HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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Form 27A—Appellant's submissions

Note: See rule 44.02.2.

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: Uber Australia Pty Ltd

Appellant

and

Chief Commissioner of State Revenue

Respondent

APPELLANT'S SUBMISSIONS

Part I: CERTIFICATION

1. This submission is in a form suitable for publication on the internet.

Part II: ISSUES ARISING

2. **Issue One:** whether a driver who supplied a driving service to a rider located by Uber's lead generation services also, under the Uber-driver contract, supplied to Uber the services of persons for or in relation to the performance of work so as to enliven s 32(1)(b) of the *Payroll Tax Act 2007* (NSW) (**Act**)?

3. **Issue Two:** was a fare collected by Uber from a rider as a driver's agent and remitted to the driver an amount paid or payable by Uber as a deemed employer for or in relation to the performance of work by a deemed employee, so as to be deemed to be wages under s 35(1) of the Act?

4. **Issue Three:** if s 32(1)(b) is enlivened, was the driving service of a driver ancillary to the use of goods, being the driver's vehicle, so as to enliven the exemption in s 32(2)(a) of the Act?

Part III: SECTION 78B NOTICE

5. No notice is required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: **REASONS FOR JUDGMENT BELOW**

6. The reasons of the Court of Appeal of NSW (**CA**) are *Chief Commissioner of State Revenue v Uber Australia Pty Ltd* (2025) 343 IR 243 (**AJ**) (CAB 75-222).

7. The reasons of the trial judge (Hammerschlag CJ in Eq) are *Uber Australia Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 1124 (**PJ**) (CAB 5-48).

Part V: **FACTS**

8. Uber (there were several Uber entities, but, as was the approach below, it is unnecessary to distinguish between them) operated an electronic platform which connected persons (**riders**) who wished to be transported by car with persons (**drivers**) offering the service of picking them up and driving them in the driver's car to their destination. Riders and drivers accessed the platform using a "Rider App" and a "Driver App" respectively: PJ [3], [30], [139]-[140].

9. Access to the Driver App and the Rider App was granted under Uber's contracts with drivers and riders respectively: PJ [53], [59]. There were several iterations of the driver and rider contracts during the period in issue (FY2015-FY2020)—the 1 December 2017 driver contract (further materials (**FM**) 4-11) and 10 June 2020 rider contract (FM 12-18) were treated in the Courts below as representative: AJ [56]-[57]; PJ [52]-[53], [58]-[59].

10. Both contracts stated that Uber did not provide transportation services: PJ [53(1)], [59(2)]. Under the driver contract, Uber provided access to lead generation services in consideration for a service fee: PJ [53(1)]. Under the rider contract, Uber provided riders with a technology platform that enabled riders to arrange and schedule transportation services from third-parties, and to facilitate, on behalf of those third parties, payments by the riders for those services: PJ [59(1), (4)]; FM 13, 15-16.

11. The Apps worked by a rider making a trip request via the Rider App, which request was transmitted via the Driver App to a driver: PJ [32]. The driver could accept, ignore or reject a request. If the driver ignored or rejected it, the request was sent to another driver: PJ [35].

12. The rider paid the fare electronically after completing a trip: PJ [39]. The 1 December 2017 driver contract obliged Uber to collect the fare as agent for the driver, and to remit the fare to the driver after deducting the service fee owed by the driver to Uber for "Uber Services" (ie, lead generation, connection, fare collection and remittance): PJ

[53(1), (6), (10)]; FM 4-7. The 10 June 2020 rider contract obliged Uber, on behalf of the driver, to facilitate the rider's payment on the driver's behalf, with such payment to be considered the same as payment made directly by the rider to the driver: PJ [59(4)]; FM 15-16. Uber's role in collecting and remitting funds is referred to as the **Payment Collection Function**.

13. There was no suggestion in the proceedings below that the driver and rider contracts operated other than according to their tenor: PJ [177]. Uber provided invoices to riders via the Rider App on behalf of drivers, using the driver's (not Uber's) ABN: PJ [43].

Part VI: **ARGUMENT**

14. **The contractor provisions in Pt 3 Div 7 – context and object:** The Act's primary subject matter is a tax on payroll – ie, employees' earnings from employers: see *Chief Commissioner of State Revenue v* ***E Group*** *Security Pty Ltd* (2022) 109 NSWLR 123 at [45]; ***Mutual Acceptance*** *Co Ltd v Federal Commissioner of Taxation* (1944) 69 CLR 389 at 403 (Dixon J). The Act taxes "wages" that are taxable in NSW, which is determined by reference to "the services performed by the employee in respect of the employer" (ss 6, 10(1), 11(2)). The definition of "wages" applies to amounts paid by an employer as remuneration for an employee's work: s 13; *Mutual Acceptance* at 399, 400 (Rich J), 401 (Starke J), 403 (Dixon J), 404, 406 (Williams J); *WA Flick and Co Pty Ltd v Federal Commissioner of Taxation* (1959) 103 CLR 334 at 339-340; *Murdoch v Commissioner of Pay-roll Tax (Vic)* (1980) 143 CLR 629 at 635, 645.

