

POSITION PAPER

Organisation: NSW Hire Car Association
ACN: 605 968 590 - ABN: 12 605 968 590

Topic: Collaborative Consumption Transport
(commonly known as *Ride sharing*)

Date: 20 July 2015

INTRODUCTION

We are a recently formed association of hire car operators in NSW. In a matter of weeks we have been able to secure membership of over 200 drivers and operators.

Our designated point of contact is Simon Kalipciyan, Director NSW HCA. Simon can be contacted by email or mobile phone on simon.kalipciyan@nswhca.org and 0402 931 766, respectively. Simon is the founder of the NSW Hire Car Association and has been actively working to engage with NSW officials and raise awareness of the issues laid out in this paper for the past 4 years.

We have created this position paper to present our escalating concerns to Government regarding the unprecedented and presumably illegal events taking place in the transport industry through the activities of what is commonly known as “ridesharing”.

An article featuring in the Guardian in December 2014 concisely sums up our high level position on the issue as follows:

*There are broadly two narratives regarding ridesharing services like Uber. **Both of them are wrong.** The first is from reactionary taxi industry forces likes Cabcharge: ridesharing is illegal, should stay illegal, and taxi drivers should strike and stamp their feet until a wormhole opens up which magically transports us back to an era before the smartphone. Needless to say, that’s a hopeless task. It doesn’t engage with the core issue that technology has quite radically changed what is possible (and profitable) in private and shared transportation.*

The second story, a similarly absurd proposition from Uber, is that due to the smartphone all is permitted and the existing rules no longer apply. But just because something new comes along doesn't mean corporates can decide what parts of the law they want to obey.¹

We put forward to you our view on what “ride sharing” means for the transport economy in NSW.

We respectfully ask you to consider these views in addressing the future of the ground transport industry.

BUT, most importantly, until such a time as the NSW government makes a decision on the future of the ground transport industry and the role of new classes of transport services, **we respectfully but urgently call on government to uphold the laws of NSW and immediately stop illegal ride sharing in NSW.**

Referenced here and separately provided is a petition raised last year by hire car operators and drivers to the NSW Premier and Minister for Transport supporting this respectful call to action for the NSW government.

SITUATION BACKGROUND

Collaborative Consumption

In the past six years, the world has seen the rise of a new commercial ideology – *collaborative consumption*. It is the notion that people want functional experiences at reduced prices and without the burden of regulation or bureaucracy.

As you would know, “ride sharing” schemes are a form of collaborative consumption whereby consumers secure ground transport services, at a nominal charge, from someone who is willing to provide this service in their private vehicle at a rate substantially below the regulated market level. You would also know the governing principle is that people from the general public can make good use of the empty seats in their cars and transport people going in their direction for a small fee.

Again, you would know that this new method of consumption is made possible by the rapid uptake of emerging mobile technologies which enable total strangers to connect under a digital signature.

This emerging practice is also being called the “sharing economy” – although some academics are calling this a misnomer as there is nothing being “shared” but rather goods and services being privately traded for money.²

¹ <http://www.theguardian.com/commentisfree/2014/dec/01/ubers-screw-you-strategy-in-australia-relies-on-regulators-too-timid-to-enforce-the-law>

² <http://theconversation.com/renting-isnt-lending-the-sharing-economy-fallacy-27084>
<https://hbr.org/2015/01/the-sharing-economy-isnt-about-sharing-at-all>
<http://www.wsj.com/articles/how-everyone-gets-the-sharing-economy-wrong-1432495921>

One of the most dangerous implications arising out of this new economy is the intentional disregard of official regulations and the blatant contempt for official regulators. This has far reaching implications into other industries and poses a serious threat to the government's perceived ability to adequately enforce the law. Many journalists and writers have referred to this new movement as "anarchy capitalism".

Out of this new landscape we have seen the creation of several major operators across a number of industries, such as AirBnB, Dovcay, RelayRides, TaskRabbit, LendingClub, Poshmark – to name a few of the pioneers. While these operators have delighted some consumers they have created significant challenges for others and most notably for industry regulators who they blatantly disregard and defy.

Entry of Uber X into Australia

Uber Black

Late in 2012 Uber came into the Australian market place and began a hire car operation. This service was based on issuing registered hire car drivers with an Uber-owned mobile device which allowed drivers to accept booking requests made by a public consumer through the Uber app. Uber now also allows authorised drivers to download the Uber app onto their personal phones.

The app calculates the fare based on a combination of a km-based rate and a time-based rate (when the vehicle speed drops below a certain level or is stationary).

