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**RATIONALES FOR REGULATING UBER**

*Driving Regulators to Seek New Solutions*

LAWS529: The Opportunities and Pitfalls of Regulatory  
Reform

Submitted for the LLB (Honours) Degree

Faculty of Law  
Victoria University of Wellington

**2015**

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## **Abstract**

*This paper conducts an enquiry into whether various regulatory theories suggest that there exists a legitimate rationale for regulating Uber in a New Zealand context. Uber is a company which provides an Internet-based mobile phone application that connects passengers and drivers. Uber presents regulators with many challenges, some of which this paper focuses on selectively. This paper outlines in brief Uber as a company and the service that it provides. It then describes the somewhat unique New Zealand taxi industry and associated regulations, and also the regulation pertaining to private hire vehicles. The conclusion of this discussion is that Uber is effectively a competitor in the taxi industry, even though it is regulated as a private hire service.*

*The overarching enquiry of this paper whether there is regulatory avoidance, or instead under- or over- inclusive rules. A discussion of regulatory compliance theory provides a basis on which to assess whether Uber is legitimately or illegitimately avoiding existing regulation, or whether the existing rules are failing to meet their intended purpose(s). This issue is discussed throughout the paper in relation to the following sections.*

*Regulatory theories relating to innovation, the sharing economy and welfare economics provide different perspectives as to whether regulatory intervention would be justified, particularly when focussing on the purposes of regulating. Then, a comparative discussion of Uber in England and California highlights how other jurisdictions are approaching Uber in various contexts. This sheds light on how other regulators perceive the challenges that Uber presents, and the rationales for imposing regulation on different areas of Uber's operations.*

## **Word length**

*The text of this paper (excluding abstract, table of contents, non-substantive footnotes and bibliography) comprises approximately **14, 901** words.*

## **Subjects and Topics**

*Uber*

*Taxis– taxi driver regulation*

*Regulation– regulatory avoidance– regulatory compliance*

*Regulation– public interest– welfare economics– information asymmetry*

*Innovation– disruptive innovation*

*Sharing economy*

## *I Introduction*

The Internet has changed the way that people are able to act and interact in many different markets.<sup>1</sup> The Internet has also driven the development of technology-based platforms that enhance this lifestyle, including companies such as Uber. Uber has become a globally recognisable brand, in large part due to the regulatory battles it has faced and continues to face when entering new markets. This paper will explore whether there are sound rationales for regulating Uber in a New Zealand context.

Uber presents regulators with multiple challenges relating to vastly different areas of law. To that end, this paper will discuss only selected regulatory issues, with a view of analysing which of these theories and circumstances provide more persuasive arguments that regulatory intervention and imposition is justified.

Section II will provide a brief introduction to Uber as a company and to its operations. Section III outlines the overarching consideration of this paper; the extent to which Uber is avoiding existing regulations, legitimately or illegitimately. A parallel question is whether those rules are over- or under-inclusive in their scope relative to their purpose. These two questions underpin the enquiry of whether legitimate rationales for regulation exist, and frame the analysis of the following sections.

Section IV contains a short description of the New Zealand taxi industry, the existing regulatory requirements regarding licensing of both taxi drivers and private hire drivers, and the influence of Uber's arrival on the taxi market. This discussion demonstrates how current frameworks have created a cloudy regulatory environment for Uber's operations. The New Zealand taxi industry is somewhat exceptional in that it is not limited by price and quantity restrictions. Thus, the focus of existing regulations is that of quality and passenger safety, which arguably can equally apply to both taxis and Uber.

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<sup>1</sup> Rachel Botsman "The Sharing Economy Lacks A Shared Definition" (21 November 2013) Fast Company <[www.fastcoexist.com](http://www.fastcoexist.com)>.

Section V will consider to what extent innovation may influence rationales for regulating Uber. In theory, innovation can create legitimate reasons to avoid existing and perhaps outdated regulations. ‘Sharing’ economies uses innovative technologies to share underutilised resources, and allow people to consume goods and services in a more economically efficient manner. Disruptive innovations may create a situation where the existing regulatory framework does not effectively deal with the new technology, leading to regulatory failure. Both of these concepts challenge regulators to determine how these new businesses should fit within a regulatory regime.

A welfare economics rationale for regulation is one of multiple perspectives to assess when regulatory intervention is justifiable. Section VI applies this traditional theory to Uber in order to determine whether Uber is creating or exacerbating ‘traditional’ market failures, and if, so, justifies the further imposition of rules restricting its activities. In relation to market power and information asymmetry problems in the taxi industry, it can be shown that Uber is in fact reducing these problems, and thus should not be subject to regulation related to correcting these market failures.

Section VII will provide comparative examples to Uber’s experiences in New Zealand. Many countries and cities are experiencing regulatory challenges regarding Uber, relating to various aspects of its business model. England’s experience provides a useful comparison of the rationales for distinguishing taxi and private hire services. Elsewhere, Uber’s ongoing dispute in Californian under employment law provides a potential glimpse into a future regulatory issue which New Zealand regulators may have to face. These examples also indicate how overseas regulators perceive the dynamic between regulatory avoidance and failures in framing the applicable rules.

## *II Uber*

Uber is a San Francisco-based company that operates a ride-share mobile phone application (“app”). The company was founded in 2009 and is expanding rapidly worldwide.<sup>2</sup> As at 28 September 2015, the Uber service is available in 60 countries.<sup>3</sup>

The app connects people needing a car ride from point A to point B with a driver and a car. Customers set their pickup and drop off locations and request a ride, which can then be accepted by a driver. The driver’s details are sent to the customer, who can choose to accept or reject the driver’s offer. Upon acceptance, the customer is shown the route and their estimated time of arrival.<sup>4</sup> Customers can also access a fare quote once they have entered their destination.<sup>5</sup>

Customers pre-enter their payment details, so no money physically changes hands after the ride is complete; rather, the fare is automatically deducted from the customer’s registered credit card. Uber takes a percentage of the fare for itself, and part of the fare is transferred to the driver as payment.<sup>6</sup> After the ride is complete, both driver and passenger must rate each other out of five stars. The rating is recorded and aggregated, and actively checked for consistently poor feedback. If this occurs, the low-ranking passenger or driver is removed from the Uber community.<sup>7</sup>

Some aspects of the Uber platform have caused public controversy and significant media attention. For example, Uber classes their drivers as independent contractors, rather than employees.<sup>8</sup> This creates issues regarding liability, particularly in cases

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<sup>2</sup> “The Company” Uber <[www.uber.com](http://www.uber.com)>.

<sup>3</sup> “Cities” Uber <[www.uber.com](http://www.uber.com)>.

<sup>4</sup> An estimated time of arrival is only available on the iOS app for Apple products.

<sup>5</sup> “How To Uber” Uber <[www.uber.com](http://www.uber.com)>.

<sup>6</sup> John Patrick Pullen “Everything You Need To Know About Uber” (4 November 2014) TIME <<http://time.com>>.

<sup>7</sup> Steffen Rusten “Uber in New Zealand” (19 January 2015) Uber <<http://blog.uber.com/uberinnz>>.

<sup>8</sup> Rusten, above n 7.

where Uber drivers have caused personal injury or death.<sup>9</sup> Further, this categorisation has been challenged, occasionally successfully, at lower levels of the judicial hierarchy.<sup>10</sup> Uber’s use of surge pricing— where the price of a journey may fluctuate according to demand— has also upset some users, but Uber’s CEO Travis Kalanick has defended the mechanism, saying it is “classic Econ 101”.<sup>11</sup> These examples provide only a taste of the regulatory hurdles Uber is currently facing.

Uber is often characterised as a “brash and, so far, highly effective” competitor to incumbent taxi industries.<sup>12</sup> This relationship has caused significant backlash from taxi drivers in many cities. Uber does not consider itself to be a taxi company, and therefore believes that taxi regulations do not apply to it. The typical Uber approach to entering a new market is to launch the app in a new city regardless of the existing legal framework. In the face of seemingly inevitable regulatory challenge, Uber unleashes lobbyists and its swarm of newly loyal users to lobby governments and regulators.<sup>13</sup>

Uber’s categorisation of its business model is potentially masking the true nature of the Uber service. While Uber has demonstrated that it has powerful voice when expressing its defiance towards existing regulations, the question of whether this is legitimate, in light of both the scope and purpose of the regulations, should be considered.<sup>14</sup>

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<sup>9</sup> “Ex-Uber Driver Charged With Manslaughter in Death of 6-Year-Old” (9 December 2014) TIME <<http://time.com>>.

<sup>10</sup> See, for example, the comparative discussion of California in the comparative section of this paper.

<sup>11</sup> Kara Swisher “Man and Uber Man” (December 2014) Vanity Fair <[www.vanityfair.com](http://www.vanityfair.com)>.

<sup>12</sup> Rosalind S Helderman “Uber pressures regulators by mobilizing riders and hiring vast lobbying network” (13 December 2014) The Washington Post <[www.washingtonpost.com](http://www.washingtonpost.com)>.

<sup>13</sup> Helderman, above n 12.

<sup>14</sup> For example, Uber lobbied heavily, and successfully, in New York City when a temporary cap on growth was proposed: see Tim Fernholz “The latest round in Uber’s battle for New York City, explained” (30 June 2015) QZ <<http://qz.com/441608/the-latest-round-in-ubers-battle-for-new-york-city-explained/>>.

### *III Regulatory Avoidance*

Uber is often described as operating in a legal grey area, and consequently various regulatory authorities have responded in a multitude of ways.<sup>15</sup> Some regulators have imposed pre-existing rules which currently apply to analogous markets, even though Uber may not create the problems that the regulations are aimed at minimising.<sup>16</sup> Elsewhere, some jurisdictions have banned Uber outright, while others have been relatively sluggish or non-committal in their response. The wide variety of reactions suggests that there are radically different views about how Uber should be regulated.

Uber supports “sensible, safety-based regulations and ones that are in the consumer interest”.<sup>17</sup> The company states that it aims to work with officials to change existing laws that it argues do not apply to the service.<sup>18</sup> CEO Travis Kalanick is extremely vocal in his dislike of outdated regulations. For example, he has stated that:<sup>19</sup>

... when we [Uber] show up in a new city, we don’t ask for special favours or handouts. When we are asked to abide by modern regulations that protect the rights and safety drivers and passengers, we do— because we believe in those protections too.

The divergence of views about whether Uber should be subject to regulation, and, if so, how, suggests that the focus of the inquiry should be the underlying purposes of the regulations. This focus will help to determine the rules’ applicability and relevance to Uber, and whether Uber’s strenuous pushback is warranted.

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<sup>15</sup> Janelle Orsi “The Sharing Economy Just Got Real” (16 September 2013) Shareable <[www.shareable.net](http://www.shareable.net)>.

<sup>16</sup> Christopher Koopman and others “The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change” (Mercatus Working Paper, Mercatus Center at George Mason University, December 2014) at 5.

<sup>17</sup> Rusten, above n 7.

<sup>18</sup> Helderman, above n 12.

<sup>19</sup> Travis Kalanick “5-Year Anniversary Remarks from Uber CEO Travis Kalanick” (speech to employees, driver partners and special guests, San Francisco, 3 June 2015).

A corresponding question is whether Uber is engaging in regulatory avoidance, and if so, whether this is legitimate or illegitimate. Illegitimate regulatory avoidance can be described as a situation where Uber provides a service that, in substance, is caught by the purpose or goal of the relevant regulation. However, Uber claims that the regulation does not apply, based on some legal construct that masks the fact that, in essence, the same activity or service is being provided. On the other hand, Uber will be legitimately avoiding regulation if they are providing something substantively different to the activity which is intended to be regulated, or if the regulation simply does not catch the activity. Phrased another way, if the goal of the regulation does not apply to Uber's activities, there is no legitimate reason for the regulation to extend to Uber.

### *A Theories of Non-Compliance and Why Rules Fail*

Regulatory avoidance is a form of non-compliance. Karen Yeung suggests that it is possible to draw a distinction between 'rule compliance' and 'substantive compliance'.<sup>20</sup> If an actor is engaging in mere 'rule compliance' they are complying with the letter of the law, but at the same time they are also deliberately avoiding the substance of the rule; that is, its purpose and intention. This misfit of rule and behaviour may be attributable either to flaws in the rule, or to the behaviour of the actor. Both of these perspectives are potentially relevant to many of the situations which Uber finds itself in.

