current Inquiry and is willing do also do so by personal attendance if required.

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## **INTRODUCTION : THE ON-DEMAND ECONOMY & RIDESHARING**

One of the defining characteristics of the Australian approach to working conditions has been “a fair go all round”. This distinctively Australian perspective should be extended to the rapidly developing on-demand economy.

The market expansion strategy in NSW, introduced by large corporations such as Uber, relied on an ambitious effort to undercut the prices previously charged by conventional taxis and hire cars. This was the key reason the new services proved to be popular with customers.

When the advanced technology behind rideshare services was introduced to NSW in 2014, new rideshare operators were able to bypass industry and workplace regulations to achieve unprecedented prices to consumers. This was due to naïve early participants failing to grasp the full extent of hidden operational costs to both drivers and operators. The unprecedented prices to consumers was the driving factor that drove the rapid expansion of the revolutionary rideshare industry, primarily at the expense of the taxi and hire car industries as revenues collapsed.

A lower price to consumers, was mostly made possible by forgoing various protections, conditions and benefits intended for drivers under the previous traditional regulatory regimes. Low remuneration to drivers is clearly a key factor that has enabled rideshare platforms to significantly undercut Taxis and hire cars and aggressively expand the rideshare market share.

On-demand work does offer flexible working arrangements for NSW Point to Point drivers with complete flexibility of working hours and this is the main attraction to drivers. There are no provisions for superannuation, income protection insurance, workers compensation, sick leave or annual leave. In fact, rideshare drivers weekly remuneration is not enough to cover barely any basic provisions.

To be profitable, drivers must work during peak/busiest times on a daily basis including weekends to be within the minimum wage level, so it can hardly be said that drivers have wholly flexible working arrangements. Drivers often set their own weekly earning targets which leads to excessive driving hours and driver fatigue.

The question now lies as to whether the nature of this technology advancement has in fact, improved the lives of drivers working in the On-Demand economy or has it become an extension of drivers now being exposed to exploitation as over 100,000 Australian rideshare drivers now struggle to make ends meet without any basic protections in place.

It is the year 2020 and exploitation is prevalent due to the low incomes of rideshare drivers, taxi drivers and private hire car drivers, it has increased as the profitable business models of technology advance.

During the current Covid-19 pandemic, the above-mentioned drivers have been at the front line, keeping communities going, by providing essential transport to those who continue to move around. Yet these workers are classified as independent contractors so Operators do not have to provide them with basic protections or any benefits, including the minimum wage, that all hardworking Australians should be entitled to.

In Part 1 of this submission, we consider the competitive advantages accruing to on-demand rideshare platforms and directly relate these to the various ways in which the platforms have bypassed traditional workplace protections, conditions and benefits.

In Part 2, we examine the legal status of rideshare drivers, presenting an account of what is publicised and explained at induction; we set out those parts of typical written platform agreement that seem to have a bearing on the legal status of drivers; finally we present an analysis of what actual operations, practices and arrangements indicate about the actual nature of drivers' legal status. We conclude that the correct view, supported by the facts, is that drivers are contractors to the rideshare platforms.

In Part 3, we briefly describe any regulatory authorities that may be relevant or useful to rideshare drivers in dispute with a rideshare platform.

In Part 4, we examine the obstacles and legal difficulties in making use of the leading legislative tools for the protection of working Australians.

In Part 5, we recapitulate the main ideas and conclusions from each section, and conclude that entrepreneurial reorganisations that leave the underlying tasks much the same are not necessarily genuine innovations at all. If their net effect and purpose is simply to bypass modes of regulation thought fit by society, then they are merely anti-social. Legislators need to embark on an aggressive program of 'deeming', forcing the categorisation of work in ways we can readily regulate.

## **PART 1 RIDESHARING PLATFORMS & THEIR COMPETITIVE EDGE**

Breaking open traditional monopolies, ridesharing platforms in fact derive a large part of their competitive edge simply from bypassing traditional workplace protections and rights.

When ridesharing services first broke into the market, publicity was focussed on the effect of breaking State-regulated monopolies in the provision of taxi services in Australia. There was indeed a great shakeup. Several features of ridesharing operations as they were introduced gave it an instant competitive advantage over the traditional solutions. It was heralded as cheaper for consumers, bookings were said to be more reliably serviced, and all payment was handled online. Other features which captured attention were the provision of rating systems by which consumers could rate their transport experience, and consumers could track the car that was to pick them up on their mobile phone screens.

Less publicity, if any, was given to the fact that rideshare platforms were not only bypassing traditional industry regulation, but they were also by-passing traditional workplace regulation. Some of the marketing advantages accruing to consumers, and to the platforms themselves, arose from the latter rather than the former. A lower price to consumers, in large part made possible by forgoing various protections, conditions and benefits intended for drivers under the traditional regulatory regime is the most obvious advantage, but others too derive from deprecating the rights of drivers. The most important deprecations of drivers rights supporting these marketing advantages are explained here:

### **1.1 Withholding Destinations**

Improved reliability in response to rideshare bookings is achieved by withholding destination information from drivers. In most parts of Australia, taxi drivers are informed of destinations of requested trips when they are offered to them. Limousine and hire car drivers always know the destination of any trip they make a commitment to undertake. Uniformly, rideshare operators withhold destination information from rideshare drivers. Each rideshare job must be accepted 'blind' by the driver. The perceived advantage of this system to the platform operator is that trips are promptly accepted whatever their direction, size or duration, promoting the image, brand and goodwill of the platform operator.

