

Innovators or Rule Breakers?

Regulating Uber, Airbnb & The Sharing Economy

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INTRODUCTION

For most people, getting a taxi in the street in 1990 was not much different to acquiring a taxi in 1890. Certainly, the taxi would be more likely to run on a fuel combustion engine rather than be drawn by horses, but the means of hiring one was much the same: we went to a rank or you flagged one down as it passed. The advent of the cellphone changed all that. Taxis could now be ordered to come to us. But the emergence of the Uber app has taken that to the next level, allowing us not only to order the taxi, but to find out in advance information about the driver, track his/her location and after the journey provide feedback about it.

Until about ten years ago, booking accommodation still followed the traditional model. We would look up registered hotels, motels or bed & breakfast operators and contact them to enquire about vacancies and rates. The only real differences from previous generations was that the enquiry may involve a web browser and an email rather than the Yellow Pages and a telephone call. The possibility of arriving in a city and using a smartphone to organise accommodation in a stranger's home was, however, unthinkable.

The success of apps such as Uber and Airbnb are revolutionizing the way in which the taxi and accommodation markets, for example, have operated for generations. Flying in the face of age-old ideas about stranger danger, they are utilising the 'sharing economy' to offer flexible and accessible services and competitive prices. Uber and Airbnb create value. They enable owners to capitalise on their under-utilised assets, provide more choice which results in downward price pressure and increase innovation leading to better service and efficiency outcomes.¹

They also, however, create regulatory challenges. Conformity with current legislation and regulations is not the primary concern of innovators. Technology can be built around regulations. They seek to disrupt and change the market as we know it, so current regulatory schemes no longer fit the new technology offered. As a disruptive innovator Uber's strategy can be described as entering a market first and only then dealing with legal compliance issues.²

The current New Zealand regulatory framework does not provide effective regulations for apps such as Uber and Airbnb who are operating in the sharing economy. Regulatory

¹ Nayeem Syed "Regulating Uberfication" 2016 22(1) C T L R 14 at 14.

² Julie Nowag "The Uber Cartel: Uber between Labour and Competition Law" (2016) Lund Student EU Law Review 3 (forthcoming).

intervention and reform are required and this dissertation seeks to identify the appropriate course of action for New Zealand.

Chapter I seeks to examine the theory of regulation and why we consider regulatory tools valuable in modern societies. Roger Brownsword's four key regulatory challenges³ will be discussed in relation to Airbnb and Uber. These challenges will be developed in more detail throughout the remainder of the dissertation. Regulators will need to overcome these challenges if they are to successfully regulate Uber and Airbnb in NZ.

Chapter II will compare and contrast the regulatory standards to which providers of the same services but through different platforms are subject in NZ. The focus will be on Uber and Airbnb operators in comparison with taxi and ordinary bed & breakfast, motel and hotel providers. The following regulatory issues will be considered: licensing requirements, employment law compliance, competition and safety standards. The practical implications of these different rules will be discussed while seeking to answer whether we can attribute the apps successes to their efficient systems, or merely to their use of regulatory arbitrage.⁴ The key consideration will be whether Airbnb and Uber are innovating in a sense that we should welcome or whether they are simply innovating around the rules.

Chapter III discusses the overseas experience in relation to Uber. Given it was launched in the USA in 2010, overseas jurisdictions have had more time to deal with the regulatory challenges posed by its business model. The Law Commission for England and Wales Advisory Report and New South Wales Point to Point Transport Act 2016 will be discussed in depth. The merits of these regulatory regimes will be identified in an attempt to highlight the most appropriate course of action for New Zealand.

Chapter IV assesses the current New Zealand legal landscape in relation to the Uber. An analysis of the Future of Small Passenger Services Consultation Paper and the Land Transport Amendment Act 2016 will be undertaken in order to determine whether they possess the ability to regulate this sphere successfully.

Momentum in the app era is not slowing. The difficulty that arises is that technologies are being created at a faster rate than the regulators can keep up with. Apps are being created offering services that consumers initially were not even aware they needed, but now

³ R Brownsword and M Goodwin *Law and the Technologies of the Twenty-First Century* (University Press, Cambridge, 2012) at 46.

⁴ Regulatory arbitrage is defined as the practice where firms capitalise on loopholes in the regulatory system in order to avoid liability under unfavourable legislation and regulatory regimes.

without them day to day activities would seem increasingly more difficult. The sharing economy presents regulators with multiple challenges relating to a variety of areas of law. Left untouched, these challenges will only continue to grow. Regulators need to ensure consumer safety, the market remains competitive and that opportunities for further beneficial innovative activities are provided.

CHAPTER ONE

An inherent tension exists between regulation and innovation. Consumers enjoy creativity, new measures and revolutionary ideas that promote efficiency in the marketplace, but simultaneously value the laws and protections which structure society. Regulators face the challenge of striking a balance when allowing for original ideas but minimising the associated risks. This chapter first seeks to establish that regulation is required in the sharing economy and then discusses the challenges regulators must overcome to successfully implement a regulatory framework. Roger Brownsword⁵ has identified four key challenges;- regulatory prudence and precaution, regulatory legitimacy, regulatory effectiveness and regulatory disconnect and their application in the sharing economy will form the basis for discussion in this chapter.

Value in the Sharing Economy

Uber and Airbnb are often described as products of the “sharing economy” but this lacks a shared definition.⁶ Generally, it is viewed as an offspring of the peer to peer business model.⁷ Owners are able to take advantage of their underused belongings by renting or sharing them with others via the Internet and mobile phone applications.⁸ At face value, it appears advantageous for all parties involved; consumers enjoy efficient service and cheaper prices, while producers capitalise on transforming spare capacity into a productive asset. The question, however, is whether these sharing economy practices can be qualified as innovations worth encouraging and protecting.⁹ In a society where individualism and waste are at their peak, sharing systems, collaborative consumption and the efficiencies they generate are exactly the type of innovation required.

The sharing economy creates value in at least five ways.¹⁰ First it provides for the productive allocation of underutilised assets. Airbnb, for example, enables home occupiers to rent out spare rooms that would have otherwise sat empty, while the occupier is able to continue to occupy their home as per usual. Secondly, the sharing economy enables a multitude of

⁵ R Brownsword and M Goodwin, above n 3, at 46.

⁶ Rachel Botsman “The Sharing Economy Lacks a Shared Definition” (27 September 2016) Collaborative Consumption <www.collaborativeconsumption.com>.

⁷ Talia Loucks “Travelers Beware: Tort Liability in the Sharing Economy” (2015) 10(4) Wash. J.L. Tech. & Arts 329 at 330.

⁸ Loucks, above n 7, at 330.

⁹ Sofia Ranchordas “Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy” (2015) 16(1) Minn J L Sci & Tech 413 at 414.

¹⁰ Christopher Koopman, Matthew Mitchell and Adam Thierer “The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change” (2015) 8(2) J. Bus. Entrepreneurship & L. 529 at 531.

buyers and sellers to interact through its user friendly platforms, which facilitate competitiveness on both the supply and demand side of its markets.¹¹ Third, it decreases transaction costs by reducing the cost of finding willing traders through innovative apps, and fourth, peer review systems are able to mitigate the problem of asymmetric information between producers and consumers,¹² contributing to a highly efficient marketplace. Finally it allows suppliers to create value for customers long underserved by those incumbents who have become inefficient and unresponsive because of their regulatory protections.¹³ Due to this creation of value, an outright ban of the services offered by sharing economy participants would be neither efficient nor an effective course of action. There are however, very serious short-term risks if this sphere is left to flourish without any form of regulatory intervention.¹⁴

Regulation

Regulation signifies “the sustained and focused attempt to alter the behavior of others, according to principles or goals, with the intention of producing a broadly identified outcome or outcomes”.¹⁵ Mechanisms of standard setting, information gathering and behaviour modification are typically involved.¹⁶ The law makes the most formal contribution to the regulatory environment but regulators can employ a variety of signals designed to channel the conduct of regulatees.¹⁷ The sharing economy requires regulation as currently the applicable legislation¹⁸ does not fit the technologies offered. Brownsword describes this as “regulatory disconnect”, where the current definitions and descriptions no longer correspond to the technology related practices that are the target of the regulation.¹⁹ Due to this disconnect the sharing economy is disrupting traditional industries across the globe²⁰ and app based services such as Uber and Airbnb have enjoyed vast amounts of success. This may arguably be due to the more efficient business models employed by the companies however, their traditional competitors consider this is largely attributable to their regulatory arbitrage.

¹¹ At 531.

¹² At 531.

¹³ At 531.

¹⁴ Syed, above n 1, at 14.

¹⁵ Julia Black, ‘What is Regulatory Innovation?’ in Julia Black, Martin Lodge and Mark Thatcher (eds.), *Regulatory Innovation* (Cheltenham: Edward Elgar, 2005), 1, at 11.

¹⁶ At 11.

¹⁷ Brownsword and Goodwin, above n 3, at 51.

¹⁸ See for example Land Transport Act 1998, Operator Licensing Rule 2007, Employment Relations Act 2000 and Innkeepers Act 1962.

¹⁹ Brownsword and Goodwin, above n 3, at 25.

²⁰ Sarah Cannon and Lawrence H Summers “How Uber and the Sharing Economy Can Win Over Regulators” (13 October 2014) Harvard Business Review <hbr.org/2014/10/how-uber-and-the-sharing-economy-can-win-over-regulators>.

Uber's success has triggered a massive outcry from taxi service providers as they believe Uber is a threat to their viability. Many claim that by failing to comply with the traditional regulatory requirements that burden taxi companies²¹ or by taking regulatory shortcuts²² Uber is engaging in unfair competition. The New Zealand Taxi Federation claims Uber is misleading the Government and the public²³ and is not in fact committed to ensuring the safety of passengers. In several jurisdictions taxi companies have initiated legal proceedings against Uber to declare their activities illegal.²⁴

Risk management is a key factor in support of a regulatory regime. Regulation promotes the uniform application of health, safety and environmental concerns. Regulators are able to be called into account if they fail adequately to address the risks presented by emerging technologies.²⁵ Protecting consumer welfare is one of the principal rationales for economic regulation. The traditional principles of the public interest theory of regulation provide that regulation is sought to protect consumers from perceived market failures, including inadequate competition, price gouging, asymmetric information and unequal bargaining power.²⁶ By seeking to mitigate these risks, regulation can also be the most significant barrier to future growth for sharing economy firms. This is particularly inopportune considering the incentives of sharing economy firms are often aligned with government incentives.²⁷ The challenge for regulators is striking the balance between ensuring that sharing economy innovations are not stifled by excessive and outdated regulation and providing adequate protection for both consumers and producers. This is difficult considering the sharing economy is predicated upon mutual trust, which is why these practices will never be risk-free.

²¹ Damien Geradin "Uber and the Rule of Law: Should Spontaneous Liberalization be Applauded or Criticised?" (2015) 11(1) Competition Policy International 15 at 16.

²² Benjamin Edelman "Whither Uber?: Competitive Dynamics in Transportation Networks" 2015 11(1) Competition Policy International at 1.

²³ NZ Taxi Federation "Submission on Future of Small Passenger Services Consultation Paper" at 1.5.

²⁴ Eric Auchard and Christoph Steitz "German court bans Uber's unlicensed taxi services" (18 March 2015) Reuters < www.reuters.com >.

²⁵ Brownsword and Goodwin, above n 3, at 46.

²⁶ Ranchordas, above n 9.

²⁷ Cannon and Summers, above n 20.

Regulatory Prudence & Precaution

Regulatory prudence and precaution requires the identification of potential risks of new technologies.²⁸ Regulators must overcome the challenge of facilitating an environment where risk is deemed to be held at an acceptable level by using sensible precautionary measures. Simply, risks and benefits must be weighed up against one another. Adam Burgess identified “in the elusive quest to establish a risk free existence, our autonomy, intelligence and capacity for change and enlightenment stand in danger of being compromised and diminished”,²⁹ which is why a balancing exercise or a cost benefit analysis ought to be undertaken.

