IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

Not Restricted

BETWEEN:

S ECI 2019 01926

NICOS ANDRIANAKIS — Plaintiff

v

UBER TECHNOLOGIES INCORPORATED & ORS (according to the attached Schedule) — Defendants

AND:

S ECI 2020 01585

TAXI APPS PTY LTD ACN 149 538 616 — Plaintiff

v

UBER TECHNOLOGIES INCORPORATED & ORS (according to the attached Schedule) — Defendants

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JUDGE:	Matthews AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	7 February 2022
DATE OF RULING:	26 April 2022
CASE MAY BE CITED AS:	Andrianakis v Uber Technologies Inc & Ors; Taxi Apps Pty Ltd v Uber Technologies Inc & Ors
MEDIUM NEUTRAL CITATION:	[2022] VSC 196 First Revision: 27 April 2022 Second Revision: 19 May 2022

PRACTICE AND PROCEDURE – Legal professional privilege – Establishment of dominant purpose where in-house counsel are involved – Waiver – Whether documents prepared or communications made in furtherance of the commission of offences – Where the commission of offences is a fact in issue in the proceeding – *Evidence Act 2008* (Vic), ss 118, 119, 122, 125 – *Amcor Ltd v Barnes* [2011] VSC 341, referred to – *Banksia Securities Ltd v Trust Co* [2017] VSC 583 – *Carbotech-Australia Pty Ltd v Yates* [2008] NSWSC 1151, referred to – *Cargill Australia Ltd v Viterra Malt Pty Ltd* [2017] VSC 126, referred to – *IOOF Holdings Ltd v Maurice Blackburn Pty*

Ltd [2016] VSC 311 referred to – *Talacko v Talacko* [2014] VSC 328, referred to.

APPEARANCES - S ECI 2019 01926	Counsel	Solicitors
For the Plaintiff	Ms M Szydzik with Ms A Mobrici	Maurice Blackburn
For the Defendants	Mr D R Sulan SC with Ms A Campbell	Herbert Smith Freehills

APPEARANCES – S ECI 2020 01585		
For the Plaintiff	Mr T Bannon SC with Mr R A Yezerski & Mr A Emmerson	Corrs Chambers Westgarth
For the Defendants	Mr D R Sulan SC with Ms A Campbell	Herbert Smith Freehills

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HER HONOUR:

Introduction

1 This ruling concerns claims in respect of legal professional privilege by the defendants in each proceeding, such that certain documents are able to be withheld from inspection by the plaintiffs following discovery, either in whole or in part.

2 These two proceedings have been case managed together, and the issues in each are very similar. In proceeding S ECI 2019 01926 ('**Andrianakis Proceeding**'), the plaintiff ('**Mr Andrianakis**') makes a number of claims against seven defendants, which are specified companies in the Uber group ('**Defendants**'). Mr Andrianakis makes his claims on his own behalf and on behalf of a number of group members, this being a class action proceeding. In proceeding S ECI 2020 01585 ('**Taxi Apps Proceeding**'), the plaintiff Taxi Apps Pty Ltd ('**Taxi Apps**') makes similar claims against the same seven Defendants. Unless it is necessary to distinguish between them, I will refer to Mr Andrianakis and Taxi Apps as the Plaintiffs. I will describe the claims later in these reasons.

3 The parties have been making discovery of documents in accordance with previous orders of the Court. Having done so, the Plaintiffs have issued summonses seeking production to them of certain documents over which the Defendants have claimed privilege, with those claims being either over the whole of a document or part thereof. In the latter instance, partly privileged documents have been produced by the Defendants to the Plaintiffs in redacted form. In other words, the Plaintiffs have challenged a number of the privilege claims made by the Defendants.

4 The Defendants rely on the following materials in pressing their privilege claims:

(a) affidavit of Cameron Hanson affirmed 21 December 2021 ('**First Hanson Affidavit**'). Mr Hanson is a partner at Herbert Smith Freehills ('**HSF**'), solicitors for the Defendants in both proceedings;

(b) affidavit of Anuambikai Annam Ambikaipalan affirmed 17 December 2021 ('**Ambikaipalan Affidavit**'). Ms Ambikaipalan is a Senior Director and the

Head of Asia-Pacific Legal at Uber Technologies Incorporated (ie the first defendant);

(c) affidavit of Mr Hanson affirmed 2 February 2022 ('**Second Hanson Affidavit**');

(d) written submissions dated 21 December 2021 ('**Defendants' Submission**'); and

(e) written submissions in reply dated 2 February 2022 ('**Defendants' Reply Submission**').

5 Mr Andrianakis relies on the following materials in challenging the Defendants' privilege claims:

(a) affidavit of Elizabeth O'Shea affirmed 19 January 2022 ('**O'Shea Affidavit**'). Ms O'Shea is a principal at Maurice Blackburn Lawyers ('**MB**'), solicitors for Mr Andrianakis and the group members; and

(b) written submissions dated 19 January 2022 ('**Andrianakis Submission**').

6 Taxi Apps relies on the following materials in challenging the Defendants' privilege claims:

(a) affidavit of Michael Russell Catchpoole affirmed 19 January 2022 ('**Catchpoole Affidavit**'). Mr Catchpoole is a partner at Corrs Chambers Westgarth ('**Corrs**'), solicitors for Taxi Apps; and

(b) written submissions dated 19 January 2022 ('**Taxi Apps Submission**').

7 In addition, the Plaintiffs rely on a bundle of documents provided to the Court and the Defendants prior to the hearing ('**Tender Bundle**'), which I understand are documents extracted from the Defendants' discovery, and the parties all made extensive oral submissions at the hearing.

8 For the reasons which follow, I have made findings in respect of the key issues and applied them to each of the disputed Sample Documents. In very general terms, I have found that:

(a) the Defendants have provided sufficient evidence to establish their claims to legal professional privilege on the basis of seeking legal advice, subject to my confirmation of that by reviewing the Sample Documents. In some instances, legal advice has not been established as the dominant purpose of the communication or document;

(b) the Defendants have not established their claims to legal professional privilege on the basis of actual or anticipated litigation, where that is relied upon in respect of certain of the Sample Documents;

(c) there is sufficient evidence that the Defendants' in-house lawyers were likely to be providing legal advice, however each of the relevant Sample Documents need to be reviewed to assess the dominant purpose of the document or communication, in light of my Uber In-House Counsel Findings (see paragraph 142 below) and taking the approach set out in paragraph 143 below;

(d) the Plaintiffs have not adduced sufficient evidence to establish waiver of legal professional privilege where that is contended in respect of certain of the Sample Documents; and

(e) the exception for misconduct applies in the circumstances of this case such that the Defendants are not able to rely on their privilege claims in respect of legal advice obtained after 23 January 2014 in Victoria and 14 April 2014 in New South Wales, Queensland and Western Australia in respect of aspects of the operation of the ridesharing platform UberX ('**UberX**') such as launching and continuing to provide UberX using unlicensed drivers, avoiding enforcement activity or detection, and dealing with fines and prosecutions and drivers providing UberX services ('**UberX Partners**') about those, including supporting UberX Partners.[1]

[1] See paragraphs 280, 287 and 291 below.

Background

Subject matter of the proceedings

Andrianakis Proceeding

9 Justice Macaulay has had occasion to publish three separate rulings in relation to aspects of the Andrianakis Proceeding. In the first of those rulings his Honour has succinctly summarised the facts alleged in the Andrianakis Proceeding, which I gratefully adopt and set out below:[2]

> Broadly speaking, the UberX ride-sharing service consists of a system for delivering a commercial point-to-point passenger transport service whereby a prospective passenger, the Rider, requests a driver, the UberX Partner, to collect him or her from one designated point and transport him or her to another, for a fee. The request is made via an app (a software application) installed on a smartphone and is received by the UberX Partner on an associated app installed on that person's smartphone. Once the passenger transport service has been supplied, a fee is debited from the Rider's funds by means of an electronic funds transfer to an Uber entity. A share of the fee is then distributed electronically to the UberX Partner. These two apps and the software that lies behind them are central to the operation of the UberX service.
>
> The promoters and proprietors of the UberX service, that is, the Uber entities, do not own a fleet of cars nor do they employ a workforce of drivers. Rather, they established the software and digital platform by and upon which the service is conducted; recruited drivers, the UberX Partners, as independent contractors who were willing to perform the service using their own vehicles; made the two apps (the rider app and the driver app) available to Riders and UberX Partners respectively to enable them to find one another by making and responding to a request for a transport service; promoted the service; and generally provided necessary administrative and financial infrastructure.
>
> In each of the four Australian States where the UberX service commenced, there was an established regime of taxi-cab, hire car, limousine and/or like services supplying commercial point-to-point passenger transport services. These existing services were regulated by local regulations in each State, typically requiring the drivers, owners and operators of such services to be licensed or accredited to supply the relevant service and to only use vehicles that were also licensed or accredited for such use.
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> Regulations extended, amongst other things to matters such as requiring payment of licence fees, restricting the assignment of licences, stipulating the qualifications or credentials of drivers and fixing standards for vehicles. Licences were usually finite in number and, for that reason, acquired a

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2 *Andrianakis v Uber Technologies (Ruling No 1)* [2019] VSC 850 (***'Ruling No 1'***), [9]-[15]. His Honour indicated that the summary was derived from the statement of claim and the documents referred to in it. Note that the Uber entities referred to in the extract are the Defendants as I have defined them.

> tradeable value. They constituted a valuable commodity in the business of the service provider.
>
> Adherence to the regulations was enforced by laws which made it an offence to own or operate a commercial passenger transport service without holding the requisite licence or accreditation, or to use an unauthorised vehicle for such a service. Arguably, the practical effect of the regulations was that they created and upheld a form of market protection for those holding the requisite licences and accreditation in the supply of commercial point-to-point passenger transport services.
>
> When UberX services began in Australia, the UberX Partners, so it is alleged, typically were neither licensed or accredited to be drivers, owners or operators for the provision of commercial passenger transport services in any of the four States. Nor, it is said, were their vehicles typically licensed or accredited for use in the provision of such services. Accordingly, so it is alleged, the provision of the UberX service in the four Australian states typically involved breaches of the local laws and regulations which regulated the supply and operation of commercial point-to-point passenger transport services.
>
> Not only that, the introduction of the UberX service was said to have had a dramatic, adverse effect on the incomes of the incumbent passenger transport providers and of the value of the businesses — that is to say, upon the income of the licensed drivers, owners and operators of taxi-cabs, hire cars and limousines, and the value of their businesses.

10 Mr Andrianakis is a Victorian taxicab operator and driver, and he seeks damages for his lost income and the reduction in the value of his business said to be caused by the arrival of UberX in the passenger transport market in Victoria. As noted above, this is a group proceeding and Mr Andrianakis brings it on his own behalf and on behalf of all other Victorian point-to-point passenger transport service drivers, operators and owners, and on behalf of similar drivers, operators and owners in New South Wales, Queensland and Western Australia.[3] I shall refer to these states and Victoria collectively as the Relevant States.

11 The Defendants are alleged to be the Uber entities responsible for introducing UberX to Australia and operating the service.[4]

12 The key allegations made by Mr Andrianakis were also succinctly summarised by his Honour:[5]

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3 Ruling No 1, [3].
4 Ruling No 1, [4].
5 Ruling No 1, [18].

> Mr Andrianakis alleges that the Uber entities entered an agreement or combination among themselves to establish UberX in each of the four States with the intention of harming the incumbent licensed commercial point-to-point passenger service providers. The agreed means of establishing the UberX service was through the engagement of unlicensed drivers using non-accredited vehicles. The provision of the service using unlicensed drivers with non-accredited vehicles was, at the relevant time, an offence in each of the States. Knowing and intending that the conduct of the UberX service by that means would be illegal, each of the Uber entities that facilitated the establishment of the UberX service was complicit with the UberX Partners (that is, the drivers) in the offences which they committed when performing the service. Further, it is alleged that the establishment and conduct of the UberX service in each State by that means caused economic loss to the incumbent, licensed commercial point-to-point passenger services providers, such as Mr Andrianakis in Victoria.

13 This is a very short summary of the claims made in the Andrianakis Proceeding and it is fair to say that they are rather more complex than I have described. However, it is not necessary for me to go into that level of detail and complexity at this stage. While the Defendants' defence is complex and detailed as well, it is fair to say that the key allegations as summarised in the preceding paragraph are denied by them.

Taxi Apps Proceeding

14 From around June 2011, Taxi Apps has published and made available in Australia a software application known as the "GoCatch" app. From around February 2016, Taxi Apps has also published and made available a software application known as the "GoCatch Driver" app. The GoCatch app, once downloaded onto a device, allowed a person to register as a GoCatch passenger and to use the app to request point-to-point passenger transport services. Drivers who used the GoCatch app to provide these services to passengers were taxi cab drivers lawfully permitted to perform those services in the Relevant States, driving vehicles lawfully permitted to be used in the provision of those services. The GoCatch app facilitated payment from the passenger to the driver, with a fee payable by the driver to GoCatch. At various times in the Relevant States between 2016 and 2017, the GoCatch app and services were extended such that drivers were not required to be licensed taxicab drivers driving licensed taxis.

15 The claims made by Taxi Apps in the Taxi App proceeding are conveniently summarised in the Taxi Apps Submission,[6] from which I have summarised the following. Taxi Apps alleges that:

(a) one or more of the Defendants committed the tort of conspiring to injure Taxi Apps by unlawful means in connection with the Defendants' operation of the ridesharing platform, UberX;

(b) the Defendants provided UberX in the Relevant States in circumstances where ridesharing services in those states were unlawful. Taxi Apps' case is that the Defendants aided, abetted, counselled or procured the commission of offences in the Relevant States ('**Ridesharing Offences**');[7]

(c) while some of these offences were committed by UberX Partners, the Defendants (or one or more of them) were themselves primary offenders in respect of those offences under the common law or statute by reason of their knowledge and conduct in connection with those offences;[8]

(d) the Defendants adopted, and publicised, a policy of paying the fines of UberX Partners who were fined for committing Ridesharing Offences.[9] Taxi Apps contend that there is documentary evidence in support of that proposition,[10] which is said to reveal that the Defendants adopted a deliberate strategy of paying UberX Partners' fines so as to reduce or remove the disincentive to offending created by the prospect of such fines; and

(e) the Defendants engaged in a practice known as "greyballing", whereby they took steps to impede the efforts of regulators to detect unlawful ridesharing

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6 Taxi Apps Submission, [7]-[11].

7 The specific provisions of State law creating those offences are conveniently summarised in the Catchpoole Affidavit, [22]. The detail of the allegations in the Andrianakis Proceeding are already canvassed in *Ruling No 1*. The relevant Ridesharing Offences are substantially similar (but not identical) in the Taxi Apps Proceeding. The offences will be discussed in greater detail later in this ruling: see paragraphs 219, 223 and 224 below.

8 Catchpoole Affidavit, [23].

9 Taxi Apps Statement of Claim dated 31 March 2020 ('**Taxi Apps SOC**'), [85], [87], [89] and [91].

10 Described in the Catchpoole Affidavit, [77]–[103].

and impose fines on UberX Partners.[11] Taxi Apps contends that there is documentary evidence in support of that proposition,[12] which is said to establish that the Defendants had a stated policy, the Violation of Terms of Service or V-TOS Policy, which involved efforts to detect users of UberX who were likely to be regulators or enforcement officers, and to prevent or frustrate their efforts to identify UberX Partners who were engaging in the Ridesharing Offences.

16 The Defendants deny these allegations.

Procedural background regarding the subject matter of this ruling

The Defendants' discovery

17 Orders were made by the Court on 21 December 2020 for discovery by the parties. The Defendants were ordered to provide discovery to the Plaintiffs by way of some 35 categories, two of which applied only to the Taxi Apps Proceeding.[13] Prior to those orders, the parties had reached agreement as to some of the discovery categories and I settled the disputed categories following a hearing on 17 December 2020. I therefore had some familiarity with both proceedings prior to dealing with the challenges made in respect of the Defendants' privilege claims.

18 Between January and August 2021, the Defendants produced some 73,086 documents to Taxi Apps by way of discovery, in six tranches.[14] In the Andrianakis Proceeding, some 69,855 documents were produced to Mr Andrianakis by way of discovery.[15] It was explained to me that discovery in one proceeding was effectively discovery in the other, save that there were some documents discovered in the Taxi Apps Proceeding only by virtue of the two additional discovery categories in that proceeding. Apart

11 Taxi Apps SOC, [92]-[93].
12 Catchpoole Affidavit, [117]–[135].
13 Catchpoole Affidavit, [7].
14 Catchpoole Affidavit, [8].
15 Andrianakis Submission, [4].

from documents in those two additional categories, the discovery made by the Defendants was identical in both proceedings.[16]

19 In addition, the Defendants provided the Plaintiffs with schedules listing documents which were subject to privilege claims, either in respect of the whole document or part thereof ('**Privilege Schedules**'). There were around 12,400 documents in the Privilege Schedules. Some of these schedules listed documents which were subject to privilege claims by third parties, in whole or in part.[17]

Privilege challenges

20 On 23 September 2021, Mr Andrianakis filed a summons seeking production of unredacted copies of certain documents from the Privilege Schedules which were listed in a schedule attached to this summons. This summons was amended on 25 October 2021 so as to amend the schedule attached to it. On 8 October 2021, Taxi Apps filed a similar summons with attached schedules, seeking production of 3,971 common documents and 73 unique documents.[18] Mr Andrianakis' schedule does not state how many documents are sought, but I apprehend there are a similar number of documents as to those sought by Taxi Apps, as his schedule is lengthy, running to some 423 pages.

Orders made by the Court regarding privilege challenges

21 The Plaintiffs' summonses were listed before me for directions on 22 October 2021. At that time, it had been agreed between the parties that the privilege challenges would proceed by way of sample documents to be taken from the schedules attached to the summonses. The parties were in disagreement as to the number of sample documents and some other procedural aspects, but after hearing from the parties I made orders in both proceedings.

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16 Catchpoole Affidavit, [11].
17 Catchpoole Affidavit, [9].
18 Common documents being ones discovered in both proceedings; unique documents being ones discovered only in the Taxi Apps Proceeding.

22 In substance, the orders made regarding documents over which the Defendants claimed privilege were that ('**Sample Documents Orders**'):

(a) the Plaintiffs were to liaise and provide a list of up to 100 documents for the sample to the Defendants;

(b) the Defendants could nominate up to 20 additional documents for the sample;

(c) the documents nominated in accordance with this procedure were to be the '**Sample Documents**';

(d) the Defendants were to file and serve affidavit material and an outline of submissions in respect of the Sample Documents by 17 December 2021;

(e) the Plaintiffs were to file and serve affidavit material and an outline of submissions in respect of the Sample Documents by 14 January 2022; and

(f) the Defendants were to file any affidavits in reply and reply submissions in respect of the Sample Documents by 28 January 2022.

23 In substance, the orders made regarding documents over which third parties claimed privilege ('**Third Party Documents**') were that ('**Third Party Documents Orders**'):

(a) the Defendants were to file any affidavits and submissions in respect of the Third Party Documents by 14 January 2022; and

(b) The Plaintiffs were to file any affidavits and submissions in reply in respect of the Third Party Documents by 28 January 2022.

24 The Plaintiffs' summonses, limited to the Sample Documents and the Third Party Documents, were listed for hearing before me for 7 February 2022.

The parties' preparation of the privilege challenges, including for this hearing

25 On 5 November 2021, the Plaintiffs jointly nominated 100 sample documents in accordance with the orders made on 22 October 2021.[19] The Defendants did not nominate any additional documents. Accordingly, the Sample Documents comprise those documents nominated by the Plaintiffs on 5 November 2021.

26 The parties filed further materials, in accordance with the 22 October 2021 orders, although there was some slippage in parts of the timetable. No complaint is made about that.

27 With the delivery of the Defendants' reply material, disputes in respect of the 100 Sample Documents had been reduced to 77 documents in the Andrianakis Proceeding and 64 documents in the Taxi Apps Proceeding,[20] as a result of the following:

(a) the Defendants had withdrawn their privilege claims over 14 documents and identified two other documents which were not the subject of privilege claims by the Defendants but may be the subject of third party privilege claims;[21]

(b) Mr Andrianakis no longer pressed his objections to the privilege claims over seven documents;[22] and

(c) Taxi Apps no longer pressed its objections to the privilege claims over 20 documents.[23]

28 By the time of this hearing, the Plaintiffs had reviewed the Defendants' reply material and further refined their positions. Mr Andrianakis provided an 'aide memoire' on the morning of the hearing, which was a table listing the Sample Documents, and in respect of each of them stating the basis of the Defendants' claim (whether advice or litigation privilege) in their primary submission and in their reply submission,

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19 Catchpoole Affidavit, [17].
20 Second Hanson Affidavit, [14].
21 First Hanson Affidavit, [8], [12], [273]; Second Hanson Affidavit, [12]-[13].
22 Second Hanson Affidavit, [11].
23 Second Hanson Affidavit, [11]; Taxi Apps Submission, [16]; Andrianakis Submission, [2].

Mr Andrianakis' position and the bases for challenge, Taxi Apps' position and the bases for challenge, and the final position ('**Aide Memoire**'). Taxi Apps confirmed during the hearing that where Mr Andrianakis' position had changed after receipt of the Defendants' reply materials, it adopted the same position as Mr Andrianakis. The number of documents in dispute was not altered by the Aide Memoire, rather, the bases for the privilege claims and the bases of the challenges were changed in some respects.

29 Mr Andrianakis complains that the Defendants did not nominate an additional 20 Sample Documents, which is said to be contrary to the orders made on 22 October 2021.[24] He says that this may reduce the utility of the sampling process as the number of 120 documents had been chosen as an appropriate and proportionate size. Mr Andrianakis contends that the sample size will have reduced by 29%.[25] The Defendants reject this complaint, saying that the Court did not mandate them to nominate an additional 20 documents, and the Plaintiffs did not seek to nominate additional documents themselves to bring the number up to 120. The Defendants also say that the reduction of 29% is not accurate.[26] I accept the Defendants' submissions in this regard, although nothing much turns on it.

30 The Defendants experienced difficulties in preparing their affidavit material in respect of the Third Party Documents by the time stipulated (14 January 2022) and had not been able to do so prior to the hearing. The Court and the Plaintiffs were kept informed of this. Accordingly, there was no material before me in relation to the Third Party Documents, and that matter is to be dealt with separately.

Issues for determination in this ruling

31 There are several issues which are of general application in these proceedings which fall for consideration. Once those have been considered and ruled upon, it then remains for those rulings to be applied to the Sample Documents.

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24 Andrianakis Submission, [8].
25 Andrianakis Submission, [12].
26 Defendants' Reply Submission, [7].

32 The parties each dealt with general matters in their submissions and then made submissions in respect of each of the disputed Sample Documents.

33 At the commencement of the hearing, I observed that the purpose of this exercise was to determine, as far as the Court was able, the position in respect of privilege claims in these proceedings at a general level by making rulings (if possible) that could be used in reviewing the remainder of the challenged documents, using the Sample Documents as a means of elucidating that. In my view, for this exercise to be of utility to the parties, the determination needs to be expressed in a way that the parties can apply it to the remainder of the challenged documents, so as to avoid or at least minimise the number of documents remaining in dispute. My aim is that by making some general rulings and then applying them to the Sample Documents, the parties will be able to use those to guide them in dealing with the remaining challenged documents. Counsel for the parties all agreed that this approach was desirable.

34 It was common ground between the parties that the Court should inspect the Sample Documents. I accept this: the Court has power to do so,[27] and given the nature of the exercise as described above, it is important that I do so.

35 The issues for determination in this ruling which are of general application in the proceedings can be conveniently set out as follows ('**Issues**'):

(a) Have the Defendants provided sufficient evidence to establish their privilege claims?

(b) Have the Defendants waived privilege?

(c) Does the exception for misconduct apply here such that the Defendants are not able to rely on their privilege claims?

36 I intend to deal with each of these issues in turn, setting out the relevant evidence, the parties' submissions, and my analysis and conclusions. The affidavit material and the

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27 At both common law and under the Evidence Act, the Court has the discretion to do so: see *Bradford v Devlot 17 Pty Ltd* [2020] VSC 246, [60] and the authorities referred to in the footnote to that paragraph.

parties' submissions were extensive, detailed and lengthy. I have not set all of it out in these reasons, such an approach being both laborious and very time-consuming. The affidavits and written submissions are on the Court files and the detail is contained therein. However, I can assure the parties that all of the affidavits and submissions have been carefully read and considered, and taken into account in forming these reasons.

37 I will then turn to deal with each of the disputed Sample Documents. I have reviewed each of the disputed Sample Documents, along with the parties' submissions on each as set out in their written outlines and in oral submissions. I have created a table, which is contained in the Annexure to these Reasons. The Annexure is derived from the Aide Memoire and contains my ruling in respect of each of the disputed Sample Documents and brief reasons for each such ruling. Defined terms in the Annexure have the same meaning as in these Reasons unless otherwise stated.

38 Due to the matters referred to in paragraph 30 above, this ruling does not concern the Third Party Documents. It was common ground at the hearing that further preparation (with the exception of the Defendants' affidavits) and consideration of matters regarding the Third Party Documents would await delivery of this ruling.

Evidence

39 Generally speaking, it is more efficient to set out the evidence when dealing with each of the three identified issues, which is what I have done.

40 The parties made submissions in their written material concerning admissibility of evidence. However, the parties indicated at the hearing that they were each content to proceed on the basis that their evidentiary objections could be dealt with as matters of weight in respect of that evidence. I am also content to deal with the evidence on that basis.

General principles regarding legal professional privilege

41 Before turning to the Issues, it is convenient to set out some general principles regarding legal professional privilege.

Statutory provisions

42 Section 118 of the *Evidence Act 2008* (Vic) ('**Evidence Act**') deals with legal advice privilege, providing as follows ('**Advice Limb**'):

> Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of—
>
> (a) a confidential communication made between the client and a lawyer; or
>
> (b) a confidential communication made between 2 or more lawyers acting for the client; or
>
> (c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person—
>
> for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

43 Section 119 of the Evidence Act deals with litigation privilege, providing as follows ('**Litigation Limb**'):

> Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of—
>
> (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or
>
> (b) the contents of a confidential document (whether delivered or not) that was prepared—
>
> for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

44 Section 122 of the Evidence Act relevantly provides as follows ('**Waiver Provision**'):

> …
>
> (2) Subject to subsection (5), this Division does not prevent the adducing of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the

evidence because it would result in a disclosure of a kind referred to in section 118, 119 or 120.

(3) Without limiting subsection (2), a client or party is taken to have so acted if—

(a) the client or party knowingly and voluntarily disclosed the substance of the evidence to another person; or

(b) the substance of the evidence has been disclosed with the express or implied consent of the client or party.

