

DICHOTOMY OR TRICHOTOMY? DEFINING EMPLOYEES AND INDEPENDENT CONTRACTORS IN AN EVOLVING MARKET

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ABSTRACT

This paper analyses the distinction between an ‘employee’ and ‘independent contractor’ and its application to companies in the ‘gig economy’. This question is exemplified by global debate concerning how Uber drivers are classified. The author argues that the current Australian legal test,¹ absent of legislative reform, cannot confidently answer this question and proposes several suggestions. This paper is divided into five sections. The first section introduces the issue. The second section examines the significance of classifying workers, explains the Australian legal test and considers its application to the gig economy. The third section explores the legal landscape in the United Kingdom and compares it with Australian law. The fourth section considers recent and notable legislative reform in both jurisdictions. The fifth section proposes and assesses solutions that may be more appropriate in an evolving market.

I INTRODUCTION

The difference between employees and independent contractors in Australia (‘employment dichotomy’) is the subject of increasing debate. This classification may decide the existence of rights and causes of action. Broadly, employees are entitled to annual leave, superannuation and access to employers’ insurance policies, but contractors may not be. Employers may be vicariously liable for employees’ actions but typically not for actions of their contractors.² Also, employers who seek to disguise an ‘employee’ as an ‘independent contractor’ (a ‘sham contracting arrangement’) can be liable to pay significant penalties.³ This issue could be significant as, in Australia, over one million workers are classified as independent contractors.⁴

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¹ See *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146.

² *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 36.

³ See *Fair Work Act 2009* (Cth) s 357.

⁴ ABC, *Millions of Australians missing out on superannuation, amid rise of gig economy* (26 March 2018) <<https://www.abc.net.au/news/2018-03-26/millions-of-australians-missing-out-on-superannuation/9584736>>.

The High Court of Australia ('HCA') articulated the prevailing multifactor test in *Hollis v Vabu Pty Ltd*⁵ ('Hollis'), which the Court first framed in 1986 in *Stevens v Brodribb Sawmilling Co Pty Ltd*⁶ ('Stevens'). Stevens was decided 23 years before the first iPhone was produced and 25 years before Uber was founded. The multifactor test is flexible, with several indicia that, considered together, decide if a relationship is one of employment or independent contracting. In Australia, multiple tests have been proposed to place workers in one category or the other. No third category has emerged. These 'tests' are the multifactor test, the entrepreneurship test, and a vicarious liability principle for agency. Innovative companies have evolved to dance around the multifactor test. This is typically achieved by intermediaries, or entities acting as a conduit between transacting parties, who maintaining a degree of separation in a transaction. Companies in the gig economy, such as ride-sharing company 'Uber',⁷ typify this arrangement. Undertaking 'gigs' (or contract, temporary and freelance work) allows people to take control of their work. Yet, the United Kingdom ('UK') Employment Tribunal and the UK's recently commissioned review of modern working practices (Taylor Review) strongly suggest Uber drivers owe a certain dependence to the company.⁸ The Taylor Review extends this idea to gig economy companies generally, promoting the formal recognition of a 'dependent contractor'.⁹

This paper considers the situation in the United Kingdom ('UK'), from which Australia can draw inspiration. As was posited in *Kaseris v Rasier Pacific V.O.F.*,¹⁰ global entity operations are a valuable constant against which to consider this area of law.¹¹ This is also because, '[a]s in Australia, English legislative drafting tends to identify whether a worker is an independent contractor or an employee by reference to the common law.'¹² As will be discussed in Part III, the UK test for employment is not identical to that of Australia, but is similar and flexible. Also in that section, this paper considers that UK legislation is similar enough to that of Australia to invite the possibility of a legal transplant. With its common law and legislative framework, the UK Employment Tribunal was empowered to issue an emphatic ruling that rejected the idea that Uber drivers are independent contractors.

⁵ (2001) 207 CLR 21.

⁶ (1986) 160 CLR 16.

⁷ See, for example, *Kaseris v Rasier Pacific V.O.F.* [2017] FWC 6610 at [66].

⁸ See, eg, *Aslam and others v Uber B.V. and others* [2017] IRLR 4 (ET) at [90]; Matthew Taylor, *Good Work: The Taylor Review of Modern Working Practices* (2017) 35.

⁹ Matthew Taylor, *Good Work: The Taylor Review of Modern Working Practices* (2017) 35.

¹⁰ [2017] FWC 6610 (Gostencnik DP).

¹¹ *Ibid.*, [64]. Gostencnik DP noted that '[a]lthough the Uber operations in both the United Kingdom and Australia are similar, the legislation at issue... is materially different to that which governs this application.'

¹² Loretta de Plevitz, 'Dependent Contractors: Can the Test from *Stevens v Brodribb* Protect Workers who are Quasi-Employees?' (1997) 13 *Queensland University of Technology Law Journal* 263, 268.

The Tribunal preferred that Uber workers are captured in the UK's broad statutory 'limb b' worker category, and can enjoy its associated protections.¹³ Australian courts are more cautious and the legislation is less complex. As such, applying the multifactor test, courts assert themes of flexibility, judicial discretion, parliamentary deference and business efficacy whilst weighing 'totality of the relationship'.¹⁴

Before studying these tests, one must appreciate some important themes. A test of employment may be flexible to adjust to technological developments and modern business models. Yet, it must be sufficiently certain to foster innovation and promote certainty. Some Australian judges have deferred to parliament, refusing to give effect to failed (or absent) legislative reform by way of judicial precedent. As suggested, business efficacy is crucial, as employee entitlements may cause innovative companies to fail, restructure, or abandon operations in a particular jurisdiction. Dr Jim Stanford notes this issue in the gig economy, albeit an extreme example. He cites an 'implicit wage subsidy paid to Uber by its drivers, in the form of below-minimum-wage labour,'¹⁵ worth hundreds of millions of dollars per year.¹⁶ Critically, he notes 'if UberX prices were increased enough to pay minimum statutory wages to its drivers, almost all of UberX's price advantage relative to traditional taxis would disappear.'¹⁷ This is worsened by costs and risks it would bear if vicariously liable for drivers' negligence, mainly from insurance premiums. This combination may be fatal to its operations. Also, though parties may mutually intend to create an independent contracting relationship and open new avenues of work, an agreement may be enticed through financial asymmetry and disparate bargaining power.

Australian courts generally empathise with the strong employee protections that are central to Australian law. On the issue of a sham arrangement, Black J stated 'the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck.'¹⁸ This distinction was simpler in 1989. Yet, with respect, it now typifies the modern challenges to the multifactor test. Ducks and roosters have scientific and observable genetic variation, whereas modern working arrangements have evolved beyond such simple classification. Black J's statement is now more of an aspiration than a reality. Whether a worker is an employee or independent contractor is more unclear if various multifactor test indicia suggest diverging classifications. Companies can

¹³ *Aslam v Uber B.V.* [2017] IRLR 4 (ET) at [100]; *Employment Rights Act 1996* (UK) s 230(3)(b).

¹⁴ *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 33 [24].