Regulatory prudence and precaution also requires consideration of the idea of “prudential pluralism”.³⁰ Regulators must recognise that different people have different risk thresholds and ensure they regulate so that consumers can make informed choices in light of their own risk aversion. Individuals will arrive at very different prudential judgments as to the acceptability of particular risks.³¹ Inevitably, regulators will not be able to satisfy all consumers as some communities will be more risk adverse than others, however they will be criticised if they do not take a suitably prudent approach.³² There is no clear formula for what constitutes a suitably prudent approach. Various factors may be taken into consideration and weighted differently. Brownsword also raises this issue and asks whether more weight should be given to the probability of harm ensuing or the seriousness of the harm and which risk is greater the low probability of serious harm or the high probability of less serious harm?³³ The answer will depend largely on personal preferences and the community at hand.

The introduction of Uber and Airbnb has caused a lot of uncertainty in New Zealand and worldwide. This is to be expected as new technologies always invite a degree of suspicion however, uncertainty leads to the creation of a sense of public unease. It is therefore imperative regulators exercise both prudence and precaution when analysing these new phenomena. The prudential challenge may in this case simply be limited to managing risk in a way that reflects public preferences and allows for consumers to make informed decisions. This is easier said than done. Regulators will need to analyse the risks that may

²⁸ Brownsword and Goodwin, above n 3, at 47.

²⁹ Adam Burgess *Cellular Phones, Public Fears and a Culture of Precaution* (Cambridge University Press, Cambridge, 2004) at 281.

³⁰ Roger Brownsword “Responsible regulation: prudence, precaution and stewardship” (2011) 62(5) NILQ 573 at 574.

³¹ Brownsword, above n 30, at 574.

³² Brownsword and Goodwin, above n 3, at 47.

³³ At 48.

arise if the status quo is maintained, that is, if Uber and Airbnb are left to continue their operations subject to current NZ legislation. They will then need to assess how potential risks could be prevented through regulation whilst still enabling the technology to flourish and grow.

Regulatory Legitimacy

Regulatory legitimacy is the second key challenge Brownsword³⁴ identified. Regulators are expected to operate in a transparent and accountable manner while ensuring that stakeholders and the public are able to participate.³⁵ Typically legislative frameworks enable this due to democratic government function, however there is no guarantee participatory processes will be sufficient or produce positive effects.³⁶

The Future of Small Passenger Services Consultation Paper³⁷ is an example of regulatory legitimacy. The paper was released by the Ministry of Transport in response to the significant changes experienced in the transport sector following the introduction of Uber. The Ministry identified the need for change³⁸ due to the regulatory disconnect operating within the sector.³⁹ Five regulatory approaches were discussed⁴⁰ and public submissions invited. This illustrates the Ministry exercising prudence by attempting to gauge the public's perception so that proposed regulatory regimes will be supported and effective in their application.

The sharing economy largely appeals to younger generations due to its low pricing and reliance on up to date technologies, however it is not the users of Uber and Airbnb who will be tasked with the responsibility of their regulation. Public submissions on the Future of Small Passenger Services consultation paper were predominantly from the traditional industry incumbents.⁴¹ It is likely that the public perception of risk will therefore be swayed in favour of the established taxi services operating in the marketplace. This raises concerns for the legitimacy of the regulations and their ability to minimise risks while maintaining the benefits that are present on both sides of the transaction.

³⁴ At 48.

³⁵ At 48.

³⁶ At 48.

³⁷ Ministry of Transport *Future of Small Passenger Services: Consultation Paper* (December 2015).

³⁸ At 9.

³⁹ At 10.

⁴⁰ At 14.

⁴¹ See submissions at www.transport.govt.nz/land/small-passenger-services-review/submissions.

Regulatory Effectiveness

A regulatory regime must be effective, economical and efficient to be fully fit for purpose.⁴² Problems can arise if regulatees are resistant to the regulations imposed. This is an area that will require attention in the case of Uber and Airbnb. Each app classifies themselves as a “platform” or “technology company” rather than a service provider.⁴³ The apps eliminate search costs by removing the middle man and enable buyers to connect directly with a group of undifferentiated sellers who are seeking to utilise spare capacity. Uber and Airbnb argue that their role ends when the connection between the service provider and consumer is facilitated and that they do not provide the bed and breakfast or transport service itself.⁴⁴ The overseas experience suggests that regulators tend to be hesitant in recognising this distinction. For example the California Public Utilities Commission rejected Uber’s argument that they were not part of the transportation industry and that they simply provided IP-enabled services on smartphones.⁴⁵ Instead, they took a progressive approach and created a new category of transport services called “transport network companies”⁴⁶ specifically for apps such as Uber and Lyft.⁴⁷ A modern approach is required if the regulations are to be met with support by and have effect on the new industry players, whom they seek to regulate.

Regulatory Connection

Regulatory connection is the most important and most difficult challenge for regulators of the sharing economy to overcome. Brownsword identifies regulatory disconnection as occurring when "covering descriptions employed by the regulation no longer correspond to the technology or to the various technology related practices that are intended targets for the regulation".⁴⁸ Currently, NZ legislation⁴⁹ does not make provision for the new sharing economy technologies that are operating. Taxi operators suggest that Uber’s success is primarily due to their regulatory arbitrage and if regulations were applied uniformly to both services then Uber’s ability to offer low prices and undercut the competition would be limited. In opposition to this is the argument that their success is not solely due to Uber’s regulatory avoidance but instead from having created a far more efficient market for car-

⁴² Brownsword and Goodwin, above n 3, at 61.

⁴³ Syed, above n 14, at 2.

⁴⁴ At 2.

⁴⁵ At 3.

⁴⁶ At 3.

⁴⁷ Lyft is another app based transportation service and Ubers major competitor in the USA.

⁴⁸ Brownsword and Goodwin, above n 3, at 61.

⁴⁹ See for example the Land Transport Act 1998, Operator Licensing Rule 2007, Employment Relations Act 2000.

hire services.⁵⁰ Either way, regulatory intervention is required in order to resolve this disconnect.

Regulators face the challenge of first becoming “connected” and secondly “staying connected”.⁵¹ Staying connected is a complex task in an evolving technological world. Both Uber and Airbnb are constantly updating the array of services they have on offer. Regulators need to be aware of the developments taking place to ensure that regulations remain fit for purpose.

Airbnb

Airbnb is a self-defined community marketplace that connects hosts and users in a short-term rental economy outside of traditional rental industries. Hosts are able to earn additional income and guests can experience the city as a local. It adds value to local economies as guests stay in local neighbourhoods, eat at local restaurants and shop at local vendors. Initially when Airbnb was founded in 2008, CEO Brad Kitsche would travel to inspect each of the properties listed with the platform. Now with over 60,000,000 users in 34,000 cities across 191 countries⁵² it would be inefficient and nearly impossible to maintain this verification process without substantial costs being incurred. Naturally, regulations would need to accommodate this change to “stay connected” as this further removes Airbnb from the hosting process.

Uber

Uber is a commercial transport app that makes use of technological developments to better match passengers with available for hire vehicles.⁵³ It began with a simple idea on a snowy Paris evening in 2008. Founders Travis Kalanick and Garrett Camp were having trouble hailing a cab and discussed how their problems would be solved if they could simply tap a button and get a ride.⁵⁴ This market inefficiency led to the introduction of Uber. Since then it has grown and disrupted the transport industry as we know it. Uber offers a variety of services in 510 cities worldwide. There’s UberX, the standard five seater vehicle; UberXL, which as the name suggests seats more than five passengers; UberBlack, where riders receive a premium vehicle at a premium price; and UberPOOL, a carpool version of the

⁵⁰ Brishen Rogers “The Social Costs of Uber” (2015) 82 U Chi L Rev Dialogue 85 at 86.

⁵¹ Brownsword and Goodwin, above n 3, at 61.

⁵² Airbnb “About Us” <www.airbnb.co.nz>

⁵³ Corporate Partnership Board *App Based Ride and Taxi Services: Principles for Regulation* (International Transport Forum, 9 May 2016).

⁵⁴ Uber “Our Story” <www.uber.com>.

service where users share the costs travel with a driver who was already heading in the same direction. Building on from this there is now UberRUSH, a delivery service, and more specifically UberEAT, a food delivery service.⁵⁵ Furthermore, Uber is currently trialling its first self-driving fleet in Pittsburgh where users can summon self-driving cars through the app.⁵⁶ The company plan to develop a fully autonomous car that is ready for the road by 2021. Growth and investment into new types of services are not likely to come to a halt. Regulators need to consider how regulations can stay connected with the new technologies that are likely to enter the marketplace in the foreseeable future, which in Uber's case includes driverless vehicles. Ideally any rules implemented should allow the technologies to flourish and grow. This is however, complicated by the fact that specific rather than general laws appear to be the most preferred and effective solution.⁵⁷

The sharing economy allows users to own less but have access to more. It is innovative and therefore by nature difficult for regulators to deal with. Regulators are at a crossroads; where public health, safety and competition considerations require them to act but the technologies evolution and future growth may be hindered by their doing so. An outright ban is not the answer. Instead I propose a new legal framework is required. To successfully implement a new framework, the challenges highlighted above need to be considered and overcome to effectively regulate sharing economy practices.

⁵⁵ Uber "Ride" <www.uber.com>.

⁵⁶ Max Chafkin "Uber's First Self Driving Fleet Arrives in Pittsburgh This Month" (16 August 2016) Bloomberg <www.bloomberg.com>.

⁵⁷ Ranchordas, above n 9, at 472.

CHAPTER TWO

Social media and technology are major forces behind the sharing economy's expansion into big business. Leading businesses such as Uber and Airbnb who have advanced the concept of collaborative consumption ought not be considered newcomers any longer; instead they now rival and in many instances surpass their traditional counterparts.⁵⁸ This has led to increased levels of competition causing an uproar amongst the traditional incumbents in the transportation and accommodation industries, who believe they are disadvantaged due to the regulatory disconnect that is present. The issue is that the majority of the applicable regulations were drafted during and specifically for a time when technologies such as the Internet, GPS and mobile communications were a science fiction.⁵⁹ In this chapter I will explain the services offered by Uber and Airbnb then compare and contrast the regulatory standards the "traditional service providers"⁶⁰ are subject to. Specific instances of regulatory disconnect will be identified and an analysis of the effect that this has on the marketplace will be undertaken.

Uber

The Uber Rider

Uber services two types of users: riders and drivers. Riders can sign up to the company's services within a matter of minutes. They simply need to download the app on their mobile device, create a profile which discloses their name, mobile number, email and credit card details and then they are good to go!⁶¹ The process of becoming an Uber driver is more complex, and I will discuss this in further detail later in this chapter.

A rider's experience of Uber typically plays out as follows. Riders login to the app which pinpoints their current location on a map along with the location of all of the driver's vehicles in the nearby area and each vehicle's estimated time of arrival. Riders then enter their desired destination and can view a fare estimate before tapping the 'request' a ride option. Riders then wait to be notified that a driver has accepted their ride request. They are then given access to that driver's profile, which includes the driver's photograph, car type, registration number and their average rating out of five stars which is collated from

⁵⁸ Joanna Penn and John Wiheby "Uber, Airbnb and consequences of the sharing economy: Research roundup" (3 June 2016) <www.journalistsresource.org>

⁵⁹ Syed, above n 14, at 20.

⁶⁰ "Traditional services providers" will be used to describe taxi operators and bed and breakfast operators who are not operating in the sharing economy.

⁶¹ Interview with Matt Fluhler, Uber Rider (Lucy Henderson, Otago University, 3 October 2016).

other rider's reviews. Riders then have the option to accept or refuse the driver. If they accept, a vehicle will be en route towards them and they will be able to continuously track the vehicle's location until they are dropped off at the end of their journey.