The pricing approach is deemed outside the law for any transport vehicle which is not a taxi (*Passenger Transport Act 1990 (NSW)*) but no one has taken any action against Uber in this regard due to a technicality of the wording in the Act.

Uber operates its hire car services at taxi prices, without the overheads of running taxi vehicles.

Uber Taxi

Shortly thereafter, Uber launched its Uber Taxi services. They enticed existing taxi users to the Uber platform by offering discounted and free rides. Once these clients downloaded the application Uber to take advantage of the discounted taxi offers Uber then marketed their low cost service to these customers.

Uber X

Not long after the Uber Taxi, Uber launched its ride sharing program in Sydney, Melbourne and Brisbane and quickly expanded to other Australian cities.

In spite of Transport for NSW publicly announcing that ride sharing is against the law, Uber is still operating its ride sharing program and has in fact increased its marketing and sales efforts.

Collaborative consumption is the basis for the UberX *ride sharing* model (also known as Uber Pop & Uber Low Cost in other parts of the world) which connects public passengers with private car owners for point-to-point ground transport. UberX is not the only ride sharing provider operating but due to \$10B³ of funding raised by parent Uber, it has become the largest and most widespread player globally.

Uber has executed a consistent market strategy designed to disregard the law, undercut existing operators, build false trust, get the public hooked on cheap fares, introduce ride sharing and ultimately drive other transport operators out of business. These items will be addressed and referenced further into this paper. If successful, UberX will be able to create a market monopoly which will ultimately allow them to exercise complete control of market pricing and absolute control of consumer options.

The company has collided with regulators and enforcement agencies across the world. Its position is that of course there will be a clash since they are challenging outdated methods of business practice and therefore they are not accountable to the law. They continue to operate and blatantly disregard all enforcement actions taken against them in every city around the world.

Uber is currently engaged in multiple legal suits in a number of other countries with recent news from France showing extensive riots across Paris and other major cities which resulted in France ordering UberX to cease operating – which they blatantly ignore. Closer to home many city officials across Australia have taken strong action and applied heavy fines to Uber ride share drivers – while Uber publicly states they will defy the authorities and pay all driver fines.

Uber have also publicly stated they plan to use their extensive funding to beat down the competition and buy market share. Uber's founder, Travis Kalanick, has been regularly cited in print and on television as supporting extreme aggression in business and openly defying regulators.

CATEGORISATION OF ISSUES

The Competition and Consumer Act 2010 (Cth)

The Competition and Consumer Act 2010 (CCA) seeks to promote competition and fair trade in markets to benefit consumers, businesses, and the community. The community in NSW is entitled to expect the business of transport in NSW to be conducted with efficiency, economy, fairness, impartiality and integrity **as these are key to public safety**. In the case against Uber we form the basis that the company is engaging in restrictive trade practices.

³ <http://www.ft.com/intl/cms/s/0/805599ae-16df-11e5-b07f-00144feabdc0.html>
<https://www.crunchbase.com/organization/uber/funding-rounds>

The restrictive trade practices/antitrust provisions in the CCA are aimed at deterring practises by firms which are anti-competitive in that they restrict free competition, in this case namely:

1. **Misuse of market power** – taking advantage of substantial market power in a particular market, for one or more purposes; namely, to eliminate or damage an actual or potential competitor, to prevent a person from entering a market, or to deter or prevent a person from engaging in competitive conduct.
2. **Violation of consumer protection laws** - based on the proposition that low consumer power or lack of information is a market failure which needs to be addressed by interference in the market. In this case namely **Misleading or Deceptive Conduct** - s 18 of the CCA - allows both individuals and the ACCC to take action against corporations who engage in conduct that is misleading or deceptive, or likely to mislead or deceive.

The Passenger Transport Act Breach

In addition to the CCA, you are aware that public transport in NSW is governed by the *Passenger Transport Act 1990 (NSW)* and its respective statutory instruments.

Please note we are aware: “a Bill to repeal and replace the Passenger Transport Act 1990 and the Air Transport Act 1964 was then introduced to Parliament on 18 June 2014 and passed by Parliament on 10 September 2014. While the new Passenger Transport Act 2014 received assent on 17 September 2014, it has not yet commenced. Therefore, the Passenger Transport Act 1990 and its regulations continue to operate.”⁴

It is reasonable to expect that all operators in NSW are required to comply with the laws laid out in this Act.

