

Submission on consultation paper, “Future of small passenger services”

16 February 2016

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1. Summary

Introduction

- 1.1 Our members welcome many of the proposals in the “Future of small passenger services” consultation paper while suggesting changes to others and additions to the proposals. Broadly we support Option 4, particularly the level playing field aspects of the authorised transport operator structure, but with changes from the detail of Option 4 in the paper.
- 1.2 Later in this summary, we have set out in table form a summary of our key submissions.

A central theme

- 1.3 A central theme of this submission is that, while disruptive technologies such as those offered by Transport Network Companies (TNCs), including Uber, bring benefits and competition for consumers, they also raise safety and other issues. Rather than speculating on what might happen as TNCs and other new entrants enter the market, Government can and should look at what is actually happening with these new services. There is actual real world evidence from what Uber is in fact doing as to how TNCs and other new entrants may operate.
- 1.4 That is why there is a focus in the submission on what Uber is in fact doing. This is not about criticising a competitor per se. It is about focussing on what provides Government with the best evidence on where the regulatory settings should lie for the industry more generally, including current providers and also new entrants.
- 1.5 We demonstrate how, as to safety, Uber is misleading Government and the public, for example, by claiming that safety is its number 1 priority, where it has strong incentives to be perceived by the public and Government as having a focus on safety. The reality is different. For example, Uber expressly states, buried in the small print, that it is not liable or responsible for carrying passengers from A to B, nor is it liable or responsible for safety in carrying passengers from A to B. Uber goes even further and states, in the small print: “Uber does not guarantee the quality, suitability, safety or ability of [drivers]”.¹
- 1.6 Yet Uber’s marketing strongly promotes its safety focus (including for example, that, contrary to the above, it – Uber – gets passengers safely from A to B).

A key conclusion

- 1.7 Passengers and the general public have little ability to assess whether Uber or any other small passenger vehicle service is sufficiently safe. Sufficiently clear and prescriptive safety obligations are required, in addition to more general safety obligations, particularly where the provider misrepresents what it is doing about safety. Among other things, such misrepresentations reflect a culture that disregards legal and safety compliance. Such cultures call for careful safety regulation. In this regard, we refer to what expert commentators and experts have to say.
- 1.8 This review is not just about Uber. While Uber’s entry into New Zealand lies behind the review, the review will have regard to broader considerations such as other new entrants and other parts of the SPSV sector. However, the experience with Uber is valuable because, just as the history of the current regulation is valuable, so too is the experience from what Uber as a new entrant is actually doing and saying. The Ministry and the Minister in this way can base the regulatory approach upon real world empirical experience including from what Uber is doing and saying.
- 1.9 This is real time evidence and not just speculation. That is the best basis for making regulatory decisions. We submit that the real time evidence from Uber provides strong support for appropriate safety obligations in particular.
- 1.10 With throw-away lines, Uber paints the need for regulatory change as being based on removing out of date and protectionist rules. While some changes are appropriate, the key existing regulation is focussed on safety for the public (and for drivers). Competition is already highly de-regulated, leaving safety as the dominant regulatory focus.

¹<https://go.uber.com/legal/nzl/terms>

Limitations of the SPSV consultation paper

- 1.11 In a number of respects, the paper has only limited regard to broader safety and transport issues and policy frameworks. Ministerial and Parliamentary decision making will be greatly assisted by the Ministry building on the current paper, and submissions on it, and providing a paper for fulsome consultation, taking into account the broader safety and policy frameworks and issues.
- 1.12 Limitations in the paper include:
- (a) There is little or – often – no reason given to remove current features such as the safety training in the PSL and P-endorsement requirements. In other words, there is little or no reason given to remove status quo safety protections, all of which were introduced to deal with identified safety concerns. Departure from those status quo requirements, originally brought in for strong safety reasons, should be carefully justified.
 - (b) There is no mention of the key context and learnings from the new Health and Safety at Work Act 2015, which follows from safety disasters such as Pike River. That context is a vital part of any safety assessment (and in any event the new legislation applies to passengers and drivers in small passenger vehicles). That context points firmly away from some of the proposed changes diluting safety regulation. As one of the Pike River Royal Commissioners reported:²
“Workplace health and safety legislation has been weakened in New Zealand over the last 20 years with a greater reliance on self-regulation and cooperation between the regulator and those being regulated. This ‘soft touch’ legislation has resulted in New Zealand having one of the worst health and safety records in the developed world.”
- 1.13 The paper also makes no mention of safety-related developments in other transport sectors within the Ministry’s umbrella, which take a different approach and strengthen safety regulation rather than diluting it, seemingly at odds with what is proposed in the paper. For example, in 2013 the Ministry provided the Productivity Commission with an example of a transport sector failure: the recently abolished maritime ‘Safe Ship Management System’ (SSMS) undermined safety because Maritime NZ took too much of a ‘hands off’ approach to regulation (i.e. through the promotion of industry self-regulation). Under the new safety model, Maritime NZ is now directly responsible for the oversight of safety.³ It is not apparent why the approach here should be so different.
- 1.14 Similarly as to maritime and aviation aspects of adventure tourism, which also fall under the Ministry of Transport’s regulatory umbrella. The recent safety approach to adventure tourism appears to be inconsistent with the new approach proposed for SPSVs, in that it moves safety regulation to a more stringent basis, whereas SPSV safety regulation is being substantially diluted.
- 1.15 As recently as 10 February 2016, there has been a strong focus on broader health and safety legislative issues, and the Health and Safety at Work Act, in the context of regulatory change within another part of the Ministry’s ambit. This is focus that is thus far missing from this review.
- 1.16 On that date, the Associate Minister of Transport announced the introduction of random testing in the commercial aviation and maritime sectors to help tackle drug and alcohol impairment. The decision is couched within that broader health and safety context including the new Act. That flows from similar treatment in the Ministry’s March 2015 consultation paper. The broader health and safety context was dealt with throughout.
- 1.17 It is important that SPSV regulation also be considered in that broader context and it is to be hoped that the Minister would not take a different approach in that regard from what happened as to random testing. The risks for maritime and aviation overlap in large measure even if some detail of the regulation differs: for example, passengers on hot air balloons in the Wairarapa – the genesis of the random testing review – are, like SPSV passengers, being carried by someone they don’t previously know.
- 1.18 We cannot see how this review can be adequately done without dealing with this ‘gorilla in the corner of the room’ which is so important.

² N Gunningham “Lessons from Pike River: Regulation, Safety and Neoliberalism” (Dec 2015) NZULR Vol 26 No 4 (SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2685444) at p 15.

³ Ministry of Transport, Submission to Productivity Commission’s inquiry into regulatory institutions and practices (Oct 2013) (<http://www.productivity.govt.nz/sites/default/files/Sub%20039%20-%20Ministry%20of%20Transport%20PDF%20-%20114Kb.pdf>) at p 8.

- 1.19 The paper, and particularly the questionnaire to be answered by submitters, channels the Ministry and submitters down a narrow path. For example, there is no provision for adding or subtracting components from the paper's preferred Option 4. That raises the question of where this consultation is heading, given other options and choices are precluded.

Clarity

- 1.20 To avoid confusion, in this submission, we will refer to:
- (a) The current Approved Taxi Organisation as "ATO1" and the proposed Approved Transport Operator as "ATO2".
 - (b) "Rideshare" in the way that it is defined in the Consultation Paper, namely, a service involving carpooling where a third party, such as Uber, is paid a fee. "Rideshare" is used in varying ways by Uber and this creates confusion.

Safety is paramount

- 1.21 Uber wishes to considerably reduce safety requirements. That will make it easier for new entrants and new drivers to start providing services, and more quickly, thereby increasing competition.
- 1.22 Uber says that its service is mostly provided by part-time drivers, the implication being that lesser safety standards are required (particularly as, for example, extended entry qualifications raise barriers to entry).
- 1.23 We acknowledge the objective of greater competition. However, safety for passengers is paramount whether the driver is part time, full time, professional or otherwise. Safety cannot be sacrificed on the altar of competition. Safety outweighs improving and expediting new entry to the SPSV market, even if that means it takes more time for new drivers to get qualified. Arguably part time drivers require even greater training.
- 1.24 Federation members would also welcome solutions that expedite entry of new drivers too, reducing time and cost before drivers can start operating. For example, processes used by NZTA and Police could be streamlined with updated systems. We are aligned with Uber on wanting reduced time and cost. The Federation and its members would welcome working with the Ministry and NZTA to find ways to reduce the time and cost of on-boarding new drivers.
- 1.25 But, critically, not at the expense of minimum safety standards that our passengers would expect to be regulated as a minimum, whether the driver is part time or full time.

Review can be informed by real world evidence

- 1.26 Returning to one of the central themes, outlined above, the review can and should have regard to real world evidence both:
- (a) Historically (e.g. as to historical reasons and experience as to why the current safety regulation applies: any departure from the status quo should be carefully justified); and
 - (b) Going forward (e.g. what Uber's actions show are the risk areas and concerns for the future).
- 1.27 What in fact is happening and has happened is much more relevant than trying to model and guess at what might happen.
- 1.28 The current regulations are focussed on safety and have evolved and been drafted based on events and concerns such as actual murders and assaults. Given that history, any departure from those regulations should be carefully justified. It is no exaggeration to say that lives are at stake.
- 1.29 We turn now to the disconnect between what Uber actually does and what it actually says to customers, the public and Government.

What Uber says and does

- 1.30 In a paper outlining multiple breaches and failures by Uber, attached as Appendix D, Harvard Professor Benjamin Edelman summarises the position:⁴

"To be sure the [TNC] companies offer important technical and business model innovations But in cutting corners on issues from insurance to inspections to background checks, they push costs from their customers to the general public—while also delivering a service that plausibly falls short of generally applicable requirements duly established by law and, sometimes, by their own marketing promises.

Despite excitement about the benefits they provide, it's far from clear that the companies have chosen the right approach."

- 1.31 As one U.S. transport sector prosecutor said of Uber:⁵

"In my two-plus decades in practice, I have never seen this level of blatant defiance [of legal obligations]."

- 1.32 Professor Edelman continues:

TNC representations to consumers at best gloss over potential risks, but in some areas appear to misstate what the company does and what assurances it can provide. . . . Uber has claimed to be "working diligently to ensure we're doing everything we can to make Uber the safest experience on the road" at the same time that the company lobbies against legislation requiring greater verifications and higher safety standards.

What Uber says to the Government and the public in New Zealand

- 1.33 Throughout our submission, there are a number of concerns raised as to Uber's actions. For example, Uber in New Zealand makes the following claims:

- (a) Uber stated to the Minister in a submission to him: "SAFETY - THE SINGLE MOST IMPORTANT THING AT UBER".⁶
- (b) Uber's New Zealand website says about safety:⁷

"Safety For All

Our commitment to riders and drivers

Uber is dedicated to keeping people safe on the road. Our technology enables us to focus on rider and driver safety before, during, and after every trip."

- (c) Uber's marketing similarly highlights its safety approach. For example, in December 2015, Uber promised New Zealanders a credit if they pledged not to drink and drive over summer, offering:⁸

"Whether it's a work party, a night out, or dinner with friends, put away the keys and let Uber get you home safely."

- (d) By linking its marketing to a well acknowledged safety issue (drink driving), Uber's purpose is to have its branding known for safety.

What Uber in fact does in New Zealand

- 1.34 However, Uber's actual contracted service is diametrically the opposite. It states that it has no responsibility to get passengers from A to B (that is only the driver's responsibility).⁹ It says this in documents that few read, so the public, customers and Government normally only see the headline statements.

⁴Prof B Edelman "Whither Uber?: Competitive Dynamics in Transportation Networks" (Nov 2015) (<http://www.benedelman.org/publications/competitive-dynamics-tncs-24nov2015.pdf>). To be published in Competition Policy International.

⁵ Prof B Edelman "Whither Uber?: Competitive Dynamics in Transportation Networks" (Nov 2015) (<http://www.benedelman.org/publications/competitive-dynamics-tncs-24nov2015.pdf>).

⁶Letter with submission to Minister Foss from Uber's Director of Public Policy, dated 14 April 2015.

⁷Clicking from the "Safety" link at <https://www.uber.com/cities/auckland> moves the reader to <https://www.uber.com/safety>

⁸ NBR, "Uber's safety branding contradicts its service" (18 Dec 2015) (<http://www.nbr.co.nz/article/uber%E2%80%99s-safety-branding-contradicts-its-service-183116>). As this is behind a paywall a copy is also available at <http://www.wigleylaw.com/assets/Uploads/Ubers-safety-branding-contradicts-its-service.pdf>

⁹ <https://go.uber.com/legal/nz/terms>

- 1.35 Uber states its legal commitment¹⁰ to passengers as follows:¹¹
- "You acknowledge that Uber does not provide transportation... services... and that all such transportation services are provided by [drivers, etc]"*
- 1.36 It only makes promises in relation to the Uber platform.
- 1.37 Uber goes even further and states in the same legal commitment:
- "Uber does not guarantee the quality, suitability, safety or ability of [drivers]"*
- 1.38 Uber misrepresents the actual position to Government, to the public and to its customers, as above.
- 1.39 This small print is important because that is what Uber commits to do for its customers and that is the opposite of what its marketing says.
- 1.40 It is likely that the statements made by Uber breach the Fair Trading Act, as to misleading and deceptive statements. The Act covers situations where the marketing says one thing and what is actually delivered (as in the small print) is contrary to that. There are multiple examples of suppliers being prosecuted, where the marketing is contradicted by the small print, typically where customers are attracted into using the service by misleading marketing.
- 1.41 Here, Uber markets safety when attracting customers (eg that "Uber get you home safely") when in fact that is exactly what it does not commit to do.

Most recent example

- 1.42 Most recently, when interviewed on the Uber submission in this review on Wednesday 10 February 2016 by John Campbell, Uber's New Zealand Public Policy Manager (that is, the Uber senior official responsible for submitting to and dealing with Government), said:
- John Campbell:** Roger Heale of the Taxi Federation [said] *"If there are problems with the Uber driver service, that has nothing to do with Uber as that is entirely the responsibility of the driver. Uber is not legally liable if something goes wrong with the Uber driver service"*.
- Is he correct?
- Brad Kitschke:** *"No he is not correct.... Everything that we do is pitched toward safety and making sure that everything is transparent and fair."*
- 1.43 In fact Mr Heale was fully correct. What Uber says again is likely to be a breach of the Fair Trading Act. Uber has, again, misrepresented the true position when communicating with the public, going further to claim that everything is "transparent and fair", when what is being said to Government, customers and the public is contrary to the actual position. Uber is being the opposite of "transparent and fair" about the true position.

What is happening in NZ reflects Uber misrepresentations overseas

- 1.44 The New Zealand experience with Uber reflects the international experience. Professor Edelman notes:¹²
- "TNC representations to consumers at best gloss over potential risks, but in some areas appear to misstate what the company does and what assurances it can provide.Uber has claimed to be "working diligently to ensure we're doing everything we can to make Uber the safest experience on the road" at the same time that the company lobbies against legislation requiring greater verifications and higher safety standards."*

¹⁰ This is explained in more detail at NBR, "Uber's safety branding contradicts its service" (18 Dec 2015) (<http://www.nbr.co.nz/article/uber%E2%80%99s-safety-branding-contradicts-its-service-183116>). As this is behind a paywall a copy is also available at <http://www.wigleylaw.com/assets/Uploads/Ubbers-safety-branding-contradicts-its-service.pdf>

¹¹ <https://go.uber.com/legal/nzl/terms>

¹² Prof B Edelman "Whither Uber?: Competitive Dynamics in Transportation Networks" (Nov 2015) (<http://www.benedelman.org/publications/competitive-dynamics-tncs-24nov2015.pdf>).

- 1.45 Uber has effectively acknowledged such misrepresentations this month. On 11 February 2016, Uber settled class action litigation against it in the U.S.¹³ In addition to agreeing to pay US\$28.5M to settle the misrepresentation claims, Uber has agreed, by settlement stipulation,¹⁴ to injunctions against it restraining Uber from claiming as to its services, in its advertising, that it has the “safest ride on the road”, “safest experience on the road”, “best in class safety and accountability” and a number of other claims. Uber also agreed to injunctions against it to stop it making certain claims as to the quality of its equivalent of fit and proper person assessments (e.g.: “best available”, “industry leading”, “gold standard”, “safest”, etc.).

Why Uber’s actions are relevant

- 1.46 Apart from Uber’s apparent disregard for its legal obligations, and the implications that has as to the need for prescriptive regulation, the key conclusion from this is that Uber has been able to build up confidence in its service, as to safety, by marketing, and by statements to the Minister, which are in fact incorrect and misleading. Consumers do not know that this is so, and gain a false level of reassurance as to safety.
- 1.47 Professor Edelman observes:¹⁵
- “Any company attempting [Uber’s] strategy necessarily establishes a corporate culture grounded in a certain disdain for the law. ... Once a company establishes a corporate culture premised on ignoring the law, its employees may feel empowered to ignore many or most laws, not just the (perhaps) outdated laws genuinely impeding its launch.”*
- 1.48 What Uber is doing, internationally and in New Zealand, shows why:
- (a) ATO2s should be subject to careful safety regulation which is sufficiently detailed and prescriptive to ensure compliance. (Prescriptive in the sense that the way in which the requirements are met is not unduly locked into particular technology for the long term). Leave too many broadly based safety obligations to ATO2s and non-compliance with reasonable requirements is likely to follow.
 - (b) Delegation of regulatory responsibility to ATO2s should be carefully constrained and subject to a close ability to audit and enforce.
 - (c) Some regulatory discretion should not be delegated (for example, fulfilment of the P-endorsement requirements, including for renewal).
- 1.49 There is a lot at stake, and things can go badly wrong when too much is left to the providers, as the Pike River tragedy and the Pike River Royal Commission report show. Another transport related tragedy illustrating the same disastrous results of a lightly regulated and largely self-regulated commercial passenger transport sector was the 2012 Carterton balloon crash which killed 11 people.

TNCs’ limited incentives as to safety

- 1.50 For a number of reasons, market pressure and commercial competition is not likely to adequately resolve minimum safety compliance. Absent regulation, providers typically do not have sufficient incentives. Professor Neil Gunningham’s 2011 report, Investigation of Industry Self-Regulation in Workplace Health and Safety in New Zealand, commissioned by the Department of Labour following Pike River, is relevant:¹⁶

“A starting point is to recognise that there is commonly a substantial gap between the self-interest of an industry (or an individual enterprise), and that of the public. ... some businesses at least may seek to cut corners and minimise spending on safety equipment and procedures in the pursuit of profit and productivity.

... Even in circumstances in which there would appear to be a substantial coincidence between the public and the private interest in self-regulation, there may still be a number of reasons why it will nevertheless fail to materialise, or function ineffectively.”

¹³ See ARS Technica “Uber settles “industry-leading background check” class-action for \$28.5M” (12 Feb 2016) (<http://arstechnica.com/tech-policy/2016/02/uber-settles-industry-leading-background-check-class-action-for-28-5m/>); the settlement is subject to court approval.

¹⁴ A copy of which is at <https://www.documentcloud.org/documents/2711764-Settlement-Stipulation-FullyExecuted.html#document>. See “Injunctive Relief” at Para 47.

¹⁵ Prof B Edelman “Whither Uber?: Competitive Dynamics in Transportation Networks” (Nov 2015) (<http://www.benedelman.org/publications/competitive-dynamics-tncs-24nov2015.pdf>).

¹⁶ N Gunningham “Investigation of Industry Self-Regulation in Workplace Health and Safety in New Zealand” (June 2011) (<http://www.dol.govt.nz/whss/resources/investigation-industry-self-regulation-whss-nz.pdf>) at pp 11-13.

The regulatory framework

- 1.51 We agree that the regulatory framework should enable responsive change when there are new developments. This is generally best achieved by facilitative legislation with the detail to be specified by Rules made by the Minister (and in some instances, by NZTA approving some detail in accordance with the Rules).

Key point - safety requires clear obligations

- 1.52 To some extent, a more flexible and technology neutral approach is to have regulation in the Rules that is outcome-focussed, rather than having prescriptive requirements. However, there is an important caveat to this, and this is a key point made in this submission. It needs to be clear to parties what they must do. In the end, given the sort of issues raised at the start of this submission, prescription is appropriate on a number of issues. It is too risky from a safety perspective to leave those issues to the discretion of ATO2s. That, for example, is one of the learnings from the real life conduct of Uber and others.
- 1.53 As technology and business models evolve, regulation will need to evolve too. However, as that detail should be in the Rules, the latter can be amended in relatively short order as new technology arrives.
- 1.54 In short, we submit that the regulation needs the right balance between prescription and an outcomes-based focus.

Integration with the Health and Safety at Work Act 2015

- 1.55 The primary regulator for the SPSV sector should still be NZTA (instead of the general regulator, Workplace NZ). Reflecting the structure and policy reform underpinning the Health and Safety legislation, the SPSV regulation should have safety compliance obligations not only upon the ATO2 but also obligations upon ATO2 directors and senior managers as well as on drivers and other sector participants. These are overlapping duties.
- 1.56 The NSW SPSV review late last year also supports all parties in the supply chain having overlapping – and measurable – safety responsibilities. The NSW report states:¹⁷

“The regulatory provisions [that are proposed for the SPSV sector] establish obligations for industry participants [through the supply chain] who will need to accept greater responsibility, and will be held accountable for ensuring they comply with those obligations. This change in focus needs to be accompanied by measures that promote compliance and, in cases of non-compliance, enable appropriate and proportionate enforcement action to be taken.”

- 1.57 Thus, industry specific safety regulation is needed, on top of generic health and safety regulation.
- 1.58 We also firmly support a broader obligation on ATO2s to promote and ensure safety generally for passengers and drivers (that is, beyond particular minimum requirements). That is consistent with the approach in the Health and Safety at Work Act 2015 and its policy underpinnings. That would be in parallel with more prescriptive requirements given the risk of leaving too much discretion to ATO2s.

P-endorsement training

- 1.59 The consultation paper proposes that the P-endorsement compulsory training requirement is removed, as does Uber in a submission to the Minister.¹⁸ In both instances, no reasons are given.
- 1.60 The current P-endorsement training is squarely focussed on fundamental core safety issues. It is not enough to leave it to ATO2s to choose whether or not to have such training, driven by marketplace competition and/or generic safety duties. When an ATO2 such as Uber opposes even the most rudimentary of safety commitments, and deliberately breaches the law, where its incentives to promote safety are limited (and it disclaims all responsibility for safety) it can be seen that minimum training standards are necessary to meet safety statements, and what would be the reasonable expectations of most passengers. Safety remains important, even if the prescribed obligations are lessened.
- 1.61 ATO2s could, however, provide training, but assessment should remain with a third party assessor.

¹⁷ NSW Point to Point Transport Taskforce, Report to the Minister for Transport and Infrastructure (Nov 2015) (https://p2p-prod-assets.s3.amazonaws.com/p2p/s3fs-public/TNSW7410_point_to_point_Taskforce_draft4.pdf) at p 112.

¹⁸ Submission with letter to Minister Foss from Uber, dated 14 April 2015.

- 1.62 There seems to be some suggestion that reducing safety regulation removes the need for training. But safety remains as important, there will still be safety obligations, and the training can be tailored to the altered regulation.

Fit and proper person assessment

- 1.63 Uber wants a considerable reduction on the factors taken into account when assessing whether someone is a fit and proper person for a P-endorsement. For example, Uber says it wants “a 24-hour registration turn around which cost less than \$100...”¹⁹ (The latest Uber submission extract suggests 3 days not 1 day).
- 1.64 That is considerably less than what currently happens. Uber again pushes for much lower safety standards, despite it saying that safety is its Number 1 priority. NZTA currently addresses criminal history, traffic history, and other information that Police hold that may be relevant (such as warnings around sexual predators), complaint history, other relevant information and, in the case of immigrants, it checks offshore histories. This cannot happen in a 24-hour registration period.
- 1.65 This level of checking is there for a reason and applies as much to part timers as full timers. Safety cannot be sacrificed in the drive to encourage competition.
- 1.66 The current fit and proper person assessment is qualitative in the sense that it involves judgment calls by NZTA and not a simple quantifiable test (e.g. “the applicant must have no more than 3 prior convictions”). In addition to the concerns about Uber noted above, as real world evidence, qualitative assessments cannot satisfactorily be delegated away from the independent regulator to the ATO2.
- 1.67 Professor Edelman reports, as to concerns about Uber’s fit and proper person assessments:²⁰
- “In People of the State of California v. Uber, these concerns were revealed to be more than speculative, including 25 different Uber drivers who passed Uber’s verifications but would have failed the more comprehensive checks permitted by law.”*
- 1.68 The 25 drivers who passed Uber’s verifications included a convicted murderer and those convicted of sex offences.
- 1.69 2015 experience with Uber and Lyft in Austin, Texas, outlined at Para 21.14 below, demonstrates this. The risk profile for passengers is considerably greater on Uber/Lyft than it is in taxis in Austin. Uber and Lyft passengers were 400% more likely to have unwanted sexual contact from drivers than passengers in taxis.
- 1.70 In Austin, Uber has and is lobbying for a lower fit and proper person threshold for its drivers, despite its customers being the subject of that unwanted sexual contact.
- 1.71 Despite that unwanted sexual contact by its drivers on Uber passengers, Uber said, in a 2015 paper devoted to Austin, continuing its wide spread theme of high safety standards, despite the reality:²¹
- “Only drivers who have passed Uber’s thorough, multi-layered background checks are given access to the platform.”*
- 1.72 Notably, Uber also claims, in submissions and in talking to the public, that it is not diluting current driver qualifications as to safety when there is, clearly, considerable dilution proposed. For example, its Public Policy manager said on Radio New Zealand on 10 February, as to the steps required for the P-endorsement:
- “It is not about a lower bar. It is about achieving the same outcome in a different way.”*
- [As to the required fit and proper person checks], *“I wouldn’t change what to check”*.

Uber claims that pilot and firearms licences are issued quicker

- 1.73 In the extract from its submission on this review this week, Uber submitted the following table to show that the time to get a P-endorsement is too long. This is another example of Uber misrepresenting the position, and being loose in its communications with Government.

¹⁹ Stuff.co.nz “Uber hotly anticipating result of Government’s transport review” (15 Sep 2015) (<http://www.stuff.co.nz/business/better-business/72031567/Uber-hotly-anticipating-result-of-Governments-transport-review>)

²⁰ Prof B Edelman “Whither Uber?: Competitive Dynamics in Transportation Networks” (Nov 2015) (<http://www.benedelman.org/publications/competitive-dynamics-tncs-24nov2015.pdf>).

²¹ Uber, Austin: a mobility case study, at page 19 (https://lntvkan.files.wordpress.com/2015/10/uber_policycasestudy_austin_r5_digital-1.pdf)

Processing time and cost (New Zealand)		
	Time	Cost
Passport ⁴	3 days	\$360
Pilot licence ⁵	1 weeks	\$230
Firearm licence ⁶	4 weeks	\$126.50
P-endorsement with training	12 weeks	~ \$800

- 1.74 Focussing on the time to get a pilot or a firearm licence (as passports don't seem relevant), this table is misleading on simple issues, as set out in more detail in Appendix B:
- (a) Both pilot and firearm licences require training, yet the P-endorsement is the only one where the words "with training" are included in the table. This apples and pears comparison would not be detected on a normal read. The normal reader would conclude that this is an apples and apples comparison and that the P-endorsement takes much longer. That is misleading.
 - (b) Both firearm and pilot licences involve a similar qualitative fit and proper person assessment by Police and CAA respectively.
 - (c) Getting flight hours, doing the exam, and being flight tested by an assessor, plus the fit and proper person assessment typically takes months, even for recreational pilots. Generally that is a lot longer than a P-endorsement including training takes.
 - (d) The firearms licence takes, according to the latest data, 30 to 60 days to process, not the 4 weeks/28 days noted by Uber. But that does not include the training and assessment that is required as well.

