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RETRYING *DELIVEROO* WITH THE IMPLIED DUTY TO COOPERATE: UNSETTLING THE INDEPENDENT CONTRACTOR STATUS OF ON-DEMAND PLATFORM WORKERS

Abstract

Following the High Court cases of *Personnel Contracting* and *Jamsek*, the Full Bench of the Fair Work Commission 'regrettably' found a Deliveroo food delivery rider to be an independent contractor, having confined their analysis to only the written terms of the agreement. As the High Court left open the possibility that implied terms may also be considered in characterising an employment contract, this article undertakes the hypothetical exercise of retrying the case emphasising the implied duty of cooperation, an accepted implied term by law in all contracts. In the context of on-demand platform workers, the authors contend that this duty requires workers to cooperate with their platforms in the supply of their labour, as such a duty is 'necessary' for the efficacy of these contracts. Consideration of this duty would highlight the legal right Deliveroo has to control its workers, pointing towards an employment relationship. The article thus offers a novel argument to unsettle the status of on-demand platform workers as independent contractors by exploring the under-researched practical implications of implied terms in classifying employees under both the common law and the legislative test for determining employment status under the *Fair Work Act 2009* (Cth).

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I Introduction

In Australia, in the absence of statutory intervention, the terms 'employee', 'employer' or 'employment' are given their ordinary meaning under the common law.[1] There is no determinative test for ascertaining the ordinary meaning of an employee. Generally speaking, whether a worker is an employee rests upon two key considerations — the extent of the putative employer's rights to control the worker's activities (including how, where, and when the work is done),[2] and 'the extent to which the putative employee can be seen to work in [their] own business, as distinct from the business of the putative employer' with neither element being determinative and both being a question of degree.[3] Decision-makers ask a series of questions to determine whether the answers point away or towards these elements, and consequently determine if an employment relationship does or does not exist (a multifactor test).[4]

Prior to 2022, it was thought that this inquiry could include the parties' conduct in executing the contract.[5] However, in 2022, High Court ('HC') plurality judgments clarified in the cases of *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting* ('*Personnel Contracting*')[6] and *ZG Operations Australia Pty Ltd v Jamsek* ('*Jamsek*')[7] that, 'in the case of a wholly written employment contract, the "totality of the relationship" which must be considered is the totality of the legal rights and obligations provided for in the contract'.[8] Post-contractual

1 See, eg: *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346, 388–9 [173]; *C v Commonwealth* (2015) 234 FCR 81, 87 [34], cited in Andrew Stewart, Mark Irving and Pauline Bomball, 'Shifting and Ignoring the Balance of Power: The High Court's New Rules for Determining Employment Status' (2023) 46(4) *University of New South Wales Law Journal* 1214, 1217.

2 *JMC Pty Ltd v Federal Commissioner of Taxation* (2022) 114 ATR 795, 801 [23] ('*JMC*'), citing *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165, 197 [73]–[74] (Kiefel CJ, Keane and Edelman JJ), 208–9 [113] (Gageler and Gleeson JJ) ('*Personnel Contracting*'); *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 24 (Mason J), 36–7 (Wilson and Dawson JJ) ('*Stevens*').

3 *JMC* (n 2) 801 [23], citing *Personnel Contracting* (n 2) 184–5 [36]–[39] (Kiefel CJ, Keane and Edelman JJ), 208–9 [113] (Gageler and Gleeson JJ).

4 The authors' references to 'decision-makers' are intended to capture courts, commissions and/or tribunals.

5 Stewart, Irving and Bomball (n 1) 1217–18. This approach had been endorsed in High Court decisions such as *Stevens* (n 2) 24 (Mason J) and *Hollis v Vabu Pty Ltd (Bicycle Couriers Case)* (2001) 207 CLR 21, 41 [44] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

6 *Personnel Contracting* (n 2).

7 (2022) 275 CLR 254 ('*Jamsek*').

8 *Personnel Contracting* (n 2) 229 [173] (Gordon J). Justice Gordon's agreement with Kiefel CJ, Keane and Edelman JJ provided a plurality finding in *Personnel Contracting* that in a wholly written contract it is necessary to consider only the terms of the

conduct is not to be considered. The inquiry must be confined to contractual rights and obligations.

This clarification prompted concerns from labour law scholars that focussing solely on parties' contractual terms to determine employee status could lead to decisions that were out of step with reality.[9] The Full Bench of the Fair Work Commission ('FWC') similarly critiqued the HC,[10] when they overturned an initial finding that a driver for the food delivery company Deliveroo, which operates as a digital on-demand platform where drivers and clients are algorithmically assigned to each other, was an employee.[11] Having delayed the appeal of this case until after the *Jamsek* and *Personnel Contracting* decisions and having then applied these precedents, the Full Bench '[r]egrettably' found the worker to be an independent contractor.[12] In coming to their conclusion, the Full Bench explained that they were 'obliged … to ignore' various factual circumstances that would have otherwise been relevant to finding the driver to be an employee, had it not been for the HC's findings.[13]

The current federal Labor government also appeared to agree with critiques of *Jamsek* and *Personnel Contracting*, introducing s 15AA to the *Fair Work Act 2009* (Cth) ('*FW Act*'), which took effect on 26 August 2024. The section requires decision-makers to have regard to the 'real substance, practical reality and true nature of the relationship between the individual and the person' having regard to 'the totality of the relationship between the [putative employee] and the [putative employer] … not only to the terms of the contract governing the relationship' when determining the 'ordinary meanings of employee and employer' for the purposes of the *FW Act*.[14] The note to s 15AA states that the section was enacted in response to the HC decisions in *Personnel Contracting* and *Jamsek*.[15]

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contract. See also *Jamsek* (n 7), 273–4 [53] (Kiefel CJ, Keane and Edelman JJ), 285–6 [95] (Gordon and Steward JJ), referring to their reasoning in *Personnel Contracting.* Subsequent references to the *Personnel Contracting* and *Jamsek* decisions refer to the plurality judgements unless otherwise stated. See also Joellen Riley Munton, 'Boundary Disputes: Employment v Independent Contracting in the High Court' (2022) 35 *Australian Journal of Labour Law* 79, 85.

9 See, eg: Stewart, Irving and Bomball (n 1); Eugene Schofield-Georgeson, 'Contract, Labour Law and Reality in the High Court of Australia' (2022) 48(3) *Monash University Law Review* 232; Eugene Schofield-Georgeson and Joellen Riley Munton, 'Precarious Work in the High Court' (2023) 45(2) *Sydney Law Review* 219; Joellen Riley Munton, 'Employment Contracts in the Australian High Court' (2022) 15(2) *Italian Labour Law e-Journal* 173.

10 *Deliveroo Australia Pty Ltd v Franco* (2022) 317 IR 253, 280 [56] ('*Deliveroo*').

11 *Franco v Deliveroo Australia Pty Ltd* (2021) 305 IR 255 ('*Franco*').

12 *Deliveroo* (n 10) 280 [57].

13 Ibid 278–9 [53]–[54].

14 *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* (Cth) sch 1 item 237 ('*Closing Loopholes Act*'), inserting *Fair Work Act 2009* (Cth) s 15AA ('*FW Act*'). This provision commenced on 26 August 2024.

15 Ibid.

Moving forward, there will therefore be two approaches to determining a worker's employment status under Australian law. The statutory test that will affect the employment status of workers under the *FW Act* and their consequent eligibility for the employee entitlements contained therein, and the common law test which will remain significant in relation to other obligations and entitlements affected by a worker's common law employment status, such as findings of vicarious liability in tort law,[16] or superannuation,[17] taxation,[18] occupational health and safety,[19] and workers' compensation obligations.[20] While the key considerations for determining a worker's employment status will presumably remain the same under both the common law and the statutory test (that is, the extent of the putative employer's control and the extent the putative employee could be said to be working in their own business), the evidence that may be considered under each test will differ, with the statutory test permitting a broader scope of inquiry beyond the parties' contractual terms.