¹⁵ Centre for Future Work, *Simulating the Net Incomes of UberX Drivers in Australia* (2018) 4.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Re Porter* (1989) 34 IR 179 at 184.

now achieve this by modifying arrangements. In that same case Gray J added, beyond Black J's statement, that:

there is no particular reason why a court should ignore the practical circumstances, and cling to the theoretical niceties. The level of economic dependence of one party upon the other, and the manner in which that economic dependence may be exploited, will always be relevant factors in the determination whether a particular contract is one of employment.¹⁹

This paper compares the Australian dichotomy and the UK's 'three-tier' model. Both countries host gig economy providers and apply a multifactor test, so one can observe broader legislative potential of this 'trichotomy'. The UK legislative model allows courts to apply the current legal test to more classifications, providing workers in the gig economy with more substantial rights. Alternatively, the common law may evolve in favour of gig economy workers. First, by adapting the factors of the current test. Second, by revisiting the 'entrepreneurship test'. Third, and limited to the issue of vicarious liability, by adopting a vicarious liability test of 'agency'.

II THE SITUATION IN AUSTRALIA

Stevens introduced the multifactor test to replace a previous, more rigid approach to classifying workers. Australian courts broadly uphold the Stevens test today. Yet, it is not the only test that judges have suggested. The entrepreneurship test was briefly upheld, but quickly overruled. Also, McHugh J argued principles of agency could (and should) slightly open the floodgates for vicarious liability beyond the question of workers' classification altogether. Of course, this second test does not extend employee rights, rather extends the right to sue of those who have a cause of action in the tort of negligence. Whilst opening the floodgates has typically negative connotations, McHugh J argued holding companies responsible for agents' actions is sound, and has a strong legal basis despite involving policy. A lower court has since doubted this.²⁰

A *The significance of the employment dichotomy*

1 *Employees' rights and employers' vicarious liability*

Employees' rights in Australia are quite comprehensive. Though beyond the scope of this paper, one should note that they are generally more comprehensive than those of independent contractors. This is fundamental to the gig economy, as companies incur fewer costs payable to workers through, for example,

¹⁹ Ibid at 184-185.

²⁰ See *Boylan Nominees Pty Ltd v Sweeney* [2005] Aust Torts Rep 81-780 at 67,219-67,222 [65]-[81].

superannuation and other entitlements. Notably, the Centre for Future Work recently expressed that ‘for the first time in recorded statistics, less than half of employed Australians work in a permanent full-time paid job with leave entitlements.’²¹

Employers may be vicariously liable for employees’ tortious acts.²² Conversely, principals are not liable for the tortious acts of an independent contractor unless a non-delegable duty exists.²³ The rationale for this is expressed to be simple; work that a contractor has agreed to do is not done as a representative of the employer.²⁴ Dixon J (as his Honour then was) previously articulated this idea in detail.²⁵ McHugh J notably prefers a test of agency, drawing from Dixon J’s remarks. This test does not discriminate between employees and independent contractors, rather applying the principles of vicarious liability to both. McHugh J promoted this idea in a series of decisions.²⁶ One must recognise that lower courts have doubted McHugh J’s extension of vicarious liability to agency in obiter dicta,²⁷ but no such pronouncement exists in the HCA.²⁸ Though a notable line of authority, and one which may modernise the law, it likely will not emerge without judicial activism. This paper considers its formulation and justification as articulated within *Hollis* alone.²⁹

2 Sham contracting arrangements

Gig economy companies can be exposed to allegations of ‘sham contracting’. In 2017, the Fair Work Ombudsman investigated Uber over this,³⁰ though the Fair Work Commission (‘FWC’) then decided its drivers were independent contractors.³¹ A sham is a denial of employees’ rights by contractual misclassification. Penalties under the *Fair Work Act 2009* (Cth) apply if:

[a] person (the **employer**) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the

²¹ Centre for Future Work, *The Dimensions of Insecure Work: A Factbook* (2013) 1.

²² *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 36 [32].

²³ *Leighton Contractors Pty Ltd v Fox; Calliden Insurance Limited v Fox* [2009] HCA 35.

²⁴ *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 366 (McHugh J).

²⁵ *Colonial Mutual Life Insurance Society Ltd v Producers and Citizens Co-operative Insurance Co of Australia Ltd* (1931) 46 CLR 41 at 48. McHugh J relies fundamentally on this judgment to extend vicarious liability.

²⁶ *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 366; *Scott v Davis* (2000) 204 CLR 333 at 346 [34], 355 [61]; *Hollis* (2001) 207 CLR 21 at 57-58 [93].

²⁷ *Boylan Nominees Pty Ltd v Sweeney* [2005] Aust Torts Rep 81-780 at 67,219-67,222 [65]-[81].

²⁸ See *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 180 [60].

²⁹ For a more comprehensive articulation, see *Scott v Davis* (2000) 204 CLR 33 at 348-359 [40]-[72].

³⁰ The Sydney Morning Herald, *Fair Work Ombudsman investigates Uber over potential breach of labour laws* (28 June 2017) <<https://www.smh.com.au/business/workplace/fair-work-ombudsman-investigates-uber-over-potential-breach-of-labour-laws-20170628-gx0a82.html>>.

³¹ See *Kaseris v Rasier Pacific V.O.F.* [2017] FWC 6610.

individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.³²

An employer is not liable for a representation if it ‘did not know’ or ‘was reckless as to whether’ a contract was one of employment rather than a contract for services.³³ Given evolving working arrangements, this is sensible. Further analysis of the offence is beyond the scope of this paper.

3 *Social and economic consequences*

As will be discussed, the multifactor test, combined with Australian legislation, may favour an independent contracting relationship in many ‘gig economy’ companies. Naturally, averting employee rights inspires resistance, with the Western Australian government considering legislative reform.³⁴ Still, its impact on superannuation is a broader economic concern. Gig economy work can markedly replace traditional employment, for example, Uber’s disruption of traditional taxi services. Associate Professor Sarah Kaine articulates this concern, which will be more significant ‘in five, 10, 15 [or] 20 years when people who have relied on freelance work [and] gig work come to retire.’³⁵ Consequently, taxpayers must likely finance retirement of Australians who have insufficient superannuation savings. This is problematic in an ageing population, as retirement in Australia is largely premised on superannuation balances.

The proliferation of gig economy work is significant. For example, Uber, Ola and Taxify have rapidly disrupted the taxi industry in under a decade. Furthermore, gig economy business models are constantly pitched, greatly inspired by the Uber business model. These ideas are crudely referred to as, for example, Uber for lawyers, tradespeople or doctors. These ‘apps’ are on the market, hoping to replicate the success of ‘ride sharing’ applications. Subject to uptake, there is a possibility of economic coercion to join the gig economy. This renders the concept of workers’ free intentions to enter gig economy employment quite equivocal. Rather than creating new employment prospects, these arrangements may become the only viable option.

³² *Fair Work Act 2009* (Cth) s 357(1).

³³ *Ibid*, s 357(2).

³⁴ Government of Western Australia, *Review of State industrial relations system* (22 September 2017) <<https://www.mediastatements.wa.gov.au/Pages/McGowan/2017/09/Review-of-State-industrial-relations-system.aspx>>.

³⁵ ABC, *Millions of Australians missing out on superannuation, amid rise of gig economy* (26 March 2018) <<https://www.abc.net.au/news/2018-03-26/millions-of-australians-missing-out-on-superannuation/9584736>>.

B Examining *Hollis v Vabu*

As stated, *Stevens* provides the relevant test for defining employees and contractors. This is expressed and applied in *Hollis*, where a courier injured Mr Hollis. Mr Hollis asserted vicarious liability pursuant to the tort of negligence against the company that sent out the courier, Vabu Pty Ltd, via an employment relationship. Vabu argued that the courier was an independent contractor. The HCA held that Vabu employed the courier, hence liable to pay damages to Mr Hollis. A 5:2 majority listed and applied the multifactor criteria to uphold this ‘employee and independent contractor dichotomy’. Yet, competing tests and considerations emerge. In separate judgments from the majority, McHugh J employs a different test for vicarious liability and Callinan J offers useful commentary on policy considerations. Each judgment is considered below. This paper then considers, chronologically, competing tests since *Hollis*, which must be appreciated to understand the FWC’s reservations when applying the multifactor test.