A consequential trade-off of this system is that drivers are given less discretion, and are less able to plan their own affairs, fitting trips that they do for online rideshare platforms into a schedule that can involve undertaking trips for any booking service they themselves may operate, under the new 'point to point' regulatory regimes that have been introduced around the country. It is common for rideshare and limousine drivers to form informal, supporting networks of drivers to assist with bookings they themselves generate. This competitive effort is necessarily compromised to a great degree when destinations are withheld.

Withholding destinations amounts to an economic burden on drivers. In NSW, the Cole report, commissioned by the NSW government, concluded that taxi drivers, unpaid by the state, or anyone else, should be free to plan and use their time between engagements as they see fit, and recommended that taxi-drivers in NSW be given destination information with bookings they are offered.

## 1.2 Workers Compensation

Under arrangements *ex ante*, taxi operators were required to maintain Workers Compensation insurance to cover drivers who drove their vehicles. This cost is not factored into pricing within the rideshare sector because there is no equivalent requirement. Indeed, the new regulatory regimes partition the landscape in a somewhat different manner: there is no equivalent to the registered taxi operator in the modern point to point regulatory systems. Drivers usually own their own vehicle, while booking operators need not own or operate vehicles at all. One class of driver which may reflect, in the point to point system, the traditional position of bailee taxi-drivers is that class of rideshare drivers who rent a vehicle wholly for driving rideshare. The comparison ends there, however, for those businesses who rent cars for rideshare purposes are not exclusively doing so. The activity is a small sub-section of the car rental business. It can scarcely be said that these rental operators have sufficient connection to actual rideshare work for them to be held accountable, as are taxi-operators, for workers compensation. If anywhere, the responsibility needs to fall on either the booking provider, or onto the driver themselves. In either case, revenue raised from consumers needs to be sufficient to support this. The lower prices rideshare platforms are able to promote and advertise are achieved, to some not insignificant degree, by overlooking this essential worker protections.

## 1.3 Holiday and Sick Leave Allowance.

Though taxi-drivers were never considered to be employees, provision has traditionally been made for them in various State instruments, for holiday pay and sick leave allowance. Taxi-drivers in most jurisdictions are entitled to 4 week annual leave, at a rate prescribed in the instrument, pro-rated for that proportion of 220 shifts per year that the driver completed. The same industrial instruments provided for an entitlement to a period of days sick leave, and a prescribed daily allowance. These benefits and protections have been wholly bypassed by the ridesharing platforms. If they had been implemented, it would certainly have added to the cost of ridesharing to consumers, and make the industry far less dramatically competitive.

It is of interest that the Federal Court of Australia has found that rideshare driving is a species of taxi-driving. Is there any principled reason why rideshare drivers ought not already fall under the protection of State instruments for the protection of workers in that industry? As with workers compensation, however, it is not entirely clear on whom the responsibilities would fall. On whomever they fall, it is clear that allowance needs to be made, and raised from consumers, for the provision of such benefits.

## 1.4 Security Provisions

The State and Territory regulatory regimes that govern the taxi industry across Australia all require that certain steps are taken to assist in ensuring the security of taxi drivers. All taxis are fitted with security camera systems and microphone systems connected by radio to taxi network control rooms. Each car is fitted with an alarm system that activates this equipment and notifies authorities. Taxi networks supported alarm activations with control room monitoring and coordination with authorities.

To some degree, the advent of GPS systems, smartphone technology, dash-cams and the like have obviated some of these security measures. In ridesharing, moreover, each party of consumers usually has at least one member, that person who made the booking, who is fully identified, if not to the driver, then at least to the rideshare platform. This identification ensures higher levels of cooperative conduct and civilised behaviour in rideshare consumers than is all too frequently the case in taxis, particularly at night.

Nevertheless, as it seems to the RSDAA, for various reasons, behavioural problems with rideshare consumers and their travelling party are increasingly prevalent. Physical security remains an issue, and one that is not dealt with at all by any practices or rules governing the ridesharing sector. This too is a source of false savings passed on to consumers or retained by the ridesharing platforms.

1.5 Lower rates of remuneration to rideshare driver than to Taxi Owner-Operator than the minimum wage.

The correct ex ante comparator with rideshare drivers is not obvious. Bailee taxi-drivers do not bear the costs themselves of managing and maintaining the vehicles they drive. Instead, a proportion of their revenue, and in some places in Australia, a fixed amount, is reserved to the taxi operator. On the other hand, the bailee-driver puts in the hours of labour - typically 12 hours per day - for their smaller share. Taxi operators need to meet the costs of car finance, license finance or lease, taxi-network fees and costs, maintenance and repairs, depreciation, comprehensive insurance, workers compensation insurance, driver uniforms, State government fees and levies, and an allowance of profit for their own time and investment.

It is unsurprising that the lion's share of taxi revenue goes to taxi operators. Uber drivers also get a larger proportion of revenue than the rideshare platforms reserve for themselves, but there is no comparison there. Drivers must maintain and insure their own vehicles, pay the costs of finance, allow for depreciation, cover operating costs, and only then provision for superannuation, holidays, and perhaps income protection insurance from any amount they are able to make beyond the costs.

When ridesharing first entered the market in Australia, many early participants drove cars the cost of which had been long forgotten, or written off, as they were originally bought for private use. (Many younger market entrants drove cars actually belonging to their parents.) Vehicular costs, finance and depreciation were not factored into their ad hoc mental equation, and satisfaction and participation rates were correspondingly high. Of course, that approach is unsustainable. The cars used for ridesharing need to be maintained and replaced. The revenue stream must certainly be sufficient to support this, at the very least.

