DEFERENCE AND INTERVENTION IN THE CHARACTERISATION OF WORK CONTRACTS

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STATEMENT OF ORIGINALITY

This thesis contains my original work. I am the sole author of all chapters of this thesis.

Pauline Bomball

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ABSTRACT

This thesis examines judicial approaches to the characterisation of work contracts in Australia. Important consequences flow from the characterisation of a contract as one of employment. A significant number of labour statutes bestow rights and protections upon employees only, thereby excluding other types of workers, such as independent contractors, from their coverage. Employing entities seeking to avoid statutory labour obligations use various contractual techniques to disguise employees as independent contractors. In some cases, courts have afforded deference to these contractual arrangements. In other cases, courts have adopted an interventionist approach, disregarding or according limited weight to the terms of the written contract, and focusing instead on the underlying substance of the relationship. There is, however, an absence of clarity as to the conceptual and doctrinal justifications for such intervention, resulting in judicial oscillations between deference and intervention.

This thesis argues that Australian courts should adopt the interventionist approach to the characterisation of work contracts. It presents the conceptual and doctrinal justifications for the interventionist approach and constructs a two-stage analytical framework for the application of this approach by the courts. In the course of elucidating and defending the interventionist approach to characterisation, this thesis addresses broader conceptual questions concerning the distinction between formalism and substantivism in common law adjudication, the interaction of common law and statute, and the normative tensions that arise when the norms of public regulation are channelled through the vehicle of private law. The thesis focuses primarily on Australian law, though it also draws upon the law of the United Kingdom, United States and Canada, where relevant.

The increasing diversity of work arrangements in the modern economy, fuelled in part by the emergence of the gig economy in recent years, has placed strains upon the common law's architecture for identifying the beneficiary of labour law's protections. This thesis seeks to make a contribution to the important task of reconstructing that architecture and consolidating its conceptual and doctrinal foundations. The thesis takes the form of a thesis by compilation, comprising an integrative chapter and seven sole-authored peer-reviewed journal articles.

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CHAPTER 1

Integrative Chapter

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Declaration: I am the sole author of this chapter.

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I INTRODUCTION

The emergence of the gig economy in recent years has brought into focus the common law principles that govern the characterisation of work contracts. Important consequences flow from the characterisation of a contract as one of employment. Many Australian labour statutes set their coverage by reference to the concept of employment.[1] These statutes generally confer rights and protections upon employees only, leaving other types of workers, such as independent contractors, beyond their scope. Employing entities seeking to avoid statutory labour obligations use various contractual techniques to disguise employees as independent contractors.[2] In some Australian cases, courts have afforded deference to these contractual arrangements.[3] In other cases, courts have adopted an interventionist approach, disregarding or according limited weight to the terms of the written contract, and focusing instead on the underlying substance of the relationship.[4] These judicial oscillations between deference and intervention reflect deeper normative tensions between the private and the public dimensions of the characterisation exercise.[5]

Labour statutes that identify the 'employee' as the beneficiary of their rights and protections generally leave the term 'employee' undefined, instead invoking the concept of an employee at common law.[6] At common law, an employee is a worker who is engaged pursuant to a contract of employment.[7] The contract of employment therefore serves as a gateway to the

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[1] Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6th ed, 2016) 196–7. For example, many of the rights in Australia's key labour statute, the *Fair Work Act 2009* (Cth) ('*FW Act*'), are bestowed upon employees only.

[2] Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15(3) *Australian Journal of Labour Law* 235, 242–51; Alan Bogg, 'Sham Self-Employment in the Supreme Court' (2012) 41(3) *Industrial Law Journal* 328, 328–9.

[3] See, eg, *Howard v Merdaval Pty Ltd* [2020] FCA 43 ('*Howard*'); *Tobiassen v Reilly* (2009) 178 IR 213 ('*Tobiassen*'); *Young v Tasmanian Contracting Services Pty Ltd* [2012] TASFC 1 ('*Young*'); *Australian Air Express Pty Ltd v Langford* (2005) 147 IR 240 ('*Langford*').

[4] See, eg, *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346 ('*Quest*'); *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146 ('*Trifunovski*'); *On Call Interpreters & Translators Agency Pty Ltd v Federal Commissioner of Taxation [No 3]* (2011) 214 FCR 82 ('*On Call Interpreters*').

[5] Pauline Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (2020) 44(2) *Melbourne University Law Review* (advance) (Thesis Chapter 2) 15–17, citing Alan Bogg, 'The Common Law Constitution at Work: *R (On the Application of UNISON) v Lord Chancellor*' (2018) 81(3) *Modern Law Review* 509, 516, 522; Hugh Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10(3) *Oxford Journal of Legal Studies* 353, 375.

[6] See below n 54 and accompanying text.

[7] See, eg, *C v Commonwealth* (2015) 234 FCR 81, 87 (Tracey, Buchanan and Katzmann JJ); *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 ('*Hollis*'); *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 ('*Brodribb*').

protections of labour law.[8] This 'channelling'[9] of statutory labour protections through the vehicle of contract gives rise to normative tensions.[10] When a court is determining whether a work contract has the character of an employment contract or an independent contract for the purposes of a labour statute, it is engaged in a process that involves two distinct functions.[11] On the one hand, the court is discerning and giving effect to the intention of the parties, and enforcing their agreement, consistently with the principles and doctrines of contract law.[12] On the other hand, the court is determining the scope of coverage of a labour statute, an instrument of 'public' regulation that has, as one of its primary goals, the protection of workers who fall within the employee category.[13]

Courts that adopt a deferential approach to characterisation tend to accord significance to the private dimension of the characterisation exercise.[14] In *National Transport Insurance Ltd v Chalker* ('*Chalker*'), for example, Mason P of the New South Wales Court of Appeal made the following observation:

> The Court is not blind to the general trend towards … 'outsourcing' that is occurring in an increasingly de-regulated labour market. The common law … should nevertheless proceed by acknowledging the contractual autonomy of the parties involved in cases such as the present. The issue in the present case is characterisation of relationships and not judicial social engineering to encourage one form rather than another.[15]

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[8] Bob Hepple, 'Restructuring Employment Rights' (1986) 15(2) *Industrial Law Journal* 69, 69–71; Sandra Fredman, 'Labour Law in Flux: The Changing Composition of the Workforce' (1997) 26(4) *Industrial Law Journal* 337, 345–6; Gordon Anderson, Douglas Brodie and Joellen Riley, *The Common Law Employment Relationship: A Comparative Study* (Edward Elgar, 2017) 25.

[9] Simon Deakin, 'The Many Futures of the Contract of Employment' in Joanne Conaghan, Richard Michael Fischl and Karl Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford University Press, 2002) 177, 181.

[10] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 15–17, citing Bogg, 'The Common Law Constitution at Work' (n 5) 516, 522; Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 5) 375.

[11] Ibid.

[12] Ibid.

[13] Ibid. See also Hepple, 'Restructuring Employment Rights' (n 8) 69–71; Fredman, 'Labour Law in Flux' (n 8) 345–6; Anderson, Brodie and Riley, *The Common Law Employment Relationship* (n 8) 25.

[14] Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 5) 375; Fredman, 'Labour Law in Flux' (n 8) 345–8; Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 10–11.

[15] [2005] NSWCA 62, [61] (Mason P).

Courts that adopt an interventionist approach tend to emphasise the public dimension of the characterisation exercise.[16] In *On Call Interpreters & Translators Agency Pty Ltd v Federal Commissioner of Taxation [No 3]* ('*On Call Interpreters*'), for example, Bromberg J of the Federal Court of Australia observed that deference to written work contracts 'would place many workers who are in truth employees beyond the protective reach of labour law'.[17] For those who are interested in preserving the protective scope of labour law, the interventionist approach to characterisation is to be favoured.[18]

There is, however, an absence of clarity as to the conceptual and doctrinal justifications for the interventionist approach to characterisation in Australia. The interventionist approach involves disregarding or according limited weight to the terms of the written contract.[19] It thereby entails judicial interference with the contractual autonomy of the parties.[20] Clear and principled justifications must be provided for such judicial interference.[21] It has been observed that '[v]ague cajoling to examine the reality of the relationship needs to be placed within a conceptually sound legal framework'[22] and that the preference for 'realism'[23] demonstrated in some cases may be 'fleeting and ephemeral in the absence of a deeper substantive anchoring.'[24] The central aim of this thesis is to provide that 'conceptually sound legal framework'[25] and 'deeper substantive anchoring'[26] for the interventionist approach to the characterisation of work contracts in Australia. In particular, it seeks to answer two research questions. The first question concerns the conceptual and doctrinal justifications for the interventionist approach. The second question concerns the analytical framework for the characterisation exercise.

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[16] Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 5) 375; Fredman, 'Labour Law in Flux' (n 8) 345–8; Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 16–17.
[17] *On Call Interpreters* (n 4) 121 (Bromberg J).
[18] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 4.
[19] Ibid 11.
[20] Ibid.
[21] Ibid, citing Sarah Worthington, 'Common Law Values: The Role of Party Autonomy in Private Law' in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing, 2016) 301–2.
[22] Mark Irving, *The Contract of Employment* (LexisNexis Butterworths, 2012) 58.
[23] Bogg, 'Sham Self-Employment in the Supreme Court' (n 2) 343.
[24] Ibid.
[25] Irving, *The Contract of Employment* (n 22) 58.
[26] Bogg, 'Sham Self-Employment in the Supreme Court' (n 2) 343.

In answering these two research questions, this thesis reconceptualises the characterisation framework, and clarifies the principles of characterisation. It demonstrates that certain doctrinal hurdles to the interventionist approach to characterisation may be surmounted once characterisation is reconceptualised as a process that involves two analytically distinct stages.[27] The first of these stages involves the ascertainment of the actual rights and obligations of the parties, and the second involves a determination of the legal character of the contract by reference to the attributes of employment.[28] In proposing this reconceptualisation, this thesis looks beyond labour law to other areas of law where questions concerning characterisation have arisen for determination.[29] It also addresses broader conceptual questions concerning the distinction between formalism and substantivism in common law adjudication,[30] the interaction of common law and statute,[31] and the normative tensions that arise when the norms of public regulation are channelled through the vehicle of private law.[32] The thesis focuses on Australian law, though it does draw comparisons with the law of the United Kingdom ('UK'), United States ('US') and Canada, where relevant.

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[27] Pauline Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (2015) 32(2) *Journal of Contract Law* 149 (Thesis Chapter 4) 160–1, 166–7, citing *Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710, 725 (Lord Millett) ('*Agnew*').

[28] Ibid. See also Pauline Bomball, 'Intention, Pretence and the Contract of Employment' (2019) 35(3) *Journal of Contract Law* 243 (Thesis Chapter 5) 257–8.

[29] See, eg, *Agnew* (n 27); *Street v Mountford* [1985] 1 AC 809 ('*Street v Mountford*'); *A-G Securities v Vaughan* [1990] 1 AC 417 ('*Vaughan*'); Matthew Conaglen, 'Sham Trusts' (2008) 67(1) *Cambridge Law Journal* 176; Susan Bright, 'Avoiding Tenancy Legislation: Sham and Contracting Out Revisited' (2002) 61(1) *Cambridge Law Journal* 146; Susan Bright, 'Beyond Sham and into Pretence' (1991) 11(1) *Oxford Journal of Legal Studies* 136.

[30] See, eg, Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing, 2019); Justice WMC Gummow, 'Form or Substance?' (2008) 30(3) *Australian Bar Review* 229; Miranda Stewart, 'The Judicial Doctrine in Australia' in Edwin Simpson and Miranda Stewart (eds), *Sham Transactions* (Oxford University Press, 2013) 5; Justice Michael Kirby, 'Of "Sham" and Other Lessons for Australian Revenue Law' (2008) 32(3) *Melbourne University Law Review* 861.

[31] See, eg, Sir Anthony Mason, 'A Judicial Perspective on the Development of Common Law Doctrine in the Light of Statute Law' in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing, 2016) 119; Andrew Burrows, 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 (April) *Law Quarterly Review* 232; J Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 (April) *Law Quarterly Review* 247; Mark Leeming, 'Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room' (2013) 36(3) *University of New South Wales Law Journal* 1002; Paul Finn, 'Statutes and the Common Law' (1992) 22(1) *University of Western Australia Law Review* 7; Elise Bant, 'Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence' (2015) 38(1) *University of New South Wales Law Journal* 367; PS Atiyah, 'Common Law and Statute Law' (1985) 48(1) *Modern Law Review* 1; Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982); Roscoe Pound, 'Common Law and Legislation' (1908) 21(6) *Harvard Law Review* 383.

[32] See, eg, Alan Bogg, 'Labour, Love and Futility: Philosophical Perspectives on Labour Law' (2017) 33(1) *International Journal of Comparative Labour Law and Industrial Relations* 7, 29; Richard Johnstone and Richard Mitchell, 'Regulating Work' in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 101; Bogg, 'The Common Law Constitution at Work' (n 5) 516, 522; Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 5) 374–7.

The principles governing the characterisation of work contracts are of practical significance. They play a fundamental role in delimiting the protective scope of labour law and are thereby central to the effective functioning and operation of labour law.[33] The need for the characterisation principles to be clarified and reoriented has become particularly acute in light of the increasing complexity and diversity of work arrangements in the modern economy,[34] fuelled more recently by the emergence and development of the gig economy.[35] Within Australia, and in multiple jurisdictions across the world, claims are being pursued against digital platforms such as Uber and Foodora.[36] A significant number of these cases involve claims that the workers who have been engaged by those platforms are employees of the platforms, rather than independent contractors, and are thereby entitled to certain labour rights and protections.[37] Changes in work practices and structures have placed strains upon the common law's architecture for determining employment status. This thesis seeks to make a contribution to the reconstruction of that architecture.

This thesis takes the form of an ANU staff PhD thesis by compilation. The aim of a staff thesis by compilation is to draw together a body of work and to explain the overall contribution that

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[33] Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2nd ed, 2011) 152–3.

[34] On changing work practices and structures in recent decades, see, eg, David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014); Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 5); Richard Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships* (Federation Press, 2012); Judy Fudge, Shae McCrystal and Kamala Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012); Katherine VW Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge University Press, 2004); Sir Brian Langstaff, 'Changing Times, Changing Relationships at Work … Changing Law?' (2016) 45(2) *Industrial Law Journal* 131.

[35] On the challenges for labour law that arise from the gig economy, see, eg, Andrew Stewart and Jim Stanford, 'Regulating Work in the Gig Economy: What are the Options?' (2017) 28(3) *Economic and Labour Relations Review* 420; Anthony Forsyth, 'Playing Catch-Up but Falling Short: Regulating Work in the Gig Economy in Australia' (2020) 31(2) *King's Law Journal* 287; Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press, 2018); Brishen Rogers, 'Employment Rights in the Platform Economy: Getting Back to Basics' (2016) 10(2) *Harvard Law and Policy Review* 479; Paula McDonald et al, *Digital Platform Work in Australia: Prevalence, Nature and Impact* (November 2019); Natalie James, *Report of the Inquiry into the Victorian On-Demand Workforce* (June 2020).

[36] In Australia, see, eg, *Gupta v Portier Pacific Pty Ltd* (2020) 296 IR 246 ('*Gupta*'); *Kaseris v Rasier Pacific VOF* [2017] FWC 6610 ('*Kaseris*'); *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579 ('*Pallage*'); *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807 ('*Suliman*'); *Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836 ('*Klooger*'). In Canada, see, eg, *Uber Technologies v Heller* [2020] SCC 16 ('*Heller*'). In the UK, see, eg, *Uber BV v Aslam* [2021] UKSC 5 ('*Uber*'). *Uber* involved a statutory category, known as 'limb (b) workers', that falls between employees and independent contractors, rather than the employee category at common law. See below nn 311, 325–326, 341–344 and accompanying text.

[37] See, eg, *Gupta* (n 36); *Kaseris* (n 36); *Pallage* (n 36); *Suliman* (n 36); *Klooger* (n 36). For an analysis of these cases, see Forsyth, 'Playing Catch-Up but Falling Short' (n 35) 294–7.

the body of work makes to the literature in the relevant field. This staff thesis by compilation consists of this integrative chapter and seven sole-authored peer-reviewed journal articles, each of which examines an aspect of the characterisation principles. The purpose of this integrative chapter is to explain the normative, theoretical and methodological foundations of the thesis, to elucidate the connections between the articles, and to demonstrate how the articles, when read together, supply the answers to the research questions that this thesis addresses. The ideas, arguments and supporting sources in this integrative chapter are thereby drawn primarily from the articles that have been selected for inclusion in this thesis.[38] A literature review is not included in this integrative chapter because the relevant literature is reviewed in the articles that are included in the thesis.

This integrative chapter proceeds in the following way. Part II of the chapter describes the problem of disguised employment and explains why this thesis approaches that problem through an analysis of the common law. Part III outlines the methodological approaches that this thesis adopts and defines some key terms that are used throughout the thesis. Part IV elucidates the normative and theoretical foundations of the thesis. Part V provides an outline of each article that is included in the thesis. Part VI draws together the key arguments that are presented in those articles and explains the connections between the articles. It provides answers to the two research questions that this thesis addresses. In so doing, it presents the conceptual and doctrinal justifications for the interventionist approach to characterisation, as well as a two-stage analytical framework for the application of this approach by the courts. Part VII identifies future directions for research in this field of study. The conclusion in Part VIII of the chapter explains the original contributions that this thesis makes to the existing literature on the characterisation of work contracts.

II OVERVIEW OF THE PROBLEM AND APPROACH OF THE THESIS

The problem of disguised employment poses significant challenges to the protective scope of labour law.[39] For the purposes of this thesis, 'disguised employment' refers to 'work relationships in which workers who are in substance employees are treated as independent

[38] It is for this reason that this integrative chapter contains repeated citations to the author's articles. These citations have been included in order to identify the relevant parts of the articles that have been drawn upon in this integrative chapter.
[39] Stewart, 'Redefining Employment?' (n 2) 259–64.

contractors.'[40] Incentives to engage in the practice of disguised employment arise in part from the fact that entry into a contract of employment, as opposed to an independent contract, brings with it a suite of statutory labour obligations, along with the concomitant costs of compliance.[41] These statutory labour obligations relate to a range of matters, such as wages, working hours, leave and protections from unfair dismissal.[42] In addition to having incentives to engage workers as independent contractors instead of employees, employing entities often have, by virtue of their superior bargaining power, the ability to exert control over the terms upon which they contract with those whom they engage to perform work.[43]

Employing entities seeking to avoid their statutory labour obligations may frame their work contracts in such a manner as to disguise workers who are in substance employees as independent contractors.[44] As Australian labour law generally confers protections upon 'employees', the practice of disguised employment removes from the realm of labour law the workers whom it seeks to protect. Disguised employment is a longstanding problem.[45] It has been brought into focus by changing work structures and practices in recent decades.[46]

In reflecting upon the 'value of doctrinal analysis'[47] in labour law, Professor Anne Davies observed that '[a]lthough many labour lawyers have turned to legislative reform proposals in despair at judicial attitudes … it is important not to neglect the potential of the courts as a source of reform.'[48] This thesis approaches the problem of disguised employment through an

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[40] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 8; Stewart et al, *Creighton and Stewart's Labour Law* (n 1) 199–200; *On Call Interpreters* (n 4) 120 (Bromberg J); International Labour Conference, *Employment Relationship Recommendation*, 95th sess, ILO Doc 198/V(1) (2006) [46].

[41] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 15, citing *Quest* (n 4) 377–8 (North and Bromberg JJ).

[42] See, eg, *FW Act* pts 2-2, 2-6, 3-2.

[43] See, eg, Mark Freedland, 'General Introduction: Aims, Rationale, and Methodology' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 3, 12–13; Hugh Collins, 'Legal Responses to the Standard Form Contract of Employment' (2007) 36(1) *Industrial Law Journal* 2, 3. See also *Uber* (n 36) [76] (Lord Leggatt for the Court): '[A]n employer is often in a position to dictate such contract terms and … the individual performing the work has little or no ability to influence those terms.' See further *Quest* (n 4) 377 (North and Bromberg JJ), citing Owens, Riley and Murray, *The Law of Work* (n 33) 164: '[M]ost contracts for the performance of work are "contracts of adhesion" — that is, contracts the terms of which are set by the dominant party on a "take-it-or-leave-it" basis.' On contracts of adhesion, see Friedrich Kessler, 'Contracts of Adhesion — Some Thoughts About Freedom of Contract' (1943) 43(5) *Columbia Law Review* 629.

[44] Stewart, 'Redefining Employment?' (n 2) 242–51; Bogg, 'Sham Self-Employment in the Supreme Court' (n 2) 328–9.

[45] Ibid.

[46] See above n 34.

[47] ACL Davies, 'The Contract for Intermittent Employment' (2007) 36(1) *Industrial Law Journal* 102, 102.

[48] Ibid.

analysis of the common law.[49] It focuses on the principles governing the characterisation of work contracts. It clarifies those principles and reconceptualises the framework for characterisation, with a view to placing the interventionist approach to characterisation on a more secure conceptual and doctrinal footing. This thesis does not seek to 'solve' the problem of disguised employment. It instead seeks to provide the courts with a clearer framework for addressing contractual arrangements that disguise employees as independent contractors.