Along with the new statutory test for determining employment status, a new category of 'employee-like' workers has also been introduced into the *FW Act*, defined to include individuals who: (1) are party to a services contract; (2) perform 'all, or a significant majority of the work' under the contract; (3) perform work that is 'digital platform work'; (4) are not performing their work as employees; and (5) satisfy at least two prescribed characteristics, including having 'low bargaining power' in negotiating the contract or having 'a low degree of authority over the performance of their work'.[21] The FWC will be able to set minimum standards of work for these

16 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161, 167 [12]–[13].

17 *Superannuation Guarantee (Administration) Act 1992* (Cth) s 12(3): common law employees are entitled to the superannuation guarantee but so are persons that work 'under a contract that is wholly or principally for the labour of the person'.

18 *Taxation Administration Act 1953* (Cth) sch 1 requires employers to deduct taxes from wages paid to their employees and remit that amount to the Australian Tax Office in a system known as PAYG. Section 12-35 states: '[a]n entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as an employee (whether of that or another entity).' Contractors must generally meet their own tax obligations. There are, however, exceptions. For example, an independent contractor may enter into a voluntary agreement to withhold tax from their remuneration payments, tax has to be withheld where a contractor does not provide an Australian Business Number, and labour hire firms need to withhold tax on the payments to labour hire workers: 'Payments You Need to Withhold From', *Australian Tax Office* (Web Page, 17 October 2022) <https://www.ato.gov.au/Business/PAYG-withholding/Payments-you-need-to-withhold-from/>.

19 Occupational health and safety obligations apply to common law employees, however, some legislations have extended employers' duties to include certain independent contractors. See, eg: *Work Health and Safety Act 2011* (Cth) ss 7, 19; *Occupational Health and Safety Act 2004* (Vic) ss 21, 23.

20 See *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 11, which defines 'worker' as any person who performs work under a contract.

21 *Closing Loopholes Act* (n 14) sch 1 item 248, inserting *FW Act* (n 14) s 15P. This provision also commenced on 26 August 2024.

workers.[22] Any worker subject to these minimum standards 'is not an employee of any person in relation to that work'[23] and any steps taken to comply with these orders cannot be considered in determining whether an employment relationship exists between the parties.[24]

As seen above, an employee-like worker excludes any worker that is found to be an employee, under the statutory test for determining an employee under the *FW Act*. However, the very existence of this category of employee-like workers to capture digital platform workers assumes that these workers will not be found to be employees, even under the new legislated test under s 15AA that is intended to capture the true nature of the relationship between parties.

This assumption is perhaps justified given the repeated failures by digital platform workers to successfully argue for employee status, even preceding *Jamsek* and *Personnel Contracting* where parties' post-contractual conduct was taken into account.[25] This suggests that contrary to the Full Bench of the FWC's statements in *Deliveroo Australia Pty Ltd v Franco* ('*Deliveroo*')[26] and the initial finding in this case, it is not necessarily a given that the ability to look beyond contractual rights and obligations will lead digital platform workers to be categorised as employees. Indeed, the inherent uncertainty of the multifactor test has led to extensive academic debate about the appropriate classification of digital platform workers in Australia. Some scholars have argued that many platform workers should be treated as employees.[27] Others have considered but argued against establishing a distinct worker category with a broader definition than employee,[28] while some have

22 Ibid; Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) [35].

23 *Closing Loopholes Act* (n 14) sch 1 item 248, inserting *FW Act* (n 14) s 15KA.

24 These clarifications were introduced by Workplace Relations Minister Tony Burke to clarify that the FWC's setting of minimum standards for gig workers must 'reflect their engagement as independent contractors': 'Burke Negotiates Changes to Loopholes Gig Provisions', *Workplace Express* (online, 9 November 2023) <workplaceexpress.com.au/nl06_news_selected.php?act=2&selkey=62881>. See also Supplementary Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023, [17]–[18].

25 See, eg: *Kaseris v Rasier Pacific VOF* (2017) 272 IR 289; *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807; *Gupta v Portier Pacific Pty Ltd* (2020) 296 IR 246 ('*Gupta*'). Cf *Klooger v Foodora Australia Pty Ltd* (2018) 283 IR 168 ('*Klooger*'). See also Anthony Forsyth, 'Playing Catch-Up but Falling Short: Regulating Work in the Gig Economy in Australia' 31(2) *King's Law Journal* 287.

26 *Deliveroo* (n 10).

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

28 Ibid; Andrew Stewart and Jim Stanford, 'Regulating Work in the Gig Economy: What are the Options?' (2017) 28(3) *Economic and Labour Relations Review* 420. In the United Kingdom, in the case of *Uber BV v Aslam* [2019] IRLR 257, the Supreme Court

proposed industry-specific regulatory responses to cover common sectors of digital platform work such as road transport.[29]

However, the authors contend that there is still scope for some digital platform workers, specifically on-demand platform workers, to be considered employees under both the common law and the statutory test for determining employment if implied terms are considered. In digital platforms such as Airtasker, the platform acts as a passive marketing tool and the worker and client determine the 'work's nature, timing, quality and price' between themselves, referred to as crowd-work systems.[30] In contrast, on-demand platforms: (1) allocate tasks directly to registered, available workers; (2) provide tasks that are often homogenous and without the need for distinct skillsets or qualifications; and (3) set pre-determined parameters for work (such as delivery times, or ride fares).[31] The platform will generally set conditions of work including rates of pay and estimated delivery times, which are offered to the client without any opportunity for input or negotiation from the worker, and expected minimum standards of service are reinforced by the platforms' algorithms.[32] Key examples of such platforms still operating in Australia include Uber, Ola and Menulog.[33]

To date, no case has attempted to introduce an argument that considers implied terms when determining a worker's appropriate employment status. Existing academic literature on this point has also been under-explored.[34] However, under both the

found an Uber driver to be a 'worker' under s 230(3)(b) of the *Employment Rights Act 1996* (UK), a category of employment in the United Kingdom which entitles workers to some but not all employee entitlements such as minimum wage rates and holiday pay. However, more recently, the Supreme Court decided a Deliveroo rider was neither a worker nor an employee for the purposes of art 11 of the *European Convention on Human Rights* and was therefore not eligible for collective bargaining rights: *Independent Workers Union of Great Britain v Central Arbitration Committee* [2024] IRLR 148.

29 Michael Rawling and Joellen Riley Munton, 'Constraining the Uber-Powerful Digital Platforms: A Proposal for a New Form of Regulation of On-Demand Road Transport Work' (2022) 45(1) *University of New South Wales Law Journal* 7.

30 Department of Premier and Cabinet, Government of Victoria, *Inquiry into the Victorian On-Demand Workforce* (Report, 12 June 2020) 72 [480].

31 Ibid 15 [77].

32 Ibid 14 [69].

33 Ibid 15 [77].

34 There has, however, been some exploration of the potential of implied terms in governing work more broadly. See, eg: David Cabrelli and Jessica D'alton, 'Furlough and Common Law Rights and Remedies', *UK Labour Law* (Blog Post, 8 June 2020) <https://uklabourlawblog.com/2020/06/08/furlough-and-common-law-rights-and-remedies-by-david-cabrelli-and-jessica-dalton/>; Philippa Collins and Gabrielle Golding, 'An Implied Term of Procedural Fairness During Disciplinary Processes: Into Contracts of Employment and Beyond?' (2024) 53(2) *Industrial Law Journal* 125; Gabrielle Golding, *Shaping Contracts for Work: The Normative Influence of Terms Implied by Law* (Oxford University Press, 2023) ('*Shaping Contracts for Work*').

common law and the statutory test for determining employment, the contract and its corresponding rights and obligations remain a relevant point of consideration.