(4) The reference in subsection (3)(a) to a knowing and voluntary disclosure does not include a reference to a disclosure by a person who was, at the time of the disclosure, an employee or agent of the client or party or of a lawyer of the client or party unless the employee or agent was authorised by the client, party or lawyer to make the disclosure.

(5) A client or party is not taken to have acted in a manner inconsistent with the client or party objecting to the adducing of the evidence merely because—

(a) the substance of the evidence has been disclosed—

(i) in the course of making a confidential communication or preparing a confidential document; or

(ii) as a result of duress or deception; or

(iii) under compulsion of law; or

(iv) if the client or party is a body established by, or a person holding an office under, an Australian law—to the Minister, or the Minister of the Commonwealth, the State or Territory, administering the law, or part of the law, under which the body is established or the office is held; or

(b) of a disclosure by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the client and the other person; or

(c) of a disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to the proceeding or an anticipated or pending proceeding in an Australian court or a foreign court.

45 Section 125 of the Evidence Act relevantly provides as follows ('**Misconduct Exception**'):

Loss of client legal privilege—misconduct

(1) This Division does not prevent the adducing of evidence of—

(a) a communication made or the contents of a document prepared by a client or lawyer (or both), or a party who is not represented in the proceeding by a lawyer, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or

(b) a communication or the contents of a document that the client or lawyer (or both), or the party, knew or ought reasonably to have known was made or prepared in furtherance of a deliberate abuse of a power.

(2) For the purposes of this section, if the commission of the fraud, offence or act, or the abuse of power, is a fact in issue and there are reasonable grounds for finding that—

(a) the fraud, offence or act, or the abuse of power, was committed; and

(b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act or the abuse of power—

the court may find that the communication was so made or the document so prepared.

(3) In this section, *power* means a power conferred by or under an Australian law.

Applicable Principles

46 The principles in respect of client legal privilege[28] are well established and there is little utility setting out a fulsome discussion of them here, unless that is necessary to deal with the parties' submissions. Generally speaking, the parties did not appear to differ on the general principles regarding privilege.

47 The common law principles inform the content and application of ss 118 and 119.[29] In the context of applying the Evidence Act, in *IOOF Holdings Ltd v Maurice Blackburn Pty Ltd*,[30] Elliott J stated that the principles applicable to privilege "are not controversial" and summarised them as follows:[31]

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28 The Evidence Act refers to it as 'client legal privilege' whereas it is usually referred to in common law cases as 'legal professional privilege'. Nothing turns on this distinction and the terms are used interchangeably in these reasons.

29 *Samenic Ltd v APM Group (Aust) Pty Ltd* [2011] VSC 194, [19].

30 [2016] VSC 311 ('***IOOF v Maurice Blackburn***').

31 Ibid, [47], citations omitted.

(1) The party claiming the privilege bears the onus. That onus will only be discharged if the party establishes facts from which the court may determine that the privilege is being properly claimed.

(2) "Purpose" in "dominant purpose" means the purpose which led to the creation of the document or the making of the communication.

(3) The "dominant purpose" is the purpose which was the ruling, prevailing or most influential purpose at the time the document was brought into existence.

(4) There can be only 1 dominant purpose. If there are 2 purposes of equal weight, neither fits the description of a "dominant purpose".

(5) If a dominant purpose existed, that dominant purpose must be determined objectively, having regard to the evidence, the nature of the document and the parties' submissions. That said, evidence of the subjective purpose of the person making the communication or creating the document is relevant.

(6) Ordinarily, the relevant purpose is that of the person who brings into existence the document which includes the privileged communication, but this will not always be the case.

(7) As the test is directed towards the purpose of bringing the document into existence, a copy of a non-privileged document may be privileged.

(8) The material relied upon by the person claiming privilege must be focused and specific. Formulaic and bare conclusory assertions are not sufficient.

(9) With respect to advice privilege, in considering whether a communication is for the purposes of legal advice, the purposes must be construed broadly. Although it does not extend to pure commercial advice, legal advice, in this context, includes any advice as to what should prudently and sensibly be done in the particular legal circumstances in which the client finds itself.

(10) Further to subparagraph (9), a document created by a lawyer that records her or his legal work carried out for the benefit of the client, such as a research memorandum, a summary of documents or a chronology, will be protected by privilege whether or not the document is provided to the client. Similarly, notes and other material created by the client that relate to the legal advice sought (whether or not actually communicated to the lawyer), or that relate to communications with the lawyer, may be privileged where such documents meet the relevant "dominant purpose" test.

(11) With respect to litigation privilege, for a proceeding to be "anticipated or pending" for the purposes of s 119, there must be more than a mere possibility of litigation. As a general rule, there must be a real prospect of litigation, but it does not have to be more likely than not.

(12) Many claims for privilege may be determined by the court without the need to inspect the documents. Further, ordinarily, the court will not

examine the documents if the party claiming privilege has not established a basis for the claim in an affidavit in support. However, in an appropriate case, the court may examine the documents to make a decision about privilege, particularly where the parties agree to this course.

(13) A law firm or a company may be a "client" if it engages or employs its own employee lawyer, but privilege will only attach to the relevant communication or document if the employee is consulted confidentially in her or his professional capacity, with the requisite degree of independence, in relation to a professional matter.

Issue 1: Have the Defendants provided sufficient evidence to establish their privilege claims?

48 There were three matters raised by the parties which go to Issue 1. These were:

(a) the nature of the evidence relied upon by the Defendants, that evidence primarily being hearsay. As noted above, the parties indicated an intention that this be dealt with as a matter of weight in establishing the Defendants' claims for privilege, rather than as a formal objection to evidence;

(b) whether the Defendants have established that the dominant purpose of the creation of the documents/communications was legal advice (so as to fall within the Advice Limb) or for use in litigation (so as to fall within the Litigation Limb); and

(c) whether the conduct of the Defendants' discovery was such as to cast doubt upon the legitimacy of their claims to privilege.

Nature of the evidence relied upon by the Defendants

49 The evidence relied upon by the Defendants in respect of their privilege claims are the First Hanson Affidavit, the Second Hanson Affidavit and the Ambikaipalan Affidavit.

Mr Andrianakis' submissions

50 Mr Andrianakis submits that the party claiming privilege must, by direct admissible evidence, set out the facts from which the Court can consider whether the assertion

concerning the purpose of the communication is properly made, and that it has been said that the best evidence is that of the person whose purpose is in question.[32]

51 He says that where a party seeks to establish privilege through the evidence of the party's lawyer, and not the author of the communication or document, such evidence may be of limited utility. In particular, where the lawyer purports to give evidence about 'purpose' in the absence of instructions having been sought from the author of the communication or document, such evidence rises no higher than that lawyer's own inference from the same objective facts which are available to the Court.[33] In that way, the lawyer's own evidence about purpose has little, or no, probative value in supporting the privilege claim, and the Court is to instead make its own assessment based upon the objective facts available to it consistently with the approach taken by Macaulay J in *Cargill No 8*.[34]

52 Mr Andrianakis submits that the evidence relied on by the Defendants is limited in scope, observing that the Ambikaipalan Affidavit does not address the Sample Documents directly. He says that no evidence has been filed by or on behalf of any author of the Sample Documents, nor any other individual from Uber who might give evidence about the factual context in which each document was prepared or communication made.

53 Of the First Hanson Affidavit, Mr Andrianakis submits that the deponent purports to give evidence about the purpose for which each communication was made or document prepared. Importantly, however, in no instance does Mr Hanson set out that he sought or received instructions from any author of any document about the purpose for which that author made the communication or prepared the document. Nor does Mr Hanson set out that he sought and received instructions about facts and context surrounding the documents from any individuals within Uber, which may shed light on the question of purpose. Rather, in each instance, Mr Hanson purports

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32 *Hancock v Rinehart (Privilege)* [2016] NSWSC 12 ('***Hancock***'), [27], [32].
33 *Cargill Aust Ltd v Viterra Malt Pty Ltd (No 8)* [2018] VSC 193 ('***Cargill No 8***'), [52].
34 Ibid, [52].

to give evidence about 'purpose' based upon his own review of the document and what he describes as 'context'. The context he refers to is almost exclusively limited to the Sample Documents themselves and other discovered documents which are referred to in the First Hanson Affidavit. There are a small number of Sample Documents where Mr Hanson purports to rely on context without identifying the source, which evidence is inadmissible or at least of very limited probative value.

54 Mr Andrianakis relies on the comments of Daly AsJ in *Setka v Dalton*,[35] where her Honour stated that:

> However, [the deponent's] lack of direct involvement in the relevant events and communications means that, where there is some doubt about the provenance and purpose of particular communications which cannot be resolved by inspection of the document recording the communication in question, then the absence of direct, specific evidence regarding the purpose (as opposed to the description) of the document concerned means that, in such cases, Boral will not have discharged the burden of establishing that the dominant purpose of the relevant communication was for Boral to seek or receive legal advice. In other words, while the evidence relied upon by Boral is sufficient to advance Boral's claims for privilege, in some cases, the evidence is generally insufficiently direct or focussed to resolve any doubts which arise upon inspection of the challenged documents.[36]

Taxi Apps' submissions

55 Taxi Apps refers to *Krok v Szaintop Homes Pty Ltd (No 1)*, where Judd J dealt with the nature of the evidence required to establish a claim of privilege as follows:

> The evidence advanced in support of a claim for client legal privilege attaching to a document must at least establish the purpose for which the document was made, identify the maker and the party for whom the document was prepared, and establish the elements of confidentiality. … Verification of the basis for the claim of privilege or confidentiality is not evidence of confidentiality.[37]

56 The remainder of Taxi Apps' submissions on this topic are very similar to those of Mr Andrianakis,[38] and I do not need to repeat them.

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35 *Setka v Dalton (No 2) (Legal professional privilege)* [2021] VSC 604 ('***Setka***').
36 Ibid, [89].
37 [2011] VSC 16, [17].
38 See Taxi Apps Submission, [21]-[23].

The Defendants' submissions

57 The Defendants make three points in response to the Plaintiffs' submissions about the nature of the evidence relied upon.

58 First, the Defendants say that the purpose for which a document is brought into existence is to be determined objectively. They contend that a party may discharge its onus as to dominant purpose by:

> evidence as to the circumstances and context in which the communications occurred or the documents were brought into existence, or by evidence as to the purposes of the person who made the communication, or authored the document, or procured its creation. It might also be discharged by reference to the nature of the documents, supported by argument or submissions.[39]

59 The Defendants point to numerous cases where privilege has been established in the absence of direct evidence from the author of the relevant communication.[40] They say that this is because the nature of the evidence required to be called to support a claim for privilege will vary in each case.[41]

60 The Defendants also say that in the present case the Plaintiffs' generalised attack fails to take into account the historical nature of the documents (being between five and nine years old) and the significant number of authors and recipients (most of whom have left the Uber entities[42]). They say that there are also case management considerations relevant to the nature of the evidence required to determine a disputed privilege claim:

> … it seems to me that each case turns on its facts, and the availability of and practicality of adducing direct, non-hearsay evidence is a relevant factor. Principles of efficient case management also loom large, particularly where there are a large number of documents where claims for legal professional privilege are in dispute.[43]

61 Secondly, the Defendants say that the Ambikaipalan Affidavit provides direct evidence as to how the legal team functioned and that relevant evidence is adduced

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39 *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30 ('***AWB***'), [44(1)-(2)]; see also *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No 4)* [2014] FCA 796 at [32].

40 The Defendants refer to *Cargill No 8*; *Setka*; *Regent 125 Pty Ltd v Brdar* [2019] VSC 177; *Malone v La Playa Nominees Pty Ltd* [2021] VSC 271.

41 *Setka*, [73]ff.

42 Ambikaipalan Affidavit, [24]-[30].

43 *Setka*, [81].

through their business records tendered on the application (ie the Tender Bundle and the Sample Documents) which properly contextualises the nature of the privileged communications.

62 Thirdly, the Defendants say that the generalised attack on the adequacy of the evidence does not preclude the Court from inspecting the relevant documents.

Analysis

63 It is apparent from a reading of the Ambikaipalan Affidavit that its purpose is to provide evidence as to the structure and function of the Defendants' in-house legal team; the qualifications, role and other details of each of the lawyers employed by Uber ('**Uber In-House Counsel**') who appear in the Sample Documents; and other employees who were not in-house lawyers but were members of the legal team and appeared in the Sample Documents.[44]

64 Ms Ambikaipalan commenced employment with Uber, in an in-house counsel role, in January 2016 and has had various roles in the legal team since then.[45]

65 Ms Ambikaipalan identifies sixteen employees who were Uber In-House Counsel and three who were not in-house lawyers but were members of the legal team.[46] From my review of paragraphs 32 to 139 of the Ambikaipalan Affidavit, 14 of the 16 Uber In-House Counsel and two of the three persons in the legal team not employed as lawyers are no longer employed by Uber.

66 In addition, Ms Ambikaipalan deposes that there are 19 employees who were not members of the legal team and were authors of or appeared in the Sample Documents. She lists those employees at Annexure A to the Ambikaipalan Affidavit, and says that five of them are still employed by Uber, and of those five each employee authored one document each within the Sample Documents.[47]

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44 Ambikaipalan Affidavit, [7].
45 Ambikaipalan Affidavit, [11].
46 Ambikaipalan Affidavit, [7].
47 Ambikaipalan Affidavit, [30].

67 Accordingly, I accept the submission that Ms Ambikaipalan does not give direct evidence as to the dominant purpose regarding each of the Sample Documents.

68 However, Ms Ambikaipalan's evidence clearly supports the Defendants' submission as to the case management concerns which are relevant in these proceedings. It is clear that very few of the employees appearing in the Sample Documents, whether they are Uber In-House Counsel, non-lawyer members of the legal team, or other Uber employees, remain employed by Uber. I accept that those former employees were not available to the Defendants for the purpose of this discovery exercise. Further, I also consider it inefficient to have those who remain employed by Uber and who appear in the Sample Documents to all make affidavits in respect of this exercise.

69 On the other hand, I accept the Plaintiffs' observations about the general and indirect nature of the evidence given in the First Hanson Affidavit. Their criticism is not addressed in the Second Hanson Affidavit, in that Mr Hanson does not say anything about the source of his evidence as to the purpose of the relevant communications/documents.

70 Effectively, Mr Hanson's evidence about the purpose of the documents/communications is based on his review of the Sample Documents and other relevant documents, his knowledge of the context and the subject matter of the proceedings based on having been involved in them for some time, and his extensive experience as a lawyer. In essence, he is discerning the purpose from conducting that review. While the Court is assisted by his evidence as to the context and surrounding circumstances, and as to the participants in the various documents/communications, at the end of the day his statements about purpose are merely his opinions based on the exercise he has undertaken. It remains for the Court to undertake a similar exercise, informed by the evidence before it, in order to discern the purpose of the Sample Documents.

71 Therefore, the evidence relied on by the Defendants has its limitations and they are such as to mean that it is imperative for me to inspect the Sample Documents. I accept,

however, that there is sufficient evidence led to mean that I should do so and that while the power of inspection is not to be used as a substitute for evidence, privilege may be established by the Court drawing inferences based on the documents themselves.[48]

72 I also accept Mr Andrianakis' submissions based on *Setka*: if there is no direct evidence as to the purpose of the document and the purpose or dominant purpose cannot be ascertained from the document itself or if the purpose is ambiguous on the face of the document, then the Court cannot be satisfied that the dominant purpose is a privileged one.

73 Accordingly, I do not regard the nature of the evidence relied on by the Defendants as precluding, at the general level, their claims to privilege.

Dominant purpose

74 Mr Andrianakis challenges the privilege claims in respect of 59 of the Sample Documents on the basis that they have not discharged their burden in establishing that the dominant purpose for the document/communication was a privileged one.[49] Taxi Apps also challenges a number of the Defendants' privilege claims on this basis.

75 The parties made some general submissions about the dominant purpose test, the principles in respect of which I have already summarised above.

76 In addition to those, the Defendants submit that where the documents/communications involve external lawyers, it is appropriate to infer the existence of privilege from the very nature of documents falling within this category. In this regard, they refer to *AWB*, where Young J said that:[50]

> where communications take place between a client and his or her independent legal advisers, or between a client's in-house lawyers and those legal advisers, it may be appropriate to assume that legitimate legal advice was being sought, absent any contrary indications.

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48 *Cargill No 8*, [43], [63].
49 Andrianakis Submission, [15].
50 *AWB* [44](4); see also *Baron v Gilmore* [2018] NSWSC 439, [13]-[15].

77 The Defendants also say that even if the description of the documents themselves was not sufficient to establish privilege, the First Hanson Affidavit provides ample basis to establish the dominant purpose for which they were created. For example, Mr Hanson says that SD 6 is a draft advice issued by Herbert Smith Freehills regarding taxi regulation in Victoria.[51]

78 In my view, this proposition is relatively uncontroversial. However, all it does is aid in assessing the dominant purpose of each document. It does not create a presumption which the Plaintiffs must rebut; rather, the onus remains on the Defendants to satisfy the dominant purpose test.

79 The Defendants submit that in considering each of the Plaintiffs' challenges, the Court ought to start from the position that legal professional privilege is an important substantive right, and "will not be allowed to be undermined by an overly narrow or technical approach to questions involved, such as the identification of the relevant advice in question".[52]

80 The Defendants also say that the Plaintiffs frequently rely upon insubstantial evidence (such as single sentences in the unredacted part of a document, or other communications that are not connected to the privileged document) and then seek extrapolate from that evidence the possibility that the document had some other purpose. Even where that possibility is established, it says nothing as to the likelihood that the dominant purpose for the creation of the document falls within or outside a privileged purpose.

81 In my view, this will fall for determination when considering the individual Sample Documents. I do not think a general proposition can be elicited from the Defendants' submission in this regard.

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51 First Hanson Affidavit, [38]-[40].

52 *DSE (Holdings) Pty Ltd v InterTAN Inc* (2003) 135 FCR 151 ('***DSE***'), per Allsop J (as his Honour then was), [31].

82 The Defendants submit that the Plaintiffs' approach to privilege, particularly the Advice Limb is overly narrow. The Plaintiffs frequently dispute that a document is privileged because, they submit, it may not, itself, contain a specific request for advice or the provision of legal advice. The Defendants say that approach is contrary to law: in a solicitor/client relationship, the document need only form part of the continuum of communications aimed at keeping both informed so that advice may be given as needed. The Defendants refer to Taylor LJ's observations in *Balabel v Air-India* that,[53] in most solicitor and client relationships, legal advice:

> … may be required or appropriate on matters great or small at various stages. **There will be a continuum of communication and meetings between the solicitor and client.** The negotiations for a lease such as occurred in the present case are only one example. **Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.** A letter from the client containing information may end with such words as "please advise me what I should do." **But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice.** Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.

83 At a general level, I consider the Defendants' submission in this regard to be correct. There does not need to be a specific request for advice or provision of advice in the individual communication. However, this can only be taken so far. There needs to be some evidence, either on the face of the document itself or from some other source (such as affidavit material or another contemporaneous document that is brought to the Court's attention), which would allow the Court to conclude that the communication was part of this continuum. This may be able to be more readily inferred where the communications are with external lawyers. In my view, particular care needs to be taken when seeking to apply this proposition to in-house lawyers. In this case, I do not consider it appropriate to infer from the participation of Uber In-House Counsel in communications alone, without more, that those

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53 [1988] 1 Ch 317 ('***Balabel***') (quoted with approval in *DSE* at [38] (bold emphasis added)). The Defendants also say that this approach to privilege has been adopted on numerous occasions: see, eg, *Setka*, [86]; *AWB Ltd v Cole* (2006) 152 FCR 382 at [100]; *DSE*, [100]; *Dalleagles Pty Ltd v Australian Securities Commission* (1991) 4 WAR 325 per Anderson J at 332-4; *IOOF Holdings Ltd v Maurice Blackburn*, [47(9)].

communications were part of the continuum of communications keeping the lawyer and the non-lawyer informed so that advice could be given as needed.

84 Some of the Plaintiffs' challenges to the dominant purpose being a privileged one concerned the claims made by the Defendants that certain of the Sample Documents were privileged on account of the Litigation Limb. In that regard, the Defendants' initial privilege claims regarding the Sample Documents were on the basis of the Advice Limb, but by the Defendants' Reply Submission, there were a number of instances where documents were also said to be privileged due to the Litigation Limb.

85 Most of the Plaintiffs' challenges to the dominant purpose being a privileged one concerned documents involving Uber In-House Counsel.

86 It is convenient to consider each of these two matters, the Litigation Limb claims and the Uber In-House Counsel involvement, in turn, which I do immediately below.

Whether the dominant purpose for the creation of the documents/communications is a privileged purpose – claims based on the Litigation Limb

87 The Litigation Limb claims emerged in the Defendants' Reply Submission and not earlier, and were made in respect of particular Sample Documents and not in a general way. In oral submissions, Mr Andrianakis' Counsel stated that the Defendants had not adduced any evidence to support their Litigation Limb claims. Apart from this, the submissions of the Plaintiffs on this topic were contained in the Aide Memoire and were made in respect of the particular Sample Documents. The Defendants made some oral submissions about their Litigation Limb claims, which I set out below.

88 Although the Plaintiffs' submissions regarding the Litigation Limb were in respect of specific Sample Documents, there are some matters raised in them which I consider may be of general application. I have therefore sought to draw these out here, before considering the individual documents (which I do later in these reasons).

89 The main issue between the parties is whether the Defendants have satisfied the Court that the requirements of s 119 of the Evidence Act have been met in that the legal

services were provided in relation to a proceeding, or an anticipated or pending proceeding, in which the Defendants are or may be, or were or might have been, a party. In other words, whether there was a proceeding (or proceedings) or an anticipated or pending proceeding (or proceedings), where the Defendants (or any one of them) are or may be a party.

Mr Andrianakis' submissions

90 As already mentioned, Mr Andrianakis says that in respect of the privilege claims on the basis of the Litigation Limb, the Defendants have not adduced any evidence.

Mr Andrianakis submits that the Defendants have not identified the pending or anticipated proceedings relied upon and, in particular, they have not explained how an investigation by a relevant regulatory authority gives rise to actual or anticipated proceedings. Mr Andrianakis also submits that s 119 only applies in relation to legal proceedings in respect of which the client, ie the Defendants, was or might have been a party, and that this is not established on the evidence. Taken together, Mr Andrianakis submits that to the extent any document evidences any regulatory investigation or action taken against or in respect of an UberX Partner, this evidence neither rises to the level of actual or anticipated proceedings nor concerns the Defendants. Mr Andrianakis contends that unless the relevant Sample Documents themselves evidence these matters, the Defendants' privilege claim based on s 119 are not made out.

Taxi Apps' submissions

91 Taxi Apps adopted Mr Andrianakis' submissions in respect of the Litigation Limb.

The Defendants' submissions

92 The Defendants' Litigation Limb claims are in addition to their claims based on the Advice Limb.

93 In respect of the meaning of an anticipated or pending proceeding, the Defendants rely on *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority*,[54] where the Court of Appeal stated that:

> In summary, then, as a general rule at least, there must be a real prospect of litigation, as distinct from a mere possibility, but it does not have to be more likely than not.

94 The Defendants submit that some of the Sample Documents the subject of a Litigation Limb claim concerned litigation or potential litigation against Uber, not UberX Partners.[55] The Defendants acknowledged in oral submissions that there was no specific evidence before me, in the affidavit material, about the prospect of litigation against the Defendants or any of them. Nonetheless, they say that this is established by some of the Sample Documents and by some of the documents in the Tender Bundle going to "the question of enforcement action and the like."[56] These documents in the Tender Bundle were not identified for me by the Defendants.

Analysis

95 The Plaintiffs are correct in their submissions that the Defendants have not adduced evidence of actual or anticipated proceedings which could give rise to s 119 applying. Neither of Mr Hanson's affidavits address this.

96 I accept the Plaintiffs' submissions that s 119 applies in respect of legal services obtained by the client who is the party or likely party to the actual or anticipated proceedings. Accordingly, proceedings against UberX Partners but not the Defendants do not fall within the Litigation Limb. I do not accept that matters such as UberX Partners being invited to interviews with the relevant authority fall within the Litigation Limb: firstly, there is insufficient evidence to establish the connection between this and actual or anticipated proceedings; and secondly, even if there was

54 (2002) 4 VR 332, [19].
55 In this regard, the Defendants refer to SD 23, 28, 30, 32, 34, 36, 39, 40 and 49.
56 Transcript, 7 May 2022, 91.19-29.

such evidence, it would concern proceedings against or in respect of UberX Partners and not the Defendants.

97 Accordingly, I have taken the approach urged upon me by the Plaintiffs: each of the disputed Sample Documents where the Defendants rely on the Litigation Limb has been reviewed so as to ascertain whether there is evidence of actual or anticipated legal proceedings to which the Defendants (or any one or more of them) are, or are likely to be, a party. If that is not revealed by the Sample Documents themselves, then I have rejected the Defendants' claim to privilege based on the Litigation Limb.

Whether the dominant purpose for the creation of the documents/communications is a privileged purpose – claims involving Uber In-House Counsel

Mr Andrianakis' submissions

98 Mr Andrianakis submits that while the concept of legal advice in the context of advice privilege is fairly broad, it is not without its limits. It extends beyond formal advice as to the law to include "professional advice as to what a party should prudently or sensibly do in a relevant legal context" but does not extend to advice that is purely factual, administrative or commercial.[57]

99 He contends that in the context of in-house counsel, the authorities recognise that the individual often has mixed commercial and legal involvement.[58] As Spigelman CJ explained in *Sydney Airports Corp Ltd v Singapore Airlines Ltd*:[59]

> An in-house solicitor is, by reason of his or her position, more likely to act for purposes unrelated to legal proceedings than an external solicitor who, in the normal course, has no relevant function other than that involving legal proceedings and/or legal advice. An in-house solicitor may very well have other functions. Accordingly, in determining whether or not a document was brought into existence for a purpose which was both privileged and dominant, the status of the legal practitioner is not irrelevant.

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57 *Balabel*, [323], [330]; *DSE*, [45]; *AWB* [44(7)]; *BWO19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 299, [62]; *Archer Capital 4A Pty Ltd v Sage Group plc (No 2)* (2013) 306 ALR 384 ('***Archer Capital***'), [72].

58 See *Archer Capital,* [59]-[73].

59 [2005] NSWCA 47 ('***Singapore Airlines***'), [24]. See also *Seven Network Ltd v News Ltd* [2005] FCA 142, [4]-[5].

100 While the courts have held that privilege ought not be denied simply on the basis of some commercial involvement,[60] nonetheless, in order for the Court to be satisfied that a document is privileged it must be satisfied that the lawyer was acting in a legal context or role when preparing the document or making the communication in question.[61]

101 Mr Andrianakis refers to the Defendants' Submission at paragraph 17, where the Defendants submit, citing the decision of Wigney J in *Australian Competition and Consumer Commission (ACCC) v NSW Ports Operations Hold Co Pty Ltd* ('***NSW Ports***'),[62] that:

> The Court should take "an appropriately broad and practical approach to the scope or meaning of "legal advice" in this context, particularly insofar as in-house lawyers are concerned" and where the "commercial or administrative aspects of the advice are essentially part of the overall legal advice and cannot be separated from it", the privilege claim should be upheld.