Research conducted by the RSDAA, in consultation with membership across the country strongly confirms the findings of Dr Jim Stanford, Director of the Centre for Future Work, in the paper "Subsidising Billionaires: Simulating the Net Incomes of UberX Drivers in Australia" published by the Centre here. Published in March 2018, the paper presents research using sophisticated modelling to simulate the incomes of the main class of rideshare driver from a leading rideshare platform in cities and regions across Australia. The study finds that the average remuneration, after all operating and capital costs, and GST, for drivers in this class, across all regions, is \$14.62 per hour. Research conducted by the RSDAA, only in recent months, has found that the regional rates of after-cost and GST remuneration upon which this average is based are strongly confirmed. (It is to be noted that rideshare rates to the public across all platforms have remained constant over that time.)

This Australia-wide hourly average falls well below Australia's current minimum wage of \$18.93 per hour ([www.fairwork.gov.au](http://www.fairwork.gov.au)). Australia-wide, drivers in this class receive, on average, 77.2% of the minimum wage. Dr Stanford found the average was only \$12.88 per hour, or 68% of the minimum wage. RSDAA research, conducted on the differing basis of considering a 40 hour working week, tends to strongly confirm these findings. It should be recalled, of course, that average weekly earnings for workers on minimum wages are frequently made higher by shift allowances and penalty rates, none of which are available to rideshare drivers.

Low remuneration to rideshare drivers is clearly a key factor in allowing rideshare platforms to significantly undercut taxis and hire cars and aggressively expand their market share. The depreciations to drivers rights outlined above are meaningfully brought home when it is considered that rideshare drivers would have to make their own provision for superannuation, income protection insurance, and leave from the remuneration they receive after all costs and GST have been deducted.



## 1.6 The Rating System

There is no doubt that the rating system provided by rideshare platforms has strong marketing appeal. It is a tool the internet was ready-made to facilitate. Younger consumers particularly seem to greatly value the chance to provide predominantly negative feedback. There is no doubt that people in the past sometimes felt powerless in the face of an unfortunate experience in taxis. Rating systems allow positive and negative feedback, but the way such systems are used by the platforms means that anything less than a perfect score is a fail for the driver, bringing his average rating down towards a threshold that when crossed will result in the deactivation of his account.

Unfortunately, the vast majority of adverse ratings are not accompanied by useful commentary. Far from being useful feedback, drivers most frequently have no idea why they have been rated poorly. This amounts to pointless punishment, a form of bullying. There is a particular problem at night. Unfortunately, many young people scarcely know how to behave themselves by the light of day. When alcohol is added into the mix at night, many lose restraint in their efforts to recruit their drivers to allow them to drink or smoke in the vehicle, carry too many passengers, go to additional destinations without entering them into the platform's app, pick up or drop in dangerous locations, and any number of other 'favours' or foolish pursuits that occur to youngsters in 'party' mode. It is frequently the case that such young people endeavour to use the rating system to bully drivers into breaking rules for them, holding over them the threat of bad ratings.

While the positive effect of focussing attention on customer service probably cannot be denied, by and large the rating systems predominantly have the effect of facilitating workplace bullying. Inexperienced drivers can go too far in seeking to please their passengers. Any experienced night time taxi-driver will tell you that 'if you give them an inch they will take a mile'. The supine attitude of appeasement that the rating systems induce in some drivers actually promotes danger to them and their property. Unopposed, some persons affected by alcohol cannot restrain themselves from further misbehaviour, pushing the limits and actively seeking the point of conflict. It is not an easy situation to handle, and even experienced drivers can mismanage the situation as it inevitably escalates. In a taxi, it is possible for the driver to 'brook no nonsense' and assert themselves, perhaps by ending the journey then and there, yet even a single admonishing word from a rideshare driver will be enough to get him rewarded with a bad rating.

There is no doubt that the rating systems are used to bully drivers. To date, no steps have been taken by any ridesharing platform to rectify this situation. As they stand, the rating systems actually endanger drivers and their property. They provide a marketing advantage to the rideshare platforms, but at the expense of facilitating a form of workplace bullying that never before existed.

## 1.7 The thin driver advantage of the change to ridesharing: flexible hours

One advantage to rideshare drivers not available to the taxi industry model is complete flexibility in the hours rideshare drivers can work. The costs of taxis and their electronic setup, taxi network fitouts, State government levies and the high cost of leasing a taxi license contributed to making anything other than 24 hour operation untenable. As there was insufficient revenue to support a decent living for three 8 hour shifts, the norm became two shifts of 12 hours, traditionally coordinated at the 3pm changeover. It is, of course, no matter of curiosity that the costs quickly grew to soak up the lion's share of revenue, leaving the driver to do the work and eke out a marginal existence.

In contrast, rideshare drivers can choose their own hours, with the important proviso that the more hours they do, the less is the proportion of fixed costs to the whole of revenue. Car repayments, insurance premia, and calendar-based depreciation require a minimum number of hours to cover. The upshot is that the more hours worked in rideshare, the lower the average cost per hour, and so, the higher the average remuneration. It is calculated by the RSDAA, however, that to approach the hourly minimum wage, rideshare drivers must drive an average of approximately 53 hours. In some regions, there are insufficient hours of work available to reach this threshold.

With this level of commitment required to reduce the hourly cost base sufficiently to bring after-cost and GST remuneration up to somewhere approaching the minimum wage, it can hardly be said drivers have wholly flexible working arrangements. To be profitable, drivers must set aside for work the busiest hours on a daily basis, and work additional hours at other times to make up the hours required

## 2 LEGAL STATUS OF RIDESHARE PLATFORM DRIVERS

### 2.1 What is explained at recruitment

When drivers or consumers register with ridesharing platforms, they are asked to accept the terms and conditions set out in a document of several pages of close typing. The registration interface does not facilitate an easy reading of the document on a mobile phone, requiring each single line to be scrolled horizontally several times before the next can be read, for page after page. It is unsurprising that the RSDAA has not heard of a driver or consumer who actually read the terms and conditions at the point of registration.

