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APPLICATION OF WORK HEALTH AND SAFETY AND WORKERS' COMPENSATION LAWS TO ON-DEMAND WORKERS IN THE GIG ECONOMY: THE NEED FOR LEGAL CLARITY

Abstract

This article examines the legal status of on-demand or 'gig' workers in work health and safety and workers' compensation legislation in Australia — are they covered by such legislation? The analysis indicates that the relevant provisions do not specifically deal with these kinds of workers, and so their status is unclear. This uncertainty over worker protections is as significant in these areas as it is in employment law, the latter of which has been the subject of more recent academic commentary. By focusing on the practical application of work health and safety and workers' compensation legislation to three well-known on-demand exemplars — Uber, Deliveroo, and Airtasker — this article suggests that there is a need for legal clarity which could be delivered by reforms that include the adoption of nationally consistent legislation and other measures aimed at making the law more coherent.

I Introduction

Recently the Fair Work Commission determined that a Deliveroo driver was an employee rather than an independent contractor, and that therefore the driver was entitled to protection against unfair dismissal.[1] The decision

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1 *Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818, [138]–[139] (Commissioner Cambridge) ('*Franco*'). Deliveroo appealed this decision to the Full Bench of the Fair Work Commission, which was heard on 19 July 2021 but awaits determination: see Transcript of Proceedings, *Deliveroo Australia Pty Ltd v Franco* (Fair Work Commission, C2021/3221, Vice President Hatcher, Vice President Catanzariti, Deputy President Cross, 19 July 2021).

lies in seeming contradiction to a decision of the Full Bench of the Fair Work Commission in 2020 that an Uber Eats driver was an independent contractor rather than an employee.[2] The only thing that is clear at this stage is that this area of the law is uncertain. New developments have seen corporate entities taking action in this space. In the United Kingdom, following a ruling of the Supreme Court of the United Kingdom, Uber has moved to treat its 70,000 drivers as workers, meaning they will be entitled to a number of basic employment protections.[3] Menulog, which has a similar online business platform to Deliveroo, has made statements that it will trial an employee model in Australia.[4]

Academic commentary,[5] as well as government-initiated inquiries and reports,[6] have discussed the issue of whether on-demand workers are employees or independent contractors.[7] Although much of this attention has focused on the question from the standpoint of employment law or labour law, this article attends to the issue from the perspective of work health and safety ('WHS') and workers' compensation legislation. The answer to this question is important as it will mean the difference between

2 *Gupta v Portier Pacific Pty Ltd* (2020) 296 IR 246, 276 [70] (Ross J and Vice President Hatcher) ('*Gupta*'). Gupta appealed this decision to the Full Court of the Federal Court; however, Uber settled the matter before judgment was handed down: Transcript of Proceedings, *Gupta v Portier Pacific Pty Ltd* (Federal Court of Australia — Full Court, NSD566/2020, Bromberg, Rangiah and White JJ, 27 November 2020) 51 (Bromberg J), 60 (White J). The amount and terms of the settlement were confidential, but likely far less onerous than the potential cost for Uber of having to pay its workers a minimum wage, roster them, and comply with unfair dismissal rules: see Nick Bonyhady, 'Staring down the Barrel of a Landmark Judgment on its Workers' Status, Uber Folds', *The Sydney Morning Herald* (online, 30 December 2020) <https://www.smh.com.au/politics/federal/staring-down-the-barrel-of-a-landmark-judgment-on-its-workers-status-uber-folds-20201217-p56oij.html>.

3 *Uber BV v Aslam* [2021] ICR 657 ('*Aslam*'); Sharon Marris and John-Paul Ford Rojas, 'Uber Gives 70,000 UK Drivers Worker Benefits: But Uber Eats Couriers Left Out', *Sky News* (online, 17 March 2021) <https://news.sky.com/story/uber-move-to-give-70-000-uk-drivers-worker-benefits-will-reverberate-through-the-entire-gig-economy-12248229>.

4 Kristy Peacock-Smith and Tessa Carlisle, 'Menulog to Trial Employment Model for Food Delivery Service', *Bird & Bird* (Web Page, April 2021) <https://www.twobirds.com/en/news/articles/2021/global/menulog-to-trial-employment-model-for-food-delivery-service>.

5 See, eg, Paula McDonald et al, *Digital Platform Work in Australia: Prevalence, Nature and Impact* (Report, November 2019). This report presented the findings from research commissioned by the Victorian Department of Premier and Cabinet.

6 See, eg, Industrial Relations Victoria, *Inquiry into the Victorian On-Demand Workforce* (Background Paper, December 2018) ('*IRV Report*'); Industrial Relations Victoria, *Report of the Inquiry into the Victorian On-Demand Workforce* (Final Report, June 2020) ('*On-Demand Workforce*').

7 See also Anthony Forsyth, *Labour Law Down Under* (Web Page) <https://labourlawdownunder.com.au/>.

such persons being entitled or not to protections under these statutes. Not only is this an issue for injured individuals, who may face severe financial consequences following injury; it is also of concern to society and the economy more broadly due to lost productivity and an increased burden on health services.

The purpose of this article, therefore, is first to seek clarity on the employment status of on-demand workers in the contexts of WHS and workers' compensation law and, second, to suggest ways that such clarity and coherence might be achieved. It is the contention of this article that a nationally-consistent approach is appropriate in both WHS and workers' compensation legislation to deal with the uncertain status of on-demand workers. Further, it is suggested that this issue can be dealt with by further reforms of national workers' compensation laws. Given the nature of these areas of law, it is contended that their application to on-demand workers should be clear one way or the other. Ultimately, the position will be a policy decision to be made by government.

The argument of this article is structured as follows. Part II defines on-demand workers, outlines the common law employee/independent contractor test and introduces three well-known exemplars to serve as illustrations of the practical application of the law. Parts III and IV outline the law as it relates to on-demand workers in WHS and workers' compensation legislation in the Australian states and territories, and concludes that this law is unsettled in terms of whether such on-demand workers are employees or independent contractors. Part V suggests that reform is appropriate to bring coherence and clarity to the status of on-demand workers by a nationally-consistent approach to the definitions of 'worker' in WHS and workers' compensation legislation, and other reforms particular to workers' compensation law.

II The Uncertain Status of On-Demand Workers

A *Defining On-Demand Workers*

The term 'on-demand worker' has become familiar in recent times, and is associated with terms such as 'gig-worker' or 'non-standard employment'.[8] Such workers are engaged in the 'gig economy', 'crowdsourcing', the 'sharing economy'[9] or 'online platform work'.[10] The 'gig' economy has been identified as being synonymous

8 International Labour Organization, *Non-Standard Employment around the World: Understanding Challenges, Shaping Prospects* (Report, 16 November 2016) 8 ('*Non-Standard Employment Report*').

9 The Treasury (Cth), *Tackling the Black Economy: A Sharing Economy Reporting Regime* (Consultation Paper, January 2019) 2–3; McDonald et al (n 5) 14.

10 European Agency for Safety and Health at Work, *Protecting Workers in the Online Platform Economy: An Overview of Regulatory and Policy Developments in the EU* (Report, 2017) 3; Industrial Relations Victoria, *On-Demand Workforce* (n 6) 11 [42].

with the 'on-demand' or 'sharing' economy, all of which are characterised by their confined scope to jobs involving small tasks known as 'gigs' or 'micro-tasks'.[11]

Given the potentially wide-ranging nature of online platform work, this article focuses on three well-known online service provider companies operating in Australia, namely, Uber, Deliveroo, and Airtasker. Further, much of the recent case law, both in Australia and overseas, has focused on these and similar online service providers, and therefore they provide a practical and visible manifestation of the application of the law to the on-demand workforce.

B *Employee v Independent Contractor*

Much of the commentary in relation to on-demand workers has focused on the correct classification of their engagement, namely, whether an on-demand worker is an employee or independent contractor.[12] In this regard, the characterisation of the

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11 Productivity Commission (Cth), *Digital Disruption: What Do Governments Need to Do?* (Research Paper, 2016) 149: 'At present, the gig economy is mostly limited to micro-tasks, or other low- to medium-value transactions'. See also Igor Dosen and Michael Graham, 'Labour Rights in the Gig Economy: An Explainer' (Research Note No 7, Parliamentary Library and Information Service, Parliament of Victoria, June 2018) 1–2.

12 The literature is vast, but some of the leading contributions include: Pauline Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (2021) 43(1) *Sydney Law Review* 83; Andrew Stewart and Jim Stanford, 'Regulating Work in the Gig Economy: What Are the Options?' (2017) 28(3) *Economic and Labour Relations Review* 420; Valerio De Stefano, 'The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig-Economy"' (2016) 37(3) *Comparative Labor Law and Policy Journal* 471; Valerio De Stefano and Antonio Aloisi, *European Legal Framework for Digital Labour Platforms* (Report, 2018); Miriam A Cherry and Antonio Aloisi, '"Dependent Contractors" in the Gig Economy: A Comparative Approach' (2017) 66(3) *American University Law Review* 635; Antonio Aloisi, 'Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of On-Demand/Gig Economy Platforms' (2016) 37(3) *Comparative Labor Law and Policy Journal* 653; Jeremias Prassl and Martin Risak, 'The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights in the Virtual Realm' in Pamela Meil and Vassil Kirov (eds), *Policy Implications of Virtual Work* (Palgrave Macmillan, 2017) 273; Jeremias Prassl and Martin Risak, 'Uber, Taskrabbit, and Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork' (2016) 37 *Comparative Labor Law and Policy Journal* 619; Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press, 2018) ch 5. See also some of the major reviews of international case law on this issue, including: International Labour Organization, *Job Quality in the Platform Economy* (Issue Brief No 5, 2nd Meeting of the Global Commission on the Future of Work, 15–17 February 2018); International Labour Organization, *World Employment and Social Outlook 2021: The Role of Digital Labour Platforms in Transforming the World of Work* (Report, 2021); International Lawyers Assisting Workers Network, *Taken for a Ride: Litigating the Digital Platform Model* (Issue Brief, 2021).

relationship is critical for many of the worker's entitlements, including in relation to minimum wages and other terms and conditions of employment, which accrue only to employees.[13]

The primary, or common law, definition of an employee requires a person to prove the existence of a contract of employment or contract of service. This encapsulates the two requirements for a person to be an employee at common law, namely: 'they must be engaged under a valid and enforceable contract; and, … the contract must be characterised as one of employment'.[14] Most of the case law concerns whether a person is an employee at common law or an independent contractor. The prevailing approach in Australia is to apply a multi-factor test. The two main cases that laid the foundations for all subsequent decisions are *Stevens v Brodribb Sawmilling*[15] and *Hollis v Vabu Pty Ltd* ('*Hollis*'),[16] in which the 'multi-factor test' emerged. The test has been subsequently endorsed by the High Court in *Sweeney v Boylan Nominees*.[17]

At first blush, on-demand workers will not fall within this primary definition of worker because of the three-way arrangement with the platform provider and the client, in which the on-demand worker is categorised as an independent contractor. However, where the particular circumstances indicate that, for instance:

- the platform provider has a high level of legal control over the on-demand worker in terms of the number of hours worked and the nature of the work performed;[18]

- there is limited ability to refuse work or, in practice, limited refusal;[19]

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13 See, eg, the majority of entitlements under the *Fair Work Act 2009* (Cth) ('*Fair Work Act*').

