Submission No 45

INQUIRY INTO APPLICATION OF THE CONTRACTOR AND EMPLOYMENT AGENT PROVISIONS IN THE PAYROLL TAX ACT 2007

Organisation: DiDi Mobility (Australia) Pty Ltd

Date Received: 10 October 2025

The Director
Portfolio Committee No. 1 – Premier and Finance
Parliament House, Macquarie Street
Sydney NSW 2000

DiDi submission to the Portfolio Committee 1 - Premier and Finance inquire into and report on the application of the contractor and employment agent provisions in the Payroll Tax Act 2007

10 October 2025

We refer to the inquiry established by the Portfolio Committee 1 – Premier and Finance of the Legislative Council on 26 November 2024, to inquire into and report on the application of the contractor and employment agent provisions in the *Payroll Tax Act 2007* (NSW) (**Inquiry**).

While the Committee initially sought submissions as part of the Inquiry which closed on 7 February 2025, following the release of the *Chief Commissioner of State Revenue v Uber Australia Pty Ltd* [2025] NSWCA 172 decision the Committee agreed to seek submissions (or supplementary submissions) from gig economy participants.

As a significant gig economy participant, DiDi Mobility (Australia) Pty Ltd (**DiDi**) welcomes the opportunity to provide this submission to the Committee for its consideration and consents to the publication of this submission by the Committee.

This submission responds to the following Inquiry terms of reference (as updated on 27 November 2024):

- the provisions in Division 7 of Part 3 of the *Payroll Tax Act 2007* (NSW) (**Payroll Tax Act**) on contractors;
- decisions of courts in cases involving the application of the contractor provisions in the Payroll Tax Act; and
- the applicability of the contractor provisions in the Payroll Tax Act on the on-demand and gig economy.

This submission does not respond to the Inquiry's other terms of reference, including the provisions in Division 8 of Part 3 of the Payroll Tax Act in relation to employment agents.

This submission contains a summary of the historical context of the introduction and continuation of the payroll tax system, our assessment of the current state of that system with a focus on its application to gig economy participants, and our recommendations for reform of the contractor provisions contained in Part 3, Division 7 of the *Payroll Tax Act 2007* (NSW) (**Payroll Tax Act**).

Key recommendations

We summarise below our recommendations to the Inquiry:

Recommendation 1	Division 7 of the Payroll Tax Act should be amended to make it clear that a person is not an 'employer' in respect of a relevant contract unless the contract is wholly or principally for the purpose of the employer acquiring the labour of another person (the 'employee'). The determination of whether the contract is wholly or principally for that purpose should take into account whether the contract also involves, in substance, the provision of substantial services by the purported 'employer'.
Recommendation 2	Section 35 of the Payroll Tax Act should be amended to expressly state that payments are not wages merely because they are made pursuant to a relationship of agency or bare trust between the deemed 'employer' and 'employee'.
Recommendation 3	The exception in section 32(2)(d) of the Payroll Tax Act should be amended so as to refer to the conveyance of goods and/or persons.
Recommendation 4	The exception in section 32(2)(b)(iv) of the Payroll Tax Act should be amended to replace the requirement of the Chief Commissioner's satisfaction with an objective test as to whether it is reasonable to conclude that the person performs services of that kind to the public generally.
Recommendation 5	A further exception should be added to clarify that a relevant contract does not include a contract under which a person supplies a service to a "designated person", where the designated person is a platform provider for that service and the service is provided to the public by users of the platform.

General comments on the gig economy

Over the last 10 years there has been a dramatic rise and acceleration in the growth of 'on-demand' work or the 'gig economy', driven by rapid technological development and other factors, which has challenged traditional workforce and economic arrangements, both internationally and in Australia.[1]

In the NSW Government's response to the Select Committee on the Impact of Technological and

[1] Select Committee on the Impact of Technological and Other Change on the Future of Work and Workers in New South Wales, *Impact of technological and other change on the future of work and workers in New South Wales, First report - The gig economy*, April 2022 (**Select Committee Report**), page 1.