There are, of course, persuasive reasons for adopting a statutory response to the problem of disguised employment, and leading labour law scholars in Australia have put forward compelling proposals for statutory reform.[50] This thesis complements that important body of work by examining how the common law of Australia might be developed to respond to this problem. In so doing, it builds upon, and seeks to make a contribution to, the existing literature that analyses and critiques the common law concept of employment.[51] Unless legislatures in Australia amend the plethora of labour statutes that set their coverage by reference to the common law concept of an employee, the common law principles governing the characterisation of work contracts will continue to apply.[52] Many labour statutes in Australia

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[49] This thesis does not deal with s 357 of the *FW Act.* Section 357(1) provides: 'A person (the employer) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.' This section only applies if it has been established that the worker is engaged under a contract of employment: Stewart et al, *Creighton and Stewart's Labour Law* (n 1) 217. In order to answer that antecedent question, courts apply the common law principles governing the characterisation of work contracts: see Stewart et al, *Creighton and Stewart's Labour Law* (n 1) 217, which notes that 'for s 357(1) to be breached, it must be established that, despite any representations to the contrary, the individual worker is actually an employee within the meaning of the common law principles.' This thesis focuses on those common law principles.

[50] See, eg, Stewart, 'Redefining Employment?' (n 2) 270–6; Cameron Roles and Andrew Stewart, 'The Reach of Labour Regulation: Tackling Sham Contracting' (2012) 25(3) *Australian Journal of Labour Law* 258, 279–80; 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, 21–2.

[51] For scholarship that addresses the Australian law on the common law concept of employment, see, eg, the sources listed in the previous footnote and Adrian Brooks, 'Myth and Muddle: An Examination of Contracts for the Performance of Work' (1988) 11(2) *University of New South Wales Law Journal* 48. For scholarship that addresses the concept of employment in other jurisdictions, see, eg, Mark Freedland, *The Personal Employment Contract* (Oxford University Press, 2003); Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (Oxford University Press, 2011); Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 5); Hepple, 'Restructuring Employment Rights' (n 9); Guy Davidov, *A Purposive Approach to Labour Law* (Oxford University Press, 2016) ch 6; Joellen Riley, 'The Definition of the Contract of Employment and its Differentiation from Other Contracts and Other Work Relations' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 321. (Professor Joellen Riley discusses both Australian and UK law.)

[52] Pauline Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (2021) 43(1) *Sydney Law Review* 83 (Thesis Chapter 8) 89.

use the common law concept of an employee as a criterion for their operation.[53] These include Australia's primary labour statute, the *Fair Work Act 2009* (Cth) ('*FW Act*').[54] Many of the provisions in the *FW Act* apply to employees only.[55] In light of the 'widespread acceptance by legislators'[56] of the concept of employment at common law, there is value in clarifying and reconceptualising the principles pertaining to this concept.

III METHODOLOGY AND TERMINOLOGY

This part of the integrative chapter explains the methodological foundations of the thesis and addresses matters of terminology. Section A explains the doctrinal methodology that this thesis adopts. Section B describes the comparative research methodologies that are adopted in certain parts of the thesis. Section C defines key terms that are used throughout the thesis.

A *Doctrinal Analysis*

The doctrinal approach that this thesis adopts is an established methodology of common law scholars.[57] It is an interpretive methodology, involving an analysis and exposition of the relevant area of law and the 'rationales and purposes underlying the law'.[58] It seeks, through the processes of interpretation and rationalisation, to '[present] the law as [a] coherent'[59] body of principles. In undertaking this doctrinal research, the author engaged with both primary

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[53] See Stewart et al, *Creighton and Stewart's Labour Law* (n 1) 196–7 for a discussion of these statutes. See also Stewart and McCrystal (n 50) 6. There are exceptions. For example, anti-discrimination statutes do not limit their coverage to employees. See, eg, *Racial Discrimination Act 1975* (Cth) s 3(1). Likewise, work health and safety statutes are not limited, in their scope, to employees: see Stewart et al, *Creighton and Stewart's Labour Law* (n 1) 199.

[54] The definitions of employee and employer in s 15 of the *FW Act* give limited content to these concepts. Section 15(1) states that the term 'employee' '(a) includes a reference to a person who is usually such an employee; and (b) does not include a person on a vocational placement' and s 15(2) states that the term 'employer' 'includes a reference to a person who is usually such an employer'. The Explanatory Memorandum makes it clear that the *FW Act* invokes the common law concept of employment: Explanatory Memorandum, Fair Work Bill 2008 (Cth) 5. See also *C v Commonwealth* (n 7) 87 (Tracey, Buchanan and Katzmann JJ); Stewart et al, *Creighton and Stewart's Labour Law* (n 1) 196; Roles and Stewart, 'The Reach of Labour Regulation: Tackling Sham Contracting' (n 50) 258–9, cited in 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 (Thesis Chapter 3) 373 n 11.

[55] For example, key provisions pertaining to the National Employment Standards (*FW Act* pt 2-2), awards (*FW Act* pt 2-3), enterprise agreements (*FW Act* pt 2-4) and unfair dismissal (*FW Act* pt 3-2) apply to employees only.

[56] Stewart et al, *Creighton and Stewart's Labour Law* (n 1) 197.

[57] Andrew Robertson and James Goudkamp, 'Between Form and Substance' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing, 2019) 7.

[58] Ibid.

[59] Ibid, citing Stephen A Smith, *Contract Theory* (Oxford University Press, 1993) 7–13; Liam Murphy, 'The Formality of Contractual Obligation' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing, 2019) 149. See also Darryn Jensen, 'Theories, Principles, Policies and Common Law Adjudication' (2011) 36 *Australian Journal of Legal Philosophy* 34, 36–7.

sources (predominantly case law) and secondary sources (including journal articles, book chapters and books). The doctrinal arguments in this thesis are informed by the broader conceptual analysis that the thesis undertakes. This thesis evaluates the relevant principles and doctrines of the common law through three conceptual lenses. These lenses concern the formalist-substantivist dichotomy in common law adjudication, the interaction of common law and statute, and the normative tensions that arise when the norms of public regulation are channelled through the vehicle of private law.

The common law develops in an incremental and evolutionary way.[60] In putting forward its doctrinal arguments, this thesis is mindful of the constraints that operate upon judges in a common law system.[61] These constraints arise in part from the nature of the common law and, relatedly, the role of the judge engaged in common law adjudication.[62] In *Breen v Williams*, Gaudron and McHugh JJ of the High Court of Australia stated:

> Advances in the common law must begin from a baseline of accepted principle and proceed by conventional methods of legal reasoning. Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles. Any changes in legal doctrine, brought about by judicial creativity, must 'fit' within the body of accepted rules and principles. The judges of Australia cannot, so to speak, 'make it up' as they go along. It is a serious constitutional mistake to think that the common law courts have authority to 'provide a solvent' for every social, political or economic problem. The role of the common law courts is a far more modest one.[63]

These observations about the nature of common law adjudication inform the arguments that are advanced in this thesis. The following statements from Chapter 2 of this thesis encapsulate the approach that the thesis adopts in seeking to provide a firmer conceptual and doctrinal footing for the interventionist approach to the characterisation of work contracts: 'The courts

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[60] Melvin A Eisenberg, *The Nature of the Common Law* (Harvard University Press, 1988) chs 5– 6.
[61] See, eg, Andrew Robertson, 'Constraints on Policy-Based Reasoning in Private Law' in Andrew Robertson and Hang Wu Tang (eds), *The Goals of Private Law* (Oxford, 2009) 268–72; The Hon Chief Justice Susan Kiefel, 'The Academy and the Courts: What Do They Mean to Each Other Today?' (2020) 44(1) *Melbourne University Law Review* 447, 455–6.
[62] Ibid.
[63] (1996) 186 CLR 71, 115 (Gaudron and McHugh JJ) ('*Breen*'), quoted in Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 8 n 31. See also Freedland, 'General Introduction: Aims, Rationale, and Methodology' (n 43) 21–2.

have a role to play in detecting and addressing disguised employment. It is, however, the case that such judicial intervention much be rationalised by reference to the existing fabric of the common law.'[64]

This thesis reconceptualises the framework that Australian courts use to characterise work contracts.[65] In so doing, it seeks to demonstrate that each element of its proposed reconceptualisation '"fits" within the body of accepted rules and principles'[66] in Australian law. For the purposes of analysing the principles that govern the characterisation of work contracts, it is useful to situate the contract of employment within two bodies of private law. The contractual nature of employment places it within the realm of contract law.[67] There is, however, a second body of private law that is relevant, and that is tort law. Australian courts have made it clear that the notion of 'employment', and the distinction between employees and independent contractors, is anchored in the doctrine of vicarious liability in tort law.[68] This thesis seeks to demonstrate that its proposed reconceptualisation of the characterisation framework coheres with the principles of the general law of contract and the principles of vicarious liability in tort law.[69]

B *Comparative Analysis*

In addition to the doctrinal analysis explained above, a comparative research methodology is adopted in certain parts of the thesis. This thesis draws upon the law of the UK, US and Canada, where relevant. In undertaking these comparative studies, this thesis invokes two recognised

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[64] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 8.
[65] Chief Justice Susan Kiefel, who is the current Chief Justice of the High Court of Australia, recently reflected upon 'academic writing which is directed to judges' and sought to 'encourage the continuance of [the] collaboration' between legal academics and the courts: Kiefel, 'The Academy and the Courts: What Do They Mean to Each Other Today?' (n 61) 448. See further Jane Stapleton, *Three Essays on Torts* (Oxford University Press, 2021) ch 1.
[66] *Breen* (n 63) 115.
[67] *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 436 (McHugh and Gummow JJ) ('*Byrne*').
[68] See, eg, *C v Commonwealth* (n 7) 87 (Tracey, Buchanan and Katzmann JJ); *ACE Insurance Ltd v Trifunovski* (2011) 200 FCR 532, 542–3 (Perram J) ('*Trifunovski Trial*'); *Trifunovski* (n 4) 149 (Lander J), 182 (Buchanan J); *Hollis* (n 7) 41 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161, 173 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*Sweeney*').
[69] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5); Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (Thesis Chapter 4) (n 27); Bomball, 'Intention, Pretence and the Contract of Employment' (Thesis Chapter 5) (n 28); Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52).

techniques of the comparative law scholar.[70] The first technique pertains to the objective of resolving or ameliorating certain problems within the domestic jurisdiction.[71] This technique entails studying the overseas jurisdiction in order to identify the existence of legal rules in that jurisdiction that have addressed the particular problem under consideration.[72] It also involves determining whether those legal rules may be amenable to adoption in the domestic jurisdiction.[73] The second technique that this thesis adopts involves a process of explication by comparison. Here, the comparative scholar analyses legal rules in the overseas jurisdiction in order to obtain a deeper and more nuanced understanding of particular facets of the law of the domestic jurisdiction.[74] Such an exercise enriches the comparative scholar's understanding of the domestic law by revealing insights that might not be apparent solely from analysing the domestic law.[75]

Two further considerations inform the approach that this thesis adopts to the comparative exercise. The first relates to the adoption of a functional approach in drawing comparisons.[76] Different legal systems may use different terms and labels to describe similar doctrines or approaches. It is important that the comparative scholar look beyond terminology and at the manner in which the doctrines function.[77] A pertinent example relates to the comparative analysis that this thesis undertakes in respect of what it terms the 'entrepreneurship approach' to determining employment status.[78] In the US, there is a body of case law on the 'entrepreneurial opportunity test'.[79] There is also a legal test for determining employment status that is referred to as the 'ABC' test.[80] The term 'entrepreneurship' does not appear in the formulation of the ABC test, yet in its function and effect this test embodies an

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[70] Hugh Collins, 'Methods and Aims of Comparative Contract Law' (1991) 11(3) *Oxford Journal of Legal Studies* 396, 397–402. The discussion in this and the following paragraph is based on Pauline Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (2021) 44(4) *University of New South Wales Law Journal* (forthcoming) (Thesis Chapter 7) 12–13.
[71] Collins, 'Methods and Aims of Comparative Contract Law' (n 70) 397–8.
[72] Ibid.
[73] Ibid.
[74] Ibid 398–402.
[75] Ibid.
[76] Ibid 398–9. See also Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Clarendon Press, 3rd ed, 1998) 34–5.
[77] Ibid.
[78] Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (Thesis Chapter 7) (n 70).
[79] See, eg, *FedEx Home Delivery v NLRB*, 563 F 3d 492 (DC Cir 2009) ('*FedEx Home Delivery*').
[80] See, eg, *Dynamex Operations West Inc v Superior Court of Los Angeles County* 4 Cal 5th 903 (2018) ('*Dynamex*').

entrepreneurship approach.[81] Accordingly, in comparing Australian and US law on the entrepreneurship approach, this thesis examines not only the entrepreneurial opportunity test, but also the ABC test.

The second consideration relates to matters that the comparative scholar should take into account when determining whether a particular legal rule from an overseas jurisdiction may be transplanted to the domestic jurisdiction.[82] In *Commonwealth Bank of Australia v Barker* ('*Barker*'), French CJ, Bell and Keane JJ of the High Court of Australia stated that '[j]udicial decisions about employment contracts in other common law jurisdictions … attract the cautionary observation that Australian judges must "subject [foreign rules] to inspection at the border to determine their adaptability to native soil.'[83] Comparative law scholars have observed that proper use of the comparative methodology requires attention to be directed not only to the particular legal rule that is being considered for transplantation, but also to 'the context in which that [rule] was developed'.[84] These broader contextual considerations include, among other things, the 'internal logic of [the] legal system'[85] of the overseas jurisdiction, as well as how the legal rule 'fits into a system of legal concepts'[86] in the overseas jurisdiction.

These observations are particularly important in relation to the comparative analysis that this thesis undertakes with respect to the 'purposive approach'[87] to determining employment status. This approach has assumed significance in several jurisdictions, including the UK.[88] This

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[81] Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (Thesis Chapter 7) (n 70) 13.

[82] The discussion in this paragraph is based on Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (Thesis Chapter 3) (n 54) 385–6.

[83] (2014) 253 CLR 169, 185 (French CJ, Bell and Keane JJ) ('*Barker*'), quoting Paul Finn, 'Statutes and the Common Law' (n 31) 13, quoting Roger J Traynor, 'Statutes Revolving in Common Law Orbits' (1968) 17(4) *Catholic University Law Review* 401, 409.

[84] Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (Thesis Chapter 3) (n 54) 386, citing Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37(1) *Modern Law Review* 1, 27.

[85] Collins, 'Methods and Aims of Comparative Contract Law' (n 70) 398.

[86] Ibid.

[87] See, eg, *Autoclenz Ltd v Belcher* [2011] 4 All ER 745, 757 (Lord Clarke for the Court) ('*Autoclenz*'); *Uber* (n 36) [63]–[78] (Lord Leggatt for the Court). As explained below at nn 323–336, *Uber* involved the statutory 'limb (b) worker' category rather than the employee category at common law.

[88] Ibid. In relation to Canada, see, eg, *McCormick v Fasken Martineau DuMoulin LLP* [2014] 2 SCR 108 ('*McCormick*'). See generally Davidov, *A Purposive Approach to Labour Law* (n 51) ch 6; Guy Davidov, 'Re-Matching Labour Laws with Their Purpose' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011) 179; Julie McClelland, 'A Purposive Approach to Employment Protection or a Missed Opportunity?' (2012) 75(3) *Modern Law Review* 427; Bogg, 'Sham Self-Employment in the Supreme

thesis considers not only the legal rules that constitute this purposive approach, but also the broader context in which those rules were propounded. In arguing that there are barriers to the adoption of the purposive approach in Australia, this thesis points, among other things, to divergences of approach between judges in Australia and the UK as to the nature of the contract of employment, and as to the interaction between common law and statute in the labour law context.[89]

C *Terminology*

This section defines key terms that are used throughout the thesis. The phrase 'common law', when used in this thesis, refers to the law made by judges, including equity. The phrase 'private law' refers to those bodies of law that comprise the law of obligations, including contract law and tort law. The phrase 'labour law' is used throughout this thesis to encompass what has traditionally fallen under the two separate areas of labour law and employment law.[90] 'Labour law', as traditionally understood, has generally referred to the law that regulates 'collective labour relations',[91] including matters such as collective bargaining and industrial action. On the other hand, 'employment law', as traditionally understood, has generally referred to the law that regulates individual employment relations, including the principles pertaining to the contract of employment as well as statutory standards such as those concerning minimum wages, protection from unfair dismissal, and working hours.[92] The traditional distinction between labour law and employment law has not been strict or precise.[93]

The phrases 'the common law of the contract of employment' and 'the law of the contract of employment' are used interchangeably to refer to 'the law of contract as developed in the particular context of the contract of employment'.[94] The 'general law of contract' or 'general contract law' refers to the body of contract law as a whole, unmodified by the specific context

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Court' (n 2); ACL Davies, 'Employment Law' in Edwin Simpson and Miranda Stewart (eds), *Sham Transactions* (Oxford University Press, 2013) 176.

[89] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 24–7.

[90] Owens, Riley and Murray, *The Law of Work* (n 33) 9.

[91] Hugh Collins, Gillian Lester and Virginia Mantouvalou, 'Introduction: Does Labour Law Need Philosophical Foundations?' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press, 2019) 1, 7; Owens, Riley and Murray, *The Law of Work* (n 33) 9.

[92] Collins, Lester and Mantouvalou, 'Introduction: Does Labour Law Need Philosophical Foundations?' (n 91) 8; Owens, Riley and Murray, *The Law of Work* (n 33) 9.

[93] Owens, Riley and Murray, *The Law of Work* (n 33) 9.

[94] Gordon Anderson, 'The Common Law and the Reconstruction of Employment Relationships in New Zealand' (2016) 32(1) *International Journal of Comparative Labour Law and Industrial Relations* 93, 94 n 6.

(for example, employment or sale of goods) in which it arises. As discussed below, much of the 'common law of the contract of employment' in Australia is simply general contract law.[95] Unlike the courts in the UK, Australian courts have generally refrained from developing a distinctive body of contract doctrine that is tailored specifically to the contract of employment.[96]

The terms 'hiring entity', 'hirer' and 'employing entity' are used interchangeably throughout this thesis to refer to 'a person or entity [that] hires a person to perform work'.[97] The term 'worker' is used to refer to a person who is hired to perform work. As noted below, under Australian law, a worker is generally 'either … an employee or an independent contractor'.[98] In the UK, there is a statutory category of worker that falls between employees and independent contractors.[99] This thesis refers to workers who fall within that statutory category as 'limb (b) workers'.[100]

IV NORMATIVE AND THEORETICAL FOUNDATIONS

This part of the integrative chapter explains the normative and theoretical foundations of the thesis. In a thesis by compilation, the discussion of these foundations may be spread across different publications.[101] The normative and theoretical foundations of this thesis are detailed in the articles that comprise Chapters 2 and 7 of the thesis. As explained below,[102] this thesis examines two key issues that are of significance to the interventionist approach to characterisation. The first issue pertains to the preference for substance over form in the characterisation of work contracts. The second issue concerns the conceptualisation of employment status. The first five articles in this thesis (Chapters 2 to 6) address the first issue,

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[95] See below nn 379–381; Joellen Riley, 'Developments in Contract of Employment Jurisprudence in Other Common Law Jurisdictions: A Study of Australia' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 273, 291–4.
[96] Ibid.
[97] Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (Thesis Chapter 3) (n 54) 377 n 38, citing Stewart, 'Redefining Employment?' (n 2) 235 n 2.
[98] *Quest* (n 4) 389 (North and Bromberg JJ). See below nn 105–109 and accompanying text.
[99] See below nn 311, 325–326, 341–344 and accompanying text.
[100] Alan Bogg and Michael Ford, 'Between Statute and Contract: Who Is a Worker?' (2019) 135 (July) *Law Quarterly Review* 347, 347.
[101] Australian National University, *Procedure: Higher Degree by Research — Thesis by Compilation and Thesis by Creative Works* (2021) cl 7: 'A thesis by compilation, in addition to its component papers, contains [among other things] … a general account of the theory and methodological components of the research where these elements may be distributed across separate papers.'
[102] See below nn 196–202.

and the final two articles (Chapters 7 and 8) address the second. Chapter 2 is therefore the first chapter of the thesis to address the formalist-substantivist dichotomy in the characterisation of work contracts, and Chapter 7 is the first chapter of the thesis to consider the conceptualisation of employment status. It is for this reason that the normative and theoretical foundations of the thesis are discussed in Chapters 2 and 7 of the thesis.

Though distributed across two separate chapters, these normative and theoretical propositions are unified conceptually. This part of the integrative chapter draws together and summarises key strands from the two chapters. Section A elucidates the normative perspective that this thesis adopts and explains how the aims and scope of this thesis bear upon the theoretical framework that it constructs. Section B then outlines the theoretical framework that informs the arguments in this thesis.

