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17 October 2016

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Attention: Tom O'Donnell

By Email:

JOINT MEMORANDUM OF ADVICE

Re: Taxi Council of Queensland v State of Queensland

1. We are briefed to advise the Taxi Council of Queensland ("**TCQ**") in relation to aspects of the de-regulation of the taxi industry in Queensland.

2. In particular, we are asked to advise on two broadly stated topics identified in our instructions:

   (a) the administrative law implications of the *Transport and Other Legislation (Hire Services) Amendment Regulation 2016*; and

   (b) compensation and other issues caused by the devaluation in taxi service licenses.

3. There are two principal questions which arise, namely:

   (a) Can the de-regulation of the taxi industry in Queensland be 'delayed' or 'overturned', and if so, by what means?

   (b) What, if any, causes of action and remedies do Taxi Service License holders have against the State of Queensland arising out of the diminution in value of their licenses?

4. Additionally, we are asked a number of specific questions throughout our instructions. As will be seen, in our view, there is no legal basis on which the deregulation of the taxi industry can be

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delayed or overturned. Nor, in our view, do Taxi Service License holders have a cause of action against the State of Queensland arising out of the diminution of the value of their licenses. The answers to the specific questions fall out of our answers to your principal questions. For that reason, the specific questions and the answers to them are dealt with at the end of our advice, after discussion of the two principal questions.

Background

5. The taxi industry in Queensland is regulated by the following:

   (a) the *Transport Operations (Passenger Transport) Act 1994* (Qld) ("**the Act**");

   (b) the *Transport Operations (Passenger Transport) Regulation 2005 (Qld)* ("**the Regulation**"); and

   (c) the *Transport Operations (Passenger Transport) Standard 2010* (Qld).

6. Between approximately May 2014 and September 2016, a taxi service named Uber operated unlawfully in Queensland. Its drivers operated a taxi service without holding a Taxi Service License ("**Taxi License**") in contravention of s 70(1) of the Act. The Department of Transport and Main Roads ("**the Department**") issued fines to Uber drivers in the order of $3 million for providing unlicensed taxi services, and other breaches of the law.

7. The *Transport and Other Legislation (Hire Services) Amendment Regulation 2016* ("**Amending Regulation**") commenced on 5 September 2016. Section 18 of the Amending Regulation amends and replaces s 52A of the Regulation and prescribes, in effect, Uber as a taxi service to which s 70(1) of the Act does not apply. While the Amending Regulation affects other changes, the amendment to s 52A of the Regulation allows Uber drivers to operate lawfully.

8. The Amending Regulation allows lawful competition between operators of taxi services who hold a Taxi License, and those who do not. Until the commencement of the Amending Regulation, s 70(1) of the Act prohibited providing a taxi service in a vehicle that was not a taxi. The definition of "taxi" means, relevantly, a motor vehicle for which a taxi license or peak demand taxi permit is in force. Until 5 September 2016, holding a Taxi License was a precondition of lawfully providing a taxi service in Queensland, and now it is not. Understandably, the value of Taxi Licenses diminished.

9. The Act establishes a regulatory framework which divides the State into geographical areas. Under that framework, the Department issued a number of Taxi Licenses proportionate to the population of the geographical areas. State-wide, and over time, the Department issued

approximately 3, 261 Taxi Licenses.[1] The Department also entered into service contracts with booking companies (such as Yellow Cabs, and Black & White Cabs). The booking companies, in turn, entered into agreements with operators to provide a certain number of taxis to the booking companies. The operators may own their own Taxi License, or enter into arrangements with the Taxi License holder to operate under that license.

10. According to the material briefed to us, the last Taxi License issued in time by the Department was on 16 June 2014 for the Redcliffe area. Before that, a Taxi License was issued on 6 August 2013 for the Sunshine Coast area. Otherwise, all trade for Taxi Licenses since July 2013 has been on the secondary market.

11. Our instructions include some information about the corporate structure and operations of Uber. Uber is a third party facilitator matching customers and drivers for point-to-point ride-sharing services. The matching occurs via a platform available online or via smartphones called UberX. Passengers and drivers are licensed to use the UberX platform by Uber Technologies Inc. Customers enter into a contract with a company called Raiser BV to obtain access to the UberX platform. Raiser BV and Uber BV are companies incorporated in the British Virgin Islands and operating from the Netherlands. Uber Technologies Inc. is a company registered in California. Uber Australia Pty Ltd provides marketing support and employs staff in Australia.

