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Cases	Commonwealth	Fair Work Commission	2022	[2022] FWC 1189

Asim Nawaz v Rasier Pacific Pty Ltd T/A Uber B.V. [2022] FWC 1189 (17 June 2022)

Last Updated: 21 June 2022

[\[2022\] FWC 1189](#)

FAIR WORK COMMISSION

DECISION

[Fair Work Act 2009](#)

[s.394](#)—Unfair dismissal

Asim Nawaz

v

Rasier Pacific Pty Ltd T/A Uber B.V.

(U2021/3449)

COMMISSIONER HAMPTON

Application for an unfair dismissal remedy -- jurisdictional objection – whether applicant an employee and protected from unfair dismissal – required approach identified following recent High Court judgements – major factors and multifactorial test applied to the parties’ legal rights and obligations – on balance, applicant not an employee – no jurisdiction to hear matter – application dismissed.

1. What this decision is about

[1] Mr Asim Nawaz (**Applicant**) has made an unfair dismissal application to the Fair Work Commission under [s.394](#) of the [Fair Work Act 2009](#) (the FW Act) claiming to have been unfairly dismissed by the Respondent, Rasier Pacific Pty Ltd (**Rasier Pacific, Respondent or Uber**). The application cites the Respondent employer as “trading as Uber B.V.”. Based upon material before the Commission in this matter, Uber B.V. is a separate related corporation rather than a trading name and is a party to certain arrangements relevant to this matter in its own right. However, unless the distinction is important, references in this Decision to Uber include both entities.

[2] Mr Nawaz operated a passenger vehicle using what may be described as the Uber rideshare platform to transport passengers who use the Uber platform (**Riders**). Amongst other elements, this involved Mr Nawaz using a computer application (**Partner App or Driver App**) to facilitate the provision of those services. In that context, Mr Nawaz, Rasier Pacific and Uber B.V. entered into a written contract on 27 July 2019 (**Services Agreement**). Associated with the Services Agreement was a Service Fee Addendum (**Fee Addendum**). Unless the distinction is important, references in this Decision to the Services Agreement include the Fee Addendum.



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ADELAIDE, 17 JUNE 2022

[3] In April 2021, Uber removed Mr Nawaz's access to the rideshare platform apparently in light of a complaint made by a Rider who had been transported by him. This is the context in which this application was made; however, given the nature of the present proceedings I make no findings, and draw no inferences, about the substance of these allegations.

[4] In opposing the application, Uber contests Mr Nawaz's eligibility to make this application and contends that he was not a person protected from unfair dismissal on the basis that he was not an employee.

[5] This decision deals with the jurisdiction of the Commission to hear and determine the substantive unfair dismissal application.

[6] It is not in dispute that for Mr Nawaz to make and advance this application, he must have been an employee within the contemplation of the FW Act. This arises from, amongst other sources, the requirement in s.382 that in order to be protected from unfair dismissal, the person (the applicant) must be an employee who has served at least the minimum employment period. Under s.380 of the FW Act the terms "employee" and "employer" are defined by reference to the concepts of national system employee and national system employer as defined in s.13 and s.14 respectively.^[1]

[7] Relevantly for present purposes, employee has its normal meaning which imports the common law test as to what constitutes an employee and employment.^[2]

[8] After conducting a conference with the parties and considering the jurisdictional question to be determined and the evidence involved, I concluded that a hearing would be the most effective and efficient way to resolve this matter.^[3] In that regard, as Mr Nawaz was not separately represented I took appropriate steps to facilitate the provision of his evidence and for submissions to be made having regard to his preference to communicate his position in writing after having the opportunity to take informal advice and undertake research.

[9] The unfair dismissal application has been subject to a hearing on 28 July 2021 in relation to the jurisdictional objection. In making the application and advancing his case, Mr Nawaz initially referred to and in part relied upon the outcome of the decision of the Commission in *Diego Franco v Deliveroo Australia Pty Ltd*^[4] (**Franco**). In addition, Mr Nawaz also provided comprehensive material that he contends distinguishes his application from other decisions of the Commission concerning the Uber rideshare platform, which found against the existence of an employment relationship.

[10] For its part, Uber initially conducted its case primarily by reference to the decision of the Full Bench of the Commission in *Amita Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats*^[5] (**Gupta Full Bench Decision**) and the application of the common law test of employment arising from *Hollis v Vabu Pty Ltd*^[6] (**Hollis v Vabu**) as distilled and applied by the Commission in *French Accent v Michael Anthony Do Rozario*^[7] (**French Accent**).

[11] The decision in *Franco* has been subject to appeal and by the time of the initial hearing in this matter, that appeal had been heard by a Full Bench of the Commission and a decision reserved. During the hearing, I advised that whilst I would reserve a decision in this matter, as both parties had relied upon, or in the case of Uber referred to, *Franco*:

"...Although there are differences in context and factual differences, it is likely that any decision in that matter may be relevant to the jurisdictional issue that I need to determine here, at least in terms of the principles that might be applied to applying the common law test of whether or not this relationship was one of employment.

So as a result, if that decision is made before I am ready to give a decision in this matter, then I will provide an opportunity for parties to make supplementary written submissions on the appeal decision. If, however, that decision is not made or announced by the time I am ready to

give my decision the likelihood is I will just issue my decision.”^[8]

[12] There were also 2 subsequent relevant developments that have impacted upon the timing and disposition of this matter. Firstly, the Full Bench dealing with the *Franco* appeal determined in *Deliveroo Australia Pty Ltd v Diego Franco*^[9] (**Deliveroo stay decision**) to stay proceedings in that matter. The context for that decision and the outcome was as follows:

“[1] In a statement issued on 6 August 2021, we indicated that we intended, in light of the decision of the High Court in *Workpac Pty Ltd v Rossato & Ors*, to give consideration to deferring the determination of the appeal in this matter until the High Court has heard and determined two appeals before it, being appeals against Federal Court Full Court decisions in *Jamsek v ZG Operations Pty Ltd* (matter S27/2021) and *CFMMEU v Personnel Contracting Pty Ltd* (matter P5/2021). These appeals are both concerned, like the appeal before us, with the employee/independent contractor distinction, and will be heard together by the High Court on 31 August and 1 September 2021. We conducted a hearing earlier today to provide the parties with an opportunity to make submissions about the postulated deferral.

... ..

[5] We have decided that the appropriate course is to defer the determination of this appeal until the High Court has heard and determined the appeals in *Jamsek* and *Personnel Contracting*. This appeal is a matter of some importance, given that it is likely to have significance for the whole of Deliveroo’s workforce and perhaps also for the “gig” sector of the economy more broadly. We agree with Deliveroo that the decision in *Rossato* (particularly at [101]) has, intentionally or otherwise, called into question what principles are to be applied in determining whether a relationship is one of employment or independent contracting and the status of *Hollis v Vabu* in that respect. In all likelihood, the High Court’s decisions in *Jamsek* and *Personnel Contracting* will provide authoritative guidance as to these issues.” (citations omitted)

[13] The decisions in the matters referred to in the *Deliveroo stay decision* were as follows:

- *Workpac Pty Ltd v Rossato & Ors*^[10] – **Rossato**;
- *Jamsek v ZG Operations Australia Pty Ltd*^[11] and
- *CFMMEU v Personnel Contracting Pty Ltd*^[12]

[14] Secondly, in light of the above developments Uber applied for this application to be stayed, or otherwise adjourned, until the High Court delivered its judgments in the *Jamsek* and *Personnel Contracting* appeals. The stay application was opposed by Mr Nawaz but granted by this arm of the Commission on 26 August 2021 for reasons set out in *Asim Nawaz v Rasier Pacific Pty Ltd T/A Uber B.V.* [2021] FWC 5178 (**Nawaz Stay Decision**). I observe that many other matters before the Commission and the Courts were also stayed on the same basis where the approach to the legal characterisation of a workplace relationship was central to the matter.

[15] The High Court subsequently heard, and on 9 February 2022 delivered its judgments in, the *Jamsek* and *Personnel Contracting* matters as follows:

Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd [2022] HCA 1 – **Personnel Contracting**; and

ZG Operations & Ors v Jamsek & Ors [2022] HCA 2 – **Jamsek**.

[16] Given the import of the High Court decisions, I arranged for the parties to update their positions and make further submissions regarding this matter. The bases of the respective positions advanced by the parties were adjusted and these are set out below. As required, the state of the law arising from *Personnel Contracting* and *Jamsek* has been applied by the Commission and this has been of significance to the outcome in this matter.

[17] I observe that neither party sought to delay the determination of this matter pending the outcome in the *Deliveroo* appeal, which is yet to be further heard. Given all of the circumstances, including the different factual context applying in that matter, I did not consider that a further delay would be appropriate.

[18] As will become clear, I have ultimately determined on balance that Mr Nawaz was not an employee of Uber. The basis and consequences of that finding are set out in the Decision that follows.

2. The position of the parties and their evidence

2.1 Mr Nawaz

[19] Mr Nawaz contended that the High Court decisions in *Personnel Contracting* and *Jamsek* have removed the ambiguity about the tests to be applied. Further, when the relevant tests are applied to the circumstances of his relationship with Uber, this reveals that the relationship was that of common law employment. That is, the jurisdictional objection should be resolved in favour of the unfair dismissal application being heard and determined on its substantive merits.

[20] Mr Nawaz contends that the parties' relationship was not comprehensively set out in the written contract. I understand that this is intended to mean that this case should not be decided by reference to the written terms of the contract, but rather taking into account the manner in which the relationship was conducted in practice.

[21] The basis of this proposition includes that the contract does not specify the form of relationship and was ambiguous, requiring further examination by the Commission.

[22] Mr Nawaz also contends that the contract was a sham and that there were several factors which "invalidated" the contract. These included:

Material mistake or material uncertainty - related to the "relationships" clause of the contract.

Illegal dispute resolution clause which refers to the International Chamber of Commerce whereas a Centralised Booking Service operating in South Australia such as Uber is required to have an in-country dispute resolution process under the [Passenger Transport Regulations 2009](#) (SA) made under the [Passenger Transport Act 1994](#) (SA) – collectively the **SA Passenger Transport laws**.

The requirement under the contract that a party either accept amendments or leave the contract constitutes economic duress.

Unfairness in terms of not providing insurance or workers compensation for drivers and previously hiding the availability of insurance.

Expecting drivers to stop at no-parking zones and take rides on the Uber App's instructions.

A cursory reading of the contract gives the impression that Uber has undue influence on drivers. I understand Mr Nawaz to contend that this was the legal and practical fact.

[23] Mr Nawaz refers to the operation of the [Competition and Consumer Act 2010](#) (Cth) (**CC Act**) to support the above contentions. In relation to the proposition that the Services Agreement was a sham, Mr Nawaz also referred to s.357 of the FW Act, which is part of the (anti) sham arrangements contained within the General Protections provisions of Part 3-1.

[24] Mr Nawaz also contends, in effect, that the Services Agreement was varied by the subsequent contract of the parties. Amongst other matters he relies upon the following propositions that he contends operated despite the terms of the contract:

Uber controls the routes, penalises drivers who reject or cancel rides, questions when stops are made during the trips and ensures maintenance of strict cleanliness standards.

Uber has the right to control who rides are provided to by not allocating a particular rider to the driver.

There is no right in practice for the driver to calculate and charge their own fare.

An insurance cover for Uber's rideshare operation was maintained and this enabled Uber to lodge claims on behalf of the drivers. This was confirmed when Uber subsequently offered insurance cover to drivers without varying the contract.

[25] Mr Nawaz submits that the multifactorial test previously applied by the Commission continues to be relevant and that the following factors supported a finding of employment:

Control

Despite the stated driver's freedom and flexibility of logging onto the Uber App, Uber's conditions require expenditure and this means that the drivers cannot choose not to drive. The expenditures include:

Buying a newish model car;

Proving good health through medical tests;

Paying extra registration for a chauffeured vehicle;

Obtaining a Working With Children Check;

Obtaining a national Police Check;

Obtaining a car fitness certificate from one of Uber's nominated service centres;

Purchasing Compulsory Third Party Property damage cover of a specified value; and

Obtaining vehicle and operators accreditation from an Accreditations and Licensing Centre.

Once an Uber driver logs on, the whole of the control is exercised by the Uber. It decides from where a ride has to be taken. Sometimes, it does not give any ride to driver as a measure of punishment. This idleness period may also be taken as counter-balancing factor of freedom of working. A driver may roam the whole day with the car and spend money on petrol and tolls in cities like Melbourne and Sydney and come home with \$40 or \$50 as earnings.

Uber penalises drivers through its own performance matrix system. An Uber driver never wants to get penalised by passing or cancelling rides.

Whilst it is feasible for a driver to carry multiple Apps linked to different rideshare operators, it was not practical to be logged onto more than one at a time.

Uber automatically logs off a rider after the span of certain number of hours (12 hours) and asks them to take 8 hours mandatory rest break. This is control tantamount to employment.

Terms of Contract

Uber acts as the dominant party and any consideration of these terms must be cognizant of the circumstances in which that contract has been established.

Taxation

The taxation arrangement of the “unjust and invalid contract” are handled through an Australian Business Number (ABN). However, there is no bar on Uber to shift the arrangements to a Tax File Number (TFN).

An independent contractor forwards invoice to the other party for payment and all the duties and government taxes are paid by the independent contractor. Under the arrangements with Uber, the drivers are not required to send their tax invoices and are paid according to the set rates. Uber withholds government levies from the amount and remits the same after doing the accounting at their own end. This kind of payment arrangement is consistent with ‘**piece-rate**’ employees.

Setting up the rates

An independent contractor should quote a separate price for each job to reflect their varying costs. However, Mr Nawaz was paid at set rates unless Uber offered surge rates according to its own supply-demand matrix. These rates are provided by Uber without consultation.

Emanation and Uniform

Uber’s website requires the driver to display a logo on the vehicle and there are penalties for non-compliance.

The absence of a requirement to wear a uniform as an indicator of contractor status was an “absolutely absurd idea” given that many occupations and professions did not have that obligation.

Distinct profession or Trade

Work performed by drivers doesn’t involve an established profession, trade, or distinct calling. Such “low skill” work is more likely to be taken up by employees rather than independent contractors.

Uncertainty of return

An independent contractor knows the final amount paid by the client and the profit margin is roughly clear when the job is accepted. This does not apply to the Uber arrangements.

Provision of Inventory (PPE)

Independent contractors don’t get inventory (PPE) from the other party. Since the start of the current Covid-19 Pandemic, Uber has spent 50 million US dollars in supplying masks, sanitisers, wipes, and disinfectant sprays to the drivers because they wanted to take care of their business as well as their employees.

Incentives from the Company

Independent contractors do not get anything other than set rates given in the contract. Whereas an Uber driver is offered promotional or extra income on top of the set rates which makes them more of an employee rather than an independent contractor.

Sub-contracting or Sub-letting

An independent contractor can sub-contract or sub-let the job if sick and unavailable to do the contracted work, but an Uber driver doesn't enjoy such liberty. Uber shares a picture of the driver to each rider and advises them to report if they find a different person in the driver's seat. Further, the Uber app frequently requires the driver to send a facial image through the Uber App's own camera as a condition to log on to the App. Such limitation on transfer of a semi-skilled job goes against the concept of independent contractor.

Provisions for disciplinary action

Uber has an elaborate criterion for disciplinary action (suspension or cessation of access to the Under App) against drivers' "misconduct" whereas it doesn't have any obligation to its drivers. Provisions for discipline are more congruous with those of an employee agreement rather than a contract between two businesses.

Creation of Goodwill and Brand Name

Drivers won't get anything in terms of above rewards. An individual rating that an Uber driver gets from riders comes into play when Uber wants to discipline its drivers. Otherwise, riders rarely accept or reject the ride on the basis of that rating. Had Uber drivers been independent contractors, their hard-work and efficiency would have earned 'Goodwill' and 'Brand Name' for their individual businesses.

Own Business/Employer's Business Dichotomy

There are many factors that indicate the control exercised by Uber over its operations and that the drivers are part of that business. This also includes:

The requirement to regularly identify the driver by taking a 'selfie'; and

Restrictions on topics of discussion with riders, which reflects that Uber is concerned about its own business rather than the liberty/independence of the drivers.

[26] Mr Nawaz also relies upon the approach taken by other overseas jurisdictions to the Uber model. In particular, he contends that the following decisions and approach are relevant:

Uber BV and others v Aslam and others [2021] UKSC 5 (*Aslam*) including the following:

"101. Taking these factors together, it can be seen that the transportation service performed by drivers and offered to passengers through the Uber app is very tightly defined and controlled by Uber. Furthermore, it is designed and organised in such a way as to provide a standardised service to passengers in which drivers are perceived as substantially interchangeable and from which Uber, rather than individual drivers, obtains the benefit of customer loyalty and goodwill. From the drivers' point of view, the same factors - in particular, the inability to offer a distinctive service or to set their own prices and Uber's control over all aspects of their interaction with passengers - mean that they have little or no ability to improve their economic position through professional or entrepreneurial skill. In practice the only way in which they can increase their earnings is by working longer hours while constantly meeting Uber's measures of performance."^[13]

• The Association of the *Dutch Trade Union Federation (Federation of Dutch Trade Unions) v Uber BV*^[14] (*DTFU*) a decision made by the Court of Amsterdam on 13 September 2021, and in particular:

“26. In today's technology-dominated age, the criterion of 'authority' has taken on a more indirect (often digitally) controlling interpretation that deviates from the classical model. Employees have become more independent and perform their work at more variable (self-chosen) times. It is judged that the relationship between Uber and the drivers involves this “modern relationship of authority”. The following applies by way of explanation.

27. The drivers can only register with Uber via the Uber app. The conditions under which they can start using the Uberapp are non-negotiable for them; they must first fully accept all conditions in order to be able to perform taxi rides via the Uber app. Uber unilaterally determines the conditions under which the drivers work, which conditions can also be unilaterally changed by Uber. That also happens regularly. The drivers cannot refuse those changes, they must – if they want to continue driving via the Uber app – accept the changed conditions before they can login to the Uber app again.

28. The algorithm of the Uberapp then determines how the rides are allocated and which priorities are set. The algorithm does this based on the priorities set by Uber. As explained by Uber at the hearing, when offering a ride, Uber only provides a limited amount of data, so that the driver cannot accept only the trips that offer him the most benefit. The Uber app determines which driver is offered a ride (first). A route is recommended on which the fare indicated to the customer is based. The drivers have no influence on that price, as Uber sets the fares. It is true that the customer and the drivers can adjust the fare by mutual agreement by taking a route other than the one proposed, but there is no question of free negotiation between passenger and driver. After all, it is not obvious that a passenger will agree to a different route if this leads to a higher fare.

29. The Uberapp also has a disciplinary effect. After all, the drivers are given a rating via the Uber app and are therefore assessed, which can affect access to the Uber platform and the offer of the rides. A low average rating can lead to removal from the platform, while a high average rating is an important condition to qualify for the extra Platinum or Diamond status with Uber, which provides (financial) benefits for the driver. For example, a driver with a Platinum or Diamond rank is more likely to be offered the financially attractive rides from Schiphol.

30. In addition, it was stated at the hearing on behalf of Uber that Uber can – simply put – “turn the buttons of the app” and change the settings. This change affects the ranks to be achieved by the drivers and, in connection therewith, the range of rides. As a result, the entrepreneurial freedom so advocated by Uber is essentially absent.”

[27] Mr Nawaz also contends that Uber provided insurance cover for riders and drivers. This was, in effect, claimed to be a “Group Accident policy” that drivers cannot use to cover themselves. That is, it would be Uber which would lodge a claim on the “employee’s” behalf and such “control” can only be exercised by employers.

[28] Further, in final submissions Mr Nawaz also raised issues associated with the cleanliness standards for vehicles, other “benefits” provided by Uber and contentions associated with the notion that Uber was a Person Conducting a Business or Undertaking (**PCBU**) under Work Health and Safety (**WHS**) laws and its actions, including in relation to the Covid-19 Pandemic, were consistent with this notion rather than the Driver (himself) being a PCBU.

2.2 Uber

[29] Uber contends that Mr Nawaz was not an employee under the FW Act and not capable of being dismissed within the meaning of the relevant provisions.