102 Mr Andrianakis says that it is helpful to read the totality his Honour's reasoning in that regard to properly understand the point his Honour was making. Those paragraphs state:

> [194] Having inspected the part of the email over which privilege is claimed, I am satisfied that, taking an appropriately broad and practical approach to the scope or meaning of "legal advice" in this context, particularly insofar as in-house lawyers are concerned (see *DSE* at [21] and [45]; *AWB* at [100]; *Archer Capital* at [50]–[51]), the email records or reveals a communication or communications made for the dominant purpose of the Port of Newcastle parties receiving legal advice from an in-house lawyer acting in his capacity as a solicitor. There are elements of the requested advice that might perhaps be said to involve commercial or administrative matters, however the advice could also be said to involve what the Port of Newcastle parties should or should not do in a particular legal context. Elements of the advice also involve the Port of Newcastle parties' legal obligations. The commercial or administrative aspects of the advice are essentially part of the overall legal advice and cannot be separated from it.
>
> [195] The Port of Newcastle parties' advice privilege claim in respect of part of document 62 is accordingly upheld.

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60 *DSE*, [22].
61 *Archer Capital*, [72].
62 [2020] FCA 1232, [194]-[195].

103 Mr Andrianakis says that it is apparent from the full extract of paragraph 194 that his Honour considered that the email in question was sent for the purpose of receiving legal advice, however there were "elements" of the redacted text that "might perhaps" be said to involve commercial or administrative matters. His Honour considered that those "commercial or administrative aspects" were "essentially part of the overall legal advice and [could not] be separated from it".

104 Mr Andrianakis submits that *NSW Ports* does not detract from the orthodox position that the dominant purpose of the communication overall must still concern the provision of legal advice, and that Wigney J merely recognised that where there are some aspects of a communication that might be (perhaps) administrative or commercial and which are "essentially part of the legal advice" and not separable, the privilege claim will be upheld in respect of the totality of the communication.

105 Mr Andrianakis submits that some authorities have recognised a separate requirement of professional independence for privilege to attach under the Advice Limb.[63] In *Australian Securities and Investments Commission (ASIC) v Rich*, Hamilton J stated that the relevant test is whether the communication can be characterised as "the giving of independent legal advice by a person acting in the role of a legal adviser giving advice to a client".[64]

106 In this regard, Mr Andrianakis says that professional independence may be more difficult to establish with respect to communications with, and documents prepared by, in-house counsel.[65] In *Telstra Corp Ltd v Minister for Communications, Information Technology & The Arts (No 2)*, Graham J stated:[66]

> In my opinion an in-house lawyer will lack the requisite measure of independence if his or her advice is at risk of being compromised by virtue of the nature of his employment relationship with his employer. On the other hand, if the personal loyalties, duties and interests of the in-house lawyer do

63 For example, see *Nipps (Administrator) v Remagen Lend ADA Pty Ltd* (2021) 152 ACSR 196, [59] (Banks-Smith J); *Mortgage Results Pty Ltd v Millsave Holdings Pty Ltd (Legal Privilege)* [2017] VSC 704 ('***Mortgage Results***'), [9(m)].

64 [2004] NSWSC 1017, [18]. See also *Australian Hospital Care (Pindara) Pty Ltd v Duggan (No 2)* [1999] VSC 131 ('***Duggan***'), [36]-[37].

65 See *Archer Capital,* [59]-[73]; *AWB* 46 [44(10)].

66 [2007] FCA 1445, [35]; *Banksia Mortgages Ltd v Croker* [2010] NSWSC 535, [23]-[26].

> not influence the professional legal advice which he gives, the requirement of independence will be satisfied.

107 Mr Andrianakis contends that whether an in-house lawyer is sufficiently independent will turn on the facts and the nature of his or her employment. As Tamberlin J stated in *Seven Network Ltd v News Ltd*:[67]

> The courts recognise that being a lawyer employed by an enterprise does not of itself entail a level of independence. Each employment will depend on the way in which the position is structured and executed. For example, some enterprises may treat the in-house adviser as concerned solely in advising and dealing with legal problems.
>
> …
>
> Commercial reality requires recognition by the courts of the fact that employed legal advisers not practising on their own account may often be involved to some extent in giving advice of a commercial nature related to the giving of legal advice. Such involvement does not necessarily disqualify the documents relating to that role from privilege. The matter is necessarily one of fact and degree and involves a weighing of the relative importance of the identified purposes.

108 In other instances, courts have considered that no such separate requirement of independence arises and the role in which a lawyer is acting is properly a matter relevant to the question of purpose.[68]

109 In any event, Mr Andrianakis submits that as was concluded by Wigney J in *Archer Capital*, in any given situation not much will likely turn on the different approaches, because the two concepts of independence and dominant purpose are inextricably linked.[69]

110 In relation to those Sample Documents where the Defendants rely on the involvement of Uber In-House Counsel to establish privilege through the Ambikaipalan Affidavit, Mr Andrianakis submits that the Defendants seek to draw a bright line distinction between the legal roles of its legal team members and commercial and business

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67 [2005] FCA 142, [4]-[5].

68 The different approaches were described recently by the New South Wales Court of Appeal in *Director of Public Prosecutions (Cth) v Kinghorn; Kinghorn v Director of Public Prosecutions* (2020) 102 NSWLR 72 ('***Kinghorn***'), [59] per Bathurst CJ, Fullerton and Beech-Jones JJ. See also *Banksia Securities Ltd v Trust Co* [2017] VSC 583 ('***Banksia Securities***'), [52] per Sifris J.

69 *Archer Capital* [72]-[73].

aspects of the business. Uber had maintained (and continues to maintain) separate teams in addition to legal that reported to separate executives within Uber that were responsible for business functions, such as operations, product development, policy and communications.[70] However, Mr Andrianakis says that it does not follow that merely because the formal structure of Uber was to have a separate legal team that Uber's in-house lawyers were not involved in giving advice of a commercial nature.

111 Mr Andrianakis points to a statement made by Ms Salle Yoo, at the time employed as General Counsel at Uber Technologies,[71] where she described the role of the legal team within Uber thus:[72]

> You know, I tell my legal team: **we are not here to solve legal problems. We're here to solve business problems.** Legal is our tool; it's our special tool that we have, but **at the end of the day we're here, each of us, to solve a business problem**. (Emphasis added by Mr Andrianakis)

112 Mr Andrianakis contends that this description is consistent with documents discovered in the proceedings. For example, in an email of January 2015, Mr Mike Brown (in the role of Regional General Manager, Uber Southeast Asia and ANZ) and Mr Allen Penn (in the role of Director and General Manager, Uber China) discuss the requirement that Uber's in-house counsel deliver "strategic advice, creative solutions and problem solving initiative".[73]

113 Mr Andrianakis submits that there are a myriad of legal services that may have been provided by in-house counsel that fall outside the scope of "legal advice". To demonstrate the point: the general description of the legal team within Uber can be contrasted with the circumstance where a law firm may have been specifically retained for the purpose of advising on a particular issue. In the latter situation, it may be open to a court to infer that all communications made and documents prepared were for the purpose of giving legal advice, because that is what the retainer was directed to. Such a circumstance is in stark contrast to the present situation – here,

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70 Ambikaipalan Affidavit, [22].
71 Ambikaipalan Affidavit, [34].
72 O'Shea Affidavit, exhibit EJO-[6].
73 Tender Bundle 231.

the evidence is said to disclose only woolly and general descriptions about the nature of the work performed by the team.

114 In the result, says Mr Andrianakis, the Court is not able to infer from the fact that a member of Uber's in-house counsel team prepared or created a document, or received a communication, that the dominant purpose of that document or communication concerned the provision of legal advice.

Taxi Apps' submissions

115 Taxi Apps' Submission refers to similar principles and authorities as identified above by Mr Andrianakis.

116 In addition, Taxi Apps refers to *Archer Capital*, where Wigney J considered the requirement of independence where in-house counsel have both legal and commercial functions. His Honour said that, in such cases, "if the personal loyalties, duties or interests of the in-house lawyer did not influence the professional legal advice given, the requirement for independence would be satisfied".[74] His Honour also observed that it was difficult to see how the two elements of independence and dominant purpose were not "inextricably linked",[75] such that:

> … a communication between a lawyer and his or her employer is unlikely to satisfy the dominant purpose test if … the lawyer was not consulted in his or her professional capacity as a lawyer (for example, if they were consulted to provide commercial advice, or provide an administrative service, or were consulted as a partner or officer of the firm or company, not as a lawyer).[76]

117 Taxi Apps says that the relevance of in-house counsel's independence is thus an aspect of the relationship between lawyer and employer client and the capacity in which the lawyer is consulted.[77]

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74 *Archer Capital*, [66], citing Boddice J in *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82 ('***Aquila***'), [9]. See, also, discussion by Daly AsJ in *Cargill Australia Ltd v Viterra Malt Pty Ltd* [2017] VSC 126 ('***Cargill***'), [106]ff, [159]ff.

75 *Archer Capital*, [72].

76 Ibid, [72].

77 Ibid, [73].

118 Taxi Apps submits that what is ultimately required is a consideration of the specific communication and function being performed by the lawyer at the particular time the communication was made. As Sifris J observed in *Banksia Securities*:[78]

> It is the communications themselves to which the privilege attaches, as opposed to protecting the source of the communications generally. As has been previously observed, "the mere fact that a person speaking is a solicitor, and the person to whom he speaks is his client, affords no protection". Consequently, the focus must be on the dominant purpose of the communications themselves, rather than undue concentration on the role of in-house counsel within the business.
>
> Consequently, a party opposing a claim of privilege may seek to elicit facts that demonstrate in-house counsel was not acting independently, *for the purposes* of establishing that the dominant purpose of the communications could not be the provision of purely legal advice. It is thus erroneous to speak of a presumption of a lack of independence. [Original emphasis]

119 Turning to the specific facts of this case, Taxi Apps submits that the evidence establishes that Uber In-House Counsel regularly performed non-legal functions such that it cannot be assumed that communications to or from those persons were necessarily for the dominant purpose of legal advice. In this regard, Taxi Apps refers to the following matters:

(a) On 24 December 2021, HSF wrote to Corrs to provide information in relation to Uber In-House Counsel. In Schedule 1 to that letter, other than in respect of Ms Yoo, HSF indicated in respect of each person that "*[n]o non-legal role has been identified*".[79]

(b) Mr Catchpoole sets out in his affidavit various matters that, contrary to the position of the Defendants, appear to suggest that several key individuals performed non-legal functions during their employment with Uber:

(i) **Salle Yoo**: Ms Yoo at various times held the positions of Chief Legal Officer, General Counsel and Corporate Secretary. Nevertheless, Ms Yoo has publicly touted her belief that her role within Uber was to

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78 *Banksia Securities*, [51]-[52], citations omitted.

79 Catchpoole Affidavit, [27].

solve commercial problems, rather than simply legal problems.[80] Ms Yoo appears, for example, to have taken a role in crafting Uber's White Paper strategy, being its publicly stated policy of launching ridesharing in jurisdictions where it knew that such ridesharing was unlawful, if certain preconditions were met.[81] Ms Yoo also appears to have prepared materials for Uber's board on occasion, and was later formally made company secretary.[82]

(ii) **Zac de Kievit**: company searches for entities incorporated in the Netherlands revealed that Mr Zac de Kievit held a role as "Bestuurder" in Uber International B.V. from 16 June 2014 to 1 December 2014; Uber International Holding B.V. from 16 June 2014 to 1 December 2014; and Uber B.V. from 30 May 2014 to 1 December 2014. Taxi Apps' inquiries indicate that "Bestuurder" is a director, or at least a company officer with authority.[83] In those circumstances, Taxi Apps submits Mr de Kievit lacked the necessary independence from Uber.

(iii) **Katrina Johnson**: public statements made by Ms Johnson suggest she often performed functions (and communicated) in a capacity other than purely as a lawyer.[84] It appears she performed a role which supported lobbying and law reform, but not necessarily the provision of legal advice. Taxi Apps submits it is likely that in some communications Ms Johnson performed non-legal, commercial roles within the Uber business; and marked correspondence as 'Privileged & Confidential' despite the fact that the contents of the correspondence were not, in fact, privileged.

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80 Catchpoole Affidavit, [31].
81 Catchpoole Affidavit, [152].
82 Catchpoole Affidavit, [29]; First Hanson Affidavit, [253].
83 Catchpoole Affidavit, [35]-[37].
84 Catchpoole Affidavit, [38]–[47].

(iv) **Stephen Kai Long Man**: there is reason to believe that Mr Man performed a role which extended beyond providing legal advice and services, to facilitating creative, commercial, solutions to issues he advised on.[85] Taxi Apps submits it is open to infer that generating "creative solutions" was more in keeping with a business advisory function, as opposed to advising on commercial matters while giving legal advice. Accordingly, Taxi Apps submits that there are likely to be communications in which there was a predominant non-privileged purpose where Mr Man was involved.

(v) **Matthew Burton**: Taxi Apps submits that Mr Burton appeared to perform lobbying, public policy or regulatory affairs functions, in additional to his legal role, within Uber.[86] Accordingly, Taxi Apps submits that there are likely to be communications in which there was a predominant non-privileged purpose where Mr Burton was involved.

(vi) **Krishna Juvvadi**: Mr Juvvadi publicly described himself as the architect of "Uber's global regulatory strategy" including activities which appear to be non-legal functions relating to lobbying and law reform. He also appears to have performed significant commercial and operational roles.[87] Accordingly, Taxi Apps submits that there are likely to be communications in which there was a predominant non-privileged purpose where Mr Juvvadi was involved.

120 For the avoidance of doubt, Taxi Apps does not submit that communications to or from the individuals listed in the preceding paragraph were necessarily incapable of attracting privilege. Its position is rather that these individuals did not perform roles that would permit the Court to infer that correspondence to or from these individuals

85 Catchpoole Affidavit, [48]–[54].
86 Catchpoole Affidavit, [55]–[60].
87 Catchpoole Affidavit, [64].

were invariably for the dominant purpose of legal advice. Again, a case-by-case, communication-by-communication, approach is said to be required.

121 Taxi Apps also submits that numerous of the Sample Documents are sent to multiple addresses including both lawyers and non-lawyers.[88]

122 Taxi Apps submits that in *TEC Hedland Pty Ltd v The Pilbara Infrastructure Pty Ltd*,[89] Hill J followed the approach of Hickinbottom LJ in *The Civil Aviation Authority v The Queen (on the Application of Jet2.com Ltd)*,[90] concerning the approach to a single email sent simultaneously to multi-addressees for advice or comment, required:

(a) the dominant purpose of the communication to be determined, including weighing if its purpose was to settle instructions to the lawyer, or to otherwise obtain commercial views of the non-lawyer addressees, noting the communication will not be privileged even if a subsidiary purpose is to obtain legal advice from the lawyer;

(b) the response from the lawyer, *if it contains legal advice*, will likely be privileged even if it is copied to more than one addressee; and

(c) multi-addressee communications should be considered as separate communications between the sender and each recipient, as there may be different purposes in sending emails to each recipient which will inform which purpose, if any, is dominant.

The Defendants' submissions

123 The Defendants submit that the description of the Uber legal team in the Ambikaipalan Affidavit makes it clear that Uber In-House Counsel provide legal services to the business, and do not have a relevant commercial function. In this regard, the Defendants particularly refer to the following:

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88 In this regard, examples referred to by Taxi Apps include SD 16, 22 and 63.
89 [2020] WASC 364, [26]-[29].
90 [2020] EWCA Civ 35, [100].

(a) Uber employs employees that were dedicated to performing commercial, policy and communications roles (and that those roles are not filled by the legal team);[91]

(b) with the exception of the General Counsel, members of the legal team report to other lawyers and are physically located together in offices;[92]

(c) the legal team ultimately reports to the General Counsel, who for the entirety of the relevant period was a very experienced and senior lawyer;[93]

(d) Uber's general practice is to reimburse lawyers the cost of maintaining their practising certificates (or Bar registration);[94]

(e) each lawyer who sent or received the sample documents:[95]

(i) was admitted to practice in a relevant Supreme Court or by a State Bar authority; and

(ii) was employed with titles, roles and responsibilities that recorded their legal function.

124 Relevant employment agreements and job descriptions have been provided to the Court as confidential exhibits.[96]

125 The Defendants submit that the dominant purpose of obtaining legal advice from Uber In-House Counsel is apparent from Mr Hanson's detailed evidence. On each occasion, it is said that he outlines, in terms that are as specific as possible, the nature of the request, the subject matter of the advice and relevant surrounding circumstances. For example, with respect to SD 5 Mr Hanson identifies that the original email in the chain (not subject to a claim of privilege) seeks input from an

91 Ambikaipalan Affidavit, [18].
92 Ambikaipalan Affidavit, [20(c)].
93 Ambikaipalan Affidavit, [20(d)].
94 Ambikaipalan Affidavit, [20(b)].
95 Ambikaipalan Affidavit, section E.
96 Confidential Exhibit AAA-2 to the Ambikaipalan Affidavit; Confidential Exhibit CDH-3 to the Second Hanson Affidavit.

in-house lawyer and the Head of Global Public Policy about potentially launching UberX in Perth. The email outlines concerns about regulator responses, both in Perth and in other locations. The Defendants say that the response from the in-house lawyer is the subject of a privilege claim, as it provides legal advice about the potential launch.[97]

126 The Defendants say that there is no evidence that suggests a mingling of legal, commercial and administrative functions with respect to the documents involving Uber In-House Counsel, still less that which would go beyond aspects that are inseparable, and essentially part of the advice itself.

127 The Defendants say that they rely upon the role performed by Uber In-House Counsel for the following purposes: (1) the in-house counsel were employed in dedicated legal roles; (2) to the extent it is required, the in-house counsel had sufficient independence for privilege to attach; and (3) privilege is capable of attaching to communications sent by those in-house counsel where the dominant purpose test is satisfied.

128 The Defendants submit that at the outset, the role of Uber In-House Counsel should be considered in the context of the nature and separate structure of the Uber in-house legal team. They should also be considered in the context of the evidence in the Sample Documents themselves. That evidence is said to establish that Uber In-House Counsel were frequently instructed to, and did, provide legal advice, and that many were responsible for working with external lawyers regarding legal advice and litigation. As Sifris J observed in *Banksia Securities,*[98] "the focus must be on the dominant purpose of the communications themselves, rather than undue concentration on the role of in-house counsel within the business".

129 The Defendants observe that the Plaintiffs make submissions about only six of the 17 Uber In-House Counsel addressed in the Sample Documents, to assert they have performed some non-legal function. It is said that these submissions have a number

97 First Hanson Affidavit, [34]-[37].
98 *Banksia Securities*, [51].

of difficulties. In respect of the individual Uber In-House Counsel, the Defendants submit as follows:

(a) **Ms Yoo** is a very experienced legal practitioner, who was General Counsel from July 2012 and throughout the period the Sample Documents were created and reported to the Chief Executive Officer. She was a registered Attorney with the State Bar of California throughout that period.[99] Her only other role at Uber was as company secretary, an appointment made after all of the Sample Documents were created.

The Plaintiffs seek to make much of general statements attributed to Ms Yoo such as "we are not here to solve legal problems. We're here to solve business problems" or a reference to Uber seeking "strategic advice, creative solutions and problem solving initiative" from in-house counsel. However, as Mr Hanson identifies,[100] it is commonplace for in-house and external lawyers to use terms such as these in referring to the service they provide to their clients. The role of a lawyer, in-house or external, is not to solve a legal problem in an abstract sense but to help their client to solve a business problem. That does not mean that the solicitor is providing commercial rather than legal advice. Rather, the solicitor provides legal advice with a view to assisting the client to address their business issues. As Ms Yoo puts it: "Legal is our tool, it is our special tool". To the extent any specifics about the legal team's role can be gleaned from general comments of the kind identified by the Plaintiffs, they do not suggest Uber's lawyers had any non-legal responsibilities.

The mere fact that Ms Yoo reviewed a policy paper (the subject of a part-privilege claim) or that she prepared material for Uber's board on occasion is not, contrary to the Plaintiffs' submissions, evidence of her performing a non-legal function. Providing legal advice on matters relating to company

99 Ambikaipalan Affidavit [32]-[35]; Ex AAA-1 p 1.
100 Second Hanson Affidavit, [23].

policy or matters requiring decision by a company's Board is exactly the kind of thing one would expect a company's General Counsel to do.

(b) **Mr Zac de Kievit** was employed as "Legal Director – EMEA" from about July 2013, reporting to the General Counsel. He was engaged to provide legal consent and advice and to manage and supervise a legal team. He was admitted to practice in New South Wales in February 2005.[101]

It is acknowledged that Mr de Kievit also had a role in two of the Defendants and a third related entity between 16 June and 1 December 2014 (in which period Mr de Kievit sent or received four Sample Documents, being SD 38 to 42). As correctly accepted by Taxi Apps, this role did not mean that his communications were incapable of attracting privilege. As to independence, the role of company secretary does not necessarily deprive in-house counsel of independence,[102] nor does potential conflict of interest (not shown to exist here).[103] The question of whether Mr de Kievit was providing legal advice in his role as Legal Director should be determined by reference to SD 38 to 42 themselves.

(c) **Ms Johnson** was employed as the Legal Director, ANZ between April 2015 and October 2017, reporting to the Associate General Counsel. She has been admitted to practice in New South Wales since 1999.[104]

Ms Johnson's public statements referred to by Taxi Apps regarding involvement in regulatory matters were general statements (made in a marketing and promotional context) and offer no insight into Ms Johnson's responsibilities. Plainly, regulatory matters (including law reform) give rise to legal issues about which legal advice is regularly provided.[105] Similarly, the

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101 Ambikaipalan Affidavit [42]-[46]; Ex AAA-1 pp 3-7; Conf Ex AAA-2 p 1.

102 As it did not in *Archer Capital*.

103 As it did not in *Nipps (Administrator) v Remagen Lend ADA Pty Ltd, Adaman Resources Pty Ltd (Admins Apptd) (No 3)* (2021) 152 ACSR 196, [59]-[60].

104 Ambikaipalan Affidavit, [78]-[80]; Ex AAA-1 pp 14-19.

105 Second Hanson Affidavit, [26].

fact that Ms Johnson was a member of Uber's leadership team in Australia does not mean that her responsibilities were other than as set out in her employment contract. As Mr Hanson identifies, it is common for in-house lawyers, as well as senior members of other business functions such as human resources and finance, to be members of corporate leadership teams and provide input based on their training and expertise.[106]

Taxi Apps' suggestion that Ms Johnson is likely to have marked correspondence as privileged and confidential when it was not (based on only two documents in which privilege claims are not maintained) is mere speculation.

(d) **Mr Man** was employed as Associate General Counsel from October 2015, reporting to the General Counsel. He was admitted to practice in Hong Kong (since 2001) and England and Wales (since 2004) during the relevant period.[107] Mr Man's LinkedIn profile records that he had been employed as a lawyer since 1999, first working at a firm for seven years and then for eight years in-house at Yahoo!.[108] By reference to two internal emails in a single email chain that discuss Mr Man's ability to provide "creative solutions" (without elaboration), Taxi Apps invites the Court to infer: (1) that creative solutions do not refer to legal advice; and (2) therefore that Mr Man performed commercial functions. Plainly, neither inference should be drawn. Again, as Mr Hanson identifies, it is common for lawyers to use such expressions in describing their role and promoting themselves.[109]

(e) **Mr Burton** was employed as Senior Counsel, Policy between August 2014 and January 2016, before moving into the role of Legal Director II in about September 2016. He reported to the General Counsel. He was registered as an

106 Second Hanson Affidavit, [25].
107 Ex AAA-1 p 10.
108 Ex EJO-10.
109 Second Hanson Affidavit, [23]–[24]

Attorney with the State of New York at that time, and had been since 2004.[110] Contrary to Taxi Apps Submission, high level references to regulatory proposals and strategy on Mr Burton's LinkedIn profile say nothing about whether he had non-legal responsibilities. As noted above, regulatory matters (including law reform) give rise to legal issues about which legal advice can be provided.

(f) **Mr Juvvadi** was employed as Senior Counsel, Policy from about April 2014. He reported to the General Counsel. He was registered as an Attorney with the State of California at that time, and had been since 2002.[111] Again, reliance on Mr Juvvadi's LinkedIn profile is misplaced for the reasons identified in the paragraph above.

130 The Defendants also address the Plaintiffs' assertions that in-house counsel must have a requisite degree of independence for legal professional privilege to attach. While Mr Andrianakis acknowledges that is contrary to some authority, when discussing specific Sample Documents he frequently asserts documents are not privileged by reason of an absence of independence.

131 The Defendants submit that caution is required when considering the Plaintiffs' submissions regarding independence. No such requirement arises on the text of ss 118 and 119 of the Evidence Act. In *Archer Capital*, having conducted a detailed review of the relevant authorities, Wigney J observed that:[112]

> It is difficult to see any reason in principle why to attract privilege in those circumstances it would be necessary to also satisfy some element of independence on the part of the employed lawyer, for example, by proving that the lawyer was not subject to pressure or other interference arising from the employment relationship. Like Katzmann J, I doubt that *Waterford* establishes that there is a separate or distinct requirement to prove independence in the case of privilege claims involving in-house lawyers.

110 Ambikaipalan Affidavit, [66]-[69]; Ex AAA-1 p 11.
111 Ambikaipalan Affidavit, [54]-[57]; Ex AAA-1 p 9.
112 *Archer Capital*, [72]-[73].

> Were it necessary for me to decide, I would err on the side of concluding that there is no separate requirement of independence in the case of privilege claims where the relevant lawyer is an employed or in-house lawyer.

132 The Defendants submit that Wigney J has subsequently adopted that view on a number of occasions.[113] The same approach was also adopted in *Martin v Norton Rose Fulbright Australia (No 2)*.[114] In *Banksia Securities*, Sifris J observed:[115]

> … such focus on the level of independence of in-house counsel, whilst helpful, should not distract from the primary task of assessing the dominant purpose of the communications. One must be cautious to avoid importing a test of independence that finds no basis within the statutory text.

133 The Defendants submit that even if independence is in some way relevant to an assessment of whether a communication to or from an in-house lawyer is privileged, there is no basis for concluding that there was a lack of independence on the part of Uber In-House Counsel. There is no presumption of a lack of independence on the part of in-house lawyers.[116] The *prima facie* position is that the legal adviser was acting independently at the relevant time. The burden then shifts to the party opposing the claim to point to evidence rebutting this presumption.[117] As such, the Plaintiffs bear the burden in this respect. If there is doubt as to whether any lawyer was acting independently, the Court should inspect the documents to determine the validity of the claim.[118]

134 The Defendants submit that neither Plaintiff has discharged the burden of adducing evidence that impugns the ability of Uber In-House Counsel to provide independent advice. Mr Andrianakis repeatedly places reliance solely on "*the nature of [his or her]" employment relationship with Uber*"[119] (without elaboration). The mere fact that Uber

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113 Referring to *NSW Ports*, [48]; *Commonwealth Director of Public Prosecutions v Citigroup Global Markets Australia Pty Ltd (No 3 – Privilege Claims)* [2021] FCA 1208, [175].

