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17

Australia: Reimagining the Regulation of Work

*Troy Sarina**

Without labour nothing prospers.

Sophocles

I THE CHANGING NATURE OF WORK

Work has long been recognised as a core element of the human experience. It helps to shape our personal identity while also ensuring that societies can function, regenerate, and grow. At present, we are in an era where technology is having a profound impact on how work is carried out. Often referred to as the 'fourth industrial revolution', technology has accelerated the automation of many types of work around the globe. For example, two of the world's largest automotive manufacturers, Mercedes-Benz and Audi, are planning to axe close to 20,000 employees in order to transition to cleaner technologies and more modern vehicle production processes.[1] Similar examples of such 'transition' have taken place in Australia. In 2018, one of Australia's largest banks, the National Australia Bank (NAB), made 6,000 employees redundant (approximately a quarter of its workforce) as part of a transition to computer systems utilising artificial intelligence (AI) in order to create a more efficient and safe banking environment for its customers.[2] These are just a few examples of a much broader disruptive effect that technology is having in the world of work. Recent projections suggest that by 2030 up to 375 million workers worldwide are likely to experience a change in the type and form of work they perform owing to the emergence of new technologies.[3]

The disruptive effect of technology has led to a narrative surrounding work in modern economies being framed around notions of 'flexicurity'.[4] That is, a demand for greater functional and numerical flexibility so that labour productivity is improved. As a result, workers are now being required to undertake a broader range of tasks while working more flexible work patterns. Demands for such increased flexibility are certainly not new in Australia. For several decades, policy- and lawmaking in Australia have attempted to improve productivity by transitioning to

* Thank you to Professor Joellen Riley Munton for all her advice, support, and discussions regarding the themes and legal principles discussed in this chapter. Her knowledge and insights were invaluable in preparing this work.

1 C. Rauwald, 'Mercedes-Benz parent Daimler plans thousands of job cuts', *Bloomberg News* (29 November 2019), https://bit.ly/44A3car.

2 C. Yeates, 'NAB reveals 6000 jobs to go as it announces $6.6b profit', *Sydney Morning Herald* (2 November 2017), https://bit.ly/437wPi8.

3 McKinsey Global Institute, *Jobs Lost, Jobs Gained: Workforce Transitions in a Time of Automation* (Brussels: McKinsey, 2017).

4 M. De Vos and J. Konings, *D'une securite de l'emploi vers une securite du travail sur le marche du travail belge* (Limal, Belgium: Anthemis 2007).

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a decentralised model of labour regulation that delivers greater labour market flexibility while promoting alternative forms of work such as contracting to meet the demands of organisations. As a result, the Australian labour market has experienced a significant transformation during the last three decades. In 2019, only 49.5 per cent of workers were employed in 'regular' full-time (thirty-eight hours per week) work, which is a significant decline from 55.6 per cent in 1992.[5] Conversely, 'irregular' forms of work such as part-time or casual work (fewer than thirty-eight hours per week) have increased from 31.9 per cent in 2004 to more than 33.3 per cent in 2019. Furthermore, there has been a steady rise in independent contractors who accounted for approximately 7.8 per cent of Australia's labour market in 2021.[6] The outcome of this growth in 'irregular' work remains double-edged. On the one hand, the emergence of more flexible forms of work has enabled organisations to respond to increased market competitiveness. However, there is also growing evidence of the detrimental effect that automation is having on those performing the work. This is owing to the precariousness of the work itself, limited access to statutory rights and entitlements, as well as the risk of injury in carrying out such work.[7]

Technological advancements and the rise of the 'gig economy' have only accelerated the growth in 'irregular' work as well as concerns about how such work is configured under the law. Gig work occurs where a third-party digital intermediary or platform connects a 'client' with workers willing to 'sell' their labour to the client in order to complete a task.[8] In effect, these types of arrangement are aimed at accessing labour within the economy without establishing any ongoing relationship or obligation between the parties involved.[9] The recent global pandemic resulting from the Covid-19 outbreak has only accelerated the growth of gig economy work in Australia. A recent survey of more than 14,000 Victorians found that 7.1 per cent of respondents had participated in some form of 'gig work' during 2018–19.[10] An associated report using data from this survey concluded that the proportion of people currently engaged in gig work at any one time in Australia was likely to be more than 13 per cent.[11] Such findings were significantly higher than previous reports that had estimated only 1 to 2 per cent of workers being engaged in such work.[12]

These developments present significant challenges and opportunities for law- and policy-makers in Australia. On the one hand, consideration needs to be given to whether the traditional configurations of employment that have helped to distinguish different classes of workers such as employees and contractors are able to accommodate the more complex irregular forms of work that are becoming prevalent in twenty-first-century economies owing to technological advancements and structural change within those economies. As a result, a Federal Senate committee hearing into job insecurity was established in 2021–2; it acknowledged the growth in precarious work within the Australian labour market. The committee report concluded that there was a need for significant legislative reform to accommodate this rise in alternative forms of work and

[5] Australian Bureau of Statistics (ABS), *Australian Labour Market Statistics*, Cat 6105.0 (October 2014).
[6] ABS, *Characteristics of Employment*, Cat 6330 (August 2021).
[7] M. Burgess and I. Campbell, 'The nature and dimensions of precarious employment in Australia', *Labour and Industry*, 8(3) (2013), 5–21.
[8] T. Sarina and J. Riley, 'Re-crafting the enterprise for the gig economy', *New Zealand Journal of Employment Relations*, 43(2) (2018), 27–35.
[9] Ibid.
[10] Industrial Relations Victoria, *Report of the Inquiry into the Victorian On-Demand Workforce* (Melbourne: Department of Premier and Cabinet, 2020), https://bit.ly/46Ajced, 14.
[11] Ibid.
[12] D. Marin-Guzman, 'Gig economy covers 7pc of workforce', *Australian Financial Review* (18 June 2019), https://bit.ly/3pBsxSl.

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the impact that insecure work was having on wages and conditions.[13] Such developments lead to a more fundamental question that needs to be answered. That is, how must employment law evolve to ensure that work continues to sustain and regenerate our society? The remainder of this chapter is dedicated to outlining how adaptive Australian employment law has been in responding to this challenge. In doing so, this work will highlight the tensions that remain as well as the possibilities to build a modern regulatory architecture that delivers mutual benefits to workers, organisations, and society.

II THE ARCHETYPE: HOW HAS THE CONFIGURATION OF WORK AND EMPLOYMENT EVOLVED?

