



HIGH COURT OF AUSTRALIA

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Details of Filing

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Form 27D—Respondent’s submissions

Note: See rule 44.03.3.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: Uber Australia Pty Ltd
Appellant

and

Chief Commissioner of State Revenue
Respondent

RESPONDENT’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, when a driver transports a rider who uses Uber’s platform, the driver supplies services to Uber for or in relation to the performance of work under the driver contract, such that the driver contract is a “relevant contract” within the meaning of s 32(1)(b) of the *Payroll Tax Act 2007* (NSW) (**Act**).
3. **Issue Two:** Whether the service of driving is ancillary to the use of goods which are the property of the driver, such that the exemption in s 32(2)(a) applies.
4. **Issue Three:** Whether amounts remitted by Uber to drivers, being the fares collected from riders and net of Uber’s service fee, are amounts paid or payable by Uber for or in relation to the performance of work within the meaning of s 35(1) of the Act, and are therefore taken to be wages. Although this is appeal ground two, it naturally follows from the other grounds because s 35 only arises

for consideration if there is a “relevant contract” under s 32.

Part III: SECTION 78B NOTICE

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

Part IV: FACTS

6. The Chief Commissioner raises the following matters by way of emphasis and qualification to Uber’s statement of the facts in its submissions (**AS**).
7. First, while there is no suggestion that the driver or rider contracts were a sham, the *legal* character of a contractual relationship turns on the rights and obligations established by the contract, not on the labels the parties attach to it: see *CFMMEU v Personnel Contracting Pty Ltd* (2022) 275 CLR 165 at 193 [58], 194 [63], 198 [79] (Kiefel CJ, Keane and Edelman JJ); 214 [127] (Gageler and Gleeson JJ); 235 [184], 237 [187] (Gordon J). Uber’s position therefore is not materially advanced by the driver contract describing the driver as having a “legal and business relationship” with the rider (and not Uber): primary judgment (**PJ** at CAB 5-48) [53(3)]; nor by the contractual terms that describe Uber as providing a “lead generation” service: cf AS [10], [28]. Moreover, the statutory test posed by the Act does not simply ask whether there is a particular legal relationship between the parties: see *Uber BV v Aslam* [2021] UKSC 5 at [69], see also [81]. The ultimate question is whether the circumstances of this case fall within the statutory language of Pt 3 Div 7 of the Act.
8. Secondly, Uber is not a passive intermediary whose role ends upon “lead generation” (introducing a driver to a rider). From start to finish, trips occur via the platform (“Driver App” and “Rider App”) that Uber controls: PJ [29]-[39]; appeal judgment (**AJ** at CAB 75-222) [26]. Uber’s rider contracts govern the rider’s use of the platform: PJ [57]-[59]. Uber’s driver contracts govern the driver’s use of the platform and the performance of driving: PJ [47]-[56]. Under those contracts, Uber determined fares unilaterally and could vary them without driver consent: PJ [40], [53(9),(12)]. Drivers were required to comply with Uber’s guidelines when transporting riders; to transport riders safely, professionally and directly to their destination without unauthorised stops; and to maintain their vehicles in a clean condition: PJ [53(5)], AJ [108]. Drivers

could be banned from the platform for breaching Uber’s community guidelines: PJ [45] (2017 Community Guidelines are at Respondent’s Book of Further Material p4). Trips thus occur via Uber’s platform and within the contractual framework which Uber establishes and administers. These features bear on whether the services of drivers are supplied “to” Uber and “under” the driver contracts.

9. Thirdly, AS [12] defines the “Payment Collection Function” as Uber’s role in collecting and remitting funds on behalf of the drivers. Uber was not, however, a mere conduit for passing funds from riders to drivers. Under the driver contracts, Uber determined the fares; it determined its service fee; it collected fares from riders; it retained a percentage as its service fee; and it paid the balance to drivers: PJ [40]-[41], [53(6), (9)-(10)]. The term “Payment Collection Function” should be understood as describing this entire contractual mechanism.

Part V: ARGUMENT ON APPEAL

10. **Legislative purpose:** Uber contends that Pt 3 Div 7 of the Act is confined to arrangements that are substitutes for, or disguises of, employment: AS [14]-[22]. That states its purpose too narrowly.
11. The text of ss 32(1) and 32(2) does not map the usual boundaries of an employment relationship. Section 32(1) defines a “relevant contract” by reference to services supplied under a contract, without requiring that the arrangement resemble employment or be adopted to avoid payroll tax. The exemptions in s 32(2) likewise do not track employment precisely. For example, s 32(2)(b)(ii) provides an exemption if the services supplied are ordinarily required by the designated person for less than 180 days per year; yet a genuine employee, such as a seasonal or casual worker, may be engaged for less than 180 days. The specific anti-avoidance provision in s 32(2A), which expressly denies exemptions where a contract was entered into to avoid tax, confirms by contrast that the primary definition in s 32(1) is not confined to avoidance arrangements: see also AJ [23].
12. The extrinsic material also confirms that the provisions are not confined to employment-like relationships. The second reading speech to the predecessor Victorian bill recognised that the provisions would apply to some genuine