It is also reasonable to expect that should an operator demonstrate that there is a loophole in the law which allows that operator to conduct its business outside the intent of the law then the relevant bodies should act swiftly to address that loophole and issue the necessary amendments in order to maintain clarity and a fair trading platform for all other law-abiding operators.

In the case against Uber there have been four areas of non-compliance with the *Passenger Transport Regulation Act 2007 (NSW)* which are of concern, namely:

1. use of metered devices in hire cars (s 188 of the Act)
2. use of unregistered vehicles - Provision of fee-paid services in private vehicles through the Uber X service offering (s 187 of the Act and the prescribed conditions contained in the Gazette);

⁴ <http://www.transport.nsw.gov.au/about/legislation/nsw-passenger-transport-legislation-review>

3. use of unaccredited drivers (s 38 of the Act) and
4. absence of insurance (s 39G of the Act). Please note, this has recently changed as insurance firms have confirmed they will be able to provide insurance specific to private point-to-point transport.

Operating without legal constraints and costs

Ride share operators are able to introduce heavily discounted transport option as they are operating without the legal constraints and costs traditionally associated with running an accredited hire car or taxi business in NSW.

We are very concerned that the operation of ride share schemes and then other schemes purporting to be hire car operations using fee meters are leading to an exponentially growing devaluation of legitimate investments made by professional operators over many years, including association members.

The appearance of illegal km-based apps and ride share schemes in NSW, Queensland and Victoria has thrown the hire car industry into complete disarray as traditional operators are not able to compete on an even playing field. Compliance with the requirements of each state's passenger transport laws is required of all other public transport operators. But Uber and similar schemes ignore the requirements to use compliant pricing methods which enable them to operate within the industry.

Existing operators, including emerging technology developers, who work within the confines of the law, have invested significant sums in their businesses. Those investments have been based on the existing market and regulatory regimes and appropriately compliant with the *Passenger Transport Act 1990* (NSW).

If operators such as Uber with its non-complaint pricing methods and ride share schemes are allowed to operate within the transport industry without fulfilling the usual requirements imposed on the rest of the industry, the result will be a biased, unfair, inequitable playing field clearly within the sights of government.

This will lead to significant financial losses to existing operators, all of whom have relied on the consistent representations of government that the marketplace would continue to be regulated. In this regard we say that the government has allowed Uber to abruptly enter a highly regulated industry where existing players have paid significant sums for the privilege to operate within that industry and without any consequence to Uber.

It would seem contrary to fair economic policy and regulation to allow a non-compliant entrant to operate in an industry where a licence to operate a hire car runs into the tens of thousands of dollars annually.

Predatory pricing

Based on our research of the most basic of economic principles, we say with that knowledge that predatory pricing⁵ such as that of Uber ride sharing will invariably lead to price gouging after legally compliant competitors are forced out of a marketplace.

The overseas experience indicates Ubers modus operandi is that of **building a monopoly by stealth**, a process deliberately designed to create confusion and then to undercut all other operators within an existing marketplace.

The **monopoly by stealth** process that Uber adopts resembles the following:

1. Uber enters a market with Uber Black and advertises heavily discounted fares.
2. It entices accredited hire car operators to do Uber Black work by paying them the gap of the customer discount and guaranteeing daily income levels.
3. Many drivers not only sign up to Uber black but actually purchase vehicles specific to this purpose, in some cases mortgaging family homes and other critical assets on the promise of heavy returns on their investment.
4. Once customers are used to the Uber Black experience, Uber introduces Uber Taxi services and commences offering heavily discounted taxi rides while progressively increasing the Uber Black fares.
5. Customers switch from Uber Black to Uber Taxi in order to take advantage of the discounts. In Sydney Uber marketed “free taxi rides” in order to entice more customers⁶. Uber uses accredited taxi operators to provide this service and also in this case pays the taxi drivers the gap of the customer discount to keep them satisfied and compliant.
6. Uber Black trips become less frequent and hire car drivers suffer the consequences.
7. Once customers become accustomed to using Uber Taxi, Uber then introduces the Uber X service, which is again heavily discounted to begin with. They also simultaneously start removing the discounts applied to the taxi service.
8. It heavily markets the new service and provides free gifts and perks in order to make the rides interesting and novel.
9. Uber then launches heavily funded marketing campaigns, predominantly across social media, that lay false claim to issues such as government compliance, driver accreditation and insurance of the Uber X service in order to dupe the public into thinking the service is safe and legitimate.
10. Customers switch from Uber Taxi to Uber X in order to take advantage of the discounts.
11. Uber taxi trips become less frequent and taxi drivers suffer the consequences.
12. Finally Uber rallies customers to petition governments for the continuation of services in spite of government regulators clearly stating the Uber X service is illegal.
13. Uber continues to operate Uber X services and not only blatantly disregards “cease and desist” orders but also ramps up marketing and gathering petitions from the public in support of the Uber X service.
14. Uber abandons hire car and taxi operators and focusses entirely on marketing Uber X services to private drivers. It also increases age restriction on Uber Black cars and