PSL

- 1.75 Both Uber and the consultation paper, without reason given, propose to remove the Passenger Service Licence (PSL).
- 1.76 As outlined above, what Uber in fact does and says is the best evidence upon which to make regulatory decisions.
- 1.77 On the PSL, Uber has misled the Minister, providing further evidence that TNCs should be carefully regulated, with limited delegation of regulatory discretion to them.
- 1.78 In its 14 April 2015 submission to the Minister, Uber said to the Minister, in the same submission when it said "SAFETY - THE SINGLE MOST IMPORTANT THING AT UBER":²²
- "The requirement of a driver-partner to sit the PSL exam, which requires them to demonstrate they are **capable of running a business**, has no direct correlation with the role of a transport licensing authority. ... It is irrelevant whether or not an individual is able to **conduct their business affairs**."* (highlighting added)
- 1.79 The NZTA Passenger Service Licence Handbook, which sets out what NZTA requires licence holders to know obtain the PSL, states:²³
- "There is no intention that an in-depth knowledge of good business practice be part of the certificate requirement."*
- 1.80 A cursory review of the training requirements shows the strong focus upon safety and bears out the above quote. We have attached the table of contents for the NZTA Passenger Service Licence Handbook as Appendix A. The training required by NZTA is to learn and be assessed on what is in that Passenger Handbook.
- 1.81 Uber's misrepresentation demonstrates even more strongly that PSL training should be mandatory. (The degree of training can alter to reflect the changed regulation).

Rank and hail work

- 1.82 Safety calls for rank and hail work only by liveried vehicles, with each ATO2's livery distinct from the other ATO2s.

²² Letter with submission to Minister Foss from Uber's Director of Public Policy, dated 14 April 2015.

²³ NZTA, Passenger Service Licence Handbook (14ed, Sep 2013) at p 6.

Complaints registers

- 1.83 The consultation paper proposes to eliminate the requirement to maintain a complaints register. No reasons are given.
- 1.84 Complaints registers are important mechanisms for ATO2s to deal with ATO and driver conduct and safety. In turn, complaint registers are important for appropriate enforcement action, for decisions as to fit and proper person, renewals, etc, plus to enable audit by NZTA. Uber's actions give even more reason to have regulation that requires complaints registers to be maintained and accessible by NZTA and Police.
- 1.85 The information can, as at present, be kept in the most convenient way, such as electronic. That can remain the case, so that this is not an onerous obligation (and in any event is something that ATO2s should do regardless).

Driver fatigue and log books

- 1.86 We welcome the retention of log books for ATO2s to reduce driver fatigue issues and for the maximum hours to be aligned with taxis.

Drivers should drive for only one ATO2

- 1.87 Uber, again noting them as a real life example providing the best evidence, supports drivers driving for multiple ATO2s.²⁴
- 1.88 London SPSV regulator, Transport for London's proposal to regulate this practice recognises the problems flowing from drivers driving for multiple ATO2s:²⁵

"This proposal would reduce the risk of drivers working excessive hours for a number of different operators. It also will assist enforcement and compliance activity because there would be more certainty as to whom a driver is undertaking bookings for at any particular time. There will be no restriction on the number of times that a driver changes the operator they are working for."

- 1.89 While we recognise that freeing up drivers to drive for multiple ATO2s has some pro-competition effects, these are outweighed by the safety considerations. For this reason, we submit drivers should only be permitted to drive for one ATO2.
- 1.90 There is a further important reason why drivers should be allowed to drive for only one ATO2, which we now turn to.

The problem of single driver ATO2s (or small sized ATO2s).

- 1.91 Given the removal of the 24x7 requirement, services can be provided by single person or small ATO2s. Absent regulatory restraint, it can be expected that there will be considerable numbers of single person and small ATO2s. While, as the consultation paper points out, a driver in such an ATO2 can have both driver and ATO2 responsibilities, this considerably erodes the policy underpinning ATO2s and, in particular, makes enforcement and audit by NZTA particularly difficult, if not unworkable.
- 1.92 There is no analysis of this problem in the consultation paper.
- 1.93 While there is no easy solution to this problem, it is of such importance that it should be the subject of a further and possibly separate consultation paper produced by the Ministry.
- 1.94 The following recommendations provide some partial solutions to the problem:
- (a) Drivers can drive for only one ATO2. They (or the ATO2) need to notify NZTA which ATO2 they drive for. This reduces competitive options resulting from a driver being able to drive for multiple ATO2s. However, safety considerations are paramount, and for that reason drivers should only be able to drive for one ATO2. Such an approach encourages (but does not force) larger ATO2s, and also provides chain of responsibility clarity.
 - (b) Where a driver drives for an ATO2, the driver cannot also set up his or her own single person ATO2, driving under the umbrella of that ATO2. In this way there is greater focus on the umbrella ATO2.

²⁴ That is the position it took, for example, on the Transport for London small passenger vehicle review.

²⁵ Transport for London, Private Hire Regulations Review: Response to consultation and Proposals: Consultation (Sep 2015) (https://consultations.tfl.gov.uk/tph/private-hire-proposals/user_uploads/private-hire-proposals-sept-2015.pdf) at p 15.

Cameras and panic alarms

- 1.95 We welcome compulsory cameras and panic alarms, but there should be no carve out for TNC services. From the perspective of passengers, there is an even greater need to have cameras in TNC vehicles than in taxis. Among the evidence demonstrating this is the experience in Austin, Texas, where Police say that in 2015 there were 400% more incidents of unwanted sexual contact by Uber and Lyft drivers on passengers than by taxi drivers on passengers. It was reported at the end of January 2016:²⁶
- "...in 2015 the Austin Police Department received 27 reports of unwanted sexual contact in taxi cabs and ride-hailing services. Two took place in an "Independent Ride Share," five happened in taxis and the remaining 20 occurred during Uber and Lyft rides. Seven assaults were committed by transportation network company drivers."*
- 1.96 This implies major problems with TNCs beyond Austin, in relation to the safety of their passengers.
- 1.97 Despite the unwanted sexual contact by its drivers on Uber passengers, Uber said, in a 2015 paper devoted to Austin:²⁷
- "Only drivers who have passed Uber's thorough, multi-layered background checks are given access to the platform."*
- 1.98 Real evidence such as this shows the importance of cameras in all vehicles. Faced with this level of attacks by their drivers on their TNC passengers, the fact that TNCs would resist cameras, which are in their passengers' interests, indicates that regulation is required.
- 1.99 Additionally, drivers are safer in all vehicles, including TNC vehicles, where security cameras are fitted. Compulsory cameras and panic alarms were introduced following murders of two taxi drivers in one year. There have been no murders since then and serious assaults have dropped at least 40%, according to the independent report by Opus. The different risk profile in TNC cars does not remove the risk to TNC drivers. Inebriated and drugged passengers will use TNC services. Identity misuse and theft are a significant problem, the more so among those that are more likely to attack drivers.
- 1.100 Serious injury and death (for both passengers and drivers) is what is at stake here.
- 1.101 The cost of having cameras and panic alarms (with support) is dropping. Safety for passengers and drivers is the paramount concern.

English language requirement

- 1.102 Being able to converse in adequate English is a safety feature. For example, being able to communicate more readily enables drivers and passengers to talk their ways out of trouble.
- 1.103 ATO2s should be responsible for ensuring those standards are met, but subject to NZTA being able to require independent assessment that the standards are met.

Non-resident TNCs

- 1.104 Again, real world experience from Uber's actions shows the problems and what solutions are appropriate.
- 1.105 The company that provides the Uber service is not resident in New Zealand even though there are staff working in New Zealand. Uber's data (such as information about passengers, drivers and trips) is also held outside New Zealand.
- 1.106 Uber thwarts regulators getting access to information to enable it to enforce regulations. For example, the NSW review of SPSV reports:²⁸
- "RMS [the NSW equivalent of NZTA] has experienced difficulties obtaining information to support action against Uber drivers because much of the relevant information is held off-shore."*
- 1.107 Uber's online guidance to regulators and enforcement agencies makes this even clearer. Such agencies must seek information by applying to the U.S. courts. This expensive and difficult process is unlikely to be undertaken, beyond rarely, by NZTA or Police.

²⁶ Re/code "Things Are Getting Ugly in Uber's and Lyft's Fight Against Fingerprint Checks in Austin" (29 Jan 2016) (<http://recode.net/2016/01/29/things-are-getting-ugly-in-ubers-and-lyfts-fight-against-fingerprint-checks-in-austin/>).

²⁷ Uber, Austin: a mobility case study, at page 19 (https://lintvkan.files.wordpress.com/2015/10/uber_policycasestudy_austin_r5_digital-1.pdf)

²⁸ NSW Point to Point Transport Taskforce, Report to the Minister for Transport and Infrastructure (Nov 2015) (https://p2p-prod-assets.s3.amazonaws.com/p2p/s3fs-public/TNSW7410_point_to_point_Taskforce_draft4.pdf) at p 112.

- 1.108 Moreover, bringing enforcement action against a non-resident TNC such as Uber will be just as rare for the same sort of reasons.
- 1.109 Fine regulation in principle becomes ineffectual regulation when faced with these enforcement hurdles.
- 1.110 We support the NSW review's conclusion that non-resident TNCs should have mirrored information located in New Zealand.
- 1.111 However, that alone is not enough. Additionally, the service by a TNC whose parent is outside NZ – such as Uber – should be contractually and legally provided by a NZ resident subsidiary or related company, so that obligations can be enforced. Without that, there will only be Clayton's regulation.
- 1.112 Additionally, in line with recent changes to NZ company law, enacted for overlapping reasons, at least one director of the NZ resident ATO2 should be resident in NZ, so that there is someone in the jurisdiction who is responsible for compliance.
- 1.113 All of the above is pragmatically and easily achievable while still promoting the same benefits of the TNC services (for example, the same computer systems can be used in offshore locations and the same NZ resident staff can be used).
- 1.114 This fits well with Uber's position, stated to the public, that it is a "New Zealand" and a "local" business, so it fits with that position to require the NZ resident subsidiary or related company to legally provide the service so that Uber walks the talk of "We are a New Zealand business. We are a local business". As Uber's NZ Director of Public Affairs said on Radio New Zealand on 10 February 2016:

"...we have staff that operate our business in New Zealand. ... We have about 15 [staff] in NZ. We have a General Manager who runs our business in New Zealand. We have a driver operations team. We have a marketing team. We have staff both in Auckland and Wellington where the business runs. ... We are a New Zealand business. We are a local business. We employ local people in the marketplace."

Enforcement where ATO2 does not carry passengers from A to B

- 1.115 The NSW Taskforce identified a problem by which, given that Uber's service explicitly purports to exclude transporting passengers from A to B, it cannot breach the NSW transport regulation, as the regulation applies only to those carrying the passenger. The Taskforce identifies a solution, which it is submitted should be included in New Zealand, namely an offence of **facilitating** a contravention of the law.²⁷

Fares

- 1.116 We support the consultation's proposal that the fare basis is agreed before the journey commences. It will be important that the regulation is careful in defining the equivalent of "the basis for the fare" or the minimum requirements would be too loose.
- 1.117 Where a car has stated and viewable fares (e.g. on the door and glove box) and a passenger agrees to be carried, that should be deemed acceptance of the fare conditions.
- 1.118 Enabling each ATO2 to set fares that are applicable to all drivers will help encourage certainty. However, there may be Commerce Act collusion risk should that happen. We submit the Act should continue to include a deemed authorisation or as at present, an exemption, under the Commerce Act enabling each ATO2 to set its own fare schedule for its drivers.

Braille signs retained

- 1.119 Braille signs are low cost and are valued by blind passengers, and should be retained.

Additional areas of agreement with consultation paper

- 1.120 We have summarised additional points where we support the consultation paper at the end of the table that follows.

²⁷ NSW Point to Point Transport Taskforce, Report to the Minister for Transport and Infrastructure (Nov 2015) (https://p2p-prod-assets.s3.amazonaws.com/p2p/s3fs-public/TNSW7410_point_to_point_Taskforce_draft4.pdf) at p 113.

2. Summary of key submissions

No.	Para below	Submission
1.	10	SPSV legislation to integrate with broader health and safety legislation and with broader transport regulation.
2.	7	ATO2s should be subject to careful safety regulation which is sufficiently detailed and prescriptive to ensure compliance.
3.	11	Issue new consultation paper to raise treatment of sole person or small ATO2 given the major problems. Among other possible solutions: <ul style="list-style-type: none"> • Drivers can drive for only one ATO2. They (or the ATO2) need to notify NZTA which ATO2 they drive for. • Where a driver drives for an ATO2, the driver cannot also set up his or her own single person ATO2, driving under the umbrella of that ATO2.
4.	7	Delegation of regulatory responsibility to ATO2s should be carefully constrained and subject to close ability to audit and enforce.
5.	7	Some regulatory discretion should not be delegated to ATO2s (for example, fulfilment of the P-endorsement requirements, including for renewal).
6.	9	Act to take a technology and business-neutral facilitative approach to the SPSV sector (e.g. taxi-specific requirements are removed), so that commercial and technology changes can be accommodated by the Rules, and by decisions delegated by the Rules to NZTA. While the Rules need to be prescriptive, they should where possible be outcomes focussed (e.g. an objective might be achievable via technologies).
7.	12	Beyond specific requirements, there should be general obligations in the Act and the Rules, to promote safety, upon all industry participants in the supply chain, including ATO2s and their directors and CEOs, car owners, and drivers.
8.	13	P-endorsement training to remain, and still assessed by a third party assessor appointed by NZTA (but training can be done by the ATO2).
9.	14	Current requirements for fit and proper person assessment to remain (like many aspects, the Federation would welcome working with MoT and NZTA to help speed up the process, but not at the expense of safety).
10.	16	PSL obligations on the SPSV sector to remain, including as to safety training (ATO2s can train but assessment to be independent of the ATO2s).
11.	17	Cars doing rank and hail work to have distinctive livery, with each ATO2 having the same livery, which can be distinguished from other ATO2s' livery (as determined by NZTA where necessary).
12.	18	Complaints registers to be retained by all ATO2s and be accessible by NZTA and Police. Registers to be retained for access for 5 years, including after driver has left the ATO.
13.	19	Log books to be retained for ATO2s.
14.	20	Driver drives for only one ATO2.
15.	21	Cameras and panic alarms (with 24x7 support) retained for safety purposes.
16.	22	ATO2s responsible for ensuring English language standards, subject to NZTA being able to require independent assessment that the standard is met.
17.	23	Non-resident ATO2s should be required to retain necessary records in New Zealand, such as a mirror of computer records held offshore recording the trips taken by TNC drivers, driver details etc, to enable the review of driving time and other compliance.
18.	23	All ATO2 services to be supplied by NZ resident companies (which can be subsidiaries or related companies of non-resident companies such as Uber, so as to bring them within the jurisdiction).
19.	23	All ATO2s to have at least one NZ-resident director.
20.	24	Amend Act to ensure the ability to enforce against an ATO2 which, like Uber, maintains it does not carry passengers from A to B.
21.	25	Fare basis to be agreed before the journey commences.
22.	25	Act to include a deemed authorisation under the Commerce Act enabling each ATO2 to set its own fare schedule.
23.	26	Braille signs retained for SPSV vehicles.
24.	27	Drivers must hold a licence for more than two years.
25.	28	SPSVs must have a current Certificate of Fitness.
26.	29	Drivers have a duty to accept first hire offered.
27.	30	Drivers have a duty to take the route most advantageous to the passenger.
28.	31	Retain the Ministry's definitions of "ridesharing" and "carpooling" and the approach outlined in the paper (rideshare as defined is subject to the regulation and carpooling as defined is not).

3. Absence of analysis, and limited consultation

Introduction

- 3.1 In order to improve the quality of the Minister's and Parliament's decisions, and of outcomes for New Zealanders, we recommend that the review take account of the following matters.

Absence of analysis

- 3.2 The paper contains limited analysis from a policy framework perspective. Most notably it has little or no analysis or stated reasons for taking away some current safety features. As we outline below, this includes current safety features that are basic and which most passengers would accept as being minimum requirements to protect their safety.
- 3.3 For example, no reason is given for removing currently central safety requirements such as:
- (a) The training requirement in the P-endorsement, which is focussed on safety;
 - (b) The PSL, including its training requirement (which again is focussed on safety). (In its earlier submission to the Minister, Uber has misrepresented this training as being for ensuring that drivers are "capable of running a business", as we outline below);
 - (c) Removal of the requirement for ATO2s to keep complaints registers – which results in a cumulative safety record for each driver;
 - (d) Although not clear from the consultation paper, it seems it may be intended that the "fit and proper person" test is to be substantially diluted; if that is so, no reason is given.

Health and Safety context

- 3.4 The consultation paper has little regard to the major concerns and reform as to health and safety, leading to the Health and Safety at Work Act 2015, in force from April 2016. The Act applies not only to workers²⁸ but also those in workplaces: thus passengers as well as drivers are typically subject to the new Act.²⁹
- 3.5 This reform has been driven by workplace safety failures in industries, particularly Pike River, the learnings from the Pike River Royal Commission and the reviews thereafter.
- 3.6 The regulatory solution for small passenger services should learn from, be consistent with, and integrate with, that broader health and safety reform.
- 3.7 As one of the Pike River Royal Commissioners reported:³⁰
- "Workplace health and safety legislation has been weakened in New Zealand over the last 20 years with a greater reliance on self-regulation and cooperation between the regulator and those being regulated. This 'soft touch' legislation has resulted in New Zealand having one of the worst health and safety records in the developed world."*
- 3.8 Additionally, in other areas managed by the Ministry, there has been a focus on safety regulation, leading to more intense and prescriptive regulation.
- 3.9 The consultation does not yet appear to have regard, and appears contrary to, the Ministry's involvement in other transport areas. The proposed changes broadly move in the opposite direction from the new solutions for maritime and aviation. There are different degrees of risk across the transport sector but the overall framework ought to be cohesive, and any departure from broader policy frameworks should be carefully justified.

²⁸ Which has a very wide definition which includes contractors as well as employees – section 19.

²⁹ A vehicle is a "workplace" under the Health and Safety at Work Act 2015, section 20. See particularly sections 36, 37, 44, 45 and 46 for the duties of care and individual particular duties of care relevant to SPSV services.

³⁰ N Gunningham "Lessons from Pike River: Regulation, Safety and Neoliberalism" (Dec 2015) NZULR Vol 26 No 4 (SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2685444) at p 15.

Example – Safe Ship Management System (SMSS)

- 3.10 Excessive devolution of safety regulation to industry providers via the SMSS system was one of the examples in the Ministry of Transport's 2013 submission to the Productivity Commission's inquiry.³¹
- 3.11 The Ministry's submission concludes with an appendix featuring "[e]xamples of regulatory failure in transport".
- 3.12 The first example given is how the recently abolished maritime 'Safe Ship Management System' (SSMS) undermined safety because Maritime NZ took too much of a 'hands off' approach to regulation (i.e. through the promotion of industry self-regulation). Under the new safety model, Maritime NZ is now directly responsible for the oversight of safety. According to the submission by the Ministry:³²

"The SSMS has perverse incentives that undermine safety

The underlying philosophy of SSMS is that safety improvements are most likely to be achieved when those in industry take responsibility for safety. However, the commercial nature of SSMS companies' interactions with industry has resulted in perverse incentives that compromise safety.

SSMS companies and SSMS surveyors intent on ensuring compliance with regulatory requirements risk losing business to other SSMS companies. Exiting unsafe vessels and operators from the SSMS means reduced revenue for SSMS companies.

As well Maritime NZ has been strongly reliant on SSMS companies for the regulatory functions they perform, and their direct relationships with industry. The regulatory model distances Maritime NZ from vessel operators that, together with poor information from SSMS companies, has hindered its ability to keep up with maritime safety issues and concerns and to effectively target its own regulatory efforts.

The consensus view is that Maritime NZ has taken too much of a 'hands off' approach under SSMS, and that the commercially competitive market that resulted has not been conducive to achieving the necessary improvements in maritime safety that government was seeking.

The SSMS will be replaced next year by the new Marine Operator Safety System, which discontinues the requirement for vessels to belong to an SSMS. Maritime operators become directly responsible for producing a safety plan for their operation, and Maritime NZ becomes directly responsible for the oversight and audits of the operator safety system. Ship surveys will continue to be provided commercially by external providers, establishing a clear separation between the commercial service and regulatory oversight."

- 3.13 While the SPSV sector will have specific issues, the policy perspective as to safety is largely the same. The Ministry has identified that excessively devolving safety to industry players fails. While industry players remain responsible for safety, and the ATO framework is valuable, care must be taken not to excessively devolve responsibility and to ensure sufficient audit and enforcement capability.
- 3.14 There is no analysis in this review paper of the issues outlined above, and why the path here is different. There should be a cohesive policy approach and response.

Example: adventure tourism

- 3.15 Again, while adventure tourism has specific issues and risks, the policy and safety considerations overlap, at a different level. The approach for adventure tourism appears to be inconsistent with the new approach proposed for SPSVs, in that it moves safety regulation to a more stringent basis, whereas SPSV safety regulation is being substantially diluted.
- 3.16 Following general public concern with safety standards in New Zealand's adventure tourism sector, the Department of Labour was tasked with undertaking a formal safety investigation in 2009. Recent incidents have included the Fox Glacier skydiving crash (Sep 2010), the Carterton ballooning incident (Jan 2012), the sinking of Easy Rider (Mar 2012) and a fatal quad bike crash (Oct 2012).
- 3.17 Adventure tourism typically is within the Ministry's maritime and aviation umbrella.

³¹ Ministry of Transport, Submission to Productivity Commission's inquiry into regulatory institutions and practices (Oct 2013) (<http://www.productivity.govt.nz/sites/default/files/Sub%20039%20-%20Ministry%20of%20Transport%20PDF%20-%2014Kb.pdf>) at p 2.

³² Ministry of Transport, Submission to Productivity Commission's inquiry into regulatory institutions and practices (Oct 2013) (<http://www.productivity.govt.nz/sites/default/files/Sub%20039%20-%20Ministry%20of%20Transport%20PDF%20-%2014Kb.pdf>) at p 8.

- 3.18 The 2010 review's main conclusions for the Minister of Labour, included:³³
- (a) There does not appear to be a fundamental problem in the sector's ability to develop appropriate safety systems.
 - (b) However, there are gaps in the safety management framework which allow businesses to operate at different standards than those generally accepted.
 - (c) While these gaps remain there is insufficient assurance that preventable accidents will not occur.
 - (d) This situation could result in harm to individuals and their families and damage to New Zealand's reputation as an international visitor destination.
- 3.19 The 2010 Department of Labour's review's main recommendation to alleviate safety concerns in the adventure tourism sector was to impose mandatory registration, safety management, and an external audit regime for all adventure tourism operators.³⁴ This would be complemented by other initiatives, including promoting operator qualifications and developing safety practice guides.
- 3.20 These main recommendations – a mandatory registration scheme and other complementary initiatives – were accepted by the government in 2010.³⁵
- 3.21 There are parallels between this investigation and (a) the Pike River tragedy (late 2010) and consequent Royal Commission review (2012); (b) the recent overhaul of New Zealand's general Health & Safety legislation; and (c) safety aspects of the current SPSV review being undertaken by the MOT:
- 3.22 Of significant relevance is the finding, as noted above, that *"there are gaps in the safety management framework which allow businesses to operate at different standards than those generally accepted"*.³⁶
- 3.23 The current Option 4 proposals to reduce safety oversight in the SPSV industry (possibly on a self-regulatory basis) increase the risk of creating similar safety framework gaps that "allow businesses to operate at different standards than those generally accepted". That is particularly so when, as evidenced by Uber's conduct, noted below, Uber has a history of pushing back on safety obligations and deliberately breaching the law.
- 3.24 The 2010 review made further observations which are of huge relevance to the importance of preserving safety standards in the SPSV industry:³⁷

"a. The nature of the sector involves inherent risk

There should not be an expectation that all accidents in these sectors can be eliminated. Rather, it should be expected that all practicable efforts are made to minimise the risk of accidents...

Penalties after the fact may act as a partial deterrent but are not satisfactory from a reputational perspective, and in any case, might be seen as the ambulance at the bottom of the cliff when what is really needed is the fence at the top.

b. Relying solely on overarching legislation poses problems

Legislative controls place obligations on businesses to identify hazards and either eliminate, isolate or minimise them. In this sector some risk is inherent in many products. In such a context it may not be appropriate to leave businesses to come up with their own standards.

The HSE Act [now the Health and Safety at Work Act 2015] is primarily designed for safety in employment. Customers are covered by the reference to 'others in the workplace'. There is a wider policy question here about whether this is the best fit for this sector in which the primary focus is the safety of consumers.

³³ Department of Labour, Review of risk management and safety in the adventure and outdoor commercial sectors in New Zealand 2009/10 – Final Report (June 2010) (<http://www.business.govt.nz/worksafe/about/what-we-do/adventure-activities/images-files-documents/review-risk-management-safety-in-adventure-outdoor-commercial-sectors-nz-final-report.pdf>) at pp 6, 23.

³⁴ Department of Labour, Review of risk management and safety in the adventure and outdoor commercial sectors in New Zealand 2009/10 – Final Report (June 2010) (<http://www.business.govt.nz/worksafe/about/what-we-do/adventure-activities/images-files-documents/review-risk-management-safety-in-adventure-outdoor-commercial-sectors-nz-final-report.pdf>)

³⁵ See Hon Kate Wilkinson "Registration for Adventure Tourism Operators" (24 Aug 2010) (<https://www.national.org.nz/news/news/media-releases/detail/2010/08/24/registration-for-adventure-tourism-operators>).

³⁶ Department of Labour, Review of risk management and safety in the adventure and outdoor commercial sectors in New Zealand 2009/10 – Final Report (June 2010) (<http://www.business.govt.nz/worksafe/about/what-we-do/adventure-activities/images-files-documents/review-risk-management-safety-in-adventure-outdoor-commercial-sectors-nz-final-report.pdf>) at pp 6, 23.

³⁷ Department of Labour, Review of risk management and safety in the adventure and outdoor commercial sectors in New Zealand 2009/10 – Final Report (June 2010) (<http://www.business.govt.nz/worksafe/about/what-we-do/adventure-activities/images-files-documents/review-risk-management-safety-in-adventure-outdoor-commercial-sectors-nz-final-report.pdf>) at pp 16-19.

... Except for activities with rules-based systems, the legislation places no obligations on many businesses to comply with up-front checks or safety audits, relying instead on full awareness and understanding of obligations and penalties as deterrence to non-compliance. This creates a situation where businesses can operate below optimum safety levels by not prioritising safety, either knowingly or unknowingly.

c. Qualifications and standards

... Many activities rely on staff knowledge derived through the guide/instructor qualifications to guide safety management. This may not be appropriate in a commercial context, given that many aspects of safety management are likely to be in the control of the business.

... In some cases, there seems to be a mismatch between what the sector requires in terms of safety competencies and the training and qualifications provided..."

Transport sector context such as the PSL

- 3.25 Additionally the Land Transport Act has, generally, a cohesive cross-sector approach that meets policy (and, predominantly, safety) objectives rather than protectionist objectives.
- 3.26 For example, the PSL is a type of transport service licence (TSL). TSLs are applicable across the sector, to trucks, buses, etc, in addition to SPSV services. There are strong policy reasons for this: any departure from that policy framework should be carefully justified, given the TSL and PSL regime is predominantly driven by safety considerations.