15. The CA's decision makes Uber liable for payroll tax on payments by riders to drivers for driving riders. It does so, first, by ignoring important words that appear in the inter-connecting provisions, including the definitions of taxable wages, employer and employee and the requirement that the designated person must be supplied with the services of persons; and secondly, by straining the meanings of relational phrases in Pt 3 Div 7, in disregard of the statutory words, their object and context, including the mischief the provisions seek to remedy: cf *AB (Pseudonym) v Independent Broad-based Anti-corruption Commission* (2024) 278 CLR 300 at [21].

16. Pt 3 Div 7 imposes tax on remuneration of some independent contracts by expanding common law notions of employment: cf *E Group* at [45]-[46]. It does so by a limited expansion of the meanings of "employer", "employee" and "wages": ss 33-35. Those expanded meanings hinge in large part on the meaning of "relevant contract" in s 32.

Significantly, although the provisions in Div 7 deploy protean relational phrases, they are not at large, but take their meaning from the scheme of the Act (see further below).

17. The extrinsic materials confirm and reinforce Uber's construction of the provisions in dispute. They explain that the object of the contractor provisions in Pt 3 Div 7 is to tax remuneration paid under some principal-independent contractor relationships—essentially, those which are substitutes for employment. Given the primary subject matter of the Act, it is unsurprising that the main object of the contractor provisions goes only this far.

18. Contractor provisions were first introduced in Victoria by the *Pay-roll Tax (Amendment) Act 1983* (Vic) (**Vic AA**), which inserted s 3C into the *Pay-roll Tax Act 1971* (Vic). For present purposes, s 3C was not significantly different from ss 32 to 35 of the Act.

19. The Explanatory Memorandum to the Bill that became the Vic AA (**Vic Bill**) explained that the mischief to be addressed was the "increased propensity of employers to engage new staff as contractors rather than as employees, and to convert existing employees to contractor status". It gave examples of where "a contracting relationship has been substituted for what was traditionally an employer/employee relationship" and explained that, under s 3C(2)(a)-(b), "[i]n general, the persons deemed to be the employer and the employee are the persons who would be the actual employe[r] and actual employee respectively if the employer/employee relationship existed".

20. The Second Reading Speech for the Vic Bill stated that "the pay-roll tax base has been eroded considerably during recent years because an increasing number of employees have become or purported to become independent contractors and their employers or former employers no longer pay pay-roll tax on remuneration paid to these contractors, notwithstanding that for all intents and purposes the relationship between the parties is almost identical": *Hansard*, Legislative Council, 24 November 1983 p 1255. The legislation was intended to catch relationships where a sub-contractor worked exclusively or primarily for one person and where the object of the contract between the parties was to obtain the labour of the sub-contractor: p 1256.

21. Section 3C was essentially replicated in NSW by the *Pay-roll Tax (Amendment) Act 1985* (NSW), inserting s 3A into the *Pay-roll Tax Act 1971* (NSW). According to the Explanatory Note, the new provisions were introduced "to combat certain avoidance practices in relation to pay-roll tax". Sections 3A and 3B were said to "provide for the

taxation of payments to contractors under certain contractual arrangements". The Explanatory Memorandum stated that the definition of "relevant contract" in s 3A was "directed to capture several means of disguising the employer-employee relationship by contractual arrangements which have been increasingly resorted to in recent years by persons seeking to defeat the objects of the Principal Act". The Second Reading Speech stated that the Bill included "a number of measures which will catch schemes designed to avoid liability for pay-roll tax by severing the employer-employee relationship": *Hansard*, Legislative Assembly, 13 November 1985, p 9558.

22. The present Act replaced the 1971 Act to harmonise NSW and Victorian payroll tax. But nothing suggests that the object of the contractor provisions has changed. As the trial judge said, the overall intention behind Pt 3 Div 7 "is to capture several means of disguising the employer-employee relationship by contractual arrangements which had been increasingly resorted to by persons seeking to defeat the objects of the Act. That is not this case": PJ [171].

23. **Ground 1 – s 32(1)(b):** Ground 1 focusses on the CA's finding that s 32(1)(b) applied in the present case: AJ [63], [109]. The CA's overarching error is its conclusion that, when a driver transported a rider, s 32(1)(b) was engaged because Uber was supplied with the driver's "driving service" under Uber's contract with the driver: AJ [59], [106]-[108].

24. In reaching that conclusion, the CA addressed: (1) whether a driver supplied Uber with a "driving service" when the driver transported a rider (CA [52]-[63]); and (2) whether any such supply occurred *under* Uber's contracts with the driver (CA [81]-[110]). The CA's errors in respect of each point are addressed sequentially below. Both questions are properly seen as subsets of a single overarching question in s 32(1)(b), namely: *When a driver transported a rider, was Uber supplied, under the driver contract, with the services of persons for or in relation to the performance of work?*

25. **Drivers did not supply a "driving service" to Uber**. The crux of the CA's reasons is that the driving service is supplied to Uber "by engaging its contractual rights against riders and drivers, thereby generating a financial benefit to it": AJ [59]. The contractual rights identified by the CA are the right against the rider "to debit the rider's account for the fare" and the rights against the driver to accept the fare from the rider on the driver's behalf and to deduct the service fee payable to Uber by the driver before remitting the balance to the driver: AJ [55]-[57]. In this way, the CA identified the driving service as

doing "something that is necessary for Uber to derive service fees and to continue its business": AJ [58]. The CA erred in the following respects.

