ANALOGUE LAWS FOR A DIGITAL AGE?

REGULATING WORK IN THE RISING 'GIG ECONOMY'

Introduction: Law, Disrupted

Austrian economist Joseph Schumpeter evocatively described the constant cycle of new and better products and processes replacing outmoded ones as 'a perennial gale of creative destruction'.[1] This, for Schumpeter, was the 'essential fact about capitalism'.[2] The most recent winds – perhaps representing 'the most profound economic change of the past forty years'[3] – are being brought by the 'third phase of the internet'. The first phase, 'Web 1.0', enabled efficient searching and access to information. 'Web 2.0' was about selling *things* like books and music. 'Web 3.0' marks the rise of the 'gig economy' and the internet expanding its reach to 'facilitate the selling of labour, effort, skills, and time'.[4] This phenomenon represents a resurfacing of problems well known to labour law with renewed force,[5] and brings an array of conceptual and practical challenges in regulating work.

The poster child of this new gig economy is Uber. Born in San Francisco in 2009, the company was not the first to recognise the new opportunities that technology offers in

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[1] Joseph Schumpeter, *Capitalism, Socialism and Democracy* (Routledge, 1994) 82–3.
[2] Ibid.
[3] Orly Lobel, 'The Gig Economy & the Future of Employment and Labor Law' (2016) 51(1) *University of San Francisco Law Review* 51, 54.
[4] Ibid, 52. See generally Orly Lobel, 'The Law of the Platform' (2016) 101 *Minnesota Law Review* 87, 94–105.
[5] See generally Jim Stanford, 'The Resurgence of Gig Work: Historical and Theoretical Perspectives' (2017) 28(3) *The Economic and Labour Relations Review* 382; Michael Quinlan, 'The 'Pre-invention' of Precarious Employment: the Changing World of Work in Context' (2012) 23(4) *The Economic and Labour Relations Review* 3; Gérard Valenduc and Patricia Vendramin, 'Work in the Digital Economy: Sorting the Old from the New' (Working paper no. 2016.03, European Trade Union Institute Working Paper, 2016) <https://www.etui.org/Publications2/Working-Papers/Work-in-the-digital-economy-sorting- the-old-from-the-new>.

bringing together jobs and workers.[6] It is also in some ways atypical of the wider gig economy. The taxi drivers Uber displaces are 'bailees' not 'employees', and the company exercises an unusual degree of ongoing control over its workers.[7] However, being familiar to the public at large,[8] a lightning rod for litigation, and the subject of much academic attention, it is a useful focal point for analysis.

This paper critically examines whether and how to regulate the gig economy. Its will focus on labour law, adopt an Australian perspective and use Uber as a vehicle for discussion. Part I introduces the broad contours of the gig economy. In Part II, after briefly sketching arguments for a *laissez-faire* approach, I outline four reasons strong regulatory responses are needed. Part III surveys and critically evaluates a suite of five potential 'modes' of regulation: 'the incremental (common law driven) approach', 'targeted legislative interventions', 'recasting the employment relationship', 'introducing a new category of "independent worker"', and 'redrawing the boundaries of labour law'. In Part IV, I propose a rough blueprint of guiding principles and priorities.

[6] That honour likely belongs to Topcoder, a crowdwork platform for computer programmers founded in 2001: see 'There's an App for That; The Future of Work', *The Economist*, Jan 3 2015, 17–20.

[7] See further Andrew Stewart and Jim Stanford, 'Regulating Work in the Gig Economy: What Are the Options?' (2017) 28(3) *The Economic and Labour Relations Review* 420, 423–4; Nicolas Suzor, 'Uber and Out? Regulating Work in the Gig Economy' on *Nicolas Suzor* (August 4 2016). <https://nic.suzor.net/2016/08/04/andrew-stewart-uber-and-out-regulating-work-in-the-gig-economy/>; Seth Harris and Allen Krueger, 'A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"' (Discussion Paper 2015–10, Brookings Institute, December 2015) 22–3 <http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf>.

[8] For example, the term 'uberisation' has entered the vernacular: see, eg, Sunny Freeman, '"Uberization" of Everything Is Happening, but Not Every "Uber" Will Succeed', *Huffington Post* (online), April 1 2015 <http://www .huffingtonpost.ca/2015/04/01/uberization-uber-of-everything_n_6971752.html>.

I. FROM STARTUPS TO UPSTARTS: CHARTING THE RISE OF THE 'GIG ECONOMY'

Some of the forces behind the gig economy have been around for decades.[9] However, its true emergence was during the global financial crisis,[10] in a 'perfect storm' of significant technological advances meeting an economic downturn that caused workers to turn to sporadic, freelance work ('gigs') to support themselves in the absence of better alternatives.[11]

The literature is still struggling to arrive at a coherent, comprehensive and precise definition.[12] But work in the gig economy can be characterised by three basic elements:[13]

(a) *Structure of relationships*: Work is structured around multiple parties interacting in a triangular relationship. Between the worker (the Uber driver, for example) and

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[9] Examples of these forces include the steady decline of trade unions and the 'standard employment relationship', and important changes in consumption and work preferences: see generally 'Workers on Tap; The On-demand Economy', *The Economist*, January 3 2015, 9; Katherine Stone and Harry Arthurs, 'The Transformation of Employment Regimes: A Worldwide Challenge' in Katherine Stone and Harry Arthurs (eds), *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (Russell Sage, 2013) 1.

[10] Hook (with admirable confidence) pinpoints the emergence of the term 'gig economy' to early 2009: Laurie Hook, 'Year in a Word: Gig Economy, *Financial Times* (online), 30 December 2015 <https://www.ft.com/content/b5a2b122-a41b-11e5-8218-6b8ff73aae15>. See also Emily Hong, 'Making it Work: A Closer Look at the Gig Economy, *New America* (online) 1 October 2015 <https://www.newamerica.org/weekly/94/making-it-work-a-closer-look-at-the-gig-economy/>.

[11] Orly Lobel, 'The Gig Economy & the Future of Employment and Labor Law' (2016) 51(1) *University of San Francisco Law Review* 51, 52; Kate Minter, 'Negotiating Labour Standards in the Gig Economy: Airtasker and Unions New South Wales' (2017) 28(3) *The Economic and Labour Relations Review* 438, 440.

[12] Or even a uniform nomenclature or consistent terminology: see especially 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 & Policy Journal* 653, 653. For a discussion of the difficulty in defining the 'gig economy' due the heterogeneity of platforms and variety of work arrangements which could sit comfortably under its umbrella, see, eg, Jeremias Prassl and Martin Risak 'Uber, Taskrabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork' (2016) 37(3) *Comparative Labor Law & Policy Journal* 619, 621.

[13] Adapted from Jim Stanford, 'The Resurgence of Gig Work: Historical and Theoretical Perspectives' (2017) 28(3) *The Economic and Labour Relations Review* 382, 384; Kate Minter, 'Negotiating Labour Standards in the Gig Economy: Airtasker and Unions New South Wales' (2017) 28(3) *The Economic and Labour Relations Review* 438, 441; Economics and Statistics Administration, 'Digital Matching Firms: A New Definition in the "Sharing Economy" Space' (Report, U.S. Commerce Department, June 2 2016) <http://www.esa.doc.gov/reports/digital-matching-firms-new-definition-"sharing-economy"-space>.

customer (the passenger) sits a digital intermediary (Uber), who commissions, supervises or assists in the delivery of work;[14]

(b) *Nature of engagement*: Workers are engaged on an *ad hoc* basis, performing specific, discrete tasks with no guarantee of continuing work;

(c) *Characteristics of work:* Workers are usually paid on completion of task rather than by unit of time[15] and must provide their own tools or assets (such as an Uber driver's car or phone).

De Stefano makes a well-accepted[16] distinction between two broad categories of gig work:[17] *crowdwork* – where workers bid for and perform work online though platforms such as Amazon's Mechanical Turk, Upwork or Topcoder;[18] and *work-on-demand via app* – where workers complete tasks in the 'real world' through platforms which generally play a more active role in organising or managing work. Uber, Deliveroo (a food delivery service) or Whizz and Helpling (cleaning services) are examples.