The terms of any contract include both express and implied terms.[35] The authors therefore submit that the implied duty to cooperate, a term implied by law into all contracts,[36] could tip the scales in characterising service agreements of on-demand platforms as employment contracts. The authors' focus on the implied duty to cooperate is inspired by the duty of cooperation that had incidentally been contained in the express terms of the Administrative Services Agreement that was at the heart of *Personnel Contracting*.[37] The case of *Personnel Contracting* involved Mr McCourt who sought to be classified as an employee of a labour hire agency. In the agreement, there was an express term that workers 'cooperate in all respects' with the agency 'in the supply of labour' to the end client.[38] This clause was central to the plurality's finding that the worker in *Personnel Contracting* was in fact an employee of the agency, as the clause suggested that the agency had a right of control over him.[39] The authors contend that the implied duty to cooperate could be similarly interpreted to include a duty for workers to cooperate in all respects with their on-demand platforms in the supply of labour to the end client, given the necessity for such a duty to give effect to these agreements.

This article revisits the *Deliveroo* decision with explicit attention on the mutual duty of cooperation and its potential impact on classifying on-demand platform workers as employees. It is acknowledged that Deliveroo is no longer operational in Australia and any future retrying of similar cases will necessarily turn on their facts.[40] However, in *Deliveroo,* the Full Bench highlights the matters it would have considered were it not for the HC's recent precedent and how this would have affected

35 *Personnel Contracting* (n 2) 187 [45] (Kiefel CJ, Keane and Edelman JJ), 213–14 [126] (Gageler and Gleeson JJ), quoting *Narich Pty Ltd v Commissioner of Pay-roll Tax* (1983) 50 ALR 417, 420–1 ('*Narich*').

36 *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607 ('*Secured Income Real Estate*'). See also: Vanitha Sundra-Karean, 'The Erosion of the Implied Term of Mutual Trust and Confidence in Australian Employment Law: Are Common Law and Statute Necessarily Uncomfortable Bedfellows?' (2016) 45(4) *Common Law World Review* 275, 285–6, 290; Gabrielle Golding, 'Rethinking the Rationale for Implying Terms by Law into Australian Employment Contracts' (2020) 39(1) *University of Tasmania Law Review* 1, 8.

37 *Personnel Contracting* (n 2) 177 [14], 197 [75].

38 Ibid.

39 Ibid 197–8 [76]–[77].

40 See, eg: Josh Taylor, 'Deliveroo Quits Australia Citing "Challenging Economic Conditions"', *The Guardian* (online, 16 November 2022) <https://www.theguardian.com/business/2022/nov/16/deliveroo-quits-australia-citing-challenging-economic-conditions>; Josh Taylor, 'Deliveroo's Sudden Collapse in Australia Leaves Delivery Riders Scrambling to Find New Jobs', *The Guardian* (online, 17 November 2022) <https://www.theguardian.com/australia-news/2022/nov/17/deliveroos-sudden-collapse-leaves-delivery-riders-scrambling-to-find-new-jobs>.

their decision.[41] This offers insight into how decision-makers may approach similar cases under the statutory test in the *FW Act*. *Deliveroo* therefore offers a valuable illustrative case against which to engage in the hypothetical exercise of exploring the potential influence of an implied duty of cooperation in unsettling the classification of on-demand platform workers under Australian law.

While the discussion in this article is focussed on the implications of an emphasised duty of cooperation in the context of on-demand platform workers under Australian law, it is hoped that this will form a foundation for further research. The potential for implied terms to govern work more broadly should be further explored. The article's arguments could also be explored in the context of other types of workers that share a similar duty of cooperation with their putative employers. The applicability of this article's arguments in other common law jurisdictions could also be an area of further research.

The article is set out as follows. Part II outlines the *Deliveroo* decision and its application of relevant precedent from *Personnel Contracting* and *Jamsek*. Part III sets out the article's arguments for emphasising the implied duty of cooperation in determining a worker's employment status and defining the scope of this duty in the context of service agreements for on-demand platforms. This is done by drawing upon existing literature on the inherent features of these platforms, justifying the applicability of this article's arguments as they relate to Deliveroo and to other on-demand platforms that share these characteristics. This is used to support the authors' contention that in the context of service agreements for on-demand platform workers, the implied mutual duty of cooperation should be interpreted to include a duty of cooperation between workers and their platforms in the supply of their labour. Part IV retries *Deliveroo* under the common law test, considering this implied term alongside the express terms in this case to demonstrate how the contract may now be found to be an employment contract. Part V discusses how this argument would be similarly useful in the context of determining a worker's employment status under the legislated test for determining employment in the *FW Act*. Part V also addresses the potential hesitancy decision-makers may have in appropriately classifying these workers and explores the alternative argument of emphasising the implied duty of mutual trust and confidence to address challenges faced by these workers. Part VI concludes the article and reiterates how its arguments can and should be pursued.

41 Although all cases post *Personnel Contracting* and *Jamsek* on the employment status of on-demand platform workers, at the time of writing, have similarly found these workers to not be employees. See, eg: *Nawaz v Rasier Pacific Pty Ltd (t/as Uber BV)* (2022) 317 IR 134 ('*Nawaz*'); *Gondal v Uber Australia Pty Ltd* [2024] FWC 300; *Muhammad v Rasier Pacific Pty Ltd* [2024] FWC 153; *Lam v Doordash Technologies Australia Pty Ltd* [2023] FWC 1683.

II The Case of *Deliveroo*

The initial decision of *Franco v Deliveroo Australia Pty Ltd* was decided by Commissioner Cambridge on 18 May 2021, pre-dating the cases of *Personnel Contracting* and *Jamsek*.[42] The case involved a driver, Mr Franco, who was working for Deliveroo, a company providing 'food and drink delivery services to customers via an online platform'.[43] Mr Franco and Deliveroo were parties to a 'supplier agreement'.[44] In April 2020, Deliveroo terminated their agreement with Mr Franco due to delayed delivery times.[45] Mr Franco sought to bring an unfair dismissal claim, a right available only to employees.[46] As such, Mr Franco's employment status was a key issue in the dispute.

Commissioner Cambridge, examining the totality of the circumstances involved in the parties' relationship, including their conduct in practice, concluded that Mr Franco was an employee of Deliveroo. This case was one of several other cases in Australia involving on-demand platform workers and their appropriate employment classification, all in the context of unfair dismissal claims.[47] Prior to this decision, in only one case involving a food delivery cyclist for the company Foodora was the worker found to be an employee.[48] However, Foodora subsequently became insolvent and exited the Australian market, making it a 'pyrrhic victory'.[49] Commissioner Cambridge's finding in this case thus marked an important shift in the classification of these workers. He acknowledged that while there was a 'purported absence of control' — one of the key factors that had pointed away from an employment relationship in a prior decision involving an Uber driver — 'a more detailed examination beyond the mere appearance of the apparent freedoms that were provided to Mr Franco, reveals a very different picture'.[50]

Mr Franco had performed most of his work for Deliveroo under a self-service booking ('SSB') system,[51] which allowed riders who had a higher priority ranking (based on their attendance rates, number of late cancellations and preparedness for participation during peak periods) to book sessions in advance of lower ranked riders.[52] Deliveroo discontinued the SSB system in Sydney in January 2020.[53]

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42 *Franco* (n 11).