26. ***First***, the CA misdirected itself by not framing the question in the language of s 32(1)(b), and of interrelated provisions such as ss 11, 33, 34 and 35; namely, was Uber a person which, in the course of its business, was supplied with the services of persons for or in relation to the performance of work? This language reflects a core requirement that is carried throughout the statutory scheme. As discussed below, it is also explicit, or necessarily implicit, in ss 11, 32(2)(a), 33(1)(b) and (2)(a) and 35(1). Instead of this orthodox approach, the CA used the theoretical construct of "a driving service to Uber" to include a triggering of contractual rights that delivered consequential financial benefits to Uber. But this triggering does not involve any supply to Uber of the "services of persons" for or in relation to the performance of driving work by drivers; nor does it make the driving service one supplied to Uber or in respect of Uber.

27. ***Secondly***, Uber's performance of the Payment Collection Function is irrelevant to the question of whether a driver supplied his or her services to Uber. The conduct engaged in by the driver was driving a rider from A to B, in a car that the driver provided. If there were no Payment Collection Function, but instead the rider paid the driver directly and the driver then paid Uber's service fee, the work performed by the driver would nonetheless have been exactly the same: driving a rider from A to B in the driver's own car. If, in driving a rider from A to B, a driver did not supply his or her driving services to Uber, then it cannot be that adding the circumstance of Uber undertaking a collection and remission function on the driver's behalf somehow leads to a different result. But that is exactly what the CA concluded, as AJ [62] makes clear.

28. ***Thirdly***, if the collection and remission of funds by Uber are put to one side, what remains is Uber's right to charge the driver the service fee. Uber provides a lead generation service to the driver. The driver uses those services to find a rider to whom the driver can supply a driving service using his or her car. Yet, on the CA's reasoning, the driver is said also to provide the driving service to Uber because the driver pays Uber for the lead generation service. That is a bizarre conclusion, and there is nothing to support it. True, the provision of the driving service by drivers to riders is "necessary for Uber to derive service fees and to continue its business": AJ [58]. But that is because: (a) Uber charges drivers for the use of its lead generation service if the drivers successfully use that service to engage a rider; and (b) Uber's business is to connect

drivers and riders—obviously if drivers do not provide services to riders, there will be no fares to collect and the business will not continue. That does not warrant the conclusion that a customer (the driver) who successfully uses the service, and thus entitles the business to charge the customer, supplies a service to the business.

29. ***Fourthly***, s 32(1)(b) stipulates that the services supplied must be the services of persons for or in relation to the performance of work. That links to other important requirements. The primary subject matter of the Act is a tax on wages, as defined in ss 6, 7, 10, 11 and 13. Under ss 10 and 11, taxable wages are paid or payable by an employer for or in relation to services performed by an employee in respect of the employer, that is, the work-related services of the employee must be provided to the employer. The same requirements are integral to s 35, as discussed below. These provisions point away from a theoretical construct, such as the "driving service" that is said to be a service supplied to Uber due to the triggering of financial benefits to Uber, being sufficient to satisfy s 32(1)(b). So too does the fact that the legislative intent was to capture contracts, the object of which was the obtaining of labour: see [20] above.

30. Other aspects of the context and purpose discussed at [14]-[22] above are against the CA's approach. The purpose of s 32(1) is only to capture (some) principal-independent contractor relationships. This informs what is meant by the supply of "services of persons for or in relation to the performance of work". A broad approach, which sees that phrase satisfied by conduct that causes the business to derive a financial benefit or that is essential to the business, goes beyond the language and purpose of s 32(1) and cannot satisfy its terms.

31. Take, for instance, a barrister's clerk providing its service to barristers. Its services include lead generation services, arranging briefs, settling and negotiating fees with a client and undertaking fee collection and accounting services; all in exchange for a clerk's fee it deducts from the fees it collects from clients and remits to barristers. The CA's analysis would have the consequence that the barrister, by providing legal services to others, provides a service to his or her clerk, rendering the clerk liable for payroll tax.

32. ***Fifthly***, the CA's approach goes far beyond authority of this Court on the concept of supply of services in tripartite cases. In *Accident Compensation Commission v* ***Odco*** *Pty Ltd* (1990) 64 ALJR 606 at 612-3, this Court said that "[o]nce it is accepted that

there was (1) an agreement between TSA and the builder for the supply of a tradesman to the builder to do certain work on terms that the builder was to remunerate TSA for supplying the tradesman and for the work which he did, and (2) an agreement between TSA and the tradesman whereby the tradesman agreed to perform work at the site at the builder's direction for remuneration to be paid by TSA, it follows as a matter of plain language that the tradesman supplies services to TSA by attending at the site and doing work there" (underlining added). That is a classic principal-independent contractor case. TSA acquired the tradesman's services and sold them to the builder. Self-evidently, *Odco* is materially different from the present case.

33. If the CA's approach were correct, then in *Odco* it would have sufficed that TSA obtained a direct financial benefit by reason of the tradesmen performing work for the builder, regardless of the specifics of the contracts between TSA and builder and TSA and the tradesmen. Yet the passage from this Court's judgment extracted above recognises that the specifics of the contract mattered. Payment by Odco to the tradesman was not the key point; rather the key point was that Odco was obliged to supply the tradesman or his services to the builder. In the present case, Uber had no analogous obligation to supply driving services to riders. Nor did Uber promise that a driver would transport the rider—it simply provided a platform on which a rider could request a ride from a driver willing to provide one.