[14] In the case of food delivery businesses such as Uber Eats there is an even more complicated quadrilateral arrangement between platform, restaurant, delivery driver and customer.
[15] Also known as 'piece-based compensation'.
[16] Cf Jeremias Prassl and Martin Risak 'Uber, Taskrabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork' (2016) 37(3) *Comparative Labor Law & Policy Journal* 619, 623.
[17] 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 & Policy Journal* 471, 473–5. For alternative typologies, see Diana Farrell and Fiona Greig, 'Paychecks, Paydays, and the Online Platform Economy: Big Data on Income Volatility' (Report, JPMorgan Chase Institute, February 2016) (who differentiate between 'capital' and 'labour' platforms); Adrian Todoli-Signes, 'The End of the Subordinate Worker? The On-demand Economy, the Gig Economy, and the Need for Protection for Crowdworkers' (2017) 33(2*) International Journal of Comparative Labour Law and Industrial Relations* 241 (who describes 'the sharing economy', 'online crowdsourcing' and 'offline crowdsourcing').
[18] Kagener *et al* usefully categorise crowdwork platforms according to four 'models': 'aggregator', 'facilitator', governor' and 'arbitrator': see Evgeny Kagener, Carmel Hirschheim, Rudy Erran and Timothy Olsen, 'Managing the Human Cloud' (2013) 54(2) *MIT Sloan Management Review* 23.

The gig economy is still largely confined to a few major industries[19] and dominated by a few high-profile players.[20] It is populated by a small, but rapidly growing, number of workers. Due to a dearth of reliable data it is hard to confidently evaluate its scope.[21] But a recent European study finds 7.7% of the adult population in 14 countries working 'relatively frequently' (at least once per month) in the gig economy. 2% are 'main platform workers', earning half or more of their income, and/or working more than 20 hours a week, via platforms.[22]

[19] Most notably transport, food delivery and cleaning.
[20] Kate Minter, 'Negotiating Labour Standards in the Gig Economy: Airtasker and Unions New South Wales' (2017) 28(3) *The Economic and Labour Relations Review* 438, 441.
[21] See generally Adrian Hawley 'Regulating Labour Platforms, the Data Deficit' (2018) 7(1) *European Journal of Government and Economics* 5.
[22] Annarosa Pesole et al, 'Platform Workers in Europe: Evidence from the COLLEEM Survey' (Joint Research Centre for Science Report, European Commission, 2018) 3. For relatively detailed (but now out-of-date) studies from the United States and Australia, see Lawrence Katz and Alan Krueger (2016) 'The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015 (Working Paper No 22667, National Bureau of Economic Research, 2016) and Jim Minifie, 'Peer-to-peer Pressure: Policy for the Sharing Economy' (Report, Grattan Institute, April 2016) <https://grattan.edu.au/wp-content/uploads/2016/04/871-Peer-to-peer-pressure.pdf>.

II. THE CASE FOR REGULATION

A. Allowing the Invisible Hand Free Reign?

The gig economy is not short of proponents spruiking its potential benefits to consumers, businesses and the wider economy.[23] Workers too, they enthuse, will find new flexibility[24] and opportunities to earn income.[25]

There is a vocal group of pro-market scholars and advocates who urge a laissez-faire approach from governments. Epstein, for example, describes Californian litigation attempting to have Uber drivers classified as employees as 'using employment law to wreck an industry'.[26] Similarly, in Australia, Berg and Allen opine that 'the real threat to the gig economy is government regulation' and 'the use of highly restrictive labour law'.[27] On this view, regulation would only support inefficient market incumbents (like the taxi industry), stifle innovation, absorb the gig economy's oft-spruiked benefits, 'prevent mutually beneficial trade', and slow economic growth.

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[23] See especially Alek Felstiner, 'Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry' (2011) 32 *Berkeley Journal of Employment and Labor Law* 143, 151–4; Bernd Waas, 'Summary' in Bernd Waas, Wilma Liebman, Andrew Lyubarsky and Katsutoshi Kezuka, *Crowdwork – A Comparative Law Perspective* (Bund-Verlag, 2017) 256, 256–7.

[24] The gig economy 'allows for individuals to work where they wish, from wherever they happen to be, choosing from a wide variety of jobs': Wilma Liebman and Andrew Lyubarsky, 'Crowdworkers, the Law and the Future of Work: The U.S.' in Bernd Waas, Wilma Liebman, Andrew Lyubarsky and Katsutoshi Kezuka, *Crowdwork – A Comparative Law Perspective* (Bund-Verlag, 2017) 24, 78.

[25] Including the chance to 'supplement or smooth' income and new access to work for certain demographic groups (like those living with a disability): see Productivity Commission, 'Digital Disruption: What Do Governments Need to Do?' (Research Paper, June 2016) 77–8.

[26] Richard Epstein, 'Uber and Lyft in California: How to Use Employment Law to Wreck an Industry', *Forbes* (online), March 16 2015, <http://www.forbes.com/sites/richardepstein/2015/03/16/uber-and-lyft-in-california-how-to-use-employment-law-to-wreck-an-industry/#497f3cbc506f>; Richard Epstein, 'The Libertarian: The Death of Independent Contractors?', *Hoover Institute* (online), March 24 2015, <http://www.hoover.org/researchlibertarian-death-independent-contractors>.

[27] Darcy Allen and Chris Berg, 'The Sharing Economy: How Over-regulation Could Destroy an Economic Revolution' (Report, Institute of Public Affairs, December 2014) 2–3.

B. Why Regulatory Attention is Needed

Despite these (in some ways understandable) concerns, the gig economy brings four interrelated challenges that labour law must be called upon to address:

1. A 'Bermuda Triangle' of Contracts and Relationships

Gig economy work is typified by a complex web of contracts and relationships between the *worker and the platform*, the *customer and the platform* and the *worker and the customer*.[28] It serves as a 'clear illustration of the profound difficulties posed by complex triangular or multilateral employment relationships.'[29]

How to construct these relationships, determine the legal status of its participants (as employees, employers, or something else),[30] and define the precise scope of their rights and obligations to each other, becomes a forbidding task.[31]

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[28] For closer examinations of this contractual 'Bermuda Triangle', see Jeremias Prassl and Martin Risak 'Uber, Taskrabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork' (2016) 37(3) *Comparative Labor Law & Policy Journal* 619, 637–34; Andrew Stewart and Jim Stanford, 'Regulating Work in the Gig Economy: What Are the Options?' (2017) 28(3) *The Economic and Labour Relations Review* 420, 424–5.

[29] Jeremias Prassl and Martin Risak 'Uber, Taskrabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork' (2016) 37(3) *Comparative Labor Law & Policy Journal* 619, 634–7.

[30] See further Alek Felstiner, 'Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry' (2011) 32 *Berkeley Journal of Employment and Labor Law* 143, 197; Adrian Todoli-Signes, 'The End of the Subordinate Worker? The On-demand Economy, the Gig Economy, and the Need for Protection for Crowdworkers' (2017) 33(2*) International Journal of Comparative Labour Law and Industrial Relations* 241, 268.

[31] See especially Jeremias Prassl and Martin Risak 'Uber, Taskrabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork' (2016) 37(3) *Comparative Labor Law & Policy Journal* 619, 619.

2. Evading Employment and the 'Protective Scope Problem'

In Australia, like many jurisdictions around the world, the employment relationship is the 'gateway' for delivering rights and entitlements.[32] Most of the obligations and protections provided for in Australian workplace law – guarantees of minimum pay, limits on hours of work, protections against unfair dismissal and rights to collective bargaining – apply only to *employees*.[33]

For its part, Uber claims that it 'does not employ drivers … it merely provides a platform for people who own vehicles to leverage their skills and personal assets and connect with other people looking to pay for those skills and assets.'[34] In the two most significant decisions on the legal status of Uber drivers to date, the Fair Work Commission agrees. It has held that, according to 'the traditional available tests of employment', Uber drivers were 'plainly not employees'.[35] As a consequence, Uber drivers (at least for the moment) fall outside the protective scope of a significant portion of Australian labour law.