The configuration of work in Australia has relied on distinguishing between an 'employee' working under a contract *of* service and a 'contractor' who is engaged under a contact *for* service. This distinction has been made by applying common law definitions and tests that Australia inherited from Britain, given its colonial ties.[14] The first test concerns the degree of control that a person has over how work is to be performed. Such a test was born out of master and servant law that applied in a time when servants required from their masters specific instruction on how to perform work.[15] However, more recently the application of the control test has moved beyond determining who controls the nature of the work to be performed. Instead, the application of this test now focusses on the extent to which an employer is able to determine where and when work is performed as well as the ability to 'dictate the terms and conditions of work'.[16] As modern work becomes more irregular, applying this control test has been held to be 'indeterminate' in establishing the existence of an employment relationship owing to this test being 'both under and over inclusive'.[17] Riley has previously highlighted the limitations of applying a simple control test to determine the status of modern workers. For example, many professional consultants may agree to surrender 'control over times and procedures' to one client while still retaining the capacity to be 'independent business people'.[18]

A second test developed at common law is known as the organisational integration test. This test focusses on whether a worker serves the interests of the employer's own business by carrying out work that is 'an integral part of the business' or whether the worker is carrying out a business on their own account and thereby completing work that is 'only accessory' to the employer's enterprise.[19] In Australia, the degree of integration has been assessed by determining whether a worker acts in the capacity of a 'representative' of an organisation or as

[13] Federal Government Senate, Select Committee on Job Security, *The Job Insecurity Report* (Canberra: Department of the Senate, February 2022), https://bit.ly/3DohQMd.

[14] However, two significant High Court decisions in 2022 signalled a departure from UK jurisprudence used to determine employment status. In particular, the 'classic' common law tests for determining employment status outlined in this section of the chapter should only be applied to the terms of the contract where the contract is committed to in writing. See *CFMMEU* v. *Personnel Contracting Pty Ltd* [2022] HCA 1 (*Personnel Contracting*) and *ZG Operations Pty Ltd* v. *Jamsek* [2022] HCA 2 (*Jamsek*). These cases are discussed in more detail later in this chapter.

[15] See *Performing Rights Society Ltd* v. *Mitchell & Brooker Ltd (Palais De Danse)* [1924] 1 KB 762 at 767.

[16] J. Riley, 'The definition of the contract of employment and its differentiation from other contracts and other work relations' in M. Freedland, A. Bogg, D. Cabrelli et al. (eds.), *The Contract of Employment*, 321–40 (Oxford: Oxford University Press, 2016), 327.

[17] H. Collins, 'Independent contractors and the challenge of vertical disintegration to employment protection laws', *Oxford Journal of Legal Studies*, 10 (1990), 353.

[18] Riley, 'The definition of the contract of employment', 327.

[19] Ibid.

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a principal of their own enterprise.[20] Factors that are considered in the application of this test include whether the worker is required to wear the livery of the employer's business, who supplies the equipment to carry out the work, and who owns the intellectual property and trademarks used in carrying out the work.[21] However, like the control test, the application of the integration test in isolation has 'been criticized for its indeterminacy'.[22]

A third test used to distinguish employees from contractors focusses on the economic reality of the relationship between the parties. This test was first applied in the United States Supreme Court and was developed in a period when there was a concern that employing enterprises were attempting to avoid the application of various 'protective' statutes that provided the right to collectively bargain.[23] In applying this test, the economic facts that were found to establish the existence of an employment relationship included the control one party had to determine the total wages earned by workers as well as the degree of control exercised over how, where, and at what price workers could sell products produced by the employing enterprise.[24] Under this test, emphasis is placed on the economic reality of the relationship of the parties rather than any 'technical legal classification [of the relationship]'. This test has been applied in several Australian cases to help determine the 'true economic relationship' between parties despite the arrangements being labelled an independent contracting arrangement.[25] However, this 'economic reality' test has now been rejected in light of the reasoning provided by Kiefel CJ, Keane, and Edelman JJ in *Construction, Forestry, Maritime, Mining and Energy Union [CFMMEU]* v. *Personnel Contracting*, who held that an assessment of the totality of the relationship between the parties may only have regard to the term of the contract rather than the reality of their relationship.[26]

A fourth test established in UK law considers whether there needs to be a mutuality of obligation between parties to create an employment relationship. This question was considered by Stephenson LJ in *Nethermere (St Neots) Ltd* v. *Gardiner*, who argued that there must be 'an irreducible minimum of obligation on each side to create a contract of service'.[27] This test developed at a time when new statutes in the UK conferred job employment protection on employees and was used by employers as a strategy to avoid obligations that arose from employee protection legislation. Relying on work by Deakin and Wilkinson, Riley points out that the application of such a test would exclude from employment 'any worker who accepts casual engagements, with no intention between the parties that there be any reciprocal obligation to continue to provide or accept work'.[28]

However, this test has 'no currency' in Australia as casual (zero hours) employment is classified as a 'special kind of employment' under statute, resulting in casuals having access to some employment protections.[29]

The inherent limitation of these tests is that, in isolation, no individual test provides a definitive classification of workers. As a result, Australian courts tend to consider all these

[20] See, for example, Dixon J in *Colonial Mutual Life Assurance Society Ltd* v. *Producers and Citizens Co-operative Assurance Co of Australia* (1931) 46 CLR 41.
[21] Riley, 'The definition of the contract of employment', 328.
[22] Collins, 'Independent contractors', 370–1.
[23] *National Labour Relations Board* v. *Hearst Publications* 322 US 111 (1943).
[24] Ibid.
[25] See, for example, *Damevski* v. *Guidice* (2003) 133 FCR 438.
[26] *Personnel Contracting* (n. 14), at [32]–[60].
[27] *Nethermere (St Neots) Ltd* v. *Gardiner* [1984] ICR 612 (CA) at [623].
[28] Riley, 'The definition of the contract of employment', 329.
[29] See, for example, obligations for minimum wage rates and casual loadings in the Fair Work Act (2009) Cth ss. 139, 284.

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tests in conjunction with each other. Often referred to as a multi-indicia test, courts consider a range of factors that include but are not limited to:

- the degree of control exercised over the worker;
- whether the worker is under an obligation to personally perform the work or whether there is a capacity to delegate tasks;
- the type of remuneration system used;
- the provisions and maintenance of assets; and
- the degree of integration of the worker into the organisation of the other party.[30]

The ultimate question that the courts are attempting to answer by applying such indices is whether the worker serves the employer's business or their own.

This question was recently considered in *Jamsek* v. *ZG Operations Australia*.[31] In this case the Federal Court considered whether two truck drivers who were classified as contractors owing to an organisational restructure were in fact employees and therefore had access to unpaid leave and superannuation entitlements provided by statute. In deciding this case, Justice Anderson argued that 'most fundamentally' the existence of an employment relationship could not be characterised by simple 'reference to the terms of a written contract'.[32] Instead, the 'totality' of the forty-year relationship between the parties needed to be examined to ascertain whether these drivers were in reality contractors or employees. In making its decision, the court considered the fact that these drivers did have 'a degree of freedom over the operation of their day-to-day activities'. However, this needed to be considered in light of the fact that these drivers were required to work for the company for a significantly large span of hours each day, which left them with little opportunity to work for anyone else.[33] Other factors considered were that the drivers' main source of income was derived from working for this company, that they had not driven or delivered goods for any other business over a forty-year period, and that they had not engaged in any 'entrepreneurial or profit motivated activity, which is the hallmark of an independent business'.[34] In finding that these drivers were employees, Wigney J emphasised the importance of assessing the 'reality and totality' of the working relationship rather than relying on 'contractual labels and theoretical possibilities' to determine the appropriate classification of workers.[35]