independent contractor relationships, including arrangements that had “always operated on the sub-contractor system”: AJ [20]. The Minister also said that the “relevant contract” provisions “deal with all other contracts involving the supply of labour where it is considered that the pay-roll tax legislation should apply” (emphasis added): *Hansard*, Legislative Assembly, 24 November 1983 at p. 1256 (**Victorian 2RS**). Thus, the policy limits of Pt 3 Div 7 are expressed in the statutory definition and the specific exemptions in s 32(2); there is no additional requirement that the arrangement resemble employment. There is therefore little utility in asking whether Uber’s arrangements are sufficiently analogous to employment to attract Pt 3 Div 7: see AJ [24]-[25].

13. **Issue 1 – services:** the CA found that drivers supplied a service to Uber because the act of transporting riders was central to Uber’s business, including by permitting Uber to earn a service fee: AJ [54]-[58]. That was the sense in which the CA used the shorthand term “driving service”: AJ [37], [41], [54].
14. The ordinary meaning of the word “service” is broad, and includes an act of helpful activity: *IW v City of Perth* (1997) 191 CLR 1 at 11. That ordinary meaning is consistent with the text and purpose of the Act, and comfortably embraces the service as found by the CA. Furthermore, s 31 gives the word “services” an expanded definition in Pt 3 Div 7 by providing that it includes “results (whether goods or services) of work performed”. That expanded definition further supports the conclusion of the CA, because it confirms that generating a financial benefit to Uber as a *result* of driving riders constitutes the supply of a service for the purpose of Pt 3 Div 7.
15. The explanatory memorandum confirms that the purpose of this expanded definition of “services”, along with the other defined terms, was to prevent an “unduly narrow interpretation of the respective expressions in the main taxing provisions”: Explanatory Memorandum, Pay-Roll Tax (Amendment) Bill (No 2) (Vic), at p. 3. That memorandum also stated that the definition of “relevant contract” was “very wide”: Explanatory Memorandum, Pay-Roll Tax (Amendment) Bill (No 2) (Vic), at p. 2.
16. While Uber argues against adopting the ordinary meaning of “services”, it is significant that at no point does Uber explain what meaning it contends should

be given to that word.

17. Even if a narrower meaning of the word “service” is adopted, the CA’s conclusion was correct. As the CA observed, the service of drivers “is not merely of assistance to Uber in some indirect or collateral way”, but “generates a financial benefit for Uber in the form of a service fee, and is the foundation of Uber’s business”: AJ [54]. That service “is the very thing which engages Uber’s legal rights” to collect money and deduct a service fee under the rider and driver contracts: AJ [55]. Uber’s service fee entitlement is also a “result...of work performed” within the expanded definition of “services” in s 31. Those matters confirm the service is supplied to Uber within the meaning of s 32(1)(b).
18. The matters raised in Uber’s submissions at AS [26]-[34] do not disclose error in the reasoning of the CA. First, the CA correctly identified that the issues in dispute for the purpose of s 32(1)(b) were whether the service was supplied “to” Uber and “under” the driver contracts: AJ [38]. There was no dispute about the other elements of s 32(1), such as services being “of persons” and supplied “in the course of a business”. Contrary to AS [26], there was no need for the CA to state the issues in a form that included matters not in dispute. Nor was the service drivers supplied to Uber a theoretical construct – their act of driving delivered a material benefit to Uber.
19. Secondly, Uber’s submission at AS [27] conflates the conclusion that a service is supplied within the meaning of s 32(1), and the broader conclusion that Pt 3 Div 7 as a whole is engaged. It is not in dispute that, if the rider paid the driver directly, there would be no payment from Uber to the drivers to which s 35 would apply. That is how the CA explained the nanny example at AJ [62]. But the application (or not) of s 35 says nothing about whether a service is supplied. In Uber’s case, regardless of whether the rider pays Uber or the driver, the driver’s work results in Uber deriving a fee and makes Uber’s system function.
20. Thirdly, AS [28] contends it is “bizarre” to say that a “customer” supplies a service to a business merely by using that business’s services. That framing is inapt, since the term “customer” is not used in the Act. In any event, a “customer” in the ordinary sense obtains services without performing any work. Here, there is no dispute that driving constitutes the performance of work: AJ

[37]. Drivers are therefore not “customers” in any relevant sense – they are persons who perform work that produces a result for Uber.

