FEDERAL COURT OF AUSTRALIA

Uber B.V. v Commissioner of Taxation [2017] FCA 110

File number:	NSD 904 of 2015
Judge:	**GRIFFITHS J**
Date of judgment:	17 February 2017
Catchwords:	**TAXATION** – whether a person supplying uberX services is required to be registered under Division 144 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (the ***GST Act***) – whether carrying on the enterprise of providing uberX services to passengers constitutes supply "taxi travel" within the meaning of s 144-5(1) (as defined in s 195-1) of the *GST Act*. **STATUTORY INTERPRETATION** – whether the terms "taxi" and "limousine" in the definition of "taxi travel" in s 195-1 of the *GST Act* should be given an ordinary meaning or a trade meaning – whether the definition of "taxi travel" in s 195-1 of the *GST Act* should be construed as a composite phrase. **Held:** application dismissed with costs.
Legislation:	*A New Tax System (Goods and Services Tax) Act 1999* (Cth) ss 9-5, 9-10 23-5, 144-5, 195-1
Cases cited:	*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27 *Australian Gas Light Co v Valuer-General* (1940) 40 SR (NSW) 126 *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; 248 CLR 378 *Chaudhri v Commissioner of Taxation* [2001] FCA 554; 109 FCR 416 *Chubb Insurance Co of Australia Ltd v Moore* [2013] NSWCA 212 *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; 187 CLR 384 *Collector of Customs v Agfa-Gevaert Ltd* [1996] HCA 36; 186 CLR 389 *Commissioner of Taxation of the Commonwealth of Australia v ICI Australia Limited* [1972] HCA 75; 127 CLR 529

The Council of the Shire of Lake Macquarie v Aberdare County Council [1970] HCA 32; 123 CLR 327

Dreamtech International Pty Ltd v Federal Commissioner of Taxation [2010] FCAFC 103; 187 FCR 352

Herbert Adams Pty Ltd v Federal Commissioner of Taxation [1932] HCA 27; 47 CLR 222

Hope v Bathurst City Council [1980] HCA 16; 144 CLR 1

Hore v Albury Radio Taxis Co-Op Society Ltd [2002] NSWSC 1130; 56 NSWLR 210

Independent Commission Against Corruption v Cunneen [2015] HCA 14; 256 CLR 1

Lansell House Pty Ltd v Commissioner of Taxation [2010] FCA 329; ATC 20-173

Lansell House Pty Ltd v Commissioner of Taxation [2011] FCAFC 6; 190 FCR 354

NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation [1956] HCA 80; 94 CLR 509

Pepsi Seven-Up Bottlers Perth Pty Limited v Commissioner of Taxation [1995] FCA 1655; 62 FCR 289

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; 194 CLR 355

Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd (1991) 25 NSWLR 541

Quikfund (Australia) Pty Ltd v Airmark Consolidators Pty Ltd (2014) 222 FCR 13

R v Brown [1996] AC 543

Residual Assco Group v Spalvins [2000] HCA 33; 202 CLR 629

Saga Holidays Ltd v Commissioner of Taxation [2005] FCA 1892; 149 FCR 41

Saga Holidays Ltd v Commissioner of Taxation [2006] FCAFC 191; 156 FCR 256

Sea Shepherd Australia Ltd v Federal Commissioner of Taxation [2013] FCAFC 68; 212 FCR 252

Telstra Corporation Limited v Commissioner of Taxation (1996) 68 FCR 566

Thiess v Collector of Customs [2014] HCA 12; 250 CLR 664

Transport for London v Uber London Ltd [2015] EWHC 2918

Wilson v Commissioner of Stamp Duties (1988) 13 NSWLR 77

Date of hearing: 20-21 July 2017

Registry:	New South Wales
Division:	General Division
National Practice Area:	Taxation
Category:	Catchwords
Number of paragraphs:	144
Counsel for the Applicant:	Mr T Thawley SC, Ms K Deards and Mr T Prince
Solicitor for the Applicant:	Ernst & Young
Counsel for the Respondent:	Mr J Hmelnitsky SC, Mr DFC Thomas and Ms E Bathurst
Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

NSD 904 of 2015

BETWEEN:	**UBER B.V.** Applicant
AND:	**THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA** Respondent

JUDGE: **GRIFFITHS J**

DATE OF ORDER:

THE COURT DECLARES THAT:

1. The uberX service supplied on 11 September 2015 by Mr Brian Colin Fine constituted supply "taxi travel" within the meaning of s 144-5(1) (as defined in s 195-1) of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

THE COURT ORDERS THAT:

2. The amended originating application dated 22 September 2015 is dismissed.
3. The applicant pay the respondent's costs as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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REASONS FOR JUDGMENT

GRIFFITHS J:

Introduction

1 At the heart of this proceeding is the question whether persons who are Uber drivers are required to be registered for GST purposes. The issue is one of statutory construction. Enterprises with a turnover of less than $75,000 do not need to register for GST but there is a special rule or exemption, created by s 144-5 in Pt 4-5(1) of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (the ***GST Act***), which has the effect that taxi and limousine operators are required to be registered, regardless of turnover. That provision requires a person who is carrying on an enterprise to be registered for GST purposes "if, in carrying on your enterprise, you supply taxi travel" (s 144-5(1)). The phrase "taxi travel" is defined in s 195-1 of the *GST Act* as meaning "travel that involves transporting passengers, by taxi or limousine, for fares". In simple terms, the core issue is whether, in carrying on the enterprise of providing uberX services to passengers (who are known as "uberX Riders"), uberX drivers (who are known as "uberX Partners") supply "taxi travel" as defined. If so, they must register for GST purposes.

2 The parties ultimately agreed that the core issue in the proceeding is encapsulated in the more specific question whether the applicant is entitled to a declaratory order that, on 11 September 2015, Mr Brian Colin Fine did not "supply taxi travel" within the meaning of section 144-5(1) of the *GST Act*. As will emerge, Mr Fine is an uberX Partner.

3 The core issue of construction is able to be expressed in relatively simple terms but, perhaps not unusually, the resolution of that issue is more complicated.

The services provided by uberX Partners to uberX Riders

4 The nature of the services provided by uberX Partners to uberX Riders is largely uncontroversial (they were described by the Commissioner as "***the Relevant Supplies***"). They are described in the affidavits of Mr Craig Jackson and Mr Fine. Mr Jackson is the applicant's solicitor. As at 11 September 2015, Mr Fine was an uberX Partner. Their evidence concerning the services provided by Mr Fine as an uberX Partner on 11 September 2015 may be summarised as follows.

5 The services provided by Partners are facilitated by two smartphone applications, the "Uber app" and the "Uber Partner app". The Uber app allows registered Riders to request transportation services from various categories of services, including UberBLACK (luxury hire cars), uberTAXI (registered taxis) and uberX. The Uber Partner app allows Partners to accept requests from Riders. This proceeding is concerned solely with the category of Partners who provide uberX services (***uberX Partners*** or ***Partners***) to registered riders (***uberX Riders*** or ***Riders***).

6 Mr Jackson stated that Uber Technologies, Inc (incorporated in the United States), is the parent company of over 110 separate Uber entities operating in more than 55 countries and 300 cities around the world. Uber B.V. is a company incorporated in the Netherlands and is a wholly-owned indirect subsidiary of Uber Technologies, Inc. The Uber app and the Uber Partner app are made available by Uber B.V., who is the licensee of the software and makes them available to users outside the United States. Uber B.V. also sub-licenses the software in the Uber Partners app to Rasier Operations B.V. (**Rasier**). Rasier enters into arrangements with uberX Partners who wish to make use of the Uber Partner app to receive "uberX ride requests".

7 There are two standard form agreements between uberX Partners and Rasier which are relevant to the services provided to Riders. The first is a Transportation Provider Service Agreement (***Service Agreement***). The other is an agreement entitled "Addendum for 'Bring Your Own Device' Program", which is described as a supplement to the Service Agreement. It is unnecessary to set out the terms of those agreements.

8 A Rider accesses and uses the services of an uberX Partner as follows:

(a) The Rider opens the Uber app on a smartphone device and either:

  (i) enters the relevant sign-in details, namely an email address and a password; or

  (ii) such details are saved and automatically recognised by the Uber app, depending on the Rider's smartphone and/or Uber app settings.

(b) The Rider is then given access to a map that displays the location of available uberX Partners near the Rider's location, as detected by GPS.

(c) The Rider is then asked to confirm their pick up address (either by accepting the location detected by the Uber app via GPS or by manually entering a location), and is provided an option to nominate the destination address.

(d) The Rider is then given the option to request an estimate of the cost of the potential ride.

(e) The Rider then presses a square marked "REQUEST uberX".

(f) The Uber app sends the request from the Rider, via the Uber Partner app, to the uberX Partner located closest to the Rider. The uberX Partner may choose to accept or decline the request, in his or her discretion. If the request is declined, the Uber app continues to send the ride request to other nearby uberX Partners through the Uber Partner app, until an uberX Partner accepts the request.

(g) The screen that is then displayed identifies the uberX Partner who has accepted the request, by name. Also displayed on the screen is:

  (i) a photograph of the uberX Partner;

  (ii) the registration plate of the uberX Partner's vehicle;

  (iii) a description of the make and model of the uberX Partner's vehicle;

  (iv) the feedback "star rating" of the uberX Partner; and

  (v) an option to cancel the service, to call the uberX Partner, or to send a text message to the uberX Partner.

(h) During the ride with the uberX Partner, the Rider:

  (i) is provided an option in the Uber app to notify their estimated time of arrival to one or more of the Rider's contacts ; and

  (ii) is not, at any time, provided with a real-time calculation or ongoing tally of the cost of the ride by the Uber app.

(i) After using the uberX service, the Rider is invited to rate the uberX Partner by assigning one to five stars and, if desired, leaving feedback comments. The uberX Partner may also rate the Rider.

9 The process of calculating the service fee for use of the uberX Partner service may be summarised as follows. When the Rider enters the Partner's vehicle, the Partner presses a button in the Uber Partner app to indicate that the ride has commenced. The Rider is then driven to the nominated destination where the Partner makes an electronic record of the destination location by pressing a button in the Uber Partner app to indicate that the ride has ended. The pick-up location and destination locations are used by Uber B.V. to calculate the cost to be charged to the Rider by the uberX Partner for the ride, a calculation which takes

place on computer services which are located outside Australia. The cost is calculated in accordance with a Service Fee Schedule, which is referred to in the Service Agreement. The cost may vary if there are any relevant promotional fee discounts or demand-based pricing. The latter is known as "surge pricing". In times of high demand, a Rider making a request is told that a surge price will apply which is expressed as a multiple of the normal ride cost, and may choose to continue or not with the request at that time.

10 At the conclusion of an uberX Partner ride, the Rider's credit card or PayPal account which is held on file by Uber B.V. is charged with the amount of the calculated fee and an electronic receipt is issued by Uber B.V. on behalf of the uberX Partner to Rider by email. An amount reflecting the Uber fee for use of the Uber Partner app is deducted from the payment received from the Rider and Uber B.V. then pays the remaining balance to the uberX Partner by way of an electronic transfer to a bank account nominated by that uberX Partner (sometimes further adjustments may be made for promotional, incentive or other purposes).

11 The following additional features of the services provided by uberX Partners to Riders are not in dispute:

(a) the services are provided in private vehicles (typically owned by the uberX Partner);

(b) there is no requirement for uberX Partners to hold a hire car or taxi driver licence;

(c) the Rider has to download and sign up to the Uber app, which includes agreeing to terms and conditions and providing payment details before the Uber app can be used to make a booking;

(d) the Rider can only make bookings through the Uber app on their smartphone; it is not possible for members of the public to make a booking unless they have first registered as a Rider; and

(e) the trip cost is calculated based on both the time taken for the ride and the distance covered in the ride (rather than by a mixture of time or distance).

12 Mr Fine gave evidence, which was not challenged, that in operating as a Partner, he did not:

- wait at ranks or other specific locations;
- accept street or kerbside hails; or
- drive in a bus lane or transit lane unless he had the required numbers of passengers to do so.