43 *Deliveroo* (n 10) [4].

44 Ibid [5].

45 Ibid.

46 *FW Act* (n 14) s 382.

47 See n 25 above.

48 *Klooger* (n 25).

49 Rawling and Munton (n 29) 17.

50 *Franco* (n 11) 277 [106]–[107], distinguishing from *Gupta* (n 25).

51 Ibid 277–8 [108].

52 Ibid 261 [22].

53 Ibid 261 [23].

However, Commissioner Cambridge was sufficiently persuaded by 'the capacity that Deliveroo possesses to exercise a significant level of control' by, for example, reintroducing the SSB system, noting:

> Work that is undertaken via computerised platform based engagements provides the operators of those digital platforms, such as companies like Deliveroo, with an extraordinarily vast repository of data relating to the performance and activities of those individuals who perform the work. It takes little imagination to envisage that the data or metrics in the possession of a company such as Deliveroo, can be used as a means to control those who perform the work.[54]

Commissioner Cambridge proceeded to examine other relevant factors but was mostly persuaded by 'the level of control that Deliveroo possessed, and which it could choose to implement or withdraw' which although 'not immediately apparent, when properly comprehended, represented an indicum that strongly supported the existence of employment rather than independent contracting'.[55]

The decision was appealed and the Full Bench of the FWC deferred the determination of this appeal until after *Personnel Contracting* and *Jamsek* were decided.[56] Consequently, the Full Bench applied their interpretation of the foregoing authorities, considering only 'the rights and obligations under that contract'.[57] First, the Full Bench disregarded any labelling terms that sought to characterise the relationship as well as clauses that were merely consequential upon this labelling such as clauses relating to tax and insurance obligations.[58]

The clause that stated that Deliveroo was not required to provide work to drivers and that Mr Franco could work for other entities was also considered not determinative in finding Mr Franco to be a contractor, in line with the plurality in *Personnel Contracting* that had found that this clause also existed in casual employment relationships.[59] The Full Bench did, however, note that Mr Franco could choose not only when but also where he worked and could unassign himself from orders even after accepting them, allowing him a greater level of control over his work, in their view, than in typical casual employment relationships.[60] The Full Bench maintained, however, that although this went against finding Mr Franco to be an employee, it was not determinative.[61]

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54 Ibid 278 [111].

55 Ibid 283 [139].

56 *Deliveroo* (n 10) 257–8 [10].

57 Ibid 272 [34].

58 Ibid 275 [41]–[42], quoting *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146, 153 [37] ('*ACE Insurance*').

59 *Deliveroo* (n 10) 273 [35], citing *Personnel Contracting* (n 2) 200 [84].

60 *Deliveroo* (n 10) 275–6 [44]–[45].

61 Ibid. See also *Nawaz* (n 41) 153–4 [51].

A range of factors were, however, considered to 'weigh decisively in favour' of finding Mr Franco to be a contractor.[62] First, in confining their analysis to the express terms of the agreement, the Full Bench found that the contract reflected a lack of control over Mr Franco's manner of performance over the delivery, aside from that it 'be delivered within a reasonable time period', which was seen as being 'typical for independent contracting arrangements in the road transport industry'.[63] Similarly, the requirement that Mr Franco provide his services with due care and skill was seen to be typical in independent contracting relationships.[64] Adding to this finding was the right for Mr Franco to choose his own vehicle, provided safety, reliability and legislative requirements were met.[65] This, combined with Deliveroo's inability to compel Mr Franco to perform deliveries, were all seen as factors that pointed towards a minimal right of control between Deliveroo and Mr Franco.[66] In this way, the Full Bench dispensed with the most persuasive indicum that Commissioner Cambridge had relied on in the first instance to find an employment relationship.

The second relevant point was Mr Franco's obligation to provide the delivery vehicle, with the Full Bench saying:

> Because the 2019 Agreement allows for this to be something more than just a bicycle, then it is possible (to borrow the language used by Gageler and Gleeson JJ in *Jamsek*) that Mr Franco may provide a 'substantial item of mechanical equipment' such that 'the personal is overshadowed by the mechanical'.[67]

Third, the Full Bench noted that Mr Franco was not asked to perform personal services as he could delegate his duties to someone else without the approval of Deliveroo while retaining the obligation to ensure the delegate had the requisite skills and training and was paid, which again pointed towards non-contractual employment.[68]

Fourth, despite the fact that being paid by result (that is, upon delivery) was not necessarily inconsistent with employment, the Full Bench found that Mr Franco's administrative fee payment of 4% to access Deliveroo's invoice providing software was 'inconsistent with the existence of an employment relationship'.[69]

In coming to this conclusion, the Full Bench clarified that they felt they had to 'close [their] eyes' to matters that would have tipped the balance in favour of finding

62 *Deliveroo* (n 10) 276–7 [46].

63 Ibid.

64 Ibid 277 [47].

65 Ibid 276–7 [46].

66 Ibid.

67 Ibid 277 [48], quoting *Jamsek* (n 7) 283–4 [88].

68 *Deliveroo* (n 10) 277 [49].

69 Ibid 277 [50].

Mr Franco to be an employee, discussed further below.[70] The Full Bench acknowledged Mr Franco's submission that the contract was a sham but noted that the relevant test requires that both parties intend for the contract to not have any legal consequences, which was not applicable in this case.[71] Aside from a claim of sham, Mr Franco made no other submissions that would allow an examination beyond the express terms of the contract. However, the authors argue that in a future similar case, emphasising the significance of implied terms may lead to a different outcome.

III Arguing for an Implied Term by Law

A *Implied Terms*

Lord Brandon's statement, endorsed in *Personnel Contracting*, regarding the appropriate points of consideration when interpreting a contract makes clear reference to implied terms:

> where there is a written contract between the parties whose relationship is in issue, a court is confined, in determining the nature of that relationship, to a consideration of the terms, express *or implied*, of that contract in the light of the circumstances surrounding the making of it …[72]

Typically, a contracting party will argue for a term that provides itself a benefit or imposes an obligation on the other party, and then argue a breach of that term and receive appropriate remedies. Here, we propose a slightly unusual situation in which a worker would be arguing for an implied term, not to establish any breach in contract law, but rather to appropriately characterise the contract as an employment agreement to receive consequent employee entitlements. Although atypical, the option is theoretically available to litigants given the precedent of *Personnel Contracting* and its repeated references to considering both express and implied terms of a contract when establishing a worker's employment status.[73]

Terms may be implied in fact, by custom or usage, or by law in particular classes of contract or in all contracts.[74] Terms implied in fact rely on the presumed intention of the parties,[75] and only apply when there is a 'deficiency in the expression of the

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70 Ibid 279 [54].

71 Ibid 279 [55].

72 *Personnel Contracting* (n 2) 187 [45] (Kiefel CJ, Keane and Edelman JJ), 213 [126] (Gageler and Gleeson JJ), quoting *Narich* (n 35) 32 (emphasis added).

73 *Personnel Contracting* (n 2) 187 [45], 213 [126], 220 [143], 232–3 [178], 238–9 [190].

74 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, 185–6 [21] ('*Barker*').

75 See, eg: *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283, 285; *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 352 ('*Codelfa Construction*'); *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 440 ('*Byrne*'); *Realestate.com.au Pty Ltd v Hardingham* (2022) 277 CLR 115, 136.

consensual agreement … caused by the failure of the parties to direct their minds to a particular eventuality and to make explicit provision of it'.[76] The HC has found, for example, that in establishing implied terms in fact, it 'is necessary to show that the term in question would have been accepted by the contracting parties as a matter so obvious that it would go without saying'.[77] Such an argument is unlikely to succeed in the context of on-demand platform agreements, given the persistent tension between parties relating to the degree of control exercised by platforms over their workers. In this context, the duty of cooperation is in no way 'obvious'.