A *The Normative Perspective*

The central aim of this thesis is to provide Australian courts with a clearer framework for addressing contractual arrangements that disguise employees as independent contractors. In so doing, this thesis proceeds on the basis of two interrelated propositions. The first proposition, which is entrenched in Australian law, is that employment is a contractual relationship.[103] The second proposition is that many Australian labour statutes bestow rights and protections upon only those workers who fall within the common law concept of an employee.[104] Unlike the UK, Australia does not have an intermediate statutory category of worker that is located between employees and independent contractors.[105] Accordingly, disputes concerning the characterisation of a work contract fall to be decided on the basis of the common law's distinction between employees and independent contractors.[106] There is, generally speaking, a 'binary divide'[107] between employees and independent contractors in Australia; a worker who is not an employee is generally an independent contractor.[108] In

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[103] *Byrne* (n 67) 436 (McHugh and Gummow JJ).
[104] See above nn 53–56.
[105] See below nn 311, 325–326, 341–344 and accompanying text.
[106] See, eg, *C v Commonwealth* (n 7) 87 (Tracey, Buchanan and Katzmann JJ); *Hollis* (n 7); *Brodribb* (n 7).
[107] *Quest* (n 4) 389 (North and Bromberg JJ): '[T]he divide between employee and independent contractor appears to be binary. In Australia, no third category has yet been recognised by the law to describe the worker and none is apparent. That means that the worker will either be an employee or an independent contractor.'
[108] Mark Irving, *The Contract of Employment* (LexisNexis Butterworths, 2nd ed, 2019) 54. The word 'generally' is used in the sentence in the text above because '[s]trictly speaking, there were and are other categories of paid worker: for example, those who perform work under a *partnership agreement*; certain kinds of *agent* … [and] certain types of *public sector worker*': Stewart et al, *Creighton and Stewart's Labour Law* (n 1) 195 (emphasis in

Sweeney v Boylan Nominees Pty Ltd ('*Sweeney*'), a decision of the High Court of Australia, the majority observed that the '[distinction] between independent contractors and employees … [is] now too deeply rooted to be pulled out.'[109]

Powerful criticisms have been directed towards the contractual basis of employment and the binary divide, including by leading labour law scholars in the UK. Professor Bob Hepple made a compelling argument for replacing the contract of employment with the 'employment relationship' as the gateway to statutory labour protections.[110] In his seminal treatise on the personal employment contract, Professor Mark Freedland demonstrated, among other things, the shortcomings of the binary divide.[111] More recently, Professor Freedland, together with Professor Nicola Kountouris, has developed the concept of 'personal work relations', a concept that is not confined by the strictures of the notion of contract or the concept of employment.[112] There is, with respect, significant force in the arguments that are advanced in these ground-breaking works. For the reasons that are explained in Chapters 2 and 3 of this thesis, however, it is unlikely that Australian courts will abandon the contractual basis of employment or the binary divide.[113] It is for this reason that this thesis proceeds within the analytical parameters of these two concepts in Australian law.

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original). The authors of that text go on to note that '[f]or the most part, however, [Australian] courts have been content to assume a "binary" divide and label as an independent contractor any paid worker found not to be an employee': Stewart et al, *Creighton and Stewart's Labour Law* (n 1) 195, citing *Quest* (n 4) 388–9 (North and Bromberg JJ).

[109] *Sweeney* (n 68) 173 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), quoted in Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (Thesis Chapter 3) (n 54) 404.

[110] Hepple, 'Restructuring Employment Rights' (n 8) 74. For an alternative proposal based on the idea of 'labour force membership status', see Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford University Press, 2001) 50–7.

[111] Freedland, *The Personal Employment Contract* (n 51) ch 1.

[112] Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (n 51). Some scholars have focused on the problems and challenges arising from the concept of the 'employer': see, eg, Jeremias Prassl, *The Concept of the Employer* (Oxford University Press, 2015); Jeremias Prassl, 'The Notion of the Employer' (2013) 129 (July) *Law Quarterly Review* 380; Paul Davies and Mark Freedland, 'The Complexities of the Employing Enterprise' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Hart Publishing, 2006) 273; Paul Davies and Mark Freedland, 'Changing Perspectives Upon the Employment Relationship in British Labour Law' in Catherine Barnard, Simon Deakin and Gillian S Morris (eds), *The Future of Labour Law: Liber Amicorum Bob Hepple QC* (Hart Publishing, 2004) 129, 134–45; Simon Deakin, 'The Changing Concept of the "Employer" in Labour Law' (2001) 30(1) *Industrial Law Journal* 72; Judy Fudge, 'Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation' (2006) 44(4) *Osgoode Hall Law Journal* 609, 635–46.

[113] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 12, 25–6; Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (Thesis Chapter 3) (n 54) 400–4.

If the binary divide and the concept of the contract of employment are accepted, then there must be a framework for distinguishing employees from independent contractors.[114] In Australia, the former are the beneficiary of labour law's protections, while the latter are not. The protective scope of labour law in Australia is, accordingly, delineated by reference to the common law concept of an employee. The practice of disguised employment extrudes from the realm of labour law those workers who are in substance employees. Disguised employment thus erodes labour law's protective scope. This thesis adopts a 'worker-protective' perspective.[115] For the purposes of this thesis, a worker-protective perspective is one that is concerned with bringing those workers who are in substance employees within the protective scope of labour law.[116] The phrase 'preserving the protective scope of labour law'[117] thereby encapsulates the normative perspective of this thesis. The theoretical framework that this thesis builds is directed towards identifying the characteristic vulnerabilities of employees that render them in need of the protections of labour law.[118] Workers who possess these characteristic vulnerabilities are to be designated as 'employees'; those who do not are to be categorised as 'independent contractors'.[119]

The normative perspective that this thesis adopts is, thus, one that centres upon the protection of those workers who are engaged pursuant to a contract of employment and thereby fall within the concept of an employee at common law. In placing the protection of employees at its normative core, this thesis is animated by Sir Otto Kahn-Freund's well-known encapsulation of the purpose of labour law: 'The main object of labour law has always been … to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.'[120] Professor Freedland has observed that this 'foundational proposition … is … essentially targeted upon the contract of employment.'[121]

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[114] Stewart, 'Redefining Employment?' (n 2) 260.
[115] Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (Thesis Chapter 7) (n 70) 2, 11, 20.
[116] Ibid.
[117] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 34. See Bromberg J's reference to 'the protective reach of labour law' in *On Call Interpreters* (n 4) 121.
[118] Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (Thesis Chapter 7) (n 70) 6–11; Davidov, *A Purposive Approach to Labour Law* (n 51) chs 3 and 6.
[119] Ibid.
[120] Otto Kahn-Freund, *Labour and the Law* (Stevens & Sons, 1972) 8.
[121] Mark Freedland, 'Reinforcing the Philosophical Foundations of Social Inclusion: The Isolated Worker in the Isolated State' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press, 2019) 322, 326.

According to this traditional 'protective' justification for labour law, labour law is justified by virtue of the disparity of bargaining power between the employer and the employee. The purpose of labour law is to provide a countervailing force against the power of the employer. Labour law performs this counteracting function in multiple ways, including by facilitating collective bargaining, which enables workers to build collective power.[122] Labour law also performs its recalibrating function through statutes that provide mandatory minimum standards with respect to employment, for example, in relation to matters such as wages, working hours, leave and protection from unfair dismissal.[123]

It is important to recognise that the traditional protective justification has been challenged on a range of fronts. One critique — which challenges labour law itself — is based in part on the view that labour law is undesirable because it '"interferes" with the market's allocation, distorting the market and leading to inefficiencies, while, at the same time, constituting a qualification of freedom of contract.'[124] Compelling responses to this critique have been advanced by labour law scholars.[125] Apart from the challenges to labour law itself, some scholars have critiqued the traditional protective justification, and considered other possible justifications for labour law. For example, some scholars have considered whether labour law can be justified by reference to rights-based theories, drawing upon human rights discourse and framing labour rights in the language of fundamental rights.[126] Other scholars have invoked Professor Amartya Sen's capabilities theory.[127] Some have considered whether the concept of non-domination in civic republican political theory might assist in justifying labour law.[128]

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[122] Owens, Riley and Murray, *The Law of Work* (n 33) 22.
[123] Ibid.
[124] Zoe Adams, 'Labour Law and the Labour Market: Employment Status Reconsidered' (2019) 135 (October) *Law Quarterly Review* 611, 613–14, discussing (among others) FA Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (*Volume 1: Rules and Order*) (Routledge, 1973); Richard Epstein, 'In Defense of the Contract at Will' (1984) 51(4) *University of Chicago Law Review* 947.
[125] See, eg, Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Revolution* (Oxford University Press, 2005) ch 5; Hugh Collins, 'Regulating the Employment Relation for Competitiveness' (2001) 30(1) *Industrial Law Journal* 17, 33–6; Adams (n 124) 616–19.
[126] See, eg, Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 *European Labour Law Journal* 151; Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011) 137.
[127] See, eg, Amartya Sen, *Development as Freedom* (Knopf, 1999), discussed in Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011) 101, 111–19. See further Brian Langille (ed), *The Capability Approach to Labour Law* (Oxford University Press, 2019); Riccardo Del Punta, 'Labour Law and the Capability Approach' (2016) 32(4) *International Journal of Comparative Labour Law and Industrial Relations* 383; David Cabrelli, 'The Capabilities Approach: A Panacea for Labour Law's Ills? (2020) 70(4) *University of Toronto Law Journal* 572.
[128] See, eg, Frank Lovett, *A General Theory of Domination and Justice* (Oxford University Press, 2010); Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1997); Philip Pettit, *On*

This brief overview of just some of the alternative justificatory accounts suffices to illustrate the point that the justifications for labour law are complex and contested.[129] Despite scholarly consideration of these alternative justifications, Professor Hugh Collins has observed that 'most conceptions of labour law … still seem to take their bearings from the gravitational pull of the need to redress the economic and social domination present in employment relations.'[130]

The traditional protective justification, and the theories concerning the relations of power and vulnerability within the employment relation that are constructed upon it,[131] provide a suitable theoretical frame for this thesis. This is because this thesis accepts, rather than challenges, the binary divide between employees and independent contractors in Australian law and the fact that the scope of labour regulation in Australia is generally set by reference to the concept of an employee. The theoretical framework that this thesis builds is directed towards identifying the particular characteristics of employees that render them in need of the protections of labour law.[132] The theories that this thesis invokes in building that framework are outlined in the following section of this integrative chapter and discussed in detail in Chapter 7 of the thesis.

B *The Theoretical Framework*

This section of the integrative chapter outlines the theoretical framework that underlies the normative worker-protective perspective adopted in this thesis. The concept of vulnerability

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the People's Terms: A Republican Theory and Model of Democracy (Cambridge University Press, 2012), discussed in David Cabrelli and Rebecca Zahn, 'Civic Republican Political Theory and Labour Law' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press, 2019) 104. For an analysis of some of the risks associated with invoking these theories in the labour law context, see Alan Bogg, 'Republican Non-Domination and Labour Law: New Normativity or Trojan Horse?' (2017) 33(3) *International Journal of Comparative Labour Law and Industrial Relations* 391.

[129] See, eg, Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011); Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press, 2019); Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006).

[130] Hugh Collins, 'Contractual Autonomy' in Alan Bogg et al (eds), *The Autonomy of Labour Law* (Hart Publishing, 2015) 45, 55. See also Hugh Collins, 'Labour Law as a Vocation' (1989) 105 (July) *Law Quarterly Review* 468.

[131] See, eg, Hugh Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (1986) 15(1) *Industrial Law Journal* 1; Hugh Collins, 'Is the Contract of Employment Illiberal?' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press, 2019) 48; Davidov, *A Purposive Approach to Labour Law* (n 51) ch 3; Orsola Razzolini, 'The Need to Go Beyond Contract: "Economic" and "Bureaucratic" Dependence in Personal Work Relations' (2010) 31(2) *Comparative Labor Law and Policy Journal* 267.

[132] Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (Thesis Chapter 7) (n 70) 6–11; Davidov, *A Purposive Approach to Labour Law* (n 51) chs 3 and 6.

is apt to capture what it is about employees that merits their protection by labour law.[133] The concepts of power and vulnerability are inextricably entwined in the employment relationship.[134] It is necessary to understand the modes of power that are reposed in the employer, and the manner in which those modes of power are structured, supported and manifested, in order to comprehend the ways in which employees are vulnerable.[135] Sir Otto Kahn-Freund's observations about the nature of employment relations are instructive here. He stated that 'the relation between an employer and an … employee … is typically a relation between a bearer of power and one who is not a bearer of power.'[136] He drew a connection between the concepts of power and vulnerability, observing that the employment relationship is '[i]n its inception … an act of submission' and 'in its operation … a condition of subordination.'[137]

The vulnerability of the employee may be analysed through the lens of the concepts of submission and subordination. In giving content to these conceptions of vulnerability in the employment relationship, Professor Collins incorporated the ideas of submission and subordination into his account of the power of the employer.[138] Professor Collins identified two forms of power that an employer exercises, which he termed 'market power' and 'bureaucratic power'.[139] He argued that the employee's submission is attributable in part to the market power of the employer that is present at the point of entry into the contract, and the employee's position of subordination arises from the bureaucratic power of the employer that exists while the contract of employment is on foot.[140] The sources, structures and manifestations of these two types of power are different.

Professor Collins contended that the market power of the employer emanates primarily from market forces, which include, among other things, asymmetries between the employer and the

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[133] Davidov, *A Purposive Approach to Labour Law* (n 51) chs 3 and 6. The discussion in this section of the integrative chapter is based on Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (Thesis Chapter 7) (n 70) 6–11, 20.
[134] Kahn-Freund, *Labour and the Law* (n 120) 8.
[135] Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (Thesis Chapter 7) (n 70) 5–6.
[136] Kahn-Freund, *Labour and the Law* (n 120) 8.
[137] Ibid.
[138] Collins, 'Is the Contract of Employment Illiberal?' (n 131) 51–6.
[139] Ibid; Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (n 131) 1–2.
[140] Collins, 'Is the Contract of Employment Illiberal?' (n 131) 51–6; Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (n 131) 1–2.

worker with respect to information, experience and resources.[141] The worker is, as a result of these market forces, generally in an inferior bargaining position relative to the employer at the point of entry into the contract.[142] This is, of course, not always the case. In some circumstances, workers may have significant bargaining power.[143] This may be so, for example, where the worker possesses particular skills that are sought after by the employer. However, in many cases, there is an inequality of bargaining power between the employer and the worker, and this enables the employer to exercise control over the terms upon which work is offered.[144]

Professor Collins' analysis of the power dynamics that exist at the point of entry into a work contract informs the first issue addressed in this thesis, which involves the formalist-substantivist dichotomy in the characterisation of work contracts. From a normative worker-protective perspective, it is important that courts privilege substance over form in the characterisation of work contracts.[145] In light of the control that employers often have over the drafting of work contracts, and the incentives that employers have to disguise employees as independent contractors, a substantivist rather than a formalist approach is required if courts are to capture accurately those workers who are in substance employees.[146]

Along with an exposition of the employer's market power, Professor Collins provided an account of the employer's bureaucratic power and the employee's corresponding subordination.[147] Upon entry into a contract of employment, the employee is brought within the employer's structure of bureaucratic control.[148] The employer's bureaucratic power is entrenched by the contract of employment.[149] It is supported in particular by those terms, which

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[141] Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (n 131) 1–2.
[142] Ibid.
[143] Ibid 1.
[144] Ibid 1–2. See also Collins, 'Is the Contract of Employment Illiberal?' (n 131) 51–2; Hugh Collins, *Employment Law* (Oxford University Press, 2nd ed, 2010) 6–8; Freedland, 'General Introduction: Aims, Rationale, and Methodology' (n 43) 12–13.
[145] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 14–17.
[146] Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (Thesis Chapter 7) (n 70) 20.
[147] Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (n 131) 1–2.
[148] Ibid.
[149] Collins, 'Is the Contract of Employment Illiberal?' (n 131) 52.

are implied by law into all contracts of employment, that require obedience and fidelity on the part of the employee.[150]

This thesis also draws upon Professor Guy Davidov's exposition of the vulnerabilities that employees possess.[151] Professor Davidov explained the first of these vulnerabilities, which he termed 'democratic deficits',[152] by reference to the control that employers exercise over employees through the organisation's 'structure of governance'.[153] Within this structure of governance, the opportunity for employees to participate in decisions that affect their working lives is attenuated.[154] Professor Davidov thus referred to the position of employees as one involving democratic deficits. He also identified a second vulnerability on the part of employees, which he termed 'dependency'.[155] He explored two dimensions of this dependency. The first is economic in nature, and the second pertains to 'social/psychological'[156] considerations. Employees are generally dependent upon their 'employer for [their] income and [for] the fulfilment of [their] socio-psychological needs'.[157] The latter point recognises, among other things, the centrality of work to a person's identity and sense of self-worth.[158]

These theories of power and vulnerability inform the second issue addressed in this thesis, which concerns the conceptualisation of employment status. This thesis favours a particular conception of employment status that involves the adoption of the entrepreneurship approach to determining employment status.[159] This thesis contends that the entrepreneurship approach has appeal, from a normative worker-protective perspective, because it captures and designates as employees those workers who warrant labour law's protections.[160]

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[150] Ibid.
[151] Davidov, *A Purposive Approach to Labour Law* (n 51) ch 3.
[152] Ibid 35.
[153] Ibid 36.
[154] Ibid 38–9.
[155] Ibid 43.
[156] Ibid.
[157] Guy Davidov, 'Setting Labour Law's Coverage: Between Universalism and Selectivity' (2014) 34(3) *Oxford Journal of Legal Studies* 543, 559 n 62; Davidov, *A Purposive Approach to Labour Law* (n 51) 43–8.
[158] Davidov, *A Purposive Approach to Labour Law* (n 51) 43–5.
[159] Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (Thesis Chapter 7) (n 70) 10–11, 20–5.
[160] Ibid.

This section of the integrative chapter has outlined the theoretical framework that underlies the normative perspective of the thesis. This thesis seeks to provide Australian courts with a clearer framework for bringing within the realm of labour law's protection those workers who exhibit the characteristic vulnerabilities of employees. It does so by reconceptualising the existing framework for characterisation. The arguments supporting this proposed reconceptualisation are set out in the articles that comprise this thesis, and it is to those articles that this integrative chapter now turns.

V OVERVIEW OF THE ARTICLES

This part of the integrative chapter provides an overview of the seven articles that are included in this thesis. This outline of the articles is succinct and serves as a prelude to the more detailed discussion of the arguments in the following part of this integrative chapter. Each article will be referred to as a chapter of the thesis.

Chapter 2 ('Contractual Autonomy, Public Policy and the Protective Domain of Labour Law') has been accepted for publication and is forthcoming in the *Melbourne University Law Review*.[161] This chapter develops a conceptual framework for justifying judicial intervention in cases concerning the characterisation of work contracts.[162] It examines the characterisation principles through two conceptual lenses: the first pertaining to the distinction between formalism and substantivism in common law adjudication, and the second concerning the normative tensions that arise when the norms of public regulation are channelled through the vehicle of private law. The application of these lenses assists in explicating the normative tensions that are immanent within the characterisation exercise.[163] In seeking to justify the interventionist approach to characterisation, Chapter 2 turns to the cases and academic commentary on the sham doctrine (and the related pretence doctrine).[164] It notes that the cases and literature on those doctrines reveal that there are 'two possible justifications for judicial intervention'[165] in cases involving a disjunction between the contractual documentation and the underlying substance of the relationship. This thesis terms those justifications the 'protective

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[161] An advance version of this article has recently been made available. The advance version has been included in this thesis: Pauline Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (2020) 44(2) *Melbourne University Law Review* (advance).
[162] Ibid 3.
[163] Ibid 9–17.
[164] See below n 305.
[165] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 5.

statutory purpose justification' and the 'contractual intention justification'.[166] It argues that the latter provides the more secure justification for the interventionist approach to the characterisation of work contracts in the Australian context.[167]

Chapter 3 ('Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work') was published in the *Melbourne University Law Review*.[168] It complements the analysis in Chapter 2 by considering more deeply the relationship between common law and statute in the characterisation of work contracts. The application of this third conceptual lens — concerning the interplay of common law and statute — sheds light upon the primary issue considered in Chapter 3, which is whether the protective purposes underlying labour statutes may influence the development of the concept of employment at common law.[169] Chapter 3 suggests that Australian courts might not accept this 'purposive approach' to the concept of employment.[170] The chapter adopts a comparative approach, drawing upon case law in the US and Canada.[171] The analysis presented in Chapter 3 provides further support for the approach in Chapter 2, which is to look elsewhere to justify the interventionist approach to the characterisation of work contracts. Instead of rationalising the interventionist approach by reference to the protective statutory purpose justification, Chapter 2 defends an alternative justification — the 'contractual intention justification' — for the interventionist approach. The article that comprises Chapter 3 has been cited in judgments of the Full Court of the Federal Court of Australia and the Victorian Court of Appeal.[172] It has also been cited by other labour law scholars.[173]

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[166] Ibid 5–7.
[167] Ibid 33.
[168] 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.
[169] Ibid 379.
[170] Ibid 397–404.
[171] In relation to Canada, see, eg, *McCormick* (n 88). In relation to the US, see, eg, *National Labor Relations Board v Hearst Publications Inc*, 322 US 111 (1944) ('*Hearst Publications*'); *United States v Silk*, 331 US 704 (1947) ('*Silk*'); *Rutherford Ford Corp v McComb*, 331 US 722 (1947) ('*Rutherford*'). These cases are cited in Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (Thesis Chapter 3) (n 54) 375 nn 24–5.
[172] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 381 ALR 457, 506 ('*Personnel Contracting*'); *Eastern Van Services Pty Ltd v Victorian WorkCover Authority* (2020) 296 IR 391, 396 n 4 ('*Eastern Van*').
[173] Stewart and McCrystal, 'Labour Regulation and the Great Divide' (n 50) 6 n 4; Tess Hardy, 'Working for the Brand: The Regulation of Employment in Franchise Systems in Australia' (2020) 48(3) *Australian Business Law Review* 234, 236 n 19; Irving, *The Contract of Employment* (2nd ed) (n 108) 61 n 53, 62 n 57.