Once riders reach their designated location they are free to leave the car without any EFTPOS or cash transaction taking place. Instead they receive an email within minutes of finishing their trip, stating that their debit or credit card has been debited for the price of the ride. The next time the passenger logs into the app on their mobile device, they will be asked to rate their last experience – i.e. to rate the driver on a scale of one star to five stars. This rating system is reciprocal, as will be discussed in further detail later in this chapter. No phone calls, no unknown lengthy waits and no wallets are required. Uber appears to solve all the problems conventional taxi users face, so it is no wonder that it is disrupting the transport sector.

The Uber Driver

Fueling the high demand of riders are the drivers of the vehicles. The process of becoming an Uber driver in New Zealand is relatively straightforward, interested applicants can simply visit www.uber.co.nz and fill out the online form, and they are almost ready to drive. Uber first obtains the driver's personal details, followed by their vehicle information. Vehicles for private hire must have four doors, be free of visible body damage and have a clean interior.⁶² Drivers then must upload pictures of their vehicle, evidence of their vehicle insurance, vehicle registration, copies of their driver license and warrant of fitness. Uber will then review this information and conduct their own assessment of whether the driver is a fit and proper person before authorising them to work as an Uber driver.⁶³

The Land Transport Rule: Operator Licensing 2007 sets out the requirements for obtaining and retaining a passenger license in New Zealand. Taxi drivers and Uber drivers must hold the same license qualifications; that is, a NZ driver license and a P endorsement.⁶⁴ A Certificate of Fitness (issued six-monthly) is also required for both taxi and Uber vehicles.⁶⁵

Passenger Endorsements

The Passenger endorsement (P endorsement) is a requirement for all drivers driving a passenger service vehicle for reward. To hold a P endorsement the driver must have held a

⁶² Uber "How to Become an Uber Driver" <www.partners.uber.com>

⁶³ Radio NZ "Uber sticks with rule change despite warnings" (29 April 2016) Radio NZ <www.radionz.co.nz>

⁶⁴ Land Transport (Driver Licensing) Rule 1999, s 26.

⁶⁵ Ministry of Transport, above n 37, at 10.

full NZ driver license for at least two years,⁶⁶ pass a fit and proper person check conducted by the New Zealand Transport Agency⁶⁷ (NZTA) in accordance with the requirements laid out in the Land Transport Act⁶⁸ and complete a P endorsement course conducted by a NZTA approved course provider.⁶⁹ Taxi drivers may also be required to have an area of knowledge certificate.⁷⁰ Drivers of small passenger services are not permitted to drive until the P endorsement has been added to their license.⁷¹

In Uber's experience, the median processing time for P endorsement applications with the NZTA is twelve weeks, and 58 percent of completed P endorsement applications from Uber Partner drivers remain outstanding after more than three months.⁷² This time lag is largely attributable to what Uber describes as a "discretionary and nebulous"⁷³ fit and proper person check which the NZTA delegates to the New Zealand Police to conduct. The Ministry of Transport in their Regulatory Impact Statement confirm the timeframe for determining whether a person is fit and proper has lengthened since 2014 and state improved service delivery is required on behalf of the NZTA.⁷⁴ To qualify as a fit and proper person the NZTA assesses the applicant's medical, criminal, behavioural and driving histories. For someone who is looking to drive part time for a few hours a week, this lengthy and costly administrative process is likely to be a significant disincentive. Uber considers "these administrative burdens kill off the potential of flexible transport that ride sharing can provide".⁷⁵ A twelve week lapse between signing up to become a driver and actually operating a vehicle on the road does not fit with the flexible nature of being an Uber driver. Uber markets itself to drivers on its' flexibility,⁷⁶ and in doing so typically attracts large numbers of part time workers who are looking for an simple and fast way to earn extra income. This market demographic is unlikely to register and wait twelve weeks before being permitted to drive for the business. This reduces the social advantages that Uber is able to provide. Ridesharing benefits the passenger by providing efficient and on-demand service as well as the driver who is able to determine their own working hours, location and whether driving will be supplemental to or their sole form of income. Uber adds value to communities and the current P endorsement regime hinders this value creation.

⁶⁶ Land Transport (Driver Licensing) Rule 1999, s 27(1)(b).

⁶⁷ Land Transport (Driver Licensing) Rule, s 27(1)(g).

⁶⁸ Land Transport Act 1998, s 30C.

⁶⁹ Land Transport (Driver Licensing) Rule, s 27(1)(d).

⁷⁰ Land Transport Rule: Operator Licensing 2007, s 4.13.

⁷¹ Land Transport (Driver Licensing) Rule, s 26.

⁷² Uber, "Uber response to the Future of Small Passenger Services consultation paper", at 4.

⁷³ Uber, above n 72, at 4.

⁷⁴ Ministry of Transport *Regulatory Impact Statement: Future Framework for Small Passenger Services* (Ministry of Transport, Agency Disclosure Statement, 15 March 2016) at 20.

⁷⁵ Uber, above n 72, at 5.

⁷⁶ At 2.

The process of obtaining a P endorsement is inefficient, costly⁷⁷ and lengthy⁷⁸ which has led to Uber's explicit disregard of the current regulatory regime in favour of their own less burdensome procedures. In April 2016, Uber removed the requirement for its drivers to have a P endorsement for their license and a certificate of fitness for their car.⁷⁹ They argue that the P endorsement is outdated and "the existing administrative processes are unworkable".⁸⁰ In Uber's submission to the Future of Small Passenger Services consultation paper, they state "it is unreasonable and unrealistic to expect that these individuals will tolerate administrative barriers to entry as great as a target 20 day waiting period, an actual 12-week waiting period, or the existing \$800 endorsement fee."⁸¹ The present regulatory regime is not operating effectively and therefore is being met with resistance, as Brownsword predicted.⁸² Uber instead conduct their own fit and proper person test.⁸³ Meanwhile, taxi companies still abide by the Operator Licensing Rule 2007 and require drivers to have P endorsements. The barriers to entry for Uber drivers are therefore lower than those of taxi drivers, which increases Uber's ability to attract partner-drivers contributing to their high growth rate and positive profit margin.

Despite being warned by the NZTA that they are now operating illegally,⁸⁴ Uber considers that, by conducting their own Ministry of Justice criminal history checks and Transport Agency driving history checks, they are ensuring a higher standard⁸⁵ of safety for their passengers whilst reducing the start-up costs of becoming an Uber driver. This does not however, deny the fact Uber is operating illegally in New Zealand by doing this. Uber drivers now face being forced off the road and fines of up to \$10,000 if caught without a P endorsement.⁸⁶ However, there is nothing to suggest the threat of fines has worked to deter drivers from signing up with the company. Instead, the company when asked whether they would pay their driver's fines said "We will stand by our drivers 100 percent. We will stand by our driver partners and we will support them".⁸⁷ So while they may be reducing the initial

⁷⁷ The advertised cost of obtaining a P-endorsement that has a five year duration period is \$458.90, however Uber states that this can cost up to \$800 if hidden costs such as 'other fees' are taken into consideration.

⁷⁸ Uber, above n 72, at 5.

⁷⁹ Radio NZ "Uber will continue to defy licensing rules" (6 July 2016) Radio NZ <www.radionz.co.nz>.

⁸⁰ Uber, above n 72, at 4.

⁸¹ At 5.

⁸² Brownsword and Goodwin, above n 3, at 62.

⁸³ Radio NZ, above n 79.

⁸⁴ Radio NZ, above n 79.

⁸⁵ Uber does not accept any disclosable criminal record on the platform unlike the passenger endorsement which allows drivers to come onto the road with certain criminal records see Radio NZ, above n 79.

⁸⁶ Charlie Mitchell "Dozens of illegal Uber drivers caught in NZTA stings" (14 June 2016) Stuff <www.stuff.co.nz>.

⁸⁷ Glenn McConnell "Uber drivers operating illegally in New Zealand, NZTA says" (29 April 2016) Stuff <www.stuff.co.nz>.

start-up costs when becoming a driver for the company, it may be that they are simply allocating them elsewhere, or delaying the inevitable.

Regulatory effectiveness is of major concern here.⁸⁸ The current P endorsement regulations are not having the desired effect as Uber's explicit disregard of them indicates. A fine of up to \$10,000⁸⁹ to drivers is not an adequate deterrent for a company with an estimated net worth of \$68 billion.⁹⁰ While these fines would mount up if enough drivers were caught, Uber drivers are driving private unmarked vehicles, making it difficult for regulatory bodies to detect license infringements. As at 22nd of June 2016, only seven drivers had been forced off the road and eleven infringement notices issued.⁹¹ Arguably the benefits of fewer administrative delays leading to more drivers on the road and the growth of the business outweigh a potential fine in the event a driver is caught. This is why there is a disconnect between Uber's services and the current legislation. Taxi companies by comparison are hindered by the P endorsement regulatory process. Billion dollar corporations do not support them therefore conducting a cost benefit analysis suggests the cost of paying driver fines may outweigh the benefit of a faster sign-up rate. Uber is therefore able to monopolise the labour market and attract a greater number of drivers as they will not be hindered by administrative delays. The P endorsement regulations are not operating to facilitate an open-market with equivalent barriers to entry. Taxi companies are disadvantaged in their ability to compete if they are unable to attract new recruits. Regulatory intervention and reform is required to ensure the market remains competitive and the rationale of a P endorsement, that is safety, is upheld. If Uber's self-checking approach is considered an adequate safety mechanism, then it should also be adequate for regular taxi services and the burdens of P endorsement regime removed for both Uber and traditional service providers.

Approved Taxi Organisation

Until the introduction of Uber, taxi companies collectively had a monopoly over the private for hire passenger transport market. The barriers to entry for taxi companies in New Zealand are relatively high; they must become an approved taxi organization before they are permitted to operate. Sections 30P and 30Q of the Land Transport Act⁹² set out the minimum requirements approved taxi organisations (ATOs) must meet, while s 8 of the Land

⁸⁸ Brownsword and Goodwin, above n 3, at 61.

⁸⁹ Radio NZ, above n 79.

⁹⁰ Liyan Chen "At \$68 Billion Valuation, Uber Will Be Bigger Than GM, Ford, And Honda" (4 December 2016) Forbes <www.forbes.com>.

⁹¹ Fiona Rotherham "Uber urges drivers to challenge NZTA illegality ruling in court" *The New Zealand Herald* (online ed, Auckland, 22 June 2015).

⁹² Land Transport Act 1998, s 30P and 30Q.

Transport Rule: Operator Licensing 2007 details the legal standards and requirements. ATOs must have their operating rules approved by the NZTA,⁹³ maintain a register of all complaints⁹⁴ received and advise the NZ Transport Agency of any serious misconduct by a driver.⁹⁵ Uber is not an ATO, instead they are defined in the Future of Small Passenger Services consultation paper as a “transport network company” who provide communications functions between passengers and drivers and omit responsibility for the trip itself. As the legislation does not currently make provision for “transport network companies”, Uber avoids responsibility for the requirements listed above, saving them both time and money. This is a clear example of Brownsword’s regulatory disconnect⁹⁶ whereby the current legislation no longer captures the business models that are being employed to offer small passenger services in New Zealand. Instead of viewing Uber as a rule breaker this may serve better as an example of technology developing at a faster rate than what regulators are able to keep up with.

The lack of regulatory connection places Uber at an advantage when operating in the marketplace. An ATO must provide taxi services and take phone bookings 24-hours-a-day, seven-days-a-week, unless exempted by the NZTA⁹⁷ and register its fare schedule with the NZTA.⁹⁸ Uber on the other hand permits drivers work whenever and wherever. Uber does not enforce any strict working requirements, apart from stipulating that drivers must provide one ride per month.⁹⁹ Theoretically there could be no Uber drivers on the road at any given time, or their whole driver base for a city could be operating. However, in practice this is unlikely to occur due to the algorithms that efficiently match supply with demand. Uber’s operations rely on simple economics; they seek to achieve market equilibrium and frequently alter their prices to accomplish this. The app has been programmed so that if there is a high demand for drivers, a price surge will occur¹⁰⁰ in order to encourage more drivers to offer their services. This promotes efficiency by ensuring that drivers are only operating when there is demand, unlike the 24/7 model, and is facilitated by the fact that they, unlike taxi services, are able to continuously alter their prices. There is no such thing as a fare schedule on display¹⁰¹ in an Uber vehicle. Uber’s avoidance of the 24/7 set fare business model enables them to capitalise on a more efficient business model leading to

⁹³ Land Transport Rule: Operator Licensing, s 8.4(1).