Three questions arise: Should the simple binary division between employee and non-employee evolve 'to catch pace with the nature of the digital economy'?[36] Do the employee

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[32] Miriam Cherry and Antonio Aloisi, 'Dependent Contractors" in the Gig Economy: A Comparative Approach' (2017) 66(3) *American University Law Review* 635, 658. See generally Matthew Finkin, 'Beclouded Work in Historical Perspective' (2016) 37(3) *Comparative Labor Law & Policy Journal* 603.

[33] See further Andrew Stewart and Jim Stanford, 'Regulating Work in the Gig Economy: What Are the Options?' (2017) 28(3) *The Economic and Labour Relations Review* 420, 425–9.

[34] See Orly Lobel, 'The Gig Economy & the Future of Employment and Labor Law' (2016) 51(1) *University of San Francisco Law Review* 51, 63.

[35] *Kaseris v Rasier Pacific* [2017] FWC 6610, [66]–[67], followed in *Pallage v Rasier Pacific* [2018] FWC 2579 (see, in particular, [17]). This approach will be critiqued in *Part III.A*. Note also the decision in *Pirot Pty Ltd v Return to Work SA (Schultz)* [2017] SAET 92. In that case, a person leased a car from a limousine company, Blue Ribbon Passenger Services, in order to drive for Uber. That driver was found to be in an employment relationship with Blue Ribbon Passenger Services for the purposes of a workers' compensation claim.

[36] *Kaseris v Rasier Pacific* [2017] FWC 6610, [66]. For a wider discussion of whether this dichotomy adequately reflects a spectrum of arrangements for the supply of personal labour, see generally Mark Freedland, *The Personal Employment Contract* (Oxford, 2003); Mark Freedland and Nicola Kountouris, 'The Legal

status tests need to be modified or updated? And, irrespective of their non-standard work arrangements, what level of legal protection are gig workers are entitled to?[37]

3. 'Uber-Capitalism' and the Erosion of Working Conditions

Gig work entails four dangers for its participants. Firstly, due to the absence of the 'psychological contract' or relationship of trust found in the traditional employment relationship,[38] it represents a *'commodification of labour'*.[39] Secondly, due to market concentration[40] and captive workers (locked in by their digital rating),[41] it *exacerbates power imbalances*.[42] Thirdly, it has been described as a 'midwife for the growth of *precarious employment*'[43] – amplifying vulnerability through the 'demutualisation of risk'[44] and the isolation of workers.[45] Fourthly, sometimes oppressive *working conditions* result from a

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Characterization of Personal Work Relations and the Idea of Labour Law' in G Davidov and B Langille (ds), *The Idea of Labour Law* (Oxford, 2011) 179. See also Richard Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships* (Federation Press, 2012).

[37] Joellen Riley, 'Brand New 'Sharing' or Plain Old 'Sweating'? A Proposal for Regulating the New 'Gig Economy' in Ron Levy et al (eds), *New Directions for Law in Australia* (ANU Press, 2017) 59, 64. For general discussions of this issue in relation to non-standard work, see Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15(3) *Australian Journal of Labour Law* 235.

[38] Austin Zwick, 'Welcome to the Gig Economy: Neoliberal Industrial Relations and the Case of Uber' (2018) 83(4) *GeoJournal* 679; Bernd Waas, 'Summary' in Bernd Waas, Wilma Liebman, Andrew Lyubarsky and Katsutoshi Kezuka, *Crowdwork – A Comparative Law Perspective* (Bund-Verlag, 2017) 256, 256.

[39] See Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford, 2018) 4; Joellen Riley, 'Brand New 'Sharing' or Plain Old 'Sweating'? A Proposal for Regulating the New 'Gig Economy' in Ron Levy et al (eds), *New Directions for Law in Australia* (ANU Press, 2017) 59, 62. See generally 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 & Policy Journal* 653.

[40] Thanks, in no small part, to 'network effects'.

[41] 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 & Policy Journal* 653, 654.

[42] Martin Kenney and John Zysman, 'The Rise of the Platform Economy' (2016) 32(3) *Issues in Science and Technology* 61, 62.

[43] 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 & Policy Journal* 653, 683; Kevin Zawacki, 'Amazon's Turkers Kick Off the First Crowdsourced Labor Guild', *Daily Beast* (online), December 3 2014, <http://www.thedailybeast.com/articles/2014/12/03/amazon-s-turkers-kick-off-the-first-crowdsourced-labor-guild.html>.

[44] Shifting contractual risk to the worker and requiring them to invest in their own 'tools of the trade'.

[45] See above 41, 677.

hyper-competitive work environment,[46] pervasive monitoring and surveillance,[47] lower pay,[48] and instability.[49]

4. An Un-level Playing Field[50]

For Prassl, 'businesses can compete on a level playing field only if existing employment laws are equally applied and consistently enforced.'[51] Platforms that are able to disguise an employment contract as a 'contract for services', and thereby avoid the financial and other obligations employers owe their employees, gain an unfair advantage over competitors.[52]

Due to these four reasons, gig workers are simultaneously stranded outside the protective umbrella of labour law while their working conditions are undermined. Effective regulation is required in response.

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[46] Foodora is an almost Dickensian example: see, eg, David Chau, 'Foodora to Cease Operations in Australia Later this Month, but Lawsuits Still Ongoing', *ABC News* (online), 2 August 2018 <http://www.abc.net.au/news/2018-08-02/foodora-pulls-out-of-australia/10066964>.

[47] Matthew Bodie et al, 'The Law and Policy of People Analytics', (Legal Studies Research Paper Series No. 2016-6, Saint Louis University School of Law, 2016) 1–3.

[48] Joellen Riley, 'Brand New 'Sharing' or Plain Old 'Sweating'? A Proposal for Regulating the New 'Gig Economy' in Ron Levy et al (eds), *New Directions for Law in Australia* (ANU Press, 2017) 59, 63.

[49] See Janine Berg, 'Income Security in the On-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers' (2016) 37 *Comparative Labour Law & Policy Journal* 543.

[50] For a discussion of labour law assuming a role in promoting sustainable, competitive markets, see, eg, Hugh Collins, 'Regulating the Employment Relation for Competitiveness' (2001) 30 *Industrial Law Journal* 17.

[51] Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford, 2018) 10.

[52] See further Cyrus Farivar, 'New Court Ruling Could Force Uber, Lyft to Convert Drivers to Employees', *Arstechnica* (online), 5 February 2018, <https://arstechnica.com/tech-policy/2018/05/new-court-ruling-could-force-uber-lyft-to-convert-drivers-to-employees/>.

III. CLOSING THE REGULATORY GAP: FIVE 'MODES' OF REGULATION FOR THE GIG ECONOMY[53]

A. The Incremental Approach

Thierer argues that the best solutions to complex, technologically-driven problems 'are almost always organic and bottom-up in nature', and, where regulation is necessary, it should be through 'targeted enforcement of existing legal norms, particularly though the common law.'[54]

Existing legal frameworks could be applied (and perhaps expanded) by workers, unions and regulators via two avenues: claiming employee status or challenging contractual terms.[55] This 'incremental approach' to improving conditions in the gig economy would be achieved both through litigation, and by 'negotiation in the shadow of the court' – unions have already had some success both in Australia[56] and overseas[57] directly engaging with platforms on the threat of formal legal action.

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[53] These modes should be seen as (broadly) complementary, not mutually exclusive: see Orly Lobel, 'The Gig Economy & the Future of Employment and Labor Law' (2016) 51(1) *University of San Francisco Law Review* 51, 58; Jeremias Prassl and Martin Risak, 'The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights' in P Meil, V Kirov (eds), *Policy Implications of Virtual Work* (Dynamics of Virtual Work, 2017) 273, 279.

[54] Adam Thierer*, Permissionless Innovation: The Continuing Case for Comprehensive Technological Freedom* (Mercatus, 2014).

[55] Uber's contracts, for example, contain provisions allowing it to modify terms at any time or, in its Uber Eats platform, requiring a restaurant to cover customer refunds even when a delivery driver is at fault: see Georgia Wilkins, 'The Uber Contract Explained: 'I Would Be Loath to Sign It', *Sydney Morining Herald* (online), 25 May 2016 < <https://www.smh.com.au/business/workplace/the-uber-contract-explained-i-would-be-loathe-to-sign-it-20160524-gp25vc.html>. The Australian Competition and Consumer Commission has already signalled their willingness to take action via the misleading and deceptive conduct, unconscionable conduct, or unfair contract provisions of the *Australian Consumer Law*: see David Chau, 'ACCC Boss to Investigate Allegedly 'Unfair' Uber Eats Contracts', *ABC News*, 23 April 2018 <http://www.abc.net.au/news/2018-04-23/uber-eats-investigation/9686942>.