Chapter 4 ('Subsequent Conduct, Construction and Characterisation in Employment Contract Law') was published in the *Journal of Contract Law*.[174] This chapter considers the rule of contract law that precludes recourse to evidence of subsequent conduct for the purposes of construing a contract.[175] As explained below, this 'exclusionary rule'[176] presents a hurdle to the interventionist approach to characterisation. This chapter reconciles the use of evidence of post-contractual conduct in the characterisation exercise with this exclusionary rule by reconceptualising the characterisation framework and deconstructing the characterisation process into two separate stages.[177] Other scholars, in both the contract law and labour law fields, have cited the article that comprises Chapter 4.[178]

Chapter 5 ('Intention, Pretence and the Contract of Employment') was published in the *Journal of Contract Law*.[179] This chapter explains the role of the parties' intentions in the characterisation exercise. An interventionist approach to characterisation involves privileging the post-contractual conduct of the parties over their intentions with respect to the legal characterisation of their contract. This thesis justifies this approach by arguing that the concept of intention is used in different senses, which are not always clearly articulated in the case law,

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[174] Pauline Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (2015) 32(2) *Journal of Contract Law* 149.

[175] *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, 582 (Gummow, Hayne and Kiefel JJ) ('*Agricultural and Rural Finance*'), quoting *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, 603 (Lord Reid) ('*Whitworth*'); *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, 252, 260, 261, 269, 272 ('*Schuler*'); NC Seddon and RA Bigwood, *Cheshire & Fifoot Law of Contract* (LexisNexis Butterworths, 11th Australian ed, 2017) 448–9; JW Carter, *Contract Law in Australia* (LexisNexis Butterworths, 7th ed, 2018) 264–5. See also Gerard McMeel, 'Prior Negotiations and Subsequent Conduct — The Next Step Forward for Contractual Interpretation?' (2003) 119 (April) *Law Quarterly Review* 272, 290–3; Lord Nicholls, 'My Kingdom for a Horse: The Meaning of Words' (2005) 121 (October) *Law Quarterly Review* 577, 588–9; David McLauchlan, 'Contract Formation, Contract Interpretation, and Subsequent Conduct' (2006) 25(1) *University of Queensland Law Journal* 77; J Edward Bayley, 'Prior Negotiations and Subsequent Conduct in Contract Interpretation: Principles and Practical Concerns' (2011–12) 28(3) *Journal of Contract Law* 179, cited in Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (Thesis Chapter 4) (n 27) 149 nn 1–2.

[176] JW Carter, *The Construction of Commercial Contracts* (Hart Publishing, 2013) §§6-05, 8-04. This thesis adopts the terminology that Professor John Carter used to explain this rule. The rule is referred to as the 'exclusionary rule' throughout the thesis.

[177] Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (Thesis Chapter 4) (n 27) 166–7.

[178] Stewart and McCrystal, 'Labour Regulation and the Great Divide' (n 50) 8 n 20; Irving, *The Contract of Employment* (2nd ed) (n 108) 52 n 17, 95 n 221, 102 n 258; Stewart et al, *Creighton and Stewart's Labour Law* (n 1) 211 n 136; JW Carter, *Contract Law in Australia* (n 175) 265 n 91; Andrew Stewart, Warren Swain and Karen Fairweather, *Contract Law: Principles and Context* (Cambridge University Press, 2019) 170 n 20; JW Carter, Wayne Courtney and Gregory Tolhurst, 'Assessment of Contractual Penalties: *Dunlop* Deflated' (2017) 34 *Journal of Contract Law* 4, 15 n 81.

[179] Pauline Bomball, 'Intention, Pretence and the Contract of Employment' (2019) 35(3) *Journal of Contract Law* 243.

in the characterisation exercise.[180] It contends that the concept of the 'parties' intentions' operates in a confined way in the context of characterisation, and this explains why the parties' intentions with respect to the legal characterisation of their contract cannot be determinative.[181] The article that comprises Chapter 5 has been cited in a contract law text.[182]

Chapter 6 ('The Attribution of Responsibility in Trilateral Work Relationships: A Contractual Analysis') was published in the *Australian Journal of Labour Law*.[183] This chapter presents a particular application of the arguments that this thesis makes about privileging substance over form. The chapter argues that the concept of an implied contract of employment, which has been used in some cases to attribute employment-related obligations to a host company in a labour hire relationship,[184] may be rationalised by reference to the principles that enable courts to focus on the underlying substance of a relationship.[185] The article that comprises Chapter 6 has been listed as further reading in a labour law text[186] and cited in a text on the contract of employment.[187]

Chapter 7 ('The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique') has been accepted for publication and is forthcoming in the *University of New South Wales Law Journal*.[188] This chapter considers the issue of employment status. It draws upon theories of vulnerability and power in the employment relationship to defend, from a normative worker-protective perspective, a particular judicial approach that it terms the 'entrepreneurship approach' to determining employment status.[189] This approach, which has been embraced in some Australian cases but rejected in others,[190] treats the concept of entrepreneurship as the organising principle for the legal determination of

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[180] Ibid 245–7, 256–61.
[181] Ibid 258.
[182] Stewart, Swain and Fairweather, *Contract Law: Principles and Context* (n 178) 170 n 21.
[183] Pauline Bomball, 'The Attribution of Responsibility in Trilateral Work Relationships: A Contractual Analysis' (2016) 29(3) *Australian Journal of Labour Law* 305.
[184] See below nn 481–491 and accompanying text.
[185] Bomball, 'The Attribution of Responsibility in Trilateral Work Relationships: A Contractual Analysis' (Thesis Chapter 6) (n 183) 322–5.
[186] Andrew Stewart, *Stewart's Guide to Employment Law* (Federation Press, 6th ed, 2018) 86.
[187] Irving, *The Contract of Employment* (2nd ed) (n 108) 128 n 6.
[188] Pauline Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (2021) 44(4) *University of New South Wales Law Journal* (forthcoming).
[189] Ibid 10–11, 20–5.
[190] See below 238–252.

employment status.[191] In substantiating its arguments, Chapter 7 draws upon two lines of case law in the US.[192]

Chapter 8 ('Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law') was recently published in the *Sydney Law Review*.[193] This chapter complements the analysis in Chapter 7. It presents a doctrinal basis for the entrepreneurship approach to determining employment status. Australian courts have stated that the concept of employment is anchored in the law of vicarious liability and informed by the rationales underlying that doctrine.[194] Chapter 8 of the thesis analyses the rationales underlying vicarious liability and argues that these rationales support the entrepreneurship approach to determining employment status.[195]

VI OVERVIEW OF THE KEY ARGUMENTS IN THE ARTICLES

This part of the integrative chapter draws together and summarises the key arguments that are presented in the articles that comprise this thesis. It explains how those articles, when read together, provide the answers to the research questions that this thesis addresses. As noted in the introduction, this thesis addresses two research questions. The first question concerns the conceptual and doctrinal justifications for the interventionist approach to the characterisation of work contracts. The second question concerns the analytical framework for the characterisation exercise.

A key aspect of the interventionist approach involves a preference for substance over form. There is, however, an additional point that must be addressed, and that relates to how the notion of employment status is conceptualised. In some Australian cases where courts have privileged substance over form in the characterisation of a work contract, the courts have focused on

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[191] *Personnel Contracting* (n 172) 461–3 (Allsop CJ); *Trifunovski* (n 4) 170, 182–6 (Buchanan J); Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 91, 101–4.
[192] See below 526–527.
[193] Pauline Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (2021) 43(1) *Sydney Law Review* 83.
[194] See, eg, *C v Commonwealth* (n 7) 87 (Tracey, Buchanan and Katzmann JJ); *Trifunovski Trial* (n 68) 542–3 (Perram J); *Trifunovski* (n 4) 149 (Lander J), 182 (Buchanan J); *Hollis* (n 7) 41 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Sweeney* (n 68) 173 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
[195] Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 101–4.

ascertaining the underlying 'economic reality'[196] of the relationship. There is, however, uncertainty about how precisely a court is to go about ascertaining that economic reality. Accordingly, in addition to justifying the privileging of substance over form, an interventionist model must provide an account of how the courts are to understand and interpret that substance in order to reach a finding of employment or independent contracting. The final two chapters of this thesis therefore address the notion of employment status in order to provide a complete model for the interventionist approach.

At present, there are uncertainties in the Australian case law with respect to both issues noted in the preceding paragraph: the first regarding the formalist-substantivist dichotomy, and the second concerning how employment status is conceptualised. With respect to the first issue, judges have adopted diverging approaches as to the post-contractual conduct of the parties in the characterisation exercise.[197] In relation to the second issue, a primary point of contestation pertains to the conceptual salience of the notion of entrepreneurship in the determination of employment status.[198] Some judges have accorded the concept of entrepreneurship a central role in the inquiry as to employment status,[199] while others have rejected such an approach.[200] This thesis favours a particular conceptualisation of employment status which treats the concept of entrepreneurship as the organising principle for the legal determination of employment status.[201] It refers to this approach as the 'entrepreneurship approach' to determining employment status.[202]

This part of the integrative chapter proceeds in the following manner. Section A explains the current judicial approaches to the characterisation of work contracts in Australia. It outlines the uncertainties pertaining to the formalist-substantivist dichotomy and the conceptualisation of employment status in the characterisation cases. Section B presents the conceptual and doctrinal justifications for the two components of the model of interventionist characterisation

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[196] See, eg, *On Call Interpreters* (n 4) 120–3 (Bromberg J); *Personnel Contracting* (n 172) 482 (Lee J); *Re Porter* (1989) 34 IR 179, 184–5 (Gray J).
[197] See below nn 211–234 and accompanying text.
[198] See below nn 238–252 and accompanying text.
[199] See, eg, *Personnel Contracting* (n 172) 461–3 (Allsop CJ).
[200] See, eg, *Tattsbet Ltd v Morrow* (2015) 233 FCR 46, 61 (Jessup J) ('*Tattsbet*').
[201] *Personnel Contracting* (n 172) 461–3 (Allsop CJ); *Trifunovski* (n 4) 170, 182–6 (Buchanan J); Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 91, 101–4.
[202] Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (Thesis Chapter 7) (n 70).

that this thesis favours: the substantivist approach and the entrepreneurship approach.[203] Section C then presents the reconceptualisation of the characterisation framework that this thesis proposes. It also illustrates the practical operation of the proposed framework by explaining how two recent Australian cases might have been decided differently had the proposed framework been applied.

A *Current Approaches to the Characterisation of Work Contracts in Australia*

In *Stevens v Brodribb Sawmilling Co Pty Ltd* ('*Brodribb*'),[204] the High Court of Australia adopted a multifactorial test for distinguishing employees from independent contractors. This test was subsequently reaffirmed by a majority of the High Court in *Hollis v Vabu Pty Ltd* ('*Hollis*').[205] This multi-factorial test requires courts to take into account a number of factors. The factors that are to be considered include whether the employing entity has the right to control the worker (and the nature and extent of that control), whether the worker is remunerated on the basis of output or time, whether the employing entity or the worker has responsibility for the supply and maintenance of the equipment that is used to carry out the work, whether the worker is allowed to work for other entities, whether the worker has a right to delegate the work to somebody else or is instead required to perform the work personally, whether the worker has an opportunity to make a profit or assumes the risk of loss, whether the employing entity provides the worker with leave benefits, and whether the employing entity deals with matters such as taxation, superannuation and insurance on behalf of the worker.[206]

Some of these factors point towards an employment contract, while others point towards an independent contract. For example, supply of equipment by the employing entity and a right on the part of the employing entity to exercise control over the worker point towards employment. Supply of equipment by the worker and payment by reference to output rather than time, for example, point towards independent contracting. Under this multifactorial test, courts are to weigh up the factors in order to reach a conclusion as to the character of the work contract.[207]

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[203] Ibid 22–5.
[204] *Brodribb* (n 7) 24 (Mason J), 36–7 (Wilson and Dawson JJ).
[205] *Hollis* (n 7) 33 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).
[206] *Brodribb* (n 7) 24 (Mason J), 36–7 (Wilson and Dawson JJ); *Hollis* (n 7) 33 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Trifunovski* (n 4) 152–73 (Buchanan J).
[207] *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939, 944 (Mummery J); *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2010) 184 FCR 448, 460 (Keane CJ, Sundberg and Kenny JJ); *Brodribb* (n 7) 29 (Mason J); *Hollis* (n 7) 33 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ), cited in Bomball,

The significance of the requirement of personal service has been emphasised in the case law.[208] Employment is regarded as a contractual relationship that requires the rendering of personal service. Accordingly, if the worker has an unqualified right to delegate his or her work to somebody else, then that will likely prevent the court from characterising the contract as one of employment.[209] Aside from the requirement of personal service, all other factors are of themselves not conclusive. The factors are to be weighed and balanced against each other, with the High Court making it clear in *Brodribb* and *Hollis* that courts must take into account 'the totality of the relationship'.[210]

There are several uncertainties concerning the multifactorial test. Two of the most significant uncertainties relate to the post-contractual conduct of the parties, and to how employment status is conceptualised.

1 *Post-Contractual Conduct and the Written Contract*

Employing entities may use a range of contractual techniques to attempt to disguise employees as independent contractors.[211] An employing entity might, for example, insert into the work contract a term stating that the relationship between the parties is one of independent contracting rather than employment. The courts have stated that such 'labels' are not determinative of the character of the relationship.[212] If the contract, properly construed, is such that the relationship is one of employment, then the contract will be characterised as one of employment.[213] Despite these general principles, there are varying judicial approaches to labels, with some judges giving more weight to labels than others.[214]

'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (Thesis Chapter 3) (n 54) 378 n 46.

[208] *Trifunovski* (n 4) 150 (Buchanan J); *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385, 391 (Lord Fraser for the Court) ('*Chaplin*'); *Brodribb* (n 7) 38 (Wilson and Dawson JJ), cited in Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (Thesis Chapter 3) (n 54) 378 n 44.

[209] Ibid.

[210] *Brodribb* (n 7) 29 (Mason J); *Hollis* (n 7) 33 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

[211] Stewart, 'Redefining Employment?' (n 2) 242–51; Bogg, 'Sham Self-Employment in the Supreme Court' (n 2) 328–9.

[212] *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, 512–13 (MacKenna J) ('*Ready Mixed Concrete*'); *Massey v Crown Life Insurance Co* [1978] 1 WLR 676, 679 (Lord Denning MR) ('*Massey*'); *Trifunovski* (n 4) 152–3 (Buchanan J).

[213] Ibid.

[214] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 19–21.

In addition to inserting labels into work contracts, employing entities seeking to avoid a finding of employment may include terms in the contract that point away from an employment contract and towards an independent contract.[215] An employing entity might, for example, include terms in the written contract which indicate that the employing entity has only a limited right to control the worker and which confer upon the worker an unqualified right to delegate the work.[216] The relationship may, in practice, function differently to the terms of the written contract. The employing entity may exercise a high degree of control over the worker, and the worker may not be able to delegate his or her work.[217]

This disjunction between form and substance is one reason why the adoption of an interventionist as opposed to a deferential approach to characterisation has practical implications.[218] A deferential approach, which privileges contractual form over the underlying substance of the relationship, makes it easier for employing entities to disguise employees as independent contractors.[219] The interventionist approach focuses on the substance of the relationship. It involves recourse not only to the written contractual terms, but also to how the parties carried out their relationship in practice. Courts that adopt an interventionist approach are better able to address instances of disguised employment.

This section traces the uncertainties with respect to the post-contractual conduct of the parties through some of the key cases. A more detailed discussion of the case law appears in Chapter 4 of the thesis.[220] The starting point for this analysis is the rule of general contract law that precludes courts from taking into account evidence of post-contractual conduct for the purposes of construing a written contract.[221] In *Agricultural and Rural Finance Pty Ltd v Gardiner* ('*Agricultural and Rural Finance*'), Gummow, Hayne and Kiefel JJ of the High Court of

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[215] Stewart, 'Redefining Employment' (n 2) 242–5.
[216] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 18–19.
[217] Ibid.
[218] Ibid.
[219] *On Call Interpreters* (n 4) 121 (Bromberg J). See further Mark Freedland, 'The Legal Structure of the Contract of Employment' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 28, 36.
[220] This thesis does not deal with *WorkPac Pty Ltd v Rossato* (2020) 296 IR 38 ('*Rossato*'), because that case addressed a specific point concerning casual workers that is beyond the scope of this thesis. The High Court of Australia will hear the appeal in *Rossato* later in 2021.
[221] *Agricultural and Rural Finance* (n 175) 582 (Gummow, Hayne and Kiefel JJ), quoting *Whitworth* (n 175) 603 (Lord Reid).

Australia stated the rule in the following way: '[I]t is not legitimate to use as an aid in the construction of [a] contract anything which the parties said or did after it was made.'[222] In some cases, this exclusionary rule has been applied to work contracts. The rule was applied, for example, in *Australian Mutual Provident Society v Chaplin* ('*Chaplin*')[223] and *Narich Pty Ltd v Commissioner of Pay-Roll Tax* ('*Narich*'),[224] both of which were decisions of the Privy Council that involved the characterisation of a work contract. Similarly, in *Connelly v Wells*, a decision of the New South Wales Court of Appeal, Gleeson CJ observed that '[w]here the relationship between two persons is founded in contract, the character of the relationship depends upon the meaning and effect of the contract.'[225]

Judges who have adopted an opposing approach to the characterisation of work contracts have relied upon the following passage from *Hollis*:

> It should be added that the relationship between the parties, for the purposes of this litigation, is to be found not merely from these contractual terms. The system which was operated thereunder and the work practices imposed by Vabu go to establishing 'the totality of the relationship' between the parties; it is this which is to be considered.[226]

This passage has been invoked in some decisions to justify recourse to post-contractual conduct in the characterisation of a work contract.[227] In *ACE Insurance Ltd v Trifunovski* ('*Trifunovski*'), a decision of the Full Federal Court of Australia, Buchanan J stated:

> Gleeson CJ in *Connelly v Wells*, and the Privy Council in *Chaplin* and *Narich*, expressed the view that the terms of the contract establishing the legal parameters of the relationship were the appropriate point of reference, and that post-contractual conduct was not relevant. The principle is, of course, well-established in contract law. However, in cases of the present kind, where it is necessary to examine whether a particular relationship is one of

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[222] Ibid.
[223] *Chaplin* (n 208).
[224] [1983] 2 NSWLR 597.
[225] (1994) 55 IR 73, 74 (Gleeson CJ).
[226] *Hollis* (n 7) 33 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).
[227] See, eg, *Quest* (n 4) 378 (North and Bromberg JJ); *Trifunovski* (n 4) 174 (Buchanan J); *On Call Interpreters* (n 4) 119–21 (Bromberg J).

> employment, or of a different character, it now seems established in Australian law that all the circumstances should be taken into account.[228]

For the reasons that are explained in Chapter 4 of the thesis, the passage from *Hollis* does not necessarily support the proposition that post-contractual conduct may be taken into account in the characterisation exercise.[229] While *Hollis* has been referred to in later cases for that proposition,[230] the opposing approach adopted in *Connelly v Wells*, *Chaplin* and *Narich* has been applied in other cases that have been handed down since *Hollis*.[231]

These inconsistencies and uncertainties persist in Australian law. In *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* ('*Personnel Contracting*'),[232] a decision of the Full Federal Court that was handed down in 2020, Allsop CJ drew attention to the divergent approaches among Australian courts. His Honour stated that the 'question of the circumstantial weight of contractual terms is sufficiently varied in application by different courts, but potentially so crucial, that it is not for an intermediate court of appeal to seek to state a binding expression of approach.'[233] His Honour also made the following observation:

> [W]hilst what might be seen as a contract-centred or dominated approach in *Connelly v Wells*, *Chaplin* and *Narich* is difficult to reconcile with *Hollis v Vabu* and other cases that emphasise the analysis of the whole relationship, they cannot be dismissed as irrelevant, being judgments of the New South Wales Court of Appeal, authored by Gleeson CJ, and of the Privy Council.[234]

2 *Employment Status*

There is uncertainty in the Australian case law as to how employment status is conceptualised. A key aspect of this uncertainty centres on the concept of entrepreneurship. The question is

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[228] *Trifunovski* (n 4) 174 (Buchanan J).
[229] Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (Thesis Chapter 4) (n 27) 156–7. Stewart, 'Redefining Employment?' (n 2) 249–51.
[230] See, eg, *Quest* (n 4) 378 (North and Bromberg JJ); *Trifunovski* (n 4) 174 (Buchanan J); *On Call Interpreters* (n 4) 119–21 (Bromberg).
[231] See, eg, *Tobiassen* (n 3); *Langford* (n 3); *Young* (n 3). See further *Creighton and Stewart's Labour Law* (n 1) 212–3 where these cases, and others, are addressed.
[232] *Personnel Contracting* (n 172).
[233] Ibid 467 (Allsop CJ).
[234] Ibid 466. See below n 592.

whether the concept of entrepreneurship should be the touchstone for determining employment status.[235] The concept of entrepreneurship in this context is derived from the following statement of Windeyer J of the High Court of Australia in *Marshall v Whittaker's Building Supply Co* ('*Marshall*'): '[T]he distinction between [an employee] and an independent contractor is … rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own.'[236] A majority of the High Court endorsed this statement in *Hollis*.[237]

Chapter 8 of the thesis demonstrates that there are at least three different judicial approaches to the concept of entrepreneurship in Australian cases involving the characterisation of work contracts.[238] The first approach is illustrated by the decision of Bromberg J of the Federal Court of Australia in *On Call Interpreters*. In this case, Bromberg J placed entrepreneurship at the centre of the inquiry as to employment status. His Honour treated entrepreneurship as a separate test for determining the legal character of a work contract.[239] In essence, the approach that Bromberg J enunciated involves asking whether the worker is carrying on a business of his or her own, with a negative answer to that question rendering a finding of employment likely.[240] The approach propounded in *On Call Interpreters* was subsequently endorsed by North and Bromberg JJ in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* ('*Quest*'),[241] which was a decision of the Full Federal Court of Australia.