1 *The majority (multifactor) test*

The multifactor test is inherently flexible, and sensibly so. To assert a strict checklist would unduly limit employment relationships. The test seems designed to stand the test of time and technology, but is now arguably a victim of its flexibility. Re-examining Black J’s metaphor, this flexibility may allow modern entities to argue that, if they are neither a ‘rooster’ nor ‘duck’, they are closer to one than the other. Despite upholding Mason J’s idea of the ‘totality of the relationship’ in *Stevens*,³⁶ judges are not free to conclude without weighing indicia.

The multifactor test emerged in 1989, where the HCA found that control was not the sole criterion by which to gauge whether a relationship is one of employment,³⁷ instead one of a series of indicia. These indicia can be listed quite simply, and the list is not closed.³⁸ Per Mason J in *Stevens* (and affirmed in *Hollis*), these include the mode of remuneration; provision and maintenance of equipment; obligation to work; hours of work and provision of holidays; deduction of income tax; and delegation of work by the putative employee.³⁹ This paper considers how the test has so far been applied to the gig economy in the section below regarding the FWC. Before considering its application, it is important to consider the judgments of McHugh and Callinan JJ, which exemplify resistance to this test in an evolving market.

³⁶ *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 33 [24], citing *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 29.

³⁷ *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 24.

³⁸ *Ibid.*

³⁹ *Ibid.*

2 *McHugh J's discourse on vicarious liability and agency*

McHugh J also found vicarious liability, though on a different basis. He rejected any need to expand the definition of 'employee' and dismissed the opportunity to bolster the employment dichotomy. His Honour preferred to find that the company vicariously liable due to the tortious conduct of an 'agent'; neither an employee or contractor.⁴⁰ Though Australian courts recognise a binary classification (employee or contractor) and no third category,⁴¹ McHugh J's reasoning does not offend this position. Rather, his Honour proposes an avenue through which to pursue vicarious liability without engaging the dichotomy at all (hence not redefining workers' rights or sham contracting arrangements). As discussed, this line of reasoning was developed by McHugh J cases surrounding *Hollis*. Still, his Honour's opening remarks are prescient:

The case reveals the difficulties in applying traditional rules of liability for a worker's negligence to new and evolving employment practices.⁴²

McHugh J exemplifies the antiquity of the common law, which holds a master liable for the torts of his or her servant.⁴³ His Honour suggests that this terminology warrants reformulation of the of the traditional test, which was 'developed in a time and in a context far removed from today's modern workforce.'⁴⁴ This modern workforce has evolved significantly since these comments, which were made some years before smart phones and the gig economy. Justice McHugh justifies this alternative approach in departing from the dichotomy (whilst finding support in *Stevens*) when his Honour states:

the genius of the common law is that the first statement of a common law rule or principle is not its final statement. The contours of rules and principles expand and contract with experience and changes in social conditions. The law in this area has been and should continue to be 'sufficiently flexible to adapt to changing social conditions'.⁴⁵

His Honour supports an 'intuitive' relationship between policy and judicial reasoning for vicarious liability by considering an earlier HCA judgment by Fullagar J in 1957 (which was also cited positively by the majority).⁴⁶ McHugh J recited that vicarious liability owed by employers to third parties is adopted not by way of an exercise in analytical jurisprudence but as a matter of policy, perhaps

⁴⁰ *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 47 [65].

⁴¹ See, for example, *FWO v Quest* (2015) 288 FCR 346 at 389 [173].

⁴² *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 47 [66].

⁴³ *Ibid*, citing, among other authorities, *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

⁴⁴ *Ibid*, citing *Scott v Davis* (2000) 204 CLR 333 at 409-410, [230] per Gummow J.

⁴⁵ *Ibid* at 50 [72], citing *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 28-29.

⁴⁶ *Ibid* at 37 [34].

justified as an ‘extension of the notion of agency as a ground of liability.’⁴⁷ Justice McHugh also cited Professor Fleming to similar effect, quoting ‘the modern doctrine of vicarious liability cannot parade as a deduction from legalistic premises, but should be frankly recognised as having its basis in a combination of policy considerations.’⁴⁸ Citing Canadian authority, McHugh J also quotes ‘fair compensation and deterrence’ as the ‘twin policy goals’ of this agency principle, not ‘artificial or semantic distinctions.’⁴⁹ Curiously, the majority also cited this.⁵⁰ In the Supreme Court of Canada, McLachlin J expressed that courts increasingly turn to policy for guidance where no clear precedent exists.⁵¹ Thus, McHugh J argues vicarious liability may be established through broader agency principles.

3 *Callinan J dissenting*

Justice Callinan was not persuaded that Mr Hollis could argue about employment and contracting relationships due to a concession in the Court of Appeal, which the majority decided was no barrier to a full oral argument.⁵² Hence, his Honour dissents. Yet, Callinan J considers the appellant’s alternate submissions in some detail. Mainly, his Honour analyses an argument to create a ‘new category of vicarious liability’ based on financial imbalance and bargaining power.⁵³ Some may suggest that this is a very practical consideration, where companies such as Uber have obtained a significant market share from traditional taxi services, coercing drivers to defect to an organisation that is larger but affords fewer protections.

Naturally, Callinan J rejects this consideration as a ‘decisive factor’, stating ‘disparity in itself in this respect cannot itself provide reason to hold [employers] liable for the negligence of [their employees or contractors].’ His Honour warns that ‘courts may be required, as a matter of course, to assess the respective wealths of contracting parties’ to allocate liability.⁵⁴ Even holistically, ‘would it follow that [liability is established] because, taken with other matters, the former happens to be much richer than the latter?’ Unsurprisingly, his Honour allows deference to Parliament, given failed legislative reform around a similar are of law.⁵⁵ Broadly,

⁴⁷ Ibid at 54 [86] citing *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 56-57.

⁴⁸ *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 54, [86] quoting John Fleming, *The Law of Torts* (LBC Information Services, 9th ed, 1998) 410.

⁴⁹ *Bazely v Curry* [1999] 2 SCR 534 at 556 [36].

⁵⁰ *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 39 [41].

⁵¹ Ibid at 552-555 [29]-[33].

⁵² Ibid at 66 [113]; cf 35-36 [30]-[31].

⁵³ Ibid at 67 [114].

⁵⁴ Ibid at 70 [119].

⁵⁵ Ibid at 69 [118].