Safety is paramount

- 3.27 Uber wishes to considerably reduce safety requirements. That will make it easier for new entrants and new drivers to start providing services, and more quickly,) in addition to the more welcome increase in competition.
- 3.28 Uber says that its service is predominantly provided by part-time drivers, the implication being that lesser safety standards are required (particularly as, for example, extended entry qualifications particularly raise barriers to entry for people who want to drive only for short times each week).
- 3.29 However, safety for passengers is paramount whether the driver is part time, full time, professional or otherwise. It makes no difference, the objective being safety, whatever number of hours are involved and whomever provides the service. Safety outweighs improving and expediting new entry to the SPSV market, even if that means it takes more time for new drivers to get qualified. Arguably part-time drivers require even greater training as they are not so involved in the industry.
- 3.30 Federation members would also welcome solutions that expedite the entry of new drivers, reducing the time and cost before drivers can start operating. We are aligned with Uber on this. But, critically, not at the expense of minimum safety standards that our passengers would expect to be regulated as a minimum. We expand on this below.

Consultation limits options and outcome

- 3.31 The consultation paper has a strong focus on Option 4 and, in particular, on Option 4 having only the elements outlined in the consultation paper. No more, no less. This for example is apparent from the questions that submitters are required to answer, as there is no ability in the questionnaire's structure to add or subtract elements other than what are in the paper for Option 4.
- 3.32 We submit that consideration of the review should not be limited to that approach, forced by the questionnaire that submitters are required to follow. This also raises a concern as to the openness of this review, given answers are being channelled down a path.
- 3.33 For these reasons, we rely primarily on this submission rather than what we have said in answer to the questionnaire.

4. Review can be informed by real world evidence

Introduction

- 4.1 In this section we show why the review can and should have regard to real world empirical evidence both historically (e.g. as to historical reasons and experience as to why the current safety regulation applies) and going forward (e.g. what Uber's actions show are the risk areas and concerns for the future). What in fact is happening is much more relevant than trying to model what might happen.

The relevance of history

- 4.2 The New Zealand SPSV sector is considerably more de-regulated than in most other countries. Most of our regulation is not protectionist, as some claim, including Uber, but rather is focussed on safety and consumer protection. Those protections are based on experience in the sector, particularly deaths and injuries. Real care is needed in removing such regulation, particularly where it deals with safety issues. We have much less "red tape" than other countries, we already have much competition, since the deregulation of 1989 and much of the regulation is pared down already to minimum requirements as to safety, etc.
- 4.3 It is therefore important to have regard to that history, and the policy and safety considerations behind the current regulation. Change away from that regulation should be carefully shown to be justified, in the interests of passengers and other road using members of the public (and drivers). As we outline above, there is little or no analysis or reason given in the consultation paper for taking away a number of the current safety requirements.

The relevance of Uber's actions

- 4.4 This review is not just about Uber. While Uber's entry into New Zealand lies behind the review, the review will have regard to broader considerations such as other new entrants and other parts of the SPSV sector. However, the experience with Uber is valuable because, just as the history of the current regulation is valuable, so too is the experience from what Uber as a new entrant is actually doing and saying. The Ministry and the Minister in this way can base the regulatory approach upon real world empirical experience including from what Uber is doing and saying.
- 4.5 This is real time evidence and not just speculation. That is the best basis for making regulatory decisions. We submit that the real time evidence from Uber provides strong support for appropriate safety obligations in particular.

5. Uber – the international experience

Background

- 5.1 New Zealanders have welcomed disruptive technologies such as Uber, with their undoubted benefits and additional services. But, understandably, in part because Uber has not been fully upfront, and has misled the public and the Minister, as we outline below, New Zealanders haven't had the full picture that shows the negatives as well as the positives; and one that enables a balanced and informed response, as between the benefits of the disruptive technology, and the problems, including those pertaining to TNCs that promote them. Carmen Nobel colloquially summarises these concerns in this way:³⁸

"Suddenly entrepreneurship is not about who can build a better mousetrap, but who can better ignore the law and develop a corporate advantage by ignoring the law."

- 5.2 Uber makes much of failings in the current taxi operations and regimes. As the Federation – we do not represent all ATO1s – we acknowledge that the current sector is not perfect. But that is not a reason to remove current safety regulation. If anything it is a reason to retain, and better enforce, the safety regulation that has greatly increased the safety of passengers (and drivers).

Uber overseas

- 5.3 We will outline the New Zealand experience below. Internationally, the position is summarised in the November 2015 article by Harvard University's Professor Edelman, *Whither Uber?: Competitive Dynamics in Transportation Networks*.³⁹

- 5.4 Professor Edelman introduces his article as follows:

"Suppose Acme Widgets manufactured cheaper widgets by dumping toxic widget by-products in the river behind its factory. By foregoing the anti-pollution efforts that competitors use and that, to be sure, the law requires, Acme would gain a cost advantage over its peers. Unaware of Acme's methods, consumers would favour its products, and its market share would predictably surge. But few would celebrate this outcome—pollution that ultimately harms everyone, requiring clean-up at the public's expense."

In the transportation sector, there are reasonable arguments that Uber, Lyft, and kin (collectively, transportation network companies or TNCs) have chosen a similar approach. To be sure the companies offer important technical and business model innovations, which I discuss momentarily. But in cutting corners on issues from insurance to inspections to background checks, they push costs from their customers to the general public—while also delivering a service that plausibly falls short of generally applicable requirements duly established by law and, sometimes, by their own marketing promises."

Despite excitement about the benefits they provide, it's far from clear that the companies have chosen the right approach."

- 5.5 Professor Edelman outlines the deliberate breach of regulatory requirements, as a strategy, by Uber and other TNCs internationally. He notes:

"For these reasons and others, numerous regulators have concluded that Uber cannot operate within their jurisdictions. But such findings are not self-effectuating, even when backed up with cease and desist letters, notices of violation, or the like. In fact, Uber's standard response to such notices is to continue operation. Pennsylvania Public Utility Commission prosecutor Michael Swindler summarized his surprise at Uber's approach: "In my two-plus decades in practice, I have never seen this level of blatant defiance," noting that Uber continued to operate in despite an unambiguous cease-and-desist order. Pennsylvania Administrative Law Judges were convinced, in November 2015 imposing \$49 million of civil penalties, electing to impose "the maximum penalty" because Uber flouted the cease-and-desist order in a "deliberate and calculated" "business decision.""

³⁸ C Nobel, Forbes, "Maybe Uber isn't God's gift to mankind" (20 Jan 2016) (<http://www.forbes.com/sites/hbsworkingknowledge/2016/01/20/maybe-uber-isnt-gods-gift-to-mankind/#ec91458379d3>).

³⁹ Prof B Edelman "Whither Uber?: Competitive Dynamics in Transportation Networks" (Nov 2015) (<http://www.benedelman.org/publications/competitive-dynamics-tncs-24nov2015.pdf>). To be published in Competition Policy International.

6. Uber – the New Zealand experience

Context

- 6.1 Uber is misleading the New Zealand public (and the Minister) in relation to its safety commitments, as we now outline. That is consistent with what Professor Edelman is saying about what he is seeing of Uber and TNCs internationally. As he states:⁴⁰

“TNC representations to consumers at best gloss over potential risks, but in some areas appear to misstate what the company does and what assurances it can provide. For example, Uber claimed its service offered “best in class safety and accountability” and “the safest rides on the road” which “far exceed... what’s expected of taxis” but taxis, with fingerprint verification of driver identity, offer improved assurances that the person being verified is the same person whose information is checked. Moreover, Uber has claimed to be “working diligently to ensure we’re doing everything we can to make Uber the safest experience on the road” at the same time that the company lobbies against legislation requiring greater verifications and higher safety standards.”

Uber acknowledges misrepresentations

- 6.2 Uber has effectively acknowledged such misrepresentations this month. On 11 February, Uber settled class action litigation against it in the U.S.⁴¹ In addition to agreeing to pay US \$28.5M to settle the misrepresentation claims, Uber has agreed, by settlement stipulation,⁴² to injunctions against it restraining Uber from claiming as to its services, in its advertising, that it has the “safest ride on the road”, “safest experience on the road”, “best in class safety and accountability” and a number of other claims. Uber also agreed to injunctions against it to stop it making certain claims as to the quality of its equivalent of fit and proper person assessments (e.g.: “best available”, “industry leading”, “gold standard”, “safest”, etc.).
- 6.3 Against that background, we turn now to what is happening in New Zealand by:
- (a) First outlining what Uber in fact is saying to the public and to the Minister about safety; and
 - (b) We then turn to identify the wide gap between that and what in fact Uber is doing.

What Uber says

- 6.4 Uber strongly pushes its focus on safety in its marketing and in its lobbying of Government. For example, it stated to the Minister when submitting for change to the regulation, including a reduction in safety obligations applicable to Uber, and for regulation that enables Uber to manage safety itself instead of NZTA:⁴³

“SAFETY - THE SINGLE MOST IMPORTANT THING AT UBER”

- 6.5 Uber’s marketing similarly highlights its safety approach. For example, in December 2015, Uber promised New Zealanders a credit if they pledged not to drink and drive over summer, offering:⁴⁴

“Whether it’s a work party, a night out, or dinner with friends, put away the keys and let Uber get you home safely.”

- 6.6 As Blair Mainwaring, a branding specialist at Ocean, points out,⁴⁵ Uber can gain a brand for safety by associating itself with well-accepted safety campaigns such as what it is aligning with here (stopping drink driving). As he says:

⁴⁰ Prof B Edelman “Whither Uber?: Competitive Dynamics in Transportation Networks” (Nov 2015) (<http://www.benedelman.org/publications/competitive-dynamics-tncs-24nov2015.pdf>).

⁴¹ See ARS Technica “Uber settles “industry-leading background check” class-action for \$28.5M” (12 Feb 2016) (<http://arstechnica.com/tech-policy/2016/02/uber-settles-industry-leading-background-check-class-action-for-28-5m/>); the settlement is subject to court approval.

⁴² A copy of which is at <https://www.documentcloud.org/documents/2711764-Settlement-Stipulation-FullyExecuted.html#document>. See “Injunctive Relief” at Para 47.

⁴³ Letter with submission to Minister Foss from Uber’s Director of Public Policy, dated 14 April 2015 (Uber stated the same thing in its submission to the NSW Point to Point Transport Taskforce).

⁴⁴ NBR, “Uber’s safety branding contradicts its service” (18 Dec 2015) (<http://www.nbr.co.nz/article/uber%E2%80%99s-safety-branding-contradicts-its-service-183116>). As this is behind a paywall a copy is also available at <http://www.wigleylaw.com/assets/Uploads/Ubers-safety-branding-contradicts-its-service.pdf>

⁴⁵ See last footnote.

"Brands often look to associate themselves with an idea that they believe their potential customers may find attractive. And over time, through careful design and management, a company's brand can become intrinsically linked to this concept. For example, Volvo has over the years run a number of marketing campaigns that successfully tell its safety story. Through this campaign, Uber is looking to associate its brand with the concept of safety."

Statements to Minister and to New Zealanders contrary to service actually provided by Uber

- 6.7 The safety focus and branding noted above, associated with a safety message that Kiwis respect (anti-drink/driving), is completely contrary to what Uber provides to its customers under its agreement with its customers.⁴⁶ Uber goes overboard by saying in multiple overlapping ways that in fact it has no responsibility for carrying passengers from A to B.
- 6.8 Contrary to what its marketing states, Uber does not "get you home safely". It is not responsible for safety on that trip.⁴⁷ Only the driver is responsible for that, states its contract with its customers explicitly.
- 6.9 Not only that, but Uber goes even further and confirms that Uber has no safety liability to passengers for its drivers and their cars. Uber's contract states that:⁴⁸

"Uber does not guarantee the quality, suitability, safety or ability of third party providers [such as drivers]."

- 6.10 That is contrary also to what Uber says on its New Zealand website about safety:⁴⁹

"Safety For All

Our commitment to riders and drivers

Uber is dedicated to keeping people safe on the road. Our technology enables us to focus on rider and driver safety before, during, and after every trip."

- 6.11 Most recently, when interviewed on the Uber submission in this review on Wednesday 10 February 2016 by John Campbell, Uber's New Zealand Public Policy Manager (that is, the Uber senior official responsible for submitting to and dealing with Government), said:

John Campbell: Roger Heale of the Taxi Federation [said] *"If there are problems with the Uber driver service, that has nothing to do with Uber as that is entirely the responsibility of the driver. Uber is not legally liable if something goes wrong with the Uber driver service"*.

Is he correct?

Brad Kitschke: *"No he is not correct. ... Everything that we do is pitched toward safety and making sure that everything is transparent and fair."*

- 6.12 But what Mr Heale said was correct and Uber's statement is incorrect. Uber has, again, misrepresented the true position when communicating with the public, this time in the context of seeking change by Government, going further to claim that everything is "transparent and fair", when what is being said to Government, customers and the public is contrary to the actual position. What is being said is the opposite of "transparent and fair".
- 6.13 This small print is important because that is what Uber commits to do for its customers and that is opposite from what its marketing says.
- 6.14 It is likely that the statements made by Uber breach the Fair Trading Act, as to misleading and deceptive statements. The Act covers situations where the marketing says one thing and what is actually delivered (as in the small print) is contrary to that. There are multiple examples of suppliers being prosecuted, where the marketing is contradicted by the small print, typically where customers are attracted into using the service by misleading marketing.
- 6.15 Here, Uber markets safety when attracting customers (eg that "Uber get you home safely") when in fact that is exactly what it does not commit to do.

⁴⁶ <https://go.uber.com/legal/nzl/terms>, see also footnote below.

⁴⁷ For example, Uber's contract with its customer states, when confirming Uber only provides the app and online services and not transportation from A to B: "You acknowledge that Uber does not provide transportation or logistics services or function as a transportation carrier and that all such transportation or logistics services are provided by independent third party contractors who are not employed by Uber or any of its affiliates."

⁴⁸ <https://go.uber.com/legal/nzl/terms>, at section 5: Disclaimer.

⁴⁹ Clicking from the "Safety" link at <https://www.uber.com/cities/auckland> moves the reader to <https://www.uber.com/safety>.

Conclusion

- 6.16 In what Uber says to the Minister, and in what Uber says to New Zealanders, Uber pushes its safety commitment strongly, in order to secure its marketing and regulatory objectives. Yet its actual service is the antithesis of this.
- 6.17 There are other examples of this approach by Uber, below in this submission.
- 6.18 Apart from Uber's apparent disregard for its legal obligations, and the implications that has as to the need for prescriptive regulation, the key conclusion from this is that Uber has been able to build up confidence in its service, as to safety, by marketing, and by statements to the Minister, which are in fact incorrect and misleading. Consumers do not know that this is so, and gain a false level of reassurance as to safety.

7. Why is Uber real life experience important?

Introduction

- 7.1 Having concluded that Uber has a culture of not following the law, Professor Edelman notes:⁵⁰

"Relatedly, when the competitive environment rewards lawbreaking, the victor may struggle to comply both with applicable law and with social norms. Notice Uber's recent scandals: Threatening to hire researchers to "dig up dirt" on reporters who were critical of the company. A "God view" that let Uber staff see any rider's activity at any time without a bona fide purpose. Analyzing passengers' rides to and from unfamiliar overnight locations to chronicle and tabulate one-night-stands. Charging passengers a "Logan Massport Surcharge & Toll" for a journey where no such fee was paid, or was even required. A promotion promising service by scantily-clad female drivers. The CEO bragging about his business success yielding frequent sexual exploits. "Knowing and intentional" "obstructive" "recalcitrance" in its "blatant," "egregious," "defiant refusal" to produce documents and records when so ordered by administrative law judges. On one view, these are the unfortunate mishaps of a fast-growing company. But arguably it's actually something more than that."
- 7.2 Professor Edelman draws important conclusions about what happens in firms where there is such a culture (highlighting added):

*"Rare is the company that can pull off Uber's strategy—fighting regulators and regulation in scores of markets in parallel, flouting decades of regulation and managing to push past so many legal impediments. **Any company attempting this strategy necessarily establishes a corporate culture grounded in a certain disdain for the law.** Perhaps some laws are ill-advised and should be revisited. But it may be unrealistic to expect a company to train employees to recognize which laws should be ignored versus which must be followed. **Once a company establishes a corporate culture premised on ignoring the law, its employees may feel empowered to ignore many or most laws, not just the (perhaps) outdated laws genuinely impeding its launch.** That is the beast we create when we admit a corporate culture grounded in, to put it generously, regulatory arbitrage."*
- 7.3 What Uber is doing, internationally and in New Zealand, shows why ATOs must be subject to careful safety regulation which is sufficiently detailed and prescriptive to ensure compliance. (Prescriptive in the sense that the way in which the requirements are met is not unduly locked into particular technology for the long term).
- 7.4 There is a lot at stake, and things can go badly wrong when too much is left to the providers, as the Pike River tragedy and the Pike River Royal Commission report show.
- 7.5 The Uber experience also shows that, on the spectrum between self-regulation – as sought by Uber – and centralised regulation (such as by NZTA and the Police), it is important to get the balance right. While we welcome extending the ATO regime to other small vehicle services, with its responsibilities on all industry participants including taxi companies, Uber, etc, the illustrations above (where Uber's conflicting incentives are demonstrated) shows that there will need to be carefully articulated minimum requirements, often undertaken and overseen by independent parties (and not the transport provider).

⁵⁰ Prof B Edelman "Whither Uber?: Competitive Dynamics in Transportation Networks" (Nov 2015) (<http://www.benedelman.org/publications/competitive-dynamics-tncs-24nov2015.pdf>).

- 7.6 While there can be co-regulation to some degree, it is important that meeting the entry level requirements (such as P-endorsement and PSL qualifications for drivers and others to enter the sector) are retained by NZTA. We expand on reasons for this later in this submission.
- 7.7 We add at this point that it can be expected that Uber (and other TNCs) being involved in assessing P-endorsement (and PSL) qualification to the degree that Uber seeks can be expected to lead to safety failure.
- 7.8 In a 17 December 2015 NBR article entitled "Uber wants to run its own checks on drivers",⁵¹ the way Uber wants to undertake the background checks is laid out, rather than this being done by NZTA.
- 7.9 Overseas experience with Uber shows how problematic this is, such as in relation to the proceedings – outlined below – by the State of California against Uber, where it is said that convicted murderers, sex offenders, etc., got through Uber's equivalent of the fit and proper assessment.
- 7.10 Self-regulation of health and safety issues, of this nature, is unsuitable for most industries, as Professor Neil Gunningham explains in his 2011 report to the Department of Labour, *Investigation of Industry Self-Regulation in Workplace Health and Safety in New Zealand*.⁵²

"... in practice, pure self-regulation often fails to fulfil its theoretical promise and commonly serves the industry rather than the public interest.

As John Braithwaite has put it:

Self-regulation is frequently an attempt to deceive the public into believing in the responsibility of an irresponsible industry. Sometimes it is a strategy to give the government an excuse for not doing its job.

According to the critics, self-regulatory standards are usually weak, enforcement is ineffective and punishment is secret and mild. Moreover, self-regulation commonly lacks many of the virtues of conventional state regulation. It is usually not as visible or credible, it does not provide the same degree of accountability, and it is usually lacking in rigorous application and strong sanctions."

- 7.11 Professor Gunningham continues:⁵³

"A starting point is to recognise that there is commonly a substantial gap between the self-interest of an industry (or an individual enterprise), and that of the public. That gap is most commonly caused by 'negative externalities', as for example, where a firm is able to pass on (externalise) some of the costs of production to a subgroup of the public such as workers. The costs of occupational injury and disease are one well recognised externality: some businesses at least may seek to cut corners and minimise spending on safety equipment and procedures in the pursuit of profit and productivity.

... Even in circumstances in which there would appear to be a substantial coincidence between the public and the private interest in self-regulation, there may still be a number of reasons why it will nevertheless fail to materialise, or function ineffectively.

First, whether it is economically rational for an enterprise to adopt self-regulation is more problematic than it might appear, because there may be a substantial gap between long term and short term self-interest. For example, it may be in the long term interests of firms to invest in OHS measures which would not only demonstrably reduce costs and increase profits of individual enterprises in the long term but would also enhance the OHS credentials of the entire industry. However, for those who are economically marginal, or for managers whose performance is judged in the short term, such investments may not be practicable in the absence of some form of external pressure. Short termism is much more prevalent in some business cultures than others.

Second, it would be a mistake to assume full rationality on the part of all the major players. Enterprises may not act as economic rationalists would predict because they are ignorant, irrational or incompetent. There may be, for example, a substantial gap between an enterprise's perception of its interests, and the reality. In any of these cases, enterprises may continue behaving in ways which are not in their 'best' interests, notwithstanding opportunities for either individual or collective 'win-win'.

⁵¹ National Business Review "Uber wants to run its own checks on drivers" (17 Dec 2015) (<http://www.nbr.co.nz/article/uber-wants-run-its-own-checks-drivers-cg-p-183071>).

⁵² N Gunningham "Investigation of Industry Self-Regulation in Workplace Health and Safety in New Zealand" (June 2011) (<http://www.dol.govt.nz/whss/resources/investigation-industry-self-regulation-whss-nz.pdf>) at p 9.

⁵³ N Gunningham "Investigation of Industry Self-Regulation in Workplace Health and Safety in New Zealand" (June 2011) (<http://www.dol.govt.nz/whss/resources/investigation-industry-self-regulation-whss-nz.pdf>) at pp 11-13.

Finally, even where win-wins potentially exist, and an industry self-regulatory initiative is established, it may be difficult to curb 'free-riding', whereby rogue firms seek to claim the public relations and other benefits of scheme membership while avoiding the obligations it entails. Unfortunately, free-riding is often an almost insurmountable problem. In practice, individual targets are often set to a lowest common denominator level and are not measurable, enforcement is often (but not invariably) weak, and such initiatives commonly lack many of the virtues of conventional state regulation in terms of transparency, accountability and rigour."

8. Online Feedback on Uber drivers is no panacea

- 8.1 The point is further illustrated by Uber strongly presenting in submissions to the Minister⁵⁴ (and elsewhere)⁵⁵ that passengers rating drivers in feedback is a strong safety feature. While some safety aspects would be apparent to a passenger (e.g. poor driving), much would not be, such as whether there are mechanical defects, whether the driver has or has not exceeded maximum working/driving hours etc.
- 8.2 To the contrary, the feedback system gives incentives to drivers to focus on customer service, and away from safety. Positive feedback is predominantly driven by factors such as tidy cars and clean and courteous drivers, not safety, most of which cannot be detected by the passenger. This is an Uber variation on Professor Edelman's "Acme Widget" example, quoted above. Online evaluation takes the focus away from the priority, which is safety.
- 8.3 Safety issues are complex for passengers and using such testimonials gives the impression of safety when, for the reasons above, a two way rating system has little to do with safety.
- 8.4 Professor Neil Gunningham's 2011 report, *Investigation of Industry Self-Regulation in Workplace Health and Safety in New Zealand*, commissioned by the Department of Labour following Pike River, is relevant:⁵⁶

A starting point is to recognise that there is commonly a substantial gap between the self-interest of an industry (or an individual enterprise), and that of the public. That gap is most commonly caused by 'negative externalities', as for example, where a firm is able to pass on (externalise) some of the costs of production to a subgroup of the public such as workers. The costs of occupational injury and disease are one well recognised externality: some businesses at least may seek to cut corners and minimise spending on safety equipment and procedures in the pursuit of profit and productivity.

... Even in circumstances in which there would appear to be a substantial coincidence between the public and the private interest in self-regulation, there may still be a number of reasons why it will nevertheless fail to materialise, or function ineffectively.

⁵⁴ Letter with submission to Minister Foss from Uber's Director of Public Policy, dated 14 April 2015.

⁵⁵ For example, Uber stated the same thing in its submission to the NSW Point to Point Transport Taskforce.

⁵⁶ N Gunningham "Investigation of Industry Self-Regulation in Workplace Health and Safety in New Zealand" (June 2011) (<http://www.dol.govt.nz/whss/resources/investigation-industry-self-regulation-whss-nz.pdf>) at pp 11-13.

9. Regulatory framework

- 9.1 The Ministry's consultation paper provides little detail on where regulatory change is to be made (e.g. in the Act and/or in the Rules). It is helpful to focus upon this, as that affects how the framework should be structured (in particular whether the Act or the Rules are to be changed), and the timing of any relevant change.
- 9.2 The paper identifies that the Act would need to be amended: that appears to mainly flow from prescriptive reference in the Act to taxis and to ATO1s (for example, that taxis must have top lights and that ATO1s are for taxis not for other small passenger services).
- 9.3 The Act otherwise broadly provides a facilitative framework for small passenger service regulation, with the detailed regulation to be set out in the Rules.
- 9.4 While we do not agree with the consultation paper's statement that small passenger vehicle service regulation is a creation of the 1980s – after all there was a major review of the Act and the Rule in the late 2000's and much has already been deregulated and streamlined – we agree that the regulatory framework should enable responsive change when there are new developments. This is generally best achieved by facilitative legislation with the detail to be specified by Rules made by the Minister (and in some instances, by NZTA approving some detail in accordance with the Rules).
- 9.5 This enables relatively quick change where there are new developments.
- 9.6 That view appears to be shared by the Ministry. As the Productivity Commission reported in its June 2014 *Regulatory Institutions and Practices – Final Report*:⁵⁷
- "...submissions by the Civil Aviation Authority (CAA), Maritime New Zealand (MNZ), the Ministry of Transport and Aviation New Zealand all highlighted the prescriptive and inflexible nature of the legislative regimes regulating transportation, emphasising that the regimes, because of their legislative structure, were not able to adequately keep pace with technological developments that could improve safety and efficiency."*
- 9.7 Where the Act is unduly prescriptive as to small passenger vehicle services, rather than facilitative, we submit that the Act should change, to be more future proof.
- 9.8 Therefore we submit that:
- (a) Amendments to the Act should be facilitative and future proof (for example, by eliminating detail as to ATO1s and ATO2s); and
 - (b) The detail is to go into Rules issued by the Minister.
- 9.9 This raises timing considerations, as draft Rules would be fully consulted on after any amendments to the Act come into force.
- 9.10 Most of the matters raised in the consultation paper are issues for Rules not for the Act, and decisions could not be made on those matters until post-amendment to the Act. It is not possible, legally, to form concluded views now.
- 9.11 The primary focus of the current review, it is submitted, should be on amendments to the Act, to facilitate later rule making.

Outcome-focused ahead of prescriptive regulation

- 9.12 To some extent, a more flexible and technology neutral approach is to have regulation in the Rules that is outcome-focussed, rather than having prescriptive requirements. As the consultation paper points out, the same outcome can be achieved sometimes in different ways, and new business models and technologies can be facilitated.
- 9.13 However, there is an important caveat to this.

⁵⁷ Productivity Commission, *Regulatory Institutions and Practices – final report* (June 2014) (<http://www.productivity.govt.nz/sites/default/files/regulatory-institutions-and-practices-final-report.pdf>) at p 224.

- 9.14 It needs to be clear to parties what they must do. In the end, given the sort of issues raised at the start of this submission, prescription is appropriate on a number of issues. It is too risky from a safety perspective to leave those issues to the discretion of ATO2s. That, for example, is one of the learnings from the real life conduct of Uber, outlined above (and below too).
- 9.15 As technology and business models evolve, regulation will also need to evolve. However, as that detail should be in the Rules, the latter can be amended in relatively short order as new technology arrives. Therefore it will be possible to avoid the regulatory environment getting out of date.
- 9.16 In short, we submit that the regulation needs the right balance between prescription and an outcomes-based focus.

