The Tax Institute

The Tax Summit

The Tax Summit

Session 13.2: State taxes in the gig economy

Presented at Melbourne Convention and Exhibition Centre (MCEC) 3-5 September 2025

Andrew Healer
Victorian Bar

Contents

1. Introduction

1.1 The gig economy

The gig economy is characterised by workers contracting to complete short-term task-based work, via digital platforms which facilitate labour transactions between workers and businesses.[1]

Definitions of the term 'gig economy' vary.[2] The OECD, in its report *The Impact of the Growth of the Sharing and Gig Economy on VAT/GST Policy and Administration*, gives the following working definition for the 'sharing/gig economy':[3]

> '*An accessibility-based socio economic model, typically enabled or facilitated via advanced technological solutions and trust-building tools, whereby human or physical resources and/or assets are accessible (for temporary use)/shared – to a large extent – among individuals for either monetary or non-monetary benefits or a combination of both*.'

Examples of gig economy platforms include:[4]

- Uber and Shebah (private transport)
- Uber Eats and Menulog (meal delivery)
- Freelancer, Fiverr, OneFlare, Hipages and Airtasker (task-based services).

A range of terms is also used to describe the performance of work within the gig economy: 'on-demand' work, 'sharing' work, 'collaborative' work, 'crowdsourcing,' 'independent work', and 'freelance' work.[5]

According to a 2019 study commissioned by the Victorian Government, 7.1% of the population had offered to undertake gig economy work in the previous 12 months.[6] The study found:[7]

> ***'How prevalent is digital platform work in Australia?***
>
> › *7.1% of survey respondents are currently working (or offering to work) through a digital platform or have done so within the last 12 months.*
>
> › *13.1% of survey respondents have, at some time, undertaken digital platform work. This rate of participation is similar to recent survey findings in Europe, and higher than some previous estimates for Australia.*
>
> › *Of the 13.1% (1827 survey respondents) that have undertaken digital platform work, 38.7% have only done work in-person at a specified location. In contrast 28.2% have done computer or internet-based work only, while almost exactly one-third have undertaken both types of work at some time.'*

[1] Murphy J, Laws and Bills Digest, 'Regulating the "gig" economy as a form of employment', *Briefing Book: Key Issues for the 47th Parliament,* Commonwealth of Australia, June 2022, p. 130.
[2] Borland, J. and Coelli, M. (2022) 'The Australian labour market and the digital economy', *Economic implications of the digital economy*, Sydney: ABS / RBA (p. 15).
[3] OECD (2021), *The Impact of the Growth of the Sharing and Gig Economy on VAT/GST Policy and Administration*, OECD Publishing, Paris, <https://doi.org/10.1787/51825505-en> (p. 15).
[4] Murphy J, Laws and Bills Digest, 'Regulating the "gig" economy as a form of employment', *Briefing Book: Key Issues for the 47th Parliament,* Commonwealth of Australia, June 2022, p. 130.
[5] State of Victoria (June 2020), *Report of the Inquiry into the Victorian On-Demand Workforce,* Victorian Government, Melbourne (p. 11).t
[6] McDonald et al (2019), *Digital Platform Work in Australia: Prevalence, Nature and Impact*, Queensland University of Technology, The University of Adelaide and the University of Technology Sydney; Melbourne (p. 5).
[7] *Ibid*.

1.2 Implications for state taxes

This session focusses on recent developments in three areas of state taxes affected by the gig economy:

- Payroll tax and the contractor provisions
- Fringe benefits and FIFO/DIDO
- Short stay accommodation

2. Contractor provisions

2.1 Overview

The concept of a 'relevant contract' is defined in s 32(1) of the *Payroll Tax Act 2007* (Vic) (the **PTA**)[8]:

> ***'32 What is a relevant contract?***
> *(1) In this Division, a relevant contract in relation to a financial year is a contract under which a person (the* **designated person***) during that financial year, in the course of a business carried on by the designated person—*
> *(a) supplies to another person services for or in relation to the performance of work; or*
> *(b) has supplied to the designated person the services of persons for or in relation to the performance of work; or*
> *(c) gives out goods to natural persons for work to be performed by those persons in respect of those goods and for re-supply of the goods to the designated person or, where the designated person is a member of a group, to another member of that group.'*

In broad terms, the designated person under a relevant contract is deemed to be an employer (PTA, s 33), and the person who performs work under a relevant contract is deemed to be an employee (PTA, s 34)

Amounts paid by the deemed employer under a relevant contract are deemed to be wages by s 35(1) of the PTA:

> ***'35 Amounts under relevant contracts taken to be wages***
> *(1) For the purposes of this Act, amounts paid or payable by an employer during a financial year for or in relation to the performance of work relating to a relevant contract or the re-supply of goods by an employee under a relevant contract are taken to be wages paid or payable during that financial year.'*

The contractor provisions are drafted, and have been interpreted, broadly.

In *Commissioner of State Revenue v The* ***Optical Superstore*** *Pty Ltd* [2019] VSCA 197 and ***Thomas and Naaz*** *Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWCA 40, the Courts of Appeal of Victoria and New South Wales applied the contractor provisions to payments made by medical centres to consultant optometrists and general practitioners, respectively.

In both *Optical Superstore* and *Thomas and Naaz*, the contractor provisions applied on the basis that the clinicians supplied services to the medical centres, in addition to the services that the clinicians supplied the patients.[9] Further, in *Optical Store,* the provisions applied notwithstanding that the payments were of amounts held on trust for the clinicians.[10]

Various exemptions have been enacted (and amnesties declared) across the jurisdictions – albeit only in respect of general practitioners – in response.[11]

[8] References are to the contractor provisions contained in ss 31 to 36 of the PTA, with near-identical provisions in New South Wales, South Australia, Tasmania, the Northern Territory and Australian Capital Territory. Equivalent provisions exist in Queensland: see Division 1A of Part 2 of the *Payroll Tax Act 1971* (Qld). Only the legislation in Western Australia does not contain similar provisions for relevant contracts: see the *Pay-roll Tax Assessment Act 2002* (WA).