21. Fourthly, the service provided by drivers sits comfortably within the s 32(1)(b) requirement that the services be “of persons” and “for or in relation to the performance of work”. The services are those of the driver and they are for or in relation to the performance of work – transporting the rider. To the extent AS [29]-[30] suggests that services provided “to” a person must be physically performed on or directed at that person, that construction is unsupported. A sales person provides services to their employer by attending to prospective customers. That work is performed within the employer’s contractual and commercial framework and delivers a financial benefit to the employer. So too here: the drivers’ performance of trips was carried out within Uber’s contractual framework and triggered Uber’s entitlement, under the driver contracts, to collect fares and retain its service fee.
22. Fifthly, in *Accident Compensation Commission v Odco Pty Ltd* (1990) 64 ALJR 606 at 612G-613B, this Court considered a tripartite relationship where tradesmen contracted with a labour agency (TSA), which in turn contracted with builders. This Court found that the tradesmen supplied services both to TSA and to the builders. The passage from *Odco* quoted at AS [32] includes the words that when TSA agreed to supply a tradesperson to the builder, it was on terms “that the builder was to remunerate TSA for supplying the tradesman and for the work which he did” (at 612G-613A). It was therefore significant to this Court’s reasoning that the work of the tradesperson caused TSA to become entitled to a payment. The case supports the CA’s finding that the service of driving was supplied “to” Uber because, under the contractual framework, the performance of that service was foundational to Uber’s business and triggered Uber’s right to be paid. Given also the extended definition of “contract” in s 31 (which includes informal arrangements), an enforceable obligation is not required for services to be provided “to” a party.
23. Sixthly, the CA’s approach does not lead to incoherence in the statutory scheme. The incoherence postulated at AS [34] is that the CA’s reasoning leads to the conclusion that Uber or its staff members are employees of each driver. That

submission overlooks the fact that Uber would fall within at least the exemptions in s 32(2)(b)(iv) (as they were performed to the public generally, namely anyone who wished to sign up to the Uber app) and s 32(2)(c)(i) (as any work would likely be performed by two or more persons employed by Uber). In any event, there is nothing incoherent about a conclusion that Uber also supplies a “service” to drivers (putting aside the exemptions). Even in a common law employment relationship, employers often provide services to their employees, such as training and professional development.

24. Finally, the example of a barrister’s clerk at AS [31], like Uber’s other hypotheticals, is flawed because it fails to consider every element of Pt 3 Div 7. It is unlikely that the barrister is supplying a work-related service to the clerk “under” any contract. The barrister and clerk likely have a contractual arrangement which provides that the clerk can retain an agreed amount of fees collected on behalf of the barrister, and remit the balance. However, it is unlikely that the legal services performed by the barrister are “under” that contract in any of the senses set out at AJ [104]. A term regulating how the barrister is to supply those services would be antithetical to the ethical obligations requiring barristers to act independently. Furthermore, the barrister’s obligation to supply legal services, and right to be paid, do not come from any contract between the barrister and clerk but from the retainer with the instructing solicitor. In any event, hypothetical examples with supposedly absurd results are of limited utility. As Sackville AJA observed in *Smith’s Snackfood Company Ltd v Chief Commissioner of State Revenue* (2013) 97 ATR 904 at 943 [245] (*Smith’s Snackfood CA*), “[a]bsurdity will rarely be a helpful notion in construing a revenue statute. The question is how the language used by Parliament applies to the particular factual situation.”
25. **The services were supplied “under” the relevant contract:** The word “under” in s 32(1)(b) requires a sufficient connection between the contract and the supply of the services: AJ [82]-[83]. The CA held that a service is supplied “under” a contract where the contract: (1) is the source of the right or obligation to supply the services; (2) expressly refers to, and governs or controls, the supply of the services; or (3) confers a right to be paid for supplying the

- services: AJ [104]. The service of driving was supplied “under” the driver contracts in (at least) senses (2) and (3): AJ [106]-[109]. Uber accepts sense (1) but resists (2) and (3): AS [36]-[46].
26. The statutory text and context support extending “under” beyond sense (1). The definition of “contract” in Div 7 includes informal arrangements or undertakings (s 31): AJ [100]. Thus, the “contract” need not be legally enforceable. Further, to the extent one purpose of Div 7 (not the sole or overriding purpose) is to identify persons supplying services “on a similar basis to ordinary employees”, casual employees need not have a contractual right, or obligation, to work at any particular time or at all: AJ [101]. Contrary to AS [36]-[37], Div 7 is not confined to legally enforceable obligations.
27. The CA’s second test: The service of drivers was supplied “under” the driver contracts in sense (2) because those contracts expressly referred to and governed the manner of its performance – by requiring drivers to drive safely and directly, maintain a clean vehicle, and so on: PJ [53(5)], AJ [108].
28. Uber’s submissions at AS [38]-[43] misread the CA’s reasons. Sense (2) was formulated “adapting the language of *Inghams*”: AJ [104(2)]. The CA did not simply import the meaning of “under” from that case without regard to statutory context. The clause in *Inghams* expressly referred to a “monetary amount payable and/or owed ... under this Agreement” – plainly a reference to legal obligations under a formal contract (see at [127] and [136]-[137]). Likewise, *Chan v Cresdon* (1989) 168 CLR 242 at 249 concerned obligations “under this lease”: AJ [95]. That is a very different context to the present case. An inquiry as to whether the contract “governs or controls” the supply of the services is consistent with the broader context and the purpose of Pt 3 Div 7. It would capture relationships akin to casual employment where the employee has no right or obligation to work a particular shift, but when they do, the contract governs and controls how they perform that work: AJ [103]. That such a test involves “questions of degree” (AS [43]) is true of virtually every legal concept and is no objection to it.
29. The CA’s third test: the CA concluded at AJ [104(3)] that a service is supplied “under” a contract if that contract confers a right to be paid for supplying the

services. The service of drivers was supplied “under” the driver contracts in this sense (3) because those contracts conferred on drivers a legal right to be paid each time they performed a trip: AJ [107].