⁵ <https://hbr.org/2014/07/regulation-is-hurting-cabs-and-helping-uber/>

⁶ <http://www.gizmodo.com.au/2013/09/uber-offering-free-taxi-rides-in-sydney-this-week-yes-really/>

forces accredited hire car drivers to take on Uber X work in order to generate additional income.

15. There is enormous public pressure for government reform to change the laws to allow Uber X to operate. Many of the public are to the last minute unaware of the risks associated with Uber X.
16. NSW hire car and taxi drivers suffer diminishing incomes and the domino effects of not being able to provide basic living requirements for themselves and their families. In NSW many operators have either left the industry or taken additional jobs in order to supplement income for their families.
17. Once Uber has a strong hold on a marketplace it commences “surge” pricing, which is supposedly a strategy to entice drivers to a location where demand is high and supply low. We have evidence shared by Uber drivers in February of 2014 stating that Uber had not activated new drivers in order for existing drivers to enjoy and profit from surge pricing on Valentine’s day (2014). This is appalling and unconscionable manipulation of supply and demand in order to increase costs and therefore profitability.

Once the monopoly is established to a sufficient degree, Uber then applies a hike in the cost of its services to consumers, thus achieving its end goal; a monopoly of the industry and fares significantly higher than initially offered by regulated operators.

In our researched opinion, Uber and other ride share schemes have their sights on a monopoly and they achieve this by stealth. The loss of income to genuine, compliant operators which will flow to non-compliant, heavily funded aggressors such as Uber, will be significant and will inevitably see the existing industry wiped out and replaced with a monopoly which can and will fix pricing at any level it deems fit.

This will not only have a serious detrimental effect on legally-compliant operators, their staff, drivers, extended families and the government through an increased social welfare burden, but it will ultimately disadvantage NSW consumers and limit their choices.

Misleading or deceptive conduct

Uber has consistently made the following false representations to the public:

1. false representations of collaboration with government bodies;
2. false representations that ride share travellers are covered by insurance;
3. false representations that drivers are carefully vetted in collaboration with RMS;
4. false representations in media statements claiming it is nothing but a technology company and that it is neither a transport company or an employer of drivers,
5. most recently false representations that it is simply a “lead generation” company.

By making such differing and false claims, Uber is deceiving passengers as to the service they are actually purchasing and the contract under which they pay for that service. Furthermore, misrepresentations like this are another example of Uber’s attack on the Australian market by illegal stealth.

Unconscionable Conduct

Uber's consistent misrepresentation of the facts has led to a situation where the consumer is at a special disability or risk. We view this as unconscionable conduct.

This disability arises from the consumer not understanding what the risks are when securing services from Uber across its entire offering of Uber Black, Uber Taxi and Uber X.

These risks can be summarised for the purposes of this document as:

1. irregular fare structures through surge pricing due to Uber-manipulated supply and demand;
2. misleading statements of driver credentials
3. denial of responsibility in relation to the driver who was issued the Uber application being the actual driver fulfilling Uber work (drivers sharing phone between shifts);
4. insufficient public liability insurance when travelling under the ride share scheme; and misrepresentations of the accreditation of drivers under the ride share scheme.

Insufficient Driver Accreditation and risks to public safety

The law requires drivers of hire cars to be of good repute and in all other respects a fit and proper person. Drivers have to demonstrate the capacity to meet and continue to meet the appropriate requirements to the degree and in the manner required under the accreditation, namely

1. financial viability
2. safety of drivers, passengers and the public
3. vehicle maintenance

On its website, Uber explicitly states that Uber *'is not a transportation provider'*, despite its provision of services to the contrary. As Uber, by its own thinking, does not fulfil the role of a *'person operating a taxi-cab or hire car service'* the above conditions are ignored, and public safety is neglected. This is a grave and erroneous misinterpretation of the law.

All aspects of hire car and taxi licences, including the grant, renewal, term of licence and conditions of the licence are monitored and regulated by the strict conditions imposed by RMS.