14 Andrew Stewart et al, *Creighton & Stewart's Labour Law* (Federation Press, 6th ed, 2016) 204 [8.20].

15 (1986) 160 CLR 16, 29 (Mason J), 35 (Wilson and Dawson JJ), 47 (Brennan J), 49 (Deane J), ('*Stevens*').

16 (2001) 207 CLR 21, 41–5 [46]–[57] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) ('*Hollis*'). Note that in the recent decision of *WorkPac Pty Ltd v Rossato* (2021) 95 ALJR 681 ('*WorkPac*'), the High Court downplayed the authority of *Hollis* by stating that it afforded 'no assistance, even by analogy, in the resolution of a question as to the character of an employment relationship, where there is no reason to doubt that the terms of that relationship are committed comprehensively to the written agreements by which the parties have agreed to be bound': at 700 [101] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).

17 (2006) 226 CLR 161, 173 [31]–[33] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) (*Sweeney*).

18 *Stevens* (n 15) 24 (Mason J), 36 (Wilson and Dawson JJ); *Hollis* (n 16) 44 [54], [57] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Sweeney* (n 17) 173 [32] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

19 *Hollis* (n 16) 42 [49] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (2010) 184 FCR 448, 446 [48] (Keane CJ, Sundberg and Kenny JJ).

- there is a near or total exclusivity of work for or with that provider;[20] or
- the on-demand worker wears livery or uniform of that platform provider,[21]

the on-demand worker may well satisfy the common law multi-factor test such that he or she will be considered an employee.[22]

This test could well apply to any on-demand worker in the service of Uber, Deliveroo, or Airtasker. The application of the multi-factor test, however, produces no clear and distinct bright line separating employees from independent contractors. Ultimately, when applying these principles to on-demand workers, whether or not they will be employees will be a matter for the court and dependant on the particular factual circumstances.[23] In particular, the business model of the relevant platform, including whether the platform is a 'vertically-integrated firm' or an 'intermediary or matching service' will be relevant to this assessment, as described by Andrew Stewart and Shae McCrystal.[24] This can be illustrated by applying the multi-factor test to the three exemplar on-demand platforms.

C *Uber, Deliveroo and Airtasker as Exemplars of the On-Demand Workforce*

1 *Uber*

According to its Australian terms and conditions, Uber BV and Portier Pacific Pty Ltd ('Uber') enter a contract with individuals (customers) by providing 'a technology platform' (ie, an app or website) that enables those customers to 'arrange and schedule' transportation or delivery services from 'independent third party providers' and 'purchase' or 'facilitate payments' for those services from those third party providers. The customer, according to these terms and conditions, enters 'a separate agreement' with the third party provider. These third party providers are 'independent third party contractors who are not employed by Uber'.[25] Accepting these terms at face value, the driver is not working for Uber, either as an employee or

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20 *Hollis* (n 16) 44 [55] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation [No 3]* (2011) 214 FCR 82, 125 [218] (Bromberg J) ('*On Call Interpreters*') citing *Commissioner of Taxation v Barrett* (1973) 129 CLR 395, 407 (Stephen J).

21 *Hollis* (n 16) 42 [50] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

22 For a useful summary of the various indicia which can be relevant to the test, see Louise Floyd et al, *Employment, Labour and Industrial Law in Australia* (Cambridge University Press, 2018) 13–17 [1.15.45].

23 *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579, [14]–[17] (Commissioner Wilson) ('*Pallage*').

24 Andrew Stewart and Shae McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (2019) 32(1) *Australian Journal of Labour Law* 4, 10.

25 'Terms and Conditions', *Uber* (Web Page, 13 May 2021) <https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=australia&lang=en-au>.

as an independent contractor. Rather, Uber is supplying a service to the driver. This characterisation has repeatedly been rejected, most notably by the European Court of Justice in competition law rulings,[26] and also the Supreme Court of the United Kingdom in *Uber BV v Aslam*, where Uber was found to be running a transportation business.[27]

In the recent Australian decisions of *Kaseris v Rasier Pacific VOF*[28] and *Pallage v Rasier Pacific Pty Ltd*,[29] the Fair Work Commission held that the lack of exclusivity and control meant that Uber drivers providing rideshare services were not employees.[30]

In contrast to Uber's ridesharing service, Uber's food delivery service, Uber Eats, has a different model. Although originally Uber's food delivery service used the same type of contracts as Uber's ridesharing services, after settling the appeal from the decision in *Gupta v Portier Pacific Pty Ltd*,[31] it switched to a contract in which Uber provides 'delivery services' but subcontracts such services to a 'delivery person' who is not an employee of Uber and may delegate those services to another person.[32] In this way, the drivers/riders are working for Uber's food delivery service as independent contractors, in a model similar to that used by Deliveroo.

2 *Deliveroo*

Deliveroo's Australian terms and conditions indicate that its service aims 'to link' customers to restaurants that it partners with and 'allow' customers 'to order [i]tems for delivery'. The terms and conditions state: 'Deliveroo acts as an agent on behalf of that … [r]estaurant to conclude' the customer's order from Deliveroo's

26 *Asociación Profesional Élite Taxi v Uber Systems Spain SL* (Court of Justice of the European Union, C-434/15, ECLI:EU:C:2017:981, 20 December 2017); *Uber France SAS v Bensalem* (Court of Justice of the European Union, C-320/16, ECLI:EU:C:2018:221, 10 April 2018).

27 *Aslam* (n 3).

28 [2017] FWC 6610.

29 *Pallage* (n 23).

30 Stewart and McCrystal (n 24) 11. The authors relevantly point out that in these cases neither Uber driver was legally represented, nor did they challenge evidence given by Uber as to its business arrangements. Note that a recent application in the Federal Court on behalf of four Uber rideshare drivers and the Rideshare Driver Network asserting non-compliance with record-keeping provisions of the *Fair Work Act* (n 13) will deal with their employment status: Ann Patty, 'Uber Drivers Launch Test Case in Federal Court', *The Sydney Morning Herald* (online, 2 August 2021) <https://www.smh.com.au/business/workplace/uber-drivers-launch-test-case-in-federal-court-20210801-p58es8.html>.

31 *Gupta* (n 2).

32 'Portier Pacific Pty Ltd: Terms and Conditions for Uber Delivery: Australia', *Uber* (Web Page) <https://www.uber.com/legal/sk/document/?country=australia&lang=en-au&name=general-terms-of-use> ('Terms and Conditions for Uber Delivery').

application or website 'and to manage' the customer's 'experience throughout the order process'.[33] The terms and conditions state that once the order is placed, Deliveroo or the restaurant will deliver the items to the customer.[34] In this last respect, Deliveroo's terms differ from Uber's in that the latter's terms specifically state that the customer enters a separate agreement with the driver and further that such drivers are 'independent third party contractors who are not employed by Uber'.[35] Nevertheless, in its submission to the Senate Inquiry on the Future of Work and Workers, Deliveroo classified its riders who deliver food as self-employed independent contractors.[36]

Deliveroo's classification of its rider partners as independent contractors is not determinative of the issue of employment status under the multi-factor test. Accordingly, in *Franco v Deliveroo Australia Pty Ltd* ('*Franco*'),[37] Commissioner Cambridge of the Fair Work Commission applied the multi-factor test to find that a Deliveroo rider was an employee for the purposes of an unfair dismissal application. In this case, consideration of the totality of the parties' relationship led to the conclusion that Mr Franco was not carrying on a trade or business of his own, but was working in Deliveroo's business, with significance placed on the level of control which Deliveroo could exercise over him.[38] This conforms with the earlier decision in *Klooger v Foodora Australia Pty Ltd*,[39] where the Fair Work Commission held that a Foodora bike rider was an employee after applying the multi-factor test, but citing as the principal reason the fact that the rider was not engaged in a business of his own.[40]

3 *Airtasker*

Airtasker's terms and conditions state that it 'operates an online platform allowing Users to connect through the Airtasker Platform with other Users who provide Services'.[41] Its services are providing the Airtasker Platform, namely, its application or website, to Users, who include both the 'Poster', the person who uses the platform

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33 'Legal', *Deliveroo* (Web Page) <https://deliveroo.com.au/legal>.

34 Ibid.

35 Terms and conditions for Uber Delivery (n 32).

36 Deliveroo Australia Pty Ltd, Submission No 103 to Senate Select Committee on the Future of Work and Workers, Parliament of Australia, *Inquiry into the Future of Work and Workers* (2018) 3.

37 *Franco* (n 1).

38 Ibid [139]. This decision was appealed to the Full Bench of the Fair Work Commission, but the tribunal reserved its determination pending the outcome of appeals to the High Court from the decisions of the Full Court of the Federal Court in *Jamsek v ZG Operations Pty Ltd* (2020) 279 FCR 114 and *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631: see *Deliveroo Australia Pty Ltd v Franco* [2021] FWCFB 5015, [1].

39 (2018) 283 IR 168.

40 Ibid 187 [102] (Commissioner Cambridge).

41 'Terms and Conditions', *Airtasker* (Web Page, September 2021) <https://www.airtasker.com/terms/>.

to search for particular 'Services' to be performed, ie the 'Posted Task', and the 'Tasker', the person who provides the Services to the Poster by making an offer in response to the Posted Task. If the Poster accepts an offer, the terms and conditions state that a 'Task Contract is created between the Tasker and the Poster' and the Poster must pay the Agreed Price into a Payment Account, an account operated by an entity appointed by Airtasker. Airtasker indicates that the Tasker is an independent contractor engaged by the Poster.[42]

Given Airtasker's position that it does not have a work relationship with the Tasker (either as employer-employee or principal-independent contractor) and the wide variety of circumstances in which tasks will arise, it is difficult to apply the multi-factor test meaningfully. In the case of a straightforward situation by which a Poster engages a Tasker to perform a task posted on the Airtasker platform, it is unlikely that the indicia of control, exclusivity, mode of remuneration, or right to sub-contract would be met.[43] Therefore, the Tasker would likely not be considered an employee. It may be that the Tasker, on the other hand, could be considered an employee of the Poster on the basis of these indicia.

On the basis of the above, it can be seen that it is difficult to be certain as to the circumstances in which an on-demand worker will be considered an employee under the common law test. Ultimately, the question will turn on the particular facts before the court.

III Legal Status of On-Demand Workers under Australian Work Health and Safety Legislation

There has been significant recent attention placed on the workplace safety of on-demand workers, particularly ridesharing drivers and food delivery riders, both in government inquiries and the media.[44] This attention has demonstrated that there is a lack of clarity around workplace safety in this space arising from the fact that

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42 'How Do I Get a Payment Invoice?', *Airtasker* (Web Page, 2018) <https://support.airtasker.com/hc/en-au/articles/217384148-How-do-I-get-a-payment-invoice-?utm_source=googleads&utm_medium=cpc&utm_campaign=AU_--&utm_content=&utm_term=&gclid=Cj0KCQiA2ZCOBhDiARIsAMRfv9LjTW-ytrBi8WuBjNdwpG73LanplmIsCrUdOiV2OBBeXwZ8CfwuTqIaArBzEALw_wcB>.