30. There are good reasons for adopting that approach. As recognised at AJ [102], one feature of an employment relationship is that the employee provides their services because their contract of employment gives them a right to be paid. Construing the word “under” in this way therefore captures relationships which bear some analogy to common law employment.
31. AS [44] reads the CA’s reasons too narrowly. There is nothing to suggest that the CA used the word “for” to mean “in exchange for” in a technical sense, nor that it required the contract to contain a legally enforceable right or obligation to supply the service in order to satisfy s 32(1)(b). As AJ [107] makes clear, the CA’s focus was that the driver contracts conferred on drivers a legal right to be paid “each time the driver performs the driving service”. To a similar effect, AS [46] misconstrues the word “for” in AJ [104(3)]. The words of a judgment are not to be read as if they are a statute. There is no reason why the word “for” in s 35(1) needs to be construed in the same way as in AJ [104(3)].
32. Uber’s concern at AS [45] about “[c]apturing relationships merely because of payment collection arrangements” overlooks the structure of Pt 3 Div 7. The provisions apply only if, relevantly, there are services supplied to the designated person *and* those services are supplied under the “relevant contract”. It is not enough that A facilitates payment by a third party to B – there must also be a supply of a service by B to A. For that reason, Uber is in a different position to a mere intermediary which simply collects and passes on payment.
33. **Issue 2 – ancillary:** The CA found that determining whether the exemption in s 32(2)(a) is engaged requires considering the relationship between the work-related service (or services) and the supply or use of goods under the contract, and the significance of the services relative to the supply or use of goods. The CA explained that s 32(2)(a) will be satisfied if the supply or use of goods is the principal or dominant characteristic of what occurred under the contract in question, and the work-related services tend to assist the supply or use of goods “in the sense of being subsidiary, incidental, accessory or auxiliary” to it: AJ

[259]. The CA found that neither of these requirements were satisfied, because driving was not “subsidiary, incidental, accessory or auxiliary” to the use of the car, and nor was the use of the driver’s car the principal or dominant characteristic of the driver contracts: AJ [261], [265]. Uber does not appear to challenge those factual findings.

34. The CA’s construction accords with how this Court has conceived the concept of whether one thing is “ancillary to” another in other contexts. As the CA recognised at AJ [239], in *Commissioner of Taxation (Cth) v Word Investments* (2008) 236 CLR 204 at [17], a majority of this Court explained that in determining whether a body was a charitable institution it was necessary to consider its “main or predominant or dominant objects, as distinct from its concomitant or incidental or ancillary objects”. Therefore inherent in the notion of something being “ancillary” is that there is something else which is dominant. Uber’s analysis of that case at AS [76] overlooks that there was no need to distinguish between the dominant object and other objects *in that case* because on the facts, the organization had “only one group of objects” (see [19]). Likewise in *TEC Desert Pty Ltd v Commissioner of State Revenue* (2010) 241 CLR 576 at [11], this Court referred to the common law rule (now modified by statute) that an instrument should be stamped for its “leading and principal object”, and that the stamp covered “everything accessory to that object so that merely accessory or ancillary provisions to the principal transaction” did not attract further duty.
35. Therefore contrary to AS [71], the question of whether the use of the good is the primary matter in the contract is not a superadded requirement. If something is “ancillary”, it is implicit or inherent in that concept that there is some primary or dominant thing for it to be ancillary to.
36. This construction is consistent with the purpose of the statute. As Starke J explained in *Mutual Acceptance Co Ltd v Federal Commissioner of Taxation* (1944) 69 CLR 389 at 401, pay-roll tax under the predecessor Commonwealth statute was designed to be a tax upon payments made for “services rendered” (cf goods). The original New South Wales payroll legislation, the *Pay-roll Tax Act 1971* (NSW), followed the Commonwealth scheme: *Terry Shields Pty Ltd v*

Chief Commissioner of Pay-roll Tax (1989) 17 NSWLR 493 at 496. Where the dominant or principal feature of the contract is the supply or use of *goods*, rather than the supply of *services*, it is entirely consistent with that purpose for payroll tax not to be levied.

