HIGH COURT OF AUSTRALIA

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Details of Filing

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Form 27E – Appellant's reply
Note: see rule 44.05.5.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: Uber Australia Pty Ltd
Appellant

and

Chief Commissioner of State Revenue
Respondent

APPELLANT'S REPLY

Part I: Certification – this reply is suitable for publication on the internet.

Part II: Argument

1. **Legislative purpose and approach to construction:** The reply submissions (**RS**) construe each of ss 32(1)(b), 32(2)(a) and 35(1) in isolation without proper regard for the statutory scheme. Hence, RS [12] argues that the "policy limits of Pt 3 Div 7" are expressed only in "the statutory definition and the specific exemptions in s 32(2)". RS [13] to RS [17] argues that the Court of Appeal was correct to construe s 32(1)(b) as if it operated in isolation from other provisions that impose employment related requirements and are incorporated into the substantive operation of s 35(1), such as ss 11, 13, 33 and 34. RS [19] contends that s 35 says nothing about whether a service is supplied. RS [57], although accepting that s 35(1) only arises for consideration if the conditions in ss 32(1)(b), 33 and 34 have been met, immediately jettisons the pre-condition that Uber must be supplied with the "services of persons" before there can be a relevant contract.

2. Such fundamental errors mirror the Court of Appeal's errors. Definitions are not to be construed in isolation, ignoring the substantive provisions in which they appear; they must be read into and construed in the context of the substantive provisions in which they sit: *Kelly v The Queen* (2004) 218 CLR 216 at [103]. Only then is proper account taken of textual limits, statutory purpose and the targeted mischief discerned from the statutory scheme and relevant extrinsic material: *Palmanova Pty Ltd v Commonwealth* (2025) 99 ALJR 1362 at [5]-[6]. The point is not whether "Uber's arrangements are sufficiently analogous to employment" (cf RS [12]). Pt 3 Div 7 must be construed as a whole and by reference to the mischief of employers obtaining personal work-related services by

substituting independent contractors for employees.

3. **Ground 1 (s 32(1)(b)):** RS [14]-[18] focus on what is capable of being a service, but ignores the explicit requirement that "the services of persons" must be supplied to Uber as the designated person. RS [21] asserts, *ipse dixit*, that there is no support for a construction that the services of persons supplied to the designated person must be "physically performed on or directed towards that person". The fact that s 32(1)(b) requires that services of persons be provided or directed to the designated person is supported by the definition of "supply" and ss 33 and 34. Those words are not satisfied where the personal services of drivers are supplied only to riders, and the riders' fare payment to drivers, via Uber as collection agent, triggers Uber's prior authority from drivers to deduct the service fee they owe it.

4. Providing a car and driving a rider to their destination clearly involves a service. There is no dispute that the driver is supplying the "services of persons" to the rider within the meaning of s 32(1)(b). The dispute is whether, at the same time, the driver is supplying the services of persons to Uber. On the Commissioner's approach, if A supplies a service to B, and thereby benefits C, A also supplies a service to C. This "mere benefit" approach is incorrect. It gives "supply" no sensible meaning. Nor does it deal with the need for Uber to be supplied with the services "of persons". RS [17] not only omits words from the definition of "services", it also imports the notion of a consequential financial benefit which finds no textual support in s 32(1)(b). Further, Uber's right to its service fee is not a "result (whether goods or services) of work performed"; rather it arises because Uber provides technological platform services to drivers that enable them to receive and accept transportation requests from riders, and in consideration thereof Uber is contractually entitled to be paid a service fee by drivers.

5. RS [17] and [19] confuse two different payment flows that run in different directions, namely, riders' payment of the fare to drivers pursuant to their direct contractual engagement of drivers, and drivers' obligation to pay Uber for their use of Uber's platform services. RS [19] accepts that the Commissioner's approach would often result in administrative payment arrangements determining liability to tax. RS [32] then fails to explain how taxing relationships by reference to administrative arrangements furthers the statutory purpose. Such arbitrariness indicates a basic mistake in the Commissioner's approach to Pt 3 Div 7.

6. The Commissioner's explanation of *Odco* at RS [22] ignores an important part of this Court's reasons. If the mere fact that a tradesman's performance of work entitled TSA to be

paid was sufficient, then this Court would not have set out the back-to-back contractual arrangements quoted in Uber's submissions (**AS**) at [32].

7. As to RS [23], the incoherence is in taking an approach that leads to each of Uber and a driver being within both the definition of employer and the definition of employee.

8. RS [24] misses the point. Does a barrister supply services to the barrister's clerk in the circumstances identified at AS [31]? Obviously not. RS [24] gives other reasons why payroll tax may not apply, but fails to grapple with this fundamental issue.

9. RS [26] mistakenly argues that the inclusion of "informal" arrangements warrants an extended approach to the construction of "under". But such arrangements can involve the assumption of obligations: cf *J Hutchinson Pty Ltd v ACCC* (2024) 302 FCR 79 at [107]. Moreover, this case concerns a formal contract—the driver contract—and the question is whether the work-related services of persons may be supplied to Uber under that contract. Even a casual employee, who has no right or obligation to work "at any particular time" (AJ [101]) fulfils an obligation or exercises a right to work, when they work.

10. RS [28] acknowledges (correctly) that *Inghams* and *Chan* did not give "under" the meaning at AJ [104(2)]. A contract that "governs or controls" the supply of a service, in a sense other than obliging or providing a right to make the supply, is not akin to a principal-independent contractor contract and goes beyond the statutory purpose.