Other Change on the Future of Work and Workers in New South Wales Introduction First Report it was noted:[2]

> *The gig economy is a flexible evolving work environment that requires appropriately tailored government and external interventions.*
>
> *The NSW Government believes that the gig economy is an innovative workforce development driven by the ongoing digital revolution affecting all aspects of our lives and that thousands of gig workers appreciate the flexibility and opportunities that the gig economy provides.*

Official data relating to the prevalence of the gig economy in New South Wales is limited.[3] It is clear, however, that a significant portion of New South Wales's (and Australia's) workforce performs as part of the gig economy, and it has been reported that compared to other Australian States and territories, New South Wales has the highest levels of participation in digital platform work.[4] In a 2019 national survey, 7.1% of respondents were working through a digital platform or had done so in the previous 12 months, while 13.1% of respondents had at some time undertaken platform work.[5] Given the accelerated growth of the gig economy, it is reasonable to expect that those workforce participation numbers may have increased significantly in the last 5 years.

The rideshare gig economy is recognised as a legitimate operating model outside of traditional norms and regulation of the employment relationship. This can be seen, in part, in New South Wales through the regulation of the rideshare industry (along with taxis, limousines, airport transfers) under the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016* (NSW) and the accompanying *Point to Point Transport (Taxis and Hire Vehicles) Regulation 2017* (NSW). That legal framework covers how service providers must conduct their business and empowers the NSW Point to Point Transport Commissioner to authorise and regulate service providers, manage compliance and enforcement, and recommend safety standards.

At Federal level, in February 2024 the Closing Loopholes reforms to the *Fair Work Act 2009* (Cth)[6] introduced new provisions in relation to independent contractors to be regulated as "employee-like workers" performing digital platform work. Relevantly, those changes:

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[2] https://www.parliament.nsw.gov.au/lcdocs/inquiries/2591/Government%20response%20-%20Report%20No.%201%20-%20Future%20of%20Work.pdf.
[3] Select Committee Report, page 7.
[4] Paula McDonald, Penny Williams, Andrew Stewart, Robyn Mayes and Damien Oliver, *Digital Platform Work in Australia: Prevalence, Nature and Impact* (**McDonald**), page 5.
[5] McDonald, page 5; Victorian Government, Department of Premier and Cabinet, *Report of the Inquiry into the Victorian On demand Workforce*, (July 2020), page 13.
[6] Introduced by the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth).

- created a new jurisdiction enabling the Fair Work Commission to set minimum standards orders and minimum standards guidelines in relation to those workers;
- empowered the Fair Work Commission to deal with unfair deactivation claims commenced by workers; and
- enable independent contractors earning below a specified high-income threshold to challenge unfair contract terms in the Fair Work Commission.

More recently, in April 2025 the NSW government passed the *Industrial Relations Amendment (Transport Sector Gig Workers and Others) Act* 2025 (NSW)[7] to amend Chapter 6 of the *Industrial Relations Act 1996* (NSW) to ensure that it captures gig economy workers working in the transport industry and to allow the Industrial Relations Commission of NSW to make contract determinations covering those workers, amongst other reforms.

Each of these legislative regimes recognise that the ridesharing industry is not simply a new manifestation of independent contractor arrangements, but rather along with other gig economy segments, that it represents a new way in which individuals provide their services to the public with the assistance of market makers.

About DiDi

DiDi is one of the world's leading mobility platforms which operates in 15 countries globally, and commenced operating in Australia in May 2018. DiDi has since expanded its operation to 28 cities across Australia and now holds the second-largest market share in the Australian rideshare sector. Our business connects driver-partners - small business owners who provide transportation and delivery services – with Australians who need those services, facilitating safe, efficient and affordable access for passengers to rideshare services. DiDi's mobility platform is a lead generation service for driver-partners that allows them to focus on providing their services to their customers while minimising downtime, risk and administrative burden.

DiDi prides itself on a focus to maximise the earnings of its driver-partners, over 100,000 of which undertook local trips using the platform last year. This includes providing driver-partners with access to DiDi's platform for an industry-leading services fee of approximately 18%, ensuring that driver-partners take home a high proportion of every fare they accept via the platform.

Our brand also has a key focus on affordability in order to make rideshare accessible to more Australians, with over 2 million passengers using DiDi's platform to access the value-for-money, safe and reliable services provided by driver-partners last year alone.

DiDi holds operating licences within five states (South Australia, Queensland, New South Wales, Victoria and Western Australia) and one territory (Australian Capital Territory) as a booking service provider, and complies with all relevant state and federal regulations. In addition to the

[7] https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=18725.

contributions of DiDi and driver-partners to the tax base through GST and income tax, DiDi pays passenger service levies to State and Territory governments on every fare generated through the DiDi platform.