According to the second approach, the concept of entrepreneurship also occupies a central place in the determination of employment status, but it is not treated as a separate legal test.[242] Instead, the concept of entrepreneurship is treated as the organising principle that informs the application of the multifactorial test that was adopted in *Brodribb* and affirmed in *Hollis*.[243] That is, the factors in that test are evaluated with a view to determining whether the worker is

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[235] The discussion in this section of the integrative chapter is based on Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 89–93.
[236] (1963) 109 CLR 210, 217.
[237] *Hollis* (n 7) 39 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).
[238] Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 89–93.
[239] *On Call Interpreters* (n 4) 123 (Bromberg J).
[240] Ibid.
[241] *Quest* (n 4) 389–92 (North and Bromberg JJ).
[242] *Personnel Contracting* (n 172) 461–3 (Allsop CJ); *Trifunovski* (n 4) 170, 182–6 (Buchanan J).
[243] Ibid.

carrying on a business of his or her own.[244] A negative answer to this question inclines the court to the conclusion that the worker is an employee.[245] This second approach, which this thesis terms the 'entrepreneurship approach' to determining employment status, is the one that is favoured by this thesis.[246] Under both the first and second approaches, a dichotomy is created between entrepreneurs and employees; both approaches essentially designate as employees those workers who are not entrepreneurs.[247] The difference between the two pertains to the function that is accorded to the concept of entrepreneurship. Whereas under the first approach entrepreneurship functions as a separate test for determining employment status, under the second approach the concept of entrepreneurship is the organising principle for the determination of employment status.[248]

The third approach rejects the significance of the concept of entrepreneurship.[249] Under this approach, the concept of entrepreneurship is treated as one factor in the multifactorial test.[250] The question whether the worker is carrying on a business on his or her own account is to be considered and weighed against the other factors in the multifactorial test. This approach is reflected in the Full Federal Court's decision in *Tattsbet Ltd v Morrow*.[251] In this case, Jessup J observed that asking whether the worker is carrying on his or her own business 'deflect[s] attention from the central question, whether the person concerned is an employee or not.'[252]

3 *Two Analytically Distinct Questions*

In addition to developing the conceptual and doctrinal justifications for the interventionist approach to characterisation, this thesis reconceptualises the characterisation framework. This

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[244] Ibid.
[245] Ibid.
[246] Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (Thesis Chapter 7) (n 70) 10–11, 20–5; Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 91, 101–5.
[247] Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 85.
[248] Ibid 91.
[249] Ibid 92.
[250] Ibid.
[251] *Tattsbet* (n 200). See also *Fair Work Ombudsman v Ecosway Pty Ltd* [2016] FCA 296, [78] (White J) ('*Ecosway*'); *Jamsek v ZG Operations Australia Pty Ltd* (2020) 297 IR 210, 216 (Perram J), 245–6 (Anderson J) ('*Jamsek*'); *Dental Corporation Pty Ltd v Moffet* (2020) 297 IR 183, 199–200 (Perram and Anderson JJ) ('*Moffet*'); *Eastern Van* (n 172) 399–400 (Tate, Kyrou and Niall JJA), cited in Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 85 n 21. On 12 February 2021, the High Court of Australia granted the application for special leave to appeal the *Jamsek* decision: see Transcript of Proceedings, *ZG Operations Australia Pty Ltd v Jamsek* [2021] HCATrans 27.
[252] *Tattsbet* (n 200) 61 (Jessup J).

proposed reconceptualisation has implications that are substantive rather than merely process-based in nature. The reconceptualisation is proposed in part to surmount the rule that precludes the use of evidence of post-contractual conduct in construction.[253] Drawing upon the cases and literature in other fields of law that have considered the characterisation issue, this thesis deconstructs the characterisation of a work contract into two stages.[254] At the first stage, the court ascertains the actual rights and obligations of the parties.[255] At the second stage, the court determines the legal character of the contract by reference to the attributes of employment.[256] This thesis argues that at the first stage of the characterisation exercise, the court is ascertaining the terms of the parties' agreement, rather than discerning the meaning of those terms by way of construction.[257] Construction takes place at the second stage of the characterisation exercise, and not at the first stage. Accordingly, this thesis contends that the rule precluding recourse to post-contractual conduct for the purposes of construction does not apply at the first stage of the characterisation exercise.[258]

Chapter 4 notes that this two-stage process for the characterisation of work contracts 'is not the approach currently adopted by Australian courts.'[259] The current multifactorial test (as adopted in *Brodribb* and affirmed in *Hollis*) comprises a range of factors, such as control, delegation and the mode of remuneration, that this thesis terms the 'attributes of employment'.[260] Under the current test, there is an absence of clarity as to the weight that is to be accorded to the terms of the parties' written contract.[261] What weight should be ascribed to those written contractual terms when determining whether a particular factor in the multifactorial test (that is, an attribute of employment) is present or absent? For example, when a court is determining whether a worker has a right to delegate or not, should the court ascribe greater weight to the written contractual terms or the conduct of the parties in practice to determine whether that right is present or absent? This in turn depends upon questions of admissibility and weight of the parties' post-contractual conduct, which are outlined below and detailed in Chapter 4. The

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[253] Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (Thesis Chapter 4) (n 27).
[254] Ibid 166–7.
[255] Ibid.
[256] Ibid.
[257] Ibid.
[258] Ibid.
[259] Ibid 150.
[260] Bomball, 'Intention, Pretence and the Contract of Employment' (Thesis Chapter 5) (n 28) 257–8.
[261] *Personnel Contracting* (n 172) 467 (Allsop CJ).

reconceptualisation of the characterisation framework that this thesis proposes seeks to separate out these two analytically distinct questions, one of which concerns the actual rights and obligations of the parties, and the other of which concerns the attributes of employment. This thesis suggests that the adoption of its proposed two-stage framework for characterisation might enable the distinct considerations underlying each stage to be explicated with greater clarity and precision.[262]

In *Hollis*, the majority adopted the proposition from *Brodribb* that courts must take into account the 'totality of the relationship'[263] when applying the multifactorial test. However, the phrase 'totality of the relationship' does not resolve the uncertainties concerning the admissibility of, and weight to be accorded to, the post-contractual conduct of the parties.[264] As noted in Chapter 4, the phrase 'totality of the relationship' comes from Mason J's judgment in *Brodribb*.[265] His Honour had stated: '[C]ontrol is not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered.'[266] The following observation is made in Chapter 4 of this thesis:

> Mason J appeared to use 'totality of the relationship' simply to indicate that the legal test for characterisation involves an analysis of a variety of factors (such as the mode of remuneration, the provision of equipment and the right to delegate), only one of which is control. This is not tantamount to saying that, in determining whether such factors are present or absent, regard must be had to the way the parties conducted themselves after entry into the contract.[267]

Part of this thesis is thereby devoted to developing conceptual and doctrinal justifications for the admission and use of evidence of post-contractual conduct in the characterisation of work contracts.

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[262] Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (Thesis Chapter 4) (n 27) 150–1.
[263] *Brodribb* (n 7) 29 (Mason J); *Hollis* (n 7) 33 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).
[264] Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (Thesis Chapter 4) (n 27) 156–7.
[265] Ibid 156, citing *Brodribb* (n 7) 29 (Mason J).
[266] *Brodribb* (n 7) 29 (Mason J).
[267] Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (Thesis Chapter 4) (n 27) 156–7; Stewart, 'Redefining Employment?' (n 2) 249 n 71.

B *Justifications for the Interventionist Approach to Characterisation*

The preceding section outlined two major uncertainties in the case law that are relevant to the interventionist approach to the characterisation of work contracts. The first concerns the formalist-substantivist dichotomy, and the second concerns the conceptualisation of employment status. This section presents the conceptual and doctrinal justifications for the two components of the model of interventionist characterisation that this thesis favours: the substantivist approach and the entrepreneurship approach. It summarises and draws together the key arguments that are advanced in the articles that comprise this thesis. It also explains how the author's views on particular issues have evolved over time as the case law on the characterisation of work contracts has developed.

1 *A Proposed Justification for the Substantivist Approach*

A substantivist approach to the characterisation of work contracts, which involves privileging substance over form, is to be preferred from a normative worker-protective perspective.[268] Labour law scholars have advocated for a substantivist approach to characterisation.[269] Some scholars have put forward proposals for enshrining the substantivist approach in statute.[270] Others have considered how the substantivist approach might be supported by common law principles.[271] This thesis falls within that latter body of literature. It seeks to develop justifications anchored in the common law for the substantivist approach to the characterisation of work contracts. This thesis makes an original contribution to that body of literature by putting forward conceptual and doctrinal justifications for the substantivist approach that are different from those that have been proposed in the literature.

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[268] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 4.

[269] See, eg, Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 5) 377; ACL Davies, 'Sensible Thinking about Sham Transactions' (2009) 38(3) *Industrial Law Journal* 318, 327–8; Bogg, 'Sham Self-Employment in the Supreme Court' (n 2) 336–9.

[270] Professor Andrew Stewart has advocated for statutory implementation of an approach that presumes that a worker is an employee unless it can be established that he or she is, in practice, carrying on a business of his or her own: see Stewart, 'Redefining Employment?' (n 2) 270–6; Roles and Stewart, 'The Reach of Labour Regulation: Tackling Sham Contracting' (n 50) 279–80; Stewart and McCrystal, 'Labour Regulation and the Great Divide' (n 50) 21–2. As noted below at n 519 and accompanying text, Professor Stewart makes a compelling proposal for statutory reform. This thesis considers whether the entrepreneurship approach (combined with the substantivist approach) might instead be operationalised by way of the common law.

[271] See, eg, Davies, 'Sensible Thinking about Sham Transactions' (n 269); Bogg, 'Sham Self-Employment in the Supreme Court' (n 2); Alan Bogg, 'Common Law and Statute in the Law of Employment' (2016) 69(1) *Current Legal Problems* 67, 98–111; Bogg, 'The Common Law Constitution at Work' (n 5) 520–4; ACL Davies, 'The Relationship between the Contract of Employment and Statute' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 73, 85–6; Davies, 'Employment Law' (n 88) 184–8.

(a) The Two Dimensions of the Characterisation Exercise

Chapter 2 develops a conceptual framework for justifying judicial interferences with the parties' contractual autonomy in cases involving the characterisation of work contracts.[272] The chapter commences with an examination of the private and the public dimensions of the characterisation exercise.[273] As many labour statutes operate by reference to the concept of employment at common law, the contract of employment is a primary mechanism for conferring the rights and protections of labour law.[274] When a court is determining the legal character of a work contract, it is giving effect to the intention of the parties and enforcing their private bargain, as mandated by contract law.[275] At the same time, the court is delineating the protective boundaries of an instrument of 'public' labour regulation.[276] Judicial oscillations between deference and intervention in the case law are referable in part to the normative tensions that arise by virtue of these two dimensions of the characterisation exercise.[277]

In constructing a justification for the first component of the interventionist approach to characterisation (the substantivist approach), Chapter 2 considers the implications arising from the fact that employment is a contractual relationship.[278] Chapter 2 observes that the contractual foundation of employment 'brings into play the values and norms of general contract law.'[279] One of those values, which is central to contract law, is that of contractual autonomy.[280] Manifestations of the value of contractual autonomy are evident in a variety of contractual principles.[281] These include the principles of contractual construction, which require the courts to discern and give effect to the intention of the parties.[282]

Contract law assumes that the parties are rational and autonomous agents who have equal bargaining power and are in a position to strike a bargain that accords with their own best

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[272] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 3.
[273] Ibid 9–17.
[274] Ibid 15, citing Bogg, 'The Common Law Constitution at Work' (n 5) 522.
[275] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 15–17, citing Bogg, 'The Common Law Constitution at Work' (n 5) 516, 522; Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 5) 375.
[276] Ibid.
[277] Ibid.
[278] *Byrne* (n 67) 436 (McHugh and Gummow JJ).
[279] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 12.
[280] Ibid 9–13.
[281] Ibid 10, citing Worthington (n 21) 303–5.
[282] Ibid 10, citing Worthington (n 21) 305; Carter, *The Construction of Commercial Contracts* (n 176) §2-11.

interests.[283] It assumes that the parties freely consent to their bargain.[284] Chapter 2 notes that under the orthodox principles of contract law, the legitimate function of the court is to discern and give effect to the intention of the parties, and to enforce the bargain that they have reached.[285] It is not to interfere with or intervene in the bargain. In *Proctor & Gamble Co v Svenska Cellulosa Aktiebolaget SCA*, Moore-Bick LJ made the following observation:

> [T]he starting point must be the words the parties have used to express their intention and in the case of a carefully drafted agreement of the present kind the court must take care not to fall into the trap of re-writing the contract in order to produce what it considers to be a more reasonable meaning.[286]

Writing on the contract of employment, Sir Patrick Elias has observed that courts 'cannot rewrite the contract; they cannot strike down a bargain because they would prefer it to have been formulated in a different way or because they think it in some general sense inequitable.'[287]

Chapter 2 acknowledges that the interventionist approach to characterisation involves a form of judicial interference with the contractual autonomy of the parties.[288] Under the interventionist approach, judges disregard or accord limited weight to the written contract where there is a disjunction between form and substance.[289] Clear and principled justifications are required for such judicial intervention.[290] Chapter 2 does not suggest that contractual autonomy is the only value that underpins contract law.[291] Moreover, it does not suggest that the classical theory of contract law, of which freedom of contract is a central tenet, subsists in

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[283] See PS Atiyah, *An Introduction to the Law of Contract* (Clarendon Press, 5th ed, 1995) 8–15.
[284] Ibid 9.
[285] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 10, citing Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 5) 375; Worthington (n 21) 304.
[286] [2012] EWCA Civ 1413 [22], quoted in Worthington (n 21) 307.
[287] Patrick Elias, 'Changes and Challenges to the Contract of Employment' (2018) 38(4) *Oxford Journal of Legal Studies* 869, 885–6.
[288] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 11.
[289] Ibid.
[290] Ibid, citing Worthington (n 21) 301–2.
[291] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 11, citing Roger Brownsword, 'The Law of Contract: Doctrinal Impulses, External Pressures, Future Directions' (2014) 31(1) *Journal of Contract Law* 73, 75–6, cited in Worthington (n 21) 302 n 7. See also Douglas Brodie, 'The Autonomy of the Common Law of the Contract of Employment from the General Law of Contract' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 124, 125–7.

an untempered manner in the modern law of contract.[292] There are a number of doctrines of contract law and equity that permit some degree and form of judicial intervention in private bargains.[293] Examples include the equitable doctrines of undue influence and unconscionable conduct.[294] The question is not whether judicial intervention is permitted. Instead, the relevant question concerns the basis on which intervention is permitted.

Chapter 2 has regard to the fact that the assumptions that contract law makes about the parties do not accurately reflect the realities of contracting in the work context.[295] It refers to Sir Otto Kahn-Freund's observation that the contract of employment serves to cloak a relation marked by subordination in the veneer of equality of bargaining power.[296] Chapter 2 argues that the value of contractual autonomy 'must be tempered by the concerns of public policy',[297] which in characterisation cases involves ensuring that the 'public goods'[298] of statutory labour regulation are not diminished by the avoidance practices engaged in by some employing entities. There is a tension between the demands of contractual autonomy and public policy, with these demands pulling in different directions (the former towards deference; the latter towards intervention).

This thesis argues that courts should take into account 'all the relevant evidence,'[299] including the terms of the written contract and the way that the parties carried out their relationship in practice, when determining the rights and obligations of the parties.[300] Where there is a

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[292] PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford, 1979).
[293] Owens, Riley and Murray, *The Law of Work* (n 33) 222–5.
[294] Ibid 223–5. On undue influence, see, eg, *Johnson v Buttress* (1936) 56 CLR 113; *Thorne v Kennedy* (2017) 263 CLR 85. On unconscionable conduct, see, eg, *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392.
[295] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 14.
[296] Ibid, quoting Kahn-Freund, *Labour and the Law* (n 120) 8.
[297] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 13.
[298] Ibid 16, citing Bogg, 'The Common Law Constitution at Work' (n 5) 516.
[299] *Autoclenz* (n 87) 756 (Lord Clarke for the Court), quoting *Autoclenz v Belcher* [2010] IRLR 70, 77 (Smith LJ) ('*Autoclenz* (*Court of Appeal*)'). The phrase 'all the relevant evidence' comes from *Autoclenz*. See below n 313. However, as explained below in Part VI(B)(1)(c)–(d) of this integrative chapter, this thesis develops justifications for the admission and use of 'all the relevant evidence' in the characterisation exercise that are different from those justifications propounded in *Autoclenz* and the UK literature that has analysed *Autoclenz*.
[300] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 21, 27–33; Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (Thesis Chapter 4) (n 27) 160–1, 166–8; Bomball, 'Intention, Pretence and the Contract of Employment' (Thesis Chapter 5) (n 28) 252–4, 256–9.

disjunction between form and substance, substance is to prevail.[301] Terms in the written contract, such as terms conferring unqualified rights of delegation, that do not reflect the way the parties conducted their relationship in practice are to be disregarded.[302] Terms that are disregarded are not taken into account at the second stage of the framework presented by this thesis, when the court is weighing up the various factors to determine whether the worker is an employee or an independent contractor.[303] Moreover, terms that seek to assign a particular characterisation to the contract ('labels') are to 'be given limited weight'.[304]

In seeking to justify this substantivist approach, Chapter 2 of the thesis draws upon the cases and academic commentary on the sham and pretence doctrines, which provide guidance as to the justifications for judicial intervention in contracts where there is a disjunction between form and substance.[305] Chapter 2 identifies two possible justifications from the cases and literature, which it terms the 'protective statutory purpose justification' and the 'contractual intention justification'.[306] As Professor Miranda Stewart and Professor Edwin Simpson have stated, there is '[a]n important distinction in the context of avoidance transactions … between judicial approaches … based on the intentions of the parties, and others founded in a construction of

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[301] Ibid.
[302] Ibid.
[303] Ibid.
[304] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 21, citing *Trifunovski* (n 4) 153 (Buchanan J); Stewart et al, *Creighton and Stewart's Labour Law* (n 1) 206–7; Irving, *The Contract of Employment* (2nd ed) (n 108) 92–5.
[305] As to the cases, see, eg, *Street v Mountford* (n 29); *Vaughan* (n 29); *Raftland Pty Ltd v Federal Commissioner of Taxation* (2008) 238 CLR 516 ('*Raftland*'); *Cam & Sons Pty Ltd v Sargent* (1940) 14 ALJ 162 (High Court of Australia) ('*Cam & Sons*'); *Autoclenz* (n 87); *Hawke v Edwards* (1947) 48 SR (NSW) 21; *Snook v London & West Riding Investments Ltd* [1976] 2 QB 786, 802 (Diplock LJ) ('*Snook*'); *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449 ('*Sharrment*'); *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471; *Australian Securities and Investments Commission v Fast Access Finance Pty Ltd* [2015] ASC ¶155-204 ('*Fast Access Finance*'), cited in Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 5 n 19. As to the literature, see, eg, Edwin Simpson and Miranda Stewart (eds), *Sham Transactions* (Oxford University Press, 2013); Conaglen, 'Sham Trusts' (n 29); Kirby, 'Of "Sham" and Other Lessons for Australian Revenue Law' (n 30); Bright, 'Avoiding Tenancy Legislation: Sham and Contracting Out Revisited' (n 29); Bright, 'Beyond Sham and into Pretence' (n 29); PV Baker, 'Shams or Schemes of Avoidance' (1989) 105 (April) *Law Quarterly Review* 167; Davies, 'Sensible Thinking about Sham Transactions' (n 269); Davies, 'Employment Law' (n 88) 176; Bogg, 'Sham Self-Employment in the Supreme Court' (n 2); Alan Bogg, 'Sham Self-Employment in the Court of Appeal' (2010) 126 (April) *Law Quarterly Review* 166; John Vella, 'Sham Transactions' [2008] (4) *Lloyd's Maritime and Commercial Law Quarterly* 488; Andrew Nicol, 'Outflanking Protective Legislation: Shams and Beyond' (1981) 44(1) *Modern Law Review* 21, cited in Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 5 n 20.
[306] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 5–7.

relevant legislation.'[307] These observations were made with respect to the sham doctrine generally and were not directed towards the labour law context. However, labour law scholars have put forward justifications for the substantivist approach to characterisation that resonate with the statute-focused rationalisation for judicial intervention identified by Professors Stewart and Simpson.[308] These justifications are explored further in the following section of this integrative chapter and discussed in detail in Chapter 2 of the thesis.

(b) The Protective Statutory Purpose Justification

Writing in the context of the UK, Professor Alan Bogg and Professor Anne Davies have, broadly speaking, each justified the substantivist approach to the characterisation of work contracts by reference to the protective statutory purpose justification.[309] In order to understand their arguments, it is necessary to explain the decision of the Supreme Court of the United Kingdom in *Autoclenz Ltd v Belcher* ('*Autoclenz*').[310] In this case, the issue was whether car valeters who had been engaged by Autoclenz Ltd were 'workers' within the meaning of certain labour regulations that provided entitlements to minimum wages and paid leave. Under the relevant labour regulations, the term 'worker' was defined in the following way:

> 'worker' … means an individual who has entered into or works under … (a) a contract of employment; or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual …[311]

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[307] Edwin Simpson and Miranda Stewart, 'Introduction: "Sham" Transactions' in Edwin Simpson and Miranda Stewart (eds), *Sham Transactions* (Oxford University Press, 2013) 13. See further Davies, 'Employment Law' (n 88) 186–7; Bogg and Ford, 'Between Statute and Contract: Who Is a Worker?' (n 100) 349–53, cited in Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 6 n 21.

