SELECT COMMITTEE ON THE IMPACT OF TECHNOLOGICAL AND OTHER CHANGE ON THE FUTURE OF WORK AND WORKERS IN NEW SOUTH WALES

AUSTRALIAN INDUSTRY GROUP

ANSWERS TO QUESTIONS ON NOTICE

At the hearing on 16 November 2020, the following questions were asked which Ai Group's representatives took on notice:

Question:

> The Hon. COURTNEY HOUSSOS: I should just clarify that I am a huge supporter of flexible work but I do think there should be a fair set of minimum wages and conditions associated with it. In your opening statement and in your submission, you said that statistics show most people use gig economy work to supplement their income. Where are those statistics from?
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> Mr SMITH: I would be happy to take that on notice. Various research articles have shown that. The evidence of Uber, for example, all the surveys appear to show that the vast majority of gig workers are supplementing their income rather than having their entire income provided by specific sources.

Answer:

Additional research relevant to this question can be found in the Victorian Government's Inquiry into Victorian On Demand Workers. The Victorian Inquiry commissioned and relied on a national survey of digital platform work in Australia, prepared by various academics associated with the Queensland University of Technology (QUT), University of Adelaide and the University of Technology, Sydney (UTS).

Published 18 June 2019, the report, Digital Platform Work in Australia – Preliminary Findings from the National Survey, surveyed remuneration arrangements for people performing work through digital platforms. The Report of the Inquiry into the Victorian On-Demand Workforce included results and findings from the National Survey. Multiple findings from the National Survey supported the finding that platforms are commonly used by workers to generate additional or supplemental income to that earned through other activities (Victorian Inquiry Report, page 16).

The National Survey reported that:

- roughly 80% of participants indicated that the income earned from working through platforms was non-essential.

- Only 2.6% of respondents reported working more than 35 hours per week on digital platforms.
- Only 2.7% of respondents derived 100% of their total annual income from platform work.
- Four in five current platform workers (80.7%), reported that digital platform work made up less than half of their total annual income.
- Engagement with digital platforms varied between a few times per week (27.5% of current platform workers) and less than once per month (28.3%).
- Only a very small percentage of people in Australia were spending a large number of hours undertaking digital platform work. Almost half (47.2%) of current platform workers report spending less than 5 hours per week working or offering services through all digital platforms with which they engage, whereas only 5.4% of current platform workers reported spending 26+ hours per week.
- Only 19.2% of current platform workers derived half or more of their income from platform work.

In its submission to the Australian Senate Select Committee on the Future of Work and Workers, Airtasker stated that on average workers complete less than five tasks a month, with the average task price at January 2018 being $140. The Victorian On-Demand Inquiry Report noted that this suggested that the average Airtasker worker is not using the platform for full-time work, but mostly to supplement other income (Victorian On-Demand Report, p. 63).

A recent AlphaBeta report, (p.6) also found that, based on an assessment of average hours online, most Uber drivers drive to earn a supplementary income, with nearly half of all drivers spending less than 10 hours per week on the app.

Question:

> The CHAIR: On notice would you come back to the Committee with a detailed view on whether the contractor provisions of the NSW payroll tax are fit for purpose when it comes to the gig economy, that is, the argument being that those contractor provisions, which effectively group a set of entities for the purposes of deciding whether they are above the threshold, were designed prior to the emergence of digital platforms so they are not fit for purpose of, sort of, properly assessing whether a digital platform is should be grouped for the objectives of the payroll tax and, as a result, that is the loophole which means that digital platforms are not liable, and whether that is fair and equitable are particularly the points that we would seek the AIG's feedback on? If you have any particular views as to how that contractor provisions should be reformed, if

you believe that they should, would also be really helpful. Is it possible for you to take that on notice?

MR GOODSELL: Yes, I can.

Answer:

NSW payroll tax legislation is discriminatory by design and its application is neither fair nor equitable in the usual sense of these words.

These characteristics of NSW payroll tax arrangements are not limited to the contractor provisions but are inherent in the structure of the tax.

