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BUSTING THE MYTHS OF THE GIG ECONOMY

PLATFORM WORKERS – HOW SHOULD THEY BE TREATED BY OUR INDUSTRIAL RELATIONS SYSTEM?

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TO THE INDUSTRIAL RELATIONS SOCIETY OF NEW SOUTH WALES

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Australia is currently facing some significant economic challenges.

Whoever wins the election next Saturday will be dealing with an economy in transition both at the macro level and at the workplace level.

Businesses are facing supply chain disruptions, significantly increased input costs, skill and labour shortages, weak productivity growth, wage pressures, and rising interest rates which impact upon business financing and investment.

Workers are facing rising prices and rising interest rates, which are imposing cost of living pressures. On the positive side, there has been strong growth in full time employment and increased participation in the workforce. Participation in the workforce is now at record levels.

In this environment, the last thing that anyone needs is for labour market and workplace flexibility to be stifled by ill-conceived new regulations. This would not be in the interests of businesses, workers, their families or the broader community.

Many of the major platform businesses are members of Ai Group and we play an important role in representing this sector in workplace relations policy matters.

Any new regulations for on-demand work need to be based on a strong foundation of facts. There are few areas where the facts are so commonly misrepresented as with the on-demand economy.

The facts

The proportion of the workforce who are platform workers is very small. The Grattan Institute reported¹ in 2016 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. This figure remains a reliable estimate of the proportion of the workforce who are platform workers.

¹ Minifie J, Grattan Institute, *Peer-to-Peer pressure, Policy for the sharing economy*, April 2016.

Platform workers are typically independent contractors. Therefore, this cohort is a subset of the proportion of the workforce who are independent contractors. Between 2016 and 2021, the proportion of the workforce who were independent contractors fell from approximately 9% in August 2016² to 7.8% in August 2021.³ The industries which have the highest percentage of independent contractors are Construction (25%) and Administrative and support services (18%).⁴

Any increase in the proportion of the workforce who were platform workers over the period from 2016 to 2021 could be expected to show up as an increase in the proportion of the workforce who were independent contractors, but this has not occurred as pointed out in the 2018 HILDA report. The report's authors said that the *"evidence indicates that, if the gig economy is growing as rapidly as is commonly believed, then either it involves the substitution of one type of self-employed worker for another (as might be happening in the taxi industry) or it is largely consigned to second jobs"*.⁵

Nearly all of the research shows that most platform workers do this type of work to supplement their main source of income, not as their main job. Also, a large proportion of platform workers carry out work for multiple platforms. In fact, many are logged on to different platforms at the same time.

Need for more research

There have been many recent inquiries into on-demand work and all of them have identified the need for further research to be carried out.

Some of the research carried out to date has involved methodology that limits the reliability of the results. For example, the respondents to the survey conducted for the Victorian Inquiry into the On-demand Workforce were self-selected and not representative, as the researchers themselves acknowledged. The Victorian survey has been widely cited as evidence that more than 7% of the workforce are platform workers. Such claims are nonsense because, as I have highlighted, the proportion of the workforce who are independent contractors is only around 7.8% of the workforce and only a small proportion of independent contractors are platform workers.

There is certainly a need for more research on the number of platform workers in Australia, the characteristics of those workers, and their working arrangements. Pleasingly, the Federal Government has given the ABS more funding⁶ to develop statistics in this area.

The importance of preserving flexibility for platform work

On-demand platform businesses are delivering huge benefits to the Australian community.

² ABS, *Characteristics of Employment*, August 2016, published on 2 May 2017.

³ ABS, *Characteristics of Employment*, August 2021, published on 14 December 2021.

⁴ ABS, *Characteristics of Employment*, August 2021, published on 14 December 2021.

⁵ Wilkins, R. and Lass I (2018) *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 16*, Melbourne Institute: Applied Economic & Social Research, University of Melbourne.

⁶ As reported at a Senate Estimates Hearing on 16 February 2022, Hansard, p.48.

On-demand platform work provides flexibility that is often not available with conventional forms of work. Individuals who wish to work flexibly around other commitments, such as studies, recreational activities, family commitments or other forms of paid employment often find the experience of working via online platforms, a useful and convenient way of earning or supplementing income.