The documents are made available for download from the respective rideshare platform websites, but it would seem unlikely that many consumers, apart from those perhaps with some legal interest in the matter, have taken the trouble to do so. Informal polling by RSDAA members indicates that few consumers have any idea of the terms and conditions they accepted upon registration. Unfortunately, the same can be said for drivers. From time to time, the rideshare platforms update the terms of the agreement, changing and tweaking various features, apparently in response to administrative and judicial decisions adverse to their interests in jurisdictions around the world. When such changes are made, the ridesharing platforms typically notify drivers that new terms and conditions are available to download that will, from a specified date, supplant those of the former agreement.

When drivers are inducted, various terminology has been coined and adopted by the rideshare platforms to describe the process. 'Onboarding' is the most prominent, and appears to be used in an effort to avoid the more natural 'recruiting', perhaps to avoid any implication that an employment relationship is being established.

For a significant period the first and most prominent ridesharing platform advertised guaranteed minimum revenue for drivers who joined upon certain conditions being met: driving during peak hours, and in certain areas. The guaranteed minimum was promoted as a tremendous return, but as we have seen, \$30/hour revenue to the driver amounts to a return considerably below minimum wages.

At promotional 'onboarding' sessions, much was made of the upside and the so-called potential to "grow your own business", but nothing was explained of finance costs, depreciation, or the unavoidable necessity of unlawful stopping for pick ups and drop offs. Nothing in the terms and conditions pertaining to the legal arrangements and relationships established was discussed at such session. Beyond vagaries speaking of "running your own business" there was no discussion of legal arrangements and relationships at all.

### 2.2 What the written agreements say

Rideshare driver agreements typically contains several paragraphs setting out legal claims purporting to describe the status and relationships of the parties that the agreement creates. These clauses specify that the driver accepting the agreement acknowledges and agrees that these descriptive legal claims are true. Some more traditional terms and conditions are also specified.

#### 2.2.1 The contract for transport services

Key among the descriptive claims is the claim that by providing transport services to a consumer, a business relationship, in the form of a contract, is created between the driver and the consumer. This is typically said to be the 'contract for transport services' or some such equivalent designation, and it is said to exist as an agreement between the driver and the consumer alone. The claim typically includes disavowal of any responsibility on the part of the platform operator arising from any conduct of the consumer, the driver, or any other circumstance arising during the provision of transport services.

## 2.2.2 The contract with the rideshare platform

The descriptive claim is made that the business relationship with the platform is not one involving control in any way by the platform operator of the driver or of the way the driver undertakes their work under the agreement or the maintenance of their vehicle, the hours the driver may choose to work, or the number of trip offers they choose to accept, ignore, decline or cancel once accepted. For the latter however, some platforms have developed so-called 'community guidelines', and the agreement refers to acknowledgement and acceptance of these insofar as they set a limit on how many jobs may be accepted and then cancelled.

Some practical terms for this contract are also specified, including that driver agrees not to use signage or wear uniforms of otherwise use colours that identify the transport service as a service provided by uber or its affiliates, unless required by law.

In current versions of the agreement, it is also explicitly spelt out that the driver is free to engage in other income generating activities, including register with and use other ridesharing services.

There are also typically terms specifying when the platform operator may restrict the driver to prevent access to the rideshare platform or the services received through it, or terminate the relationship entirely. One example specifies that the operator may so restrict or deactivate the driver for:

- any violation of the agreement or other policy promulgated by the operator;
- any disparagement of the operator or related entities;
- any act causing harm to the reputation or brand of the operator or affiliates;

for any reason at all, at the sole discretion of the platform operator at any time, and completely without notice.

## 2.2.3 Fare calculated as guide only

The claim is made that the fare quoted to consumers before the trip, or the fare amount calculated according to the published kilometre rates and waiting times at the termination of the journey are only recommended amounts and guides for drivers and do not determine what the driver is to charge the consumer. The driver is said to be free to charge the consumer any amount agreed with the consumer so long as it is less than the quoted or calculated amount. It is a term of the agreement with the platform operator that the platform operator nevertheless receives the fee it would receive on its own guide figures.

## 2.2.4 Tax Arrangements

The agreement typically includes the claim, said to be acknowledged by acceptance of the agreement, that the driver is responsible for their own tax obligations on their own earnings under the agreement. In some cases, the agreement provides that the driver agrees that the platform operator will have the authority, in accordance with applicable tax law and regulation, to deduct amounts in fulfilment of tax obligations from driver monies before they are remitted to the driver.

## 2.2.5 The relationship with the platform operator

The agreement document of a leading rideshare provider makes the explicit descriptive claim that its role in the business relationship with the driver is merely that of acting as a limited payment collection agent, solely for the purpose of collecting payment from consumers on behalf of the driver. The clause goes on to explicitly specify that the agreement with the driver is not an employment agreement, and does not create a relationship, for any purpose under the law, of:

- employment;
- independent contractor;
- worker;
- joint venture;
- partnership; or
- agency

## 2.3 What the facts indicate

The RSDAA firmly believes that the rideshare platform operators are transportation companies offering transport services. It is our view that drivers, at least as independent contractors, merely fulfil the needs of those transport companies by responding to requests made to drivers by the platform itself, and not by the consumer. On this view, the rideshare platform operators conduct an enterprise in the provision of taxi transport services, not the drivers,

This is certainly the overwhelming view held by consumers, and is a view supported by many elements and aspects of the factual matrix of day to day operations.