Callinan J believed adapting the law in this way (to impact or be influenced by public policy), even for vicarious liability, is beyond the court's role. Specifically, his Honour stated:

[h]ow to strike the right balance, where the public interest truly lies, what is the most efficient way of dealing with the rights and obligations of the parties, and to what extent economic efficiency should influence legal principles are not questions which I can, or, in my opinion, the Court, should seek to answer here.⁵⁶

Callinan J highlights the implications of courts engaging with public policy, specifically in weighing workers' rights and business efficacy. His Honour's comments (and hence the appellant's submissions) are ahead of their time. They greatly apply to the gig economy. The majority thought to mention that these policy considerations 'might be significant in evidentiary circumstances which differed from [...] this case.'⁵⁷ Though not as useful in a more primitive market and business model, they are in the gig economy. Namely, imposing employee protections and vicarious liability on gig economy companies hinders their efficacy. This may cause this business model to be infeasible, likely being the case with Uber, as discussed above. This may be more unfair on workers if a contracting arrangement is the only work available to them and thus tolerable without typical employee entitlements. Callinan J expresses this concern as one of forcing a relationship that is not mutually desired, stating:

[o]pportunities to do remunerative and useful work for unskilled people may shrink as the costs of directly employing people increases. To impose upon the [company] the rigidities of a contract of service might perhaps be to destroy an avenue of work for people who might find it difficult to gain remunerative employment otherwise.⁵⁸

Still, at some point, the gig economy may be so disruptive that alternatives are scarce. Though a question of policy, an absence of legislation may encourage submissions and judicial action.

Callinan J also engages with the assertion that insurance ought to provide a more efficient means by which to allocate expenses and therefore favour broader principles of vicarious liability. This submission by the appellant, being Mr Hollis, failed. In some sense, its failure implicitly undermines McHugh J's argument for broader vicarious liability principles. Broadly, the appellant submitted that, if a company is insured, it can compensate an injured party's injury and pass on that cost to customers and workers. Thus, companies are incentivised to take responsibility for the training and conduct of their workers. Judicial treatment of insurance policies inspires considerable debate in tort law. In *Imbree v McNeilly*

⁵⁶ Ibid at 69 [117].

⁵⁷ Ibid at 41 [46].

⁵⁸ Ibid at 69 [117].

(2008) 236 CLR 510, seven years after *Hollis*, Gleeson CJ described the effect of insurance. Though the issue was not in contention, raised by the respondent and not the appellant, his Honour usefully addressed, in *obiter dicta*, the merits of arguing an outcome based on the existence or non-existence of an insurance policy. Gleeson CJ describes it as ‘morally incoherent’ and ‘productive of legal confusion.’⁵⁹ This reconciles with Callinan J’s view, specifically it ‘may tend to lead to distortions in the law of tortious liability and the assessment of damages, and to invite the intrusion of courts into quasi-legislative activity.’⁶⁰

C Competing legal tests

1 The entrepreneurship test

Before discussing this test, one must realise that its application over the multifactor test was disavowed two months after it prevailed by a differently composed Federal Court of Australia (‘FCA’).⁶¹ Yet, that same decision permits the test as a factor to be considered after applying the multifactor test. It is important to discuss the entrepreneurship test for two reasons. First, it received judicial support, being applied in the FCA in 2011 as the dominant test.⁶² A similar test was also applied by the FCA in 2013, citing ‘clear indications of the pursuit of an independent business.’⁶³ Second, it mirrors the UK test for employees and contractors.

This entrepreneurship test was argued and prevailed in the case of *Fair Work Ombudsman v Quest South Perth Holdings*⁶⁴ (‘*Quest*’). Yet, its support in *Quest* is by way of *obiter*, as was recognised in subsequent authority.⁶⁵ Here, a majority of North and Bromberg JJ cited 1963,⁶⁶ 2001⁶⁷ (the majority in *Hollis*) and 2006⁶⁸ HCA authority to promote the ‘essential hallmark’ of an independent contractor. Their Honours argued that the dichotomy is ‘rooted fundamentally in the difference between a person who serves his employer in his, the employer’s, business, and a person who carries on a trade or business of his own.’⁶⁹

⁵⁹ *Imbree v McNeilly* (2008) 236 CLR 510 at 519, [21] (Gleeson CJ). His Honour draws support from Jane Stapleton, ‘Tort, Insurance and Ideology’ (1995) 58(6) *Modern Law Review* 820, 825.

⁶⁰ *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 68, [116]. Callinan J draws support from *Scott v Davies* (2000) 204 CLR 333 at 454 [346].

⁶¹ *Tattsbet Ltd v Morrow* (2015) 233 FCR 46.

⁶² *On Call Interpreters & Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* (2011) 214 FCR 82.

⁶³ *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146 at 173 [102] (Buchanan J).

⁶⁴ (2015) 288 FCR 346.

⁶⁵ *Tattsbet Ltd v Morrow* (2015) 233 FCR 46 at 62 [62].

⁶⁶ *Marshall v Whittaker’s Building Supply Company* (1963) 109 CLR 210 at 217.

⁶⁷ *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 41 [47]; 44-45 [57].

⁶⁸ *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 172-173 [30]-[33] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

⁶⁹ *FWO v Quest* (2015) 288 FCR 346 at 389 [177] (North and Bromberg JJ).

Incidentally, this is almost wholly consistent with UK law, though absent of a necessary legislative category to which entrepreneurship can be applied. This will be discussed below. Yet, seemingly to extend the test, North and Bromberg JJ explained that the nature of a business may vary and the term cannot be exhaustively defined or inferred through certain facts and circumstances.⁷⁰ Previously, the FCA summarised the definition of a ‘business’ in its full complexity (including indicia and authority current to 2011).⁷¹ The approach in *Quest* can be distilled to the following distinction: ‘[employees] will be content to be remunerated with a wage which reflects the value of the personal services provided,’ whereas, ‘the independent contractor will [also] want a return on the risk and expense involved in running a business.’⁷²

2 *Affirming the multifactor test*

Two months after *Quest*, a differently composed FCA in *Tattsbet Ltd v Morrow*⁷³ (*Tattsbet*) engaged with the employment dichotomy. In doing so, they explicitly rejected the approach in *Quest*, insisting that the dichotomy does not involve notions of entrepreneurship. Their Honours accepted that the entrepreneurship dichotomy is also frustratingly opaque, quoting previous FCA authority. There, Buchanan J found that ‘[w]orking in the business of another is not inconsistent with working in a business of one’s own.’ Hence, Jessup J (Allsop CJ and White J concurring) return to the question and test in *Stevens* and *Hollis*. Specifically, because ‘[viewing] the matter through a prism of [entrepreneurship deflects] attention from the central question, whether the person concerned is an employee or not.’⁷⁴ Rather, the ‘question is not whether the person is an entrepreneur: it is whether he or she is an employee.’⁷⁵

This is not to say that entrepreneurship must be quarantined from the employment dichotomy. This offers hope for evolution of the legal test. Rather, per Jessup J, it is a matter that should be considered ‘in determining the question at hand, so long as sight is not lost of the question itself.’⁷⁶ Allsop CJ supported this, beyond concurring more generally, stating: ‘[t]he statutory and factual context will always be critical in a multifactorial process of characterisation of a legal and human relationship: employment. Whose business or enterprise is being carried on

⁷⁰ Ibid at 389 [180], citing *London Australia Investment Company Ltd v Federal Commissioner of Taxation* (1977) 138 CLR 106 at 129.

⁷¹ See *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)* (2011) 214 FCR 82 at 124-125 [217]. See also 123 [210].

⁷² *FWO v Quest* (2015) 288 FCR 346 at 389 [181].

⁷³ (2015) 233 FCR 46.

⁷⁴ *Tattsbet Ltd v Morrow* (2015) 233 FCR 46 at 61 [61].

⁷⁵ Ibid.

⁷⁶ Ibid.

may be critical [but may not for a sole trader] who wishes, or is prepared to bargain for, or accept, a sufficient degree of independence that tends to deny a characterisation of employment in all the circumstances, including the relevant statute.⁷⁷ As above, factors themselves can be revised. Yet, this is not easily achieved. This paper argues the list may lag a modern market.