34. ***Sixthly***, the CA's approach leads to incoherence in the statutory scheme. For instance, under ss 6, 7, 10, 11, 13, and Div 7 as a whole, taxable wages are payable by someone who qualifies as an employer to someone who qualifies as an employee. If the CA was correct that Uber qualifies as an employer under s 33 because the performance of the driving service is necessary for Uber to collect the fare and to deduct its service fee, then the same logic would say that Uber is (or its relevant staff members are) simultaneously an employee (or employees) of each driver under s 34. That follows because Uber is receiving payments from drivers in relation to the performance of its agency work for drivers, and, on the CA's theory, all that work relates to a relevant contract. As mentioned above, further examples of incoherence are afforded by ss 10, 11 and 35.

35. **There was no relevant contract *under which* drivers supplied services of persons to Uber.** Below, Uber contended that, for a service to be supplied to Uber "under" a driver contract, the contract had to be the source of the right or obligation to make that supply. The CA rejected that contention, holding that a contract is "a contract under which" for

the purposes of s 32(1) if *any one* of the following tests is met: AJ [104]. **First test**: The contract is "the source of the right or obligation to supply the services": AJ [104(1)]. **Second test**: The contract "expressly refers to, and governs or controls, the supply of the services": AJ [104(2)]. **Third test**: The contract "confers a right to be paid for supplying the services": AJ [104(3)]. The CA relied upon the second and third tests to find that drivers supplied the driving service to Uber *under* the driver contracts.

36. ***The CA's first test*** correctly describes the meaning of "under which", and accorded with Uber's contention below. It is supported by *Chief Commissioner of State Revenue v* ***Downer*** *EDI Engineering Pty Ltd* (2020) 103 NSWLR 772 at [123] (Bathurst CJ, Macfarlan and Meagher JJA agreeing, drawing on *Commissioner of Taxation of the Commonwealth of Australia v* ***Sara Lee*** *Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520 and ***Inghams*** *Enterprises Pty Ltd v Hannigan* (2020) 379 ALR 196).

37. Further, there is contextual support for this construction. As identified above at [17]-[22], parliament chose to extend the reach of payroll tax to certain relationships that involve a supply of services similar to the obtaining of labour under a traditional employer-employee relationship. Relevantly this included relationships established by contracts which resemble employment contracts in that there is the obtaining of services similar to labour by the principal from the independent contractor. Self-evidently the supply of such services in that relationship is obtained and secured by the use of a contract. This suggests that to fall within the extended reach of the legislation one is looking for a contract which obtains such services, that being a contract which is the source of the obligation to supply those services, or the source of a right to supply them.

38. ***The CA's second test*** is underpinned by a misunderstanding of *Inghams*. In *Inghams*, Meagher JA stated that identifying amounts "payable and/or owed" "under" an agreement required "attention to the source of the underlying payment obligation and whether the agreement governs or controls its existence": at [137]. The CA relied on this passage (CA [97]), but failed to refer to the critical passages that follow in *Inghams*.

39. Meagher JA relied on three decisions of this Court to support the statement at [137]. First, ***Chan*** *v Cresdon Pty Ltd* (1989) 168 CLR 242 at 249, where the majority stated "[t]he word 'under', in the context in which it appears, refers to an <u>obligation created by, in accordance with, pursuant to</u> or under the authority of, the lease": at 249 (underlining added). At AJ [95], the CA erroneously described *Chan* as authority for the concept of

an obligation being "under" a lease extending "beyond obligations 'created by' the lease to include those performed 'in accordance with, pursuant to or under the authority of, the lease'" (underlining added). The CA misunderstood *Chan* which, at 249 referred, *inter alia*, to obligations *created* in accordance with or pursuant to the lease, not obligations performed in accordance with or pursuant to the lease.

40. The second decision (see [138]) was *Sara Lee*, where at [42] the majority held that "the words 'under a contract', in s 160U(3), direct attention to the source of the obligation which was performed by the transfer of assets which constituted the relevant disposal". The phrase "whether the agreement governs or controls its existence" at *Inghams* [137] should be understood accordingly. Incidentally, the same passage from *Sara Lee* was relied on by Bathurst CJ in *Downer* in affirming the first test as the correct one to apply.

41. The third decision (see [139]) was *Queensland Premier Mines Pty Ltd v French* (2007) 235 CLR 81 at [55]. The passage quoted by Meagher JA confirms that the statement at *Inghams* [137] did not comprehend a contract that governed or controlled an obligation other than by governing or controlling the coming into being of the obligation.

42. This is confirmed by *Inghams* at [140]: "the words 'payable and/or owed' when used in relation to 'a monetary amount' describe an obligation owed by one party to the other and the use of the phrase 'under this Agreement' with respect to that obligation identifies their contract as its source" (underlining added).

43. It follows that *Inghams* is not authority for the CA's second test. Moreover, the content of that test is uncertain. The concept of a contract that "governs or controls" the supply of services self-evidently introduces questions of degree that create uncertainty as to whether a contract is a "relevant contract" (and whether there is liability to payroll tax).