Where terms are implied by custom and usage in a particular industry, the custom must be so 'well known and acquiesced in that everyone making a contract in that situation can reasonably be presumed to have imported that term into the contract'.[78] Courts have tended to strictly apply this test and the introduction of such terms has been exceedingly rare, especially in the context of employment law.[79] It may, therefore, be difficult to introduce implied terms by custom or usage in contracts relating to on-demand platforms, given the relative novelty of the industry. Instead, the focus of this article's analysis lies in the duty of cooperation, an implied term by law.

B *The Duty of Cooperation*

The duty of cooperation is an accepted implied term by law under the common law in all contracts.[80] As with all implied terms effected by the common law, this term may only be displaced by statute or express terms of the contract.[81] There is a question as to whether the term exists as an implied term in its own right or if the duty is applied in the construction of the contract.[82] However, this debate largely highlights 'taxonomical distinctions which do not necessarily yield practical differences'.[83] For the purposes of this analysis, what is more important is to determine what the duty entails.

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76 *Codelfa Construction* (n 75) 346.

77 *Byrne* (n 75) 446.

78 *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226, 241, quoted in *Byrne* (n 75) 423.

79 Gabrielle Golding, 'Terms Implied by Law into Employment Contracts: Rethinking their Rationale' (PhD Thesis, University of Adelaide, 2017) 32–3 ('Terms Implied by Law'); Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6th ed, 2016) 281; Mark Irving, *The Contract of Employment* (LexisNexis Butterworths, 2nd ed, 2019) 422.

80 See, eg: *Butt v M'Donald* (1896) 7 QLJ 68, 70–1 where Griffith CJ stated that the principle is 'applicable to every contract' and arises by implication; *Barker* (n 74) 189–90 [30]; *Secured Income Real Estate* (n 36) 607.

81 *Barker* (n 74) 185–6 [21].

82 Ibid 186–7 [24]–[25], 189 [29]. See also: Golding, 'Terms Implied by Law' (n 79) 36–8; Wayne Courtney and JW Carter, 'Implied Terms: What is the Role of Construction?' (2014) 31(2) *Journal of Contract Law* 151.

83 *Barker* (n 74) 187 [24].

The duty of cooperation has been expressed in different ways.[84] However, 'the scope of each co-operative duty or standard is ultimately defined through a normative assessment, namely, an assessment of what is necessary and appropriate in terms of protecting the bargain'[85] — '[t]he degree of co-operation warranted is established on a case-by-case basis'.[86] This element of 'necessity' was described by the HC as essential in limiting the courts' judicial law-making powers when implying terms.[87] This concept of 'necessity' has been viewed as encompassing 'more general considerations', having regard to the 'inherent nature of the contract and of the relationship thereby established',[88] particularly in the context of implied terms by law.[89] In fact, for terms implied by law, the test of necessity has been described as 'no more than the imposition of legal duties in cases where the law thinks that policy requires it'.[90]

However, the test of 'necessity' has also been defined narrowly to mean a term where 'absent the implication, "the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps be seriously undermined" or the contract would be "deprived of its substance, seriously undermined or drastically devalued"'.[91] Even if the element of 'necessity' is viewed narrowly, interpreting the general duty of cooperation to encompass a duty for workers to cooperate with their platforms in the 'supply of their labour' is natural and logical. If the duty was not interpreted in this way, the inherent value and purpose of the contract would be seriously undermined, as evidenced by the inherent mechanics of these platforms.

C *Interpreting the Duty to Cooperate in On-Demand Platform Agreements*

As mentioned above, the duty to 'cooperate' mirrors a clause in the Administrative Services Agreement that was at the heart of the *Personnel Contracting* decision, that is, an express term to 'cooperate in all respects' with the labour hire agency 'in the supply of labour' to the end client.[92] In *Personnel Contracting*, the plurality

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84 Golding, 'Terms Implied by Law' (n 79) 79; Ryan Catterwell, 'Co-Operation and Prevention in Contract Law' (2023) 47(1) *Melbourne University Law Review* 114, 121–35: the article identified four recognised duties of cooperation in Australia: the 'performance duty' (performing acts reasonably necessary to achieve the contract's objectives); the 'prevention principle' (not preventing or delaying the performance of the contract; the 'benefit duty' (doing all that is reasonably necessary to enjoy the contract's benefits; and the 'negative covenant' (not hindering or preventing fulfilment of the purpose of any express terms).

85 Catterwell (n 84) 116.

86 Ibid 120.

87 *Barker* (n 74) 189 [29].

88 *University of Western Australia v Gray* (2009) 179 FCR 346, 377 [142] ('*Gray*').

89 Jane Knowler and Charles Rickett, 'Implied Terms in Australian Contract Law: A Reappraisal after *University of Western Australia v Gray*' (2011) 37(2) *Monash University Law Review* 145, 149–50.

90 *Simonius Vischer & Co v Holt* [1979] 2 NSWLR 322, 348.

91 *Barker* (n 74) 189 [29], quoting *Byrne* (n 75) 450, 453.

92 *Personnel Contracting* (n 2) 175–8 [14], 197 [75].

described Mr McCourt's obligation to cooperate with the labour hire agency, Construct, in the supply of his labour as 'unambiguously central to Construct's business of supplying labour to builders' and that this right to control was advertised to Construct's end clients.[93] To quote the decision:

> The marketability of Construct's services as a labour-hire agency turned on its ability to supply compliant labour; without that subservience, that labour would be of no use to Construct's clients. That right of control was therefore the key asset of Construct's business … Indeed, the right of control held by Construct over Mr McCourt explains why there was no need for any contractual relationship between Mr McCourt and [the end client].[94]

The plurality's statements can just as easily be applied to the business structure of Deliveroo and other on-demand platforms. Clients of these on-demand platforms rely entirely on the assumption that the platforms' promises will be kept by 'compliant labour' and it is this ready and ever available workforce that Deliveroo, and other on-demand platforms, advertise.

While Deliveroo is no longer operational in Australia, Deliveroo United Kingdom boasts on the homepage of its website that your favourite food will be 'delivered in a flash' and that '[y]ou'll see when your rider's picked up your order, and be able to follow them along the way. You'll get a notification when they're nearby, too.'[95] Uber Australia advertises their rideshare services with the slogan, 'Request a ride, hop in, and go.'[96] Without an expectation on the part of clients that food will be delivered within stated delivery windows or rides will arrive almost immediately and for the price set by platforms such as Deliveroo and Uber, the business model of such platforms necessarily fails. It is the convenience, reliability, and transparency of these businesses that contribute to its success and this can only be guaranteed where there is close cooperation between platforms and its riders in the supply of their labour.

This view is supported by further findings of the plurality in *Personnel Contracting*, when deciding whether Mr McCourt was running his own business. The plurality drew upon *Lehigh Valley Coal Co v Yensavage* ('*Lehigh Valley Coal*'),[97] a case concerning a coal miner working on a mine site where the mine owner contended that the miner was not his employee. The plurality noted how this contention was mocked by Coxe and Learned Hand JJ in *Lehigh Valley Coal* who said that, if this contention was accepted, the mine owner would not be

> in the business of coal mining at all … It is absurd to class such a miner as an independent contractor … He has no capital, no financial responsibility. He is himself as

93 Ibid 197–8 [76].

94 Ibid.

95 'Deliveroo', *Deliveroo* (Web Page) <https://deliveroo.co.uk/>.