⁹⁴ Land Transport Rule: Operator Licensing, s 8.5(1)(f).

⁹⁵ Land Transport Rule: Operator Licensing, s 8.5(1)(f).

⁹⁶ Brownsword and Goodwin, above n 3, at 65.

⁹⁷ Land Transport Rule: Operator Licensing, s 8.5(1)(b).

⁹⁸ Land Transport Rule: Operator Licensing, s 8.6(1).

⁹⁹ Grant Brown “An Uberdilemma: Employees and Independent Contractors in the Sharing Economy” (2016) 75 Md L Rev Endnotes 15 at 19.

¹⁰⁰ A price surge is a temporary increase in standard prices, which the rider is notified of and accepts before booking their journey.

¹⁰¹ See Land Transport Rule: Operator Licensing Rule, ss 4.7 and 4.8.

lower prices for the consumer. Their taxi counterparts are unable to achieve the same levels of efficiency as they are restricted by outdated regulations.

The regulatory disconnect¹⁰² where Uber is not subject to the same regulations as an approved taxi organisation operates to advantage Uber and their users at the expense of taxi companies. Taxi companies argue this facilitates unfair competition in the marketplace. Uber's response is that it is not unfair as they are a technology company not a transportation company. The rationale for requiring providers of taxi services to operate as approved taxi organisations is to ensure regulatory compliance of drivers as the organisation has a significant influence over the standards of safety and the service of their drivers.¹⁰³ This is as applicable to Uber as it is to taxi services therefore there is a problem if it is being applied to the latter and not the former. The disconnect increases the barriers to entry for taxi services and hinders their ability to offer innovative products. Change is required in the form of a regulatory reform in order to ensure an open market and a level playing field.

Independent Contractor v Employee Distinction

Uber's business model precludes the employment of drivers directly by the platform itself; instead drivers who register with the company are classified as independent contractors,¹⁰⁴ distinguishing Uber from taxi services. Section 6 of the Employment Relations Act 2000 defines an employee as "any person of any age of any age employed by an employer to do any work for hire or reward under a contract of service";¹⁰⁵ an independent contractor falls outside of this definition as their contract is "for service".¹⁰⁶ The distinction in the relationship classification largely results from Uber's characterisation of itself as a 'technology company' rather than a 'transport company'. They state in their terms and conditions:

YOU ACKNOWLEDGE THAT UBER DOES NOT PROVIDE TRANSPORTATION OR LOGISTICS SERVICES OR FUNCTION AS A TRANSPORTATION CARRIER AND THAT ALL SUCH TRANSPORTATION OR LOGISTICS SERVICES ARE PROVIDED BY INDEPENDENT THIRD PARTY CONTRACTORS WHO ARE NOT EMPLOYED BY UBER OR ANY OF ITS AFFILIATES.¹⁰⁷

¹⁰² Brownsword and Goodwin, above n3, at 65.

¹⁰³ New Zealand Transport Agency "Land Transport Rules: Work Time and Logbooks 2007 (Rule 62001) and Operator Licensing Rule 2007 (Rule 81001)" < <https://www.nzta.govt.nz> >.

¹⁰⁴ Uber "Legal: UBER B.V. TERMS AND CONDITIONS" (4 November 2015) Uber <www.uber.com>.

¹⁰⁵ Employment Relations Act 2000, s 6.

¹⁰⁶ *Cunningham v TNT Express Worldwide (New Zealand) Ltd* [1993] 1 ERNZ 695 (CA).

¹⁰⁷ Uber, above n 104, at 2.

They limit their role to the development of applications that connect riders with driver-partners who provide transportation services and exclude themselves from responsibility for their drivers. This self-classification is critical to their low cost business model¹⁰⁸ as employees are entitled to more statutory rights and protections than independent contractors.¹⁰⁹ Unlike an ATO in New Zealand, Uber avoids having to offer workers compensation, holiday pay, sick pay, KiwiSaver benefits,¹¹⁰ and its drivers do not have the right to unionise.¹¹¹ This is a clear example of regulatory avoidance on Uber's behalf. They have designed their business so that it falls outside the traditional industry standards and as a result have successfully eliminated the costs associated with employment and liability under the Employment Relations Act 2000.

Classification of drivers as independent contractors also minimises Uber's liability in the event of an accident or misconduct. If an Uber driver commits a tort, this employment structure enables Uber to avoid liability for harm caused, leaving the plaintiff without clear recourse to Uber.¹¹² Fisher states this is a loophole commonly seen in the sharing economy:

As the so-called "sharing economy" expands with the proliferation of digital technology making it simple to match up willing buyers with willing sellers of just about anything you can imagine, the traditional job of tort law – matching up victims of misfortune with the people who must pay them for their losses – is falling behind.¹¹³

In this event, the courts will consider is whether the users of these sharing economy services are employees. Unsurprisingly the NZ Taxi Federation argues that safety rationales justify drivers being classified as "employees". They contend that the Uber independent contractor responsibility model, which involves allocating responsibility and fault to drivers to the greatest extent possible, reduces and decentralises workers' ability to collectively engage with safety issues,¹¹⁴ potentially placing both drivers and riders at risk. Safety is the dominant rationale behind the small passenger services regulatory regime,¹¹⁵ therefore in

¹⁰⁸ Syed, above n 1, at 15.

¹⁰⁹ Employees receive all of the statutory rights provided for in the Employment Relations Act 2000.

¹¹⁰ KiwiSaver Act 2006, s 9.

¹¹¹ Employment Relations Act 2000, s 12.

¹¹² Erin Mitchell "Uber's Loophole in the Regulatory System" (2015) HLRe Off Rec 6(1) 75 at 78.

¹¹³ Daniel Fisher "The Big Question with Uber, Airbnb and The Rest of The 'Sharing Economy': Who to Sue?" (25 March 2015) Forbes < www.forbes.com >

¹¹⁴ NZ Taxi Federation, above n 23, at 10.6.

¹¹⁵ Ministry of Transport, above n 37, at 6.

so far as the current employment structures do not reflect this, regulatory intervention is required to ensure safety is prioritised.

The Health and Safety at Work Act 2015 defines a vehicle as a “workplace”¹¹⁶ defines “workers” widely to include both employees and contractors. Uber arguably falls under the definition of a person conducting a business or undertaking (PCBU)¹¹⁷ and therefore is subject to the duties laid out in the Act. This includes the primary duty of care in Section 36(1)(a) which requires a “PCBU must ensure, so far as is reasonably practicable, the health and safety of workers who work for the PCBU, while the workers are at work in the business or undertaking”. Uber may argue that their requirement all drivers operate a registered and warranted vehicle and their passenger rating system fulfils this duty. However, their disregard for driver licensing requirements¹¹⁸ and lack of control over driver hours and breaks¹¹⁹ is likely to suggest otherwise. The duty in s 36(1)(a) only extends to workers who work for the PCBU. Therefore while Uber may be liable to their drivers this does not resolve the issue identified above, whereby Uber omits liability for the safety of passengers during the duration of their journey. If Uber drivers were classified as employees rather than independent contractors, then the company could be held accountable for the safety of their passengers.

Uber’s avoidance of the legal and financial burdens to which the rest of the transportation industry is subject, by means of their self-classification of independent contractors, has led taxi drivers to argue their success can only be attributed to their regulatory arbitrage. There have been suggestions that Uber’s drivers are not truly independent contractors as Uber “controls the details of the services performed”¹²⁰ through their company policies for drivers and vehicle standards.¹²¹ Recently California’s Labour Commissioner in *Berwick v Uber Technologies Inc*¹²² held Uber drivers were employees and not as the company claimed, independent contractors. The Commissioner outlined that an employment relationship will be found if:

¹¹⁶ Health and Safety at Work Act 2015, s 20.

¹¹⁷ Health and Safety at Work Act, s 17.

¹¹⁸ Radio NZ, above n 79.

¹¹⁹ Uber does not impose worktime limits on its drivers *cf* taxi drivers who are only permitted to work seven hours without taking a break see Ministry of Transport, above n 37, at 31.

¹²⁰ Mitchell, above n 112, at 83.

¹²¹ Uber, above n 62.

¹²² *Barbara Ann Berwick v Uber Technologies* California Labour Commissioner (11-46739 EK, 10 March 2015).

...persuasive control over the operation as a whole is retained, the worker's duties are an integral part of the organization, and the nature of the work makes detailed control unnecessary.¹²³

In New Zealand s 6(3)(a), of the Employment Relations Act 2000 states that all relevant matters may be considered when determining the nature of the employment relationship. The following common law tests are typically taken into consideration under this subsection: the control test,¹²⁴ the organisation or integration test¹²⁵ and the economic reality test.¹²⁶ These tests reflect the Californian Labour Commissioner's summary of what constitutes an employment relationship in California. It is therefore useful to consider the arguments put forward in that case and the rationale for the Commissioner's finding as it is likely a similar situation will be seen in New Zealand.

In *Berwick*¹²⁷ Uber argued they were a neutral platform who maintained little control over the plaintiff¹²⁸ a "partner-driver". They emphasised their flexible working arrangements which enables employees to work as much or as little as they desire, whenever and wherever with no maximum or minimum working hours to be fulfilled. They argued that this arrangement was more akin to that of an independent contractor. Despite this, the Labour Commissioner considered that the fact Uber required the driver to register and maintain a car of a specified standard, controlled the smartphone application that the drivers used, set and controlled the fares and that drivers could not hire other drivers whom Uber did not already approve, all pointed toward the conclusion *Berwick* was an employee of Uber.¹²⁹ Control and the fact the defendants were involved in every aspect of the operation¹³⁰ appear to have been the main factors relied upon by the Commissioner to point toward an employer/employee relationship.

*Berwick*¹³¹ indicates that Uber drivers do not fall neatly within the category of either an independent contractor or employee. However, as the law presently stands, Uber is able to enjoy a low cost independent contractor business model without having to facilitate employee rights and responsibilities, which contributes to unfair competition in the small passenger services sector. On the other hand, to demand that all Uber drivers automatically

¹²³ *Berwick v Uber*, above at n 122, referring to *Yellow Cab Cooperative v Workers Compensation Appeals Board* 226 F 3d 1288 (9th Cir 1991).

¹²⁴ *Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561.

¹²⁵ *Stevenson, Jordan and Harrison Ltd v MacDonald and Evans* [1952] 1 TLR 101.

¹²⁶ *Cunningham v TNT Express Worldwide (New Zealand) Ltd* [1993] 1 ERNZ 695 (CA).

¹²⁷ *Berwick v Uber*, above n 122, at 9.

¹²⁸ At 9.

¹²⁹ At 9.

¹³⁰ At 9.

¹³¹ At 9.

be classified as employees would arguably detract from the efficiencies the company is able to offer to their drivers and passengers through this employment structure. Contractors receive the benefit of flexible working arrangements which provide a good opportunity for an additional source of income outside of standard business hours. Flexible working arrangements also benefit the consumer as they enable the price surge to occur which ensures that demand will always be met with supply. Whether drivers are independent contractors is an uncertain area of law more so than an example of regulatory disconnect. Nonetheless, it does place Uber at an advantage in comparison to taxi companies in terms of their ability to compete, as the status of drivers as independent contractors enables lower operating costs which can be passed onto the consumers in the form of lower prices.