44. ***The CA's third test*** begs the question of what "paid *for* supplying the service" means. If it means that A paid B *in exchange for* B's service, the governing contract must surely oblige or confer upon B the right to supply the service. So understood, the CA's third test would add little to the first test. Moreover, in performing the Payment Collection Function, Uber collected fares from riders on behalf of drivers. Remitting a fare to the driver (after deducting Uber's service fee) was not payment *in exchange for* the driving service, but fulfillment of Uber's obligation to account to the driver for funds collected on the driver's behalf: PJ [178]. The CA erred in holding that this test was met.

45. If, however, the phrase "paid *for* supplying a service" meant something broader than "paid *in exchange for* …", the CA nonetheless erred. Services supplied under a contract between B and C are not also supplied under a contract between A and B simply because A facilitates C's payment to B by collecting money for B. The casual employee example at AJ [102]-[103] does not support such an approach. Capturing relationships merely because of payment collection arrangements goes beyond what is required to achieve the purpose of the contractor provisions identified at [14]-[22] above.

46. Further, the CA's approach in dealing with the third test is inconsistent with its approach with respect to s 35(1). As discussed below, s 35(1) is concerned with amounts paid "for or in relation to the performance of work". It was not suggested below that Uber's payments were "for…the performance of work"—the CA held that payments to drivers in discharge of the Payment Collection Function were "in relation to" the performance of work: AJ [363]-[364]. It is incongruous that payments were not "for" the performance of work under s 35(1), but, on the CA's approach, were for the performance of work under the CA's third test.

47. Ultimately, ground 1 is concerned with whether drivers' driving services were, under the driver contracts, services of persons (the drivers) supplied to Uber for or in relation to the performance of work. When answering this question, the purpose of the contractor provisions in the Act must be kept in mind. Section 32(1) is apt to capture principal-independent contractor relationships without taking the broad approach adopted by the CA. Uber's approach sees the provision serve its purpose without going further, and resulting in tax being imposed on relationships which are not that of principal-independent contractor (much less contractual relationships that are not substitutes for employer-employee relationships).

48. It is noted, for completeness, that the Commissioner's notice of contention contains two grounds directed to s 32(1). Uber will respond to those grounds in reply.

49. **Ground 2 – s 35:** Where there is a "relevant contract" under s 32, ss 33 and 34 identify a deemed employer and a deemed employee, and s 35 identifies the amounts that are treated as wages for that deemed employment relationship, namely, the "amounts paid or payable by an employer … for or in relation to the performance of work relating to a relevant contract".

50. In the present case, remittal to a driver of a fare collected by Uber from a rider is remittance of an amount paid by the rider to the driver (PJ [178]); it is not remuneration paid by Uber for any driving services constituting the services of persons supplied to Uber. The payment by the rider to the driver has the character of remuneration for the driver's services to the rider. Although the transfer of funds by the rider to Uber as the driver's agent pursuant to the Payment Collection Function is a good discharge of the rider's obligation to pay the driver (*Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 1 WLR 1048 at 1052, 1055, 1056), it does not cause the subsequent remittance by Uber of those funds to the driver to take on the character of remuneration paid by Uber for the driver's services to Uber.

51. The trial judge was alive to this. His Honour construed the words "for or in relation to the performance of work" in s 35(1) as requiring reciprocity or calibration between the payment and the work such that, where a putative employee earned money from a third party but the amount was collected by the putative employer on behalf of the putative employee, the remittal of that amount to the putative employee pursuant to the putative employer's obligation to do so lacked that reciprocity or calibration, and no deeming can occur: PJ [170], [178]-[181].

52. The CA rejected that construction, reasoning that the words "in relation to" in s 35(1) expand the scope of the deemed wages to any amount bearing any "direct relationship" with work: AJ [358], [363]. The CA's concept of a "direct relationship" with work is obviously a loose and inexact one, since it embraces consequential connections; here it was said to have been satisfied by the putative employer's actions as agent for a driver in collecting and remitting fare payments that a third party owed to the driver for his or her personal driving services.

53. The preferable construction of the compendious phrase "amounts paid or payable by an employer … for or in relation to the performance of work relating to a relevant contract" in s 35(1) is that it applies to payments by the deemed employer substantively as remuneration for work performed by the deemed employee for the deemed employer.

54. In construing Div 7, one must keep in mind its context in a statute, the primary subject matter of which is a tax on payroll, being the earnings of employees from employers: see [14] above. Thus, the definition of "wages" in s 13 applies to those amounts that are paid by an employer as remuneration for the work of an employee: see [14] above.

55. Whether wages are taxable is determined by reference to the services performed "by the employee in respect of the employer": s 11(2). Further, the definition of "wages" is extended by a constructive payment and receipt provision in s 46(1), which provides for certain amounts to be wages even where they are not paid to the employee (but to someone else) or they are not paid by the employer (but by someone else). However, such an amount is only taken to be wages if it is "for the employee's services as an employee of an employer". Section 46(1) identifies a capacity ("as" an employee) and a relation between the payment and that capacity ("for" the "services" in that capacity).

56. Div 7 expands common law notions of employment by deeming an employment relationship where the deemed employer is supplied with services of persons for or in relation to the performance of work, with that work being performed by the deemed employee: ss 32(1)(b), 33(1)(b), 34(a). The CA's construction of s 35 as expanding the scope of deemed wages to any amount that bears what it described as a "direct relationship" with work (AJ [358], [363]) would include as deemed wages any amount that bears a relationship with some work, even a deferred and consequential relationship of the kind described in [55] above and even if that is not the same work as that referred to in s 32(1)(b) that results in the deemed employment relationship.