114 [2019] FCA 96, [187]-[188]. See also *Dye v Commonwealth Securities Ltd (No 5)* [2010] FCA 950, [15] per Katzmann J.

115 *Banksia Securities*, [48], see also [52]; footnotes omitted.

116 *Aquila* [9].

117 *Aquila* [9] citing *Duggan*, [67]-[68].

118 *Duggan*, [71].

119 See eg Andrianakis Submission Schedule B [21(b)(iv)]; [81(b)(vii)]; [174], [184], [233].

In-House Counsel are employees does not suggest they have personal loyalties, duties or interests that would influence the advice they give.[120]

135 The Defendants say that the matters referred to in paragraph 123 above all suggest that Uber In-House Counsel were giving independent legal advice.

136 Finally, the Defendants refer to *Archer Capital* and submit that Wigney J found in-house counsel with the title of "Group Legal Director", to the extent this was required, was sufficiently independent having regard to matters such as his lengthy legal career, admission to practice and practising certificate and the professional nature of his responsibilities.[121] The fact that his role included responsibilities beyond acting as a legal adviser (including administrative and managerial functions), and that he sent communications that were not privileged, did not mean that, when considered in his capacity as a legal adviser, he relevantly lacked independence.[122]

Analysis

137 The parties' submissions in respect of Uber In-House Counsel are, as set out above, detailed and comprehensive. The statements of principle cited by them can readily be accepted. It is helpful for me to summarise my views in respect of the principles, which I turn briefly to now.

138 The fact that some in-house lawyers may have a mixed role in their organisation does not preclude their documents/communications from attracting privilege.[123] It is important to ascertain whether the in-house lawyer has functions other than those involving legal advice or litigation as that may affect the purpose of the communication. For legal advice/litigation to be the dominant purpose, the in-house lawyer must have been acting in a legal context or role in respect of the document or communication in question. Where the document/communication involves commercial or administrative matters, that does not preclude the dominant purpose

120 *Duggan*, [82]; *Aquila*, [9]-[10].
121 *Archer Capital*, [82].
122 Ibid, [83].
123 *Singapore Airlines Ltd*, [24]. See also *Seven Network Ltd v News Ltd* [2005] FCA 142, [4]-[5].

being a privileged one, provided that they are essentially part of the legal advice and not separable.[124] In appropriate circumstances, documents or communications concerning commercial or administrative matters may form part of a 'continuum' of documents or communications in which legal advice is sought and given.[125]

139 As set out when describing the parties' submissions, the authorities differ on whether there is a separate requirement of independence when it comes to in-house lawyers. In that context, and doing the best I can, I prefer the view that independence is not a separate requirement. Rather, it is a matter to be considered when assessing whether the dominant purpose is a privileged one. I adopt the comments made and approach taken by Sifris J (as his Honour then was) in *Banksia Securities*, as cited in paragraphs 118 and 132 above.

140 Many of the cases have considered indicia of independence, pointing to such matters as being part of a legal team that is a separate unit within the organisational structure, reporting to a lawyer, maintaining a practising certificate, and providing legal advice that is not compromised by commercial considerations. If the in-house lawyer lacks the indicia of independence, it may be more likely that their purpose in respect of a document or communication is not a privileged one, or if it is, it is not the dominant purpose. Conversely, an in-house lawyer displaying the indicia of independence may be more likely to have a privileged purpose and for that to be the dominant purpose. Similarly, an in-house lawyer whose role is solely or predominantly a legal one is more likely to have a privileged purpose which is the dominant purpose in respect of a document or communication.

141 However, the generalities referred to in the previous paragraph merely assist the assessment of dominant purpose: they do not dictate or determine it. In the end, it all comes down to a consideration of the particular organisation, the individual in-house lawyers, the context, and the specific communications or documents. Even if the in-house lawyer has a purely legal role and displays the indicia of independence, the

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124 *NSW Ports*, [194].

125 *DSE*, [38] citing *Balabel*.

context and documents themselves may be reviewed so as to ascertain whether the dominant purpose was a privileged one.

142 In this case, extensive evidence has been led about the structure of Uber's legal team and the roles of the employees in that team, their qualifications and experience. I am satisfied, based on the evidence adduced by the Defendants, that the structure and operations of Uber's legal team are such as to support the submission that Uber In-House Counsel had legal roles within the organisation, and that any other roles particular individual in-house lawyers may have had were not a significant part of their role and do not preclude them from having a privileged purpose when involved in documents or communications. I do not accept Taxi Apps' submissions that particular Uber In-House Counsel appearing to have roles that extended to lobbying, public policy, regulatory affairs, or law reform[126] means that they were not performing a legal role. I accept that legal advice may be a part of such activities. Whether those particular Uber In-House Counsel were acting in a legal role and providing legal advice in the context of lobbying, public policy, regulatory affairs and law reform will come down to an assessment of each document. I do not consider that statements such as those attributed to Ms Yoo[127] mean that she was not performing a legal role and providing legal advice, or that Mr Man's 'creative solutions' means he was playing a business advisory function.[128] I accept that it is common, particularly in public statements, for lawyers (including in-house ones) to emphasise the strategic or commercial qualities of their advice, presumably as a means of emphasising their usefulness. Further, I do not see such statements as detracting from their legal role or the provision of legal advice. I am also satisfied that, in general terms, Uber In-House Counsel displayed indicia of independence. For convenience, I will refer to this paragraph as the '**Uber In-House Counsel Findings**'.

143 Nonetheless, I do not consider that the circumstances of this case are such that presumptions about the dominant purpose of documents/communications involving

126 See paragraph 119(b)(v) and (vi) above.
127 See paragraph 111 above.
128 See paragraph 119(b)(iv) above.

Uber In-House Counsel can or should be made. Rather, the Uber In-House Counsel Findings are to be taken into account when reviewing the context and content of those documents/communications. The assessment of the dominant purpose of each document will primarily rest on the content of the document and its context (in terms of subject matter and who is participating in the document or communication). Where it is clear from the face of the document that the dominant purpose is a privileged one, then recourse to the Uber In-House Counsel Findings is unlikely to be necessary. Where more analysis of the document is required, then the Uber In-House Counsel Findings may be drawn upon to assist that analysis. In such circumstances, the Uber In-House Counsel Findings may or may not be sufficient to lead to the conclusion that there is a privileged purpose for the document which is the dominant purpose. This all leads to the conclusion that the Sample Documents must be inspected and assessed to ascertain whether there is a privileged purpose that is the dominant one.

144 In respect of the specific individual in-house counsel identified in the parties' submissions, I accept the Defendants' submissions as set out at paragraph 129 above.

Whether aspects of the conduct of the Defendants' discovery casts doubt upon the legitimacy of their privilege claims

Relevant evidence

145 As already noted, the Defendants abandoned their privilege claims over some of the Sample Documents.

146 On 17 November 2021, HSF notified Corrs and MB that the Defendants were reconsidering over 3,000 redacted privileged documents along with related documents to determine whether there were any inconsistent redactions that remained unresolved.[129] On 13 January 2022, HSF notified:

[129] Catchpoole Affidavit, [18(b)]; O'Shea Affidavit, [4].

(a) Corrs that the Defendants were completely or partially abandoning their privilege claim over 388 documents and that there 59 documents which had been inadvertently disclosed;[130]

(b) MB that the Defendants had re-reviewed part privileged documents and produced 237 redacted documents (these were re-provisions of previously produced documents, I apprehend that the redactions may have differed from those previously given) and 172 documents which had not been produced before.[131]

147 Mr Hanson says that in his experience, it is not unusual for parties to a privilege challenge to narrow the issues in dispute by the party claiming privilege no longer pressing its claims in respect of some documents and the party challenging privilege not pressing its challenge in respect of some documents.[132]

148 Mr Hanson deposes as to the review of the part-privileged documents recently completed by the Defendants. He says that the review was undertaken because there were some inconsistencies in redactions, predominantly involving email chains where different versions of emails in the chain had different redactions. Over 2,600 documents, comprising part-privileged documents as well as related privileged and not-privileged documents, were reviewed. As a result of that review, the Defendants no longer pressed a privilege claim in respect of 188 documents as well as 43 attachments to them. In addition, they amended their privilege claim in respect of 277 documents by amending redactions to part-privileged documents or producing redacted versions of documents that had previously been subject to a privilege claim in respect of the whole document. This resulted in 388 documents being produced for inspection, or reproduced with amended redactions.[133]

130 Catchpoole Affidavit, [18(c)].
131 O'Shea Affidavit, [8].
132 Second Hanson Affidavit, [15].
133 Second Hanson Affidavit, [16].

149 Mr Hanson deposes that discovery in these proceedings involved the analysis of over ten million documents (primarily through a technology assisted review but some were done manually), of which over 300,000 were discovered in the proceedings.[134] Approximately 1,400 of the discovered documents were initially the subject of a part-privileged claim and were redacted.

150 Mr Hanson then deposes as follows:

> In my experience, particularly in circumstances where discovery involves the review of a significant number of documents and is given under significant time constraints, as was the case with discovery in these proceedings, it is not uncommon for inconsistencies to arise in relation to privilege redactions, as has occurred in this case. That is because there is no automated way of ensuring that the same content that requires redaction for privilege in different documents, particularly email threads, is treated consistently. Ensuring consistency of redactions is therefore a time-consuming manual exercise. In the present case, that review exercise took a team of reviewers approximately two months. Given the amount of work that was involved in giving discovery in these proceedings, it was not possible in the present case for that exercise to be undertaken before discovery was given. It is therefore unsurprising to me in the context of giving discovery in these proceedings that a small number, relative to the number of documents discovered, of partially privileged documents were redacted inconsistently and required rectification, as has now occurred.[135]

The Plaintiffs' submissions

151 Mr Andrianakis submits that the fact that the Defendants have abandoned their privilege claims over what he describes as a 'large proportion of the original sample' is indicative of the overly broad nature of the claims for privilege in the first place. He also says that the fact that the Defendants' review of the redacted privilege documents in January 2022 led to 'such a large number' of documents being produced is indicative of a failure in the review process in the first place.

152 Taxi Apps acknowledges that the Defendants' withdrawal of some privilege claims in respect of some Sample Documents and some of the redacted privileged documents does not bear directly on the question of whether privilege has been properly claimed over the remaining Sample Documents. However, it says that this suggests that the

134 Second Hanson Affidavit, [17]. The discovered documents included just over 225,000 documents of a similar nature not produced for inspection but provided on a list: Second Hanson Affidavit, [17].

135 Second Hanson Affidavit, [18].

Defendants' general approach to matters of privilege has been overly broad, and points to the need for close scrutiny of the privilege claims in respect of the disputed Sample Documents.

The Defendants' submissions

153 The Defendants submit that the Plaintiffs' contentions in this regard should be rejected.

154 They say that with the number of documents discovered in the proceeding, including there being over 12,000 privilege claims, it is unremarkable that some claims would not be pressed in the context of a contested privilege challenge, informed by the preparation of evidence and as a hearing approaches, particularly in circumstances where the sample consists of documents identified by the parties challenging the privilege claims. They observe that the Plaintiffs themselves, having selected the Sample Documents, no longer press privilege challenges in respect of them.

155 The Defendants also note that consistently with the sampling process, they are conducting a review of other documents to confirm whether any of the matters that led to them not pressing these privilege claims affects privilege claims in other documents.

156 The Defendants submit that the fact that they have fixed inconsistent redactions in part-privilege documents is again unremarkable, as the discovery has involved a significant number of documents and time constraints, and it is not uncommon for inconsistencies in redactions to arise. This is exacerbated by the fact that redactions have to be made manually with no automated process to ensure consistency across documents.

Analysis

157 I accept Mr Hanson's evidence in this regard. He has extensive experience in managing large discoveries,[136] and his observations about the difficulties associated

136 First Hanson Affidavit, [4]-[5].

with consistency, particularly in respect of redactions, accords with my own experience as a practitioner managing large document production exercises.

158 I also accept the Defendants' submissions in this regard.

159 I find it unremarkable that upon closer review and in the context of privilege challenges, decisions as to whether certain documents are privileged are reviewed and altered. I also find it unremarkable that in the context of challenges, parties make decisions to narrow the scope or volume of disputed documents. Rather than criticise parties for that, I would observe that it is consistent with the overarching obligations in the *Civil Procedure Act 2010*. I would not wish to discourage parties from either re-reviewing their position or altering their privilege claims by too readily accepting the Plaintiffs' submissions that the Defendants' changed positions in respect of some documents means that their approach to privilege claims in the first place is somehow suspect. Such an inference may be available where the proportion of changed documents is large or the claims are very inconsistent, but that is not this case.

Summary of outcome in respect of Issue 1

160 To summarise the approach I have taken to Issue 1, being whether the Defendants have provided sufficient evidence to establish their privilege claims:

(a) the Ambikaipalan Affidavit, the First Hanson Affidavit and the Second Hanson Affidavit are relevant to consideration of the context in which the documents subject to claims of privilege arise, and the nature of their evidence does not preclude the Defendants' claims for privilege, but they do not give direct evidence which is conclusive as to the purpose of particular documents or communications (see [63]–[73] above);

(b) similarly, the bare fact that a document or communication was prepared by a lawyer will not make it privileged, and particular care must be taken when considering documents or communications prepared by Uber In-House Counsel (see [78] and [81] above);

(c) documents and especially communications may form part of the 'continuum of communications' and it will not always be required that there be a specific request for or provision of legal advice, however there must be evidence which would allow the Court to conclude that the document or communication formed part of such a continuum (see [83] above);

(d) there must be evidence of actual or anticipated legal proceedings to which the Defendants (or any one or more of them) are, or are likely to be, a party, in order for the Defendants or the relevant Defendant(s) to rely on the Litigation Limb (see [95]–[97] above);

(e) my Uber In-House Counsel Findings are, in summary form, that Uber In-House Counsel generally had legal roles and that their non-legal roles do not appear to have been a significant part of their overall activities, and that Uber In-House Counsel generally displayed indicia of independence; but that each document should be assessed to determine whether it bears the relevant legal character or is a document or communication prepared in some other capacity or for some other purpose (see [137]–[144] above); and

(f) I do not accept that any inference concerning the Defendants' claims for privilege can be drawn from their conduct of the dispute, and in particular their withdrawal of claims over certain documents and communications (see [157]-[159].

Issue 2: Have the Defendants waived privilege?

161 By virtue of non-lawyer Uber employees or other persons being involved in some documents/communications, the Plaintiffs contend that the Defendants have waived privilege in respect of certain Sample Documents. Mr Andrianakis contends that

privilege (if it subsists) has been waived in respect of ten of the Sample Documents,[137] and Taxi Apps makes this contention in respect of four of the Sample Documents.[138]

162 Most of the parties' general submissions in respect of waiver were made to emphasise the particular principles associated with waiver that they relied upon. Their submissions in the context of this case were contained in their detailed submissions about each of the Sample Documents where waiver was alleged by one or more of the Plaintiffs. I will not summarise the submissions made in respect of individual documents.

163 In terms of the general principles, the parties did not appear to differ significantly, if at all, on what these are. I summarise these principles, as postulated by the parties, submissions below. Before doing so, I think it worth setting out the succinct statement regarding s 122 of the Evidence Act from *IOOF v Maurice Blackburn*, where Justice Elliott stated that:[139]

> With respect to waiver of privilege, and s 122(2) of the Evidence Act, a person may be taken as acting inconsistently with maintaining privilege by reason of the following:
>
> (1) Partial disclosure of communications or documents, while claiming privilege over the remainder.
>
> (2) A party making an assertion as part of its case that puts privileged communications or the contents of privileged documents in issue, or necessarily lays them open to scrutiny.
>
> Further, a waiver of advice privilege extends to the documents and information which were taken into account in formulating, or which otherwise underpinned or influenced, the legal advice no longer the subject of privilege.

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137 These are SD 1, 2, 3, 10, 26, 42, 57, 59, 61, and 89. Mr Andrianakis' challenge in respect of SD 10 has been amended (in the Aide Memoire) to contend waiver in respect of only one of the persons named.

138 These are SD 1, 26, 42 and 74.

139 *IOOF v Maurice Blackburn*, [48], citations omitted.

Summary of principles drawn from the parties' submissions

164 Mr Andrianakis submits that s 122(2) of the Evidence Act was introduced to adopt the common law principles relating to waiver established in *Mann v Carnell*, where Gleeson CJ, Gaudron, Gummow and Callinan JJ stated:[140]

> What brings about the waiver is the inconsistency, which the courts, where necessary informed by the consideration of fairness, perceive, between the conduct of the client and the maintenance of confidentiality; not some overriding principle of fairness operating at large.

165 In determining whether a party has acted inconsistently with the maintenance of a claim of privilege, "the starting point must be an analysis of the disclosures or other acts or omissions of the party claiming privilege that are said to be inconsistent with the maintenance of confidentiality in the privileged material".[141] This will necessarily be a "very fact-specific exercise".[142] The waiver may be express or implied.

166 As to whether "the substance of the evidence" has been disclosed for the purpose of ss 122(3) and (5), the relevant test is "a quantitative one, which asks whether there has been sufficient disclosure to warrant loss of the privilege."[143] In *Mortgage Results*, a communication to a third party which summarised confidential legal advice previously received was held to constitute conduct that was inconsistent with a claim of privilege.[144] Derham AsJ stated that this conduct resulted in an "imputed waiver of privilege, even if there is no intention of waiving privilege and the disclosure is for a limited and specific purpose".[145]

167 Waiver is not established only by demonstrating a voluntary disclosure to a third party. For example, disclosure for a limited and specific purpose on confidential terms may not amount to waiver.[146] The obligation of confidentiality need not be express or arise under law, it "can extend to an unspoken obligation, and to an ethical, moral or

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140 (1999) 201 CLR 1 (***'Mann v Carnell'***), [29]. See *Cargill*, [138(a)-(b)].
141 *AWB*, [134], cited in *Matthews v SPI Electricity Pty Ltd* [2013] VSC 33, [38].
142 *Cargill*, [140].
143 *Adelaide Steamship Co Ltd v Spalvins* (1998) 81 FCR 360, 371.
144 *Mortgage Results*, [57].
145 Ibid, [57]; see also at [38(a)], [55]-[56] (with respect to "email 13"). See also *Cargill*, [138(d)].
146 *Mann v Carnell*, [29]-[30]; Evidence Act s 122(5)(a)(i).

social obligation. Especially when a lawyer is not involved, the particular circumstances determine whether an obligation implicitly arises".[147]

168 The disclosure of the substance of privileged material to employees or agents of the client does not comprise waiver (such persons falling within the definition of "client" in s 117(1)). An external adviser, such as an accountant, may be an agent of the client or inferred to be under the requisite obligation of confidentiality.[148]

169 The test for waiver is an objective one; the law may impute waiver even if this was not intended by the party claiming the privilege. The intention will be imputed where the actions of a party are "plainly inconsistent with the maintenance of the confidentiality which the privilege is intended to protect".[149]

170 Section 122(5)(a)(i) provides that a party is not taken to have acted inconsistently with the maintenance of a claim of privilege "merely because" the substance of the evidence has been disclosed in the course of making a confidential communication or preparing a confidential document.[150] The use of the word 'merely' in that section indicates that privilege may be lost in appropriate circumstances, notwithstanding the confidential basis of the disclosure.[151]

171 A waiver of advice privilege extends to the documents and information which were taken into account in formulating, or which otherwise underpinned or influenced, the legal advice that is no longer the subject of privilege.[152]

172 The onus of establishing waiver lies upon the party seeking to displace the existence of the legal professional privilege.[153]

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147 *New South Wales v Jackson* [2007] NSWCA 279, [41] (Giles JA; Mason P and Beazley JA agreeing); Evidence Act s 117(1) "confidential communication".

148 *Chan v Valmorbida Custodians Pty Ltd* [2021] VSC 527, [90].

149 *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management & Marketing Pty Ltd* (2013) 250 CLR 303, 315, [30].

150 "Confidential communication" and "confidential document" are defined in Evidence Act s 117.

151 See *Fonterra Brands Australia Pty Ltd v Bega Cheese Ltd (No 4)* [2020] VSC 16, [69].

152 *IOOF v Maurice Blackburn*, [48]. See also Evidence Act s 126.

153 *Archer Capital*, [100], citing with approval *New South Wales v Betfair Pty Ltd* (2009) 180 FCR 543 (FCAFC), [54].

Analysis and summary of outcome in respect of Issue 2

173 Given the "very fact-specific"[154] nature of the determination of a waiver of privilege, my findings in respect of waiver are contained in the Annexure, set out in respect of each document. Generally speaking, I have:

(a) not found that waiver of privilege has occurred where there is insufficient evidence to establish that proposition;

(b) not found that waiver of privilege has occurred by the sharing of legal advice to non-lawyers within Uber;

(c) not found that waiver of privilege has occurred by the sharing of legal advice to external persons where agency and obligations of confidence are established;

(d) not found that waiver of privilege has occurred by the sharing of legal advice by those external persons with their own employees, agents or contractors where the external person was obliged to bind those third parties to the same obligations of confidence; and

(e) found that waiver of privilege has occurred by disclosure to other external persons who were not bound by confidentiality obligations, unless it can be shown that disclosure was inadvertent.

Issue 3: Does the Misconduct Exception apply here such that the Defendants are not able to rely on their privilege claims?

174 The Misconduct Exception deals, *inter alia*, with communications made or documents prepared by a client or lawyer (or both) in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty. It is common ground between the parties that neither the first nor the third of these arise in this case. The two key aspects for consideration here are the 'offence' (or offences) and the meaning of 'in furtherance of'.

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154 *Cargill*, [140].

175 It also seemed to be common ground that s 125(2) of the Evidence Act applies here, in that the commission of the Ridesharing Offences is a fact in issue in the proceeding. In those circumstances, the issue is whether there are reasonable grounds for finding that (a) the offence was committed and (b) a communication was made or document prepared in furtherance of the commission of the offence, such that the Court may find that the communication was so made or the document so prepared.

General principles

Mr Andrianakis' submissions

176 Mr Andrianakis relies on the definition of "Offence" contained in the Evidence Act's Dictionary as "an offence against or arising under an Australian law". Kyrou J in *Amcor Ltd v Barnes*[155] noted this definition and observed that s 125 "refers to offences generally and is not confined either to indictable offences or to offences involving dishonesty".[156] The term "offence" would therefore include a minor offence of strict liability for which the penalty is a small fine.[157]

177 With respect to the words "in furtherance of", Mr Andrianakis submits that in *Amcor*, Kyrou J considered that "furtherance" means "the fact of being helped forward; the action of helping forward; advancement, aid assistance".[158]

178 Mr Andrianakis submits that courts have drawn a distinction between, on the one hand, a document or communication that is relevant to, or might disclose, misconduct and, on the other hand, a document or communication that came into existence for the furtherance of such misconduct.[159]

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155 [2011] VSC 341 ('***Amcor***').

156 Ibid, [46].

157 Ibid.

158 *Amcor*, [59], citing the *Shorter Oxford English Dictionary*. See also *Talacko v Talacko* [2014] VSC 328 ('***Talacko***'), [15(5)] and *Kaye v Woods (No 2)* (2016) 309 FLR 200, [38].

159 *Carbotech-Australia Pty Ltd v Yates* [2008] NSWSC 1151 ('***Carbotech-Australia***'), [24]-[25], citing *AG Australia Holdings Ltd v Burton* (2002) 58 NSWLR 464, [198] (Campbell J). In *Carbotech-Australia*, the Court found that the common law, rather than the uniform evidence law applied, however it also found that the application of the provisions of the evidence law would not produce a different outcome and in any event adverted to such provisions in the decision (*Carbotech-Australia*, [13]).

179 Mr Andrianakis also submits that where a client is obtaining legal advice in the context of ongoing misconduct, so that the advice will or may impact upon or inform the client in the course of that misconduct, it will be regarded as being in furtherance of the improper purpose.[160] In *Watson v McLernon*, Hodgson CJ in Eq stated:[161]

> The next question is, what would amount to furtherance of such a purpose? I accept that **a purpose of merely concealing previous dishonest conduct, and avoiding adverse consequences, such as penalties or claims for damages, which could flow therefrom, would not amount to furtherance of the improper purpose**. The policy of the law is to encourage people to get legal advice so that they can be aware of their rights in relation to such matters. **However, if the person seeking advice proposes to continue the dishonest conduct … and proposes to use legal advice to assist in this purpose, then in my opinion that would be sufficient to amount to a furtherance of the improper purpose**.

180 In *Carbotech-Australia*, the Court said:[162]

> **In the context of an ongoing scheme** to compete fraudulently with the employer by using the employer's commercial opportunities or formulas, persisted in until the Anton Piller orders were made in July 2005, **communications with lawyers did not cease to be in furtherance of the scheme just because, in the absence of the scheme, they could have been permissibly undertaken**. Advice could permissibly have been sought in respect of the scope of the restraint, and advice could permissibly have been sought by SES in respect of the incorporation of an Australian subsidiary, the preparation of a shareholders' agreement, and the establishment of a secondary support services business in Australia. **But when the context in which that advice is sought is the scheme to which I have referred, then those were all steps in furtherance of the implementation of that scheme.** Indeed, the incorporation of the company, the preparation of the shareholders' agreement and the establishment of the secondary services business were essential elements of the scheme.

181 Mr Andrianakis submits that conduct occurring after misconduct is completed may also be "in furtherance of" the fraud, offence or act.[163] This will depend on the nature and purpose of the misconduct. For example, positive steps taken to conceal information about a fraud can be "in furtherance of" the fraud, insofar as those steps

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160 *Carbotech-Australia*, [26], cited with approval in *Ding and Ding* (2019) 59 FamLR 262, [75] and *Amcor*, [63].

161 *Watson v McLernon* [2000] NSWSC 306 ('***Watson***'), [116] (emphasis added).

162 *Carbotech-Australia*, [29] (emphasis added).