43 See Pt IIB above and the references cited therein.

44 See Industrial Relations Victoria, *On-Demand Workforce* (n 6); Senate Select Committee on Job Security, Parliament of Australia, *First Interim Report: On-Demand Platform Work in Australia* (Report, June 2021); Michael Rawling and Joellen Riley Munton, 'Tough Gig: Urgent Regulation of On-Demand Work Economy Needed', *The Sydney Morning Herald* (online, 19 March 2021) <https://www.smh.com.au/business/workplace/tough-gig-urgent-regulation-of-on-demand-work-economy-needed-20210316-p57b6j.html>; Joel Harward, 'Danger for Delivery: Cyclists Put Their Lives at Risk for Your Convenience', *The Age* (online, 30 November 2020) <https://www.theage.com.au/national/victoria/danger-for-delivery-cyclists-put-their-lives-at-risk-for-your-convenience-20201129-p56iuv.html>.

the legal status of on-demand workers is not expressly addressed in Australian WHS legislation. This Part outlines how these legal frameworks apply to determine the rights of, and duties owed to, on-demand workers.

In Australia there has largely been a harmonisation of WHS laws, commencing in 2011. This harmonisation has led to a convergence of coverage in most jurisdictions. Seven of the nine Australian jurisdictions have implemented the Model WHS laws, which comprise the model Work Health and Safety Act ('Model WHS Act'), the model Work Health and Safety Regulations, and the model Codes of Practice.[45] The Commonwealth, Australian Capital Territory, New South Wales, Northern Territory and Queensland implemented the Model WHS laws on 1 January 2012;[46] South Australia and Tasmania implemented the laws on 1 January 2013.[47] Western Australia has recently passed the *Work Health and Safety Act 2020* (WA), which is very similar to the Model WHS Act and is substantially identical in terms of the provisions related to the discussion below. Although the new Act is not yet in force, it will come into effect when the regulations are finalised.[48] On this basis, this article will consider the Western Australian position as in line with the Model WHS Act.

This leaves Victoria as the only jurisdiction which remains an outlier in its regulation of WHS matters. In this respect, this article will identify the critical areas in which the differences between the Model WHS Act and the Victorian law impact on duties owed to on-demand workers. The relevant Victorian statute is the *Occupational Health and Safety Act 2004* (Vic) ('*Vic OHS Act*').

In considering the discussion below in relation to WHS duties, one important feature of this regulatory scheme must be borne in mind — that it is one in which statutory breaches give rise to criminal prosecutions by a regulator. This means that the criminal burden of proof (beyond reasonable doubt) must be met in respect of each element of a breach.

A *Duties under the Model WHS Act*

The Model WHS Act imposes a 'primary duty of care' for safety in the workplace on a 'person conducting a business or undertaking' ('PCBU').[49] In this context,

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45 'Law and Regulation', *Safe Work Australia* (Web Page, 11 February 2021) <https://www.safeworkaustralia.gov.au/law-and-regulation>.

46 *Work Health and Safety Act 2011* (Cth); *Work Health and Safety Act 2011* (ACT); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Work Health and Safety Act 2011* (Qld). For the purposes of this article, the *Work Health and Safety Act 2011* (Cth) ('*WHS Act*') will be cited wherever the Model Work Health and Safety Act (WHS Act) is referenced.

47 *Work Health and Safety Act 2012* (SA); *Work Health and Safety Act 2012* (Tas).

48 'Work Health and Safety Act 2020 Receives Assent', *Government of Western Australia, Department of Mines, Industry Regulation and Safety* (Web Page, 30 August 2021) <https://www.commerce.wa.gov.au/worksafe/november-2020-work-health-and-safety-act-2020-receives-assent>.

49 *WHS Act* (n 46) ss 5, 19.

the word 'primary' is intended to indicate the importance of the PCBU as the duty holder, rather than the employer, the latter term not defined in the Model WHS Act. The meaning of PCBU is specified in s 5 as a person who conducts a business or undertaking alone or with others, whether for profit or not, and includes each partner in a partnership and an incorporated association. Section 5 also specifies certain persons who will not be a PCBU, such as a worker or a volunteer. It also provides for categories of PCBUs to be specified by the *Work Health and Safety Regulations 2011* (Cth).

The PCBU owes a duty to two groups of people under s 19 of the Model WHS Act, namely, 'workers' under s 19(1), and 'other persons' under s 19(2). In addition, a self-employed person has a duty under s 19(5) expressed in the same terms as s 19(1), namely, to 'ensure, so far as is reasonably practicable, his or her own health and safety while at work'. There are also duties imposed on workers in s 28 and 'other persons' under s 29, although these are not expressed as assurances but rather as the taking of reasonable steps.

The duty owed by a PCBU to 'workers' under s 19(1) is to 'ensure, so far as is reasonably practicable, the health and safety' of relevant workers at relevant times. A further duty is owed by a PCBU to 'other persons' under s 19(2) to 'ensure, so far as is reasonably practicable, that the health and safety of other persons *is not put at risk* from work carried out as part of the conduct of the business or undertaking'.[50] Note that the requirement here is to avoid risk to health and safety, which is a negative (rather than positive obligation), [51] and may be narrower than the general assurance of health and safety in s 19(1).

In what circumstances will the duty of a PCBU to a 'worker' under s 19(1) be enlivened? Section 19(1) requires that: first, the on-demand worker is a 'worker' within the meaning of the Model WHS Act; second, the worker has a specific connection to the PCBU; and third, at the relevant time, the on-demand worker was 'at work in the business or undertaking'. It is necessary to consider each of these matters in detail.

In respect of the first matter, a 'worker' is broadly defined by the Model WHS Act in s 7 as a person who

> carries out work in any capacity for a … [PCBU], including work as:
>
> (a) an employee; or
>
> (b) a contractor or subcontractor; or
>
> (c) an employee of a contractor or subcontractor; or
>
> (d) an employee of a labour hire company who has been assigned to work in the person's business or undertaking …

50 Ibid s 19(2) (emphasis added).

51 Richard Johnstone, 'Regulating Work Health and Safety in Multilateral Business Arrangements' (2019) 32(1) *Australian Journal of Labour Law* 41, 50.

According to the Explanatory Memorandum, Work Health and Safety Bill 2011 (Cth) ('Explanatory Memorandum'), the breadth of the definition is deliberate and was intended to 'recognise the changing nature of work relationships and to ensure health and safety protection is extended to all types of workers'.[52] In the context of the gig economy, this broad definition obviates the need for an analysis of whether a worker is an independent contractor or employee when considering whether the platform owes a primary duty regarding workplace safety, since the duty will be owed whichever categorisation applies. It is also relevant to note that the definition of worker in s 7 is not tied to the particular PCBU said to owe them a duty under s 19(1); rather, the worker must work for *a* PCBU.[53] This means that a worker could be carrying out work either in the business or undertaking of the platform, or in their own PCBU (for example, as a self-employed person), or in the PCBU of the ultimate end user of their services, or a combination of these.[54] Given this, it is likely that most on-demand workers will fall within the definition of 'worker' in s 7.

The second matter requires the worker to have a connection to the PCBU. There are various ways that the connection can be demonstrated, as set out in ss 19(1)(a)–(b) as follows:

> (a) workers engaged, or caused to be engaged by the … [PCBU]; and
>
> (b) workers whose activities in carrying out work are influenced or directed by the … [PCBU] …

Richard Johnstone has undertaken significant analysis of these requirements, including in the context of multilateral business arrangements.[55] Johnstone notes that these requirements do not depend on a contractual relationship between the PCBU and the worker, and that it is possible that the breadth of ways in which a person is 'caused to be engaged' could include circumstances where a platform provider brings together a worker and the end user.[56]

In terms of the third matter — which requires the worker to be 'at work in the undertaking or business' — the expression 'at work in the undertaking or business' is not defined, and nor are the terms 'work' or 'at work'.[57] In the non-traditional workplace of on-demand workers, this uncertainty may be further exacerbated as a worker could be undertaking work for multiple platforms at one time (for example, where a rider has two orders in their delivery bag from two different platform providers).

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52 Explanatory Memorandum, Work Health and Safety Bill 2011 (Cth) 7 [32] ('Explanatory Memorandum'). See Johnstone (n 51) 44.

53 Johnstone (n 51) 46.

54 Ibid.

55 Ibid 46–7.

56 Ibid 47.

57 Johnstone notes that the term 'conduct of the undertaking' has been given a broad interpretation in previous versions of Australian OHS laws: ibid 48.

In such a case, the application of this duty to on-demand workers could be particularly unclear. As described below, the Model WHS Act is designed so that multiple parties may have duties for health and safety at the same time; however, this situation presents unique challenges. In a usual multi-duty holder situation (for example, a labour hire arrangement under which both the host and the labour hire company will have duties) the parties are aware of each other's obligations. In the present example, platform operators may not be aware that a worker to whom they owe duties is also undertaking work for another *simultaneously*. Where the worker is working for two different businesses *in sequence*, this issue will be less difficult to address.

While the primary duty is owed by a PCBU to workers (however engaged), the Model WHS Act makes clear in s 15 that a person can have more than one duty and in s 16 that more than one person can concurrently have a duty for safety in the workplace. It further provides in s 16(2) that, where this occurs, all duty holders must comply with that duty to the standard required by the Act — that is, a duty holder is not relieved of their duty just because another party also holds that same duty. In the context of the on-demand workforce, this overlap of duties can occur in several ways. For example, the platform may have duties to workers as a PCBU under s 19(1), provided the requirements of that section are met, and the worker will have duties in respect of themselves under s 28 (and possibly under s 19(5) as a self-employed independent contractor). Further, where the worker is employed or engaged by an intermediary business, the duty holders would be the platform (as a PCBU), the intermediary (also as a PCBU), and the worker.

If, in relation to a particular matter, there is more than one duty holder then the duty is imposed on each person, and pursuant to s 16(3), each person must 'discharge' their duty to the extent to which they have 'the capacity to influence and control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity'. In light of this provision, the question of influence and control is relevant to the *discharge* of the platform's duty (as a PCBU), but not to whether the platform owes a duty to the worker in the first instance. This is confirmed as the intention of the provision in the Explanatory Memorandum, which explains that 'where a duty holder has a very limited capacity, that factor will assist in determining what is "reasonably practicable" for them in complying with their duty of care'.[58] This position has also been taken in prosecutions in NSW under the Model WHS Act, such as *SafeWork NSW v Assign Blue Pty Ltd*.[59] Further, the Explanatory Memorandum indicates that 'the capacity to control' in s 16(3) means both 'actual' or 'practical' control; in addition, 'the capacity to influence, connotes more than just mere legal capacity and extends to the practical effect the person can have on the circumstances'.[60]

58 Explanatory Memorandum (n 52) 15 [9].

59 [2020] NSWDC 756, [3] (Scotting DCJ). See also *Poletti Corporation Pty Ltd v SafeWork NSW* (2020) 300 IR 167.