57. The CA proceeded on the basis that the words "in relation to" should not be read narrowly: AJ [347], [352]. In doing so, it has failed to give effect to the interconnecting elements of the statutory scheme. Those elements also demonstrate that the primary subject matter of the Act is a tax on wages, as defined in ss 6, 7, 10, 11 and 13. The use of relational phrases in Div 7, such as "for or in relation to the performance of work" and "relating to a relevant contract", should neither blunt the legislative scheme nor outflank its role as an add-on to common law notions of employment: see *E Group* at [45]-[46] (Bell CJ, Gleeson and Leeming JJA).

58. However, exactly that kind of outflanking flows from the CA's construction of the Act. Under s 35(1), the reference to "relating to a relevant contract" must mean, consistently with s 32(1)(b), relating to a contract under which Uber is supplied with the services of persons for or in relation to the performance of work. The CA's analysis overlooks this critical part of the text, just as it did when it construed s 32(1)(b). Further, reading ss 32(1)(b), 33(1)(b) and 34 together, the other person to whom the services of drivers are supplied must be the person referred to in ss 32(1)(b) and 33(1)(b), that is, the designated person to whom the services of persons are supplied. The CA's failure to

analyse these interrelated requirements led it to mistakenly conclude that s 35(1) does not state that work services must have been supplied to the designated person: AJ [358].

59. It is incongruous in the face of these provisions and the other provisions referred to above, and repugnant to the scheme of the Act, that an amount should be deemed to be wages if: (a) it is a payment by a putative deemed employer that has some connection with work performed for someone else (s 35(1)); (b) that work has some connection with a contract between the recipient of the payment and the deemed employer (s 35(1)); and (c) under that contract, the recipient of the payment does not supply, and is not contractually obliged to supply, its personal services as a driver performing driving work to the deemed employer (s 32(1)(b)): cf AJ [363].

60. The words "in relation to" in s 35(1) have work to do, but they are nonetheless confined in scope. In this respect:

(a) The phrase "for or in relation to the performance of work" in s 35(1) occurs in the context of Div 7 distinguishing between "services" and "work". Services *may* be the same as work (*Odco* at 612), but they may also be different. Thus, s 31 defines "services" as including the results of work performed. Typically, a company would contract to supply services but any work required to be done to achieve that supply of services would be performed by individuals.

(b) This distinction is deployed in identifying the deemed employee as the person performing the *work* (s 34(a)) but the deemed employer as the person being supplied with the *service* (s 33(1)(b), (2)). Similarly, there is an exemption in s 32(2)(c) where a person is supplied with a service but the *work* is done by two or more people.

(c) Because of this conceptual distinction between services and work, if the service and the work are identical then a payment may be *for* the work. But, if the services and the work are different, then a payment may be *for* the service but only *in relation to* the work.

(d) A payment may also be in relation to, but not for, work where that payment is in the nature of annual leave or sick leave – a payment for not working.

64. The words "in relation to" in s 35(1) do not, however, expand the scope of the deemed wages to a payment bearing merely some relationship with work, even if a direct relationship (contra AJ [358]), where that is at odds with the basal operation of the

statute. Rather, the role of those words is to recognise the distinction between services and work that is deployed in a statute concerned with the taxation of remuneration of labour.

65. Correctly construed, the compendious phrase "amounts paid or payable by an employer … for or in relation to the performance of work" applies to a payment (or part thereof: s 35(2)) by the deemed employer substantively as remuneration for work by the deemed employee. That is consistent with the role of s 35 in its context in Div 7, which takes a relationship short of common law employment and deems it to be one of employment, and then identifies, consistent with the scheme of the statute, the amounts that are remuneration by the (deemed) employer for the work of the (deemed) employee.

66. Linguistically, the word "for" is protean and capable of bearing a wide range of meanings dependent on context: *E Group* at [46]. Likewise, "in relation to" is used in a variety of contexts and the degree of connection required between the two subject matters which it joins depends heavily on context: *Travelex Ltd v Federal Commissioner of Taxation* (2010) 241 CLR 510 at [25], [90]; *R v Khazaal* (2012) 246 CLR 601 at [31]. The degree of connection required depends on a judgment about the purpose and intended range of the provision, with resort to dictionary meanings being of little assistance: *R v Orcher* (1999) 48 NSWLR 273 at [28]-[32], [42]; *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 288-289.

67. Moreover, that the relevant amount in s 35(1) is "paid or payable by an employer", in context, identifies a capacity and reason for the payment. In *Mutual Acceptance* at 396, Latham CJ observed that the statutory requirement in predecessor payroll tax legislation that an amount be "paid or payable … *to any employee*" would not include funds given to the employee to make a payment to a third party on behalf of the employer, as the employee holds the money to the employer's account and so it is not "paid" to them. The converse is equally true. Funds given by a third party to a deemed employer to pass on to a deemed employee are held by the employer to the employee's account and so are not "paid" to the employee when they are remitted: contra *Commissioner of State Revenue v The Optical Superstore Pty Ltd* [2019] VSCA 197 at [64]-[65].