#### *1 Over- or under- inclusive rules*

Julia Black states that rules may fail to capture their intended substance for three main reasons: relevantly for this discussion, for the rule's over- or under-inclusiveness, or its indeterminacy.<sup>21</sup> First, rules are either over- or under-inclusive because they are based on imperfect generalisations. Generalisations can suppress relevant information or elevate unimportant information, or represent only an approximate relationship between the generalisation and the goal or purpose of the regulation. They may also

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<sup>20</sup> Bronwen Morgan and Karen Yeung *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, Cambridge, 2007) at 152.

<sup>21</sup> Julia Black 'Rules and Regulators' in Morgan and Yeung, above n 20, at 153.

fail to cover future developments.<sup>22</sup> Black suggests that a flaw in a rule will be exacerbated in certain circumstances, such as:<sup>23</sup>

... where the context in which the rule operates is one which is subject to frequent change, where the course of change is unforeseeable, where the range of situations in which the rule will apply is great, and where there is an uncertain causal relationship between the events, objects or behaviour focused on and the harm to be avoided or the goal to be achieved.

Applying this theory to Uber, it may appear that a variety of existing rules are under-inclusive from the perspectives of, for example, Uber's competitors or the relevant regulatory agency. These actors would argue that Uber should be subject to certain rules, even if they currently do not apply. Conversely, Uber may claim that in some situations the law is over-inclusive and inappropriately extends to them, because the goals of the regulation do not apply to Uber's activity that is caught within the regulation.

Uber could be described as introducing an 'unforeseeable course of change' into the market, and also as creating uncertainty between Uber's behaviour and activities and the existing regulatory goals. Thus, Black's criteria indicate that Uber perhaps presents a situation in which the problems created by an over- or under-inclusive rule will be exacerbated. The question of a rule's under- or over-inclusiveness will be discussed throughout this paper, where relevant, in the context of different regulatory areas and theories.

## *2 Indeterminacy and interpretive failure*

Secondly, a rule's failure can sometimes stem from the rule's inability to anticipate all future events and possibilities.<sup>24</sup> It is almost impossible for the law to foresee all developments that it may be expected to cover, and therefore when new situations

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<sup>22</sup> At 153-154.

<sup>23</sup> At 154.

<sup>24</sup> At 155.

arise it is unclear how the rule may apply.<sup>25</sup> Black suggests a remedy to interpretative failures of law is the use of “vague, permissive language” to mitigate opportunities to interpret law formalistically.<sup>26</sup> A formalistic approach to law— one that reveres form over substance— allows creative compliance to flourish.<sup>27</sup> There is potential for a regulated actor to engage in create compliance, which constitutes illegitimate regulatory avoidance.

### 3 *Creative compliance*

In taking a formalistic approach to the law, actors can comply literally with the black-letter rule (‘rule compliance’ as termed by Yeung), while failing to substantively comply with the underlying purpose of the same rule.<sup>28</sup> As a result, an actor can engage in creative compliance by exploiting formalism in order to avoid legal control, rather to comply with the law.<sup>29</sup> Creative compliance allows actors to manipulate and undermine the purpose of regulation. Doreen McBarnet and Christopher Whelan emphasise this by noting that “[u]nless the rules promote the overall purpose of the law, compliance with them and insisting on their literal interpretation or enforcement will not achieve the declared objectives.”<sup>30</sup>

Situations where it is open to argument that Uber is engaging in a form of creative compliance will be addressed throughout the paper. The line between creative compliance and situations where a rule is under-inclusive is often difficult to demarcate. In the former situation, the regulated actor is deliberately constructing their compliance in a way that undermines the rule. In the latter, the fault lies with the rule-maker and the unfit-for-purpose rule. Consequently, the ‘fault’ or regulatory failure may lie with either the regulatory agency, or with Uber, or it may be difficult to state for sure which is responsible for the failure.

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<sup>25</sup> Doreen McBarnet “Law, Policy, and Legal Avoidance: Can Law Effectively Implement Egalitarian Policies?” (1988) 15(1) *Journal of Law and Society* 113 at 120.

<sup>26</sup> Morgan and Yeung, above n 20, at 158.

<sup>27</sup> Doreen McBarnet and Christopher Whelan “The elusive spirit of the law: Formalism and the struggle for legal control” (1991) 54(6) *Mod L Rev* 848 at 849.

<sup>28</sup> At 850.

<sup>29</sup> At 849.

<sup>30</sup> At 850.

The topic of regulatory avoidance, and particularly creative compliance, is more common in some areas of literature, such as taxation and accounting.<sup>31</sup> It has been claimed that Uber is avoiding tax in many of the jurisdictions where it is operating, but this paper will not be dealing with taxation issues.<sup>32</sup>

### ***B A Framework for the Paper***

The considerations of regulatory compliance or avoidance will be addressed throughout this paper. The approach will be as follows. First, the initial enquiry is to determine the purpose or goal of the regulation in question. Secondly, is Uber caught by the regulation? If so, is this due to the rule being over-inclusive? A related question is whether Uber is engaging in illegitimate avoidance, possibly by creatively complying with the existing regulation.

Thirdly, if the regulation does not capture Uber's activity, the relevant inquiry is whether the purposes or goals of the existing regulation apply to Uber's activities. Is Uber's activity substantially different to that which the law intends to regulate? Would imposing regulation on Uber be pursuing the same goal? If answered in the affirmative, it is implied Uber is legitimately avoiding regulation, since the rules are technically failing to catch them. However, in such a situation the spirit and purpose of the law is being undermined. Thus suggests the law is under-inclusive relative to its purpose. Additionally, Uber will be engaging in legitimate avoidance if their activity is genuinely something new and different that the existing law is not intended to regulate.

This approach will permeate the following discussions of the New Zealand taxi industry and Uber's role within it, Uber's position within the sharing economy, the role of innovation in Uber's business model, a welfare economics rationale for regulation, and an analysis of Uber within different jurisdictions. In each of these sections, a discussion of the purposes of regulation, whether Uber is captured within

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<sup>31</sup> See, for example, McBarnet and Whelan, above n 27.

<sup>32</sup> See, for example, Winston Peters "An Uber Rip Off For Taxpayers" (21 January 2015) New Zealand First <<http://nzfirst.org.nz>>.

the regulation or its purpose, and any regulatory avoidance issues will attempt to inform under what circumstances there is a sound rationale for regulating Uber.

#### *IV Taxis and Uber in New Zealand*

##### *A Deregulation in the Taxi Industry*

The New Zealand taxi industry was historically subject to price and quantity controls, which were removed in 1989. The regulation of prices and quantities of taxis was replaced with new regulations relating to taxi drivers.<sup>33</sup> The larger players in the industry drove out smaller businesses, and by 2008 the New Zealand Taxi Federation owned around half of the taxi fleet in New Zealand.<sup>34</sup> There are approximately 7,000 taxis currently operating in New Zealand, compared to 2,700 during the regulated era.<sup>35</sup> However, passenger numbers have not significantly risen since deregulation occurred.<sup>36</sup>

The increase in the number of vehicles available for hire has not driven down the price of taxis, as would normally be predicted when a market is flooded with suppliers. In a 2014 study, Christchurch and Queenstown were found to be the most expensive and second most expensive cities in the world respectively to hire a taxi from the city centre to the airport, on a dollar per kilometre basis. In the same study, New Zealand was also the most expensive country in the world to commute from the airport to the city centre.<sup>37</sup> Thus, it appears that without price regulation the market has a tendency to offer relatively high prices and high levels of supply. From an economic perspective this is unusual, and may indicate an atypical market structure; in particular an unusual supply curve structure. A full explanation of this unfamiliar market structure goes beyond the scope of this paper, but would make for interesting further research.

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<sup>33</sup> Jane Tolerton “Taxis and cabs - Taxi industry deregulation”, Te Ara <[www.TeAra.govt.nz](http://www.TeAra.govt.nz)>.

<sup>34</sup> “About Us” New Zealand Taxi Federation <[www.taxifed.co.nz](http://www.taxifed.co.nz)>. “About Us”, above n 34.

<sup>35</sup> “About Us”, above n 34.

<sup>36</sup> Tolerton, above n 33.

<sup>37</sup> GO Rentals “Taxi Charges to the World’s Most Visited Cities (June 2014) GO Rentals <[www.gorentals.co.nz](http://www.gorentals.co.nz)>.

New Zealand's taxi industry deregulation is often held up as the "holy grail" of reform, but many voices now support the idea of reregulation to limit taxi numbers within certain areas, and also limiting fares.<sup>38</sup> Deregulation has certainly increased customer choice, but has not correspondingly resulted in a decrease in price. Despite the general understanding that a deregulated market will move to an equilibrium determined by supply and demand, the equilibrium in the New Zealand taxi market has been criticised as being too high.<sup>39</sup>

This may be partially explained by the way in which taxis are required to set their fares. Taxi organisations must have their fares approved by the New Zealand Transport Agency ("NZTA") before displaying them in or on a taxi.<sup>40</sup> These fares cannot be altered on a case-by-case basis, as any alteration must be processed through the NZTA.<sup>41</sup> This may discourage taxi organisations from constantly altering their fares, which removes the ability for the prices of taxis to be responsive to consumer demand. Further, there is industry consensus that the fares are set in an attempt to ensure that taxi drivers can earn a living in what is becoming an unforgiving industry.<sup>42</sup> This suggests that fares are being set at an artificially high rate, which is preventing the market from moving to a naturally determined equilibrium.

### ***B The Taxi Regulatory Framework***

The removal of quantity and price restrictions in the taxi industry led to new standards being imposed on taxi drivers. The intention of this shift was to transition from a quantity to a quality standard.<sup>43</sup> Taxis are regulated under the small passenger services regulatory framework. The Land Transport Rule: Operator Licensing 2007 defines a small passenger service vehicle as a passenger service vehicle that seats

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<sup>38</sup> Geoff Cumming "Taxis– why you're paying so much" *The New Zealand Herald* (online ed, New Zealand, 17 May 2014).

<sup>39</sup> Peter Mills "Taxi fares: Feeling ripped off? Find out what your taxi should cost" *The New Zealand Herald* (online ed, New Zealand, 6 April 2015).

<sup>40</sup> Land Transport Rule: Operator Licensing 2007, cl 4.9(1).

<sup>41</sup> Land Transport Rule: Operator Licensing 2007, cl 4.10.

<sup>42</sup> Cumming, above n 38.

<sup>43</sup> *Effectiveness of controls over the taxi industry: Report of the Controller and Auditor-General* (Controller and Auditor-General, Report, June 2005) at 28.

twelve people or fewer, including the driver.<sup>44</sup> Thus, small passenger services extends beyond taxis, and includes vehicles such as minivans and hired wedding cars.

Taxi drivers, or their employer, must hold a passenger service licence in order to carry passengers.<sup>45</sup> Additionally, taxi drivers are required to hold a P endorsement, which allows them to carry passengers. Requisites of the application for a P endorsement include the completion of a theory course, and holding a full New Zealand class one driver licence for at least two years.<sup>46</sup> If drivers are intending to operate in certain areas, they must also obtain an area knowledge certificate.<sup>47</sup> The NZTA will also undertake a background check to ensure that the applicant is a fit and proper person.<sup>48</sup>

Part 4A Subpart 2 of the Land Transport Act 1998 outlines factors the NZTA will take into account when making a fit and proper person assessment. It includes a police check, which may canvas such matters as a person's criminal history, any historical transport-related offences, and any complaints made about the person in respect of those offences, particularly from users.<sup>49</sup> For drivers of small passenger service vehicles such as taxis, the NZTA will pay particular attention to any history of serious behavioural problems, violent, sexual or drug-related offending, transport-related offences, and any persistent or serious complaints, especially in respect of the person or transport service.<sup>50</sup> Persons convicted of specified serious offences are prohibited from holding a P endorsement.<sup>51</sup> It is evident that a fit and proper person assessment is intended to ensure that persons holding a P endorsement are trustworthy, thereby ensuring the quality of people who hold those endorsements.

When providing taxi services, drivers must adhere to rules about the length of time they are permitted to work for at any one time. Section 30ZC imposes limits on work

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<sup>44</sup> Land Transport Rule: Operator Licensing 2007, Part 2.