DiDi has a clear mission: Facilitating access to safe, reliable and value-for-money rideshare services for Australians while being the preferred earning platform for the nation's driver-partners.

Our detailed submission

DiDi is concerned that the current administration of the law by Revenue NSW and the recent decision of the New South Wales Court of Appeal's in *Chief Commissioner of State Revenue v Uber Australia Pty Ltd* (***Uber***) establishes a precedent that rideshare operators will be liable to payroll tax on the fares that they collect and pay to drivers (as a payment collection agent), even though drivers are operators of their own business and contract with and earn their fares from passengers directly. The decision in *Uber* follows other recent judicial decisions that have applied the "contractor provisions" to services performed in the gig economy in a similar way.

Whilst there may be examples of "gig economy" arrangements that in substance exhibit employer/employee characteristics, in DiDi's view, driver-partners are genuine independent contractors who operate their own businesses providing transportation services to the public (often across multiple platforms) and the imposition of payroll tax on such arrangements is outside the intended scope of the payroll tax regime. Legislative amendment should be considered to expressly clarify the scope of the "contractor provisions" so as to exclude such arrangements where the role of the rideshare operator is to facilitate a marketplace and provide a booking service. These arrangements are clearly distinguishable from other contractor relationships where an "employer" procures the labour of a person for use in the employer's own business and to provide services to the employer's customers.

If payroll tax is imposed on rideshare operators, the tax burden will ultimately be passed on to and borne by passengers, diminishing the accessibility and affordability of rideshare services to the public and potentially impacting the many drivers who rely on the rideshare industry as a source of income. It also creates an anomalous divergence between taxi fares and delivery services (not subject to payroll tax) and fares originated through rideshare platforms (potentially subject to payroll tax), despite the fact that those services are often performed by the same drivers using the same vehicle, potentially leading to distortions and inefficiencies in the transportation service industry.

The history and purpose of payroll tax system

The purpose of the payroll tax system is and has always been to levy tax on wages paid by employers in respect of their employees.

Payroll tax was first introduced in Australia by the Commonwealth under the *Pay-roll Tax Act 1941* (Cth) (**1941 Act**), with its stated purpose being to 'finance a national scheme for child endowment'. Although the use of revenue raised by payroll tax has changed with time, the nature of the tax and its tax base has not fundamentally changed. The 1941 Act was clear that the payroll tax imposed by it "shall be levied and paid on all wages paid or payable by any employer" and was a tax payable by the employer.[8]

In 1971, the imposition of payroll tax was 'handed over' by the Commonwealth to the States and Territories as a source of revenue to replace State receipts duties, which had been found by the High Court of Australia to be unconstitutional. At this time, each State and Territory adopted the form of the existing Commonwealth legislation. Accordingly, the operation of the payroll tax regime as a tax levied on employers for wages paid to employees was carried through to the *Pay-roll Tax Act 1971* (NSW) (**1971 Act**)[9] and in the other Australian States.

The current Payroll Tax Act was a repeal and reenactment of the 1971 Act to give effect to the harmonisation of payroll tax across Australia jurisdictions (with the exception of Western Australia). The reenactment of Payroll Tax Act did not (and was not intended to) materially alter the incidence of payroll tax.

The long title to the current Payroll Tax Act is "An Act to provide for a tax on employers in respect of certain wages….", which shows that the overall purpose and intent of the Payroll Tax Act remains consistent with that of the 1941 and 1971 Acts.

The contractor provisions

The contractor provisions, now contained in Division 7 of the Payroll Tax Act, were introduced in the 1980s to address concerns that payroll tax could be avoided, and the tax base eroded, through the use of arrangements which had the substance of an employer/employee relationship but which were disguised as independent contractor arrangements.

The legislative material relating to the introduction of the contractor provisions reveals that the original intention of the amendments was specific in its aim: to capture artificial contractual arrangements which purported to disguise employer/employee relationships for the purpose of avoiding payroll tax.[10]

This anti-avoidance purpose was explicitly *not* intended to capture genuine independent contractor arrangements. To this end, the provisions operated by defining the concept of a 'relevant contract' (with payroll tax attaching to payments under a 'relevant contract') and then

[8] 1941 Act ss 12-13.
[9] 1971 Act ss 6 and 8.
[10] See also *Uber Australia Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 1124, [171].

enumerating a number of broad exceptions designed to take genuine independent contractor arrangements out of the scope of the contractor provisions.