Further, he did not:

- operate a taximeter or otherwise provide any ongoing tally of the cost of the ride;
- display a schedule of fares;
- have any rides pre-booked for a specific time;
- provide uberX services to anyone other than registered Riders;
- wear a uniform; or
- display any roof light or other indication on the vehicle identifying it as a taxi or limousine, or as being associated with Uber.

Relevant provisions of the *GST Act*

13 Only an entity that is registered or required to be registered can make taxable supplies: s 9-5(d) of the *GST Act*. An entity is required to be registered if:

(a) the entity is carrying on an enterprise and its "GST turnover" meets the registration turnover threshold (relevantly $75,000): s 23-5 of the *GST Act* and s 23.15.01 of *A New Tax System (Goods and Services Tax) Regulation 1999* (Cth); or

(b) the entity, in carrying on its enterprise, supplies "taxi travel": s 144-5(1) of the *GST Act*.

14 Division 144 of Pt 4-5 of the *GST Act* provides (asterisks indicate a defined term):

> **Part 4-5-Special rules mainly about registration**
>
> Note: The special rules in this Part mainly modify the operation of Part 2-5, but they may affect other Parts of Chapter 2 in minor ways.
>
> **Division 144-Taxis**
>
> **144-1 What this Division is about**
>
> | Taxi operators are required to be registered, regardless of turnover. |
> |---|
>
> **144-5 Requirement to register**
>
> (1) You are ***required to be registered*** if, in *carrying on your enterprise, you supply *taxi travel.
>
> (2) It does not matter whether:
>
> (a) your *GST turnover meets the *registration turnover threshold; or
>
> (b) in *carrying on your enterprise, you make other supplies besides supplies of *taxi travel.

> (3) This section has effect despite section 23-5 (which is about who is required to be registered).

15 Because it is at the heart of the proceeding, it is important to note s 195-1 of the *GST Act,* which includes the following definition:

> ***taxi travel*** means travel that involves transporting passengers, by taxi or limousine, for fares.

16 There is no definition in the *GST Act* of "taxi", "taxi operator" or "limousine".

The applicant's submissions summarised

17 The applicant's submissions may be summarised as follows.

(a) The task of statutory construction

18 The applicant emphasised that, with the specific exception of taxi travel, there is a universal rule that enterprises with a turnover of under $75,000 do not need to register for GST. Moreover, Div 144 of the *GST Act* operates as a specific exception to this otherwise universal rule. This single exception reflects a concern, as recorded in the relevant Explanatory Memorandum, that taxis not registered for GST would charge a lower fare, or reflect the GST in the fare where it was not actually collected and remitted.

19 Section 144-1 states that "[t]axi operators are required to be registered, regardless of turnover". The legislature did not seek to deal with this issue in any other industry where there are registered and unregistered service providers. In particular, Div 144 does not deal with other forms of point to point transport (a form of transportation service whereby passengers are taken from their chosen pick-up point at the time of their choosing directly to their chosen destination) involving transporting passengers for fares.

20 The applicant submitted that these features of Div 144 are relevant to the principle of statutory construction to the effect that a statute is "always speaking" and to the related distinction which is drawn between "connotation" and "denotation" (see, for example, *The Council of the Shire of Lake Macquarie v Aberdare County Council* [1970] HCA 32; 123 CLR 327 at 331 per Barwick CJ).

21 The applicant contended that there was an anterior question which needed to be addressed, relying upon what Campbell J said in *Hore v Albury Radio Taxis Co-Op Society Ltd* [2002] NSWSC 1130; 56 NSWLR 210 at [43]:

> ...However, some caution must be applied in the exercise of this principle. There is

> still a question of construction which needs to be decided, about whether a particular expression ought to be construed, in the context of the particular legislation in which it occurs, as actually extending to some new state of affairs to which it might arguably extend. Thus, an exemption from stamp duty of a hiring arrangement relating to "*a motion picture film*" did not extend to exempt from stamp duty a hiring arrangement relating to a video cassette: *Wilson v Commissioner of Stamp Duties* (1988) 13 NSWLR 77.

22 The applicant submitted that, if it was correct to look to "connotation" and "denotation", the "connotation" must depend on the statutory context and the permissible denotation must also respect the statutory context. The applicant contended that the statutory context indicated that the provisions were intended to create an exception for a specific industry: taxi operators.

23 The applicant added that, in light of this statutory context, Div 144 is not to be construed as having been intended to extend to some new state of affairs to which it might arguably extend. Rather, it was intended to create a specific exception to a specific circumstance or industry, namely the taxi industry or "taxi operators". In oral address, Mr Thawley SC (who appeared together with Ms Deards and Mr Prince for the applicant) contended that the "always speaking" principle did not apply because Div 144 introduced a very special exception to an otherwise universal rule.

24 The applicant submitted that the statutory context suggests that the words "taxi" and "limousine" bear a trade or non-legal technical meaning; or, at least that those words bear an ordinary meaning best suited to achieving the statutory object of carving out a specific existing industry from the operation of an otherwise universally applicable general (and beneficial) rule (i.e. the option of non-registration for enterprises with lower turnovers). When pressed, to clarify whether or not the applicant's case was that the terms "taxi" and "limousine" should be given their ordinary meaning or a trade meaning, and whether any trade meaning was different to the ordinary meaning, Mr Thawley said that the applicant did not "insist" that the Court decide whether there was a technical meaning or an ordinary meaning because the applicant's case was that the result was the same. He explained that that is because the ordinary meaning was heavily influenced by the underlying regulatory regime. Mr Thawley later acknowledged that the applicant was, in effect, having "a bet each way" in relation to the meaning "taxi" but that, in the case of the word "limousine", the applicant's case was that the word had to be given its ordinary meaning.

25 The applicant also contended that whether the words of Div 144 bear their ordinary meaning (determined in the statutory context) or a trade or non-legal technical meaning, the result is the same.

26 The applicant submitted that significance should attach to the disjunctive "taxi **or** limousine" in the definition of "taxi travel" in s 195-1 as confirming that the terms "taxi" and "limousine" have different meanings. The word "taxi" in s 195-1 cannot simply mean any vehicle available for hire, at a fare, by members of the public. If "taxi" bore such a wide meaning, the reference to "limousine" would be otiose (see *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 (***Project Blue Sky***) at [71] per McHugh, Gummow, Kirby and Hayne JJ).

27 The applicant contended that the relevant questions were:

(a) what features does the word "taxi" imply (beyond a vehicle available to the public for hire at a fare) in light of the statutory context identified above; and

(b) does an uberX Partner's vehicle fall within what the legislature intended to carve out as a specific exclusion from the general rule under the *GST Act*?

28 The applicant's case was that the answers to these questions are provided by the features of taxi travel which are inherent in the operation of the taxi industry as regulated by and under the laws of each of the States and Territories.

29 In its outline of written submissions, the applicant submitted that, in its ordinary meaning, travel by "taxi" is a service which has at least the following characteristics, which reflect and are founded upon the regulation of the taxi industry in each Australian jurisdiction:

(a) In each State and Territory in Australia, taxi travel must be provided in a vehicle registered as a taxi and driven by a driver who is licensed, authorised or accredited to drive a taxi.

(b) The provision of taxi travel services, in each of the States and Territories, is subject to the following requirements:

(i) the vehicle must contain a physical marking on its exterior which identifies it as a "taxi";

(ii) the vehicle must have affixed to it, or to its roof, a light which indicates the availability or unavailability of the vehicle for hire;

(iii) the vehicle must contain on its exterior an approved sign (or signs), be painted in an approved colour (or colours), and/or the driver must wear such approved uniform as may be specified by or under the relevant State or Territory law;

(iv) the driver must accept a hire, and is not entitled to refuse a hire, by any member of the public, except in certain limited circumstances identified by or under the relevant State or Territory law;

(v) when waiting kerbside at a taxi hire rank, the vehicle must be available to be hired by the next passenger in attendance at the rank, subject to certain limited exceptions identified by or under the relevant State or Territory law;

(vi) the driver must display in the vehicle certain prescribed information including maximum fares and charges, the registration details of the vehicle and the driver's authority details;

(vii) the vehicle contains a taximeter which is affixed to the vehicle which calculates and displays to the passenger the progressive fare; and

(viii) subject to certain limited exceptions, the vehicle must be fitted with a security camera.

(c) The providers of taxi travel services in the various States and Territories in Australia enjoy certain privileges, benefits or advantages conferred by or under the relevant State or Territory law, as follows:

(i) provided that the vehicle is not already hired or unavailable for hire, the driver is entitled to wait kerbside in an area designated, exclusively, as a taxi hire rank or taxi zone;

(ii) the driver is entitled to accept a booking when hailed by hand gesture by a member of the public from the side of a public road, in the circumstances specified by or under the relevant State or Territory law; and

(iii) the driver is entitled to drive in or otherwise use certain special purpose lanes, such as a lane designated as a "bus lane" or a "transit lane", subject to the terms and conditions specified in or under the relevant State or Territory legislation.

(d) The calculation and payment of fares for the provision of taxi travel services is the subject of regulation in the various States and Territories as follows:

(i) the vehicle must be fitted with a taximeter visible to the passenger which progressively calculates and displays the fare during each trip;

(ii) the calculation of the fare, or maximum fare, is defined or regulated by or under the relevant State or Territory law; and

(iii) at the end of the hire, the hirer must pay to the driver the authorised fare and may do so by tendering cash or by using another approved payment method.

30 The applicant provided detailed references to State and Territory laws in support of these submissions.

(b) The provision of uberX services is not "travel that involves transporting passengers, by taxi"

31 The applicant described the main differences between uberX services and taxi services as follows:.

(a) uberX vehicles are not marked as taxis and are private vehicles. They do not carry lighted signs showing availability; they are not fixed with a prescribed taximeter.

(b) uberX Partners can only accept bookings from Riders. They are not required to generally accept hires, nor hold taxi authorisations, licences and accreditations nor wear uniforms.

(c) uberX Partners do not enjoy the privileges, benefits and advantages of taxis, including accepting street hails, waiting at dedicated ranks or using privileged lanes.

(d) Payments received by uberX Partners are calculated in a different manner to taxis. Payments are made only in the manner described above, whereas taxi fares are paid in many ways.

(e) The Uber app allows Riders to obtain an estimate of the cost of the ride. It provides the Rider and the Partner with star ratings and certain other details to enable them to determine whether to proceed with the service.

32 The applicant submitted that Dr Abelson's expert evidence was relevant in ascertaining the common understanding of the word "taxi" which, the applicant submitted, is a question of fact relevant to the interpretative task of giving effect to the ordinary meaning of the statutory language (citing *Hope v Bathurst City Council* [1980] HCA 16; 144 CLR 1 at 7-8 per Mason J; *NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation* [1956] HCA 80; 94 CLR 509 at 512 per Kitto J and *Pepsi Seven-Up Bottlers Perth Pty Limited v Commissioner of Taxation* [1995] FCA 1655; 62 FCR 289 (***Pepsi***) at 299G per Hill J).

33 The applicant summarised Dr Abelson's evidence and conclusions as follows:

(a) The term "taxi" is not used as a catch-all term that describes all point to point transport for a fare.

(b) There is a clear regulatory concept of a "taxi" in Australia, which has arisen because of perceived market failures that are either unique to, or most prominent in, the rank and hail channel. The regulatory concept of a "taxi" is a vehicle which has an exclusive licence to operate in the rank and hail channel, which is subject to a range of regulatory interventions which have sought to address perceived market failures and to facilitate the operation of the rank and hail channel.

(c) The defining features of a "taxi" in public and regulatory discourse are the operational features most closely related to the rationale for, and consequences of, regulatory intervention in the rank and hail channel. Those features are more or less uniform across the States and Territories. They include the ability to operate in the rank and hail channel, that is to stand for hire in ranks and ply for hire on public roads; the characteristic appearance of taxis which make them easily recognisable (including livery, decal and roof lights) and is essential to street hailing; the use of taximeters and fare regulations such as maximum fares; strict licencing and accreditation of drivers, vehicles and operators; and the requirement that taxis provide public transport services.

