

TRANSCRIPT

STANDING COMMITTEE ON THE ECONOMY AND INFRASTRUCTURE

Subcommittee

Inquiry into ride sourcing services

Melbourne — 8 September 2016

Members

Mr Joshua Morris — Chair

Mr Khalil Eideh — Deputy Chair

Mr Jeff Bourman

Mr Nazih Elasmr

Mr Bernie Finn

Ms Colleen Hartland

Mr Shaun Leane

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Ms Samantha Dunn

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Secretary: Ms Lilian Topic

Witnesses

Ms Clare Amies, CEO, and

Ms Leanne Hughson, general counsel, WorkSafe Victoria.

The CHAIR — I declare open the Standing Committee on the Economy and Infrastructure public hearing. Thank you for agreeing to come along and provide evidence today. We have got a subcommittee present here today. Today we are hearing evidence in relation to our inquiry into ride sourcing, and the evidence today is being recorded. All evidence taken today is protected by parliamentary privilege, and therefore you are protected for what you say in here today, but if you were to go outside and repeat those same things, those comments may not be protected by this same privilege. Once again, welcome, and thank you for coming along today. I might get you both to state your names and your roles in your organisation and then move into any introductory comments, and then we will have some questions to follow. Over to your good selves.

Ms AMIES — I am Clare Amies. I am the chief executive of WorkSafe Victoria.

Ms HUGHSON — And I am Leanne Hughson. I am the general counsel at WorkSafe Victoria.

Ms AMIES — I will make some opening comments. Firstly, thank you also for inviting us to discuss our submission to the committee. Broadly we wanted to open with just our responsibilities. WorkSafe's key responsibility is to insure and help employers to avoid injuries and fatalities in the workplace from actually occurring. Second to that, obviously, is to enforce the occupational health and safety laws, and also we manage the workers compensation system for the state as well, and that is really focused on providing reasonably priced insurance for employers for their workers in case of injury in the workplace. Our focus is on rehabilitation and recovery with return to work for any injured worker in the state.

In terms of our role and the requirements and the protections that apply to business and workers in the state, they are set out in legislation, particularly the Occupational Health And Safety Act 2004 and the Workplace Injury Rehabilitation and Compensation Act 2013. As we have outlined in our submission, the Victorian occupational health and safety legislation is flexible enough to ensure that any requirements that apply to ride-sourcing services apply regardless of the employment status of drivers. For example, even where a driver is self-employed the operator of the ride-sourcing service is still required to ensure the health and safety of drivers and passengers as far as reasonably practicable.

In terms of workplace injury rehabilitation and compensation, this is generally available for people who perform work for an employer and contractors who are deemed to be working under a contract of service. Whether ride-sourcing drivers meet these definitions will depend on the nature of the contractual arrangements. The legislation does make special provision for some persons who do not meet these definitions but who provide services under a work-like arrangement — so, for example, taxidivers. They operate under a bailment agreement and are deemed to be workers for workers compensation purposes.

The changing nature of work is something that we are quite focused on, and obviously, I imagine, so is this inquiry around ride sourcing. This does create some challenges, we believe, particularly for regulatory regimes but also in terms of the line between employer and employee, particularly where this is an independent contractor. We think this does become a little bit blurred. More and more Victorians are looking to earn a living outside of what we refer to as traditional employment relationships. Uber, for example, states that its drivers are independent third-party contractors who are not employed by Uber.

I note that this is not yet tested in court, as I understand, in Australia, and it is subject to ongoing litigation in other jurisdictions. So WorkSafe is currently considering how best to address some of these challenges broadly as part of our strategic planning work that we are undertaking, and we anticipate that the future of work, particularly the increasing prevalence of services such as ride sourcing, are going to be a key feature in what that looks like for us in the future. So, again, we are happy to answer any questions, and Leanne is here also to answer any questions. We thought we would just open with those comments.

The CHAIR — Fabulous. Thank you very much. It is a fascinating area and certainly one that has already been the topic of quite a few discussions in this inquiry, in trying to work out where does this all land? It is quite a difficult thing to pin down, because individual contracts are going to have individual statements and the like, and that is going to have implications for it. Uber is always the company that we use as an example, but, say, we have a driver who is driving using the Uber app. That relationship is yet to be defined under case law, as we know, in terms of the responsibilities there, but if case law were to find that, for your purposes, that driver was an employee of Uber, what responsibilities does Uber have for that driver in that instance?