D *The Fair Work Commission*

Given competing arguments and tests, one can understand tensions in the multifactor test in two recent FWC decisions, being *Kaseris v Rasier Pacific V.O.F.* ('*Kaseris*')⁷⁸ and *Pallage v Rasier Pacific Pty Ltd* ('*Pallage*').⁷⁹ Each concerned the status of Uber drivers. Both applied the multifactor test to confirm they are independent contractors, not employees, and expressed frustration with being confined to that test due to the gig economy.

1 *Kaseris v Rasier Pacific V.O.F.*

In *Kaseris*, a Victorian Uber driver unsuccessfully brought an action for unfair dismissal. This is the first Australian decision to apply the employment dichotomy to the gig economy. It does so with difficulty. Essentially, applying the multifactor test, the driver was an 'independent contractor'. The driver had complete control over the way in which he wanted to conduct the services he provided.⁸⁰ He provided his own vehicle, mobile phone and data plan.⁸¹ He did not and was not required to wear a uniform, and was not permitted to display Uber's name, logo, or colours on his vehicle.⁸² He was also expected to maintain his own private taxation affairs,⁸³ was described as an employee,⁸⁴ and was not required to perform services only for Uber.⁸⁵

The driver also relied on a recent United Kingdom ('UK') decision⁸⁶ which found that an Uber driver was an employee rather than contractor. This case is discussed in Part III. To perhaps foreshadow the limitations of a cross-jurisdictional analysis of the matter, Gostencnik DP recognises that the UK definition of worker is 'self-evidently broader than the definition of an employee and encapsulates some

⁷⁷ Ibid at 50 [5].

⁷⁸ [2017] FWC 6610.

⁷⁹ [2018] FWC 2579.

⁸⁰ [2017] FWC 6610 at [54].

⁸¹ Ibid at [56].

⁸² Ibid at [57].

⁸³ Ibid at [58].

⁸⁴ Ibid at [60].

⁸⁵ Ibid at [24].

⁸⁶ *Aslam and others v Uber B.V. and others* [2017] IRLR 4 (ET).

independent contractors.’⁸⁷ As will be discussed, this breadth is a central argument of this paper. Therefore, Gostencnik DP found that UK legislation, considering its drafting, may accommodate a test that analyses entrepreneurship more heavily than the other factors in the multifactor test. Gostencnik DP seems to engage with this issue in his conclusion. He acknowledges that the multifactor test ‘developed and evolved at a time before the new “gig” or “sharing” economy.’⁸⁸ Most significantly, he states:

[i]t may be that these notions are outmoded in some senses and are no longer reflective of our current economic circumstances. These notions take little or no account of revenue generation and revenue sharing as between participants, relative bargaining power, or the extent to which parties are captive of each other, in the sense of possessing realistic alternative pursuits or engaging in competition. Perhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy. Perhaps the legislature will develop laws to refine traditional notions of employment or broaden protection to participants in the digital economy. But until then, the traditional available tests of employment will continue to be applied.⁸⁹

This statement seems to best articulate the issues that the current legal test experiences, subject to the argument for business efficacy. The conclusion raises two important issues. First, that technological advancements may warrant careful reformulation of the multifactor test. Second, that parliament faces increasing pressure to legislate on the matter. Gostencnik DP’s concerns are not new. Callinan J considered bargaining power in *Hollis*, promoting it as a consideration but not a ‘hard and fast rule’. The legal test may struggle to presume the parties’ intentions.

2 *Pallage v Rasier Pacific Pty Ltd*

In *Pallage*, the FWC overwhelmingly applied the same law and reached the same conclusion as it did in *Kaseris*. Commissioner Wilson essentially found that ‘all but two of the indicators, delegation or subcontracting and capacity to suspend or dismiss, resolve against Mr Pallage.’⁹⁰ Despite that some elements of the contract indicated employment, such as those dealing with termination, most were found not to.⁹¹ Notably, Commissioner Wilson stated:

[t]he nature of the work and its environment, in which unskilled work is performed, albeit alone, repetitively and over many engagements for the one principal also has some consistency, possibly greater consistency, with a finding of employment.⁹²

⁸⁷ *Kaseris v Rasier Pacific V.O.F.* [2017] FWC 6610 at [64].

⁸⁸ *Ibid* at [66].

⁸⁹ *Ibid*.

⁹⁰ *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579 at [53].

⁹¹ *Ibid*.

⁹² *Ibid*.

Again, provision of equipment was significant, as ‘Mr Pallage provided substantial equipment to the contract, principally in the form of a motor vehicle and less so in the form of a mobile phone with an attendant broadband connection.’⁹³ The vehicle ‘was required to be licenced, insured at the time of registration and certified as roadworthy before Mr Pallage was able to access the Partner App.’⁹⁴ Again, in combination with, for example, prohibiting display of a logo,⁹⁵ the gig economy company could adapt its business to favour ‘independent contracting’.

E *Reflecting on the tests*

The legal situation in Australia is rather awkward. Clearly, the multi-factor test prevails. However, as discussed, many themes compete. These include flexibility, judicial discretion, parliamentary deference and business efficacy. Some tests even prefer not to engage with the employment dichotomy at all, promoting separate legal test for vicarious liability via agency principles. The result is quite astonishing, given the fundamental similarity between Uber and standard taxi services. It also begs the question of how easily the criteria may be exploited. Rather than guidance, the test seems to offer a checklist to avoid obligations, particularly in an age where technology allows unanticipated flexibility and massive disruptive power.

F *The multifactor criterion may lag a modern market*

It is useful to scrutinise the multifactor test, particularly the ‘equipment’ indicia and ‘emanation of the business’ indicia (which includes wearing an uniform and displaying a logo). Rigidly applying both indicia ignores technological changes and lags an evolving market. Regarding equipment, though the value of a car is significant, the action bringing such an expensive asset to earn money for Uber in such a marginal way is a new practical reality. Specifically, one does not buy a car exclusively to drive for Uber as an electrician buys equipment to install or repair infrastructure. Regarding emanation of a business, Uber has little need for advertising on cars, as is common with taxi services, or uniforms, instead relying on the app and digital marketing.

1 *Provision of equipment*

In *Hollis*, the majority noted a worker is likely an independent contractor ‘where the investment in capital equipment [is] more significant, and greater skill

⁹³ Ibid at [40].

⁹⁴ Ibid.

⁹⁵ Ibid at [46].

and training [is] required to operate it.’⁹⁶ In *Hollis*, the couriers used bikes, which are less expensive than motor vehicles. This is largely why the HCA noted the Court of Appeal ‘fell into error in making too much of [this factor].’⁹⁷ Despite that the value of the assets required to drive with Uber are more expensive, this this raises an important issue. Uber drivers do not purchase a car, phone or data plan specifically to work in that role. These assets are almost certainly owned in advance, which forms much of the appeal of working with Uber. How must the courts define an ‘investment in capital’ if recreational assets may be so easily used for a dual purpose?