<sup>45</sup> *Report of the Controller and Auditor-General*, above n 43, at 31-32.

<sup>46</sup> "P endorsement for carrying passengers" New Zealand Transport Agency <[www.nzta.govt.nz](http://www.nzta.govt.nz)>.

<sup>47</sup> See "Taxi drivers and area knowledge certificates" New Zealand Transport Agency <[www.nzta.govt.nz](http://www.nzta.govt.nz)> for a list of areas requiring area knowledge certificates.

<sup>48</sup> "Fit and proper person check" New Zealand Transport Agency <[www.nzta.govt.nz](http://www.nzta.govt.nz)>.

<sup>49</sup> Land Transport Act 1998, s 30C.

<sup>50</sup> Section 30D.

<sup>51</sup> Section 29A.

time; under subs (2)(a) a driver may not exceed 13 hours of work in any cumulative work day. Correspondingly, under subs (2)(b) a driver must have at least 10 hours of continuous rest time. Section (3) states that drivers may not work more than 70 hours in one week. Section 30ZD outlines which records taxi drivers must keep. They include time records, wage records, and other employment related records for the driver. These regulations are intended to ensure that taxi drivers are competent while they are on the road, and are again related to upholding the quality of taxi drivers in general.

In addition to these obligations, taxi drivers must display prices outside and inside their taxi, and their photo identification must also be visible.<sup>52</sup> The requirement of displaying prices is intended to ensure that consumers are informed about the relevant costs, which becomes important when canvassing the distinction between taxis and other forms of small passenger service vehicles.

It is evident that these requirements are relatively burdensome, which is understandable, given that the purpose of the regulation is to ensure the high quality of people employed as taxi drivers. Thus, while the New Zealand taxi industry is commonly referred to as a ‘deregulated’ industry, this may be a misnomer, or at the very least misleading. While there are no longer any price or quantity controls in the market, there are other significant regulatory requirements aimed at upholding the quality of taxi drivers which have an effect the operation of the market.

### *C Uber in New Zealand*

Uber currently operates in Auckland and Wellington, and has begun recruiting drivers in Christchurch.<sup>53</sup> In September 2015 Uber marked its one-millionth ride provided in New Zealand after just over one year of operation.<sup>54</sup> Uber’s growing popularity is seemingly buoyed by a general feeling of dissatisfaction with taxi services, and

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<sup>52</sup> Tolerton, above n 33.

<sup>53</sup> Brittany Mann “More than 1300 apply for Uber jobs in Christchurch” (8 July 2015) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

<sup>54</sup> “Uber NZ marks millionth ride” (24 September 2015) Radio New Zealand <[www.radionz.co.nz](http://www.radionz.co.nz)>.

particularly with high prices.<sup>55</sup> However, Uber’s operations have not been without significant media attention, and, predictably, backlash from the taxi industry. This is also true of the response to Uber in many other countries.

Like taxis, Uber is classified as a small passenger service, but it is not subject to exactly the same regulations. Uber works with drivers that have been vetted and approved by the NZTA in order to operate as a private hire service.<sup>56</sup> A private hire service is defined as a passenger service carried on by means of a private hire vehicle.<sup>57</sup> A private hire vehicle is one which is operating a small passenger service, carrying passengers for reward, and is pre-booked on an agreed fare basis.<sup>58</sup> This definition excludes taxis, on the basis that taxis do not pre-arrange fares. Other forms of transport covered by the private hire services regime include wedding cars and limousines.<sup>59</sup>

Uber drivers must hold a driver licence, a P endorsement licence, and have their own vehicle with a current warrant of fitness.<sup>60</sup> Uber drivers are not required to have additional insurance,<sup>61</sup> but they are required to be registered as a private hire vehicle, or work for an employer who holds these licences.<sup>62</sup> Similarly to taxi drivers, private hire drivers must either hold, or be employed by a holder of, a passenger service licence, and must also hold and display a current driver identification card.<sup>63</sup> Restrictions on work hours are also imposed on private hire drivers, so as to lower the risk of overworked drivers being on the road.<sup>64</sup>

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<sup>55</sup> See, for example, Cumming, above n 38.

<sup>56</sup> “Required licences” Uber <[www.driveuber.co.nz](http://www.driveuber.co.nz)>.

<sup>57</sup> Land Transport Rule: Operator Licensing 2007, Part 2.

<sup>58</sup> Land Transport Rule: Operator Licensing 2007, Part 2.

<sup>59</sup> “Questions and answers on SPSVS” (25 February 2015) Ministry of Transport <[www.transport.govt.nz](http://www.transport.govt.nz)>.

<sup>60</sup> “Getting Licensed to Drive with Uber!” Uber <<http://blog.uber.com>>.

<sup>61</sup> “Getting Licensed to Drive with Uber!” above n 60.

<sup>62</sup> “Types of passenger services” New Zealand Transport Agency <[www.nzta.govt.nz](http://www.nzta.govt.nz)>.

<sup>63</sup> “Getting Licensed to Drive with Uber!”, above n 60.

<sup>64</sup> “Work-time and log book requirements” New Zealand Transport Agency <[www.nzta.govt.nz](http://www.nzta.govt.nz)>.

Recently, several Auckland Uber drivers have been fined for using the Uber app as a meter. This is prohibited for private hire services, since the fare must be pre-agreed. However, there was insufficient evidence to charge the drivers, and the fines were reimbursed.<sup>65</sup> Uber spokeswoman Katie Curran has stated that there are a number of precedents around the world determining that smartphones are not taxi meters.<sup>66</sup> However, this is one of many regulatory issues for which Uber is consistently garnering media attention. In large cities with established taxi industries such as London, taxis drivers have loudly protested this particular aspect of Uber's technology.

It should also be emphasised that the legal scope of Uber's model is the facilitation of the interaction between driver and rider, rather than the provision of the service itself. Roger Heale, executive director of the New Zealand Taxi Federation, points out that such a term effectively absolves Uber of responsibility for any of its drivers' conduct.<sup>67</sup> Such a characterisation of Uber's activities has significant implications legally in terms of limiting its liabilities. However, when considering the scope of Uber's activities within the market, a more practical approach will be taken, rather than a strictly legalistic one.

#### ***D Small Passenger Services Review***

Uber is currently awaiting the outcome of the Small Passenger Services Review ("SPSR") before considering any further expansion to its service in New Zealand.<sup>68</sup> The Ministry of Transport is leading the review, with the assistance of the NTZA and the New Zealand Police.<sup>69</sup> The aim of the SPSR is "to ensure that New Zealand's regulatory environment for [small passenger service vehicles] continues to be fit for

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<sup>65</sup> John Antony "Police drop charges against 16 Auckland drivers" (8 June 2015) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

<sup>66</sup> Ian Steward "Passengers focus of Uber crack-down" (12 January 2015) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

<sup>67</sup> Roger Heale "Taxis face rigorous safety standards – Uber doesn't" *The Dominion Post* (online ed, Wellington, 22 September 2015). Uber's New Zealand user terms were unavailable at the time of writing to confirm Mr Heale's statement.

<sup>68</sup> Shawn McAvinue "Uber offering icecream but that's all for now" *Otago Daily Times* (online ed, New Zealand, 24 July 2015).

<sup>69</sup> "Small passenger services review" (17 April 2015) Ministry of Transport <[www.transport.govt.nz](http://www.transport.govt.nz)>.

purpose and flexible enough to accommodate new technologies.”<sup>70</sup> Thus, it is clear the review will consider the impact of new market players such as Uber.

The SPSR will review the licensing requirements applicable to small passenger service vehicle, and intends to provide an updated regulatory framework.<sup>71</sup> Uber has made an application to the SPSR requesting that the current licensing requirements be relaxed, as it feels that “the licensing structure in New Zealand is the single biggest barrier to competition and growth in [the] industry”.<sup>72</sup> Uber New Zealand spokesman Oscar Peppitt states that the existing requirements are “a serious barrier to someone using their car to make some money”.<sup>73</sup> As yet, there is no indication as to whether Uber’s requests will be taken into account in any potential regulatory reform.

The SPSR was expected to be complete by mid 2015, with subsequent advice to be presented to the Associate Transport Minister. If the SPSR concludes that changes to the regulatory framework for licensing must be made, the review will propose amendments to the relevant legislation, which will be debated in a public consultation process. If necessary, this will occur later in 2015.<sup>74</sup> Transport Minister Simon Bridges has hinted that the government will take a light-handed approach to regulating Uber, in order to allow the ‘ridesharing technology’ to grow, with the intention of benefitting consumers.<sup>75</sup> It is expected that the outcome of the review will “be closely analysed around the world”, as the framing of the regulations could set a standard which other countries are encouraged to follow.<sup>76</sup>

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<sup>70</sup> “Small passenger services review”, above n 69.

<sup>71</sup> “Small passenger services review”, above n 69.

<sup>72</sup> John Anthony “Uber hotly anticipating result of Government’s transport review” (15 September 2015) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

<sup>73</sup> Jessy Edwards “Uber asks government to relax the rules” (22 May 2015) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

<sup>74</sup> “Small passenger services review”, above n 69.

<sup>75</sup> Michael Forbes “Government says it will ‘take the lightest touch possible’ to regulating Uber” (6 June 2015) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

<sup>76</sup> Grant Bradley “NZ could set world standard, Uber tells Bridges” *The New Zealand Herald* (online ed, New Zealand, 1 June 2015).

### *E A Regulatory Avoidance Analysis*

It is apparent that the requirements imposed on private hire drivers are essentially the same as those imposed on taxi drivers. Since both must hold a P endorsement and either hold, or be employed by someone who holds, a passenger service licence, the standard to this extent is identical. The purpose of these regulations, as discussed above, is to ensure the quality of drivers and also the safety of both drivers and passengers. This goal applies equally to taxi services and Uber, since no real distinction should be made between ensuring the quality and safety of a taxi journey versus an Uber journey. Therefore, the P endorsement and passenger service licence requirements are neither under- nor over-inclusive relative to their purpose.

However, not all regulation for private hire services is exactly the same as for taxis. For example, the requirement to install security cameras does not apply to private hire services.<sup>77</sup> From a safety perspective, this is less than desirable for riders choosing to use Uber over taxis. Further, if the intention of the existing regulations is to ensure quality and safety, it is unclear why there is a split in the standard for taxi drivers and passenger hire services; perhaps it would be desirable to have similar, if not identical standards, particularly in relation to Uber. This may suggest that this rule is currently under-inclusive relative to its purpose of ensuring the welfare of drivers and passengers. There is a clear rationale for extending such a rule, which has the purpose of improving both driver and passenger safety, to Uber.

Uber's request that the licensing requirements be relaxed indicates that they believe the existing rules are over-inclusive. This may suggest that that New Zealand has a high standard of driver vetting in comparison to other cities where Uber operates. However, Uber's perspective arguably places too much emphasis on the employment and income-earning benefits of working for Uber relative to the necessary safety goals of regulating transport services. Having an even lower standard for Uber drivers, who are providing essentially the same service as taxi drivers, is unlikely to be palatable to a safety-conscious public. Thus, arguing that the rule is over-inclusive

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<sup>77</sup> Under the Land Transport Rule: Operator Licensing 2007, area knowledge tests only apply to taxi services (s 4). Further, s 4A only refers to taxis in relation to in-vehicle security camera systems.

seems facetious when looking at the underlying purposes of the existing licensing system.

The requirement that private hire vehicles must arrange an advance fare also distinguishes them from taxi services. Charges were dropped against New Zealand Uber drivers because there was insufficient evidence to prove any illegal behaviour. However, Uber's app seems to be a prima facie breach of this rule. Uber is perhaps engaging in creative compliance by stating that their app is not a meter, and therefore complies with the private hire regulations.

In London, the relevant regulator Transport for London reacted to this same complaint by stating that there was no breach,<sup>78</sup> since the Uber app did not have "some sort of connection between the device and the vehicle" which is the case with taxis; instead, the app makes use of global positioning time and distance data, which was not illegal.<sup>79</sup> This seems to be a very fine distinction, but one that seems to satisfy both English and New Zealand regulators— so far, at least. Is the purpose behind this rule intended to capture activities such as those that Uber provides? This will accordingly inform whether the existing rule is under-inclusive in its scope.