[56] For negotiations between Airtasker and Unions New South Wales, see Kate Minter, 'Negotiating Labour Standards in the Gig Economy: Airtasker and Unions New South Wales' (2017) 28(3) *The Economic and Labour Relations Review* 438.

[57] See Orly Lobel, 'The Gig Economy & the Future of Employment and Labor Law' (2016) 51(1) *University of San Francisco Law Review* 51, 68.

Given the importance of employee status as a 'gateway to legal rights', determining the legal position of gig workers is the most pressing question.

The notion of 'employment' is deliberately not defined in Australian statutes, with courts and tribunals left to apply tests developed at common law. There is wisdom in this approach. It leverages the two biggest advantages of the common law: its capacity to undertake a 'granular analysis' of specific work arrangements and circumstances;[58] and its general flexibility and adaptiveness.[59] Australian courts have arrived at an 'impressionistic multi-factor approach'[60] which involves evaluating a suite of 'indicia'[61] to probe the relationship between organisation and worker.

It is likely that at least some gig workers will be found to be employees under this test. It would be unsurprising if this were the case for Uber drivers, despite the two earlier decisions of the Fair Work Commission. Discernible shifts in the approach of the Federal Court – emphasising the *substance* of the relationship and focusing on whether the worker is genuinely an entrepreneur running their own business[62] – make such a finding even more

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[58] Benjamin Means and Joseph Seiner, 'Navigating the Uber Economy' (2016) 49(4) *U.C. Davis Law Review* 1511, 1543.
[59] See Lyria Moses, 'Adapting the Law to Technological Change: A Comparison of Common Law and Legislation' (2003) 26(2) *University of New South Wales Law Journal* 394, 403–5.
[60] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 24 (Mason CJ, Brennan J agreeing), 35 (Wilson and Dawson JJ) 49 (Deane J). See also *Peter F Burns Pty Ltd v Commissioner of Stamps (SA)* (1980) 24 SASR 283, 284 (Jacobs J); *Connelly v Wells* (1994) 55 IR 73, 73 (Gleeson CJ), 81–84 (Kirby P), 93 (Clarke JA).
[61] *In Jiang Shen Cai trading as French Accent v Do Rozario* [2011] FWAFB 8307 (see, in particular, at [30]) the Full Bench of Fair Work Australia (the precursor to the Fair Work Commission) usefully surveyed the authorities and listed thirteen. They include: 'Whether the putative employer exercises, or has the right to exercise, control over the manner in which work is performed, place or work, hours of work and the like'; 'whether the worker has a separate place of work and/or advertises his or her services to the world at large'; 'whether the worker provides and maintains significant tools or equipment'; 'whether the work can be delegated or subcontracted'; and 'whether income tax is deducted from remuneration paid to the worker'. See also *Abdalla v Viewdaze Pty Ltd* (2003) 122 IR 215 (in particular at [23]).
[62] Rather than helping to conduct the business of another. This is often referred to as the 'economic reality test' or 'practical reality test'.

likely.[63] Judicial bodies around the world have been happy to accept that Uber is more than a mere 'matching service' (with some going as far as to describe this claim as 'faintly ridiculous'[64] or 'fatally flawed'[65]), and confer its drivers rights and entitlements as 'employees'.[66] A cases on foot in the Federal Court against Foodora, a food delivery service, will begin to provide more definitive answers in Australia.[67]

Some academic commentators have proposed modifications of employment status tests which would make them more inclusive of gig economy workers and more alive to the policy objectives behind the regulatory scheme at issue.[68] Over the coming years, Australian courts could 'evolve to keep pace with the new realities of the gig economy'[69] by adopting more expansive approaches such as these.

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[63] See especially *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)* (2011) 214 FCR 82, 122–3 (Bromberg J). See also *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146; *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (2010) 184 FCR 448.

[64] *O'Connor v Uber Techs. Inc.* 82 F.Supp.3d 1133 (ND Cal 2015).

[65] *Cotter v Lyft Inc.* 60 F Supp 3d 1067 (ND Cal 2015).

[66] Or as 'workers' (a separate statutory category in the United Kingdom): see *Aslam, Farrer v Uber BV, Uber London and Uber Britannia Ltd*, Case Nos 2202551/2015, decided on 12 October 2016. For comprehensive surveys of litigation around the world, see Bernd Waas, Wilma Liebman, Andrew Lyubarsky and Katsutoshi Kezuka, *Crowdwork – A Comparative Law Perspective* (Bund-Verlag, 2017) 24, 47–53 (US) and 271–284 (US, Germany and Japan); Miriam Cherry, 'Beyond Misclassification: The Digital Transformation of Work' (2016) 37(3) *Comparative Labor Law & Policy Journal* 577, 579–594 (concentrating on the US); Stefan Nerinckx, 'The 'Uberization' of the Labour Market: Some Thoughts from an Employment Law Perspective on the Collaborative Economy' (2016) 17(2) *ERA Forum* 245, 255–258 (Europe); Mimi Zou, 'The Regulatory Challenges of 'Uberization' in China: Classifying Ride-hailing Drivers' (2017) 33(2) *International Journal of Comparative Labour Law and Industrial Relations* 269, 276–284 (China).

[67] See Fair Work Ombudsman, *Fair Work Ombudsman commences legal action against Foodora*, 12 June 2018, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/june-2018/20180612-foodora-litigation>; Danny Tran and Matilda Marozzi, 'Online Food Delivery Company Foodora Facing Legal Action Over Alleged Underpayment of Staff', *ABC News* (online) 13 June 2018 <http://www.abc.net.au/news/2018-06-12/foodora-online-delivery-company-faces-legal-action-over-pay/9861178>.

[68] See, eg, Davidov's proposal for a 'purposive approach' based on an inquiry into the 'subordination' and 'dependency' of the worker: Guy Davidov, 'The Status of Uber Drivers: A Purposive Approach' (2017) 6(1–2) *Spanish Labour Law and Employment Relations Journal* 6, 12–15.

[69] See *Kaseris v Rasier Pacific* [2017] FWC 6610, [66].

This 'incremental approach' suffers four drawbacks. Firstly, changes via the common law are slow, piecemeal and uneven.[70] Secondly, it relies on vulnerable workers engaging in expensive and time-consuming litigation. Thirdly, there are many workers in the gig economy who should still be provided rights and entitlements, but would not satisfy even a more expansive test.[71] Fourthly, Oliver Wendall Holmes famously said: 'I [recognise] without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.'[72] Contemporary Australian judges generally seem happy to accept this confined vision of the judicial role.[73] Accordingly, it is likely that as the gig economy grows a more radical and comprehensive legislative response will be called for.

B. Targeted Legislative Interventions

Measures which adapt or build upon existing legislative schemes to accommodate gig work can be described in two categories:

1. 'Picking the Low-Hanging Fruit'

Legislatures should begin by taking the most easily implementable interventions with the most tangible benefits.

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[70] See Lyria Moses, 'Adapting the Law to Technological Change: A Comparison of Common Law and Legislation' (2003) 26(2) *University of New South Wales Law Journal* 394, 395; Alek Felstiner, 'Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry' (2011) 32 *Berkeley Journal of Employment and Labor Law* 143, 197. Further, claiming employee status relies on a notoriously messy and unpredictable tests: Orly Lobel, 'The Gig Economy & the Future of Employment and Labor Law' (2016) 51(1) *University of San Francisco Law Review* 51, 68.

[71] See, eg, Joellen Riley, 'Brand New 'Sharing' or Plain Old 'Sweating'? A Proposal for Regulating the New 'Gig Economy' in Ron Levy et al (eds), *New Directions for Law in Australia* (ANU Press, 2017) 59, 64.

[72] *South Pacific Co v Jensen*, 244 US 205, 221 (1917).

[73] See, eg, *Breen v Williams* (1996) 186 CLR 71, 115.