Delaying or overturning the Amending Regulation

12. We are asked to consider any means by which the Amending Regulation can be delayed or overturned.

13. In respect of delay, our instructions note that TCQ would be prepared to consider any action which may delay the deregulation of the taxi industry in Queensland. We understand that the Amending Regulation is a first step in the de-regulation of the industry. It clarifies the legality of Uber until such time as more comprehensive amendments to the regulatory framework are made.[2]

14. The Amending Regulation cannot be delayed because it has already commenced. It was notified in the *Gazette* on being 2 September 2016, and s 2(1) of the Amending Regulation provides that it commences on 5 September 2016. If, however, our instructions are to advise on whether the de-regulation of the industry can be delayed generally, then on the material briefed to us the answer must be 'no', for the following reasons. Of course this will need to be reviewed when the precise form of the further de-regulation becomes known.

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1 Document 1 to our brief.

2 Media reports suggest further amendments to the regulatory scheme will occur in 2017.

The Amending Regulation is within the power of the Queensland Parliament

15. The States of the Commonwealth of Australia owe their existence to the *Commonwealth of Australia Constitution Act*. Sections 106 and 107 of the Constitution provides for the constitutions and powers of each State referentially to the constitutions and powers which the former colonies enjoyed: *NSW v Commonwealth* (1975) 135 CLR 337 at 372.

16. The Queensland Parliament's legislative power is plenary. Section 2 of the *Constitution Act 1867* provides that "Within the said colony of Queensland Her Majesty shall have power by and with the advice and consent of the said Assembly to make laws for the peace welfare and good government of the colony in all cases whatsoever." Section 8 of the *Constitution of Queensland 2001* preserves s 2 of the Constitution Act 1867 as the "law-making power in Queensland."

17. In *Pauls Ltd v Elkington* (2002) 189 ALR 551,[3] McPherson JA described the nature of the State's legislative power. His Honour said that the Parliament has "...power to legislate for the peace, welfare and good government" of the state. The investiture of legislative authority in that form or in the form "peace, order and good government", has long been held to be plenary, and to connote, within its appointed limits, the widest law-making powers appropriate to a sovereign."[4]

18. Courts will not inquire into the expediency or wisdom of laws; that is, whether they are in fact for the peace, order, or good government of Queensland: see *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 9-10.[5] The power is not, of course, limitless. But the few limitations have no application to the question of the validity of the Amending Regulation. It is not outside the power of the Queensland Parliament, and cannot be overturned by a court on that basis. For that reason, also, we doubt that further steps in the de-regulation of the taxi industry in Queensland would could be overturned.

Administrative law remedies

19. The Amending Regulation is subordinate legislation. We have considered whether there is scope for judicial review arising out of the enactment of that legislation. For the reasons that follow, in our opinion, there is not.

20. Section 47 and 49 of the *Statutory Instruments Act* 1992 (Qld) provide for the notification and tabling procedures applicable to statutory instruments. A failure to comply with these requirements means that the statutory instrument does not take effect: *Watson v Lee* (1979) 144 CLR 374.

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[3] At paragraph 7.

[4] See also *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 33 per Gaudron, Gummow and Hayne JJ; and at 53-54 per Kirby J.

[5] Per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaurdron JJ.

21. The Amending Regulation was notified in the Gazette on 2 September 2016 and tabled on 13 September 2016 in accordance with the *Statutory Instruments Act 1992* (Qld). There is no procedural ultra vires argument open to TCQ. In any event, we do not think this remedy would achieve TCQ's practical objectives of 'overturning' the Amending Regulation. Any defect in the tabling procedures could be easily cured. For the reasons expressed above, the de-regulation of the taxi industry is within the power of the Queensland Parliament, and challenging the first procedural step in that process lacks utility.

22. We have also considered whether the Amending Regulation is made within the power of the Act, both as to its terms and scope. We have concentrated on s 70 of the Act, and s 18 of the Amending Regulation. That is because s 70(1) of the Act is the provision under which fines against Uber drivers were issued, and the amendment to s 52A of the Regulation allows Uber to operate lawfully, until such time as the Parliament enacts a more comprehensive regulatory scheme.