A fare that is set in advance provides certainty for customers. Situations such as hiring wedding cars and limousines may require budgeting, or at least searching for prices before deciding which company to hire with. Customers booking this type of service have an increased ability to shop around and compare prices. If certainty is indeed the reason behind the rule, it seems that Uber's activity does not fall within the purpose of the regulation. Uber operates much in the same way as taxis, offering 'everyday' journeys rather than necessarily for special occasions, and therefore the advance certainty of a fare is perhaps not such an important consideration.

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<sup>78</sup> Paul Sawers "Taxi regulator TfL takes legal advice and concludes Uber is operating lawfully in London" (3 July 2014) The Next Web <<http://thenextweb.com/uk>>.

<sup>79</sup> Dave Lee and Leo Kelion "London black taxis plan congestion chaos to block Uber" (8 May 2014) British Broadcasting Company <[www.bbc.com](http://www.bbc.com)>.

Further, the requirement that taxi drivers operating in some areas must take knowledge area tests seems inapplicable to Uber, as Uber drivers are guided by a global positioning system through the Uber app. Requiring Uber drivers to pass an area knowledge test would be a redundant requirement, since they can rely on immediate GPS information and location services. Therefore, the purpose of such a rule—ensuring that drivers know their surroundings and can navigate—does not seem to be applicable to Uber drivers.

In summary, the regulations which have the purposes of ensuring safety, but do not currently apply to private hire vehicles, should be extended to include Uber, as its activities are similar enough to taxis to require the additional safety standards. In contrast, the private hire rule requiring a pre-set fare seems inapplicable to Uber in practice, as it is very different to other types of private hire services which have a greater need for price certainty. The purpose behind the rule regarding area knowledge tests is also inapplicable to Uber, since the app is able to meet the goal of the rule without the need for regulatory intervention. This particular aspect of Uber’s business model is also highly relevant to an enquiry of whether innovation justifies regulatory avoidance, which this paper will now turn to.

## *V The Role of Innovation*

### *F The Sharing Economy*

The Oxford English Dictionary defines a sharing economy as “an economic system in which assets or services are shared between private individuals, either for free or for a fee, typically by means of the Internet”.<sup>80</sup> An alternate definition is “[a]n economic model based on sharing underutilised assets from spaces to skills to stuff for monetary or non-monetary benefits.”<sup>81</sup> The latter definition is narrower than the former, as it focuses on the underutilisation of existing resources. Rather than the market

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<sup>80</sup> “Sharing economy” Oxford Dictionaries <[www.oxforddictionaries.com](http://www.oxforddictionaries.com)>.

<sup>81</sup> Botsman “The Sharing Economy Lacks A Shared Definition”, above n 1.

facilitating transfer of ownership, lenders retain ownership over their goods, and borrowers pay for a right of limited use.<sup>82</sup>

The sharing economy can be distinguished from other forms of economy due to the requirement of a digital platform that facilitates interaction between lenders and borrowers.<sup>83</sup> Modern technological changes and innovations have created an unprecedented ability to tap into the capacity of underutilised resources and temporarily redistribute them, in order to increase their efficiency and also to improve consumer utility.<sup>84</sup> Thus, it is often proposed that the sharing economy is innovative, in that it offers innovative solutions to traditional market problems.

In news articles or opinion pieces it is common to see Uber cited as an example of the sharing economy. However, there is also strong dissent to the suggestion that Uber belongs in this category.<sup>85</sup> In order to determine whether Uber does indeed participate in a sharing economy, and what relevance this may have for a regulatory analysis, it is first useful to examine what is meant by the term.

The phrase ‘sharing economy’ has a vigorously contested scope. Sharing has a “positive and progressive connotation”, which incentivises businesses to brand themselves as being part of the new trend.<sup>86</sup> However, the term is often misapplied to relationships that involve no collaboration at all, or to refer to all digital start-ups in general.<sup>87</sup> Rachel Botsman attributes some of this confusion to ‘Uberification’– where companies with similar structures to Uber are instinctively categorised as part of the sharing economy. Botsman would instead place Uber in the category of the ‘on-

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<sup>82</sup> Bryant Cannon and Hanna Chung “A Framework for Designing Co-Regulation Models Well-Adapted to Technology-Facilitated Sharing Economies” (2015) 31(1) Santa Clara High Tech L J 23 at 29.

<sup>83</sup> At 29.

<sup>84</sup> Botsman “The Sharing Economy Lacks A Shared Definition”, above n 1.

<sup>85</sup> See, for example, Frank Pasquale and Siva Vaidhyanathan “Uber and the lawlessness of ‘sharing economy’ corporates” (28 July 2015) The Guardian <[www.theguardian.com](http://www.theguardian.com)>, and contrast with Toon Meelen and Koen Frenken “Stop Saying Uber Is Part Of The Sharing Economy” (14 January 2015) Fast Company <[www.fastcoexist.com](http://www.fastcoexist.com)>.

<sup>86</sup> Meelen and Frenken, above n 85.

<sup>87</sup> Rachel Botsman “Defining The Sharing Economy: What Is Collaborative Consumption – And What Isn’t?” (27 May 2015) Fast Company <[www.fastcoexist.com](http://www.fastcoexist.com)>.

demand' economy, which refers to "platforms that directly match customer needs with providers to immediately deliver goods and services".<sup>88</sup>

Uber's app is an Internet-based platform, so it does possess that distinctive sharing economy trait. Uber's activities also arguably meet the wide sharing economy definition— the use of underutilised resources by persons other than the owner, for payment. Uber cars would otherwise be idle, and are providing a service to someone other than their legal owner. Thus, Uber can perhaps fall within the wider interpretation of the sharing economy.

However, categorising Uber as part of the sharing economy sheds no real light on whether their business model is a legitimate method of avoiding regulation. The risk of taking the 'sharing economy' label at face value is subsequently forgetting to question what aspects of this categorisation actually present sound rationales to regulate. The heart of the sharing economy debate is whether Uber's business model and operations are innovative in a way that allows it to legitimately avoid regulation.

### ***G Current Regulatory Responses to Innovation***

Uber presents regulators with challenges relating to how existing regulations should deal with innovative products and services. It has been observed that "[i]n general, there is a lack of tailored policy frameworks for regulating new sharing economy industries".<sup>89</sup> Many regulators are responding to innovative new businesses by simply imposing existing regulations. For example, in New Zealand, Uber is regulated as a private hire service, although it is in practice quite different to other types of private hire services. By simply applying existing rules to the newcomers, there is a risk of creating over-inclusive rules, or encouraging creative compliance on the part of the newly regulated actors.

In the opinion of some commentators, inappropriately applying conventional industry standards or legislation could lead to companies attempting to exploit loopholes in the

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<sup>88</sup> Botsman "Defining The Sharing Economy", above n 87.

<sup>89</sup> Kristina Dervojeda and others "The Sharing Economy: Accessibility-based models for peer to peer markets" (Case study, September 2013) at 16.

regulatory framework.<sup>90</sup> This approach has been described as “a frantic game of ‘whack-a-mole’”, where regulators struggle to contain new innovations while even more pop up.<sup>91</sup> Uber is well known for criticising existing laws and regulations that “make innovation very difficult”, including those that are, in their opinion, unjustifiably extended to their operations and thus over-inclusive.<sup>92</sup>

An analysis of the role of innovation within markets is useful in determining whether a different approach is necessary for the regulation of Uber. It will also inform an assessment of whether Uber can rely on its innovative business model to avoid certain regulations.

### ***H The Role of Innovation***

Regulators often find themselves at a crossroads when faced with an innovation such as Uber.<sup>93</sup> Innovative goods and services can often better serve consumer needs by providing more information about those goods or services at a lower cost.<sup>94</sup> However, innovations also bring risk and uncertainty to the market. In these uncertain conditions, regulations can play a role in balancing these competing concerns.<sup>95</sup> The relationship between regulation and innovation is “full of dilemmas and paradoxes”, including trade-offs such as freedom versus predictability and competition versus regulation.<sup>96</sup> The “fundamental paradox” is that of uncertainty versus flexibility.<sup>97</sup> Regulation has some ability to reduce uncertainty to tolerable levels, which may be necessary to create incentives for further innovation. However, innovative

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<sup>90</sup> Derojeda and others, above n 89, at 16.

<sup>91</sup> CBC News “New forms of regulation urged for Uber and the rest of the sharing economy” (17 February 2015) CBC News <[www.cbcnews.ca](http://www.cbcnews.ca)>.

<sup>92</sup> Interview with Travis Kalanick, Uber CEO (Congressman Bob Goodlatte, 2013 State of the Net Luncheon Keynote, 25 January 2013).

<sup>93</sup> Sofia Ranchordás “Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy” (Tilburg Law School Legal Studies Research Paper Series, Tilburg University, 2015) at 1.

<sup>94</sup> Koopman and others, above n 16, at 17, drawing on Arun Sundararajan “Why the government doesn’t need to regulate the sharing economy” (22 October 2012) Wired <[www.wired.com](http://www.wired.com)>.

<sup>95</sup> Frans van Waarden “A prototypical institution: law, regulation and innovation” in Casper Steven and Frans van Waarden *Innovation and institutions: a multidisciplinary review of the study of innovation systems* (Edward Elgar, Northampton and Cheltenham, 2005) 229 at 230.

<sup>96</sup> At 230.

<sup>97</sup> At 234.

developments also require some freedom and flexibility, otherwise immobility is a real risk.<sup>98</sup>

“The plight of the modern regulator is to adapt old regulatory frameworks to new technologies and practices. This should not be as paralyzing as it seems.”<sup>99</sup> Sofia Ranchordás explains this plight in a manner that encapsulates the balancing of interests that is the core challenge of achieving successful regulation:<sup>100</sup>

Regulators should try to understand the challenges of innovation to traditional regulatory instruments and institutions— including how to marry the fast-changing character of innovation with the need for predictability and legal certainty, bridge innovation with regulatory procedure and requirements... and convince legislators and regulators to accommodate and incentivize social innovation.

This is a significant challenge that requires the consideration of a number of factors, and is likely to depend greatly on personal perceptions on how this balance should be struck. A liberal perspective would believe that regulations should not hold back businesses, and if they do they may need to be rethought.<sup>101</sup> Alternatively, regulators may instead have the predominant concerns of ensuring safety and certainty. From a regulator’s perspective, a relevant focus point is whether the rationales for the existing or proposed regulations truly apply to the activity in question; if not, the regulatory framework should be altered.

### *1 Does innovation justify regulatory avoidance?*

It is first necessary to what aspects of Uber’s business model and activities are innovative. Uber’s app is a novel method of connecting drivers with passengers. This particular system of connecting suppliers and customers is common to sharing

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<sup>98</sup> At 230, 234.

<sup>99</sup> Nathan Cortez “Regulating Disruptive Innovation” (2014) 29 Berkeley Tech L J 175 at 228.

<sup>100</sup> Ranchordás, above n 93, at 31.

<sup>101</sup> Nicole Kobie “Regulation and Innovation: The case for regulating the UK’s sharing economy” *PC Pro* (London, March 2015), at 12.

economy companies, but is innovative in the context of taxi and private hire services. Uber may claim that this facilitative role means that pre-existing regulation, such as taxi regulation, should not apply to it because it is doing something akin to the nature of ‘sharing’, rather than providing a taxi service. This is the precise distinction that Uber will use in arguing that it should not be subject to European Union tax regulations.<sup>102</sup>

There is, of course, disagreement with this approach to defining Uber’s services. A strong counterargument is that even if Uber’s partner drivers provide the actual transport, the journey could not occur without Uber’s information provision and ‘matching’ process. Thus, Uber is practically providing the same service as a taxi— that is, moving passengers from point A to point B— regardless of the innovative provision of information, or Uber’s legal disengagement from the journey itself.

Consequently, the view of whether Uber is truly providing an innovative service turns on whether the regulator views Uber merely as the platform to match drivers and riders, or takes a wide view and includes the actual provision of the journey within the scope of Uber’s operations. It seems that, in reality, Uber’s provision of information and the service of a driver providing transport are not severable. Uber’s app provides information in an innovative way, but that information is not useful unless a journey is actually made. Vice versa, the journey could not occur in the same way without utilising Uber’s platform. So, it seems that Uber’s innovativeness should be assessed in light of all of its activities, rather than merely the innovativeness of the app. On this broad understanding of Uber’s service, perhaps Uber is not doing anything innovative enough to legitimately avoid regulation.