Generally, payroll tax liabilities are calculated on the wages paid to the employees of a business. In addition, where labour services are contracted for under an *employee-like* relationship (as set out in Division 7 of Part 3 of the Payroll Tax Act 2007), the remuneration associated with these services is included when determining a business's payroll tax liability. Whether payroll tax is actually payable in respect of such remuneration will depend on whether the total amount of assessable remuneration of the business (i.e. employer remuneration and contractor remuneration) is above or below the payroll tax threshold in Schedule 1, as varied from time to time, subject to the grouping provisions in Part 5. These arrangements apply to businesses providing digital platform services in the same way as they apply to any other business. In other words, there is no loophole that applies to digital platform providers.

While addressing an avenue for the evasion of payroll tax, the Part 3 Division 7 contractor provisions remove the availability of the payroll tax threshold in respect of the labour services captured by those provisions – an outcome that would be unfair and inequitable. In reaction, the provisions that include in the payroll tax base remuneration paid by businesses under *employee-like* relationships contain a number of exemptions (in s.32). A key purpose of these exemptions is to exclude from payroll tax remuneration amounts that, but for the contractor provisions, would not attract payroll tax liabilities by virtue of the payroll tax threshold. To the extent that this purpose is achieved, the exemptions act to ensure that payroll tax arrangements apply more consistently.

This situation complicates the assessment of the fairness or equity of the contractor provisions in the NSW payroll tax legislation. One dimension of the fairness or equity of payroll tax arrangements is the role played by the payroll tax threshold (and by extension the exemptions to the contractor provisions that achieve a purpose similar to the payroll tax threshold) in providing compliance cost relief to smaller businesses. To the extent that smaller businesses bear proportionally higher compliance costs (relative to their capacity to pay) than larger businesses, excluding them from payroll tax liabilities and compliance costs can be argued to improve the fairness or equity of Australia's taxation arrangements in general. While it is a very rough way to achieve this purpose, it is a factor relevant to the assessment of the equity and fairness issues relating to the contractor provisions.

Ai Group is keenly interested in reforms to taxation arrangements. One approach would be to remove payroll tax completely. This would of course also remove all discriminatory features of the tax and would also remove the deadweight losses it imposes on the economy. The complicating consideration is whether other taxes would need to rise to make up for the loss of payroll tax and/or whether government spending could be reduced to make up for the lower level of revenue collected. The fairness, equity and efficiency implications of the alternative taxes or of the lower spending would need to be assessed in light of concrete proposals.

Question:

> The Hon. NATASHA MACLAREN-JONES: Since you have raised "recommendations" I want to ask about recommendation No. 4 that you made to the Victorian inquiry which talked about costings, particularly the need for looking at the economic benefits of platform businesses, job creation and also barriers for the expansion of platforms. I am wondering whether you have heard anything back. I am mindful that their inquiry is still ongoing. Are you aware of any work that has been done in this space? Obviously jurisdictions should not necessarily duplicate everything but are you aware of any costing analysis that has been done in Australia or overseas in relation to this matter?

Answer:

A recent AlphaBeta report identified that food delivery apps from restaurants bring $2.6 billion of trade to the Australian restaurant industry, of which 70% is incremental. This represents a significant community benefit associated with digital platforms.

In the context of any recommended legislative change (as recommendation 4 of the Victorian Inquiry contemplated), it is important, and consistent with best practice cost benefit analysis (e.g. as required of Regulatory Impact Statements) to account for the economic benefits associated with platform businesses, even where such benefits are not easily quantifiable. The economic benefits associated with platform businesses include the:

- Benefit of the introduction of new services and products to the market;
- Benefit of a greater range of choice for consumers;
- Benefit of increased accessibility to products and services to people who may have had limited options or access (e.g. food delivery for consumers with limited mobility);
- Benefit to consumers in saved time in accessing services and products;

- Benefit of increased workforce participation by people who are unable to work regular or full-time hours, or work prescribed minimum engagement periods, because of marginal attachment to the workforce, or because of family or study commitments;

- Benefit of supplementary income to such workers;

- Benefit of faster access to income for workers that may not be offered through ordinary full-time, part-time or casual employment; and

- Benefit of new jobs that do not displace existing or traditional jobs.