96 'Ride', *Uber* (Web Page) <https://www.uber.com/au/en/ride/>.

97 218 Fed 547 (1914) ('*Lehigh Valley Coal*').

> dependent upon the conditions of his employment as the company fixes them as are his helpers. By him alone is carried on the company's only business; he is their 'hand', if any one is.[98]

The plurality in *Personnel Contracting* agreed that the judges had highlighted 'the absurdity of the notion that the mine owner was no more than an introduction agency' for their miners.[99] The 'absurd notion' that Deliveroo is a mere introducer of labour, however, is exactly what on-demand platforms like Deliveroo often contend, arguing that they merely match willing contractors to available work.[100] Although Deliveroo required riders to provide their own vehicles, suggesting some capital investment, it is still the riders that provide the work central to the operation of Deliveroo's business and the riders who act at their 'hands'.

To borrow the plurality's reasoning, if the contention of platforms such as Deliveroo is that they are mere matchers of labour, then this would mean that companies such as Deliveroo are not food delivery service companies at all. In short, although the above findings in *Personnel Contracting* were directed toward a different purpose, they demonstrate the centrality of compliant workers, and by extension a duty of cooperation in the supply of workers' labour, to the inherent nature of these platforms' businesses. Without these workers' cooperation in the performance of their duties, the value proposition of these organisations is wholly undermined, and the business is deprived of the compliant labour necessary to perform its main business activities.

The centrality of this duty of cooperation to on-demand service agreements is evidenced by the extensive use of algorithmic management tools as a staple feature of on-demand platforms to facilitate and enforce workers' cooperation.[101] On-demand platforms like Deliveroo employ algorithmic management digital tools to monitor drivers' activities, including any drops in efficiency in delivery times that Deliveroo

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98 *Personnel Contracting* (n 2) 196–7 [69] (Kiefel CJ, Keane and Edelman JJ), quoting *Lehigh Valley Coal* (n 97) 552–3.

99 *Personnel Contracting* (n 2) 196 [70].

100 See, eg: 'How Does Uber Match Riders with Drivers', *Uber* (Web Page) <https://www.uber.com/us/en/marketplace/matching/>; Ipshita Sen, 'How Deliveroo Uses Machine Learning to Power Food Delivery', *Outside Insight* (Web Page) <https://outsideinsight.com/insights/how-deliveroo-uses-machine-learning-to-power-food-delivery/>; Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press, 2018) 13–14.

101 See: Prassl (n 100) 55–8; Mareike Möhlmann et al, 'Algorithmic Management of Work on Online Labor Platforms: When Matching Meets Control' (2021) 45(4) *Management Information Systems Quarterly* 1999, 2006–8; James Duggan et al, 'Algorithmic Management and App-Work in the Gig Economy: A Research Agenda for Employment Relations and HRM' (2020) 30(1) *Human Resource Management Journal* 114, 120.

(and Deliveroo alone) considers reasonable.[102] Beyond the mere knowledge of available drivers on the platform, 'effective algorithmic matching also relies on market-level performance or outcome data' that often includes delivery drivers' ratings and the speed with which deliveries are made.[103] This real-time monitoring exerts the pressure necessary to impose discipline and efficiency standards on workers and has been described as an essential component in the success of on-demand platforms.[104]

Drivers may choose when to accept requests and may unassign themselves from a delivery. The express terms of these agreements may even permit drivers to choose their vehicles and routes. However, the algorithm will penalise workers for low acceptance rates, delayed delivery times or frequent cancellations, making it less likely that they will receive work in the future.[105] Customer ratings are also used to monitor drivers' compliance with the platforms' expectations, with workers reporting acute awareness of the importance of maintaining high average ratings to ensure work is filtered towards them when on the app.[106] In essence, 'for most platforms, rather than simply "matching" workers and customers, they instead act as digital work intermediaries [or in other words labour-hire agencies] that use algorithms to tightly manage a large, invisible workforce'.[107] These platforms' algorithms have been described as a 'panopticon' or 'invisible' bosses that discipline and control workers.[108]

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102 See generally: Prassl (n 100) 55–8; Martin Wiener, W Alec Cram and Alexander Benlian, 'Algorithmic Control and Gig Workers: A Legitimacy Perspective of Uber Drivers' (2023) 32(3) *European Journal of Information Systems* 485, 488.

103 Möhlmann et al (n 101) 2005. See also Alessandro Gandini, 'Labour Process Theory and the Gig Economy' (2019) 72(6) *Human Relations* 1039, 1051.

104 Nura Jabagi et al, 'Gig-Workers' Motivation: Thinking Beyond Carrots and Sticks' (2019) 34(4) *Journal of Managerial Psychology* 192, 197; Alex Rosenblat and Luke Stark, 'Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers' (2016) 10 *International Journal of Communication* 3758; Duggan et al (n 101) 120.

105 Alex J Wood et al, 'Good Gig, Bad Gig: Autonomy and Algorithmic Control in the Global Gig Economy' (2019) 33(1) *Work, Employment and Society* 56, 64; Keith Cunningham-Parmeter, 'From Amazon to Uber: Defining Employment in the Modern Economy' (2016) 96(5) *Boston University Law Review* 1673, 1720; Kristine M Kuhn and Amir Maleki, 'Micro-Entrepreneurs, Dependent Contractors, and Instaserfs: Understanding Online Labor Platform Workforces' (2017) 31(3) *Academy of Management Perspectives* 183, 195; Ben Z Steinberger, 'Redefining "Employee" in the Gig Economy: Shielding Workers from the Uber Model' (2018) 23(2) *Fordham Journal of Corporate and Financial Law* 577, 585.

106 Ibid.

107 Duggan et al (n 101) 125. See also Antonio Aloisi and Valerio De Stefano, *Your Boss is an Algorithm: Artificial Intelligence, Platform Work and Labour* (Hart Publishing, 2022) 104.

108 See, eg: Duggan et al (n 101) 126; Aloisi and De Stefano (n 107) 58; Jamie Woodcock, 'The Algorithmic Panopticon at Deliveroo: Measurement, Precarity, and the Illusion of Control' (2020) 20(3) *Ephemera* 67; Sophia Galière, 'When Food-Delivery Platform

The implications of the algorithm are widely understood by the drivers themselves, with workers of these platforms expressing concerns relating to the constant surveillance, minimal transparency and dehumanisation that comes from knowing their work is subject to the purview of the algorithm.[109] On-demand platforms are increasingly obfuscating their algorithm's decision-making powers and factors for consideration from view, potentially to limit their appearance of control. However, to imply a duty for workers of these platforms to cooperate in the supply of their labour, decision-makers need only be satisfied that such a term is 'necessary', such that, without the term, the contract would 'be rendered nugatory, worthless' or 'deprived of its substance, seriously undermined or drastically devalued'.[110] If successfully argued, this interpretation of the implied duty of cooperation would necessarily fall within the factors of consideration when determining employment status. The parts below discuss how the inclusion of such a duty would be central in finding workers of these platforms to be employees under the common law and statutory test.

IV Retrying *Deliveroo*: The Common Law Test

The duty for workers to cooperate in the supply of their labour was highly influential in characterising the agreement as an employment contract in *Personnel Contracting*. However, the plurality also noted that in *Personnel Contracting* '[t]here was no suggestion that the work Mr McCourt agreed to do would involve the exercise of any discretion on his part, either as to what he would do or as to how he would do it.'[111] This was not the case in *Deliveroo,* as the Full Bench found several express clauses of the agreement pointed towards Mr Franco having more discretion in the conduct of his work.