163 *Amcor*, [58]. See also *Talacko*, [15(6)]; *Cargill*, [170].

continue the fraud's efficacy.[164] In contrast, advice on the legal consequences of a past fraud, and how to avoid or minimise those consequences,[165] would not be in furtherance of the commission of the fraud, offence or act.[166]

182 Continuing, Mr Andrianakis submits that in *Amcor*, Kyrou J held that the misconduct need not be "consummated" for s 125 to apply.[167] His Honour drew an analogy with a situation where a lawyer is instructed to prepare a letter of advice but instructions are subsequently withdrawn before the advice is finalised.[168] In these circumstances, any draft advice would be privileged because it was prepared for the dominant purpose of providing legal advice and subsequent events cannot alter this original purpose. His Honour held that similarly, "if a document is prepared for the purpose of planning or otherwise furthering misconduct, it does not attract privilege and this status cannot be affected by subsequent events".[169]

183 In respect of the time at which the Misconduct Exception applies, Mr Andrianakis submits that as privilege attaches at the point of creation of the document/communication, the question of whether a document/communication is prepared in furtherance of misconduct arises when the document or communication is created.[170]

184 The offence being one committed by someone other than the client also falls for consideration. Mr Andrianakis submits that s 125 will apply where the client is "knowingly involved" in the misconduct of another person.[171] With respect to

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164 *Amcor*, [60]-[61]. The case of *Finers v Miro* [1991] 1 All ER 182, [187] is also referenced at footnote [23] in *Amcor* as authority for the proposition that privilege does not apply to legal advice on how "to cover up or stifle a fraud."

165 *Watson*, [116]; *Amcor* [62]. The distinction between continuing a fraud, stifling a fraud and minimising the consequences of a fraud is likely to be one that is finely drawn. In particular, in the case of *Kinghorn*, [120], the Court commented that Kyrou J in *Amcor*, [61] took the opposite view to Hodgson CJ in Eq in *Watson*, [116].

166 *Amcor*, [62]; *Talacko*, [15(9)]; *P & V Industries Pty Ltd v Porto (No 3)* [2007] VSC 113 ('***P & V Industries***'), [27].

167 *Amcor*, [64]-[65].

168 Ibid, [64].

169 Ibid, [65]; *Talacko*, [15(11)].

170 *Ding,* [80].

171 *Amcor*, [50]-[51], [55].

circumstances in which the client is "knowingly involved" in such misconduct, Kyrou J in *Amcor* stated:[172]

> A client may be knowingly involved in the fraud, offence or impugned act of another person by conspiring with that person to commit the fraud, offence, or act; by being a knowing participant in the other person's fraud, offence or act; or by knowingly providing other forms of assistance to that person in relation to the fraud, offence or act. Legal advice that is procured by a client for the purpose of assisting another person to commit a fraud, an offence or an act that can attract a civil penalty would fall within s 125(1)(a) and would not be privileged.

185 Mr Andrianakis says that whether the lawyer is aware of the client's nefarious purpose is not relevant.[173] It is the client's state of mind which is relevant, not the solicitor's state of mind.[174] The Misconduct Exception may also apply where a person, who is not aware of any misconduct, obtains legal advice as agent for another person, and that other person has an undisclosed purpose of misconduct in obtaining the advice. This is on the basis that it is that other person who is the true client, even if the lawyer is not aware of the client's existence.[175]

186 Similarly, legal advice procured by a client for the purpose of assisting another person to commit misconduct falls within s 125(1)(a) and is not privileged.[176]

187 Mr Andrianakis submits that if s 125(2) applies, which it does here, then this means that the party challenging the claim of privilege is not required to prove the alleged misconduct on the balance of probabilities. Rather, there must be "something to give colour to the charge" at a prima facie level that has foundation in fact.[177] What this requires will depend on the circumstances of the case.[178]

188 Mr Andrianakis also submits that if the application of s 125 means that evidence of a communication or the contents of a document loses privilege, evidence of another

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172 Ibid, [52]. See also *Talacko*, [15(2)-(3)].
173 *Carbotech-Australia*, [22].
174 *P & V Industries*, [23].
175 *Amcor*, [53]-[55]. See also *Talacko*, [15(4)]. However, in the absence of any established agency relationship, Mr Andrianakis submits that the better view is that Kyrou J's comments regarding "knowledge" would apply.
176 *Amcor*, [52]. See also *Talacko*, [15(3)].
177 *Talacko*, [16(1)], citing *Kang v Kwan* [2001] NSWSC 698 ('***Kang***'), [37.6]. See also *Cargill*, [170].
178 *Talacko*, [16(2)], citing *Kang*, [37.7].

communication or document will also cease to be privileged if it is reasonably necessary to enable a proper understanding of the communication or document.[179]

Taxi Apps' submissions

189 Taxi Apps relies on the same definition of "Offence" as set out above.

190 In *Talacko*, Elliott J outlined the relevant propositions informing the question of when s 125 is enlivened and how its application is approached, drawing on *Amcor*.[180] Without repeating that analysis, in summary, to establish the Misconduct Exception, Taxi Apps submits it need not prove the Ridesharing Offences were committed.[181] It is sufficient that it is a fact in issue in the proceeding (which is said to be plainly the case here), and that there are "reasonable grounds" to give "colour to the charge" at a prima facie level that has foundation in fact.[182] In *Kinghorn*, the New South Wales Court of Criminal Appeal explained:[183]

> … the reference to "reasonable grounds" in s 125(2) encompasses proof of the relevant facts to a standard less than the balance of probabilities so as to warrant the loss of privilege.

191 The word "furtherance" in the phrase "in furtherance of the commission of … an offence" has been held to mean "the fact of being helped forward; the action of helping forward; advancement, aid, assistance".[184] As the New South Wales Court of Criminal Appeal in *Kinghorn* said:[185]

> … in *Zemanek*, even though a prima facie case of fraud was established, Hill J observed that there was no evidence that any lawyer "gave advice to further the commission of the fraud" (at 13). In *Kaye v Woods (No 2)* (2016) 309 FLR 200; [2016] ACTSC 87 at [38], Mossop As J referred to the necessity for the communications to be connected to the fraud in the sense of "helping it, advancing it or assisting it".

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179 See Evidence Act s 126. Taxi Apps makes the same submission.

180 *Amcor,* [15]-[16].

181 Ibid, [32], referring to Kyrou J's earlier decision of *Hodgson v Amcor Ltd* (unreported, Supreme Court of Victoria, 20 June 2011), [28]-[30].

182 *Kang*, [37.6], referring to *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 587 (McHugh J) ('***Propend***').

183 *Kinghorn*, [117].

184 *Amcor*, [59]. This meaning was derived from the *Shorter Oxford English Dictionary*. See also Macquarie Dictionary (5th ed, 2009), 676.10, col 3.

185 *Kinghorn*, [120].

192 Taxi Apps submits that there is some divergence in the authorities on the question of whether "merely concealing" a past offence would be in "furtherance" of that offence:

(a) In *Watson*,[186] Hodgson J said:

> I accept that a purpose of merely concealing previous dishonest conduct, and avoiding adverse consequences, such as penalties or claims for damages, which could flow therefrom, would not amount to furtherance of the improper purpose. The policy of the law is to encourage people to get legal advice so that they can be aware of their rights in relation to such matters. However, if the person seeking advice proposes to continue the dishonest conduct… and proposes to use legal advice to assist in this purpose, then in my opinion that would be sufficient to amount to a furtherance of the improper purpose.

(b) By contrast, in *Amcor*, Kyrou J was inclined to the view that singular acts of concealment of a past fraud (or offence) would be in "furtherance" thereof:

> [T]he rationale of legal advice privilege is to enable clients to obtain advice from their lawyers to facilitate the organisation of their affairs within the law. Legal advice that is sought for the purpose of committing a fraud falls outside this rationale. In my opinion, so does legal advice that is sought about what positive steps can be taken to give continuing efficacy to the fraud, such as advice on positive steps to conceal the fraud or positive steps to place the relevant property beyond the reach of any court order that the victim may obtain. Advice about the taking of such steps can be described as advice prepared in furtherance of the commission of a fraud. [187]

193 Taxi Apps says that in *Kinghorn*, the New South Wales Court of Appeal noted this divergence of views[188] but did not resolve it.

194 Taxi Apps says that it is unnecessary to resolve the divergence of views between Hodgson J and Kyrou J in the present case. That is because it is clear from the passage quoted above that Hodgson J accepted that an act of concealment by a person proposing to continue in the proscribed conduct would be "furtherance" of that continuing conduct. That view was said to be echoed by Brereton J in *Carbotech-Australia*:[189]

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186 *Watson*, [116].
187 *Amcor*, [61].
188 *Kinghorn*, [120].
189 *Carbotech-Australia*, [26].

> [I]f the client is obtaining legal advice in the context of an ongoing dishonest or fraudulent undertaking, so that the advice will or may impact upon or inform the client in the course of that undertaking, it will be regarded as being in furtherance of the improper purpose.

195 According to Taxi Apps, the present case is of that kind. The relevant communications are said to be in furtherance of ongoing and future offending, including because the Defendants were concerned to ensure the fines and regulatory enforcement did not have the effect of discouraging UberX Partners from offending.

The Defendants' submissions

196 The Defendants begin their submissions about the Misconduct Exception by noting that legal professional privilege is a substantive common law right that promotes the rule of law.[190] As Lord Taylor observed in *R v Derby Magistrates' Court, Ex p B*[191] legal professional privilege is "more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."[192] For these reasons, the Defendants say that in the context of s 125 it "is a serious thing to override legal professional privilege where it would otherwise be applicable".[193]

197 The Defendants contend that the Plaintiffs make serious allegations in replying on the Misconduct Exception, *viz* that the Defendants and the UberX Partners committed offences, and that a number of the Sample Documents were created "in furtherance" of these offences. According to the Defendants, the Plaintiffs have approached the requirements of s 125 at an intolerably high level of generality. For example, Taxi Apps does not address, at all, why they say there are reasonable grounds to find that the UberX Partners committed offences, still less the Defendants' complicity in those offences. Mr Andrianakis addresses the alleged offences for each jurisdiction in two conclusionary and generalised paragraphs. This absence of precision is said to be

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190 *Baker v Campbell* (1983) 153 CLR 52 at 88-89, 96-96, 116-117, 127-128 and 131-132; *Attorney General (NT) v Maurice* (1986) 161 CLR 475 at 490; *Carter v Managing Partner, Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 132-3, 145, 161; *Goldberg v Ng* (1995) 185 CLR 83, 95, 106, 109, 120 and 123; *Akins v Abigroup Ltd (*1998) 43 NSWLR 539, 546; *DSE,* [27] (and the authorities cited therein).

191 [1996] 1 AC 487, 507.

192 This passage was quoted with apparent approval in *DSE* at [30].

193 *Propend,* 592.

unsatisfactory and leaves the Defendants, and the Court, in the position that the Plaintiffs' challenges cannot be understood, still less upheld. The Plaintiffs have similarly failed to properly articulate how the Sample Documents can be said to have been "in furtherance" of the unspecified offences. The high level explanations they provide are said to be deficient. For these reasons, the Defendants submit that the Plaintiffs' challenge under s 125 of the Evidence Act should fail.

198 The Defendants submit that the Plaintiffs bear the onus of establishing the requirements of s 125 have been met.[194]

199 They say that even where the commission of an offence is a fact in issue in the proceedings, the challenging party must prove:

(a) there are reasonable grounds that the offence was committed. That requires "there must be "something to give colour to the charge", some evidence at a prima facie level that has foundation in fact grounding such a claim".[195] That will be something less than proving the facts on balance of probabilities;[196] and

(b) the alleged facts, if demonstrated to the relevant standard, would amount to the commission of an offence as a matter of law (and not only that there are "reasonable grounds" to that effect);[197] and

(c) the communication or document was prepared "in furtherance of" the offence identified in (a) and (b). As with the offence itself, a party cannot merely assert that is the purpose for which the document is created; there must be prima facie evidence that the communication was in furtherance of the offence.[198]

200 The Defendants submit that it is critical that the challenging party set the alleged offence out with precision to provide the other party with particulars of the allegation against them, to satisfy the requirements above and to allow the Court to test whether

194 *Kang*, [37.3].
195 *Kang*, [37.6].
196 *Kinghorn*, [117].
197 *Kinghorn*, [118].
198 See, eg, *Butler v Board of Trade* [1971] 1 Ch 680, 689.

the document or communication was prepared "in furtherance" of that offence. In *Propend*, McHugh J described the requirement as follows:[199]

> A mere allegation of illegal purpose or fraud is not, of itself, sufficient to displace a claim of legal professional privilege. A person who alleges that legal professional privilege does not apply to a communication tenders an issue for decision and has the onus of proving it. … Legal professional privilege is a legal right. Its prima facie application to a communication can only be displaced by admissible evidence. That evidence does not have to prove that the communication was made in furtherance of a crime or the commission of a fraud, but it must establish a prima facie case that the communication was so made. In *O'Rourke v Darbishire*, Viscount Finlay said that what is required is 'something to give colour to the charge. The statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact.'

201 Similarly, in *Kinghorn* a party failed to specify how the alleged facts gave rise to a fraud as a matter of law. The New South Wales Court of Criminal Appeal observed:[200]

> … To hold that advice or litigation privilege is lost in circumstances where the relevant facts are not in issue, but a party asserts but declines to fully argue that those facts establish a fraud, an offence, an act rendering a person liable to a civil penalty or a deliberate abuse of power, would represent far too low a threshold for the loss of privilege.
>
> … A forensic decision was made on Mr Kinghorn's behalf not to fully argue the law before the primary judge so as to preserve Mr Kinghorn's position for the determination of the stay motion. One consequence of that decision is that he does not satisfy s 125(1).

202 To be in furtherance of an offence, the Defendants submit that the document or communication must have the purpose of helping the offence forward or advancing it.[201] The client must have this purpose at the time the document is created.[202] As Brereton J observed in *Carbotech-Australia:*

> it is clear that it is insufficient to deny a communication the privilege to which it might otherwise be entitled that it merely be relevant to, or might disclose, a fraud or crime: for that consequence to follow, it must be in furtherance of the fraudulent or criminal purpose.

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199 *Propend*, 587, footnotes omitted.
200 *Kinghorn*, [118]-[119].
201 *Lewis v Nortex Pty Ltd (in liq)* [2002] NSWSC 1245, [7]; *Amcor*, [59].
202 *Ding and Ding* (2019) 59 FamLR 262, [80].

The Defendants say that Mr Andrianakis misstates the effect of this remark and Brereton J's subsequent reference to *AG Australia Holdings Ltd v Burton*[203] and should be disregarded.

203 The Defendants submit that where advice is sought as to whether a client is within the scope of an Act of Parliament, as opposed to how to escape the consequences of being within it, privilege is not lost.[204] The Defendants say that importantly, this has the effect that legal advice sought for the purposes of understanding whether offences have been or will be committed is not "in furtherance" of them.

204 Similarly, advice on the legal consequences of past misconduct, the legal remedies that may be invoked and any legal defences that may be available is not, say the Defendants, in furtherance of the commission of the fraud.[205] Legal advice will not be in furtherance of an offence where it is merely for the purposes of avoiding adverse consequences, such as penalties or claims for damages.[206] The passage of a number of years between the alleged offences and the documents in issue render it less likely they were in furtherance of the offence.[207]

205 The Defendants submit that examples of circumstances in which advice has been held not to have been in furtherance of misconduct for the purposes of s 125 and at common law are illustrative, and rely on the following:

(a) In *Butler v Board of Trade*, the Court held that a letter from a solicitor voluntarily warning that conduct could lead to prosecution for fraud was held not to fall within the common law equivalent of s 125 on the basis that the Court "cannot regard that on any showing as being in preparation for or in furtherance or as part of any criminal designs on the part of the plaintiff".[208]

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203 (2002) 58 NSWLR 464.
204 *Attorney-General (NT) v Kearney* (1985) 158 CLR 500, 514 per Gibbs CJ citing *Bullivant v Attorney-General for Victoria* [1901] AC 196, 207.
205 *Amcor*, [62].
206 *Watson,* [116].
207 *Kinghorn*, [121].
208 [1971] Ch 680, 687.

(b) In *Cargill*, Daly AsJ found that, for the purposes of s 125, there were reasonable grounds to conclude that the business JWM had engaged in a fraud by altering the results of analysis provided to customers, to conceal its breaches of contract and deprive customers of a remedy. The "Viterra Policies" documented the policies that enabled the company to provide customers with the altered analysis. Daly AsJ concluded:[209]

> Accordingly, any documents which were made or prepared in order to further give effect to, or conceal from JWM customers the Viterra Practices, including the Viterra Policies, are not protected from disclosure by reason of legal professional privilege. **For the avoidance of doubt, this of course does not include legal advice as to the consequences of JWM developing and implementing the Viterra Policies.** [emphasis added]

(c) In *Zemanek v Commonwealth Bank of Australia*,[210] Hill J found that there was a prima facie case that a bank had made false representations to Mr Zemanek, causing him to deposit the maximum amount of funds with the bank to his detriment, that would amount to fraud. The bank had appointed receivers, frozen accounts and applied funds in his accounts to debts he owed the bank. Legal advice was sought from internal and external lawyers leading up to and including these events. Nonetheless, his Honour held that:

> there was not a scintilla of evidence to suggest that any lawyer, whether internal or external, gave advice to further the commission of the fraud. … It is not made out by showing that officers of the Bank perpetrated a fraud against … Mr Zemanek.

(d) In *Varawa v Howard Smith & Co Ltd*,[211] the plaintiff alleged that the defendants had falsely and maliciously caused their arrest by reliance on statements in affidavits they knew to be false and misleading to extort money from them. The plaintiff administered an interrogatory asking if they had legal advice regarding the cause of action, relying on the common law exception preceding s 125 of the Evidence Act. The Court held that legal professional privilege in

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209 At [185].

210 Federal Court of Australia, Hill J, 2 October 1997, unrep.

211 (1910) 10 CLR 382.

the advice obtained was not lost. O'Connor J observed that, even assuming the defendants' conduct amounted to fraud:

> I cannot understand how the mere fact that the company did what is complained of after obtaining their solicitor's advice necessarily, or even reasonably, leads to the inference that the communication with their solicitor was in itself a step in the wrong-doing, or preparatory to, or in aid of it …[212]

206 Similarly, the Defendants submit that examples of circumstances in which privilege has been lost assist in understanding the relevant principles. They say that in each instance, there was a specific and direct link between the advancement of the precise misconduct alleged and the advice sought, relying on the following:

(a) In *R v Cox & Railton*,[213] the prosecution alleged the defendants had prepared and signed a memorandum dissolving a partnership that was falsely backdated, for the purposes of defeating a judgment obtained against them. They consulted a solicitor in the course of which it was expressly arranged that the partnership be kept secret, and advice was sought about various ways to dispose of assets. The Court held the communications with the solicitor were not protected by legal professional privilege, with Stephen J (who gave the judgment for the Court) observing:[214]

> The only thing which we feel authorized to say upon this matter is, that in each particular case the court must determine upon the facts actually given in evidence or proposed to be given in evidence, whether it seems probable that the accused person may have consulted his legal adviser, not after the commission of the crime for the legitimate purpose of being defended, **but before the commission of the crime for the purpose of being guided or helped in committing it**. We are far from saying that the question whether the advice was taken before or after the offence will always be decisive as to the admissibility of such evidence. Courts must in every instance judge for themselves on the special facts of each particular case … (emphasis added)

(b) In *Amcor*, Kyrou J found two types of documents were within the scope of the Misconduct Exception: first, advice on the acquisition of interests that were

212 Ibid, 387; see also Griffith CJ at 385 and Isaacs J at 390.
213 (1884) 14 QBD 153.
214 Ibid, 175.

sought to be secretly and improperly acquired by the client; and secondly, where beneficial interests had been obtained through fraud, advice as to restructure arrangements that were to continue the efficacy of the secret beneficial interests and their financial benefits were in furtherance of a fraud and not privileged.[215]

(c) In *Talacko*, documents were variously found by Elliott J to be in furtherance of a fraud for the purposes of s 125 where the advice was in respect of: transferring properties where the proposed transfers were found, prima facie, to be a fraud; different explanations that might be given for the transactions comprising the property transfers; steps that needed to be taken for the transfers to proceed; and as to how to defraud creditors.[216]

207 In considering authorities regarding the Misconduct Exception, the Defendants say that it is important to note that it appears the Plaintiffs rely upon a series of offences involving different drivers and different trips on different dates in different locations (the particulars of which offences are not known to the Defendants), which the Defendants are said to be complicit in. Authorities and fact patterns involving ongoing dishonest schemes should therefore be approached with caution.

208 The Defendants say that cases such as *Carbotech-Australia* are not analogous as cases based on fraudulent schemes are not relevant, there being no scheme pleaded by the Plaintiffs in this case and as the Plaintiffs accept that no ongoing offences were committed, rather several individual offences. They say that a fraudulent or criminal design is very different to what occurred here.

209 The Defendants say that Mr Andrianakis' submission that advice that will "impact upon or inform the client" in the course of misconduct is in furtherance of it should not be accepted. First, it is based on a more limited statement by Brereton J in *Carbotech-Australia* that refers only to an "ongoing dishonest or fraudulent undertaking" and not a series of individual offences (as do the cases that have

215 *Amcor*, [118], [127].
216 *Talacko,* [81].

subsequently referred to it). Secondly, the statement from Brereton J was only paraphrasing (it begins "in other words") remarks by Hodgson CJ in Eq in *Watson* set out in the balance of *Carbotech-Australia*[217] which makes plain that the client must "propose to use the legal advice to assist" in the purpose of continuing the dishonest conduct. To the extent the Plaintiffs suggest the words "impact upon or inform" have some lesser meaning than "assist", that submission should be rejected. That would, say the Defendants, plainly be inconsistent with the authorities set out above.

Analysis

210 The parties addressed the general principles and key authorities in respect of the Misconduct Exception in a thorough manner, much of which is set out above. There was not a great deal of difference between the parties as to the principles, the disagreement was in their application to this case.

211 Therefore, there is no need for me to separately set out the principles as the parties have done so sufficiently. Nonetheless, it is helpful to draw them together and in this regard I can do no better than adopt the summary made by Elliott J in *Talacko*, drawing upon *Amcor*. Justice Elliott stated the following propositions:[218]

> (1) The court does not need to be satisfied on the balance of probabilities that a fraud, an offence or an act that renders a person liable to a civil penalty ("Penalty Act") has been committed, but rather that there are reasonable grounds for finding the fraud, offence or Penalty Act has been committed.
>
> (2) The section requires that "the client" be knowingly involved in the fraud, offence or Penalty Act. A client may be knowingly involved in the fraud, offence or Penalty Act of another person by:
>
> (a) conspiring with that person to commit the fraud, offence or Penalty Act;
>
> (b) being a knowing participant in the other person's fraud, offence or Penalty Act; or
>
> (c) knowingly providing other forms of assistance to that person in relation to the fraud, offence or Penalty Act.

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217 *Carbotech-Australia,* [25].

218 *Talacko*, [15] (citations omitted).

(3) Legal advice procured by a client for the purpose of assisting another person to commit a fraud, offence or Penalty Act falls within s 125(1)(a) and is not privileged.

(4) Where a person, who is not aware of any fraudulent purpose, obtains legal advice as agent for another person, and that other person has an undisclosed fraudulent purpose in obtaining the advice, s 125(1)(a) applies. The other person is the true client, even if the lawyer is not aware of the client's existence.

(5) The word "furtherance" in the phrase "in furtherance of the commission of a fraud or an offence or the commission of [a Penalty Act]" means "the fact of being helped forward; the action of helping forward; advancement, aid, assistance".

(6) There is no absolute rule that conduct occurring after a fraud, an offence or a Penalty Act has been completed cannot be held to be "in furtherance of the commission" of the fraud, offence or Penalty Act. Subsequent conduct may or may not be in furtherance, depending on the nature and purpose of the conduct.

(7) Positive steps taken by a fraudster to conceal information about the fraud or to place the property beyond the legal reach of the victim once the fraud is discovered can be in furtherance of the fraud insofar as the steps continue its efficacy.

(8) Legal advice sought about what positive steps can be taken to give continuing efficacy to the fraud, such as advice on positive steps to conceal the fraud or positive steps to place the relevant property beyond the reach of any court order that the victim may obtain, fall outside the rationale for legal advice privilege and may be described as advice prepared in furtherance of the commission of a fraud.

(9) Legal advice about legal consequences of a past fraud, the legal remedies that may be invoked by the victim of the fraud and any legal defences would not be in furtherance of the commission of a fraud.

(10) Where the commission of a fraud, offence or Penalty Act is not a fact in issue in a proceeding, by operation of s 125(1) a document will not be privileged if the party who alleges that the document is not privileged satisfies the court that there is a prima facie case that a fraud, offence or Penalty Act has been committed and a document was prepared in furtherance of that fraud, offence or Penalty Act.

(11) If a communication is made or a document is prepared for the purpose of planning or otherwise furthering a fraud, offence or Penalty Act, the communication or document falls within s 125(1)(a). This position is not affected by the subsequent events by which the fraud, offence or Penalty Act either is or is not committed.

212 His Honour then went on to elaborate on what must be established before the requirements of s 125(a)(1) may be satisfied, as follows:[219]

> (1) Although the person challenging the claim for privilege is not required to prove the alleged fraud or other improper purpose on the balance of probabilities, such a person must do more than simply allege that a fraud or other improper conduct has occurred, or was intended to occur at the time of the impugned communication or document. There must be "something to give colour to the charge" at a prima facie level that has foundation in fact.
>
> (2) What is sufficient to establish reasonable grounds to give "colour to the charge" will depend upon the circumstances of the case.

213 There was some debate at the hearing as to whether the characterisation of privilege as being "lost" where the Misconduct Exception applies is correct. It may be that a privileged document or communication to which the Misconduct Exception applies is stripped of its privilege by operation of the Misconduct Exception; or it may be that if the Misconduct Exception applies, privilege never attaches or subsists in the first place. I do not think it necessary to resolve this, since the end result is the same: if the Misconduct Exception applies, then the party seeking to resist production of it on the basis of privilege is not able to do so.

Application of the Misconduct Exception

214 The parties made extensive submissions as to the application of the Misconduct Exception in this case. For convenience and clarity I have set these out below according to the party making the submission and in rough correspondence to subsections (a) and (b) of s 125 of the Evidence Act, being the identification and commission of the offences and whether the communication or document is 'in furtherance of' the commission of the offences.

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219 Ibid, [16] (citations omitted).

Mr Andrianakis' submissions

Identification and commission of the offences

215 The allegations in the Andrianakis Proceeding include that UberX Partners committed offences and that the Defendants were complicit in those offences because they had knowledge of the essential elements of the offences and assisted in their commission. Mr Andrianakis also alleges that in New South Wales and Queensland, the Defendants themselves were acting contrary to the applicable legislation.

216 Mr Andrianakis submits that the Defendants' criticism that his submissions only go to their operations at a general level and that individual offences by individual drivers are not identified misconceives what is required to fall within the Misconduct Exception. As the offences are issues in the proceeding, the test is as outlined above in terms of lending colour to the charge at a prima facie level.

217 He also relies on his submission that he does not have to show that the offences were actually committed. Rather, the question is whether the document was prepared in furtherance of the commission of an offence, whether it was in fact committed or not.[220]

218 Notwithstanding that, Mr Andrianakis submits that the commission of offences is amply demonstrated in the material so far available to him. The Andrianakis Submission sets this out in considerable detail,[221] which I do not repeat here, however I have read it carefully. At the hearing, Counsel for Mr Andrianakis carefully took the Court through the main elements of that submission, which I summarise below and in the next section.