[30] As to the broad approach to be adopted by the Commission, Uber contends that the recent decisions of the High Court in *Personnel Contracting* and *Jamsek* clarify that the characterisation of a relationship of employment proceeds by reference to the rights and obligations of the parties under the terms of any written agreement between them, where the parties have comprehensively committed the terms of their relationship to a written contract or agreement and that document is not ineffective. While the "totality of the relationship" may be considered, this must be by reference to various indicia but such indicia are to be considered by reference to, and as found in, the express terms of the comprehensive agreement (and not by reference to post-contractual conduct or the manner of the performance of the contract).

[31] Further, Uber contends that where the parties have a comprehensive written agreement, as in the case here, there is no reason to determine the character of the parties' relationship by undertaking a wide-ranging review of the entire history of the parties' dealings, nor to "rake through the day-to-day workings of their relationship after the formation of the contract." Accordingly, taking an expansive approach to the characterisation of the relationship between the parties by considering the "substance and reality" involves a departure from orthodox contractual analysis and is not permitted.

[32] The basis of Uber's position may be summarised as follows:

The Services Agreement is critical to the analysis of the relationship;

The Services Agreement is a comprehensive written agreement between the parties which establishes the rights between the parties;

Under the terms of the Services Agreement, the Respondent does not have the right or ability to control the Applicant in the performance of his work, let alone whether he performed work at all. The Applicant was solely responsible for determining whether he worked at all and, if so, when he worked and the most effective manner to perform each trip (clauses 2 and 4). There was an absence in the Services Agreement of any other manner of control that may be expected in an employment relationship;

The critical terms of the Services Agreement are: clause 2 – "Provision of Transportation Services", clause 3 – "Your Relationship with Users", clause 4 – "Your Relationship with the Uber Group", clause 6 – "Requirements", clause 8.1 – "Fare Calculation and Your Payment", clause 10 – "Service Fee", clause 12 – "Taxes", and clause 15 – "Devices". None of those terms, on a proper characterisation, amount to there being an employment relationship;

It could not properly be contended that the Services Agreement is a sham; and

Accordingly, on a proper characterisation of the Services Agreement, the relationship between the Applicant and Respondent is not one of employment, including given the absence of any indicia of weight that would point to such a relationship.

[33] Uber also contends that with some modification to the multi-factorial approach in light of *Personnel Contracting* and *Jamsek*, the Commission should be satisfied that the rights and obligations contained in the Services Agreement bear none of the essential hallmarks of an employment relationship because:

Control: There is an absence of the right to control the performance of work (or its exercise) by the Applicant in the Services Agreement, in particular because the Applicant "retain[s] the sole right to determine when and for how long [he] ... will utilise the Driver App or the Uber Services" and he "alone decide[s] when, where and for how long [he]... want[s] to use the Driver App, and when to try [sic] to accept, decline or ignore a User request" (clause 4).

Non-exclusivity: The Applicant owed no exclusivity to the Respondent, with the Services Agreement providing for the express right of the Applicant to use other software application services in addition to the Partner App, and being under no obligation to notify the Respondent if he chose to do so (clause 4).

Emanation of the business: The Applicant is not presented as an emanation of the Respondent's business, and the Services Agreement specifically provided that the Applicant was not required nor permitted to display the Respondent's (or "Uber's") name, logos or colours on any vehicle, or to wear any uniform or other clothing displaying such livery, unless required by law (clause 4).

[34] In this respect, Uber submits that, in accordance with *Personnel Contracting* and *Jamsek*, those indicia remain relevant to the characterisation of the relationship between the parties but only as far as they are found and referred to in the express terms of the Services Agreement or the associated Fee Addendum. To that end, Uber also contends that the post-contractual and non-contractual matters relied upon by Mr Nawaz, should now be disregarded by the Commission.

[35] Uber also contends that the reasoning provided in the *Gupta Full Bench Decision* remains relevant to the question before the Commission. That is, the indicia of "a requirement to perform work at particular times or in particular circumstances, exclusivity when work is being performed, and presentation to the public as serving in the business" were essential hallmarks of an employment relationship and ultimately resulted in a finding that Ms Gupta was not an employee. It further submits that those indicia were all grounded in the contract between Ms Gupta and Portier Pacific Pty Ltd. By parity of reasoning, the same should apply in this case. In particular:

Control

The right or ability to control the activities of a putative employee remains a relevant factor in characterising the relationship between the parties.

Under the terms of the Services Agreement, there is an absence of a right to control the work of the Applicant because its express terms provided:

that the Applicant had the right to determine if, when and for how long he would use the Partner App (as defined in the Services Agreement) and retained the right to accept, reject or ignore a rider's request for Transportation Services (clause 4);

that the Applicant had discretion for how he was to perform the work, was free to choose any route, could drive in a manner he saw fit (provided he obeyed the law) and was able to work for others whilst logged onto the app (clauses 2 and 4); and

no other terms in the Services Agreement amounted to providing the Respondent with an ability to control the Applicant over when nor how he performed work (clauses 2 and 4).

- The terms of the Services Agreement also have an absence of any obligation by the Applicant to perform work as and when it is required. That is one of the irreducible minima of an employment relationship, such that if it is not present then the contract is necessarily not one of employment. The position of the Applicant is analogous to the workers who were held in *Commissioner of Pay-roll Tax (Vic) v Mary Kay Cosmetics Pty Ltd*¹⁵¹ not to be employees because "they were not compelled to do anything, except in certain negative respects ... the only spur which may keep her active is self-interest, but the level of her activity remains entirely a matter for her".

To the extent that the Services Agreement reserved a degree of control for the Respondent to deactivate or otherwise disconnect the Applicant for violation of the terms of the Services Agreement or relevant Uber policy (including the Community Guidelines) (see clause 4), this

was only to the extent necessary to achieve the Respondent's overall commercial objectives and to meet its statutory obligations.

As stated in the *Gupta Full Bench Decision*: "There is nothing particularly unusual about a principal establishing and enforcing performance and quality standards in respect of independent contractors engaged to perform work" (at [66]). Such standards do not provide any right to the Respondent to control or direct the allocation of work, or the way in which the Applicant undertook the work in a broader sense. This is properly a strong indication that the relationship was not one of employment.

The terms of the Services Agreement demonstrate no right to control as may be exercised over an employee. The absence of control points decisively away from the relationship being one of employment. Here, the Applicant has absolute discretion over what work he chooses to do, and how he will carry out that work if he chooses to do it.

Non-exclusivity

The non-exclusivity of undertaking work for a putative employer remains a relevant indicia.

Under the terms of the Services Agreement, the Applicant retained the complete right to use other ridesharing networks and apps, and to engage in any other business or income generating activities (clause 5).

It was a relevant factor in *Jamsek* that Mr Jamsek and Mr Whitby were entitled under the terms of their contracts to work for third parties, despite contentions that non-contractual "expectations" or practical considerations of availability of time to do so, meant in that case that they did not in fact perform work for others. As is the case here, the Applicant had the contractual right to perform work for others.

Further, while it may be accepted that non-exclusivity may be consistent with casual employment per se, such non-exclusivity operates only outside of the period of any engagement for a casual employee. No form of employment, whether casual or permanent, reserves rights for employees that the Applicant enjoyed under the Services Agreement. Employees including casuals assume an obligation to work for the duration of engagement for the employer who has so engaged them. They work exclusively, for the period of the engagement, while completing the work allocated during the engagement. Such employees also owe duties of fidelity. The Applicant never assumed such obligations to the Respondent. In effect, he had control over the allocation of work. "[T]he right to do as little or as much work as one wants and to take as many holidays as one feels like for as long as one wants, is not a common feature of employment relationships.

Accordingly, the commentary concerning casual employment in *Personnel Contracting* (at [84]) ought properly be seen as a rejection of the conclusion of the primary judge in that matter, in light of the relevant contractual terms and the ability to exercise those rights only on an overall engagement basis, and not on a day to day basis.

It remains the case that an express term permitting the Applicant to work for others, including accepting work from competitors at the very same time as working on the platform of the Respondent, is entirely inconsistent with the Applicant being an employee of the Respondent. It is a further indicator of a lack of the ability to control the Applicant.

Provision of equipment

The provision of plant and equipment remains a relevant indicia. It may be further noted, where the provision of equipment, such as a vehicle, is provided compendiously with the skills of operating that vehicle, this is characteristic of an independent contractor. That is the case here.

The Services Agreement provided that the Applicant was required to provide and maintain an insured vehicle, licenses, mobile device and wireless data plan and other equipment (clauses 2, 3, 4, 15 and 21).

It should properly be seen to involve a not inconsiderable capital investment indicative of an independent contractor, and as being inconsistent with the Respondent having a right of control over the Applicant's work.

The post contractual provision by the Respondent of personal protective equipment is not relevant. It is, in any event, a matter of statutory compliance and does not point to an employment relationship given the broad application of work health and safety laws beyond employer-employee relationships.

Livery and uniform

The requirement to display livery or wear uniforms, and the provision of such items, remains a relevant indicia.

Under the Services Agreement, not only is there an absence of any requirement to display livery or wear a uniform, there is an express direction that the Applicant was not required or permitted to display any of the Respondent, Uber B.V. or any of their affiliate's names, logos or colours on any vehicle, or to wear any uniform or other clothing displaying such livery (clause 4).

Accordingly, under the terms of the Services Agreement, the Applicant was not presented as an emanation of the Respondent. That indicium is central to any employment relationship. The absence of representation and of identification with the alleged employer is indicative of a relationship of principal and independent contractor.

In respect of the requirement to display Uber logos in accordance with applicable State law this is a non-contractual matter and not relevant to the characterisation of the relationship.

It is, in any event, a matter of statutory compliance imposed by a State government authority upon the Applicant, and not an obligation imposed by the Respondent under the Services Agreement. While the Services Agreement required the Applicant to comply with applicable laws in the performance of the Agreement (clause 24), that is entirely consistent with a principal requiring compliance with laws by an independent contractor engaged to perform work.

Taxation arrangements and GST

The Services Agreement provides that the Applicant was responsible for calculation and remission of tax (clause 12.1), and also provided that the Applicant was responsible for taxes on his earnings (clause 12.1). Further, the effect of clause 12 is that GST is payable on the earnings of the Applicant. There is an absence of any reference to PAYG withholding.

Those indicia point to an assumption of responsibility for taxes by the Applicant, and is contrary to the relationship being one of employment. The Respondent submits that it warrants appreciable weight as an indicium of an independent contractor arrangement. The terms show the parties sought to acquit their regulatory and taxation obligations and ought not be deprecated.

Insurance

The Services Agreement provided that the Applicant was responsible for automobile insurance (clause 21), and was not entitled to workers' compensation (clause 21.2). This indicia

points to the assumption of risk by the Applicant, and is contrary to the relationship being one of employment.

Contractual characterisation

The Services Agreement expressly states that the relationship between the Applicant and Respondent is not one of employment, and that the Services Agreement is not an "employment agreement" (clause 28.1). It is accepted that attaching a 'label' to describe a relationship which is inconsistent with the rights and duties set out in the contractual terms, will not be either determinative nor effective in making the relationship something that it is not on a proper characterisation.

However, it is not suggested here that the Services Agreement was a sham, or that it was varied by conduct. There is no basis on which to find that the description of the relationship by the parties contradicts the nature of the relationship that they actually created, at least insofar as it stipulated that the relationship was not one of employment.

While it may be "rare" that the parties' description of their status or relationship will be helpful to a court or tribunal in ascertaining the rights and obligations of the parties, it remains the case that such a description can shed light on the objective understanding of the operation of their written agreement. As is the case here, the terms of the Services Agreement recording that the parties do not intend the relationship to be one of employment, is entirely consistent with the other terms of the Services Agreement and their operative effect, as described above. Those descriptions ought be given weight in that regard, as it remains the correct position that "the actual terms and terminology of the contract will *always* be of considerable importance".

Other indicia

In respect of other indicia the following remain apposite, and point toward the relationship between the Applicant and Respondent not being one of employment:

Clause 8 of the Services Agreement provides that the Applicant did not receive "wages" but payment of trips from Riders;

The Services Agreement is silent as to leave and accordingly does not specifically provide for leave entitlements;

Clause 28.2 of the Services Agreement provides that payments to the Applicant are inclusive of superannuation (if deemed an employee for superannuation purposes) but does not state that superannuation contributions are made on the Applicant's behalf; and

Clause 21.2 of the Services Agreement provides that the Applicant was not covered by workers compensation insurance of the Respondent.

[36] Uber relies upon a series of cases^[16] concerning the Respondent, or other members of the Uber group in Australia and New Zealand. It contends that each of those cases ultimately formed the view that the "driver partner"/"delivery partner" (operating on either the Uber Rides or Uber Eats platform) was not an employee, for reasons that were grounded in the relevant Services Agreement. Accordingly, those conclusions are apposite to this case and lead to the same conclusion that the Applicant is not an employee of the Respondent.

[37] In relation to Mr Nawaz's contentions, Uber submits that certain of those submissions relate to post-contractual conduct and non-contractual matters and should be disregarded as follows in light of *Personnel Contracting* and *Jamsek*:

Notions associated with the differing bargaining power of the parties, the claimed unfairness and financial hardship do not bear upon the meaning and effect of the bargain struck between

the Applicant and Respondent in the form of the Services Agreement or bear upon the legal characterisation of the relationship.

The suggestion that the contract is "invalid" is not explained, except for what appears to be a reference to bargaining power which, as noted, is irrelevant. Further, any claim that the Services Agreement is a sham could not be sustained on the material before the Commission. Such a claim would necessitate that both the Respondent and the Applicant had a common intention that the Services Agreement did not represent the actual arrangements between them, and was made for the purpose of masking or covering-up their true arrangement. No such case is, nor could, be made out.

Mr Nawaz makes reference to there being a "binary outcome", which is presumably a reference to the "own business/employer's business" dichotomy, or put more expansively whether the person is carrying on an independent business for themselves, or working in the business of another. While the plurality of the High Court has noted in *Personnel Contracting* that this dichotomy may be useful to focus attention on matters in the contract that bear more directly upon whether the work performed was so subordinate to the business, that it can be seen to have been performed by the person as an employee rather than part of an independent enterprise, it is not the actual nor correct test. That is acknowledged by the plurality. Thus, whilst the distinction may be useful, it has limits and will not be useful in every case. Indeed, such an analysis in cases such as the present are, with respect, not of assistance. It wrongly presumes that the answer to the question results in a binary outcome as to whether the person is an employee or independent contractor, which, again, deflects attention from the correct question. It is, in any event, only one factor for consideration.

The central question remains whether the Applicant was an "employee", and any suggestion of there being any alternative test should, and has been, resoundingly rejected. For the above reasons, it would be wrong for the Commission to approach its task by considering any different question.

[38] In relation to the various employment indicia relied upon by Mr Nawaz for the purposes of the "multi-factorial test", Uber contends that the Commission should not take into account the following matters as they are not grounded in the Services Agreement and are contrary to its express terms:

The impact of the ongoing conditions and costs (to drive for Uber) in terms of having to drive "especially on weekends" - This is in contrast to the express terms of the Services Agreement which provided the Applicant with the sole right to determine when, where and for how long to use the Driver App.

The notion that "it is absolutely impracticable to use two apps at the same time..." - this is in contrast to the express terms of the Services Agreement which provide that the Applicant had the "complete right to engage in other business or income generating activities, and to use other ridesharing networks and apps in addition the Uber services and the Driver App."

"Uber's own website is quite clear about this [display Uber logo] requirement." - this is in contrast to the express terms of the Services Agreement which provide not to display any Uber or Rasier Pacific logo on vehicles. Further, any requirement to display such signs are regulatory requirements (not requirements of the Respondent).

"An independent contractor knows the final amount paid by the client and his profit margin is roughly clear to him when he accepts any job. But Uber doesn't tell its (basic level) drivers that what will be the return/length of ride." - this is in contrast to the Services Agreement taken together with the Fee Addendum which sets out how fares are calculated.

There is an "elaborate criterion for disciplinary action against drivers' misconduct" and monitoring activity of drivers - such contentions are made without any reference to the Services Agreement, and none exist.

[39] Further, Uber denies that any comparison to Drivers as employees being paid "piece rates" and that the flexibility afforded of choosing when and how to work is allowed in a number of professions. Rather, it submits that the Services Agreement does not resemble either an employment relationship of a piece worker or a casual employee. No employee, whatever their designation, enjoy the discretions and absence of control as provided in the Services Agreement. In addition, in the terms of the Services Agreement, there is a complete absence of a firm advance commitment by the Respondent as to any future engagements, as is enjoyed by casual employees. The parallels are entirely "inapposite" and the Commission would be led into error in adopting them.

[40] Finally, the decisions of overseas courts and tribunals concerning other entities in the global Uber group are not binding on the Commission, nor are they relevant in light of the High Court decisions which have clearly enunciated the common law test of employment to be applied by Australian courts and tribunals.

[41] Uber opposed consideration of certain materials provided by Mr Nawaz as part of final submissions and in the alternative contended, in effect, that these elements were not inconsistent with the Services Agreement or the legal duties of the parties under its terms.

3. Observations on the evidence

[42] Mr Nawaz provided a series of documents^[17] and gave sworn evidence by reference to the various contentions set out in the originating application.

[43] As would be expected in the circumstances, Mr Nawaz's evidence contained elements of facts combined with elements of submissions about the impact of those facts. I have had regard to the relevant material and evidence with that distinction in mind.

[44] I found the evidence of Mr Nawaz to have been given genuinely and openly and where he gave evidence about what he had seen and did directly, I generally accept it. There were some matters where Mr Nawaz speculated about some of the facts based upon what he understood the case to be. In those circumstances, I have relied upon the direct objective evidence where it is before the Commission.

[45] Uber led evidence from Ms Margarita Peker, Head of Rider Operations for Australia and New Zealand, including by reference to a comprehensive witness statement.^[18]

[46] I also found Ms Peker's evidence to have been given genuinely and openly. I accept that evidence as to the facts. To the extent that any of that evidence ventured into matters that are properly issues for the Commission to determine, I have also treated those aspects as submissions.

[47] Where there is a conflict in the evidence, I have resolved this having regard to the degree to which the evidence was objective and based upon direct knowledge. This has meant that many of the factual findings are based upon the objective evidence of Ms Peker, objective matters that Mr Nawaz knew from his direct knowledge, and the relevant documentary material provided by both parties where the source and authenticity of the material was established.

[48] In final written submissions, Mr Nawaz provided some documentation associated with what was contended to be insurance arrangements applicable to Uber drivers, some "benefits" associated with Uber and some documents said to be associated with stopping at bus stops. Given the timing and manner of their provision, there is little by way of evidence to provide the necessary context. I have had regard to those documents, but with some significant caveats outlined in the consideration that follows.

[49] Ultimately, I am required to determine this matter based upon cogent evidence that is before the Commission.

4. The required approach to the characterisation of the relationship

[50] The High Court of Australia in *Jamsek and Personnel Contracting* pronounced on the approach to be adopted under the law in determining whether, absent a specific statutory definition or rule, a person is an employee or contractor. This also involved the High Court reviewing past decisions of the Court and other courts. Relevantly, elements of the past approach of the Commission (itself based on the extant court authority) as outlined in the Full Bench decision of *French Accent*^[19] are, to a large degree, no longer to be applied.

[51] Amongst the principles that now apply, the following are apposite in this matter:

The characterisation of the relationship is to be determined by reference only to the parties' legal rights and obligations.

- Where a comprehensive written contract is in place, this will be the primary source of the parties' legal rights and obligations, and these will be decisive of the characterisation of the relationship. This will apply unless the contract is a sham, or has been varied after it was made, or post agreement conduct or context demonstrates that a term is legally ineffective.^[20]
- The conduct and expectations of the parties after entering into the contract are not generally relevant to the assessment.^[21]
- The manner in which the relationship is worked in practice may be relevant for certain limited purposes, such as to find contractual terms where they cannot otherwise be ascertained^[22] or to determine the nature of any variation to agreed terms.^[23]
- It is permissible to have regard to objective events, circumstances and things external to the contract known to the parties at the time of contracting which assist in identifying the purpose or object of the contract.^[24]
- The relative bargaining power of the parties is not relevant. That is, the fact that the arrangement was brought about by the superior bargaining power of the company has no bearing on the meaning and effect of the contract.^[25]
- The "multifactorial" test remains appropriate; however, it is to be applied by reference to the parties' legal right and obligations not to the post contract conduct. In that respect, the terms of contract between the parties are not merely "factors" but are determinative.^[26] The manner in which the contractual terms address the mode of remuneration, provision of equipment, obligation to work, hours of work, delegation of work, holidays and the right to control may show that it is not an employment contract.^[27]

Whilst all relevant factors require consideration, two factors in particular assist in assessing the ultimate question of whether an applicant was an employee:

Control: The greater the degree (rights) of control exercisable by the principal/employer over the work performed, the greater the likelihood that an employment relationship existed.