The Explanatory Note to the *Payroll Tax (Amendment) Bill 1985* (NSW) stated the following about the definition of 'relevant contract', originally contained in section 3A(1) of the 1971 Act (emphasis added):

> *The terms of this definition are directed to capture several* ***means of disguising the employer-employee relationship*** *by contractual arrangements which have been increasingly resorted to in recent years by persons* ***seeking to defeat the objects of the Principal Act****. The definition contains appropriate exclusions so that the parties to* ***genuine service contracts*** *will not be prejudiced.*
>
> *The effect of the new section is that the parties to these contractual arrangements will be treated as employers and employees, and money paid in accordance with these arrangements will be treated as wages, for the purposes of the Principal Act.*

The Minister responsible for the amendments (Mr Bob Debus) said in the second reading speech (emphasis added):[11]

> *I turn now to the* ***subject of tax avoidance****. It is a most unfortunate fact that in every walk of life there is a small minority of people who, by their unscrupulous behaviour, spoil things for everyone else. Thus it is that there has been a significant increase over the years in the use of* ***artificial schemes and contrived arrangements*** *by taxpayers attempting to avoid their liabilities to taxation. This has occurred in the area of pay-roll tax, just as it has in other more celebrated fields such as income tax. This bill includes a number of measures which will catch* ***schemes designed to avoid liability for pay-roll tax*** *by severing the employer-employee relationship. Such arrangements have included the use of so-called contractors to replace wages staff.* ***Typical of the situations that are known to exist and are the target of the legislation is the employer who, by arrangement with an employee, enters into a contract for service with the employee's family trust, partnership or company for the provision of the employee's services****.* ***The employee then performs the services for the employer but his salary is paid to the trust, partnership or company, resulting in the avoidance of pay-roll tax by the employer****. Certain contracts will be exempted from liability for pay-roll tax, including contracts in excess of $500,000 where the contractor would need to hire staff and would therefore be liable for pay-roll tax.* ***Bona fide independent contractors will not be caught by the legislation****.*

[11] New South Wales Legislative Assembly, Parliamentary Debates (Hansard), 13 November 1985, at 9557–9559.

…

> *In effect,* ***only contracts that are similar to a normal contract of service are subject to payroll tax****; that is, only* ***if a contractor works solely or mainly for one employer for an extended period*** *or periods does the employer become liable for payroll tax. … On 10 March, I announced that* ***the Government had made a decision to exclude contracts involving owner-drivers****, direct sellers and insurance agents from payroll tax under the relevant contracts provisions.*

The limited anti-avoidance purpose of the contractor provisions has also been acknowledged subsequently by Parliament. At the time of introducing amendments to the employment agent provisions in 1998, the Minister said:[12]

> *The relevant contract provisions are anti-avoidance provisions designed to bring to tax wages paid to persons who are, for all intents and purposes, performing duties similar to those of employees.*

In summary, the intended scope and purpose of the contractor provisions can be summarised as follows:

- The provisions are intended to capture tax avoidance schemes and contrived arrangements which seek to escape the application of payroll tax through the use of contracting arrangements that disguise the employer-employee relationship.
- This includes schemes in which:
  - an 'employee' establishes an interposed entity to disguise the employer-employee relationship; or
  - the contractor works solely or mainly <u>for</u> the employer for an extended period,

  in both cases, the employee performing services <u>for</u> the entity identified as the employer.
- Bona fide independent contractors are not intended to be subject to the contractor provisions.
- Arrangements that are well understood to be examples of bona fide independent contractor arrangements are explicitly excluded, including owner-drivers conveying goods, insurance brokers and door-to-door sellers.

Bona fide independent contractor arrangements do not include those where a contractor operates their own business and provides services to the public generally. For example:

- where Contractor A provides services to Party B and other customers generally, the contractor provisions should not apply and Party B should not be an 'employer'; and

[12] New South Wales, House of Representatives, State Revenue Legislation (Miscellaneous Amendments) Bill (Hansard) 14 October 1998, page 1 (Mr Michael Knight - Minister for the Olympics).

- similarly, where Contractor A provides services to multiple customers and Party C provides services to Contractor A that Contractor A uses in their business, the contractor provisions should not apply and Party C should not be an 'employer'.