(d) uberX services display none of those "essential operational features".

34 The applicant submitted that the Uber app does not operate in the same way as a taximeter, relying on *Transport for London v Uber London Ltd* [2015] EWHC 2918 (***Uber London***) at [17]-[32] and [49]. There, the Court granted a declaration to the effect that a taximeter, for the purpose of the English private hire vehicles legislation, does not include a device that receives GPS signals in the course of a journey, and forwards GPS data to a server located outside of the vehicle, which server calculates a fee that is partially or wholly determined by reference to distance travelled and time taken, and sends the fee information back to the device.

35 The applicant submitted that, when Div 144 of the *GST Act* was enacted, the ordinary meaning of "taxi", derived from and reflecting the regulation of the taxi industry in the States and Territories, was well settled.

36 The applicant clarified, however, that its position was not that the meaning of the term "taxi", as used in s 195-1 of the *GST Act*, is determined or confined by the provisions made by and

under State and Territory legislation governing the taxi industry. Rather, it said that those provisions provide an important objective aid in ascertaining the ordinary meaning of the word. The State and Territory provisions contributed to, confirmed and reflected the common understanding of the word "taxi", as used throughout the nation, so submitted the applicant.

37 The applicant urged caution before attributing to the legislature an intention to include, within words of settled meaning at the time of enactment, later technological developments unforeseen at the time of enactment. A fortiori where the statutory object is to provide a specific exception to an otherwise universal rule. It contended that there is an analogy with *Wilson v Commissioner of Stamp Duties* (1988) 13 NSWLR 77 at 85-86, where a tax (stamp duty) exemption for "motion picture films" did not apply to a video cassette. This was in part because the latter used quite different technology (albeit producing the same practical end result for the consumer) and the term "motion picture films" had not been shown to have become commonly interchangeable with, or regarded as descriptive of, a videotape. Similarly, assessed on a technological or common usage basis, the provision of uberX services does not fall within the description of transporting passengers "by taxi". Ride sharing arrangements are referred to as such and employ quite different technology. Such arrangements might achieve the end result: point to point transport; but Div 144 was not intended to apply to everything that achieved that result.

38 The applicant submitted that later regulatory developments confirm the distinction between uberX services and taxi services, with particular reference to reforms in New South Wales and the ACT which regulate the provision of uberX services not as a form of travel by taxi, but as falling within a separate category subject to requirements that differ from those applicable to taxis (see Part 3A.3 (Ridesharing) of the *Road Transport (Public Passenger Services) Regulation 2002* (ACT) and cl 26A and the definition of "exempt private hire vehicle operator" in cl 3 of the *Passenger Transport Regulation 2007* (NSW).

39 The applicant's alternative submission was that the same conclusion is obtained under the principle that, where a piece of revenue legislation is directed to a particular sector of commerce or industry, the technical meaning which a word bears in that sector ordinarily prevails: *Herbert Adams Pty Ltd v Federal Commissioner of Taxation* [1932] HCA 27; 47 CLR 222 (***Herbert Adams***) at 226, 227-8; *Collector of Customs v Agfa-Gevaert Ltd* [1996] HCA 36; 186 CLR 389 (***Agfa-Gevaert***) at 398-399. Section 144-5(1) was directed, at least in

major part, to the taxi industry, as evidenced by the statutory language including the phrase "taxi operators" in s 144-1. The term "taxi" has a recognised meaning in that industry arising from, or reinforced by, the regulation of that sector in each of the States and Territories and the public and industry usage, so submitted the applicant.

(c) The provision of uberX services is not "travel that involves transporting passengers, by ... limousine..."

40 The applicant submitted that the word "limousine" in the definition of "taxi travel" should take its ordinary meaning. It relied upon *Dreamtech International Pty Ltd v Federal Commissioner of Taxation* [2010] FCAFC 103; 187 FCR 352 (***Dreamtech***), where the Full Court considered s 27-1(b) of the *A New Tax System (Luxury Car Tax) Act 1999* (Cth), which defined the term "car" to include "limousine". The term "limousine" was not further defined. The Full Court said (at [26]):

> "Parliament chose the word limousine. If it had intended to define the word to have a meaning different from its ordinary meaning it would have. It did not".

41 The Full Court said (at [24]) that the word limousine has "no technical legal meaning" and declined (at [36]) to disturb the Tribunal's finding that a limousine:

> "is usually considerably larger than a standard road vehicle, conveying a sense of luxurious motor transport driven by a chauffeur".

42 The applicant contended that, on its ordinary meaning, travel by "limousine" has at least the following characteristics:

(a) The vehicle is a large, luxury hire car or a special occasion vehicle.

(b) As is almost universally emphasised in the marketing of limousine services, the service has a prestige or luxury quality as appropriate for specific destinations, special occasions or high end clients, rather than as a regular mode of transportation.

(c) The customer is able to select the vehicle type or category at the time of booking.

(d) The fares are usually fixed in advance or include a substantial minimum fare.

(e) Pre-booking of rides is a regulatory requirement or an operational standard.

(f) The price is high and generally significantly more expensive than taxi services or uberX services.

(g) Limousine vehicles are purchased and maintained primarily for commercial purposes.

43 The applicant identified the following primary differences between uberX services and limousine services:

(a) uberX services are typically provided by ordinary vehicles. uberX Riders are not entitled to request a luxury vehicle on the uberX platform. If they wish to do so, they are required to request one of the UberBLACK or similar product offerings instead. uberX Partners receive the same fee irrespective of their vehicle type and lack any incentive to use a luxury vehicle.

(b) uberX is not marketed as a luxury service. Rather, it is marketed as the "low-cost" Uber. Uber has separate services, namely uberBLACK, for luxury vehicle requests, but such services are not relevant to this proceeding.

(c) uberX Riders have no choice as to the make or model of vehicle offered. Instead, they are offered one UberX Partner, namely the Partner located closest to the nominated point of pick-up who accepts the ride request.

(d) uberX trip fees are calculated by reference to the time and distance actually travelled and are not pre-paid.

(e) uberX services can only be booked for near immediate pick-up.

(f) uberX services are generally less expensive than limousines and taxis.

(g) uberX services are provided using the Partner's owned or leased private vehicle.

The Commissioner's submissions summarised

44 The Commissioner's submissions may be summarised as follows.

45 The Commissioner contended that the definition of "taxi travel" is to be construed as a whole and connotes the transportation, by a person driving a private vehicle, of a passenger from one point to another at the passenger's direction and for a fare, irrespective of whether the fare is calculated by reference to a taximeter.

46 Alternatively, if the expressions "by taxi" and "by … limousine" are individually applied to the facts, the Commissioner submitted that the supplies made by Mr Fine on the relevant date had the essential features of transportation "by taxi" and "by limousine".

47 The Commissioner submitted that it was wrong for the applicant to rely on State and Territory regulatory regimes applying to the taxi industry as producing a "regulatory concept" of "taxi" and "limousine". This was because the *GST Act* is a federal taxing statute with

uniform operation throughout Australia. The *GST Act* also provides, in s 9-10(3), that a supply occurs irrespective of whether it is made in compliance with the law (which would include State and Territory regulations). The Commissioner submitted that it is inherently unlikely that the Federal Parliament intended the definition of "taxi travel" to be determined by reference to State and Territory regimes that are outside the Parliament's control and which are not consistent in their nomenclature and content, let alone regulatory concepts of "market failure".

(a) Relevant principles of statutory construction

48 The Commissioner submitted that the following five principles were relevant. First, the process of construction begins with a consideration of the text itself (*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27 (***Alcan***) at [47]). The meaning of the text will often require consideration of the context, which includes the general purpose and policy of the provision and the mischief the provision is seeking to remedy (*Alcan* at [47]). Questions of context arise "in the first instance, not merely at some later stage when ambiguity might be thought to arise" (*CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; 187 CLR 384 (***CIC***) at 408; *Quikfund (Australia) Pty Ltd v Airmark Consolidators Pty Ltd* (2014) 222 FCR 13 at [76] and *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; 256 CLR 1 at [31] and [57]. A consideration of context may require general words to be read narrowly or narrow words to be given a wider application (*CIC* at 408).

49 Secondly, where two or more constructions of a provision are available, the court will prefer a construction that gives the provision a sensible operation (*CIC* at 408).

50 Thirdly, because GST is payable on a wide variety of business transactions constituting taxable supplies, the *Act* is necessarily expressed in general terms to facilitate its application to that wide variety of transactions. As a result, the legislation is not to be construed in a narrow and technical way but, rather, in a broad and practical manner (*Saga Holidays Ltd v Commissioner of Taxation* [2005] FCA 1892; 149 FCR 41 at [29] and, on appeal, *Saga Holidays Ltd v Commissioner of Taxation* [2006] FCAFC 191; 156 FCR 256 (***Saga Holidays***) at [29] per Young J and [70] per Stone J).

51 Fourthly, the construction of a revenue statute may require consideration of whether or not its words are used in their natural and ordinary meaning, or in some commercial sense, or in an

intermediate way whereby there is an extension or limitation of the ordinary or commercial meaning.

52 Fifthly, statutory descriptions of a particular category of conduct are normally to be treated as "always speaking", absent a contrary intention (*Telstra Corporation Limited v Commissioner of Taxation* (1996) 68 FCR 566 at 571 per Heerey J). As explained by the NSW Court of Appeal in *Chubb Insurance Co of Australia Ltd v Moore* [2013] NSWCA 212 (***Chubb***) at [82]:

> ... a statute should generally be construed so as to apply to all things coming within the denotation of its terms, having regard to their connotation at the time of enactment. The connotation of a word or phrase is its essential attributes, which are to be determined as at the time of enactment. The denotation of a word or phrase is the class of things that, from time to time, may be seen to possess those essential attributes sufficiently to justify the application of the word or phrase to them.

53 The Commissioner contended that it is wrong to construe the composite expression in s 195-1 of the *GST Act* by dividing each element of the definition and seeking to give the words "taxi" and "limousine" regulatory meanings divorced from the statutory context in which they appear (citing *R v Brown* [1996] AC 543 at 561, as approved in *Agfa-Gevaert* at 396-7 and also *Sea Shepherd Australia Ltd v Federal Commissioner of Taxation* [2013] FCAFC 68; 212 FCR 252 (***Sea Shepherd***) at [34] per Gordon J with whom Besanko J agreed). The definition should be construed as a whole. When construed in this way, the inclusion of references in the definition to two different (albeit related) types of transport suggests an intention by Parliament to capture that category of transportation in which passengers are transported in a vehicle from one point to another at their direction for a fare, so submitted the Commissioner.

54 This construction was said to be consistent with the ordinary meaning of the words "taxi" and "limousine".

(b) "Taxi"

55 In the Commissioner's submission, a "taxi" is a vehicle available for hire by the public and which transports a passenger at his or her direction for the payment of a fare that will often, but not always, be calculated by reference to a taximeter. This submission was said to be supported by the following dictionary definitions:

(a) *Macquarie* (online): a car for public hire, especially one fitted with a taximeter;

(b) *Oxford* (online): a motor vehicle licensed to transport passengers in return for payment of a fare and typically fitted with a taximeter;

(c) *Collins English Dictionary* (online): a car, usually fitted with a taximeter, that may be hired, along with its driver, to carry passengers to any specified destination;

(d) *Merriam-Webster* (online): a car that carries passengers to a place for an amount of money that is based on the distance travelled;

(e) *Macmillan* (online): a car whose driver is paid to take you to a particular place, especially a fairly short distance;

(f) *The Chambers Dictionary* (13th edition, UK, online): a car which may be hired together with its driver to carry passengers on usually short journeys, and which is usually fitted with a taximeter for calculating the fare.

56 The Commissioner acknowledged that there are limitations of using dictionary definitions (citing *Residual Assco Group v Spalvins* [2000] HCA 33; 202 CLR 629 at [27] and *Thiess v Collector of Customs* [2014] HCA 12; 250 CLR 664 (***Thiess***) at [23]), but he contended that the above references helped identify the key features of a "taxi" in ordinary understanding.