- **Own business/employer's business:** The resolution of the question whether a person engaged to work for another as an employee or an independent contractor depends upon the extent to which, upon an analysis of the parties' rights and obligations under the terms of their contract, it can be shown that the person acts in the business of, and under the control and direction of, the other.^[28] In this way, one may discern a more cogent and coherent basis for the time-honoured distinction between a contract of service and a contract for services than merely forming an impressionistic and subjective judgment or engaging in the mechanistic counting of ticks on a multifactorial checklist.^[29]

While the “own business/employer’s business” dichotomy may not be perfect or universal (because not all contractors are entrepreneurs), it usefully focuses attention upon those aspects of the contractual relationship which bear more directly upon whether the worker’s work was so subordinate to the employer’s business that it can be seen to have been performed as an employee of that business rather than as part of an independent enterprise.

[30]

It is not necessary or suitable to ask whether the worker is working in their own business. This is not a binary choice between employment or own business. The better question is whether, by the terms of the contract, the worker is contracted to work in the business or enterprise of the purported employer.

[31]

- The notion of the generation of goodwill by the worker is not necessarily relevant or decisive.

[32]

- When assessing the significance of a relevant fact in the characterisation process, the court (Commission) should consider the extent to which the fact bears directly or obliquely on whether the worker is contracted to work in the employer’s business rather than part of an independent enterprise. The more directly it bears on that issue, the more significant it is.

[33]

The label applied by the parties to the contract is not decisive and does not act as a “tie-breaker” where the multifactorial test is ambiguous. The proper characterisation of the relationship is a matter for the courts, not the parties.

[34]

- Non-exclusive work may be consistent with casual employment and not just contracting. The fact that the worker was free under the contract to accept or reject any offer of work, and not precluded from working for others, are not necessarily contraindications of employment, since this is also commonplace for casual employees.

[35]

- Terminability at short notice and the absence of a guarantee of work of any direction are not decisive given that they may also be indicative of casual employment.

[36]

[52] In relation to the overseas cases relied upon by the parties, I do not consider that they are of much assistance now given the emphasis placed upon the contract-based legal rights and obligations of the parties under Australian law following the recent High Court judgements. In particular, those jurisdictions that have given significant weight to the practical post-contract conduct of the relationship, such as in *Aslam* and *DTFU* are now of limited guidance in Australia as to the proper legal characterisation of the relationship.

[37]

5. The facts of the matter

5.1 The terms of the Services Agreement

[53] The Services Agreement is a comprehensive set of terms and conditions. The relevant version of the Services Agreement and associated Fee Addendum are set out in full and attached as Attachment A to this Decision.

[54] There is little evidence before the Commission about the formation of the Services Agreement. The evidence that is before the Commission reveals that Mr Nawaz applied to become an Uber driver and the Services Agreement, which I understand to be a standard used at that time, was agreed to by him on 22 May 2019. I observe that Mr Nawaz undertook his first trip using the Uber Apps on 27 July 2019.

[38]

[55] Without detracting from the full terms of the Services Agreement, the following provisions were directly or indirectly relied upon by the parties concerning the general characterisation

of the relationship from within the contract itself:

“

2. Provision of Transportation Services. When the Driver App is active, User requests may appear in the Driver App if you are available and in the vicinity of the User. If you accept a User's request for Transportation Services, you will be provided with the User's first name and pickup location via the Driver App. You acknowledge and agree that the Uber App may provide the User with certain information about you, including your first name, contact information, photo, location, your vehicle make, model and license plate number. You shall not contact any User or otherwise use any of their personal information other than for the purposes of fulfilling Transportation Services. You acknowledge and agree that you alone will choose the most effective and safe manner to perform each instance of Transportation Services, and, except for the provision of the Uber Services and the licence to use the Driver App, you will need to provide (at your own expense) all necessary equipment, tools and other materials to perform Transportation Services.

3. Your Relationship with Users. You acknowledge and agree that your provision of Transportation Services to Users creates a legal and direct business relationship between you and the User. Rasier Pacific, Uber and their affiliates are not responsible or liable for the actions or inactions of a User in relation to you, your activities or your vehicle. You shall have the sole responsibility for any obligations or liabilities to Users or third parties arising from your provision of Transportation Services. You acknowledge and agree that you are solely responsible for taking such precautions as may be reasonable and proper (including maintaining adequate insurance that meets the requirements of all applicable laws) regarding any acts or omissions of a User or third party. You acknowledge and agree that, unless consented to by a User, you may not transport or allow inside your vehicle individuals other than a User and any individuals authorised by such User, during the performance of Transportation Services for such User. You acknowledge and agree that all Users should be transported directly to their specified destination, as directed by the User, without unauthorised interruptions or stops.

4. Your Relationship with Uber Group. You acknowledge and agree that Rasier Pacific's provision of the Uber Services creates a legal and direct business relationship between Rasier Pacific and you. You also acknowledge and agree that Uber's licence to you of the Driver App creates a legal and direct business relationship between Uber and you. Neither Rasier Pacific nor Uber shall be deemed to direct or control you generally or in your performance under this Agreement, including in connection with your provision of Transportation Services, your acts or omissions, or your operation and maintenance of your vehicle. Except as expressly set out herein, you retain the sole right to determine when and for how long you will utilise the Driver App or the Uber Services. You alone decide when, where and for how long you want to use the Driver App, and when to try to accept, decline or ignore a User request. A User request can be cancelled, subject to Uber's then-current policies (including the Community Guidelines located at www.uber.com/legal/community-guidelines/rides/anz-en/). You acknowledge and agree that you will not: (a) display Rasier Pacific's, Uber's or any of their affiliates' names, logos or colors on any vehicle(s); or (b) wear a uniform or any other clothing displaying Rasier Pacific's, Uber's or any of their affiliates' names, logos or colors, unless you and Rasier Pacific or Uber (as applicable) have agreed otherwise or if so required by law. You retain the complete right to engage in other business or income generating activities, and to use other ridesharing networks and apps in addition to the Uber Services and the Driver App. Rasier Pacific retains the right to, at any time at its sole discretion, restrict you from using the Uber Services in the event of a violation of this Agreement or any relevant Uber policy, your disparagement of Rasier Pacific, Uber or any of their affiliates, or your act or omission that causes harm to Rasier Pacific's, Uber's or their affiliates' brand, reputation or business as determined by Rasier

Pacific in its sole discretion. Rasier Pacific also retains the right to restrict you from using the Uber Services for any other reason at the sole and reasonable discretion of Rasier Pacific. Uber retains the right to, at any time at its sole discretion, deactivate or otherwise restrict you from accessing the identification and password key assigned to you by Uber ("Driver ID") and/or the Driver App, in the event of a violation of this Agreement, any relevant Uber policy, including the Community Guidelines or the Uber Privacy Policy (located at privacy.uber.com/policy/), your disparagement of Rasier Pacific, Uber or any of their affiliates, your act or omission that causes harm to Rasier Pacific's, Uber's or their affiliates' brand, reputation or business as determined by Uber in its sole discretion. Uber also retains the right to deactivate or otherwise restrict you from accessing the Driver ID and/or Driver App, for any other reason at the sole and reasonable discretion of Uber.

... ..

28. Relationship.

28.1 Rasier Pacific is acting as the limited payment collection agent solely for the purpose of collecting payment from Users on your behalf, except as otherwise expressly provided herein. This Agreement is not an employment agreement, and does not create an employment, independent contractor or worker relationship (including from a labour law, tax law or social security law perspective), joint venture, partnership or agency relationship. You have no authority to bind Rasier Pacific, Uber and/or their affiliates, or hold yourself out as an employee, independent contractor, worker, agent or authorized representative of Rasier Pacific, Uber and/or their affiliates.

28.2 Where, by implication of mandatory law or otherwise, you may be deemed an employee, agent or representative of Rasier Pacific, Uber or any of their affiliates, you undertake and agree to indemnify, defend (at Rasier Pacific's and Uber's option) and hold Rasier Pacific, Uber and any of their affiliates harmless from and against any claims by any person, entity, regulators or governmental authorities based on such implied employment, agency or representative relationship. The indemnity set out in this clause 28.2, insofar as it relates to a finding by a judicial body or legislative authority of competent jurisdiction that there is an employment relationship between you and Rasier Pacific, Uber or any of their affiliates, applies only to that proportion of Rasier Pacific's or Uber's liability that directly or indirectly relates to you holding yourself out to be an employee of Rasier Pacific or Uber or any of their affiliates, or any other act or omission by you that is not expressly authorised by Rasier Pacific or Uber and would reasonably suggest to a third party that you are an employee of Rasier Pacific or Uber or any of their affiliates. You expressly agree that where required or implied by applicable law or otherwise, you may be deemed an employee, agent or representative of Rasier Pacific, Uber or an Affiliate of Rasier Pacific or Uber, any payments made to you will be taken to be inclusive of (i) superannuation contribution amounts; and (ii) amounts equivalent to all taxes (including but not limited to income taxes) payable by you in respect of those payments, in each case that Rasier Pacific or Uber (or any of their affiliates) may otherwise be required to pay under applicable law.

29. **General.** You hereby acknowledge and agree that, by using the Uber Services, or downloading, installing or using the Driver App, you are bound by any future amendments and additions to this Agreement, information referenced at hyperlinks herein, or documents incorporated herein, including with respect to Fare Calculations. Continued use of the Uber Services or Driver App after any such changes shall constitute your consent to such changes. Invalidity of any provision in this Agreement does not affect the rest of this Agreement. Each of Rasier Pacific and Uber may assign or transfer this Agreement or any or all of their respective rights or obligations hereunder, in whole or in part, without your prior consent (you may not, however, as the Agreement needs to remain with you). Should Rasier Pacific or Uber do so, you have the right to terminate this Agreement immediately, without prior notice. Each of Rasier Pacific and Uber may subcontract its rights and obligations under this Agreement.

This Agreement, including the recitals and all supplemental terms, constitutes the entire agreement and understanding of the parties with respect to its subject matter, and replaces and supersedes all prior or contemporaneous agreements or undertakings on this subject matter. In this Agreement, “including” and “include” mean “including, but not limited to.””

[56] Many other clauses were referenced by the parties or are relevant to the consideration of various propositions arising in this matter. These will be canvassed in the consideration that follows.

5.2 The conduct of the relationship

[57] Mr Nawaz relied upon certain aspects arising from the actual conduct of the relationship. For reasons set out above, these may be relevant for certain limited purposes, such as to find contractual terms where they cannot otherwise be ascertained or to determine the nature of any variation to agreed terms. Mr Nawaz also relied on the notion that the Services Agreement was a sham. I will return to this aspect shortly.

5.2.1 Outline of the Uber rideshare model as applied to Mr Nawaz

[58] The Uber business model was founded on software developed by Uber to facilitate the connection of drivers with members of the public seeking transportation services via applications. This model operated across two smartphone applications - a “Rider App” (for those seeking transportation services) and a “Partner App” (for those seeking to supply transportation services). Both of these applications can be downloaded onto a smart phone by an individual at any time, free of charge.

[59] The Rider App is the dedicated application for people who want to request what is commonly known as a “trip”. In order to use the Rider App an individual must create an account and register their contact and payment details within the application. Once registered, an individual must accept the terms and conditions of use and if and once they are accepted, the individual is then able to use the application to request a trip. In order to request a trip, the Rider must open the application on their smart phone, provide their pickup and drop off location and then select the category of vehicle they want to ride in. Once these details have been provided, the Rider is given an estimate of the fare for the trip as well as an estimated time of arrival of the Driver. If the Rider is content with the estimated fare and the Driver, the Rider confirms the request for the trip.

[60] The Partner App is the dedicated application for people who want to provide transportation services to Riders. In order to use the Partner App, the first step that a prospective Driver needs to complete is to set up an account in the application. Once an account has been set up, the prospective Driver must go through an activation process, which involves submitting a number of formal documents, including a valid driver’s licence, driving history check and motor vehicle insurance to the relevant authority. The prospective Driver must also select which kind of Uber service (vehicle standard etc) they want to provide. Once all of the mandated documents have been submitted to the relevant authority, they are electronically uploaded into the systems owned by Uber and are reviewed for compliance with Uber’s minimum standards.

[61] I observe that Uber does not interview prospective Drivers and there is no indication that this occurred in the case of Mr Nawaz.

[62] If the application is approved, the final step that a prospective Driver must complete before he or she can accept trip requests via the application is to accept the terms and conditions contained in the Services Agreement. At that point, the Driver is then able to accept requests from Riders via the Partner App.

[63] When a Rider makes a trip request through the Rider App, that request is sent to a nearby Driver who is logged into the Partner App and is either not on a trip or is nearing the end of a trip with another Rider. Despite suggestions by Mr Nawaz to the contrary, the evidence confirms that a Driver's acceptance rate or other performance factors have no bearing on the sending of trip requests to the Driver. I will return to the Driver's rating shortly.

[64] A trip request from a Rider is communicated to a Driver as a pop-up notification within the Partner App. That notification includes information including the Rider's rating, the location where the Rider wants to be picked-up, and the number of minutes to get to the Rider's location.

[65] The Driver who receives the trip request can accept or ignore the request from the Rider, or select 'decline' to reject the trip request. If the Driver:

- a. accepts the trip request, the Driver has agreed to provide the trip to that Rider;
- b. ignores the request, it will lapse after approximately 10-15 seconds and the Driver is able to receive other trip requests from other Riders;
- c. selects 'decline', the trip request will be rejected and the Driver is able to receive trip requests from other Riders.

[66] If a Driver lets a trip request lapse or declines a trip request, that request becomes available for another Driver to accept.

[67] After a Driver has accepted a trip request, they may:

- a. complete the trip;
- b. cancel the accepted trip request before they arrive at the Rider's location;
- c. cancel the accepted trip request after they arrive at the Rider's location but before the Rider is picked-up by the Driver (for example, if the Rider cannot be found at the location); or
- d. cancel the trip after they have picked-up the Rider but before they have completed the trip (for example, because the Driver does not want to travel to a certain area).

[68] A Rider may also choose to cancel their trip request after they have sent the request. The Rider may cancel both before and after a request has been accepted by a Driver. In certain circumstances, this may mean the Rider is charged a cancellation fee, which is paid to the Driver.

[69] Once a Driver has accepted a request from a Rider (and subject to any cancellation by the Driver or Rider), they drive to the Rider's location to pick up the Rider. Once the Driver has picked up the Rider, the trip commences and the Driver selects "Start Trip" within the Partner App. The Driver then drives the Rider to their destination (again, subject to any cancellation). When the Driver arrives at the destination, they end the trip by selecting "End Trip" within the Partner App.

[70] Subject to some limitations in the Services Agreement, Drivers are free to take whatever route they, or their Rider, want to take to get to the ultimate destination. While the Uber App contains GPS navigation, many Drivers choose to use their own app (such as Waze or Google Maps) to get to the rider's destination. If the Driver chooses the Uber App mapping, that will show a suggested route and will update in real time if the Driver deviates from that (for example, if they decide to take a different route from that suggested). This may lead to a fare dispute from the Rider however this does not directly impact upon the Driver.^[39] This may however impact upon the Rider's rating of the Driver if one is provided.

[71] At the end of a trip, the total confirmed fare payable by the Rider to the Driver for the trip is communicated to the Rider via an emailed receipt. The fare is paid by the Rider by a charge to the payment profile nominated in the Rider's account in the Rider App.

[72] A ratings system for both Drivers and Riders applies. I further discuss this aspect below.

[73] The effect of the various Apps is that the fare charged to and paid by the Rider for each trip is paid to the Driver who provided the service. This is done automatically through the Uber system, and I will discuss this aspect and the calculation of the fares in more detail shortly.

[74] A cancellation fee may also be payable by a Rider where the Rider cancels a trip request after making the request and the Driver has accepted the request and is on their way to the Rider's location. It may also be payable where the Driver cancels the trip after arriving at the Rider's pick-up location because the Rider is a "no-show". The fare and any cancellation fee payable by Riders are inclusive of all taxes including the Goods and Services Tax (GST) which applies. The trip invoice generated by Uber (on behalf of that Driver) identifies the GST payable and other relevant information the Driver has provided (including their ABN).

[75] Rasier Pacific remits the fares and any cancellation fees collected from Riders to Drivers (minus the service fee) on a weekly basis. However, Rasier Pacific will remit those fares and cancellation fees at any time upon the request of the Driver (including on a daily basis).

[76] No superannuation is paid on behalf of Drivers by Riders, Uber, or any associated entity, in respect of the payments made by Riders to Drivers.

[77] The Drivers pay a service fee to Rasier Pacific. This service fee is payable each time a Driver provides a trip to a Rider and for each cancellation fee payable by a Rider to a Driver. Payment of the service fee is made by a Driver to Rasier Pacific by deducting the service fee from the amounts Rasier Pacific collects from Riders before those payments are remitted to the Driver. Drivers do not pay a set or fixed fee to Rasier Pacific to participate in the rideshare arrangements.

[78] In the case of Mr Nawaz, he:

- a. logged into the Partner App at varying times;
- b. logged into the Partner App for varying periods;
 - c. logged into the Partner App on multiple occasions on some days and did not log in at all on others;
 - d. provided varying numbers of trips when he was logged into the Partner App, including providing no trips on some occasions when he was logged into the Partner App;
- e. Accepted 2139 of the trip requests sent to him via the Partner App;
- f. rejected 294 of the trip requests sent to him via the Partner App;
 - g. did not accept a further 62 of the trip requests sent to him via the Partner App; and
 - h. cancelled 89 of the trip requests that he had received and accepted via the Partner App.^[40]

[79] The objective evidence^[41] is that Uber did not penalise Mr Nawaz for the non-acceptance or cancellation of trip requests. Further, ratings are based only on completed trips.

[80] Mr Nawaz also provided a motor vehicle to provide trips to Riders via the Partner App. Neither Rasier Pacific nor Uber B.V. made any payments to Mr Nawaz for the motor vehicle he used to provide trips, or for their operation (other than through the overall fares payments).

[81] Mr Nawaz was responsible for ensuring that the vehicle he used to provide trips via the Partner App had the necessary insurance arrangements. Neither Rasier Pacific nor Uber B.V. made any payments to Mr Nawaz for any insurance (other than through the overall fares payments).

[82] Mr Nawaz used a smartphone to access and use the Partner App. That smartphone was not owned or paid for by Uber. Uber did not make any payments for any wireless data plans used to access and use the Partner App from that smartphone (other than through the overall fares payments).

[83] Although Mr Nawaz did not utilise multiple Apps during his term with Uber, and considered that this was not practical, he had the right to do so under the Services Agreement.

[84] For trips provided to Riders by Mr Nawaz, Uber issued invoices to Riders in the name of Mr Nawaz, which specifically identified GST payable in connection with those trips. Further, Uber collected fares and cancellation fees from Riders on his behalf. Uber remitted those fares and fees to Mr Nawaz, subject to deduction of the service fee.

[85] I am satisfied that all of the above arrangements applied to the Mr Nawaz's relationship with Uber.

[86] On 3 April 2021, the Services Agreement with Mr Nawaz was terminated by Uber relying upon clause 16 of the Agreement.

5.2.2 Regulatory regime in South Australia

[87] The regulatory regime in South Australia provides some of the context in which the contract was made and applied by the parties.

[88] Uber operates as a regulated Centralised Booking Service^[42] under the SA Passenger Transport laws. Further, the [Child Safety \(Prohibited Persons\) Act 2016](#) (SA) applies to some of the services provided under the Services Agreement.