The second example above describes arrangements that are common in the gig economy – that is, a contractor operates their own business of providing services to end-users of those services, but procures the services of a digital platform or marketplace provider to connect with end-users. This is consistent with the relationship that exists between driver-partners (who operate their own business providing transportation services to end-users) and rideshare platforms like DiDi (and a number of other similar platforms) that facilitate a marketplace that connects drivers with passengers who wish to use the drivers' services. These features of rideshare platforms are explained in greater detail below.

Administrative approach and judicial consideration of the contractor provisions and the gig economy

Notwithstanding that digital platform and marketplace operators in the gig economy are service providers to the bona fide independent contractors who use their marketplace and platform services, in recent years, Revenue NSW and other State and Territory revenue authorities have sought to apply the relevant contractor provisions to deem digital platform and marketplace operators to effectively be employers in respect of the independent contractors that use their services.

This appears to be on the basis that the independent contractors, in providing their services to, and under contracts with, their own customers (the passengers), at same time provide a 'service' to the platform/marketplace operator, rather than the other way around. The below diagram is extracted from Revenue NSW's online guidance titled "Payroll tax and the gig economy" and reflects Revenue NSW's characterisation of gig economy models:[13]

[13] https://www.revenue.nsw.gov.au/taxes-duties-levies-royalties/payroll-tax/industry-specific-guidance/gig-economy.

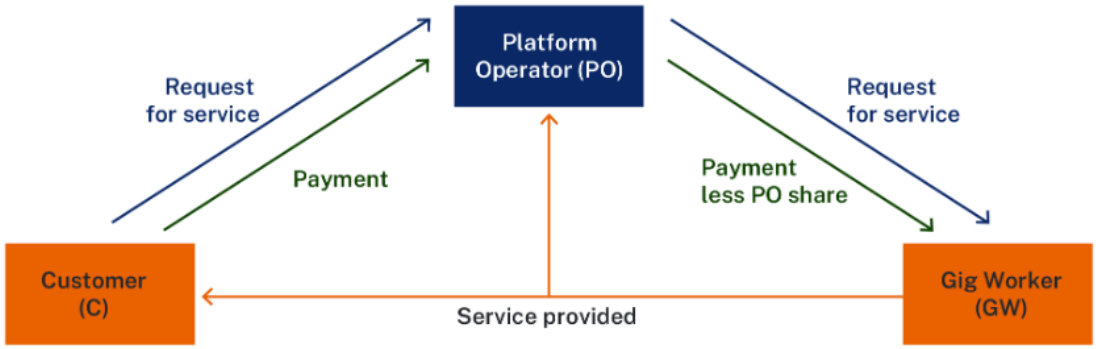

Diagram 1: In this gig economy model, the Customer requests services from the Platform Operator, who then allocates the request to the Gig Worker (blue arrows). The Platform Operator also facilitates the payment from the Customer, distributing to the Gig Worker after taking a share (green arrows). The Gig Worker provides services (orange arrows) to both the Customer and Platform Operator by fulfilling customer service requests.

In DiDi's view, Revenue NSW's analysis that the independent contractor (or "gig worker") provides a service to the platform operator may be correct if the platform operator itself contracts with the customer to provide the transportation service in question, and therefore procures the independent contractor to perform the service on the platform operator's behalf and in discharge of the platform operator's transportation obligation to the customer. But that is not the case in many instances, including in the case of DiDi. DiDi expressly does not provide transportation to customers. Drivers contract with customers to provide that service and are entitled to payment from that customer. DiDi provides administrative support as a payment collection agent and makes payment to drivers only in that capacity.

Recent judicial decisions concerning the application of the contractor provisions to gig economy and other independent contractor arrangements similar to those described above have generally upheld the application of the contractor provisions to those arrangements (and consequently found a liability for payroll tax). There appear to have been three key reasons for these outcomes:

1. The Courts have adopted a broad construction of the 'relevant contract' definition. For example, in *Uber*, the New South Wales Court of Appeal held that drivers provided a 'driving service' to Uber (and not just to passengers) because driving generated a 'clear financial benefit' for Uber in the form of a service fee and the 'service' was provided to Uber under the contract existing between Uber and the driver, even though that contract did not confer a legal right or impose a legal obligation to perform the service.