Classification of drivers as employees is not the only answer to what has been termed an “uber-dilemma”.¹³² Julia Black suggests that there is also room for innovation in regulation.¹³³ The test for employment could be applied on a case by case basis as many of the determinations involved in the control test and economic realities test cut both ways and depend not on Uber’s app, but how its drivers use it.¹³⁴ For example typically the permanency of the relationship¹³⁵ is another common law factor considered when applying these tests. Woo and Bales state:

When applying this common law factor to an Uber driver providing for a family, the driver would have a much more permanent relationship with Uber than, for example, a part-time Wal-Mart associate who drives while on a lunch break.¹³⁶

This is in line with the International Transport Forum report who also suggested the permanency of the relationship should be considered when determining the frequency for vehicle inspections. It was recommended that:

...a car operating three hours a week on a CTA platform would likely require no more than existing vehicle inspections – a car operating 40 hours per week should be subject to stricter and more frequent controls.¹³⁷

While this case-by-case basis approach is likely to ensure the fairest results, it would also be incredibly time consuming and costly. It may be that in this instance, Uber has simply

¹³² Brown, above n 99.

¹³³ Black, above n 15, at 1.

¹³⁴ Christian Woo and Richard Bales “The Uber Million Dollar Question: Are Uber Drivers Employees or Independent Contractors?” (2016) Mercer Law Review at 29 (forthcoming).

¹³⁵ Woo and Bales, above n 134, at 29.

¹³⁶ At 29.

¹³⁷ Corporate Partnership Board, above n 53 at 21.

“employed” a more efficient business model than the traditional employer/employee taxi model. They should be commended for their innovation and the social advantages this model is able to provide to both drivers and passengers.

Peer Reviews

Peer review systems operate as a control mechanism in the sharing economy.¹³⁸ Real time evaluation by both passengers and drivers allows Uber to ensure the quality and safety of their rides. Consistent reviews add value to Uber’s brand. If any driver was providing sub-par service, then Uber would be immediately notified and could engage in an appropriate course of action. Traditionally taxi services have relied on driver licenses, their initial screening of the driver and in car cameras which act as a deterrent to unacceptable behaviour to facilitate both driver and passenger safety. Sharing economy peer review systems, however, provide continuous quality control via ratings and feedback from registered customers. The Uber rating scheme is simple. Passengers rate drivers on a scale of one to five stars and vice versa, following the completion of their journey.¹³⁹ While these systems provide an additional layer of safety they should not serve as the dominant safety mechanism in the sharing economy.

A five-star review system is not apt to replace the fit and proper person check for example. Uber should not rely on their rating system in its entirety to screen for driver safety. Uber’s rating system may require drivers, and perhaps even passengers, to engage in what has been called emotional labour, or the work of establishing micro-relationships that make customers feel good.¹⁴⁰ This is not indicative of a driver’s skill, but instead their ability to provide good conversation, free mints and bottled water. To replace the fit and proper person check with a five-star rating system would add unnecessary risk to the sector.

Perfection is easy to obtain on an Uber app. Users of the app are surprisingly generous when it comes to evaluating other users as indicated by the 4.6 star cut off for drivers.¹⁴¹ If drivers fall below an average rating of 4.6 stars then they will be notified by Uber that their service is sub-par and required to attend a driver education course before being permitted to drive for the company once more.¹⁴² The concern is that positive feedback is

¹³⁸ Hannah Posen “Ridesharing in the Sharing Economy/ Should Regulators Impose Uber Regulations on Uber?” (2015) 101 Iowa L Rev 405 at 432.

¹³⁹ Uber “Rating a Driver” <www.uber.co.nz>.

¹⁴⁰ Rogers, above n 50, at 97.

¹⁴¹ Jack Smith “Uber Drivers: The Punishment For Bad Ratings Is Costly Training Courses” (2 March 2015) Observer <www.observer.com>

¹⁴² Smith, above n 141.

predominantly driven by what the customer sees and experiences during their ride and as a result, some safety aspects are compromised. For example whether the driver has exceeded the maximum working hours¹⁴³ is unlikely to be apparent to the passenger and therefore their ratings submitted are not indicative of this. This supports the NZ Taxi Federations submission that “online feedback on Uber drivers is no panacea”.¹⁴⁴ While testimonials give the impression of safety, in reality safety only plays a small role in determining the rating given, undermining Uber’s submission that their rating system is sufficient to allow them to self-regulate.¹⁴⁵

Feedback systems are also subject to abuse and manipulation on behalf of both the passenger and driver. Uber requires the passenger to rate their experience after they have completed their journey. However, it is not until the next time that the passenger logs into the app that they are required to submit their review via a scale of one to five stars. Often a passenger may use the app on Friday night for example to get home after having had a few drinks. If this is the only time that they require Uber services then they are unlikely to log back into the app until the following Friday evening when they require a ride again. This leaves a week delay between completion of their journey and their rating submission, during which time the details of the trip are likely to be forgotten. Continuing with this example, one might also ask whether drunk post-clubbing reviewers really well-placed to evaluate a driver’s performance? A wholly subjective evaluation criterion is employed by each individual rider, which will depend on a variety of factors, some of which the driver has no control over. Considering the cut off rate is relatively high at 4.6 stars, theoretically only a few one star reviews are required before the driver is disconnected from the company’s app. This also opens up opportunities for ratings to be influenced by discriminatory views.

The peer review system has both positive and negative features. It promotes trust in the sharing economy as passengers are able to report on the quality of the ride reducing information asymmetries. This mitigates market failure as it requires the provision of information that is immediately relevant to the customer. However, ratings may be ill-informed, the result of discriminatory beliefs or based on hazy or incomplete memories of the ride home. Ratings undoubtedly add value to the system, but ought to remain as a supplementary safety screening mechanism alongside traditional requirements such as the fit and proper person check, in vehicle security cameras and complaints registers, which serve as stronger safety protections.

¹⁴³ NZ Taxi Federation, above n 23, at 8.1.

¹⁴⁴ At 8.

¹⁴⁵ Uber, above n 72, at 2.

Airbnb

Similarly, to Uber, Airbnb has been termed a “disruptive innovation”, that is a product or service that transforms the market sometimes even overturning previously dominant companies.¹⁴⁶ Airbnb also does not fit within the heavily regulated hotel and guest accommodation industry. Airbnb is slightly different to Uber in that they target a different market to hotels and motels. They seek to attract the intrepid traveller. Their marketing campaign emphasises the attraction of exploring the city like a local.¹⁴⁷ This explains why the same levels of anger have not been voiced by other operators in the accommodation industry in response to the app, as we have seen in response to Uber. Airbnb does not market itself as a direct replacement for the services provided in the accommodation sector, as Uber does itself for taxi services. However, Airbnb like Uber also exhibits aspects of regulatory avoidance and disconnect, which enhances their efficiency adding to their net profits.

Peer Reviews

Airbnb seeks to ensure the safety for its travellers through a five-star rating system, similar to what is used by Uber. However, unlike Uber, Airbnb’s review system also invites the guests and hosts to include text in their reviews. Initially when the company first began, their CEO Brad Kitsche would travel and visit and inspect each property on the website individually to ensure that it was as the photos and profile described. Obviously, now with 60,000,000 users this task is far too inefficient and uneconomical to pursue. This is what has led Airbnb to rely on the ratings system to facilitate safety and promote quality accommodation. The first issue that arises here is that the system, like Uber’s, is reactive rather than proactive; problems with accommodation can only be fixed after the guest has stayed there and completed their local experience. Furthermore, Airbnb disclaims any responsibility for ensuring that the property meets fire, safety and cleanliness standards.¹⁴⁸ They state on their website that it is a host’s responsibility to be familiar with local government requirements in terms of what a host is legally responsible to provide.¹⁴⁹ It could be said that travellers are impliedly being advised to make reservations at their own risk.

¹⁴⁶ Daniel Guttentag “Airbnb: disruptive innovation and the rise of an informal tourism accommodation sector” (2015) 18(12) *Current Issues in Tourism* 1192 at 1194.

¹⁴⁷ Airbnb “Local Lens” <www.blog.airbnb.com>.

¹⁴⁸ Airbnb “Responsible Hosting” <www.airbnb.co.nz>.

¹⁴⁹ Airbnb, above n 148.

Airbnb's ratings system has come under scrutiny recently. Online reviews are a significant driver of consumer behaviour, providing a way for consumers to discover, evaluate, and compare products and services on the web.¹⁵⁰ Obviously there are many advantages associated with hosts being compulsorily reviewed online; unlike a hotel who may receive a mystery guest once a month, their performance is under constant scrutiny. Also consumers feel comfortable reading other traveller's views in that they believe they are receiving the true story behind their stay, more than a flashy hotel website would ever describe. However, recently a study conducted into the supposedly transparent review system that Airbnb hosts, revealed that travellers are not as honest as we may be led to believe. An analysis of ratings collected for over 600, 000 properties listed on Airbnb worldwide, found that nearly 95 per cent of Airbnb properties boast an average user-generated rating of either 4.5 or 5 stars (the maximum) and virtually none have less than a 3.5 star rating.¹⁵¹ The study went on to explain that the average TripAdvisor hotel rating is 3.8 stars, which is much lower than the average Airbnb property rating. This suggests that, while TripAdvisor ratings employ the same five star scale employed by Airbnb, TripAdvisor reviewers appear to have a greater willingness to use the full range of ratings than Airbnb reviewers.¹⁵²

This is an example of Brownsword's regulatory disconnect¹⁵³ arising, but in a slightly different manner than described above with regard to Uber. Airbnb unlike Uber is not required to conduct the equivalent of a fit and proper person check before the user registers on their system. They rely entirely on the ratings scheme to ensure that there has been no misrepresentation as to the description of the property and hospitality provided. Reviews to allow guests to make informed choices when selecting an accommodation provider. Regulatory disconnect therefore arises as the ratings on the system are inflated and therefore do not ensure an accurate description of the property provided, as intended by Airbnb. However, this disconnect in Airbnb's own regulatory regime does not outweigh the benefits that Airbnb provides to local communities. It allows hosts to generate additional income and boosts local economies by attracting guests to alternative holiday destinations. Ideally regulation could be implemented to provide quality assurance. However, due to the scale of the company's operations this is likely to be difficult and costly to perform, resulting in higher prices for guests. Instead, it may be simply that the risk of misrepresentation ought to lie with the traveler when making a booking via sharing economy services, as regulation would detract from the social advantages Airbnb provides.

¹⁵⁰ Georgios Zervas, Davide Proserpio and John Byers "A First Look at Online Reputation on Airbnb, Where Every Stay is Above Average" (28 January 2015) Social Science Research Network < papers.ssrn.com> at 1.

¹⁵¹ At 1.

¹⁵² At 4.

¹⁵³ Brownsword and Goodwin, above n 3, at 61.

Safety & Accessibility

Safety is a key concern that an accommodation provider typically is required to consider when allowing others to stay in their property. Airbnb disclaims responsibility for maintenance, repairs and cleaning of units. They exclude themselves from responsibility for regulatory compliance and state it is the host's responsibility to be aware of local regulatory regimes requiring fire exits and smoke alarms.¹⁵⁴ The Fire Safety and Evacuation of Buildings Regulations 2006 set out that "an owner of the building must maintain means of escape from fire for the building".¹⁵⁵ Schedule One lists the types of "building" to which this Act applies which includes "hotels, motels and other premises providing accommodation to the public."¹⁵⁶ It is unclear whether Airbnb rentals fall within the meaning of "other premises", a literal interpretation would suggest they do, however the primary function of the hosts' premises is designed to be used as a personal home, which suggests they fall outside of the regulatory regime. The Act also states that the owner of a building must provide an evacuation procedure¹⁵⁷ that must be approved by the National Commander¹⁵⁸ and a trial evacuation must take place¹⁵⁹ - a burdensome process for an average homeowner looking to utilise a spare room. However, these regulations have been put in place to ensure public safety when staying in accommodation for which they have paid a fee. This rationale applies equally to the provision of Airbnb services as it does to hotels, motels and hostels. Clarification of the status of Airbnb rentals is required to ensure fundamental public safety requirements are met. If Airbnb is not subject to this regulatory regime, then travelers need to be made aware of this, via the description of the accommodation on the website so that they are able to make an informed choice.