Question:

The CHAIR: And do you have views about the suitability of chapter 6 and its potential use with respect to the gig economy? At two levels: firstly, have you ever obtained any advice as to whether chapter 6 applies to the gig economy?

Mr SMITH: We have not, but our view is that chapter 6 has the scope set out in chapter 6 and that that would not generally apply to gig businesses.

The CHAIR: Why do you say that you do not think that it would apply to gig businesses?

Mr SMITH: It applies within its scope—

The CHAIR: For a contract for carriage.

Mr SMITH: —so the circumstances would need to be looked at in each particular case, but we have not contemplated it applying to the sort of gig businesses that are prominent in this inquiry.

The CHAIR: I accept that you have not had the opportunity to consider that but perhaps on notice if we could ask you to come back with a view as to whether or not you think, particularly the gig work that has been done in the road freight space—I am talking about Amazon Flex—would qualify as a contract for carriage for the purpose of chapter 6 as well. That is one proposition that the Australian Road Transport Industrial Organisation advanced effectively this morning as well. Equally, it did make the point that there are aspects of Uber's work, particularly freight transport—it did make the point that there is an argument to say that food is a good for the purposes of a contract of carriage and, therefore, chapter 6 would apply under the existing definition. Any specific views or feedback on that would be most welcome. In general, do you think there is a role for chapter 6 here or not?

Answer:

Chapter 6 of the *Industrial Relations Act 1996 (NSW)* (IR Act) applies to contracts of bailment and contracts of carriage. The terms "*contract of bailment*" and "*contract of carriage*" are separately defined in the IR Act. There are very specific criteria that must be met in order for a contract to fall within the scope of these definitions and there are also a raft of types of contract that are specifically exempt from inclusion in the definitions. Under the IR Act, the Industrial Relations Commission of NSW is empowered to declare contracts to be contracts of carriage in certain circumstances.

Determining whether Chapter 6 would apply to a particular contract for gig work requires assessment of the terms of the individual contract and in particular the nature of the work to be undertaken pursuant to it. The characteristics of the individual carrier that is a party to the contract and the nature of their business, including the type of business entity that they comprise and the extent to which that entity employs any other persons in the course of their business, must also be taken into account. Given such considerations, Ai Group is not able to express a view on whether Chapter 6 applies to operations such as Amazon Flex.

To the extent that the question relates to gig work involving the transportation of passengers, we note that the definition of contract of bailment is contained in s.307 of the IR Act. Again, we are not able to confirm as a general proposition whether the provision has application to gig work. We do however observe for the benefit of the Committee that the definition contained in this section is very specific. We would expect that s.307 is very unlikely to apply in the context of businesses that facilitate gig work associated with the provision of ride sharing services, given the provision's narrow scope.

In response to the question regarding the delivery of food, we note that there are longstanding exemptions contained in s.309(4) of the IR Act that exclude contracts for the delivery of certain foods in certain circumstances from the application of Chapter 6.

Section 309(4)(b) of the IR Act provides exemptions for the delivery of bread, milk or cream for sale or delivery for sale.

Section 309(4)(i) exempts contracts for the delivery of meals by couriers to homes or other premises for consumption.

The removal of these exemptions would have potentially very negative consequences. This would likely result in the inappropriate application of various industrial instruments known as contract determinations in force under Chapter 6 to such contracts. The relevant contract determinations set minimum rates and condition for contract carriers. However, the operations of gig platforms have not been taken into account in the framing of such instruments.

The adverse impacts of the application of inappropriate regulation relating to the rates of pay for individual contractors was demonstrated through the operation of the now abolished Road Safety Remuneration Tribunal. In 2016 this tribunal made an order that set minimum rates and conditions for certain sectors of the road transport industry. The operation of the Tribunal was widely condemned by industry and its order was a catalyst for a major controversy that included significant protests by individual contractors alarmed that it had rendered the cost of their engagement so unviable that it jeopardised their livelihood. This resulted in the urgent repeal of the legislation creating the Tribunal. There are obvious risks that similar problems may flow from the simplistic removal of the exemptions contained in s.309(4).