[9] See [2019] VSCA 197 at [63]-[68]; [2023] NSWCA 40 at [41]-[47].

[10] [2019] VSCA 197 at [79]-[86].

[11] As at 1 July 2025:

- in Victoria and South Australia, an exemption applies in relation to bulk-billed consultations (cl 19B of Schedule 2 of the PTA; cl 17B of Schedule 2 of the *Payroll Tax Axt 2009* (SA));
- in New South Wales, from 4 September 2024 a rebate applies in relation to GPs based on the percentage of services bulk-billed by the medical centre (division 2A of Part 3 of Schedule 2 of the *Payroll Tax Act 2007* (NSW));

Exemptions

Exemptions to the contractor provisions are contained in s 32(2) of the PTA, and include (in summary) that:

- the supply of services is ancillary to the supply of goods: s 32(2)(a) (**Goods Exemption**);
- the services are not ordinarily required by the principal and the contractor provides the same or similar services to the public: s 32(2)(b)(i) (**Services Not Ordinarily Required Exemption**);
- the services performed by the contractor for the principal are services required by the principal for less than 180 days in a financial year: s 32(2)(b)(ii) (**180-day Exemption**);
- the contractor provides their services for no more than 90 days in a financial year: s 32(2)(b)(iii) (**90-day Exemption**);
- if the services are supplied under a contract to which the exemptions in s 32(2)(b)(i) - (iii) do not apply, *and* the Commissioner is satisfied those services are performed by a person who ordinarily performs services of that kind to the public generally in that financial year: s 32(2)(b)(iv) **(Services Provided to the Public Exemption**);
- the services are performed by two or more people: s 32(2)(c) (**Two or More People Exemption**); and
- the services are provided by an owner-driver ancillary to the conveyance of goods: s 32(2)(d) (**Owner-Driver Exemption**).

Recent developments

The NSW Legislative Council is currently conducting an inquiry into the application of the contractor (and employment agent) provisions.[12] The terms of reference include a particular focus on their application to the gig economy.

Notably, the contractor provisions have been the subject of recent judicial consideration in New South Wales in:

- *Loan Market Group Pty Ltd v Chief Commissioner of State Revenue; Loan Market Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 390 (***Loan Market Group***); and
- *Chief Commissioner of State Revenue v Uber Australia Pty Ltd* [2025] NSWCA 172 (***Uber Australia***).

Those decisions are discussed below.

2.2 *Loan Market Group*

In *Loan Market Group*, the Court (Richmond J) held that the contractor provisions applied to the payments made by a mortgage aggregator pursuant to agreements with individual mortgage brokers.

Background

Loan Market Group Pty Ltd (**LML**) was a party to agreements with individual mortgage brokers (**Broker Agreements**) whereby, in consideration for various fees paid by the broker to LML, the broker was provided with various services by LML which assisted the broker in establishing and operating their mortgage broking business. That business involved the broker applying to lenders for loans on behalf of their clients using systems provided by LML and, when those loans were approved, brokers became entitled to part of the commission paid by the lender. Lenders paid the commission on loans originated by the brokers to a related

- in Queensland, *all* wages paid or payable 'by a medical practice to a general practitioner' have been exempted from payroll tax (s 14(2)(m) of the *Payroll Tax Act 1971* (Qld)); and
- in the ACT, the recent 2025-26 Budget announced an exemption for bulk billed GP services (see 'ACT Budget 2025–26: investing in public health' <https://www.act.gov.au/our-canberra/latest-news/2025/june/ACT-Budget-202526-investing-in-public-health> (accessed 15 July 2025).

[12] Parliament of New South Wales 'Application of the contractor and employment agent provisions in the *Payroll Tax Act 2007*' https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=3083#tab-termsofreference (accessed 25 July 2025).

company of LML, and the commission was then paid to the individual mortgage brokers by LML, after subtracting fees owing to LML.

The Chief Commissioner assessed LML to payroll tax for the 2012 to 2018 financial years in respect of commissions paid by LML to the brokers, in reliance on the contractor provisions. This was on the basis that:

- the Broker Agreements were 'relevant contracts' within the meaning of s 32(1)(b); that is, LML was the 'designated person' who, in the course of a business carried on by LML, had supplied to it the services of the brokers for or in relation to the performance of work;
- none of the exemptions in s 32(2) applied to the Broker Agreements; and
- LML is therefore taken to be the employer of the brokers (ss 33 and 34) and the amounts paid to the brokers are taken to be wages (s 35). As the employer, LML is liable to pay payroll tax on those wages (s 7).

The Court dismissed LML's appeal.

Findings

The Court affirmed that the Broker Agreements were 'relevant contracts'. In relation to the definition of that term in s 32(1)(b), Richmond J held (at [195]-[197]):

> *'A Broker Agreement will be a relevant contract within the meaning of s 32(1)(b) for a financial year in the Relevant Period if it is a contract under which LML (being the designated person) during that financial year and in the course of a business carried on by it, has supplied to it the services of persons for or in relation to the performance of work.*
>
> *…*
>
> *The words "under which" mean "in accordance with", "pursuant to" or "required by" the terms of the Broker Agreement. This is consistent with the approach to the words "under which" in the chapeau to s 32(2) in* Smith's Snackfood Co Ltd v Chief Commissioner of State Revenue *[2013] NSWCA 470; (2013) 97 ATR 904 at [79] per Gleeson JA (Beazley P and Sackville AJA agreeing). There is no reason why these words should have a different meaning in the chapeau to s 32(1).'*

Further, the Court confirmed that 'services' should be given a broad meaning. His Honour commented (at [199]-[200]):