219 While the terminology and the provisions of the applicable legislation in the Relevant States differs somewhat from each other, broadly speaking and as noted by Macaulay J in Ruling No 1, at the relevant time it was an offence to own or operate a commercial passenger transport service (defined as a vehicle used or intended to be used as carrying a passenger for hire or reward) without holding the requisite licence

220 Relying on *Cargill*, [195].

221 See Andrianakis Submission, [129]-[142].

or accreditation, or to use an unauthorised vehicle for such a service. In these reasons, these are referred to as Ridesharing Offences.[222]

220 The purpose of UberX was to provide transport for a fare. In the claim periods, where the UberX Partner was not licensed to provide point-to-point passenger services or was not driving a vehicle licensed for that purpose, an offence was committed every time such an UberX Partner provided the service. The commission of Ridesharing Offences was therefore integral to the establishment and operation of UberX in the Relevant States. It would only be if a UberX Partner happened to hold the requisite licence and to drive an authorised vehicle that Ridesharing Offences would not be committed in respect of particular trips.

221 Mr Andrianakis rejects the Defendants' submission that the Plaintiffs allege that there was some ongoing offence engaged in by the Defendants. He says that that is not the Plaintiffs' position; they say that there was ongoing conduct but each offence was separate.

222 Mr Andrianakis submits that in each of the Relevant States, that the UberX Partners would not, and then did not, hold the necessary licence, permit, authority or driver accreditation and thereby would commit and in fact committed the Ridesharing Offences is established by:[223]

(a) the intention to launch using unlicensed drivers;

(b) regulatory risk assessment undertaken by Uber employees prior to launch;

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222 By way of example, the Ridesharing Offences were breaches of the following: in Victoria, ss 158(1) and 165 of the *Transport (Compliance and Miscellaneous) Act 1983* (Vic); in New South Wales, ss 37(1) and 40(2) of the *Passenger Transport Act 1990* (NSW); in Queensland, ss 15, 27 and 70 of the *Transport Operations (Passenger Transport) Act 1994* (Qld); in Western Australia, s 15 of the *Taxi Act 1994* (WA), ss 50, 47ZD and 47ZE of the *Transport Co-ordination Act 1966* (WA) and s 49 of the *Road Traffic (Authorisation to Drive) Act 2008* (WA).

223 I have summarised the submissions regarding each of these matters in the next section. The Andrianakis Submission sets out the sources for these matters in respect of each of the Relevant States: see paragraphs 133 (Victoria); 135 (New South Wales); 137 (Queensland); 139 (Western Australia).

(c) Uber's conduct in avoiding enforcement activity following launch, in particular stifling and delaying enforcement action;

(d) admissions in the Defendants' discovered documents about the unlawfulness of UberX;

(e) the issuing of fines for the Ridesharing Offences;

(f) the Defendants' payment of fines issued to UberX Partners;

(g) the prosecution of certain UberX Partners; and

(h) Uber's ultimately successful campaign to legalise UberX in the Relevant States.

223 Mr Andrianakis submits that the matters referred to in paragraph 222 above establish that Uber was complicit in the UberX Partners' offences and thereby the Defendants themselves committed offences, alternatively that Uber was knowingly concerned in the UberX Partners' offences.[224]

224 In addition, Mr Andrianakis submits that these same matters establish that:

(a) the Third and Fifth Defendants contravened s 35(1)(a) of the *Passenger Transport Act 1990* (NSW) by not holding the necessary accreditation under that Act;

(b) the Third and Fifth Defendants contravened s 15 of the *Transport Operations (Passenger Transport) Act 1994* (Qld) by not holding the necessary accreditation under that Act; and

(c) the First, Third and Fifth Defendants contravened s 15(1) and (2) of the *Taxi Act 1994* (WA); one or more of the Defendants contravened s 26 of the *Taxi Act 1994* (WA); the First, Third and Fifth Defendants contravened s 50 of the *Transport*

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224 The Andrianakis Submission sets out the sources for these matters in respect of each of the Relevant States: see paragraphs 134 (Victoria); 136 (New South Wales); 138 (Queensland); 141 (Western Australia).

Co-ordination Act 1966 (WA); and one or more of the Defendants contravened s 47ZD of the *Transport Co-ordination Act 1966* (WA).

Furtherance of the offences

225 Mr Andrianakis submits that courts have recognised that where a person seeks legal advice in the context of an ongoing scheme to engage in misconduct and proposes to use that legal advice in a way that will or may impact upon or inform the client in the course of that misconduct, it will be regarded as being in furtherance of that improper purpose.[225]

226 He says that the launch and operation of UberX in the Relevant States would, and then did, result in the Ridesharing Offences being committed – continuously and on a mass scale – across the entire claim period for each of those states. In those circumstances, legal advice which assisted the Defendants in the establishment and operation of UberX was advice obtained or received in furtherance of the commission of the Ridesharing Offences, and privilege does not attach to such documents or communications.

The Defendants' knew that using unlicensed UberX Partners would be unlawful

227 Mr Andrianakis submits that it was the Defendants' stated intention to launch using unlicensed drivers and assessments regarding regulatory risk were to be carried out prior to and at launch.[226] Uber's 'P2P City Launch Playbook' ('**Playbook**') published in around November 2013 and its 'International P2P Launch Guide' ('**Launch Guide**') operationalised the implementation of the White Paper. Matters such as the seriousness of enforcement were considered, for example whether civil or criminal, fine amount and/or licence revocation.[227] Mr Andrianakis submits that the purpose of the regulatory review was not to ascertain whether UberX would be lawful in a given jurisdiction, rather it was to identify the risks associated with enforcement if launched and strategies regarding that enforcement. Examples of regulatory reviews

225 See paragraphs 177-186 above.
226 Tender Bundle 5: Uber Policy White Paper 1.0, April 2013.
227 Tender Bundle 79: Launch Guide.

carried out by the Defendants in respect of the Relevant States which identify that unlicensed drivers could not lawfully provide the UberX service are detailed in the Andrianakis Submission.[228]

228 By way of example, Mr Andrianakis points to the Minister for Transport in Western Australia reminding the Defendants of the requirements for the provision of point-to-point transport in Perth immediately prior to launching UberX in Perth.[229] The Defendants' internal reaction to this was:[230]

> He's stated the law and making it clear he is not condoning us breaking it, which we will do when we launch X.

Many of the UberX Partners were unlicensed and the Defendants knew this

229 Mr Andrianakis submits that there is sufficient evidence that many of the UberX Partners were unlicensed and that the Defendants knew this.

230 Mr Andrianakis says that Australia was first identified as a possible launch candidate for UberX in May 2013.[231] By April 2014 it had been launched in Victoria, New South Wales and Queensland, and by October 2014 it had been launched in Western Australia.[232] He says that consistently with the White Paper, the Defendants planned to and did launch UberX in Australia using unlicensed providers. By way of two examples, an email dated 28 November 2013 from Jordan Condo of Uber Asia Pacific stated "licensed UberX is not where we want to be in AUS. The licensing fee is too expensive"; and a notification from David Rohrsheim to Mr Condo dated 28 April 2014 stated:

> Penalties As far as we can see, the only penalties are monetary - $1700 for operating without a proper license … The regulator also has the power to revoke the driver or partner's limo/taxi licence. Practically this means our

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228 In respect of **all jurisdictions**, see Tender Bundle 32, 52. In respect of **New South Wales**, see Tender Bundle 57. In respect of **Victoria**, see Tender Bundle 32, 50, 46, 83, 35, 40. In respect of **Queensland**, see Tender Bundle 73. In respect of **Western Australia**, see Tender Bundle Tab 212.

229 Tender Bundle 212.

230 Tender Bundle 212.

231 Tender Bundle 6, 11.

232 Defendants' Consolidated Amended Defence, Schedule 1.

> pioneering P2P drivers will likely be from outside the existing industry and wholly unlicensed.[233]

Building scale and 'flipping a city'

231 Mr Andrianakis says that the Defendants' stated aim when launching in a city was to build scale quickly so as to grow the business, get positive media, and leave the government with no choice but to accept UberX.[234] For example, when launching in Melbourne and Sydney, the aim was to get to 2,000 trips each week in each of those cities as quickly as possible, to ensure that it had "as many people as possible to support uberX [sic] leading up to what will inevitably be a regulatory fight in both cities".[235]

232 According to Mr Andrianakis, this meant that Ridesharing Offences were being systemically committed on a mass scale.

233 Where UberX was launched in jurisdictions where it was not lawful, the Defendants' goal was to make UberX legal in that city. This was referred to as 'flipping' a city. By way of example, in September 2014 Uber acknowledged that it was operating UberX in over 100 markets worldwide while it had been legalised in only 12 of those jurisdictions.[236]

234 To achieve its ultimate aim of legalising UberX in each of the Australian states,[237] Uber undertook a campaign to lobby state governments. This involved engaging the services of government relations firms, who facilitated meetings and opportunities for ongoing dialogue with relevant ministers, their chief of staff and/or policy advisors on Uber's behalf.[238]

235 Mr Andrianakis submits that when enforcement action occurred or where the Defendants were otherwise engaged with regulators about UberX, a key tactic used

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233 Tender Bundle 40, 42.
234 Tender Bundle 82.
235 Tender Bundle 80.
236 Tender Bundle 210.
237 Tender Bundle 216.
238 Tender Bundle 204, 206, 211, 248, 164, 176, 184, 210.

by them was delay. When the regulator in Melbourne requested a meeting to discuss 'low cost Uber', the internal response was to delay the meeting for as long as possible so as to grow the business and achieve positive press interest and public sentiment.[239] Following a raid of the Sydney Uber office by the New South Wales enforcement body shortly after the launch of UberX in that city, an internal legal update stated "Legal counsel are involved. Their goal to minimise breadth of request and delay".[240]

Avoiding enforcement measures being taken by regulators

236 Where the Defendants were concerned about likely regulatory enforcement, strategies such as hiding from and/or deceiving regulators were employed, which were documented in documents such as 'Global V-TOS Program' and 'Hack the Police'.[241]

237 One of the mechanisms for avoiding enforcement action that was considered by the Defendants was to disguise UberX as 'carpooling'. In an email dated 26 March 2014 regarding launching UberX in Victoria, Mr Condo stated that:[242]

> The idea was to launch uberX disguised as carpooling for a month and then switch it to full on p2p. The hope was to delay regulatory scrutiny long enough to have a business that could withstand the pressure from taxi to shut us down.

238 A similar plan was to be deployed for New South Wales, and regulators in both states prior to launch were told that Uber would be "testing" a "carpool-like service".[243] Of this plan, Mr Condo said "[w]e only agreed on the carpooling idea after having MEL lawyers run through our options". He later described the plan internally as "only a ploy in meeting with regulators".[244]

239 The carpooling plan was ultimately abandoned, as the "regulator isn't buying our carpooling 'approach'".[245] Other plans such as providing free services or unprofitable

239 Tender Bundle 152.
240 Tender Bundle 92.
241 Tender Bundle 245, 251, 182.
242 Tender Bundle 59.
243 Tender Bundle 73.
244 Tender Bundle 145.
245 Tender Bundle 115.

ones were contemplated or attempted, with Mr Rohrsheim stating in an email in August 2014:[246]

> We avoided calling it uberX and instead called it a "low cost Uber trial". We also launched with free (Brisbane) and non-profit (Sydney/Melbourne) pricing, but that didn't trick the regulator.

240 Mr Andrianakis says that the Defendants used various measures to stifle enforcement action so that UberX could continue to grow. These measures included:

(a) 'greyballing': this was the name given to the technique of removing users who it was suspected may be enforcement officers. This meant that they could not use the Uber app to access a UberX service;[247] and

(b) 'blackout geofences': this technique prevented requests for UberX services from high risk areas, such as around the office buildings used by enforcement officers/regulators, by making it look on the Uber app as if there were no cars available in the area.[248]

Payment of fines incurred by UberX Partners and other measures to ensure continued supply and product growth

241 According to Mr Andrianakis, enforcement action against UberX Partners commenced shortly after UberX was launched, primarily involving the issuing of fines but also some prosecutions.[249] The Defendants' concern was that this enforcement action, including the threat of it, would have a chilling effect on the supply of drivers.[250]

242 In response, the Defendants paid the fines and reassured UberX Partners that it would support them. With the assistance of Uber In-House Counsel and external legal

246 Tender Bundle 194, 110.
247 Tender Bundle 130, 127.
248 Tender Bundle 178, 138, 134, 99, 103, 112, 108, 187, 188, 215, 251, 303.
249 In respect of fines, see Tender Bundle 181, 191, 154, 140, 221, 291, 197, 198, 200, 202, 209, 208, 247, 294, 301. In respect of prosecutions, see Tender Bundle 226, 227, 246, 228, 284, 279, 240.
250 Tender Bundle 188, 104, 105.

advisors, the Defendants devised the following scheme[251] to pay the UberX Partners' fines:

(a) Uber proactively called UberX Partners and told them get in touch immediately if they received a fine.

(b) When an UberX Partner received a fine and made contact with Uber, Uber employees would contact the UberX Partners and give instructions as to how to provide a copy of the infringement to Uber.[252] The UberX Partner may also be directed to "drop in to our partner centre and one of our managers can talk through the simple process".[253]

(c) Separately, Uber had entered into arrangements with a number of external law firms to pay the fines on behalf of the UberX Partners.[254]

(d) Once Uber had collected a number of fines within each state, Uber emailed these to the relevant law firm.[255]

(e) Uber would pay funds to the law firm, often in large instalments.

(f) The law firm would then pay the fines on behalf of the UberX Partners.

243 This resulted in the payment by Uber of at least $4.29 million for fines and related fees over a period of three years in Australia. [256]

244 Uber also expended significant effort reassuring drivers about the fines. Commitments were made both publicly[257] and privately to drivers that Uber would "support its drivers". The latter included telephone calls and text messages.[258] Uber

251 Tender Bundle 181, 191, 154, 140, 221, 291, 197, 198, 200, 202, 203, 209, 208, 247.
252 Tender Bundle 304, 305.
253 Tender Bundle 302.
254 See Schedule A to the Andrianakis Submission.
255 Tender Bundle 208, 155.
256 This is detailed in Schedule A of the Andrianakis Submission, including citing source documents.
257 Tender Bundle 92, 214.
258 Tender Bundle 192, 141, 220.

also proactively called drivers it thought *might* receive fines.[259] Uber's key messages or 'script' when reassuring UberX Partners was as follows:[260]

> Not to worry
>
> Uber will cover it
>
> The fine is only a monetary offence (like a big parking ticket).
>
> This isn't a surprise, [Uber has] seen this tactic around the world.
>
> If [a driver] receive[s] one – to get in touch with [Uber] ASAP.
>
> [Uber] stand[s] by you 100%. If you receive a fine, please call us immediately so we can take care of it.
>
> We stand by our partner drivers and as we've seen around the world, they will not be paying fines.

245 That reassurance was for the sole purpose of protecting driver supply:[261]

> Your goal will be to not spook your supply (new or existing.) So long as our strategy is to eat the fines, you don't want this to reach the press. Glenn had a nice generic message that said "Hey, Uber receives a lot of attention every day. If you ever get a question from the press or Transport just bring it to us and we'll be happy to help you out."

246 In some instances, UberX Partners wrote to Uber about the fines they had received seeking clarification on the requirements that they needed to satisfy to provide a lawful service.[262] Mr Andrianakis says that it is apparent from these communications that these UberX Partners did not know that the Uber service they were providing using Uber's apps was unlawful. There is internal correspondence suggesting that Uber did not, despite request, provide written confirmation to a concerned driver that UberX is not illegal.[263]

247 Mr Andrianakis' submissions in relation to the individual Sample Documents is set out in Schedule B of the Andrianakis Submission. Again, he says that the applicable standard of proof is reasonable grounds for so finding rather than the balance of

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259 Tender Bundle 139, 136.
260 Ibid.
261 Tender Bundle 179, 139, 162, 220, 104, 190.
262 Tender Bundle 305, 304, 186.
263 Tender Bundle 186.

probabilities,[264] which is said to be amply satisfied for the reasons explained in Schedule B.

Taxi Apps' submissions

Identification and commission of offences

248 Taxi Apps submits that having regard to the evidence,[265] it is apparent that each of the Ridesharing Offences falls within that definition of "Offence". Taxi Apps adopted the submissions made on behalf of Mr Andrianakis.

249 Taxi Apps says that to the extent the Defendants say that some of the documents it relies on post-date legalisation, they only post-date legalisation in some but not all of the Relevant States. Taxi Apps submits that the advice is likely to be regarding the system rather than specific proposed offences.

Furtherance of offences

250 Taxi Apps says that it is clear that, before UberX was launched in Australia, the Defendants understood that the provision of ridesharing services was unlawful in the Relevant States and likely to result in the imposition of fines.[266] On one view, all communications and documents in furtherance of the launch and operation of UberX after that point were in furtherance of the Ridesharing Offences because those offences were an integral aspect of the UberX service.[267] That would be so even if the lawyers involved in the specific communications or documents themselves had no knowledge of the proposed offending, and no intention to facilitate such offending. It would be sufficient that Uber's purpose in obtaining the relevant legal advice was to advance the operation of UberX in circumstances where the UberX business model at that time depended upon the ongoing commission of the Ridesharing Offences. Taxi Apps refers to this approach as the **Broad s 125 Submission**.

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264 *Cargill*, [170].
265 Catchpoole Affidavit, [22].
266 See, for example, Catchpoole Affidavit, [79].
267 Similarly, see *Carbotech-Australia*.

251 While Taxi Apps relies on the Broad s 125 Submission, it says that the present application does not depend upon its acceptance. That is because the evidence is said to demonstrate that several of the Sample Documents satisfy the Misconduct Exception on a narrower basis having regard to the nature and substance of the communications at issue.

252 During oral submissions, Counsel for Taxi Apps illustrated its position by reference to the analogy of a house burglar. The analogy was put in this way: a person goes to a lawyer and tells the lawyer he plans to rob a house, without identifying the house or when the burglary is intended to occur, and asks for advice on whether police can use geo-tracking on his mobile telephone to demonstrate he was at a particular house at a particular time. If the Defendants are correct about the Misconduct Exception, then it does not apply because the exact house and date are not identified. Taxi Apps says that cannot be right. The analogy was then taken further, by asking what the situation would be if the house burglar tells the lawyer he is going to burgle several houses. Again, Taxi Apps says it cannot be right that the Misconduct Exception does not apply. Further, it does not matter if the lawyer is unaware of the client's nefarious purpose, since it is the client's purpose not the lawyer's knowledge of it that is important.[268] Continuing the analogy, the house robber asking the lawyer about the admissibility of geo-tracking evidence from his mobile telephone, without giving the lawyer the context for it (being the intent to commit burglary offences), is in furtherance of the house burglar's scheme to commit the offences.

253 Taxi Apps submits that here, the Defendants know that the conduct (ie the provision of UberX in the Relevant States) is unlawful. To the extent they get advice about what they know is a systematic commission of offences, then the Misconduct Exception applies. Taxi Apps says that advice regarding setting up the system will fall within the Misconduct Exception, as will matters such as advice on greyballing, as these are in furtherance of the offences because they will assist in the success of the scheme.

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268 *Carbotech-Australia*, [21]-[22].

254 Taxi Apps says that the discovery reveals that the Defendants adopted a number of specific strategies in furtherance of the Ridesharing Offences and a number of the Sample Documents were in furtherance of those strategies. It is said that these relevant strategies were to:

(a) pay the fines and legal fees of UberX Partners with a view to ensuring that those drivers did not have to pay the penalties for any Ridesharing Offences they committed;[269]

(b) delay or frustrate regulatory enforcement of the Ridesharing Offences;[270] and

(c) engage in various activities, which involved taking steps to prevent regulators and enforcement officers from enforcing against UberX Partners, including the practice called "greyballing".[271]

255 Taking these in turn, Taxi Apps submits that:

(a) the Defendants' strategy of paying fines on behalf of UberX Partners, and promoting their willingness to do so, was plainly intended to reduce or remove the disincentive to offending created by possibility that fines would be imposed in respect of the Ridesharing Offences. There are therefore reasonable grounds for finding that communications and documents in furtherance of the Defendants' payment of fines on behalf of UberX Partners were in furtherance of the ongoing commission of the Ridesharing Offences;

(b) the Defendants' strategy of delaying or frustrating enforcement of the Ridesharing Offences was intended to build a customer base of supporters of the UberX product, the effect of which would increase public and political pressure to change the law to permit ridesharing.[272] Inherent in this strategy was to foster and facilitate a period of undetected and unsanctioned offending.

269 Catchpoole Affidavit, [74].
270 Catchpoole Affidavit, [105].
271 Catchpoole Affidavit, [118].
272 Catchpoole Affidavit, [105].

There are therefore reasonable grounds for finding that communications and documents in furtherance of the Defendants' strategy of delaying and frustrating enforcement was in furtherance of the ongoing commission of the Ridesharing Offences; and

(c) the Defendants' strategy of "greyballing" and otherwise obstructing enforcement efforts was clearly intended to prevent the detection and punishment of the Ridesharing Offences, with a view to ensuring that UberX Partners would continue to provide such services. In this way, the strategy was clearly directed at facilitating or promoting ongoing offending. There are therefore reasonable grounds for finding that communications and documents in furtherance of the Defendants' strategy of obstructing enforcement was in furtherance of the ongoing commission of the Ridesharing Offences.

256 In addition, during oral submissions Taxi Apps referred to particular documents in the Tender Bundle as support for various propositions and listed some of the Sample Documents which appeared to it to be examples of those propositions. These can be shortly described, as much of the explanation of the various propositions is set out in detail above.

257 Taxi Apps contends that:

(a) There is sufficient evidence supporting there being reasonable grounds that offences were being committed.[273]

(b) There is evidence of 24 fines incurred in May 2014 in Melbourne[274] and there are a number of other documents regarding the payment of fines by Uber.[275]

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273 Tender Bundle 112, 140, 141.

274 Tender Bundle 140, 141.

275 For Victoria, Tender Bundle 156, 274, 291, 292, 296, 297; for New South Wales, Tender Bundle 163; for Queensland, Tender Bundle 149, 196, 197, 200, 221, 293, 300.

(c) The Defendants knew, prior to launch, that the provision of UberX during the relevant periods in the Relevant States was unlawful.[276]

(d) Paying fines and supporting UberX Partners is in furtherance of past offences and future offending.[277]

(e) Taking measures to frustrate or delay enforcement are indicative of knowledge of unlawfulness and of offences.[278]

258 Taxi Apps submits that the documents are unlikely to comprise the Defendants seeking advice on whether the provision of UberX in the Relevant States was or would be lawful, since asking lawyers about consequences, for example the issuing of fines, is not in the circumstances of the larger UberX rollout advice about lawfulness but about informing the cost of doing business. This is said to be in furtherance of the offences. So too is seeking advice about paying the fines, since the Defendants were paying them and telling drivers they would do so. After the offences were committed, advice regarding dealing with the fines were in furtherance of the offences, because it was part of the scheme by which the Defendants would maintain a fleet of UberX Partners which would continue to commit the Ridesharing Offences, and was aiding and abetting and advice that would assist in the undertaking because it will be used for committing further offences. Taxi Apps also submits that advice which promotes the building of scale was in furtherance of the offences as the building of scale was part of a strategy of making it more difficult for regulators to enforce the relevant laws on a large scale. Similarly, advice on how to deal with regulators in that context was also in furtherance of the offences.

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276 Tender Bundle 34, which is an email dated 1 November 2013 from Mr Rohrsheim to John Griffin at Barton Deakin regarding non-monetary penalties, which is said to be predicated on it not being lawful. Other examples of prior knowledge of unlawfulness are said to be: for Victoria, Tender Bundle 21, 22, 42, 47; for New South Wales and Queensland, Tender Bundle 67; for Western Australia, Tender Bundle 212, 216.

277 Tender Bundle 181, 163. Sample Documents 27, 30, 31, 32, 36 and 40 are said to fall within the Misconduct Exception and relate to assisting UberX Partners who have committed offences.

278 Tender Bundle 59, 67, 82, 194. Sample Documents 12, 13, 14, 15 and 26 are said to fall within this category. In respect of greyballing: Tender Bundle 135, 178, 179, and Sample Documents 83, 84, 85, 86, 87 and 88 are said on their face to fall within this category.

The Defendants' submissions

Identification and commission of the offences

259 The Defendants submit that Taxi Apps does not describe the offences relied upon for the purposes of the Misconduct Exception, still less does it set out the alleged reasonable grounds for finding the facts underpinning them, and why as a matter of law those facts establish the offences. The challenge made by Taxi Apps is said to fail at this threshold.

260 The Defendants conceded that the Andrianakis Submission addresses the alleged offences, but says that his approach is also deficient. It is said that the Andrianakis Submission primarily addresses UberX's operation in Australia and globally at a high level, and that little of the summary of UberX's operation is related back to the offence provisions in issue. The Defendants say that Mr Andrianakis does not specify any particular instance in which he says an offence was committed: no driver, providing an UberX service allegedly in contravention of the transport legislation referred to, is identified. Further, Mr Andrianakis does not identify the time period in which he says offences were committed, nor how many offences were committed. It is said that the broad statements made in the Andrianakis Submission summarised in paragraphs 222 to 224 above are not supported by the documents referenced by him.

261 The Defendants submit that the Plaintiffs' proposition that Uber had a concluded view prior to the launch of UberX in the Relevant States that it was unlawful should not be accepted. The Defendants' Counsel took me to a number of documents in the Tender Bundle and Sample Documents which were said to demonstrate that there was not a concluded view about this prior to launch.[279]

262 The Defendants say that a number of the documents relied upon by the Plaintiffs post-date the launch of UberX, and that these are standard communications between lawyer and client when there is the spectre of regulatory action.[280]

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279 The Defendants referred to Tender Bundle 43, 46, 47, 48 and 51 and Sample Documents 11, 12, 13, 14, 15 and 21.

280 In this regard, the Defendants referred to Sample Documents 23, 31, 35, 43 and 72. I will analyse these when considering the Sample Documents.

Furtherance of the offences

263 The Defendants say that even if the approach adopted by the Plaintiffs to the commission of offences was sufficient, the Plaintiffs have not established the relevant Sample Documents were created in furtherance of those offences. Without identifying the precise offence, specific documents cannot be found to have been in furtherance of it.

264 Both Plaintiffs are said to proceed on the basis that the Defendants committed some ongoing offence by the continued operation of the UberX service. That is not what is alleged against the Defendants in the pleadings (nor could it be: drivers with the regulatory approvals the Plaintiffs say were required could use UberX). The Defendants say that as the claim is framed, the challenged documents must be shown to assist or advance the commission of *specific* offences, not merely the operation of UberX.