[308] Bogg, 'Sham Self-Employment in the Supreme Court' (n 2) 343; Bogg, 'Common Law and Statute in the Law of Employment' (n 271) 100; Bogg, 'The Common Law Constitution at Work' (n 5) 520–1; Davies, 'The Relationship between the Contract of Employment and Statute' (n 271) 85–6; Davies, 'Employment Law' (n 88) 187.

[309] Ibid.

[310] *Autoclenz* (n 87).

[311] *National Minimum Wage Regulations 1999* (UK) reg 2(1); *Working Time Regulations 1998* (UK) reg 2(1). Identical or very similar definitions appear in other labour statutes and regulations in the UK, including the *Employment Rights Act 1996* (UK) s 230(3). Limb (a) refers to those workers who are engaged pursuant to a contract of employment and are thereby employees at common law. Limb (b) is a statutory category of worker that falls between employees and independent contractors. Those falling within limb (b) are often referred to as 'limb (b) workers': Bogg and Ford, 'Between Statute and Contract: Who Is a Worker?' (n 100) 347.

Lord Clarke, who delivered the Court's judgment in *Autoclenz*, concluded that the car valeters were employees at common law. Thus, they fell under limb (a) of the definition.[312] Lord Clarke held that 'all the relevant evidence',[313] including evidence of the post-contractual conduct of the parties, may be taken into account for the purposes of determining the legal character of a work contract. His Lordship observed that 'the true agreement will often have to be gleaned from all the circumstances of the case'[314] and that terms of a written contract that are at variance with how the parties carried out their relationship in practice may be disregarded.[315] In so doing, Lord Clarke drew attention to the difference between commercial contracts and work contracts, observing that '[t]he circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed.'[316] His Lordship also stated that 'the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed',[317] and said that this 'may be described as a purposive approach to the problem.'[318]

In his analysis of *Autoclenz*, Professor Bogg observed that '[w]hat Lord Clarke means by this "purposive" characterisation is not entirely clear.'[319] In explaining and clarifying the approach propounded in *Autoclenz*, both Professor Davies and Professor Bogg drew attention to the centrality of statutory purpose. Professor Davies contended that the Court 'was seeking to prevent avoidance of the statutory regime.'[320] Professor Bogg argued that the Court in

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[312] Lord Clarke was not required to address the question whether the car valeters fell within limb (b) of the definition, but would have answered that question affirmatively. His Lordship observed: 'Since the question whether the claimants were workers within limb (b) would only arise if the claimants had not entered into a contract of employment, that question does not arise, although, like the [employment tribunal], I would have held that they were in any event working under contracts within limb (b)': *Autoclenz* (n 87) 759.
[313] *Autoclenz* (n 87) 756 (Lord Clarke for the Court), quoting *Autoclenz* (*Court of Appeal*) (n 299) 77 (Smith LJ).
[314] *Autoclenz* (n 87) 757 (Lord Clarke for the Court).
[315] Ibid 757–9.
[316] Ibid 757, quoting *Autoclenz* (*Court of Appeal*) (n 299) 80 (Aikens LJ).
[317] *Autoclenz* (n 87) 757 (Lord Clarke for the Court).
[318] Ibid.
[319] Bogg, 'Sham Self-Employment in the Supreme Court' (n 2) 341. The discussion in this paragraph is based on Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 23–4.
[320] Davies, 'Employment Law' (n 88) 187.

Autoclenz was 'developing the common law tests for "employee" … in support of a general legislative policy of worker protection'[321] and 'to support protective statutory norms'.[322]

In a very recent decision, *Uber BV v Aslam* ('*Uber*'),[323] the Supreme Court of the United Kingdom developed further the purposive approach enunciated in *Autoclenz*. Lord Leggatt delivered the judgment of the Court in *Uber*. The claimants in this case were Uber drivers. They made claims relating, among other things, to entitlements to minimum wages and paid annual leave under the relevant statutes and regulations.[324] For the purposes of this case, their eligibility for these entitlements depended upon their being characterised as 'limb (b) workers'.[325] The statutory definition of 'worker' was set out above.[326] The 'limb (b) worker' category is a statutory category of worker that falls between employees and independent contractors.

Lord Leggatt concluded that the Uber drivers were limb (b) workers. His Lordship had regard to *Autoclenz*, observing that Lord Clarke had, in that case, held that it was permissible for terms of a written work contract to be disregarded if those terms did not reflect the reality of the relationship between the parties.[327] Lord Leggatt also referred to Lord Clarke's observation that 'the true agreement will often have to be gleaned from all the circumstances of the case.'[328] Lord Leggatt stated that '[w]hat was not … fully spelt out in [*Autoclenz*] was the theoretical justification for this approach.'[329] His Lordship had regard to the observations in *Autoclenz* about the inequality of bargaining power that exists between the parties to a work contract.[330] Lord Leggatt observed, however, that 'inequality of bargaining power is not generally treated as a reason for disapplying or disregarding ordinary principles of contract law.'[331]

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[321] Bogg, 'Common Law and Statute in the Law of Employment' (n 271) 100.
[322] Bogg, 'The Common Law Constitution at Work' (n 5) 521, citing Aileen Kavanagh, 'The Role of the Courts in the Joint Enterprise of Governing' in NW Barber, Richard Ekins and Paul Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing, 2016) 121, 132.
[323] *Uber* (n 36). This decision was handed down on 19 February 2021.
[324] The relevant statutes and regulations included the *National Minimum Wage Act 1998* (UK) and *Working Time Regulations 1998* (UK). See *Uber* (n 36) [34] for a summary of the claims that were made in this case.
[325] The second key point from the decision, which related to how 'working time' for the claimants was assessed, is beyond the scope of this thesis. See *Uber* (n 36) [121]–[138] (Lord Leggatt for the Court).
[326] See above n 311 and accompanying text.
[327] *Uber* (n 36) [68] (Lord Leggatt for the Court). See *Autoclenz* (n 87) 759 (Lord Clarke for the Court).
[328] *Uber* (n 36) [63], [84], citing *Autoclenz* (n 87) 757.
[329] *Uber* (n 36) [68].
[330] Ibid [63], citing *Autoclenz* (n 87) 757.
[331] *Uber* (n 36) [68].

In putting forward a justification for the purposive approach expounded in *Autoclenz*, Lord Leggatt emphasised the statutory basis of the rights that the workers were claiming,[332] the protective purposes of the labour statutes and regulations,[333] and the provisions in the labour statutes and regulations that prohibited parties from contracting out of those statutes and regulations.[334] His Lordship stated that the 'general purpose of the employment legislation … is to protect vulnerable workers'[335] and that '[t]he efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker.'[336] *Uber* is an example of a judicial approach to the characterisation of work contracts that is attentive to the vulnerability of workers and the protective purposes of labour statutes. Lord Leggatt adopted, albeit in relation to the statutory limb (b) worker category rather than in relation to the common law concept of employment, a line of reasoning that largely endorses, and develops further, the 'protective statutory purpose justification' that Professor Bogg and Professor Davies have put forward in respect of the *Autoclenz* decision.

(c) The Contractual Intention Justification

The protective statutory purpose justification is, with respect, cogent and compelling.[337] However, for the reasons that are detailed in Chapters 2 and 3 of the thesis, this thesis constructs a different justification for the substantivist approach. This thesis terms this justification, which it draws from the cases and academic commentary concerning the sham and pretence doctrines, the 'contractual intention justification'.[338] This thesis does not challenge the protective statutory purpose justification itself. Instead, it concludes that there are barriers to the adoption of this justification in Australia.[339] In light of those barriers, this thesis contends that it would be fruitful for those who are concerned with preserving the protective scope of labour law in Australia to search for other possible justifications for the substantivist approach, which might

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[332] Ibid [69]–[70].
[333] Ibid [71].
[334] Ibid [79]–[81].
[335] Ibid [71].
[336] Ibid [76].
[337] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 24.
[338] Ibid 27–33.
[339] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 24–7; Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (Thesis Chapter 3) (n 54) 397–404.

be put forward in addition to the protective statutory purpose justification.[340] Before proceeding to those arguments, some observations will first be made about the absence of a statutory 'limb (b) worker' category in Australia.

(i) The Absence of an Intermediate Category of Worker in Australia

One major difference between Australia and the UK is that Australia does not have a statutory category of worker that falls between employees and independent contractors. Australian cases concerning the characterisation of work contracts thereby turn upon the common law concept of an employee. Arguments based upon protective statutory purposes might be more readily accepted when made in relation to a statutory category of worker, especially where the underlying rationale for the introduction of that category was evidently to extend the protection of labour statutes.[341]

In an article that preceded the *Uber* decision, Professor Bogg observed that a protective purpose underlies the limb (b) worker category in the UK.[342] In so doing, Professor Bogg referred to the decision of the UK Employment Appeal Tribunal in *Byrne Bros (Formwork) Ltd v Baird*, where the following observation was made in relation to the limb (b) worker category:

> It seems to us that the best guidance is to be found by considering the policy behind the inclusion of limb (b). That can only have been to extend the benefits of protection to workers who are in the same need of that type of protection ... Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services — but with the boundary pushed further in the putative worker's favour.[343]

Professor Bogg stated that 'the extension of statutory protection'[344] was clearly the reason for the enactment of the limb (b) worker category in the UK. He acknowledged that 'the legislative

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[340] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 27.
[341] Bogg, 'Common Law and Statute in the Law of Employment' (n 271) 98–9.
[342] Ibid.
[343] [2002] ICR 667, 677, quoted in Bogg, 'Common Law and Statute in the Law of Employment' (n 271) 98. See further Deakin and Wilkinson, *The Law of the Labour Market: Industrialization, Employment*, *and Legal Revolution* (n 125) 312–13.
[344] Bogg, 'Common Law and Statute in the Law of Employment' (n 271) 98.

policy underlying the category of "employee" is far less clear-cut.'[345] Nevertheless, Professor Bogg has, in subsequent work, put forward compelling reasons for adopting the protective statutory purpose justification in respect of the common law concept of an employee in the UK.[346] Moreover, as Professor Bogg and Professor Davies have demonstrated, the approach in *Autoclenz*, which concerned the common law concept of an employee, may be rationalised by reference to the protective statutory purpose justification.[347] Furthermore, while *Uber* involved the statutory limb (b) worker category, some of the broader points made in the judgment regarding the statutory basis of the rights claimed, the protective purposes of labour statutes and regulations, the contracting out provisions of those statutes and regulations, and the vulnerability of workers, might be invoked to support the adoption of a purposive approach to the common law concept of an employee.[348]

In short, arguments pertaining to the protective statutory purposive justification might apply with similar force to the common law concept of an employee. Accordingly, the absence of a statutory limb (b) worker category in Australia might not, of itself, be a barrier to the adoption of this justification. There are, however, more fundamental reasons why the protective statutory purpose justification for the substantivist approach might not be accepted by Australian courts. These reasons are considered in the following section.

(ii) The Nature of the Contract of Employment and the Relationship between Common Law and Statute

The analysis presented in Chapters 2 and 3 of this thesis suggests that Australian courts might be reluctant to embrace the proposition that the protective purposes underlying labour statutes may influence the development of the concept of employment at common law.[349] One of the key reasons put forward in Chapters 2 and 3 involves broader conceptual considerations

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[345] Ibid 100.
[346] Bogg, 'The Common Law Constitution at Work' (n 5) 520–4.
[347] Bogg, 'Sham Self-Employment in the Supreme Court' (n 2) 343; Bogg, 'Common Law and Statute in the Law of Employment' (n 271) 100; Bogg, 'The Common Law Constitution at Work' (n 5) 520–1; Davies, 'The Relationship between the Contract of Employment and Statute' (n 271) 85–6; Davies, 'Employment Law' (n 88) 187.
[348] *Uber* (n 36) [69]–[81] (Lord Leggatt for the Court).
[349] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 24–7; Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (Thesis Chapter 3) (n 54) 397–404.

pertaining to the relationship between common law and statute.[350] The relationship between common law and statute was once viewed as one of 'oil and water',[351] with the 'two bodies of law flowing next to but … separately from each other in distinct streams.'[352] More recently, however, courts and scholars have come to acknowledge the idea of statute and common law as being in symbiosis.[353] As Gleeson CJ observed in *Brodie v Singleton Shire Council*, '[l]egislation and the common law are not separate and independent sources of law; the one the concern of parliaments, and the other the concern of courts. They exist in a symbiotic relationship.'[354]

In addition to recognising the impact that statute and common law may have upon each other, attention has been directed to the need to develop both bodies of law in a way that is coherent and integrated. This is reflected, for example, in the High Court of Australia's jurisprudence on the concept of 'coherence'[355] as well as scholarly contributions which have emphasised that statute and common law are to 'be seen as integrated parts'[356] of the whole of the law. These observations, which have been made in a range of different legal contexts, have also been articulated in the context of labour law. For example, labour law scholars have identified a need for the courts 'to develop a *coherent* body of employment law in which statute and common law work together effectively.'[357] At the same time, as Professor Elise Bant and

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[350] Ibid. On the relationship between common law and statute, see the sources cited at above n 31. On the relationship between common law and statute in the labour law context, see, eg, Bogg, 'Common Law and Statute in the Law of Employment' (n 271); Davies, 'The Relationship between the Contract of Employment and Statute' (n 271); Douglas Brodie, 'The Dynamics of Common Law Evolution' (2016) 32(1) *International Journal of Comparative Labour Law and Industrial Relations* 45, 64–7; Alan Bogg and Hugh Collins, 'Lord Hoffmann and the Law of Employment: The Notorious Episode of *Johnson v Unisys Ltd*' in Paul S Davies and Justine Pila (eds), *The Jurisprudence of Lord Hoffmann: A Festschrift in Honour of Lord Leonard Hoffmann* (Hart Publishing, 2015) 185.

[351] Jack Beatson, 'Has the Common Law a Future?' (1997) 56(2) *Cambridge Law Journal* 291, 308.

[352] Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (n 31) 247.

[353] See, eg, *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 532 (Gleeson CJ) ('*Brodie v Singleton*'); Bant, 'Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence' (n 31); Burrows, 'The Relationship between Common Law and Statute in the Law of Obligations' (n 31); Leeming, 'Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room' (n 31); Paul Finn, 'Statutes and the Common Law: The Continuing Story' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 52. On the symbiosis between the common law of the contract of employment and labour statutes, see Freedland, 'The Legal Structure of the Contract of Employment' (n 219) 34.

[354] *Brodie v Singleton* (n 353) 532.

[355] See, eg, *Miller v Miller* (2011) 242 CLR 446; *Sullivan v Moody* (2001) 207 CLR 562. See further Andrew Fell, 'The Concept of Coherence in Australian Private Law' (2018) 41(3) *Melbourne University Law Review* 1160. In the UK, see, eg, *Johnson v Unisys Ltd* [2003] 1 AC 518, 539–40 (Lord Hoffmann) ('*Unisys*').

[356] Burrows, 'The Relationship between Common Law and Statute in the Law of Obligations' (n 31) 258. See also Bant, 'Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence' (n 31) 368.

[357] Davies, 'The Relationship between the Contract of Employment and Statute' (n 271) 75 (emphasis in original).

Professor Jeannie Paterson have observed in the consumer law context, 'it must not be forgotten that the search for coherence in private law also demands that we take seriously the different normative foundations and objectives that can underpin statutory and common law regimes.'[358]

The relationship between statute and common law is multi-faceted in nature; there are many different 'modes of interaction'[359] between these two sources of law. It is also 'the case that no satisfying overarching principle has been identified to explain the relationship between statute and common law.'[360] In some cases, the effect of statute upon the common law is catalytic; in others, it is stultifying.[361] Chapter 2 deals with a specific question concerning the interaction between common law and statute. It examines how courts in the UK and Australia have addressed the relationship between the common law of the contract of employment and the protective norms of labour statutes.[362]

As Professor Bogg and Professor Davies have argued, *Autoclenz* may be regarded as an example of the judiciary developing the common law of the contract of employment in accordance with the protective norms of labour statutes.[363] It is useful to place *Autoclenz* within the broader context of the law of the contract of employment in the UK. Professor Freedland has observed that courts in the UK have, 'intermittently … from the 1970s onwards,'[364] adopted 'an openly worker-protective approach which can usefully be understood in terms of "fairness and industrial justice" and as reinforcing the apparatus of worker-protective employment legislation.'[365] The development of the implied term of mutual trust and confidence in the UK was a prime example of this interaction between common law and statute in that jurisdiction.[366]

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[358] Elise Bant and Jeannie Marie Paterson, 'Consumer Redress Legislation: Simplifying or Subverting the Law of Contract' (2017) 80(5) *Modern Law Review* 895, 926.
[359] Bogg, 'Common Law and Statute in the Law of Employment' (n 271) 68.
[360] Stephen McLeish, 'Challenges to the Survival of the Common Law' (2014) 38(2) *Melbourne University Law Review* 818, 827.
[361] Douglas Brodie, 'Mutual Trust and Confidence: Catalysts, Constraints and Commonality' (2008) 37(4) *Industrial Law Journal* 329.
[362] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 25–7.
[363] Bogg, 'Sham Self-Employment in the Supreme Court' (n 2) 343; Bogg, 'Common Law and Statute in the Law of Employment' (n 271) 100; Bogg, 'The Common Law Constitution at Work' (n 5) 520–1; Davies, 'The Relationship between the Contract of Employment and Statute' (n 271) 85–6; Davies, 'Employment Law' (n 88) 187.
[364] Freedland, 'The Legal Structure of the Contract of Employment' (n 219) 35.
[365] Ibid 35–6.
[366] Freedland, *The Personal Employment Contract* (n 51) 155–6, 521; Douglas Brodie, 'Legal Coherence and the Employment Revolution' (2001) 117 (October) *Law Quarterly Review* 604, 625. See, eg, *Western Excavating*

Chapter 2 of this thesis states that '[t]he common law of the employment contract in the UK has, in some respects, undergone a revolution or transformation, rendering it more attentive to worker-protective ideas.'[367] Professor Douglas Brodie has observed that 'the emergence of mutual trust was an exemplar of a changed judicial view of the employment relationship in the UK.'[368] This changed view, which has also included some judicial recognition of the relational nature of employment contracts,[369] was encapsulated by Lord Hoffmann in the following way in *Johnson v Unisys Ltd* ('*Unisys*'):

> [O]ver the last 30 years or so, the nature of the contract of employment has been transformed. It has been recognised that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem. The law has changed to recognise this social reality. … The contribution of the common law to the employment revolution has been by the evolution of implied terms in the contract of employment.[370]

Chapter 2 of the thesis also considers the decision of the Supreme Court of the United Kingdom in *R (UNISON) v Lord Chancellor* ('*UNISON*'),[371] a case that concerned the lawfulness of a Fees Order that imposed fees for claims brought before employment tribunals in the UK. The

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(ECC) Ltd v Sharp [1978] QB 761; *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20 ('*Malik*'); *Eastwood v Magnox Electric plc* [2005] 1 AC 503 ('*Eastwood*').

[367] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 25, quoting *Unisys* (n 355) 539 (Lord Hoffmann). See Brodie, 'Legal Coherence and the Employment Revolution' (n 366) 604–5; Jason NE Varuhas, 'The Socialisation of Private Law: Balancing Private Right and Public Good' (2021) 137 (January) *Law Quarterly Review* 141, 155. The present author's use of the phrase 'in some respects' in the text above is important. It should be noted that UK courts have not in all cases developed the common law of the contract of employment by reference to the protective norms of labour statutes, or in a manner that could be described as worker-protective; as Professor Freedland observed, UK courts have adopted a worker-protective approach 'intermittently' rather than consistently: see Freedland, 'The Legal Structure of the Contract of Employment' (n 219) 35–6.

[368] Brodie, 'The Dynamics of Common Law Evolution' (n 350) 47. On the term of mutual trust and confidence, see, eg, Douglas Brodie, 'The Heart of the Matter: Mutual Trust and Confidence (1996) 25(2) *Industrial Law Journal* 121; Douglas Brodie, 'A Fair Deal at Work' (1999) 19(1) *Oxford Journal of Legal Studies* 83; Brodie, 'Legal Coherence and the Employment Revolution' (n 366); David Cabrelli, 'The Implied Duty of Mutual Trust and Confidence: An Emerging Overarching Principle?' (2005) 34(4) *Industrial Law Journal* 284.

[369] *Unisys* (n 355) 532 (Lord Steyn). See Douglas Brodie, 'How Relational Is the Employment Contract?' (2011) 40(3) *Industrial Law Journal* 232; Douglas Brodie, 'Relational Contracts' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 145; Ian Macneil, *The New Social Contract: An Enquiry into Modern Contractual Relations* (Yale University Press, 1980); Melvin A Eisenberg, 'Relational Contracts' in Jack Beatson and Daniel Friedmann, *Good Faith and Fault in Contract Law* (Clarendon Press, 1995) 291.

[370] *Unisys* (n 355) 539. *Unisys* was a decision of the House of Lords.

[371] [2020] AC 869 ('*UNISON*').