> *'The requirement that the services supplied under the contract are "services of persons for or in relation to the performance of work" is merely that the services supplied under the agreement are work-related:* Accident Compensation Commission v Odco Pty Ltd *(1990) 95 ALR 641 at 651;* Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue *[2005] NSWSC 788; (2005) 60 ATR 237 at [225];* Smith's Snackfood *at [56].*
>
> *… This work is done in accordance with the Relevant Broker agreement because it was required to be done in the way it was by the terms of that Broker Agreement. The performance of that work involved the provision of services to LML. As noted in* IW v The City of Perth *(1997) 191 CLR 1 at 11, the term "services" has a wide meaning. In the Macquarie Dictionary, the first two meanings given to "service" are "an act of helpful activity" and "the supplying or supplier of any articles, commodities, activities etc required or demanded". In the Oxford Dictionary, the first two meanings of "service" are "the action of helping or doing work for someone" and "an act of assistance".'*

In respect of the payments to the brokers being deemed wages, the Court rejected an argument that the services provided under the Broker Agreements were not sufficiently connected to the commissions paid to the brokers such that the commissions were not for work 'relating to a relevant contract' within the meaning of s 35(1). The Court found (at [288]):

> *'The work performed by the Assessed Brokers was central to the operation of LML's business, which included assisting eMOCA earn commissions. LML employed no staff to assist it achieve that outcome.*

> *Instead, LML relied upon the work performed by the Assessed Brokers that it engaged under the Broker Agreements. The phrase "relating to" or "in relation to" requires no more than a relationship, whether direct or indirect, between two subject matters:* Smith's Snackfood *at [59]. There was a direct relationship between the commissions, the performance of work by the Assessed Brokers and the Broker Agreements: the work was authorised by the Broker Agreements and the commissions were paid to the Assessed Brokers under the Broker Agreements.'*

Moreover, the Court considered that the application of the contractor provisions was not limited to their original anti-avoidance purpose. His Honour commented (at [207]-[208]):

> *'The conclusion that the Broker Agreements constitute a relevant contract under s 32 may be seen as a harsh outcome for LML because the contractor provisions now found in s 32 were originally introduced as an anti-avoidance measure which was not intended to catch "bona fide independent contractors": see* Bridges Financial Services *at [218]–[219];* Downer EDI Engineering Pty Ltd v Chief Commissioner of State Revenue *[2019] NSWSC 743 at [101]–[110]. But the way the legislature approached the implementation of that purpose was to cast the net of 'relevant contract' very widely and then to give exclusions which were intended to catch the bona fide independent contractor relationships. …*
>
> *The potential difficulty for a taxpayer is that the exclusions are very specific and may leave a subset of relationships such as those in the present case where the contractor is a genuine independent contractor but may not come within any of the exclusions.'*

The Court also considered the following issues:

- ***Trail commissions.*** In respect of 'trail commissions' (*ie.* commissions payable to a broker following termination of the Broker Agreement), these were not deemed to be wages for the purpose of s 35(1).[13] This was because, in a financial year in which there was no Broker Agreement, there was no 'relevant contract' and therefore no deemed employer or deemed wages.

- ***Exemptions.*** Of note, the Court considered the application of the following exemptions to the contractor provisions in s 32(2):

  - *Services Provided to the Public Exemption.* In respect of s 32(2)(b)(iv), the Court was not satisfied that the services performed by the brokers for LML were performed by a person who 'ordinarily performs services of that kind to the public generally'.[14] In performing the Broker Agreements, the brokers were providing LML 'a bundle of services different to, and more extensive in nature'[15] than services of the kind that the brokers provided their customers.

  - *Two or More People Exemption.* In respect of s 32(2)(c), the Court found that the Two or More People Exemption applied to payments made to certain brokers.[16] For these brokers, the evidence demonstrated that the services were provided by both the broker and another person. It did not matter that that other person was party to an existing agreement with LML, or that there was no contract in place between the broker and that other person.[17] Further, the Court rejected that the *de minimis* principle precluded the application of the exemption notwithstanding the relatively small amount paid to the other person[18] (*eg.* $330 paid for data entry for 10 loan transactions[19]).

Implications

[13] [2024] NSWSC 390 at [209]-[220].
[14] [2024] NSWSC 390 at [221]-[237].
[15] [2024] NSWSC 390 at t [237].
[16] [2024] NSWSC 390 at [256]-[277].
[17] [2024] NSWSC 390 at [267].
[18] [2024] NSWSC 390 at [268]-[271].
[19] [2024] NSWSC 390 at [271].

Loan Market Group again demonstrates the potential breadth of application of the contractor provisions, including to the mortgage broking industry. Of relevance for the gig economy, the decision highlights that:

- The contractor provisions can apply in circumstances where:
  - the deemed employee is operating his or her own business. Here, there was not dispute that the brokers were operating their own broking businesses;
  - the deemed employee also receives services from the deemed employer (*ie.* the brokers were receiving services from LML, as well as providing services to LML);
  - the nature of the services performed by the deemed employee can be intangible/digital – 'services' has a wide meaning and can include services potentially not traditionally associated with the contractor provisions.

- Notwithstanding that the deemed employee is operating a business *and* is offering services to the public, it cannot be assumed that the Services Provided to the Public Exemption will apply. Among other requirements, the exemption in s 32(2)(b)(iv) requires that the services the deemed employee offers to the public must be the *same services* as those performed for the deemed employer.

2.3 *Uber Australia*

The Chief Commissioner assessed Uber to payroll tax, on the basis that amounts collected from riders and then remitted by Uber to drivers were taken to be wages, as amounts paid or payable for or in relation to the performance of work relating to a relevant contract.

The primary judge (Hammerschlag CJ in Eq) set the assessments aside. While the primary judge was satisfied that the contracts between Uber and the drivers were relevant contracts pursuant to s 32(1) and no exemption applied pursuant to s 32(2), the amounts paid or payable by Uber to the drivers were not deemed wages pursuant to s 35(1).