### 2.3.1 The so-called contract for transport services

It is the position of the rideshare platforms that it is the driver and the consumer who enter a contract for the provision of transport services in return for a calculated fare. There seem to be several reasons to doubt that this true:

- ❖ at no stage drivers nor consumers have any control in determining the price at which transport services will be provided, but price is an essential term in any contract.
- ❖ freedom for drivers to agree to be paid less is not control over price
- ❖ there is no convenient or practical method in the app for changing the price
- ❖ consumers and drivers are merely price-takers, having to agree to the terms of the platform, or simply declining to engage with the platform
- ❖ surge pricing and the like is not the result of genuine market bidding, but of the platform operator perceiving that an opportunity exists to charge more for transport services
- ❖ drivers have no knowledge of the destination, an essential term of the contract
- ❖ the platform operator is not a contracting agent for the driver
- ❖ offers of work are not unmediated offers coming directly from consumers, but mediated offers made to drivers at the discretion and under the control of the rideshare platform operator.
- ❖ It is certainly clear that offers are not distributed on a purely geographic basis, nor are they distributed at random.
- ❖ drivers cannot delegate the task or assign contractual rights. At all stages, the platform operator maintains control over the task.
- ❖ drivers are free to cancel with no contractual liability whatsoever, even by terminating a journey while underway. At no point has a contract between the consumer and the driver actually arisen
- ❖ drivers have no contractual right of recovery in case of payment default
- ❖ some rideshare platforms indemnify drivers for payment defaults
- ❖ some platforms remit cancellation fees to drivers even if at the same time refunding that fee, from their own pocket, if disputed by consumers
- ❖ despite explicit disavowal of responsibility, some operator platforms routinely make secret payments in compensation to drivers who are injured or have their property damaged by the consumer they arranged for the driver to pick up

### 2.3.2 The relationship with the platform operator

The agreements typically specifies that although no control is exercised by the platform operator over the driver or the way that work is performed, refunds will be made to consumers, at the expense of drivers, if the platform considers that the route taken was not optimal or fair.

- ❖ the terms of the transportation arrangements, are set solely by the rideshare platform
- ❖ the platforms 'homogenise' drivers into a commodity, allocating work to drivers in different classes as a 'homogenised' commodity within that class
- ❖ all goodwill arising from the transaction accrues to the rideshare platform, not the driver
- ❖ there is no sense in which a driver "grows her own business" by doing more work - she only grows the business of the rideshare platform.
- ❖ higher ratings do not lead to more work
- ❖ the agreement not to use signage or uniforms is relevant to the question of employment, but the goodwill and reputational benefit at stake is already safeguarded for the rideshare platform through the branded app. Drivers may yet be independent contractors.
- ❖ the platform operator applies quality control to the drivers to ensure its own reputation and goodwill by means of the rating system.
- ❖ the platform operator explicitly reserves to itself the right to deduct monies from driver earnings for remittance to the taxation authorities under certain conditions. It is a somewhat high-handed reservation of power for a limited payment collection agent, more akin to the power, and responsibilities, of an employer or business engaging independent contractors.

### 2.3.3 The indicia of control

A finding in a court or in the Fair Work Commission that a worker is not an employee is not in itself a finding that that worker is, in fact, an independent contractor. Though the test is often described as the means of distinguishing these two statuses, such a finding is more accurately understood as one that the worker is at most an independent contractor, but may in fact have even less connection to the operations and responsibilities of the entity that pays them. It is the view of the rideshare platform operators that drivers are not only not employees, but do not even have sufficient connection to their operations and responsibilities to be independent contractors. It is no coincidence, however, that several of the indicia of employment are relevant also to this question. While the degree of control exercised may not be sufficient, in the context of other indicia, to strongly indicate employment, it may be sufficient to strongly indicate a contractor relationship.

The rideshare platforms 'own' the work, in the sense that they not only determine all essential terms under which transport services will be offered, but determine who will be offered the chance to do a job, and determine that once accepted the job may not be delegated to another qualified driver. Although they officially disavow control on the execution of the work, they monitor that execution and make adjustments to the fare charged and the remuneration the driver receives, as they see fit, and in their sole discretion.

They maintain a system of policies and so-called community guidelines that prescribe behaviours and expectations in the execution of work. They maintain a rating system that is designed to apply constant pressure on drivers to provide a more uniformly predictable and homogenised service, at least to fulfil the expectations of consumers as they have been informed and developed by those policies and community guidelines. The platform controls every aspect of the business, with final say on all matters regarding fees and payments, conduct, and platform access. We have even seen that the very terms of the written agreements typically even proscribe the expression of honest opinion contrary to its terms.

Despite their best draughting efforts to the contrary, there is nothing of significance about the rideshare business and the work drivers do for it that the platform operators do not control absolutely and completely. Taking account of the entirety of the relationship, and the nature of the enterprise, it is difficult not to conclude that the reality is that the ridesharing platform operators ply for trade in the point to point transport sector as transportation providers, while drivers merely supply the labour and equipment necessary to fulfil, at their behest, the transport expectations of platform customers.

### 2.3.4 Conclusion

Drivers in their cars are, as much as possible, homogenised and commodified by the platforms: “Our mission is to connect riders to transport as reliable as running water, everywhere for everyone.” (uber Community Guidelines) In these circumstances, it cannot be said that drivers are carrying on their own enterprise. Rather, they must conform to the expectations of the platform operators and assist them, if not as employees, then certainly as contractors, to carry on and build theirs.

## **PART 3 THE REGULATORS MECHANISMS IN AUSTRALIA**

### 3.1 Relevant Regulatory Bodies

#### 3.1.1 The Fair Work Ombudsman

As the Inquiry knows, the office of the Fair Work Ombudsman is able to provide assistance to employees on almost any matter of dispute with their employer, but is only empowered to help independent contractors in respect of a limited range of matters dealt with by the Fair Work Act 2009 (Cth), primarily adverse action, coercion, and abuses of freedom of association. The most significant of these, adverse action, is constituted primarily by improper curtailment of rights. As we have seen, under the current arrangements in ridesharing, and the prevailing view of current law, there are very few rights that might be curtailed or infringed by the rideshare platform operators.