[89] As part of the Partner App activation process, the individual submits the documents required under the applicable regulations for the relevant Australian State or Territory in which they wish to provide trips. In South Australia, this currently requires the individual to obtain a driver accreditation and operator accreditation from the South Australian Department of Infrastructure and Transport (DIT) which verifies their identity and eligibility to provide passenger transportation services. As part of this process, Mr Nawaz had to provide proof of a valid, full driver's licence for South Australia, a Working with Children Check, a criminal and driving history check, and a Certificate of Fitness after passing a medical check.

[90] In addition, as part of the activation process and relevant to the regulatory regime, Mr Nawaz had to:

- provide registration and other identification details of the motor vehicle in which he intended to provide trips - this provides confirmation that the vehicle being used is legally able to be driven on roads in South Australia. The applicable passenger transport regulations in South Australia provide that a person must not use a vehicle for the purposes of a service operated under a Small Passenger Vehicle (Metropolitan) Accreditation if the vehicle is more than 8 years old;^[43]

provide proof of a relevant motor vehicle insurance policy (comprehensive or third party property) in connection with the motor vehicle in which he intended to provide trips - this provides confirmation that the vehicle being used complies with South Australian insurance requirements. The vehicle registration process in South Australia includes a requirement to pay a Compulsory Third Party insurance premium for small public passenger vehicles. This is a regulatory requirement in South Australia and the cost depends on the Driver's chosen CTP insurance provider, and is typically higher for a vehicle used for rideshare;

successfully complete a motor vehicle inspection for the motor vehicle in which he intended to provide trips - this is a requirement under South Australian regulations; and

select which motor vehicle option(s) (standard of the vehicle and service) he sought to use to provide trips.

[91] The documents submitted by Mr Nawaz to activate his account in the Partner App were uploaded electronically to Uber's systems for verification.

[92] South Australia's Passenger Transport Regulations mandate certain inspections of rideshare vehicles. Uber does not require inspections above the regulatory requirements, and there is no requirement that a service centre nominated by Uber provide the inspection (it must simply be an inspection centre recognised by the relevant South Australian authorities).

[93] One of the obligations applicable to a Centralised Booking Service pertains to a requirement to maintain a dispute resolution system meeting certain requirements. I will return to whether the Services Agreement met this requirement.

5.2.3 Factual findings about the principal aspects of the relationship raised in this application in the context of the validity of the Services Agreement

[94] In light of the required approach now evident following *Personnel Contracting and Jamsek* I emphasise that the following factual findings are necessary in order to deal with Mr Nawaz's propositions about the validity of the Services Agreement including the notions that it was varied or was a sham.

The obligation to work and to accept jobs

[95] Mr Nawaz contends, in effect, that the economic reality required that he regularly log onto the Uber system and accept as many jobs as possible. I will return to this contention as part of my substantive consideration. In terms of the formal nature of the relationship, Drivers such as Mr Nawaz have flexibility as to if, when, where and for how long, they use the Partner App to receive trip requests and to provide trips; and then when they are online whether to accept any trip requests and provide trips or not. Drivers can choose to be online (or not online) at any time, at their complete discretion.

[96] Uber did not impose any minimum period during which Mr Nawaz must be online in the Partner App and if he decided not to log on to the Partner App or be online in the Partner App, he was not obliged to notify the Respondent of that decision.

[97] Within the arrangements, there are no direct negative consequences if Drivers decide to not use the Partner App, stop using the Partner App, or decide not to be online in the Partner App at any time or for any period of time. Of course, the Driver is not able to earn income from the Uber arrangements unless they use the Partner App and accept jobs.

[98] Drivers are also not required to be available to accept trip requests at any time of the day or days of the week, either at the time of being activated, in advance of using the Partner App, or at any time the Partner App is being used.

[99] The evidence^[44] is that Mr Nawaz understood that when within 2 kilometres of Adelaide Airport, he would not be offered other jobs. That is, jobs that did not involve a pick-up from the Airport. I accept that evidence. It is also apparent from the balance of the evidence and the terms of the Services Agreement that he was not required to accept an airport job or to remain in the area.

[100] Mr Nawaz and other Drivers were not rostered or asked to be online at particular periods of time or at particular locations. There is no required regularity with which they must log on in order to continue using the Partner App.

[101] All of this is consistent with the terms of the Services Agreement, including clause 2.

[102] Consistent with clause 4 of the Services Agreement, when Mr Nawaz was online, he had complete discretion to accept a trip request from a Rider. There was no requirement on him to accept a minimum number of trip requests from Riders in order to use the Partner App. There was however a system in place that monitored the acceptance of trip requests. If a Driver is online in the Partner App and does not accept three consecutive trip requests, the Driver is automatically logged off the Partner App. However, Drivers can immediately go back online by simply reactivating the App. This system seeks to ensure that the Drivers who are logged on intend to be available. But this also had the impact that Mr Nawaz had to be available to accept the requests within that short timeframe.

[103] Drivers are not exclusive to the Partner App and there is no exclusivity clause in the Services Agreement. Under section 4 of the Services Agreement, Drivers retain the complete right to use other software application services in addition to the Partner App and are under no obligation to notify Rasier Pacific or Uber B.V. if they choose to do so.

[104] The Services Agreement contemplated that Drivers may also be logged into and/or provide transport services via other smartphone applications which compete with the Partner App, such as Didi or Ola, while they are logged into and receiving trip requests via the Partner App, including while completing a trip with a Rider. In addition, Drivers are not prevented from providing any other kinds of services or from obtaining or holding employment while they have an active account in the Partner App. I do accept for reasons set out above that there are some practical limitations on the degree that this flexibility might be applied by a Driver. However, the evidence does suggest that this right to utilise multiple Apps is real.

[105] Uber does monitor and, in effect, limits the number of hours a Driver can continuously use the Partner App in any 24-hour window to 12 hours. This is intended to reflect Uber's regulatory obligations under passenger transport and work health and safety legislation.^[45]

[106] Should a Driver be either unable or unavailable to accept trip requests, the terms of the Services Agreement prevent the sharing of the App with others and the SA Transport laws do not permit the license and accreditation to be delegated. The vehicle may however be loaned or leased to someone else. This is consistent with the Services Agreement.

Requirement to place a sign in the vehicle

[107] Amongst his own view on the matter, Mr Nawaz relied upon the following communication from Uber:

“Driver requirements

Display sticker/sign

Some regulations require you to display a sign or sticker that helps riders identify that you are a rideshare driver. To help with this, we provide a removable Uber sticker to be displayed on your vehicle whenever you're online (where required). If the sticker is not properly displayed, or if it's not visible while you're driving with the Driver app (day or night), you could be subject to penalties by local authorities.”^[46]

[108] The sign provided was about half the size of an A4 document.

[109] In addition, Mr Nawaz indicated that he had been advised by an inspector apparently operating under the SA Passenger Transport laws that he was required to have an Uber sign on his vehicle if he was to park or stand in certain areas to pick up Riders.^[47]

[110] There is no suggestion that Mr Nawaz was required to wear any form of uniform, and this would have been contrary to the Services Agreement.

[111] Clause 4 of the Services Agreement states that a Driver will not display Rasier Pacific's, Uber B.V.'s or any of their affiliates' names, logos or colours on any vehicle in which trips are provided by Drivers to Riders. This includes that a Driver will not display any name, logo or colours of the "Uber" brand, unless agreed or required by law.

[112] In South Australia, Drivers are required under the [Passenger Transport Regulations^{\[48\]}](#) to display their name or the name of the registered booking service provider used by the Driver on their vehicle. As a result, any requirement to display an Uber sign on the vehicle would be consistent with the terms of the Services Agreement. In any event, the evidence also falls short of establishing that Mr Nawaz was required to display an Uber sign given the terms of the Uber communication and the relevant regulations.

[113] In final submissions,^[49] Mr Nawaz provided what appeared to be a screen shot of some information apparently provided to him by Uber. It stated:

“Window Stickers

State regulations require you to display a sign identifying your vehicle as a passenger transport vehicle. Whenever you're online, the sign should be visible.

To help with this, we've made available removable Uber stickers. Under the regulations:

These stickers must be displayed whenever you're driving with the Uber app.

You should remove these stickers are not driving with the Uber app.

• You cannot display an advertisement or other marking on your vehicle whilst driving with the Uber app.”^[50]

[114] The precise nature of this material and whether this was communicated whilst Mr Nawaz and Uber were parties to the Services Agreement is not clear. Accepting this at face value, this would confirm the above findings regarding the context in which the Uber sticker was provided including the this was because of the relevant State transport regulations and the display of the sticker was not required by Uber.

[115] Also subject to the above caveat, it would suggest that Uber purports to restrict advertising being placed on vehicles where the Driver chooses to place an Uber sign on their vehicle (rather than a “PV” sign or their own name). If as suggested by Mr Nawaz this is beyond the scope of the SA Passenger Transport laws^[51] this would not appear to be consistent with the Services Agreement.

Calculation of fares and related matters

[116] Subject to some caveats, the fares are calculated based on time and distance estimations. A minimum fare applies, and the fare may include any tolls, taxes or other fees (such as an airport charge). Further, the fare involved may also reflect dynamic pricing, an approach applied by Uber. Dynamic pricing, commonly referred to as "surge pricing", reflects the number of Drivers who are online to accept trip requests relative to the number of Riders who are making trip requests at a particular time and area. The increase is a multiplier of the fare that would otherwise ordinarily be payable for that trip, and the increased fare is charged to the Rider and paid to the Driver. This means that Drivers who choose to drive at busy times and/or in busy areas may increase their earnings opportunities.

[117] Clause 8 of the Services Agreement provides as follows:

“8. Fare Calculation and Your Payment

8.1 You can charge a fare to Users for each instance of completed Transportation Services that you provide to a User that are obtained via the Uber Services ("Fare"). Rasier Pacific will calculate a recommendation of the Fare that you can elect to charge Users ("Fare Calculation"). As at 1 December 2017, Rasier Pacific determines the Fare Calculation as a base fare amount plus distance (as determined by Rasier Pacific using location-based services enabled through your mobile device and/or time amounts, as detailed at www.uber.com/cities for the applicable Territory). You can also charge the User for any applicable road, bridge, ferry, tunnel and airport charges and any other fees (including innercity congestion, environmental or miscellaneous charges as reasonably determined by the Uber Services) ("Tolls"), taxes and/or fees incurred during the provision of Transportation Services, whether charged by a third party or Rasier Pacific. Rasier Pacific reserves the right to change the Fare Calculation at any time in Rasier Pacific's discretion. Rasier Pacific will provide you with notice in the event that any such change would result in a change in the recommended Fare. Continued use of the Uber Services after any such change shall constitute your consent to such change. You appoint Rasier Pacific as your limited payment collection agent solely to accept the Fare, applicable Tolls, and, depending on the region and/or if requested by you, applicable taxes and fees from the User on your behalf via the Uber Services' payment processing functionality, and agree that the User's payment to Rasier Pacific shall be considered the same as payment made directly by the User to you. If a User cancels their request for Transportation Services prior to your arrival, Rasier Pacific may charge that User a cancellation fee on your behalf, and a Service Fee will be payable to Rasier Pacific.

8.2 The parties acknowledge and agree that as between you and Rasier Pacific, the Fare Calculation is a recommended amount, and the primary purpose of the Fare Calculation is to act as the default Fare in the event you do not negotiate a different Fare. You shall always have the right to charge a Fare that is less than the pre-arranged Fare Calculation ("Negotiated Fare"). Rasier Pacific agrees to remit, or cause to be remitted, to you on at least a weekly basis, (a) the Fare less the applicable Service Fee and other fees charged by Rasier Pacific; (b) the Tolls (excluding applicable airport charges, which Rasier Pacific may pay to the airport on your behalf); (c) any incentive payments made under clause 13; and (d) depending on the region, certain taxes and ancillary fees (where applicable). If you have separately agreed to any other amounts being deducted from your Fares (such as vehicle financing, lease payments, government fees and charges, etc), those amounts will be deducted before remittance to you, and Rasier Pacific will determine the order of any such deductions from the Fare (as between you and Rasier Pacific). Rasier Pacific reserves the right to adjust payment in relation to a particular Fare for reasons such as inefficient routes, failure to properly end a particular instance of Transportation Services in the Driver App, or technical error in the Uber Services. In more serious situations, such as fraud, charges for Transportation Services that were not provided or User complaints, Rasier Pacific may cancel a Fare entirely or if the Fare has already been paid, require reimbursement of the Fare from you. Rasier Pacific reserves the right, in its sole discretion, to seek reimbursement from you if Rasier Pacific discovers payment processing errors. Rasier Pacific may obtain reimbursement of any amounts owed by you to Rasier Pacific by deducting from future Fares owed to you, debiting your card on file or your bank account on record, or seeking reimbursement from you by any other lawful means. You authorise Rasier Pacific to use any or all of the above methods to seek reimbursement."

[118] The evidence before the Commission suggests that, in practice, the parties treat the "recommended fare" (the fare calculated by the Uber App) as the actual fare. However, the limited evidence^[52] about this matter does not reveal that the capacity for the Driver to negotiate a different fee with the Rider under clause 8.2 of the Services Agreement has been removed. Although there is no inconsistency with the stated legal rights, the respective roles of the parties under this provision are relevant to the characterisation of the relationship and I will return to this aspect as part of my consideration.

The ratings system and its consequences

[119] In relation to the rating system used by Uber, at the end of each trip, the Rider and Driver are invited, via the Rider App and Partner App respectively, to "rate" the other party. This is not compulsory for either Riders or Drivers. The rating is provided as a number of "stars" from a total possible of five "stars". Riders are able (but not required) to comment on the Driver, either by selecting a standard form comment or by writing their own comment. Prior to a trip commencing, a Rider is advised (through the Rider App) of the Driver's rating. A Rider is able to cancel a trip at any point, including on the basis of a Driver's rating. The Driver may also decline to provide a service based upon the rating shown for the Rider.

[120] Clause 5 of the Services Agreement provides the following in terms of the ratings and comments system:

"5. Ratings. You acknowledge and agree that after receiving Transportation Services, a User will be prompted by the Uber App to rate you and such Transportation Services, and you will be prompted to rate your User. This can also include comments and other feedback, which, along with the rating, you agree to provide in good faith. Rasier Pacific, Uber and their affiliates reserve the right to use, share and display your User ratings and comments in any manner in connection with the business of Rasier Pacific, Uber and their affiliates without attribution to you or your approval. You acknowledge and agree that Rasier Pacific, Uber and their affiliates are distributors (without an obligation to verify) and not publishers of your ratings and comments, and may remove comments in the event that such comments include obscenities or other objectionable content, include an individual's name or other personal information, or violate any privacy laws, other applicable laws or Rasier Pacific, or their affiliates' content policies. There is no obligation on you or the User to provide ratings or comments nor is there any consequence for not providing a rating."

[121] The objective evidence supports the notion that this is applied in practice. Under clause 5 of the Services Agreement, there is no obligation on a Driver or Rider to provide ratings or comments nor is there any consequence for not providing a rating.

[122] Ratings are not used to influence whether a job request is sent to a Driver.^[53]

[123] However, users of the Uber platform, both Riders and Drivers, may lose access to their account with Uber if their overall rating drops below a certain threshold or for breach of the Community Guidelines. This led to the cancellation of 23 Drivers in Australia in recent times, out of a total of some 60,000 Drivers.^[54] However, it is the right to take this action that is relevant for present purposes.

[124] The community guidelines^[55] are identified in the Services Agreement and the subject of reminders to Drivers in communications. The critical service standards include matters such as treating everyone with respect, keeping one another safe and following the law.

[125] The guidelines also include restrictions upon physical contact with Riders, inappropriate conduct and sexual assault, discrimination, sharing the Uber account with others, and the need to maintain up to date information on the vehicle.

[126] An alleged breach of the guidelines was relied upon by Uber to deactivate Mr Nawaz's access to the Driver App.

"Control" over routes

[127] Clause 3 of the Services Agreement requires that the Driver transport the Rider (described as a User) as directed by the Rider, without unauthorised interruptions or stops.

[128] The Uber App contains GPS navigation and mapping assistance that will show a suggested route and will update in real time if the Driver deviates from that (for example, if they decide to take a different route from that suggested). As set out earlier, the Drivers may choose to use their own navigation app (such as Waze or Google Maps) to get to the Rider's destination and subject to the import of the Services Agreement are free to take whatever route they, or their Rider, want to take to get to the ultimate destination.

[129] For reasons set out earlier, the choice of a different route may lead to a fare dispute from a Rider.^[56] I further observe that under clause 8.2 of the Services Agreement, Uber has reserved the right to adjust payments to Mr Nawaz where an "inefficient route" has been used.

[130] There is insufficient evidence to make a finding as to whether the Uber suggested routes have the Driver stopping in bus stops that are not available to the Drivers. In any event, there is no indication in the evidence of any actual requirement to pick up or drop at a bus stop and no confirmation of any negative consequences for the Driver, with the potential indirect exception of an impact upon ratings from a Rider.

[131] The Uber Apps monitor the progress of the trip. If there is a stop of some duration during the trip, both the Driver and the Rider will receive an in-app message "You stopped, what happened?". Uber contends that this is designed as a safety feature, and I accept that it may be applied for that purpose.

"Control" over hours

[132] The evidence is that Uber monitors the time spent with the Driver App activated. The Uber system will automatically log a Driver off after 12 consecutive hours.

Accounting arrangements

[133] As set out earlier, for trips provided to Riders by Mr Nawaz, Rasier Pacific issued invoices to Riders, in Mr Nawaz's name. Rasier Pacific remitted those fares and fees to Mr Nawaz, subject to deduction of the service fee.

[134] In addition, Rasier Pacific also collected and paid government taxes and levies (such as the additional fees to access the airport) on behalf of Mr Nawaz. It is also the case that these arrangements operated without any direct involvement of Mr Nawaz other than the activation of the App before and after the trip and of course the provision of the actual service.

[135] These aspects are relevant to the characterisation of the relationship but are not inconsistent with the terms of the Services Agreement. These are the arrangements contemplated in clauses 8, 9, 10, 11, 12 and 28 of the Services Agreement.

Pandemic related changes

[136] During the Covid-19 Pandemic in 2020, Uber introduced 2 initiatives. Uber supplied masks, anti-bacterial wipes and hand sanitizer to Drivers and introduced a payment to support Drivers who had tested positive to Covid-19 or were required to quarantine. A time-limited support payment was provided by Uber based upon average daily earnings with some limitations. This was introduced globally^[57] but a version of this did apply in Australia.^[58]

[137] I observe that these arrangements are not contemplated in the Services Agreement or the Fee Addendum.

Cleaning of the vehicles

[138] To the extent that there was any requirement for Mr Nawaz to maintain the cleanliness of the vehicle he was using, this is contemplated in clause 6 of the Services Agreement which

acknowledges the Driver's to (amongst other matters) keep the vehicle in a "clean and sanitary condition" and in "good operating condition consistent with industry standards" and other regulatory requirements.

Insurance

[139] Clause 21 of the Services Agreement states that the Driver agrees to obtain and maintain insurance in connection with their provision of trips to Riders. It does so in the following terms:

"Clause 21 Insurance & Accidents

21.1 You agree to maintain during the term of this Agreement motor vehicle liability insurance on all vehicles which you operate at insurance levels that satisfy the minimum requirements to operate a private passenger vehicle on public roads within the Territory, as well as any other minimum motor vehicle liability insurance cover which Rasier Pacific requests you hold. You agree to provide Rasier Pacific with a copy of the insurance policy, policy declarations, proof of insurance identification card and proof of premium payment for the insurance policy required in this clause 21.1 upon request. Furthermore, you must provide Rasier Pacific with written notice of cancellation of any insurance policy required by Rasier Pacific. Rasier Pacific shall have no right to control your selection or maintenance of your policy. You must be a named insured or individually rated driver, for which a premium is charged, on the insurance policy required in this paragraph 21.1 at all times. You understand and acknowledge that your private passenger motor vehicle insurance policy, including any insurance coverage held via a commercial arrangement you have with a vehicle rental or leasing provider, may not afford liability, comprehensive, collision, medical payments, first or third party no fault personal injury protection, uninsured motorist, underinsured motorist or other coverage while you provide for any Transportation Services you provide pursuant to this Agreement. If you have any questions or concerns about the scope or applicability of your own insurance coverage, it is your responsibility, not Rasier Pacific's or Uber's, to resolve them with your insurer(s). Rasier Pacific may maintain during the term of this Agreement insurance related to your provision of Transportation Services as determined by Rasier Pacific in its reasonable discretion, provided that Rasier Pacific and its affiliates are not required to provide you with any specific insurance coverage for any loss to you or your vehicle. Should Rasier Pacific procure insurance related to your provision of Transportation Services, Rasier Pacific may cancel such coverage at its sole discretion at any time. You are required to promptly notify Rasier Pacific of any accidents that occur while providing Transportation Services and to cooperate and provide all necessary information."