23. The test of whether a Regulation is substantively intra vires of the parent Act is a process of statutory construction of both the parent Act and Regulation. As discussed above, the court will not examine the wisdom or expediency of the Amending Regulation.[6]

24. Section 70(4) of the Act contemplates that a regulation will prescribe taxi services to which s 70(1) does not apply. Section 18 of the Amending Regulation amends s 52A of the Regulation to state that:

> "*A taxi service provided in a way other than as a rank and hail service is prescribed.*"

25. The definition of 'taxi service' in the Act is as follows:

> ***taxi service*** *means a public passenger service, other than an excluded public passenger service, provided by a motor vehicle under which the vehicle—*
>
> *(a) is able, when not hired, to be hailed for hire by members of the public; or*
> *(b) provides a demand responsive service under which members of the public are able to hire the vehicle through electronic communication; or*
> *(c) plies or stands for hire on a road.*

26. So, for instance, it remains an offence for an Uber driver to compete with taxi services provided under a Taxi License on ranks. It is no longer an offence, however, for an Uber driver to provide a taxi service using the UberX platform.

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6 See also *South Australia v Tanner* (1989) 166 CLR 161.

27. There is no available argument that the subordinate legislative instrument authorises conduct beyond the scope of the authorising Act. The prescription of taxi services to which the prohibition in s 70(1) of the Act does not apply is expressly contemplated by s 70(4) of the Act and is not inconsistent with the objects of the Act.

28. We have also considered whether judicial review under the *Judicial Review Act 1991* (Qld) is open. In our view, it is not. The enactment of the Amending Regulation is an exercise of legislative power. It involves the creation of new law of general application. It does not apply a law of general application to a particular case. It is not a decision of an administrative character amenable to judicial review.[7]

Did the Department issue Taxi Licenses 'in trade or commerce'?

29. The Taxi Licenses were issued progressively as demand and the population of Queensland increased over time. We are asked to consider whether the Department issued Taxi Licenses 'in trade or commerce' as a threshold issue for the availability of possible causes of action under the *Trade Practices Act 1974* (Cth) ("**TPA**"); the *Australian Consumer Law* ("**ACL**"); and the *Fair Trading Act 1989* (Qld) (**FTA**).

30. However, we note that the material briefed to us does not contain material which suggests that State made any misleading statements upon, or before, issuing Taxi Licenses (or otherwise).

TPA and ACL– sections 2A and 2C(1)(b)

31. Issuing Taxi Licenses was conduct by the Crown in right of the State of Queensland. It is therefore necessary, as a first step, to consider whether the Crown in right of the State is amenable to the provisions of the TPA, and the ACL.

32. In *Bradken Consolidated Ltd v BHP Co Ltd* (1979) 145 CLR 107, the High Court held that on the proper construction of section 2A of the TPA, the Crown in right of the State was not amenable to the provisions of the TPA. In 1996, the TPA was amended to include sections 2B and 2C. Section 2B provides that, so far as the Crown carries on a business (either directly or by an authority of the State) it is amenable to Parts IV and XIB of the TPA. Those Parts concern restrictive trade practices and the telecommunications industry, respectively. Section 2A continues to determine whether the Crown in right of the State is subject to the consumer protection provisions in Part V of the TPA (which contains the prohibition of misleading or

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7 *Hamblin v Duffy* (1981) 34 ALR 333 at 338 per Lockhart J; s 4 of the *Judicial Review Act 1991* (Qld).

deceptive conduct in s 52 of the TPA). It follows, in our view, that the State is not subject to the TPA in its conduct of issuing Taxi Licenses.

33. From 1 January 2011, the ACL was adopted as a law of Queensland. After 31 December 2010, the ACL, as a law of Queensland, binds the Crown in right of the legislature in so far as the Crown carries on a business, either directly or by an authority of the jurisdiction.

34. In *NT Power Generation v Power and Water Authority* (2004) 219 CLR 90, the High Court considered s 2C(1)(b) of the TPA which relevantly provides:

> *"For the purposes of sections 2A and 2B, the following do not amount to carrying on a business:*
>
> *(b) granting, refusing to grant, revoking, suspending or varying licenses (whether or not they are subject to conditions)*

35. This provision is retained in section 2C(1)(b) of the *Competition and Consumer Act 2010* (Cth), of which the Australian Consumer Law is a Schedule.