However, it is not conceded by rideshare platform operators that drivers are their contractors. Without taking the matter into the courts to establish otherwise, bodies such as the Office of the Fair Work Ombudsman have few teeth with which to compel cooperative engagement on the part of the platforms.

#### 3.1.2 The Australian Competition and Consumer Commission

In 2015, amendments made to the Competition and Consumer Act 2010 (Cth) granted to the Australian Competition and Consumer Commission (ACCC) powers to review unfair standard form contracts for small business. In respect of certain generic aspects of typical rideshare platform agreements, this development appears to be promising.

The agreements include several terms maximally limiting the liability of the platforms in the event of, for example, any administrative or judicial decision that drivers are in fact employees. In that event, other provisions require that all losses, to the extent they are attributable to drivers holding themselves out as employees, are to be indemnified by the employee. The contracts appear to contain penalty terms, allowing that drivers can be deactivated for any breach of the contract, including, we must presume, any public statements in opposition to the descriptive legal claims made by the platform in the agreement. The current submission would qualify on that score. Finally, there are terms providing for unlimited unilateral variation of the contract by the platform, while there is no provision for variation by the driver.

This new jurisdiction is invaluable to small business, and may well prove useful to rideshare drivers. While it is a powerful way of addressing formal and generic shortcomings that may be found in any contract, it is, as may be expected, powerless to address the key concerns of rideshare drivers as to their proper legal status, and their rights in work. Those questions of fairness are reserved for a more specialised jurisdiction concerning the substance of working arrangements. While it remains to be seen whether the protections in the Fair Work Act could ever be invoked for rideshare drivers, the Independent Contractors Act 1006 (Cth) comes to mind in this context.

### 3.1.3 The Office of the Australian Information Commissioner

Members of the RSDAA who have unfortunately had their rideshare platform accounts permanently deactivated by platform operators have had some success in compelling disclosure of the reasons behind those decisions by making formal complaints to the Office of the Australian Information Commissioner(OAIC). Until platform agreements undergo revision through some form of unfair contract review process, rideshare operators retain the right reserved in the agreements to deactivate and terminate accounts at their sole discretion. However, should advances be made on this front, access to the reasoning process behind deactivations could be relevant to the making of applications for review of such decisions on the grounds, for example, of a denial of natural justice. The OAIC is a valuable institution in the Australian regulatory landscape

### 3.1.4 A dedicated on-demand regulator?

The work of rideshare drivers clearly involves the same work as performed by traditional transport industry workers, with two distinctions relevant here. Firstly, every aspect of providing the work is subject to the control of the platform operators, either directly, or indirectly, through the imposition of 'community guidelines' and expectations, and the implementation of a rating system to enforce those expectations. Secondly, every measure and step that can be taken has been taken to deny to drivers any legal status that affords them the protections of other workers in the Australian economy.

Instead, they are said to be 'in business', 'growing their own business', 'carrying on an enterprise'. None of these descriptors fit the actuality. An enterprise has leveraged growth potential. An enterprise involves decisions as to marketing and product differentiation. Rideshare driving just involves work, and work of a kind well understood and already long dealt with under various industrial instruments over the years.

The artful finessing of relations is one thing that generates these conundra, but another is that the final user of the services provided, the consumer, with whom the platform operators insist the driver has the transport contract is usually (but not always) an individual. It is the internet itself that facilitates the illusion of direct contact, individual to individual, through the 'ether' as early internet prophets were inclined to call it. We now know better, for the relationship is always mediated. Yet the illusion has brought forth the prospect that the rights and responsibilities of employers or businesses that engage contractors to provide their services can now, supposedly, be completely fragmented to their atomistic constituents, each individual task bearing its own minimal legal consequence.

Could there even be an employment or contractor relationship with an individual consumer for the duration of a 15 minute car ride? Retained by the platforms are, the 'good bits', the economies of scale and the power of mass marketing with the wherewithal to follow through with the provision of services; dissipated and discarded are the responsibilities of employment or the liabilities of business contracting.

There would seem to be a strong case for the creation of an on-demand work ombudsman, or similar body. The landscape is entirely new, and the problems unique to the internet-driven on-demand sector of the economy, which will only grow.

## **PART 4 POTENTIAL DIFFICULTIES WITH EXISTING LEGISLATION**

The RSDAA, in consultation with members, has established achieving sustainable rates of remuneration, a fair, open and reviewable approach to account deactivations, and driver safety as its leading priorities. The equivalents for employees covered by the Fair Work system are fair rates of pay secured by New Awards or Enterprise Bargaining Agreements, protection against unfair dismissal, and a vast array of workplace safety provisions. The Fair Work Act 2009 and the Independent Contractors Act 2006 would appear to be the most suitable means of achieving these ends.

### **4.1 The Fair Work Act 2009 (Cth)**

To many, bringing rideshare drivers within the protection of the Fair Work Act would be the 'holy grail', while of course, it would be anathema to some others. It is well known that recent applications to the Fair Work Commission by rideshare platform drivers in appeal against unfair dismissal when their rideshare platform accounts have been deactivated have failed for want of jurisdiction (See *Kaseris v Raisier Pacific vof* [2017] FWC 6610, for example). Findings that rideshare platform drivers are not employees in the Fair Work Commission, in some cases with some litigants being self-represented, however, do not make it certain that the same result would be reached if the matter was taken up in the courts.