[140] Clause 21.1 of the Services Agreement states that Drivers agree to maintain motor vehicle insurance in respect of the motor vehicle they use to provide trips to Riders. That insurance must provide certain levels of coverage that satisfies the minimum level required by the law applicable in the area in which the Driver will provide trips to Riders.

[141] Clause 21.2 of the Services Agreement states that Drivers agree to maintain "workers compensation" insurance or other occupational accident injury insurance as required by law applicable in the area in which the Driver will provide trips to Riders.

[142] There was material provided by Mr Nawaz in final submissions that suggested that Uber had obtained some insurance that covered riders, passengers and drivers. In particular, he contended that on 30 November 2021 (after the Services Agreement had concluded in his case), Uber sent him an insurance document which included coverage of the Riders. He also stated:

“Uber sent me only that part of cover which pertained to drivers . Although they named it a ‘Partner Support Insurance’(Annex J) but in reality, it was ‘Group Accident Cover’ which is a normal cover for employees (Annex L &M). Chubbs (insurance company’s) website confirms its applicability on employees of organization (Annex N). Here it must be noted that drivers cannot use this cover by themselves, it would be Uber which would lodge claim on employees’ behalf (Annex M). Such control can only be exercised by employers.”^[59]

[143] The evidence does not enable me to know whether this additional insurance was in place during Mr Nawaz’s term under the Services Agreement. If it applied, any additional insurance taken out by Uber to cover riders and drivers would not have been required by the Services Agreement. But this would not have been, in itself, inconsistent with the terms of clause 21 or the obligation upon Mr Nawaz under the Services Agreement to obtain and retain appropriate insurance.

Other “benefits”

[144] During final submissions, Mr Nawaz provided some documents that appeared to indicate that there were some discounts on transport related and other expenditure (fuel, tyres, automotive products, phones) that were available to persons associated with Uber. It is conceivable that this was intended to be linked to findings made by the Court of Amsterdam in *DTFU*.^[60] However, there was no evidentiary context for this material, and it is not clear how these benefits were organised, who was eligible, and whether they applied during Mr Nawaz’s term with Uber.

[145] I observe that even if taken on face value, this would be of limited value as an indicator of the nature of the relationship. The provision of “benefits” of this kind may be offered to anyone associated with a business including clients, suppliers and workers. The evidence before the Commission does not establish any link to the ratings arrangements applied to Mr Nawaz and it is not clear how the levels of access are determined or by whom.

Dispute resolution process

[146] Clause 34 of the Services Agreement provides as follows:

“**34. Arbitration** Any dispute, conflict or controversy, howsoever arising out of or broadly in connection with or relating to this Agreement, including those relating to its validity, its construction or its enforceability, shall be first mandatorily submitted to mediation proceedings under the International Chamber of Commerce Mediation Rules (“ICC Mediation Rules”). If such dispute has not been settled within sixty (60) days after a request for mediation has been submitted under such ICC Mediation Rules, such dispute can be referred to and shall be exclusively and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce (“ICC Arbitration Rules”). The ICC Rules’ Emergency Arbitrator provisions are excluded. The dispute shall be resolved by one (1) arbitrator to be appointed in accordance with the ICC Rules. The language of the arbitration shall be English. The existence and content of the mediation and arbitration proceedings, including documents and briefs submitted by the parties, correspondence from and to the ICC, correspondence from the mediator, and correspondence, orders and awards issued by the sole arbitrator, shall remain strictly confidential and shall not be disclosed to any third party without the express written consent from the other party unless: (i) the disclosure to the third party is reasonably required in the context of conducting the mediation or arbitration proceedings; and (ii) the third party agrees unconditionally in writing to be bound by the confidentiality obligation stipulated herein. Nothing herein limits or excludes (nor is intended to limit or exclude) any statutory rights that you may have under applicable law, including the Australian Consumer Law, that cannot be lawfully limited or excluded.”

[147] Under the SA Passenger Transport laws one of the obligations applicable to a Centralised Booking Service pertains to a dispute resolution system in the following terms:

“(m) a condition that the accredited person will establish and maintain a system for dealing with any dispute between the person and the owner or driver of a vehicle participating in the scheme, and that if the dispute is not resolved within a reasonable time and is referred to the Minister, that the accredited person will accept and, if necessary, implement or observe, a decision made by the Minister in order to resolve the dispute;”^[61]

[148] Clause 34 does not expressly represent a dispute resolution system that meets the above requirements. That is, there is no express obligation in respect of a dispute which is not resolved within a reasonable time, and which is referred to the Minister, for Uber to accept the decision of the Minister. The savings provision (not to exclude any statutory rights you may have under applicable law) may operate to preserve the rights however this is certainly not an express term as appears to be contemplated by the SA Passenger Transport laws.

[149] Uber did not provide evidence about any additional dispute resolution term that might provide the necessary express recognition of the role of the Minister. I infer that none existed.

Variation of the Services Agreement

[150] Clause 10 of the Services Agreement provides as follows:

“10. **Service Fee.** In consideration of Rasier Pacific’s provision of the Uber Services to you, you agree to pay Rasier Pacific a service fee on a per Transportation Services transaction basis, which as at 1 December 2017, is calculated as a percentage of the Fare Calculation (**“Service Fee”**) (regardless of any Negotiated Fare). Rasier Pacific will provide you with notice via email or via the Driver App, of the Service Fee that applies to each Transportation Service that you provide. You acknowledge that, unless regulations applicable to your Territory require otherwise, taxes (in particular GST) will be calculated and charged on the Fare, and Rasier Pacific shall calculate the Service Fee on an amount equal to the Fare Calculation plus the amount of such taxes (in particular GST) that would be calculated on the amount of the Fare Calculation. You acknowledge and agree that Rasier Pacific may, in its sole discretion: (i) adjust the Service Fee; or (ii) introduce a new model to determine the Service Fee payable by you. Rasier Pacific will provide you with at least 14 days’ notice in the event of an increase to the Service Fee under (i) above or the introduction of a new Service Fee model under (ii) above. If either of these occurs, you have the right to terminate the Agreement immediately, without notice. Continued use of the Uber Services after any such change in the Service Fee calculation shall constitute your consent to such change.

[151] I observe that there was no variation of the fees^[62] during the life of Mr Nawaz’s relationship with Uber; however, it is the right to make the changes that matters for present purposes.

[152] Clauses 28, 29, 30 and 31 of the Services Agreement enables Uber to change the terms of the agreement on written notice, with, in effect, continuing use of the relevant App being treated as confirmation of consent.

Termination of the Services Agreement

[153] Clause 16 of the Services Agreement states that either Rasier Pacific, Uber B.V. or the Driver can terminate the Services Agreement at any time on 30 days’ notice. When either party terminates the Services Agreement, a Driver’s account in the Partner App is deactivated.

[154] Clause 16 of the Services Agreement also states that Rasier Pacific may terminate the Services Agreement immediately, without notice, in the event a Driver no longer qualifies,

under applicable law or the standards and policies of Rasier Pacific, Uber B.V. or their affiliates to provide trips.

[155] The circumstances in which Rasier Pacific and/or Uber B.V. may seek to rely on clause 16 of the Services Agreement in Australia are set out in the Community Guidelines as discussed above.

6. Was Mr Nawaz an employee?

6.1 Was this a relationship regulated by a wholly written, comprehensive contract which is not a sham or otherwise ineffective?

[156] There is no doubt that the Services Agreement represents a comprehensive written contract regulating the arrangements between the parties. The issues raised by Mr Nawaz are whether the contract was a sham or otherwise ineffective. I understand that Mr Nawaz also indicates, in the alternative, that the contract may have been varied by conduct on some aspects. Given the integrated way these propositions were advanced by Mr Nawaz I also deal with the variation contentions in this part of the Decision. I will shortly return to the broader notion that the Services Agreement was a sham, and therefore ineffective generally.

[157] I have dealt with the written contractual terms of the post agreement conduct earlier in this decision. Many of the conduct aspects where Mr Nawaz has contended were in breach of, or were inconsistent with the contract terms, involve a misunderstanding about the terms of the contract. This includes the display of the Uber logo and the insurance arrangements. Further, there were a number of other contentions that were not supported by the evidence and these included some aspects that go to the capacity for Uber to control the services undertaken.

[158] Those sustained aspects where the actual practice may not have been consistent with the terms of the Services Agreement, or where it was directly contended that the Services Agreement was not legally compliant, are discussed below. That is, the discussion immediately below deals only with these aspects for the purposes of Mr Nawaz's attack on the validity of the terms of the Services Agreement.

[159] For reasons previously stated, where the contentions are supported by evidence many of these matters remain relevant to the characterisation of the relationship but based upon the terms of the contract. I deal with those later in this Decision.

Dispute resolution procedure

[160] I have found that the dispute resolution provision of the Services Agreement did not expressly meet the requirements of the SA Passenger Transport laws in that respect. There is no indication of another process agreed to by the parties or otherwise operated by Uber that would expressly meet these requirements and I doubt whether the savings provision - not to exclude statutory right - would be sufficient for this purpose. What are the implications of this for the Services Agreement?

[161] To the extent that clause 34 of the Services Agreement did not meet the dispute resolution requirements of the SA Passenger Transport laws, this might mean that the contract was in breach of those laws. This is a matter for the Courts. However, whether this be so or not, the possible implications would not mean that the Services Agreement as a whole is invalid, and this is sufficient for present purposes.

[162] I observe that the absence of a local and more accessible dispute resolution process within the Services Agreement may however be relevant more generally and I will return to this aspect.

The absence of a positive description of the nature of the relationship

[163] The descriptions of the relationship provided in the Services Agreement are set out earlier in this Decision. For the most part, the terms partly describe what the relationships do not create rather than positively asserting the nature of the relationships. These terms do however describe the roles and obligations under the Services Agreement and they are not ambiguous in any legal sense. It is not clear how Mr Nawaz otherwise contends that this could represent a basis to impugn the contract and I do not consider that this aspect undermines the legal veracity of the Services Agreement as a contract between these parties.

Pandemic related initiatives

[164] Whilst, these arrangements were not directly contemplated in the Services Agreement, given the context and the basis upon which that occurred, their provision did not represent a variation to the contract. That is, these were temporary arrangements unilaterally applied to the direct benefit of the Drivers and the Riders (and indirectly to Uber's business) and no variation of the Services Agreement was made as required by its own provisions. I will return to the contentions arising from the WHS laws as part of my broader consideration of the matter.

Airport arrangements

[165] The capacity for Uber not to allocate requests in the manner outlined by Mr Nawaz is not inconsistent with the Services Agreement. Clause 2 does not commit Uber to provide requests.

Limit on hours activated on App

[166] Whilst, these arrangements were not directly contemplated in the Services Agreement, given the context and the basis upon which that occurred, their provision did not represent a variation to the contract. Clause 2 does not commit Uber to provide requests. I will return to the contentions arising from the WHS laws as part of my broader consideration of the matter.

Limit on advertising and discussions with riders

[167] The evidentiary basis for these propositions is somewhat unclear. The assertion by Mr Nawaz is that Uber restricts the advertising that may be placed on a vehicle that is displaying an Uber sign. Further it was also suggested that Uber places some form of restriction upon what the Drivers can discuss with the Riders.

[168] Uber contends that any material on discussion topics are suggestions in line with the Community Standards document rather than instruction.

[169] The evidence about these matters is limited. I can only deal with them on face value. Certainly, given the nature of the evidence, there is no foundation for a finding that the terms of the Services Agreement have been varied. If the advertising restriction is beyond the terms of the Services Agreement, it would not have been legally binding, and any such post-contract conduct practice is not relevant to the present exercise.

Summary on the contended contract variations

[170] Given my findings, no basis to establish that the Services Agreement was varied or is otherwise ineffective has been made out. This includes that not all of the necessary elements for a variation of a contract^[63] have been demonstrated even where an alteration in practice was demonstrated.

Was the Services Agreement a Sham?

[171] Mr Nawaz has contended that the Services Agreement is a sham. He does so by reference to the matters outlined earlier in this decision and by relying upon the CC Act – Schedule 2 The Australian Consumer Law in particular, and s.357 of the FW Act.

[172] This issue arises from the approach of the High Court in *Personnel Contracting*. In particular, the requirement to determine legal rights according to a comprehensive written contract, unless that contract is (amongst other factors) a sham. Gordon J also took the view that the Court may consider evidence of the reality of the working relationship for that purpose.^[64] However, in *Jamsek*, Keifel CJ, Keane and Edelman JJ stated:

“62. The circumstance that this state of affairs was brought about by the exercise of superior bargaining power by the company weighed heavily with the Full Court; but that circumstance has no bearing on the meaning and effect of the bargains that were struck between the partnerships and the company. To say this is not to suggest that disparities in bargaining power may not give rise to injustices that call for a legal remedy. The law in Australia does provide remedies for such injustices under both the general law and statute. Those remedies were not invoked in this case. As has been noted earlier, the respondents did not claim that the contracts with the partnerships were shams. Nor did they seek to make a claim under statute or otherwise to challenge the validity of the contracts that were made by the partnerships. In Australia, claims of sham cannot be made by stealth under the obscurantist guise of a search for the "reality" of the situation.”

[173] I turn to initially consider the statutory grounds relied upon by Mr Nawaz; namely, those arising from the CC Act, including The Australian Consumer Law (**ACL**) in Schedule 2.

[174] There is some immediate tension in Mr Nawaz’s reliance upon the ACL. The Services Agreement is about the provision of services and this concept is relevantly defined in s.2 of the ACL in the following terms:

“services includes:

(a) any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce; and

(b) without limiting paragraph (a), the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:

(i) a contract for or in relation to the performance of work (including work of a professional nature), whether with or without the supply of goods; or

...

but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.“

[175] The ACL does not define ‘contract of service’. However, as is evident in this case, Australian law distinguishes between work performed under a ‘contract of service’ or

employment and work performed under an independent contract (contract for services).^[65]
This distinction is also consistent with *The Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill 2009*.^[66]

[176] This means that most of the provisions of the ACL relevant to the provision of services would only be applicable should the Commission find that the Services Agreement was not a contract of service (employment). Sections 20, 21, 22, 23, 29 relied upon by Mr Nawaz fall within this compass.^[67]

[177] Section 31 of the ACL is expressly applicable to employment and provides that a person must not, in relation to employment that is to be, or may be, offered by the person or by another person, engage in conduct that is liable to mislead persons seeking the employment as to:

the availability, nature, terms or conditions of the employment; or

any other matter relating to the employment.

[178] The effect of a contravention of s.31 is that a pecuniary penalty may be imposed on the contravener. I observe for completeness that there would not appear to be any basis under the ACL to void the employment contract in these circumstances.

[179] On this basis, the rather circular approach that arises from the potential application of the ACL is not helpful in a case of this nature. This does not mean that some of the common law concepts reflected in the ACL are not applicable, but these are not made out in this case.

[180] Section 357 of the FW Act is also relied upon by Mr Nawaz and provides as follows:

“357 Misrepresenting employment as independent contracting arrangement

(1) A person (the employer) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.

Note: This subsection is a civil remedy provision (see Part 4 1).

(2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:

(a) did not know; and

(b) was not reckless as to whether;

the contract was a contract of employment rather than a contract for services.”

[181] The provision creates an offence but does not of itself provide guidance about the approach to be adopted to determining whether an arrangement is a sham.

[182] The traditional approach to the assessment of a sham contract is as follows:

Raftland Pty Ltd v Commissioner of Taxation [2008] HCA 21, 238 CLR 516 at [34]:

“A sham contract is one brought into existence as a “mere piece of machinery” to serve some purpose other than that of constituting the whole of the arrangement.”^[68]

Equuscorp Pty Ltd v Glengallan Investments [2004] HCA 55; 218 CLR 471 at [46]:

“Sham’ is an expression which has a well-understood legal meaning. It refers to steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences.”

[183] The plurality of the High Court in *Personnel Contracting* also referenced^[69] several other High Court decisions^[70] that were consistent with the required approach on this aspect. This potentially permits assessment of the exercise of control in a relationship as part of the consideration of a contract as a sham. Further, there are other grounds upon which a contract can be impugned.^[71] However, none of these elements are made out in this case.

[184] I accept that there are issues of control in this relationship. However, for reasons set out above, those elements that have been supported by the evidence are not inconsistent with the terms of the Services Agreement and do not generally impugn the veracity of the contract.

[185] There is also no evidence of a common intention for the Services Agreement to not represent the actual terms between them or that it was made by the parties to mask the true arrangement. In many respects, the sham proposition in this case bore some of the hallmarks of a search for the “reality of the situation” disavowed by the plurality of the High Court.^[72]

Summary of the status and role of the Services Agreement

[186] As a result, I find that this relationship was regulated by a wholly written, comprehensive contract which is not a sham, was not varied and was not otherwise ineffective. Further, given this finding, the characterisation of the relationship is to be determined by reference to the parties’ rights and obligations set out in the Services Agreement.

6.2 Two of the major factors

[187] For reasons set out earlier, and subject to important caveats arising from *Jamsek* and *Personnel Contracting*, the multifactorial test remains of assistance provided it is applied to the legal rights and obligations of the parties. In that regard, it is convenient to initially deal with 2 particular aspects that remain apposite and provide context for that assessment.

Control

[188] The Full Bench in the *Gupta Full Bench Decision* summarised the approach in the following terms:

“[57] It is only necessary to refer to two High Court authorities concerning the multifactorial test to be applied. First, in *Stevens v Brodribb Sawmilling Co Pty Ltd (Brodribb)* Mason J (as he then was) said:

“...A prominent factor in determining the nature of the relationship between a person who engages another to perform work and the person so engaged is the degree of control which the former can exercise over the latter. It has been held, however, that the importance of control lies not so much in its actual exercise, although clearly that is relevant, as in the right of the employer to exercise it (*Zuijs v. Wirth Brothers Pty Ltd* [1955] HCA 73; (1955) 93 CLR 561, at p 571; *Federal Commissioner of Taxation v. Barrett* [1973] HCA 49; (1973) 129 CLR 395, at p 402; *Humberstone v. Northern Timber Mills* [1949] HCA 49; (1949) 79 CLR 389). In the last-mentioned case Dixon J. said (at p 404):

‘The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter’s order and directions.’

But the existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this Court has been to regard it

merely as one of a number of indicia which must be considered in the determination of that question (*Queensland Stations Pty Ltd v. Federal Commissioner of Taxation* [1945] HCA 13; (1945) 70 CLR 539, at p 552; *Zuijs' Case*; *Federal Commissioner of Taxation v. Barrett*, at p 401; *Marshall v. Whittaker's Building Supply Co.* [1963] HCA 26; (1963) 109 CLR 210, at p 218). Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee.”

[189] This remains apposite to the extent that it applies to the right to control under the relevant contract. The plurality in *Personnel Contract* stated:

“73. Like the "own business/employer's business" dichotomy, the existence of a right of control by a putative employer over the activities of the putative employee serves to sensitise one to the subservient and dependent nature of the work of the employee, so as to assist in an assessment of whether a relationship is properly to be regarded as a contract of service rather than a contract for services.^[73]

[190] There are some elements of a right of control evident in the Services Agreement. These include some aspects of control exercised by Uber through the various obligations imposed directly by the Services Agreement, and the much more indirect impact of the Guidelines and the ratings system. These aspects, in effect, require the performance of the work to a satisfactory standard but this form of control does not necessarily point to an employment relationship. There is nothing particularly unusual about a principal establishing and enforcing performance and quality standards in respect of independent contractors engaged to perform work.