However, this Federal Court decision was overturned unanimously in 2022 by the High Court in *ZG Operations Pty Ltd* v. *Jamsek*; the Court held that any assessment of the totality of the relationship may have regard only to the terms of the contract and not the reality of the relationship between the parties.[36] The same principles were adopted in the *Personnel Contracting* case, which is discussed in more detail in Section III. As a result, Riley Munton (2022) notes that 'Australian courts and tribunals have now been warned they cannot take account of the way a working relationship evolves in assessing employment'.[37] She notes subsequently that there may be several arguments that could be made to justify the conduct of the parties being examined. These include when the contract is not wholly in writing, when

[30] For a comprehensive discussion on the application of this multi-indicia test, see *ACE Insurance Limited* v. *Trifunovski* [2013] FCAFC 3.
[31] *Jamsek* v. *ZG Operations Australia* [2020] FCAFC 119.
[32] Ibid., at [248].
[33] Ibid., at [216].
[34] Ibid., at [244].
[35] Ibid., at [19].
[36] *Personnel Contracting* (n. 26).
[37] J. Riley Munton, 'Boundary disputes: Employment v independent contracting in the High Court', *Australian Journal of Labour Law*, 35(1) (2022), 79–94, at 88.

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the contract has been 'varied, discharged or replaced by a new oral contract to help establish the existence of a new contract, when the written contract was a sham from the outset', or when the doctrine of estoppel by convention may be applied.[38]

Despite the complexities that may arise in applying these evolving tests and principles, determining the classification of a worker remains crucial for several purposes. These include ascertaining whether a worker is covered by Australia's employment laws including the Fair Work Act (2009) Cth as well as helping to determine liability for any harm or damage caused while performing work. Australia's first federal labour laws were enacted under the conciliation and arbitration power found in section 51 (xxxv) of the Constitution. This power allowed the federal government to pass laws to help settle industrial disputes that extended beyond the limits of any one state. It is worth noting that this system of conciliation and arbitration presumed the existence of an employment relationship while also helping to establish the birthright of Australian industrial citizens.[39] Despite this distinction being crucial for understanding the nature of work, scholars have been quick to note that attempting to categorise modern work into such a 'binary divide' represents 'both a false unity . . . and a false duality' as work in modern economies comprises 'various complex relationships' that are difficult to categorise.[40] These consequences of such complex structures are discussed in more detail later in this chapter.

III THE PROTOTYPES: CLASSIFYING WORKERS IN TRIANGULAR RELATIONSHIPS

As outlined at the beginning of this chapter, the proportion of workers classified as contractors in the Australian labour market has continued to rise. Alongside this change, there has also been a rise in market intermediaries that help to connect these workers to organisations who require labour on an increasingly temporary basis. Often referred to as 'labour hire agencies', these organisations establish what are effectively triangular relationships between the worker, the agency, and the organisation requiring the work. Riley outlines the process by which these relationships are formed. In effect, labour hire agencies enter a commercial contract with a 'host' organisation in which the host organisation agrees to pay a fee to the agency for the supply of workers. This allows the host organisation to exercise day-to-day control over the tasks that these workers are required to perform. The agency then pays the workers remuneration and any costs associated with this engagement. The formation of such relationships effectively 'separates the contractual relationship from the employment relationship'.[41] Such arrangements have had unsatisfactory consequences where workers subject to these arrangements find themselves without any access to a remedy when in a dispute with a host organisation over issues such as dismissal owing to the absence of any direct contractual relationship. However, these workers may be unable to bring a claim against the labour hire agency as their contractual arrangement fails to establish the requisite degree of control to establish any mutuality of obligation, which remains an important marker of a contract of service or 'wage–work' bargain.[42]

[38] Ibid., at 88–9.

[39] R. McCallum, 'Convergences and/or divergences of labor law systems: The view from Australia', *Comparative Labor Law and Policy Journal*, 28 (2006), 455–68.

[40] M. Freeland, 'From the contract of employment to the personal work nexus', *Industrial Law Journal*, 35(1) (2006), 1–29.

[41] Riley, 'The definition of the contract of employment', 333.

[42] See, for example, *Stevens* v. *Brodribb Sawmilling Co Pty Ltd* [1986] 160 CLR 16. However, in *Personnel Contracting* (n. 14), the labour hire agency, Construct, was held to be the employer of the worker as the contract between

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Recent decisions examining the status of a worker subject to such triangular relationships signal a growing desire by courts to re-evaluate how workers in such relationships are assessed. In *CFMMEU* v. *Personnel Contracting* (2020), Allsop CJ noted that the current 'dichotomy' between an employee and a contractor used to characterise workers 'has produced ambiguity, inconsistency and contradiction'.[43] In this case, a young British backpacker was engaged as a contractor of a labour hire agency, Personnel Contracting Pty Ltd (trading as Construct). Construct had entered into a services agreement with a construction company, Hanssen Pty Ltd, to provide labour for its construction projects. The union representing this worker claimed that, despite entering a contracting arrangement with Personnel, the worker was in fact an employee and was entitled to various award entitlements.

In making its decision, the court noted that the contractual arrangements established by Personnel reflected the bifurcation of 'the relationship between the person who supplies the labour from the ultimate end user of that labour'.[44] However, relying heavily on issues of 'contractual characterisation' to determine the status of a worker is becoming increasingly problematic in modern work arrangements. Allsop CJ argued that 'a considered, qualitative appreciation of the whole' relationship needs to be carried out rather than relying on the terms of a contract to act as a 'default' or 'tie breaker' to characterise the nature of work.[45] In this particular case, the court noted that although the young worker had entered a lawful contractor arrangement with Personnel, it was more like a contract of adhesion that had no particular value in helping to ascertain the status of this worker as the terms of the contract were not negotiated. Instead, the worker was simply prepared to sign any documents that would allow him to obtain work. Combined with the fact that this worker had no business or entrepreneurial intention, this led the court to find that the worker 'merely sought payment for working as a builder's labourer'.[46] This led Allsop CJ to conclude that the true nature of the relationship between the worker and Personnel was more like that of casual employee rather than contractor and therefore the worker was entitled to access the relevant award entitlements. However, ultimately, the Full Bench decided that even though they could see the artificiality of his classification as an independent contractor, they were bound to follow an earlier decision of an appellate-level court (the Supreme Court of Western Australia Court of Appeal), which had considered this particular contract used by Personnel and decided that it created independent contracting arrangements.

However, this decision was overturned by the High Court in 2022. It held that the Western Australian Court of Appeal had in fact given too much weight to the 'labels' given to the parties of the contract and that, in order to determine statutory entitlements relating to this case, aspects of the way in which the relationship played out 'on the ground' needed to be considered to ascertain the nature of the contractual relationship between the parties.[47] Riley Munton notes that the factors used to establish that an employment relationship existed between Mr McCourt and Construct included the fact that Construct could direct where McCourt should work and that McCourt had no discretion over what work he performed. The fact that Construct had a right of control over McCourt's labour was a 'key asset' of Construct's business.[48] Munton also

Construct and the worker provided Construct with the requisite level of control to establish an employment relationship. See paras. [89]–[90].