36. In *NT Power*, the appellant generated electricity at a plant which it owned. It could not sell that power to consumers without access to transmission and distribution infrastructure owned by the Power and Water Authority ("**PAWA**"). The PAWA, a body corporate established under statute, generated electricity for purchase by consumers. It made that power available to customers by transmitting it on its infrastructure. NT Power requested that PAWA supply the electricity which NT Power generated using PAWA's infrastructure. That request was declined. One issue on appeal was whether PAWA was beyond the reach of s 46 of the TPA because, in so far as it owned infrastructure for the distribution and transmission of electricity, it did not 'carry on a business', taking into account the exclusionary effect of s 2C

37. PAWA contended that, on the proper construction of s 2C of the Act, the word "license" included permission or consent, such that its conduct in refusing access to its infrastructure could not constitute an abuse of market power under s 46 of the Act. Relevantly, NT Power had been licensed pursuant to the *Electricity Act* (NT) to sell power. The High Court said that the definition of "license" in s 2C(3) requires that "it allows the licensee to supply goods or services." McHugh A-CJ, Gummow, Callinan and Heydon JJ referred to *Federal Commissioner of Taxation v United Aircraft Corporation* (1943) 68 CLR 525 at 533 where Latham CJ said that a license "provides an excuse for an act which would otherwise be unlawful as, for example, an entry upon a person's land, or the infringement of a patent or copyright. It is an authority to do something which would otherwise be wrongful or illegal or inoperative." In *NT Power*, their Honours said:

"In Latham CJ's examples, the illegality that a license prevents is the infringement of some private right, whether it is created by the common law or by enactment. But in other areas, the illegality is a wrong against the State. It is found in conduct without a license, contrary to an enactment – carrying on some profession (like medicine or law), or some trade or business (like selling liquor or drugs, erecting buildings, or dealing in second-hand goods), or some past time (like shooting, fishing, owning a pet, or in former times, watching television), or some common activity (like driving). The license referred to in s2C(1)(b) is of this kind."

38. Clearly, in our view, Taxi Licenses are also licenses of the kind which prevent an illegality as a wrong against the State. That is reflected in s 70(1) of the Act which provides for an offence punishable by 200 penalty units to operate a taxi service in a motor vehicle that is not a taxi. A 'taxi', as noted elsewhere, is a motor vehicle in respect of which a Taxi License has been issued. It follows, in our view, that the ACL does not apply to the conduct by the State in issuing Taxi Licenses because in doing so, by definition, the State was not carrying on a business. And, for the reasons above, s 2B of the TPA does not apply to this conduct, and s 2A does not bind the Crown in right of the State of Queensland.

Fair Trading Act

39. All but two of the 3, 261 Taxi Licenses were issued by the Department before August 2013. Given the expansion of population in Queensland during the 1990s and 2000s, it is likely that a large number of Taxi Licenses were issued during that period of time. Accordingly, we anticipate the vast majority are therefore likely to have been issued before 31 December 2010.

40. Therefore, we have considered whether s 38(1) of the FTA is capable of applying to the conduct in issuing Taxi Licenses before 31 December 2010, (when the ACL comes into effect). This, in turn, depends upon whether it was done 'in trade or commerce'.

41. In order to examine this issue, it is necessary to consider the statutory context in which Taxi Licenses were issued.

Nature of the tender process – statutory context

42. The Act provides for the tender process for issuing Taxi Licenses. Section 68 of the Act provides that the purpose of Taxi Licenses is to ensure that the community served by taxis receives quality and innovative taxi services at a reasonable cost. Section 69 provides that a "taxi service license" is a license issued by the chief executive under which the holder is required to provide a taxi service in an area in a way that meets or exceeds specified performance levels. Section 70(1) provides that a person must not provide a taxi service using a motor vehicle that is not a taxi. To

do so is an offence, the maximum penalty for which is 200 penalty units. A "taxi" is defined in the Dictionary to the Act as follows:

"taxi, other than in the definition *demand responsive service* means –

(a) a motor vehicle for which a taxi service license or peak demand taxi permit is in force; or

(b) a substitute taxi.