These terms may give rise to the argument that interpreting the duty of cooperation to extend to the supply of workers' labour would be displaced by the express terms that suggest a level of independence between Deliveroo and its workers. Since terms implied by law are usually presumed to exist, the onus of proof will rest with the party that contests the implication (that is, the obligation to argue a purported

Workers Consent to Algorithmic Management: A Foucauldian Perspective' (2020) 35(3) *New Technology, Work, and Employment* 357, 359; Alex Veen, Tom Barratt and Caleb Goods, 'Platform-Capital's "App-Etite" for Control: A Labour Process Analysis of Food-Delivery Work in Australia' (2020) 34(3) *Work, Employment and Society* 388, 400–1.

109 Mareike Möhlmann and Ola Henfridsson, 'What People Hate about Being Managed by Algorithms, According to a Study of Uber Drivers', *Harvard Business Review* (Web Page, 30 August 2019) <https://hbr.org/2019/08/what-people-hate-about-being-managed-by-algorithms-according-to-a-study-of-uber-drivers>; Rosenblat and Stark (n 104) 3775.

110 *Barker* (n 74) 189 [29], quoting *Byrne* (n 75) 450, 453.

111 *Personnel Contracting* (n 2) 197 [75].

inconsistency would presumably fall to Deliveroo).[112] However, the authors take the view that the express terms can be read alongside the duty for workers to cooperate with their platforms in the supply of their labour, which reveals the true control these platforms exercise over their workers, pointing towards an employment relationship.

Clause 2.3 of Deliveroo's agreement, for example, was found by the Full Bench of the FWC to go beyond typical casual employment relationships, as Deliveroo's workers could also elect where they worked and unassign themselves from deliveries.[113] However, the control, or lack thereof, over workers outside of the supply of their labour is not as relevant. It is the control exercised during the 'supply of [their] labour', and the ability for Deliveroo to allocate who their workers will work for, that point towards Mr Franco being an employee of Deliveroo, factors that were similarly persuasive in *Personnel Contracting*.[114]

The Full Bench also highlighted clauses such as cl 2.5.1, which permitted riders to use 'any route [they] determine to be safe and efficient', and clauses that alluded to riders using their choice of vehicle,[115] as suggesting Mr Franco had a degree of 'control over the mode of performance of [his] work'.[116] However, this discretion can easily be read as being subject to the worker's duty to cooperate with Deliveroo in the supply of their labour, curtailing the discretion that would be afforded to a contractor. For example, while a rider may choose their route and vehicle, if the proposed interpretation of the implied term was accepted, this discretion would be subject to the worker's ability to meet the promised delivery times that the platform unilaterally sets.

Clauses stating that Mr Franco was required to supply his own vehicle, could delegate his tasks, and was required to pay an administrative fee to access Deliveroo's software and invoicing services were also seen as inconsistent with an employment relationship by the Full Bench of the FWC.[117] However, the degree of investment and 'questions of scale can be important and even decisive' when considering the criterion of capital.[118] The equipment at the heart of *Deliveroo*, and most on-demand platforms, is not specialised and likely to be equipment already owned by everyday Australians for their personal use, suggesting limited capital investment.

The required payment of an administrative fee is also perhaps more appropriately characterised as a matter that reflects the 'view by one party (or both) that the

112 JW Carter and Wayne Courtney, 'Implied Terms in Contracts: Australian Law' (2015) 43(3) *Australian Business Law Review* 246, 248; Courtney and Carter, 'Implied Terms: What is the Role of Construction?' (n 82) 153; *Gray* (n 88) 392–3 [205].

113 *Franco* (n 11) 277 [107].

114 *Personnel Contracting* (n 2) 197 [75].

115 See *Deliveroo* (n 10) 281–3.

116 Ibid 276–7 [46].

117 Ibid 277–8 [48]–[51].

118 *Jamsek* (n 7) 283–4 [88]–[89].

relationship is, or is not, one of employment', such as insurance cover or superannuation, or the lack thereof, which 'may be taken into account but are not conclusive'.[119] It was for this reason that the Full Bench disregarded the labelling of Deliveroo's agreement, and the requirement for Mr Franco to pay for tax and insurance and maintain an Australian Business Number, as discussed above.

The Full Bench of the FWC did not apply this same treatment to the 4% administration fee. However, it is difficult to see why it should be treated any differently as it appears to be another formality intended to reflect the platform's view that this was not an employment relationship. Arguably, on the issue of payment, it is more important to consider that Deliveroo had the absolute right in its express terms to set the relevant rates of pay for each task and act as its workers' paymaster. These were among the rights found by the plurality in *Personnel Contracting* to be persuasive in establishing an employment relationship.[120]

Finally, perhaps the most persuasive clause for the Full Bench of the FWC in establishing the agreement as a contractual relationship was the ability for Deliveroo's workers to delegate.[121] It should also be noted that since *Deliveroo*, a recent Full Federal Court decision took a similarly strict stance against the argument that a right to subcontract (ie delegate) was 'hollow' in practice as it was subject to the putative employer's approval.[122] The Court found that 'it is the existence of the rights which is important, not the question of whether they are likely to be or have in fact been exercised'.[123] This finding would suggest that courts may similarly allow for a right of delegation in future agreements to weigh heavily in favour of finding an on-demand platform worker to not be an employee.

However, the coal miner case, *Lehigh Valley Coal*, cited by the plurality in *Personnel Contracting*, involved establishing whether a coal mine owner was the employer of both a miner and their 'helper' — both were ultimately found to be the mine owner's employees.[124] This further supports the possibility that the use of delegates, or 'helpers', does not necessarily preclude a finding in favour of employment. The HC's endorsement of this case is significant, as it was one of the early cases that adopted a purposive approach to characterising workers for the purposes of a protective labour statute.[125] The authors posit that even if a Deliveroo worker acts on the contractual right to delegate their work, an occurrence that is neither

119 *ACE Insurance* (n 58) 153 [37].

120 *Personnel Contracting* (n 2) 196 [71].

121 *Deliveroo* (n 10) 277 [49].

122 *JMC Pty Ltd v Federal Commissioner of Taxation* (2023) 297 FCR 600, 624–5 [80]–[83].

123 Ibid 625 [83], citing *Stevens* (n 2) 24.

124 *Personnel Contracting* (n 2) 195–6 [69].

125 Pauline Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (2019) 42(2) *Melbourne University Law Review* 370, 375.

commercially practical nor likely to occur in practice,[126] their delegates can and should be considered employees of these platforms too. Thus, this right to delegate should not in itself negate an employment relationship where the central duty of cooperation in the supply of labour can be made out between the parties.

In short, although Deliveroo's agreement, and likely other service agreements for on-demand platforms, include more express terms pointing towards a contractual relationship than in *Personnel Contracting*, these terms are not necessarily determinative of an independent contractor relationship. If the duty of cooperation encompasses the supply of workers' labour and read alongside the express terms, there are several key factors that would favour finding an employment relationship under the present common law test. Namely, the platform's unilateral right to allocate work, set the relevant rates of pay, act as workers' paymaster, and, crucially, if successfully argued, the obligation for workers to cooperate in all respects with the platform in the supply of their labour (that is, to be subject to the platform's 'control').

V Retrying *Deliveroo*: The Statutory Employment Test

The introduction of the 'employee-like' category for 'digital platform workers' may suggest that their employment status under the *FW Act* is settled. This is significant as the courts have found policy considerations to be relevant

> in negativing the making of an implication, or else in demonstrating that the issues raised by the proposed implication are of such a character or complexity as to make it inappropriate for a court, as distinct from a legislature, to impose the obligation in question.[127]

Therefore, courts may be especially reluctant to consider the duty of cooperation in the context of determining the employee status of these workers under the *FW Act*. However, the statutory test for determining employment requires decision-makers to identify the 'true relationship' between parties. As set out below, the authors contend that the duty of cooperation remains critical to unearthing the true relationship between on-demand platform workers (as opposed to other digital platform workers).