43 *CFMMEU* v. *Personnel Contracting Pty Ltd* [2020] FCAFC 122, Allsop, CJ at [61].

44 Ibid., at [118].

45 Ibid., at [18].

46 Ibid., at [27].

47 See *Personnel Contracting* (n. 14), at para [41].

48 Riley Munton, 'Boundary disputes', 84.

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notes that the majority reasoning in this case confirmed the 'orthodox Australian view' that the labour hire company, not the host employer, is the employer.[49]

IV UBERISATION: THE CHALLENGES OF APPLYING A BINARY APPROACH TO CLASSIFYING WORK IN THE GIG ECONOMY

The challenges in applying traditional classification tests to the triangular relationships found in the gig economy have further highlighted the inherent tensions and contradictions arising from using traditional characterisation tests. This often results in workers being denied access to a range of statutory protections and entitlements. Developing solutions that overcome this ambiguity is needed to address the inequality and poor working conditions that are often generated from this type of work.[50]

One area where there has been considerable attention concerns ride and food delivery services in the gig economy. In these cases, two distinct classification issues arise, namely, correctly characterising the status of the digital intermediary itself and the workers who contract with such intermediaries. Intermediaries or platform providers such as Uber argue that they simply provide a 'communication service' that connects drivers with passengers through the provision of an application (app) that users can download. By characterising their service in this way, these types of ride-sharing service are deliberately trying to avoid their arrangements with drivers/workers being characterised as any form of labour hire arrangement. However, such characterisations have been criticised as neglecting an important element of the exchange that occurs between the parties in such arrangements, namely payment. Riley argues that services such as Uber require user payments to be deposited into an account directly managed by the intermediary who then distributes payment to the workers after deducting a commission. As a result, a more appropriate classification of such entities would be 'labour hire intermediaries'.[51]

Yet recent cases examining the nature of the relationship between digital intermediaries and workers have struggled to provide a definitive answer on the correct classification of these entities or the relationship they have with those workers who sign up to use their service. In *Amita Gupta* v. *Porter Pacific*, the Fair Work Commission (FWC) considered whether a driver who had signed up to the 'Uber Eats partner app' was in fact an employee of Uber Eats (a food delivery service) and therefore entitled to pursue an unfair dismissal claim based on Uber's decision to suspend her access to the digital app used to obtain work.[52] In reaching a decision, Commissioner Hampton gave significant weight to both the terms of the 'services agreement' that Miss Gupta had signed and various indicia to characterise both the status of Uber and the type of contract Miss Gupta had entered. The terms of the services agreement led Commissioner Hampton to characterise Uber Eats as nothing more than a technology company that simply entered into two distinct services agreements, one with workers/drivers and another with parties who prepared the food to be delivered.[53] This arrangement was distinguished from a recent United States District Court decision that found that Uber's ride-sharing service was an entity that did much more than simply connect parties. It in fact controlled and 'sold rides', which

[49] Ibid.

[50] H. W. Arthurs, 'The false promise of the sharing economy' in D. McKee, F. Makela, and T. Scassa (eds.), *Law and the 'Sharing Economy': Regulating Online Market Platforms*, 55–72 (Ottawa: Ottawa University Press, 2018).

[51] J. Riley, 'Regulating work in the "gig economy"' in M. Roennmar and J. Julén Votinius (eds.), *Festskrift Till Ann Numhauser-Henning*, 669–84 (Lund, Sweden: Juristförlaget i Lund [Lund Legal Foundation], 2017), 672.

[52] *Amita Gupta* v. *Portier Pacific Pty Ltd; Uber Australia Pty Ltd T/A Uber Eats* (U2019/1001).

[53] Ibid., [85].

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characterised the nature of the relationship between Uber and its drivers as one that was more reflective of a contract of service.[54] Emphasis was then placed on the degree of control that Uber Eats could exercise over how Ms Gupta was required to complete work obtained using the driver app. Ultimately, Commissioner Hampton concluded that the 'independent nature' of the services agreement Ms Gupta signed allowed her to retain a right to control when and how she carried out work. As a result, her worker status was held to be that of an independent contractor.[55]

However, on appeal to the Full Bench, the previous characterisation of the relationship between Ms Gupta and Uber was questioned. Here, the Full Bench held that the relationship between the parties was more accurately characterised as one where Ms Gupta 'performed her delivery work . . . and was paid for it' by Uber.[56] Such a characterisation allowed the Full Bench to argue that there was evidence of an employment relationship as the 'minimum reciprocal obligations of work and payment' existed between the parties.[57] Yet, despite this characterisation of the contractual arrangements, the Full Bench ultimately held that this was a 'borderline' case where the existence of an employment relationship could not be established owing to absence of three fundamental indices of an employment relationship, namely (1) a requirement for Ms Gupta to perform work at particular times and in particular circumstances dictated by Uber; (2) evidence of an obligation for Ms Gupta to perform work exclusively for Uber; and (3) evidence of Ms Gupta being presented to the public as serving the business.[58] The inherent tension in this decision highlights the challenge that decision-makers continue to face in their efforts to categorise workers into the binary divide between employees and contractors. The Full Bench itself noted that it 'might be considered that there is some tension' in the fact that Ms Gupta was found not to conduct her own business but also not to be an employee.[59] Such findings only help reinforce the observation that distinguishing between employees and contractors is becoming increasingly murky in modern work arrangements. Rawling and Riley Munton (2022) note that this lack of clarity certainly isn't helped when an application for judicial review of this case is discontinued; in this case, Ms Gupta accepted a settlement offer made by Uber, resulting in 'no authoritative court decisions in Australia' on whether these types of ride-share contract are for the performance of work or the provision of telecommunication services.[60] This decision is reflective of several cases where workers have been denied a statutory relief owing to their worker status being characterised as 'independent contractor'. In *Janaka Namal Pallage* v. *Raiser Pacific Pty Ltd*, Mr Pallage made an application to the FWC alleging that he had been unfairly dismissed by Rasier Pacific (trading as Uber).[61] In this case, Commissioner Wilson placed less emphasis on the specific terms of the services agreement. Instead, the commissioner applied multiple indicia to ascertain the true nature of the relationship between the parties. Significant emphasis was placed on whether Uber possessed a right to exercise control over how and when Mr Pallage performed work. In arriving at a decision, Commissioner Wilson found that the level of control Uber could exercise over Mr Pallage was 'relatively weak' as he could choose the hours he

[54] *O'Connor and Others* v. *Uber Technologies Inc*., 82 F. Supp. 3d, 1133 (N.D. Cal 2015).
[55] *Amita Gupta* (U2019/1001) [87].
[56] *Amita Gupta* v. *Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698 at [44].
[57] Ibid., [48].
[58] Ibid., [69].
[59] Ibid., [71].
[60] M. Rawling and J. Riley Munton, 'Constraining the uber-powerful digital platforms: A proposal for a new form of regulation of on-demand road transport work', *University of New South Wales Law Journal*, 45(1) (2022), 7–34, at 14.
[61] *Janaka Namal Pallage* v. *Raiser Pacific Pty Ltd* (U2019/13448).