The Court of Appeal (Ward ACJ; Mitchelmore JA; Kirk JA; Adamson JA, McHugh JA) allowed the Chief Commissioner's appeal and dismissed Uber's cross-appeal; thus, the assessments raised on the relevant contracts between Uber and the drivers were upheld.

Background

The background facts are set out in detail by the primary judge in *Uber Australia Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 1124.

In summary, Uber operates a 'rideshare' system. It puts riders who wish to be transported by motor vehicle in contact with drivers offering the service of picking them up and driving them to their destination. The connection is achieved by way of Uber's software applications (apps) which include a 'Driver App' and a 'Rider App'. Uber enters into a contract with the drivers (the **Driver Contracts)**, and enters into a different contract with the riders.

At a journey's end, the rider automatically pays the fare electronically. Uber deducts its service fee from the rider's payment and pays the balance to the driver. Uber does not require drivers to be online at any particular time or for any minimum period of time. Drivers have discretion as to when to go 'online' and for how long.

The Chief Commissioner contended (and the primary judge accepted) that Uber had three services supplied to it by drivers for the purposes of s 32(1)(b): transporting riders to their destination ('driving'), giving feedback about riders ('rating'), and referring people to Uber to become drivers ('referring').

Issues

The Court of Appeal's judgement addresses three main issues:

- Was driving a service provided to Uber under the Driver Contracts for the purpose of s 32(1)(b)?

- Did the Goods Exemption apply to the Driver Contracts?
- Were the amounts paid to the drivers deemed wages under s 35(1)?

Findings

The **first issue** was whether driving was a service provided to Uber under the Driver Contracts for the purpose of s 32(1)(b). In other words, whether driving was a service provided under a 'relevant contract'. Uber contended that the driving services (i) were not supplied 'to' Uber, and (ii) were not supplied 'under' the Driver Contracts.

- Driving services provided 'to' Uber

There was no dispute that the drivers provide a driving service *to the riders*. However, in respect of whether a driving service was also provided to Uber, Uber contended that it was not sufficient that the service be one that was of assistance to it or from which it benefited.

The Court rejected this argument, reasoning that the driving service was critical for Uber's business to function.[20] The Court stated (at [54]):

> *'The transportation of riders to their destination (the driving service) is not merely of assistance to Uber in some indirect or collateral way. It clearly generates a financial benefit for Uber in the form of a service fee, and is the foundation of Uber's business insofar as it concerns ridesharing.'*

- Driving services provided 'under' the Driver Contracts

Uber relied on the test in *Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520; [2000] HCA 35 at [49], requiring identification of the source of the obligation in question. Uber contended that, on the '*Sara Lee* test', the Driver Contracts imposed no obligation on the drivers to provide the driving service. Rather, Uber contended that the Driver Contracts simply gave the drivers the right to use the Driver App.

This issue turned on whether the applicable test was the '*Sara Lee* test' relied on by Uber (see above), or the test in *Smith's Snackfood Company Ltd v Chief Commissioner of State Revenue (NSW)* [2013] NSWCA 470 at [79]-[80]. On the '*Smith's Snackfood* test', the words 'under which' are construed as meaning 'in accordance with', 'pursuant to' or 'required by' the terms of the relevant agreement. The primary judge had proceeded on the basis that the '*Sara Lee* test' applied (although, in applying that test, the judge was satisfied the driving services were provided under the Driver Contracts).

Ultimately, the Court rejected that s 32(1) is controlled by the '*Sara Lee* test', given the differences between the legislation considered by the High Court and the contractor provisions.[21] The Court considered that the purpose of the contractor provisions favours a wider construction.[22] In particular, where the subject contract confers a right to be paid will suffice.[23] The Court stated (at [104]):

> *'It follows, in our opinion, from the text, context and purpose of Div 7 that the words "a contract under which …" in s 32(1) of the* Payroll Tax Act *extend to a "contract" (as defined in s 31):*
>
> *(1) which is the source of the right or obligation to supply the services (using the language of* Sara Lee*); or*
> (2) *which expressly refers to, and governs or controls, the supply of the services (adapting the language of* Inghams[24]*); or*

[20] [2025] NSWCA 172 at [52]-[63].
[21] [2025] NSWCA 172 at [81]-[110].
[22] [2025] NSWCA 172 at [52]-[63].
[23] [2025] NSWCA 172 at [102]-[103].
[24] Note: *Inghams Enterprises Pty Ltd v Hannigan* (2020) 379 ALR 196; [2020] NSWCA 82 at [137]-[139]. See [2025] NSWCA 172 at [97].

(3) *which confers a right to be paid for supplying he services (having particular regard to the purpose of Div 7).'*

Applying the above construction, the Court considered that Uber clearly had driving services supplied to it (within categories (2) and (3) of the above) under the Driver Contracts.[25]

The **second issue** was whether the Goods Exemption applied to the Driver Contracts. This issue turned on whether driving was 'ancillary' to the use of the driver's vehicle for the purpose of s 32(2)(a).[26]

The Court agreed with the primary judge that the driving service 'is one and the same as the use of the vehicle', and found that the driving service 'is not subsidiary, incidental, accessory or auxiliary to the use of the car'.[27] The Court stated (at [261]):

> '*The driving service is supplied by the very use of the driver's car to pick up and transport the rider to the destination. It is inherent in the driving service that there will be the use of a vehicle, provided by the driver… And at least for the periods in question (and still currently) it was inherent in the use of the vehicle that there be a driver driving.'*

In respect of the *rating service*, the Court also agreed with the primary judge that rating was bound up with the use of the vehicle and was therefore ancillary to that use.[28] However, it did not follow that the Goods Exemption applied, as use of the vehicle was not the principal or dominant characteristic of the Driver Contracts (see above).[29]

As the Goods Exemption did not apply, it was strictly unnecessary for the Court to consider whether the exemption was disapplied by the exclusion in s 32(2B).[30] Although, on the hypothetical scenario that driving was found to be an ancillary service but rating was not, the Court considered that s 32(2B) would have disapplied the Goods Exemption in any event.[31]

The **third issue** was whether the payments to the drivers were deemed wages under s 35(1). This issue turned on whether the amounts collected by Uber and remitted to the drivers were 'for or in relation to the performance of work', and 'paid or payable' by Uber. This was the central issue on which the primary judge found in favour of Uber.