57 The Commissioner submitted that the applicant's reliance on what it claims are 15 characteristics of a taxi as supporting a "trade or non-legal technical meaning" of "taxi" was misdirected because the States and Territories do not adopt consistent nomenclature and impose requirements and restrictions that differ from jurisdiction to jurisdiction. For example, there are certain taxis where taximeters are not mandated, such as Pt VII of the *Transport (Country Taxi-car) Regulations 1982* (WA) and reg 5 of the *Country Taxi-Cars (Fares and Charges) Regulations 1991* (WA).

58 The Commissioner submitted that the applicant's reliance on a regulatory concept of "taxi" was also misguided because in applying s 144-5 there is no basis for concluding that the Parliament intended the Court to embark on an analysis of the operation of, and difficulties in, the "taxi industry" and the perceived need for "regulatory intervention" in that channel.

(c) "Limousine"

59 The Commissioner submitted that, in the context of the definition of "taxi travel" in s 195-1, "limousine" refers to a private motor vehicle made available for public hire and which transports a passenger at his or her direction for the payment of a fare. In contrast to a taxi, that fare will generally not be calculated by reference to a taximeter. In further contrast to a

taxi, a limousine is not ordinarily available for immediate hire, but will instead be pre-booked. In ordinary parlance, "limousine" is a synonym for a hire car.

60 The Commissioner urged the Court not to accept the applicant's position that "limousine" in the definition of "taxi travel" is confined to luxury vehicles. That position was described as giving no weight to the context and purpose of the definition in which the word is used and gives the definition an unworkable operation because it would have the result that taxis and luxury vehicles would be required to be registered while hire cars that were not luxury vehicles avoid the need for registration. It is unlikely that the Parliament intended the Court (or a taxpayer) to have to address whether a particular vehicle was sufficiently luxurious to be classified as a limousine and therefore subject to a GST registration requirement. The Full Court in *Dreamtech* was concerned with a quite different context (the luxury car tax regime), in which concepts of luxury were central to the statutory scheme, so the Commissioner contended.

61 The Commissioner submitted that his construction is consistent with the mischief which the relevant Division of the *GST Act* was intended to address. The Explanatory Memorandum to the Bill that introduced Div 144 explained the policy underlying the Division as follows:

> 6.267 In other countries that introduced a GST there were problems with taxis. The problems arose because many taxi drivers only drove taxis some of the time and hence were below the registration threshold. This led to the situation where there were taxis that charged a GST inclusive price and taxis that were able to charge a lower fare because they did not have to charge GST. Unregistered taxi drivers could also charge a fare as if it included GST, but without the obligation to remit it.
>
> 6.268 One of the consequences of this was that if you acquired taxi travel from an unregistered driver in the course of your enterprise you would not be entitled to an input tax credit even though you may have paid a GST equivalent fare.
>
> 6.269 Other countries have addressed these problems by requiring all taxi drivers to register for GST.
>
> 6.270 This is the approach adopted in Division 144.

62 Thus, the Parliament was concerned to ensure that all persons who supplied 'taxi travel" were subject to GST to ensure an equal tax impact on passengers, which suggests that the definition of "taxi travel" should be construed broadly. Acceptance of the applicant's construction would produce the very thing Parliament intended or sought to avoid because some uberX Partners (like Mr Fine) are registered for GST, but some are not.

(d) The Relevant Supplies involved transporting passengers, by taxi, for fares

63 The Commissioner submitted that if "taxi travel" is not viewed as a composite expression, the Court should nevertheless find that the Relevant Supplies involved the transportation of a passenger, by taxi, for a fare. Although it was acknowledged by the Commissioner that a fitted "taximeter" is not utilised by Uber to determine the fare, the methodology used is not relevantly different. The fee is calculated by reference, inter alia, to the distance travelled (on a per kilometre basis) and the amount of time taken (on a per minute basis). There is also a minimum fare defined by the Service Schedule that is not conceptually different to the calculation of traditional taxi fares, or maximum fares, as defined or regulated by or under a State or Territory law. The Commissioner submitted that the decision in *Uber London* is distinguishable, having been made in a different legal and regulatory context.

(e) The Relevant Supplies involved transporting passengers, by limousine, for fares

64 The Commissioner contended that, if the Relevant Supplies do not involve the transportation of passengers, by taxi, for fares, such transportation nevertheless occurred "by … limousine".

65 The Commissioner submitted that, while a "limousine" is sometimes used to describe a luxury motor vehicle, as is reflected in many dictionary definitions, the word must be construed in its context, which is the supply of transportation for a fare. In that context, the word refers to motor vehicles, other than taxis, that transport passengers from one point to another on a pre-booked basis and for a fee that is usually calculated otherwise than pursuant to a taximeter. Such vehicles will include what are commonly considered to be luxury hire cars but will also include other vehicles that do not bear that label, such as 4WDs, mini-vans and standard class automobiles.

66 The Commissioner submitted that the fact that Mr Fine provided uberX services in a Honda Civic does thereby not preclude that vehicle from being characterised as a limousine for the purposes of the *GST Act*. What is important is that: (a) he provided a commercial passenger service for the carriage of passengers from one point to another; and (b) that service was provided on a pre-booked basis for a fare. In this regard, Mr Fine does not provide uberX services to a passenger unless that passenger has "booked" or "requested" the service previously via the Uber app. That the booking might only occur moments before the trip commences is immaterial. There is no in-built timing restriction on how far in advance a hire-car needs to be pre-booked. Accordingly, the Commissioner contended that if the Court accepts that a word "limousine" as it appears in the definition of "taxi travel" is synonymous

with a hire car, the Relevant Supplies fell within what is encompassed by that term as ordinarily defined.

The applicant's submissions in reply summarised

(a) Issues of construction

67 The applicant generally agreed with the Commissioner's submissions on the approach to statutory construction, with the following specific exceptions.

68 First, while the *GST Act* is to be interpreted in a manner that recognises that the GST is a practical business tax, Stone J in *Saga Holidays* (with whom Gyles and Young JJ agreed) stated at [30] that there is no "special canon of construction that should be applied when interpreting the *GST Act*". Her Honour preferred a practical approach to construction but did not describe that approach as "broad".

69 Secondly, the Commissioner's reliance on the Explanatory Memorandum was said by the applicant to be misplaced for two reasons. The first is that the Explanatory Memorandum says nothing about the meaning of the word "taxi" or the word "limousine" – cf s 15AB of the *Acts Interpretation Act 1901* (Cth). The second is that, in any event, submissions on the "mischief" to which he says Div 144 is directed approaches the question from the wrong perspective. The Commissioner's reasoning is that because the Explanatory Memorandum reveals that the existence of registered and unregistered taxi drivers is undesirable, and if not caught by Div 144, some uberX Partners would be registered and others not, Div 144 should be interpreted broadly so as to cover uberX services. However, in most if not all industries in which small businesses participate there will be registered and unregistered participants (those falling above and below the $75,000 threshold for registration). There is no general legislative concern with that phenomenon, such that would lead to a conclusion that "on Uber's construction, the very thing Parliament ... sought to avoid arises". The legislature only created one specific exception: travel "by taxi or limousine".

70 Thirdly, there is no "difficulty" in, or inconsistency between, Uber's position that caution should be exercised in the application of the principle that a statute is always speaking, and in its reference to material that post-dates the *GST Act*. The material in question explains, by reference to public discourse, the characteristics of taxi travel and the differences between taxi travel and uberX services. The applicant did not contend that the meaning of taxi travel has changed since the introduction of the *GST Act*.

71 The Commissioner's proposition with respect to the legislation "continuously speaking" is that the phrase "taxi travel" captures the new technology through which taxi services are now provided, including smartphone apps, mistakes the facts and argument put forward by Uber. uberX Partners do not seek to provide an existing service – taxi travel – through a new technology, namely smartphone apps. The applicant contended that uberX Partners supply a different service that does not replicate the core aspects of what is understood in ordinary parlance and in trade to be transport by "taxi". uberX Partners supply a new service, referred to as ridesharing.

72 Fourthly, the effect of the Commissioner's argument that the phrase "travel that involves transporting passengers, by taxi or limousine, for a fare" is to be construed as a composite expression is that the words "by taxi or limousine" would be read out of the legislation. The Commissioner suggests that the statutory phrase should be construed to mean "transportation in which passengers are transported in a vehicle from one point to another at their direction for a fare". The concepts of transporting passengers and the payment of a fare are express parts of the statutory definition. All that the phrase "by taxi or limousine" does, in the Commissioner's submission, is to indicate that the transportation should be by "private vehicle". The applicant submitted that this cannot be correct, given that taxis are not "private vehicles": their sole purpose is to transport passengers for fares, whereas uberX vehicles are used for personal travel as well as fare paying trips. Putting that to one side, the applicant submitted that the Commissioner's construction might be sensible if the legislation revealed an intention to cover all forms of transport by all "private vehicles" at the passenger's direction (for a fare). But no such intention can be discerned: the obvious term "hire car" was not selected, and as the Commissioner acknowledges, other forms of transport by "private vehicle" at the passenger's direction are not covered (eg wedding cars, reception and transfer services).

73 The applicant further submitted that the Commissioner's "composite expression" argument is an invitation to construe the *GST Act* at such a high level of abstraction that the meaning is lost. It claimed that, while the Commissioner acknowledges that "taxi" and "limousine" are different types of transport, the Commissioner prefers a construction that obliterates that difference and fails to give any role to those terms or to their role in qualifying the remaining words in s 144-5.

(b) Uber's use of the regulatory meaning of "taxi"

74 The applicant clarified that it did not contend that the definition of "taxi travel" in the *GST Act* is to be determined by reference to, or in compliance with, State and Territory legislation. Nor did it place any direct reliance on the non-applicability of certain State and Territory legislation to uberX services. Rather, it stated that its submission is that the ordinary meaning of the word "taxi" is one that reflects and is founded upon the regulatory meaning of the word taxi. The regulatory meaning of the word "taxi" determines and reflects what taxis actually do. It is an appropriate reference point by which one can ascertain how taxi services are provided in the various States and Territories in Australia. What it reveals is that, while there are some differences between States and Territories, there are also core common characteristics that taxis actually share throughout the whole of Australia. For example, taxis wait kerbside at taxi hire ranks. They can be hailed on the street. As a result of what is referred to as the universal service obligation, they must (subject to limited exceptions) accept fares from any member of the public. These are all things that taxis actually do in the real world, throughout Australia. And what taxis actually do in the real world, throughout Australia, informs the ordinary meaning of the word "taxi" in Australia. The applicant stated that it did not rely on how taxis are regulated, it relied on what vehicles marked as taxis on the streets of Australia actually do. Reference to the regulation of taxis is merely a convenient way to demonstrate to the Court what kind of activity Australians observe being undertaken in Australia by cars that are marked as "taxis".

75 The applicant reiterated its submission that there are features of the ordinary meaning of the word "taxi" that (a) were not features of uberX services prior to the regulation of ridesharing; (b) were not features of uberX services at the relevant time; and (c) will continue not to be features of uberX services in a post-regulation environment.

(c) Dictionary definitions of "taxi"

76 As to the Commissioner's reliance on six dictionary definitions of "taxi", the applicant emphasised the limitations of that approach and urged the Court to prefer its evidence as to what kind of activity Australians observe being undertaken in Australia by cars that are intentionally marked as "taxis".

77 The applicant also emphasised that four of the six definitions refer to a taximeter, yet the Commissioner contends is not a necessary element of the ordinary meaning of the word "taxi". Taximeters are used in taxis in all States and Territories in Australia due to the

anonymity of the rank and hail work reserved for taxis. The personal vehicles used for uberX services do not have taximeters affixed.

78 The Commissioner's construction of "taxi" is so broad that it gives "limousine" no work to do because he says that both refer to a vehicle available for hire by the public and which transports a passenger at his or her direction for the payment of a fare.

(d) Correct operation of s 9-10(3) of the GST Act

79 The applicant submitted that there can be no issue about the application of s 9-10(3) of the *GST Act* because the applicant's case does not rely on compliance or non-compliance with State or Territory legislation. In any event, s 9-10(3) concerns the existence of a supply, not its character. There is no dispute that there is a supply made by uberX Partners.