2. Although, in theory, some of the exceptions in subsection 32(2) of the Payroll Tax Act should apply, the platform operator may face evidentiary difficulties in establishing that any of the exceptions in subsection 32(2) apply, as was the case in *Uber*. This is because, for example, the platform operator cannot access information about drivers regularly using other rideshare platforms, although they know, anecdotally, that it is a widespread practice.

3. The fact that payment for the service is owed to the contractor by the customer (and not the platform operator) should take the payments outside of the definition of 'wages' in section 35 of the Payroll Tax Act (as 'wages' are only amounts paid or payable by an 'employer'). However, the Courts have held that, where the platform operator performs the administrative support service of a payment collection agent and merely remits funds to the independent contractor in that capacity, the remittance of funds by the platform operator nonetheless meets the statutory language of an amount 'paid or payable' to the independent contractor. We submit that there is no principled basis for a platform operator to be brought within the payroll tax base simply because it performs a payment collection service.

Consequently, it is apparent that Division 7 of the Payroll Tax Act has been recently construed by the Courts and Revenue NSW as applying to a much broader range of contracts and payments than was originally intended or which is necessary for the provisions to achieve their anti-avoidance purpose, including so as to cover bona fide independent contractor arrangements. This has been acknowledged by the Courts. For example, in *Loan Market Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 390 at [207], Richmond J observed:

> *"[t]he conclusion that the Broker Agreements constitute a relevant contract under s 32 may be seen as a harsh outcome for LML because the contractor provisions now found in s 32 were originally introduced as an anti-avoidance measure which was not intended to catch "bona fide independent contractors" … But the way the legislature approached the implementation of that purpose was to cast the net of 'relevant contract' very widely and then to give exclusions which were intended to catch the bona fide independent contractor relationships."*

The decided cases reveal that, in a world which now includes the use of digital platforms to facilitate transportation services between customers and service providers, the exclusions are not broad enough to capture all bona fide independent contractor arrangements including rideshare operators. A more detailed analysis specific to the rideshare industry is provided below. However, DiDi makes the following general recommendations for reform of the 'contractor provisions' to ensure that the provisions continue to achieve their anti-avoidance purpose without inadvertently capturing genuine independent contractors such as rideshare.

> **Recommendation 1:** Division 7 of the Payroll Tax Act should be amended to make it clear that a person is not an 'employer' in respect of a relevant contract unless the contract is wholly or principally for the purpose of the employer acquiring the labour of another person (the 'employee'). The determination of whether the contract is wholly or principally for that purpose should take into account whether the contract also involves, in substance, the provision of substantial services by the purported 'employer'.

Recommendation 2: Section 35 of the Payroll Tax Act should be amended to expressly state that payments are not wages merely because they are made pursuant to a relationship of agency or bare trust between the deemed 'employer' and 'employee'.

Further analysis of the rideshare industry

The rideshare business model provides one example of the unintended application of Division 7 to bona fide independent contractor arrangements. This has become evident from the recent decision of the New South Wales Court of Appeal in *Uber*, where it was found that Uber was an employer (under the contractor provisions) in respect of drivers who utilised Uber's rideshare platform to accept fares on the basis that Uber indirectly receives a financial benefit (in the form of its service fees which are provided for Uber's platform-operator services) from a driver's performance of their driving services for their passengers. The decision in *Uber* is subject to an application of special leave to the High Court of Australia and accordingly the final outcome is not yet been determined.

Rideshare platforms like DiDi do not provide transportation services to passengers. Drivers, who operate their own businesses, usually as sole traders and using their own vehicles, provide transportation services to passengers. Drivers often use more than one platform provider to get in touch with potential customers. The role of rideshare platforms is as marketplace operators, the primary function of which is the creation and facilitation of a market that is of benefit to both drivers and passengers. For example, DiDi's technology solutions are of inherent value to drivers because they enable drivers to quickly find and accept fares, increasing the volume of work for their driving businesses. At the same time, rideshare platforms grow demand for transportation services generally by increasing accessibility, which in turn benefits drivers and increases the attractiveness to drivers of making use of rideshare platforms. Rideshare platforms also provide value to drivers in other ways, for example by providing a payment collection service that eliminates risk of non-payment to a driver and the administrative burden for drivers, with the platform enabling drivers to focus on their core business activity of driving. For this value, drivers are willing to pay the service fees that rideshare platforms charge them. Rideshare platforms operate primarily as a service provider to drivers.