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worked and which jobs to accept when using the digital app.[62] The commissioner did note that provisions in the services agreement constrained Mr Pallage's capacity to delegate the task of driving. Furthermore, Uber also retained the right to dismiss a worker for serious misconduct while using the digital app. The existence of such factors did suggest some evidence of a contract of service. However, when all factors were considered, the relationship between Mr Pallage and Uber was characterised as one of contractor and agent, therefore denying Mr Pallage the right to proceed with an unfair dismissal application as no employment relationship was found to exist.

Similar emphasis was given to the extent of control that digital intermediaries exercise over workers in *Rajab Suliman* v. *Rasier Pacific Pty Ltd*.[63] In this case, the FWC considered whether a driver who obtained work from using the Uber app should be classified as a casual driver or a contractor owing to the degree of control that Uber was able to exercise over how the work was performed. Here, Commissioner Bissett found that the nature of the relationship between casual workers and an employer differed from that of drivers who had entered into a services agreement with Uber. The main difference was found to be that, unlike with an Uber driver, once a casual worker attends work their employer can compel them to work in exchange for wages provided. Under the services agreement offered by Uber, drivers retain control over whether to offer their services even if they sign onto the driver app, suggesting that the relationship is more appropriately characterised as that of contractor.[64]

In contrast, a driver who worked for an alternative digital food delivery intermediary, Foodora, was found to be an employee. In *Joshua Klooger* v. *Foodora Australia Pty Ltd*, an assessment of the degree of control that Foodora was able to exercise over its drivers led to Commissioner Cambridge characterising the work as akin to that of an employee.[65] He argued that despite drivers having the capacity to accept or decline work as part of their services agreement, the start and finishing times and the geographical locations of the work were fixed by Foodora. He went on to argue that this process of allocating work is similar to a 'variety of electronic and web-based systems that are frequently used to advise, in particular[,] casual employees' who can secure these shifts by responding to this request.[66] In addition to such characterisation, attention was given to the specific terms of the service agreement, which was found to contain clauses that required the worker to adhere to the rostering systems established by Foodora and stipulated the attire that drivers needed to wear while carrying out work, but failed to provide an 'unfettered right' for the driver to be able to delegate work on their own terms.[67] After assessing the terms of the services agreement and applying multiple indicia to establish an 'overall picture' of the relationship, Commissioner Cambridge concluded that the driver was not carrying out their own business and instead was 'integrated in the respondent's business and not independent operation' and therefore was an employee of Foodora.[68] The finding in *Klooger* v. *Foodora* was tested sometime later in *Franco* v. *Deliveroo*.[69] At first instance, a single commissioner held that a delivery rider was an employee, but Deliveroo appealed. However, on appeal to the Full Bench of the FWC, ~~this~~ was overturned, and the delivery driver was found to be an independent

[62] Ibid., [37].
[63] *Rajab Suliman* v. *Rasier Pacific Pty Ltd* (U2019/2392).
[64] Ibid., [38].
[65] *Joshua Klooger* v. *Foodora Australia Pty Ltd* (U2019/2625).
[66] Ibid., [68].
[67] Ibid., [84].
[68] Ibid., [102].
[69] *Deliveroo Australia Pty Ltd* v. *Diego Franco* [2022] FWCFB 156.

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contractor.[70] In applying the principle of at first instance relying on the terms of the contract established in the *Personnel Contracting* High Court decision, the full Bench found that there were four main reasons why Mr Franco should be classified as an independent contractor. These included the degree of control that Mr Franco had to determine the routes he would take to make deliveries. This led the Full Bench to conclude that Deliveroo had no contractual right to control 'the mode of performance of the work'.[71] Furthermore, the Full Bench held that Mr Franco had control over the vehicle he would use to make these deliveries as well as retaining the right to delegate the work he had agreed to perform. Finally, on reviewing the terms of the contract, the Full Bench also found that the fact that Mr Franco was required to pay a fee to Deliveroo for accessing its delivery service and for preparing invoices payable to him was also inconsistent with the existence of an employment relationship.[72] These cases provide two important observations. Firstly, they demonstrate that in light of the rulings in *Personnel Contracting* and *Jamsek*, the multi-factorial tests used to ascertain the nature of the relationship between the parties in modern triangular relationships like those found in the gig economy must now be applied by Australian courts and tribunals to assess the terms of the contract itself rather than the realities of how the employment relationship may play out between the parties (with some important exceptions noted previously in this chapter).[73] Secondly, relying on the interpretation of contractual terms may remain a long and often expensive exercise. Riley Munton notes that the inability to 'take actual work practices' into account when assessing employment status marks the loss of a 'short cut' that could provide a quick and effective way of determining the 'boundary issue' of worker status that seems to becoming increasingly apparent in digital platform work.[74] The remainder of this chapter is dedicated to outlining the response of various stakeholders to the regulatory challenges surrounding modern work relationships and the extent to which these responses help deliver mutually beneficial and more sustainable models of work.

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There has been much debate over how best to respond to the limitations that current common law tests have had in producing an appropriate classification of modern work relationships that exhibit characteristics of a contract both *of* and *for* service. There seem to be three distinct ways forward to address this challenge. The first is to persevere with attempting to fit modern forms of work into legal categories that were established in a time when it was much easier to identify a 'master who directs and controls work' and the existence of an employment relationship.[75] One proposal that reflects this approach is found in a recent report investigating the challenges of regulating work in the on-demand workforce of Victoria. The proposal calls for codifying a 'worker status' test into the Fair Work Act. In making this proposal, the authors suggest that assessing the entrepreneurial nature of work undertaken in modern work relationships would help provide a more accurate depiction of the 'totality' of the working relationship and the correct status of the worker.[76] The application of such a test would involve answering two questions: (1) whether the worker has a business; and (2) whether the 'work or the economic activity being performed is being performed in and for the business of that person'.[77] A key element of such a proposal would require that any party asserting that a worker was not an

[70] Ibid.
[71] Ibid., at [46].
[72] Ibid., at [48]–[50].
[73] This was seen in *Amita Gupta* v. *Portier Pacific Pty Ltd* and has now been confirmed in *Personnel Contracting* and *Jamsek*.
[74] Riley Munton, 'Boundary disputes', 94.
[75] Riley, 'Regulating work in the "gig economy"', 678.
[76] Industrial Relations Victoria, *Report of the Inquiry*, 193.
[77] *On Call Interpreters and Translators Agency Pty Ltd* v. *Commissioner of Taxation* (No 3) [2011] FCA 366 at [209].