- 'For or in relation to the performance of work'

The Court disagreed with the primary judge that s 35(1) requires there be some 'reciprocity or ascertainable calibration between the money paid and the work done'.[32] That construction 'puts an unsupportable gloss on the section'.[33]

Notably, the Court rejected the primary judge's reasoning that there was a lack of 'reciprocity' or 'calibration' because Uber has an obligation to account to the driver. The Court considered that that fact was not materially different from *Optical Superstore* and *Thomas and Naaz*, and the concepts of 'reciprocity' and 'calibration' were contrary to both those decisions.[34]

[25] [2025] NSWCA 172 at [106].
[26] [2025] NSWCA 172 at [260]-[267].
[27] [2025] NSWCA 172 at [261], adopting the test in *Smith's Snackfood Company Ltd v Chief Commissioner of State Revenue (NSW)* [2013] NSWCA 470 at [96] (Gleeson JA).
[28] [2025] NSWCA 172 at [274].
[29] [2025] NSWCA 172 at [277]
[30] Section 32(2B) of the NSW legislation provides: '*Subsection (2) (a), (b), (c) or (d) does not apply to a contract under which any additional services or work (of a kind not covered by the relevant paragraph) are supplied or performed under the contract*'. In Victoria, equivalent provisions are contained in ss 32(2A) and 32(2B).
[31] [2025] NSWCA 172 at [293]-[307].
[32] [2025] NSWCA 172 at [346].
[33] [2025] NSWCA 172 at [346].
[34] [2025] NSWCA 172 at [357].

The Court stated (at [363]), emphasis added):

> '*The payments by Uber to drivers are payments related to the work performed by the drivers in transporting riders, notwithstanding that these represent part of the payments received by Uber from riders in discharge of the riders' obligation to pay for the transportation service obtained through use of the Rider App. They are calculated by reference to the driving service (e.g. duration and time of trip), less Uber's service fee, which itself is just a percentage proportion of the fare … There is, thus, a direct relationship between the performance of work and what was payable by Uber to drivers, along with what Uber itself was entitled to retain. The fact that Uber has an obligation to drivers to account for the amounts received (less the service fee) does not change the nature of the payments as being in relation to the performance of work.'*

- 'Paid or payable' by Uber

Uber contended that an amount is not 'paid or payable', within s 35(1), when the deemed employee is entitled to receive funds from a third party, and the deemed employer simply collects those funds on behalf of the deemed employee and remits those funds to the deemed employee. Uber accepted this argument was inconsistent with *Thomas and Naaz* and *Optical Superstore*, however contended that both those decisions were plainly wrong.

The Court rejected Uber's argument. To overturn the applicable intermediate appellate authority, Uber needed to establish that there was 'compelling reason'[35] to depart from it. Instead, the Court considered the reasoning in both cases was 'persuasive'.[36]

The Court dealt with some **subsidiary issues** as follows:

- **Rating service:** The Court rejected Uber's challenge to the primary judge's finding that rating was also a service provided to Uber under the Driver Contracts.[37] The Court found: '*Rating riders was a service necessarily provided to Uber in the exercise of the driver's rights conferred by the driver contracts, and was therefore supplied under those contracts'*.[38] The Court also rejected Uber's ground that the service of rating riders was so trivial as to give rise to the *de minimis* principle.[39]

- **Referring service:** The Court also rejected that the *de minimis* principle applied to the service of referring potential drivers to Uber.[40] However, the Court upheld Uber's argument that the service of referring was not provided 'under' the Driver Contracts. The Court accepted that there were separate contracts between Uber and the drivers under which payments were made for successful referrals.[41] Although, this did not alter the outcome – given the assessments in issue were for payments under the Driver Contracts and the balance of the Court's findings.

- **Remission of interest:** The primary judge erred in finding that, if Uber had been unsuccessful, premium interest should be remitted in full. (Note: prior to the initial hearing, the Chief Commissioner agreed to remit 50% of market and premium interest up to the time of the assessments, and so the dispute concerned the balance of premium interest accrued both before and after the assessments). Firstly, the landscape has changed considerably since the first instance decision (*ie.,* given the result of the appeal itself).[42] Second, the primary judge has acted on the incorrect principle that the evidence did not establish any 'wilful default' on the part of the Uber – rather, it should have been Uber who bore the onus to establish the absence of any such default.[43] In re-exercising the discretion under s 25 of

[35] [2025] NSWCA 172 at [382].
[36] [2025] NSWCA 172 at [382].
[37] [2025] NSWCA 172 at [128]-[137].
[38] [2025] NSWCA 172 at [134].
[39] [2025] NSWCA 172 at [147]-[151].
[40] [2025] NSWCA 172 at [158]-[160].
[41] [2025] NSWCA 172 at [178]-[183].
[42] [2025] NSWCA 172 at [418].
[43] [2025] NSWCA 172 at [419].

the *Taxation Administration Act 1996* (NSW), the Court took into account the remission already received by Uber, and did not consider there should be any further remission.[44]

Implications

The Court of Appeal's judgment will have significant implications for gig economy work.

- **Definition of 'relevant contract':** The Court confirmed the broad interpretation of the term 'relevant contract' in s 32. Presumably, this interpretation captures many gig economy arrangements, including where the deemed employee is not required to work particular hours or accept particular tasks.