2 *Emanation of a business*

One need only revisit the majority judgment in *Hollis* to recognise that the multifactor test can be more flexible than it was in the FWC regarding this indicia. The majority achieved this in *Hollis* by affording the factor less weight. Their Honours discussed this specifically regarding ‘wearing a uniform’ (or ‘livery’).⁹⁸ Considering the complexity of the case in *Hollis*, their Honours reject the strong influence of that indicia that was apparent in a UK case from 1840, that being *Quarman v Burnett* (‘*Quarman*’).⁹⁹ In that case, Parke B noted that wearing livery ‘at once answers’ the question in favour of employment.¹⁰⁰ The majority noted [h]ere, there is rather more to the facts’.¹⁰¹

3 *Possible amendments and treatment in a test case*

Naturally, this application may suggest that, if the HCA had a test case that involved classifying workers in Uber, it would perhaps weigh the factors less cautiously than the FWC. Further to this, new factors may be inserted into the test because the list is not closed.¹⁰² Still, considering a general preference for parliamentary deference evidenced in the cases discussed, modernising the classification of workers through new legislation seems to be the more likely means for change. If courts were to modernise the law by departing from judicial precedent, then judges become the final unelected arbiters of employment relationships for the first time since Stevens. Yet, either now or in the future, judges may be compelled to display judicial activism in the absence of legislative reform and not merely the rejection of it.

⁹⁶ *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 41 [47].

⁹⁷ *Ibid.*

⁹⁸ See *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 41 [47].

⁹⁹ See *Quarman v Burnett* (1840) 151 ER 509.

¹⁰⁰ *Ibid* at 513 (Parke B).

¹⁰¹ *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 41 [47].

¹⁰² *Ibid.*

III CONTRASTING THE UNITED KINGDOM

A *The legal background*

UK worker classification is not dichotomous. In fact, Theresa May recently commissioned a review of employment rights considering the gig economy, as considered above. This Taylor Review describes the current system of classifying workers as a ‘three-tier’ approach.¹⁰³ This allows greater flexibility in judicial analysis and broadens the ambit of potential legislative reform (see Part IV). It is neatly summarised in the UK Supreme Court by Lady Hale (Lord Neuberger and Lord Wilson agreeing).¹⁰⁴ Her Ladyship states ‘the natural and ordinary meaning of “employed by” is employed under a contract of service. Our law draws a clear distinction between those who are so employed and those who are self-employed but enter into contracts to perform work or services for others.’¹⁰⁵ Her Ladyship then reinforces that UK law ‘now draws a distinction between two different kinds of self-employed people.’¹⁰⁶ This second distinction is crucial to classifying gig economy workers, whereby:

[o]ne kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them [and] the other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by some-one else.¹⁰⁷

UK employees have certain rights. It is unnecessary to list these, but one should note they are similar to those in Australia. The second distinction in UK legislation is far more important, that being between the two types of self-employed people.¹⁰⁸ The latter kind (the ‘limb b’ worker) attracts certain protections. This is despite that the person in question is classified as a ‘worker’ rather than an ‘employee’.¹⁰⁹ The concept of a ‘limb b’ worker allowed the UK Employment Tribunal to extend protections to Uber drivers in *Aslam and others v Uber B.V. and others*¹¹⁰ (*Aslam*). As will be discussed, Australia can benefit from this approach.

B *Classifying ‘gig economy’ workers*

¹⁰³ Matthew Taylor, *Good Work: The Taylor Review of Modern Working Practices* (2017) 35.

¹⁰⁴ *Bates van Winkelhof v Clyde & Co LLP* [2014] 1 WLR 2047.

¹⁰⁵ *Ibid* at [24].

¹⁰⁶ *Ibid* at [25].

¹⁰⁷ *Ibid*.

¹⁰⁸ See *Employment Rights Act 1996* (UK) s 230(3).

¹⁰⁹ *Employment Rights Act 1996* (UK) s 230(3)(b).

¹¹⁰ [2017] IRLR 4 (ET). See, eg, at [100].

Considering UK law, it is no surprise that Uber argued that its employees were self-employed through their own undertaking in *Aslam*. Yet, Uber's submissions attract scathing criticism. Specifically, the Employment Tribunal states '[t]he notion that Uber in London is a mosaic of 30,000 small businesses linked by a common 'platform' is to our minds faintly ridiculous.'¹¹¹ This is because '[d]rivers do not and cannot negotiate with passengers' but instead 'are offered and accept trips strictly on Uber's terms.'¹¹² The judgment considers the substance of the relationships of all parties. Illustratively, the UK court criticised 'fictions, twisted language and even brand new technology'¹¹³ and rejected the proposition that Uber drivers are in any position to grow their business, unless 'growing his business simply means spending more hours at the wheel.'¹¹⁴ This deficit of independence is arguably the hallmark of a 'limb b' worker, which explains the Tribunal's finding at a high level. It also more aptly describes the business model.

Ultimately, the court found that 'the supposed driver/passenger contract is a pure fiction which bears no relation to the real dealings and relationships between the parties.'¹¹⁵ The Tribunal decided that a driver is a worker under the 'limb b' definition when one 'has the App switched on, is in the territory in which he is licensed to use the App, and is ready and willing to accept trips.'¹¹⁶ The Tribunal even stated it would hold in the alternative that 'at the very latest, the driver is 'working' for Uber from the moment when he accepts any trip.'¹¹⁷ This is not a conclusion the Australian FWC could reach with the multifactor test and current legislation.

C *Reconciling UK and Australian law*

It is beyond the scope of this paper to consider the UK common law test of employment, but sufficient to note that it is also flexible. Broadly, it considers the extent to which a worker is integrated into a business, resembling the multifactor test.¹¹⁸ Yet, due to its different legislative framework, the UK Employment Tribunal could apply an 'entrepreneurship test' that briefly emerged in the FCA before being promptly rejected by that same Court, as discussed. To distinguish a self-employed contractor that works either on 'his own business' or 'the business

¹¹¹ *Aslam and others v Uber B.V. and others* [2017] IRLR 4 (ET) at [90].

¹¹² *Ibid.*

¹¹³ *Ibid* at [87].

¹¹⁴ *Ibid* at [90].

¹¹⁵ *Ibid* at [91].

¹¹⁶ *Ibid* at [100].

¹¹⁷ *Ibid* at [102].

¹¹⁸ See, eg, *Nethermere (St Neots) Ltd v Gardiner And Another* [1984] ICR 612; *Bank Voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248; *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497.

of another', this is clearly an apt test to apply. In *Hollis*, McHugh J recites language that resembles the former definition. His Honour refers to an independent contractor as 'someone who acts as an independent principal, exercising an independent discretion in carrying out a task for his own business interest and who is retained simply to product a result.'¹¹⁹

This description by McHugh J is, in substance, what the UK Employment Tribunal considered not to be the case in a gig economy company, that being Uber. This is also an essential hallmark of the category in which the FWC has placed Uber drivers. Therefore, this produces an odd result. Essentially, the multifactor test considers Uber drivers to fall into a category with a description that the UK Tribunal has rejected as a fiction in its enterprise. This exemplifies the sensibility of adapting legislation to reflect that of the UK, such that gig economy workers can fall under a category that more adequately reflects their working arrangement. Clearly, the UK legislative framework offers a means by which Australian law may evolve or be encouraged to evolve.

IV LEGISLATIVE DEVELOPMENTS

A *Legislative landscape and parliamentary deference*

Legislative reform for gig economy workers receives increased attention. It is useful to monitor developments of each State and compare implementations and proposals. This part considers the actual developments. The paper considers possible reform in Part V, which could manifest as anything from changing the definition of 'employee' to an entirely new legislative scheme. This paper notes recent developments in Western Australia and Australian Federal Parliament, comparing the approach to UK recent legislative proposals where appropriate. The UK 'three-tier' approach to employment, as opposed to a dichotomy, broadens the ambit for such reform. Australian employment conditions are detailed in federal and state legislation. Though beyond the scope of this paper, the Fair Work Act 2009 (Cth) and state Acts are substantially similar, and questions of employment are typically decided under the former.