Health and Safety at Work Act 2015

- 9.17 As we noted above, the SPSV regime should integrate and learn from the recent reform of the general health and safety legislation. That is a key part of the regulatory framework, to which we now turn.

10. The Health and Safety context

- 10.1 We introduced this in Para 3 above. The Health and Safety at Work Act 2015 applies to most passengers and drivers in small passenger service vehicles, and results from failure in the prior regime, highlighted by disasters such as Pike River.
- 10.2 We will deal first with the general position under the Health and Safety at Work Act, and then address transport-specific aspects arising from that.

Health and Safety at Work Act 2015

- 10.3 While the entity such as the company that is operating the business – known under the Act as the PCBU (person conducting a business or undertaking) – has overall health and safety responsibility:
 - (a) So also do all others in the supply chain such as employees and contractors have health and safety responsibilities, which include responsibilities as to others.
 - (b) Responsibilities extend to people other than workers; and
 - (c) Officers of the company (PCBU), which includes directors and CEOs, also have responsibilities as to health and safety (namely, to “exercise due diligence to ensure the PCBU complies with [its] duty or obligation”).⁵⁸
 - (d) The Act provides for inter-linked general responsibilities as to health and safety, along with the ability to have more prescriptive regulation as well in particular sectors and areas.
- 10.4 It is that integrated approach, where all are responsible for health and safety, which is key to the new regime.

Integrating transport safety with that general regime

- 10.5 The primary regulation and regulator in the transport sector must be the sector agencies: CAA, NZ Police, MNZ and NZTA. Additionally, the transport regulation must integrate with the general health and safety framework. That is confirmed by the Independent Taskforce on Workplace Health and Safety, which stated in its April 2013 report:⁵⁹

“290. In the transport area, it is more effective for sector agencies (e.g. NZTA, New Zealand Police, MNZ and CAA) to regulate workplace health and safety as they have the specialist capabilities and established links with regulated entities through their broader regulatory responsibilities. However, consistent with our view that there needs to be a primary regulator and an integrated approach to workplace health and safety, we believe that an effective co-ordination mechanism should be put in place.”

⁵⁸ Health and Safety at Work Act 2015, section 44(1).

⁵⁹ The Report of the Independent Taskforce on Workplace Health & Safety (April 2013) (<http://hstaskforce.govt.nz/documents/report-of-the-independent-taskforce-on-workplace-health-safety.pdf>) at [290] – [294].

The Uber experience

- 10.6 Again, Uber provides real life evidence as to why a careful health and safety approach is needed. In addition to the points above (e.g. the culture at Uber in terms of legal compliance), we note the major shift in the Health and Safety legislation to strengthen worker participation and engagement with the PCBU. However, the Uber contractor/driver responsibility model involves allocating responsibility and fault to drivers to the greatest extent possible, and reducing and decentralising workers' ability to collectively engage with safety issues.
- 10.7 Additionally, the short term incentives created by enhanced competition and lower barriers to entry run contrary to long term investments in safety. Innovation is good but does not automatically equate to safety.

11. Responsibilities of ATO2s

- 11.1 We welcome the proposed extension of the current ATO1 model to all ATO2s. ATO1s have successfully improved compliance, quality and safety outcomes in the taxi industry.
- 11.2 It will be important to get the detail of the ATO2's obligations right.
- 11.3 We firmly support a broader obligation on ATO2s to promote and ensure safety generally for passengers and drivers (that is, beyond particular minimum requirements). That is the approach under the Health and Safety at Work Act, and should apply specifically to the Transport Act safety treatment of the SPSV sector.
- 11.4 With the removal of the 24x7 coverage, we recognise there will be ATO2s that have small numbers of drivers (and sometimes only one person). The proposed ATO2 framework can still apply, however. The practical management of the safety aspects of the small ATO2 are much less than for a large ATO2.

The problem of the single driver or small ATO2

- 11.5 Given the removal of the 24x7 requirement, services can be provided by single person or small ATO2s. Absent regulatory restraint, it can be expected that there will be considerable numbers of single person and small ATO2s. While, as the consultation paper points out, a driver in such an ATO2 can have both driver and ATO2 responsibilities, this considerably erodes the policy underpinning ATO2s and, in particular, makes enforcement and audit by NZTA particularly difficult if not unworkable.
- 11.6 There is no analysis of this problem in the consultation paper.
- 11.7 While there is no easy solution to this problem, it is of such importance that it should be the subject of a further and possibly separate consultation paper produced by the Ministry.
- 11.8 The following recommendations provide some partial solutions to the problem:
 - (a) Drivers can drive for only one ATO2. They (or the ATO2) need to notify NZTA which ATO2 they drive for. While this reduces competitive options where a driver is able to drive for multiple ATO2s, safety considerations are paramount. Such an approach encourages (but does not force) larger ATO2s, and also provides chain of responsibility clarity.
 - (b) Where a driver drives for an ATO2, the driver cannot also set up his or her own single person ATO2, driving under the umbrella of that ATO2. In this way there is greater focus on the umbrella ATO2.

12. Safety obligations upon all participants

- 12.1 The consultation paper implies, at page 28, that it is only the ATO2 under Option 4 that has the broader duty to promote safety (and only the driver has that duty if Option 3 applies). Consistent with the new health and safety legislation, and best practice, as outlined above, the duty to promote safety should lie on all participants in the supply chain: ATO2, vehicle owner, driver, her employer if applicable, and so on.
- 12.2 Directors' and other officers'⁶⁰ duties as to health and safety are a key component of the new health and safety legislation and we consider that this duty should apply to the companies in the SPSV supply chain as well. This is one of the key learnings from the recent reviews following disasters such as Pike River.
- 12.3 Such an approach integrates with generic health and safety legislation, and is best practice in managing safety no less in small passenger service vehicles.
- 12.4 In a small ATO2, the operator/owner of the ATO2 may also have the duties of the vehicle owner and of the driver too.

The SPSV approach in NSW in relation to responsibilities across the supply chain

- 12.5 The conclusion that all participants in the supply chain should have safety responsibilities is well summarised, in relation to the equivalent of ATO2s to be established in NSW, in the following excerpt from the Point to Point Transport Taskforce's November 2015 report:⁶¹

"IPART [the NSW regulator] stated in its submission: "A revised regulatory framework in NSW will need to ensure that the providers in the supply chain for point to point transport have clear accountabilities, and that the regulator is empowered to enforce those accountabilities.

The regulatory provisions [that are proposed] establish obligations for industry participants who will need to accept greater responsibility, and will be held accountable for ensuring they comply with those obligations. This change in focus needs to be accompanied by measures that promote compliance and, in cases of non-compliance, enable appropriate and proportionate enforcement action to be taken."

⁶⁰ Such as Chief Executives.

⁶¹ NSW Point to Point Transport Taskforce, Report to the Minister for Transport and Infrastructure (Nov 2015) (https://p2p-prod-assets.s3.amazonaws.com/p2p/s3fs-public/TNSW7410_point_to_point_Taskforce_draft4.pdf) at p 112.

13. P-endorsement training

- 13.1 The consultation paper proposes that the P-endorsement compulsory training requirement is removed, as does Uber in a submission to the Minister.⁶² In both instances, no reasons are given.
- 13.2 As we submit above, there should be broad safety obligations on ATO2s and others in relation to safety. However, there needs to be minimum requirements that are specified too.
- 13.3 The current P-endorsement training is squarely focussed on fundamental core safety issues. It is not enough to leave it to ATO2s to choose whether or not to have such training, driven by marketplace competition and/or generic safety duties. When an ATO2 such as Uber opposes even the most rudimentary of safety commitments, and deliberately breaches the law, where its incentives to promote safety are limited (and it disclaims all responsibility for safety) it can be seen that whole of industry minimum training standards are necessary to meet safety statements, and what would be reasonable expectations of most passengers.
- 13.4 That the P-endorsement is focussed on training is apparent from the syllabuses for the two P-endorsement training modules, as outlined by NZQA.⁶³

“Demonstrate knowledge of driver requirements for endorsement P (passenger)”

People credited with this unit standard are able to describe: the responsibilities of the driver of a passenger service vehicle in relation to passengers with impairments or disabilities; legislative requirements relevant to drivers of all passenger service vehicles; legislative requirements specific to drivers of small passenger service vehicles; and legislative requirements for operator identification and display of driver identification cards specific to those driving a vehicle when operating a dial-a-driver service.

Demonstrate knowledge of fatigue management, work time, and driver logbook requirements

This unit standard is for drivers of motor vehicles who must comply with work time legislation. People credited with this unit standard are able to: identify causes and symptoms of fatigue, and effects of fatigue on driving performance; describe life management skills and work related measures that can be implemented to prevent fatigue; identify the work time requirements and penalties prescribed by legislation; identify driver logbook requirements and associated penalties prescribed by legislation; describe the management of work time records contained in driver logbooks, and identify associated penalties prescribed by legislation; and complete driver logbook entries.”

- 13.5 While the outcome of this review may be reduced amounts of regulation, and that may streamline what is in the training, this training itself is still applicable as it involves fundamental safety issues in all circumstances. Further:
- (a) Safety cannot be compromised on the altar of freeing up competition.
 - (b) Safety applies also to part-time drivers, in just the same way that it applies to full-time and professional drivers. Whether a driver operates 4 hours a week or full time, the same fundamental safety considerations apply and there is no reason to reduce the requirements; to the contrary, the part-time driver with less experience overall is more in need of such training.
 - (c) As we submit, part timers have greater need for training. An example of this lies around log book keeping, and maximum hours in light of dangers due to fatigue. All work, whether driving or not, is included in the maximum hours permitted. It is important for drivers to be trained in these requirements. It is too risky to leave that to the vagaries of possible training by ATO2s, or to the driver somehow picking up the obligations. In this regard the training is not unduly onerous.
 - (d) Like Uber, our members also would like to see the process of getting new drivers on board and qualified to be as expeditious and least-cost as possible, and we support justified steps in that regard. Importantly, however, that cannot be at the expense of safety. In the end, some key requirements will take time and involve multiple steps. The P-endorsement training requirements are rudimentary and fundamental.
 - (e) While the training can be undertaken or arranged by the ATO2, in our submission, the tests to show the driver has met the standards should be externally arranged and assessed (by NZTA or companies approved by it). The risk of taking the testing in-house is too high, against the background of new entrants’ perverse incentives, illustrated as outlined above by Uber’s actions in New Zealand and internationally.

⁶² Submission with letter to Minister Foss from Uber, dated 14 April 2015.

⁶³ From the NZQA website <http://www.nzqa.govt.nz/framework/search/results.do?type=UNIT&query=24089>

14. P-endorsement - fit and proper person

- 14.1 Uber wants a considerable reduction on the factors taken into account when assessing whether someone is a fit and proper person for a P-endorsement. That is clear from this, among other statements by Uber:⁶⁴
- "[Uber's General Manager for] New Zealand... said he would like a 24 hour registration turn around which cost less than \$100..."*
- 14.2 That's 24 hours for the whole process and not just the fit and proper assessment. The ultimate submission by Uber in this review seeks a turnaround of 3 days.
- 14.3 Reflecting on what the Rule currently requires:
- (a) NZTA obtains from Police the criminal history, the traffic history, and other information that Police hold that may be relevant (such as warnings around sexual predators);
 - (b) It reviews complaints history for the applicant and other information that may be relevant such as behavioural history;
 - (c) In the case of immigrants, it checks offshore histories.
- 14.4 24 hours, or even 3 days, as proposed by Uber, permits only a quick database check of traffic and criminal records and does not permit a sufficient review of whether or not a person is fit and proper.
- 14.5 Uber's approach is well short of the rigour of the status quo, which is there for a reason, based on safety issues and history. Yet Uber claim that this is not so. Notably, Uber claims that it is not diluting current driver qualifications as to safety when there is, clearly, considerable dilution proposed. For example, its Public Policy manager says on Radio New Zealand on 10 February, as steps required for the P-endorsement:
- "It is not about a lower bar. It is about achieving the same outcome in a different way."*
- "As to the required fit and proper person checks", "I wouldn't change what to check".*
- 14.6 In fact, (a) Uber would lower the bar considerably and (b) Uber is far from not changing "what to check". Far lower assessment thresholds are proposed.

Qualitative not quantitative assessment

- 14.7 An important point is that the current fit and proper assessment is qualitative, in that it calls for NZTA to weigh up a number of factors and come to a qualitative assessment. It is not possible to have such a test based on only quantitative factors such as a certain number of convictions over 3 years (although a quantitative test can be used, as it is by NZTA, as a threshold test, before evaluating further).
- 14.8 The current fit and proper test is far better from a safety perspective, and unsuitable people will become drivers if this is eroded.
- 14.9 Importantly too, the current test, which it is submitted should remain, is not suitable for delegation (e.g. to the ATO2) in light of the qualitative evaluation that is required. Additionally, while ATO2s will take much responsibility for safety once a driver has his or her P-endorsement, the entry of drivers into the sector is the point at which the regulator should exercise threshold control.

⁶⁴ Stuff.co.nz "Uber hotly anticipating result of Government's transport review" (15 Sep 2015) (<http://www.stuff.co.nz/business/better-business/72031567/Uber-hotly-anticipating-result-of-Governments-transport-review>)

Uber's position

- 14.10 In the extract from the Uber submission on this review that Uber has made available publically before due date, Uber submits:

"Uber's strict partner screening policies are more effective than the costly and highly discretionary Agency evaluation."

- 14.11 Again, that is not correct. For example, the solution proposed by Uber, in the submission extract made public by it, has a fit and proper person assessment which is far less "strict" than the current evaluation.
- 14.12 It is also incorrect in a particularly obvious way and, again, demonstrates Uber having no difficulty in making misleading statements.
- 14.13 Moreover, it is also particularly clear that the ability of NZTA (and obligation upon it) to consider multiple issues qualitatively in coming to a decision, provides a significantly more reliable fit and proper person assessment.

What Uber is doing overseas

- 14.14 Professor Edelman demonstrates why Uber's proposals are problematic:⁶⁵

"Nonetheless, applicable legal rules offer no "de minimis" exception and little support for TNCs' position.

Differing standards for background checks raise similar questions. TNCs typically use standard commercial background check services which suffer from predictable weaknesses. For one, TNC verifications are predicated on a prospective driver submitting his correct name and verification details, but drivers with poor records have every incentive to use a friend's information. (Online instructions tell drivers how to do it.) In contrast, other commercial drivers are typically subject to fingerprint verification. Furthermore, TNC verifications typically only check for recent violations—a technique far less comprehensive than the law allows. (For example, Uber admits checking only convictions within the last seven years, which the company claims is the maximum duration permitted by law. But federal law has no such limitation, and California law allows reporting of any crime for which release or parole was at most seven years earlier.) In People of the State of California v. Uber, these concerns were revealed to be more than speculative, including 25 different Uber drivers who passed Uber's verifications but would have failed the more comprehensive checks permitted by law."

- 14.15 2015 experience with Uber and Lyft in Austin, Texas, outlined at Para 21.14 below, demonstrates this. The risk profile for passengers is considerably greater on Uber/Lyft than it is in taxis in Austin. Uber and Lyft passengers were 400% more likely to have unwanted sexual contact from drivers than passengers in taxis.
- 14.16 In Austin, Uber has and is lobbying for a lower fit and proper person threshold for its drivers, despite its customers being the subject of that unwanted sexual contact.
- 14.17 Despite that unwanted sexual contact by its drivers on Uber passengers, Uber said, in a 2015 paper devoted to Austin, continuing its wide spread theme of high safety standards, despite the reality:⁶⁶

"Only drivers who have passed Uber's thorough, multi-layered background checks are given access to the platform."

⁶⁵ Prof B Edelman "Whither Uber?: Competitive Dynamics in Transportation Networks" (Nov 2015) (<http://www.benedelman.org/publications/competitive-dynamics-tncs-24nov2015.pdf>).

⁶⁶ Uber, Austin: a mobility case study, at page 19 (https://intvixan.files.wordpress.com/2015/10/uber_policycasestudy_austin_r5_digital-1.pdf)

15. Air / Maritime Transport Operator licensing

- 15.1 While the fit and proper person and training requirements for marine and aviation will have differing standards, the approach for SPSV, maritime and aviation should apply the same framework. The three sectors are regulated by the NZTA, Maritime NZ and CAA, respectively, under the overarching portfolio of the MOT and the Minister of Transport.
- 15.2 Careful licensing checks are currently an important means of preserving safety standards in each sector.
- 15.3 For example, to become a licensed Air Transport Operator or Maritime Transport Operator (the equivalent of a PSL holder), an applicant must:⁶⁷
- (a) Be a fit and proper person;
 - (b) Possess the prescribed qualifications, experience and/or knowledge;
 - (c) Meet all other prescribed requirements.
- 15.4 Importantly, to become a licensed Air or Maritime Transport Operator, undertaking a satisfactory fit and proper person test is not sufficient – an operator licence involves further qualifications, including knowledge relating to safety.
- 15.5 The fit and proper person assessment is materially identical under both the Aviation and Maritime Acts.⁶⁸

[10] [50] Criteria for fit and proper person [test]

(1) For the purpose of determining whether or not a person is a fit and proper person for any purpose under this Act, [or under the maritime rules], the Director shall, having regard to the degree and nature of the person's proposed involvement in [the New Zealand civil aviation system] [maritime activities], have regard to, and give such weight as the Director considers appropriate to, the following matters:

(a) the person's compliance history with transport safety regulatory requirements:

(b) the person's related experience (if any) within the transport industry:

(c) the person's knowledge of the applicable [civil aviation system] [maritime] regulatory requirements:

(d) any history of physical or mental health problems or serious behavioural problems;

- 15.6 The SPSV fit and proper person test for the P-endorsement and the PSL is materially similar. This should not change, given the policy objective of consistent regulation.
- 15.7 We turn now to the PSL requirements.

⁶⁷ Civil Aviation Act 1990, s 9; Maritime Transport Act 1994, s 41.

⁶⁸ Civil Aviation Act 1990, s 10; Maritime Transport Act 1994, s 50.

16. Passenger Service Licence

- 16.1 The consultation paper proposes that the PSL is no longer a requirement. No reasons are given. We submit that it will help Government to make the best decision, in the interests of New Zealanders, to consult on this issue, having outlined in a paper whether and why there should be change from the safety enhancing status quo requirements of the PSL.
- 16.2 PSLs are part of the overall Transport Service Licence structure in the Act and are aimed at safety considerations (that is, they have nothing to do with protecting interests, etc).
- 16.3 A core part of the PSL is the training that is required before applicants are granted the PSL.⁶⁹
- 16.4 As outlined above, what Uber in fact does and says is the best evidence upon which to make the regulatory settings decisions. We now turn to that.

What Uber says

- 16.5 Uber, in its 14 April 2015 submission to the Minister, submits that the PSL should be removed. Uber said to the Minister:⁷⁰
- "The requirement of a driver-partner to sit the PSL exam, which requires them to demonstrate they are **capable of running a business**, has no direct correlation with the role of a transport licensing authority. . . It is irrelevant whether or not an individual is able to **conduct their business affairs**. **If this rationale were applied to other service industries, then it would be a requirement for gardeners, cleaners, and house painters to also undertake such training.**"*
(highlighting added)

Uber misrepresented the position to the Minister

- 16.6 It is concerning that, in a submission where Uber states, "SAFETY - THE SINGLE MOST IMPORTANT THING AT UBER", it would dismiss the safety training for the PSL as being about "running a business".
- 16.7 The NZTA *Passenger Service Licence Handbook*,⁷¹ which sets out what NZTA requires licence holders to know obtain the PSL, states:
- "There is no intention that an in-depth knowledge of good business practice be part of the certificate requirement."*
- 16.8 We have copied the table of contents to the NZTA *Passenger Service Licence Handbook* at Appendix A.
- 16.9 According to that *Handbook*, aspiring PSL applicants must have knowledge of the following:⁷²
- (a) Driver health;
 - (b) On road vehicle operation;
 - (c) Vehicle performance;
 - (d) Duties and conduct of drivers;
 - (e) Transporting people with disabilities;
 - (f) Work time and logbook responsibilities;
 - (g) Crashes and fire extinguishers;
 - (h) Health & safety.

⁶⁹ Rule 2.2, Operator Licensing Rule 2007.

⁷⁰ Letter with submission to Minister Foss from Uber's Director of Public Policy, dated 14 April 2015.

⁷¹ NZTA, *Passenger Service Licence Handbook* (14ed, Sep 2013) at p 6.

⁷² NZTA, *Passenger Service Licence Handbook* (14ed, Sep 2013).

Solution

- 16.10 As we submitted in relation to P-endorsement training, all participants in the SPSV sector, full time or part time, should, in the interests of safety, have minimum safety training, assessed independently by NZTA or an entity appointed by it. Safety is too important to be deregulated (removed from regulation). While the review may lead to lesser detail in the obligations, the overall appropriate standard for meeting safety requirements should not be eroded. The training may change shape but it is still required. That is reinforced by the learnings from the recent Health and Safety reforms, pointing firmly to each participant in the supply chain having safety responsibility.
- 16.11 Uber's misleading of the Minister shows that there is even more reason to ensure that industry participants receive appropriate and adequate PSL training. If Uber get something as simple as this so wrong, that implies a greater need to ensure adequate training.
- 16.12 PSL and P-endorsement training have overlapping roles. Moreover, in the status quo, the two training structures reflect the fact that some participants in the supply chain do not have to hold a P-endorsement (for example, the operator, if he or she is not driving).
- 16.13 As we outlined as to P-endorsement training, while we, like Uber, would welcome expedited and less cost processes, these cannot be at the expense of fundamental safety training. Changes to regulations will change and possibly reduce the scope of the PSL training but it is important that drivers receive this training.
- 16.14 Our members would welcome working with the Ministry and NZTA to find ways to expedite bringing new drivers, etc on board. But not at the expense of safety.

17. Rank and hail

- 17.1 Safety aspects, such as the typically quick decision-making by customers at the rank or when hailing a car, call for cars plying the ranks to have distinctive livery (as at present or some variation on that theme). Rank and hail otherwise would be unworkable and too unsafe. For example, drivers who have not been qualified as fit and proper could more easily pick up unsuspecting passengers (as has already happened).
- 17.2 Lack of livery opens up the general public to potential false representation by predatory drivers seeking out vulnerable passengers, whom they later harm.
- 17.3 The risk is illustrated by the person in an unmarked car, masquerading as a taxi driver outside bars in Hamilton, who last year picked up and assaulted two young women.
- 17.4 The Rules as to cars doing rank and hail work should also require each ATO2's cars to have the same livery so that passengers can readily identify the ATO2 (e.g. to be able to take action). For the same reasons, each ATO2, where rank and hail services are offered, should be required to have livery that is sufficiently distinct from other ATO2s' livery. NZTA needs to have the authority to determine that livery is sufficiently distinct if requested to do so by any party.
- 17.5 These safety needs are not solved by territorial authority decisions as to cab ranks, contrary to the view stated by the Ministry.

18. Complaints Register

- 18.1 The consultation paper proposes to eliminate the requirement to maintain a complaints register. No reasons are given.
- 18.2 Complaints registers are important mechanisms for ATO2s to deal with ATO and driver conduct and safety. In turn, complaint registers are important safety mechanisms, including:
- (a) To enable NZTA and/or Police to utilise the information when determining appropriate enforcement action in relation to drivers, ATO2s and other sector participants;
 - (b) Because, correctly, what is in the complaints register is relevant to the P-endorsement (and PSL) fit and proper person assessment, to augment the information used in that assessment, thereby improving safety;
 - (c) It is also a particularly valuable resource, when decisions to renew, suspend, etc, licences are made.
 - (d) To facilitate audit and review by NZTA. Without this paper trail, that will be difficult to do. This is an essential function if delegation to ATO2s is to be sufficiently monitored.
- 18.3 The information can, as at present, be kept in the most convenient way, such as electronic. That can remain the case, so that this is not an onerous obligation (and in any event is something that ATO2s should do regardless).
- 18.4 In any event, a copy needs to be mirrored at all times in New Zealand, for the reasons outlined above as to offshore TNCs.
- 18.5 The complaints registers that ATO1s are required to keep contain a running record of any complaints. That record can be requested at any time by NZTA and Police and shows a picture of the types of complaints and the driver the complaint was about. Absent regulatory requirement it can be expected that an ATO2 (e.g. such as a TNC operating in the cloud) will not retain such records such as after the driver leaves. But that can still be a valuable resource as the driver moves elsewhere in the industry and also as a record relating to the ATO2's own compliance. A record of multiple complaints could show a weakness with the company's operations that could even pose a danger to the travelling public which would otherwise never be able to be picked up. Under our current regulatory environment they would have been shut down because of safety issues.
- 18.6 Therefore, the ATO2s should be required to retain the complaints register on a rolling basis for 7 years, even if the driver has moved on. A mirror should be retained in New Zealand.

19. Driver fatigue and log books

- 19.1 We welcome retention of log books for ATO2s to reduce driver fatigue issues.
- 19.2 TNC drivers (who, in the case of Uber, for example, may be part-time drivers) could also undertake other work, including non-driving work. All work is included in the work time restriction.
- 19.3 There is no apparent current solution to auditing and ensuring drivers declare all their work hours in their log books. There does not appear to be a solution to the problem of detecting driving for multiple ATO2s. Hence the solution noted in the following paragraph.

Uber's position again illustrates why regulatory intervention is needed

- 19.4 Uber has made public some of its submission this week in response to the consultation paper. When submitting that the log book requirement should be removed, Uber submits:

"As a matter of business policy, ridesharing platforms such as Uber already monitor partner workhours and advise partners of their responsibilities. The work hours data collected by the Uber app cannot be altered intentionally or mistakenly. It is a more reliable approach to fatigue management than self-reporting."
- 19.5 Uber is well aware, for they submit it in the same submission, that a majority of its drivers have other non-driving jobs. Time on non-driving jobs falls within the maximum hours obligation. Tracking only time working for Uber is simply not a "more reliable approach to fatigue management than self-reporting" as all time is not captured (and in any event, time spent driving for other ATO2s is not captured). The app does no more than provide a useful adjunct to complete recording of time worked, although it is relatively accurate as to elapsed time with Uber alone.
- 19.6 This provides another example of why only broad brush safety obligations are insufficient to ensure adequate handling of safety by Uber.

20. Drivers should drive for only one ATO2

- 20.1 We have also raised this earlier in a related context.
- 20.2 Uber, again noting them as a real life example providing the best evidence, supports drivers driving for multiple ATO2s. This raises working hour compliance issues, as the driver could easily, and unlawfully, have a separate log book for each ATO2, making driving excessive hours difficult to detect.
- 20.3 Moreover, which ATO2 is responsible for compliance will be unclear.
- 20.4 Transport for London's proposal to regulate this practice recognises the problems flowing from drivers driving for multiple ATO2s:⁷³

"This proposal would reduce the risk of drivers working excessive hours for a number of different operators. It also will assist enforcement and compliance activity because there would be more certainty as to whom a driver is undertaking bookings for at any particular time. There will be no restriction on the number of times that a driver changes the operator they are working for."
- 20.5 Driver fatigue, which can lead to injury and death, is a major issue. So too is ensuring a clear chain of responsibility. While we recognise that freeing up drivers to drive for multiple ATO2s has some pro-competition effects, these are outweighed by the safety considerations. For this reason, we submit drivers should only be permitted to drive for one ATO2.

⁷³ Transport for London, Private Hire Regulations Review: Response to consultation and Proposals: Consultation (Sep 2015) (https://consultations.tfl.gov.uk/tph/private-hire-proposals/user_uploads/private-hire-proposals-sept-2015.pdf) at p 15.