43. Section 71(2) and (4) of the Act provide that the chief executive may, by public notice and according to defined criteria, fix the number of taxi service licenses for a taxi service area. Section 72 provides that before the chief executive issues a new taxi service license for a taxi service area, the chief executive must, by public notice, call for offers for the Taxi License stating:

(a) the intention to issue the license; and

(b) if licenses have been previously issued for the area – the most recent prices for which licenses have been transferred.

44. Section 72(2) provides that the chief executive is not obliged to accept any offer for a taxi service license. Section 74 provides for various conditions of Taxi Licenses. Section 74(2) provides for the conditions which a Taxi License must contain, and which include:

(a) requiring the operator to use a particular type of vehicle;

(b) stating the taxi service area to which the Taxi License applies;

(c) requiring the operator not to charge more than maximum fares published in the *Gazette*.

45. Section 74(3) provides for conditions that the Taxi License may conditions. These include providing for such matters as access to a continuous booking service; installation and maintenance of equipment; limiting hours of operation; and other matters.

46. Our instructions note that the underlying philosophy of the legislative framework was to: ensure driver and passenger safety; provide a minimum standard for vehicles; ensure sufficient taxis on the road to service a taxi service area; and to ensure the market was not flooded so that drivers received adequate remuneration and to minimise road congestion.

Nature of the tender process – documents briefed

47. We are briefed with a number of tender documents. For the purposes of discussion in this advice, we shall refer to the pertinent conditions in the document entitled "Tender conditions for five (5)

Wheelchair Accessible Taxi Service Licenses Gold Coast Taxi Service Area QPT005/11". Those conditions are representative of the documents briefed to us.

48. Condition 1 provides that any application which does not comply in every respect with the requirements of the conditions may be rejected.

49. Condition 7 provides that the Director-General is not obliged to accept the highest or any tender for the Taxi License. In order to meet state-wide objectives, Condition 7 also states that where a conforming tender is received for a transfer from an area with identified excess of taxi service licenses, the Director-General may give a financial incentive of 15% applied to each eligible tender's bid as per a particular Appendix. So, for example, Bundaberg is identified as a Taxi Service Area with 1 excess license. If a licensee in the Bundaberg area applied to transfer the license to the Gold Coast area, he or she could receive a 15% "preference" because it is consistent with state-wide objectives not to have excess Taxi Licenses in a given area. This can be seen as a means of redistributing Taxi Licenses to accord with changing demand and population.

50. Condition 9 provides:

> *"In the event of more than five (5) tenders being received from applicants who hold or are eligible to hold Operator Accreditation – Taxi Service, which the Director-General is satisfied are equally advantageous in the public interest, the Director-General may decide by ballot, the tender or tenderers to be accepted."*

51. The best guide for the purpose of Taxi Licenses is the Act. The purpose of the Taxi License is to ensure that the community is served by taxis receiving quality and innovative taxi services at a reasonable cost. The purpose is not to maximise the cost of, and profit from issuing Taxi Licenses. Indeed, Condition 9 provides that in the event of more than the allocated number of eligible tenderers applying for a Taxi License, the Director-General looks first to the public interest. If no determination can be made on that basis, a ballot determines the successful tenderers.

52. Condition 24 provides that a list of values for the transfer / release of Wheelchair Accessible Taxi Service Licenses in the Gold Coast areas is annexed to the Conditions. Condition 26 provides that no variation in tender prices are accepted after the closing of time of tenders.

Did the Department issue Taxi Licenses 'in trade or commerce'?

53. In *Concrete Constructions (NSW) v Nelson* (1990) 169 CLR 594, the High Court[8] held that the phrase "in trade of commerce" (in the context of s 52 of the TPA[9]) refers:

> "*...only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character. So construed, to borrow and adapt the words used by Dixon J in a different context in* Bank of NSW v The Commonwealth, *the words 'in trade or commerce' refer to 'the central conception' of trade or commerce and not the 'immense field of activities' in which corporations may engage in the course of, or for the purposes of, carrying on some overall trading or commercial business.*"

54. Generally, conduct which has the character of regulation of a regulated industry by a government regulator will not be regarded as in trade or commerce, even if the act of regulation itself has a significant impact on subsequent or related commercial activity.