This paper has considered that Australian courts and the FWC to defer to parliament in cases involving workers' classification. As will be discussed, judges are more likely to defer to parliament if there is legislative reform related has recently failed. This gives effect to parliament's intention not to legislate on the issue, and was explored in some depth in *Hollis*. Yet, where there is prolonged legislative inaction, Australian courts have adopted a legislative function. As will be discussed, this sentiment manifested in the judgment of *Hollis*. This was

¹¹⁹ *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 48, [68].

particularly so in McHugh J's judgment, but even faintly appeared in the majority judgment. The HCA has, on occasion, reversed its decisions. This was particularly so in the 1980s and 1990s, where judges were convinced that conditions had changed so much that the law must adapt.¹²⁰ This sentiment produced *Mabo v Queensland [No 2]*,¹²¹ where the HCA overruled past authority to recognise Native Title in Australia, and *R v L*,¹²² which recognised the offence of rape within marriage. In 1988, Justice McHugh asserted that '[l]aw is a social instrument — a means, not an end', and that '[s]ince it is virtually impossible for legislatures to devote sufficient sitting time to the continual reform of the law, [...] the role must be filled by other institutions including the courts.'¹²³ His Honour noted 'the judiciary should not be composed exclusively of those who are master only of a strict and complete legalism.'¹²⁴ This may explain why McHugh J championed broader 'employer and agent' vicarious liability. It may also explain why Kirby J, a champion of judicial activism,¹²⁵ also reserved the question in *Northern Sandblasting*.¹²⁶ Perhaps more tellingly, the sentiment that the judiciary ought to update the law even presented itself amongst the majority in *Hollis*, albeit sparingly. Notably:

[it] is one thing to say [...] that the common law may develop by analogy to the enacted law. It is another proposition that the common law should stay still because the legislature has not moved.¹²⁷

Interestingly, the majority then found certain legislative reform (about liability for collisions between courier cyclists and others) was peripheral to the central question of the employment dichotomy.¹²⁸ Yet, Callinan J found it was suitably close to warrant parliamentary deference.¹²⁹ This demonstrates the delicate interaction between legislative proposals, reforms and legal tests. More importantly, it suggests that, given previously failed legislative attempts, there is no proximate judicial intervention regarding employment classification in favour of workers' rights. Yet, as previously discussed, a vicarious liability test based on

¹²⁰ Catriona Cook et al, *Laying Down the Law* (Lexisnexis Butterworths, 9th ed, 2015) 170.

¹²¹ (1992) 175 CLR 1.

¹²² (1991) 174 CLR 379.

¹²³ Michael McHugh, 'The Law-Making Function of the Judicial Process – Part II' (1988) 62(2) *Australian Law Journal* 116.

¹²⁴ *Ibid*, 124.

¹²⁵ See, eg, The Honourable Justice Kirby, 'Judicial Activism' (1997) 27(1) *University of Western Australia Law Review* 1.

¹²⁶ *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 392 (Kirby J).

¹²⁷ *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 46 [59] (Gleeson CJ, Gaudron, Gummow, Kirby, and Hayne JJ).

¹²⁸ *Ibid* at 46 [59]-[60] (Gleeson CJ, Gaudron, Gummow, Kirby, and Hayne JJ).

¹²⁹ *Ibid* at 69 [118] (Callinan J).

agency distantly looms in the form of that proposed multiple times by McHugh J. This test may circumvent legislation.

B Recent parliamentary activity

1 Australian Federal Parliament and international examples

The unashamedly named Fair Work Amendment (Making Australia More Equal) Bill 2018 purported to bring contractors in line with employee protections. Yet, it lapsed on 23 October 2018 under Standing Order 42, having not been called upon in eight consecutive weeks. Still, it is useful to briefly consider its approach. It proposed ‘minimum entitlement orders’, whereby the FWC could ‘extend provisions of [the] Act, modern awards or enterprise agreements to workers.’¹³⁰ These orders were designed to be applied to a worker, workers or even a class of workers.¹³¹ The Bill sought to address ‘a wide range of legal relationships regulating work’ to allow workers ‘terms and conditions that are no less than those applying to employees.’¹³² This idea, though perhaps equitable, seems too flexible. It may stifle innovation in the gig economy, as discussed, as gig economy companies may not be able to operate profitably with the additional costs that employee protections impose. This is quite likely the case for Uber.¹³³ The effect of stifling innovation is likely compounded by the uncertainty in an approach that is premised on discretion, as companies that operate in this market are not afforded certainty.

Another legislative proposal that has failed in Australia is the concept of a ‘quasi-employee’;¹³⁴ a dependent contractor of sorts.¹³⁵ In Australia, considering the legal dichotomy, this idea is ridiculed as one which has ‘no meaning, is illegitimate, and confuses rather than clarifies issues.’¹³⁶ It is accused of being an ‘artificial creation for the purpose of lending credence to attempts to pull independent contractors into the sphere of industrial relations legislation.’¹³⁷ Its failure in Australia is a stark symbol of the difference between a dichotomy and trichotomy. The UK Taylor review recommended, as recently as in 2017,

¹³⁰ Fair Work Amendment (Making Australia More Equal) Bill 2018 (Cth) sch 1 cl 1.

¹³¹ Ibid at sch 1, cl 11.

¹³² Explanatory Memorandum, Fair Work Amendment (Making Australia More Equal) Bill 2018 (Cth) 2.

¹³³ Above n 15.

¹³⁴ Australia Report of the Committee of Review into Australian Industrial Relations Law and Systems Vol 2 AGPS Canberra 20 May 1985 at para 7.75.

¹³⁵ See Loretta de Plevitz, ‘Dependent Contractors: Can the Test from *Stevens v Brodribb* Protect Workers who are Quasi-Employees?’ (1997) 13 *Queensland University of Technology Law Journal* 263, 265.

¹³⁶ Self-employed Australia, *The ‘Dependent Contractor’ Argument: Background and why it is Discredited* (2006) <<https://www.selfemployedaustralia.com.au/Archives/ILO/dependent-contractor-concept-rejected>>.

¹³⁷ Ibid.

‘[retaining] the current three-tier approach to employment status as it remains relevant in the modern labour market, but [renaming] as ‘dependent contractors’ the category of people who are eligible for worker rights but who are not employees.’¹³⁸ Notably, this review was heavily motivated by the emerging gig economy. Canada recognises a dependent contractor,¹³⁹ and lawyers are of the opinion that that, ‘given [this category] and the major implications for governmental inability to recover taxes and other payments, it is likely that [the government] will adapt and move quickly to regulate the gig economy in a manner that maximizes recovery and ensures that Canadian workers’ rights are protected.’¹⁴⁰ This broadly captures the legislative potential of a trichotomy.

2 *Western Australia*

Industrial Relations Minister Bill Johnston revealed that the State Government is considering bringing gig economy ‘contractors’ under the Western Australian industrial relations system.¹⁴¹ The submission considered updating the definition of employee.¹⁴² The proposal exemplifies the importance of this ‘area of major concern,’ with aims to ‘[ensure] comprehensive coverage of all employees.’¹⁴³ This review was due to report in June. As at the date of submitting this paper, there is no update on its progress. The WA Council of Social Service also called for minimum employment standards for gig workers in a separate submission. Uber has argued workplace laws discourage it from providing perks and benefits to its drivers out of fear they will be classified as employees.¹⁴⁴ Rather, in its submission to Labor’s Senate inquiry into the future of work, Uber ‘called for a scheme of “portable benefits” to step around legal constraints for independent contractors and demonstrate its commitment to “skills development and life-long learning”’.¹⁴⁵ This exemplifies the tension between regulators and gig economy companies.

