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The Treasury
Black Economy Division
Langton Crescent
PARKES ACT 2600

By email: BlackEconomy@treasury.gov.au

Dear Sir/Madam,

Thank you for the opportunity to contribute to policy discussions on the possible design characteristics of a reporting regime to provide information on Australians who receive an income from sharing economy websites.

The on-demand workforce is a 21st century phenomenon being regulated via 19th and 20th century systems and approaches.

Entities engaging the on-demand workforce have leveraged new technology and exploited out-of-date regulatory frameworks to circumvent industrial laws and have sought to classify workers as independent contractors in order to avoid tax, insurance, industrial and other obligations.

There is now a high degree of public concern regarding the impact of those changes. This concern arises from the increasing prevalence of such arrangements and the disproportionate impact of insecure work on the most vulnerable members of the workforce.

Insecure work arrangements, such as independent contracting, strike at the fundamentals of what Australians associate with work – regular pay, ongoing employment, protection and fair conditions, and the opportunity for advancement.

Despite undertaking work which in every other aspect has the hallmarks of a direct employment relationship, these low paid, vulnerable workers who are engaged as independent contractors are denied access to basic minimum labour standards and institutionalised collective bargaining.

Maurice Blackburn believes that the best way to achieve certainty in tax revenue is to clarify the employment relationships in the sharing economy.

Maurice Blackburn submits that some businesses have engaged in deliberate attempts to misclassify employees. The ability to shift costs, together with ambiguities in the legal test for establishing when a person is an employee, have enabled these behaviours to thrive.

The practice of misclassifying employees appears to be more prevalent in some industries than in others. The Fair Work Building Commission has estimated that up to 13 percent of self-defined contractors in the building and construction industry may be misclassified.[1] In 2011 a targeted audit of 102 employers in the cleaning services, hair and beauty and call-centre industries by the Fair Work Ombudsman assessed 23% of enterprises as misclassifying employees.[2]

The misclassification of employees means that the tax office is likely not receiving a number of taxes including income and company tax that it should be receiving.

While Maurice Blackburn supports the introduction of a reporting regime for sharing economy platforms, a reporting regime in and of itself is unlikely to go the distance needed to fix the problem of sharing economy platforms not paying the correct amount of tax. This is because currently, some sharing economy platforms are exploiting ambiguities in the law relating to the definition of an employee to avoid taxation and other obligations.

A more direct means of addressing this problem would be to amend relevant legislation to extend the definition of an employee. A number of sharing economy platforms would then attract the reporting obligations that attach to employers who engage employees including PAYG withholding obligations.

The common law test for distinguishing contractors from employees:

The distinction between employees and independent contractors arose in the 19th century as a means of determining whether one person should be liable for the torts of another.[3]

Over the years the Courts have developed various common law tests in order to distinguish independent contractors from employees. Presently the common law test applied by the Courts is set out in the High Court decision in *Hollis v Vabu*[4].

These tests have often been criticised for their complexity, uncertainty in application, and ability to be manipulated in order to achieve a desired outcome.

Despite these flaws the common law test for determining whether a worker is an employee pervades labour and industrial regulations in Australia including, the *Fair Work Act 2009 (**FW Act**).* The FW Act does not contain an extended definition of the term 'employee' and relies on the common law definition.

The ambiguity in the common law test has led to a number of legal disputes over the rights and entitlements of workers that turn on the application of a test, the results of which, cannot be predicted with certainty.

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[1] FWBC 2012, Working Arrangements in the Building and Construction industry - further research resulting from the 2011 Sham Contracting Inquiry, December.

[2] 2011, Sham contracting and the misclassification of workers in the cleaning services, hair and beauty and call centre industries, November.

[3] See *ACE Insurance Ltd v Trifunovski [2011] FCA 1204 (25 October 2011)* Perram J at [25] and *ACE Insurance Limited v Trifunovski [2013] FCAFC 3 (25 January 2013)* Buchannan J at [14].

4 [2001] HCA 44

Maurice Blackburn submits that some on-demand businesses are attempting to exploit this uncertainty by wrongly classifying workers as independent contractors to avoid insurance, tax, industrial and other obligations.

The following legislation contains extended definitions that capture workers who would not otherwise meet the definition of an employee at common law:

a. *Workplace Injury, Rehabilitation and Compensation Act* (WIRC Act)[5];
b. Superannuation legislation[6]; and
c. Payroll tax legislation.[7]

Maurice Blackburn submits that some of these extended definitions of 'employee' would cover some on-demand workers, but not all. For example, the WIRC Act and Superannuation legislation both include an 'income derived' test deeming contractors to be included if at least 80% of their gross income is derived from the contract with the person engaging them.

If a workers' on-demand job is a second income stream or the work is performed under a series of short term contracts many on-demand workers may not be caught by the 'income derived' test.

Therefore even where an extended definitions of "worker" applies, some on-demand workers may still not be covered by these extended definitions. Maurice Blackburn submits that to the extent there is any doubt about whether workers are caught by these extended definitions some on-demand businesses are using that doubt to exploit on-demand workers.

Maurice Blackburn believes that the definition of employee should be extended by legislation to be broader than the present definition at common law.

In August 2018 the Supreme Court of California handed down a decision adopting the 'ABC test' for determining whether workers were independent contractors or employees. The case follows other jurisdictions in America also adopting the ABC test.

According to the 'ABC test' in order for a worker to be an independent contractor all three of the following criteria must be satisfied:

A. that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
B. that the worker performs work that is outside the usual course of the hiring entity's business; and
C. that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.[8]

If a worker does not satisfy all three criteria, he/she is deemed to be an employee.

Maurice Blackburn believes that Treasury should consider recommending that the above test be inserted into federal tax and other legislation that uses the common law definition of employee as a means of determining whether a worker is an employee or contractor. That

[5] See Schedule 1, Part 1 – Section 9 WIRC Act
[6] See section 12 of the *Superannuation Guarantee (Administration) Act 1992*
[7] See s 32 of the *Payroll Tax Act 2007* (Vic)
[8] See *Dynamex Operations West, Inc. v. Superior Court, 4 Cal.5th 903 (2018)*

test should apply in addition to the common law test so a worker will be considered an employee if they meet the definition of employee under either test.

Recommendations:

Recommendation 1:
That Treasury recommend legislating an extended definition of 'employee' so that persons who do not satisfy all three criteria in the ABC test are considered to be employees for the purpose of tax legislation and superannuation legislation.

Recommendation 2:
That Treasury recommend that payroll tax legislation in the States and Territories be amended to make payroll tax payable in respect of any worker who does not meet all three criteria of the ABC test.

If Treasury accepts the first recommendation in this submission it follows that payroll tax legislation in the States and Territories should be harmonised so that the definition of an employee under tax legislation is consistent across all jurisdictions.

Please do not hesitate to contact me and my colleagues on 03 9605 2712 or via DVictory@mauriceblackburn.com.au if we can further assist with Treasury's important work.

Yours faithfully,

Daniel Victory
Principal Lawyer
Maurice Blackburn