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employee would bear the onus of proof in proving the worker was engaged in entrepreneurial activities. In carrying out this assessment, the bargaining power of the parties would be expressly considered to ensure that the worker had not simply formed a contract of adhesion to obtain work. The development of such a proposal emphasises that simply 'amending' traditional common law tests to obtain a more accurate characterisation of the status of such workers may result in more workers being classified as employees and thereby obtaining access to a range of statutory protections afforded to this class of worker. This approach of refining the application of existing tests is described by the authors themselves as being 'revisionist and not revolutionary'.[78]

Pursuing this approach may help to provide greater certainty regarding the application of associated areas of law relating to worker contracts such as taxation and superannuation. Presently, Australian taxation laws are contingent on determining the worker status of individuals and, as the previous discussion has shown, ascertaining this status remains difficult. Under the Income Tax Assessment Act 1997 (Cth) (ITA), employers remain responsible for withholding income tax from employee wages while contractors remain responsible for managing their own tax arrangements. While variations in decisions regarding worker status continue to occur, uncertainty is likely to remain about the tax obligations that apply to platform work. The question of worker status is also used to determine whether any obligation exists to pay a superannuation contribution on behalf of workers. Under the Commonwealth Superannuation Guarantee (Administration) Act 1992 (Cth), employers are currently required to contribute 10.5 per cent of an employee's ordinary time earnings.[79] This obligation does not extend to contractors. As a result, the variation in findings over the correct status of platform workers has meant that many workers have been denied this statutory entitlement. Interestingly enough, some of the largest digital intermediaries operating these platforms have indicated a degree of support for workers who use their services to be entitled to benefits such as superannuation. However, this support is constrained by a concern over their ability to maintain the viability of their business model.[80] Whether such a reference to the viability of business models is nothing more than a deliberate attempt to avoid liabilities and obligations that arise from 'employing' workers is yet to be seen.

An alternative approach to overcoming the worker status question is to explore other areas of law that can provide statutory protections that may shield 'new economy' workers from exploitative working conditions. For example, Australian Workplace Health and Safety (WHS) laws provide a regulatory frame that moves beyond the question of distinguishing between employee and contractor and instead applies a broad concept of 'worker' to establish obligations to provide safe work practices. As illustrated by the cases discussed in this chapter, a significant amount of the gig economy is currently composed of transport, food delivery, and home services. In completing these tasks, workers have been found to be exposed to a range of hazards and risks, including road traffic as well as work-related violence from colleagues and clients.[81] These gig workers are more likely to experience unfavourable working conditions than workers who perform similar work who are engaged under traditional employment contracts.[82] This can

[78] Industrial Relations Victoria, *Report of the Inquiry*, 188 [1325].

[79] Commonwealth Superannuation Guarantee (Administration) Act 1992 (Cth), s. 12.

[80] Industrial Relations Victoria (n. 10), Submission 79: Uber – see Uber, *Inquiry into the Victorian On-Demand Workforce: Uber's Submission*, https://engage.vic.gov.au/download/document/7373, at 5.

[81] Safework Australia (SWA), *The Effectiveness of Work Health and Safety Interventions by Regulators: A Literature Review* (Canberra: SWA, April 2013), https://bit.ly/3D3afww.

[82] K. Minter, 'Negotiating labour standards in the gig economy: Airtasker and Unions New South Wales', *Economic Labour Relations Review*, 28(3) (2017), 438–54.

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also help address the growing trend for modern work relationships to shift responsibility for managing safety away from 'client' organisations towards workers.[83]

Section 19 of the model WHS Act places an obligation on a person conducting a business or undertaking (PCBU) to provide 'workers' with a safe work environment.[84] Here, a worker is defined as someone who is 'engaged[,] or caused to be engaged, directly by the PCBU'. The duty extends to workers whose activities in carrying out such work are 'influenced or directed' by the PCBU. The application of such a broad definition has led some scholars to argue that this could establish a duty of care on digital intermediaries such as Uber, depending on the nature of the work and the context of how it is performed.[85] In addition, WHS laws establish a set of 'horizontal' and 'vertical' duties on PCBUs and their nominated officers to consult over how work is to be performed.[86] Horizontal duties require PCBUs to coordinate with each other to ensure that work is carried out safely. In contrast, vertical duties require PCBUs to consult with workers who carry out work for the 'lead' PCBU or entity that allocates work. The effect of these obligations is that, regardless of worker status, an obligation to consult about how work is to be performed is likely to exist as long as it can be established that digital intermediaries are in fact lead PCBUs.[87] By adopting a broad definition of worker, Australian WHS laws may provide a set of regulatory protections that help to ensure that work, regardless of how it is characterised, is carried out in a safe manner. Furthermore, obligations to consult and engage in dialogue with all parties involved in modern triangular relationships help to foster 'strong and innovative forms of social partnerships' between emerging institutional actors involved in modern work processes such as digital intermediaries.[88]

A more radical solution to addressing the worker status issue is to move beyond characterising modern work relationships within the frame of employment law. Instead, emphasis should be placed on the commercial nature of the contracts that digital intermediaries form with 'workers' to ensure that those contracts are fair and equitable. Such a proposal is based on the fact that the intermediaries themselves not only exercise a great deal of control over how workers and customers connect with each other but also profit from this process. The Independent Contractors Act 2006 (Cth) allows parties to seek a review of work contracts involving incorporated parties. The advantage of this legislation is that it moves beyond characterisation of the work relationship and instead allows workers to seek a review of the terms of their contract. This review is assessed against 'objectively determined benchmarks of fair terms' while offering compensatory remedies and the ability to make variations to the contract. Adopting a similar approach to contract review for on-demand workers would be a relatively straightforward 'small step' of application.[89] This is just one example of how the law can help to ensure that contracts governing on-demand work are not exploitative and that they recognise the fundamental labour rights of workers.[90]

[83] D. Schneider and K. Harknett, 'Consequences of routine work-schedule instability for worker health and well-being', *American Sociological Review*, 84(1) (2019), 82–114.

[84] Workplace Health and Safety Act 2011 (Cth) (WHS), s. 19.

[85] R. Johnstone, 'Regulating work health and safety in multilateral business arrangements', *Australian Journal of Labour Law*, 32(1) (2019), 41–61.

[86] WHS Act, ss. 46–7.

[87] J. Horton, A. Cameron, D. Devaraj, R. Hanson, and S. Hajkowicz, *Workplace Safety Futures: The Impact of Emerging Technologies and Platforms on Work Health And Safety and Workers' Compensation over the Next 20 Years* (Brisbane: CSIRO, 2018).

[88] E. Frino and T. Sarina, 'Regulating for safe work in a digital age: Building on the adaptive power of workplace health and safety (WHS) laws in Australia', *Journal of Health, Safety and Environment*, 36(2) (2020), 91–102.

[89] Riley, 'Regulating work in the "gig economy"', 680.

[90] Ibid.