It is acknowledged, however that Australian law does not enjoy the benefit of the United Kingdom provision, in the Employment Rights Act 1996 (UK), which created the so-called "limb (b) worker". Under s230 (5) of that law, 'employee' is extended to include a category of 'worker under contract', that contract in some sense falling short of a common law contract of employment. It was into this category that the UK Employment Tribunal had no difficulty in placing certain rideshare drivers, that decision being upheld by the UK Court of Appeal (*Uber B.V. et al v Yasleen Aslam et al* [2018] EWCA Civ 2748).

#### **4.1.1 The Taxation Arrangements Employment Indicium**

Nevertheless, when certain of the indicia of employment are placed properly into perspective, the results may yet change in Australian courts. While it is true that taxation arrangements are a well known indicium, among several, established by the leading cases on the test of employment, it is submitted that to consider the taxation arrangements that have been put in place in a case involving *Raisier Pacific v.o.f. uber's* Australian rideshare platform operator, would be to beg the question.

It is the RSDAA position that both the Australian Taxation Office (ATO) and Uber have misconstrued the nature of the relationships created by the arrangements that have been put in place. Already uncritically assuming that rideshare drivers are, for tax purposes, identical to taxi-drivers, the ATO was perhaps incentivised to take the perspective that uber (and related entities) aggressively put forward, because at that early stage, *Uber B.V.*, based in The Netherlands, existed wholly outside the GST net. If the ATO was not going to receive GST from *Uber B.V.*, for services it was arranging and providing in Australia (via the internet), the implication is that in agreeing with uber that drivers run their own transportation enterprise, at least the ATO could guarantee holding rideshare drivers to account for 100% of the GST revenue arising from fares.

If that is indeed what rideshare drivers are doing, then they must obtain an Australian Business Number (ABN) and register for GST, like all participants in the taxi industry (*A New Tax System (Goods and Services Tax) Act 1999 (Cth) s144.5 (The GST Act)*). After unsuccessfully contesting whether providing UBER transportation actually is providing 'taxi transport services', Uber readily cooperated with the view that had now also become the ATO's preferred position, and quickly implemented the requirement that to drive on the UBER ridesharing platform, a driver must obtain an ABN and register for GST.

Neither this view, nor the alternative, have been tested in a court of law. As has been explained, it is the view of the RSDAA that rideshare drivers are not conducting an enterprise providing transport services. The transport services are being provided by the rideshare platforms to consumers, and rideshare drivers merely apply their labour and capital to fulfil the platform's transport undertakings. Unlike taxi-drivers, rideshare drivers do not ply for trade in the street, picking up fares in their own right



and generating additional income above and beyond that earned by assisting the rideshare platforms. It is a critical difference, well marked by the majority in the UK court in *Uber v Aslam* (citation above).

Rideshare drivers in Australia registered for GST under protest, it being forced upon them, in the same manner as a variation in the terms of a form contract are forced upon persons already engaged in the work, by the mutually self-serving but untested arrangements put in place by the ATO and by UBER. It is the RSDAA position that the rideshare platforms are carrying on the enterprise in provision of taxi transportation services, whilst drivers are not.

A great deal rides on the argument, for on this view, drivers would be free to deregister for GST, leaving rideshare platforms unable to claim an input tax credit on the monies paid by them to drivers. In the current context, the point is that current arrangements for taxation are not an independent source of perspective on the question of employment. The basis of current taxation practices in ridesharing is equally as unsettled as the question to be settled by considering employment indicia, and not unrelated to it.

## 4.2 The Independent Contractors Act 2006 (Cth)

### 4.2.1 Contract for Services - s5(1)

If the view that rideshare drivers are contractors to the rideshare platforms was to prevail, there would be no difficulty making application for contract review under the Independent Contractors Act 2006. The proposition is perhaps better expressed by saying that the key hurdle in any application under the Act would be jurisdictional: the court only has power under the Act to review contracts for services with the requisite constitutional connection.

Contracts for services are distinguished from contracts of service, which constitute employment. The argument that rideshare drivers have a contract for services with the platform provider, and so are contractors, has occupied the larger part of this submission.

### 4.2.1 Constitutional Connection - s5(2)

The constitutional connection is satisfied if the circumstances of the contract bring it within the domain of at least one of the heads of power available to the Commonwealth for the enacting of laws. If a driver could prove the agreement with the rideshare platform is properly to be understood as a contract for services - IE the driver is a contractor to the platform - then the jurisdictional requirement is met: the contract is for services, and it is with a platform operator, a corporation either foreign or local with respect to which the Commonwealth has the power to make enactments.

On the view of the rideshare platform operators, drivers are not in the requisite contract for services with them. Instead, as we have seen, they argue that the driver's only contract is with the consumer of transport services. If this view were to prevail, two potential difficulties arise.

Firstly, if the contract for services relied upon is the transport contract with the consumer, it may or may not have the requisite constitutional connection. This would depend on whether the consumer is using an account in their own name, or in the name of a corporation. (There are other less practical ways the requisite constitutional connection might be established). Either way, this is information which is not made available to drivers by the platforms (and a further factual element tending to support the view that drivers are working for the platform). Assuming most consumers are acting in their own name, most of these supposed transport contracts will not have the requisite constitutional connection to invoke the powers of the court under the Act.

Secondly, the contract for transport services said to exist between the driver and the consumer is extremely short-lived. The contract, if indeed one arises, would have a duration roughly equivalent to the length of the trip undertaken. It is by no means clear that it is even possible to bring such an ephemeral contract under review, and nor would it be worth doing so if that was all that could be achieved.