In stark contrast to these strict conditions, the complete and exact requirements and regulations of an Uber driver are not publically available. From the limited information available, it seems at most, Uber provides an assurance to passengers that drivers are 'Uber Qualified' and 'Rider Rated'.

In its attempts to lure new drivers, Uber advertises the basic requirements of a proposed driver primarily based upon the make and model of the car and the profession of the

proposed driver. As a minimum requirement, Uber, operating in Sydney, merely requires its drivers to be over the age of 24 years and to have a car that is no older than 9 years.

Several investigative journalism initiatives have reported convicted criminals easily becoming 'Uber Qualified' and commencing public transport in their own vehicles.⁷

There have also been several reported cases of convicted felons perpetrating criminal activities against their customers. Uber and other ride sharing providers are increasingly under scrutiny regarding their process of vetting drivers⁸. One Uber-approved driver with a 20-year criminal record, acting undercover for a news reporting crew, indicated that her *'first thought after taking a passenger from home to airport would be to go back to their home and check out what valuables she could take from their unattended house'*.⁹

Taxation issues

We are of the opinion that the lack of visibility and accountability of non-compliant foreign operators and ride sharing drivers is a very real and significant risk to NSW including the area of economic stability. Income generated from ride share schemes is not likely to be declared in NSW because the schemes rely on drivers declaring their own income from these schemes and no tax is withheld.

As Uber states, it is not an employer, and therefore it does not withhold tax or pay superannuation on the income generated from these scheme. The result may be a black hole in federal tax revenues created by a rogue company that ignores regulation.

Other taxation implications outside the scope of this submission would involve tax evasion by a foreign operator who does not see itself as a transport provider and whose gains are directly secured in an overseas tax haven without making any contributions to the Australian economy it seeks to disrupt. This bleeding out of the transport economy has far-reaching social implications for NSW residents and operators alike. In the USA Ms Hillary Clinton has recently characterized the on-demand economy *as committing wage theft*.¹⁰

In NSW Uber has recently been order to commence paying GST but we anticipate as with every other lawful order, Uber will most like defy this instruction and continue to operate, rallying strong public pressure against the government and challenging the ruling in the courts.¹¹

⁷ <http://www.forbes.com/sites/ellenhuet/2014/06/03/uber-driver-with-felony-conviction-charged-with-battery-for-allegedly-hitting-passenger/>

⁸ http://www.nytimes.com/2014/12/10/technology/ubers-system-for-screening-drivers-comes-under-scrutiny.html?_r=0

⁹ <http://www.nbclosangeles.com/news/local/Risky-Ride-Uber-Investigation-256604571.html>

¹⁰ <http://www.morningnewsusa.com/hillary-clinton-calls-ubers-employment-practices-wage-theft-2328083.html>

¹¹ <http://thenewdaily.com.au/news/2015/05/22/reasons-to-avoid-uberx/>

Environmental Issues

As indicated earlier, ridesharing companies would have us believe that the benefit is all about people from the general public making good use of the empty seats in their cars to transport members of the public going in the same direction for a small fee and that one of the many associated benefits is the reduced carbon footprint of this elegant form of “car-pooling”.

We are of the opinion that this is not the case and that ridesharing companies rather take the view that unused, idle assets such as private vehicles sitting in people’s garages are objectively capable of earning an income for their owners and the third party ride-share companies.

One of the material outcomes therefore of this ridesharing economy is the significant increase of motor vehicles on the roads waiting for and conducting private ridesharing transfers which substantially increases the carbon footprint of point-to-point transfers.

A CALL ON GOVERNMENT

The NSW Hire Car Association wishes to engage in meaningful dialog with all relevant authorities around the issue of ridesharing. We understand that emerging technology poses substantial questions in relation to how point-to-point transport will evolve in the near future.

The NSW Hire Car Association also strongly supports reform across our industry but it is our opinion that *anarchy capitalism* is not the answer and that reform must be introduced in an orderly manner where the new regulations lawfully apply to all operators equally.

We have been invited to meet with the Task Force appointed to address this very issue under the leadership of Professor Gary Sturgess and look forward to a fruitful and mutually beneficial dialog.

Until such a time as the NSW government makes a decision on the future of the ground transport industry and the potential role of new models of transport services, **we respectfully but urgently call on government to uphold the laws of NSW and immediately stop illegal ride sharing in NSW.**

Any action less than this would be disrespectful and unfair to law-abiding transport operators who have invested heavily over decades to support the NSW Transport economy and provide safe and secure services to the public as outlined in the laws of this state.

END DOCUMENT