Providing avenues to earn an income through platform work alleviates the adverse effects associated with unemployment, such as social isolation, poorer mental health and reduced confidence. Periods of unemployment are often longer for mature age workers than other workers, making the ability to earn an income, even temporarily through an online platform, a useful option.

For younger workers, entry into the labour market can be difficult without relevant work experience. Online platforms provide paid work opportunities that do not require extensive work experience or professional qualifications.

On-demand platform work has been particularly important to the community and the economy during the pandemic. For example, many restaurants would not have survived without on-demand platform delivery services and many thousands of people have continued to earn income in circumstances where they have been stood down from their regular jobs.

Many entitlements that commonly apply to employees do not suit the work arrangements of platform workers. For example, the three or four hour minimum engagement periods that commonly apply under awards would be unworkable for platform work.

A platform worker may be logged on to one or more apps waiting for a job while they are sitting on their couch at home. The whole notion of when work begins and ends for a platform worker is far more complex than for an employee.

The definition of an ‘independent contractor’

Most platform workers are independent contractors and most do not wish to be employees.

In February, the High Court handed down judgments in two important cases in which it was argued that particular persons engaged as independent contractors were in fact employees. In *CFMMEU v Personnel Contracting*,⁷ a young backpacker engaged by a labour hire business to work as a labourer on construction sites was held by the High Court to not be an independent contractor but rather an employee. In *ZG Operations v Jamsek*,⁸ two truck drivers engaged by a company were held by the High Court to be independent contractors and not employees.

The High Court’s judgments in these cases have delivered increased certainty for businesses and workers, which will have a positive impact on investment and jobs. It is essential that the Court’s decisions are not disturbed through legislative changes.

⁷ [2022] HCA 1.

⁸ [2022] HCA 2.

Courts and tribunals are accustomed to dealing with the distinction between employees and independent contractors under common law, including in the context of workers engaged by platform businesses. They should be allowed to continue to do so.

Initiatives by the major platform businesses to improve standards for on-demand work

Many on-demand platform businesses have invested heavily in improving working arrangements and safety for their workers, irrespective of whether the workers are employees or contractors.

For example, a set of [Food Delivery Platform Safety Principles](#) was developed by Deliveroo, DoorDash, Menulog and Uber Eats in consultation with Ai Group. All of these businesses are signatories to the Principles. Hungry Panda also recently became a signatory.

The Principles aim to minimise risk for all delivery workers, whether they are driving a car or riding a bicycle, e-Bike, scooter or motorbike.

The Principles cover the topics of:

1. Training and information
2. Personal protective equipment
3. Safety policies, standards and controls
4. The provision of accident insurance at no cost to the delivery worker
5. Consultation
6. Incident notification and investigation
7. Monitoring and compliance

The Principles highlight that the major platform businesses take their responsibilities to their workers very seriously. They intend to have a long term future in Australia and they know they will only achieve this if they maintain the support of the community, and are able to attract and retain workers with the right skills and other attributes.

In a tight labour market, the major platform businesses are continuing to engage a very large number of workers, which shows that workers value the flexibility that platform work provides.

This week Door Dash and the TWU announced that they have reached agreement on a *Statement of Principles to Ensure Safety and Fairness for Workers in the On-Demand Economy*. The Statement recognises the importance of the on-demand economy and commits the parties to six principles:

1. Workers in the on-demand economy should not be prohibited from accessing appropriate work rights and entitlements.

2. Workers should be provided with transparency in relation to how work is monitored, controlled, and remunerated.
3. On demand platforms must respect and facilitate the rights of drivers to join a registered industrial organisation which is entitled to represent their interests.
4. There should be a government established independent body with powers to deal with dispute resolution between on-demand transport workers and on-demand platforms.
5. Appropriate resources should be allocated to ensuring industry standards are established and maintained, and to driver education and training.
6. The formalisation of the Statement of Principles is the first stage of an ongoing process. The formalisation of a more detailed Memorandum of Understanding between the parties is the second stage. The lobbying of government by both parties for the implementation of the framework for regulation is stage three.

Another initiative is the application that Menulog has made to the Fair Work Commission (FWC) for an On Demand Delivery Services Award. This initiative is interesting but given that awards only cover employees and the vast majority of workers in the industry are not employees, it appears that the Award is not going to cover many platform workers, even if it is ultimately made by the Commission.