#### 4.2.2 A condition or collateral arrangement - s5(4)

If the contract for services were a contract said to arise between the driver and the consumer, but another condition or collateral arrangement relates to it, then that condition or arrangement will be taken by the court to be part of that contract for services. Provided the condition or collateral arrangement would have the requisite constitutional connection if it actually were a contract for services, it will be taken to be part of the contract for services.

It is clearly the case that the agreement with the rideshare platform operator 'relates' to the transport contract with the consumer. For instance, the kilometre and waiting time rates used to calculate the fare, an essential term of the transport contract, are actually set as part of the agreement with the platform operator. In this way, if the contract for services with the consumer can be the object of review under the Act, so too can the entirety of the collateral arrangement the driver has entered with the platform operator. That it is a collateral arrangement is beyond dispute. Without entering the agreement with the platform operator there can be no contract with the consumer.

#### 4.2.3 The Powers of the Court

There is no doubt that the power of the court with respect to unfair or harsh contracts under this legislation is immense. If the jurisdictional question can be satisfied, the court has the power to review the entire contract, not being limited to considering those parts actually complained of. After a finding that part or all of a contract is unfair or harsh, the court is to record just how this is so, and is then empowered not just to strike out the unfair or harsh provisions, but actually to rewrite them insofar as it is required to remedy their defect.

In reviewing a contract, the court is empowered to have regard to the relative strengths of the parties, undue influence, and whether the contract provides total remuneration that is, or is likely to be, less than that an employee would earn doing similar work.

Clearly the court has the power, under this act, to address all of the primary concerns of the RSDAA. The failure of natural justice in the process leading to deactivation of accounts that is explicitly enshrined as acceptable by the platform agreement is a clear example of a harsh or unfair provision that the court would readily alter. Livelihoods are at stake. The low rates of remuneration, as we have seen, considerably lower than the minimum wage, would immediately command attention and be re-written.

#### 4.2.4 Summarising the difficulties in invoking this jurisdiction

As we have seen, the primary obstacle is establishing that a driver does, in fact, have a contract for services with the ridesharing platform. If that cannot be established, then the only other way to achieve a review of the platform agreement is by applying for review of an ephemeral contract said to arise with the consumer, and having the platform agreement reviewed as a related condition or collateral arrangement. This consumer contract for services most of the time will not have the requisite constitutional connection, and in any case, will have long ceased to remain on foot.

The upshot is that, unless drivers can be found to be contractors to the platform, the mode of organising the work developed by online, on-demand, ridesharing platform operators completely slips through an Act that might otherwise have been thought well suited to deal with the contract issues of non-employee drivers.

#### 4.2.5 The overriding of State workplace relations laws

Finally, it is necessary to mention a fundamental purpose of this Act, which was to override and replace State laws purporting to bring independent contractors within the jurisdictions of State workplace relations systems. This aspect of the legislation is well understood. It remains only to be observed that if rideshare drivers cannot satisfy the jurisdictional requirements of this Act, it would seem to follow that

State-based legislation would not be excluded from applying to rideshare drivers and others with similarly nebulous legal status.

## 5 RECAPITULATION & CONCLUSION

In Part 1, we set out the many aspect of traditional workplace protections bypassed or ignored by current practices in the ridesharing industry. Operators were able not only to bypass industry regulation, but also workplace regulation, and workplace norms, to achieve unprecedented prices to consumers. We considered, in part, that naive early participants failed to grasp the full extent of hidden costs. This, and the unflinching sense of entitlement that is engendered among consumers when cheaper prices are experienced, rapidly drove the expansion of the ridesharing industry.

We hope that Part 1 set the scene for the task of Part 2, which was to explore both what was said about the legal status of drivers as they entered the ridesharing industry, and what is evidenced about their legal status in day to day operations. We concluded that drivers have no power or control over the terms at which they provide the labour and capital required to provide transport services. We also concluded that the true consumer of the labour and capital provided by the driver is the platform itself, as it dispatches drivers to meet its personal transport undertakings. We finished with a discussion arguing that the overarching control by the platform, while seeking to appear to have no control, is the decisive element that makes us conclude that the work of drivers is done for the platform and for its business purposes. That is why information relevant to essential terms is freely withheld from drivers. Though not employees, drivers do their work for the platforms. When they accept a job and begin to head to the pick-up, drivers are working for the platform, not the consumer. If not actually employees, drivers are certainly contractors to the platforms themselves.

In Part 3, a brief discussion clearly indicates that existing regulatory bodies are not at all optimised by their empowering legislation for dealing with the problems the legal ambiguities of the on-demand economy are beginning to create. Traditional bases of legal and economic responsibility are morphing and dissipating, leaving nothing but the original worker and the original consumer, doing what they always did. Where once was an overarching mantle upon which rested responsibility as well as economic advantage, there now no such thing. The remote organisation of work has led to the abandonment of traditional responsibilities. There is certainly a need for change.

Finally in Part 4, we note the failure of the continued failure of the Fair Work Act to protect significant numbers of workers. And we note the likely failure of the Independent Contractors Act to achieve its purposes in an area where it might be thought to be ready-made to succeed.

Clearly, the new technologies, in allowing the ultimate fragmentation of large enterprise-scaled activities, has enabled the complete bypassing of, quite literally, all regulatory options this society has to offer. Is it new business, or is it old business done a new way. We agree with Dr Jim Stanford, from the Centre for Future Work, when he suggests that doing business is an unregulated way is not a new thing at all, but an old thing. Organisational models that defeat regulation intended for the very types of work still actually being performed are not new, they are just anti-social.

The RSDAA believes that legislators need to embark on an aggressive program of 'deeming', forcing work back into categories that can be readily regulated as the Independent Contractors Act does not accommodate for the actual "Gig Economy Worker"

END