[191] The apparent limitation on carrying advertising on a vehicle in some circumstances would also be relevant here as an indicator of control, albeit not significantly so.

[192] There are aspects of control associated with how the fees are set and varied and variations to the Services Agreement more generally operate. However, whilst these are capable of operating unfairly and are a reflection of the imbalance in the bargaining power of the parties, in light of the judgements in *Personnel Contracting* and *Jamsek* on these aspects discussed earlier, they are not relevant indicators of the nature of the relationship. The absence of a more workable dispute resolution procedure also falls into that category.

[193] I also observe that many of the aspects of control relied upon by Mr Nawaz arise from the regulatory environment rather than from requirements contractually applied by Uber. This includes those associated with the age of the vehicle, police and other such checks, and the insurance arrangements. These apply by force of the SA Passenger Transport laws and would do so irrespective of the legal characterisation of the relationship for present purposes. Further, the notion of the practical economic reality of the situation and its impact on the need to work is real but has little if any work to do in the present context given the approach now evident following the recent High Court judgments.

[194] Further, some elements of control are likely to be of more significance in assessing the nature of the contract. In this case, with a limited exception associated with the length of time spent with the Partner App activated, Uber exercised no right of control at all over when or how long Mr Nawaz performed services under the Services Agreement. As a matter of legal right (and in practice) it was entirely within Mr Nawaz’s control as to when he logged onto the Partner App and for how long he remained logged on. Once logged on, there was no obligation upon him to accept any particular Rider request. The limited caveat discussed above does not undermine this fundamental absence of legal control in this respect.

[195] Mr Nawaz was also able, even when logged on and when performing work pursuant to a rider request, to accept work through other rideshare and delivery apps. This was an express

term of the Services Agreement, and as found earlier, I am not persuaded that this term was illusory or varied.

[196] Accordingly, there are some competing aspects of the right of control evident in this case. However, in my view the more significant elements of control based upon the legal rights and obligations of the parties point away from a finding of employment.

[197] As earlier indicated, there are some elements of the relationship which reflect the relative bargaining power of the parties. For reasons already outlined, this is now largely irrelevant to the characterisation of the relationship, but I will return to this aspect as part of the concluding observations.

Own business/putative employer's business

[198] For reasons previously stated, the central question is always whether or not Mr Nawaz was an employee. However, consideration of whether Mr Nawaz's contractual role and his rights and obligations were so subordinate to Uber's business that it can be seen to have been performed as an employee of the business rather than as part of an independent enterprise focuses the approach. That is, one of the purposes of this consideration is to assist in the assessment of the legal facts as they reveal the nature of the relationship. The more directly a factor bears upon this aspect, the more significant it is likely to be.

[199] It is in this context that I understand Mr Nawaz raises the notion that Uber is the PCBU under the WHS laws and that he was not a PCBU himself. In this respect, he relies, in part, upon the Pandemic initiatives taken by Uber and other WHS matters including monitoring the trips and limits on active hours on the App. He also contends, in effect, that if he were a contractor, he would also be a PCBU and asserts that this did not apply in any practical sense.

[200] Under the [Work Health and Safety Act 2012](#) (SA), (WHS Act) the concept of a PCBU is defined in the following terms:

"5—Meaning of person conducting a business or undertaking

(1) For the purposes of this Act, a person conducts a business or undertaking—

- (a) whether the person conducts the business or undertaking alone or with others; and
- (b) whether or not the business or undertaking is conducted for profit or gain.

(2) A business or undertaking conducted by a person includes a business or undertaking conducted by a partnership or an unincorporated association.

(3) If a business or undertaking is conducted by a partnership (other than an incorporated partnership), a reference in this Act to a person conducting the business or undertaking is to be read as a reference to each partner in the partnership.

(4) A person does not conduct a business or undertaking to the extent that the person is engaged solely as a worker in, or as an officer of, that business or undertaking.

(5) An elected member of a local authority does not in that capacity conduct a business or undertaking.

(6) The regulations may specify the circumstances in which a person may be taken not to be a person who conducts a business or undertaking for the purposes of this Act or any provision of this Act.

(7) A volunteer association does not conduct a business or undertaking for the purposes of this Act.

(8) In this section—

volunteer association means a group of volunteers working together for one or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.”

[201] For context, I observe that worker is defined under the WHS Act in the following terms:

“7—Meaning of worker

(1) A person is a worker if the person carries out work in any capacity for a person conducting a business or undertaking, including work as—

- (a) an employee; or
- (b) a contractor or subcontractor; or
- (c) an employee of a contractor or subcontractor; or
 - (d) an employee of a labour hire company who has been assigned to work in the person's business or undertaking; or
- (e) an outworker; or
- (f) an apprentice or trainee; or
- (g) a student gaining work experience; or
- (h) a volunteer; or
- (i) a person of a prescribed class.

(2) For the purposes of this Act, a police officer is—

- (a) a worker; and
 - (b) at work throughout the time when the officer is on duty or lawfully performing the functions of a police officer.

(3) The person conducting the business or undertaking is also a worker if the person is an individual who carries out work in that business or undertaking.”

[202] Clearly, the notion of worker under the WHS Act is broader than employee and includes a contractor.

[203] The primary duties that apply to a PCBU are set out in s.19 of the WHS Act in the following terms:

“19—Primary duty of care

(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of—

- (a) workers engaged, or caused to be engaged by the person; and
 - (b) workers whose activities in carrying out work are influenced or directed by the person,

while the workers are at work in the business or undertaking.

(2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

(3) Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable—

(a) the provision and maintenance of a work environment without risks to health and safety; and

(b) the provision and maintenance of safe plant and structures; and

(c) the provision and maintenance of safe systems of work; and

(d) the safe use, handling and storage of plant, structures and substances; and

(e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities; and

(f) the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and

(g) that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.

(4) If—

(a) a worker occupies accommodation that is owned by or under the management or control of the person conducting the business or undertaking; and

(b) the occupancy is necessary for the purposes of the worker's engagement because other accommodation is not reasonably available,

the person conducting the business or undertaking must, so far as is reasonably practicable, maintain the premises so that the worker occupying the premises is not exposed to risks to health and safety.

(5) A self employed person must ensure, so far as is reasonably practicable, his or her own health and safety while at work.

Note—

A self employed person is also a person conducting a business or undertaking for the purposes of this section.”

[204] As a result, a self-employed person may also be a PCBU. Further, I observe that the WHS Act also contains differently stated, but broadly consistent, duties to and by workers and others in a workplace.

[205] There would be some grounds for suggesting that Mr Nawaz was a worker under the WHS Act. However, it is not necessary for me to determine whether this was the case. As set out earlier, Mr Nawaz must be an employee and not merely a worker, which has a broader scope. It is sufficient to observe that whatever duties Uber may have owed as a PCBU, it owed them to Mr Nawaz and others irrespective of his status as a worker or employee. Further, the fact that Mr Nawaz may or may not have been a PCBU in his own right arises as a consequence of any finding as to the nature of the relationship and is not of assistance. That is, the analysis of the impact of the WHS Act does not directly assist the determination of the immediate jurisdictional issue.

[206] I do accept that the notion of actions taken by Uber in the context of WHS obligations would be relevant to the consideration as to whether Mr Nawaz was working in Uber’s

business, provided they arise from legal rights and obligations and not merely practice.

[207] There were few aspects of the Services Agreement that would permit it to be characterised as Mr Nawaz carrying on of an independent business or enterprise in the sense of being entrepreneurial. He could not independently expand his part of the Uber work and could not generate goodwill or delegate the driving function. This has much less significance in light of the recent High Court judgements. However, Mr Nawaz could use his own car and mobile phone to generate work by utilising other rideshare Apps.

[208] On the other hand, Mr Nawaz was not presented as an emanation of the Uber business in the performance of the services. He was not contractually required (and was not permitted) to wear a uniform or otherwise identify as being part of the Uber business. While his car may have displayed a relatively small Uber sign, this was largely as a result of the SA Passenger Transport laws and intended for that purpose.

[209] I would accept that the steps taken by Uber in the context of the Pandemic were undertaken, at least in part, to protect Uber's own business interests. However, this conduct was not required by the terms of the Services Agreement and other than to the extent that these may also have been consistent with its WHS obligation this post contract conduct would not be relevant to the characterisation of the relationship. These steps were also temporary and exceptional.

[210] The Services Agreement required the use of the relevant Uber Apps by both the Riders and the Drivers and this has the impact of providing some identification of the services as being part of the Uber business. The identity of the driver and the user are disclosed to each before a request is actioned. Further, the driver and/or rider may cancel based upon that information. This tends to support the notion that those parties also form a relationship as part of the Uber rideshare model.

[211] In summary, I consider that whilst there are some contrary indicators, Mr Nawaz was not conducting a business as an entrepreneur in his own right. Further, there is also some indication that he was working in Uber's business. Relevantly, this analysis of the nature of the legal rights and obligations established by the Services Agreement sets some of the context for the consideration of the indicia. In particular, the nature of the control that arises in this contract over the work and how and when it is performed is not indicative of employment.

6.3 Consideration of the other elements of the legal relationship

[212] These aspects are to be considered to the extent that they shed light upon the true character of the relationship. As with all other aspects in this case, because of my findings as to the status of the Services Agreement, this is to be assessed based upon the legal rights and obligations evident in that contract.

[213] As would be clear from the earlier outline of the parties' submissions, each has adopted different characterisations of the indicia and there is also some duplication with the consideration of the major factors. In terms of those additional factors identified by the parties my conclusions are set out below.

Taxation

[214] The taxation arrangements are not consistent with employment. They are the direct result of the manner in which the Services Agreement treats taxation but remain relevant for present purposes, albeit not of significant weight.

Accounting arrangements – invoices

[215] The arrangements established by the Services Agreement are certainly consistent with a contractual relationship other than employment. That is, an invoice for work is issued to the Rider in the name of the Driver, government and other charges are paid in the name of the Driver and the payments are made to the Driver after the deduction of a service fee by Uber.

[216] These arrangements are however undertaken directly by Uber, using Uber's rates and systems. Mr Nawaz's immediate role was to log onto the Partner App, accept and undertake rides and confirm their completion. This is the arrangement that is hard-wired into the Services Agreement.

[217] In my view, what this means is that whilst invoicing and business style arrangements would in the normal course be a strong contrary indicator to employment, the manner in which this was contractually provided for under the Services Agreement means that this is of lesser significance.

Uniforms and livery

[218] The Services Agreement did not require Mr Nawaz to wear (and in fact prohibited him from so doing) any uniform or otherwise publicly identify his vehicle with Uber, except as required (in this case) by the SA Transport regulations.

[219] The provision of the PPE in response to the Pandemic has been addressed earlier and taken into account in my consideration of the major issues to the extent that it is relevant to the legal rights and obligations of the parties.

Distinct trade or profession

[220] I would not consider the work involved to be unskilled, but I do accept that it does not involve a profession, trade or special calling as contemplated by the authorities.

[221] This factor weighs for a finding that an employment relationship existed.

Incentives

[222] For reasons set out earlier, this aspect is not of assistance as an indicator of the nature of this relationship.

Non exclusivity/no requirement to Work

[223] The fact that Mr Nawaz was not required to accept jobs even when activated, is a factor contrary to a finding of employment. That is, unlike the circumstances of a casual or part-time employee who may of course work for multiple employers, the degree of legal freedom and the absence of the obligation to perform any work even when Mr Nawaz had the user App activated differentiates that arrangement.^[74]

[224] The right within the Services Agreement to operate multiple Apps at any time, including when Mr Nawaz was online with Uber App, is also relevant.

Provision of equipment

[225] Mr Nawaz was required to provide his own capital equipment. That is, in order to use the Partner App and ultimately be available to accept riders and be paid for that work, Mr Nawaz was required by the Services Agreement to supply his own vehicle, smart phone and wireless data plan. In addition, at his own cost, he was required to maintain and fuel the vehicle, maintain a valid vehicle registration, and hold relevant insurance including the compulsory third party insurance on the vehicle.

[226] The fact that the required equipment is largely not special equipment (beyond the nature of items that many people have in their private life) is a factor to be weighed in assessing the import of this indicia.

Insurance

[227] The Services Agreement required Mr Nawaz to hold insurances more consistent with the notion of Mr Nawaz not being an employee. For reasons set out earlier, the fact that Uber may have provided additional insurance does not disturb that finding.

Characterisation of the contract

[228] The Services Agreement makes various statements about the nature of the contract. These include, in effect:

The provision of services to a Rider creates a legal and direct business relationship between the Driver and the user (Rider) – clause 3;

The provision of services by Uber to the Driver creates a legal and direct business relationship between Rasier Pacific and the Driver – clause 4;

Rasier Pacific is acting as the limited collection agency – clause 28.1; and

The Agreement is not an employment agreement and does not create an employment, independent contractor or worker relationship (including from a labour law, tax law or social security law perspective), joint venture, partnership or agency relationship – clause 28.1.

[229] However, the above provisions may largely be regarded as labelling or characterising the nature of the contractual relationship between Mr Nawaz and Uber. None of these notions set out the substantive rights and obligations of that relationship. It is now well established and confirmed by the High Court that such labels cannot alter the substantive nature of the relationship and do not act as some form of tiebreaker in the event of a “borderline” case.

Variation and termination of the Services Agreement

[230] The terms of the Services Agreement regarding these matters have been set out earlier in the Decision. The manner in which the contract can be varied or terminated is consistent with business arrangements but is also reflective of the relative bargaining power of the parties. I will return to this aspect shortly.

Basis of the payment and non-provision of superannuation and leave

[231] The fact that Mr Nawaz, in effect, received payments based on a per-trip basis, does not point to him necessarily being an independent contractor. Although this is certainly consistent with the contract being an independent contractual arrangement, this is also notionally consistent with piece-work arrangements. I would however observe that in the context of piece work rates for employees under the FW Act, a minimum payment by reference to award minimum hourly rates would generally operate. No minimum payment directly related to activation of the Apps applied under the contract.

[232] Likewise, the fact the Mr Nawaz did not individually quote for jobs is not particularly insightful as a measure of the nature of the relationship. There are various forms of independent contractual arrangements including where a business may opt to undertake work at rates on offer to the market by the principal.

[233] The fact that Mr Nawaz received no leave or superannuation benefits under the terms of the Services Agreement also leads to the same conclusion. That is, the absence of formal leave

is notionally consistent with both being a contractor and casual employment. The non-payment of superannuation is consistent with being a contractor but largely reflects the view taken in the Services Agreement that the relationship was not that of employment.

[234] The capacity under the Services Agreement for Mr Nawaz to negotiate an alternative fee with the Riders is of course relevant more generally.

[235] The support payments apparently offered to drivers during some stages of the Pandemic were not the result of a legal obligation under the Services Agreement.

Sub-contracting or Sub-letting

[236] There was no capacity for Mr Nawaz to subcontract the arrangements with Uber. He had to undertake the work personally. This arises from the Services Agreement and is more consistent with that of employment. Whilst the limitation is also conceptually consistent with the import of the SA Passenger Transport laws, which require the drivers to hold the relevant qualifications and approvals, the Services Agreement prevented Mr Nawaz from subcontracting the use of the Partner App, even to a driver who would otherwise be eligible under the SA laws.

Provisions for “disciplinary action”

[237] Many elements of Mr Nawaz’s factual contention in this regard were not sustained on the evidence. However, Uber has the right under the Services Agreement to suspend and terminate the arrangements on stated grounds that included non-compliance with the community standards obligations. For reasons previously outlined, these arrangements are relevant but not necessarily indicative of the nature of the relationship given that all such relationships rely upon standards and obligations for the quality of the output of the contract.

[75]

[238] I have taken the other aspects of the indicia relied upon by the parties, but not expressly set out above, in my earlier consideration of the 2 major contextual factors.

6.4 The overall assessment of the impact of the legal rights and obligations

[239] The ultimate question is whether Mr Nawaz was employed, as an employee, by Uber. The assessment of the totality of the relationship between the parties by reference to the various indicia of employment as concerned with the rights and obligations established by the parties’ contract, is apposite. [76] Given my findings as to the veracity of the Services Agreement and absence of any variation, the post-contract conduct is not relevant.

[240] The factors within the legal relationship pointing away from employment are more significant than those that would lead to the opposite outcome sought by Mr Nawaz. This includes that the nature and degree of the control exercised is not consistent with the nature of employment. Further, Mr Nawaz’s role under the terms of the Services Agreement was not so subordinate to Uber’s business in the sense contemplated in *Jamsek* and *Personnel Contracting* that it can be seen to have been performed as an employee of the business.

[241] In this case, I consider on balance that Mr Nawaz was not an employee of Uber.

7. Conclusions and Order

[242] Given my findings, Mr Nawaz was not protected from unfair dismissal and was not entitled to bring this application. As a result, this application must be dismissed and an

Order^[77] to that end is being issued in conjunction with this Decision.

[243] I would observe that there are some elements of the relationship between Mr Nawaz and Uber that could operate unfairly. These include the approach evident in the Services Agreement to the establishment and variation of the fees and to other changes that may be made. These arise for the most part from the imbalance in the bargaining power of the parties. The role of the Commission in the present context is not to compensate for these factors or adjust the legal rights and obligations to provide a fairer outcome.^[78] I would also observe that in many situations within Australian workplaces and in our society these elements have led to some regulation to establish minimum standards and related dispute resolution rights and obligations. Any broad policy response remains a matter for the Parliaments of Australia.

 Title: sig - Description: Seal of the FWC with with members signature

COMMISSIONER

Appearances:

A *Nawaz*, the Applicant on his own behalf.

C Loughlin and later (for written submissions) *Y Shariff SC* of counsel instructed by Ashurst on behalf of Rasier Pacific Pty Ltd, the Respondent.

Hearing details:

2021

July 28

August 23

Video and telephone Hearing.

Final written submissions:

2022

Applicant: 4, 18, 19 March

Respondent: 4, 18 March.

Attachment A.

RASIER PACIFIC PTY LTD

UBER B.V.

SERVICES AGREEMENT

Last update: 1 December, 2017

1. Recitals. This Services Agreement ("**Agreement**") constitutes a legal agreement between you, an individual ("**you**"), Rasier Pacific Pty Ltd., an Australian company registered in New South Wales under ACN 622 365 833 ("**Rasier Pacific**") and Uber B.V., a private limited liability company established in the Netherlands, having its offices at Mr. Treublaan 7, 1097 DP Amsterdam, The Netherlands, registered at the Amsterdam Chamber of Commerce under number 56317441 ("**Uber**"). Rasier Pacific will procure and facilitate the provision of lead generation services, being on-demand intermediary and related services rendered via a digital technology application that enable transportation providers to seek, receive and fulfil on-demand requests for transportation services ("**Uber Services**") to you, an independent provider of peer-to-peer passenger transportation services ("**Transportation Services**"). Uber will license you the Uber Driver App ("**Driver App**"), a mobile application provided by Uber that enables you to access and receive the Uber Services. The Uber Services and Driver App enable you to seek, receive and fulfill requests for Transportation Services from authorised users of the mobile application provided by Uber ("**Uber App**"), ("**Users**"). In order to use the Uber Services and Driver App, you must agree to the terms and conditions that are set forth below. Upon your execution (electronic or otherwise) of this Agreement, you, Rasier Pacific and Uber shall be bound by the terms and conditions set forth below. References herein to "Uber Group" shall be taken as a reference to Rasier Pacific, Uber and each of their affiliates.

2. Provision of Transportation Services. When the Driver App is active, User requests may appear in the Driver App if you are available and in the vicinity of the User. If you accept a User's request for Transportation Services, you will be provided with the User's first name and pickup location via the Driver App. You acknowledge and agree that the Uber App may provide the User with certain information about you, including your first name, contact information, photo, location, your vehicle make, model and license plate number. You shall not contact any User or otherwise use any of their personal information other than for the purposes of fulfilling Transportation Services. You acknowledge and agree that you alone will choose the most effective and safe manner to perform each instance of Transportation Services, and, except for the provision of the Uber Services and the licence to use the Driver App, you will need to provide (at your own expense) all necessary equipment, tools and other materials to perform Transportation Services.