68. The sums paid by riders and passed on to drivers are not wages under section 35. In this respect, CA erred.

69. **Ground 3 – ancillary:** s 32(2)(a) has two limbs, the second of which excludes from a "relevant contract" a contract under which a person supplies services for or in relation to the performance of work that are "ancillary … to the use of goods which are the property of that person"; here, the driver's vehicle. In construing "ancillary … to" in s 32(2), the CA has twice held that the service is not required to be minor, subordinate or subservient (***Smith's*** *Snackfood Company Ltd v Chief Cmr of State Revenue (NSW)* [2013] NSWCA 470 at [104], [111]; *Downer* at [127], [130]-[132]), and held that the phrase means "something which tended to assist, or which naturally went with": *Downer* at [132]. The CA seemingly accepted or at least did not dispute these propositions, but said that the service nonetheless had to be "secondary" and superadded the requirement that the use of goods be the principal or dominant characteristic of the contract: AJ [233]-[234], [255], [259], [277].

70. The correct legal meaning of "ancillary to" in s 32(2)(a) is enables, assists or is bound up with, such that the service supports the supply or use of the goods in question. In *Smith's* at [95]-[111], Gleeson JA (Beazley P agreeing) reviewed authorities on the meaning of the word "ancillary" and identified its protean nature, referring to observations by Basten JA that the word was broad and arguably vague and that its Latin origin ("ancilla", a handmaid), while evocative, does little to identify its scope in a particular statutory context: at [100]. Depending on context, the word can mean "auxiliary or accessory", and can indicate supplemental but need not mean subordinate: at [101], [104]. Given the range of grammatical meanings open, the constructional choice in s 32(2)(a) turns on the relative coherence of those alternative meanings with the statutory objects and policies: *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 274 CLR 565 at [88].

71. As to structure, "ancillary" in s 32(2)(a) expresses a relationship between the relevant "service" supplied by a person and either the supply of goods by that person or the use of goods that are the property of that person. In its terms, that is an enquiry as to the relationship between two things: (1) one or more of possibly several services supplied under the contract; and (2) the supply or use of goods. It is not additionally an enquiry as to the significance of the supply or use of goods in the context of the contract as a whole, contrary to the decision below. The engrafting of that further limb is too much at variance with the text of the legislation to be justified: *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at [38].

72. The extrinsic materials to the Victorian Bill identify three examples of the intended scope of the predecessor provision, which was in materially identical terms. Having moved an amendment to the Bill to adopt the wording of "ancillary" instead of the original wording of "only incidental", the Treasurer explained that the term "ancillary" was chosen to ensure that the exemption could apply even where the service was "essential", and gave as an example the services of a plumber installing prime cost plumbing items during the construction of a house, as the "primary reason" for purchasing those services was "to ensure that the prime cost item is put in place": *Hansard*, Victorian Legislative Assembly, 22 November 1983, p 2085-2086 (extracted at AJ [225]).

73. That explanation reveals the legislature's intention that the "ancillary" services contemplated are those that enable, assist or are bound up with the supply or use of goods (the "primary reason") in question. It contains no suggestion that the supply or use of the goods must be dominant or principal in terms of the contract as a whole. The word "ancillary" was chosen to ensure that the exemption applied where what is sought to be achieved is an inextricable combination of both the service and the good. Thus, in the case of the plumber's installation of prime cost items, what is sought is neither merely the service itself nor merely the physical item, but the *installed* item: cf *Downer* at [132], where Bathurst CJ explained that Foxtel equipment supplied to a customer was of no benefit to the customer unless installed.

74. The two further examples in the Explanatory Memorandum to the Vic Bill (extracted at AJ [227]) are consistent with this. One is a contract under which both the use of a crane and an operator are supplied. The operator's services are ancillary to the use or supply of the crane because the bargain between the parties to that contract is for the functionality of an operated crane. The second example is a contract under which a person's testing equipment is to be operated by that person's staff. Again, the services are ancillary to the use of the testing equipment because the contractual bargain is for the equipment to be operated.

75. Each of those three examples supports the constructional choice of the legal meaning of "ancillary" from among its grammatical meanings as being that which enables, assists, or is bound up with the use of the driver's vehicle to provide the ride.

76. That was the sense in which the majority considered the activities of the taxpayer to be "ancillary" to its charitable purpose in *Commissioner of Taxation v Word Investments*

Ltd (2008) 236 CLR 204. The taxpayer ran for-profit investment and funeral businesses and dedicated the profits solely to its charitable purposes. At [19], the majority rejected the need "to distinguish between the main, predominant or dominant object and other objects", concluding that the taxpayer's activities "in raising funds by commercial means are not intrinsically charitable, but they are charitable in *character* because they were carried out *in furtherance of* a charitable purpose": at [26], emphasis added.

77. Similarly, a service will be ancillary to the supply or use of goods if the service is in furtherance of, such that it takes its character from, that supply or use of goods. That is the intended scope of s 32(2)(a) as illustrated by the three examples in the extrinsic materials—the services of the plumber, crane operator or testing equipment operator bring about the installed plumbing item and the functionality of the operated crane and operated testing equipment respectively, such that the service is bound up with, and takes its character, from that supply or use of goods. That is sufficient; there is no superadded requirement that the use of goods be the predominant characteristic of the contract—that is extratextual and unnecessary and it is unworkable in the standard case of services inextricably linked with the use of goods.

78. If the driving service was supplied to Uber under the driver contracts (contrary to Uber's case), that service enabled the rider and any accompanying persons or items to go from their pick-up point to their destination in the driver's vehicle. The use of the vehicle to transport persons and items from one place to another was enabled and assisted by, and inextricably bound up with, the driver's personal services.