- **Goods Exemption:** In the context of rideshare, the Court rejected driving being a service ancillary to use of a vehicle (*ie.*, driving and use of the vehicle was 'one and the same'). The test for the Goods Exemption is that the services must be 'subsidiary, incidental, accessory, or auxiliary' to the supply or use of the goods.

- **Deemed wages:** The Court (sitting as a bench of five) confirmed that an entitlement to receive payment from a third party does not exclude that payment, when made under a relevant contract, from being deemed wages under s 35(1). The reasoning in *Thomas and Naaz* and *Optical Superstore* therefore applies beyond the medical centre context, including to gig economy arrangements.

2.4 Other heads of liability

Apart from the contractor provisions, it should be borne in mind that gig economy work may also attract liability payroll tax on the basis that:

- workers are engaged as common law employees; or
- the employment agents provisions apply.

Common law employees

Generally, wages are taxable if 'paid or payable by an employer for or in relation to services performed *by an employee*'.[45] The term 'employee' is not defined by the legislation and so takes its meaning from the common law.

By way of example, and at least according to media reports, Foodora (now defunct in Australia) was assessed to payroll tax in NSW on the basis that its riders were common law employees.[46]

Following the decisions of the High Court in *Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) v Personnel Contracting Pty Ltd* (2022) 275 CLR 165 and *ZG Operations Australia Pty Ltd v Jamsek* (2022) 275 CLR 254, the issue of whether or not a worker is an employee is to be determined – at least when the parties have comprehensively committed the terms of their relationship to a written contract – by reference to the terms of the written contract.[47]

Those decisions marked a departure from the multifactorial approach, as previously applied in *eg., Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.

Employment agents

[44] [2025] NSWCA 172 at [436].
[45] PTA, s 11(1)). See the identical provisions in New South Wales, South Australia, Tasmania, Northern Territory and Australian Capital Territory legislation. See also s 9(1) of the *Payroll Tax Act 1971* (Qld); ss 6A and 9AA(1) of the *Pay-roll Tax Assessment Act 2002* (WA).
[46] Chau, ABC News (28 August 2018) 'Foodora fallout: ATO comes after failed food delivery company for unpaid taxes' <https://www.abc.net.au/news/2018-08-28/foodora-fallout-taxman-chasing-delivery-food-company/10172650>
[47] See *eg.* (2022) 275 CLR 165 at [59].

Under the 'employment agents' provisions[48], an 'employment agency contract' is defined as a contract, whether formal or informal and whether express or implied, under which a person (an employment agent) procures the services of another person (a service provider) for a client of the employment agent.

The 'employment agent' is deemed to be an employer, the person performing the work is deemed to be an employee of the employment agent, and the amount paid to or in relation to the service provider taken to be wages. The exemptions available to relevant contracts (noted above), are not available to employment agency contracts.

The employment agents provisions do not only apply to traditional labour hire arrangements.

In *Chief Commissioner of State Revenue v Integrated Trolley Management Pty Ltd* [2023] NSWCA 302, the NSW Court of Appeal (Ward P, Payne JA and Basten AJA) considered payments made from the taxpayer to contractors, for the performance of trolley collection services under contracts that the taxpayer (ITM) held with various supermarkets (Woolworths, Aldi and IGA).

The Court (Basten AJA, with whom Ward P and Payne JA agreed with additional reasons) held:

- the subject 'employment agency contracts' were those between ITM (that is, the employment agent) and the supermarkets (that is, the client), rather than the contracts between the employment agent and the service providers.[49]

- the statutory test requires that the service providers who carry out the work for the client should do so in much the same way as would an employee of the client: '*That meant that the business would involve work having a degree of regularity and continuity, and where the nature of the work was to a significant degree under the control and direction of the client.*'[50]

- the 'in and for test' in *UNSW Global*[51] requires the identification of (i) the work to be done by persons who provide the services to a client, and (ii) the nature and ordinary conduct of the client's business: *'It is the relationship between the two which determines the application of s 37(1) in a particular case.'*[52]

- further, consideration of how the client might conduct its business, and whether it might have conducted its business by employing workers directly to carry out the services obtained through the agency agreement, is 'a potentially valuable inquiry'.[53] In respect of the hypothetical comparison, the Court commented: *'…to compare the situation the subject of dispute with the hypothetical circumstances of direct employment by the client will serve to emphasise the importance of various features of the arrangement, including the degree of control which would be exercised in each case, whether employees would be maintained on a regular and continuous basis and whether the nature of the services would be different.'*[54]

- reliance on 'indicia' identified in previous cases can result in misconstruing the statute.[55]

- importantly, the application of the provisions must be assessed by reference to the terms of the employment agency contract.[56] In most cases, a 'fact-sensitive analysis', going beyond an an analysis of the contractual arrangements and the nature of the client's business, will not be necessary.[57]

[48] See ss 36A to 42 of the PTA, and equivalent provisions in the New South Wales, South Australia, Tasmania, Northern Territory and Australian Capital Territory legislation. See also ss 13G to 13LA of the *Payroll Tax Act 1971* (Qld); s 9GA of the *Pay-roll Tax Assessment Act 2002* (WA).
[49] [2023] NSWCA 302 at [27]-[36].
[50] [2023] NSWCA 302 at [86].
[51] *UNSW Global Pty Ltd v Chief Commissioner of State Revenue (NSW)* [2016] NSWSC 1852 at [26] (White J).
[52] [2023] NSWCA 302 at [49].
[53] [2023] NSWCA 302 at [90].
[54] [2023] NSWCA 302 at [91].
[55] [2023] NSWCA 302 at [40]-[54] and [113].
[56] [2023] NSWCA 302 at [111].
[57] [2023] NSWCA 302 at [112].