265 The Defendants say that to similar effect, the Andrianakis Submission contends that any legal advice that assisted the Defendants in the establishment and operation of UberX in Australia was in furtherance of the commission of offences. The Defendants say that appears to be the same as what is termed the Broad s 125 Submission by Taxi Apps. Both Plaintiffs' submissions are said to suffer from a number of difficulties:

(a) first, they conflate the individual driver offences with the operation of UberX itself. The launch of UberX is too far removed from those particular offences to be regarded as furthering them for the purposes of s 125;

(b) secondly, they are expressed at far too high a level of generality. It is unclear what the words "establishment" and "operation" are intended to refer to. The purpose for which a document is created must be considered in the context of the particular document and the specific offence; and

(c) thirdly, and relatedly, even if these submissions were accepted, they fail to grapple with the specific issue, namely, how precisely it is said that any advice assisted or advanced the operation of UberX. It is clear from the authorities set

out above that many types of advice would not do so in a manner that attracts the Misconduct Exception. In this regard, the Defendants submit that:

(i) one of the advices that is the subject of some Sample Documents concerns carpooling, and submit that the Court cannot form the view that it is on the wrong side of the line, because it is not in furtherance of the commission of offences;[281]

(ii) advice on how to defend oneself is not within the Misconduct Exception, and a contention that external legal advice on how to conduct oneself in light of enforcement action falls within the Misconduct Exception would be to 'drive a truck' through legal professional privilege; and

(iii) in respect of the commission of offences and the payment of fines, where the communications/documents post-date the offence, the Defendants say that unless these go to concealment of the offence then they do not fall within the Misconduct Exception.[282]

266 The Defendants say that Taxi Apps' submission as set out at paragraphs 252 and 255 above is based on inadmissible evidence as to the contents of documents (without exhibiting the documents). They say they have not been informed which documents these submissions are based upon and cannot respond to them. Consequently, the Defendants say that these paragraphs should be disregarded (as should the evidence they are based upon).

267 The Plaintiffs' alleged failure to show that any of the relevant Sample Documents were created for the purposes of furthering any particular offence is addressed by the Defendants in further detail in the schedule to the Defendants' Reply Submission.

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281 Transcript 7 May 2022, 109-29 – 110.5. The Defendants referred to Tender Bundle 59 and SD 15.

282 In this regard, the Defendants referred to Sample Documents 28, 30 and 33.

Analysis

Identification and commission of the offences

268 It is common ground that the commission of the Ridesharing Offences is a fact in issue in these proceedings. Therefore, as required by s 125(2)(a) of the Evidence Act, the first question is whether there are reasonable grounds for finding that the offences were committed. The applicable test in this regard is also common ground: the alleged misconduct, in this case, commission of the Ridesharing Offences, are not required to be proven on the balance of probabilities, rather, there must be "something to give colour to the charge" at a prima facie level that has foundation in fact.[283]

269 It is uncontroversial that the Ridesharing Offences are 'offences' for the purposes of the Misconduct Exception.

270 I do not accept the Defendants' submission that the Plaintiffs are obliged to identify and specify the individual offences with the level of particularity that the Defendants' propose. The Ridesharing Offences have been identified and defined, and there can be no misunderstanding or lack of clarity around what is relied on by the Plaintiffs in that regard. It is not as if the Plaintiffs make bare reference to 'offences' without articulating which legislation has been breached and how it has been breached. In the context of this case, I do not consider it necessary for the Plaintiffs to identify each individual commission of a Ridesharing Offence, by particularising matters such as the date and time of the offence, the name of the UberX Partner committing the offence, and the details of the actual trip in terms of pick up and destination.

271 There is nothing in the text of s 125 of the Evidence Act to suggest that this is required, and nor was I taken to any cases which supported that proposition. Rather, what is required by s 125 of the Evidence Act is that there be reasonable grounds for finding that the alleged offence or offences were committed, or 'something to give colour to the charge'.

283 *Talacko*, [16(2)].

272 I am satisfied, both from the above and the matters discussed in the next section, that the Plaintiffs have established that there is 'something to give colour to the charge' that the operation and provision of UberX in the Relevant States from the date of launch to the date ridesharing was legalised in each of the Relevant States was carried out in the context where:

(a) the Defendants knew that most UberX Partners would be unlicensed; and

(b) the Defendants knew that where that was the case, Ridesharing Offences would be committed.

273 The commission of offences, being the Ridesharing Offences, was not a theoretical possibility. It was, by virtue of the manner in which UberX was launched and operated in the Relevant States, a certainty. I accept the Plaintiffs' submission that Ridesharing Offences were being committed systemically and on a large scale.

274 Even were that not the case, there is ample evidence before the Court that Ridesharing Offences were in fact committed. There are instances of individual offences (both fines, and in some instances, prosecutions) being discussed in internal Uber communications; and the Defendants established set procedures for paying fines incurred by UberX Partners, the reporting about which sometimes included the details of each fine, and for dealing with the drivers who were fined or nervous about being fined.

275 I also accept the Plaintiffs' submissions that the Ridesharing Offences are constituted by a series of individual offences, and that the Plaintiffs do not allege a single ongoing offence committed by the Defendants. I note that the Plaintiffs' case in their respective proceedings is that the Defendants conspired to cause harm to the Plaintiffs by committing or facilitating or procuring the Ridesharing Offences, but the allegation of conspiracy in these proceedings should not be confused with an allegation of a particular overarching offence said to have been committed by the Defendants. Where I or the parties refer to the unlawfulness of UberX, what is meant is the commission of Ridesharing Offences by UberX Partners as a feature of the UberX product or model.

Furtherance of the offences

276 Next, I need to consider whether, as required by s 125(2)(b) of the Evidence Act, there are reasonable grounds for finding that a communication was made or a document prepared in furtherance of the commission of the offences. Again, the applicable test is that there must be "something to give colour to the charge" at a prima facie level that has foundation in fact.

277 As already noted, I accept the Plaintiffs' submission that, prior to legalisation of ridesharing in the Relevant States, a clear consequence of the launch and operation of UberX in those states was that Ridesharing Offences were committed systemically and on a large scale. I accept that the commission of Ridesharing Offences was an integral aspect of the UberX business model in respect of the Relevant States. I also accept the Plaintiffs' submission that the Defendants' purpose in seeking legal advice was to advance the operation of UberX in those circumstances. What is required is that the communication or document must be in "furtherance" of the commission of the offences, being "the fact of being helped forward; the action of helping forward; advancement, aid, assistance".[284] In this sense, what is important is whether the advice has 'helped forward' the commission of the offence. It is the client's purpose, not the lawyer's (if the author of the document is a lawyer), determined objectively, which is relevant,[285] and there is nothing in the text of s 125 of the Evidence Act or in the numerous authorities referred to by the parties which suggest that this must be the sole or dominant purpose.

278 To the extent that the Plaintiffs' written submissions rested on the concept of ongoing offending, an approach criticised by the Defendants, that was clarified in oral submissions. The Plaintiffs confirmed that their position was that there was ongoing conduct by the Defendant comprising the deployment of UberX services and related activities, but that each Ridesharing Offence was a separate offence.

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284 Ibid, [15(5)].

285 *Carbotech-Australia*, [23].

279 That said, I do not think that this means the principles derived from cases such as *Watson* and *Carbotech-Australia* have no application here. In this instance, the person seeking the advice (ie the Defendants) proposed and intended that the dishonest conduct (ie the commission of Ridesharing Offences) would continue and the advice was to be used to assist in that purpose.[286] The provision of UberX in the Relevant States prior to its legalisation involved, as I have already stated, the repeated commission of Ridesharing Offences on a systematic and large scale. This was an ongoing undertaking and a business model that involved, as a necessary element in the majority of circumstances, the commission of Ridesharing Offences. Accordingly, it can be seen as "the client obtaining legal advice in the context of an ongoing dishonest or fraudulent undertaking, so that the advice will or may impact upon or inform the client in the course of that undertaking" such that "it will be regarded as being in furtherance of the improper purpose."[287] That is the case here, and I do not consider it to be inapposite just because Brereton J refers to an "ongoing dishonest or fraudulent undertaking" rather than to repeated commission of offences, since the former was the context for the case his Honour was considering. The Defendants submitted that the 'scheme cases' should not be relied upon as the Plaintiffs do not plead the existence of a scheme. However, for the reasons I have already stated, that is not to the point and I reject the submission that cases such as *Carbotech-Australia* are not able to be relied upon in this instance.

280 Therefore, in <u>general terms</u> I accept the Broad s 125 Submission advanced by Taxi Apps, which is effectively the same submission made by Mr Andrianakis as set out in paragraph 226 above. However and to be clear, I do not think that legal advice regarding all aspects of the operation of UberX in the Relevant States falls within the Misconduct Exception. Rather, it is legal advice after the Relevant Dates (defined in paragraph 287 below) regarding aspects of the operation of UberX such as launching and continuing to provide UberX using unlicensed drivers, avoiding enforcement activity or detection, and dealing with fines and prosecutions and UberX Partners

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286 To interpolate into the language used by Wigney J in *Watson*, [116].

287 *Carbotech-Australia*, [26].

about those, including supporting UberX Partners, which falls within the Misconduct Exception.

281 This requires further elaboration.

Operating UberX in the Relevant States was unlawful and the Defendants knew this

282 I am satisfied there are reasonable grounds for finding that prior to launch in the Relevant States, the Defendants knew that operating UberX would involve the commission of Ridesharing Offences.

283 For example, on 22 October 2013, Mr Rohrsheim sent an email to Mr Condo which stated:[288]

> I already know that monetary fines are in place (up to $1700 max), and John included that information in his briefing pack. The really meaty question is what non-monetary options they might have. Specifically: can they impound vehicles? can then cancel personal driver licences? That's the stuff Travis wants to know. I haven't seen those powers written, but I may not know where to look. It might be harder to find those answers, but those are the penalties that matter.

284 This is the earliest document to which I was taken that the Plaintiffs submit clearly reveals that the Defendants knew UberX would be unlawful in Victoria. While a number of emails around or after that time refer to "enforcement risks" or "potential liability", it is clear from their context that this is about the cost of enforcement or the consequences of committing the offences. For example:

(a) in an email dated 17 October 2013 from Mr Condo, he directs that the recipients should "Complete a survey of the enforcement mechanisms, the appetite for enforcement and ability to enforce the regulations against ride sharing in Victoria, New South Wales and Western Australia";[289]

(b) in an email dated 10 January 2014, Simon Rossi stated to Albert Penn:

> based on David's and my review of the Transport Act and enforcement schedule the biggest risk is that we get classified as a Hire Car by the

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288 Tender Bundle 32. For other examples, see paragraphs 240 and 241 above and the references in the footnotes thereto.

289 Tender Bundle 34.

> regulator and are then fined $1,700 for operating a commercial passenger vehicle without a licence (per vehicle). The Regulator typically does 1,600 taxi inspection [sic] per month but has the capacity to do 3,000 so the risk is moderate".[290]

285 There is some evidence before the Court to suggest that, at least in respect of Victoria, the Defendants knew by around October 2013 that UberX would be unlawful in that state. Some of the documents relied upon by Taxi Apps to support the submission that the Defendants knew, prior to launch, that UberX was unlawful in the Relevant States do not go so far as contended. I do not accept Taxi Apps' characterisation of emails dated 22 September 2013[291] and 23 September 2013.[292] I have reviewed the documents in the Tender Bundle relied on at paragraphs 22 and 32 in Schedule B to the Andrianakis Submission for the proposition that by 13 November 2013 the Defendants knew that UberX was unlawful in Victoria. Those documents suggest some knowledge of illegality, but do not satisfy me to the required standard that the Defendants intended at that time to launch UberX regardless. I do not think that knowledge of illegality alone is sufficient to establish that the advice was in furtherance of the Ridesharing Offences. Rather, it is the combination of knowledge of illegality and a clear intention to launch UberX regardless which constitutes the circumstances for the advice to be in furtherance of the Ridesharing Offences.

286 That said, I do not accept the Defendants' submission that I should reject the Plaintiffs' contention that the Defendants had a concluded view prior to the launch of UberX in the Relevant States that it was unlawful. The Defendants submit that just because employees are discussing enforcement does not mean that they knew UberX was unlawful. The documents in the Tender Bundle to which I was taken to support the Defendants' submission do not actually do so. For example:

(a) the Defendants emphasised the statement "we still have questions about enforcement" in an email dated 27 December 2013,[293] however it is clear upon

290 Tender Bundle 46.
291 Tender Bundle 21.
292 Tender Bundle 22.
293 Tender Bundle 43.

a proper reading of the email that the comment is about enforcement of the regulations rather than questions about what regulation exists;

(b) it is clear that "enforcement risks" in an email dated 10 January 2014[294] is directed to the costs of enforcement, rather than the risk of something being unlawful;

(c) the Defendants emphasised the phrase "potential penalties" in an email dated 12 January 2014,[295] but it is clear from the content and context of this email that this is not directed at conduct being potentially illegal, just the potential as to whether or not fines were likely to be issued. Similar comments apply in respect of "potentially" liable in an email dated 13 January 2014;[296] and

(d) this view is not displaced by the phrase "what does the law say?" in an email dated 16 February 2014.[297]

287 [Redacted]. That coincides with the period of time when the Defendants were close to launching UberX in a Relevant State, and some of the documents to which I was taken evidence an intention to launch regardless of the unlawfulness of doing so. [Redacted].[298] [Redacted].[299] [Redacted] so I have decided to use 14 April 2014 as the date for Western Australia as well. Therefore, the **Relevant Date** in respect of Victoria is 23 January 2014, and the **Relevant Date** in respect of NSW, Queensland and Western Australia is 14 April 2014.

288 Even if at trial it is found otherwise, there are reasonable grounds for making this finding as part of this application.

289 Similarly, I am also satisfied that reasonable grounds exist for finding that the Defendants knew that most UberX Partners were or would be unlicensed, for the

294 Tender Bundle 46.
295 Tender Bundle 47.
296 Tender Bundle 48.
297 Tender Bundle 51.
298 [Redacted].
299 [Redacted].

reasons submitted in paragraph 230 above.

290 This is supported by the Defendants' stated aim of flipping a city and building scale. If UberX was lawful, or not known to be unlawful, then there would have been no need to embark on a strategy to change the regulations or the regulatory framework. Indeed, a "regulatory fight" was seen as inevitable when launching in Melbourne and Sydney.[300] Building scale as quickly as possible was only possible by using unlicensed drivers, which the evidence establishes was well understood by the Defendants. I also accept that the attempts made by the Defendants to avoid enforcement were an aspect of building scale, garnering public support, and growing the business (including by attracting and retaining UberX Partners) until they had managed to flip a city.

291 Therefore, I am satisfied that reasonable grounds exist for concluding that legal advice sought or obtained after the Relevant Dates, being 23 January 2014 for Victoria and 14 April 2014 for the other Relevant States, regarding such matters (aspects of the operation of UberX such as launching and continuing to provide UberX using unlicensed drivers, avoiding enforcement activity or detection, and dealing with fines and prosecutions and UberX Partners about those, including supporting UberX Partners) was in furtherance of the commission of Ridesharing Offences. Having decided to launch in the Relevant States before it was lawful to do so, legal advice regarding these matters was 'helping forward' the commission of the Ridesharing Offences.

Dealing with fines and prosecutions and communicating with UberX Partners

292 In my view, reasonable grounds exist for the finding that the Defendants' activities in connection with fines and prosecutions and their communications with UberX Partners about the same, including seeking legal advice or services in connection with the same, was in furtherance of the commission of Ridesharing Offences.

293 I do not accept the Defendants' submissions that communications or documents which post-date particular offences cannot be in furtherance of the commission of

300 See paragraph 244 above.

offences. While they may not strictly help forward an offence already committed, it is clear from the evidence adduced on this application that the Defendants' purpose in dealing with fines and prosecutions was to re-assure UberX Partners and decrease the likelihood of individual drivers ceasing to provide UberX for fear of being left with fines or being prosecuted. In other words, this conduct helped forward the commission of similar offences after incurring fines. As Elliott J said in *Talacko*, there is no absolute rule that conduct occurring after an offence cannot be in furtherance of the commission of the offence, as subsequent conduct may be in furtherance depending on its nature and purpose. Here, the Defendants' purpose was self-evidently to keep UberX Partners providing UberX by setting up a system for dealing with and paying their fines. It is not to the point that legal advice on a specific past offence is usually not considered to be within the Misconduct Exception, since the circumstances here were such that the advice was sought in order to give continuing efficacy to the conduct. The system set up by the Defendants was also designed to avoid visibility with the relevant authorities when physically paying the fines: this was to be done by other law firms and preferably not from an Uber account.[301]

294 While it is the case that the offence does not have to actually be committed for the legal advice to be in furtherance of its commission,[302] in the circumstances of this case it is not necessary to engage with this principle. That is because, irrespective of whether individual unlicensed UberX Partners were fined or charged, when they provided UberX services prior to legalisation in the Relevant States, they committed Ridesharing Offences.

Avoiding enforcement or detection

295 In the circumstances of this case, reasonable grounds exist to find that legal advice or services for the purposes of avoiding or delaying enforcement action being taken or offences being detected fall within the Misconduct Exception.

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301 Tender Bundle 154.

302 *Talacko*, [15(11)].

296 Advice regarding avoiding enforcement action is not the same as advice regarding avoiding offending. The question being asked is not "is this conduct legal" but "how can I avoid being caught". The offence has been or will be committed: the advice is how to avoid the consequences, being the enforcement of the relevant regulations.

297 Accordingly, advice regarding matters such as greyballing and geo-blocking is in furtherance of the commission of Ridesharing Offences.

298 Similarly, advice regarding carpooling may be in furtherance of the commission of Ridesharing Offences, if the advice is sought not because the Defendants intended to provide a carpooling service but to use it to disguise the provision of UberX from regulators. In that sense, carpooling was contemplated as a means of concealing the commission of Ridesharing Offences, and it is clear that advice with a view to concealing offences may fall within the Misconduct Exception.[303]

Acceptance of Taxi Apps' alternative submission

299 As indicated above, in general terms I accept the Broad s 125 Submission and the similar submission made by Mr Andrianakis. However, I also accept the alternate submission that the evidence in this case provides reasonable grounds for finding that certain documents or communications were prepared or made in furtherance of the commission of offences on a narrower basis, having regard to their nature and substance, for the reasons set out above.

Summary of outcome in respect of Issue 3

300 To summarise the outcome in respect of Issue 3, there are reasonable grounds for finding that:

(a) the Ridesharing Offences were committed, as:

(i) in the circumstances of this case, the Plaintiffs are not obliged to identify and specify the individual commission of each Ridesharing Offence

303 Ibid, [15(8)].

relied upon by particularising matters such as the date and time of the offence, the name of the UberX Partner committing the offence, and the details of the actual trip in terms of pick up and destination;

(ii) by virtue of the manner in which UberX was launched and operated in the Relevant States, the commission of offences, being the Ridesharing Offences, was not a theoretical possibility but a certainty; and

(iii) in any event, there is ample evidence before the Court that Ridesharing Offences were in fact committed, systemically and on a large scale; and

(b) a communication was made or a document was prepared in furtherance of the commission of the Ridesharing Offences, as:

(i) the Defendants' purpose in seeking legal advice was to advance the operation of UberX in circumstances where the commission of Ridesharing Offences was an integral aspect of the UberX business model in the Relevant States;

(ii) the Defendants intended that the commission of Ridesharing Offences would continue and the advice was to be used to assist in that purpose; and

(iii) legal advice received after the Relevant Dates regarding aspects of the operation of UberX such as launching and continuing to provide UberX using unlicensed drivers, avoiding enforcement activity or detection, and dealing with fines and prosecutions and UberX Partners about those (including supporting UberX Partners) falls within the Misconduct Exception.

Review of sample documents

301 As mentioned in paragraph 37 above, I have reviewed each of the disputed Sample Documents along with the submissions made regarding them. My ruling and brief

reasons for ruling in respect of each disputed Sample Document is set out in the Annexure, and the Annexure forms part of these Reasons.

Conclusion

302 The parties are requested to confer regarding a form of orders to give effect to these Reasons, including costs and any directions for the further conduct of the Plaintiffs' privilege challenges (including in respect of the Third Party Documents).

303 The proceedings will both be listed before me on 6 May 2022 for the making of orders and directions regarding the matters referred to in the preceding paragraph.

ANNEXURE

RULINGS REGARDING DISPUTED SAMPLE DOCUMENTS

Sample Document	Uber's privilege claim	Andrianakis' position – challenge and bases for challenge	Taxi Apps' position – challenge and bases for challenge	Final position as between the parties	Brief reasons for ruling	Ruling
1	Advice privilege (s 118)	Challenge: purpose; s 122 (only in respect of Mr Mittenthal)	Challenge: purpose; s 122; s 125	In dispute: purpose; s 122; s 125	s 118 purpose established – nothing to suggest Ms Yoo not performing her legal function. s 122 – Uber's position that Court should infer Mr Mittenthal subject to confidentiality obligation because he was entrusted with plainly confidential communications not accepted. Mr Hanson's evidence that Mr Mittenthal "worked with Mr Loeser" insufficient on its own. However, Mr Loeser's engagement agreement required him to take all reasonable steps to ensure that employees, agents or contractors assisting him were bound by the same confidentiality obligations as he was (First Hanson Affidavit, [24]). By sharing Document 1 with Mr Mittenthal, Uber was entitled to assume confidentiality was maintained. Therefore, no waiver. s 125 – Uber's submission (Reply Submission, [5]) accepted. Not sufficiently connected in a substantive way to the Ridesharing Offences	Privilege claim upheld to redacted portion
2	Advice privilege (s 118)	Challenge: purpose; s 122	Challenge: purpose; s 122; s 125	In dispute: purpose; s 122; s 125	As for Document 1	Privilege claim upheld
3	Advice privilege (s 118)	Challenge: purpose; s 122	Challenge: purpose; s 122; s 125	In dispute: purpose; s 122; s 125	As for Document 1	Privilege claim upheld to redacted portion
4	Advice privilege (s 118)	Challenge: purpose	Challenge: purpose	In dispute: purpose	s 118 purpose not established. No evidence to establish that this version of the document is privileged. Being labelled "privileged & confidential" not sufficient. Being similar to an earlier version prepared by external	Privilege claim rejected

Sample Document	Uber's privilege claim	Andrianakis' position – challenge and bases for challenge	Taxi Apps' position – challenge and bases for challenge	Final position as between the parties	Brief reasons for ruling	Ruling
					counsel and edited by Uber In-House Counsel (Ms Gaussy) not sufficient. Submissions that Ms Gaussy not performing legal role rejected	
5	Advice privilege (s 118)	Challenge: purpose	Challenge: purpose	In dispute: purpose	s 118 purpose established. Content of redacted portion makes it clear that Ms Gaussy was providing legal advice in a commercial and strategic context. Privileged purpose of redacted portion established as dominant purpose	Privilege claim upheld to redacted portion
8	Advice privilege (s 118)	Challenge: purpose	Challenge: purpose; s 125	In dispute: purpose; s 125	s 118 purpose established from the content of the redacted portion. s 125 – Uber's Reply Submission [29] accepted. Document not in furtherance of commission of Ridesharing Offences	Privilege claim upheld to redacted portion
9	Advice privilege (s 118)	Challenge: purpose; s 125	Challenge: purpose; s 125	In dispute: purpose; s 125	s 118 purpose established for redacted portions, except for email sent on 10 Oct 2013 by Ms Yoo to Mr Rohrsheim (second redaction on page 2 of document), as Ms Yoo is not providing legal advice in this email. s 125 – Document not in furtherance of Ridesharing Offences, as redactions are to emails prior to the Relevant Date which is when I have found Uber knew UberX would be unlawful, and nothing in the content of the redaction portions is sufficiently connected to launching UberX with that knowledge and therefore with the purpose of furthering the commission of offences. See paras 280, 287 and 291 of Reasons	Privilege claim partly upheld. Revised version of document to be produced, by removing the redaction of the 10 Oct 2013 email from Ms Yoo to Mr Rohrsheim
10	Advice privilege (s 118)	Challenge: purpose; s 125	Challenge: purpose	In dispute: purpose; s 125	s 118 purpose established for redacted portions. Clear from review of those portions that legal advice was being sought.	Privilege claim upheld to redacted portions

Sample Document	Uber's privilege claim	Andrianakis' position – challenge and bases for challenge	Taxi Apps' position – challenge and bases for challenge	Final position as between the parties	Brief reasons for ruling	Ruling
					s 125 – Document not in furtherance of Ridesharing Offences, as redactions are to emails (dated 19 Dec and 5 Jan) prior to the Relevant Date which is when I have found Uber knew UberX would be unlawful, and nothing in the content of the redaction portions is sufficiently connected to launching UberX with that knowledge and therefore with the purpose of furthering the commission of offences. See paras 280, 287 and 291 of Reasons	
11	Advice privilege (s 118)	Challenge: purpose; s 125	Challenge: purpose; s 125	In dispute: purpose; s 125	s 118 purpose established. Mr The email from Mr Rossi to Mr de Kievet is privileged. The email from Mr Rossi to Mr Condo merely forwards his earlier email to Mr de Kievet. It is privileged as disclosing it would reveal a privileged communication and there is no loss of privilege in it being forwarded to Mr Condo. s 125 – Document not in furtherance of Ridesharing Offences, as the emails are prior to the Relevant Date. See paras 280, 287 and 291 of Reasons	Privilege claim upheld
12	Advice privilege (s 118)	Challenge: s 125	Challenge: s 125	In dispute: s 125	s 125 – Document not in furtherance of Ridesharing Offences [Redacted]	Privilege claim upheld
13	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: s 125	In dispute: purpose, s 125	s 118 purpose established in redacted portion. s 125 – Document is in furtherance of Ridesharing Offences, see paras 280, 287 and 291 of Reasons	Privilege claim to redacted portion rejected
14	Advice privilege (s 118) Uber has changed the basis upon which attachment	Challenge: purpose, s 125	Challenge: purpose, s 125	In dispute: purpose, s 125	s 118 purpose established. s 125 – Document is in furtherance of Ridesharing Offences, see paras 280, 287 and 291 of Reasons. As Document 15 is required to be disclosed, Uber's concession applies	Privilege clam rejected