60 Explanatory Memorandum (n 52) 15 [9].

B *Practical Application of Model WHS Act to On-Demand Workers*

Given the broad meaning of PCBU under s 5 of the Model WHS Act, the online platforms Uber, Deliveroo and Airtasker are likely within the ambit of that term. Accordingly, it is likely that these online platforms owe duties under ss 19(1)–(3). Further, given that the Model WHS Act does not distinguish employees from independent contractors in its definition of 'worker' in s 7, the WHS duties owed by platforms to their on-demand workers will not be impacted by the classification of the engagement as either employment or independent contracting. The duties owed by the platform, as a PCBU, to its employees and to independent contractors are identical. However, where a platform says that it has no employment or independent contracting relationship with the worker, the duties of the parties are difficult to discern.

1 *Uber*

As indicated above, it is necessary to consider Uber's ridesharing and food delivery services as distinct.

In both models, Uber would meet the definition of a PCBU. The key issue is whether, in its ridesharing service, a driver is considered a worker. As noted above, a PCBU owes a primary duty for safety to its workers under s 19(1) to ensure, so far as is reasonably practicable, their health and safety while they are at work in the business or undertaking. In this regard, in respect of its ridesharing service, Uber says it provides technology services to its drivers and customers. If this is accepted, it is possible that Uber drivers would not be workers to whom Uber owes duties for want of meeting the second or third matters outlined above — that is, they are not workers with a sufficient connection to Uber, nor are they 'at work' in Uber's business or undertaking. Rather, Uber is providing the driver with a service.

Given that Uber's application causes the driver to be matched with the end user, it can be argued that Uber causes the driver to be engaged by the end user, thus satisfying the connection requirement of s 19(1)(a). The question then arises as to whether an Uber driver is 'at work' in Uber's business or undertaking. In the authors' view, this term should be broadly construed in accordance with previous case law as noted by Johnstone.[61] Given that the business of Uber is to charge for a ridesharing service, the conduct of a driver providing driving services to an end user should be seen as work within Uber's business or undertaking.

Even if Uber does not owe duties to drivers as workers under s 19(1), it is likely that s 19(2) would extend protection to drivers as 'other persons'. In this regard, a driver is allocated work through Uber's platform which would likely bring that driver into the scope of s 19(2) even though they are not working in Uber's business or undertaking.[62]

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61 Johnstone (n 51) 48.

62 Ibid 50.

Uber's food delivery service, as noted above, explicitly engages its riders/drivers as independent contractors. Such an arrangement would mean that the riders would be 'engaged by' Uber and working within Uber's business or undertaking such that Uber would owe its riders duties under s 19(1).

Given the nature of the way in which drivers and riders interact with the Uber platform, there may, in certain circumstances, be questions about when a driver is 'at work'. As noted above, the duty is limited to workers while 'at work in the business or undertaking', and this undefined expression may be uncertain in its application, particularly to on-demand workers.

As drivers and riders also have a duty for their own safety, Uber is required to discharge its duty to 'the extent to which [Uber] has the capacity to influence and control the matter'.[63] This will be a factual question, and the control exercised by Uber will depend on a number of factors, including the matter in respect of which the safety breach is alleged.

2 *Deliveroo*

A similar analysis to that above regarding Uber's food delivery service applies to Deliveroo. Deliveroo would be a PCBU engaging it riders as workers and, therefore, would owe its drivers/riders (as workers) duties under s 19(1).

As with Uber's food delivery service, there is a strong possibility that the restaurant, cafe, or other food supplier for whom the rider is performing deliveries would also owe WHS duties to the Deliveroo rider/driver. In this regard, the rider/driver could possibly be considered a worker of the restaurant for the purposes of s 19(1) as a sub-contractor whose work is directed or influenced by the restaurant, and whose delivery duties are considered to occur while 'at work' in the restaurant's business or undertaking. At the very least, a s 19(2) duty would arise for the restaurant to ensure, so far as is reasonably practicable, that the rider/driver is not put at risk from work carried out as part of the restaurant's business or undertaking. Foreseeable examples of when this duty could be relevant are when the rider/driver is at the relevant restaurant waiting for food or in ensuring that food provided to the rider/driver is safely packed.

3 *Airtasker*

Airtasker is likely to be considered a PCBU under the broad meaning of that term in the Model WHS Act and, therefore, owe a duty under section 19(1) to 'workers'. Based on comments made by Airtasker's Chief Executive Officer to a recent Senate inquiry, Airtasker would likely argue that it is not responsible for the health and safety of Taskers as a PCBU.[64]

63 *WHS Act* (n 46) s 16(3).

64 Senate Select Committee on the Future of Work and Workers, Parliament of Australia, *Hope Is Not a Strategy: Our Shared Responsibility for the Future of Work and Workers* (Report, 19 September 2018) 80 [4.82]–[4.83].

The critical issue is whether the Taskers would be considered as workers with a sufficient connection to Airtasker, given Airtasker's position that it does not have either an employment or principal-contractor relationship with the Tasker. Despite this, s 7 of the Model WHS Act has a broad, inclusive definition of 'worker' and is not limited to workers of Airtasker but includes a worker engaged by any PCBU. Assuming that the Tasker is a 'worker' (either in their own PCBU or another PCBU, as discussed further below), the question is whether a Tasker is a worker who meets the connection requirement with Airtasker and is considered to be 'at work in … [Airtasker's] business or undertaking' within the meaning of s 19(1).

Airtasker may well argue successfully that it did not engage or cause the Tasker to be engaged, or influence or direct the work of the Tasker. In this regard, Airtasker could argue that the worker is engaged by the Poster for whom work is carried out, and that Airtasker merely facilitated that arrangement. To this end, Airtasker may well rely on a distinction being drawn between 'causing the worker to be engaged' and *arranging or facilitating* the performance of that work. A useful analogy drawn by Stewart and McCrystal could be relied upon, being that between Airtasker and a 'newspaper or website publishing classified advertisements'.[65] A critical issue here may be whether Airtasker recommends or actively connects the Poster and the Tasker, or whether the parties determine this themselves. This can be seen as distinct from Uber's drivers, who are matched by the platform.

In the event that Taskers are considered 'workers' who are owed duties by Airtasker, the extent of Airtasker's duty under s 19(1) is likely to be limited. As described above, s 16(3) limits a person's duties to the extent to which they have influence and control over the matter. For example, if the task is performed by the Tasker from their home office (such as graphic design work), Airtasker may be seen to have limited influence or control over that workplace. Similarly, if the task is performed by the Tasker at the Poster's home, office or another location, then Airtasker will also be limited in its ability to influence or control matters related to safety in that workplace. It may be that the ability Airtasker has to influence or control these spaces is limited to providing information about a safe workplace or responding to safety related complaints.

On the other hand, if the Tasker is not a worker owed duties by Airtasker under s 19(1), it is possible that Airtasker would owe that Tasker a duty of care within the conception of 'other persons' to which s 19(2) speaks. Again, this will only be the case if the Tasker is seen as being put at risk from work undertaken as part of the conduct of Airtasker's business or undertaking. If the view is adopted that the work undertaken as part of Airtasker's business is simply the facilitation of advertisements and processing of payments, the safety of the Tasker when on a task may not be sufficiently connected to Airtasker's business or undertaking.

It is also relevant to consider the potential duties of the Poster in engaging with the Airtasker platform. It is possible that the Poster could fall within the definition of a

65 Stewart and McCrystal (n 24) 10.

PCBU under the Model WHS Act and, therefore, owe duties to the Tasker (as a 'worker' or 'other person'). This will require close consideration of the characteristics of the Poster, and also a determination of whether the Tasker is a 'worker'. For instance, where the Poster is a business, it will itself be a PCBU owing duties generally under the Model WHS Act and consideration must be given to whether those duties extend to the Tasker as a 'worker'. In this regard, the Tasker could be a worker because the nature of the relationship between the Poster and the Tasker (including features such as control, regularity of work and the degree of supervision) transform a bare contractual relationship into a work relationship such that the worker is an employee or contractor of the Poster as a PCBU. Alternatively, the Tasker may already work in their own PCBU (perhaps as a self-employed person or through another business). Further, for the Tasker to be a 'worker' who is owed duties by the Poster, consideration would need to be given to the nature of the task. If the task is one being undertaken in the Poster's business or undertaking, s 19(1) duties will be enlivened.

Where a Poster is an individual consumer or householder, it is very unlikely that they will be considered a PCBU given the definition of PCBU in s 5, although this is not entirely clear.[66] Where the Poster is an individual and posting a task of a household or domestic nature, Safe Work Australia's Interpretive Guideline suggests that in such situations, an engagement of a Tasker to provide one-off household or domestic work (such as putting together furniture or the conduct of home improvements by a tradesperson) is not intended to make the Poster a PCBU.[67]

C *Duties under the Vic OHS Act*

As noted above, Victoria has not implemented the Model WHS Act, and the legislation in force is the *Vic OHS Act*. Under the *Vic OHS Act,* the principal duty-holder in respect of maintaining a safe workplace is not the PCBU, but rather the 'employer', defined in s 5(1) as 'a person who employs one or more other persons under contracts of employment or contracts of training'. The employer owes duties to two main groups: employees and independent contractors under s 21; and 'other persons' under s 23.[68]

1 *Duty of Employer to Employees and Independent Contractors*

Section 21(1) relevantly provides that an 'employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment

66 Johnstone (n 51) 45–6.

67 'Interpretive Guideline: Model Work Health and Safety Act', *Safe Work Australia* (Web Page, 2021) 4 <https://www.safeworkaustralia.gov.au/system/files/documents/1702/interpretive_guideline_-_pcbu.pdf>.

68 This article will not deal with s 26(1) of the *Occupational Health and Safety Act 2004* (Vic) ('*Vic OHS Act*') which requires persons who have 'the management or control of a workplace' to 'ensure so far as is reasonably practicable that the workplace and the means of entering and leaving it are safe and without risks to health', as such a duty is not explicitly directed to workers or contractors and, therefore, does not raise the same issues as the other provisions dealt with here.

that is safe and without risks to health'. In a similar structure to s 19(3) of the Model WHS Act, s 21(2) of the *Vic OHS Act* then goes on to provide a non-exhaustive list of requirements which, if not met by the employer, would result in the employer being in breach of this general duty. Section 5(1) of the *Vic OHS Act* defines an 'employee' as 'a person employed under a contract of employment or contract of training'. It therefore accords with the definition of 'employer' in that Act.

Section 21(3) of the *Vic OHS Act* explicitly extends the employer's duty under ss 21(1) and (2) 'to an independent contractor engaged by the employer, and any employees of the independent contractor'. While the contractual terms of the ridesharing service provided by Uber and the services provided by Airtasker would arguably exclude any such 'engagement', Uber's food delivery service and that of Deliveroo would most likely include this kind of engagement. That duty, whether under ss 21(1) or (2), is attenuated or limited in its application to independent contractors and employees of independent contractors by s 21(3)(b) to 'matters over which the employer has control or would have control if not for any agreement purporting to limit or remove that control'.