55. In *Dockpride Pty Ltd & Anor v Subiaco Redevelopment Authority* [2005] WASC 211, Le Miere J considered whether a statutory authority was acting "in trade or commerce" in making representations to tenderers for the purchase of land for development purposes. The plaintiff contended that by representation, the authority obliged itself to conduct the tender process fairly and in accordance with defined criteria. The defendant authority contended that its conduct was not in trade or commerce because it merely related to, rather than being "in", trade or commerce. It submitted that the tender was not for the sale of land at the highest price, but rather, a tender in accordance with numerous regulatory provisions and guidelines. Le Miere J held that calling for tenders for the purchase and development of land is conduct in trade or commerce, notwithstanding that the authority was required to have regard to matters other than the profit motive.

56. In *Burton v Minister for Fisheries* [2010] WASC, Martin CJ considered whether representations about the renewal of a fishing license were made "in trade or commerce." His Honour held they were not because, rather than a profit motive, "...it was a fee that was calculated by the government to recoup the cost of regulatory activity undertaken by the Department responsible for that regulation and to include a component for contribution to the Development and Better Interest Fund which is a fund available for the enhancement of the industry generally through the conduct of research and such like."[10]

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8 Mason CJ, Deane, Dawson and Gaudron JJ.

9 In *Houghton v Arms* (2006) 225 CLR 553 at 565, Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ held that the same construction is to be accorded to the terms used in the FTA as applied under the corresponding provisions of the TPA.

10 At [48].

57. In *Auswest Timbers Pty Ltd v Secretary to the Department of Sustainability & Environment* [2010] VSC 389, Croft J considered whether representations made in a letter sent to prospective 'Saw-log' licensees under the Forests Act 1958 were "in trade or commerce". The plaintiff contended that the defendant statutory authority represented that the holder a license which the plaintiff had acquired from a third party would be the subject of an offer for renewal for 15 years with the same volume and log quality provided for in that license, subject to an agreement on the price for the time the subject of the license. Croft J held that the alleged representations were not made in trade or commerce. His Honour held that licensing was primarily a governmental and regulatory function, notwithstanding that the authority carried out its functions in a "business-like way".[11] His Honour considered the overall activities of the defendant, and noted that it had commercial activities which extended beyond, and were distinct from, its licensing activities.[12]

58. In *Auswest Timbers*, His Honour also relied (in particular) upon a decision of Hill J in *Unilan Holdings Pty Ltd v Kerin* (1992) 35 FCR 272. That case concerned a speech made by the Minister for Primary Industry and Energy in which he guaranteed that the government would not countenance downward movement of wool prices. Eight months later, the government effected a fundamental regulatory change, and suspended the national wool marketing scheme. The wool price fell dramatically as a result. Hill J held that the speech made impinged upon, or related to the international wool market, it was not made *in* trade or commerce.

59. In *RT & YE Falls Investments Pty Ltd v New South Wales* [2003] NSWCA 54, the appellant (**Falls Investments**) was a cattle breeder. In early 1992, the NSW Department of Agriculture adopted a policy to eradicate a bovine disease. The primary method of eradication involved the slaughter of each herd found to contain infected animals. Compensation was payable to owners under the *Cattle Compensation Act* 1951 (NSW). Some representations were made which Falls Investments claimed it acted on to its detriment. Falls Investments relevantly alleged misleading conduct under the Fair Trading Act (NSW).

60. Hodgson JA said that government, or a government agency, may be carrying on a business by activities which are themselves only a part of activities which are, when considered as a whole, plainly the provision of government services and not a business. His Honour held that to be a business, the activities must be sufficiently systematic and regular, and sufficiently similar to commercial activities that private persons might engage in, to justify being characterised as a business. In that regard, His Honour distinguished *Paramedical Services Pty. Limited v. The Ambulance Service of N.S.W.* [1999] FCA 548, in which the Federal Court held that carrying out the statutory function of providing ambulance services for a fee was not a trading activity, but on the other hand, the provision of ambulance services at sporting events for reward or first aid

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11 At [161].
12 At [166].

training to the NSW Fire Brigade for reward was in trade or commerce, in circumstances where in supplying those services the respondent was doing what any citizen or private trader might potentially do.[13]

61. Hodgson JA said that NSW Agriculture was not providing goods or services for a fee in competition with cattle traders. His Honour characterised the conduct as a government body implementing a policy and providing compensation to farmers for cattle slaughter pursuant to an Act. The fact that the cattle were re-sold to abattoirs for human consumption was merely an efficient way to dispose of the carcases and recoup some of the funds. The purpose of eradicating the disease from livestock was consistent with purely governmental activity in the interests of the community, rather than constituting the carrying on of a business.