37. The CA's construction is also confirmed by the extrinsic material which specifically refers to this exemption. The Victorian 2RS explained that the legislation is intended to catch relationships where the sub-contractor "works exclusively or primarily for the one person and where the object of the contract between the parties is to obtain the labour of the sub-contractor. Therefore the exclusion is provided where the provision of the sub-contractor's labour is ancillary to the supply of goods under the contract": at 1256. The second sentence of that quote makes clear that the underlined intention was given effect by what is now the exemption in s 32(2)(a). The construction given by the CA to the word "ancillary" achieves that purpose because it excludes contracts where the primary object of the contract is the supply or use of goods.
38. The construction contended for by Uber seeks to discard the ordinary meaning of ancillary and its inherent requirement of primacy and requires only that the service "enables, assists or is bound up with" the use of the good (AS [70]). However that construction fails to give effect to the statutory purpose. A service can enable, assist or be bound up with the use of a good even where the object of the contract is to obtain the labour of the subcontractor. For example, a business may engage a person to provide secretarial services. The labour of that secretary is bound up with the use of a computer to type letters and minutes. However in such a case it is clear that the object of the contract is to obtain the labour of the secretary. Examples may be readily multiplied, such as a gardener who uses a lawnmower and a house painter who uses brushes and a roller. Virtually every service involves the use of goods that are the property of the provider. If that were sufficient to engage s 32(2)(a), the exemption would extend to most labour arrangements, contrary to the purpose of Div 7. The provision therefore requires a limiting principle, which is provided by the ordinary meaning of the word ancillary: the use of goods must be the principal subject of the arrangement, with the services ancillary to that use.

39. As the CA acknowledged at AJ [225]-[226], the Victorian bill originally used the terms “only incidental” before amending it to “ancillary”. That change supports the Chief Commissioner’s construction. As the Victorian Treasurer explained, the purpose of the change was to ensure that the bill only imposed tax in cases “where the labour content is the key ingredient of the contractual arrangement”: see AJ [225]. The point of the change was to ensure that the exemption also applied where the labour was an essential, but nonetheless ancillary, component of the arrangement. There was nothing to suggest that the amendment was meant to remove the requirement that the service be secondary to the use of the good, which was also inherent in the concept of “incidental”.
40. Consistent with this, when the Treasurer proposed this change, he explained the rationale as “to specify, as precisely as possible, the fact that, if the major reasons [sic] for the contract is to use labour services, it will be caught by the proposed legislation and be subjected to payroll tax”: *Hansard*, Victorian Legislative Assembly, 22 November 1983, p. 2065. This passage was not referred to by the CA, however it confirms that payroll tax was intended to be levied on contracts where the “major” purpose of the arrangement was to obtain labour services. The exemption facilitates this by excluding contracts where the object is to obtain the supply or use of goods.
41. Therefore contrary to AS [73], the extrinsic material makes clear that the exemption in s 32(2)(a) was designed to ensure that payroll tax was only imposed on contracts where labour, rather than the supply or use of goods, is the “key” or “major” purpose. Uber’s construction, which sees s 32(2)(a) applying where the goods and services are inextricably bound up, would by contrast engage the exemption whenever the supply or use of a good was a purpose of the contract, even if the supply of labour remained the key purpose.
42. None of the examples in the extrinsic material contradict the CA’s analysis. Properly understood, they support it. The explanatory memorandum to the Victorian bill gave two examples which are extracted at AJ [227]. The first is the case where A enters into a contract with B, for B to supply the use of a crane in A’s business and B also insists on providing the crane driver. The explanatory memorandum expressly stated that in such a case, the contract would be

“regarded primarily” as one for the supply of the crane and therefore excluded. That is consistent with the exemption being directed to cases where the primary purpose of the contract is the supply or use of a good. It is also significant that the memorandum uses the example of a crane – a very substantial piece of equipment which overshadows the driver’s labour.

43. The second example concerns a case where A sends machinery to B “for testing on B’s equipment”. In that case the labour involved by B’s staff in operating that unspecified equipment would be regarded as “incidental”. It is significant that the note describes the machinery as being sent to B “for testing on B’s equipment”. Implicit in that language is that the principal feature of the arrangement is the use of B’s equipment – in other words, the purpose of the arrangement is “for” the use of B’s equipment. It follows that despite the imprecise language used in this second example, it is better understood as also being a case where the contract was primarily one for the use of goods (rather than labour, or something else).
44. The third example is the one quoted at AJ [225], where a plumber is engaged to install a prime cost item in the construction of a house. The Treasurer explained that in such a case, the “primary reason” for engaging that plumber “is to ensure that the prime cost item is put in place”. The Treasurer plainly had in mind that the exemption turned on the “primary” purpose of the contract. Moreover the first paragraph of the extract at AJ [225] makes clear that this example was intended to illustrate that the exemption would operate so as to mean that payroll tax was only imposed where “the labour content is the key ingredient” of the arrangement. Contrary to AS [73], neither this example nor the Foxtel box example constitutes an inextricable combination of both service and good. In both cases the primary object is the supply of a good. The labour involved in installing the good is ancillary to the good, not inextricably woven together with it.
45. The CA further found that s 32(2)(a) did not apply because the service of driving and the use of the vehicle are one and the same such that the service supplied to Uber could not be ancillary to the use of the good (AJ [261]).
46. The statutory context confirms the need for the supply or use of the good to be