(e) Dictionary definition of "limousine"

80 With respect to "limousine", the applicant said that there was ample evidence to support its position that luxury is one of the defining characteristics of a limousine.

(f) Factual matters

81 In reply, the following submissions were made by the applicant concerning factual matters raised by the Commissioner.

(a) The Commissioner's contention that "the methodology used by Uber was not relevantly different" should be rejected. The point of a taximeter is that it is affixed to, and on display within, the vehicle to enable the customer to see at any time the running balance of the fare. Furthermore, there is no connection between the fixed minimum fare applied by Uber (for the benefit of uberX Partners) and the capped maximum time and distance rates that apply to taxi fares (for the protection of consumers).

(b) The physical markings on taxis are important because it is what those vehicles do and it is the special entitlements of such vehicles which informs the ordinary meaning of the word "taxi". The Commissioner's contention that the State and Territory regulatory requirements with respect to those markings are not the issue. The contention that the car symbol displayed on the GPS map on the Uber app is equivalent to the marking on a physical vehicle is incorrect. The marking on a taxi

vehicle facilitates street hails and indicates availability at kerbside ranks. That is peculiar to taxis and is absent in any other vehicles, including the uberX service.

(c) As a result of what is referred to as the universal service obligation, taxis must (subject to limited exceptions) accept fares from any member of the public (passengers who are anonymous). Contrary to the Commissioner's submission, Uber submitted that this is a significant feature of the ordinary meaning of "taxi". Furthermore, uberX vehicles are not "available for hire by members of the public" in the same way as taxis, in that they cannot be hired anonymously by anyone through rank and hail services. uberX services are only available to those who register as a licensee of the Uber app, meet qualifying conditions (such as being 18 years of age or older), and provide information in advance of making any trip request, including credit card details.

(d) There is a significant distinction between rank and hail services that taxis provide and the electronic booking for near immediate pick up through the Partner app to which uberX Partners are confined. Rank and hail services are a defining characteristic of taxis, and only taxis. While opening the Uber Partner app may be suggested as bearing similarities to waiting for an online booking, nothing that any uberX Partner does is the equivalent of waiting at a taxi rank for passers-by to enter without any booking at all, or the equivalent of accepting fares by a street hand gesture, again without any booking at all. uberX Partners are free at all times to accept or reject trip requests, unlike taxi drivers.

Rulings on evidence

82 An affidavit dated 31 July 2015 by the applicant's solicitor, Mr Jackson was read (apart from paragraphs 17 and 19) without objection. An affidavit dated 15 October 2015 of Mr Fine, an uberX Partner, was read without objection. This was also the case with the two affidavits of Mr Robert Suttie, dated 12 and 17 February 2016, and the affidavit of Mr Nicholas Summers, dated 17 February 2016. The affidavits of Mr Suttie dated 12 February 2016 and Mr Summers described the features of limousine services in Sydney and Perth, respectively, and the deponents' experiences of using those services in those cities. Mr Suttie's affidavit dated 17 February 2016 described features of the Honda Civic motor vehicle driven by Mr Fine in his capacity as an uberX Partner. The applicant also tendered various industry and regulatory reports, which were admitted into evidence on a non-hearsay basis.

83 Uber sought to tender three reports by Dr Peter Abelson, who was put forward as an expert witness. The reports are dated 24 November 2015, 17 February 2016 and 17 June 2016 (**the first, second and third expert reports** respectively).

84 The Commissioner objected to all three expert reports.

85 During the course of the hearing, I ruled that the second expert report was inadmissible in its entirety, as also were those parts of the third expert report which related to the second expert report. As to the first expert report, sections 9 and 10 were not read. I provisionally admitted the balance of the first expert report while saying that I had "grave doubts" about its admissibility. I indicated that I would give my reasons for the rulings on evidence in my reasons for judgment. These are those reasons.

Dr Abelson's expertise

86 Dr Abelson is a director of Applied Economics Pty Ltd. He describes himself as a Director and as an Economist. He has a PhD in Economics from London University and has practised as a consulting and academic economist since 1964. He has been the managing director of the economic consultancy firm, Applied Economics Pty Ltd, since 1989. He held the Chair in Economics at Macquarie University for five years from 2001 to 2006 and lectured in public finance at Sydney University from 2007 to 2012. From 2006 to the present he has been a part-time Principal Economic Advisor to the New South Wales Treasury. He describes his areas of professional expertise as:

> Public economics and finance, cost-benefit analyst, pricing policy, taxation, economic infrastructure, transport, health economics, education, environmental economics, local government, land and housing.

87 Dr Abelson set out in his curriculum vitae many examples of the consultancies he had undertaken during the period from 1990 to 2015. He also listed his publications.

88 It is evident that Dr Abelson is well qualified to give advice on economic and public policy regulatory matters. Although he has not been personally involved in the taxi industry, he stated that he gave evidence in 2013 to the Victorian Essential Services Commission on the regulation of the taxi industry in that State. Dr Abelson is the author of a text entitled *Public Economics: Principles and Practice*, 3rd ed, McGraw–Hill, Sydney, 2012. His academic articles in the area of transport economics include an article entitled "The High Cost of Taxi Regulation with Special Reference to Sydney", which was published in *Agenda,* in 2010. Dr Abelson stated that, in 2008, he developed "a special interest in the taxi industry". In May

2009, he provided a presentation on "*The Economic Evaluation of Taxi Industry Reform in Sydney*" to the Institute of Transport and Logistics at Sydney University. He said that his special interest in the taxi industry is also reflected in the submission he made in January 2010 to an inquiry by the NSW Legislative Council into the taxi industry. Dr Abelson pointed to the following additional activities undertaken by him as illustrating his interest and expertise in the taxi industry:

- in mid-2010, he presented a paper entitled "Governance and Economics of the Taxi Industry with Special Reference to Sydney" to the Australian Transport Forum;
- he gave presentations on the topic of the taxi industry at Macquarie University and to the Economic Society of Australia (NSW Branch);
- by invitation, he has sat twice on a special panel of the NSW Independent Pricing and Regulatory Tribunal (**IPART**) to assist the review of pricing policy for taxis in New South Wales; and
- he made a special submission to the Victorian Inquiry into Taxis in September 2011 and, in July 2013, he was commissioned by the Essential Services Commission in Victoria to provide a Review of Taxi Fare Determination Methodology in Victoria.

(i) The first expert report

89 The first expert report (24 November 2015) is entitled "Transport Services Provided by Taxis and uberX Partners". It was written in response to the following two questions which Dr Abelson was asked to address by the applicant's solicitors:

> 1. In your opinion as an expert on the regulation and economics of the taxi industry, do the services provided by uberX Partners to Riders involve transporting passengers, by taxi, for fares?
>
> 2. Please describe your experience and observations when you have been transported as a passenger in a taxi for a fare in New South Wales, Victoria and ACT (sic) and in particular what features you observe in relation to the nature of the vehicle and the service provided.

90 It is immediately apparent that the second question elicits lay and not expert evidence. Uber did not seek to rely on this section of the first expert report, nor did it rely upon sections of the report entitled "International Observations" (section 9) and "My Observations as a User of Taxi Services" (section 10).

91 The balance of the first expert report may be summarised as follows. In his executive summary, Dr Abelson summarised his response to the first question as being to the effect that

the service provided by uberX Partners to Riders does involve transporting passengers for fares, however, in his view the services do not fit the description of transportation "by taxi". That is because, in Dr Abelson's opinion:

(a) taxis and other forms of what he describes as "point to point" transport services (**P2P**), including hire cars and ride-sharing services like uberX services, have "distinct meanings in public discourse" and the term "taxi" is not used as "a catch all term that describes all P2P transport for a fare";

(b) there is "a clear regulatory concept" of a "taxi" in Australia, which arises because of perceived market failures that are either unique to, or most prominent in, the "rank and hail channel"; and

(c) based upon his views of the meaning in "public discourse" and the "regulatory concept" of a "taxi", Dr Abelson opined that the most essential or defining features of taxis "are the operational features which are most closely related to the rationale for and consequences of this regulatory intervention in the rank and hail channel". Further, he opined that those features "are more or less uniform across jurisdictions. uberX services displays (sic) none of these essential operational features". He added that, "a comparison of other operational features that are characteristic of taxis and hire cars against the operational features of uberX services suggests that uberX services are different to both [i.e. taxis and hire cars], but are closer in many respects to hire cars than to taxis".

92 Dr Abelson's core views are reflected in [20] and [21] of his first expert report (footnotes omitted):

> In my view, terms such as "taxi-cab" and "taxi services" have specific meanings in the taxi industry and in public discussion about its regulation. That meaning is tied to the way the State and Territory transport legislation and related regulations deal with taxi services. In my experience, this legislation and regulation over the past 30 or so years, or perhaps even earlier, has essentially brought about the contemporary meaning of what constitutes a taxi.
>
> There are numerous examples in public discourse concerning transport of the distinction drawn between taxis and other forms of transport, including "ridesharing", including a major recent discussion paper by the NSW Government Point to Point Transport Taskforce (the NSW Point to Point report) and a Draft Determination of the Australian Competition and Consumer Commission (ACCC). In the Point to Point discussion paper the Taskforce (August 2015, page 6) notes that in NSW P2P transport services "include taxis, hire care, tourist services, ridesharing services, community transport and courtesy transport". Thus they clearly distinguish between taxis and ridesharing services and this distinction is maintained throughout the report.

93 Sections 3 and 4 of the first expert report deal respectively with concepts and terminology in P2P transportation and the nature of uberX services. They are substantially descriptive.

94 Section 5 discusses the meaning of the term "taxi" in what Dr Abelson described as "public discourse". In his oral evidence, Dr Abelson stated that the references in his reports to "public discourse" was **not** intended by him to be a reference to "ordinary meaning" and that he had deliberately refrained from opining on the ordinary meaning of the term "taxi" in his reports.

95 Dr Abelson reviewed what he described as a "selection of relevant industry reports, policy statements and regulatory documents to evaluate their references to taxis, hire cars, ride-sourcing and other forms of P2P transportation services". The relevant documents are derived from various Commonwealth, State and Territory sources. The earliest document is entitled "Review of the Taxi Cab and Hire Car Industries" by IPART and is dated November 1999. A Productivity Commission Research Paper dated November 1999 and entitled *Regulation of the Taxi Industry* was also reviewed by Dr Abelson. The balance of the documents are all dated in the period June 2002 to October 2015 (i.e. after the enactment of the *GST Act*). Based on his review of these materials, Dr Abelson concluded that taxis and other forms of P2P transport services, including ride-sourcing services like uberX services, have distinct meanings in public discourse. He said that, in his view, the term "taxi" is not used as a catch all term which describes all P2P transportation services. Rather, it "is used in a way that is synonymous with the regulatory concept of a licenced (sic) taxi".

96 Section 6 of the first expert report deals with the subject of "The Regulatory Concept of a 'Taxi'". In this section, Dr Abelson expands upon his view that the meaning of the term "taxi" is "bound up with the regulatory concept of a taxi". He discusses that regulatory concept and, in particular, "its policy rationale and legislative expression". In [99] of his first expert report, Dr Abelson describes his view of the "policy rationale for taxi regulation" in the following terms (footnotes omitted):

> The basic policy rationale that is usually offered for regulatory intervention in the provision of taxi and hire car services is that market failures due to information asymmetry, search and transaction costs, and imperfect competition lead to inefficient outcomes in the absence of intervention. Equity or "social" objectives and the provision of universal access also serve as the basis for certain interventions".

97 In support of that statement, Dr Abelson made reference to numerous extracts from various State and Territory reports on the subject of regulatory intervention in taxi and hire car

markets. He also set out various legislative definitions of taxis in New South Wales, Victoria and Queensland which, he claimed, "clearly distinguishes between taxis and hire cars". However, Dr Abelson then added at [110] that the position appeared to be different in Queensland:

> The most significant variation for present purposes relates to the treatment of e-hailing. In Queensland, an e-hailed service would appear to meet the definition of a "taxi service". This is not clearly the case in NSW and Victoria, where the critical terms such as "hail" and "ply or stand for hire" are not defined.