Question:

> The Hon. ADAM SEARLE: I will rephrase my question. Do you have any other research that you have done that paints a different contrary picture to what has been advocated by the TWU?
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> Mr SMITH: What we will do is take on notice that issue.
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> The Hon. ADAM SEARLE: Thank you.
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> Mr SMITH: Because we have actually seen other research. We have not done it ourselves but I have seen other research that paints a very different picture, which we are happy to provide to the Committee.
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> The CHAIR: But you are aware of the research that Ms James did as part of her inquiry, are you not?
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> Mr SMITH: We are and we are on the public record as expressing some disquiet about the methodology of that survey because that—
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> The CHAIR: That was a Swinburne University survey?
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> Mr SMITH: Yes. That survey concluded that there was this extremely high proportion of workers working in the gig economy compared to other research. There are some earlier surveys that show that only about half of 1 per cent of workers in Australia are gig economy workers, which is an extremely different figure to the one that was the conclusion of that inquiry. One of the things that we were concerned about was the self-selection approach of the sample.
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> The CHAIR: Any feedback on that on notice would be most useful. In the same vein, basically three pieces of research have been put before this Committee as to what gig economy workers are earning and, for that matter, how many people are working in the gig economy. There is a TWU survey, which you could probably characterise as being on the low end, there is Ms James's inquiry, which finds about $15 to $16 for 39 per cent of workers on average,

from memory. Do you have any feedback on that? Equally, Ola made reference to, and I believe Uber introduced it in its submission, the 2018 AlphaBeta study, which finds it at $21. That is not too much above the minimum wage as well. We are working on it being within that range of $12 to $21 depending on whose survey methodology and definitions you like, but there does not seem to be much dispute that that is where the range is falling. Any specific feedback that AIG would have on methodology and any additional research that you might have would be most welcomed by Committee members in that respect…

Answers:

Proportion of the workforce who are earning income from platform work

The National Survey commissioned by the Victorian Inquiry reported that 7.1% of survey respondents were currently working or seeking work via a digital platform. The Victorian Inquiry Report concluded that results of the National Survey "*indicated that more people are accessing online work than labour market data or earlier studies suggest*." This conclusion may be attributed to the research methodologies used by different research organisations to extract quantitative and qualitative data about digital platform work. For instance, the Grattan Institute found that fewer than 0.5% of the workforce earned income from digital platform work based on an assessment of figures published by a selection of digital platform information, bank transaction data, and other research reports.

The National Survey derived its results from a survey of respondents self-selecting to participate in a survey branded as a university research project. The National Survey is a useful body of research in relation to the nature and features of digital platform work; however because of its nature as a survey inviting responses from a self-selecting sample, it should be used with caution as a data source for the purpose of demonstrating the prevalence of digital platform work as a proportion of the broader Australian (or Victorian) workforce.

Moreover, the researchers who conducted the National Survey acknowledged the overrepresentation in the survey sample of persons holding university qualifications and the underrepresentation of persons with no post-school qualifications. (See the section on the research methodology in the National Survey Report). The sample also overrepresented respondents living in major cities and underrepresented respondents living in more remote areas.

ABS statistics show that 8.2% of the workforce were independent contractors in August 2020 (ABS *characteristics of employment, Australia*; *August 2020*). The industries which had the highest percentage of independent contractors were Construction (24%), Administrative and support services (18%) and Professional, scientific and technical services (15%). These statistics highlight that the 7.1% figure in the Victorian Inquiries National Survey cannot be validly used as an estimate of

the proportion of the workforce who are carrying out platform work. The 0.5% estimate of the Grattan institute is credible.

Ai Group contends that a variety of credible data sources are needed to more accurately measure the proportion of the workforce who are working via digital platforms.

Average hourly rate of a platform worker

The Victorian Inquiry's National Survey found that the trimmed mean hourly rate for the most common platform workers – in transport and food delivery – was $22.19. This is reasonably consistent with estimates by some platforms. For example, Deliveroo estimated that its workers earn $22 per hour. A study commissioned by Uber and conducted by advisory firm, AlphaBeta, found Sydney drivers earn $21 per hour after expenses and commissions.