21. Cameras and panic alarms

Introduction and effectiveness of compulsory cameras and panic alarms

- 21.1 After two taxi drivers were murdered in one year, against a background of 677 recorded serious assaults of taxi drivers over 10 years⁷⁴ (when that may be only small part of actual assaults), cameras and panic alarms were made compulsory. According to Opus's independent post-implementation report for NZTA on the new regime, attached as Appendix C:⁷⁵

"The purpose of the changes was to reduce the risk to taxi drivers of being seriously assaulted or even killed while operating a passenger service by deterring potential assailants and if an attack occurred, enabling the driver to use the taxi's communications system to summon urgent assistance. It was also considered that the changes would help protect passengers from danger of assault and reduce the risk of fare evasion."

- 21.2 The changes had a substantial positive outcome, concluded Opus. To date, there have been no more taxi driver fatalities. Opus also noted positive changes including a 40% drop in reported serious assaults. Opus stated there was:

- An estimated minimum 40% decrease in the number of serious assaults dealt with under the Crimes Act, and
- An estimated 40% decrease in the percentage of all reported assaults which were serious assaults dealt with under the Crimes Act.

This decrease in the number and percentage of severe Police reported assaults indicates that the cameras and communications systems combination has had a substantial positive outcome.

- 21.3 Opus added, among other things, that there were accounts of *"possible dangerous behaviours by late night inebriated or drug impaired passengers have been averted by drivers bringing the cameras to the attention of the people concerned"*.
- 21.4 The Taxi Federation and its members, which strongly lobbied for compulsory cameras and panic alarms, welcome the consultation paper's intention to retain the requirement. While our companies would require drivers to have cameras and panic alarms anyway, we are concerned that others in the industry have them too, but may not do so if that is not compulsory.

Carve out for TNC-type operations

- 21.5 As Uber points out, drivers and passengers in TNCs have a different risk profile from taxis engaged also in rank and hail work. However, that does not mean that the compulsory camera and panic alarm requirements are unnecessary. As we outline below, the risk profile is in fact greater in TNCs than in taxis, and there is even more reason for TNCs to have compulsory cameras.

Real world evidence

- 21.6 As we have already submitted, Government is able to assess the position based on real world evidence, both from the past and from what Uber and other TNCs are in fact doing.
- 21.7 Compulsory cameras and panic alarms are saving taxi drivers' lives. There have been no murders since they were introduced, and that shows that the stakes at issue are high. That there were around 67 reported serious assaults each year before cameras and panic alarms were required (which is likely to be only part of actual assaults given lack of reporting and limited statistics), with substantial drop in reported assaults, further shows how serious the issue is and how effective the requirements are. Any departure from cameras and panic alarms should only happen if that is shown to be clearly justified, whether in taxi or TNC vehicles. Serious injury, assault and even death, are at stake.
- 21.8 Drivers for TNCs still face real prospect of attack, despite the use of the online app to arrange the trip where the TNC has some information about the passenger. TNC driver and passenger still don't know each other. Drunk passengers and passengers on narcotics remain a real prospect for TNC drivers. Whether TNC or taxi, inebriated and other passengers can make myriad poor decisions. The TNC approach may change the risk profile somewhat but that is far from eliminating it. A camera is a strong deterrent to an intoxicated passenger, and often the driver only has to point to the camera to see a quick improvement in the attitude of passengers.

⁷⁴ This is reported in the Opus, Taxi Safety Review, commissioned by NZTA, (26 Nov 2013) (<http://www.transport.govt.nz/assets/Uploads/News/Documents/Taxi-Driver-Safety-Review-Opus.pdf>) at pp 1, 3.

⁷⁵ Opus, Taxi Safety Review (26 Nov 2013) (<http://www.transport.govt.nz/assets/Uploads/News/Documents/Taxi-Driver-Safety-Review-Opus.pdf>) at p 1.

- 21.9 Further, to become a passenger, little information is required that verifies who the passenger is, or enables them to be tracked down. In any event, identity theft and misuse is a real and commonplace issue, more likely among those passengers (and drivers) who would be more inclined to be violent. The risk remains sufficiently large, and what is at stake in terms of injury and death is such that cameras and panic alarms should be compulsory.
- 21.10 Additionally, panic alarms are low cost (a one-off cost of around \$25 and modest phone support cost from an ATO2 or a contracted security firm), and use GPS. Key is that they enable immediate response, whereas GPS recordings are no use for that: GPS coordinates are just logged on a database.
- 21.11 Based on its culture and its approach to safety, Uber demonstrates that it is unlikely to take sufficient steps to endeavour to protect the drivers in other ways. This is an example of why prescriptive regulation is needed to ensure sufficient safety. It will not be enough to leave general safety obligations alone to TNCs.

What about assaults on passengers by drivers?

- 21.12 To be emphasised is that, as Opus identify, the regulation is also there *“to help protect passengers from the dangers of assault”*.
- 21.13 The Uber experience, again, provides real world evidence for the need for cameras. A key reason is to protect Uber’s passengers from its own drivers, when otherwise Uber would not sufficiently do so.
- 21.14 Evidence demonstrating this is building. For example, in Austin, Texas, a city with a population of around 900,000, it was reported at the end of January 2016:⁷⁶

“...in 2015 the Austin Police Department received 27 reports of unwanted sexual contact in taxi cabs and ride-hailing services. Two took place in an “Independent Ride Share,” five happened in taxis and the remaining 20 occurred during Uber and Lyft rides. Seven assaults were committed by transportation network company drivers.”

- 21.15 In other words, the risk profile for passengers is considerably greater on Uber and Lyft than it is in taxis. Uber and Lyft passengers were 400% more likely to have unwanted sexual contact from drivers than passengers in taxis.
- 21.16 From the passengers’ perspective, the need to have cameras in TNC vehicles is far higher than it is to have them in taxis.
- 21.17 Despite the unwanted sexual contact by its drivers on Uber passengers, Uber said, in a 2015 paper devoted to Austin:⁷⁷
- “Only drivers who have passed Uber’s thorough, multi-layered background checks are given access to the platform.”*
- 21.18 The problem in Austin implies a wide-reaching problem with TNCs, beyond Austin. Many reputable taxi companies also have apps and have been running systems with GPS tracking for years without the incidents that Uber have had.
- 21.19 This problem is significantly increased by Uber’s push to greatly reduce the evidence to be taken into account on the fit and proper person assessment, and for TNCs to undertake much of that assessment activity instead of NZTA (as appears from the extract from its submission in the current review that has been made public). As has been said in Professor Edelman’s article quoted above:

“In People of the State of California v Uber, these concerns [as to fit and proper checks] were revealed to be more than speculative, including 25 different Uber drivers who passed Uber’s verifications but would have failed the more comprehensive checks permitted by law”.

- 21.20 It is alleged that the criminal histories include convictions for murder, sex offences, kidnapping, assault, robbery, burglary, fraud and identity theft (and that a convicted murderer for example passed the Uber test as he applied to drive for Uber in a different name than the name appearing on the court records relating to his murder conviction).

⁷⁶ Re/code “Things Are Getting Ugly in Uber’s and Lyft’s Fight Against Fingerprint Checks in Austin” (29 Jan 2016) (<http://recode.net/2016/01/29/things-are-getting-ugly-in-ubers-and-lyfts-fight-against-fingerprint-checks-in-austin/>).

⁷⁷ Uber, Austin: a mobility case study, at page 19 (https://intvixan.files.wordpress.com/2015/10/uber_policycasestudy_austin_r5_digital-1.pdf)

- 21.21 This can happen in the taxi industry too, although rarely, and cameras are a major deterrent (and therefore protection for passengers). Further recent examples as to Uber include what happened in London on 5 November 2015:⁷⁸

"[Uber driver] Haile, of Lionel Road North, Brentford, then explicitly told the 26-year-old he wanted to have sex with her at which point she asked to leave the car. The predator then refused, continued to drive and 'began to touch her.'"

– and again in NSW on 21 October 2015:⁷⁹

"Police say a 22-year-old woman was walking along Bayswater Road in Vaucluse just after midnight on Sunday when the [Uber] driver pulled over and offered her a lift home. The woman accepted the lift and the 39-year-old ride-sharing driver then allegedly parked in a nearby street and sexually assaulted her."

Summary

- 21.22 In summary, this real world evidence shows that TNCs may not take sufficient steps to protect their passengers from unlawful acts by their drivers: therefore prescriptive regulation such as cameras is required to ensure passengers are protected in ways that the TNC would not otherwise do.

Solutions

- 21.23 While cameras need to be sufficiently robust (e.g. to be tamper proof and provide evidence in court), the cost of panic alarm and camera technology is dropping. The technical solution can be an outcome focussed solution rather than locked into legacy products.
- 21.24 At stake are sexual and physical assaults, by both passengers and drivers, and even death. Those issues outweigh ever-diminishing cost.

22. English language requirement

- 22.1 Both the recent NSW and London SPSV reviews concluded that minimum English language requirements should be regulated. For example, the Transport for London review concluded:⁸⁰

"We believe it is essential PHV [Private Hire Vehicle] drivers are able to communicate with customers and other road users, especially in case of an emergency and from a consumer perspective passengers may also need to communicate with drivers during or after the journey."

- 22.2 Being able to converse in adequate English is a safety feature. For example, being able to communicate more readily enables drivers and passengers to talk their ways out of trouble. More specifically, the failure of a driver to understand a passenger constitutes a potential safety risk to the passenger.
- 22.3 Both London and NSW require minimum objective standards. ATO2s should be responsible for ensuring those standards are met, but subject to NZTA being able to require independent assessment that the standard is met.
- 22.4 The fact, as stated in the Consultation paper, that "the NZ Transport Agency considers that few drivers are tested for English" – and that it has not adequately used its powers under the 2007 Rule to ensure adequate English – is no justification for abandoning a valuable safety requirement. Rather it should be more rigorously enforced, for passenger safety.

⁷⁸ London24 "Predatory Uber driver sexually assaulted young woman in west London" (5 Nov 2015) (http://www.london24.com/news/crime/predatory_uber_driver_sexually_assaulted_young_woman_in_west_london_1_4297889).

⁷⁹ MSN "Sex assault charges for NSW Uber driver" (21 Oct 2015) (<http://www.msn.com/en-nz/news/other/sex-assault-charges-for-nsw-uber-driver/ar-BBmj3vK>).

⁸⁰ Transport for London, Private Hire Regulations Review: Response to consultation and Proposals: Consultation (Sep 2015) (https://consultations.tfl.gov.uk/tph/private-hire-proposals/user_uploads/private-hire-proposals-sept-2015.pdf) at p 14.

23. Overseas based TNCs such as Uber

The problem

- 23.1 What Uber is doing in the real world, in relying on the fact that it is not a locally-based company, highlights the need for appropriately robust regulation, particularly to have legislation and regulation that enables obtaining information from, and enforcement against, non-resident TNCs. Without that, any commitment from non-resident TNCs will be largely ineffectual, as the TNC knows in practice that it can evade court action and evade providing information to regulators. Public and competitive pressure is unlikely to change this materially.
- 23.2 Again, the real world evidence shows the problems.

Real world experience with Uber

- 23.3 Uber provides its services from a company based offshore that has no entity in New Zealand holding relevant information or which can be proceeded against in court. It is apparent from the November 2015 report to the NSW Minister for Transport by the Point to Point Transport Taskforce that Uber refused to provide details about drivers to the NSW regulator to support enforcement action. The report states, for example:⁸¹

"RMS [the NSW equivalent of NZTA] has experienced difficulties obtaining information to support action against Uber drivers because much of the relevant information is held off-shore."

- 23.4 Clearly Uber did not voluntarily provide the information and resisted doing so.
- 23.5 That the NSW regulator faced this push back from Uber is not surprising, given Uber's fortress-like resistance to disclosure of information about its drivers to law enforcement agencies/regulators outside the U.S. Uber requires that such agencies must bring expensive U.S. court proceedings before information about drivers is produced. Only rarely will it be realistic for regulators to seek that information in this way.
- 23.6 In its guidelines provided for such regulatory agencies, Uber states:⁸²

"WHAT TYPE OF LEGAL PROCESS DOES UBER REQUIRE BEFORE PRODUCING USER OR PARTNER [DRIVER] INFORMATION?"

For Non-U.S. Law Enforcement

We disclose business records only in accordance with our terms of service and applicable law. A valid U.S. court order (via mutual legal assistance treaty, mutual legal assistance agreement, or letter rogatory) may be required to compel disclosure of certain records."

- 23.7 This implies that New Zealand enforcement agencies will have considerable difficulty enforcing against Uber and obtaining information from Uber.
- 23.8 That point is even stronger, against the background of the points made at Paras 5.3 - 6.14 above, using Uber as a real life example. Uber has a culture of deliberately not complying with legal requirements. For example, as one prosecutor said:⁸³
- "In my two-plus decades in practice, I have never seen this level of blatant defiance."*
- 23.9 And Professor Edelman notes:⁸⁴

"Any company attempting [Uber's] strategy necessarily establishes a corporate culture grounded in a certain disdain for the law. ... Once a company establishes a corporate culture premised on ignoring the law, its employees may feel empowered to ignore many or most laws, not just the (perhaps) outdated laws genuinely impeding its launch."

⁸¹ NSW Point to Point Transport Taskforce, Report to the Minister for Transport and Infrastructure (Nov 2015) (https://p2p-prod-assets.s3.amazonaws.com/p2p/s3fs-public/TNSW7410_point_to_point_Taskforce_draft4.pdf) at p 112.

⁸² <https://www.uber.com/legal/guidelines-for-law-enforcement>

⁸³ Pennsylvania Public Utility Commission prosecutor Michael Swindler, quoted by Professor Edelman.

⁸⁴ Prof B Edelman "Whither Uber?: Competitive Dynamics in Transportation Networks" (Nov 2015) (<http://www.benedelman.org/publications/competitive-dynamics-tncs-24nov2015.pdf>).

- 23.10 All this is a recipe for Uber continuing its existing practice of not complying with regulation, and not providing necessary information to the regulator, unless it is brought within real enforceability. For the reasons outlined above at Para 3 onwards, public and reputational pressure on maintaining safety standards will have minimal effect (and it is recognised in the post-Pike River enquiries and legislation that such pressure is inadequate).
- 23.11 Therefore, applying the Uber experience more widely, safety regulation that seems fine in principle is worthless in practice unless the TNC is made clearly subject to the New Zealand jurisdiction.

A new challenge – the offshore provider

- 23.12 This is a new challenge for the transport sector, calling for close examination and careful solution of this novel situation. TNC's like Uber will be offshore companies (i.e. the service is provided by an overseas company not by an NZ company even if the company has staff resident in NZ). They will hold their information offshore.

Solutions

- 23.13 As we noted above, the NSW Taskforce on Point to Point Transport recognised the problem. It concluded (and the NSW Government has accepted the recommendation):⁸⁵

"To address this, the taskforce recommends the future regulatory framework include a requirement for any records required under the proposed regime to be retained in NSW. We also recommend there be an appropriate extraterritorial jurisdiction provision to enable the regulator to take enforcement action against industry participants whose operations are based offshore, when they contravene the law."

Relevant information to be available in New Zealand

- 23.14 We agree that non-resident TNCs should be required to retain necessary records in New Zealand, such as a mirror of computer records held offshore recording the trips taken by TNC drivers within New Zealand, to enable review of driving time and other compliance. Safety is a key objective of the regulation of ATO2s and therefore it is important to ensure that relevant information is readily available.
- 23.15 As Transport for London, points out, the regulator's access to information will improve enforcement and oversight:⁸⁶
- "At present we do not know for certain which driver is working for which operator. This change would mean that we can quickly trace back the driver to the operator where illegal activity is suspected and/or a complaint is made about a vehicle or driver. It also means we can better monitor whether drivers connected to a particular operator are consistently committing offences or other behavioural indiscretions. This will enhance enforcement and compliance activity."*
- 23.16 However, merely ensuring extraterritorial jurisdiction would be problematic. The regulator still has to enforce offshore with the difficulties that entails, regardless of a suitable jurisdiction. For example, enforcing judgments is challenging.
- 23.17 To be clear, Uber's presence in this jurisdiction is by way of entities that are set up not to be part of the company that supplies the TNC service. To the extent that NZ Uber staff are employed by the offshore entity, no enforcement action can be taken against them, nor do they hold relevant records.
- 23.18 It is a simple matter for Uber, and other non-resident TNCs, to set up a New Zealand subsidiary or related company to provide the TNC service so that there is a party that is resident within the jurisdiction, against which enforcement action can be taken. Otherwise regulation that is fine in theory fails and is unworkable in practice.

Little operational difference for Uber

- 23.19 The service in practical terms can still be operated by Uber (or other offshore TNC) from the same computer platforms and using the same staff. The only difference is that the TNC subsidiary or related company that is resident in New Zealand is the legal provider of the service. For example, the computer systems can operate as they do at present overseas (so long as a copy of relevant information is mirrored in New Zealand).

⁸⁵ NSW Point to Point Transport Taskforce, Report to the Minister for Transport and Infrastructure (Nov 2015) (https://p2p-prod-assets.s3.amazonaws.com/p2p/s3fs-public/TNSW7410_point_to_point_Taskforce_draft4.pdf) at p 112.

⁸⁶ Transport for London, Private Hire Regulations Review: Response to consultation and Proposals: Consultation (Sep 2015) (https://consultations.tfl.gov.uk/tph/private-hire-proposals/user_uploads/private-hire-proposals-sept-2015.pdf) at p 11.

23.20 This fits well with Uber's position that it is a "New Zealand" and a "local" business, so it fits with that position to require the NZ resident subsidiary or related company to legally provide the service. As Uber's NZ Director of Public Affairs said on Radio New Zealand on 10 February 2016:

"...we have staff that operate our business in New Zealand. ...We have about 15 [staff] in NZ. We have a General Manager who runs our business in New Zealand. We have a driver operations team. We have a marketing team. We have staff both in Auckland and Wellington where the business runs. ...We are a New Zealand business. We are a local business. We employ local people in the marketplace."

New Zealand-resident director

23.21 In addition, to further ensure safety, the TNC should have a New Zealand resident as one of its directors, so that there is an identifiable and accountable individual within the jurisdiction.

23.22 Similar issues have been resolved in this way as to companies. Parliament amended the Companies Act in 2014, in recognition of such concerns, by requiring all New Zealand companies to have at least one director who lives in New Zealand.⁸⁷

23.23 The purpose of the NZ-resident director requirement is explained in the 2012 Select Committee report on the Companies and Limited Partnerships Amendment Bill:⁸⁸

"The purpose of requiring a director who lives in New Zealand is to ensure that there is an identifiable individual with a substantive connection with the company who can be questioned about the activities of the company, and who can in certain circumstances be held to account. The requirement would provide a broad, practical, non-technical test for the Registrar to apply. A person would not be required to be a New Zealand citizen or to hold an appropriate visa before they could be a director who lives in New Zealand, although the person's residence status would probably be relevant to the Registrar's consideration in appropriate cases."

23.24 While the TNC service should be provided by a New Zealand resident subsidiary or related company, and have a New Zealand-based director, in any event, the TNC, even if offshore, should have a New Zealand resident director or senior manager who takes personal legal responsibility. That is consistent too with the Health and Safety at Work Act obligations on directors and senior managers.

24. Enforcement where AT02 does not provide transport service from A to B

24.1 The NSW Taskforce identified a problem by which, given that Uber's service, as outlined at Para 6.7 above, explicitly excludes transporting passengers from A to B, it cannot breach the NSW transport regulation, as the regulation applies only to those carrying the passenger. The Taskforce identifies a solution, which it is submitted should be included in New Zealand, namely an offence of **facilitating** a contravention of the law:⁸⁹

"The difficulty in taking action against Uber occurred because while the company is pivotal to the operation of its drivers, Uber's activities are not themselves illegal, and there is currently no offence of facilitating a contravention of the law. The taskforce recommendations capture ridesharing in the proposed regime as a booked service, and so it could be argued that a facilitation offence provision is no longer needed."

⁸⁷ Section 10, Companies Act 1993. This does not apply where a director is in an "enforcement country" (currently, only Australia) or it is an overseas company on the NZ register.

⁸⁸ Commerce Committee, Companies and Limited Partnerships Amendment Bill (2012) (http://www.parliament.nz/resource/en-nz/50DBSCH_SCR5679_1/1d47f07fb86c7b7e7a702293fda8c351d2440c0c) at p 3.

⁸⁹ NSW Point to Point Transport Taskforce, Report to the Minister for Transport and Infrastructure (Nov 2015) (https://p2p-prod-assets.s3.amazonaws.com/p2p/s3fs-public/TNSW7410_point_to_point_Taskforce_draft4.pdf) at p 113.

25. Fares

Deemed acceptance of fares

- 25.1 We support the consultation's proposal that the fare basis is agreed before the journey commences. In relation to cars that display fares, such as on the door and the glove box, we submit that the passenger agreeing to take the ride constitutes deemed acceptance. This will provide certainty and reassurance to both the passenger and the driver as to the fare basis. Otherwise, obtaining verbal agreement each time will be unworkable and uncertain.
- 25.2 The consultation paper notes that the "basis of the fare" needs to be agreed. That should be carefully defined in the Rule. Otherwise the "basis" could be too loose and subject to abuse.

Commerce Act authorisation

- 25.3 Enabling each ATO2 to set fares that are applicable to all drivers will help encourage certainty. That applies to current ATO1s as well as to TNCs. However, there may be Commerce Act collusion risk should that happen. The pro-competitive benefits outweigh the anti-competitive detriments. Therefore we submit there should continue to be, in the Transport law, a deemed authorisation under the Commerce Act – as happened for Chorus under the 2011 Telecommunications Act amendments – enabling each ATO2 to set its own fare schedule for its drivers.

26. Braille signs retained

- 26.1 Braille signs are low cost and are valued by blind passengers, and should be retained.

27. Driver to hold a licence for more than two years

- 27.1 We agree with the Option 4 proposal that SPSV drivers must have held a New Zealand drivers licence for more than two years. From a safety perspective, it is important that professional drivers have practical experience and familiarity with New Zealand roads.
- 27.2 Additionally, this requirement will ensure that NZTA have at least two years of driving history to be considered as part of the qualitative fit and proper person P-endorsement assessment. The importance of this assessment is addressed above.

28. Vehicle CoF

- 28.1 We agree with the Option 4 proposal to retain the Certificate of Fitness (CoF) requirement for SPSVs.
- 28.2 It is important that vehicles used for professional purposes are maintained to rigorous safety standards. The annual cost difference between CoFs and WoFs is minimal (approximately \$20 per inspection) and, as acknowledged in the Ministry's paper, the CoF is "more robust".⁹⁰
- 28.3 Vehicles require the same high standards, whether the vehicle is used for only a few hours or many hours each week. Part timers are still providing the same sort of service as full timers and safety is too important. This is entirely different to passengers getting voluntarily in someone's car such as the car of friend. The passenger has choice: not so when, having selected the service, such as via a TNC or other ATO2, the passenger has little choice and the vehicle is driven by an unknown person.

⁹⁰ Ministry of Transport, *Future of small passenger services – consultation paper* (2015) at p 29.

29. Duty for driver to accept first hire offered

- 29.1 We agree with the Option 4 proposal that drivers must accept the first hire offered. This duty protects consumers by ensuring that drivers cannot refuse passengers travelling short distances. However, the duty does not apply if the driver's safety is threatened.

30. Duty to take route most advantageous to hirer

- 30.1 We agree with the Option 4 proposal that drivers must take a route most advantageous to the passenger, for similar reasons to the point above. This duty will protect consumers by ensuring that drivers cannot intentionally take a more profitable route to the passenger's destination.

31. Approach to ridesharing and carpooling

- 31.1 We agree with the definitions of "ridesharing" and "carpooling" in the Ministry's paper.⁹¹ Clarity is important as "ridesharing" is used in varying ways by stakeholders, most particularly by Uber, where this seems to be driven by seeking to confuse the position.
- 31.2 The "ridesharing" definition sensibly includes "ridesharing", so defined within the regulation, carves out this emerging service from the SPSV review under a cost-sharing exemption. "Ridesharing" has been used by Uber and others in varying ways, which has created confusion. Uber is not a ridesharing service.
- 31.3 "Carpooling" as defined, is correctly excluded from regulation.

⁹¹ Ministry of Transport, *Future of small passenger services – consultation paper* (2015) at p 11.

Appendix A.

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Appendix B.

Processing time for pilot and firearms licences

Uber's SPSV submission

Uber is critical of the time taken to get a P-endorsement relative to the time taken for passports, pilot licences and firearms licences, as it notes in the following table in the publicly available extract from its submission this week to the Ministry. The footnotes are in the text that follows.

The table is misrepresents to the Government the actual position and is loose with facts which are sitting on the same page that Uber relies upon.

Processing time and cost (New Zealand)		
	Time	Cost
Passport ⁴	3 days	\$360
Pilot licence ⁵	1 weeks	\$230
Firearm licence ⁶	4 weeks	\$126.50
P-endorsement with training	12 weeks	~ \$800

The Passport application is not particularly relevant and so we do not develop that further. While there are problems with the cost comparison too we focus on the time delays.

As above, Uber submits that pilot licences and firearm licences can be obtained in New Zealand as follows:⁹⁰

- (a) Pilot licence: 1 week, \$230;⁹²
- (b) Firearm licence: 4 weeks, \$126.50.⁹³

Uber contrasts these figures with the "P-endorsement with training" licence, which involves:

- (a) P-endorsement with training: 12 weeks, \$800.

There's the first problem. The P-endorsement reference adds "with training" but ignores that for the pilot and firearms holder, both of which involve training. This apples and pears difference would not be detected on a normal read, and that is misleading.

We now turn to why, even based on the documents on which Uber relies, Uber misrepresents the position.

Pilot licences: training + flight experience + examination + test + fit and proper assessment

Uber submits that a NZ pilot's licence involves one week of processing time, based on the following statement from the CAA:⁹⁴

Getting a licence

*If you are seeking the issue or amendment of flight crew documents, expect it to take **one week** to receive your new documents.*

The CAA's note that a pilot's licence can be processed in **one week** refers only to the physical *processing of ready to go applications*.

It is not possible for pilot licence applicant to become licenced in the space of a week, for the following reasons.

⁹² See: Uber response to the Future of Small Passenger Services consultation paper (Feb 2016).

⁹³ https://www.caa.govt.nz/pilots/getting_a_licence_pilot.htm

⁹⁴ <https://www.loc.gov/law/help/firearms-control/newzealand.php>

Obtaining a NZ pilot licence involves:⁹⁵

- (a) Holding all relevant and prescribed qualifications and experience;
- (b) Being a fit and proper person.

Qualifications and experience

There are several 'tiers' of pilot licences in New Zealand, each of which permit the holder to undertake different flights with different craft:⁹⁶

- Pilot Certificate: personal recreational flying;
- Private Pilot Licence (PPL): recreational flying, including non-fare paying passengers;
- Commercial Pilot Licence (CPL): permits the holder to be an Agricultural Pilot, Charter Pilot, and/or a Flying Instructor;
- Airline Transport Pilot Licence (ATPL): commercial airline captains.

Using the Private Pilot Licence (PPL) as an example, which is at the lower end of safety concerns as there is no commercial flying, the licence applicant must do the following training:

- (a) Have PPL equivalent flight time experience of at least 50 hours in an aeroplane, or 40 hours in a helicopter;⁹⁷
- (b) Undertake a PPL written examination;⁹⁸
- (c) Undertake a PPL flight test before a flight examiner.⁹⁹

Fit and proper person

A pilot licence applicant must also be deemed a fit and proper person by the Director of the CAA.