In *Deliveroo*, the Full Bench stated that the following factors would have contributed to Mr Franco being found to be an employee: the operation of the SSB (eventually discontinued); the actual minimal capital investment by Mr Franco; the fact that Mr Franco used branded Deliveroo items that were provided to him and that he was encouraged to use; the reality that Mr Franco never delegated his work and it was never commercially practical to do so (noting the general rule that

126 *Deliveroo* (n 10) 278–9 [53].

127 *Gray* (n 88) 379 [146], citing *Reid v Rush and Tompkins Group Plc* [1990] 1 WLR 212, 220.

Mr Franco was to provide his services personally was eventually removed from later agreements); and the prevalence of unilateral iterations of the contract that 'might be inferred … was done with an eye to maintaining Deliveroo's position that the delivery workers were contractors and not employees'.[128]

Factors such as these would presumably be permitted for consideration by decision-makers when determining employment under the *FW Act* in future cases. It is questionable, however, the extent to which these factors would be persuasive, applicable, or easily proven. The SSB system, for example, had been discontinued by Deliveroo. In any future case, establishing the level of control enacted by these platforms would require evidence of the intricacies of their algorithms, which may be difficult to establish.

Also, while the minimal required capital investment eliminates a factor in favour of finding Mr Franco to be a contractor, it does not necessarily indicate that he was in fact an employee. As for the use of branded items, while this appears to be a similar practice with other on-demand platforms in the food delivery space, all platforms maintain that the use of these items is voluntary.[129] A worker may therefore not necessarily use these items regularly; platforms may eventually stop offering these items to workers, start requiring that workers purchase these items themselves, or even disallow workers from wearing any branded merchandise, as Uber has required of its drivers.[130]

A similar problem arises in relation to the right of delegation.[131] If a worker were to occasionally delegate their work, as they are often entitled to do, they would presumably lose the benefit of this factor in determining their employment status. Finally, while the unilateral revisions to the contract were highlighted by the Full Bench as being rightfully problematic, it is difficult to see how these changes point towards an employment relationship per se.

Ultimately, workers' and platforms' behaviour may vary with each case, and it is likely that platforms will continue to artfully adjust their (and their workers') behaviour, alongside their express contractual terms, to dodge the classification of their workers as employees. Establishing an implied duty for workers to cooperate in the supply of their labour, however, relies only on whether such a right of control

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128 *Deliveroo* (n 10) 278–9 [53].

129 See, eg: 'New Delivery Bags Launching!', *Uber Blog* (Blog Post, 20 August 2023) <https://www.uber.com/en-AU/blog/new-delivery-bags-launching/>; *Gupta v Portier Pacific Pty Ltd* (2020) 296 IR 246, 252 [11]; 'The New Dasher Roadmap', *DoorDash Dasher Support* (Web Page) <https://help.doordash.com/dashers/s/article/New-Dasher-Roadmap?language=en_AU&ctry=AU&divcode=VIC>.

130 *Nawaz* (n 41) 145 [33].

131 See, eg: 'Nominating Someone to Deliver for You', *Uber Blog* (Blog Post, 3 February 2023) <https://www.uber.com/en-AU/blog/nominating-someone-else-to-deliver-for-you/>; 'Independent Contractor Agreement', *DoorDash* (Web Page) [10.1] <https://help.doordash.com/legal/document?type=dx-ica&region=AU&locale=en-AU>.

is 'necessary' for the efficacy of the parties' contractual relationship. This question is not affected by factors such as the presence, or lack thereof, of uniforms, the occasional delegation of work, or the intricacies of each platform's algorithms. Therefore, while the statutory test for determining employment states that the terms of the contract will not be the only factor that is considered, its terms, both express and implied, can and should continue to play an important part in the classification of workers.

VI Conclusion

Deliveroo has ceased operations in Australia and the argument to consider the scope of the implied duty of cooperation in the context of on-demand platform agreements has yet to be tested. However, this legal argument needs to be presented and explored. The amendments to the *FW Act* may suggest that any matter that would affect the employment status of digital platform workers is best left to the legislature. However, the consideration of an implied term that would reflect a more accurate representation of the parties' relationship aligns with the broader intentions of the amendments to the *FW Act* to legislate a statutory test for determining employment based on the true nature of the parties' relationships. Moreover, establishing a worker's employment status under the common law remains an open and important point of consideration in various other legal contexts such as tort, taxation, superannuation, and workers' compensation — all of which have yet to be considered by Parliament.

A clear statement that all digital platform workers are contractors across all legal domains may reduce the potential for ambiguity. However, this must be weighed against the fairness and accuracy of such an approach. If the proposed implied duty of cooperation is 'necessary' to give effect to service agreements for on-demand platforms and the inclusion of this term gives rise to a finding that such workers are employees, then this is a decision that is open to decision-makers. This would be in keeping with the approach adopted by Gageler and Gleeson JJ (now, Gageler CJ) in *Personnel Contracting* that, unlike the majority, defended the examination of the totality of the relationship when applying the multi-factorial test, stating that through this approach, 'the common law has shown itself to be "sufficiently flexible to adapt to changing social conditions"'.[132]

If examining only the express terms of these contracts, companies like Deliveroo could maintain that drivers have extensive autonomy by continuing to leave the existence of these algorithms and its functions out of the terms of the contract. Where post-contractual conduct is considered, as will be permitted under the statutory test in the *FW Act,* such an examination will also require an analysis of each worker's circumstances. This analysis may turn on the facts of each case,

132 *Personnel Contracting* (n 2) 211–12 [120] (Gageler and Gleeson JJ), quoting *Stevens* (n 2) 29. Justice Gageler was appointed Chief Justice with effect from 6 November 2023.

and will require overcoming evidentiary challenges such as obtaining access to platforms' algorithmic decision-making tools. It is therefore critical that the duty for workers to cooperate with their platforms in the supply of their labour is deemed within the scope of the implied duty of cooperation for all service agreements of on-demand platforms. If successful, this duty would clearly illuminate the reality of the parties' relationship as one that is subject to extensive control, warranting the workers of these platforms to be considered employees.

Deliveroo demonstrates how examining only the express terms of a contract and post-contractual conduct can create the illusion of an independent contractor relationship. This needs to be challenged. The potential for implied terms to influence classifications under the common law and the *FW Act* must also be explored, so that on-demand platform workers' classification as independent contractors or 'employee-like' is not a given. It will not necessarily be the case, however, that all digital platform workers would be considered employees. The gig economy is diverse and varied, and includes platforms that genuinely support independent contractors who will benefit from the standard setting measures under the *FW Act*. The arguments put forward in this article accommodate and respect this distinction in the employee versus contractor debate by limiting focus to on-demand platform workers.

In conclusion, the authors argue that it is possible to unsettle the classification of on-demand platform workers as independent contractors through the examination of implied terms. The obligation for workers to cooperate with their respective platforms in the supply of their labour should be emphasised as an implied term by law across all services agreements for on-demand platforms. This obligation is essential to these platforms' viability, as evidenced by the algorithmic management tools used to enforce and oversee the performance of this obligation. The consideration of this implied duty would demonstrate the substantial right of control that these platforms have over their workers and tilt the scales towards finding the agreement representative of an employment relationship. It is hoped that the article has highlighted the legitimacy and fairness of classifying these workers as employees and the important potential for implied terms in securing workers' entitlements and protections in Australia and that this is given due consideration by the legislature and decision-makers.