On the other hand, there is a persuasive argument that Uber’s app negates the need for a pre-determined fare as required by private hire regulation. The app is able to

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<sup>102</sup> The Commercial Court of Barcelona has referred a determination of whether Uber is a transport service, an ‘information society’ service, or both, to the Court of Justice of the European Union. Uber will claim it is an information society service, which would permit it to avoid certain national tax laws implemented under EU directives. See Sam Schechner “Uber to Fight EU Rules in Europe’s Top Court” (20 July 2015) *The Wall Street Journal* <[www.wsj.com](http://www.wsj.com)>.

estimate a fare for the rider, and saves time and search costs by providing useful information immediately. As a result, the consumer may be willing to trade off the certainty of a fare which they have spent considerable time seeking in favour of an estimated fare that has saved their searching efforts. This is an example of Uber's operations in fact falling within a grey area, but meets customer needs in an alternate manner, thereby reducing the need to enforce private hire regulations. Therefore, the purpose of imposing such a rule is rendered unnecessary through Uber's innovation.

### *I Disruptive Innovation*

An alternative approach to the role of innovations is that of disruptive innovation. Disruption theory refers to a situation where a new innovation undermines and potentially displaces existing products, firms, or industries.<sup>103</sup> Disruptive innovations can disturb incumbents in many ways, such as creating unanticipated risks or benefits, or disturbing the equilibrium in the market.<sup>104</sup> New customers are often enticed by the innovation's more efficient or cost-effective way of providing a product or service.<sup>105</sup> Classic examples of disruptive innovations are the Ford Model T in the world of automobiles, or the personal computer in communications.<sup>106</sup> A modern example is open-source publishing.<sup>107</sup> It has even been suggested that Twitter has the potential to be a disruptive innovation to the way that people watch and interact with live sports.<sup>108</sup>

The phrase 'disruptive innovation', much like the 'sharing economy', has been criticised for becoming overly broad; one which commentators and theorists attach to start-ups somewhat thoughtlessly.<sup>109</sup> MaryAnn Gobble suggests that:<sup>110</sup>

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<sup>103</sup> Cortez, above n 99, at 175.

<sup>104</sup> At 176.

<sup>105</sup> Ann Pegoraro "Twitter as Disruptive Innovation in Sport Communication" (2014) 2(2) C&S 132 at 133.

<sup>106</sup> Cortez, above n 99, at 177.

<sup>107</sup> Marion E Broome "Open access publishing: A disruptive innovation" (2014) 62(2) Nursing Outlook 69.

<sup>108</sup> Pegoraro, above n 105.

<sup>109</sup> MaryAnne M Gobble "The Case Against Disruptive Innovation" (2015) 58(1) RTM 59 at 59-60.

<sup>110</sup> At 61.

Truthfully, creating a truly disruptive innovation is a bit like creating a viral video: there are attributes you have to have to have a shot at either one, but the final result depends on the alchemy of the market and your management team.

If disruptiveness were based on marketing power alone, Uber would rank highly as being a potentially disruptive technology. However, as the quote suggests, an innovative technology must have certain base attributes to have disruptive potential. This can include the way in which the innovation presents challenges to incumbents, and to regulators.

Disruptive innovations challenge regulators because the innovation can “fall within an agency’s jurisdiction but not square well with the agency’s existing regulatory framework”.<sup>111</sup> As such, technologies can challenge existing frameworks and also trigger debate about whether the innovation is compatible with social and legal norms.<sup>112</sup> Nathan Cortez suggests that some regulatory bodies suffer from inertia that can be “hard to break without an external shock, usually a tragedy or some other massive failure that reignites interest in regulation.”<sup>113</sup> This may result in regulatory agencies being reluctant or slow to respond to incrementally disruptive innovations, and could ultimately lead to regulatory disruption.<sup>114</sup>

### *1 Is Uber a disruptive innovation?*

It is possible to argue that Uber is in fact a form of disruptive innovation. It is apparent that Uber does not fit well within the existing New Zealand regulatory framework, since it is classified as a private hire service but is essentially competing in the market for taxis. Since Uber is not subject to taxi regulations, but is nevertheless a competitor, it is able to use its innovative business model to undercut taxi prices and disrupt the established industry. Uber could perhaps be described as a

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<sup>111</sup> Cortez, above n 99, at 175.

<sup>112</sup> At 199.

<sup>113</sup> At 175.

<sup>114</sup> At 183.

low-end encroachment on the taxi industry; that is, one that captures price-sensitive customers first, before expanding to take over more of the market.<sup>115</sup>

However, the question still remains whether Uber's potential as a disruptive innovation is sufficient to establish a legitimate basis for regulatory avoidance. It seems that if Uber is cannibalising price-sensitive taxi customers without being subject to the same regulations, the existing rules are under-inclusive. Thus, perhaps the 'fault' of the regulatory failure lies not with Uber's behaviour, as it is complying with private hire regulations, but with the NZTA for failing to adjust a rule that falls short of capturing the intended actors.

But which rules are Uber's activities undermining the purpose of? Uber drivers, like taxi drivers, must comply with the P endorsement licensing requirements. Thus, there is no real shortcomings of these rules. Arguably it is once again the taxi regulations that have the purposes of safety and security, such as the requirement for vehicles to be fitted out with security cameras, which are the under-inclusive regulations. Uber is not subject to these rules since it is classified as a private hire service. This is clear example of Black's indeterminacy and interpretive failure explanation for why regulations fail in practice.<sup>116</sup> The taxi and private hire regulations are arguably too specific to have predicted an innovation such as Uber, whose operations bridge the two categories of small passenger services.

While Uber has not grown to a stage where it has completely displaced the market for taxi rides in New Zealand, it has potential to boom and consequently present a greater threat to the incumbents, as can currently be seen in large cities such as New York City and London.<sup>117</sup> Commentators have even described Uber as "crushing" and "annihilating" the New York City taxi industry.<sup>118</sup> This may suggest that Uber has the

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<sup>115</sup> Glen M Schmidt and Cheryl T Druehl "When Is a Disruptive Innovation Disruptive?" (2008) 25 *J Prod Innov Manag* 347 at 350.

<sup>116</sup> Black in Morgan and Yeung, above n 20, at 155

<sup>117</sup> See Lee and Kelion, above n 79.

<sup>118</sup> Maya Kosoff "New York City's taxis are being annihilated by Uber—so this startup created an app to help them fight back" (29 August 2015) *Business Insider Australia* <[www.businessinsider.com.au](http://www.businessinsider.com.au)>.

potential to become truly disruptive, both in the New Zealand context and perhaps worldwide.

Uber's innovative business model is challenging regulations that are outdated, under-inclusive relative to their purpose, and suffering from interpretive failure. Uber is also challenging the operation and success of the taxi industry. This is how many disruptive innovations begin their lives; it is not in every instance that a disruptive innovation is immediately revolutionary, like the Ford Model T. Uber's exposure of the flaws in the regulatory framework hints that these issues could be exacerbated as Uber expands their operations.

It is impossible to ignore the role of innovation in Uber's business model, and regulatory agencies should take it into account when deciding how to respond. Regulators should not be frozen when faced with an innovative newcomer such as Uber, but should react to adapt or change existing regulations in a way that provides clarity.

It is difficult to see how Uber's information provision service and the journeys provided by their partner drivers are separable in practice. This is an important consideration when determining whether existing regulations are under-inclusive, or whether Uber can legitimately claim their innovativeness truly affords them the ability to operate outside the regulations. While it is difficult to conclusively assert that Uber is already genuinely disruptive in the New Zealand context, overseas examples demonstrate that Uber has the potential to cause true chaos in the local taxi industries. This indicates that regulators should take steps to adjust the regulatory framework now, before Uber imposes even greater threats and challenges.

## *VI Welfare Economics Rationales for Regulation*

If we existed in a world that functioned in accordance with the perfect competition paradigm, there would be little need for... regulatory efforts. All

markets would consist of a large number of sellers of a product, and consumers would be fully informed of the product's implications. Moreover, there would be no externalities present in this idealized economy, as all effects would be internalized by the buyers and sellers of a particular product.<sup>119</sup>

As the above extract suggests, perfect competition is an ideal state that does not exist. Competition is generally viewed as a positive situation within a market, and various solutions can be utilised to attempt to bring the real world closer to the ideal. Occasionally regulation is the chosen mechanism to correct these problems.

Many theories of regulation exist, and canvassing all of them is beyond the scope of this paper. A focus on the welfare economics approach to regulation, a subset of the public interest theory, will guide this discussion. The public interest theory was “bequeathed by a previous generation of economists to the present generation of lawyers”.<sup>120</sup> This hints at its blended background of both legal and economic perspectives. According to the public interest theory regulators have a desire to pursue collective goals and aim to promote the general welfare of the community.<sup>121</sup> What constitutes the public interest will vary according to time and place, and also according to the values held by the particular society.<sup>122</sup> Therefore, the public interest is not static, which implies that the goals of the associated regulation will also have an element of fluidity.

Public interest rationales of regulation can be divided into economic and political approaches. Normative economic theories principally rely on the concepts of

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<sup>119</sup> W Kip Viscusi and others *Economics of Regulation and Antitrust* (MIT Press, Cambridge, Massachusetts, 2005) at 2.

<sup>120</sup> Richard Posner “Theories of Economic Regulation” (NBER Working Paper Series No 41, Center for Economic Analysis of Human Behaviour and Social Institutions, 1974) at 1.

<sup>121</sup> Morgan and Yeung, above n 20, at 18.

<sup>122</sup> Anthony Ogus *Regulation: Legal Form and Economic Theory* (Hart Publishing, Oxford and Portland Oregon, 2004) at 29.

economic efficiency and market failure.<sup>123</sup> Efficiency can be described as a situation when:<sup>124</sup>

... resources, goods and services are allocated to their highest expected valued uses as measured by individual willingness to pay, assuming that the most productive existing technology is used.

A market that is not efficient can also be described as creating a situation of market failure.<sup>125</sup> According to the public interest theory, regulation is justified if it corrects these perceived deficiencies in the market.<sup>126</sup> Therefore, correcting these market failures and improving market efficiency may be an underlying purpose of imposing regulation. Market failure may also indicate that the existing regulation is not fit for purpose, perhaps because it is either under- or over-inclusive.

Market failure is a necessary but not sufficient economic justification for intervention.<sup>127</sup> Anthony Ogus' view is that market failure must also be accompanied by private law failure before there is a prima facie case for regulatory intervention.<sup>128</sup> He also cautions that regulatory intervention is not a flawless solution, since it is not guaranteed to reduce inefficiencies, and there is also a risk that any efficiency gains may be outweighed by increased transaction costs.<sup>129</sup> Consequently, it should be remembered that regulation is not the ultimate answer to market failure.

Markets can fail for four main reasons. These include imbalances of market power, the presence of externalities, the nature of public goods, and the effects of imperfect information. The most relevant potential market failures in relation to Uber's situation are market power imbalances and imperfect information. These will be discussed in

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<sup>123</sup> Cento Veljanovski "Economic Approaches to regulation" in Robert Baldwin, Martin Cave and Martin Lodge (eds) *The Oxford Handbook of Regulation* (online ed, Oxford, England, 2010) 17 at 19.

<sup>124</sup> At 20.

<sup>125</sup> Morgan and Yeung, above n 20, at 18.

<sup>126</sup> Ogus, above n 122, at 15.

<sup>127</sup> Veljanovski, above n 123, at 20.

<sup>128</sup> Ogus, above n 122, at 30.

<sup>129</sup> At 30.

the context of Uber and the New Zealand taxi market, in order to identify whether there are any indications of market failure, and whether Uber mitigates or reinforces any existing market imperfections.