One option would be to strengthen the provisions prohibiting sham contracting[74] in two ways: replacing the requirement that an employer be 'reckless' in misrepresenting the nature of an employment contract with a test of 'reasonableness'; and applying stiffer penalties.[75]

A second option is to regulate specific areas of the gig economy. The rideshare market is a ripe target due to it being dominated by a few readily identifiable players, prominent in the public mind, and a less difficult regulatory task than other parts of the gig economy.[76]

Riley argues that legislation in New South Wales[77] and Victoria[78] regulating 'owner-drivers' in the road transport industry could serve as a model for providing more comprehensive protection for rideshare drivers.[79] The Victorian *Owner Drivers and Forestry Contractors Act* ('*OFDC Act*') gives inspiration for how four key entitlements could be provided:

(a) *Protecting freedom of association*: One of the most important mechanisms for improving the lot of gig workers is fostering their ability to organise collectively.[80] A recent action by Uber drivers across Australia demanding better pay and conditions,

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[74] The process of misclassifying employees as independent contractors. See especially *Fair Work Act 2009* (Cth), s 357; *Fair Work Ombudsman v Happy Cabby Pty Ltd* [2013] FCCA 397; *Director, Fair Work Building Industry Inspectorate v Supernova Contractors Pty Ltd* [2012] FMCA 935, [6]–[7] (Jarrett FM).
[75] See Productivity Commission, *Workplace Relations Framework*, (Inquiry Report No. 76, 30 November 2015) 46–7.
[76] These 'hitherto unregulated services' are already beginning to be 'subjected to light regulatory treatment': Michael Rawling and Eugene Schofield-Georgeson, 'Industrial legislation in Australia in 2017' (2018) 60(3) Journal of Industrial Relations 378, 392–3. See, eg, *Commercial Passenger Vehicle Act 2017* (Vic).
[77] *Industrial Relations Act 1996* (NSW), Ch 6 – applying to 'public vehicles and carriers' (taxis and owner-drivers).
[78] *Owner Drivers and Forestry Contractors Act 2005* (Vic) ('*ODFC Act*').
[79] See Joellen Riley, 'Brand New 'Sharing' or Plain Old 'Sweating'? A Proposal for Regulating the New 'Gig Economy' in Ron Levy et al (eds), *New Directions for Law in Australia* (ANU Press, 2017) 59, 64–7. In South Australia, a similar scheme would sit comfortably in the *Passenger Transport Act 1994* (SA).
[80] See 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 & Policy Journal* 653, 678–81.

involving them 'logging off' between 7 and 9.30 one Monday morning, demonstrates a growing collective voice.[81] However, such action would fall foul of the 'anti-competitive practices' provisions of the *Competition and Consumer Act*.[82] Under the *ODFC Act*, drivers are expressly exempted from these provisions and can bargain collectively though 'negotiation agents'.[83]

(b) *Protection from capricious termination*: Uber's contract provides that drivers can be given seven days' notice of termination for any reason (or no reason at all), and be 'blocked' if their rating dips below a certain level.[84] The *ODFC*, in recognition of the need for truck drivers to invest in job-specific and expensive rigs, provides a three month notice period.[85]

(c) *Promoting decent levels of pay*: Under its standard contract, fares are determined by Uber, can be unilaterally varied at any time, and do not take into account drivers' expenses.[86] The *ODFC Act* provides mechanisms for the relevant minister or the Victorian Civil and Administration Tribunal ('VCAT') to review rideshare drivers' fares and costs.[87]

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[81] See 'Uber Drivers Log Off in Australia-wide Protest Against Low Fares, *The Guardian* (online), 6 August 2018, <https://www.theguardian.com/australia-news/2018/aug/06/uber-drivers-log-off-in-australia-wide-protest-against-low-fares>.
[82] 2010 (Cth), pt 4. See further See Shae McCrystal, 'Organising Independent Contractors: The Impact of Competition Law' in Judy Fudge, Shae McCrystal and Kamala Sankaran, *Challenging the Legal Boundaries of Work Regulation* (Hart, 2012) 139.
[83] *ODFC Act*, s 64(1)(c)–(e).
[84] See Joellen Riley, 'Brand New 'Sharing' or Plain Old 'Sweating'? A Proposal for Regulating the New 'Gig Economy' in Ron Levy et al (eds), *New Directions for Law in Australia* (ANU Press, 2017) 59, 66 (referring to cls 12.2 and 2.5.2).
[85] *ODFC Act*, s 21. As passenger cars are cheaper and a less 'specific asset' than trucks, a shorter period (of perhaps two or four weeks) is likely warranted for Uber drivers.
[86] Similar provisions in the United States have been used to cut fares without warning by 25%: see Adrian Chen 'An Uber Labor Movement born in a LaGuardia Parking Lot', *New Yorker* (online), 8 February 2016, <www.newyorker.com/business/currency/an-uber-labor-movement-born-in-a-laguardia -parking-lot>.
[87] *ODFC Act*, s 44(1)(g) and 47(2). See also ss 31, 31(2)(k).

(d) *Providing access to quick, affordable and fair dispute resolution mechanisms*: Uber's 'Terms and Conditions' set up mediation and arbitration mechanisms governed by the International Chamber of Commerce and conducted in the Netherlands. The *ODFC Act* provides the far more practical alternative of access to a Small Business Commissioner or, if necessary, VCAT.[88]

This kind of scheme could additionally be used to address problems specific to rideshare work, like the non-portability of ratings systems locking drivers into a particular platform.[89]

2. Towards More Comprehensive Regulation

There are three noteworthy proposals for regulating the gig economy more generally:

a. A 'Gig Economy Code of Conduct'

Franchising arrangements are an apt analogy for some gig work.[90] Accordingly, setting up a mandatory industry code modelled on the Franchising Code of Conduct ('*FCC*') would be a practical avenue for providing general protections for gig workers.[91] This, similar to the *FCC*, could include disclosure requirements for digital intermediaries,[92] protections against

[88] *ODFC Act*, s 65.
[89] See further Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford, 2018) 108; Jim Stanford, 'The Resurgence of Gig Work: Historical and Theoretical Perspectives' (2017) 28(3) *The Economic and Labour Relations Review* 382, 396.
[90] They involve significant control from the franchisor, financial investment and risk from the franchisee, and a relationship characterised by dependence: see Joellen Riley, 'Brand New 'Sharing' or Plain Old 'Sweating'? A Proposal for Regulating the New 'Gig Economy' in Ron Levy et al (eds), *New Directions for Law in Australia* (ANU Press, 2017) 59, 67–8.
[91] See *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth); *Competition and Consumer Act 2010* (Cth) s 51AD.
[92] *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth), pt 2 (*'FCC'*).

capricious termination,[93] an obligation to act in good faith,[94] and mechanisms to resolve disputes.[95]

b. Labour Hire

Queensland,[96] Victoria[97] and (for the time being) South Australia[98] have legislative schemes which cover another form of triangular relationship subject to growing attention – labour hire.[99] This arrangement involves an agency entering into an agreement with a worker to hire out their services to a host.[100] Stewart and Stanford suggest that it would be possible to classify specific types of digital intermediation as 'labour hire' functions and bring them within the scope of these schemes.[101]

c. A '*Gig Economy Act*'?