11. The "legal right to be paid" identified in RS [29] is the driver's right to have the fare paid by the rider remitted to the driver by Uber as the driver's collection agent (AJ [107]) which is different from a payment made by an employer to a casual employee: cf RS [30].

12. RS [31] fails to realise that the CA's reasoning for the test in AJ [104(3)] was that a casual employee's work "engages the employee's contractual right to be paid": AJ [103]. A casual employee's right to be paid "for" doing work for the employer is a right earned in exchange for work, in the sense discussed in AS [44].

13. **Ground 3 (ancillary):** RS [41] and [51] argue that s 32(2)(a) cannot apply here where the driving service and use of the car were "inextricably bound up". But inextricably bound up cases are the mainstay of the exemption.

14. RS [38], [34]-[35], [37] argue that "ancillary" has an "inherent" single meaning, expressing a relationship with a dominant item. That is not so. "Ancillary" covers a range of connections and is context dependent. RS [34] points to cases in other contexts but fails to address the payroll tax cases (*Downer* and *Smith's*) which reject hierarchy.

15. The Commissioner points to extrinsic material to the effect that payroll tax applies where the contractor's *labour* was the "key ingredient" of the contract (RS [37], [39]-[41], [44], [51]) and leaps to arguing that s 32(2)(a) can only apply if the *use of goods* is the primary object of the contract (AJ [225]-[226], [265]-[266]). That reasoning invokes a false dilemma. Contracts for the supply of services and use of goods do not fall within a dichotomy whereby either one or the other is the primary object—a third class exists where the two items are inextricably bound up and ranking is impossible.

16. RS [43] (see also [49], [50]) downplays the testing equipment example by calling the explanatory memorandum "imprecise" and arguing for an "implicit" (and superadded) notion of principality. On the contrary, this is an instance of the exemption applying when service and use are inextricably bound together.

17. RS [38] contends that Uber's construction would apply whenever a contractor uses a tool while supplying labour. That misunderstands AS [75]-[77]. A painter's labour in painting a building does not take its character from, nor is it bound up with, the use of the roller. By contrast, the labour in operating a motor vehicle, crane or testing equipment *is* bound up with and ancillary to the use of that machine.

18. RS [51] argues that "where the service and the use of good is the same thing, the use of the good is not the key ingredient because it cannot be separated from the labour". This submission wrongly assumes (1) that the use of goods must be the key ingredient even though there is an important class of contract where ranking is impossible and (2) that two things which cannot be separated are identical. Further, the 2014 amendment to s 32(2)(d)(i) referred to at RS [47] was for the avoidance of doubt and does not assist the Commissioner.

19. RS [48] argues that a rider does not use a vehicle as they do not operate it. But using a car is not limited to driving it—the rider chooses the class of vehicle they want to use (e.g., Uber-X, Uber Black or Uber Taxi: PJ [51]) which will deliver different features concerning, size, comfort, boot storage, etc. The Commissioner's submission defies the ordinary meaning of "use", which includes availing oneself of such features.

20. **Ground 2 (s 35):** RS [56] cites *WA Flick and Co Pty Ltd v FCT* (1959) 103 CLR 334 at 339 to argue that "wages" need only be payments "because" of the employee's service. But in the same passage this Court incorporated within the "critical question" whether the payment was for "something done in the service of the employer" and stated that "the Act is concerned with the actual remuneration which [the employee] is entitled to receive in respect of his employment". In other words, the payment must be actual remuneration for

personal services of the relevant employee that are supplied to the employer— curiously, a proposition embraced in RS [36]. Section 11(2)-(6) similarly stipulates that taxable wage payments must be "for services performed by the employee in respect of the employer".

21. RS [57] and [59] correctly accept that the payments captured by s 35(1) cannot be unfettered from the purpose of Pt 3 Div 7 but resists the proposition that the requirements of s 32(1)(b), s 33 and s 34 are incorporated into s 35(1)—the Commissioner contends that s 35(1) applies to a service "irrespective of whether it is a 'personal' service" and even if it is not supplied to the designated person. There is no sound basis for either contention. Nothing in s 35(1) permits departure from the definition of wages beyond what appears in s 13 so as to include a remittance by the putative employer of funds paid by a third-party. The conditions incorporated into s 35(1) by the definitional provisions demand that the amounts in question (a) be payable by a s 33 employer to a s 34 employee; and (b) relate to a contract under which the employer has been supplied with "the services of persons" for or in relation to their performance of work.

22. RS [60] misunderstands AS [67]. The point is that, just as the phrase "paid or payable … to any employee" contemplates a capacity and a reason for payment, so does the phrase "paid or payable by an employer". Contrary to RS [60], AS [67] falls squarely within the scope of Appeal Ground 2.

23. **Notice of contention (NoC):** Uber has submitted elsewhere why Uber's earning of a service fee for its provision of its platform services to a driver is insufficient to engage s 32(1)(b). There is no principled reason why a more nebulous form of benefit for Uber—driving increases the "reliability and attractiveness of Uber's platform"— could or should engage s 32(1)(b), and none is identified in RS [62]: cf NoC ground 1.

24. At the level of principle, if the approach in AJ [104(2)] is rejected, there is no reason to take the approach in NoC ground 2(i), which is not supported by *Smith's*.

25. As to NoC ground 2(ii), the fact that the driver contract gave them the practical opportunity to drive riders does not come anywhere near satisfying the requirement that, under the driver contract, Uber must be supplied with the services of persons for or in relation to the performance of work.

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