Integrated Trolley was recently followed in the NSW Civil and Administrative Tribunal to find that the employments agents provisions applied to subcontracted cleaning services provided to supermarkets: see *XL Retail Services Pty Ltd v Chief Commissioner of State Revenue* [2025] NSWCATAD 22.

3. Fringe benefits and FIFO/DIDO

3.1 Payroll tax

Under the payroll tax legislation in all the jurisdictions, wages include fringe benefits.[58]

The term 'fringe benefit' has the same meaning as in the *Fringe Benefits Tax Assessment Act 1986* (Cth) (**FBTA Act**).[59] The value of wages comprising a fringe benefit is also based on the taxable value of the benefit for the purposes of the FBTA Act.[60]

In ***Bechtel Australia*** *Pty Ltd v Commissioner of Taxation* (2024) 302 FCR 44; [2024] FCAFC 33, the Full Court re-revisited the treatment of travel expenses for FIFO workers as a fringe benefit. This issue was previously considered in ***John Holland*** *Group Pty Ltd v Federal Commissioner of Taxation* [2015] FCAFC 82; (2015) 232 FCR 59, where the taxable value of the fringe benefit by way of travel expenses was reduced to nil pursuant to the the 'otherwise deductible rule' in s 52(1) of the FBTA Act.

3.2 *Bechtel Australia*

The question in *Bechtel Australia* was, for the purpose of s 52(1) of the FBTA Act, had the employee himself or herself incurred the travel expenses, would the employee have been entitled to a deduction for those expenses?

The Full Court answered this question in the negative, finding that the travel expenses would not have been deductible by the employee and were therefore not deductible for the taxpayer under the FBTA Act.

Background

The taxpayer incurred expenses in respect of travel of employees to and from a project site on Curtis Island off the Queensland coast. Employees were rostered on for shifts (or 'swings') on the Curtis Island Projects, which commenced at the project location for a number of weeks (generally four), and then rostered off for one week.

The taxpayer organised and paid for travel from an employee's point of origin to Curtis Island so that employees arrived at the projects location in time to commence their shifts, allowing time to check-in to temporary accommodation.

The primary judge (Logan J) concluded that the travel expenses, had they been incurred by the employees, would not have been allowable as deductions to the employee under the ITAA 1997 or ITAA 1936. Accordingly, the primary judge held that there was no reduction in the taxable value of the residual fringe benefits provided by the taxpayer to its employees.

Findings

The Full Court dismissed the taxpayer's appeal.

---

[58] Apart from benefits that are exempt benefits for the purposes of the *Fringe Benefits Tax Assessment Act 1986* (Cth) (other than deposits to the Superannuation Holding Accounts Special Account within the meaning of the *Small Superannuation Accounts Act 1995* (Cth)): s 14(1) of the PTA. See the definition of 'wages' in the Schedule-Dictionary of the *Payroll Tax Act 1971* (Qld); s 9BA of the *Pay-roll Tax Assessment Act 2002* (WA).

[59] But excluding:
(a) a tax-exempt body entertainment fringe benefit within the meaning of FBTA; or
(b) anything that is prescribed by the regulations under the PTA not to be a fringe benefit,
s 3(1) of the PTA. See the definition of 'fringe benefit' in the Schedule-Dictionary of the *Payroll Tax Act 1971* (Qld) and the Glossary of the *Pay-roll Tax Assessment Act 2002* (WA).

[60] PTA, s 15. See s 13(5) of the *Payroll Tax Act 1971* (Qld); s 9BB of the *Pay-roll Tax Assessment Act 2002* (WA).

- The Court applied the general proposition that expenses of travelling from home to work or business and back again are not deductible (citing *Commissioner of Taxation v Payne* (2001) 202 CLR 93).[61] Therefore, it is critical to identify the point at which the employees commence (and cease) their duties. The Court stated (at [17]-[20], emphasis added):

> *'Employee expenditure on travel will be incurred in gaining or producing assessable income where travel occurs in the course of performing employment duties. In that case, the costs of travel are incurred in the process of deriving assessable income. Thus, in* John Holland Group Pty Ltd v Federal Commissioner of Taxation *[2015] FCAFC 82; (2015) 232 FCR 59 the cost of travel from Perth Airport to the project site was an outgoing that would have been incurred by an employee in gaining or procuring assessable income because the employees' employment duties commenced at Perth Airport. It was at Perth Airport that the employees in that case came under their employer's direction and control.*
>
> *By contrast, expenditure incurred before an employee commences, or after they cease, to perform their employment duties is not incurred in gaining or deriving assessable income:* Payne *at [14].*
>
> ***The question is determined by identifying the point at which an employee commences or ceases to perform their employment duties.***
>
> ***Here, by the terms of employment, each employee was assigned to work at Curtis Island. It was at Curtis Island that each employee performed their employment duties*** *…'*

- The Court rejected the taxpayer's argument that the relevant test was whether the travel was 'part of their employment'.[62] Further, the fact that employees were FIFO and paid a travel allowance did not alter the analysis. The Court stated (at [27]-[30]):

> *'Neither the fact that an employee lives a long distance from Curtis Island nor the fact that the appellant could not, as a practical matter, source a workforce from Curtis Island or Gladstone transforms the character of the expenditure. The travel costs are incurred because the employees live at a distance from their employment base "and this is so, whether [they have] a choice in the matter or not":* Newsom v Robertson (Inspector of Taxes) *[1953] Ch 7 at 15–16, cited with approval in* Lunney *at 500. The "point of origin" for each employee is reflective of the employee's personal circumstances and not the requirement imposed by the employer.*
>
> *The fact that the employees were FIFO workers and therefore did not travel between home and work on a daily basis is similarly not to the point. It is the relationship between the performance of income producing activities and the travel which is critical and not the frequency of the travel.*
>
> *The fact that the employer facilitated the travel arrangements and provided in-house travel co-ordination does not mean that employees were travelling at the direction of their employer or by travelling were performing employment duties. Part of the inducement or benefit provided to FIFO workers was travel to and from home for recreational leave. Travel was described in the appellant's policy documents in the language of entitlement. Employees could choose not to take the travel entitlement and have a cash sum paid instead.*
>
> *Employees were not paid for the time travelled. Although employees were paid allowances in recognition of the remoteness of the location of Curtis Island, such allowances did not result in employees performing employment duties when not on Curtis Island.'*

[61] [2024] FCAFC 33 at [14].
[62] [2024] FCAFC 33 at [24].