Drivers, on the other hand, are service providers to their passengers, who they contract with directly. It is the drivers' services that are rated by their customers. In the case of DiDi, this is underscored by the fact that drivers have no obligation to DiDi to perform any driving services, can use DiDi's services as much or as little as they like, when they like, and may (and commonly do) make use of the services of other rideshare platforms. Some also operate as taxis, delivery drivers and couriers, and accept fares other than through rideshare platforms.

Drivers are *genuine* independent contractors and operators of their own businesses and the potential application of the contractor provisions to their contracts with rideshare platforms (the

cost of which would necessarily be passed on to drivers and, in turn, to passengers) in DiDi's view squarely falls outside the intended scope of Division 7. As such, it ought to be addressed through legislative amendment, including Recommendations 1 and 2 outlined above.

The application of the exclusions to the rideshare industry

The enumerated exceptions in Division 7 expressly exclude contracts for the supply of services "solely for or ancillary to the conveyance of goods by means of a vehicle provided by the person conveying them". In other words – owner-drivers. The exception refers to the conveyance of goods but not persons, probably because when the contractor provisions were introduced it was never contemplated that they might operate to capture booking services provided to taxi drivers (the closest analogy to the services provided by rideshare platforms to drivers today). However, there is no principled basis for payroll tax to be payable on the fare a driver receives for transporting a passenger, but not for delivering food or other goods using the same vehicle.

Rideshare platforms bring a technological solution to the transportation industry and have a similar relationship with drivers as that which historically existed between taxi booking services and taxi drivers (although the rideshare technology brings many additional advantages such as payment collection solutions, estimations of time, safety, location tracking etc.), to which payroll tax would not typically have been payable. It is well established that the "standard model" by which taxi drivers operated historically (which involved the bailment of a vehicle together with its licence in return for a commission-based rental fee) was not in the nature of an employer/employee relationship, even where the taxi owner may have collected fares and remitted the balance less commission fees to the driver.[14] Moreover, DiDi is not aware of payroll tax ever being imposed on traditional taxi booking service providers, especially not at the time when the contractor provisions were introduced in the 1980s. It is, therefore, reasonable to assume that the specific owner-driver exclusion makes reference to the conveyance of goods (but not persons), because it was never contemplated that a taxi driver operating as an independent contractor would be the type of arrangement that would be otherwise captured by Division 7.

> **Recommendation 3:** The exception in section 32(2)(d) of the Payroll Tax Act should be amended so as to refer to the conveyance of goods and/or persons.

Finally, in DiDi's view, the case as ventilated before the New South Wales Court of Appeal in *Uber* did not fully raise for consideration the application of the exception in section 32(2)(b)(iv) of the Payroll Tax Act relating to services of a kind ordinarily performed to the public generally. Given the Court of Appeal's finding that drivers provided the same 'service' of driving to both Uber and passengers, it should be open to conclude that drivers meet the requirements of this section simply by performing their driving services for passengers (being 'the public generally'). Alternatively, the exception might be enlivened by demonstrating that a driver provides driving

[14] See, for example, *Voros v Dick* [2013] FWCFB 9339.

services through more than one rideshare platform or booking service, or as a rank and hail taxi operator. However, rideshare operators may face practical difficulties in substantiating this exception because the information in respect of drivers using other platforms and acting as a taxi driver is unlikely to be available to them. For example, in *Uber Australia Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 1124 at [153], Hammerschlag CJ in Eq at first instance could not accept Uber's attempt to apply the exception because:

> *There was no evidence led by Uber as to the frequency of taxi or hire car driving by those drivers, to enable the Court to conclude that they ordinarily engaged in that activity.*

Recommendation 4: The exception in section 32(2)(b)(iv) of the Payroll Tax Act should be amended to replace the requirement of the Chief Commissioner's satisfaction with an objective test as to whether it is reasonable to conclude that the person performs services of that kind to the public generally.

Recommendation 5: A further exception should be added to clarify that a relevant contract does not include a contract under which a person supplies a service to a "designated person", where the designated person is a platform provider for that service and the service is provided to the public by users of the platform.

We respectfully submit our views to the Portfolio Committee 1 - Premier and Finance on the application of the contractor and employment agent provisions of the Payroll Tax Act 2007.