98 Dr Abelson elaborated on those remarks in [122] (footnotes omitted):

> In Queensland uberX services appear more likely to come within the legislative definition of "taxi services" than the legislative definition of "limousine" (which is the Queensland legislative term for hire cars). Indeed, where Queensland authorities have undertaken enforcement action against uberX Partners, this has been for providing a taxi service without a licence.

99 In a footnote to [122], Dr Abelson referred to newspaper reports that Uber had been fined $1.7 million in Queensland.

100 In cross-examination, Dr Abelson emphasised that his statements regarding the position in Queensland reflected matters as they stood when he wrote his report in November 2015 and that the position in Queensland was in the process of changing following the recent publication of a report which recommended reforms to Queensland legislation regulating taxi services.

101 Section 7 of the first expert report is headed "Operational Features of Taxis and Hire Cars". It described what Dr Abelson considered to be the "core or essential features of taxis, as opposed to incidental or contingent features". He described those features as including the following matters:

(a) the ability of taxis in all jurisdictions to operate in the rank and hail channel, unlike hire cars;

(b) the characteristic appearance across jurisdictions which makes taxis easily recognisable by reference to livery, decals, roof lights etc, unlike hire cars;

(c) the common feature of taxis across jurisdictions to use a taximeter and have fare regulations, unlike hire cars; and

(d) the common features across jurisdictions that there be strict licensing and accreditation of drivers, vehicles and operators, which is not entirely unique to taxis

and is shared with hire cars in many jurisdictions, although the requirements are in many cases higher for taxis.

102 The Commissioner objected to Dr Abelson's first expert report on the following grounds:

(a) citing Hill J's decision in *Pepsi*, while evidence may be led as to the meaning of a word used in the statute in a trade or technical sense and that usage differs from the ordinary English meaning of the word, such evidence is not admissible for the purpose of interpreting a word which is used in its ordinary English meaning;

(b) Dr Abelson's evidence concerning taxi travel is not admissible because he is not a specialist in that trade and does not describe a trade usage, rather he describes a "regulatory concept"; and

(c) sections 5 and 6 of his first expert report are inadmissible in circumstances where the applicant contends that there is not any difference between the ordinary meaning and any trade or technical meaning of the word "taxi".

103 In oral address, the applicant contended that the first expert report was admissible as providing "factual context or background of the legislation", relying on Hill J's fifth principle in *Pepsi*. It was also submitted that the report was relevant in assisting to determine the meaning of "taxi" in the industry, which was "a true trade usage". It was contended that the regulatory meaning of taxi "necessarily bears on the trade meaning". It was emphasised that Dr Abelson's evidence was **not** related to the "ordinary meaning" of the term taxi. It was submitted that the reference to "taxi" had to be construed in its trade meaning.

104 Before explaining my rulings, it is desirable to summarise the relevant legal principles concerning the admissibility of expert evidence in ascertaining the meaning of words. They are helpfully set out in cases such as *Pepsi* and the decision of Sundberg J at first instance in *Lansell House Pty Ltd v Commissioner of Taxation* [2010] FCA 329; ATC 20-173 (***Lansell House at first instance***) (noting that his Honour's decision was upheld on appeal (see [129] below)).

(a) It is well-established that the courts will refuse to admit evidence for the purpose of interpreting a word used in a statute in accordance with its ordinary English meaning (see *Australian Gas Light Co v Valuer-General* (1940) 40 SR (NSW) 126 at 137 per Jordan CJ).

(b) Evidence may, however, be admitted as to the meaning of a word used in a statute where that word is used in a trade or technical sense and that usage differs from the ordinary English meaning of the word (see *Herbert Adams* at 227-228).

(c) Even where a word is used in its ordinary meaning, evidence may be admitted to understand the context of the legislation under consideration, such as the evidence of experts as to what constituted "mining" in interpreting the phrase "mining operations" in s 122(1) of the then *Income Tax Assessment Act 1936-1966* (Cth) in *Commissioner of Taxation of the Commonwealth of Australia v ICI Australia Limited* [1972] HCA 75; 127 CLR 529 at 544-545 per Walsh J.

105 In *Pepsi*, Hill J summarised the general principles and exceptions as to when evidence may be admitted as to the meaning and use of a word in a trade or specialised sense with the following propositions at 298G to 299B:

> The general principle and apparent exceptions can be expressed in the following propositions which, to some extent, overlap. In construing a statute, evidence may be given of the meaning and usage of a word in a trade:
>
> (1) where it is clear that a word in the statute is used in a specialised or trade sense and that usage differs from the ordinary English usage of the word (sic). The courts will be more ready to conclude that the word is used in a specialised or trade usage where the statute to be construed is a revenue law directed to commerce;
>
> (2) where the word is used in a specialised or trade sense in the statute, the word has an accepted trade usage and it is necessary to determine whether that trade usage differs from the ordinary English usage;
>
> (3) where the word is used in a specialised or trade sense in the statute and it is necessary to determine whether there is an accepted trade usage as a preliminary to showing that that usage differs from the ordinary English usage;
>
> (4) where the word used in the statute is directed to a particular trade and there has not been occasion for a widespread adoption by the general public of the word or a particular denotation of the word;
>
> (5) where the trade usage assists in supplying the context or background of surrounding circumstances necessary to the construction of a word used in the statute;
>
> (6) where the trade usage may assist the court by way of background to determine whether the word used in the statute is used in a specialised or trade usage or in accordance with ordinary English usage.

106 In *Pepsi*, after determining that the words "take-away food" and "take-away beverage" were ordinary English words, Hill J found at 299C that expert evidence could not be admitted under the first of those propositions but that, in the circumstances of that case, such material

was admissible under both propositions (4) and (5) above. In the event, however, his Honour observed at 299C that he did not find the evidence to be of any assistance and he made no use of it.

107 In *Lansell House at first instance*, where the issue was whether a product described as "Italian flat bread" fell within item 32 of Sch 1 to the *GST Act* (which related to "food that is, or consists principally of, biscuits, cookies, crackers, pretzels, cones or wafers"), Sundberg J described the words in that item as ordinary English words which were in common usage and intelligible to a lay person. His Honour rejected the contention that the words were used in a specialised or trade sense which differed from their ordinary meaning. In doing so, he emphasised the need for caution in subjecting words with ordinary meaning to "intensive analysis" (at [57]). His Honour also stated at [60] that it was not the function of an expert to give evidence about the meaning of ordinary words such as bread, biscuit and cracker. Expert evidence was, however, admitted and taken into account by Sundberg J in understanding the ingredients and manufacturing processes of various types of food.

108 Mr Hmelnitsky SC (who appeared together with Mr Thomas and Ms Bathurst for the Commissioner) developed in oral address the Commissioner's position that the first expert report was inadmissible because ordinary English words were used in Div 144 and expert evidence is inadmissible as to the meaning of ordinary English, citing *Pepsi*. Moreover, Mr Hmelnitsky submitted that the applicant's case was not that the word "taxi" had a trade usage. Rather, he described the case as one which posited that the "regulatory use" of the word "taxi" accorded with its ordinary meaning. Although the Commissioner did not challenge Dr Abelson's qualifications as an economist to give evidence on regulatory matters, he submitted that Dr Abelson was not a trade expert or specialist. Mr Hmelnitsky emphasised the wording of the first question which Dr Abelson was asked to address in his capacity as "an expert on the regulation and economics of the taxi industry".

109 One of the difficulties in ruling on the admissibility of the first expert report relates to the fact that the applicant's case concerning the meaning of "taxi" was put somewhat elusively. The Court put to Mr Thawley during his opening address that it was unclear from the applicant's outline of written submissions whether its position was that the phrase "taxi travel" ought to be given its ordinary meaning or whether it had a specialised or trade usage. Mr Thawley said that the "tension" in the outline was deliberate and that the applicant's case was that "it probably does have a technical trade meaning, but if we're wrong about that it has an

ordinary meaning which has the features which I take your Honour to...". Mr Thawley SC then said that the applicant's case was not that the trade usage differed from the ordinary meaning, but that "the ordinary meaning was affected by the regulatory regime". He added that the applicant did not "insist" that the Court "decide that it's not a technical meaning and it's an ordinary meaning" because "the result is the same whether it's a technical meaning or an ordinary meaning, and the reason it's the same is that in fact the ordinary meaning, at the end of the day, is heavily influenced by the underlying regulatory regime...". Mr Thawley said that Dr Abelson's evidence went to the "trade technical meaning", which the applicant relied on.

110 Later in the hearing, in the course of the discussion concerning the admissibility of Dr Abelson's expert reports, the following exchange occurred between the Court and Mr Prince (who presented this part of the applicant's case):

> HIS HONOUR: So I will put to you the question that I put to your leader; what is your case? Is your case that this is about establishing the ordinary meaning or is this a case about establishing whether or not there is a specialised meaning which differs from the ordinary meaning?
>
> MR PRINCE: Well, I put it slightly differently, your Honour. There's the anterior – the first question is, as a matter of statutory construction, is it to be given a trade meaning or an ordinary meaning or some other meaning dependent on the whole range of materials that your Honour would refer to as a process of statutory construction? If your Honour gets – now, we say it has its trade meaning. It has its meaning in the specialised trade.
>
> HIS HONOUR: And it's a specialised meaning which differs from its ordinary meaning?
>
> MR PRINCE: Well, it depends what your Honour decides is the ordinary meaning, with respect. It certainly differs from the ordinary meaning proposed by the Commissioner.
>
> HIS HONOUR: Well, on your case. Forget about the Commissioner's case. I'm more interested in hearing what your case is.
>
> MR PRINCE: Yes. Well, our submission is that the statute, as a matter of proper construction with respect to taxis, is to be construed in its trade meaning. Your Honour then has to determine as a question of fact what the trade meaning is and my leader went through that this morning in the sense of the taxi is the vehicle which is exclusively operating in the rank and hail channel. As an alternative, if your Honour rejects the question – the first issue of statutory construction decides, no, it does not have a trade meaning as a matter of proper construction, and it has its ordinary meaning, then your Honour will have to determine that as a question of fact.
>
> This material, other than as a background, is not admissible to determine the question of the ordinary meaning in the statute, and we say the ordinary meaning then on our case is the same as what we have said is the trade meaning but that's the logical progression of the way the argument is put. Have I answered your Honour's

question? I'm not sure.

111 As noted above, sections 9 and 10 of the first expert report were not relied upon by the applicant. As to the balance of the first expert report, I continue to hold strong doubts concerning its admissibility. However, in view of the difficulties presented by the way in which the applicant's case was presented as to the meaning of the word "taxi", I am prepared to admit the balance of the report relying on Hill J's sixth proposition. In taking this approach, I accept the applicant's position that the notion of language having a specialised meaning could include "a regulatory concept". Thus, although I agree with the Commissioner's submission that Dr Abelson is not a "trade expert", I accept that he is qualified as an expert in economic regulatory matters, including in respect of the taxi industry. As will shortly emerge, however, I consider that the material in the first expert report has little if any significance in construing that word, or indeed, the broader phrase "taxi travel". That is because I do not accept the applicant's central contention that the word "taxi" has a specialised or trade meaning. Rather, I consider that the word, when used in the context of ss 144-1 and 195-1, has its ordinary meaning which differs from what Dr Abelson describes as its meaning as a regulatory concept.

(ii) The second expert report

112 Dr Abelson's second expert (17 February 2016) report is entitled "Transport Services Provided by Limousines and uberX Partners". It was prepared in response to the following request by the applicant's solicitors:

> In your opinion as an expert on the regulation and economics of the point to point transport industry, do the services provided by uberX Partners to Riders involve transporting passengers, by limousine, for fares?