A final option is comprehensive legislation dealing with problems across the gig economy more broadly. Prassl and Risak 'sketch in very rough strokes' a proposal for a '*Crowdwork Act*' based on the regulation of temporary agency work in Europe.[102] They suggest that such an Act could require that an organisation's existing workforce and crowdworkers are treated equally. This, they argue, would disincentivise businesses from switching to crowdworkers in

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[93] *FCC*, cl 27. This provision requires a 'notification of breach' and 'proposal to terminate' from the franchisor, and a reasonable opportunity to remedy the breach for a franchisee
[94] *FCC*, cl 6.
[95] *FCC*, pt 4.
[96] *Labour Hire Licensing Act 2017* (Qld).
[97] *Labour Hire Licensing Act 2018* (Vic).
[98] *Labour Hire Licensing Act 2017* (SA).
[99] See generally Industrial Relations Victoria, 'Victorian Inquiry into the Labour Hire Industry and Insecure Work' (Final Report, 31 August 2016).
[100] See Andrew Stewart et al, *Creighton & Stewart's Labour Law* (Federation Press, 6th ed, 2016) 256–8.
[101] Andrew Stewart and Jim Stanford, 'Regulating Work in the Gig Economy: What Are the Options?' (2017) 28(3) *The Economic and Labour Relations Review* 420, 429–30.
[102] Temporary Agency Work Directive 2008/104/EC.

an attempt to avoid protective employment laws. This Act could also prohibit specific contractual clauses, like those enabling a party to refuse to accept a completed task without reason.[103]

Riley argues that targeted legislative interventions are a 'better solution' than attempts to have gig workers treated as employees.[104] Further, legislative responses offer several general advantages over the 'incremental approach': a more transparent and participative process which allows for stakeholder input, greater certainty of legal positions, and an ability to be prospective, comprehensive and holistic.[105]

However, these proposals suffer four drawbacks. Firstly, some could very well prove to be blunt instruments which, especially in the dynamic gig economy, risk being over- or under-inclusive, or missing their regulatory targets altogether. Secondly, they will be ineffective without concerted, appropriate enforcement bringing them to life. Thirdly, Prassl and Risak warn that given the diversity of the gig economy, a 'one-size-fits-all' approach (schemes intended to cover large parts of the gig economy) may not work.[106] Finally, legislation specific to the gig economy risks falling into 'the trap of technological exceptionalism', inappropriately treating it as a siloed, *sui generis* category of work.[107]

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[103] See further Jeremias Prassl and Martin Risak, 'The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights' in P Meil, V Kirov (eds), *Policy Implications of Virtual Work* (Dynamics of Virtual Work, 2017) 273, 290–2.
[104] Joellen Riley, 'Brand New 'Sharing' or Plain Old 'Sweating'? A Proposal for Regulating the New 'Gig Economy' in Ron Levy et al (eds), *New Directions for Law in Australia* (ANU Press, 2017) 59, 61.
[105] See generally Lyria Moses, 'Adapting the Law to Technological Change: A Comparison of Common Law and Legislation' (2003) 26(2) *University of New South Wales Law Journal* 394, 406–11.
[106] Jeremias Prassl and Martin Risak, 'The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights' in P Meil, V Kirov (eds), *Policy Implications of Virtual Work* (Dynamics of Virtual Work, 2017) 273, 290.
[107] Ibid, 292.

C. Recasting the Employment Relationship

1. Shifting Focus to the Employer[108]

Prassl suggests that the employment status question be turned on its head by shifting its focal point from the worker to the employer.[109] On this approach, an ensemble of five 'functions' that an employer typically performs are evaluated.[110] The exercise of these functions triggers the concomitant regulatory responsibilities, regardless of the underlying contractual arrangements.[111]

Prassl and Risak road test this 'functional concept of the employer' through analyses of Uber and TaskRabbit.[112] They find that Uber obviously 'exercise[s] all relevant employer functions usually involved in the provision of transport services'[113] and 'should be characterised as the employer counterparty to the workers' contract of service.'[114] TaskRabbit is a more complicated proposition. Different employer functions are exercised by different entities – sometimes by Taskrabbit, sometimes the customer, and sometimes the worker themselves.

This important, conceptually coherent contribution offers twin advantages:[115] being a

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[108] This paper does not explore the related issue of 'joint employment'. For a treatment of this concept in relation to the gig economy, see Alek Felstiner, 'Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry' (2011) 32 *Berkeley Journal of Employment and Labor Law* 143, 187–96.
[109] See generally Jeremias Prassl, *The Concept of the Employer* (Oxford, 2015)
[110] These five functions are 'hiring and terminating workers', 'receiving labour and its fruits', 'providing work and pay', 'co-ordinating and controlling how and what work is done', and 'engaging in economic activity for profit': see especially Jeremias Prassl and Martin Risak, 'The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights' in P Meil, V Kirov (eds), *Policy Implications of Virtual Work* (Dynamics of Virtual Work, 2017) 273, 279–83.
[111] Jeremias Prassl and Martin Risak 'Uber, Taskrabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork' (2016) 37(3) *Comparative Labor Law & Policy Journal* 619, 646.
[112] Ibid, 636–45.
[113] Ibid, 637.
[114] Ibid, 641.
[115] See Jeremias Prassl, *The Concept of the Employer* (Oxford, 2015), 155–94.

nuanced, fact-driven approach, it 'allows for flexibility across regulatory domains' and is capable of applying to the whole gig economy in all its diversity; and it adeptly handles the complexities of multilateral arrangements.

Prassl and Risak optimistically suggest that this approach 'has the advantage of requiring little legislative activity and may therefore be the most easily applicable, especially as judges are increasingly asked to adjudicate upon employment status in platform-based work.'[116] However, Stewart and Stanford are right in saying that 'there are likely to be considerable difficulties in applying it without wholesale regulatory redesign'.[117]

2. Bringing Gig Workers into the Employment Relationship

Prassl argues that 'by treating gig workers as employees … we can throw out the bathwater and save the baby.'[118] There are three 'legislative shortcuts' for doing just this.

Firstly, legislative instruments[119] could incorporate a statutory test of employee status which more readily covers work organised, supervised or facilitated by a digital intermediary. This would offer gig workers greater clarity on their status and rights.[120] However, this proposal has been rejected by the Productivity Commission and the Victorian Government, based on a desire to maintain the flexibility of the common law tests and concerns that disincentivising

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[116] Jeremias Prassl and Martin Risak, 'The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights' in P Meil, V Kirov (eds), *Policy Implications of Virtual Work* (Dynamics of Virtual Work, 2017) 273, 275.
[117] Andrew Stewart and Jim Stanford, 'Regulating Work in the Gig Economy: What Are the Options?' (2017) 28(3) *The Economic and Labour Relations Review* 420, 431.
[118] Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford, 2018) 128.
[119] Most importantly, the *Fair Work Act 2009* (Cth).
[120] See Orly Lobel, 'The Gig Economy & the Future of Employment and Labor Law' (2016) 51(1) *University of San Francisco Law Review* 51, 63.

'true' independent contractor arrangements would reduce productivity and employment.[121] Davidov (somewhat pessimistically) adds that this is 'an area in which some degree of indeterminacy is necessary. New forms of work appear all the time. If we set in legislation a specific list of criteria for clear-cut determination, it will be easy for employers to work around them and evade the law.'[122]

Secondly, statutory presumptions could be used in two ways.[123] Like in some countries,[124] there could be a *general* statutory presumption establishing 'employee status as a default condition'.[125] Alternatively, as Liebman and Lyubarsky argue, a *specific* 'provision could state that [gig workers] are presumed employees of the platform'.[126]

A third solution, elegant in its simplicity, could be to deem gig economy workers (or specific groups of them) employees for the purpose of providing specific rights and entitlements.[127] Such schemes exist in the *Fair Work Act*[128] for clothing industry outworkers,[129] and are common in State industrial statutes.[130]

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[121] See Productivity Commission, *Workplace Relations Framework*, (Inquiry Report No. 76, 30 November 2015) 805–12; Industrial Relations Victoria, 'Victorian Inquiry into the Labour Hire Industry and Insecure Work' (Final Report, 31 August 2016) 32.
[122] Guy Davidov, 'The Status of Uber Drivers: A Purposive Approach' (2017) 6(1–2) *Spanish Labour Law and Employment Relations Journal* 6, 11.
[123] See generally Miriam Cherry and Antonio Aloisi, '"Dependent Contractors" in the Gig Economy: A Comparative Approach' (2017) 66(3) *American University Law Review* 635, 682–4.
[124] Such as the Czech Republic, Estonia, Mexico, Netherlands and Portugal.
[125] Seth Harris and Allen Krueger, 'A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"' (Discussion Paper 2015–10, Brookings Institute, December 2015) 22–3.
[126] Wilma Liebman and Andrew Lyubarsky, 'Crowdworkers, the Law and the Future of Work: The U.S.' in Bernd Waas, Wilma Liebman, Andrew Lyubarsky and Katsutoshi Kezuka, *Crowdwork – A Comparative Law Perspective* (Bund-Verlag, 2017) 24, 132.
[127] See generally Andrew Stewart, *Stewart's Guide to Employment Law* (Federation Press, 5th ed, 2015) 51–2, 69–70.
[128] *2009* (Cth).
[129] See especially *FWA*, s 789BB.
[130] Particularly in legislation concerning workers compensation and payroll tax: see, eg, *Industrial Relations Act 1996* (NSW), Sch 1; *Industrial Relations Act 1999* (Qld), s 275.