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Another example of legislation that offers guidance on how regulators might safeguard against the formation of exploitative contracts for workers/drivers in the gig economy is the Owners Drivers Forestry Contractors Act 2005 (Vic) (ODFC Act). The ODFC Act offers a number of protections relating to remuneration, 'capricious' termination, access to affordable dispute resolution systems, and the right to freedom of association and collective bargaining, which can be used to enhance the right of workers to determine their own working conditions.[91] Examining how these provisions can help avoid the application of pay rates that undercut relevant award rates of pay, Riley argues that standard Uber driver contracts allow Uber to establish fare rates that do not take into account the costs that drivers incur in making their service available, such as car running costs and data charges required to access the partner app that enables them to obtain work.[92] However, under the ODFC Act, hirers of drivers are required to publish rates of fares and costs associated with the provision of these services that have been determined by the Minister in consultation with the Transport Industry Council and the Forest Industry Council. This allows drivers to compare the remuneration they are likely to receive to that of someone carrying out the same work who is classified as an employee.[93] Failure to disclose such information may subject the hirer to a determination made by the Victorian Civil and Administrative Tribunal (VCAT) that requires the driver to be 'paid a fair and reasonable rate notwithstanding the terms of the contract'.[94] This provides an opportunity for the 'establishment of an administrative body' to review fares of similar ride-share arrangements or 'on-demand workers in different industries' and thereby could help establish fairer 'remuneration for their work'.[95]

Furthermore, the ODFC Act provides a means by which drivers can secure a remedy for being subject to 'unconscionable conduct'.[96] This includes whether the parties are subject to contracts that fail to provide for a regular and systematic review of costs associated with operating as a driver. This type of review can be extended to contracts of other specific classes of worker provided the application is made by a trade union or a nominated 'negotiation agent'.[97] Establishing this capacity to bargain collectively remains a fundamental way for workers to be able to establish more equitable and efficient outcomes in modern economies, and drivers in the gig economy should be provided with a statutory right to do the same.[98]

The ODFC Act also provides protections against the capricious termination of some categories of worker. For example, drivers of heavy vehicles must be provided with a minimum of three months' notice in recognition of the substantial investment that owner drivers make in purchasing 'job specific, expensive rigs'.[99] In contrast, the terms of services agreements that govern work undertaken by transport or food delivery drivers allow an intermediary to suspend access to the digital app that drivers use to obtain work when customer reviews fall below a certain level. Such systems rely on a simple algorithm to produce a 'crude assessment' of the workers' performance while denying workers any avenue for appealing such

[91] Owners Drivers Forestry Contractors Act 2005 (Vic) [hereinafter ODFC Act], ss. 14(2)(b), 16, 44(1), 47(2), 45.
[92] Riley, 'Regulating work in the "gig economy"', 681.
[93] Ibid.
[94] Ibid.
[95] Ibid.
[96] ODFC Act s. 31.
[97] Ibid., s. 29.
[98] D. Peetz, 'Awards and collective bargaining in Australia: What do they do, and are they relevant to New Zealand?', *New Zealand Journal of Employment Relations*, 44(3) (2019), 58–75.
[99] ODFC Act s. 21.

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a decision.[100] In effect, such terms are seen as being 'patently unfair'; these workers should be provided with a reasonable notice period and opportunity to respond similar to other classes of driver regulated by the Act.[101]

Finally, the ODFC Act provides drivers with a right to have any complaints mediated by the Small Business Commissioner before proceeding to the VCAT for resolution. This right could easily be extended to drivers working for digital intermediaries, thereby enabling the quick and cheap resolution of any disputes that may arise. Recent reports suggest that these alternative forms of dispute resolution are successful, with only 10 per cent of parties indicating that they would not be willing to participate in such processes. The high rates of participation in such schemes are likely owing to the risk of 'adverse publicity' that parties would experience by not participating.[102] However, despite the provision of such a service, there have been only four applications involving digital intermediaries/online platforms. None of these cases proceeded to mediation as the parties decided not to pursue the matter or it was resolved before proceeding to hearing.[103]

This discussion has outlined a number of strategies for creating a regulatory architecture that is able to better accommodate the emergence of new forms of work and places the emphasis on analysing the contract of employment to determine worker status. Some commentors have noted that there are already state-based statutory mechanisms that could increase protection to certain on-demand workers such as delivery drivers. As mentioned previously, these include chapter 6 of the Industrial Relations Act 1996 (NSW), which allows these types of worker to make and register 'contract determinations', covering fixed remuneration and other conditions of work, as well as protection from 'capricious contract termination'. Importantly, this legislation also allows owner-drivers to collectivise and negotiate the conditions of their work.[104] Regardless of which proposals are adopted, what this discussion has shown is the adaptive nature of the law, which will allow it to accommodate the emergence of new forms of work in a way that underpins contractual arrangements with fair standards that deliver mutual benefits to workers, end-users, and intermediaries. In addition to this regulatory response, some consideration needs to be given to how the institutional actors themselves have responded to the emergence of new forms of work.

V QUO VADIS? THE RESPONSE OF INSTITUTIONAL ACTORS TO THE EMERGENCE OF MODERN WORK RELATIONSHIPS

As explained earlier, the common law relies on characterising the employment relationship 'exclusively in terms of individual workers and those who engaged them'.[105] Workers have historically attempted to enhance their negotiation power by organising in a range of different forms of collective, the most well-known being the trade union. Trade unions have long been recognised as providing employees with a vehicle to enhance their negotiating power; employees

[100] A. Todolí-Signes, 'The end of the subordinate worker? Collaborative economy, on-demand economy, gig economy, and the crowdworkers' need for protection', *International Journal of Comparative Labour Law and Industrial Relations*, 33(2) (2017), 1–33.

[101] Riley, 'Regulating work in the "gig economy"', 682.

[102] Industrial Relations Victoria (n. 10), Submission 87: Victorian Small Business Commission – see Judy O'Connell, *Response from the Victorian Small Business Commission* (5 August 2019), https://engage.vic.gov.au/download/document/7380, at 2.

[103] Ibid.

[104] Rawling and Riley Munton, 'Constraining the uber-powerful digital platforms', 28–9.

[105] R. Johnstone, 'The regulation of work relationships in an historical context' in R. Johnstone, S. McCrystal, I. Nossar, M. Quinlan, M. Rawling, and J. Riley (eds.), *Beyond Employment: The Legal Regulation of Work Relationships*, 6–28 (Annandale, NSW: Federation Press, 2012).

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can apply pressure to their employer often by withdrawing their labour and undertaking industrial action.[106] In Australia, trade unions have played a critical role in the 'emergence of continuing employment as the dominant form of work relationship' in the economy.[107] However, as this chapter has shown, this trend is now under threat as many workers in the gig economy struggle to collectivise owing to their classification as part-time, casual, or contract workers.[108]

This has not stopped some trade unions from deploying alternative strategies to remain an important agent for promoting fair and equitable work arrangements between workers and digital intermediaries. For example, Unions NSW recently negotiated a number of practices that will apply to workers who sign up with the digital intermediary known as Airtasker. This digital platform is self-described as a digital intermediary that simply 'outsources' tasks to workers.[109] Unlike with Uber, the rates for work advertised through Airtasker are not set by the digital intermediary itself. Instead, clients 'offer' a price they are willing to pay for the service to be performed. This often results in workers accepting pay rates that are below the minimum rates of pay prescribed by statutory instruments that apply to employees. Unions NSW was able to negotiate an agreement to 'identify and communicate' the minimum statutory pay rates attached to such work to all workers who sign up to use the digital platform.[110] In addition, an agreement was reached between Airtasker and Unions NSW to search for optional personal injury insurance providers as well as establishing various safety and dispute resolution policies that workers can access. Even though these agreements may help to shape the custom and practice of working standards that apply, the long-term impact of such arrangements is likely to remain limited as they lack any real legal enforceability. In the case of Unions NSW, negotiating an agreement with Airtasker to improve peripheral aspects of how work is carried out does not provide these workers with a 'set of truly enforceable labour standards' including the application of mandatory minimum pay rates as well as access to independent dispute resolution tribunals.[111]

The emergence of worker cooperatives is another institutional development appearing in response to the rise of gig economy work. Cooperatives are non-profit organisations that are established to satisfy a 'mutual purpose' that has been determined by its members who also own the enterprise.[112] Cooperatives are required to establish governing structures that comply with seven main principles established by the International Co-operative Alliance (ICA). These include voluntary and open membership as well as demonstrating a concern for the broader community.[113] There is a growing pool of literature showing how some groups of workers from distinct occupational groups are forming 'platform cooperatives' that act as an institutional barrier protecting these worker from being exposed to the exploitative working conditions found in contracts of gig economy workers.[114] This is achieved by workers not only owning the

[106] H. A. Clegg, *Trade Unionism under Collective Bargaining: A Theory Based on Comparisons of Six Countries* (Oxford: Basil Blackwell, 1976).