Options for reform

The development of any regulatory changes for platform work needs to be led by the Commonwealth, in collaboration with the States and in consultation with stakeholders. It would not be in anyone's interests for legislative or other changes to be introduced at the State level when all the major platform businesses operate nationally and when Australia has a national workplace relations system.

Different governments, opposition parties and inquiries have put forward reform proposals:

- The Federal Opposition has announced a policy of giving the FWC the power to set minimum pay and conditions for gig workers.
- The Victorian Inquiry into the On demand Workforce recommended that minimum standards be set for platform workers, ideally at the national level, as well as various other reforms.
- The Non-Government majority on the Commonwealth Parliamentary Committee which conducted a major Job Security inquiry has recommended that the definition of 'employee' be expanded in the Fair Work Act, and also that the FWC be given the power to set standards for platform workers who fall outside of the definition of an 'employee'.
- The Non-Government majority on the NSW Parliamentary Committee which conducted the NSW Future of Work inquiry, recommended that the NSW Industrial Relations Commission, or another tribunal, be given the power to

set minimum pay and conditions for gig workers.

- The Queensland Government is endeavouring to establish a system of regulation for 'independent courier drivers' modelled on Chapter 6 of the NSW Industrial Relations Act, but it needs the Federal Government to grant an exemption under the Federal *Independent Contractors Act* to enable the laws to operate.

In addition, the Victorian Government has released a Consultation Paper on minimum standards for on-demand workers. The proposed minimum standards cover the areas of:

- Consultation
- Bargaining power
- Fair conditions and pay
- Independent dispute resolution
- Worker representation
- Safety

Sifting through all the reform proposals, it appears that there is a significant level of support for at least some propositions:

1. Platform work has some unique characteristics and it would not be appropriate or workable to just deem platform workers to be employees.
2. It would be better for any standards to be set at the national level rather than having different standards in different States.
3. Platform businesses should have strong systems in place to ensure the work health and safety of their workers.
4. Platform workers should be adequately inducted and trained, and have access to relevant information.
5. Platform workers should be consulted about any significant workplace changes.
6. Platform workers should be entitled to join any union that is eligible to represent them.
7. Platform workers should have access to an independent body to assist in resolving any disputes that may arise.
8. Platforms should ensure that their algorithms do not result in discrimination on the basis of sex, race, disability etc.

It is also important that there be no disincentive for platform businesses to provide safety and welfare benefits to their workers because of concern that this may impact upon a worker's status. To address this issue, Ai Group has proposed that the

definition of an 'independent contractor' in section 12 of the Fair Work Act be amended to clarify that the provision of certain safety and welfare benefits should not be taken into account in deciding whether a person is an independent contractor, namely:

- Safety systems and equipment;
- Training;
- Insurance; and
- Consultation processes.

This Ai Group proposal was largely supported by the Victorian inquiry into the On Demand Workforce.

Another important issue is accident insurance. As I mentioned, the major food delivery platforms have agreed to provide accident insurance at no cost to workers.

Rather than trying to comprehensively regulate platform work and risk disrupting an industry that is providing extensive benefits to the community and workers, when developing any new regulations it would be better for Governments to focus on the areas where there is considerable common ground.

Need for a cost-benefit analysis

Any reform proposals need to be supported by a thorough cost-benefit analysis.

In February 2020, AlphaBeta published a report that showed that Delivery apps were bringing \$2.6 billion of trade to the Australian restaurant industry. The benefits are likely to be much higher today given the increased use of delivery apps during the pandemic.

Many businesses beyond the restaurant industry are entering into partnerships with platform businesses, including fast food and grocery businesses, to name just a few.

It is vital that the "baby is not thrown out with the bathwater" when new legislation is being considered. A thorough cost-benefit analysis will reduce the risk of this.

Many people like to refer to overseas approaches to regulatory reform but, as we all know, Australia's workplace relations system is unique and any reforms need to be appropriate in the Australian context.

Conclusion

Regardless of which party wins Government at the upcoming federal election, it appears that the regulation of on-demand work will be an important issue on the agenda.

Australia is not on its own in this area. Other countries are grappling with the same challenges given the success of the on-demand economy.

The on-demand economy is providing vital benefits to the community, to businesses and to workers. With careful thought and the development of research-based policy

proposals, an appropriate balance can be struck.