Uber and Airbnb's business models both provide examples of regulatory disconnect. In some instances, the rationales for the regulations which each business model avoids are outdated, and to require compliance with the regulatory regimes traditional providers are subject to would detract from the benefits their innovative models able to offer to both producers and consumers. However, where fundamental safety concerns are not provided for and traditional industry incumbents are being hindered in their ability to compete, regulatory intervention is required.

¹⁵⁴ Airbnb, above n 148.

¹⁵⁵ Fire Safety and Evacuation of Buildings Regulations 2006, s4.

¹⁵⁶ Fire Safety and Evacuation of Buildings Regulations, sch 1 (j).

¹⁵⁷ Fire Safety and Evacuation of Buildings Regulations, s 6.

¹⁵⁸ Fire Safety and Evacuation of Buildings Regulations, s 21C.

¹⁵⁹ Fire Safety and Evacuation of Buildings Regulations, sch 2.

CHAPTER THREE

The regulatory challenges posed by uberfication and responses of overseas jurisdictions are useful when analysing what actions should be taken in NZ. This chapter will focus solely on Uber as regulatory intervention is more pressing for Uber than Airbnb. The English & Wales and Australian jurisdictions have had more time than New Zealand to deal with the challenges faced when regulating Uber. The overseas experiences will be used to predict the issues that may arise in NZ and the merits of the strategies each jurisdiction has pursued will be identified.

Law Commission for England & Wales Advisory Report

In May 2014, the Law Commission for England and Wales conducted a review of taxi and private hire services and produced an advisory report. The report analysed the current two tier system that was operating in England at the time, whereby taxi vehicles and private hire vehicles (i.e. Uber) were subject to different regulatory regimes. The Law Commission concluded this distinction should remain¹⁶⁰ and that regulation should continue to distinguish between taxis who dominate the rank and hail market and private hire vehicles that can only be pre-booked. The rationale for this distinction was that “competitive forces do not work fully in rank and hailing markets”.¹⁶¹ In the private hire market, the Commission considered that consumers have the opportunity to shop around and compare factors such as price, reliability and availability¹⁶² which justifies light touch regulation, whereas in the rank and hail market a consumer will typically take the first taxi at the rank or to pass in the street. The first hail rule is upheld by members of society and therefore regulation is required to promote quality and regulate fares¹⁶³ as taxi services are unable to compete on these grounds due to social norms at play. The Commission commented that there were strong arguments made for common safety regulation of both markets, but said that considerations regarding price and quality controls were very different.¹⁶⁴ Their concern was that over-regulation would increase costs for providers, which would be passed onto consumers¹⁶⁵ and take away from what is good and popular about the private hire market.

Before reaching this recommendation, the Commission considered the merits of a one tier system whereby taxi services and private hire vehicles were regulated in the same manner.

¹⁶⁰ Law Commission for England and Wales *Taxi and Private Hire Services* (8824, May 2014) at 2.28.

¹⁶¹ At 2.12.

¹⁶² At 2.13.

¹⁶³ At 2.12.

¹⁶⁴ At 2.24.

¹⁶⁵ At 2.24.

In favour of a one tier system the following arguments were made: first that a single set of rules would improve enforcement and reduce regulatory loopholes¹⁶⁶ and secondly a one size fits all approach would be easier for both passengers and drivers to understand. It was noted the two services were likely to be considered interchangeable by most.¹⁶⁷ However, the Commission ultimately held competition and quality considerations should be of higher importance. If a one tier system was implemented then all services would be subject to price regulation, thus preventing the operation of the price surge algorithm on the Uber app. Concerns voiced by Transport for London supported this conclusion. They argued if the current high standards imposed on taxis were extended to private hire vehicles, this would exclude many drivers from the market and potentially create a larger unlicensed, illegal market.¹⁶⁸

In their report, the Commission sought to redefine taxi and private hire services. Most of the analysis undertaken was specifically relevant to the English jurisdiction where taxis were referred to as “hackney carriages”.¹⁶⁹ However, comments were made in regard to the advertising of each service which is relevant to the NZ legal landscape. The Commission also considered that that only the providers of licensed taxi services should be allowed to describe themselves using the term “taxi” on vehicles or in advertising materials.¹⁷⁰ This restriction would be difficult to apply in NZ as Uber’s advertising campaigns likens themselves to taxi services - “Uber gets you home safely”¹⁷¹ - however, they do not explicitly use the “taxi” terminology. Therefore, perhaps further regulations are required to outline the boundaries for which comparisons to taxi services are able to be made when marketing private hire services.

The Commission’s report is of particular relevance in light of the Small Passenger Services Consultation Paper currently welcoming submissions in New Zealand. It is interesting that they have chosen to reinforce the distinction between a one tier and two tier system, whilst acknowledging that:

...it is hard to dispute the claim that, in general, the public neither knows nor cares about the distinction [between taxi and private hire services], and indeed even those who work in the industry may well refer to a private hire vehicle as a taxi for

¹⁶⁶ At 2.19.

¹⁶⁷ At 2.19.

¹⁶⁸ At 2.17.

¹⁶⁹ Transport Act 1980.

¹⁷⁰ Law Commission for England and Wales, above n 160, at 3.34.

¹⁷¹ Uber “Safety” <www.Uber.com>.

sake of ease. This ties in with the fact that both types of service may be said to do the same task, of transporting passengers for a fee.¹⁷²

Part of the rationale for maintaining a two-tier system was due to the different services requiring separate price regulations in order to operate efficiently. The Commission recommended the information obligations for private hire vehicles should include fare estimates.¹⁷³ The rationale for this was to retain transparency in pricing,¹⁷⁴ which the Commission considered to be fundamental to promoting competition in the for hire market. The requirement to provide a specific price, like taxi services, was rejected by the Commission.¹⁷⁵ This is a feature which NZ could consider implementing in the Small Passenger Services Transport Bill. A price estimate requirement seeks to reduce information asymmetries operating in the private hire vehicle market. Critics have applauded Uber's ability to reduce overall information asymmetries in the market, by providing the passenger with the driver's name, registration number, rating, time until arrival and fare estimate. Reduction of information asymmetries prevents market failures. There is, however, no requirement that drivers maintain prices within a specified range of the estimate provided. This opens up opportunities for regulatory avoidance, and drivers may take longer or slower routes in attempt to receive a greater fare. This undermines the rationale for the recommendation, that is to give drivers the right incentives to plan their journeys efficiently and to allow passengers to make an informed choice.¹⁷⁶ An additional requirement that the fare should not exceed a certain percentage of the estimate, unless there is a significant change in circumstances, is required to resolve this issue.

If the two tier distinction was employed in NZ legislative framework, it is unlikely to successfully mitigate the regulatory disconnect currently experienced in the small passenger services market. The Commission's rationale for maintaining the two-tier system was centred around the fact consumers have the ability to shop around and make an informed decision before requesting the service. However, in practice Uber's app operates more similarly to a taxi service, whereby the services are requested in real time and not pre-booked in the same way that a limo or shuttle service generally is. If this distinction is to be upheld, a clear definition of what it means to pre-book a service is required.

The Law Commission's report may encourage New Zealand to introduce separate regulations for transport services provided via the sharing economy. It is however,

¹⁷² Law Commission for England and Wales, above n 160, at 2.23.

¹⁷³ At 3.40.

¹⁷⁴ At 3.41.

¹⁷⁵ At 3.42.

¹⁷⁶ At 3.41.

important to acknowledge that generally taxi services operating in England and Wales are subject to more stringent regulatory regimes¹⁷⁷ than taxi operators in New Zealand. Nevertheless, the Commission's rationales regarding price and quality controls provide good reasons for maintaining the distinction between the two services. Furthermore, taxi regulation is specific to the local market in which it is operating, which prevents and deters from a single model approach being taken.¹⁷⁸ Others have also favoured a lighter touch regulatory policy when dealing with new technologies. Syed considers:

...a less prescriptive approach can nonetheless fit within the wider local transport policies and regulation, allowing Uber to complement other transport options, ensuring greater mobility by providing safe and reasonably priced choices, easing and not adding to congestion.¹⁷⁹

Therefore while there are differences between the NZ and England & Wales small passenger services markets, the advisory report and rationales contained within provide a good starting point for New Zealand when assessing how we ought to regulate uberfication.

The Commission also discussed in depth how intermediaries fit into the proposed regulatory regime, referring specifically to the app Halio¹⁸⁰. Halio is similar to Uber whereby customers open an app on their phone and request a ride, a driver then accepts their request and the app provides payment mechanisms.¹⁸¹ However, the key difference is Halio drivers are already licensed taxi operators, driving registered taxis when they sign on to the app. The Commission considered that operator licensing should not be extended to cover intermediaries more generally than present¹⁸² due to the fact that users of an intermediary can protect themselves through contractual arrangements. An intermediary was considered to be someone who does not provide any services beyond communicating with a licensed operator.¹⁸³ This reasoning could not be applied in New Zealand when considering Uber drivers due to the fact that Uber has removed the requirement for their drivers to possess P endorsements. Furthermore, the Commission also highlighted "it is often unclear as to whether the contract is being made with the intermediary who then effectively sub-contracts the booking, or directly with the licensed operator". The same could be said for Uber in regard to whether bookings are made with Uber who sub-contracts to their partner-drivers or directly with the partner-drivers themselves. Uber however, define themselves as

¹⁷⁷ For example, in London taxi drivers must pass an area of knowledge test.

¹⁷⁸ Syed, above n 14, at 25.

¹⁷⁹ At 22.

¹⁸⁰ Law Commission for England and Wales, above n 160, at 3.100

¹⁸¹ At 3.100

¹⁸² At 3.102

¹⁸³ At 3.103

a technology company and in their terms and conditions exclude themselves from liability for the transport service itself,¹⁸⁴ therefore it is unlikely users could protect themselves through contractual arrangements. This supports the argument that operator licensing should be extended specifically to cover intermediaries such as Uber.

New South Wales

New South Wales (NSW) have recently enacted the Point to Point Transport Act 2016. This Act deals specifically with the regulations regarding the provision of taxi and passenger hire vehicle services in NSW. It was enacted in response to the challenges that have arisen in the taxi industry due to emerging technologies and changing customer expectations.¹⁸⁵ A passenger legislation transport review commenced in NSW in September 2012, resulting in a discussion paper being produced, similar to what we have seen in New Zealand with the Small Passenger Transport Services review. NSW are ahead of NZ, as they have recently published a comprehensive report titled “Point to Point Transport – A report to the Minister for Transport and Infrastructure” which outlines the rationales for the proposed changes to the industry and on the 22 June 2016 the Point to Point Transport (Taxis and Hire Vehicles) Bill 2016 was passed by the NSW Parliament. Given the similarities in the processes undertaken by NSW and NZ, the NSW legislation is a useful point of comparison for what we can expect to see in NZ.

The Point to Point Taskforce acknowledges that the transport industry has experienced fundamental changes regarding the way in which services are delivered to customers.¹⁸⁶ The industry has been overcome by innovation leading to better value for service, improved management of peaks and troughs and enhanced booking, payment and tracking technologies.¹⁸⁷ This innovation should not be stifled by regulation, which is why the taskforce considered:

...it would not be enough to graft ridesharing provisions onto the existing regulatory structure... Simply amending the law by creating a new category for ridesharing would lock existing point to point providers, particularly the taxi industry, into an outdated regulatory framework and business model that would make it much more difficult for them to compete.¹⁸⁸

¹⁸⁴ Uber, above n 104, at 2.

¹⁸⁵ Barry O’Farrell MP “Safer, smarter, cheaper and more reliable: customers win from NSW Government taxi reforms” (media release, 8 April 2014).

¹⁸⁶ Transport for NSW “*Point to Point Transport Taskforce: Report for the Minister of Transport and Infrastructure*” (NSW Government, November 2015) at 4.

¹⁸⁷ At 4.

¹⁸⁸ At 4.

This explains the modern¹⁸⁹ approach taken to regulation of ridesharing services in NSW. The taskforce advocated for an outcomes based regulatory approach, which ensured the safety and security of customers and drivers, while at the same time allowing for all industry participants to take advantage of the improvements in emerging technologies. This resulted in a complex regulatory regime that is founded upon strong rationales however, it may be difficult and costly to successfully implement.