The standard of the fit and proper assessment under the Civil Aviation Act is of comparable breadth and qualitative rigour, from a safety perspective, to the fit and proper assessment under the Land Transport Act for P-endorsement applicants.¹⁰⁰

Further, the Director of the CAA has a comparable qualitative obligation as the NZTA to take account of any matters it considers necessary.¹⁰¹

The CAA's guide, *How to be a Pilot*, states (highlighting added):¹⁰²

"Fit and Proper Person

The Civil Aviation Act 1990 requires the holder of a PPL (and other aviation documents) to be assessed as a "fit and proper person". To be considered a fit and proper person to hold an aviation licence you must, among other things, have demonstrated an acceptable respect for the law, such that the Director may have confidence in your ability to fly within the Civil Aviation Rules.

*When you apply for your licence, you must provide the Director of Civil Aviation with information to make this assessment. There is information on the applicable CAA forms to guide you through the process. **It can take some time to get the information required to accompany your application**, and your flight training organisation should advise you when to start this process. As with the medical certificate, **it is a good idea to make sure you qualify as a Fit and Proper Person before beginning flight training**, to avoid possible disappointment."*

⁹⁵ Civil Aviation Act 1990, section 9.

⁹⁶ See Civil Aviation Rules Part 61; and Civil Aviation Rules Advisory Circulars Part 61: Pilot Licences and Ratings.

⁹⁷ Civil Aviation Rules Advisory Circulars AC61-3: Appendix I.

⁹⁸ Examination syllabus at Civil Aviation Rules Advisory Circulars AC61-3: Appendix II.

⁹⁹ Test standard described at Civil Aviation Rules Advisory Circulars AC61-3: Appendix VII.

¹⁰⁰ Compare the fit and proper assessment criteria at Civil Aviation Act 1990, s 10; and Land Transport Act 1998, s 30C.

¹⁰¹ Compare Civil Aviation Act 1990, s10(2)-(3); and Land Transport Act 1998, s 30C(3)-(4).

¹⁰² Civil Aviation Authority, *How to be a Pilot* (2011) (https://www.caa.govt.nz/safety_info/how_tos/how_to_be_a_pilot.pdf) at p 8.

Uber's claim that a pilot's licence can be processed in one week evidently fails to take account of these licensing steps which, in the case of the fit and proper assessment, is often undertaken *prior* to the required training and 50 hours of flight experience for a Private Pilot Licence (PPL).

Firearm licences: 30 – 60 days (plus safety course and test)

Uber submits that NZ firearm licences involve 4 weeks of processing time, based on this reference - <https://www.loc.gov/law/help/firearms-control/newzealand.php> - which states:

*"The Police set performance standards for various services and activities, with the **target standard** for firearm licensing in the 2011/2012 fiscal year being **90% of licenses issued within thirty days** of receipt of the application."*

However, the same reference then goes on to state:

*"The reports for the last two years show that the **average period** is considerably longer, being **104 days** in 2010/2011 and **120 days** in 2011/2012."*

Uber's selective reference to the NZ Police "target standard", rather than the actual processing time, is a deliberate misrepresentation.

Firearm licence process: safety course and test

The 6-step process to obtain a firearms licence is described here: <http://www.police.govt.nz/advice/firearms/standard-new-zealand-firearms-licence>.¹⁰³

The process involves undertaking a firearms safety course and sitting a safety test (Step 1). The course takes 2-3 hours,¹⁰⁴ and must be booked in advance through NZ Police. The test occurs at the end of the course.

The frequency of these safety courses is not available online. In many parts of NZ, they occur very infrequently.

The NZ Police must also be satisfied that the licence applicant is fit and proper (Step 5), as required by s24(1)(b) of the Arms Act 1983. This step involves interviewing the applicant's referees, and taking into account a range of factors.

NZ Police 2014 statistics: 30 – 60 day processing time

Since 2010-12, when the average license processing time was over 100 days (see above), the NZ Police have significantly reduced this to 30 – 60 days.

The NZ Police 2014 Annual Report states:¹⁰⁵

¹⁰³ See also: <http://www.police.govt.nz/about-us/publication/arms-code/firearms-licensing>

¹⁰⁴ For an example course, see <http://www.mountainsafety.org.nz/training/Firearms/Firearms-Safety-Course.asp>

¹⁰⁵ NZ Police, Annual Report 2013/14 (<http://www.police.govt.nz/sites/default/files/publications/annual-report-2014.pdf>) at p 32.

Output 2.4 - Firearms Licensing

This output covers the processing of applications for firearms licences, the issuing of licences, the verification of compliance with endorsed licences, enforcement, and the revocation of firearms licences. It also covers the work to ensure people whose licences have expired have lawfully disposed of any firearms they have possessed.

Performance Measures		Outturn 2012/13	Performance Standard 2013/14	Outturn 2013/14
Quantity				
2.4.1	Number of firearms licences revoked ^[6]	564	400 to 600	565
Timeliness				
2.4.2	Number of days taken to process 90% of firearms licence applications	63 days	30 days	60 days
2.4.3	Percentage of firearms licence applications processed within 30 days	67%	90%	66%
2.4.3	Average number of days to follow-up with expired firearms licence holders to ensure appropriate disposal or removal of firearms	228 days ^[7]	60 days	166 days ^[7]

Notes

[6] This measure reports on the number of people holding firearms who are no longer deemed to meet minimum requirements or eligibility for doing so, and where as a result firearm removal occurs.

[7] This reports the *mean* number of days taken to follow-up with expired firearms licence holders. The improvement from 2012/13 can largely be attributed to a focus on reducing outstanding, longterm expired licenses. The median (middle value) for 2013/2014 is 47 days, and the most commonly occurring value is one day (2012/13: eight days, and one day respectively).

The key information from this table is that:

- (a) 66% of firearm licence applications were processed within 30 days;
- (b) 90% of firearm licence applications were processed within 60 days.

Appendix C. Opus Report



Taxi Driver Safety Review





Taxi Driver Safety Review

Prepared By Bill Frith

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Executive Summary

Taxis provide a 24 hour door-to-door service and are thus a very important part of our public transport network. By the nature of this environment, both taxis passengers and drivers are placed in a position of mutual trust. They are alone in the taxi together, potentially at lonely times and places. The passenger may be affected adversely by drugs or alcohol as taxis are often the preferred mode of those who are unfit to drive owing to the substances they have ingested. The driver trusts the passenger to behave reasonably and to pay the fare. Passengers trust the driver to behave reasonably and take them expeditiously to their destination for the fare stated on the meter or previously negotiated with the driver.

When the behaviour of either party breaches this trust safety problems can arise and legislation may be required to minimise the harm caused by these problems. The Government is committed to both safe workplaces and a safe transport system. It has strategies aimed at achieving both, with goals of the eventual elimination of serious and fatal injury. Taxis are both workplaces and part of our transport system; therefore Government commitment to safety in this case is two pronged. The Government hence treats violence in Taxis very seriously.

In the years leading up to 2010 the Government had become concerned about the level of violence by passengers against taxi drivers. In September 2010, the New Zealand Transport Agency (NZTA) released an overview document related to the then proposed rule changes. This document stated that in the period from January 2000 to February 2010, the New Zealand Police recorded 677 assaults against taxi drivers and that two taxi drivers had been killed in assaults between December 2008 and the time of writing of the document. This led to legislative action making changes to the parts of the Land Transport Rules related to taxi operation in order to ameliorate this violence.

The changes required approved taxi organisations (ATOs) to install the following in each of their taxis operating in major towns and cities:

- NZTA approved in-vehicle security cameras
- a telecommunications system that links all taxis to their ATO and provides each taxi with an emergency alert facility ("panic button") on a 24-hours, 7 day a week basis from a fixed location, and to maintain a fulltime alert assessment and response capability

The changes became operative from August 2011, apart from in Christchurch (where due to the earthquakes, the implementation time was delayed to 1 May 2012).

The purpose of the changes was to reduce the risk to taxi drivers of being seriously assaulted or even killed while operating a passenger service by deterring potential assailants and if an attack occurred, enabling the driver to use the taxi's communications system to summon urgent assistance. It was also considered that the changes would help protect passengers from danger of assault and reduce the risk of fare evasion.

There were some problems experienced by some ATOs related to supply of Camera Systems which delayed the fitment of fully operating camera systems by varying lengths of time. These problems necessitated changes to NZTA operational procedures. The procedural changes made at the time of writing are all moves in the right direction and can be expected to improve compliance.

Notwithstanding these problems and an increase in total Police reported assaults, there have been positive movements in statistics related to Taxi Driver assaults since the changes. These include:

- An estimated minimum 40% decrease in the number of serious assaults dealt with under the Crimes Act, and
- An estimated 40% decrease in the percentage of all reported assaults which were serious assaults dealt with under the Crimes Act.

This decrease in the number and percentage of severe Police reported assaults indicates that the cameras and communications systems combination has had a substantial positive outcome.

The number and percentage of resolved Crimes Act assaults has also reduced, and at the time of writing there have been no more taxi driver fatalities from assaults since the law changes in 2011. There has also been a substantial reduction in social costs related to against Taxi Drivers since the introduction of the new laws.

Generally ATOs and the Taxi Federation agree that the changes have resulted in safety benefits.

A possible issue is whether Police are able to access the camera images and use them in court effectively. The Police have not been able to provide any information on this in time for this review. It is to be hoped that this information will become available in the future as it will be valuable in assessing what scope there will be for future efficiency gains in this area.

Anecdotal accounts indicate that at least one allegation of sexual impropriety against a taxi driver has been shown to be false using camera records, and that possible dangerous behaviours by late night inebriated or drug impaired passengers have been averted by drivers bringing the cameras to the attention of the people concerned.

No useful information on the impact of the law changes on the level of fare evasion has been able to be accessed.

The changes are also still very recent, and further improvements in administration by ATOs and the NZTA provide a prospect of further improvement.

1 Introduction

1.1 Background

Taxis provide a 24 hour door-to-door service and are thus a very important part of our public transport network. By the nature of this environment, both taxi passengers and drivers are placed in a position of mutual trust. They are alone in the taxi together, potentially at lonely times and places. The passenger may be affected adversely by drugs or alcohol, as taxis are often the preferred mode of those who are unfit to drive owing to the substances they have ingested. The driver trusts the passenger to behave reasonably and to pay the fare. Passengers trust the driver to behave reasonably and take them expeditiously to their destination for the fare stated on the meter or previously negotiated with the driver.

When the behaviour of either party breaches this trust safety problems can arise and legislation may be required to keep the harm caused by these problems to a minimum. The Government is committed to both safe workplaces and a safe transport system. It has strategies aimed at achieving both¹, with goals of the eventual elimination of serious and fatal injury. Taxis are both workplaces and part of our transport system; therefore Government commitment to safety in this case is two pronged. The Government hence treats violence in Taxis very seriously.

In the years leading up to 2010 the Government had become concerned about the level of violence by passengers against taxi drivers. In September 2010, the NZTA released an overview document² related to the then proposed rule changes. This document stated that in the period from January 2000 to February 2010, the New Zealand Police recorded 677 assaults against taxi drivers, and that two taxi drivers had been killed in assaults between December 2008 and the time of writing of the document. This led to legislative action to make changes to the parts of the Land Transport Rules³ related to taxi operation in order to ameliorate this violence.

The changes required approved taxi organisations (ATOs) to install the following in each of their taxis operating in major towns and cities:

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- a telecommunications system that links all taxis to their ATO and provides each taxi with an emergency alert facility ("panic button") on a 24-hours, 7 day a week basis from a fixed location, and to maintain a fulltime alert assessment and response capability

The purpose of the changes was to reduce the risk to taxi drivers of being seriously assaulted or even killed by deterring potential assailants and enabling the driver, if attacked, to use the taxi's communications system to summon urgent assistance. It was also considered that the changes would help protect passengers from the danger of assault and reduce the risk of fare evasion.

A prospective benefit-cost analysis completed by the Ministry of Transport showed a benefit cost ratio of 2:1 for requiring in-vehicle cameras (at an assumed cost of \$1100.00 each) in all taxis in major population areas. This analysis assumed a 70 percent reduction in both crime against drivers and in fare evasion. Benefits from improved passenger security, easier resolution of false complaints or potential contributions to other crime investigations were excluded. More detail on the benefit cost analysis may be accessed in NZTA (2010).

¹ www.saferjourneys.govt.nz; <http://www.dol.govt.nz/whss/index.asp>

² NZTA (2010) Land Transport Rule Operator Licensing Amendment (No 2) 2010, Taxi Safety, Overview.

³ <http://nzta.thomsonreuters.co.nz/DLEG-NZL-LTSA-T.LTR-81001.pdf>

These changes would appear to fulfil a basic safety need in the potentially unsafe space which exists in a taxi cab. In this respect they are similar to basic road safety requirements like seatbelts, child restraints and motorcycle helmets.

The changes to Land Transport Operator Licensing Rules became operative from August 2011, apart from in Christchurch (where due to the earthquakes, the implementation time was delayed to 1 May 2012).

1.2 Purpose

This review looks at the operation of these rule changes since their implementation against their stated purpose of reducing risk of assault to taxi drivers, and as a side benefit, to passengers and to reducing fare evasion. It is important that this purpose be borne in mind by the reader. The review is not concerned with any wider issues related to the workings of the taxi market, neither is it an inquisitorial enquiry into the minutiae of the processes by which the changes have been implemented. While paying regard to process, it has an outcome based approach looking at the safety outcomes associated with the changes, and taking the present situation as a baseline, considering how they might be improved in the future.

2 Requirements for security cameras and communication systems

Security cameras fitted in taxis must comply with minimum specifications set out in the Operator Licensing Rule. The Rule currently requires ATOs to operate in accordance with their own operating rules which have to be submitted to, and approved by, the NZTA. This means that when the Rule changes, ATOs must update their operating rules to reflect the new requirements and have them reapproved by the NZTA.

The Rule states that for ATOs operating in areas where the requirements for security cameras and communication systems apply, each ATO's operating rules must contain:

- Procedures for the operation of an in-vehicle security camera system, including the means of compliance with the rules, how the camera system will be initially and periodically checked, maintained and repaired, how the recorded material will be handled, and how access to it will be controlled;
- Details of the telecommunications system through which its emergency alert and response facility will be provided; and,
- Procedures for managing an emergency alert received from a driver, including sending notification to the police and establishing a two-way communication with the driver, and notifying the approved taxi organisation.

The rule also requires that the emergency and response facility:

- Is easily and quickly activated by the taxi driver;
- Initiates a two-way communication with a person able to arrange assistance; and,
- Establishes the identity and location of the driver or the taxi.

The above requirements imply that the ATO ensures that the person who receives an emergency alert from a driver knows what to do and is able to respond, and that each driver is competent to operate the vehicle's security camera system.

Under the Rule, the following people can access a security camera system:

- A Police employee in the execution of police duties, or a person acting under the direction, or authorisation, of a police employee, and
- A person identified in an ATO's operating rules as authorised to access, delete, copy or use recorded material to provide information to the Police, to manage personal information in accordance with the Privacy Act 1993; to investigate a complaint, or to repair, test or maintain the system.

Specifications for the Security Camera Systems are included in Schedule 6 of the Rule. ATOs have to abide by their operating rules, and breaches of the Operator Licensing Rule when detected, are dealt with in the context of them being breaches of the Operating Rules in which they are contained. The rules require that the ATO ensure that the Taxi security camera and communications systems in working order when any Taxi is in use. They are also required to conduct regular security camera inspections at least every 6 months to ensure they are fitted in a manner that is fit for purpose.

3 The operational history of the changes

The amended Rule came into force on 1 February 2011. This date signalled the beginning of the process of the NZTA approving camera systems for installation into Taxis. The ATOs had until 1 August 2011 to fit the security camera systems. This seven month time frame has face validity as a reasonable time for ATOs to order and have equipment installed, especially given that the changes had bi-partisan support in Parliament, had been foreshadowed by a consultation period and were enthusiastically supported by the New Zealand Taxi Federation. The Federation reported in its Magazine⁴ that it was preparing a tender for equipment purchase on behalf of its members. An article in the same issue of Taxi which discussed the mooted changes in detail indicated that the Federation was comfortable with the time frame. The time frame was based on a desire by the Government and the Ministry of Transport to, within the realms of practicality, provide the safety measures as soon as possible in order to achieve safety gains as soon as possible.

The approval system is product-based with the supplier of the equipment. In accordance with the rule, the supplier is required to seek approval from the NZTA. The approvals were originally carried out using a paper-based system, based on trust that the documentation presented by the supplier applied to the product being sold to the ATO and that the ATO was actually installing the camera system described by the documentation provided. Once systems were approved, they were added to a list of approved systems on the NZTA web site along with details of the suppliers. The NZTA later removed the supplier details as a precautionary move in case their presence on the website was taken as an endorsement. This is a relatively light handed approval system in line with the government's desire to keep the regulatory burden imposed on business to a minimum, consistent with the achievement of good practice.

Regulatory systems associated with new initiatives may be somewhat iterative in nature, with Government Agencies making changes to regulatory regimes if opportunities for improvement become apparent. Short term arrangements to deal with short term problems may be also required. In this case the NZTA found it necessary to respond in both the above ways.

In the event, only a minority of operators arranged installation of working camera systems on time. The shortfall has been covered by short-term exemptions which have continued to be used in cases where ATOs have experienced operational problems with their camera systems.

There were also a number of ATOs which ran into trouble with their cameras and camera suppliers. Perhaps the most serious of these related to an importer who obtained NZTA approval to supply a reputable brand and then supplied a generic product to his ATO customers. When installed a concerning number did not work to NZTA standards and have had to be replaced or modified to comply.

⁴Taxi, New Zealand Taxi Federation Magazine Issue 89 July 2010

It is surprising that the ATOs concerned became victims of this scam as the equipment was plainly generic; lacking the branding of the genuine product it claimed to be. In New Zealand, where parallel importing is legal and encouraged, it is always important for buyers of products claiming to be branded (but being sold at cheaper prices) to make sure they are genuine. In this case, the ATO buyers did not adequately check this and the NZTA's checking procedure, which at the time was paper-based, did not pick up the importer's misrepresentation of the product.

However, it is also of concern to the NZTA that this has happened. Changes to NZTA procedures which now involve physical testing of equipment, along with the ATOs learning from their experiences, can be expected to markedly reduce the risk of such an event happening again. These procedures however cannot circumvent potential fraud related to presenting a genuine product to the NZTA and then selling a non-genuine product to taxi firms. It is a civil matter between buyer and supplier when a supplier misrepresents a product to customers. It is incumbent on ATOs to comply with their own operating rules and to act prudently in their business dealings just as it is incumbent on members of the public to evaluate investments by reading prospectuses and seeking advice before investing.

The NZTA's concerns about these problems with compliance have resulted in action to tighten the way in which the Agency vets applications for equipment approval. A new set of guidelines for suppliers of In-vehicle Security Camera systems for Taxis have been developed. The process of approval now involves the certification of systems by independent NZTA approved electronic experts (called independent certifiers) as a prerequisite for approval. These experts carry out a physical examination of each system. Suppliers are also expected to carry out an image capture exercise involving two dynamic tests satisfying the authority that their equipment can capture images satisfactorily.

It is apparent from the narrative above that some ATOs which had problems related to cameras could have avoided them with a more prudential approach. The taxi industry is a broad grouping with entry based on good and proper person criteria rather than business acumen. A system which every taxi company would implement correctly, first time up, is an unlikely eventuality.

4 Assaults on Taxi Drivers

4.1 Overview

This section relates to assaults on Taxi drivers as reported by the Police and published by Statistics New Zealand in Official Crime Statistics. This does not necessarily cover all assaults on Taxi Drivers, as there may be some assaults which are not reported to the Police and others which are reported to the Police but for one reason or another do not reach official records. The installation of camera systems and communication systems including a „panic button“ should increase the level of overall reporting. However, this will result in the total reported assaults on Taxi Drivers becoming a flawed measure of any change in the underlying rate of assaults associated with the law changes of 2011.

The information used in this section covers the more serious assaults dealt with under the Crimes Act and the less serious assaults dealt with under the Summary Offences Act. It excludes homicides and robberies.

4.2 Police reported assaults

Statistics New Zealand crime statistics provide the data shown in Figure 1, which traces reported assaults on taxi drivers of various categories by year since 2007.

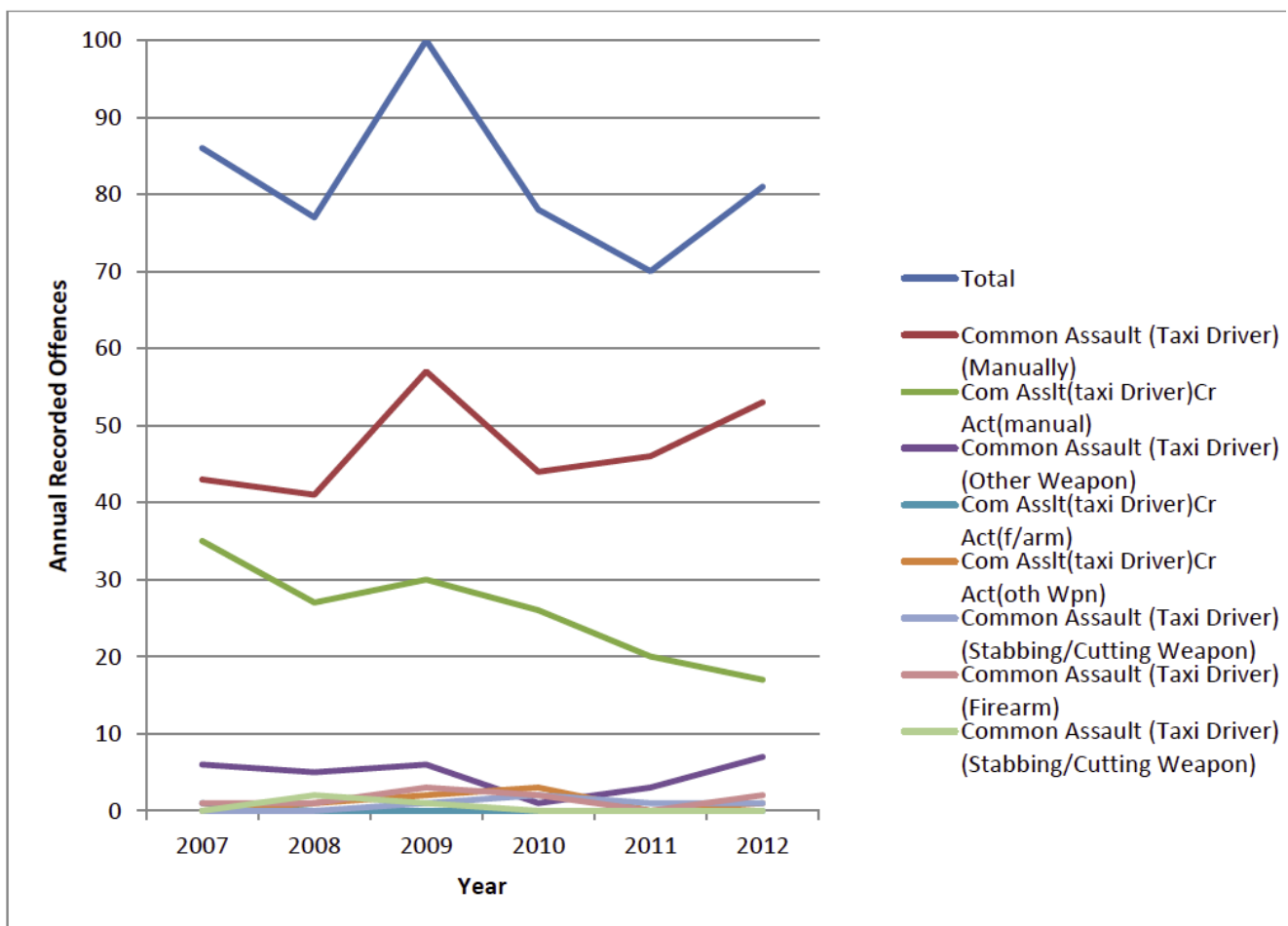


Figure 1. Offences involving assault of a taxi driver by year and crime statistics classification

Naively, it might be expected that these statistics would give excellent idea of how well the cameras/communication systems are working in terms of reducing taxi driver assaults. For example, it might be expected that if Police reported assaults reduce then assaults have reduced and vice versa. However, there is more than one factor in play here. In this case, the two main factors are the following:

- The cameras will deter would-be assailants, thus reducing the number of reported assaults, and
- They will also make apprehension of assailants easier, thus increasing the number of reported assaults, but conversely tending to reduce the severity of assaults through help arriving in a timelier manner.

This second factor will mitigate the impact of the deterrence on the statistics. Thus we can expect that with effective cameras operating, Police reported assaults may decrease less than would be expected from a naive analysis. Further, they may even increase in number and the severity of assaults will reduce.

The reporting of the more serious assaults (for which our surrogate is reported Crimes Act assaults) should be impacted on by this reduction in the severity of assaults and also, as with less serious assaults, an increase of the number reported by the Police. Thus we can expect the number of Crimes Act assaults to reduce if the cameras are effective, but their percentage reduction to give a lower bound for the reduction achieved through the changes of 2011.

It is apparent from perusal of Figure 1 that the total number of reported assaults on taxi drivers has varied considerably over the period from 2007 covered by the figure. There is a downward trend starting prior to the implementation of the law change in 2011. This is not surprising. The Taxi Federation in the December 2011 issue of its magazine (NZ Taxi Federation, 2011), published only 3 months after implementation, mentions anecdotal reports of attacks on drivers indicating a "significant" reduction. It is probable that publicity before implementation provided deterrence prior to the widespread use of cameras.

It is also apparent that there is no compelling evidence from overall reported Police assault data that the total frequency of assaults has changed since 2011. The number reported for 2012 is not very different from that in 2010, and around 16% greater than that of 2011. However, reasons have already been stated to show that such an outcome in the total reported assaults does not necessarily indicate that the cameras are ineffective. There is a need to delve deeper and look at severity.

Evidence of a positive outcome is to be found in Figure 1. This shows that since 2011, total reported assaults have increased, as have the less serious categories not dealt with under the Crimes Act. However the more serious category involving use of the Crimes Act has declined. This indicates a decrease in the overall severity of assaults.

This is shown more clearly in Figure 2, which compares the total number of reported Crimes Act offences with the total number of reported non Crimes Act offences over time.

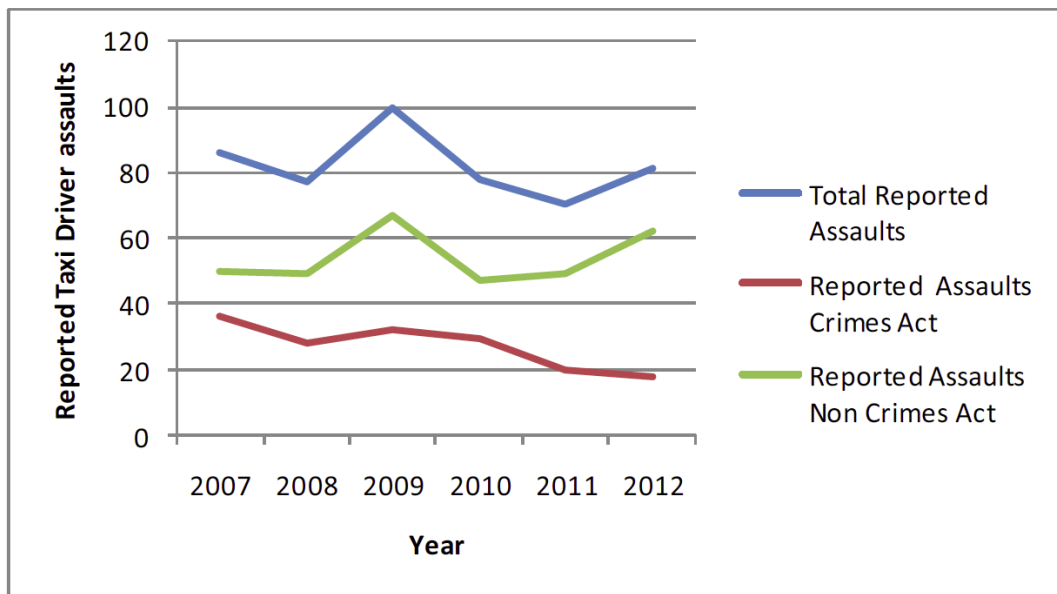


Figure 2. Reported taxi driver assaults by crimes act/non crimes act'

It is clear that there has been a downward trend in the more serious Crimes Act assaults beginning before the law changes. There is no such trend discernible in the less serious assaults not dealt with under the Crimes Act. The existing downward trend in the more serious assaults steepened at 2011, the inaugural year for the legislation, with the value for 2012 being 18 (38% below the value of 29 in 2010, the year before the legislation was passed). This indicates that the impact of the changes of 2011 on serious assaults has been an at least 40% decrease. Figure 3 depicts the percentage of taxi driver assaults which were dealt with under the Crimes Act over time.