[107] Johnstone, 'The regulation of work relationships', 18.

[108] J. Stanford, 'The resurgence of gig work: Historical and theoretical perspectives', *Economic and Labour Relations Review*, 28(3) (2017), 382–401.

[109] See Airtasker.com, 'How it works', www.airtasker.com/how-it-works/.

[110] Minter, 'Negotiating labour standards'.

[111] Ibid., at 450.

[112] T. Sarina and A. Fici, 'A comparison between Australian and Italian co-operative law' in A. Jensen, G. Patmore, and E. Tortia (eds.), *Cooperative Enterprises in Australia and Italy: Comparative Analysis and Theoretical Insights*, 21–36 (Florence: Firenze University Press, 2015).

[113] See principles of International Co-operative Alliance (ICA), www.ica.coop/en/cooperatives/cooperative-identity.

[114] T. Scholz, *Platform Cooperativism: Challenging the Corporate Sharing Economy* (New York: Rosa Luxemburg Foundation, 2016), https://bit.ly/3O5qXlm.

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cooperative but also establishing their own digital intermediary to transact with external clients to 'sell' their labour or services. This allows the worker members of the cooperative to 'capture' the fee often charged by external market intermediaries (which can range from 20 per cent to 35 per cent of the contract price), which can then be redistributed back to the workers themselves.[115] This has been a response in part to organisations developing more elaborate human resource strategies that allow them to use digital intermediaries to source high-skilled and high-paid workers through low-paid exploitative work systems in order to extract more value from the work itself.[116]

By securing ownership of the digital intermediary itself, these workers have developed an alternative strategy that assists them to improve pay and working conditions regardless of their work status. In effect, these types of cooperative can transform workers from price-takers into price-makers.[117] Although these platform cooperatives are popular in Europe, their formation in Australia has remained limited owing to a historical legacy where national corporation laws have facilitated the growth of 'at profit' organisations across the country. This resulted in an absence of any national cooperative laws until 2012, which constrained cooperatives to individual state jurisdictions and thereby limited their growth.[118] However, this has recently changed with all states having now passed uniform cooperative laws enabling them to operate and grow across jurisdictions.[119]

VI CONCLUSIONS AND CHALLENGES AHEAD FOR REGULATING THE FUTURE OF WORK

This chapter has outlined how technology has accelerated the fragmentation in different types of work relationship appearing in Australia. In underpinning the rise of the gig economy, technology has forced us to look at how work can be arranged and regulated in more effective and sustainable ways. The current legal architecture based on distinguishing between an employee and a contractor has struggled to deliver a consistent answer on how best to regulate triadic relationships between digital intermediaries, workers, and 'buyers' of labour to avoid exploitative working conditions and instead provide mutual benefit. Viewing modern work arrangements as commercial interactions provides us with a much more effective avenue for ensuring that digital intermediaries that exercise considerable control over workers are restrained from offering exploitative working arrangements that otherwise may be allowed if traditional employment law tests are applied.

In conjunction with refocussing our regulatory lens, we also need to encourage greater social dialogue between institutional actors so we can learn more about how these actors are responding. This chapter has shown how trade unions and workers themselves have developed a raft of innovative responses to the impact that technology is having on work arrangements. Some trade unions have pursued a strategy of partnering with digital intermediaries in an attempt to ensure that workers who enter into these modern arrangements are informed and equipped with some protections (albeit unenforceable) against exploitative worker arrangements. We have also seen how workers themselves are using alternative organisational forms

[115] Sarina and Riley, 'Re-crafting the enterprise', 31.
[116] D. J. Teece, 'Business models, business strategy and innovation', *Long Range Planning*, 43(2–3) (2010), 172–94.
[117] Scholz, *Platform Cooperativism*, 13.
[118] T. Sarina, 'Australia' in D. Cracogna, A. Fici, and H. Henrÿ (eds.), *International Handbook of Cooperative Law*, 207–30 (Heidelberg: Springer-Verlag, 2013).
[119] See 'Co-operatives national laws', *NSW Government*, https://bit.ly/3JHiEJS.

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such as cooperatives to create an institutional shield that provides them with greater control over maintaining working conditions regardless of their worker status.

The ultimate outcome of these regulatory and institutional developments is difficult to predict with absolute certainty. However, one thing that is certain is that economies will face a high rate of technological change and increased competitive pressure over the next decade. The economic devastation that countries including Australia experienced owing to the Covid-19 pandemic was significant. As a result, governments are desperate to kick-start their economies out of hibernation while helping to manage inflationary pressures. Australia is looking to achieve this by improving workplace productivity, regulatory reform, and consultation with institutional players including employers, trade unions, and workers. As part of the former Morrison government's 'jobmaker' programme, the former Australian Prime Minister signalled an intention to 'throw out the industrial handbook' to revive businesses, employment levels, and productivity.[120] The Federal Labor government elected in 2022 remains committed to tackling issues including increased job security as well as re-examining the challenges of regulating modern forms of work. As this volume goes to publication, the Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022 was enacted. This Act includes a raft of proposed amendments to workplace regulation that aim to 'get wages moving . . . and promote job security'.[121]

This reform package will also ensure that a statutory review of the Act occurs within two years of this law being enacted. Let's hope that these amendments and the review process can help build a regulatory architecture of modern work that can continue to adapt and respond to future evolutions in both market structures and the nature of work itself. If we can achieve that lofty ambition, work will indeed remain capable of delivering a more prosperous and sustainable society.

[120] G. Jennett, 'Scott Morrison has thrown out the industrial relations rulebook, but can old enemies work toge
ABC News (26 May 2020), https://bit.ly/44BAq9p.

[121] The Hon. Tony Burke MP, ' Senate support for Secure Jobs, Better Pay', Media Release (28 November 2022), h
ministers.dewr.gov.au/burke/senate-support-secure-jobs-better-pay-0.

New reference needed for new comment inserted here. Two issues: 1. Please use Italics for the legislation referred to in the previous comment.

Reference for legislation is: Fair Work Legislation Amendment (Closing Loopholes) Bill 2023, s.15ff.

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