The NSW Taskforce have taken a similar approach to the England & Wales Law Commission and considered that the distinction between small passenger services should rest on whether they are booked by a customer or hailed or hired from a rank.¹⁹⁰ Their rationale for this distinction was that the two services have different risk profiles that justify different regulatory approaches. Rank and hail services possess more anonymity and invisibility than booking apps which supposedly provide a high degree of transparency.¹⁹¹ Passengers when standing in line at a taxi stand, have a duty to take the first taxi available in the rank. They rely on the taxi's signage, driver ID on display and fare schedule on display in order to be assured first that the vehicle they are entering is a genuine taxi service and secondly that they are being fairly charged for their journey. Due to the first hail rule they do not have the opportunity to shop around and compare prices. Uber vehicles on the other hand, eliminate these sources of potential information asymmetries by providing the vehicle registration number, location, driver profile photograph and a fare estimate before the rider enters the vehicle.

The recommended regulations, however, go further than simply imposing a two-tier distinction. Instead the taskforce considered that, for the objective of "risk-based regulation that established clear accountabilities for safety outcomes"¹⁹² to be achieved, regulations should reflect the four essential functions in the provision of point to point transport services. The four functions are the booking service, the taxi organisation, the vehicle owner and the driver,¹⁹³ and each entity has separate obligations specific to their role which outline their accountability for the services on offer. It is acknowledged in the report that a person or a firm may be performing more than one role at a time and if this is so, then they bear these obligations simultaneously.¹⁹⁴ This may be difficult to enforce and could result in uncertainties when attributing liability. This signals a change in the traditional model that

¹⁸⁹ At 4.

¹⁹⁰ At 7.

¹⁹¹ At 24.

¹⁹² At 6.

¹⁹³ At 25.

¹⁹⁴ At 29.

focused solely on the specific service (eg. taxi vs private for hire vehicles) used to regulate the small passenger services industry.

A flexible regulatory approach based on the essential functions in the industry, and not the traditional entities who are operating transport services, provides the potential for entrenched costly business models to be replaced with innovative and efficient models.¹⁹⁵ The Taskforce, unlike the Law Commission for England and Wales, did not tailor the new regulations to the services offered at the present point in time. They acknowledged the fact that innovation was growing at an exponential rate and considered “if there is not a substantial overhaul of the model through which the industry has historically been regulated, it will lack flexibility...”¹⁹⁶ and be inadequate to respond to emerging challenges in future. This signifies the regulators attempt to overcome Brownsword’s challenge of “getting connected and then staying connected”.¹⁹⁷ As discussed earlier in Chapter One, the task of ensuring that regulations remain connected is complex in a world where technology is constantly evolving. However, the NSW Taskforce appears to have dealt well with this, by targeting the regulation generally at the functions of engaging a small passenger service, rather than specifically at the type of service being offered. In the event of future developments such as driverless cars,¹⁹⁸ which are likely to provide further disruption in the industry, the regulatory regime will be able to operate to ensure consumer safety outcomes.

Regulatory effectiveness¹⁹⁹ was also a concern of the Taskforce. They identified that:

Regulation that focuses on achieving particular outcomes is more likely to be effective and efficient, rather than policymakers, in consultation with incumbent industry participants, seeking to specify the individual steps that must be taken to achieve those outcomes.²⁰⁰

Uber, who define themselves as a technology company,²⁰¹ are predictably going to display resistance to any obligations imposed which heighten their liability to that of a transport company, as this has the effect of lessening their economic efficiency. The Taskforce, by channeling their regulations at outcomes rather than Uber or the applicable booking service itself, is likely to achieve less hostility from the company, resulting in a higher likelihood the

¹⁹⁵ At 26.

¹⁹⁶ At 17.

¹⁹⁷ Brownsword and Goodwin, above n 3, 64.

¹⁹⁸ Transport for NSW, above n 186, at 17.

¹⁹⁹ Brownsword and Goodwin, above n 3, 61.

²⁰⁰ Transport for NSW, above n 186, at 20.

²⁰¹ Uber, above n 104, at 2.

rules that protect consumers will be followed. Uber has accepted that ridesharing can be fairly regulated,²⁰² and implicit in this is the fact they cannot continue to operate in a state of regulatory disconnect. A degree of uniformity is achieved in the regulation, but in a general manner that promotes accountability for safety and security, rather than targeting the specific practices by one industry member. This is more likely to preserve the desirable flexibility in the provision of these services than regulation which simply seeks to promote age old models with little prospect for innovation. The Taskforce considered that:

...by limiting government regulation to matters of safety, security and consumer protection, and adopting an outcome-based approach to such regulation, these organisations will have greater flexibility and choice in deciding the best and most cost-effective way to deliver a quality customer service.²⁰³

This approach is commendable and should be considered by NZ regulators when conducting their review of the Future of Small Passenger Transport Services, as it does not seek to confine all aspects of the operation and reduce future prospects for innovation in the process.

Safety regulation relating to drivers was also considered in depth by the Taskforce. It was recommended that the historic driver authorisation scheme should be overhauled in favour of “a system which gives taxi organisations and booking services greater flexibility to determine how standards are met”.²⁰⁴ Point to point drivers must hold an unrestricted NSW driver license²⁰⁵ and a background check by the NSW Police is required. Unlike the NZ regulatory regime, special passenger licenses are not required. The equivalent of a fit and proper person test has been maintained however, the taskforce specifically states that improvements to RMS systems should be made to ensure that the regulator has access to licensing and criminal charge information in real time from the NSW Police. This was in response to similar complaints seen in NZ by industry participants about the delays in conducting background checks. The taskforce considered that this was sufficient to ensure safety and consumer protection. It was also noted in the NSW Taxi Council’s submission that “these checks need to be ongoing. A driver of a public passenger vehicle must be fit and proper in all respects at all times.”²⁰⁶ This is a point for consideration in light of the Small Passenger Transport Services review in NZ. We don’t have the technology in NZ presently to

²⁰² Uber, above n 72, at 2.

²⁰³ Transport for NSW, above n 186, at 29.

²⁰⁴ At 32.

²⁰⁵ At 32.

²⁰⁶ NSW Taxi Council “NSW Taxi Council Submission: NSW Government Point to Point Transport Taskforce Discussion Paper” at 22.

achieve this affordably however, arguably it is required to ensure that the ongoing safety rationale is upheld.

CHAPTER FOUR

Uber clearly blurs the regulatory lines. A legitimate regulatory response²⁰⁷ is required to overcome the regulatory disconnect²⁰⁸ that the small passenger services transport market currently experiences. This chapter will focus on how effective regulatory regimes can be introduced to maximise safety, efficiency, competition and innovation for both traditional and app based transport services. The Future of Small Transport Services Consultation Paper²⁰⁹ and proposed Land Transport Act 1998 and Land Transport Rule: Operator Licensing 2007 amendments will form the basis for discussion. The rationales behind the current regime and proposed changes will be analysed both in light of their immediate effect and ability to withstand future technological developments.

The Future for Small Passenger Services review signaled the first legitimate regulatory response to the disconnect evident in the market. As the law stands presently Uber is subject to the regulations for private hire services under the Land Transport Act and Operator Licensing Rule, however, in reality its operations are distinct from pre-booked limousine or shuttle hires. Rather than simply apply the existing rules to newcomers to the industry New Zealand sought to proactively engage in an analysis of the regulations that have plagued the industry since the 1980's.²¹⁰ The review was announced in January 2014²¹¹ and New Zealand had the potential to become a world leader, however it has taken almost two years for any form of legislative progress to occur.²¹² Some critics consider this a gracious timeframe to streamline what could already be considered a deregulated industry.²¹³ This time lag however, allows for analysis of overseas responses to the challenges faced arguably adding to the potential effectiveness of a new regulatory regime.

The purpose of the review was to ensure New Zealand's regulatory environment for small passenger services continued to be fit for purpose and flexible enough to accommodate new technologies.²¹⁴ Discussions with stakeholders in the industry and consideration of government policy outcomes led to the Small Passenger Services Consultation Paper.²¹⁵ The paper begins by acknowledging the emergence of ridesharing services that operate outside

²⁰⁷ Brownsword and Goodwin, above n 3, at 48.

²⁰⁸ At 61.

²⁰⁹ Simon Bridges and Craig Foss *Future for Small Passenger Services* (Ministry of Transport, consultation paper, 2015).

²¹⁰ At 6.

²¹¹ Uber, above n 72, at 3.

²¹² The Land Transport Amendment Bill had its first reading on 15/9/16.

²¹³ Uber, above n 72, at 3.

²¹⁴ Ministry of Transport "Small Passenger Services Review" (23 September 2016) Ministry of Transport <www.transport.govt.nz>

²¹⁵ Bridges and Foss, above n 209.

of the current regulatory regime which causes difficulties when managing the safety risks associated with ridesharing services.²¹⁶ The paper considers five broad proposals, labelled “options”. Option one is simply retaining the status quo and option two considers a slight modification of this.²¹⁷ Options three and four discuss the creation of a new single class system that classifies taxi and private hire services alike. Option three places the onus of responsibility on the driver to ensure they comply with the rules,²¹⁸ whereas option four shifts the responsibility to the approved transport operator.²¹⁹ Option five considers the effect of applying the existing taxi regulatory burdens to all small passenger services.²²⁰ All of the proposals lack innovation in their approach. They focus on the existing business models operating in the industry and fail to consider and provide for future technological developments. For example they do not prepare the industry for the event of driverless Uber vehicles²²¹, however, in the meantime they do attempt to close the gap between the regulations and operations that can be seen at present. The consultation paper exhibits regulatory prudence in response to the immediate threats faced by the industry. While it is likely Parliament will have to legislate in future, an immediate response is required to overcome the present regulatory disconnect that can be seen.

Option four appeared the favourite amongst the “punters”. The consultation paper concluded a single class service for all passenger services whereby the responsibility for compliance with the rules was focused at an operator level²²² was likely to best meet the objectives of safety, further innovation, increased competition and improved customer services.²²³ Advocates of this option considered it would impose a low level cost on the sector whilst maintaining a sufficient level of safety and consumer protection.²²⁴ The reform focused on ensuring that the compliance burden was placed as low as it could be whilst still achieving the regulatory objectives,²²⁵ which should be true of all regulation. However, arguably the compliance burden has been set too high by failing to recognize a distinction between rank and hail and private for hire services.²²⁶ Option four removes the distinction

²¹⁶ Bridges and Foss, above n 209, at 7.

²¹⁷ At 7.

²¹⁸ This includes P endorsements, work time, reporting serious complaints requirements see Bridges and Foss, above n 209, at 21,

²¹⁹ Bridges and Foss, above n 209, at 23.

²²⁰ At 25.

²²¹ Chafkin, above n 56.

²²² Bridges and Foss, above n 209, at 23.

²²³ At 7.

²²⁴ At 7.

²²⁵ At 13.

²²⁶ Land Transport Act Amendment Bill 2016 (173-1) explanatory note.

between operators and creates a single class of small passenger services.²²⁷ The effect of this is all passenger services are subject to the same set of rules and the responsibility for compliance with the rules lies with the approved transport operator.²²⁸ The approved transport operator is the person in control of the service who has been approved as fit and proper by the NZTA.²²⁹ This replaces the requirement of services being run by an approved taxi organisation. Uber would therefore be required to apply to become an approved transport operator. They would be responsible for ensuring that all of their drivers had a P endorsement, worked within their worktime limits, maintained log books and that their vehicles had a Certificate of Fitness.²³⁰ Uber has been landed with significantly more responsibilities than what they have previously enjoyed and this increased burden is unlikely to sit well with their technology company business model and the benefits flexible ridesharing services provide in local communities.