Ms AMIES — They have multiple responsibilities. Firstly, under the OHS act to ensure that that is a safe working environment for that person and that it is assessed to ensure that risk of harm to the driver, as the employee, but also passengers within that environment also are safe. Secondly, if it is clear that they are an employee of Uber, then there would probably be a requirement in terms of possibly premium paid and therefore workers compensation for those employees.

The CHAIR — Yes, and I suppose that premium to be paid, if that was to be found to be the case, I imagine could completely change the business models of these companies. I suppose it is a bit of a waiting brief really, is it not, to find out exactly where we are going to find ourselves in that situation. Is there any case law at all in Australia with regard to these types of scenarios that you are aware of?

Ms HUGHSON — I think it would be fair to say that the question of whether a worker is a worker under our act for compensation purposes is a regular matter that comes up for consideration by us and is litigated in the courts on a reasonably regular basis.

The CHAIR — Yes, so it is being continually refined and defined, I imagine, as a result of the changing nature of workplaces?

Ms HUGHSON — That is right.

Ms AMIES — So the definition of ‘worker’ I think is what is important in terms of workers compensation, and who is then responsible.

The CHAIR — Indeed; very good.

Mr BOURMAN — We do have at least some precedent, I guess, in Australia, with some states legalising ridesharing. From a WorkSafe perspective, do you have any idea how the other states have managed to deal with all the issues that we are foreseeing here?

Ms HUGHSON — No, we are not. I think it is reasonably new in those jurisdictions, it is fair to say, and we certainly have not seen any legislative change that I am aware of to try and accommodate it being legalised. So I imagine it is all just being worked through at the moment.

Mr BOURMAN — Yet to come?

Ms HUGHSON — Yes.

Ms AMIES — Yes.

Mr BOURMAN — With things like the safe working environment, I think you said in terms of taxis that you have watched over the years, some horrible things that have happened to taxidriviers, and then the reaction to that. Can you see that sort of applying to a rideshare driver in the end, because they are doing a very similar thing? We do not want it to happen, but at some point in time, whether it is now or in 100 years, someone will get hurt, and there needs to be a reaction. But all of a sudden you are talking about someone’s individual car, not a work car, so I am not really sure how practical that can be, for starters.

Ms HUGHSON — Yes, I think if we can look at it in two ways. If a platform operator like Uber was found to be the employer of the driver, then they would have obligations to ensure the workplace, which would be the car, is safe and without risk to the health of the worker. What the Occupational Health and Safety Act does is require the employer to work through a hierarchy of control to eliminate the risk where it can. So the insertion of some of those plastic guards that you see the taxidriviers have on the driver’s seat may be a way of doing that.

Where the platform operator is not the employer and the driver is self-employed, they have got obligations to look after their own health and safety — and whether that would extend to them putting a cage around will remain to be seen, I think — but also the obligation to ensure the safety of the passengers who are in their car, as part of what we call the conduct of their undertaking, so how they are earning their income. So they would need to make sure that springs in the seat, for example, are not poking out and going to hurt someone, or that the way of entering and exiting the car was safe. There would be all of those considerations.

Mr BOURMAN — If we assume, just for a moment, that the individual was the employer, are they able to assume their own risk in the event of something happening, like, being a workplace, they do not want to put in a cage, for instance? If there is a not a direction, but a strong suggestion, can they say, ‘Well, I don’t want it. I am the employer. I am assuming my own risk’, and if so, what would be the repercussions from a WorkSafe point of view?

Ms HUGHSON — So where they are self-employed, then they do assume the risk to make sure that they are looking after themselves. If you take that to its full degree, where that would come in is the compensation side of the business, and they would not be covered, if they are self-employed, on the compensation side, because it is relying on that relationship of worker and employer to be present for them to be entitled to compensation. So I think from their point of view they need to do everything to keep themselves safe so they can earn their income. That might also include looking at other insurances that might be available to them.

Mr BOURMAN — So they can ignore it, but they will be responsible for it later down the track if something happens?

Ms HUGHSON — Yes.

Mr BOURMAN — That is really all I have. I think you have answered everything else. Thank you.

The CHAIR — I want to follow on with one question that Jeff took up in terms of if there was to be a mandated need for a cage, or the like, in a car. Who is it that makes the determination that that is a requirement to ensure that that particular workplace is safe — whether it be a cage or whether it be a camera or what have you? How is that determination made to say that to ensure your workplace is safe this is what it needs to look like? Who makes that determination?