Court concluded that the Fees Order 'effectively prevent[ed] access to justice',[372] thus placing it in contravention of the constitutional right of access to the courts. In reaching the conclusion that the Fees Order was unlawful, the Court noted, among other things, that Parliament had enacted labour rights and protections in recognition of the 'vulnerability of employees'.[373] Professor Bogg has drawn attention to the normative dimensions of the decisions in *UNISON* and *Autoclenz*. He made the following observation:

> *UNISON* resolves an important ambiguity in the common law. It can no longer be said that judges 'turn a blind eye' to the inequalities that abound in employment relationships. Judges at the highest level have now openly acknowledged that employment contracts are different to ordinary commercial contracts. It was sometimes unclear whether these judicial observations were *descriptive* or *normative* propositions. As a descriptive proposition, the recognition of contractual inequality is simply a brute statement of sociological facts, without any necessary normative implications. *UNISON*, by contrast, adopts a normative understanding, building upon Lord Clarke's interpretive approach in *Autoclenz v Belcher*.[374]

In a separate article, Professor Bogg considered the emphasis, in *Autoclenz*, on the differences between commercial contracts and employment contracts.[375] Professor Bogg argued that the Court in *Autoclenz* was developing a distinctive body of contract law principles that is tailored to the contract of employment and 'relatively autonomous from general contract law'.[376] This autonomous body of principles involves a modification of, among other things, the parol evidence rule and the signature rule in the employment context.[377]

In Australia, the courts have adopted a different approach to the relationship between common law and statute in the labour law context, and a different view of the nature of the employment

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[372] Ibid 905 (Lord Reed).
[373] Ibid 882.
[374] Bogg, 'The Common Law Constitution at Work' (n 5) 519–20 (emphasis in original).
[375] Bogg, 'Sham Self-Employment in the Supreme Court' (n 2) 331, 344. See *Autoclenz* (n 87) 757 (Lord Clarke), quoting *Autoclenz* (*Court of Appeal*) (n 299) 80 (Aikens LJ).
[376] Bogg, 'Sham Self-Employment in the Supreme Court' (n 2) 344.
[377] Ibid. There is a burgeoning body of scholarship on the 'autonomy of labour law'. See, eg, Mark Freedland, 'Otto Kahn-Freund, the Contract of Employment and the Autonomy of Labour Law' in Alan Bogg et al (eds), *The Autonomy of Labour Law* (Hart Publishing, 2015) 29; Brodie, 'The Autonomy of the Common Law of the Contract of Employment from the General Law of Contract' (291); Collins, 'Contractual Autonomy' (n 130); Gabrielle Golding, 'The Distinctiveness of the Employment Contract' (2019) 32(2) *Australian Journal of Labour Law* 170.

contract.[378] As Professor Joellen Riley has pointed out in her study of the law of the contract of employment in Australia, there has been relatively limited interaction between common law and statute in the labour law context.[379] Moreover, 'Australian courts … have not evolved an exceptional branch of contract law for dealing with employment cases'[380] and '[t]o the extent that employment contract law has developed its own independent jurisprudence, it has largely aligned its principles with general commercial contract law.'[381]

The decision of the High Court of Australia in *Barker* illustrates those points.[382] In this case, the High Court rejected the implied term of mutual trust and confidence. In the course of rejecting the implied term, French CJ, Bell and Keane JJ explicitly rejected the 'transformative'[383] view of the employment contract that Lord Hoffmann espoused in *Unisys*.[384] Their Honours also declined to express a concluded view on whether the contract of employment might properly be regarded as a relational contract.[385] Chief Justice French, Bell and Keane JJ also observed that recognition of the implied term of mutual trust and confidence would entail an 'exercise of the judicial power in a way that may have a significant impact upon employment relationships and the law of the contract of employment in this country.'[386] In such circumstances, their Honours concluded that implication of the term was a 'step beyond the legitimate law-making function of the courts'[387] and that any such changes should be left to the Parliament.

Professor Riley has observed that '[t]he High Court's reasoning proceeded on the assumption that any duty not to destroy mutual trust and confidence must derive from some normative principle'[388] and that '[a] key justification for rejecting [the implied term] … was a conviction

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[378] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 24–7.
[379] Riley, 'Developments in Contract of Employment Jurisprudence in Other Common Law Jurisdictions: A Study of Australia' (n 95) 274, 294. See also Johnstone and Mitchell, 'Regulating Work' (n 32); Breen Creighton and Richard Mitchell, 'The Contract of Employment in Australian Labour Law' in Lammy Betten (ed), *The Employment Contract in Transforming Labour Relations* (Kluwer Law International, 1995) 129.
[380] Riley, 'Developments in Contract of Employment Jurisprudence in Other Common Law Jurisdictions: A Study of Australia' (n 95) 294.
[381] Ibid 291.
[382] *Barker* (n 83).
[383] Ibid 195 (French CJ, Bell and Keane JJ).
[384] *Unisys* (n 355) 539 (Lord Hoffmann).
[385] *Barker* (n 83) 194 (French CJ, Bell and Keane JJ).
[386] Ibid.
[387] Ibid 178.
[388] Joellen Riley, 'The Future of the Common Law in Employment Regulation' (2016) 32(1) *International Journal of Comparative Labour Law and Industrial Relations* 33, 35.

that such "normative" developments belonged squarely within the prerogative of Parliament.'[389] The following section of this integrative chapter discusses the implications of these broader conceptual considerations pertaining to the relationship between common law and statute, and to the nature of the contract of employment, for the way that this thesis frames its doctrinal justifications.

(iii) Framing the Doctrinal Justification

This thesis contends that *Barker* renders it more difficult for Australian courts to accept doctrinal arguments that are framed in the language of worker protection or in terms of the protective purposes of labour statutes.[390] The approach that this thesis adopts, therefore, is to ground the doctrinal justifications for its proposed reconceptualisation of the characterisation framework in the principles and doctrines of private law (along with the rationales underlying those principles and doctrines).[391] It is necessary, here, to distinguish between the normative perspective that this thesis adopts on the one hand, and the doctrinal justifications that it constructs on the other. As noted above, the normative perspective of this thesis may be encapsulated in the idea of 'preserving the protective scope of labour law'.[392] From a normative worker-protective perspective, this thesis favours the substantivist approach because it is more conducive to preserving the protective scope of labour law than the formalist approach. In developing a doctrinal basis for the substantivist approach, however, this thesis turns to the general law of contract. The doctrinal basis presented by this thesis is not couched in the language of labour law's protective scope or the protective purposes of labour statutes, but rather in the principles and doctrines of the general law of contract.[393]

Chapter 3 of this thesis demonstrates that Australian courts have generally refrained from taking into account the protective purposes of labour statutes when dealing with questions

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[389] Ibid 34.
[390] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 24–7; Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (Thesis Chapter 3) (n 54) 397–404.
[391] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5); Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (Thesis Chapter 4) (n 27); Bomball, 'Intention, Pretence and the Contract of Employment' (Thesis Chapter 5) (n 28); Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52).
[392] See above 117.
[393] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5); Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (Thesis Chapter 4) (n 27); Bomball, 'Intention, Pretence and the Contract of Employment' (Thesis Chapter 5) (n 28).

concerning the characterisation of work contracts.[394] In *C v Commonwealth*,[395] for example, the Full Court of the Federal Court of Australia was asked to adopt a broad construction of the term 'employee' in the *Fair Work Act 2009* (Cth), in part on the basis that the provisions of the statute that were under consideration in that case were beneficial statutory provisions.[396] The Court rejected the argument, observing, among other things, that the term 'employee' was also invoked in other parts of the *FW Act* that could not be described as beneficial.[397] The Court observed that the term 'employee' in the *FW Act* refers to the concept of employment at common law.[398] The *FW Act* confers rights and protections with respect to a range of matters, including paid leave, collective bargaining and unfair dismissal.[399] Conceptions of worker protection and 'fairness to work[ing] Australians'[400] may be found in the objects provision of the *FW Act*.[401] As noted in Chapter 2, however, that objects provision also includes references to other purposes, including the promotion of 'productivity and economic growth for Australia's future economic prosperity',[402] 'social inclusion for all Australians',[403] and 'flexib[ility] for businesses.'[404]

A range of Australian statutes, including those in the areas of labour law, superannuation, and taxation, operate by reference to the concept of employment at common law.[405] Australian courts have observed that the 'modern distinction between employee and independent contractor is … primarily drawn from the development of the common law doctrine of vicarious liability.'[406] They have held that when a labour statute, such as the *FW Act*, invokes

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[394] See, eg, *C v Commonwealth* (n 7) 87 (Tracey, Buchanan and Katzmann JJ); *Trifunovski Trial* (n 68) 542–3 (Perram J); *Trifunovski* (n 4) 149 (Lander J), 182 (Buchanan J). See the discussion in Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (Thesis Chapter 3) (n 54) 379–84, and see 384–5 for exceptions. For a further exception, see *Personnel Contracting* (n 172) 459 (Allsop CJ).
[395] *C v Commonwealth* (n 7).
[396] Ibid 90 (Tracey, Buchanan and Katzmann JJ).
[397] Ibid, discussed in Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 26.
[398] *C v Commonwealth* (n 7) 87 (Tracey, Buchanan and Katzmann JJ).
[399] See, eg, *FW Act* pt 2-2, 2-4, 3-2.
[400] *FW Act* s 3(a).
[401] See Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 26.
[402] *FW Act* s 3(a).
[403] *FW Act* s 3.
[404] *FW Act* s 3(a). See Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 26.
[405] Stewart et al, *Creighton and Stewart's Labour Law* (n 1) 196–7; Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (Thesis Chapter 3) (n 54) 372–3.
[406] *Personnel Contracting* (n 172) 474 (Lee J). See also *Trifunovski Trial* (n 68) 542–3 (Perram J); *Trifunovski* (n 4) 149 (Lander J), 151, 182 (Buchanan J).

the concept of employment at common law, it is referring to that concept as developed in vicarious liability cases, untempered by the purposes of the labour statute.[407] Accordingly, the issue of whether a worker is an employee in a case involving a claim under such a statute is to be 'approached from the common law's perspective on the imposition of vicarious liability and with it a subsisting policy debate about the distributive allocation of losses between tortfeasors and their victims'.[408] This approach is supported by broader principles of statutory interpretation that apply when statutes invoke terms with technical meanings at common law.[409] Those principles are discussed in Chapter 3. In *Aid/Watch Inc v Federal Commissioner of Taxation* ('*Aid/Watch*'), a case involving the meaning of the word 'charitable' in a taxation statute, a majority of the High Court of Australia had regard to those interpretive principles and stated:

> [W]here, as here, the general law comprises a body of doctrine with its own scope and purpose, the development of that doctrine is not directed or controlled by a curial perception of the scope and purpose of any particular statute which has adopted the general law as a criterion of liability in the field of operation of that statute.[410]

In Chapter 3, this thesis considers whether these principles might be modified by reference to the principle of purposive statutory construction,[411] which has been enshrined in interpretation statutes in Australia.[412] It ultimately concludes that there are barriers to the acceptance, by Australian courts, of the proposition that the protective purposes underlying labour statutes may influence the development of the concept of employment at common law.[413] For these reasons, along with several others outlined in Chapters 2 and 3, this thesis contends that a

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[407] *Trifunovski Trial* (n 68) 542–3 (Perram J); *Trifunovski* (n 4) 149 (Lander J), 182 (Buchanan J); *C v Commonwealth* (n 7) 87 (Tracey, Buchanan and Katzmann JJ). See also Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 86; Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (Thesis Chapter 3) (n 54) 379–84; Irving, *The Contract of Employment* (2nd ed) (n 108) 58–9.
[408] *Trifunovski Trial* (n 68) 543 (Perram J). See also *Trifunovski* (n 4) 149 (Lander J), 182 (Buchanan J).
[409] *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531, 580 (Lord Macnaghten): 'In construing Acts of Parliament, it is a general rule … that words must be taken in their legal sense unless a contrary intention appears.'
[410] (2010) 241 CLR 539, 549 (French CJ, Gummow, Hayne, Crennan and Bell JJ).
[411] See Matthew Harding, 'Equity and Statute in Charity Law' (2015) 9(2) *Journal of Equity* 167, 172–7.
[412] See, eg, *Acts Interpretation Act 1901* (Cth) s 15AA.
[413] Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (Thesis Chapter 3) (n 54) 394, 397–404.

justification for the substantivist approach to characterisation that is based on protective statutory purposes might not be embraced by Australian courts.

This thesis therefore explores an alternative justification — the 'contractual intention justification' — for the substantivist approach. This justification is explained in detail in Chapter 2 of the thesis. According to the contractual intention justification, courts will intervene where there is a disjunction between the form of a contract and its underlying substance, even though this undermines the contractual autonomy of the parties, because of 'a higher purpose or value.'[414] Chapter 2 contends that this higher purpose or value is 'grounded in the notion that judicial imprimatur will not be given to the conscription of contractual rules in aid of transactions or documents that are deceitful or that mask the true agreement of the parties.'[415] Chapter 2 also identifies and analyses specific principles of general contract law that enable a court to look beyond contractual form and at the underlying substance of a relationship where there is a disjunction between form and substance.[416]

This thesis contends that there may be some utility in adopting, in the Australian context, the contractual intention justification for the substantivist approach to the characterisation of work contracts.[417] Australian courts have emphasised the need to maintain coherence between the general law of contract and the law of the contract of employment.[418] As Chapter 2 explains, the contractual intention justification is grounded in the principles of general contract law.[419] It is not tethered to the notion that there is an autonomous body of contract law tailored specifically to employment contracts.[420] It does not entail judicial development of the concept of employment by reference to worker-protective considerations or the protective norms of

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[414] Gummow, 'Form or Substance' (n 30) 233.
[415] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 6–7, citing Gummow, 'Form or Substance' (n 30) 233; Miranda Stewart, 'The Judicial Doctrine in Australia' (n 30), 66–7.
[416] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 31–3.
[417] The discussion in this paragraph is based on Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 33.
[418] See, eg, *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2007) 69 NSWLR 198, 224 (Rothman J); *Quest* (n 4) 378 (North and Bromberg JJ); Riley, 'Developments in Contract of Employment Jurisprudence in Other Common Law Jurisdictions: A Study of Australia' (n 95) 291. On the importance of coherence between the law of the contract of employment and general contract law, see Brodie, 'Legal Coherence and the Employment Revolution' (n 366) 605; Brodie, 'The Autonomy of the Common Law of the Contract of Employment from the General Law of Contract' (291) 125–30.
[419] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5).
[420] Ibid 27–33.

labour statutes in a manner contrary to the principles articulated by the High Court of Australia in *Aid/Watch* and *Barker*.[421] When viewed by reference to the contractual intention justification, a court that adopts the substantivist approach to characterisation is applying the accepted principles and techniques of the general law of contract.[422] It is not engaged in a form of 'judicial social engineering.'[423] For these reasons, Chapter 2 contends that the contractual intention justification is, within the Australian context, more secure than the protective statutory purpose justification.[424]

(d) Specific Rules and Applications

This section summarises and draws together the key conclusions from Chapters 4, 5 and 6, which deal with specific rules and applications of the substantivist approach.

(i) Post-Contractual Conduct: Admissibility

Chapter 4 confronts directly the exclusionary rule prohibiting recourse to post-contractual conduct in the construction of a contract.[425] The need to address this rule was made clear in the discussion above concerning the uncertainties in Australian law.[426] The rule presents a hurdle to the substantivist approach. The formalist-substantivist dichotomy in common law adjudication is used in many different senses. The sense in which this thesis uses the term was encapsulated by Professor Andrew Burrows as a 'distinction between false appearance and inner reality.'[427] Chapter 4 of this thesis begins with an examination of the varying conceptualisations of that 'inner reality' or 'substance' in the case law. It argues that the concept of 'substance' has been understood in at least two different ways in the cases concerning characterisation, and that only the second conceptualisation involves recourse to the post-contractual conduct of the parties.[428] It notes that the second conceptualisation

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[421] Ibid 33. See also Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (Thesis Chapter 3) (n 54) 397–404.
[422] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 33.
[423] Ibid. The observation regarding 'judicial social engineering' comes from *Chalker* (n 15) [61] (Mason P).
[424] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 33.
[425] *Agricultural and Rural Finance* (n 175) 582 (Gummow, Hayne and Kiefel JJ), quoting *Whitworth* (n 175) 603 (Lord Reid).
[426] See above nn 211–234.
[427] Andrew Burrows, 'Form and Substance: Fictions and Judicial Power' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing, 2019) 17, 17.
[428] Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (Thesis Chapter 4) (n 27) 154–7.

(adopted in cases such as *Trifunovski*)[429] is the subject of disagreement. Chapter 4 is therefore primarily concerned with reconciling the substantivist approach to the characterisation of work contracts with this exclusionary rule.

In order to do so, Chapter 4 deconstructs the characterisation process for a work contract into two stages. In so doing, it adopts (subject to an important clarification) the reasoning of Lord Millett in *Agnew v Commissioner of Inland Revenue* ('*Agnew*'),[430] a decision of the Privy Council concerning whether a charge was a fixed or a floating charge. The first stage of the characterisation process involves the ascertainment of the rights and obligations of the parties.[431] The second stage involves a determination of the legal character of the contract.[432] Adapted to the employment context, the determination of the legal character of the contract involves assessing the rights and obligations of the parties by reference to the attributes of employment. Those attributes are determined by precedent.[433] What is not, with respect, clear from Lord Millett's judgment is when and why evidence of post-contractual conduct can be taken into account in this two-stage framework for characterisation.[434] In the course of his Lordship's judgment, Lord Millett stated: '[I]t is not enough to provide in the debenture that the account is a blocked account if it is not operated as one in fact.'[435] Professor Gerard McMeel stated that Lord Millett's observation 'appears to admit subsequent conduct as relevant to the interpretation of contracts which create charges over book debts.'[436]

Chapter 4 analyses closely the nature of the exercise in which the court is engaged at the first stage of the characterisation process. It argues that at this first stage, 'the court is not *construing* the terms of the contract, but rather *determining what those terms are*.'[437] That is, the court is

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[429] *Trifunovski* (n 4).
[430] *Agnew* (n 27). Professor Matthew Conaglen has adopted this two-stage framework from *Agnew* in his analysis of sham trusts: Conaglen (n 29) 180. The reasoning in *Agnew* has been adopted in some Australian cases: see, eg, *Dura (Australia) v Constructions Pty Ltd v Hue Boutique Living Pty Ltd* (2014) 49 VR 86, 97 (Santamaria JA, with whom Maxwell P and Whelan JA agreed); *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2016] QCA 148, [13]–[14] (Fraser JA, with whom Gotterson JA agreed); *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd* (2018) 53 WAR 325, 344 (Murphy and Mitchell JJA and Allanson J). These cases did not concern labour law.
[431] *Agnew* (n 27) 725 (Lord Millett).
[432] Ibid.
[433] Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (Thesis Chapter 4) (n 27) 166.
[434] Ibid 160–1.
[435] *Agnew* (n 27) 730 (Lord Millett).
[436] McMeel, 'Prior Negotiations and Subsequent Conduct — The Next Step Forward for Contractual Interpretation?' (n 175) 292.
[437] Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (Thesis Chapter 4) (n 27) 167 (emphasis in original).

ascertaining the terms of the parties' agreement, rather than discerning the meaning of those terms by way of construction.[438] Chapter 4 therefore argues that the first stage of the characterisation process 'does not involve an exercise in construction.'[439] The exclusionary rule precludes recourse to evidence of post-contractual conduct for the purposes of construction.[440] This thesis contends that as the first stage of the characterisation exercise does not involve an exercise in construction, the exclusionary rule does not apply at that first stage.[441] Thus, evidence of the parties' post-contractual conduct is admissible at the first stage of characterisation.[442]

A court that is seeking to ascertain the rights and obligations of the parties is to take into account all of the relevant evidence, including the post-contractual conduct of the parties, at the first stage.[443] In other words, the court is to adopt a substantivist approach to characterisation. If a term in the written contract is at variance with how the parties have conducted their relationship in practice, then the court is to disregard the term. Terms that are disregarded as not taken into account at the second stage, where the court assesses the actual rights and obligations of the parties by reference to the attributes of employment to determine whether the contract is an employment contract or an independent contract.[444]

A final observation should be made about the present author's evolving views as to the nature of the broader justification for the substantivist approach. At the end of Chapter 4, the author

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[438] Ibid 166–7.
[439] Ibid 167.
[440] *Agricultural and Rural Finance* (n 175) 582, quoting *Whitworth* (n 175) 603 (Lord Reid); Carter, *The Construction of Commercial Contracts* (n 176) §§9-02–9-03, 9-12; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, 1121. The exclusionary rule does not, for example, 'exclude the use of evidence of subsequent conduct for the purpose of determining "whether a contract was formed"': Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (Thesis Chapter 4) (n 27) 166, citing (at n 119) *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153, 163–4 (Heydon JA); *Howard Smith and Co Ltd v Varawa* (1907) 5 CLR 68, 77–8 (Griffith CJ, with whom O'Connor J agreed); *Barrier Wharfs Ltd v W Scott Fell & Co Ltd* (1908) 5 CLR 647, 669 (Griffith CJ), 672 (Isaacs J); *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540, 551 (Gleeson CJ, with whom Hope and Mahoney JJA agreed); *Sagacious Procurement Pty Ltd v Symbion Health Ltd* [2008] NSWCA 149, [99]–[100] (Giles JA, with whom Hodgson and Campbell JJA agreed); *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603, 616 (Allsop P), 683 (Campbell JA); *Lederberger v Mediterranean Olives Financial Pty Ltd* [2012] VSCA 262, [26]–[31] (Nettle, Redlich JJA and Beach AJA).
[441] Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (Thesis Chapter 4) (n 27) 160–1, 166–7.
[442] Ibid.
[443] Ibid 160–1, 166–8; Bomball, 'Intention, Pretence and the Contract of Employment' (Thesis Chapter 5) (n 28) 252–4, 256–9; Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 21, 27–33.
[444] Ibid.

suggested, in line with Professor Bogg's analysis of *Autoclenz*, that such an approach (including departures from the parol evidence rule and the signature rule) might be supported by the idea that employment contracts are different from commercial contracts and thereby warrant different rules.[445] The decision of the High Court of Australia in *Barker*, which conveyed a judicial view of the employment contract that differed from that propounded in *Autoclenz*, prompted the author to find an alternative justification for the substantivist approach in Australia. As discussed above in the outline of Chapters 2 and 3,[446] the author instead justified the substantivist approach by reference to the principles of general contract law. This change in the broader conceptualisation of the justification does not affect the specific doctrinal analysis of the exclusionary rule, and the two-stage framework based on the reasoning in *Agnew,* that is presented in Chapter 4. The doctrinal analysis in Chapter 4 applies with equal force. It is also rendered more secure, within the Australian context, by the broader conceptual framework, based on general contract law, that is presented in Chapter 2. In addition to that broader analysis, Chapter 2 also justifies and rationalises deviations from the parol evidence rule and the signature rule by reference to general contractual principles.[447]

The core arguments presented in Chapter 4 need not be justified by reference to the view that employment contracts are different from commercial contracts. These arguments may be rationalised by reference to general principles of contract law, untethered to the specific context of employment. The arguments pertaining to the two stages of characterisation and the permissibility of recourse to the parties' post-contractual conduct in the characterisation exercise may be supported by reference to cases discussed in Chapter 4, including *Agnew* and *Agricultural and Rural Finance*, that do not involve employment.[448]

(ii) Post-Contractual Conduct: Weight

In addition to providing a basis for the admissibility of evidence of post-contractual conduct in the characterisation exercise, this thesis provides a basis for according primacy to the post-

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[445] Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (Thesis Chapter 4) (n 27) 168–9, citing Bogg, 'Sham Self-Employment in the Supreme Court' (n 2) 333–5, 344.
[446] See above Part VI(B)(1)(a)–(c).
[447] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 27–33.
[448] Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (Thesis Chapter 4) (n 27) 149, 160–1, 166–7. See further Bomball, 'Intention, Pretence and the Contract of Employment' (Thesis Chapter 5) (n 28) 252–4, 256–9; Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 21, 27–33.

contractual conduct relative to the terms of the written contract. As this thesis notes in Chapter 2, the question is not simply one of admissibility, but also one of weight.[449] In *Fair Work Ombudsman v Ecosway Pty Ltd*, White J of the Federal Court of Australia observed that the characterisation process 'usually requires an examination of the reality of the relationship in practice so that the Court does not consider only the written contractual terms.'[450] His Honour also stated: 'Nevertheless, the terms of the parties' written agreement when such exists are usually fundamental.'[451] Chapter 2 contends that where there is a disjunction between the written terms of the contract and the reality of the relationship, 'there must be a principled way of assigning a hierarchy to these and of determining which should be given precedence.'[452] The arguments presented in Chapters 2, 4 and 5 of this thesis provide support for privileging substance over form where there is a disjunction between the two.