79. The trial judge and the CA considered that the driving service and the use of the driver's vehicle to be one and the same, or at least inseparable and practically intertwined, so that one could not be ancillary to the other: PJ [127], AJ [261]. Given that holding, it should inevitably have followed that the driving service was ancillary to the use of the vehicle. The CA only avoided that result by engrafting another requirement onto the concept of what is "ancillary". The correct analysis is that the driving service and the use of the vehicle are inextricably bound up together, but not the same. The service is the act of driving by the driver. The use of the vehicle is different, both practically and conceptually. It is the successful deployment of both driving and the driver's vehicle that enables the rider, and any accompanying persons or items, to be transported to their destination with such comforts as the vehicle may afford. That is why driving is ancillary to the use of the vehicle.

80. Further, the extrinsic materials contemplate that the service and the use of the goods need not be distinct: "if A in the course of his business sent certain machinery to B for testing on B's equipment, the labour involved by B's staff in operating B's equipment would be regarded as incidental and not caught" (Explanatory Memorandum to the Vic Bill). It is impossible to reconcile the reasoning in PJ [127] and AJ [261] with this example, in which there is an identity between the service of operating the testing equipment and the use of that equipment. Uber's case is starker as the rider also uses the vehicle.

81. That example in the Explanatory Memorandum identifies the contemplated operation of the provision: cf ***Mondelez*** *Australia Pty Ltd v AMWU* (2020) 271 CLR 495 at [31]-[32], [37], [71], [96]; *Bayside City Council v Telstra Corp Ltd* (2004) 216 CLR 595 at [42]-[43]. It is a concrete example of the intended operation of a linguistically ambiguous provision (cf *Mondelez* at [73]), and so is highly probative of the legal meaning to be attributed to the word "ancillary".

82. That operation of the second limb of s 32(2)(a) is unsurprising given the first limb applies to a "supply" of goods, which includes a supply of legal possession of those goods without imparting any greater title: *Downer* at [115]-[118]. For the "use of goods" limb to have work to do, the "use" must have a lower threshold than the person supplying legal possession of the goods (there is also the requirement that the goods be that person's property).

83. The core target of the second limb – the most natural situation in which a person supplies a service and there is a use of goods belonging to them, but without the person parting with legal possession – is where the service is the person *operating* their own goods. To see the service and the use of the goods as the same, such that the former cannot be ancillary to the latter, would deny the exemption its central operation.

84. Exempting services to operate the service provider's own goods furthers the purpose of this limb. In the context of a tax on wages, excluding payments for services tied up with the contractor's use of their goods serves the intent that "[b]ona fide independent contractors will not be caught by the legislation" (*Hansard*, NSW Legislative Assembly, 13 November 1985 at 9558) and to "exempt payments to genuine independent contractors" (*Hansard*, NSW Legislative Assembly, 29 May 2014 at 29468). Section 32 does not deploy the common law distinction between employment and independent contracting, but the exemptions in s 32(2) draw on badges of independent contracting which include, as reflected in the second limb of s 32(2)(a), the provision of the

contractor's own substantial equipment: *ZG Operations Australia Pty Ltd v Jamsek* (2022) 275 CLR 254 at [70], [88].

85. Services are ancillary to the use of the goods under s 32(2)(a) where they enable, assist or are bound up with the use of the goods in question. If and to the extent that (contrary to Uber's case) a driving service is supplied to Uber under the driver contracts, that driving service is also ancillary to the use of the driver's own vehicle. In such a case, both the services and the goods are significant. The relevant ancillary relationship exists; there is no further requirement that the use of goods be the dominant or primary characteristic of the contract. That would conflict with the text and structure of the provision, be unworkable in the standard case of services to operate the goods in question and thwart the purpose of the legislation.

86. **Rating** of riders by drivers was found by the CA to be ancillary to the use of the vehicle, in the sense of assisting with and being subsidiary, incidental, accessory or auxiliary to that use: CA [274], [275]. However, s 32(2)(a) was found not to apply to rating due to the CA's superadded requirement that the principal or dominant characteristic of the contract be the use of goods: CA [277]. Accordingly, if Uber's construction of s 32(2)(a) is correct, it follows that rating, as well as driving, is within s 32(2)(a) and the driver contract is not a relevant contract. Further it should be noted that the Commissioner conceded at trial that if there was no driving service under s 32(1), no payroll tax would be payable in respect of any service of rating.

Part VII: ORDERS

87. The orders sought are as set out in the Notice of Appeal.

Part VIII: **TIME ESTIMATE**

88. Counsel estimate that two and a half hours are likely to be required for the presentation of the appellant's oral argument, with up to 20 minutes in reply.

Dated: 5 February 2026

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ANNEXURE TO APPELLANT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	Payroll Tax Act 2007 (NSW)	Version in force 14 May 2020 to 10 August 2020	S 3, Pt 2, s 13, Pt 3 Divs 7 – 9	• Parties proceeded below on basis that resolution of their dispute by reference to this version of the legislation is determinative of the dispute for the whole of the relevant period (1 July 2014 to 30 June 2020), as any differences in provisions across the period are not material • Act in force at the conclusion of the tax period	As indicated in preceding column, parties have proceeded on the basis that this version can be applied to all relevant events in this case