62. The decisions discussed above offer a guide to the court's reasoning, but depend in each case on the statutory context in which the representations were made, and the terms of the representations. *Dockpride* is distinguishable. The sale of land on a commercial basis for development purposes is quite a different governmental activity to regulatory licensing. *Burton* and *Auswest Timbers* are analogous decisions. In both cases, the representations made were to potential licensees, and by statutory authorities. In *Burton*, the lack of any profit motive appeared to be a decisive factor against finding that the licensing activity was in trade or commerce. In *Auswest Timber*, the decisive findings were that the defendant authority had extensive commercial functions which were separate from its comparatively less significant regulatory licensing function. While the representations were made by an authority which had commercial functions, statements made in respect of its licensing activities were not in trade or commerce.

63. Falls Investments offers a guide in considering whether the activities are sufficiently systematic and regular, and sufficiently similar to commercial activities that private persons might engage in, to justify being characterised as a business. The Department used a demand-based economic model to periodically ensure that sufficient Taxi Licenses were in place for each Taxi Service Area.[14] That is unlike systematic and regular commercial activity, such as offering ambulance services at sporting events or first aid training to the NSW Fire Brigade for reward, as in *Paramedical Services Pty. Limited v. The Ambulance Service of N.S.W.* On the contrary, on the material briefed to us, it appears the Department issued Taxi Licenses on an *ad hoc* basis, in order to meet the objects of the Act.

64. In our view (though the converse is arguable), a court is likely to find that the licensing function is not in trade or commerce. The purpose of the Taxi License is to ensure that the community is served by taxis receiving quality and innovative taxi services at a reasonable cost. The purpose is not to maximise profit from issuing Taxi Licenses in a systematic, business like and commercial

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13 See also *J S McMillan Pty Ltd v Commonwealth* (1997) FCR 337 at 335.

14 Instructions to Counsel – page 3.

way. Taxi Licenses are issued to achieve the objects of the Act by imposing conditions upon the operation of taxi services by licensees.

65. Our observation that the converse is arguable reflects our acknowledgement that the licences were, as we understand things, issued at a premium which reflected the perceived economic value, in each case, of the licence to the licence holder. The Queensland Government, to that extent, acted with a profit motive more easily classified as commercial (and pursued this by a 'competitive' tender). The fact that the government permitted trade in those licences reinforces the fact that there was a commercial element to the regulatory scheme.

66. The difficulty with that analysis is really identified in that last sentence. The government's activity is regulatory in character, albeit with some element of commerciality.

67. In discussions between one of us (Mr Ferrett) and your Mr O'Donnell, the question of whether there had been any contravention of statutory prohibitions on unconscionable conduct was explored. The allegation would have to be that the government, by failing to maintain the market for taxi licences despite having accepted payments on a commercial basis for licences to participate in the market, had acted in such a way as to offend modern norms of commercial morality (cf *Paciocco v ANZ Banking Group Ltd* (2015) 236 FCR 199).

68. What is referred to above as a failure to maintain the market was, in reality, the positive decision to change the regulatory environment through legislative action. The conclusion that legislative action could constitute a contravention of such a statutory prohibition would be a radical one. It would require not only a conclusion that the legislative action was conduct in trade or commerce but that the various statutory prohibitions were intended to impact upon the legislative power of the states. Neither has reasonable prospects of success.

Is there a cause of action in equity?

69. We have considered whether there is a cause of action in equity. In our view, there is not. There is no evidence of any misrepresentation, mistake, duress, undue influence or unconscionable dealing by the State of Queensland in respect of issuing the Taxi Licenses.

Is there a cause of action in tort?

70. Does the State of Queensland owe a duty of care to Taxi License holders? In short, our answer is that no duty of care arises in these circumstances. The essence of TCQ's complaint is that the Amending Regulation has the effect of diminishing the value of the Taxi Licenses. The question is therefore whether the State of Queensland owed a duty of care to holders of Taxi Licenses not to cause licensees economic loss by enacting a regulation.