While the term 'control' is not defined in the legislation, it has been the subject of judicial consideration in Victoria and other jurisdictions. Analysis of relevant case law illustrates that control can be a contentious issue. In *Baiada Poultry Pty Ltd v The Queen* ('*Baiada Poultry*'),[69] the Victorian Court of Appeal considered that the meaning of control for the purposes of s 21(3) turns on whether the employer 'has the right to control',[70] not whether that right to control was exercised. The exercise of the right goes to what was reasonably practicable in the circumstances, and is a question of fact and degree. Further, it was noted that in the case of independent contractors, such control may arise but will vary in its extent depending on the circumstances.[71] Therefore, the issue of control is one of determining the legal rights of the employer in respect of the worker, and the extent of any such rights. In *Baiada Poultry*, Nettle JA referenced the contract between the parties in making this decision,[72] and other indicators of a right of the employer to direct how the contractor performs their work.[73] It is conceivable that there would be matters relevant to a safe working environment over which an on-demand platform provider may be found not to have control, such that they do not owe the resultant safety duties to their independent contractors.

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69 (2011) 203 IR 396 ('*Baiada Poultry*'). Note that the appeal to the High Court from this decision, *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92, concerned the unrelated issue of the prosecution having to prove its case beyond reasonable doubt, a failure of which led to a miscarriage of justice.

70 *Baiada Poultry* (n 69) 401 [19] (Nettle JA).

71 Ibid.

72 Ibid 401–2 [20].

73 *Reilly v Devcon Australia Pty Ltd* (2008) 36 WAR 492; *Stratton v Van Driel Ltd* (1998) 87 IR 151, 157 (Byrne J).

2 *Duty of Employer to Other Persons*

In addition to the duty to employees, an employer owes a duty to 'other persons' under s 23 of the *Vic OHS Act* to 'ensure, so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer'. The Supreme Court of Victoria in *Muscat v Magistrates' Court of Victoria*[74] confirmed that this provision applies to non-employees, including independent contractors. Thus, Richards J confirmed that a prosecutor can elect to pursue charges either under ss 21 or 23[75].

It is noteworthy that the duty under s 23 differs in several respects from the duties under ss 21(1) and (2) in that: first, its scope extends to assurance against 'risks to … health and safety', while the s 21 duties are expressed positively and more broadly to 'provide and maintain … a working environment that is safe and without risks to health';[76] and second, it is not attenuated in the same way as the s 21 duties to 'matters over which the employer had or would have control'.[77]

D *Practical Application of Vic OHS Act to On-Demand Workers*

As indicated above, ss 21(1) and (2) of the *Vic OHS Act* create duties of health and safety that are owed by online platform providers regardless of whether the on-demand worker is considered an employee or independent contractor. Whether that on-demand worker is categorised as an employee or independent contractor, however, will affect the *extent* of the duties owed by the platform provider. If the worker is considered an independent contractor, the duty owed will be less extensive and include only those matters over which the platform provider has 'control' within the meaning of s 21(3).

As with the Model WHS Act analysed above, the obligations owed by the platform are less clear where the online platform's position is that it has no working relationship with the on-demand worker.

1 *Uber*

In the event that an Uber driver providing rideshare services is not considered an employee or an independent contractor, no duty would be owed by Uber under s 21 of the *Vic OHS Act*. Section 23 of the *Vic OHS Act* could be seen to apply to the drivers as 'persons other than employees of the employer' for similar reasons to s 19(2) of the Model WHS Act applying to 'other persons', being that 'conduct of the undertaking of [Uber]'[78] should be seen to encompass the undertaking of ride-sharing services.

74 (2018) 59 VR 570.

75 Ibid 582–3 [52]–[54].

76 *Vic OHS Act* (n 68) s 21(1).

77 Ibid s 21(3)(b).

78 Ibid s 23(1).

As indicated above, Uber's duty in respect of health and safety under ss 21(1) and (2) of the *Vic OHS Act* will be attenuated in the case of Uber food delivery drivers, if they are considered independent contractors consistent with Uber's understanding of its contractual terms, to those matters over which Uber has control per s 21(3). Therefore, where Uber is found not to control a matter relevant to a driver's safety, there can be no duty owed to the driver in respect of that matter.

2 *Deliveroo*

Given the similarity in working arrangements to Uber's food delivery service, a Deliveroo driver/rider will similarly be owed a duty under ss 21(1) and (2) of the *Vic OHS Act*, although this will be limited if the driver is classified as an independent contractor. In the event that the driver/rider is an independent contractor, duties will also be owed under s 23(1).

Given the recent finding in *Franco* that a Deliveroo worker was an employee, such a finding would, in relation to health and safety, broaden Deliveroo's duties. In this regard, if workers are employees, and not independent contractors, duties would be owed in respect of all matters, not just matters over which Deliveroo has control.

3 *Airtasker*

As the description of Airtasker's business model at the beginning of this article suggests, Airtasker's position is that it forms no contract for the performance of work with either the Tasker or the Poster; rather, those two parties enter into their own contract. If such a position is accepted, the Tasker will be neither an employee nor an independent contractor of Airtasker captured by ss 21(1), (2) or (3). Consequently, s 23(1) would operate to impose a duty on Airtasker to ensure, so far as is reasonably practicable, that other persons (ie, Taskers) are not exposed to risks to health and safety arising from Airtasker's business. Critical issues in this regard are whether the risks to a Tasker when they are performing work arise 'from the conduct of the undertaking of [Airtasker]' and, if so, what will be considered to be 'reasonably practicable' for Airtasker. This will be a question of fact contingent on the particular circumstances.

As discussed above in relation to the Model WHS Act, the Poster may owe a duty to the Tasker. This responsibility for safety being imposed on Posters is a matter which has been identified by Airtasker directly.[79]

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79 Timothy Fung, Chief Executive Officer of Airtasker Pty Ltd, stated:

> [I]f the environment provided for that person to work in was unsafe, then a lot of the responsibility would lie with the person who procured the work. In relation to that, there are different levels of insurance that are provided, such as home and contents insurance. Some of them provide cover for some of these trades; some of them don't provide cover for these kinds of trades.

Evidence to Senate Select Committee on the Future of Work and Workers, Parliament of Australia, Canberra, 4 May 2018, 4 (Timothy Fung).

If, for example, the Poster is considered an employer under the *Vic OHS Act*, and has engaged the Tasker as an employee or independent contractor, then duties will be owed under ss 21(1) and (2). Again, these will be limited to matters over which the Poster has control if the Tasker is an independent contractor. Control would depend on contractual matters and also be informed by other matters such as the nature of work and where it is being undertaken. For example, if the task is being performed in the employer's (Poster's) business premises, then the extent of the Poster's control may be very high, such that the duties owed under s 21 are significant and more akin to those owed by an employer to employees. On the other hand, if the work is being performed externally, ie, remotely by the Tasker, the duties owed by the Poster may be minimal.

E *Summary of WHS as it Relates to On-Demand Workers*

The above analysis indicates that the uncertain employment status and variable contractual arrangements of on-demand workers mean that their protections under the Model WHS Act and *Vic OHS Act* are unclear. While it is clear that some online platform providers will owe on-demand workers duties in respect of health and safety, in some business models the existence of health and safety duties are far from certain. Further, where a duty does arise, the *extent* of that duty is less clear as it varies between duties owed to employees, independent contractors, and other persons. In addition, there are instances where third parties accessing services through an online platform may owe duties for safety which may not be evident to those involved in a transaction.

IV The Application of Australian Workers' Compensation Laws to On-Demand Workers

There are 12 main workers' compensation systems in Australia. Unlike the WHS legislation, there is no harmonisation of workers' compensation statutes. Each of the eight Australian states and territories has developed its own workers' compensation scheme and there are also four Commonwealth schemes.[80] Like the Australian WHS legislation, there are no specific provisions in the workers' compensation legislation that deal with on-demand workers. The coverage of an on-demand worker for injuries will depend on whether their injury has a connection to their employment and this, in turn, depends in part on whether they are considered to be a 'worker' within the meaning of the relevant statute.

80 For the four Commonwealth schemes, see: *Safety Rehabilitation Compensation Act 1988* (Cth) ('*SRC Act*') (which applies to Commonwealth government employees and employees of licensed self-insurers); *Seafarers Rehabilitation and Compensation Act 1992* (Cth) ('*Seacare Act*') (which applies to certain seafarers); *Safety, Rehabilitation and Compensation (Defence-Related Claims) Act 1988* (Cth) ('*DRC Act*') (which applies to Australian Defence Force personnel who served prior to 1 July 2004); *Military Rehabilitation and Compensation Act 2004* (Cth) ('*MRC Act*') (which applies to military personnel who served on or after 1 July 2004).

The Australian states and territories do not have a uniform definition of the term 'worker'. There is, however, a degree of consensus that a person will be considered to be a 'worker' if they meet one or more of the following types of definition of a worker:

- That equivalent to an employee at common law, namely, a person engaged under a 'contract of employment', also known as a 'contract of service'.[81] Most of the definitions of 'worker' in the workers' compensation schemes accord with this approach, which we will call the 'primary' definition.

- A contractor engaged in circumstances that are akin to an employment relationship such that the legislation 'deems' them to be a worker. We refer to this as the 'contractor deeming provision'.

- Engaged in activities of a particular nature such that the legislation 'deems' them to be a worker. Relevant examples include drivers carrying passengers for reward (ie, taxi drivers), drivers providing transport of the carriage of goods for reward, and labour hire workers. We refer to this as the 'specified activity deeming provision'.

The Commonwealth workers' compensation schemes do not have contractor deeming provisions or specified activity deeming provisions, and therefore we do not deal with them in the following discussion.[82]

A *Application of Primary Definition to On-Demand Workers*

The primary definition of 'worker' in all Australian jurisdictions makes reference to either a contract of service[83] or to a contract of employment,[84] and so effectively reproduce the common law test for an employment contract referred to above. As also indicated above, the practical application of that common law definition to

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81 See above Part II(B).

82 See: *SRC Act* (n 80) s 6, which confines coverage to 'employees'; *Seacare Act* (n 80) s 26, which also confines coverage to 'employees'; *DRC Act* (n 80) s 4AA, which confines coverage to any 'employee'; *MRC Act* (n 80) s 7A, which confines coverage to 'members'.

83 *Workers' Compensation Act 1951* (ACT) s 8(1)(a) ('*ACT WC Act*'); *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 4(1) (definition of 'worker') ('*NSW WIMWC Act*'); *Return to Work Act 2014* (SA) s 4(1)(a) (definition of 'worker' para (a)) ('*SA RTW Act*'); *Workers Rehabilitation and Compensation Act 1988* (Tas) s 3(1) (definition of 'worker' para (a)) ('*Tas WRC Act*'); *Workers' Compensation and Injury Management Act 1981* (WA) s 5(1) (definition of 'worker') ('*WA WCIM Act*').