¹³⁸ Matthew Taylor, *Good Work: The Taylor Review of Modern Working Practices* (2017) 35.

¹³⁹ Randy Kaardal and Alexander Bjornson, ‘The Gig Economy: Dependent Contractors, Workers’ Rights, and the Canadian Approach’ (Paper presented at the ERR 2018 Midwinter Meeting, Florida, 20-24 March 2018).

¹⁴⁰ *Ibid* at 2.

¹⁴¹ Government of Western Australia, *Review of State industrial relations system* (22 September 2017) <<https://www.mediastatements.wa.gov.au/Pages/McGowan/2017/09/Review-of-State-industrial-relations-system.aspx>>.

¹⁴² See *Industrial Relations Act 1979* (WA) s 7.

¹⁴³ *Ibid*.

¹⁴⁴ The Australian Financial Review, *Uber says workplace laws discourage offering its drivers perks* (12 February 2018) <<https://www.afr.com/news/policy/industrial-relations/uber-calls-for-social-protection-for-drivers-20180212-h0vysh>>.

¹⁴⁵ *Ibid*.

V POTENTIAL REFORM AND GUIDANCE

A *Legislative guidance*

As discussed, the divergence between Australian and UK law is largely, if not solely, attributable to the expanded definition of ‘worker’ in the UK. The legislative provision invites an entrepreneurship test over the multifactor test. Perhaps this provides a more sensible result. This could inspire a shift by the judiciary to give effect to this definition. It would also encourage more bold legislative reform, evidenced by the UK’s Taylor Report. Though the change appears quite radical, the entrepreneurship test has attracted significant judicial support in the past. This approach is sensible for two reasons. First, it allows the issue to be solved by public scrutiny and parliamentary debate. Second, it provides certainty for courts, who have formerly denied that the test is one of entrepreneurship and remained with the multifactor test.

Still, parliament must consider the cost implications on gig economy businesses. Generally, the argument for avoiding these costs is that the companies create business that would otherwise not exist. This includes employment opportunities. Parliament must balance the utility of regulation and employee protection against the risk of deterring the operation of these entities and undermining their financial sustainability. This decision becomes increasingly difficult as companies in the gig economy obtain a greater market.

Of course, recognising ‘quasi-employees’ or ‘dependent contractors’ through legislation (as had the UK and Canada) can reduce the role of the courts. Kirby J particularly noted this whilst commenting, in *obiter dicta*, on the bases for McHugh J’s ‘employer and agent’ category of vicarious liability. To clarify, ‘*CML*’ is the primary case on which McHugh J relies, particularly citing Dixon J’s remarks.¹⁴⁶ Kirby J states that increased legislative protections:

make it inappropriate to confine, or narrow, the *CML* rule. If anything, the new circumstances may, in the future, require an enlargement of that rule. In the present case, it is sufficient to apply the *CML* rule, according to the terms in which it was expressed, to arrive at the legally correct outcome which is also the outcome that is just in the circumstances.¹⁴⁷

B *Legislative scheme*

Perhaps the Parliament of Australia may formulate a different framework. This may take the form of entirely new legislation, designed to clarify worker

¹⁴⁶ See *Colonial Mutual Life Insurance Society Ltd v Producers and Citizens Co-operative Insurance Co of Australia Ltd* (1931) 46 CLR 41.

¹⁴⁷ *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 193 [105] (Kirby J).

classification in the gig economy. This is undoubtedly a drafting challenge. Again, this allows parliamentary debate and public scrutiny, perhaps more so than a simple amendment. However, it attracts the threat of uncertain interpretation, particularly in such a rapidly evolving space. It also lacks the security of a UK interpretive benchmark that is inherent in drawing inspiration from its legislation. Generally, if legislation is preferred, rights may be amended more flexibly. This is also a delicate exercise, as it may be a preferable policy to impose rules on ‘gig economy’ contractors but not all contractors. As discussed, this was the broad aim of the Fair Work Amendment (Making Australia More Equal) Bill 2018, albeit on a problematically discretionary basis.

C *Judicial evolution*

Apart from recent FWC decisions, Australia has not yet had a test case for the gig economy. The FWC’s decisions seemingly invite concern over the current law. Even in the first instance of *Hollis*, and regarding a less complicated and evolved business model, Meagher JA expressed that classification under the multifactor test was ‘hardly without difficulty’;¹⁴⁸ a comment which the HCA thought it proper to recite in the 2001 appeal.¹⁴⁹ As discussed, and exemplified by judicial tension in the FCA, the multifactor test is unlikely to be replaced. As discussed, there is potential for the HCA, or a lower court, to weigh the multifactor test differently to that of the FWC. Absent of a test case, this may turn out not to be a viable option, or to not have sufficient effect to reach a different conclusion. This would suggest that, absent of judicial activism, a test case will result in the same conclusion as *Kaseris and Pallage*. Factors such as ‘skill’ and ‘financial imbalance’ could become slightly more prominent to truly give effect to its intention of considering the ‘substance of the relationship’ or the ‘relationship in its totality’. Factors such as ‘providing equipment’ could be interpreted more practically to reflect that, in substance, equivocal gig economy working arrangements may resemble that of employment.

Despite judicial preference for the multifactor test, there is a chance that, many years from now, the court will modify the test to adapt to a modern economy. Such a change last occurred in *Stevens*, which radically altered the test in 1986 to adapt to economic conditions. As considered, courts are unlikely to be persuaded that this is appropriate. For example, a radical change may involve adopting the entrepreneurship test without parliamentary guidance.

McHugh J’s ‘employer and agent’ vicarious liability principle is an interesting concept. Though it has been doubted in the past, there is limited scope to suggest

¹⁴⁸ *Vabu Pty Ltd v Commissioner of Taxation* (1996) 33 ATR 537 at 539.

¹⁴⁹ *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 31 [19].

that, in the absence of legislative reform, it may be a valid extension of the principles on which *McHugh J* relied. Of course, this argument is moot if the definition of ‘employee’ is applied or expanded to encompass gig economy work. Otherwise, a new intermediate category may be established that may accommodate the same principles of vicarious liability as employment arrangements.

VI CONCLUSION

Generally, employment and contracting are not as dichotomous as they have been in the past. This is particularly due to significant technological advancement since the multifactor test was framed in 1986, which increasingly plagues its application. Such advancement manifests as intermediary arrangements in the gig economy, creating a working ‘spectrum’ that exceeds a ‘duck and rooster’ enquiry. This paper has analysed the nature, consequences and possible answers to the question of how to engage with workers’ classification in an evolving market. It explores the merits of a trichotomy, which allows courts to fairly apply the multifactor test.

Clearly, the situation is increasingly unclear, and this trend may continue as technology advances. In 1986, it was practically impossible to predict the rise of business models such as Uber, nor the proliferation of similar business models and their profound impact on employees’ classification and rights. Yet, the test remains dominant due to legislation, rejected competing legal tests. This is despite judicial rejection of severing related vicarious liability. The legal difficulties this paper highlights will surely increase as time progresses. Such difficulties may render the multifactor test an unfair mechanism by which to define intermediaries’ workers.