D. Introducing a New Category of 'Independent Worker'

A Californian judge recently described having to categorise workers as employees or independent contractors as 'akin to being handed a square peg and asked to choose between two round holes'.[131] Proposals for an intermediate category situated between these two 'round holes' are not new,[132] and exist in several jurisdictions around the world.[133] Harris and Kruger's suggestion to create a new 'independent worker' classification[134] is the latest to create waves (at least in academic circles).[135]

Harris and Krueger believe that gig work is a novel phenomenon, and that forcing gig workers 'into a traditional employment relationship could be an existential threat to the emergence of online-intermediated work.'[136]

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[131] Order Denying Cross-Motion for Summary Judgment for *Cotter et al v Lyft Inc*., U.S. Dist. Ct, Case No. 13-cv-04065-VC, at 19 (Mar. 11, 2015).

[132] They date back (at least) to a seminal 1965 article from Canadian academic Harry Arthurs: see Harry Arthurs, 'The Dependent Contractor: A Study of the Legal Problems of Countervailing Power' (1965) 16(1) *The University of Toronto Law Journal* 89. The article was itself based on laws which were in place in Sweden at that time.

[133] Including the United Kingdom, Spain, Italy, Germany and Canada. See further Miriam Cherry and Antonio Aloisi, 'Dependent Contractors" in the Gig Economy: A Comparative Approach' (2017) 66(3) *American University Law Review* 635, 650–675; Jeremias Prassl and Martin Risak, 'The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights' in P Meil, V Kirov (eds), *Policy Implications of Virtual Work* (Dynamics of Virtual Work, 2017) 273, 288–9; Wilma Liebman and Andrew Lyubarsky, 'Crowdworkers, the Law and the Future of Work: The U.S.' in Bernd Waas, Wilma Liebman, Andrew Lyubarsky and Katsutoshi Kezuka, *Crowdwork – A Comparative Law Perspective* (Bund-Verlag, 2017) 24, 103–4.

[134] Seth Harris and Allen Krueger, 'A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"' (Discussion Paper 2015–10, Brookings Institute, December 2015). It would encompass both online gig economy jobs and traditional jobs involving an intermediary in a triangular relationship (see at 22).

[135] For alternatives, see Miriam Cherry and Antonio Aloisi, '"Dependent Contractors" in the Gig Economy: A Comparative Approach' (2017) 66(3) *American University Law Review* 635, 667–674 ('dependent contractors'); Tiziano Treu, 'Le fiforme del lavoro: Spagna e Italia', (2015) 25(3) *Diritto Delle Relazioni Industriali* <http://www.bollettinoadapt.it/wp-content/uploads /2015/09/dri_3_2015_treu.pdf> ('dependent autonomous workers'); and (citing Joellen Riley) 'Uber Found Not To Be An Employer By FWC', *Professional Contractors and Consultants Australia*, 14 May 2018, <http://www.professionalsaustralia.org.au/contractors-consultants/blog/uber-found-not-employer-fwc/> ('dependent workers').

[136] See Seth Harris and Allen Krueger, 'A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"' (Discussion Paper 2015–10, Brookings Institute, December 2015).

Based on three guiding principles to identify gig workers and inform their regulation,[137] they recommend a suite of protections and entitlements that should be afforded. These include the right to collectively bargain, and allowing intermediaries to 'pool' workers and offer benefits[138] without workers being classified as employees. This approach brings the benefit of extending the labour law protections to a wider range of workers,[139] and is consciously adapted to features typical of gig work.[140]

However, the proposal has been challenged on four main grounds. Firstly, 'adding a third round hole is unlikely to solve any classification problems'[141] and may even lead to more confusion.[142] Secondly, there is the obvious potential for 'regulatory arbitrage' – with platforms given a further opportunity to misclassify workers.[143] Thirdly, it lowers the protective bar through forcing workers who should considered employees into an 'intermediate bucket' with fewer rights and entitlements.[144] Fourthly, its implementation

[137] 'Immeasurability of hours', 'neutrality' and 'efficiency': see Seth Harris and Allen Krueger, 'A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"' (Discussion Paper 2015–10, Brookings Institute, December 2015) 13–4.
[138] For example, vehicle insurance and financial services.
[139] Orly Lobel, 'The Gig Economy & the Future of Employment and Labor Law' (2016) 51(1) *University of San Francisco Law Review* 51, 68.
[140] Lobel argues that, most importantly, it captures the 'fundamental fact' that gig workers are often independent in terms of task selection but economically dependent on the platform: see ibid, 65. Lobel also argues (at 68–9) that a new category would allow us to modify and better-interpret duties of loyalty and post-employment restrictive covenants to better reflect the increased mobility of gig workers.
[141] Jeremias Prassl and Martin Risak, 'The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights' in P Meil, V Kirov (eds), *Policy Implications of Virtual Work* (Dynamics of Virtual Work, 2017) 273, 288
[142] Ibid.
[143] Cherry and Aloisi argue that 'three categories create more mischief than two': Miriam Cherry and Antonio Aloisi, '"Dependent Contractors" in the Gig Economy: A Comparative Approach' (2017) 66(3) *American University Law Review* 635, 677.
[144] Further, these workers 'might often be amongst the most vulnerable participants in the labour market': Jeremias Prassl and Martin Risak, 'The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights' in P Meil, V Kirov (eds), *Policy Implications of Virtual Work* (Dynamics of Virtual Work, 2017) 273, 289.

would be 'politically and logistically tortuous',[145] especially as 'little or no consensus on how to constitute the category or how it might meet the needs of platforms and gig workers'.[146,147]

E. Beyond 'SER-Centrism': Redrawing the Boundaries of Labour Law

Many scholars question the utility of framing labour laws around employee status, and advocate extending the scope of workplace protections to anyone performing 'work'.[148] In Australia, the work health and safety and antidiscrimination regimes (mostly)[149] apply irrespective of an employment relationship.

This would dramatically simplify (at least conceptually) many aspects of labour law, and obviate the problem of workers being disguised as 'freelancers'. However, this is the most radical of the five 'modes' proposed and would require drastic regulatory redesign.[150]

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[145] Miriam Cherry and Antonio Aloisi, '"Dependent Contractors" in the Gig Economy: A Comparative Approach' (2017) 66(3) *American University Law Review* 635, 678. The best example is the need to find a regulatory 'goldilocks zone'. Conferring too few rights (as in Italy) would carry the risk of 'regulatory arbitrage', with platforms forcing genuine employees into the third category to lower costs; but making it too generous or burdensome to opt into (as in Spain) would mean the regime would be seldom used.

[146] Ibid, 682.

[147] For more specific criticisms of Harris and Krueger's approach as being 'empirically flawed' and under-inclusive of rights, see Ross Eisenbrey and Lawrence Mishel, 'Uber Business Model Does Not Justify a New "Independent Worker" Category', *Economic Policy Institute*, 17 March 2016 <www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent- worker-category>; Benjamin Sachs, 'A New Category of Worker for the On-Demand Economy?', *On Labor*, 22 June 2015, <onlabor.org/2015/06/22/a-new-category-of-worker-for-the-on-demand-economy>.

[148] See Gerhard Bosch, 'Towards a New Standard Employment Relationship in Western Europe' (2004) 42(2) *British Journal of Industrial Relations* 617 (Bosch's could be described as the 'Flexible SER Approach'); Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford, 2001) (which could be called the 'Beyond Employment Approach'); and Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (Oxford, 2011) 347 (the 'Broad Domain of Personal Work Relations'). See generally Leah Vosko, 'Precarious Employment and the Problem of SER-centrism in Regulating for Decent Work', in S Lee and D McCann (eds), *Regulating for Decent Work: New Directions in Labour Market Regulation* (Palgrave Macmillan and ILO, 2011) 58, 66. For discussions involving other jurisdictions, see Richard Carlson, 'Why the Law Still Can't Tell an Employee When it Sees One and How it Ought to Stop Trying' (2001) 22 *Berkeley Journal of Employment and Labor Law* 295; Judy Fudge, Eric Tucker and Leah Vosko, 'Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada' (2003) 10 *Canadian Labour & Employment Law Journal* 193.