84 See: *Return to Work Act 1986* (NT) s 3B ('*NT RTW Act*'); *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 11(1) ('*Qld WCR Act*'), which require both a 'contract' and that the person is an employee for tax purposes. See also *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 3 (definition of 'worker' para (a)) ('*Vic WIRC Act*'), which requires both a 'contract of employment … or otherwise' and that the worker performs work or agrees to perform work at the direction of the employer.

on-demand workers is uncertain and will vary depending on the particular factual scenario.[85]

B *Application of Contractor Deeming Provision to On-Demand Workers*

The contractor deeming provision is designed to look beyond the outward form of the contract between a principal and a contractor to determine whether the substance of that relationship is in fact akin to that of an employer and employee. The contractor deeming provisions in all Australian state and territory workers' compensation statutes have one feature in common, namely, the requirement that the contractor is not working in their own independent trade or business.[86]

There are additional requirements that feature in several states' provisions, namely that:

- the contractor's performance of the work is 'not incidental to' the work normally performed by the contractor (NSW, Qld, Tas);[87]
- the contractor does not delegate work to another person, such as a subcontractor (NSW, Qld, Vic);[88]
- the contractor's provision of the services is 'not ancillary to' the provision of goods or materials by that contractor (Vic);[89]
- the contractor is working for the principal most of the time and deriving most of their income from that principal (Vic);[90] and
- the contractor is self-employed (SA).[91]

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85 See a recent application to the County Court of Victoria by an Uber Eats driver whose application for compensation under the *Vic WIRC Act* (n 84) was rejected on the basis that he was not a 'worker' within the meaning of that Act, but rather a self-employed contractor: Tom Cowie, 'Uber Eats Faces Test Case over Driver's Ruptured ACL During Delivery', *The Age* (online, 12 September 2021) <https://www.theage.com.au/national/victoria/uber-eats-faces-test-case-over-driver-s-ruptured-acl-during-delivery-20210909-p58q4q.html>.

86 *ACT WC Act* (n 83) s 8(1)(b); *NSW WIMC Act* (n 83) s 5, sch 1 cl 2; *NT RTW Act* (n 84) s 127(1); *Qld WCR Act* (n 84) s 11(2), sch 2 pt 1 s 3; *SA RTW Act* (n 83) s 4(1) (definition of 'worker' para (a)); *Return to Work Regulations 2015* (SA) ('*SA RTW Regs*') regs 5(1) (definition of 'building work' para (a)), ('definition of 'cleaning work' para (b)); *Tas WRC Act* (n 83) s 4B; *Vic WIRC Act* (n 84) s 3 ('definition of 'worker' para (b)), sch 1 cl 9; *WA WCIM Act* (n 83) s 5(1)(b).

87 *NSW WIMWC Act* (n 83) s 5, sch 1 cl 2; *Qld WCR Act* (n 84) s 11(2), sch 2 pt 1 s 3; *Tas WRC Act* (n 83) s 4B.

88 *NSW WIMWC Act* (n 83) s 5, sch 1 cl 2; *Qld WCR Act* (n 73) s 11(2), sch 2 pt 1 s 3; *Vic WIRC Act* (n 84) s 3 ('definition of 'worker' para (b)), sch 1 cl 9.

89 *Vic WIRC Act* (n 84) s 3 (definition of 'worker' para (b)), sch 1 cl 9.

90 Ibid.

91 *SA RTW Act* (n 83) s 4(1) (definition of 'contract of service' para (a)); *SA RTW Regs* (n 86) reg 5(1) (definition of 'building work' para (a)), ('definition of 'cleaning work' para (b)).

The requirement that the contractor not be working in their own independent trade or business has close connections to the common law test for employment. This is evident from an analysis of the Victorian provisions, arguably the most comprehensive of the contractor deeming provisions. Schedule 1 cl 9(1) of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ('*Vic WIRC Act*') lists a number of criteria, all of which must be satisfied for the contractor to be deemed a worker. Even if these are satisfied, however, cl 9(2) precludes the contractor from being deemed a worker if that contractor is 'carrying on an independent trade or business'. The current understanding of the cl 9(2) test, according to the Victorian Court of Appeal decision in *BSA Ltd v Victorian WorkCover Authority*,[92] is the 'modified control test' formulated in the High Court decision of *Humberstone v Northern Timber Mills*.[93] This test overlaps in part with the common law concepts of control and exclusivity in the multifactor test discussed above.

How do these contractor deeming provisions apply to Uber, Deliveroo, and Airtasker? We apply sch 1 cl 9 of the *Vic WIRC Act* by way of example and illustration.

There are five factors to consider in sch 1 cl 9 of the *Vic WIRC Act*, namely:[94]

- whether there is a contract in place (cl 9(1)(a));
- whether the services by the contractor are 'not ancillary to the provision of materials or equipment' by that contractor (cl 9(1)(b));
- whether the contractor does 80% of the work themselves (cl 9(1)(c));
- whether the gross income from the contract is at least 80% of the gross income from those services during the 'relevant period' (12 months) (cl 9(1)(d)); and
- whether the contractor is 'carrying on an independent trade or business': (cl 9(2)).

The application of these factors is considered in the next section.

92 [2018] VSCA 265.

93 (1949) 79 CLR 389, 404 (Dixon J): 'The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions.' This test was subsequently rearticulated in *Zujis v Wirth Brother Pty Ltd* (1955) 93 CLR 561, 571 (Dixon CJ, Williams, Webb and Taylor JJ, McTiernan J agreeing at 576). For critical analysis of this decision, see Jason Taliadoros and Genevieve Grant, *Victorian Statutory Compensation Schemes* (LexisNexis Butterworths, 2021) 45–8 [3.29]–[3.37].

94 Taliadoros and Grant (n 93) 4 [3.24].

1 *Uber*

It has been observed above that Uber could assert that a work contract might exist between its food delivery service and the relevant driver or rider, while it could contest the notion that there is any work contract at all between them in respect of its rideshare service.

In terms of the latter arrangement, it is unlikely that an Uber rideshare driver would satisfy the criteria in sch 1 cl 9 of the *Vic WIRC Act*. In the former arrangement, however, it is possible that an Uber food delivery driver/rider would satisfy four of the five criteria, namely:

- the existence of a contractual relationship between the driver and Uber to provide food delivery services for reward;

- that these food delivery services 'not [be] ancillary to the provision of materials or equipment by the contractor to the principal under the contractual arrangement',[95] noting that only the food delivery services would be provided;

- that at least 80% of the contracted services be provided by the contractor personally, assuming there is no delegation; and

- that the driver's gross income from the contracted services be at least 80% of their total gross income 'earned from services of the same class provided by or on behalf of the contractor in the relevant period',[96] that is, the preceding 12-month period. This fourth criterion would exclude some workers who derived their income from more than one platform, however.

As noted above, the fifth criterion found in cl 9(2) will preclude the Uber food delivery driver from being a deemed worker if that driver 'is carrying on an independent trade or business'. If an Uber driver has been engaged in circumstances akin to those in *Pirot Pty Ltd v Return to Work South Australia (Schultz)* ('*Schultz*'),[97] namely, of near exclusivity and of tight control (but by Uber rather than the intermediate taxi business as in *Schultz*), then it is likely that cl 9(2) will not operate to preclude the Uber driver from being deemed an employee of Uber, given the likelihood that the driver is not carrying on an independent business. Each case, however, will turn on its facts.

2 *Deliveroo*

As discussed above, Deliveroo classifies its rider partners as independent contractors, and so sch 1 cl 9 of the *Vic WIRC Act* would potentially apply in a similar way to Uber's food delivery contractual arrangements. One significant difference here is

95 *Vic WIRC Act* (n 84) sch 1 cl 9(1)(b).

96 Ibid sch 1 cl 9(1)(d).

97 [2017] SAET 92.

that cl 9(1)(a) specifically excludes from its purview 'transport services' within the meaning of cl 8. Schedule 1 cl 8 of the *Vic WIRC Act* is a specified activity deeming provision, and its application to Deliveroo is discussed below.

3 *Airtasker*

Schedule 1 cl 9 of the *Vic WIRC Act* is unlikely to apply to the relationship between the Poster and the Tasker. Three of the five criteria are likely to be met, namely: the existence of a contractual relationship; the ancillary services test; and the personal performance of work test. But it is unlikely that the fourth criterion, the one principal test, would be met, as Taskers are likely to complete tasks for a number of different Posters and not exclusively or near-exclusively for one Poster. Further, the fifth criterion — the preclusion in cl 9(2) — is likely to apply since many Taskers are running their own businesses. The application of cl 9 would depend on the facts, but would most likely exclude Taskers from being deemed workers of the Poster.

C *Application of Other Contractor Deeming Provisions to On-Demand Workers*

Sections 8(1)(b)–(c) of the *Workers Compensation Act 1951* (WA) ('*ACT WC Act*') are noteworthy as they provide two further contractor deeming provisions, namely:

> (b) works under a contract, or at piecework rates, for labour only or substantially for labour only;[98] or
>
> (c) works for another person under a contract (whether or not a contract of service) unless—
>
> (i) the individual—
>
> (A) is paid to achieve a stated outcome; and
>
> (B) has to supply the plant and equipment or tools of trade needed to carry out the work; and
>
> (C) is, or would be, liable for the cost of rectifying any defect in the work carried out …

Section 8(1)(b) is broader than the common law definition of an employment contract, since it applies to a contract for 'labour only or substantially for labour only'; it is also quite distinct from other contractor deeming provisions, such as those in

98 For the meaning of the phrase 'for labour only or substantially labour only', see the recent case law on the similar phrase in s 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (Cth), which deems a person to be an employee if that person works under a contract that is 'wholly or principally for the labour' of that person, including the recent decision of *Dental Corporation Pty Ltd v Moffet* (2020) 278 FCR 502, [82]–[84] (Perram and Anderson JJ, Wigney agreeing at 527–8 [115]–[118]) ('*Moffet*'). Cf *On Call Interpreters* (n 20) 146 [306] (Bromberg J).

sch 1 cl 9 of the *Vic WIRC Act*, which require the satisfaction of multiple criteria, not simply that there is a contract for all or mostly labour services. Section 8(1)(c) is also broader than the conventional contract of service, and applies to situations normally associated with independent contractor arrangements, namely, where the contractor is paid for achieving a 'stated outcome', provides their own plant and equipment, and is liable for rectifying any defective work. Section 8(1)(c)(i) is similar in nature to other contractor deeming provisions; however, as the features just described would typify the circumstances of an individual running their own independent business, that would exclude such a person from being deemed a worker.

How would these contractor deeming provisions in ss 8(1)(b) and (c) of the *ACT WC Act* apply to the three on-demand platforms?

1 *Uber*

The s 8(1)(b) requirement for labour-only/substantially contracts would, on initial appearances, appear to be satisfied by Uber drivers/riders providing their labour in food delivery services. On the application of the principles in *Dental Corporation Pty Ltd v Moffet* ('*Moffet*'),[99] the contract is principally or predominantly for their labour in driving or riding rather than the provision of equipment, ie, the vehicle. Further, even if an Uber food delivery driver is deemed to be a worker, it is not clear who the 'employer' would be in these circumstances; the *ACT WC Act* is silent on this. Consistent with *Moffet*, the perspective of the entity 'for' whom labour is provided is critical in determining the purpose of those services, ie, whether they are for labour. As noted above, where that entity is a business, such as a cafe or restaurant, it may be that such a purpose is apparent.