113 In the executive summary to the second expert report, Dr Abelson opined that the services provided by uberX Partners to Riders do not fit the description of transportation "by limousine" because:

> (a) The term "limousine" has a less clearly defined meaning in public and regulatory discourse than the term "taxi", and it is used in at least two different senses. However, in Australia it is almost always used to refer to a large, luxury hire car. uberX services are provided by ordinary (non-luxury) vehicles and their lack of a luxury service feature is the most obvious characteristic that distinguishes them from limousine services.
>
> (b) One prominent meaning of the term "limousine" in public and regulatory discourse in Australia is a special luxury vehicle type, often related to the term "stretch limousine". uberX services provided by ordinary vehicles do not meet this description.

(c) The second prominent meaning of the term "limousine", particularly in Queensland and the Northern Territory, is a broader regulatory category of luxury hire care that includes non-stretched vehicles. Again, uberX vehicles do not meet this description, most obviously because they are not necessarily luxury vehicles, but there are several other operational differences as well.

(d) It might be argued that a third possible meaning of the term "limousine" is that it is simply synonymous with "hire car" and would in principle include non-luxury hire cars. Very few of the references I have reviewed actually support this view. The references that are potentially consistent with this view related to jurisdictions in which all hire cars are luxury vehicles. However, for the reasons outlined in my first report, even if the term "limousine" simply means "hire car", uberX services in Australia do not fit the description of transportation "by hire car" either.

(e) My review of internet limousine service providers revealed a number of common features of limousines, namely:

- they are luxury or special occasion vehicles;
- the ability of the customer to select vehicle type or at least category;
- fare structure – limousine fares are usually fixed in advance or substantial minimum fares apply;
- pre-booking as a regulatory requirement or operational standard; and
- price level – limousine services are significantly more expensive than uberX services.

114 The structure of the second expert report is as follows:

- sections 1 and 2 provide introductory material and Dr Abelson's understanding of the task he was asked to undertake;
- section 3 contains a discussion by Dr Abelson of the meaning of the term "limousine" in public and regulatory discourse;
- section 4 discusses the usage of the term "limousine" by companies and other businesses providing limousine services;
- section 5 deals with the operational features of limousines in comparison with uberX; and
- Dr Abelson's conclusions are stated in section 6.

115 In oral submissions, it was confirmed that Uber's case in relation to the term "limousine" was that the word should be given its ordinary meaning. It is well settled that expert evidence is not admissible as to the ordinary meaning of the word or phrase (see *Pepsi*). I was not satisfied that the second expert report fell within any of the principles identified by Hill J in

Pepsi, including the fifth principle. Accordingly, I ruled that the second expert report was inadmissible in its entirety.

(iii) The third expert report

116 The third expert report (17 June 2016) comprises copies of documents which were referred to in the first and second expert reports. Consistently with my rejection of the entirety of the second report, those parts of the third expert report which relate to that material are also inadmissible, whereas those parts which relate to the admissible sections of the first expert evidence should be admitted while noting their limited significance in view of the matters discussed in [111] above.

117 Finally, Uber sought to tender a large bundle of documents largely comprising copies of industry reports and other materials of a regulatory nature issued by various government departments and agencies regarding the regulation of taxi and hire car industries. Some of these materials were referred to and discussed by Dr Abelson in his first and second expert reports. The documents numbered 12.67 to 12.78 inclusively, which largely comprised extracts from limousine hire websites, were admitted into evidence (Exhibit 4). I upheld an objection by the Commissioner to the balance of the documents being admitted into evidence for other than a non-hearsay purpose. These documents were marked Exhibit 5.

Consideration and determination on statutory construction

118 As noted above, the parties were generally agreed on the relevant principles of statutory construction, however, the applicant joined issue with some aspects of the Commissioner's reliance on those principles. In my view, the central task of statutory construction in this proceeding is assisted by reference to the following general principles.

119 First, it is important at the outset to acknowledge the distinction between the legal, as opposed to the grammatical, meaning of statutory text. This is emphasised in the following extract from the joint judgment of McHugh, Gummow, Kirby and Hayne JJ in the leading decision of the High Court in *Project Blue Sky* (footnotes omitted):

> 78. However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning. In *Statutory Interpretation*, Mr Francis

Bennion points out:

> The distinction between literal and legal meaning lies at the heart of the problem of statutory interpretation. An enactment consists of a verbal formula. Unless defectively worded, this has a grammatical meaning in itself. The unwary reader of this formula (particularly if not a lawyer) may mistakenly conclude that the grammatical meaning is all that is of concern. If that were right, there would be little need for books on statutory interpretation. Indeed, so far as concerns law embodied in statute, there would scarcely be a need for law books of any kind. Unhappily this state of being able to rely on grammatical meaning does not prevail in the realm of statute law; nor is it likely to. In some cases the grammatical meaning, when applied to the facts of the instant case, is ambiguous. Furthermore there needs to be brought to the grammatical meaning of an enactment due consideration of the relevant matters drawn from the context (using that term in its widest sense). Consideration of the enactment in its context may raise factors that pull in different ways. For example the desirability of applying the clear literal meaning may conflict with the fact that this does not remedy the mischief that Parliament intended to deal with.

120 The importance of the distinction between the legal and grammatical meaning of statutory text was subsequently emphasised by French CJ, Hayne, Kiefel, Gageler and Keane JJ in *Thiess* at [22] (footnotes omitted):

> 22. Statutory construction involves attribution of meaning to statutory text. As recently reiterated:
>
> > This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text'. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text.

121 Chief Justice French and Hayne J reaffirmed these principles in *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; 248 CLR 378 at [25]-[26]. In particular, their Honours emphasised that the search for "legal meaning" involves the application of "the processes of statutory construction" and that the identification of statutory purposes and legislative intention is the product of those processes, and not the discovery of some subjective purpose or intention.

122 Secondly, as the Commissioner correctly emphasised, the consideration of text often requires consideration of context and questions of context should be addressed in the first instance and not merely at a subsequent stage when ambiguity may arise (see the authorities referred to in [48] above). I consider that the Explanatory Memorandum to the Bill which introduced Div 144 provides a relevant part of that context. In particular, as the Commissioner submitted, the relevant part of the Explanatory Memorandum (which is set out at [61] above)

makes clear that the exception which was created in respect of taxis was informed by an appreciation of the difficulties which had arisen with goods and services taxes in overseas jurisdictions and the fact that some but not all taxi drivers were registered for GST purposes. This meant that GST was not paid by all drivers or, in the case of unregistered taxi drivers, GST could be collected and not remitted.

123 A plain object of Div 144 was to address this problem by requiring all persons who supplied "taxi travel" to be registered for, and remit, GST. I accept the Commissioner's construction that, in these circumstances, the concept of "taxi travel" as defined in s 195-1 should be construed broadly and not technically.

124 Thirdly, although the High Court made reference in *Agfa-Gevaert* at 399 to a "presumption" in favour of trade meaning in revenue statutes, it emphasised that this did not "deny the possibility that words used in a revenue statute directed to commerce are to be understood in their ordinary meaning".

125 I consider that other matters point to the need for a broad and non-technical approach to be taken in construing the relevant provisions of the *GST Act*. As Young J noted in *Saga Holidays* at [70] in the context of determining whether holiday package tours were "taxable supplies" within the meaning of s 9-5 of the *GST Act*:

> 70 The second answer to Saga's argument is that it depends on a very technical reading of s 195-1 that does not sit comfortably with the policy and purposes of the GST Act or the context in which s 195-1 must be applied: see *HP Mercantile* 143 FCR 553 at [40]-[43] per Hill J. GST has been described as a practical business tax: *Sterling Guardian Pty Ltd v Commissioner of Taxation* (Cth) (2005) 60 ATR 502; 220 ALR 550 at [39]. It falls on a wide variety of transactions that constitute taxable supplies and it is self-assessing. For this reason, the legislation is expressed in broad and flexible language. These considerations, and the nature, policy and surrounding legislative context of the GST Act, indicate that the Court should construe the Act in a practical and common sense way and that, generally speaking, it should avoid interpretations which are unduly technical or overly meticulous and literal: see *HP Mercantile* 143 FCR 553 at [41]-[53] per Hill J; and Hill DG, "Some Thoughts on the Principles Applicable to the Interpretation of the GST" (2004) 6 *Journal of Australian Taxation* 1. This approach seems particularly apposite to the construction of s 9-25 and s 195-1.

126 In *Saga Holidays*, Stone J (with whom Gyles J and Young J agreed) noted that the Court had tended to adopt a purposive approach to the interpretation of the *GST Act* and had rejected "strict grammatical analyses in favour of a consideration not only of the syntax but also of "the policy and the surrounding legislative context" of the relevant provision" and with the characterisation of the tax as "a practical business tax" (see at [29]). Her Honour added that,

this did not mean that there was "some special canon of construction that should be applied when interpreting the GST Act", however, recognition of the legislation as involving "a practical business tax", requires a broad approach to be taken to the relevant context, which includes the "legislative history, the parliamentary intention and the mischief to which a particular provision has been directed", citing at [30] the Full Federal Court's observations in *Chaudhri v Commissioner of Taxation* [2001] FCA 554; 109 FCR 416.

127 I consider that there is particular force in the Commissioner's submission that, in construing the phrase "taxi travel", it is relevant to take into account the fact that the legislation is directed to persons who supply "taxi travel", who need to understand whether or not they are obliged to register for GST, notwithstanding that their income does not reach the general statutory threshold. This reinforces the desirability of construing the legislation in a practical and common sense way and to avoid an approach which is "unduly technical or overly meticulous and literal" as Young J observed in *Saga Holidays* at [70].

128 A practical and common sense approach was adopted and applied by Sundberg J in *Lansell House at first instance* at [51] and [52]. As noted above, the issue there was whether Italian flat bread fell within item 32 of Sch 1 to the *GST Act*. His Honour described the question for decision as "the proper classification of every day food items for the purpose of the Goods and Services Tax". He then added at [59]:

> ... The everyday English words in item 32 must be given their ordinary and natural meaning – what is the reasonable view on the basis of all the facts known to the Court as to whether or not the product is one which falls within the relevant category, which here is crackers. Thus, it seems to me, it is inappropriate for the Court to apply refined analytical tools – in this case rather elusive and qualified technical distinctions – to an ordinary English word, rather than local knowledge and common sense. As Toulson LJ said in *Procter & Gamble*, this is not a scientific question.

129 Justice Sundberg held that the words in item 32 were ordinary English words and were not used in any specialised sense. His Honour held that the product in question was a "cracker" within the meaning of item 32. His Honour's decision was upheld on appeal (see *Lansell House Pty Ltd v Commissioner of Taxation* [2011] FCAFC 6; 190 FCR 354 per Bennett, Edmonds and Nicholas JJ).

130 Fourthly, I accept the Commissioner's submission that this is an appropriate case in which to regard the relevant provisions of the *GST Act* as "always speaking". Thus, merely because software technology of the type used in providing the uberX service may not have been known at the time that Div 144 was inserted into Pt 4-5 of the *GST Act* is not determinative.