73. In *Graham Barclay Oysters*, Gummow and Hayne JJ examined the statutory context in which the claim against the State was advanced.[15] Their Honours said that parts of Wallis Lake were leased to participants in the aquaculture industry for growing and harvesting oysters through the grant of permits. By legislation, the State was empowered to determine aquaculture industry management plans. Various state organs and officers were empowered to prevent or mitigate pollution and address threats to public health, including by ordering oyster farms to cease operations. Their Honours noted that the statutory framework reflected a political decision to "*enlist shellfish industry participants in a system of industry regulation, rather than to impose on that industry a publicly funded regulatory regime*", and that "*...decision of that nature involves a fundamental governmental choice as to the nature and extent of regulation of a particular industry.*"

74. The circumstances and statutory context in this case are somewhat different, but the essential basis of the decision to dismiss the claim against the State applies equally. In this case, the State, by the Act and the Regulation, established a regulatory framework for the regulation of the taxi industry in Queensland. Between around May 2014 and September 2016, the Department enforced s 70(1) by issuing fines against Uber drivers. Then, the State decided to cease doing so by prescribing Uber as a service to which s 70(1) did not apply.

75. In our view, no duty of care arises out of those circumstances. Section 70(4) expressly recognises that, by regulation, the State may prescribe taxi services to which the prohibition in s 70(1) does not apply. The nature of the decision to, in effect, prescribe Uber is an inherently political one. In the language used by Gleeson CJ in *Graham Barclay Oysters*, it is a decision about the extent of government regulation of private and commercial activity that is proper. It raises a number of considerations which are not justiciable under the rubric of negligence.

Is there a cause of action in contract?

76. We have been briefed with sample Taxi Licenses[16] and 'Conditions of Application' and 'Tender Condition' documents. Those documents do not contain terms which create an obligation on the part of the State to maintain the value of Taxi Licenses, or not to take legislative steps to diminish the value of the Taxi License. Nor, in our view, would the implication of terms to that effect be necessary to give efficacy to the Taxi License. That is because the purpose of the Taxi License is to require the licensee to operate the taxi service and to comply with certain conditions related to the service provided. Thus, the purpose of the Taxi License is to license and regulate conduct on the part of the licensee, rather than to promise to keep or maintain the license in place or its value as property or to regulate the conduct of the Licensor (the State). For these reasons, we

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15 See page 606.

16 Brief, vol. 2 documents 4 and 5.

do not think there is any cause of action in contract arising out of the commencement of the Amending Regulation.

Consideration of specific questions asked

77. In our instructions we are asked a number of specific questions. Our answers are based upon the advice provided above.

(a) Are there any means by which the Transport and Other Legislation (Hire Services) Amendment Regulation 2016 can be delayed or overturned?

For the reasons provided above, 'no'.

(b) Did the tender process undertaken by the Department for the issue of new Taxi Licenses constitute the government entering into trade or commerce pursuant to the consumer law?

For the reasons provided above, 'no', though the converse may be arguable.

(c) How might damages be assessed under any cause of action, and in particular, by reference to five hypothetical scenarios?

As will be apparent from our advice above, in our view, taxi service licensees do not have a cause of action against the State of Queensland arising out the diminution in value of Taxi Licenses.

(d) Would the introduction of the Transport and Other Legislation (Hire Services) Amendment Regulation 2016 constitute a crystallisation of a loss for the purpose of the assessment of damages, if any?

For the reasons provided above, in our view, no legally compensable loss crystallised with the commencement of the Amending Regulation.

(e) Does a claim for economic loss arise from the five hypothetical scenarios described in our instructions?

For the reasons provided above, 'no'.

(f) Do Taxi License holders have sufficient commonality in cause of action to bring a class action against the State of Queensland?

For the reasons provided above, Taxi License holders do not have a cause of action against the State of Queensland.

(g) Are there specific group of Taxi License holders who may be able to constitute a group with sufficient commonality for a cause of action to facilitate a class action?

For the reasons provided above, Taxi License holders do not have a cause of action against the State of Queensland.

(h) Is a more extensive Right to Information process justified on the material briefed?

The material briefed does not disclose a cause of action. In our view, it is unlikely to obtaining similar documents relating to the tender conditions for Taxi Licenses would justify the expense of doing so.

With Compliments,

Shane Doyle QC

Nick Ferrett