Section 8(1)(c)(i) would not apply to Uber food delivery drivers/riders as they satisfy the disqualifying factor in sub-s (A), namely, they are paid to achieve a stated outcome; further, they (arguably) satisfy the disqualifying factor in sub-s (B), in that they have to supply their own plant and equipment (ie, the vehicle). On the application of the principles in *Moffet* to s 8(1)(b), it would, therefore, depend on the interpretation to be given to the labour-only/substantially component. Little guidance to date exists in the case law.

In respect of Uber's rideshare service, from Uber's perspective, its purpose is arguably, applying *Moffet*, not to receive services from its drivers (it provides technology services to them) and so there is a mere contractual relationship and no work relationship between the entities for the purposes of s 8(1)(b). If Uber's perspective were not accepted and it was seen to be providing transport services, however, then s 8(1)(b) would apply in the same way as with its food delivery service.

99 *Moffett* (n 98) requires: that '(a) there should be a "contract"; (b) which is wholly or principally "for" the labour of a person; and (c) that the person must "work" under that contract': at 522 [82] (Perram and Anderson JJ).

2 *Deliveroo*

These contractor deeming provisions in s 8(1)(b) would apply to Deliveroo drivers/riders in a similar manner to their application to Uber food delivery drivers/riders, as described above.

3 *Airtasker*

Section 8(1)(b) of the *ACT WC Act* may not apply to Taskers engaged via Airtasker because the labour only/substantially component would disqualify any skilled taskers who provided tools and/or equipment for the task, such as a fencer. Section 8(1)(c)(i) would not apply to Taskers either because the disqualifying factor in sub-s (A), being paid to achieve a stated outcome, would apply; further, the Taskers would (arguably) satisfy the disqualifying factor in sub-s (B), in that they supply their own plant and equipment (tools and materials, eg, nail gun and fence posts).

Accordingly, s 8(1) of the *ACT WC Act* is unlikely to apply to on-demand workers, although little guidance to date exists in the case law to confirm this.

D *Application of Specified Activity Deeming Provisions to On-Demand Workers*

The specified activity deeming provisions in workers' compensation legislation in Australia deem individuals performing certain categories of activities to be workers. Such provisions exist in workers' compensation legislation in certain states and territories, and can typically be divided into three types of activities: driving passengers for reward;[100] transporting goods for reward;[101] and labour hire arrangements.[102] We examine the applicability of these provisions below.

1 *Uber*

The taxi-driving deeming provisions usually require that there is a bailment arrangement in place, eg, *Vic WIRC Act* sch 1 cl 7(1)(a). Most Uber drivers, however, use their own vehicles and so there will be no bailment between the driver and Uber.

2 *Deliveroo*

The carriage of goods for reward deeming provision, eg sch 1 cl 8 of the *Vic WIRC Act*, has some likelihood of applying to the contract that exists between Deliveroo

100 *NSW WIMWC Act* (n 83) s 5, sch 1 cl 10; *Return to Work Regulations 1986* (NT) reg 3A(1)(c) ('*NT RTW Regs*'); *SA RTW Regs* (n 86) reg 5(1)(d); *Tas WRC Act* (n 83) ss 4DA, 4DB; *Vic WIRC Act* (n 84) s 3(b), sch 1 cl 7.

101 *ACT WC Act* (n 83) s 11 (examples 3 and 8); *SA RTW Regs* (n 83) reg 5(1)(e); *Vic WIRC Act* (n 84) s 3(b), sch 1 cl 8.

102 *ACT WC Act* (n 83) s 12; *NSW WIMWC Act* (n 83) s 5, sch 1 cl 1 2A; *NT RTW Act* (n 84) s 3B(16); *Qld WCR Act* (n 84) s 11(2), sch 2 pt 1 cls 4–6; *Tas WRC Act* (n 83) s 4DA; *Vic WIRC Act* (n 84) ss 3 (definition of 'employer'), 109.

and its drivers. This is despite Deliveroo's treatment of such drivers as third-party independent contractors. The existence of such a contract, in contrast to the position of Uber, would not itself have the effect of disqualifying the application of these carriage of goods for reward deeming provisions.

Schedule 1 cl 8 deems an 'owner-driver' to be an employee where that person 'drives a motor vehicle, of which he or she is the owner, mainly for the purposes of providing transport services to the principal'. This could potentially apply to Deliveroo drivers, since the expression 'transport services' is defined in cl 8(6) as 'the service of transporting and delivering goods', which appears to be broad enough to include the transportation or delivery of food. However, similar to cl 9, cl 8 does not apply where the owner-driver 'is carrying on an independent trade or business' under cl 8(2). Clause 8(2), like cl 9(2), would exclude a Deliveroo driver from being a deemed worker where there is evidence that the driver is running their own business.

3 *Airtasker*

The provisions deeming labour hire workers vary across the jurisdictions and take various forms. These forms are usually of three kinds: deeming the labour hirer to be the employer (NSW and Vic);[103] deeming the hired worker to be the worker (ACT, NT, Qld and Tas);[104] or no labour hire provisions being present at all (SA and WA). Common to such provisions is that there must be: first, an employment relationship between the worker and the labour hire company that 'hires' their services to the third party 'hirer'; and second, a hiring or lending contract to that third party hirer. As noted above, it is unlikely that an employment relationship between the Tasker and Airtasker exists, or that a hiring or lending arrangement between either Airtasker or the Poster and the Tasker such as would satisfy these provisions. Usually, the Tasker uses the Airtasker online platform to market their services for future work and their services are provided no more often than an intermittent basis.

E *Summary of the Application of Workers' Compensation Laws to On-Demand Workers*

In light of the above, the following observations can be made about the definition of 'worker' under workers' compensation legislation in the Australian states and territories. First, while the primary definition of a worker is more or less consistent across the Australian states and territories, as a person engaged under a contract of service or a contract of employment in accordance with the common law understanding of an employee, there is no complete uniformity in this definition. Added to this is the great uncertainty in the application of such a definition to any given factual scenario. Second, the contractor deeming provision varies to a large extent in its form and substance across the Australian states and territories workers' compensation acts.

103 *NSW WIMWC Act* (n 83) s 5, sch 1 cls 1, 2A; *Vic WIRC Act* (n 84) ss 3 (definition of 'employer'), 109.

104 *ACT WC Act* (n 83) s 12; *NT RTW Act* (n 84) s 3B(16); *Qld WCR Act* (n 84) s 11(2), sch 2 pt 1 cls 4–6; *Tas WRC Act* (n 83) s 4DA.

The one commonality is the provision requiring that a worker *not* be working independently in their own business or undertaking. Yet the form of this provision, too, varies across jurisdictions. Like the primary definition, this test is uncertain in its application and factually contingent. Third, a specific activity deeming provision has not been enacted in all of the Australian states and territories and, where enacted, the specific activity deeming provision varies in its form and covers different activities. Such a provision has the advantage of being reasonably clear in its application, but most likely will not apply to the three exemplar on-demand workers dealt with in this article. Such a provision, therefore, is of limited utility in dealing with the identified problems of on-demand workers.

V Discussion and Reform Recommendations

In light of the above, it is apparent that the problems in respect of on-demand workers and Australia's WHS laws, on the one hand, and workers' compensation schemes, on the other, share the singular problem of lack of uniformity across the states and territories. The problems facing the workers' compensation legislation, however, are more extreme in this regard and go beyond mere disconformity.

A *Australian WHS*

In terms of the WHS laws, online platform providers, such as Uber Eats or Deliveroo, are likely to be considered either employers or PCBUs and therefore criminally liable for any breach of WHS duties. Airtasker and Uber rideshare services are quite different in that their contractual terms arguably create no work relationship with the worker (although this is under challenge in the courts in relation to Uber), and so any application of the WHS laws to them as PCBUs or employers is uncertain and factually contingent. Further, other parties, such as businesses who have a role in directing the services provided by Airtasker and Uber rideshare, may be implicated as PCBUs.

1 *National Consistency*

It is the authors' view that *all* states and territories should enact the Model WHS laws; that is to say, Victoria should join the scheme. This is consistent with the object in s 3(1) of the *WHS Act*, 'to provide for a balanced and nationally consistent framework', although the current trend has seen substantial variations in Queensland and (to a lesser extent) New South Wales and South Australia.[105] Uniformity of concepts (such as those of PCBU and worker) will only increase the coherence and consistency of the application of such laws across Australia.

This recommendation for complete uniformity is in line with internationally benchmarked standards, such as the *Occupational Safety and Health Convention 1981*

[105] Marie Boland, *Review of the Model Work Health and Safety Laws: Final Report* (Report, December 2018) 21–2, 25.

('*OHS Convention*').[106] The *OHS Convention* was developed by the International Labour Organization ('ILO'). Australia is a signatory to the *OHS Convention*, having ratified the ILO's P155 Protocol of 2002 to the *OHS Convention* on 26 March 2004.[107] Although the *OHS Convention* does not deal explicitly with on-demand workers, its key relevance is the requirement for a coherent national policy in art 4.1, which imposes obligations on Members to 'formulate, implement and periodically review a coherent national policy on occupational safety, occupation health and the working environment'.[108] In this regard, the differences among Australian jurisdictions in relation to WHS is inconsistent with the *OHS Convention*.

Further, it is possible for regulators such as Safe Work Australia to provide interpretative guidance on these duties as they apply to on-demand workers, or else to support and fund test cases in the High Court on such matters.

B *Australian Workers' Compensation*

In terms of workers' compensation, the varying provisions defining workers and their uncertain application call for reform.[109] Although Australia is not a signatory to the *Convention Concerning Benefits in the Case of Employment Injury*, other ILO documents have relevance. The Preamble to the *Constitution of the International Labour Organization* ('*ILO Constitution*'), to which Australia is a signatory, refers to the need for 'protection of the worker against sickness, disease and injury arising out of his [or her] employment … [and], provision for old age and injury'.[110] Further, the annex to the *ILO Constitution*, which comprises the *Declaration Concerning the Aims and Purposes of the ILO* ('*Declaration of Philadelphia*'),[111] contains two provisions of aspirational relevance to workers' compensation schemes in ch III, namely that such legislation should aim to provide:

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106 *Convention (No 155) Concerning Occupational Safety and Health and the Working Environment*, opened for signature 11 August 1983, 1331 UNTS 279 (adopted 22 June 1981).

107 'Ratifications for Australia', *International Labor Organization* (Web Page) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102544>.

108 *Convention (No 155) Concerning Occupational Safety and Health and the Working Environment* (n 106) art 4.1

109 See, eg: *IRV Report* (n 6) 116 [803], [805]; David Peetz, *Operation of the Queensland Workers' Compensation Scheme: Report of the Second Five-Yearly Review of the Scheme* (Report, 27 May 2018) 16–21, 88, 94–108; Stewart and McCrystal (n 24) 11–12; Stewart and Stanford (n 12) 427; McDonald et al (n 5) 16; International Labour Organization, *Non-Standard Employment Report* (n 8) 199–203, 261–6.