## ***J Market Power***

An imbalance of market power can cause market failure due to the large market players inhibiting competition. When competition is restricted, prices tend to rise and the quantity that is supplied is normally lower than is socially desirable. This situation is typified by the existence of a monopoly in the market.<sup>130</sup> Monopolies create market failure since they result in a higher price and lesser quantity of their good or service than a perfectly competitive market would provide. In such a situation, demand and supply are not at a socially desirable equilibrium.<sup>131</sup> Monopolies can also lead to reduced innovation, lower product service and quality, and excessive production costs.<sup>132</sup>

### *1 The existing taxi industry*

Worldwide, taxis are traditionally a heavily regulated industry. Local taxi industries are often regulated, to varying degrees, to the extent that the situation created through regulation is akin to a monopoly. For example, New York City yellow cabs, which operate based on a medallion system, essentially operate as a monopoly in the City district. The number of medallions is currently just over 13,000.<sup>133</sup> As a result, participation in the industry is limited to those who can obtain one of a limited number of medallions through an auction run by the New York City Taxi and Limousine Commission.<sup>134</sup> This restricts the level of supply, and consequently taxi prices are higher than if the market was unregulated. Thus, taking New York as an only one example, taxi industries are commonly seen as acting in a monopolistic manner, regardless of whether the industry is technically a monopoly or not.

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<sup>130</sup> Veljanovski, above n 123, at 21.

<sup>131</sup> At 21.

<sup>132</sup> At 21.

<sup>133</sup> “Yellow Taxi” (2015) New York City Taxi and Limousine Commission <[www.nyc.gov](http://www.nyc.gov)>.

<sup>134</sup> “Medallion Auction Homepage” (2015) New York City Taxi and Limousine Commission <[www.nyc.gov](http://www.nyc.gov)>.

The New Zealand taxi market structure is somewhat different, since taxis are not regulated in terms of prices and quantities. Theoretically, the taxi industry should be operating in a competitive manner, based on taxi organisations' ability to set prices at "whatever level they think the market will take".<sup>135</sup> However, there appears to be social consensus that fares have not fallen as much as they should have, or were expected to, since the industry was deregulated.<sup>136</sup> This sentiment is perhaps evidenced by New Zealand's relatively high cost of taxi journeys.<sup>137</sup> There is also evidence of an oversupply within the industry, especially in large cities such as Auckland.<sup>138</sup> These two factors juxtapose uneasily, and indicate that the 'deregulated' New Zealand market is not functioning in a way that traditional market theory would expect.

It is unclear exactly what forces have caused this unusual situation. One potentially socially unpalatable solution is that the market for taxis has reached its natural equilibrium in regard to price and quantity, which unfortunately is at a higher price than what consumers would prefer. As stated in the above discussion of the New Zealand taxi industry, a full economic analysis is beyond the scope of this paper. However, it is clear that the New Zealand taxi industry is somewhat unconventional—and the increased competition from Uber has possibly muddied the waters further.

## 2 *Uber's position within the taxi market*

Ridesharing is here to stay, technologically. The only open question is whether regulators (and prosecutors) will allow competition from the legacy taxi industry. If every car service were permitted to set whatever price they want, those cab drivers in Paris and New York would have no reason to protest and lots of financial reasons to laud the differentiation advantages (experience, safety, availability, etc.) their service offers in competition with Uber. But as *Forbes* commented, whether the sharing economy can survive

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<sup>135</sup> Cumming, above n 38.

<sup>136</sup> Cumming, above n 38.

<sup>137</sup> See, for example "Taxi Charges", above n 37; 3 News "New Zealand taxi fares rated highest in the world" (9 July 2014) <[www.3news.co.nz](http://www.3news.co.nz)>; Anna Pearson "Christchurch taxis among world's priciest" (9 July 2014) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

<sup>138</sup> Cumming, above n 38.

in a regulatory world where its basic innovation paradigm of connecting people who want to engage in private, consensual transactions is treated legally as something completely different is the much harder, and more economically important, question.<sup>139</sup>

The above quotation emphasises how a heavily regulated traditional taxi industry is potentially at a disadvantage in relation to newcomers such as Uber. It also identifies one of the main question facing regulators in this situation. Is Uber to be treated as a direct competitor and thus a substitute within the existing taxi industry, or is it to be treated as “something completely different”?

This question has been discussed in light of both the sharing economy and innovation rationales for regulatory intervention. It has been suggested that Uber is essentially providing the same service as a taxi, despite some aspects of their business being innovative, and that legally Uber’s liability is limited to the work of its app. This conclusion is bolstered by the fact that Uber is often referred to as a competitor to taxis.

Uber CEO Travis Kalanick consistently laments the existence of regulations that “might have originally been designed to protect passengers or drivers, but decades later exist to preserve a century-old monopoly for a connected view.”<sup>140</sup> He has also pinned blame on regulatory bodies, stating that laws can create roadblocks for new technologies.<sup>141</sup> In the New Zealand context, Ian Apperley has described the taxi industry’s response to Uber as “choos[ing] to try and kill the new player in the market to retain their profit.”<sup>142</sup> These comments emphasise Uber’s direct competition with the taxi industry, and imply that the practical response is to view them as being competitors. Accordingly, this discussion will continue based on the assessment Uber

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<sup>139</sup> Glenn Manishin “The Disturbing State of Uber in California and France” (10 July 2015) Project Disco <[www.project-disco.org](http://www.project-disco.org)>.

<sup>140</sup> Kalanick “5-Year Anniversary Remarks”, above n 19.

<sup>141</sup> See, for example, Interview with Travis Kalanick, Uber CEO (Loïc Le Meur, LeWeb Digital Innovation Conference, 10 December 2013).

<sup>142</sup> Ian Apperley “NZ Uber war shows divide between dinosaur business models and new innovation” (12 January 2015) National Business Review <[www.nbr.co.nz](http://www.nbr.co.nz)>.

drivers are essentially providing the same services as a taxi driver, and should be considered as competitors within the market for taxi services.

### *3 Regulatory responses to Uber's entry into the taxi market*

The quantifiable impact of Uber on the taxi industry is unclear, as there is a lack of data to inform how the market has altered due to Uber's growth. The respective numbers of new Uber drivers, taxi drivers switching to become Uber drivers, and taxi drivers dropping out of the market altogether would be informative in evaluating the new market forces. According to traditional theory, the market price should decrease as Uber expands, since in most instances Uber prices are lower than taxis.<sup>143</sup> This is desirable for consumers who are now, on average, paying less for essentially the same service. However, the effect on the quantity of supplied journeys is unclear.

The lack of data creates uncertainty about how, or even whether, regulators should respond. Further, existing regulation is not aimed at controlling the market price and quantity. Deregulation of the industry was intended to allow the number of taxis and fares to become flexible. Imposing regulations on taxi drivers was the compromise, and these regulations are intended to ensure the quality of taxi drivers and their vehicles, rather than the price of taxis. Focusing on safety precautions, such as background checks and minimum vehicle standards, intentionally leaves the issue of prices and quantities outside the regulatory scope. As a result, these existing regulations do not get at the reasons behind the existing market failure. This suggests that additional regulation relating to price and or quantity may be desirable, in order to correct the market failure based on excess supply. Conversely, regulators may wish to take a 'wait and see' approach to how Uber influences the price and quantity in the market over time, before reintroducing price and quantity controls.

As noted above, Black suggests that flawed rules are likely to be exposed during times of rapid change and where the course of change is unforeseeable.<sup>144</sup> This description could be applied to the taxi industry as Uber expands its operations. While

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<sup>143</sup> See, for example, John Anthony "Uber increases Auckland fares to attract drivers" (24 April 2015) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

<sup>144</sup> Black in Morgan and Yeung, above n 20.

regulators may ideally wish for the market to become more stable before imposing any new rules, the uncertainty of the current system has exacerbated a potentially flawed regulatory regime. The SPSR has acknowledged this, however since the report is focussing only on licensing requirements, it may not have addressed this question at all.

In conclusion, there is no conclusive rationale for regulatory intervention for the purposes of correcting a market failure. The existing regulations have different purposes entirely, and regulators would have to return to old price and quantity controls to begin to address this flaw in the market. The impact of Uber does not point the argument in either direction; rather, it further muddies the waters in what is an unusual and complex market. However, one thing seems clear—Uber is operating in competition with taxis.

### ***K Information Asymmetry***

A situation of information asymmetry indicates that one party has more information than the other. This causes the market to operate inefficiently, and can result in market failure. In relation to information symmetry producing an efficient market, Ogus states that:<sup>145</sup>

The assertion that observed market behaviour in the form of expressed preferences leads to allocative efficiency depends crucially on two fundamental assumptions: that decision-makers have adequate information on the set of alternatives available, including the consequences to them of exercising choice in different ways; and that they are capable of processing that information and of ‘rationally’ behaving in a way that maximises their expected utility. A significant failure of either assumption may set up a prima facie case for regulatory intervention.

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<sup>145</sup> Ogus, above n 122, at 38.

These assumptions never hold completely true since perfect information never exists.<sup>146</sup> Consequently, an absence of perfect information alone cannot justify regulatory intervention.<sup>147</sup> It is widely accepted that ‘bounded rationality’ applies in such situations; referring to humans’ limited ability to receive, store and process information.<sup>148</sup> The more relevant policy question, Ogus suggests, is whether the unregulated market generates ‘optimal’ information. An optimal quantity of information exists where the marginal costs of generating the information equals the marginal benefit of supplying that information.<sup>149</sup> Optimal information should allow a consumer to make an informed decision, subject to their bounded rationality.<sup>150</sup>

Schwartz and Wilde advocate that this traditional approach is not sufficient to determine whether intervention is justified. A question of optimal information requires a generalisation about how informed the consumers are in a given market, and also focuses on individuals rather than on markets, which leads to unhelpful assumptions. Instead, they suggest the inquiry should be whether competition amongst firms for particular groups of consumers who search for information is sufficient to generate optimal prices and terms for all consumers, including searching and non-searching customers. Accordingly, the focus is on whether the market is behaving competitively, rather than the level of information customers have. Schwartz and Wilde suggest that the questions that should concern regulatory decision-makers can essentially be boiled down to whether markets are, or can be made, competitive.<sup>151</sup>

### *1 Uber effectively reduces information asymmetries*

The Internet has allowed for a more efficient allocation of resources and facilitation of commerce. In particular, sharing economy structures have great potential to decrease information asymmetry due to the Internet’s ability to lower information barriers and also to facilitate feedback. Sharing economies also encourages market participants to

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<sup>146</sup> Alan Schwartz and Louis Wilde “Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis” (1979) 127(3) U Pa L Rev 630 at 630.

<sup>147</sup> Ogus, above n 122, at 38.

<sup>148</sup> At 41.

<sup>149</sup> At 38-39.

<sup>150</sup> At 41.

<sup>151</sup> Schwartz and Wilde, above n 146, at 636-640.

establish trust, which enhances reputational mechanisms.<sup>152</sup> Aspects of these benefits can be seen when assessing Uber's role in overcoming information asymmetry issues within the taxi industry.

In many jurisdictions taxis are regulated in an attempt to protect consumers from information asymmetry.<sup>153</sup> Arguably this is true in New Zealand, and is reflected in the requirements that taxi drivers must display their prices and driver identification. However, it is suggested by some commentators that the New Zealand taxi industry is still too geared towards supplier interests.<sup>154</sup> For example, even though taxis are required to display prices, the information is too complicated for a consumer to process when they are in a hurry to get somewhere. The information asymmetry is in favour of the taxi organisation, which benefits from making it difficult for consumers to ascertain all relevant information before making a choice. So, while the purpose of the rule that taxis must display prices and driver information is intended to aid the consumer in making an informed decision, in practice the existing regulation does not successfully meet its purpose.

Some commentators argue that regulations which are justified by claiming that consumers lack adequate information are mitigated "by the Internet's powerful and unprecedented ability to provide timely and pointed consumer information".<sup>155</sup> Uber and its Internet-based information platform support this proposition by providing relatively more up-front information. Once a passenger enters their pickup and drop-off locations in the app, Uber provides information about the closest available driver, such as the driver's name and photograph, their license plate number, and their rating. This information is provided before the offer of the ride is accepted, so a passenger has the opportunity to assess the information before making a decision. Uber's five-star rating system also provides an assessment of the quality of the driver; and conversely, the driver can see the rating of the passenger. Passengers are also warned

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<sup>152</sup> Cannon and Chung, above n 82, at 31; Juliet Schor and Connor Fitzmaurice "Collaborating and Connecting: The emergence of the sharing economy" (Research paper, Boston College and Boston University, 2014) at 3.