The Victorian Inquiry Report, however acknowledged the variances between the results of surveys carried out by AlphaBeta and the TWU. In relation to survey variances, also occurring in the area of hours worked, the Victorian Inquiry Report observed:

> VTHC, Uber (AlphaBeta), and the TWU used different methodologies in carrying out these surveys. VTHC reported to the Inquiry that in surveying workers, it performed 40 on-street sessions in which interviews were conducted face-to-face. AlphaBeta confirms that, as part of its research, it commissioned YouGov to conduct a representative survey of active Uber drivers. Uber provided YouGov with a randomly generated geographically representative sample of 10,000 'active drivers'.

The TWU survey of gig workers. relied on in its submission to this current inquiry, identifies that the "*Results were collected during a survey conducted by workers in April with 337 respondents around the country*." (TWU Submission, p.24). The AlphaBeta report used a variety of data sources, including administrative data on a random sample of 3,621 Sydney driver-partners using the Uber app and a driver survey completed by 1154 drivers.

The National Survey findings in respect of average hourly rates for food and delivery drivers is reasonably consistent with the AlphaBeta report. Greater weight should be attributed to these sources of data, than the TWU survey.

Question:

> The CHAIR: In proposition 22 passing, a law was replaced by another. Do you accept that that was what the mechanism was in California?
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> Mr SMITH: I would have to take that on notice.

The CHAIR: Because the version that the legislature there passed, which was effectively to classify people or to deem them as employees, was replaced by a proposition that was advanced heavily by the gig companies, specifically Lyft and Uber, to provide them with independent contracting status, but with a minimum income guarantee on a per-trip basis, as well as access to accident compensation schemes and access to various forms of leave entitlements, albeit a lot more minimal than the law it replaced. Either way, it was a proposition that was similar to the debate that we are having here as to whether or not we should have minimum income guarantees. It seems like the gig companies, at least the major ones, favour it, but their view is that it should be decided on a trip basis, not an hourly basis, that is probably the main difference between the two California propositions. Any feedback you have on that would be most useful as well. I think that was it from me…

Answer:

Regarding the Californian developments, Ai Group notes Californian voter support for Proposition 22 that provides an exemption for app-based transportation (rideshare) and delivery companies from coverage of Assembly Bill 5 (**AB5**) enacted in 2019. AB5 had the effect of codifying a common law presumption (based on the case *Dynamex Operations West, Inc. v. Superior Court of Los Angeles (2018) 4 Cal.5th 903 (Dynamex*)) that workers who perform services for a hirer are employees for the purpose of wages and other benefits.

The exemption from AB5 for app-based transportation and delivery companies resulting from Proposition 22 confirms the status of app-based transportation workers as independent contractors able to work their own hours around personal commitments (a flexibility that would have been lost under AB5) and provides workers with various new entitlements such as:

- A new minimum earnings guarantee tied to 120% of the minimum wage, with no maximum;
- A healthcare subsidy consistent with the average contributions required under the Affordable Care Act;
- Compensation for vehicle expenses;
- Occupational accident insurance to cover on-the-job injuries; and
- Protection against discrimination and sexual harassment.

The Californian outcomes are not appropriately transferred into the Australian context. However, we refer the Committee to our submission in response to the Victorian Inquiry's recommendations, proposing the following amendment to the Fair Work Act's definition of 'independent contractor' in section 12 to reduce any disincentives to 'gig economy' businesses improving the working arrangements of

their independent contractors. We propose that the underlined wording be added to the definition:

> *An **independent contractor** is not confined to an individual and has the common law meaning, except that the provision of the following benefits by the person engaging the contractor shall not be taken into account in determining whether there is a contract for services:*
>
> > *a. Safety systems and equipment;*
> >
> > *b. Training;*
> >
> > *c. Insurance;*
> >
> > *d. Standard prices or payment terms;*
> >
> > *e. Consultation processes*