110 *Constitution of the International Labour Organization*, opened for signature 28 June 1919 (entered into force 10 January 1920) Preamble para 2.

111 *Constitution of the International Labour Organization*, opened for signature 28 June 1919 (entered in to force 10 January 1920) annex ('*Declaration of Philadelphia*').

> (f) the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care;
>
> (g) adequate protection for the life and health of workers in all occupations …

In addition, the *Employment Injury Benefits Convention* ('*EIB Convention*') provides for minimum levels of coverage for all injured 'employees' in art 4.1.[112] Australia, however, has not ratified the *EIB Convention*, and so is not bound to observe it. Article 4.2 permits exceptions to coverage where necessary, such as in the case of:

> (a) persons whose employment is of a casual nature and who are employed otherwise than for the purpose of the employer's trade or business; and
>
> …
>
> (d) other categories of employees, which shall not exceed in number 10 per cent of all employees …

These *EIB Convention* provisions, therefore, exclude coverage of casuals, independent contractors and other employee categories forming a minority percentage of the workforce.

The above provisions from the *Declaration of Philadelphia* do not deal specifically with on-demand workers. They aspiringly seek coverage for 'workers in all occupations'[113] and all injured employees, which is not helpful as it begs the question of who is classified as an employee. It also seeks coverage for 'all in need … of protection',[114] although without specifying who this might be. The universal nature of this measure is something that we will return to below in the discussion of reform. These provisions do not, however, indicate what kinds of workers should be covered and protected and so do not provide any clear assistance on the issue of on-demand workers.

1 *National Consistency*

As with the Australian WHS laws, it is the authors' view that the Australian workers' compensation laws, in line with the aim of coherence, should be reformed so as to contain uniform provisions providing a definition of 'worker'. This would include uniform or 'model' provisions regarding the different types of definition of worker, namely the primary definition, the contractor deeming provision, and the specified activity deeming provision.

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112 *Convention (No. 121) Concerning Benefits in the Case of Employment Injury*, opened for signature 8 July 1964, 602 UNTS 259 (entered into force 28 July 1967) ('*EIB Convention*').

113 *Declaration of Philadelphia* (n 111) ch III (g).

114 Ibid ch III (f).

In respect of the primary definition, it is suggested that consistent terminology be adopted that is centred on the notion of the existence of a contract of employment, or a contract of service. We discuss further below the additional need to clarify this test of worker status. In respect of the adoption of uniform provisions for the other deeming provisions, it is suggested that, at least as a first step, there be the uniform adoption of a precluding provision, already common to nearly all jurisdictions, that a contractor not be deemed a worker where that contractor is working independently for their own business.

With the adoption of nationally-consistent laws, an on-demand worker in one jurisdiction in Australia will not be prejudiced by the 'postcode injustice' of being subject to different provisions than those that apply elsewhere in Australia.

2 *Clarity and Modification of the Definition of Worker*

In addition, it is suggested that there be legislative intervention to clarify the common law worker status test. Such a measure is required so long as there is a lack of definitive guidance by the High Court on the matter. Further, the plethora of competing public policy considerations and theories make it more appropriate that the legislature be the source of such clarity rather than the judiciary. Recent academic commentary has suggested several alternatives, which are discussed below.

One is the adoption of an overarching principle by which to decide the issue of worker status. The *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation [No 3]* ('*On Call Interpreters*')[115] 'enterprise test', as the sole test of employment status for the purposes of the primary definition of worker, has come into favour recently and continues to cause discussion, despite the High Court's adoption of the multi-factor test.[116] Pauline Bomball has recently and convincingly argued that the 'enterprise test', favoured in *On Call Interpreters*, provides a coherent unifying thread for interpreting the multi-factor test.[117] This is the approach favoured by the authors of this article. It has the advantage of drawing on a considerable body of case law as well as the practical realities of such circumstances. Furthermore, such an approach is consistent with the majority of Australian workers' compensation contractor deeming provisions, and numerous specified activity deeming provisions, that exclude persons independently running their own business from being classified as workers. At the time of writing, however, two relevant appeals to the High Court await determination.[118] It remains to be seen whether the Court will take the enterprise approach or revisit *Hollis* by taking an

115 *On Call Interpreters* (n 20).

116 *Hollis* (n 16); *Stevens* (n 15).

117 Bomball (n 12).

118 Transcript of Proceedings, *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2021] HCATrans 138; Transcript of Proceedings, *ZG Operations Australia Pty Ltd v Jamsek* [2021] HCATrans 139.

approach consistent with its decision in *WorkPac v Rossato*[119] in placing the primacy of the contract ahead of other factors.[120]

An issue that arises in respect of this approach is the distinction identified in this article between, on the one hand, a work model of principal-contractor, such as that between Uber food delivery services and Deliveroo and their drivers/riders, and, on the other, a model that recognises no work relationship, such as that between Uber rideshare services and its drivers and Airtasker and its Taskers. It is not clear that an 'enterprise test' of the kind suggested above would necessarily provide any clearer guidance to such circumstances than the existing multi-factor test.

A second means is to substitute the notion of 'employer' in the WHS and workers' compensation legislation with that of a PCBU. David Peetz, in the most recent review of the Queensland workers' compensation scheme, suggests that the notion of a PCBU from the Model WHS Act be inserted in workers' compensation legislation to replace the term 'employer'. Such an amendment would in turn replace the requirement of an employment contract, as constitutive of 'worker' status, with a requirement that there be a person who carries out work in any capacity for a PCBU.[121] Given that the aims of both of these legislative schemes are to provide 'protections' for workers, this suggestion has much to commend it as a longer-term aim of legislative reform. As Peetz outlines, this alignment of WHS and workers' compensation with the notion of the PCBU may well provide consistency, although it may not necessarily cover all online platforms.[122] This would face the same issues identified above in the WHS law discussion as to whether a PCBU's duties would extend to platforms such as Uber's ridesharing and Airtasker.

A third means is to include a further category of worker in workers' compensation statutes, namely, 'agents'. As Peetz suggests,

> [u]nder this option coverage would be extended to people engaged to perform work under an agency arrangement where an employment relationship is not created with another party, and responsibility for premiums would go to the ['']intermediary organisations' or 'agencies' that hire them.[123]

Peetz suggests a possible wording for this 'agency liability' provision, namely: 'A person engaged via an intermediary or agency to perform work under a contract (other than a contract of service) for another person'.[124] It is not clear whether such a provision would replace or be in addition to existing deeming provisions in the legislation. It is also conceded by Peetz that this agency liability provision may well

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119 *WorkPac* (n 16).

120 The authors are grateful to one of the anonymous reviewers for suggesting this possible development.

121 Peetz (n 109) 104.

122 Ibid.

123 Ibid 105.

124 Ibid.

apply to a number of categories of employee additional to on-demand workers.[125] Stewart and McCrystal appear to damn this suggestion with faint praise as being 'rather creative'.[126] This agency approach is clearly aimed at bringing within its sphere intermediary platforms such as Uber's ridesharing and Airtasker.

An alternative additional category of deemed worker suggested by a report into employment law in the United Kingdom, known as the 'Taylor Review', is the 'dependant contractor'.[127] This is based on the 'limb (b)' definition of 'worker' in s 230(3) of the *Employment Rights Act 1996* (UK). Stewart and McCrystal have criticised this proposed 'intermediate category of worker', which they label 'independent worker', on the basis that it may have the unintended consequence, as it has in Italy and arguably in the United Kingdom, 'to disenfranchise existing employees through reclassification or manipulation of their legal status'.[128]

Yet another additional category of deemed worker could be created, according to Peetz, by way of ad hoc deeming provisions to deem certain persons workers by the relevant Minister by means of subordinate legislation, such as regulations.[129] This would be a means of responding nimbly to particular circumstances and including particular categories of workers, such as on-demand workers. It would also have the added advantage, if the relevant subordinate legislation is carefully drafted, of only including those intended categories. Conceivably, such a measure could operate in response to any 'emerging signs of organisation and collective action by platform workers, both in Australia and overseas'.[130] In this way, the lack of a work contract, in platforms such as Uber's ridesharing and Airtasker, would not prevent workers providing services to be deemed 'workers' by such deliberate ad hoc legislative or regulatory intervention.

3 *Other Measures*

Two further measures have been suggested by commentators in the context of employment law, one radical and the other more pragmatic. With reference to the latter, Stewart and McCrystal have suggested that more active measures be taken to tackle 'sham contracting', arguing that

> the issue of sham contracting, or misclassification of workers, can best be tackled by clarifying and expanding the category of employment, in particular by presuming workers to be employees unless they can be shown to be running their own business.[131]

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125 Ibid 107.

126 Stewart and McCrystal (n 24) n 44.

127 Matthew Taylor, *Good Work: The Taylor Review of Modern Working Practices* (Report, July 2017) 35–6.

128 Stewart and McCrystal (n 24) 19.

129 Peetz (n 111) 107.

130 Stewart and McCrystal (n 24) 20. See also Luke Mason, 'Locating Unity in the Fragmented Platform Economy: Labor Law and the Platform Economy in the United Kingdom' (2020) 41(2) *Comparative Labor Law and Policy Journal* 329, 340.

131 Stewart and McCrystal (n 24) 21–2.

This is broadly consistent with the principal suggestion advocated above of harmonising the definition of employee according to the principles espoused in *On Call Interpreters*. It could apply to the deeming provisions in workers' compensation legislation.

The more radical option suggested by Stewart and McCrystal is to establish certain minimum 'universal rights' that apply 'to *all* types of contract, not just those involving employment'.[132] In this way, certain minimum requirements would apply to any contractual scenario, whether there is an employee-employer or principal-contractor contract in place, and thus potentially including on-demand workers. This would cover matters such as 'work health and safety, redress for discrimination or harassment, privacy, access to cheap and effective dispute resolution, whistleblower protection and general obligations of fair dealing as appropriate subjects for broadly framed standards'.[133] Such a measure, however, would require a radical remodelling of not just workers' compensation legislation but a raft of other statutory and common law institutions.

VI Conclusion

This article has highlighted the lack of clarity in the application of WHS and workers' compensation laws to on-demand workers in the gig economy. This lack of clarity stems from longstanding unpredictability in the application of the law as to whether an individual is an employee or independent contractor at common law, as well as legal uncertainties in this area (matters which are at the time of writing pending determination by various courts, including the High Court). These uncertainties have consequences that impact on the coherence and consistency of WHS and workers' compensation legislation across the Australian states and territories. In addition, as outlined in this article, the contracting models of the online platform providers have increased this uncertainty; issues of employment status arise not only in the context of the traditional employee-independent contractor dichotomy but also in situations where arguably no work contract exists.

This article has also pointed to a range of measures that have been put forward to resolve the lack of clarity and the uncertain application of employment status regarding on-demand workers in the context of WHS and workers' compensation laws. The issue is a timely one, and calls for decisive and prompt attention by policy-makers, legislatures, regulatory bodies and the courts. By such action, in accordance with coherence and consistency, the opportunity presents itself to bring much-needed clarity to this area of law and to deal with the dynamic and ever expanding scope of the digital economy.

132 Ibid 13 (emphasis in original).

133 Ibid 21.