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Black Economy Division
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By email: Blackeconomy@treasury.gov.au

Dear Black Economy Division

A sharing economy reporting regime

Thank you for the opportunity to provide a submission in response to the Treasury consultation paper on implementing a reporting regime for the sharing economy, dated 23 January 2019. The development of administrative arrangements to more effectively engage with the sharing economy has the potential to both assist the ATO in detecting non-compliance and foster the voluntary compliance of sharing economy market participants, who also suffer from the transparency gap produced by the current administrative frameworks. I offer the following observations in relation to the issues raised by the consultation paper.

Targeting a new regime (questions 1-3)

As an initial matter, a key factor that will influence the design of any new reporting regime is the delineation of exactly which transactions will trigger the new obligation to report. The pace of development of the sharing economy and the diversity in platform arrangements suggest that any new rules will be more functional if they enshrine principles rather than seeking to be too specific.

The consultation paper uses the term ‘sellers’ to denote those participants who receive payment from consumers as facilitated by the platform provider, but there would appear to be at least three broad categories of sellers engaging through the platforms: so-called ‘gig workers’ who are providing services for a fee; asset owners willing to ‘share’ the use of the property (such as a home or car) for a fee; and those who sell goods through online platforms (the true ‘sellers’). A gig worker, whether described as an independent contractor or self-employed free-lancer, is being rewarded for the provision of services so whether the activity is described as employment or a business, the nature of the receipt is ordinary income. Similarly, receipts for allowing another party to use one’s asset are (ordinary) income from property. Online selling is the more difficult category. As

reflected in the ATO's current online guidance,¹ whether online selling produces income will turn on whether the activity is a business, and this requires the application of the multifactorial, common law test. As a result, an occasional sale of goods may well not be an income earning activity whilst increasing regularity and repetition may see the activity evolve to that of a business. Given this, it may be considered preferable to direct any new reporting regime initially towards gig workers and asset 'sharing' as these activities are more clearly productive of assessable income.

It seems clear that there is a gap in reporting that may disadvantage the ATO's efforts to detect non-compliance as well as sellers' efforts to willingly comply with their tax obligations. With the increasing diversity of platforms and ease of participation, and the projected growth in the value of transactions occurring through sharing platforms, the government may well determine that changes to the reporting systems are necessary. The current use of s 353-10 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (TAA) information collection mechanisms allows the ATO to be flexible in determining which platforms to engage with, thereby allowing, in effect, a safe harbor for start-ups, but the lack of standardisation of format of the data and reporting deadlines can be a significant barrier to its usefulness. A new regime based in legislation would allow for the fixing of reporting cycles and data formats. As shown by the recent Black Economy amendments, an easy way to establish such a regime would be to add sharing economy platform operators as a new item to the table of third-party reporting requirements at s 396-55 of Schedule 1 to the TAA, which can be supplemented by a Law Companion Guideline issued by the ATO. Such a reporting regime could act as a 'nudge' to encourage seller compliance and it may also be desirable to include within any new system a requirement that platforms also report to sellers on a regular basis, mirroring the requirement that employers report to employees as part of the Pay-as-you-go (PAYG) withholding regime.

The gap in current legal frameworks – the gig workers' perspective

The consultation paper describes in some detail the challenges faced by the ATO in relying on current mechanisms but it should also be recognised that platform 'sellers' (as they are referred to in the paper) may often fall between the current reporting and collection mechanisms, making it more difficult for them to comply with their obligations. This in part stems from the uncertainty regarding the status of gig workers as either employees or independent contractors. The pressure on this distinction is primarily coming from the employment law perspective as gig workers seek to access labour protections and/or the right to bargain collectively. Litigation to date shows that the outcome of the application of the common law test of employment to gig work is not clear cut as it turns on the specific arrangements (both in contract and in practice) established by the platform operator.² In Australia, worker protection concerns may ultimately raise

¹ See <https://www.ato.gov.au/business/starting-your-own-business/in-detail/online-selling---hobby-or-business-/>.

² *R (on the application of the Independent Workers Union of Great Britain) v Central Arbitration Committee v Rooffoods Limited t/a Deliveroo* [2018] EWHC 3342 (Admin); [2018] 12 WLUK 17; 2018 WL 06330550 (5 December 2018) (finding that Deliveroo riders are not workers); compare *Uber BV v Aslam & Ors* [2018] EWCA Civ 1748 (19 December 2018) (finding that Uber drivers are workers).

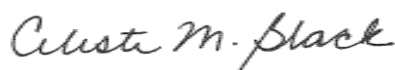
the prospect of the development of a third category, such as the ‘dependent contractor’ in Canada³ and the ‘worker’ in the UK.⁴ However, for tax purposes, the current binary distinction leads to a significant gap. Designation as an employee is the gateway to PAYG withholding and employer reporting. Carrying on business as an independent contractor leads to the PAYG instalment system but there is a lag time between the commencement of a new business and coverage by PAYG instalments, and the ATO will not generally give notice of the need to make PAYG instalments where the amount of income derived is less than \$4000.⁵ This withholding and reporting gap has the potential to exacerbate the difficulties that a seller may have in meeting their tax obligations, even if willing. A similar gap in withholding and reporting systems has also been identified in the United States.⁶

The consultation paper raises the question of withholding tax mechanisms. As noted, the Black Economy Taskforce determined that mandating withholding on sharing payments was not warranted unless non-compliance remained a problem after the introduction of a reporting obligation. However, the current PAYG withholding system provides another option worth considering: voluntary PAYG withholding agreements under s 12-55 of Schedule 1 to the TAA. A non-employee worker who holds an ABN is able to enter into a voluntary agreement with the payer such that PAYG withholding applies at a flat rate of 20% (or at a rate otherwise notified by the ATO based on a prior year assessment of business income). In order to assist sellers in managing their tax liabilities and cash-flow, platforms and sellers could be encouraged to take up this option.

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Thank you for the opportunity to make a submission in relation to this proposal. I am happy to be contacted to discuss this submission and look forward to the release of further developments in relation to tax issues and the digital economy.

Yours sincerely



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Compare *Kaeris v Rasier Pacific VOF* [2017] FWC 6610 (finding that Uber drivers not employees) and *Klooger v Foodora Pty Ltd* [2018] FWC 6836 (finding that Foodora riders are employees).

³ *Canada Labour Code*, s 3. For the purposes of Part I, the term ‘employee’ is defined to include a ‘dependent contractor’, where this term includes in para (c) the following meaning: ‘any other person who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that they are, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person.’

⁴ United Kingdom, *Employment Rights Act 1996 c. 18*, s 230.

⁵ See <https://www.ato.gov.au/General/PAYG-instalments/Who-needs-to-pay-PAYG-instalments/>.

⁶ See Caroline Bruckner, *Shortchanged: The Tax Compliance Challenges of Small Business Operators Driving the On-Demand Platform Economy* (2016), available at <https://www.american.edu/kogod/news/shortchanged.cfm>.