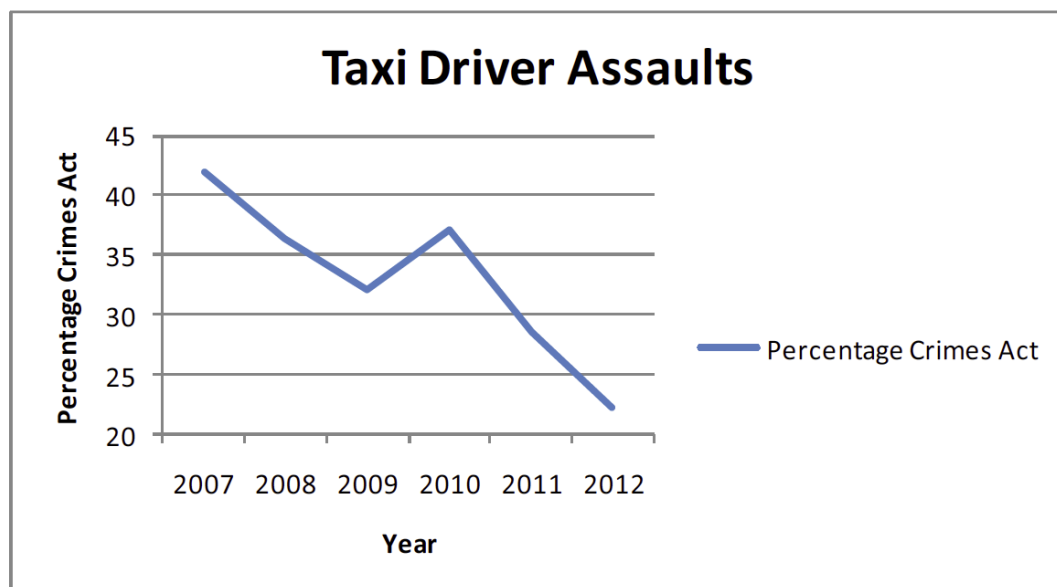


Figure 3. The percentage of all police reported assaults dealt with under the Crimes Act by year

It is apparent from Figure 3, that following 2010 there was a steep reduction in the percentage of Crimes Act assaults among reported assaults. The decrease between the figures for 2010 and 2012 is from 37.2 % to 22.2%, a similar size drop to the aforementioned drop in the number of serious Crimes Act offences. This also indicates strongly that assaults had reduced in severity around the time of the law changes.

4.3 Assaults reported as resolved by Police

As mentioned elsewhere, it would be good to have an intermediate outcome measure related to the ease of using camera images in bringing people to account for assaults. At the time of writing, such information is not available from the Police. This is not surprising as such information may not be routinely collected at present. The only information available which may shed some light in this area relates to the resolution rates of taxi driver assault cases. Resolved Offences are defined by the Police as recorded offences, where an offender has been identified and dealt with (e.g. warned, cautioned, prosecuted, etc)⁵. Figure 4 depicts resolved assaults on taxi drivers of various categories by year since 2007. It is broadly similar to Figure 1, which presents parallel information on reported assaults. Any differences in pattern relate to the resolution rates of the various offences as measured by the ratio of the number of cases resolved to the number of cases reported.

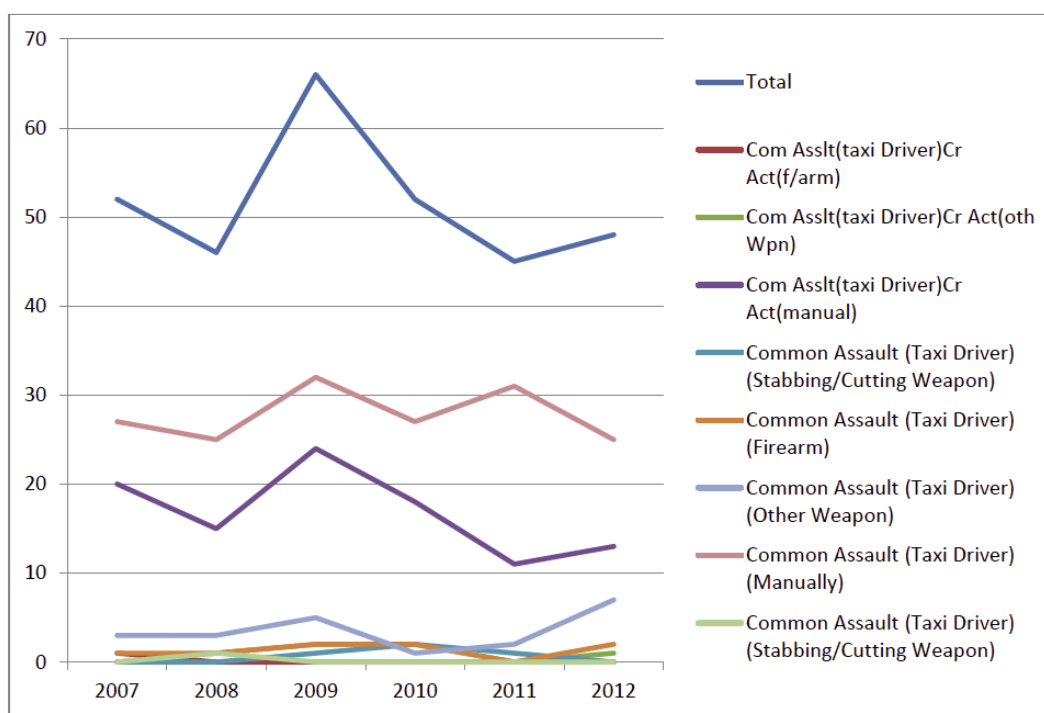


Figure 4. Resolved assaults on taxi drivers of various categories by year

⁵ <http://www.police.govt.nz/sites/default/files/publications/crime-stats-national-20130630.pdf>

Figure 5 compares the total number of resolved crimes act offences with the total number of resolved non crimes act offences over time.

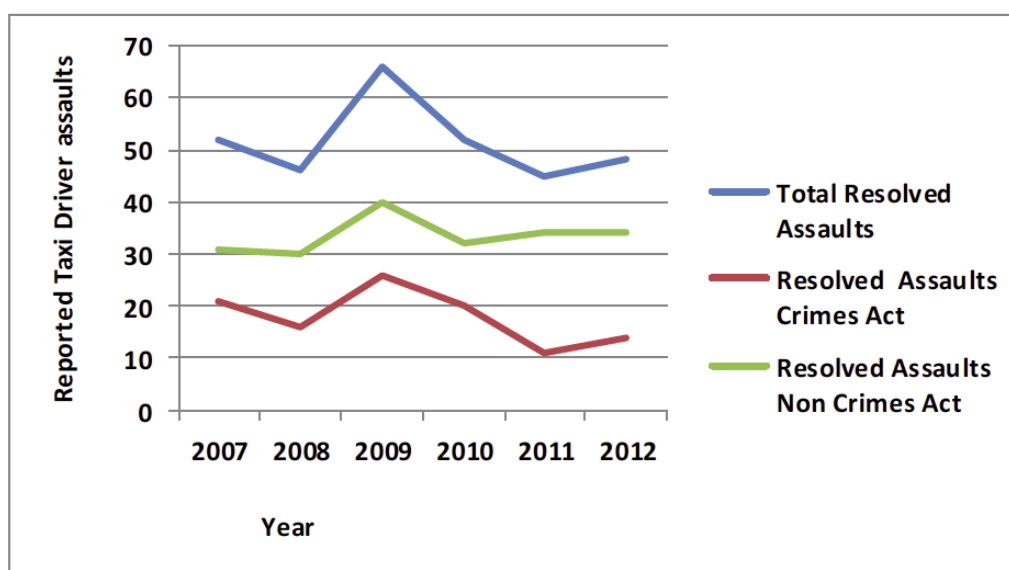


Figure 5. Resolved taxi driver assaults by crimes act/non crimes act

This shows that in 2011 the number of resolved assaults continued downward from a peak in 2009 followed by a small increase in 2012. When this is disaggregated by severity, one finds this pattern is composed of a slightly increasing tendency for less serious assaults and a reducing trend for the more serious Crimes Act assaults. This pattern is broadly similar to that found for the reported assaults. Figure 6 depicts the percentage of resolved assaults which are more serious assaults dealt with under the Crimes Act over time.

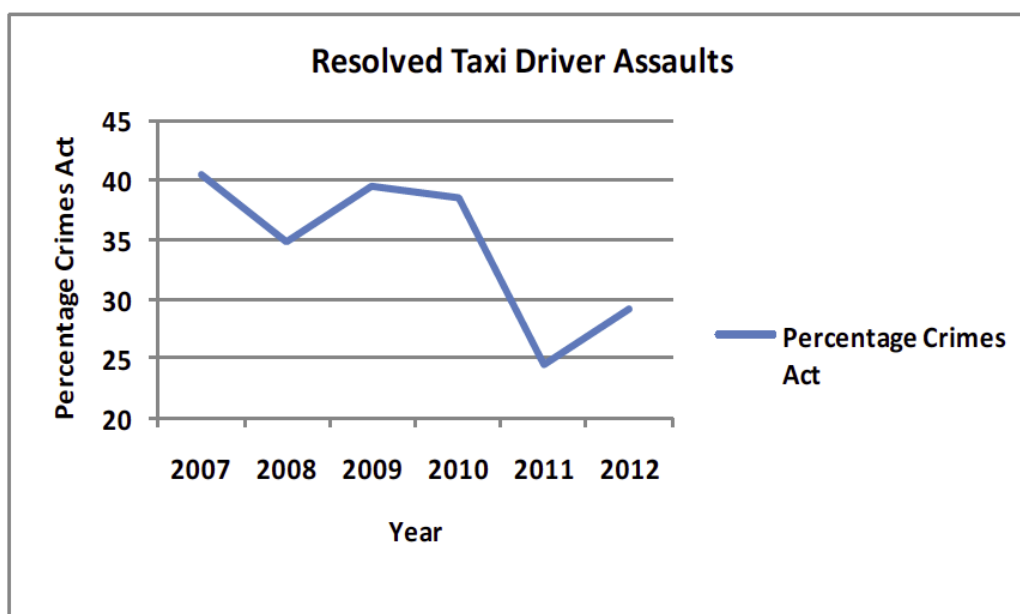


Figure 6. Percentage of assaults dealt with under the Crimes Act which are resolved by year

This chart is broadly similar in pattern to Figure 3, which depicts the percentage of reported assaults dealt with under the Crimes Act. There is however a relatively small increase between 2011 and 2012, perhaps indicating an improvement in the resolution of more serious cases.

Perhaps the best indicator available at present of the effectiveness of the Police in resolving these cases is the Resolution Rate⁶. This indicator as shown in Figure 5 is however approximate, as not all cases reported during a particular year will necessarily be resolved during that year, meaning that not all of the cases in the numerator may necessarily be the resolutions of cases in the denominator.

Figure 7 indicates a lowering of overall resolution rates of late. This overall lowering has since 2011 been driven by a lowering of the resolution rate for less severe assaults. Without further information it is not possible to consider the factors involved in this reduction in the resolution rate, be they resources issues (the number of less serious assaults reported has increased), technical issues in using camera images, or other reasons. The resolution rate for the smaller number of Crimes Act offences varies widely from year to year, allowing no basis for commenting on its direction.

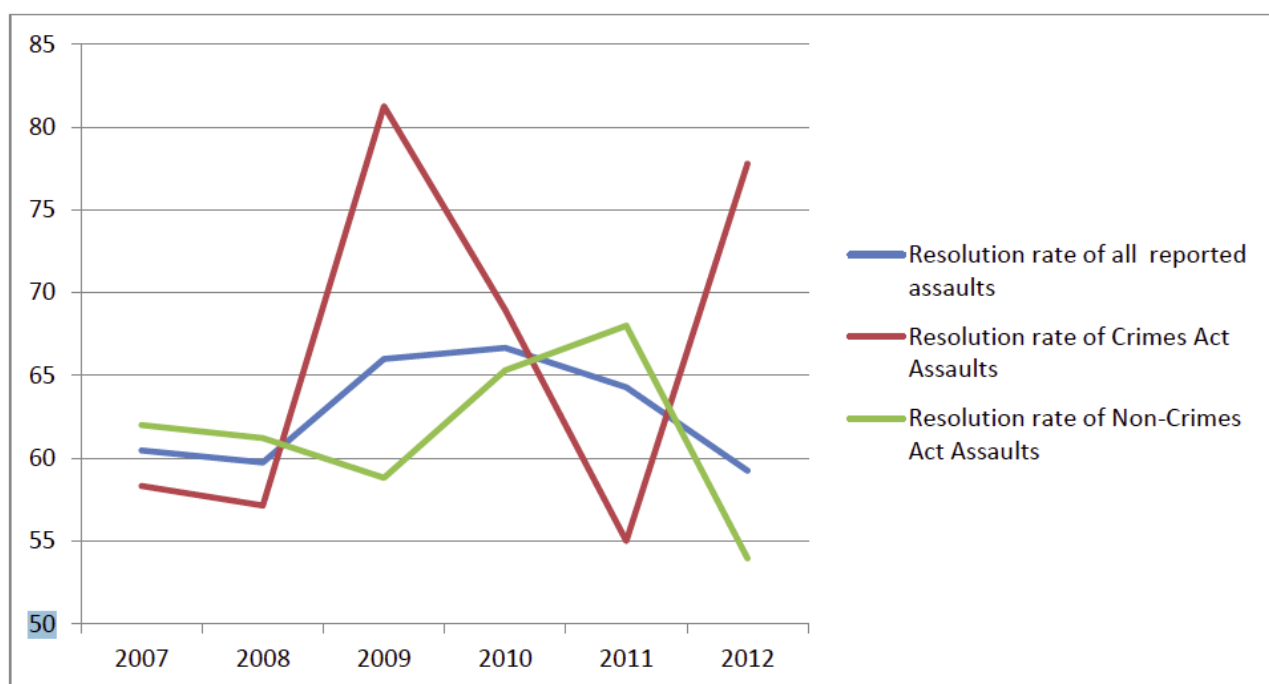


Figure 7. Resolution rate of taxi driver assaults to reported assaults by severity and year

The inconclusive nature of evidence from the resolution rate underlines the importance of gleaning as much direct information related to the Police experience accessing and using taxi camera images as possible.

⁶<http://www.police.govt.nz/sites/default/files/publications/crime-stats-national-20130630.pdf>

4.4 Summing up

Thus notwithstanding an increase in total Police reported assaults there has been:

- An estimated minimum 40% decrease in the number of serious assaults dealt with under the Crimes Act, and
- An estimated 40% decrease in the percentage of all assaults which are serious assaults dealt with under the Crimes Act.

This decrease in the number and percentage of severe Police reported assaults indicates that the cameras and communications systems combination has had a substantial positive outcome.

The number and percentage of resolved Crimes Act assaults has also reduced.

The changes are also still very recent, and further improvements in administration by ATOs and NZTA provide a prospect of further improvement. In addition, there have been no more fatal assaults. All this indicates good progress in a positive direction since the law changes.

5 The social costs of taxi assaults

The reduction on assault severity mentioned above is reflected in Ministry of Transport figures related to the social costs of taxi assaults over time, as shown in Figure 8.

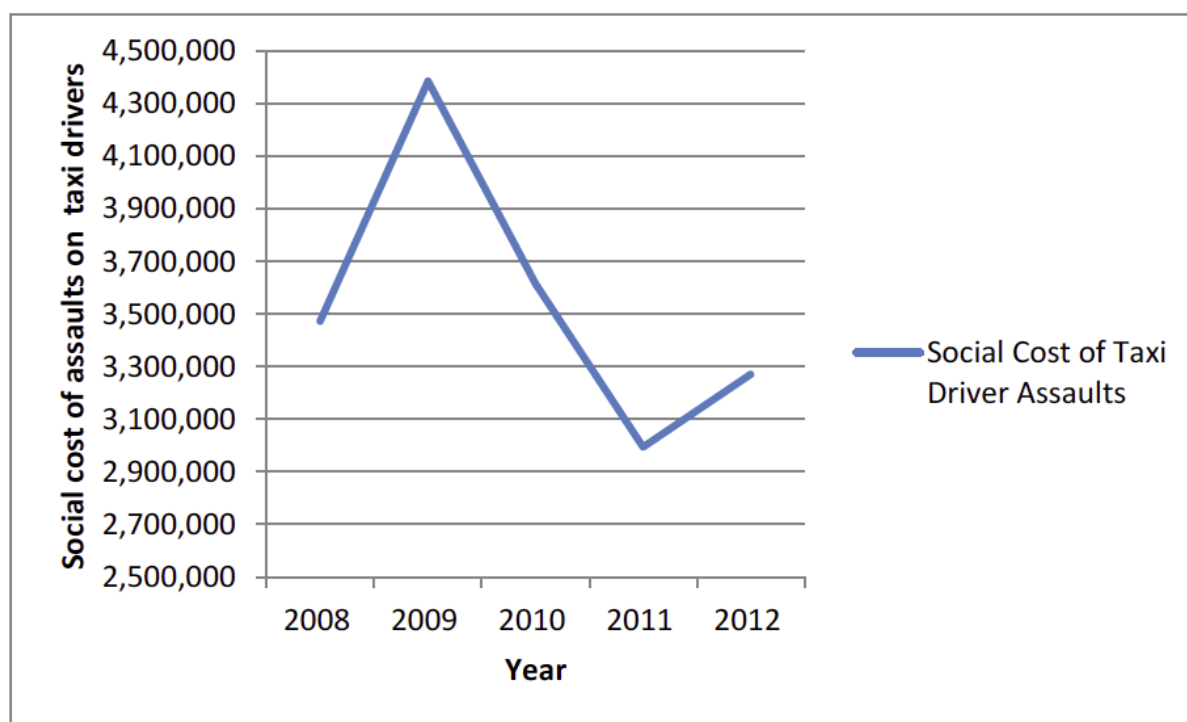


Figure 8. Social costs associated with assaults on taxi drivers by year – excludes homicides and robberies

The social costs used in Figure 8 were produced by the Ministry of Transport using Treasury figures for the social costs of violent crime⁷ adjusted for under reporting and inflation. The calculations behind these figures, which exclude homicides and robberies, are presented in the Appendix. To the \$17.7 million total of these from 2008 to 2012 inclusive could also be added around another \$8 million for the social costs of the taxi driver homicides, which are known to have occurred in 2008 and 2010. This results in a total social cost including homicides in the region of \$26 million for the period 2008 to 2012 inclusive. Given that no homicides have occurred since the law changes, overall social costs associated with assaults on taxi drivers have decreased considerably since the law changes.

6 The mechanisms by which the law changes may reduce injury

The two measures in the rule changes, cameras and communication systems/panic buttons, aim to improve driver safety in two ways. Firstly by reducing the chances of attacks and secondly, in the event of an attack getting first responders (Police/paramedics) to the scene as quickly as possible.

Reducing the chances of attack works by two mechanisms: general deterrence and specific deterrence. Specific deterrence happens when a specific would-be attacker is deterred from attacking through fear of apprehension. General deterrence is when a larger group of possible attackers are deterred from planning attacks from fear of apprehension. In the case of taxi cameras, both specific and general deterrence are at work. In the case of the panic button, only specific deterrence is in play, as an attack needs to be actually happening or about to happen before the button is pressed.

Thus, both systems work together as deterrents to assault crime, with the cameras providing added protection through their general deterrence. For the greatest impact through specific and general deterrence, all systems need to be working in the greatest number of taxis possible. However, in the case of general deterrence, this may occur when people believe the systems are working; or that there is a good chance the systems are working in the taxi in which they are travelling. Thus there may still be significant general deterrence even if the systems or parts of the systems are not working in some taxis. Thus it can be expected that the law changes will have had some positive impact, even at times in the process when significant numbers of taxis had yet to be equipped with the systems.

Another important component of deterrence of any sort is certainty of punishment if apprehended. Thus the evidential value of the camera outputs should be high. In the case of taxi cameras, this means that the system of downloading images and the quality of the images themselves should be capable of standing up to robust scrutiny in the courtroom. This indicates that the degree of success by police in accessing downloaded images when they are needed, and the acceptability of those images in the court system are important. If offenders cannot be successfully prosecuted, deterrence is likely to break down over time.

At present information related to the availability to Police of image downloads and the success of their use in prosecutions is not routinely collected or analysed at a Regional or National level. It would be a positive move if such information was able to be routinely collected and analysed over time to ascertain if the prosecution side of this initiative is working satisfactorily. This information was not able to be accessed for this review.

⁷ Roper, T and Thompson, A (2006), Estimating the costs of crime in New Zealand in 2003/04, New Zealand Treasury Working Paper 06/04, Wellington: New Zealand Treasury

7 Compliance by taxi companies

The requirement for taxi companies to have NZTA approved, working camera systems, communication systems and panic buttons in their cabs is not easy to enforce. The systems are only required to be working while the cabs are hired or plying for hire, which precludes spot checks by the authorities. In addition, the NZTA's powers are limited to checking the "system status indicators" to see if a camera system is operating. This is a green light indicating system operation, which can be wired to be permanently green by a dishonest operator.

The responsibility for setting up the most effective compliance enforcement regime possible under the resources available is shared by the NZTA and the Commercial Vehicle Investigation Unit (CVIU) of the Police. The NZTA approaches ATOs which breach their operating rules regarding camera/communication systems firstly with education and information. This approach is usually successful. It is only when it is not successful that issuing an infringement offence notice (ION) or going to court is considered. Unlike the NZTA, the Police are able to test a taxi camera system to determine if it is "fit for purpose". As at 2 July 2013, there had been no NZTA prosecutions for breaching camera system rules, and at the same date the Police had issued 12 offence notices for such breaches.

All this means that, like other aspects of our taxi system, compliance with the laws on security cameras and communication systems are based on trusting the operator to be responsible and using enforcement as a last resort. This of course is true of many laws which operate mainly by trust rather than heavy enforcement. One could cite food safety laws, workplace safety laws, industrial relations laws and hate speech laws as other examples. In these cases, some are subject to periodic audits and reporting of breaches by the public, while for others breaches are only detectable if reported by the public. This does not mean that such regimes should not be part of our compliance system, however. What it does mean is that enforcement of laws is prioritised by the Government according to resources available, the government's values and the consequences of non-compliance.

As with any other compliance issue, in terms of ensuring compliance by ATOs, a similar deterrence model to that described in Section 6 would apply to those companies which have not yet realised the benefits of having effective driver safety measures in their cabs. They need to know that there is an enforcement regime which is effective enough for them to have a significant perception of potential detection and subsequent sanction if they persist in offending.

ATOs also need to have continually brought to their attention the benefits of improving the safety of the workplaces of their drivers. They have varied structures and may be in some cases being structured as driver cooperatives, but their operating rules make them clearly responsible for driver welfare, and they are accountable for compliance with their operating rules.

8 Comments of organisations

A number of organisations, both Governmental and non-Governmental, were given an opportunity to make comments related to the changes. These included:

- Taxi organisations, including those which are members of the New Zealand Taxi Federation and operators who are not members of that organisation;
- Security camera suppliers;
- The Ministry for Business Innovation and Employment (MBIE) which has responsibility for Workplace Safety, Tourism and Consumer Affairs;
- The Accident Compensation Corporation;
- The Privacy Commission; and,
- Citizens Advice Bureaux.

Of these organisations, comment was provided by a small number of ATOs including ATOs within and outside the Taxi Federation, three camera suppliers, the New Zealand Taxi Federation (through verbal discussions with its Executive Director, Tim Reddish), the MBIE and the Privacy Commission. The ACC replied but had no comment. Some of the comments from the Privacy Commission, the MBIE and the Camera suppliers covered areas outside the scope of this review and were referred to the Ministry of Transport for its consideration.

The response from the taxi industry was small, with two Taxi Federation ATOs and five independent ATOs providing comment. This difficulty in achieving participation from the industry may indicate that industry members are at this stage relatively sanguine about the outcome of the changes.

Generally comments were positive about the benefits of cameras and the communication systems, and the general sentiment was that troubles with passengers had decreased. There were also some not unexpected negative comments on operational matters, rather than safety benefits from companies, who had experienced problems with cameras and some who had reservations about how the changes had been made and the enforceability of breaches of the law regarding cameras. The Taxi Federation's corporate view, as gleaned from discussions with the executive director, was positive about the safety benefits of the new laws, but somewhat negative about historic aspects of their implementation.

From the viewpoint of driver safety from false allegations, there was one anecdotal report of a male driver being accused of sexual impropriety by a female passenger and then exonerated by camera footage.

9 Conclusions

- Notwithstanding an increase in total Police reported assaults following the law changes, there has been:
 - » An estimated minimum 40% decrease in the number of serious assaults dealt with under the Crimes Act, and
 - » An estimated 40% decrease in the percentage of all assaults which are serious assaults dealt with under the Crimes Act.
- This decrease in the number and percentage of severe Police reported assaults indicates that the cameras and communications systems combination has had a substantial positive outcome.
- The number and percentage of resolved Crimes Act assaults has also reduced.
- At the time of writing there have been no more taxi driver fatalities from assaults since the law changes in 2011.
- Based on this and Official Crime Statistics there has also been a substantial reduction in social costs related to assaults against taxi drivers since the law.
- Generally ATOs and the Taxi Federation agree that the changes have resulted in safety benefits.
- There have been operational problems associated with the introduction of the cameras and communication systems. This impacted on the number of cabs with working systems. This has been an obvious concern to the NZTA which has changed its procedures in response. NZTA's procedures will continue to be updated in the future if further challenges and possible new technologies emerge. The procedural changes made at the time of writing are all moves in the right direction and can be expected to improve compliance.
- ATOs also need to have continually brought to their attention the benefits of improving the safety of the workplaces of their drivers. They have varied structures and may be in some cases being structured as driver cooperatives, but their operating rules make them clearly responsible for driver welfare, and they are accountable for compliance with their operating rules.
- A possible issue is whether Police are able to access the camera images effectively and use them in court effectively. The Police have not been able to provide any information on this in time for this review. It is to be hoped that this information will become available in the future as it will be valuable in assessing what scope there will be for future efficiency gains in this area.
- Anecdotal accounts indicate that at least one allegation of sexual impropriety against a taxi driver has been shown to be false using camera records and that possible dangerous behaviours by late night inebriated or drug impaired passengers have been averted by drivers bringing the cameras to the attention of the people concerned.
- No useful information on the impact of the law changes on the level of fare evasion has been able to be accessed.
- The changes are still very recent, and further improvements in administration by ATOs and NZTA provide a prospect of further improvement.