<sup>153</sup> Koopman and others, above n 16, at 10.

<sup>154</sup> Cumming, above n 38.

<sup>155</sup> Koopman and others, above n 16, at 17.

when fare rates will be higher than normal due to high levels of demand. Consequently, a potential passenger is able to access relevant information immediately and can use this to make an informed decision about whether or not they will choose to ride with Uber.

Since the app removes information barriers that otherwise exist in the taxi market, there is no rationale for Uber to be subject to regulations regarding price and driver information display. As a result, the existing rule relating to taxis displaying prices successfully encapsulates its purpose, and should not be extended to cover Uber. Uber could also legitimately argue that they are complying private hire service regulation that requires driver details to be displayed, since they are provided by the app.

Even if Uber diminishes information asymmetries in the market for taxis, they are possibly failing to meet the regulation that does in fact apply to them— the requirement that private hire services must pre-arrange a fare for the journey. As discussed above in the taxi and Uber operations section of this paper, the rationale for this rule is somewhat unclear, but the fact that Uber is in practice competing with taxis may mean that the setting of a fare in advance, which is intended to create certainty for a rider, has an over-reaching purpose in this context.

Based on Schwartz and Wilde’s view, if it is accepted that Uber is improving the level of competition in the market, there is no need to alter existing regulations in relation to Uber. Uber is creating competition by encouraging greater information disclosure. If any recommendation were to be made, Schwartz and Wilde would probably conclude that taxis should be required to disclose information in an even clearer manner, in order to increase the competition for information-seeking consumers.

## *2 Feedback systems and the importance of reputation*

Feedback systems give customers “a more powerful voice in economic transactions”,<sup>156</sup> and create reputational incentives for providers to offer a positive

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<sup>156</sup> Koopman and others, above n 16, at 15.

experience in return for good feedback.<sup>157</sup> The Internet has facilitated the ability for feedback to influence reputation, and consequently regulate the market by creating higher demand for providers with a positive reputation. Conversely, potential customers are clearly disincentivised from exchanging with traders with poor feedback. Therefore, success and a positive reputation directly affect a provider's ability to participate in the market.<sup>158</sup>

Uber's post-ride feedback tool is an apt example of this mechanism. Uber is able to somewhat mitigate market failure by requiring the provision of information that is immediately relevant to the customer. Therefore, the passenger can independently verify whether the best route was taken, and can place negative feedback if not.<sup>159</sup> The passenger also has the information they require to take action should they be less than satisfied with their experience. Drivers have the same ability to report unruly or unsafe passengers. This relationship drives trust within the sharing economy, and arguably removes some need for regulations that address issues of information asymmetry. The Internet's ability to remove some of these information barriers has created a "fundamental shift in the balance of power between consumers and salesmen over the last generation and it points in the direction of consumers."<sup>160</sup>

However, there will always be some level of information barrier between driver and passenger, regardless of whether the customer chooses to use a taxi or an Uber. For example, customers are required to take Uber at their word that adequate safety checks have been conducted on the driver prior to the journey. In New Zealand, the requirements of Uber drivers are relatively stringent, as is noted above. Perhaps, therefore, this issue is not as significant as in other countries where drivers do not have such high requirements of competence.

Since feedback systems are based on trust between the users of the platform, they can be open to abuse and manipulation by the users; for example, passengers giving

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<sup>157</sup> At 16.

<sup>158</sup> Molly Cohen and Arun Sundararajan "Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy" (2015) 82 U Chi L Rev Dialogue 116 at 121.

<sup>159</sup> Koopman and others, above n 16, at 16.

<sup>160</sup> At 16.

drivers unfairly poor feedback. Such actions may “bring imperfections into the feedback and trust-building mechanisms that constitute the very backbone of the shared economy”.<sup>161</sup> Simply relying on the goodwill of Uber users and drivers to provide honest feedback is a somewhat weak-response to this critique, but it reflects the trust-based nature of the sharing economy. It is in each participant’s best interests to be honest about their experience with Uber, in order to build a network of relationships and strengthen the peer-to-peer aspect of this corner of the sharing economy.

### *L Evaluation of the Welfare Economics Model*

The welfare economics theory of public interest rationales for regulation only encapsulates a rather narrow approach to evaluating the justifications of regulatory intervention. In order to have a more balanced analysis, it would be desirable to also consider distributional factors. However, a comprehensive public interest theory analysis, including a political public interest approach to regulation, is beyond the scope of this paper.

### *VII Uber’s Operations in Other Countries*

A comparative analysis of taxi industries and Uber’s experiences in different jurisdictions is a useful exercise as it highlights some of the challenges that Uber presents to regulatory bodies. The examples which this paper will focus on are England and California. First, England’s analysis of Uber in the context of the distinction between taxi and private hire services is informative for the same distinction under New Zealand law. Secondly, Californian regulatory agencies are addressing a question that has not yet significantly troubled New Zealand regulators, but sheds light on how Uber’s grey-area operations within the field of employment are being characterised.

The questions and conclusions that arise from these discussions and comparisons may influence recommendations for regulatory reform in New Zealand, and potentially

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<sup>161</sup> Cannon and Chung, above n 82, at 38.

foreshadow challenges that New Zealand regulators may face in the future. A discussion of the regulatory responses is also relevant to the discussion of whether Uber is considered to be legitimately avoiding regulation, or, alternatively, whether the existing rules appear to be over- or under- inclusive.

## *A England*

### *1 Law Commission report on taxi and private hire services*

The Law Commission for England and Wales recently undertook a review of taxi and private hire services, which culminated in an advisory report in May 2014. The report ultimately recommended retaining the current two-tier regulatory system which distinguishes between taxis and private hire services, as well as recommending the repeal of most of the existing legislation and the implementation of broad national standards for all taxis and private hire vehicles.

The setting of independent taxi and private hire service standards by local authorities meant that there was a lack of consistency, and, in the Commission's opinion, meant that the law was unduly restrictive and contained confusing overlaps.<sup>162</sup> The report advocates the application of broadly similar standards to drivers, vehicles and dispatchers, to the extent that regulation would meet the defined purposes of public safety, accessibility, enforcement of the legislation and environmental protection.<sup>163</sup>

The Commission began by looking at the 'common regulated activity', which was defined as "the carriage of passengers in a vehicle provided for hire together with the services of a driver".<sup>164</sup> To the extent of this common activity, they considered that a common national framework of standards for both taxis and private hire vehicles would remove these problems.<sup>165</sup> The Commission stated that regulation should aim at ensuring that the vehicle and driver are both of a high standard, and that the quality and safety of the journey is upheld regardless of what form the transport takes.<sup>166</sup>

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<sup>162</sup> Law Commission for England and Wales *Taxi and Private Hire Services* (8864, 2014) at 1.3.

<sup>163</sup> At 1.24.

<sup>164</sup> At 2.6.

<sup>165</sup> At 2.8.

<sup>166</sup> At 2.6.

Thus far, it seems that the Commission’s approach accepts that the rationale for regulation extends to both taxis and private hire services. However, it was ultimately recommended that the two-tier framework be retained. This decision was partly justified on the basis that customers seeking to hire a private hire vehicle have a greater opportunity to shop around and compare factors such as price, reliability and availability,<sup>167</sup> while taxi customers tend to take the first taxi that comes along.<sup>168</sup> Consequently, taxi customers should have greater protections, since they have lesser ability to assess these factors in advance.<sup>169</sup>

A stakeholder consultation process affirmed this distinction as being legitimate. The current higher standards imposed on taxis were considered justifiable since taxis service “more immediate needs”, and high and consistent standards need to be ensured.<sup>170</sup> In contrast, private hire customers have more choice when planning a journey, and thus do not need such stringent protections.<sup>171</sup>

The feedback on the administrative impacts of adopting a single regulatory framework was mixed. For example, Transport for London (“TfL”) was concerned that a one-tier system would impose unnecessarily high standards on private hire drivers, and could create a black market for unlicensed drivers.<sup>172</sup> In contrast, licensing authorities were largely in favour of moving to a one-tier system,<sup>173</sup> in particular because enforcement would be substantially easier and regulatory loopholes would be reduced.<sup>174</sup>

The report highlights how new technologies such as Uber are blurring the distinction between taxis and private hire vehicles.<sup>175</sup> The Commission acknowledged that as

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<sup>167</sup> At 2.13.

<sup>168</sup> At 2.12.

<sup>169</sup> At 2.12.

<sup>170</sup> At 2.16.

<sup>171</sup> At 2.16.

<sup>172</sup> At 2.17.

<sup>173</sup> At 2.18.

<sup>174</sup> At 2.19.

<sup>175</sup> At 1.9.

new technologies grow, “the interchangeability of taxi and private hire services... increases, placing a strain on the different modes of regulation applicable to each”.<sup>176</sup>

They also conceded that:<sup>177</sup>

... it is hard to dispute the claim that, in general, the public neither knows nor cares about the distinction [between taxi and private hire services], and indeed even those who work in the industry may well refer to a private hire vehicle as a taxi for the sake of ease. This ties in with the fact that both types of service may be said to do the same task, of transporting passengers for a fee.

This seems to acknowledge that taxi and private hire service providers are practically operating within the same market; they are providing the same service and can be referred to interchangeably. The Commission then went on to state:<sup>178</sup>

That said, it is perhaps superficial to suggest that lack of consumer understanding necessitates a change in the law— after all, members of the public often find themselves affected by regulatory regimes they do not understand, but which may nevertheless benefit them.

The Commission placed great emphasis on taxi fare regulation by local authorities as a justification for retaining the two-tier framework. They affirmed that imposing fare regulation on pre-booked journeys would undermine the distinction between private hire and taxi services.<sup>179</sup> Therefore, the distinction that should be drawn between taxis and private hire should be focussed on the issues of dispatch and pre-booking.<sup>180</sup> This implies that the decision to retain the distinction is not predominantly related to the purpose of safety, although the Commission did agree with TfL’s argument about imposing unnecessarily high standards on private hire drivers.<sup>181</sup>

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<sup>176</sup> At 2.14.

<sup>177</sup> At 2.23.

<sup>178</sup> At 2.23.

<sup>179</sup> At 2.28.

<sup>180</sup> At 2.28.

<sup>181</sup> At 2.24.

## *2 Analysis of the Law Commission's approach*

The Commission's recommendation to retain a two-tier system, and the reasons they give for doing so, are relevant when considering the current regulatory approach to this situation in New Zealand. The Commission admits that new technologies such as Uber are making the division between taxi and private hire services somewhat unclear, and is reinforced by the fact that customers often barely register the distinction between the two services. This is an interesting concession to the practical view of the market; that Uber is most probably a competitor in the taxi industry, even if it is regulated by another name.

When considering the purposes of the regulation in the context of the common activity of a driver carrying passengers in a for-hire vehicle, the Commission states that broadly similar regulations should apply. This seems to acknowledge the conclusion that was reached above in this paper— the purposes of quality and safety assurance should apply equally to both modes of transport.

However, England's existing lighter-handed approach to private hire services appears to largely be based on the claim that pre-booking affords customers time to search for information and subsequently to make an informed decision. In contrast, taxi services are more immediate, and do not allow information to be gathered to any significant extent. Therefore, more stringent standards on taxis are justifiable because they protect customers who have no opportunity to gather information.

It is possible to contend that Uber is actually bridging these two situations, and therefore the purpose of the regulation does not apply to it. This suggestion was made in the above discussion of the New Zealand taxi market. Uber provides upfront information to a potential passenger, thereby allowing them to make an informed decision, similar to what would occur when hiring a private hire vehicle. However, in practice Uber's service is perhaps more akin to an 'on-demand' journey, like a taxi, rather than one that is arranged well in advance like other private hire vehicles, such as wedding cars or limousines. Thus, the rationale for the distinction arguably does not apply in this case. In this way, Uber could argue that it should be entitled to avoid

regulation, since the purposes of the private hire regulations do not apply to its activities.

This distinction is perhaps even less persuasive in the New Zealand context, since the requirements for New Zealander taxi drivers and Uber drivers are more similar than the vastly different standards in London. For example, New Zealand taxi drivers do not have such burdensome requirements such as learning ‘the Knowledge’, or a city map by heart.<sup>182</sup> The fees for becoming a licensed taxi driver are also much greater in London.<sup>183</sup> As a result, the argument that a common standard would place unjustifiably high burdens on private hire drivers does not carry the same weight for a discussion related to New Zealand.