3. Your Relationship with Users. You acknowledge and agree that your provision of Transportation Services to Users creates a legal and direct business relationship between you and the User. Rasier Pacific, Uber and their affiliates are not responsible or liable for the actions or inactions of a User in relation to you, your activities or your vehicle. You shall have the sole responsibility for any obligations or liabilities to Users or third parties arising from your provision of Transportation Services. You acknowledge and agree that you are solely responsible for taking such precautions as may be reasonable and proper (including maintaining adequate insurance that meets the requirements of all applicable laws) regarding any acts or omissions of a User or third party. You acknowledge and agree that, unless consented to by a User, you may not transport or allow inside your vehicle individuals other than a User and any individuals authorised by such User, during the performance of

Transportation Services for such User. You acknowledge and agree that all Users should be transported directly to their specified destination, as directed by the User, without unauthorised interruptions or stops.

4. Your Relationship with Uber Group. You acknowledge and agree that Rasier Pacific's provision of the Uber Services creates a legal and direct business relationship between Rasier Pacific and you. You also acknowledge and agree that Uber's licence to you of the Driver App creates a legal and direct business relationship between Uber and you. Neither Rasier Pacific nor Uber shall be deemed to direct or control you generally or in your performance under this Agreement, including in connection with your provision of Transportation Services, your acts or omissions, or your operation and maintenance of your vehicle. Except as expressly set out herein, you retain the sole right to determine when and for how long you will utilise the Driver App or the Uber Services. You alone decide when, where and for how long you want to use the Driver App, and when to try to accept, decline or ignore a User request. A User request can be cancelled, subject to Uber's then-current policies (including the Community Guidelines located at www.uber.com/legal/community-guidelines/rides/anz-en/). You acknowledge and agree that you will not: (a) display Rasier Pacific's, Uber's or any of their affiliates' names, logos or colors on any vehicle(s); or (b) wear a uniform or any other clothing displaying Rasier Pacific's, Uber's or any of their affiliates' names, logos or colors, unless you and Rasier Pacific or Uber (as applicable) have agreed otherwise or if so required by law. You retain the complete right to engage in other business or income generating activities, and to use other ridesharing networks and apps in addition to the Uber Services and the Driver App. Rasier Pacific retains the right to, at any time at its sole discretion, restrict you from using the Uber Services in the event of a violation of this Agreement or any relevant Uber policy, your disparagement of Rasier Pacific, Uber or any of their affiliates, or your act or omission that causes harm to Rasier Pacific's, Uber's or their affiliates' brand, reputation or business as determined by Rasier Pacific in its sole discretion. Rasier Pacific also retains the right to restrict you from using the Uber Services for any other reason at the sole and reasonable discretion of Rasier Pacific. Uber retains the right to, at any time at its sole discretion, deactivate or otherwise restrict you from accessing the identification and password key assigned to you by Uber ("**Driver ID**") and/or the Driver App, in the event of a violation of this Agreement, any relevant Uber policy, including the Community Guidelines or the Uber Privacy Policy (located at privacy.uber.com/policy/), your disparagement of Rasier Pacific, Uber or any of their affiliates, your act or omission that causes harm to Rasier Pacific's, Uber's or their affiliates' brand, reputation or business as determined by Uber in its sole discretion. Uber also retains the right to deactivate or otherwise restrict you from accessing the Driver ID and/or Driver App, for any other reason at the sole and reasonable discretion of Uber.

5. Ratings. You acknowledge and agree that after receiving Transportation Services, a User will be prompted by the Uber App to rate you and such Transportation Services, and you will be prompted to rate your User. This can also include comments and other feedback, which, along with the rating, you agree to provide in good faith. Rasier Pacific, Uber and their affiliates reserve the right to use, share and display your User ratings and comments in any manner in connection with the business of Rasier Pacific, Uber and their affiliates without attribution to you or your approval. You acknowledge and agree that Rasier Pacific, Uber and their affiliates are distributors (without an obligation to verify) and not publishers of your ratings and comments, and may remove comments in the event that such comments include obscenities or other objectionable content, include an individual's name or other personal information, or violate any privacy laws, other applicable laws or Rasier Pacific, or their affiliates' content policies. There is no obligation on you or the User to provide ratings or comments nor is there any consequence for not providing a rating.

6. Requirements. You acknowledge and agree that you may be subject to certain background, driving record and other checks from time to time. You acknowledge and agree that at all times you shall hold and maintain a valid driver's license and all other required licenses, permits, work entitlements, approvals and authority to provide passenger Transportation

Services in the city or metro areas within Australia in which are you enabled by the Driver App to receive requests for Transportation Services ("**Territory**"). You acknowledge and agree that you have a citizenship, residency or visa status that allows you the right to work in Australia. You acknowledge and agree that you will provide the Transportation Services with due skill, care and diligence and that you will maintain high standards of professionalism, service and courtesy. You acknowledge and agree that your vehicle must meet the then-current Rasier Pacific requirements for a vehicle to provide the Transportation Services and must be authorised by Rasier Pacific for this use, be properly registered, licensed and generally suitable to operate as a passenger transportation vehicle in your Territory, either owned or leased by you or otherwise in your lawful possession, kept in a clean and sanitary condition, and maintained in good operating condition consistent with industry safety and maintenance standards for a vehicle of its kind and any additional standards or requirements in the applicable Territory. You acknowledge and agree that Rasier Pacific reserves the right, at any time in its sole discretion to restrict you from using the Uber Services, if you fail to meet the requirements in this Agreement. You also acknowledge and agree that Uber reserves the right, at any time in its sole discretion to deactivate or otherwise restrict you from accessing the Driver ID and/or Driver App, if you fail to meet the requirements in this Agreement.

7. Documentation. To ensure your compliance with all requirements in clause 6 above, you must provide Rasier Pacific (or a Rasier Pacific affiliate) with written copies of all such licenses, permits, work entitlements, approvals, authority, registrations and certifications (including renewals) prior to and during your provision of any Transportation Services, and allow Rasier Pacific (or a Rasier Pacific affiliate) to review any of this documentation on an ongoing basis (note that Rasier Pacific may independently verify your documentation in any way Rasier Pacific deems appropriate in its reasonable discretion). You must notify Rasier Pacific immediately if you cease to hold any license, permit, work entitlements, approvals, authority, registration or certification or there are changes to the terms of any of those which would alter your ability to provide the Transportation Services in accordance with applicable laws. Rasier Pacific shall, upon request, be entitled to review such licenses, permits, work entitlements, approvals, authority, registrations and certifications from time to time. Your failure to meet any of the requirements in this clause or clause 6 shall constitute a material breach of this Agreement.

8. Fare Calculation and Your Payment

8.1 You can charge a fare to Users for each instance of completed Transportation Services that you provide to a User that are obtained via the Uber Services ("**Fare**"). Rasier Pacific will calculate a recommendation of the Fare that you can elect to charge Users ("**Fare Calculation**"). As at 1 December 2017, Rasier Pacific determines the Fare Calculation as a base fare amount plus distance (as determined by Rasier Pacific using location-based services enabled through your mobile device and/or time amounts, as detailed at www.uber.com/cities for the applicable Territory). You can also charge the User for any applicable road, bridge, ferry, tunnel and airport charges and any other fees (including inner-city congestion, environmental or miscellaneous charges as reasonably determined by the Uber Services) ("**Tolls**"), taxes and/or fees incurred during the provision of Transportation Services, whether charged by a third party or Rasier Pacific. Rasier Pacific reserves the right to change the Fare Calculation at any time in Rasier Pacific's discretion. Rasier Pacific will provide you with notice in the event that any such change would result in a change in the recommended Fare. Continued use of the Uber Services after any such change shall constitute your consent to such change. You appoint Rasier Pacific as your limited payment collection agent solely to accept the Fare, applicable Tolls, and, depending on the region and/or if requested by you, applicable taxes and fees from the User on your behalf via the Uber Services' payment processing functionality, and agree that the User's payment to Rasier Pacific shall be considered the same as payment made directly by the User to you. If a User cancels their request for Transportation Services prior to your arrival, Rasier Pacific may

charge that User a cancellation fee on your behalf, and a Service Fee will be payable to Rasier Pacific.

8.2 The parties acknowledge and agree that as between you and Rasier Pacific, the Fare Calculation is a recommended amount, and the primary purpose of the Fare Calculation is to act as the default Fare in the event you do not negotiate a different Fare. You shall always have the right to charge a Fare that is less than the pre-arranged Fare Calculation ("**Negotiated Fare**"). Rasier Pacific agrees to remit, or cause to be remitted, to you on at least a weekly basis, (a) the Fare less the applicable Service Fee and other fees charged by Rasier Pacific; (b) the Tolls (excluding applicable airport charges, which Rasier Pacific may pay to the airport on your behalf); (c) any incentive payments made under clause 13; and (d) depending on the region, certain taxes and ancillary fees (where applicable). If you have separately agreed to any other amounts being deducted from your Fares (such as vehicle financing, lease payments, government fees and charges, etc), those amounts will be deducted before remittance to you, and Rasier Pacific will determine the order of any such deductions from the Fare (as between you and Rasier Pacific). Rasier Pacific reserves the right to adjust payment in relation to a particular Fare for reasons such as inefficient routes, failure to properly end a particular instance of Transportation Services in the Driver App, or technical error in the Uber Services. In more serious situations, such as fraud, charges for Transportation Services that were not provided or User complaints, Rasier Pacific may cancel a Fare entirely or if the Fare has already been paid, require reimbursement of the Fare from you. Rasier Pacific reserves the right, in its sole discretion, to seek reimbursement from you if Rasier Pacific discovers payment processing errors. Rasier Pacific may obtain reimbursement of any amounts owed by you to Rasier Pacific by deducting from future Fares owed to you, debiting your card on file or your bank account on record, or seeking reimbursement from you by any other lawful means. You authorise Rasier Pacific to use any or all of the above methods to seek reimbursement.

9. Receipts. As part of the Uber Services, Rasier Pacific provides you with a system for delivering receipts to Users for Transportation Services rendered. Upon your completion of Transportation Services for a User, Rasier Pacific prepares and issues a receipt to the User via email on your behalf. It includes a breakdown of amounts charged to the User for Transportation Services and certain information about you (including your name, contact information, photo and the route taken). Any corrections to a User's receipt for Transportation Services must be submitted to Rasier Pacific in writing within 3 business days after the completion of such Transportation Services. Absent such a notice, Rasier Pacific shall not be liable for any mistakes in or corrections to the receipt or for recalculation or disbursement of the Fare.

10. Service Fee. In consideration of Rasier Pacific's provision of the Uber Services to you, you agree to pay Rasier Pacific a service fee on a per Transportation Services transaction basis, which as at 1 December 2017, is calculated as a percentage of the Fare Calculation ("**Service Fee**") (regardless of any Negotiated Fare). Rasier Pacific will provide you with notice via email or via the Driver App, of the Service Fee that applies to each Transportation Service that you provide. You acknowledge that, unless regulations applicable to your Territory require otherwise, taxes (in particular GST) will be calculated and charged on the Fare, and Rasier Pacific shall calculate the Service Fee on an amount equal to the Fare Calculation plus the amount of such taxes (in particular GST) that would be calculated on the amount of the Fare Calculation. You acknowledge and agree that Rasier Pacific may, in its sole discretion: (i) adjust the Service Fee; or (ii) introduce a new model to determine the Service Fee payable by you. Rasier Pacific will provide you with at least 14 days' notice in the event of an increase to the Service Fee under (i) above or the introduction of a new Service Fee model under (ii) above. If either of these occurs, you have the right to terminate the Agreement immediately, without notice. Continued use of the Uber Services after any such change in the Service Fee calculation shall constitute your consent to such change.

11. No Additional Amounts. You acknowledge and agree that, for the mutual benefit of the parties, through advertising and marketing, Rasier Pacific, Uber and their affiliates may seek to attract new Users and to increase existing Users' use of the Uber App. You acknowledge and agree such advertising or marketing does not entitle you to any additional monetary amounts beyond the amounts expressly set forth in this Agreement.

12. Taxes.

12.1 You acknowledge and agree that you are required to: (a) complete all tax registration obligations and calculate and remit all tax liabilities related to your provision of Transportation Services as required by applicable law; and (b) provide Rasier Pacific with all relevant tax information requested of you by Rasier Pacific, Uber and/or each of their affiliates (including a valid Australian Business Number (ABN) and/or Goods and Services Tax (GST) registration number under which you provide Transportation Services, if obtaining such a valid ABN and/or GST registration number is required of you by applicable law). You further acknowledge and agree that you are responsible for taxes on your own earnings arising from your provision of Transportation Services, including without limitation, income tax and GST. Notwithstanding anything to the contrary in this Agreement, Rasier Pacific may in its reasonable discretion based on applicable tax and regulatory considerations, or as required under the law, collect and remit taxes resulting from your provision of Transportation Services and/or provide any of the relevant tax and other information you have provided pursuant to the foregoing requirements in this clause 12.1 directly to the applicable governmental tax authorities on your behalf or otherwise

12.2 Unless expressly stated otherwise in this Agreement, all amounts payable or consideration to be provided under this Agreement by you to Rasier Pacific are exclusive of GST. If GST is payable on any supply by Rasier Pacific made under this Agreement, for which the consideration is not expressly stated to include GST, you agree to pay Rasier Pacific an additional amount equal to the GST at the same time that the consideration for the supply, or the first part of the consideration for the supply (as the case may be), is to be provided. In this Agreement, GST that is payable by Rasier Pacific includes GST that is payable by the representative member of Rasier Pacific's GST group.

12.3 The parties agree that, for the purposes of the GST law, Rasier Pacific supplies to you the Uber Services in sole consideration for the Service Fee. In addition, Uber supplies to you a licence to use the Driver App under clause 19 for no consideration.

13. Incentives. From time to time, Rasier Pacific may make an incentive payment(s) to you as consideration for your satisfaction of certain conditions as determined by Rasier Pacific in its discretion ("**Conditions**"). These Conditions may be included in promotional materials, and/or may be communicated to you, including via text message and email. You acknowledge and agree that any incentive payment(s) is made to you at Rasier Pacific's sole discretion, subject to the Conditions.

14. Other Fees. You acknowledge and agree that Rasier Pacific may, in its sole discretion, charge other fees in addition to the Service Fee including, fees related to airports. Rasier Pacific will provide you with at least 14 days' notice before it implements any such fees. Your use of the Uber Services after the implementation of the new fees shall constitute your consent to Rasier Pacific charging such fees. If Rasier Pacific imposes or provides notice of an intention to impose a fee under this clause 14, you have the right to terminate the Agreement immediately, without notice. There are no fees payable to Uber in connection with the Driver App and licence granted under clause 19.

15. Devices. You are responsible for the acquisition, cost and maintenance of your mobile device/s and any associated wireless data plans that you use to access the Driver App. Subject to this Agreement, Uber grants you a personal, non-exclusive, non-transferable, non-sublicensable user right to install and use the Driver App on your device solely for the purpose of providing Transportation Services. This license shall immediately terminate in the event

that you cease to provide Transportation Services using your mobile device, and you must then delete the Driver App from your mobile device. You agree not to give the Driver App or any associated data to anyone else. You agree that using the Uber Services may consume very large amounts of data, and Rasier Pacific and Uber advise that your mobile device should only be used under a data plan with unlimited, or at least very high, data usage limits. Neither Rasier Pacific, Uber, nor their affiliates, shall be responsible or liable for any fees, costs, or overage charges associated with any data plan.

16. Term & Termination. This Agreement shall commence on the date that the Agreement is executed by you (electronically or otherwise) and will continue until terminated by you, Rasier Pacific or Uber, which any party can do (a) without cause at any time on 30 days' prior written notice to the other parties; (b) immediately, without notice, for any other party's material breach of this Agreement; or (c) immediately, without notice, in the event of the insolvency or bankruptcy of any other party, or upon such other party's filing or submission of request for suspension of payment (or similar action or event) against the terminating party. In addition, Rasier Pacific may restrict you from using the Uber Services and/or Uber may deactivate or otherwise restrict you from accessing or using the Driver ID and/or Driver App immediately, without notice, in the event you no longer qualify, under applicable law or the standards and policies of Rasier Pacific, Uber and their affiliates, to provide Transportation Services or to operate the vehicle, or as otherwise set out in this Agreement.

17. Effect of termination. Upon termination of the Agreement, you shall immediately delete and fully remove the Driver App from your mobile device(s). Outstanding payment obligations and all clauses 3, 4, 5, 11, 12, 17, 18, 19, 20, 22, 23, 24, 25, 27, 28, 29 and 34 and 35 shall survive any such termination.

18. Privacy. Your personal information will be collected, used and shared in accordance with the Uber Privacy Policy (located at privacy.uber.com/policy).

19. Intellectual Property. Subject to the terms and conditions of this Agreement, Uber hereby grants you, for no consideration, a non-exclusive, royalty-free, non-transferable, non-sublicensable, non-assignable license, during the term of this Agreement, to use the Driver App in connection with the provision of the Uber Services by Rasier Pacific solely for the purpose of providing Transportation Services to Users and tracking resulting Fares and fees. Uber, its affiliates and respective licensors reserve all rights not expressly granted in this Agreement. The Driver App and all data related to the access and use of the Uber Services (including all intellectual property rights in all of the foregoing) are and remain the property of Uber, its affiliates or respective licensors. You shall not improperly use the Uber Services or Driver App. You shall not use any of Uber's names, logos or marks for any commercial purpose except as Uber expressly allows, nor shall you try to register or otherwise use or claim ownership over any of Uber's or its affiliates' names, logos or marks. You shall not copy, modify, distribute, sell or lease any part of the Driver App, Uber Services or related data, nor shall you reverse engineer or attempt to extract the source code of Uber software, except if allowed by law.

20. Confidentiality. This Agreement and any information provided by Uber or Rasier Pacific to you, which Uber or Rasier Pacific designates as confidential or which you should reasonably know should be treated as confidential, should be treated accordingly.

21. Insurance & Accidents.

21.1 You agree to maintain during the term of this Agreement motor vehicle liability insurance on all vehicles which you operate at insurance levels that satisfy the minimum requirements to operate a private passenger vehicle on public roads within the Territory, as well as any other minimum motor vehicle liability insurance cover which Rasier Pacific requests you hold. You agree to provide Rasier Pacific with a copy of the insurance policy, policy declarations, proof of insurance identification card and proof of premium payment for the insurance policy

required in this clause 21.1 upon request. Furthermore, you must provide Rasier Pacific with written notice of cancellation of any insurance policy required by Rasier Pacific. Rasier Pacific shall have no right to control your selection or maintenance of your policy. You must be a named insured or individually rated driver, for which a premium is charged, on the insurance policy required in this paragraph 21.1 at all times. You understand and acknowledge that your private passenger motor vehicle insurance policy, including any insurance coverage held via a commercial arrangement you have with a vehicle rental or leasing provider, may not afford liability, comprehensive, collision, medical payments, first or third party no fault personal injury protection, uninsured motorist, underinsured motorist or other coverage while you provide for any Transportation Services you provide pursuant to this Agreement. If you have any questions or concerns about the scope or applicability of your own insurance coverage, it is your responsibility, not Rasier Pacific's or Uber's, to resolve them with your insurer(s). Rasier Pacific may maintain during the term of this Agreement insurance related to your provision of Transportation Services as determined by Rasier Pacific in its reasonable discretion, provided that Rasier Pacific and its affiliates are not required to provide you with any specific insurance coverage for any loss to you or your vehicle. Should Rasier Pacific procure insurance related to your provision of Transportation Services, Rasier Pacific may cancel such coverage at its sole discretion at any time. You are required to promptly notify Rasier Pacific of any accidents that occur while providing Transportation Services and to cooperate and provide all necessary information.

21.2 In relation to the Transportation Services, you agree that you are not an employee, or a worker or a deemed worker for the purposes of any workers compensation laws and therefore acknowledge that Rasier Pacific and/or Uber do not, and are not required to, maintain or provide you with workers' compensation insurance or maintain other occupational accident injury insurance on your behalf. You agree to maintain at your cost during the term of this Agreement workers' compensation insurance or other occupational accident injury insurance (or the local equivalent) as required by any applicable law in the Territory (provided that the foregoing shall have no impact on the mutual understanding between you and Rasier Pacific and Uber that you are a self-employed individual (including from a labour and social security perspective)) and otherwise comply with all statutory workers compensation requirements. If permitted by applicable law, you may choose to insure yourself against industrial injuries by maintaining occupational accident insurance in place of workers' compensation insurance. Furthermore, if permitted by applicable law, you may choose not to insure yourself against industrial injuries at all, but do so at your own risk.