Implications

The Full Court has confirmed that the deductibility test for travel expenses remains that the travel must be incurred 'in the course of performing employment duties' (confirming the test in *John Holland*). However, in applying the test:

- It is critical to identify the point at which performance of those duties commences and ceases. In *John Holland*, the employees commenced work at Perth airport, hence travel costs to and from Perth airport to the project site were deducible.[63]
- The distance that an employee is required to travel – including on a FIFO or DIDO basis – does not transform the character of the travel.
- The fact that the employer organises the travel and/or pays a travel allowance will not necessarily mean that the employee is performing employment duties during travel.

[63] See [2024] FCAFC 33 at [17].

4. Short stay accommodation

4.1 Victoria

The *Short Stay Levy Act 2024* (Vic) (the **SSL Act**) introduced a 7.5% levy on short-term accommodation rentals in Victoria, specifically for stays of fewer than 28 consecutive days, effective 1 January 2025.[64] The levy applies to bookings made through platforms (*eg.* Airbnb and Stayz), as well as direct bookings.

The rationale for the levy was explained in terms of addressing housing availability, and that the revenue raised from the levy would go to Homes Victoria for social and affordable housing, with 25 per cent of funds to be invested in regional Victoria.[65]

Short Stay Levy

The SSL Act charges a levy in respect of a 'short stay' in 'short stay accommodation' located in Victoria.[66] The levy is a flat 7.5% of the total booking fees paid, including fees and charges such as cleaning fees and GST, where applicable.[67] The total booking fee does not include credit card fees.[68]

A 'short stay' means occupation of the premises for a continuous period of less than 28 days.[69]

'Short stay accommodation' means 'any premises that can accommodate a person'[70] but excluding[71]:

- premises that are someone's principal place of residence (whether they own or rent the premises);
- commercial residential premises within the meaning of section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (*eg.* hotels, motels or hostels); and
- certain employee accommodation, retirement villages and residential care facilities, student accommodation and temporary crisis accommodation.

The levy is payable:

- by the booking platform[72]; or
- for direct bookings, by the owner (or if the booking is made with the renter, by the renter).[73]

Registration with the Commissioner is required for booking platforms and persons accepting direct bookings.[74] Returns and payments must be made to the Commissioner annually (or quarterly if total booking fees are $75,000 or more per annum).[75]

If an exempt property is offered by a booking platform, the owner (or renter) of the property must provide the booking platform with a declaration that the property is not short stay accommodation.[76]

[64] SSL Act, ss 2, 10, 13,
[65] State of Victoria (Department of Premier and Cabinet) 2023, *Victoria's Housing Statement: The decade ahead 2024-2034* (p. 20) <https://www.vic.gov.au/victorias-housing-statement-0>
[66] SLA Act, s 10.
[67] SLA Act, ss 7, 13(1).
[68] SLA Act, s 7(1)(a).
[69] SLA Act, s 3.
[70] SLA Act, s 5(1).
[71] SLA Act, s 5(2).
[72] SLA Act, s 12(1).
[73] SLA Act, s 12(2).
[74] SLA Act, s 17.
[75] SLA Act, ss 16, 18.
[76] SLA Act, s 21.

Other amendments

The SSL Act is defined as a 'taxation law' for the purpose of the *Taxation Administration Act 1997* (Vic).[77]

The SSL Act also introduced amendments to the *Owners Corporation Act 2006* (Vic), allowing an owners corporation to make rules prohibiting the use of lots as short-stay accommodation (but not from prohibiting an owner or lessee from doing so if that person occupies the lot as their principal place of residence).[78]

4.2 Australian Capital Territory

Similarly, the *Short-Term Rental Accommodation Levy Act 2025* (ACT) (**STRAL Act**) introduced a 5% levy on short-term rental accommodation in the Australian Capital Territory for stays of less than 28 consecutive days, effective 1 July 2025.

In contrast to the Victorian model, under the STRAL Act:

- the levy only applies to bookings made through platforms, but does not apply to direct bookings with the owner/occupier[79]. As such, only the booking platforms are required to register.[80]
- there is no exclusion for property that is someone's principal place of residence.[81] However there is an exemption for 'hosted accommodation', where the property is occupied by the owner or occupier (or their agent) at the same time.[82]

4.3 Other jurisdictions

Tasmania has announced a 5% levy, however this is yet to be legislated.[83]

New South Wales is undertaking a review of the short stay sector.[84]

[77] *Taxation Administration Act 1997* (Vic), s 4(1)(da).
[78] See *Owners Corporation Act 2006* (Vic), Schedule 1, cl 5.5.
[79] STRAL Act, s 11(1) (and see the definition of 'booking service' in s 9(1) and the exclusion for direct bookings in s 9(2)).
[80] STRAL Act, s 15.
[81] STRAL Act, ss 7 and 8.
[82] STRAL Act, s 7.
[83] Holmes, ABC News (18 February 2024) 'Tasmanian Liberals announce levy on short stay accommodation visits over rental supply issues' <https://www.abc.net.au/news/2024-02-18/tas-airbnb-levy-announcement-liberals/103480560>
[84] NSW Government 'Short-term rental accommodation' https://www.planning.nsw.gov.au/policy-and-legislation/housing/short-term-rental-accommodation?utm_source=chatgpt.com (accessed 15 July 2025).