separate to the service. Prior to 2014, the exemption in s 32(2)(d)(i) relevantly applied to contracts where the designated person is supplied with “services ancillary to the conveyance of goods by means of a vehicle provided by the person conveying them”. It was therefore materially similar to s 32(2)(a). In *Smith’s Snackfood Company Ltd v Chief Commissioner of State Revenue* [2012] NSWSC 998, the Court considered whether a company which sold snacks was liable for payroll tax on payments made to contractors who transported their goods to vending machines and restocked those machines. Before Gzell J, it was common ground that the Chief Commissioner would not impose payroll tax with respect to the service provided by the contractor of conveying goods (at [104]-[105]). However his Honour identified that the position was “curious” (at [106]). Gzell J described it as “hardly open” on the text to conclude that the contract of conveyance fell within the exemption “on the basis that the contract of conveyance is ancillary to the contract of conveyance” – that is to say, that one thing could not be ancillary to itself.

47. His Honour recommended that the matter be “referred for urgent amendment” (at [110]). Parliament took up that invitation and amended s 32(2)(d): *State Revenue Legislation Further Amendment Act 2014* (NSW), sch 3, items [3]-[4]. That amendment inserted the words “is supplied with services solely for or ancillary to the conveyance ...”. That insertion extended s 32(2)(d) to capture cases where the service itself is the conveyance of goods. However, a similar amendment was not made to s 32(2)(a). That suggests that s 32(2)(a) retains the feature identified in *Smith’s Snackfood*, namely that it does not lend itself to cases where the service, and the use or supply of goods, is the same thing.
48. AS [79] attempts to explain that the service of driving, and the use of the vehicle, are not the same. That explanation is not persuasive. In particular, in the penultimate sentence, Uber reasons that it “is the successful deployment of both driving and the driver’s vehicle” that enables riders to be transported to their destination. The difficulty with that analysis is that the “deployment of ... the driver’s vehicle” means driving. That is the point made at AJ [261], where the CA explained that the “driving service is supplied by the very use of the driver’s car to pick up and transport the rider” (emphasis added). Contrary to the final

sentence of AS [80], the rider does not use the vehicle by sitting in it. They do not operate the vehicle, but instead simply obtain a benefit from its use by the driver.

49. Uber calls in aid the example from the extrinsic material concerning testing equipment (set out at AJ [227] and addressed at [43] above) as demonstrating that the service and the use of goods need not be distinct (AS [80]). Care needs to be taken when using explanatory memoranda, as they lack the precision of parliamentary drafting and are not infallible: *Mondelez Australia Pty Ltd v AMWU* (2020) 271 CLR 495 at [72]. This example is expressed at too high a level of generality to be of assistance to Uber's argument. Importantly, it does not specify what the relevant service is, what the testing equipment is, and what the "labour involved" required. There may be cases where the service of testing A's machinery is one and the same as the use of the equipment, however that is not invariably the case. The "labour involved" in operating the equipment may include preparing the machinery for testing, calibrating the equipment, and interpreting the results. Whether the service and the use of the good is one and the same is fact sensitive, and this example lacks the degree of clarity needed to support Uber's argument.
50. In addition, the testing equipment example was inserted to illustrate that the exemption applies where the principal feature of the arrangement is the use of B's equipment, and the labour is incidental. It does not appear that the drafters were considering the conceptual question of whether a thing can be ancillary to itself, still less intending to resolve it. To read the example as establishing that a service can be ancillary to the very same use of goods presses the example far beyond its apparent purpose.
51. Concluding that s 32(2)(a) does not apply where the service and the use of the good is the same thing does not deny the exemption its central operation (cf AS [82]-[84]). Where a contractor uses a good, it does not follow that the service they supply must be coextensive with the use of that good. There will also be cases where it is a recipient of the services, not the contractor, who is the user of the good. However where the service and use of the good is the same thing, the use of the good is not the key ingredient because it cannot be separated from the

labour. It is consistent with the purpose of Pt 3 Div 7 for payroll tax to be imposed in those circumstances.