The Law Commission’s report may influence New Zealand regulators to consider Uber within the same market as taxi services, particularly since the different standards between the two services is not as explicit in a New Zealand context. However, the rationale for information barriers and pre-booking do still apply in a New Zealand context, but on a practical view Uber seems to overcome this issue. This may be persuasive to New Zealand regulators when making decisions about how to regulate Uber in New Zealand.

## ***B California***

### *1 Labour Commissioner’s ruling on employee status*

Uber is also facing multiple regulatory challenges in California. Notably, the California Labour Commissioner’s Office has recently ruled that a specific Uber driver should have been classified as an employee rather than an independent contractor.<sup>184</sup> This has been perceived as a potentially troublesome hurdle for Uber to overcome in the future, especially if this ruling is upheld upon appeal.

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<sup>182</sup> “Apply for a taxi driver licence” Transport for London <<https://tfl.gov.uk>>.

<sup>183</sup> A Small Passenger Service Vehicle licence costs \$161.70 for one year, assuming that the applicant has passed the P endorsement course: See “P endorsement for carrying passengers”, above n 46, while a London taxi driver licence costs upwards of £936: See Transport for London, above n 182 (as at 28 September 2015).

<sup>184</sup> *Barbara Ann Berwick v Uber Technologies* California Labour Commissioner (11-46739 EK, 10 March 2015).

In order to determine whether the driver, Barbara Ann Berwick, was an employee or a contractor, the Commissioner assessed the level of control that Uber had over her. In *Yellow Cab Cooperative*,<sup>185</sup> which involved very similar circumstances, the overriding factor in finding an employment relationship was that the workers were not engaged in a distinct business from the employer. The Commissioner summarised that an employment relationship will be found if:<sup>186</sup>

... pervasive control over the operation as a whole is retained, the workers' duties are an integral part of the operation, and the nature of the work makes detailed control unnecessary.

Further, the *Borello* case stated there is an inference of employment if personal services are performed, as opposed to business services. It is not necessary for an employer to maintain complete control over the employee; the minimum necessary control is the standard.<sup>187</sup>

In the Berwick hearing the Commissioner stated that there is a presumption of employment in this situation, and the party seeking to avoid liability must prove otherwise. "By obtaining the clients in need of the service and providing the workers to conduct it, Defendants retained all necessary control over the operation as a whole".<sup>188</sup> Although Uber claimed that their involvement is limited to being a technological platform, this was rejected; "The reality, however, is that Defendants are involved in every aspect of the operation."<sup>189</sup>

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<sup>185</sup> *Yellow Cab Cooperative v Workers Compensation Appeals Board* 226 F 3d 1288 (9th Cir 1991).

<sup>186</sup> *Berwick v Uber*, above n 184, at 7, referring to *Yellow Cab Cooperative*.

<sup>187</sup> *S G Borello & Sons, Inc v Department of Industrial Relations* 48 F 3d 341 (9th Cir 1989) at 355-360.

<sup>188</sup> *Berwick v Uber*, above n 184, at 8.

<sup>189</sup> At 9.

Although the media has highlighted this as being a significant decision for Uber, the ruling does not apply beyond Berwick.<sup>190</sup> In other jurisdictions Uber has successfully defended the claim that their drivers are independent contractors. However, it has the potential to result in a flood of claims in California, and may encourage claims in other states.<sup>191</sup> Since the Berwick hearing, there has been a similar successful claim in the California Employment Development Department.<sup>192</sup>

The consequences for Uber are potentially wide reaching if further claims are successfully pursued, both in the United States of America and also worldwide. If all Uber drivers in the United States are indeed employees, Uber's United States costs alone would explode due to the sudden imposition of social security workers' compensation and unemployment insurance.<sup>193</sup> Such a finding would also impose further employment regulations regarding insurance, indemnification, holiday pay, and many other expenses, which would be extremely costly to Uber, particularly for employees who only work a few hours a week.<sup>194</sup> So far, Uber has essentially shirked these costs by placing the burden for such protections on the drivers; a move some commentators perceive as the corporation abusing an unfair advantage.<sup>195</sup> With the aid of slick marketing Uber promotes this as a positive feature of being an Uber driver. The flexibility and self-control of working hours, and the attractiveness of providing the opportunity to earn income from multiple sources, has in part been responsible for the speed of Uber's growth.<sup>196</sup>

The central question facing Uber in California is how much control they have over their 'employees'. If Uber's ability to deregister drivers, set fare rates and enforce certain protocols amounts to sufficient control to establish an employee-employer

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<sup>190</sup> Mike Isaac and Natasha Singer "California Says Uber Driver is Employee, Not a Contractor" *The New York Times* (online ed, New York, 17 June 2015).

<sup>191</sup> Isaac and Singer, above n 190.

<sup>192</sup> Heather Somerville "Uber driver was an employee, rules California department" (10 September 2015) Reuters <[www.reuters.com](http://www.reuters.com)>.

<sup>193</sup> Chris Johnston "Uber drivers are employees not contractors, California rules" (17 June 2015) *The Guardian* <[www.theguardian.com](http://www.theguardian.com)>.

<sup>194</sup> Gil Silberman "The California Ruling On Uber Drivers Would Be Disastrous – But It's Probably An Aberration" (30 June 2015) *Forbes* <[www.forbes.com](http://www.forbes.com)>.

<sup>195</sup> Katy Steinmetz "Why the California Ruling on Uber Should Frighten the Sharing Economy" (17 June 2015) *TIME* <<http://time.com>>.

<sup>196</sup> Steinmetz, above n 195.

relationship for a wider category than one individual in California alone, this will radically alter Uber's business model. As stated, the Commissioner's decision was binding only on the individual in the hearing. Uber has appealed that decision to the San Francisco Superior Court,<sup>197</sup> which may be a risky move, considering that an unsuccessful appeal within the court system could create a binding precedent.<sup>198</sup>

## 2 *Analysis of the Labour Commissioner's ruling*

The distinction between employees and independent contractors is significant for Uber in all of its markets, not just in California. When someone is defined as an employee, this categorisation "acts as a gateway to a wide range of... legal rights, obligations and protections".<sup>199</sup> In contrast, independent contractors are "seen as autonomous, arranging their own remuneration, holidays, and other conditions".<sup>200</sup> Whilst a comprehensive discussion of the employment status of Uber drivers is beyond the scope of this paper, it is yet another regulatory issue that has many regulators pausing for thought.

Uber would argue that they are able to avoid the requirements and responsibilities of employment, both due to the legal categorisation of Uber drivers and also from a practical perspective. Uber's flexible business model allows a driver to work as much or as little as they like, whenever they like, and there are no requirements surrounding part-time or full time employment, or minimum or maximum work hours. This type of arrangement, Uber would contend, falls under an independent contractor regime, rather than one of employment. If this categorisation is legitimate, perhaps Uber's innovation consequently allows them to legitimately avoid regulation.

This analysis is also, of course, dependent on the jurisdiction in question and the relevant employment regulations. In California Uber's business model was not accepted as legitimate avoidance of employment laws. On this view, it could be said

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<sup>197</sup> Ellen Huet "Uber Driver Is An Employee, Not Contractor, Rules California Labor Commission" (27 June 2015) Forbes <[www.forbes.com](http://www.forbes.com)>.

<sup>198</sup> Steinmetz, above n 195.

<sup>199</sup> Gordon Anderson "Employment Law in New Zealand" (LexisNexis, Wellington, 2014) at 95.

<sup>200</sup> At 104.

that Uber is deliberately constructing their employment agreements to contract out of employer responsibilities, which is arguably illegitimate regulatory avoidance. Many sceptics of Uber's business model would agree that Uber is deliberately evading their obligations.

This issue has not been significantly debated in New Zealand. It is unlikely that the SPSR will address this issue, since it is focused on licensing requirements, rather than the relationships between Uber and Uber drivers. However, the issue may arise in the future as Uber's operations grow within New Zealand, and more people are employed, or independently contracted as, Uber drivers.

### *VIII Conclusion*

It is clear to see why Uber is often described as blurring the regulatory line. Uber presents regulators with both opportunities and challenges. Its ruthless approach to entering new markets has regulatory bodies scrambling to determine what, if any, actions should be taken in response. Uber is growing by the day, and is entering new countries and cities extremely rapidly. Consequently, it is also likely to face heightened and various challenges from both disgruntled competitors and regulators.

The New Zealand situation is different to many other taxi industries worldwide, since existing regulations largely focus on the quality of the taxi drivers rather than imposing price and quantity controls on taxi services. The rationale behind these regulations is to ensure the quality of taxi drivers, and correspondingly, the safety of both passengers and drivers. So, even if Uber's avoidance of these regulations is legitimate as a result of an under-inclusive rule, it is undesirable based on the purpose of the regulations. However, the licensing requirements of Uber drivers are very similar to those of taxi drivers, so to this extent the rules capture both Uber drivers and taxi drivers to a similar degree.

While there is debate as to whether Uber can be truly categorised as a sharing economy company, there are aspects of Uber's operational model that draw on characteristics of sharing economy businesses. As an Internet platform, Uber has changed the way in which passengers can request and make a journey by car. Uber arguably also displays features of disruptive innovation, and as Uber grows within New Zealand and worldwide, these qualities are likely to become exacerbated. Thus, regulators should not shy away from dealing with Uber, as it appears it is here to stay.

As an innovative platform, Uber confronts regulators with multiple difficult trade-offs. Innovations can mitigate the need for certain types of regulation, but can also create a need to balance a minimum level of certainty while also allowing for flexibility in order to drive further innovation. Although Uber can be legitimately characterised as an innovative business, it seems that the purposes of several existing regulations, particularly those relating to safety, still apply to the service it provides. Therefore, an innovation theory analysis suggests that these rules are under-inclusive relative to their purpose, and should be extended to cover the new, innovative Uber model.

The traditional regulatory intervention theory of welfare economics provides a conventional framework for assessing whether regulatory intervention in the market would be justified. Uber is essentially competing in the same market as taxis. In many jurisdictions, including New Zealand, it is possible to construe the existing taxi industry as effectively a form of monopolistic competition, and Uber is providing an increased level of competition within that industry. However, any regulatory change would need to address price and quantity restrictions, rather than adjusting the existing quality-focussed regulations.

Uber's utilisation of an Internet-based platform means that Uber is able to provide both passengers and drivers with greater levels of information than what currently exists in the taxi market. Uber's app successfully lowers information asymmetry barriers, meaning that regulation aimed at this form of market failure is less justifiable. Consequently, Uber's approach to information provision negates to a large

extent the justification for regulatory intervention based on claims of imperfect information.

London and California's approaches towards the problems they are facing with Uber demonstrate the diversity of issues that Uber presents. While neither of these jurisdictions yet has a comprehensive regulatory framework for the many challenges which Uber presents, their various tactics may aid New Zealand regulators in identifying future issues and also in deciding how to approach these aspects of Uber's business models to the extent that they also exist in New Zealand. In particular, there is a comparison to be made between the outcomes of the SPSR, once they are made public, and the approach that other jurisdictions take in regard to licensing requirements.

The overarching question of regulatory avoidance has aided the framing Uber's business model, but Uber's activities cannot be wholly characterised as legitimate or illegitimate regulatory avoidance. In relation to some aspects of its activities, Uber's innovative approach to providing passengers with a driver and a car appears to be a legitimate method of avoiding existing regulations that apply to taxi or private hire services. From another perspective, if it is accepted that Uber is essentially operating in the taxi market, it seems that Uber may be avoiding regulations that should ideally apply to them. Uber has legally distanced itself from several regulations; thus, the avoidance is legitimate. Whether this is socially desirable, however, is another question altogether.

Regulators should be urged to reconsider the under-inclusiveness of several existing regulations since their purposes, particularly those relating to safety, apply to both taxis and Uber. There is a clear rationale for regulating Uber when taking a practical view of the service that Uber provides, and the corresponding safety considerations that should be upheld. Whether people choose to use Uber or taxis, they want to get to their destination safely. Surely this consideration is sufficient to persuade regulators that they must reassess how the existing regulatory framework could better achieve these goals.

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