[149] Anti-discrimination regimes interestingly do not apply to Uber 'for technical reasons': see Nicolas Suzor, 'Uber and Out? Regulating Work in the Gig Economy' on *Nicolas Suzor* (August 4 2016) <https://nic.suzor.net/2016/08/04/andrew-stewart-uber-and-out-regulating-work-in-the-gig-economy/>.

[150] Stanford and Stewart warn that regulations that carry a financial burden, like superannuation contributions and minimum pay, would be particularly difficult to implement: Andrew Stewart and Jim Stanford, 'Regulating

Further, Davidov argues that categorising workers can serve an important purpose – reflecting the degree of regulation or protection that a group requires.[151] Eliminating these distinctions risks a dilution of labour standards: 'if we offer the same level of protection to everyone, we can offer much less than what those workers really in need of protection might need.'[152]

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[151] For example, a skilled tradesperson or experienced business consultant is a very different regulatory proposition than an Uber driver.

[152] Guy Davidov, 'The Status of Uber Drivers: A Purposive Approach' (2017) 6(1–2) *Spanish Labour Law and Employment Relations Journal* 6, 9.

IV. HASTEN SLOWLY: AN INVOCATION FOR A CAUTIOUS BUT CONCERTED REGULATORY RESPONSE

Actively regulating the gig economy need not be a matter of 'using blunt regulatory machinery to squeeze it down or stomp it out.'[153] Rather, ensuring the full application of labour law 'is crucial if we want to realise the promise of the gig economy – without being exposed to its perils.'[154] But this will require a deft regulatory touch.

In the short term, it should be guided by three priorities. Firstly, Dworkin argues that if a legal answer to a problem is required, the common law and the courts should be the 'presumptive first-line response'. [155] Accordingly, rigorous enforcement of existing laws should be the first priority.[156] Given the vulnerability of many gig workers,[157] regulators[158] have a particularly important role to play in strongly enforcing, and testing the boundaries of, existing laws through test cases.[159] Secondly, legislatures should begin by 'picking the low hanging fruit' – taking targeted legislative interventions which involve less legal complexities and addressing the most acute problems faced by gig workers. Providing them the same rights to engage in collective bargaining as employees, strengthening sham contracting provisions and getting a regulatory 'foot in the door' in the rideshare market should be first on the agenda. Thirdly, a premium should be placed on information gathering. Greater

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[153] Alek Felstiner, 'Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry' (2011) 32 *Berkeley Journal of Employment and Labor Law* 143, 198.
[154] Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford, 2018) 10.
[155] Roger Dworkin, *Limits: The Role of the Law in Bioethical Decision Making* (Indiana University Press, 1996) 169–70.
[156] 'The Gig Economy on Trial', *The Economist*, 24 February 2018, 23–4.
[157] Sarah Kaine, Damian Oliver and Emmanuel Josserand, 'Precarity in the Gig-Economy: The Experience of Ride-share Drivers (paper presented at the Association of Industrial Relations Academics in Australia and New Zealand Conference, Canberra, 8–10 February).
[158] Most notably the Fair Work Ombudsman and the Australian Competition and Consumer Commission.
[159] *Fair Work Act 2009* (Cth), ss 357 – 359. See eg, *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346.

attention needs to be paid in Australia to comprehensive labour market data in general, and collecting reliable evidence on the scope and nature of the gig economy is essential in informing appropriate policy.

We are still waiting for the true dynamics of the gig economy to become clear.[160] Despite fears of on-demand labour 'creating a workforce of independent contractors',[161] not all jobs are suited to this mode of working.[162] How deeply the gig economy will permeate the Australian workforce is uncertain. At the same time, looming at the not-too-distant horizon are even more dramatic technological advances that the law will have to come to terms with, such as automation and artificial intelligence.

Accordingly, it is not yet time to fundamentally redraw the boundaries of labour law or introduce an intermediate classification of worker. However, interventions such as these – and perhaps even more drastic ones like fundamentally transforming social security – should start being carefully considered.[163]

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[160] Alek Felstiner, 'Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry' (2011) 32 *Berkeley Journal of Employment and Labor Law* 143, 198.
[161] Nick Hanauer and David Rolf, 'Shared Security, Shared Growth', *Democracy: A Journal of Ideas* (online), Summer 2015, <http://www.democracyjournal.org/37/shared-security-shared-growth.php>.
[162] David Marin-Guzman, 'Gig Economy and Casualisation Threat to Employment Model 'a Myth', Expert Says', *Australian Financial Review*, 25 July 2018 <https://www.afr.com/news/policy/industrial-relations/gig-economy-and-casualisation-threat-to-employment-model-a-myth-expert-says-20180725-h134lk>; Productivity Commission, 'Digital Disruption: What Do Governments Need to Do?' (Research Paper, June 2016) 79.
[163] This idea of creating a 'New "New Deal"' is an important and fascinating one, but beyond the scope of this paper. For interesting treatments, see Productivity Commission, 'Digital Disruption: What Do Governments Need to Do?' (Research Paper, June 2016) 79 (discussing the idea of a 'Universal Basic Income'); Anthony O'Donnell, 'Welfare after Work?' (1999) 14 *Arena Journal* 140; Orly Lobel, 'The Gig Economy & the Future of Employment and Labor Law' (2016) 51(1) *University of San Francisco Law Review* 51, 69; Bernd Waas, 'Summary' in Bernd Waas, Wilma Liebman, Andrew Lyubarsky and Katsutoshi Kezuka, *Crowdwork – A Comparative Law Perspective* (Bund-Verlag, 2017) 256, 266; 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 & Policy Journal* 653, 686.

Two lodestars should guide the regulation of the gig economy in the longer term: articulating a *coherent underpinning philosophy*,[164] informed, above all, by a deep understanding of the protective function of labour law;[165] and *maintaining flexibility*. Regulators must be alive to the heterogeneity, complexity and fast-changing nature of the gig economy, and treat its regulation as a 'rolling project' – requiring constant attention and adjustment.

[164] Zittrain argues that '[a]lthough we cannot predict exactly the issues that will arise, if we can forge a coherent philosophy of what we want and what we cannot accept in these areas, we will find these networks easier to regulate as they come about.': Jonathan Zittrain, 'Ubiquitous Human Computing 1-2' (Research Paper No. 32, University of Oxford Legal Research Paper Series, 2008) <http://ssrn.com/abstractl 140445>.

[165] See, eg, Otto Kahn-Freund, *Labour and the Law* (Stevens, 2nd ed, 1977) 6; Hugh Collins, 'Labour Law as a Vocation' (1989) 105 *Law Quarterly Review* 468, 469.

Conclusion: Law 'Marching with Technology'?

In 1970, Australian courts overcame their early scepticism and belatedly recognised that a legal action could lie for someone that had experienced pure mental harm, long after the existence of psychological injuries was well-established in the *corpus* of medical knowledge. Windeyer J, presiding over that case, bemoaned the inability of the law to keep pace, describing it as 'marching with medicine, but in the rear and limping a little.'[166] The rapid technological advances that have led to the rise of the gig economy – this latest 'gale of creative destruction' – are a more recent incarnation of this phenomenon. There is, once again, a discernible 'law lag'.[167]

This paper has argued that there is a clear need to regulate gig work, critically analysed five 'modes' of possible action, and recommended immediately taking targeted legislative interventions while considering more comprehensive ones. With brave, creative and intelligent regulation, it will be possible to 'march with' the gig economy, and capture its significant upside while managing its downside.

[166] *Mt Isa Mines v Pusey* (1970) 125 CLR 383, 395 (Windeyer J).
[167] David Mercer, 'Technology and the Law: Dealing with the "Law Lag"', *The Australian* (online), 4 July 2011 <http://www.theaustralian.com.au/archive/business/techn ology-and-the-law-dealing-with-the-law-lag/story-fn8ex0pl-1 226086951328>.

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