52. **Issue 3 – section 35:** The CA at AJ [363] concluded that the amounts paid or payable by Uber to drivers had a direct relationship to the performance of work by the driver. That was so because the payment was calculated by reference to the duration and time of the trip, less a proportion of that amount for Uber’s service fee. Uber does not appear to challenge the conclusion that there is a direct relationship between the work performed by the driver, and the payments made to them. Rather it contends that properly construed, s 35(1) only applies to payments made by the deemed employer “substantively as remuneration” for work performed by the deemed employee (AS [53]).
53. This ground fails at the outset as it is in substance an attempt to support the “reciprocity”/“calibration” construction given to s 35(1) by the primary judge: AS [51]. However, ground two of the Chief Commissioner’s appeal to the CA was that s 35(1) was satisfied even on the primary judge’s construction. That ground was argued before the CA and upheld: AJ [322]-[325], [364]. Accordingly even if Uber is correct as to the proper construction of s 35(1), the factual findings made below mean that this would not assist Uber in the outcome of this appeal.
54. In any event, Uber’s proposed construction places an unsupportable gloss on the statute. It also pays insufficient attention to the text of s 35(1), which requires that the payments be “for or in relation to” the performance of work. The concept of payment being “for” work may embrace the concept of the payment being made as remuneration for the work performed. However as the CA noted at AJ [358], the words “in relation to” are intended to expand the scope of the payments which fall within s 35(1). Uber’s submissions do not give those words due regard. At AS [60], Uber attempts to explain the work done by the words “in relation to”. However even if Uber’s construction gives those words some work to do, it does not follow that their operation must be so limited.
55. The statutory context of the Act does not support the construction advanced by Uber. The analysis of that context at AS [54]-[59] overlooks a number of important matters. First, while the Act certainly captures “wages” paid by

employers to employees it expressly goes further than that. It is therefore inappropriate to approach s 35(1) with the presupposition that it is only directed to payments which bear an employment-like character.

56. Secondly, the definition of “wages” in s 13 itself expressly embraces payments that go beyond those which have a remunerative character for work performed (cf AS [54]). Section 13 defines wages to mean “wages, remuneration, salary, commission, bonuses or allowances”. In *WA Flick & Co Pty Ltd v Federal Commissioner of Taxation* (1959) 103 CLR 334, this Court confirmed that payments made by an employer to reimburse employees for the running costs of their vehicles were an “allowance” within the meaning of the *Pay-roll Tax Assessment Act 1941-1942* (Cth), and therefore fell within the definition of “wages”. In answering that question, the critical inquiry was “whether the payment is one which the employer makes to the employee because of something done in the service of the employer” (at 339). That is broader than the formulation proposed by Uber, as it simply requires the payment to be made “because” of the employee’s service. There was no additional requirement that the payment be “for” the employee’s labour, which is apparent from the fact that in *WA Flick* the payments were made to reimburse the employee for their expenses.
57. Thirdly, the question of whether a payment is “for or in relation to the performance of work” in s 35(1) only arises for consideration if a number of preliminary findings have been made. Those findings include that a person has supplied work-related services to the designated person (s 32(1)(b)); that the person who performs the work is deemed to be an employee (s 34); that the designated person is deemed to be an employer (s 33); and that there is an amount paid or payable by the employer (s 35(1)). Those requirements mean that payments captured by s 35(1) cannot become untethered from the purpose of Pt 3 Div 7. Uber overlooks this at AS [59], because its so-called “incongruous” example overlooks the basal requirement that there be a work-related service supplied to the employer by the employee (cf point (c)). Section 35(1) only arises if the performance of work gives rise to the supply of a service to the deemed employer, irrespective of whether it can be characterised as a

“personal” service.

58. Fourthly, s 35(2) provides that, if an amount referred to in s 35(1) forms part of a larger amount paid or payable under a relevant contract, then the portion of the “larger amount which is not attributable to the performance of work ... is as determined by the Chief Commissioner”. The paradigm case where apportionment may be available is where payment is made for expenses relating to the costs of supplying goods. Section 35(2) provides for that apportionment by distinguishing between amounts which fall within s 35(1), and those amounts which are “not attributable to the performance of work”. The shorthand way of describing s 35(1) as capturing amounts “attributable” to work points against Uber’s construction, because that word is broader than simply capturing payments which have a remunerative character.
59. Contrary to the final sentence of AS [58], there is no error in AJ [358]. When AJ [358] is read as a whole, it is clear that “work services” was used as a shorthand to mean the work which gave rise to the service. The CA correctly identified that s 35(1) does not state that work (or services) must be supplied to the designated person. Of course, the CA was fully aware that s 32(1)(b) did require the supply of services to the designated person.
60. Finally, at AS [67] Uber asserts that funds given by a third party to a deemed employer to pass on to a deemed employee are not “paid” within the meaning of s 35(1). Uber failed on that issue before the CA: AJ [365]-[384]. It was not granted, and did not seek, special leave to appeal from that finding, nor has Uber attempted to explain why the CA’s reasoning on that topic is wrong. Its reference to *Mutual Acceptance* is also inapt. Latham CJ’s point at 396 was that money is “paid to an employee” when they become the owner of that money, having complete control of it. Once Uber transferred money to the driver, they became the owner and controller of it. That money was therefore “paid” in the sense discussed in *Mutual Acceptance*.

Part VI: ARGUMENT ON NOTICE OF CONTENTION

61. Contention Ground 1 (CAB 256): By contention 1, the Chief Commissioner contends that drivers supplied a service to Uber by driving riders because this work improved the reliability of Uber’s platform and made it more attractive.