22. Indemnity. You shall indemnify, defend (at Rasier Pacific's and Uber's option) and hold harmless Rasier Pacific, Uber and their affiliates and each of their respective officers, directors, employees, agents, successors and assigns from and against any and all liabilities, expenses (including legal fees), damages, penalties, fines, social security contributions and taxes arising out of or related to: (a) your breach of your representations, warranties or obligations under this Agreement; or (b) a claim by a third party (including Users, regulators and governmental authorities) directly or indirectly related to your provision of Transportation Services or use of the Uber Services ("**Losses**"). Your liability under this clause 22 shall be reduced proportionately if, and to the extent that, Rasier Pacific or Uber directly caused or directly contributed to any such Losses.

23. Tax Indemnity. You shall comply with all of your obligations under tax and social security laws to the extent applicable to this Agreement. You shall indemnify Rasier Pacific, Uber and their affiliates from all tax liabilities, duties, levies, claims and penalties that may be imposed on you or on Rasier Pacific, Uber and/or their affiliates as a result of your failure to comply with any of your tax obligations, or for providing false information requested of you under clause 12.1. In particular, but without limitation to the foregoing, such taxes or duties shall include taxes, wages or other duties or withholdings (including any wage tax, social insurance premiums or employee insurance premiums) ("**Tax Liabilities**") arising in the event that the relationship described in this Agreement, contrary to the intention and meaning of the

parties, should be held to be an employment agreement between Rasier Pacific or Uber and you by the Dutch or Australian taxation, fiscal or social security authority or the taxation, fiscal or social security authority of any other country. The indemnity set out in this clause 23, insofar as it relates to a finding by a judicial body or legislative authority of competent jurisdiction that there is an employment relationship between you and Rasier Pacific, Uber or an affiliate of Rasier Pacific or Uber, applies only to that proportion of Rasier Pacific's or Uber's liability that directly or indirectly relates to or arises from you holding yourself out to be an employee of Rasier Pacific or Uber or any of their affiliates, or any other act or omission by you that is not expressly authorised by Rasier Pacific or Uber and would reasonably suggest to a third party that you are an employee of Rasier Pacific, Uber or any of their affiliates.

24. Representations and warranties. You hereby represent and warrant that: (a) you have full power and authority to enter into this Agreement and perform your obligations hereunder; (b) you have not entered into, and will not enter into, any agreement that would prevent you from complying with this Agreement; and (c) you will comply with all applicable laws in your performance of this Agreement, including holding and complying with all permits, licenses, registrations and other governmental authorisations necessary to provide Transportation Services under this Agreement, and passenger transportation services to third parties in the Territory generally.

25. Disclaimer. This clause 25 applies only to the maximum extent permitted by applicable law, and does not (and is not intended to) override any rights that you have pursuant to applicable law, including the Australian Consumer Law. Rasier Pacific, Uber and their affiliates (as applicable) provide, and you accept, the Uber Services and Driver App on an "as is" and "as available" basis, and do not represent, warrant or guarantee that the Uber Services or Driver App will be uninterrupted or error free or will result in any requests for Transportation Services. Rasier Pacific, Uber and their affiliates function as on-demand lead generation and related service providers only and Rasier Pacific, Uber and their affiliates make no representations, warranties or guarantees as to the actions or inactions of the Users who may request or receive Transportation Services from you, and Rasier Pacific, Uber and their affiliates do not screen or otherwise evaluate Users. Notwithstanding the appointment of Rasier Pacific as the limited payment collection agent of you for the purpose of accepting payment from Users on your behalf as set forth in clause 8 above, Rasier Pacific, Uber and each of their affiliates expressly disclaim all liability for any act or omission of you, any User or other third party.

26. No Service Guarantee. This clause 26 applies only to the maximum extent permitted by applicable law, and does not (and is not intended to) override any rights that you have pursuant to applicable law, including the Australian Consumer Law. Rasier Pacific, Uber and their affiliates do not guarantee the availability or uptime of the Uber Services or Driver App. You acknowledge and agree that the Uber Services or Driver App may be unavailable at any time and for any reason (e.g., due to scheduled maintenance or network failure). Further, the Uber Services or Driver App may be subject to limitations, delays, and other problems inherent in the use of the internet and electronic communications, and Rasier Pacific, Uber and their affiliates are not responsible for any delays, delivery failures or other damages, liabilities or losses resulting from such problems.

27. Limitation of Liability. This clause 27 applies only to the maximum extent permitted by applicable law, and does not (and is not intended to) override any rights that you have pursuant to applicable law, including the Australian Consumer Law. Rasier Pacific, Uber and each of their affiliates shall not be liable under or related to this Agreement for any of the following, whether based on contract, tort or otherwise, even if a party has been advised of the possibility of such damages: (i) any incidental, punitive, special, exemplary, consequential, or other indirect damages of any type or kind; or (ii) your or any third party's property damage, or loss or inaccuracy of data, or loss of business, revenue, profits, use or other economic advantage. Except for Rasier Pacific's (or an affiliate of Rasier Pacific's) obligation to remit amounts owed to you pursuant to clause 8 above, but subject to any

applicable limitations or other provisions contained in these Agreement, in no event shall the liability of Rasier Pacific, Uber and/or any of their affiliates under this Agreement exceed the amount of Service Fees actually paid to or due to Rasier Pacific in the 6 months immediately prior the event giving rise to such claim. You acknowledge and agree that any and all claims you have or purport to have against Rasier Pacific, Uber and/or their affiliates should be notified to Rasier Pacific, Uber and/or their affiliates within one (1) year after the event(s) that gave rise to such claim and that you forfeit all rights in respect of that claim if you fail to do so. This limitation of liability only applies to the extent the law allows.

28. Relationship.

28.1 Rasier Pacific is acting as the limited payment collection agent solely for the purpose of collecting payment from Users on your behalf, except as otherwise expressly provided herein. This Agreement is not an employment agreement, and does not create an employment, independent contractor or worker relationship (including from a labour law, tax law or social security law perspective), joint venture, partnership or agency relationship. You have no authority to bind Rasier Pacific, Uber and/or their affiliates, or hold yourself out as an employee, independent contractor, worker, agent or authorized representative of Rasier Pacific, Uber and/or their affiliates.

28.2 Where, by implication of mandatory law or otherwise, you may be deemed an employee, agent or representative of Rasier Pacific, Uber or any of their affiliates, you undertake and agree to indemnify, defend (at Rasier Pacific's and Uber's option) and hold Rasier Pacific, Uber and any of their affiliates harmless from and against any claims by any person, entity, regulators or governmental authorities based on such implied employment, agency or representative relationship. The indemnity set out in this clause 28.2, insofar as it relates to a finding by a judicial body or legislative authority of competent jurisdiction that there is an employment relationship between you and Rasier Pacific, Uber or any of their affiliates, applies only to that proportion of Rasier Pacific's or Uber's liability that directly or indirectly relates to you holding yourself out to be an employee of Rasier Pacific or Uber or any of their affiliates, or any other act or omission by you that is not expressly authorised by Rasier Pacific or Uber and would reasonably suggest to a third party that you are an employee of Rasier Pacific or Uber or any of their affiliates. You expressly agree that where required or implied by applicable law or otherwise, you may be deemed an employee, agent or representative of Rasier Pacific, Uber or an Affiliate of Rasier Pacific or Uber, any payments made to you will be taken to be inclusive of (i) superannuation contribution amounts; and (ii) amounts equivalent to all taxes (including but not limited to income taxes) payable by you in respect of those payments, in each case that Rasier Pacific or Uber (or any of their affiliates) may otherwise be required to pay under applicable law..

29. General. You hereby acknowledge and agree that, by using the Uber Services, or downloading, installing or using the Driver App, you are bound by any future amendments and additions to this Agreement, information referenced at hyperlinks herein, or documents incorporated herein, including with respect to Fare Calculations. Continued use of the Uber Services or Driver App after any such changes shall constitute your consent to such changes. Invalidity of any provision in this Agreement does not affect the rest of this Agreement. Each of Rasier Pacific and Uber may assign or transfer this Agreement or any or all of their respective rights or obligations hereunder, in whole or in part, without your prior consent (you may not, however, as the Agreement needs to remain with you). Should Rasier Pacific or Uber do so, you have the right to terminate this Agreement immediately, without prior notice. Each of Rasier Pacific and Uber may subcontract its rights and obligations under this Agreement. This Agreement, including the recitals and all supplemental terms, constitutes the entire agreement and understanding of the parties with respect to its subject matter, and replaces and supersedes all prior or contemporaneous agreements or undertakings on this subject matter. In this Agreement, "including" and "include" mean "including, but not limited to."

30. Modification. Rasier Pacific and Uber reserve the right to modify the terms and conditions of this Agreement at any time, effective upon publishing an updated version of this Agreement on the online portal available to you on the Uber Services. Rasier Pacific and Uber reserve the right to modify any policies or information referenced at hyperlinks from this Agreement from time to time. Rasier Pacific or Uber will provide you with at least 14 days' notice in the event of a material change to any clause of the Agreement, provided that in such event you shall have the right to terminate the Agreement immediately upon receiving notice from Rasier Pacific or Uber. You hereby acknowledge and agree that, by using the Uber Services, or the Driver App, you are bound by any future amendments and additions to this Agreement, information referenced at hyperlinks herein, or documents incorporated herein, including with respect to Fare Calculations. Continued use of the Uber Services or Driver App after any such changes shall constitute your consent to such changes.

31. Supplemental Terms. Supplemental terms may apply to your use of the Uber Services, such as use policies or terms related to certain features and functionality, which may be modified from time to time ("**Supplemental Terms**"). You may be presented with certain Supplemental Terms from time to time. Supplemental Terms are in addition to, and shall be deemed a part of, this Agreement. Rasier Pacific will provide you with 14 days' notice in the event that it adds or modifies Supplemental Terms in a manner that it reasonably considers materially alters your rights under the Agreement, provided that in such event you shall have the right to terminate the Agreement immediately upon receiving notice from Rasier Pacific. Supplemental Terms shall prevail over this Agreement in the event of a conflict.

32. No Third Party Beneficiaries except for Rasier Pacific's and Uber's affiliates. You acknowledge that there are no third party beneficiaries to this Agreement except for Rasier Pacific's and Uber's affiliates. Nothing contained in this Agreement is intended to or shall be interpreted to create any third party beneficiary claims, except with respect to Rasier Pacific's and Uber's affiliates.

33. Notices. Any notice delivered by Rasier Pacific or Uber to you under this Agreement will be delivered by email to the email address associated with your account or by posting on the Driver App or the online portal available to you on the Uber Services. Any notice delivered by you to Rasier Pacific or Uber under this Agreement must be delivered by contacting Rasier Pacific or Uber at t.uber.com/partner-contact. Additional Territory-specific notices may be required from time to time.

34. Arbitration Any dispute, conflict or controversy, howsoever arising out of or broadly in connection with or relating to this Agreement, including those relating to its validity, its construction or its enforceability, shall be first mandatorily submitted to mediation proceedings under the International Chamber of Commerce Mediation Rules ("**ICC Mediation Rules**"). If such dispute has not been settled within sixty (60) days after a request for mediation has been submitted under such ICC Mediation Rules, such dispute can be referred to and shall be exclusively and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce ("**ICC Arbitration Rules**"). The ICC Rules' Emergency Arbitrator provisions are excluded. The dispute shall be resolved by one (1) arbitrator to be appointed in accordance with the ICC Rules. The language of the arbitration shall be English. The existence and content of the mediation and arbitration proceedings, including documents and briefs submitted by the parties, correspondence from and to the ICC, correspondence from the mediator, and correspondence, orders and awards issued by the sole arbitrator, shall remain strictly confidential and shall not be disclosed to any third party without the express written consent from the other party unless: (i) the disclosure to the third party is reasonably required in the context of conducting the mediation or arbitration proceedings; and (ii) the third party agrees unconditionally in writing to be bound by the confidentiality obligation stipulated herein. Nothing herein limits or excludes (nor is intended to limit or exclude) any statutory rights that you may have under applicable law, including the Australian Consumer Law, that cannot be lawfully limited or excluded.

35. Governing Law and Jurisdiction. Except as otherwise set forth above, these Agreement shall be exclusively governed by and construed in accordance with the laws of New South Wales, excluding its rules on conflicts of laws. The Vienna Convention on the International Sale of Goods of 1980 (CISG) shall not apply.

By clicking “Yes, I accept” or signing below (as such may be required by applicable law), you expressly acknowledge that you have read, understood, and taken steps to thoughtfully consider the consequences of this Agreement, that you agree to be bound by the terms and conditions of the Agreement, and that you are legally competent to enter into this Agreement with Rasier Pacific and Uber.

Your Signature:

Name:

Date:

SERVICE FEE ADDENDUM – South Australia

Last update: 27 June 2019

You entered into an agreement (“Agreement”) with Rasier Pacific Pty Ltd (“Company”), an Australian company with ACN 622 365 833 and Uber B.V. (“Uber”), a private limited liability company established in The Netherlands registered at the Amsterdam Chamber of Commerce under number 56317441 under which the Company provides the Uber Services to you, an independent provider of peer-to-peer passenger transportation services and Uber licenses you the Uber Driver App.

This Service Fee schedule is an addendum to the Agreement and it sets forth additional terms and conditions that are applicable in the region in which you provide transportation services. By clicking “Yes, I agree”, you agree to be bound by the additional terms below. Capitalized terms used herein but not defined shall have the meanings set forth in the Agreement.

1. Fares. For all product offerings, fares are posted and updated online (“City Page”).

1.1. All Cities. <https://www.uber.com/cities>

1.2 Adelaide.

<https://www.uber.com/en-AU/cities/adelaide/>

2. Service Fee. In consideration of the Company’s provision of the Uber Services to you, you agree to pay Company a service fee on a per Transportation Services transaction basis, currently calculated as a percentage of the Fare Calculation as set forth below:

Trip Type	UberX trips	Uber Assist trips	UberXL trips	Uber Comfort trips	Uber Premium trips
Service Fee (GST inclusive)	27.5%	27.5%	27.5%	27.5%	27.5%

Not all Trip Types are available in all cities. Your eligibility to receive requests for different Trip Types from passengers is subject to you and your vehicle meeting the requirements for the Trip Type as made available on the Uber website as set out below (as updated from time to time) or other links notified to you from time to time:

2.1 Adelaide. <https://www.uber.com/en-AU/drive/adelaide/vehicle-requirements/>

3. Trips in other cities. If requests are accepted in other cities, the Fares and Service Fees for that city will apply for those requests.

^[1] See *Gupta Full Bench* at [2].

^[2] *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610 at [46].

^[3] Section 399(1) of the FW Act.

^[4] [2021] FWC 2818.

^[5] [2020] FWC 1698; (2020) 296 IR 246.

^[6] [2001] HCA 44; (2001) 207 CLR 21.

^[7] [2011] FWA 8307, 215 IR 235.

^[8] Transcript PN25 and PN26.

^[9] [2021] FWC 5015.

^[10] [2021] HCA 23.

^[11] [2020] FCA 119, 279 FCR 114, 297 IR 210.

^[12] [2020] FCA 122, 279 FCR 631, 297 IR 269.

^[13] UK Supreme Court (per Lord Leggatt with whom the rest of the Court agreed).

^[14] Case number 8937120 CV EXPL 20-22882.

^[15] [1982] VicRp 87; [1982] VR 871

^[16] *Uber Eats Full Bench Decision*, *Kaseris v Rasier Pacific V.O.* [2017] FWC 6610, *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579, *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807, *Atapattu Arachchige v Rasier New Zealand Limited* [2020] NZEmpC 230.

^[17] Exhibits A1 – A10.

^[18] Exhibit R1.

^[19] *Jiang Shen Cai trading as French Accent v Rozario* [2011] FWA 8307.

^[20] *Jamsek* per Kiefel CJ, Keane and Edelman JJ at [40]-[62], *Personnel Contracting* per Gordon J at [172]-[178]:

^[21] *Ibid.*

^[22] *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [42], [54], Gordon J at [177] - [178], [188] - [190].

^[23] *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [46], [54].

^[24] *Jamsek* per Kiefel CJ, Keane and Edelman JJ at [61].

^[25] *Jamsek* per Kiefel CJ, Keane and Edelman JJ at [6], [8], [62] and *Personnel Contracting* at [81].

^[26] *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [33]-[34], [47], [61], per Gordon J at [174], [186]-[189].

^[27] *Personnel Contracting* per Gordon J at [174], [186]-[189].

^[28] *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [62].

^[29] *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [39] and *Jamsek* at [60].

[30] Ibid.

[31] *Personnel Contracting* per Gordon J at [180]-[183].

[32] *Jamsek* per per Kiefel CJ, Keane and Edelman JJ at [58].

[33] *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [39], *Jamsek* at [60].

[34] *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [58], [63]-[66], [79], Gageler and Gleeson JJ at [127], Gordon J at [184]:

[35] *Personnel Contracting* per Kiefel CJ, Keane and Edelman at [84].

[36] *Personnel Contracting* per Gordon J at [196].

[37] *Jamsek* per Kiefel CJ, Keane and Edelman JJ at [51].

[38] Exhibit R1 at 80.

[39] Transcript PN500.

[40] Exhibit R1 par 82 as confirmed by Mr Nawaz – transcript PN305.

[41] Transcript PN473, PN474.

[42] [Passenger Transport Regulations 2009](#) (SA) Division 3 reg 14-17, Court Book page 149 and transcript PN564.

[43] [Passenger Transport Regulations 2009](#) (SA) – reg 135(1)(a)(ii).

[44] Transcript PN277.

[45] Transcript PN 297.

[46] Exhibit A1. Other messaging to the same end was also referenced in final submissions.

[47] Transcript PN 265-267

[48] [Regulation 9\(j\)](#).

[49] Submissions from Mr Nawaz dated 18 March 2022 addressing questions from the Commission.

[50] Ibid – attachment D2.

[51] By reference to [regulation 55](#). This restricts advertising to only the rear (boot) space of the vehicle but relates to taxis as defined and would not appear to apply to rideshare vehicles.

[52] Including the evidence of Mr Nawaz – transcript PN70 and PN71.

[53] Transcript PN348.

[54] Transcript PN354.

[55] Attached to exhibit R1.

[56] Transcript PN500.

[57] Exhibit A10.

[58] PN344.

[59] Applicant's final submissions 4 March 2022

[60] *DTFU* at [29].

[61] Reg 15.1 of the [Passenger Transport Regulations 2009](#) (SA).

[62] Transcript PN243.

[63] Applying standard notions associated with the making and variation of enforceable agreements including an offer, acceptance, consideration, and the intention to create (vary)

the legal relationship. See *Australian Workplace Solutions Pty Ltd v P. Fox* AIRC Print S0253 and *Damevski v Giudice* (2003) 133 FCR 438. See also *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [42] and [46] and the comprehensive discussion of Gordon J at [177] to [179].

^[64] *Personnel Contracting* at [177].

^[65] See for example *Zujis v Wirth Brothers Proprietary Ltd* [\[1955\] HCA 73](#).

^[66] at 6.162.

^[67] See also the definition of ‘consumer contract’ is [s.23\(3\)](#), of the ACL.

^[68] As summarised by Gordon J in *Personnel Contracting* at [177].

^[69] At [54],

^[70] This included *Cam and Sons Pty Ltd v Sargent* [\(1940\) 14 ALJ 162](#), *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd* [\[1952\] HCA 10](#); [\(1959\) 85 CLR 138](#).

^[71] See also *Personnel Contracting* per Gordon J at [177] to [179].

^[72] *Jamsek* per Kiefel CJ, Keane and Edelman JJ at [62].

^[73] *Personnel Contracting* at [73]

^[74] See by contrast *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [58].

^[75] See also *Jamsek* per Kiefel CJ, Keane and Edelman JJ at [62] and per Gordon and Steward JJ at [105].

^[76] *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [62].

^[77] [PR742310](#).

^[78] *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [59].

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