Ms HUGHSON — The way that we would work on this is to say that you need to take the highest order of control to make sure that that workplace is safe, and we might suggest a couple of things for that. One example that might resonate with you is quad bikes. We have been seeing a lot of fatalities on farms with quad bikes. So what we say there is: there are a couple of things that you need to do to ensure that you are safe when you ride a quad bike — so a helmet could be something; we suggest rollover protection bars on the back of the quad bikes. It is also making sure that you have maintained your vehicle in a safe way, that you have assessed the terrain that you are going on. We would normally provide guidance to employers about a number of things that they could do to ensure that their workplace was safe, and it might be that some kind of guarding on the seat was one of those, but we would have to go away and do the appropriate analysis to ensure that that was going to be an appropriate control in terms of safety.

Ms AMIES — We do produce guidance material as well as risk assessment, so we can provide information where a risk assessment can be done, and we actually work with employers on an appropriate risk assessment to ensure that they are making an informed decision about it, that they have the right tools and that they have also put in the right protections ensuring safety.

The CHAIR — Is there any intention to come up with some of those guidelines for ride-sourcing or ridesharing drivers and the like? What brings about the delivery of that advice to different employees, employers and the like?

Ms AMIES — Sometimes for us it is also based on a risk assessment in terms of what industries and areas of employment are of greatest risk that we probably should be providing more guidance material to, because we do produce quite a lot of guidance material. Sometimes we can work in partnership with industry groups, where their members are also saying they need guidance material in specific areas, so we can work with them, but it is usually based on a risk assessment in terms of the guidance material we produce. So if there was evidence that this was an area that should be prioritised for us to actually look at how we engage with the appropriate assessments and safety standards that would be required, then we would definitely look at that. But it is not currently on our priority, it is fair to say.

The CHAIR — Sure; very good.

Mr EIDEH — I just have a question regarding training. In your view what sort of training, as an example, should drivers undertake before they start to operate or engage in this sort of thing?

Ms AMIES — It is interesting you ask that. In terms of some of the discussion that we have had already, if there is an employer in place, there are obligations on the employer to ensure that workers are well trained in terms of what is required to actually conduct their role, which includes the health and safety requirements of doing that, so that they can do that in a safe way. It is about training so that they are actually skilled, licensed for a driver, and that they understand the requirements of non-use of mobile phones, distractions; it would be a whole range of things I imagine in that example. If you are self-employed, then the requirement is on that person to be well trained in terms of what is required in terms of the role.

Mr EIDEH — And they should be tested?

Ms AMIES — It depends. There are certain roles and functions in employment where you are required to have licensing. That would be different, I imagine, to this environment currently. So again, that would have to be a decision on whether it is regulated or not in terms of people who are employed as drivers in this environment actually having to be required to have certain licensing, but at the moment I imagine that they are required to have a drivers licence, so we would not do that testing. It would be a decision of ‘what would those requirements be’.

Ms DUNN — My apologies if you have already covered this, and my apologies for just stepping back into the inquiry now. Does WorkSafe have a current view in relation to rideshare drivers as to whether they are employees, self-employed or contractors? Is there a current view?

Ms HUGHSON — No. For us we would have to look at all of the facts surrounding the relationship, which would look at contractual arrangements, for example, the type of control that is exerted by the platform operator over the driver and whether that is indicative of an employment relationship or not. We would need to consider all of that for each case until we saw some commonality across the industry before we could make that judgement.

Ms DUNN — That is a fair comment. I am not sure if you are aware that at the moment there is a legal challenge by Uber against the Australian Taxation Office in relation to the classification around whether drivers are contractors or employees. My question is: if it is found that as a result of that challenge a court determines that drivers are in fact contractors or self-employed, I assume that that means that those individual drivers would be responsible for procuring services in relation to WorkCover and those arrangements; is that correct?

Ms HUGHSON — If the driver was found to be an employee of Uber, then Uber would have responsibilities for registering for WorkCover if they have not already, and paying WorkCover premiums based on the remuneration that is paid, akin to wages. If they are an independent contractor, there is no such obligation, and in fact they are not entitled to workers compensation insurance because that is based on there being an employment relationship. They would need to seek their own appropriate insurances to cover them.

Ms DUNN — Yes, it just switches into a completely different category of insurance if they are a contractor, so it is probably a really critical threshold for that driver, particularly if there is some sort of personal injury.

Ms HUGHSON — That is right. They may have coverage under the TAC scheme, depending on what the injury is.

Ms DUNN — The nature of the incident.

Ms HUGHSON — And how it has occurred.

Ms DUNN — Okay, thank you.

The CHAIR — Thank you very much for your attendance and assistance today. You will receive a copy of the transcript of today’s evidence in the coming days for proofreading, and that will ultimately make its way onto the committee’s website. Once again, thank you for your testimony today.

Ms HUGHSON — Thank you.

Ms AMIES — Thank you.

Witnesses withdrew.