The CA termed this the “Rider value proposition”: AJ [48]. The CA found that it was unnecessary to determine whether the drivers supplied a service to Uber in this sense: AJ [59]. However it concluded, with respect correctly, that the primary judge accepted the Chief Commissioner’s argument that this constituted the supply of a service to Uber: AJ [41]; PJ [74], [88]. Acceptance of that argument by the primary judge necessarily carried with it a factual finding that drivers transporting riders improved the reliability of Uber’s platform. Uber did not challenge that factual finding in the CA. Accordingly the issue that remains is whether this benefit constitutes the supply of a service to Uber.

62. As explained above, the concept of “service” in s 32(1)(b) should be given a wide meaning that takes account of the fact that it includes the “results ... of work performed”. As the primary judge accepted, the act of driving led to the result that Uber’s platform became more attractive, which is a benefit to Uber. Although the CA suggested that this benefit was “less tangible” (cf AJ [59]), nothing turns on this. There is no requirement that a service can only be supplied under the Act where there is some “tangible” benefit provided, and nor is there any indication as to what the criterion for tangibility may be. If this Court finds that drivers supplied a service to Uber on this basis, then this is a further answer to Uber’s submissions concerning the significance (or otherwise) of the fact that Uber collected and remitted payments: cf AS [27]-[28].
63. Contention Ground 2 (CAB 256): Although it was unnecessary to decide, at AJ [105] the CA said that there is “much to be said” for construing the phrase “a contract under which” to include (i) a contract in accordance with, or pursuant to which, the services are supplied; or (ii) a contract which is the source of the practical opportunity, or the practical requirement, to supply the services. The Chief Commissioner seeks to support these formulations by contention 2.
64. The first formulation was adopted in *Smith’s Snackfood CA* at [79]. This Court should accept it as correct. In general, Pt 3 Div 7 operates by identifying a “relevant contract”, and imposing payroll tax on payments made “for or in relation to the performance of work relating to a relevant contract” (s 35(1)). For s 32(1) to apply, there must be services supplied by the contractor to the designated person. The words “under which” ensure that there is a sufficient

connection between the supply of the services, and the relevant contract. If a person supplies the services in accordance with or pursuant to the contract, there is a sufficient connection between the contract and the services because the former sets out how the latter is to be performed.

65. That is the case here, because when drivers transported a rider, they did so in accordance with obligations set out in the driver contracts (see AJ [108]). Whether the supply of the service is governed or controlled by the contract (AJ [104(2)]), or in accordance with the contract (AJ [105]), is a question of fact and degree. Accordingly even if this Court is not satisfied that the terms set out at AJ [108] mean that the contracts governed or controlled the supply of the service, they nonetheless satisfy the threshold of causing the services to be supplied in accordance with or pursuant to the contract.
66. Alternatively this Court should find that the second formulation, which requires the contract to be the source of the practical opportunity or requirement to supply the service, is satisfied. Uber accepts that a service is supplied “under” a contract if that contract is the source of the right or obligation to supply the services (AS [36]). However as the definition of “contract” includes an informal arrangement, there is no apparent reason to restrict this formulation to cases where the contract is the source of a *legal* right or obligation. As the primary judge found at PJ [118], the driver contract gave the drivers the right to use the Uber app, which in turn gave them the opportunity to drive riders. Put another way, without the contract, the drivers would not be able to supply the service to Uber. It follows that the service of driving was supplied to Uber “under” the contracts in this sense.

Part VII: TIME ESTIMATE

67. The Chief Commissioner estimates two hours and fifteen minutes for argument.

Dated 5 March 2026



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ANNEXURE TO RESPONDENT'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.	<i>Payroll Tax Act 2007</i> (NSW)	Version in force 14 May 2020 to 10 August 2020	Section 13; Pt 3 Div 7	This version was in force at the end of the last financial year in question (30 June 2020). The parties, and the Court of Appeal, proceeded on the basis that this version of the legislation was determinative of the dispute for the whole period: see AJ [7].	The parties have proceeded on the basis that this version of the Act can be applied to all relevant events in the case.
2	<i>Payroll Tax Act 2007</i> (NSW)	Version in force 1 July 2013 to 30 June 2014	Section 32(2)(d)	This version was in force immediately prior to the commencement of the relevant portions of the <i>State Revenue Legislation Further Amendment Act 2014</i> (NSW)	This Act does not directly apply to any events in this case. It is referred to as an explanation of the legislative context.
3.	<i>Pay-roll Tax Act 1971</i> (NSW)	As made	N/A	For illustrative purposes only.	This Act does not directly apply to any events in this case. It is referred to as an explanation of the legislative context.
4.	<i>State Revenue Legislation Further Amendment Act 2014</i> (NSW)	As made	Schedule 3, items [3]-[4]	For illustrative purposes only.	This Act does not directly apply to any events in this case. It is referred to as an explanation of the legislative context.