131 Fifthly, there is the issue whether the definition of "taxi travel" in s 195-1 is to be construed as a composite phrase. The relevant principles guiding the construction of a composite phrase are reflected in the following summary by Gordon J in *Sea Shepherd* at [34] (with whom Besanko J agreed):

> 34. The general principles of construction of a statute were not in dispute. For present purposes, it is sufficient to record that they were identified by the Tribunal and may be summarised as follows:
>
> 1. The task is to construe the language of the statute, not individual words: *St George Bank Ltd v Federal Commissioner of Taxation* (2009) 176 FCR 424 at [28]; see also *XYZ v Commonwealth* (2006) 227 CLR 532 at [102]; *R v Brown* [1996] AC 543 at 561 quoted *in Agfa-Gevaert* at 397 and *Metropolitan Gas Company v Federated Gas Employees' Industrial Union* (1925) 35 CLR 449 at 455.
>
> 2. The task is not to pull apart a provision, or composite phrase within a provision, into its constituent words, select one meaning, divorced from the context in which it appears, and then reassemble the provision: *Lorimer v Smail* (1911) 12 CLR 504 at 508–10; *R v Carter; Ex parte Kisch* (1934) 52 CLR 221; *Biga Nominees Pty Ltd v Commissioner of Taxation* (1991) 21 ATR 1459 at 1468–1469. Indeed, it is rare that resort to a dictionary will be of assistance in searching for the legal meaning of a provision in a statute: *R v Campbell* (2008) 73 NSWLR 272 at [49].
>
> 3. As Gleeson CJ said in *XYZ v Commonwealth* at [19]:
>
> > There are many instances where it is misleading to construe a composite phrase simply by combining the dictionary meanings of its component parts.
>
> See also *General Accident Fire & Life Assurance Corporation Ltd v Commissioner of Pay-roll Tax* [1982] 2 NSWLR 52 referred to by Gleeson CJ where Lord Wilberforce remarked, in the course of argument, that an Australian who looked up the words "commission" and "agent" in a dictionary would probably be surprised to be told that, in England, a commission agent is a bookmaker.
>
> 4. The text of the provision is to be construed according to the context "by reference to the language of the instrument viewed as a whole": *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] (citations omitted). In the present case, the word "care" is to be construed in the context of the composite phrase of which it forms part, being "short-term direct care", in the context of the rest of the specific paragraph and in the context of para (b) of Item 4.1.6. Similarly, the phrase "animals without owners" is to be construed in context.

132 I should indicate, however, that I do not consider that the definition of "taxi travel" in s 195-1 of the *GST Act* is in truth a composite phrase. Rather, the focus in the definition on "travel that involves transporting passengers, **by taxi or limousine**, for fares" (emphasis added)

expressly differentiates between two types of vehicles, as is further reflected in the use of the disjunctive "or". The definition is to be contrasted with the phrase in *Agfa-Gevaert*, namely "silver dye bleach reversal process", which was viewed as a composite phrase. For these reasons, I see no utility in approaching the task of statutory construction as if it was directed to a composite phrase. It may be that the phrase "taxi travel" in s 144-1 is itself a composite phrase but attention must also be focused upon the specific statutory definition of that phrase in s 195-1 which is not properly characterised as a composite expression.

133 Sixthly, and perhaps related to the first of the principles summarised above, I acknowledge that appropriate caution needs to be taken in using dictionary meanings. This is highlighted in the passage from Gordon J's judgment in *Sea Shepherd* which is set out in [131] above. I also respectfully agree with her Honour's further observations at [36]:

> 36. ...Construction of a statute cannot be undertaken with no more than the words of the provision in one hand and a dictionary in the other. Judge Learned Hand rightly cautioned against the mechanical examination of words in isolation. As his Honour said *in Cabell v Markham* 148 F (2d) 737 (2d Cir 1945) at 739:
>
> > ... it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

134 That is not to say, however, that reference can never be made to dictionary meanings in ascertaining or confirming the ordinary meaning of words. I respectfully agree with the following observations of Mahoney JA in *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd* (1991) 25 NSWLR 541 at 560 concerning the use of dictionary meanings:

> Dictionaries are not a substitute for the judicial determination of the interpretation and then construction of statutes and other documents: *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60 at 78 per Isaacs J. The meaning of the words used in a statute or document is not merely the sum of the individual meanings of the words used, ascertained from dictionaries. To adapt the much cited comment of Holmes J, a word is the skin of a living thought, and it is the thought which the court must ascertain and apply.
>
> In doing this, it is, of course, necessary first to determine what is the ordinary or natural meaning of the words used because primarily it is from that that the intention of the legislator or of the parties is to be ascertained: see *M P Metals Pty Ltd v Commissioner of Taxation* (1968) 117 CLR 631 at 634; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304-305; *Tullamore Bowling & Citizens Club Ltd v Lander* [1984] 2 NSWLR 32 at 53. But that meaning is the ordinary usage of society: *Shore v Wilson* (1842) 9 Cl &

> Fin 355 at 527; 8 ER 450 at 518 per Coleridge J and *R v Peters* (1886) LR 16 QBD 636 at 641. And it is to be taken from the judge's understanding of the sense in which words are used: see, eg, *NSW Associated Blue Metal Quarries Ltd v Federal Commissioner of Taxation* (1956) 94 CLR 509 at 514 per Kitto J. In *Midland Railway Co v Robinson* (1889) LR 15 App Cas 19, Lord Macnaghten (albeit in dissent) said (at 35) that, in considering the meaning of a term such as 'mines and minerals', the opinion of particular judges may be "a safer guide than any definitions or illustrations to be found in dictionaries". No doubt a judge will find it of assistance to know the meanings in which, as dictionaries show, the words have been used: for an early example of resort to dictionaries, see *Matthew v Purchins* (1608) Cro Jac 203; 79 ER 177 (the dictionary of Thomas. Thomasius not that of Robert Cowdrey). But courts are not bound by such meanings: *Grieves v Rawley* (1852) 10 Hare 63 at 65; 68 ER 840 at 841.

135 Applying these principles, which I view as providing helpful guidance rather than talismanic formulae or inflexible rules of law, I consider that the words in s 195-1 should be given their ordinary, everyday meanings and not a trade or specialised meaning (including one which reflects what Dr Abelson describes as a "regulatory concept"). I accept the Commissioner's submission that the ordinary meaning of the word "taxi" is a vehicle available for hire by the public and which transports a passenger at his or her direction for the payment of a fare that will often, but not always, be calculated by reference to a taximeter. This meaning is supported by the dictionary definitions which are set out in [55] above. I do not regard the use of those dictionary definitions to confirm the ordinary meaning of the word "taxi" as offending any of the relevant principles concerning limitations in the use of such materials.

136 The word "limousine" should also be given its ordinary meaning. That meaning is a private luxurious motor vehicle which is made available for public hire and which transports a passenger at his or her direction for the payment of a fare. This meaning is confirmed by the following definition in the *Macquarie Dictionary*, 3rd edition:

> **limousine**... any large, luxurious car, especially a chauffeur-driven one, often with a glass division between the passengers and the driver.

Neither party seriously disputed the proposition that a "hire car" is a synonym for a "limousine" in ordinary parlance. The emphasis on a limousine being a car which is both large and luxurious reflects the everyday understanding of the meaning of that word. The presence of a glass division between the passengers and the driver is not an essential feature of a limousine (or a hire car).

137 I do not accept the Commissioner's submissions that the ordinary meaning of "limousine" is not confined to luxury vehicles. As emphasised above, the ordinary meaning of the words "limousine" (and its synonym "hire car") involves a luxury vehicle. I am not persuaded by

the Commissioner's contention that the word "limousine" should be construed as not involving the use of a luxury vehicle because of the practical difficulties which he contends such a construction would allegedly present for limousine operators having to decide whether or not their vehicle is or is not a luxury vehicle. I consider that the inclusion of the words "or limousine" in the definition of "taxi travel" in s 195-1 suggests that the Parliament considered that a taxi is different from a limousine in supplying transport to passengers for a fare. I do not consider that the relevant difference is to be found at the level of granularity suggested by the applicant's lists of "essential characteristics" of such vehicles, which lists are drawn from various State and Territory legislative requirements which apply to the regulation of the operation of such vehicles. Those requirements address discrete regulatory purposes which, I believe, are far removed from the purpose or object of the *GST Act*. In common usage, the fundamental relevant difference between a taxi and a limousine (or hire car) is that the latter is invariably a luxury car (which is often large) which is available for hire to transport passengers for a fare.

138 I consider that, on 11 September 2015, Mr Fine was supplying taxi travel as defined in ss 144-5(1) and 195-1 of the *GST Act* when he was operating as an uberX Partner. That is because I consider that, at that time, he was supplying travel that involved transporting passengers by taxi for fares. The fact that his car did not have a taximeter installed in it is not determinative of the question because I do not consider that it is an essential aspect of the ordinary meaning of the word "taxi" that a vehicle must have such a device. This is reflected in the dictionary definitions which make clear that while such a device is usually present in a taxi, it is not essential to the ordinary meaning of that word. Nor do I consider that the ordinary meaning of the word "taxi" requires consideration to be given to the numerous other characteristics which the applicant advanced as being essential to the notion of a "taxi" as set out in [29] above. The applicant's approach, which emphasised these so-called "essential characteristics" and highlighted how the uberX service failed to meet those characteristics is at odds with the common usage of the word "taxi". In my respectful view, the approach is also inappropriate for the reasons given by Sundberg J in *Lansell House at first instance* at [59], which bear repeating (emphasis added):

> ... The everyday English words in item 32 must be given their ordinary and natural meaning - what is the reasonable view on the basis of all the facts known to the Court as to whether or not the product is one which falls within the relevant category, which here is crackers. **Thus, it seems to me, it is inappropriate for the Court to apply refined analytical tools - in this case rather elusive and qualified technical distinctions - to an ordinary English word, rather than local knowledge and**

> **common sense**. As Toulson LJ said in *Procter & Gamble*, this is not a scientific question.

139 Although it is strictly unnecessary to determine the matter in the light of my finding that the type of car used by Mr Fine on the relevant day was a "taxi" within the ordinary meaning of that word, I can also indicate that I consider that the Honda Civic vehicle which he used on the relevant day is not a luxury car, with the consequence that Mr Fine was not on that day supplying a service which involved travel by limousine. That is not to deny, however, that the position may be different in a case of other uberX Partners who do use luxury cars in providing uberX services.

140 The following additional matters support the conclusions expressed above (some of these matters serve to underline the application of the general principles of statutory construction set out above). First, the words in s 195-1 are common, everyday words which are intelligible to ordinary people, including those who operate taxis and limousines.

141 Secondly, I do not accept that the "regulatory concept" of "taxi", as described by Dr Abelson coincides with the ordinary meaning of the word "taxi". The ordinary meaning of the word "taxi", as is reflected in various dictionary definitions, is expressed at a higher level of generality than the "regulatory concept" identified by Dr Abelson. I accept the Commissioner's submission that there is no basis for concluding that the Parliament intended persons who offer supplies which are affected by the *GST Act* closely to analyse State or Territory legislation governing the provision of taxi or limousine services. The GST legislation has a national and uniform operation. As the Commissioner pointed out, the licensing and regulatory requirements applicable to taxis have various subtle and not so subtle variations from one jurisdiction to another. The point is illustrated by the fact that in Western Australia taximeters are not required in all vehicles which are taxis (see [57] above). As has been emphasised above, the purpose or object of State and Territory licensing and regulatory requirements applicable to taxis and limousines are quite different from the purpose or object of the *GST Act*.

142 Moreover, I reject the applicant's contention that the meaning of the phrase "taxi travel" in s 144-5 of the *GST Act* , as defined in s 195-1, is influenced by the "regulatory concept" of taxi as has emerged in various publications which are directed to the issue whether regulatory intervention is required in what Dr Abelson described as "the rank and hail channel" arising from perceived market failures. Most of that literature postdates the *GST Act*. Some of it predates the legislation but the applicant did not point to any conclusive material which

supported its claim that the choice of terminology by the Commonwealth Parliament in enacting Div 144 was influenced in any way by a broader public policy debate concerning regulation of the taxi industry and emerging transport operations, such as those involved in the uberX service. In any event, State and Territory licensing and regulatory provisions serve quite different purposes or objects to the *GST Act*.

143 Finally, I consider that some limited assistance is obtained from the mischief identified in the Explanatory Memorandum for inserting Div 144 (see [61] above). I accept the Commissioner's submission that this mischief or purpose supports a broad construction of the relevant provisions, however, it does not dictate the resolution of the task of construction. Broadly construed, and having regard to other relevant matters of construction, I consider that the word "taxi" is sufficiently broad in its ordinary meaning to encompass the uberX service supplied by Mr Fine on 11 September 2015.

Conclusion

144 For these reasons, the amended originating application dated 22 September 2015 should be dismissed and the applicant ordered to pay the Commissioner's costs. A declaratory order should be made to the effect that the uberX service supplied by Mr Fine on 11 September 2015 constituted supply "taxi travel" within the meaning of s 144-5(1) (as defined in s 195-1) of the *GST Act*.

I certify that the preceding one hundred and forty-four (144) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Griffiths.

Associate: 

Dated: 17 February 2017