The Land Transport Amendment Bill 2016 (the Amendment Bill) discusses the proposed reforms for the sector and states its objective, that is to respond to the changes in business models and ensure the sector remains competitive while obtaining the maximum benefits for consumers. The Bill expands on the proposals laid out in Option four²³¹ and formally proposes that a single class definition for small passenger transport services is adopted. If implemented, Uber and taxi drivers would both be required to obtain a P-endorsement which includes undergoing a fit and proper person test. Uber has shown a strong disregard for these legislative requirements in the past²³² and regulatory effectiveness²³³ is likely to be a challenge. As of April 2016 Uber removed the requirement for their partner-drivers to maintain a P endorsement in favour of their own less burdensome procedures.²³⁴ They state in their submission to the Future of Small Passenger Services Consultation Paper the existing administrative process for P endorsements is “unworkable”²³⁵ and highlight that “over 86 per cent of partner-driver applicants referred to the P endorsement process by Uber decline to complete the process because it takes too long or is too expensive”.²³⁶ This raises concerns for the effectiveness of the proposed regulations. Brownsword identifies that, if regulatees are resistant to the regulations imposed, the regimes efficiency is likely to be compromised. This lengthy timeframe is addressed in the Regulatory Impact Statement for

²²⁷ Bridges and Foss, above n 209, at 23.

²²⁸ At 23.

²²⁹ At 23.

²³⁰ At 24.

²³¹ At 23.

²³² Radio NZ, above n 79.

²³³ Brownsword and Goodwin, above n 3, at 61.

²³⁴ Radio NZ, above n 79.

²³⁵ Uber, above n 72, at 4.

²³⁶ At 4.

the Future Framework for Small Passenger Services which states “the review recommends that the NZTA should continue to be responsible for the fit and proper person assessments – with improved service delivery.”²³⁷ However, no actions to improve the service delivery have been put in place. The regulatory effectiveness of the proposed amendments and consultation paper are lacking given that they do not deal directly with the significant time delay when applying for a P endorsement. As discussed earlier this results in losses to both customers and drivers as they are unable to enjoy the flexible transport arrangements that are provided by ridesharing. Efficiency has been labelled as an objective of the review and the single class proposal that ignores the administrative burdens of licensing requirements fails to meet this purpose.

Worktime limits are another area for contention. The Amendment Bill proposes that the approved transport operator is responsible for ensuring that drivers continue to operate within their worktime limits.²³⁸ If Uber is responsible for ensuring that their drivers do not work more than seven hours at a time²³⁹ and take required breaks this suggests that their relationship with their partner-drivers may be more akin to employees than independent contractors. This suggestion is likely to be met with strong force from Uber, who are adamant to retain their status as a technology company.²⁴⁰ However, as discussed in Chapter Two this is an area requiring clarification to eliminate the regulatory disconnect currently blurring the employment relationship boundaries. The proposal that heightens operator responsibilities suggests that the legislature considers the relationship between Uber and their drivers should be classified as a contract of service. This classification is in line with the safety and accountability objectives that the review seeks to promote. This will increase Uber’s regulatory burden as not only would they be required to maintain evidential records that this fundamental safety requirement is being complied with²⁴¹ but they would also have to offer their drivers the benefits associated with an employee status.²⁴² In terms of competition in the market this levels the playing field, by ensuring fundamental safety requirements are adhered to however, it is likely to result in rigid working hours and increased costs to the consumer.

Safety is the dominant concern of regulators in the small passenger services market. The Bill also proposes that vehicles operating within the 18 main urban areas should require an in-

²³⁷ Ministry of Transport *Regulatory Impact Statement: Future Framework for Small Passenger Services* (Ministry of Transport, Agency Disclosure Statement, 15 March 2016) at 20.

²³⁸ Land Transport Act Amendment Bill 2016 (173-1) s 71.

²³⁹ Bridges and Foss, above n 209, at 24.

²⁴⁰ See for example arguments advanced in *Berwick v Uber*, above n 122, at 9.

²⁴¹ Bridges and Foss, above n 209, at 24.

²⁴² See Chapter Two for a list of examples.

vehicle recording camera, unless an exception or exemption applies. Due to the single class categorisation, this means Uber vehicles will be required to operate an in-vehicle recording camera unless they qualify for an exemption. The requirement for operating cameras and 24/7 panic alarms and in vehicle operating cameras was in response to the deaths of two taxi drivers in 2010²⁴³, which arguably could have been avoided if stricter safety mechanisms were in place. From a safety perspective it would appear that the effect of this regulation is necessary and adds value to the regulatory regime by ensuring the ongoing safety and monitoring of both passengers and drivers. However, the installation of in-vehicle cameras is expensive. This increases the barriers to entry in the market place, especially for the part-time drivers who drive less than ten hours per week who make up half of Uber's partner driver database.²⁴⁴ They state that 75 per cent of their partner drivers rely on Uber as a supplemental rather than a primary source of income²⁴⁵ therefore the requirement for drivers to install in-vehicle security cameras in their private vehicles simply to drive for less than ten hours per week is likely to be incredibly burdensome and deter potential drivers from entering the market. Furthermore, taxi services do not monitor the in-vehicle cameras 24/7. They are a reactive rather than a proactive safety feature. To increase the barriers to entry for Uber drivers in this way detracts from the social advantages ridesharing provides.

Uber argues their app is able to mitigate safety risks in the same way that an in-vehicle security camera would. This argument largely rests on the different risk profiles of pre-booked and rank and hail services, which Uber suggest is strong enough to heed different regulatory responses. Uber state in their submission:

...it is not 'unfair' that one mode of personal transport has different burdens or barriers to entry than another, if the different modes mitigate risks in different ways and have access to different portions of the market.²⁴⁶

The risk profile of the ridesharing model can be distinguished from a traditional rank and hail service due to the following features; Uber provides passengers with their driver's name, profile picture and vehicle registration number²⁴⁷ before embarking on their journey, whereas a traditional taxi passenger must rely on the signage and driver ID displayed in the vehicle to be certain that they are riding in a genuine taxi service. Uber drivers and passengers have access to the GPS function on the app so their journey is tracked and in real

²⁴³ Ministry of Transport, above n 237, at 4.

²⁴⁴ Uber, above n 72, at 5.

²⁴⁵ At 5.

²⁴⁶ At 8.

²⁴⁷ Writers own experience.

time²⁴⁸, also the app enables riders to share their estimated time of arrival and route with their friends²⁴⁹, minimising the need for monitored panic alarms.²⁵⁰ There is no cash involved in the process, instead the riders credit/debit card is automatically debited following completion of the journey, reducing the risk of cash robbery, fare evasion or credit card fraud as the calculation and payment of fees is beyond the control of either party²⁵¹. There is less anonymity involved in the Uber ride than the traditional rank and hail taxi service which suggests that a blanket approach to all safety specifications including in-vehicle cameras only heightens the regulatory disconnect that can be seen.²⁵²

Information asymmetries also justify a distinction being drawn between the two types of service. Deregulation of taxi services by removing the signage requirements in order to reduce their barriers to entry and equalize the playing field in the market, must be weighed against the risk profiles associated with each service. The rationale for implementing signage regulations is to reduce information asymmetries between the passenger and driver. Passengers need to be assured that they are travelling in a genuine taxi service. Uber's app has found an innovative new way to do this but there is no suggestion that taxi services will provide the same technologies to passengers to reduce these information asymmetries. This is a factor which, if not monitored and regulated effectively, can lead to market failures. Uber's app lowers information barriers. While the absence of perfect information alone does not justify regulatory intervention²⁵³, efficient market functions rely on the consumer having optimal information²⁵⁴. Uber is creating competition by encouraging greater information disclosure therefore it appears counterproductive to deregulate the taxi industry signage requirements when this would only lead to the provision of less information and hinder their ability to compete.

The New South Wales and England & Wales jurisdictions both chose to maintain the distinction between rank and hail and private hire services. New Zealand by choosing to implement a single class system, falls short of overcoming the challenge of regulatory disconnect. The proposed regulations focus on the simplicity that uniform application would provide instead of considering the safety risks and information required for optimal market functions. It is likely the proposals will be met with significant resistance and may be wholly

²⁴⁸ Uber, above n 72, at 9.

²⁴⁹ At 9.

²⁵⁰ Bridges and Foss, above n 209, at 10.

²⁵¹ Uber, above n 72, at 9.

²⁵² Brownsword and Goodwin, above n 5, at 63.

²⁵³ Alan Schwartz and Louis Wilde "Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis" (1979) 127(3) U Pa L Rev 630 at 630.

²⁵⁴ Anthony Ogus *Regulation: Legal Form and Economic Theory* (Hart Publishing, Oxford and Portland Oregon, 2004) at 29.

disregarded by some industry players thus also failing to overcome the challenge of regulatory effectiveness. The proposals hinder competition by placing additional regulatory burdens where they are not essential and fail to account for fundamental safety considerations. Regulators should reconsider their approach to the Land Transport Amendment Act as it is unlikely to successfully overcome the challenges discussed by Brownsword and prevent market failures.

CONCLUSION

Airbnb cofounder Brian Chesky summarises the legal challenges created by the sharing economy as follows:

There were laws created for businesses, and there were laws for people. What the sharing economy did was create a third category: people as businesses," to which the application of existing laws is often unclear.²⁵⁵

New Zealand is being overtaken by uberfication. The introduction of Uber and Airbnb have disrupted the traditional transport and accommodation markets. Both companies are asserting their dominance in these markets leaving regulators scrambling to determine an appropriate regulatory response. Currently there is a regulatory disconnect operating whereby the existing regulations do not encompass the "sharing" services on offer. They present new and significantly different challenges that were not foreseen when the governing statutes and regulations were enacted.²⁵⁶ Where a regulatory framework becomes disconnected, regulatees cannot be sure where they stand. This will create difficulties irrespective of whether the regulatory environment is intended to support and promote certain activities or to prohibit them.²⁵⁷ Clarification and reconnection are required.

Uber and Airbnb are the two main players in the sharing economy. They are similar in that they challenge traditional industry incumbents, however, the regulations which they challenge and their risk profiles are different. Simply because both operate in the sharing economy this does not justify the same regulatory response. Uber requires urgent intervention whereas Airbnb does not call for an immediate regulatory response.

Airbnb displays regulatory disconnect to a degree, however, as the risks associated with the services provided are well-known to the traveller and they are able to make an informed decision. Innovation should not be regulated simply because it is "innovation" rather

²⁵⁵ Andy Kessler, *The Weekend Interview with Brian Chesky: The 'SharingEconomy' and Its Enemies* (Wall St J Jan 17, 2014) <www.wsj.com>.

²⁵⁶ Airbnb/ A Case Study in Occupancy Regulation and Taxation at 104.

²⁵⁷ Brownsword and Goodwin, above n 3, at 61.

prudential pluralism requires the risks of the activity to first be assessed to determine whether intervention is required.

Uber as an innovative business poses many challenges, some similar to traditional industry incumbents and some different. The safety rationales behind many traditional taxi regulations still apply to the services Uber provides. Uber's innovation however, mitigates the need for many of the regulations that have plagued the industry since the 1980's. The app's pre-booking service reduces information asymmetries, providing for a safer journey and more efficient marketplace. A one size fits all approach to regulation does not take this into consideration. Regulators need to balance the need to safeguard public health and safety, protect consumers from problems with liability and fraud while ensuring further innovative activities are not stifled.

New Zealand should take note of the approach taken in New South Wales whereby regulation was imposed based on the various risk profiles of the services offered. The taskforce identified the key functions involved in providing both taxi and ridesharing services and established accountabilities for safety outcomes on this basis. This ensures safety and provides flexibility, ensuring the regulatory regime will remain connected while simultaneously allowing for innovation. The proposals in the Land Transport Amendment Act 2016 fall short of this. New Zealand has taken a step backwards in attempting to establish a universal definition for all small passenger service providers. Instead, the system should be revised to reflect the new paradigm. If the amendments are accepted, then this is likely to lead to a litigious industry response to future innovation. This will threaten constructive industry development²⁵⁸ reducing the potential benefits that flexible transport services are able to offer to both drivers and riders. After all, sharing is caring.

²⁵⁸ Syed, above n 1, at 26.

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