Appendix: Tables of offences against Taxi Drivers and their Social Costs by year

OFFENCE CATEGORY	NUMBER	2008			
		Average social cost per case 2003/04 \$	2013 prices (inflated by 2.5% p.a.)	adjustment for under reporting	total SC 2013\$
Crimes Act offences		Grievous assaults			
Common Assault (firearm)		\$30,430	\$38,000	1.8	\$0
Common Assault (other weapon)	1	\$30,430	\$38,000	1.8	\$68,400
Common Assault (manual)	27	\$30,430	\$38,000	1.8	\$1,846,800
Common Assault (stabbing /cutting weapon)		\$30,430	\$38,000	1.8	\$0
Total	28				\$1,915,200
Summary Offences Act offences		Other assaults			
Common Assault (firearm)	1	\$3,310	\$4,130	7.7	\$31,801
Common Assault (other weapon)	5	\$3,310	\$4,130	7.7	\$159,005
Common Assault (manual)	41	\$3,310	\$4,130	7.7	\$1,303,841
Common Assault (stabbing /cutting weapon)	2	\$3,310	\$4,130	7.7	\$63,602
Total	49				\$1,558,249
Grand total (2013 prices)					\$3,473,449

OFFENCE CATEGORY	NUMBER	2009			
		Average social cost per case 2003/04 \$	2013 prices (inflated by 2.5% p.a.)	adjustment for under reporting	total SC 2013\$
Crimes Act offences		Grievous assaults			
Common Assault (firearm)		\$30,430	\$38,000	1.8	\$0
Common Assault (other weapon)	2	\$30,430	\$38,000	1.8	\$136,800
Common Assault (manual)	30	\$30,430	\$38,000	1.8	\$2,052,000
Common Assault (stabbing /cutting weapon)	1	\$30,430	\$38,000	1.8	\$68,400
Total	33				\$2,257,200
Summary Offences Act offences		Other assaults			
Common Assault (firearm)	3	\$3,310	\$4,130	7.7	\$95,403
Common Assault (other weapon)	6	\$3,310	\$4,130	7.7	\$190,806
Common Assault (manual)	57	\$3,310	\$4,130	7.7	\$1,812,657
Common Assault (stabbing /cutting weapon)	1	\$3,310	\$4,130	7.7	\$31,801
Total	67				\$2,130,667
Grand total (2013 prices)					\$4,387,867

OFFENCE CATEGORY	NUMBER	2010			
		Average social cost per case 2003/04 \$	2013 prices (inflated by 2.5% p.a.)	adjustment for under reporting	total SC 2013\$
Crimes Act offences		Grievous assaults			
Common Assault (firearm)		\$30,430	\$38,000	1.8	\$0
Common Assault (other weapon)	3	\$30,430	\$38,000	1.8	\$205,200
Common Assault (manual)	26	\$30,430	\$38,000	1.8	\$1,778,400
Common Assault (stabbing /cutting weapon)	2	\$30,430	\$38,000	1.8	\$136,800
Total	31				\$2,120,400
Summary Offences Act offences		Other assaults			
Common Assault (firearm)	2	\$3,310	\$4,130	7.7	\$63,602
Common Assault (other weapon)	1	\$3,310	\$4,130	7.7	\$31,801
Common Assault (manual)	44	\$3,310	\$4,130	7.7	\$1,399,244
Common Assault (stabbing /cutting weapon)		\$3,310	\$4,130	7.7	\$0
Total	47				\$1,494,647
Grand total (2013 prices)					\$3,615,047

2011					
OFFENCE CATEGORY	NUMBER	Average social cost per case 2003/04 \$	2013 prices (inflated by 2.5% p.a.)	adjustment for under reporting	total SC 2013\$
Crimes Act offences		Grievous assaults			
Common Assault (firearm)		\$30,430	\$38,000	1.8	\$0
Common Assault (other weapon)		\$30,430	\$38,000	1.8	\$0
Common Assault (manual)	20	\$30,430	\$38,000	1.8	\$1,368,000
Common Assault (stabbing /cutting weapon)	1	\$30,430	\$38,000	1.8	\$68,400
Total	21				\$1,436,400
Summary Offences Act offences		Other assaults			
Common Assault (firearm)		\$3,310	\$4,130	7.7	\$0
Common Assault (other weapon)	3	\$3,310	\$4,130	7.7	\$95,403
Common Assault (manual)	46	\$3,310	\$4,130	7.7	\$1,462,846
Common Assault (stabbing /cutting weapon)		\$3,310	\$4,130	7.7	\$0
Total	49				\$1,558,249
Grand total (2013 prices)					\$2,994,649

2012					
OFFENCE CATEGORY	NUMBER	Average social cost per case 2003/04 \$	2013 prices (inflated by 2.5% p.a.)	adjustment for under reporting	total SC 2013\$
Crimes Act offences		Grievous assaults			
Common Assault (firearm)		\$30,430	\$38,000	1.8	\$0
Common Assault (other weapon)	1	\$30,430	\$38,000	1.8	\$68,400
Common Assault (manual)	17	\$30,430	\$38,000	1.8	\$1,162,800
Common Assault (stabbing /cutting weapon)	1	\$30,430	\$38,000	1.8	\$68,400
Total	19		\$0		\$1,299,600
Summary Offences Act offences		Other assaults			
Common Assault (firearm)	2	\$3,310	\$4,130	7.7	\$63,602
Common Assault (other weapon)	7	\$3,310	\$4,130	7.7	\$222,607
Common Assault (manual)	53	\$3,310	\$4,130	7.7	\$1,685,453
Common Assault (stabbing /cutting weapon)		\$3,310	\$4,130	7.7	\$0
Total	62				\$1,971,662
Grand total (2013 prices)					\$3,271,262

Appendix D. Professor Edelman article

forthcoming, Competition Policy International

Whither Uber?: Competitive Dynamics in Transportation Networks

Benjamin Edelman — November 2015

Suppose Acme Widgets manufactured cheaper widgets by dumping toxic widget byproducts in the river behind its factory. By foregoing the anti-pollution efforts that competitors use and that, to be sure, the law requires, Acme would gain a cost advantage over its peers. Unaware of Acme's methods, consumers would favor its products, and its market share would predictably surge. But few would celebrate this outcome—pollution that ultimately harms everyone, requiring clean-up at the public's expense.

In the transportation sector, there are reasonable arguments that Uber, Lyft, and kin (collectively, transportation network companies or TNCs) have chosen a similar approach. To be sure the companies offer important technical and business model innovations, which I discuss momentarily. But in cutting corners on issues from insurance to inspections to background checks, they push costs from their customers to the general public—while also delivering a service that plausibly falls short of generally applicable requirements duly established by law and, sometimes, by their own marketing promises. Despite excitement about the benefits they provide, it's far from clear that the companies have chosen the right approach.

The benefits of app-based transportation networks

Even the staunchest critics concede that TNCs bring important efficiencies to the markets they serve. Consider, for example, the task of assigning drivers to passengers. Historic telephone-based dispatch of traditional drivers today seems laughably inefficient. When a customer calls a dispatcher who then alerts drivers by radio, the sequential oral communications are quite literally a "game of telephone" with inevitable errors. But errors are only the tip of the iceberg. At best, a dispatcher could find the closest available driver. But dispatchers have limited information about driver availability and locations, and might end up matching a passenger with a far-away driver, thereby delaying the driver's arrival to the customer and simultaneously increasing the driver's unpaid "backhaul" with no passenger aboard. At least as worrisome is that dispatchers have been accused of demanding kickbacks for referring desirable passengers such as those headed to an airport—further distorting matching of passengers and drivers. TNCs remedy these mishaps by replacing phone calls with text entries and GPS, simultaneously eliminating dispatcher cost, delay, errors, and potential bias. It's shrewd, efficient, and by all indications highly effective. The TNC approach also dispenses with proprietary taxi meters, often surprisingly pricey, in favor of standardized mass-produced smartphones drivers can also use for other purposes.

In addition, TNCs add important levels of accountability for both drivers and passengers. Most passengers have had the experience of waiting for a driver who never comes. That could be an error, perhaps the result of double-dictation of a passenger's location. But consider a driver who is driving, unpaid, to a passenger pickup—only to see a roadside hail right along the way. With no further unpaid driving required, the hail will often be too good to refuse—even if it leaves the telephone booking unsatisfied. Meanwhile, if the passenger happens to see an available taxi, he too has every incentive to hop in—even if that's not the vehicle the dispatcher sent. Each party may regret shortchanging the other. But anticipating that the other may in turn shortchange him, they're likely to do so anyway. TNCs fix this too, in part with real-time tracking of vehicle location (so a passenger can see the vehicle en route), plus accountability through reputations (penalties on both sides for no-shows) and as well as payment linked to traveling in the assigned vehicle.

Though controversial, the TNC approach to pricing also seems to reflect a step forward. There is no logical reason why urban transportation prices must be the same price at all times of day. To the contrary, if prices reflect both supply and demand, flexible passengers will shift journeys to off-peak times, and price spikes will inspire drivers to provide service at peak times. Of course there are losses, most notably to the lucky passengers who previously obtained vehicles at peak times at no additional charge. But if those benefits were previously assigned randomly, greater surplus is created through optimal matching of passengers to vehicles based on willingness to pay. In principle, TNCs on net should be able to make all customers better off,

including through lower prices at off-peak times. All of this would be virtually impossible in an offline context—too difficult for passengers and drivers to identify the appropriate price in light of available information about changing conditions, plus inevitable disputes at the end of a journey. But in a mobile app, electronic contracting and automatic recordkeeping make this easy.

Still other efficiencies come from the prospect of using a single vehicle for multiple purposes. It is tragic to see a taxi driver drive a personal vehicle to a depot to pick up a taxi—contributing to congestion and pollution along the way, yet failing to transport any passengers; wasting time on a drive with no direct benefit to anyone; and parking, buying, and maintaining two separate vehicles, only one of which is used at a time. TNCs handily eliminate these sources of waste by reusing the driver's personal vehicle, albeit simultaneously raising the problems discussed in the subsequent sections.

Ultimately, the TNC electronic dispatch model facilitates numerous further efficiencies. In developing countries, jitneys have long provided multi-passenger hop-on-hop-off service, often a fixed price to travel as far as you want on a single main road or route. Despite low prices, jitneys tend to have limited appeal; consider an origin or destination off the preset route. In contrast, TNCs can facilitate on-demand multi-passenger routing, including limited detours for pick-ups and drop-offs so long as inconvenience to others falls within the given parameters. Centralized algorithms and routing are crucial for these improvements; such flexibility would be difficult or impossible without strong IT support. Meanwhile, TNC drivers can also transport packages, restaurant meals, and almost anything else—perhaps even in spare time when passenger demand is light. One wonders about the distinctive benefits of purposespecific vehicles, but perhaps efficiencies from shared usage can outweigh any capabilities not available. To its credit, TNCs stand ready to try.

Cutting corners and worse

While the widespread adoption of TNCs plainly results in part from the innovations just discussed, usage is also follows TNC use of regulatory shortcuts – less than strict compliance with applicable rules.

A first potential concern is that TNC drivers lack medallions or taxi permits. Many cities require such permission to accept roadside hails, and in major cities, buying a medallion entails considerable expense. That said, the TNC approach seems not to require a medallion: In most jurisdictions, the defining characteristic of a taxi is permission to accept an ad hoc roadside hail, whereas TNC passengers request rides via a mobile app, making this “prearranged” transportation rather than “taxi” as a matter of law. This one, at least, TNCs seem to get right— a clever hack to escape a regulatory scheme that TNCs (and many passengers) consider ill-advised.

But what about the myriad other requirements the legal system imposes on commercial drivers? Consider: In most jurisdictions, a “for hire” livery driver needs a commercial driver's license, a background check and criminal records check, and a vehicle with commercial plates, which often means a more detailed and/or more frequent inspection. Using ordinary drivers in noncommercial vehicles, TNCs skip most of these requirements, and where they take such steps (such as some efforts towards a background check), they do importantly less than what is required for other commercial drivers (as discussed further below). One might reasonably ask whether the standard commercial requirements in fact increase safety or advance other important policy objectives. On one hand, detailed and frequent vehicle inspections seem bound to help, and seem reasonable for vehicles in more frequent use. TNCs typically counter that such requirements are unduly burdensome, especially for casual drivers who may provide just a few hours of commercial activity per month. Nonetheless, applicable legal rules offer no “de minimis” exception and little support for TNCs' position.

Differing standards for background checks raise similar questions. TNCs typically use standard commercial background check services which suffer from predictable weaknesses. For one, TNC verifications are predicated on a prospective driver submitting his correct name and verification details, but drivers with poor records have every incentive to use a friend's information. (Online instructions tell drivers how to do it.¹) In contrast, other commercial drivers are typically subject to fingerprint verification. Furthermore, TNC verifications typically only check for recent violations – a technique far less comprehensive than the law allows. (For example, Uber admits checking only convictions within the last seven years,² which the company claims is the maximum duration permitted by law. But federal law has no such limitation, and California law allows reporting of any crime for which release or parole was at most seven years earlier.³) In *People of the State of California v. Uber*, these concerns were revealed to be more than speculative, including 25 different Uber drivers who passed Uber's verifications but would have failed the more comprehensive checks permitted by law.⁴

Relatedly, TNC representations to consumers at best gloss over potential risks, but in some areas appear to misstate what the company does and what assurances it can provide. For example, Uber claimed its service offered “best in class safety and accountability” and “the safest rides on the road” which “far exceed... what’s expected of taxis”—but taxis, with fingerprint verification of driver identity, offer improved assurances that the person being verified is the same person whose information is checked. Moreover, Uber has claimed to be “working diligently to ensure we’re doing everything we can to make Uber the safest experience on the road” at the same time that the company lobbies against legislation requiring greater verifications and higher safety standards.

A separate set of concerns comes from insurance. For one, TNCs encourage drivers to carry personal insurance rather than commercial insurance⁵—anticipating, no doubt correctly, that drivers might be put off by the higher cost of commercial coverage. But TNC drivers are likely to have more frequent and more costly accidents than ordinary drivers: they drive more often, longer distances, with passengers, in unfamiliar locations, primarily in congested areas, and while using mobile apps. To the extent that drivers make claims on their personal insurance, they distort the market in two different ways: First, they push up premiums for other drivers. Second, the cost of their TNC accidents are not borne by TNC customers; by pushing the cost to drivers in general, TNCs appear to be cheaper than they really are.

In a notable twist, certain TNC policies not only encourage drivers to make claims on their personal policies, but further encourage drivers to commit insurance fraud. Consider a driver who has an accident during the so-called “period 1” in which the driver is running a TNC app, but no passenger has yet requested a ride from the driver. If the driver gets into an accident in this period, TNCs historically would deny both liability and collision coverage, claiming the driver was not yet providing service through the TNC. An affected driver might instead claim from his personal insurance, but if the driver admits that he was acting as a TNC driver—he had left home only to provide TNC services; he had transported several passengers already; he was planning more—the insurer will deny his claim. In fact, in all likelihood, an insurer in that situation would drop the driver’s coverage, and the driver would also be unable to get replacement coverage since any new insurer would learn the reason for the drop. As a practical matter, the driver’s only choices are to forego insurance coverage (a possibility in case of a collision claim, though more difficult after injuring others or damaging others’ property) or, more likely, lie to his insurance issuer. California law AB 2293, effective July 1, 2015, ended this problem as to collision claims in that state, requiring TNCs to provide liability coverage during period 1, but offering nothing elsewhere, nor any assistance on collision claims.

Passengers with disabilities offer additional complaints about TNCs. Under the Americans with Disabilities Act (ADA) and many state laws, passengers with disabilities are broadly entitled to use transportation services, and passengers cannot be denied transport on the basis of disability. Yet myriad disabled passengers report being denied transport by TNCs. Blind passengers traveling with guide dogs repeatedly report that TNC drivers sometimes reject them. In litigation Uber argued that its service falls beyond the scope of the ADA and thus need not serve passengers with disabilities, an argument that a federal court promptly rejected.⁶ Nonetheless, as of November 2015, Uber’s “Drivers” page continues to tell drivers they can “choose who you pick up,”⁷ with no mention of ADA obligations, nor of prohibitions on discrimination on the basis of race, gender, or other prohibited factors.

For these reasons and others, numerous regulators have concluded that Uber cannot operate within their jurisdictions. But such findings are not self-effectuating, even when backed up with cease and desist letters, notices of violation, or the like. In fact, Uber’s standard response to such notices is to continue operation. Pennsylvania Public Utility Commission prosecutor Michael Swindler summarized his surprise at Uber’s approach: “In my two-plus decades in practice, I have never seen this level of blatant defiance,” noting that Uber continued to operate in despite an unambiguous cease-and-desist order.⁸ Pennsylvania Administrative Law Judges were convinced, in November 2015 imposing \$49 million of civil penalties, electing to impose “the maximum penalty” because Uber flouted the cease and-desist order in a “deliberate and calculated” “business decision.”⁹ Nor was this defiance limited to Pennsylvania. Uber similarly continued to provide service at San Francisco International Airport, and affirmatively told passengers “you can request” an Uber at SFO, even after signing a 2013 agreement with the California Public Utilities Commission disallowing transport onto airport property unless the airport granted permission and even

after San Francisco International Airport served Uber with a cease-and-desist letter noting the lack of such permission.¹⁰ In some instances, cities ultimately force Uber to cease or suspend operations. But experience in Paris is instructive. There, Uber continued operation despite a series of judicial and police interventions. Only the arrest of two Uber executives compelled the company to suspend its casual driving service in Paris.

Competitive dynamics under incomplete enforcement

Looking at TNC operations, it is striking to see the incompleteness of regulation or, more precisely, enforcement. In this environment, competition reflects unusual incentives: Rather than competing on lawful activities permitted under the applicable regulatory environment, TNC operators compete in part to defy the law—to provide a service that, to be sure, passengers want to receive and buyers want to provide, notwithstanding the legal requirements to the contrary.

The brief history of TNCs is instructive. Though Uber today leads the casual driving platforms, it was competing transportation platform Lyft that first invited drivers to provide transportation through their personal vehicles. Initially, Uber only provided service via black cars that were properly licensed, insured, and permitted for that purpose. In an April 2013 posting by CEO Travis Kalanick, Uber summarized the situation, effectively recognizing that competitors' casual drivers are largely unlawful, calling competitors' approach "quite aggressive" and "non-licensed."¹¹

Suppose, as Travis's post indicates and as subsequent regulatory disputes seem to confirm, that casual driving services are and have been largely unlawful. Uber leaders clearly believe that such services are, on the whole, desirable and should be permitted, and any survey of consumers would likely agree. Assuming strict compliance with the law, how might Uber have tried to get its service off the ground? One possibility: Uber could have sought some jurisdiction willing to let the company demonstrate its approach. Consider a municipality with little taxi service or deeply unsatisfactory service, where regulators and legislators would be so desperate for the improvements Uber promised that they would be willing to amend laws to match Uber's request. Uber need not have sought permanent permission; with great confidence in its offering, even a temporary waiver might have sufficed, as Uber would have anticipated the change becoming permanent once its model took off. Perhaps Uber's service would have been a huge hit—inspiring other cities to copy the regulatory changes to attract Uber. Indeed, Uber could have flipped the story to make municipalities want its offering, just as cities today vie for Google Fiber and, indeed, make far-reaching commitments to attract that service.

Different as this may be from Uber's actual strategy, it is far from unprecedented. In fact, it is probably the right strategy, and maybe the only strategy, if a company concludes that breaking the law is highly likely to provoke substantial penalties. Consider the experience of Southwest Airlines as it planned early low-fare operations in 1967. Southwest leaders realized that the comprehensive regulatory scheme, imposed by the federal Civil Aeronautics Board, required unduly high prices, while simultaneously limiting routes and service in ways that, in Southwest's view, harmed consumers. Envisioning a world of low-fare transport, Southwest sought to serve routes and schedules CAB would never approve, at prices well below what regulation required. Had Southwest simply begun its desired service at its desired price, it would have faced immediate company-ending sanctions; though CAB's rules were increasingly seen as overbearing and ill-advised, CAB would not have allowed an airline to brazenly defy the law. Instead, Southwest managers had to find a way to square its approach with CAB rules—and, to the company's credit, they were able to do so. In particular, by providing solely intra-state transport within Texas, Southwest was not subject to CAB rules, letting the company serve whatever routes it chose, at the prices it thought best. Moreover, these advantages predictably lasted beyond the impending end of regulation: After honing its operations in the intra-state Texas market, Southwest was well positioned for future expansion.

Southwest's strategy was compelled by fear of regulators—knowing that breaching legal duties would guarantee severe penalties. But as Uber CEO Kalanick looked at Lyft in his revealing 2013 post, we see no such fear. Kalanick explains: Regulators "have chosen not to" bring enforcement actions "against non-licensed transportation providers," yielding "one-sided competition" to competitors' advantage and Uber's disadvantage. Uber laid out regulators' weakness: "Regulators for the most part will be unable to act or enforce in time to stop them before they have a critical mass of consumer support." Of course Uber might have moved to assist regulators, for example in gathering and organizing information about competitors' infractions, by proposing model regulations to adjust requirements in the way Uber considered wise, and by explaining the need for diligent enforcement to maintain fair competition. Uber could even have sued competitors whose methods competed unfairly—unlawfully!—with Uber's offering. Predictably, Uber did none of those things.

Uber's ultimate decision, to recognize Lyft's approach as unlawful but nonetheless to follow that same approach, is hard to praise on either substantive or procedural grounds. On substance, it ignores the important externalities discussed above—including safety concerns that sometimes culminate in grave physical injury and, indeed, death. On procedure, it defies the democratic process, ignoring the authority of democratic institutions to impose the will of the majority.¹² Uber has all but styled itself as a modern Rosa Parks defying unjust laws for everyone's benefit. But Uber challenges purely commercial regulation of business activity, a context where civil disobedience is less likely to resonate. And in a world where anyone dissatisfied with a law can simply ignore it, who's to say that Uber is on the side of the angels? One might equally remember former Arkansas governor Orville Faubus' 1957 refusal to desegregate public schools despite a court order.

Notably, Uber's approach puts other transportation platforms in a position that's at least as untenable. Consider Hailo's 2013-2014 attempt to provide taxi-dispatch service in New York City. On paper, Hailo had every advantage: \$100 million of funding from A-list investors, a strong track record in the UK, licensed and insured vehicles, and full compliance with every applicable law and regulation. But Uber's "casual driver" model offered a perpetual cost advantage, and in October 2014 Hailo abandoned the U.S. market. Uber's lesson to Hailo: Complying with the law is bad business if your competitor doesn't have to. Facing Uber's assault in numerous markets in Southeast Asia, transportation app GrabTaxi abandoned its roots providing only lawful commercial vehicles, and began "GrabCar" with casual drivers whose legality is disputed. One can hardly blame them—the alternative is Hailo-style irrelevance. When Uber ignores applicable laws and regulators stand by the wayside, competitors are effectively compelled to follow.

Relatedly, when the competitive environment rewards lawbreaking, the victor may struggle to comply both with applicable law and with social norms. Notice Uber's recent scandals: Threatening to hire researchers to "dig up dirt" on reporters who were critical of the company.¹³ A "God view" that let Uber staff see any rider's activity at any time without a bona fide purpose.¹⁴ Analyzing passengers' rides to and from unfamiliar overnight locations to chronicle and tabulate one-night-stands.¹⁵ Charging passengers a "Logan Massport Surcharge & Toll" for a journey where no such fee was paid, or was even required.¹⁶ A promotion promising service by scantily-clad female drivers.¹⁷ The CEO bragging about his business success yielding frequent sexual exploits.¹⁸ "Knowing and intentional" "obstructive" "recalcitrance" in its "blatant," "egregious," "defiant refusal" to produce documents and records when so ordered by administrative law judges.¹⁹ On one view, these are the unfortunate mishaps of a fastgrowing company. But arguably it's actually something more than that. Rare is the company that can pull off Uber's strategy—fighting regulators and regulation in scores of markets in parallel, flouting decades of regulation and managing to push past so many legal impediments. Any company attempting this strategy necessarily establishes a corporate culture grounded in a certain disdain for the law. Perhaps some laws are ill-advised and should be revisited. But it may be unrealistic to expect a company to train employees to recognize which laws should be ignored versus which must be followed. Once a company establishes a corporate culture premised on ignoring the law, its employees may feel empowered to ignore many or most laws, not just the (perhaps) outdated laws genuinely impeding its launch. That is the beast we create when we admit a corporate culture grounded in, to put it generously, regulatory arbitrage.

Looking back and looking ahead

Take a walk down memory lane for a game of "name that company." At an entrepreneurial California startup, modern electronic communication systems brought speed and cost savings to a sector that had been slow to adopt new technology. Consumers quickly embraced the company's new approach, particularly thanks to a major price advantage compared to incumbents' offerings, as well as higher quality service, faster service, and the avoidance of unwanted impediments and frictions. Incumbents complained that the entrant cut corners and didn't comply with applicable legal requirements. The entrant knew about the problems but wanted to proceed at full speed in order to serve as many customers as possible, as quickly as possible, both to expand the market and to defend against potential competition. When challenged, the entrant styled its behavior as "sharing" and said this was the new world order.

You might think I'm talking about Uber, and indeed these statements all apply squarely to Uber. But the statements fit just as well with Napster, the "music sharing" service that, during brief operation from 1999 to 2001, transformed the music business like nothing before or since. And we must not understate the benefits Napster brought: It offered convenient music with no need to drive to the record store, a celestial jukebox unconstrained by retail inventory, track-by-track choice unencumbered by any requirement to buy the rest of the album, and mobile-friendly MP3's without slow "ripping" from a CD.

Ultimately, Napster faced major copyright litigation, culminating in an injunction compelling the company to cease operations. Napster then entered Chapter 7 bankruptcy, and investors got nothing. One might worry that Napster's demise could set society back a decade in technological progress. But subsequent offerings quickly found legal ways to implement Napster's advances. Consider iTunes, Amazon Music, and Spotify, among so many others.

In fact, the main impact of Napster's cessation was to clear the way for legal competitors—to increase the likelihood that consumers might pay a negotiated price for music rather than take it for free. When Napster offered easy free music with a major price advantage from foregoing payments to rightsholders, no competitor had a chance. Only the end of Napster let legitimate services take hold.

And what of Napster's investors? We all now benefit from the company's innovations, yet investors got nothing for the risk they took. But perhaps that's the right result: Napster's major innovations were arguably insufficient to outweigh the obvious and intentional illegalities.

Uber CEO Travis Kalanick knows the Napster story all too well. Beginning in 1998, he ran a file-sharing service soon sued by the MPAA and RIAA on claims of copyright infringement. Scour entered bankruptcy in response, giving Travis a first-hand view of the impact of flouting the law. Uber today has its share of fans, including many who would never have dared to run Napster. Yet the parallels are deep.

It is inconceivable that the taxis of 2025 will look like taxis of 2005. Uber has capably demonstrated the benefits of electronic dispatch and electronic record-keeping, and society would be crazy to reject these valuable innovations. But Uber's efforts don't guarantee the \$50+ billion valuation the company now anticipates—and indeed, the company's aggressive methods seem to create massive liability for intentional violations in most jurisdictions where Uber operates. If applicable regulators, competitors, and consumers succeed in litigation efforts, they could well bankrupt Uber, arguably rightly so. But as with Napster's indisputable effect on the music industry, Uber's core contributions are unstoppable and irreversible. Consumers in the coming decades will no more telephone a taxi dispatcher than buy a \$16.99 compact disc at Tower Records. And that much is surely for the best.

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