Sample Document	Uber's privilege claim	Andrianakis' position – challenge and bases for challenge	Taxi Apps' position – challenge and bases for challenge	Final position as between the parties	Brief reasons for ruling	Ruling
	UBR.003.001.0278 is privileged. The Uber Entities now maintain that this document should only be disclosed if Document 15 is required to be disclosed.					
15	Advice privilege (s 118)	Challenge: s 125	Challenge: s 125	In dispute: s 125	s 125 – Document is in furtherance of Ridesharing Offences, see paras 280, 287 and 291 of Reasons. Also see para 298 of the Reasons	Privilege claim rejected
16	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: purpose, s 125	In dispute: purpose, s 125	s 118 purpose established to part of the email chain, being all parts of the chain except for the email from Mr Condo dated 8 April 2014 at 12:49:23pm to Mr Rohrsheim, copied to Mr de Kievit, Mr Rossi and Mr Brown and the email from Mr Rohrshiem dated 8 April 214 at 7:46pm. Those two emails do not contain privileged communications and would therefore not reveal privileged communications. I do not accept the characterisation of these two emails that is given to them in the third sentence of paragraph [72] of the First Hanson Affidavit. s 125 – Document not in furtherance of Ridesharing Offences, as it is prior to the Relevant Date, for the reasons set out in para 286 of the Reasons, I have found to be the clearly identifiable and unequivocal date by which Uber knew that UberX in NSW and Queensland was unlawful. See also paras 280 and 291 of the Reasons	Privilege claim partly rejected: document to be produced although Uber may redact the emails in the chain apart from the two identified in the previous column
17	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: purpose, s 125	In dispute: purpose, s 125	s 118 purpose established. s 125 – Part of the Document is in furtherance of	Privilege claim partly rejected:

Sample Document	Uber's privilege claim	Andrianakis' position – challenge and bases for challenge	Taxi Apps' position – challenge and bases for challenge	Final position as between the parties	Brief reasons for ruling	Ruling
					Ridesharing Offences, see paras 280, 287 and 291 of Reasons, and part is not. The emails which are in furtherance of the Ridesharing Offences are those dated 16 April 2014 at 12:04:12am from Mr de Kievet to Mr Brown, copied to Mr Condo, Mr Rohrsheim and Mr Abbott; 15 April 2014 at 2:17am from Mr Brown; and 14 April 2014 at 9:30pm from Mr Condo. The emails which are not in furtherance of the Ridesharing Offences are the earlier emails in the chain, being those seeking the advice from Herbert Smith Freehills (HSF), providing the advice from HSF dated 14 April 2104 at 11:53:22am and the email from Mr de Kievet dated 14 April 2014 at 8:22pm forwarding the HSF email.	document to be produced although Uber may redact the emails listed in the previous column which I have said are not in furtherance of the Ridesharing Offences
19	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: s 125	In dispute: purpose, s 125	s 118 purpose of the redacted portion is established. Having reviewed the redacted portion I accept paragraph [86] of the First Hanson Affidavit. The Plaintiffs' speculation as to the likely content of the redacted portion is just that, speculation, and it is not borne out upon inspection. s 125 – the redacted portion is not in furtherance of the Ridesharing Offences. That is consistent with the view taken of Document 12, which is summarised in the redacted portion	Privilege claim to the redacted portion upheld
20	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: purpose, s 125	In dispute: purpose, s 125	s 118 purpose not established. Uber's submissions, in respect of the purpose of this document, at paragraphs 101 and 104 of the Reply Submission are expressly rejected. Ms Yoo is not providing legal advice in her response to Mr Rohrsheim. s 125 – the document is in furtherance of the	Privilege claim rejected

Sample Document	Uber's privilege claim	Andrianakis' position – challenge and bases for challenge	Taxi Apps' position – challenge and bases for challenge	Final position as between the parties	Brief reasons for ruling	Ruling
					Ridesharing Offences, as I have found that advice relating to payment of fines or reassurance of UberX Partners after the Relevant Dates fall within the Misconduct Exception	
21	Advice privilege (s 118)	Challenge: s 125	Challenge: s 125	In dispute: s 125	s 125 – document is in furtherance of the Ridesharing Offences. See paras 280, 287 and 291 of Reasons	Privilege claim rejected. The 'short note' referred to in the email is not one of the Sample Documents as best as I can ascertain, but should be produced for the same reasons
22	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: purpose	In dispute: purpose, s 125	s 118 purpose in respect of the emails the subject of the privilege claim is established. s 125 – document is in furtherance of the Ridesharing Offences, as its purpose is to keep the unlawful UberX service operating. The Andrianakis Submission at [85] is accepted	Privilege claim rejected
23	Advice privilege (s 118)	Challenge: s 125	Not challenged	In dispute: s 125	s 125 – document is in furtherance of the Ridesharing Offences. The Andrianakis Submission at [87]-[89] is accepted. The relevant offences are not just those committed by individual UberX Partners but those which Uber may have committed under the relevant legislation	Privilege claim rejected

Sample Document	Uber's privilege claim	Andrianakis' position – challenge and bases for challenge	Taxi Apps' position – challenge and bases for challenge	Final position as between the parties	Brief reasons for ruling	Ruling
24	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: s 125	In dispute: purpose, s 125	s 118 purpose in respect of redacted portion is established. s 125 – redacted portion of document is in furtherance of the Ridesharing Offences. See paras 280, 287 and 291 of Reasons. I do not accept that this issue in respect of this document ought have the same outcome as Document 19	Privilege claim rejected
25	Advice privilege (s 118)	Challenge: purpose	Challenge: purpose	In dispute: purpose	s 118 purpose is established.	Privilege claim upheld
26	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: s 122, s 125	In dispute: purpose, s 122, s 125	s 118 purpose not established. No evidence to confirm whether the redacted portion reflects legal advice and nothing to suggest that legal advice is sought. s 122 – no evidence to establish waiver. Challenge to privilege on this basis rejected. s 125 - Not apparent that the redacted portion summarises the 23 January 2014 advice from Brand Partners. Document is in furtherance of Ridesharing Offences – see paras 280, 287 and 291 of Reasons. I do not accept that this issue in respect of this document ought have the same outcome as Document 19	Privilege claim rejected
27	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: purpose, s 125	In dispute: purpose, s 125	s 118 purpose is established. s 125 - Document is in furtherance of Ridesharing Offences – see paras 280, 287 and 291 of Reasons	Privilege claim rejected
28	Advice privilege (s 118) Litigation privilege (s 119)	Challenge: purpose, s 125	Challenge: purpose, s 125	In dispute: purpose, s 125	s 118 purpose not established – setting up mechanisms for payment of fines issued to UberX Partners is not for purposes of legal advice. s 119 purpose not established – review of document makes it clear it pertains to fines issued to UberX Partners. Even if pending or anticipated proceedings	Privilege claim rejected

Sample Document	Uber's privilege claim	Andrianakis' position – challenge and bases for challenge	Taxi Apps' position – challenge and bases for challenge	Final position as between the parties	Brief reasons for ruling	Ruling
					have been identified, these are not proceedings in which Uber itself is or might be a party and so s 119 does not apply, as it applies only where the client is or might be a party. Uber Reply Submission at [157] expressly rejected: fines issued to drivers in Melbourne are not sufficiently connected to actual or anticipated proceedings against Uber in NSW by the RMS. s 125 - Document is in furtherance of Ridesharing Offences – see paras 280, 287 and 291 of Reasons	
29	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: purpose, s 125	In dispute: purpose, s 125	s 118 purpose is not established. Ms Yoo is not providing legal advice in her email and there is nothing in the content of the emails between Mr Graves and Mr Brown (the latest two emails in the chain) to indicate the content of the discussion Mr Graves intends to have with Ms Yoo. s 125 - Document is in furtherance of Ridesharing Offences – see paras 280, 287 and 291 of Reasons	Privilege claim rejected
30	Advice privilege (s 118) Litigation privilege (s 119)	Challenge: purpose, s 125	Challenge: purpose, s 125	In dispute: purpose, s 125	s 118 purpose not established – looking for lawyers to assist with payment of fines and arrangements in respect of same is not for purpose of legal advice. s 119 purpose not established – review of document makes it clear it pertains to fines issued to UberX Partners. My comments in respect of Document 28 are repeated. s 125 – the document is in furtherance of the Ridesharing Offences, as I have found that advice relating to payment of fines (including setting up a system for payment of fines or hiring lawyers to do so) or reassurance of UberX Partners after the Relevant Dates fall within the Misconduct Exception	Privilege claim rejected
31	Advice privilege	Challenge: s 125	Challenge: s 125	In dispute:	s 125 - Document is in furtherance of Ridesharing	Privilege

Sample Document	Uber's privilege claim	Andrianakis' position – challenge and bases for challenge	Taxi Apps' position – challenge and bases for challenge	Final position as between the parties	Brief reasons for ruling	Ruling
	(s 118)			purpose, s 125	Offences – see paras 280, 287 and 291 of Reasons. RMS requests to UberX Partners to attend interviews sufficiently proximate to commission of offences	claim rejected
32	Advice privilege (s 118) Litigation privilege (s 119)	Challenge: purpose, s 125	Challenge: s 125	In dispute: purpose, s 125	s 118 purpose is established. s 119 purpose is not established – proposed clients are the UberX Partners, not Uber. My comments re Document 28, insofar as they are relevant to this document, are repeated. s 125 - Document is in furtherance of Ridesharing Offences – see paras 280, 287 and 291 of Reasons. RMS requests to UberX Partners to attend interviews sufficiently proximate to commission of offences. Comments regarding Documents 30 and 31 and s 125 repeated. Taxi Apps' Submission re this document expressly accepted	Privilege claim rejected
33	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: s 125	In dispute: purpose, s 125	s 118 purpose is established. s 125 - Document is in furtherance of Ridesharing Offences – see paras 280, 287 and 291 of Reasons.	Privilege claim rejected
34	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: s 125	In dispute: purpose, s 125	s 118 purpose is established. s 125 - Document is in furtherance of Ridesharing Offences – see paras 280, 287 and 291 of Reasons. In respect of the two emails dated 23 May 2014, my comments re Document 30 are repeated. In respect of the emails dated 19 May 2014, these go to avoiding enforcement activity or detection	Privilege claim rejected
36	Advice privilege (s 118) Litigation privilege (s 119)	Challenge: purpose, s 125	Challenge: s 125	In dispute: purpose, s 125	s 118 purpose is established. s 119 purpose is not established – proposed clients are the UberX Partners, not Uber. Even if that were not the case, to the extent that there is actual or potential litigation, that is against the drivers, not Uber. My	Privilege claim rejected

Sample Document	Uber's privilege claim	Andrianakis' position – challenge and bases for challenge	Taxi Apps' position – challenge and bases for challenge	Final position as between the parties	Brief reasons for ruling	Ruling
					comments re Document 28, insofar as they are relevant to this document, are repeated. s 125 - Document is in furtherance of Ridesharing Offences – see paras 280, 287 and 291 of Reasons	
37	Advice privilege (s 118)	Challenge: s 125	Challenge: s 125	In dispute: s 125	s 125 - Document is in furtherance of Ridesharing Offences – see paras 280, 287 and 291 of Reasons. In particular, it concerns support for drivers invited to interviews with the TSC as part of an enforcement / prosecution process	Privilege claim rejected
38	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: purpose, s 125	In dispute: purpose, s 125	s 118 purpose is established. I accept that there is nothing on the face of this document to suggest Mr de Kievit not acting in a legal role.	Privilege claim upheld
39	Advice privilege (s 118) Litigation privilege (s 119)	Challenge: purpose, s 125	Challenge: purpose, s 125	In dispute: purpose, s 125	s 118 purpose is established. s 119 purpose is not established – proposed clients are the UberX Partners, not Uber. Even if that were not the case, to the extent that there is actual or potential litigation, that is against the drivers, not Uber. My comments re Document 28, insofar as they are relevant to this document, are repeated. s 125 - Document is in furtherance of Ridesharing Offences – see paras 280, 287 and 291 of Reasons, in particular, assistance / reassurance of drivers re prosecutions is within the Misconduct Exception	Privilege claim rejected
40	Advice privilege (s 118) Litigation privilege (s 119)	Challenge: purpose, s 125	Challenge: purpose, s 125	In dispute: purpose, s 125	s 118 purpose is established. s 119 purpose not established. No evidence of actual or anticipated proceedings involving Uber, as opposed to drivers. s 125 - Document is in furtherance of Ridesharing Offences – see paras280, 287 and 291 of Reasons. My comments regarding Document 39 are repeated	Privilege claim rejected

Sample Document	Uber's privilege claim	Andrianakis' position – challenge and bases for challenge	Taxi Apps' position – challenge and bases for challenge	Final position as between the parties	Brief reasons for ruling	Ruling
41	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: purpose, s 125	In dispute: purpose, s 125	s 118 purpose is established. s 125 - Document is in furtherance of Ridesharing Offences – see paras 280, 287 and 291 of Reasons	Privilege claim rejected
42	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: purpose, s 122, s 125	In dispute: purpose, s 122, s 125	s 118 purpose not established. Clear from content that dominant purpose was to provide an update to the Uber employee recipients, not to seek legal advice. s 122 – if privilege had been established, then I am satisfied that waiver by virtue of inadvertently sending to Kate Bensimon has not occurred. s 125 - Document is in furtherance of Ridesharing Offences – see paras 280, 287 and 291 of Reasons	Privilege claim rejected
43	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: s 125	In dispute: purpose, s 125	s 118 purpose is established. s 125 - Document is in furtherance of Ridesharing Offences – see paras 280, 287 and 291 of Reasons. RMS requests to UberX Partners to attend interviews sufficiently proximate to commission of offences	Privilege claim rejected
46	Advice privilege (s 118)	Challenge: purpose, s 125	Not challenged	In dispute: purpose, s 125	s 118 purpose is established. s 125 - Document is not in furtherance of Ridesharing Offences	Privilege claim upheld
47	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: purpose	In dispute: purpose, s 125	s 118 purpose in respect of redacted portions is established. s 125 – Redacted portions of document are not in furtherance of Ridesharing Offences	Privilege claim upheld
49	Advice privilege (s 118) Litigation privilege (s 119)	Challenge: purpose, s 125	Challenge: purpose, s 125	In dispute: purpose, s 125	s 118 purpose is established. s 119 purpose not established. No evidence of actual or anticipated proceedings involving Uber, as opposed to drivers.	Privilege claim rejected

Sample Document	Uber's privilege claim	Andrianakis' position – challenge and bases for challenge	Taxi Apps' position – challenge and bases for challenge	Final position as between the parties	Brief reasons for ruling	Ruling
					s 125 - Document is in furtherance of Ridesharing Offences – see paras 280, 287 and 291 of Reasons	
51	Advice privilege (s 118)	Challenge: s 125	Not challenged	In dispute: s 125	s 125 - Document is in furtherance of Ridesharing Offences – see paras 280, 287 and 291 of Reasons	Privilege claim rejected
52	Advice privilege (s 118)	Challenge: purpose	Challenge: purpose	In dispute: purpose	s 118 purpose is established	Privilege claim upheld
53	Advice privilege (s 118)	Challenge: s 125	Not challenged	In dispute: s 125	s 125 - Document is in furtherance of Ridesharing Offences – see paras 280, 287 and 291 of Reasons	Privilege claim rejected
54	Advice privilege (s 118)	Challenge: purpose, s 125	Not challenged	In dispute: purpose, s 125	s 118 purpose is not established, including for the reason that the redacted portion does not reveal the substance of legal advice. s 125 - Document is in furtherance of Ridesharing Offences – see paras 280, 287 and 291 of Reasons	Privilege claim rejected
56	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: purpose, s 125	In dispute: purpose, s 125	s 118 purpose not established. There is nothing in the emails to suggest that the information is being collated for the dominant purpose of providing legal advice s 125 – if it was privileged, then I am satisfied that the Document is in furtherance of Ridesharing Offences – see paras 280, 287 and 291 of Reasons	Privilege claim rejected
57	Advice privilege (s 118)	Challenge: s 122, s 125	Not challenged	In dispute: s 122, s 125	s 122 – insufficient evidence to establish waiver. s 125 – Redacted portion of Document is in furtherance of Ridesharing Offences, see paras 280, 287 and 291 of Reasons	Privilege claim rejected
59	Advice privilege (s 118)	Challenge: s 122, s 125	Not challenged	In dispute: s 122, s 125	s 122 – insufficient evidence to establish waiver. Although it is a script for Uber employees when communicating with drivers, there is no evidence to say whether the script was actually used. s 125 – Document is in furtherance of Ridesharing	Privilege claim rejected

Sample Document	Uber's privilege claim	Andrianakis' position – challenge and bases for challenge	Taxi Apps' position – challenge and bases for challenge	Final position as between the parties	Brief reasons for ruling	Ruling
					Offences – see paras 280, 287 and 291 of Reasons	
60	Advice privilege (s 118)	Challenge: purpose	Not challenged	In dispute: purpose	s 118 purpose is established	Privilege claim upheld
61	Advice privilege (s 118)	Challenge: purpose, s 122	Challenge: purpose	In dispute: purpose, s 122	s 118 purpose not established – there is nothing from the email or its description of the documents attached to it which suggest any of them convey legal advice. s 122 – First Hanson Affidavit at [252] states recipients of the email included stockholder representatives of Uber Technologies Inc. I accept Andrianakis Submission at [223] and I do not accept the inference urged upon me by Uber Reply Submission at [353]	Privilege claim rejected
62	Advice privilege (s 118)	N/A (relates to Taxi Apps only)	Challenge: purpose	In dispute: purpose	s 118 purpose is not established. The first email in the chain dated 28 April 2015 from Mr Rohrsheim to Mr Kitschke and others is not privileged and is not the subject of a privilege claim (First Hanson Affidavit, [256]). There is nothing on the face of the document, particularly the email from Ms Johnson to Mr Man to establish privilege (no legal advice is sought or obtained) or that the copy of the Rohrsheim email is a privileged copy of an unprivileged document	Privilege claim rejected
63	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: purpose, s 125	In dispute: purpose, s 125	s 118 purpose is established. s 125 – Document is not in furtherance of Ridesharing Offences – not sufficiently connected with the matters identified in paragraph 280 of the Reasons	Privilege claim upheld
64	Advice privilege (s 118)	Challenge: purpose	Challenge: purpose	In dispute: purpose	s 118 purpose in respect of redacted email is not established. There is no request for legal advice and purpose of Ms Johnson's email (ie the redacted one) is not to provide legal advice. Plaintiffs' challenge in respect of Ms Johnson's independence / alleged non legal role in respect of this Document not accepted	Privilege claim rejected
65	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: purpose, s 125	In dispute: purpose, s 125	s 118 purpose is not established. There is insufficient evidence as to the purpose of the Document. The First	Privilege claim

Sample Document	Uber's privilege claim	Andrianakis' position – challenge and bases for challenge	Taxi Apps' position – challenge and bases for challenge	Final position as between the parties	Brief reasons for ruling	Ruling
	Litigation privilege (s 119)				Hanson Affidavit at [267] is too broad to support the claim and I have not been provided with the document referred to therein so as to consider it further. First Hanson Affidavit at [268] and Second Hanson Affidavit at [36] not accepted, including as on the face of the Document there is no request for legal advice and nothing to suggest that the information is being compiled for that purpose. Plaintiffs' challenge in respect of Ms Johnson's independence / alleged non legal role in respect of this Document not accepted. s 119 purpose not established. No evidence of actual or anticipated proceedings involving Uber, as opposed to drivers. s 125 – Document is in furtherance of Ridesharing Offences – see paras 280, 287 and 291 of Reasons	rejected
66	Advice privilege (s 118)	N/A (relates to Taxi Apps only)	Challenge: purpose	In dispute: purpose	s 118 purpose is established	Privilege claim upheld
68	Advice privilege (s 118)	Challenge: purpose	Challenge: purpose	In dispute: purpose	s 118 purpose is established	Privilege claim upheld
69	Advice privilege (s 118)	Challenge: purpose	Challenge: purpose	In dispute: purpose	s 118 purpose is established – as an attachment to Document 68, which I have found to be privileged, this Document is also privileged	Privilege claim upheld
70	Advice privilege (s 118)	Challenge: s 125	Challenge: s 125	In dispute: s 125	s 125 – Document is in furtherance of Ridesharing Offences – see paras 280, 287 and 291 of Reasons	Privilege claim rejected
71	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: purpose, s 125	In dispute: purpose, s 125	s 118 purpose not established. Nothing on the face of the Document to support First Hanson Affidavit at [283] and [284] that this was information shared with Ms Johnson for the purpose of her seeking legal advice from Brand Partners. Plaintiffs' challenge in respect of Ms Johnson's independence / alleged non legal role in	Privilege claim rejected

Sample Document	Uber's privilege claim	Andrianakis' position – challenge and bases for challenge	Taxi Apps' position – challenge and bases for challenge	Final position as between the parties	Brief reasons for ruling	Ruling
					respect of this Document not accepted. s 125 – Document is in furtherance of Ridesharing Offences – see paras 280, 287 and 291 of Reasons	
72	Advice privilege (s 118)	Challenge: s 125	Challenge: s 125	In dispute: s 125	s 125 – Document is in furtherance of Ridesharing Offences – see paras 280, 287 and 291 of Reasons	Privilege claim rejected
73	Advice privilege (s 118)	N/A (relates to Taxi Apps only)	Challenge: purpose	In dispute: purpose	s 118 purpose not established. First Hanson Affidavit at [290] not accepted - no evidence, including on the face of the Document, to support contention that the dominant purpose of the communication was for legal advice	Privilege claim rejected
75	Advice privilege (s 118)	Challenge: purpose	Challenge: purpose	In dispute: purpose	s 118 purpose not established. First Hanson Affidavit at [298] not accepted – no evidence, including on the face of the Document, to support contention that the dominant purpose of the communications between Ms Johnson and Mr Man was for legal advice	Privilege claim rejected
76	Advice privilege (s 118)	N/A (relates to Taxi Apps only)	Challenge: purpose	In dispute: purpose	s 118 purpose is established	Privilege claim upheld
77	Advice privilege (s 118)	Challenge: purpose	Not challenged	In dispute: purpose	s 118 purpose is established	Privilege claim upheld
78	Advice privilege (s 118)	Challenge: purpose	Challenge: purpose	In dispute: purpose	s 118 purpose is not established in respect of the purpose of this Document. Self-evident from inspection that the dominant purpose of the Document is not for the purposes of legal advice. However, to the extent that disclosure of parts of the document would reveal legal advice, those parts may be redacted	Privilege claim over whole Document rejected. Document to be produced for inspection, save that Uber may redact those

Sample Document	Uber's privilege claim	Andrianakis' position – challenge and bases for challenge	Taxi Apps' position – challenge and bases for challenge	Final position as between the parties	Brief reasons for ruling	Ruling
						parts of it which would reveal legal advice
81	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: s 125	In dispute: purpose, s 125	s 118 purpose is established in respect of redacted portions. s 125 – Document is in furtherance of Ridesharing Offences – see paras 280, 287 and 291 of Reasons	Privilege claim in respect of redacted portions rejected
83	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: s 125	In dispute: purpose, s 125	s 118 purpose is established. s 125 – Document is not in furtherance of Ridesharing Offences – clear from inspection of Document that it does not 'help forward' the Ridesharing Offences, insufficient connection to Australian operations	Privilege claim upheld
84	Advice privilege (s 118)	Challenge: privileged due to host / purpose, s 125	Challenge: s 125	In dispute: privileged due to host, purpose, s 125	s 118 purpose is established. s 125 – Document is not in furtherance of Ridesharing Offences – clear from inspection of Document that it does not 'help forward' the Ridesharing Offences, insufficient connection to Australian operations	Privilege claim upheld
85	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: s 125	In dispute: purpose, s 125	s 118 purpose is established. s 125 – Document is not in furtherance of Ridesharing Offences – clear from inspection of Document that it does not 'help forward' the Ridesharing Offences, insufficient connection to Australian operations	Privilege claim upheld
86	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: s 125	In dispute: purpose, s 125	s 118 purpose in respect of entire Document not established. That purpose established only in respect of two emails: from Mr Capp dated 5 March 2017 at 10:04am and from Ms Johnson dated 4 March 2017 at 11:25:01pm. s 125 – Document is in furtherance of Ridesharing	Privilege claim rejected

Sample Document	Uber's privilege claim	Andrianakis' position – challenge and bases for challenge	Taxi Apps' position – challenge and bases for challenge	Final position as between the parties	Brief reasons for ruling	Ruling
					Offences – see paras 280, 287 and 291 of Reasons. I do not accept that this Document should be categorised in the same way as Documents 83, 84 and 85. Sufficient connection with Australia and within the claim period for Victoria (at least) such that can be seen as 'helping forward' the Ridesharing Offences	
87	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: s 125	In dispute: purpose, s 125	s 118 purpose is established. s 125 – Document is not in furtherance of Ridesharing Offences – clear from inspection of Document that it does not 'help forward' the Ridesharing Offences, insufficient connection to Australian operations	Privilege claim upheld
88	Advice privilege (s 118)	Challenge: purpose, s 125	Challenge: s 125	In dispute: purpose, s 125	s 118 purpose is established. s 125 – Document is not in furtherance of Ridesharing Offences – clear from inspection of Document that it does not 'help forward' the Ridesharing Offences, insufficient connection to Australian operations	Privilege claim upheld
89	Advice privilege (s 118)	Challenge: s 122, s 125	Not challenged	In dispute: s 122, s 125	s 122 – insufficient evidence to establish waiver. s 125 – Redacted portion of Document is in furtherance of Ridesharing Offences, see paras 280, 287 and 291 of Reasons, for same reason as Document 57.	Privilege claim re redacted portion rejected

S C H E D U L E O F P A R T I E S

S ECI 2019 01926

BETWEEN:

NICOS ANDRIANAKIS	Plaintiff
- v -	
UBER TECHNOLOGIES INCORPORATED (4849283)	First Defendant
UBER INTERNATIONAL HOLDING B.V. (RSIN 851 929 357)	Second Defendant
UBER B.V. (RSIN 852 071 589)	Third Defendant
UBER AUSTRALIA PTY LTD (ACN 160 299 865)	Fourth Defendant
RASIER OPERATIONS B.V. (RSIN 853 682 318)	Fifth Defendant
UBER PACIFIC HOLDINGS B.V. (RSIN 855 779 330)	Sixth Defendant
UBER PACIFIC HOLDINGS PTY LTD (ACN 609 590 463)	Seventh Defendant

AND:

S ECI 2020 01585

TAXI APPS PTY LTD (ACN 149 538 616)	Plaintiff
- v -	
UBER TECHNOLOGIES INCORPORATED (4849283)	First Defendant
UBER INTERNATIONAL HOLDING B.V. (RSIN 851 929 357)	Second Defendant
UBER B.V. (RSIN 852 071 589)	Third Defendant
UBER AUSTRALIA PTY LTD (ACN 160 299 865)	Fourth Defendant
RASIER OPERATIONS B.V. (RSIN 853 682 318)	Fifth Defendant
UBER PACIFIC HOLDINGS B.V. (RSIN 855 779 330)	Sixth Defendant
UBER PACIFIC HOLDINGS PTY LTD (ACN 609 590 463)	Seventh Defendant

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CERTIFICATE

I certify that this and the 125 preceding pages are a true copy of the reasons for Ruling of Matthews AsJ of the Supreme Court of Victoria delivered on 26 April, 2022.

DATED this 27th day of April 2022.

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Associate