(iii) Intention

Chapter 5 of the thesis addresses the vexed relationship between the intention of the parties and the characterisation exercise. It does so in the context of an analysis of the pretence doctrine.[453] On one view, Lord Clarke's judgment in *Autoclenz* involved an endorsement of the pretence doctrine.[454] Writing on the law of the contract of employment in the UK, Professor Freedland stated that there is 'continuing doubt about how far [a court is] to defer to the expressed intentions of the parties themselves'[455] when the court is characterising a work contract. The same uncertainty persists in Australian law.[456] This thesis contends that an account of the substantivist approach must be able to explicate and accommodate the role of the parties' intentions in the characterisation exercise. Failure to do so leaves the substantivist approach vulnerable to challenge, including on the basis of judicial overreach. The observations of Professor Davies are illuminating here. In the aftermath of *Autoclenz*, Professor Davies, who

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[449] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 17–20.
[450] *Ecosway* (n 251) [76] (White J).
[451] Ibid.
[452] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 20.
[453] See *Street v Mountford* (n 29); *Vaughan* (n 29); Bright, 'Avoiding Tenancy Legislation: Sham and Contracting Out Revisited' (n 29); Bright, 'Beyond Sham and into Pretence' (n 29).
[454] Davies, 'Employment Law' (n 88) 185, cited in Bomball, 'Intention, Pretence and the Contract of Employment' (Thesis Chapter 5) (n 28) 243. See, eg, *Street v Mountford* (n 29); *Vaughan* (n 29), cited in *Autoclenz* (n 87) 754 (Lord Clarke for the Court).
[455] Freedland, *The Personal Employment Contract* (n 51) 21.
[456] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 2.

was supportive of the decision, nevertheless recognised that the concept of 'true agreement'[457] expounded in *Autoclenz* might be seen as 'too elusive to offer any real control over the courts' decision-making'.[458] Professor Davies also made the following observation:

> The written contract offered strong evidence that the firm did not wish to incur the obligations of an employer towards the valeters, because it had prepared (and revised) its contractual documentation with a view to securing this result. Of course, the parties' subjective intentions are not conclusive, but there was no real discussion at any stage in *Autoclenz* of the impact of this piece of evidence or of why other aspects of the factual background were to be preferred.[459]

Chapter 5 of the thesis seeks to provide a justification for privileging the post-contractual conduct of the parties over the intention, whether subjective (actual) or expressed,[460] of the parties as to the legal character of their contract. In putting forward this justification, this thesis argues that uncertainty with respect to the role of intention in the characterisation exercise persists in part because the concept of intention is used in different senses that are not always the subject of clear exposition in the cases.[461] Chapter 5 draws upon Professor John Carter's analysis of the principles pertaining to intention in general contract law.[462] Chapter 5 identifies three separate questions that need to be answered with respect to the role of intention in the characterisation of work contracts, namely 'whose intention is relevant, which intention is relevant and to what must the intention relate?'[463]

In viewing the case law through the lens of these three questions, Chapter 5 distinguishes the different ways in which intention is conceptualised. It uses this analysis, along with the following two propositions that are supported by the 'labelling' cases,[464] to explain why the

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[457] Davies, 'Employment Law' (n 88) 186. See *Autoclenz* (n 87) 755, 757 (Lord Clarke for the Court).
[458] Davies, 'Employment Law' (n 88) 186, quoted in Bomball, 'Intention, Pretence and the Contract of Employment' (Thesis Chapter 5) (n 28) 244.
[459] Davies, 'Employment Law' (n 88) 187, quoted in Bomball, 'Intention, Pretence and the Contract of Employment' (Thesis Chapter 5) (n 28) 244.
[460] In this thesis, 'actual intention' is defined as 'the subjective intention of the parties to the contract': Bomball, 'Intention, Pretence and the Contract of Employment' (Thesis Chapter 5) (n 28) 246, quoting Carter, *The Construction of Commercial Contracts* (n 176) §2-10. The concepts of 'actual intention' and 'expressed intention' are discussed in further detail in Chapter 5 of the thesis.
[461] Bomball, 'Intention, Pretence and the Contract of Employment' (Thesis Chapter 5) (n 28) 249–50, 256–61.
[462] See ibid 245–7 for the citations to Professor Carter's scholarship.
[463] Bomball, 'Intention, Pretence and the Contract of Employment' (Thesis Chapter 5) (n 28) 246.
[464] Ibid 250–2. See, eg, *Street v Mountford* (n 29).

parties' intentions as to the legal character of their contract cannot be determinative. The first proposition is that 'it is the legal operation of the contract, rather than the expressed intention of the parties, that determines the legal character of the contract.'[465] The second proposition is that 'the legal operation of the contract is discerned by analysing as a whole the "rights conferred and the duties imposed by the contract"[466] by reference to precedent.'[467] These propositions concerning labels are not confined to the employment context. They have been accepted more generally in cases concerning characterisation, both in the UK[468] and in Australia.[469]

Chapter 5 argues that the parties' intentions in relation to the legal character of their contract cannot be determinative because the characterisation of a contract turns upon its legal operation.[470] The concept of intention is relevant to the characterisation exercise, but it operates in a specific, and confined, manner with respect to that exercise.[471] It will be recalled that the first stage of the characterisation framework that this thesis proposes involves the ascertainment of the actual rights and obligations of the parties.[472] At that stage, the court takes into account all of the relevant evidence, including evidence of post-contractual conduct.[473]

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[465] Bomball, 'Intention, Pretence and the Contract of Employment' (Thesis Chapter 5) (n 28) 251, citing *Ready Mixed Concrete* (n 212) 512–3 (MacKenna J); Carter, *The Construction of Commercial Contracts* (n 176) §§2-26–2-27.

[466] *Ready Mixed Concrete* (n 212) 513 (MacKenna J).

[467] Bomball, 'Intention, Pretence and the Contract of Employment' (Thesis Chapter 5) (n 28) 256, citing *Ready Mixed Concrete* (n 212) 513 (MacKenna J); Carter, *The Construction of Commercial Contracts* (n 176) §§2-26; JW Carter, 'Commercial Construction and Contract Doctrine' (2009) 25 *Journal of Contract Law* 83, 90–1.

[468] See, eg, *Street v Mountford* (n 29) 819 (Lord Templeman) (a tenancy case): 'But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.'

[469] See, eg, *Curtis v Perth and Fremantle Bottle Exchange Co Ltd* (1914) 18 CLR 17, 25 (Isaacs J) (a case concerning a contract pursuant to which beer bottles were hired out): 'Where parties enter into a bargain with one another whereby certain rights and obligations are created, they cannot by a mere consensual label alter the inherent character of the relations they have actually called into existence. Many cases have arisen where courts have disregarded such labels, because in law they were wrong, and have looked beneath them to the real substance.' See also Chief Justice James Allsop, 'Characterisation: Its Place in Contractual Analysis and Related Inquiries' (2017) 91 *Australian Law Journal* 471, 475.

[470] The discussion in this paragraph is based on Bomball, 'Intention, Pretence and the Contract of Employment' (Thesis Chapter 5) (n 28) 258.

[471] Ibid.

[472] Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (Thesis Chapter 4) (n 27) 166–7.

[473] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 21, 27–33; Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (Thesis Chapter 4) (n 27) 160–1, 166–8; Bomball, 'Intention, Pretence and the Contract of Employment' (Thesis Chapter 5) (n 28) 252–4, 256–9.

Chapter 5 argues that the intention of the parties is relevant at the first stage of the characterisation exercise, but that the relevant intention is not an intention with respect to the legal character of the contract.[474] It is, instead, an intention with respect to the particular rights and obligations of the parties.[475] A clause in a written contract is a pretence '[i]f the parties never intended for the clause to have any effect'.[476] The court is to disregard any clause that is a pretence.[477] Clauses that are disregarded are not taken into account at the second stage of the characterisation exercise, where the court assesses the actual rights and obligations of the parties by reference to the attributes of employment to determine whether the contract is an employment contract or an independent contract. The jurisdictional focus of Chapter 5 is upon the UK because the doctrine of pretence has received sustained judicial consideration in that jurisdiction.[478] This doctrine has, however, received some judicial recognition in Australia, including in contexts outside of employment.[479]

(iv) Application to Trilateral Work Relationships

Chapter 6 applies, to labour hire relationships,[480] the arguments that this thesis makes about privileging substance over form. Labour hire relationships involve three parties: the host company, the labour hire agency, and the worker. Under one common form of labour hire, the labour hire agency enters into a work contract with the worker and assigns that worker to work for a host company.[481] There is usually no contract between the host company and the worker. As employment-related obligations are generally only attributed to a person or entity that has a contract of employment with the person who has been engaged to perform work, the absence of a contract creates problems for a labour hire worker who seeks to claim certain statutory labour protections, such as protection from unfair dismissal, against a host company.[482]

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[474] Bomball, 'Intention, Pretence and the Contract of Employment' (Thesis Chapter 5) (n 28) 258.
[475] Ibid.
[476] Ibid, citing *Vaughan* (n 29) 454 (Lord Bridge), 462 (Lord Templeman), 470 (Lord Oliver), 476 (Lord Jauncey); Bright, 'Avoiding Tenancy Legislation: Sham and Contracting Out Revisited' (n 29) 153.
[477] Ibid.
[478] Bomball, 'Intention, Pretence and the Contract of Employment' (Thesis Chapter 5) (n 28) 244.
[479] Ibid 244–5, citing *Raftland* (n 305) 535 (Gleeson CJ, Gummow and Crennan JJ); *Quest* (n 4) 378–9 (North and Bromberg JJ); *Fast Access Finance* (n 305) [265]–[277] (Dowsett JJ). *Quest* is an employment case; the other two cases do not concern employment.
[480] On labour hire relationships in Australia, see, eg, Anthony Forsyth, 'Regulating Australia's "Gangmasters" through Labour Hire Licensing' (2019) 47(3) *Federal Law Review* 469; Stewart et al, *Creighton and Stewart's Labour Law* (n 1) 256–63.
[481] Stewart et al, *Creighton and Stewart's Labour Law* (n 1) 256.
[482] Bomball, 'The Attribution of Responsibility in Trilateral Work Relationships: A Contractual Analysis' (Thesis Chapter 6) (n 183) 307–8.

Chapter 6 considers whether a contract of employment between the labour hire worker and the host company may be implied from the way in which they have carried out their relationship in practice. It adopts a comparative approach, turning first to the concept of an implied contract of employment that has been developed in cases in the UK.[483] In the UK, the test for implying a contract of employment is a strict one. In *James v London Borough of Greenwich*,[484] the English Court of Appeal held that the test for implication of a contract of employment is the necessity test propounded in *The Aramis*,[485] a case involving a commercial contract rather than an employment contract. In *The Aramis*, a decision of the English Court of Appeal, Bingham LJ stated that a contract will be implied only where the implication is 'necessary … in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist.'[486] Adoption of this strict test in the UK has made it difficult for labour hire workers to establish implied contracts of employment with their host companies.[487]

Chapter 6 considers these points in the Australian context. It considers whether general principles of contract law in Australia can be invoked in support of the claim that a labour hire worker has an implied contract of employment with the host company, such that employment-related obligations can be attributed to the host company.[488] It argues that general contractual principles can support such a claim in certain limited circumstances.[489] Chapter 6 examines the Australian cases on the implied contract of employment and suggests that a labour hire worker in Australia might not need to demonstrate 'necessity', in the sense articulated in *The Aramis*, before a contract of employment may be implied.[490] The chapter analyses the

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[483] See *Dacas v Brook Street Bureau (UK) Ltd* [2004] ICR 1437; *Royal National Lifeboat Institution v Bushaway* [2005] IRLR 674; *Cable & Wireless Plc v Muscat* [2006] ICR 975; *Cairns v Visteon UK Ltd* [2007] ICR 616; *James v London Borough of Greenwich* [2008] ICR 545 ('*James*'); *Tilson v Alstom Transport* [2011] IRLR 169; *Smith v Carillion (JM) Ltd* [2015] IRLR 467, cited in Bomball, 'The Attribution of Responsibility in Trilateral Work Relationships: A Contractual Analysis' (Thesis Chapter 6) (n 183) 306 n 3, 307 n 9, 308 n 19.
[484] *James* (n 483) 552–3 (Mummery LJ, with whom Thomas and Lloyd LJJ agreed), citing *The Aramis* [1989] 1 Lloyd's Rep 213, 224 ('*The Aramis*').
[485] *The Aramis* (n 484).
[486] Ibid 224 (Bingham LJ).
[487] See, eg, Brodie, 'How Relational Is the Employment Contract?' (n 369) 249–51; Freedland, 'The Legal Structure of the Contract of Employment' (n 219) 36; Michael Wynn and Patricia Leighton, 'Agency Workers, Employment Rights and the Ebb and Flow of Freedom of Contract' (2009) 72(1) *Modern Law Review* 91, 92–5.
[488] Bomball, 'The Attribution of Responsibility in Trilateral Work Relationships: A Contractual Analysis' (Thesis Chapter 6) (n 183) 318–20.
[489] Ibid 320–6.
[490] Ibid 321, citing *Damevski v Giudice* (2003) 133 FCR 438; *Quest* (n 4); Brodie, 'How Relational Is the Employment Contract?' (n 369) 250–1. See further Brodie, 'The Autonomy of the Common Law of the Contract

circumstances in which Australian courts will imply a contract of employment between a worker and a host company, having regard to the way in which the parties have conducted their relationship in practice.[491] It illustrates the application of an approach that privileges substance over form in circumstances involving a trilateral, as opposed to a bilateral, work relationship.

2 *A Proposed Justification for the Entrepreneurship Approach*

The preceding sections discussed the justifications for the substantivist approach to characterisation. This section discusses the justifications for a particular conception of employment status, one that is grounded in the notion of entrepreneurship. These justifications for the entrepreneurship approach to determining employment status are set out in Chapters 7 and 8 of the thesis.

Before discussing the entrepreneurship approach, it is useful to draw out and explain a point concerning the 'purposive approach'.[492] The previous part of this integrative chapter discussed the protective statutory purpose justification in relation to the substantivist approach. *Autoclenz* concerned the substantivist approach (the privileging of substance over form); it did not develop the tests for determining employment status.[493] As Chapter 3 of the thesis explains, however, the idea of a 'purposive approach' has also been deployed to support arguments regarding the development of the tests for determining employment status.[494]

For the reasons canvassed above,[495] there are barriers to the adoption of a purposive approach, whether it relates to the privileging of substance over form or to the tests for determining employment status. Both 'versions' of the purposive approach are anchored in the protective

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of Employment from the General Law of Contract' (n 291) 132–4; Anderson, Brodie and Riley, *The Common Law Employment Relationship* (n 8) 48–50.

[491] Bomball, 'The Attribution of Responsibility in Trilateral Work Relationships: A Contractual Analysis' (Thesis Chapter 6) (n 183) 320–6.

[492] See Davidov, *A Purposive Approach to Labour Law* (n 51) ch 6; Bogg, 'The Common Law Constitution at Work' (n 5) 520–4; Bogg, 'Sham Self-Employment in the Supreme Court' (n 2) 341–4.

[493] Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (Thesis Chapter 3) (n 54) 387; Davidov, *A Purposive Approach to Labour Law* (n 51) 115–17. See also Anderson, Brodie and Riley, *The Common Law Employment Relationship* (n 8) 35, noting that *Autoclenz* 'was largely confined to the question of whether contractual documents accurately represented the relationship between the parties, and the tests generally were not reconsidered.'

[494] Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (Thesis Chapter 3) (n 54) 383–4, discussing Davidov, *A Purposive Approach to Labour Law* (n 51) 115–7. See further *McCormick* (n 88) 122 (Abella J for the Court); *Uber* (n 36) [75] (Lord Leggatt for the Court). *Uber* dealt with 'limb (b) workers' rather than common law employees; the Court adopted a 'purposive approach' to the determination of 'limb (b) worker' status. See above nn 323–336.

[495] See above Part VI(B)(1)(a)–(c).

statutory purpose justification (the idea that the protective purposes underlying labour statutes may influence the development of the concept of employment at common law)[496] and both are susceptible to the barriers in Australian law discussed earlier. The existence of these barriers prompted the author to search for a different basis for the substantivist approach, one grounded in the contractual intention justification and the principles of general contract law. These barriers also prompted the author to search for a different approach to the test for determining employment status. A purposive approach to determining employment status appears, from the emerging case law on this approach, to be broad and inclusive in its operation.[497] In light of the barriers to the adoption of this approach in Australia, it is fruitful to consider other broad and inclusive approaches that might be more readily accepted by Australian courts.[498] This thesis contends that the entrepreneurship approach to determining employment status warrants consideration.

This thesis argues that the entrepreneurship approach should be applied at the second stage of the framework that it proposes for the interventionist approach to characterisation.[499] As noted above, there are at least three diverging approaches to the concept of entrepreneurship in Australian cases concerning the characterisation of work contracts.[500] The particular approach that this thesis favours, and which it terms the 'entrepreneurship approach' to determining employment status, is the second of those three approaches. This thesis seeks to provide a solid conceptual and doctrinal footing for the entrepreneurship approach to determining employment

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[496] Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (Thesis Chapter 3) (n 54) 394; Davidov, *A Purposive Approach to Labour Law* (n 51) 117–9; Guy Davidov, 'The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection' (2002) 52(4) *University of Toronto Law Journal* 357, 371–6; Bogg, 'Common Law and Statute in the Law of Employment' (n 271) 100, noting that the purposive approach involves the courts 'developing the common law tests for "employee" … in support of a general legislative policy of worker protection.'

[497] See, eg, *McCormick* (n 88); *Uber* (n 36) (dealing with 'limb (b) worker' status); Davidov, *A Purposive Approach to Labour Law* (n 51) ch 6; Bogg, 'The Common Law Constitution at Work' (n 5) 520–4.

[498] Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (Thesis Chapter 7) (n 70) 24–5. As noted above at nn 339–340 and accompanying text, this thesis does not challenge the 'purposive approach' itself, but rather argues that there are barriers to its adoption in Australia. Some labour law scholars have expressed reservations about the purposive approach. See, eg, Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (n 5) 377 (citations omitted): 'It is always tempting to urge the courts to adopt a purposive approach, and indeed this was attempted for a brief period in the USA. But without additional guidance this seems highly indeterminate and vulnerable to judicial misconceptions of purpose.' See also Judy Fudge, Eric Tucker and Leah F Vosko, 'Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada' (2003) 10 *Canadian Labour and Employment Law Journal* 193, 227–8.

[499] Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (Thesis Chapter 7) (n 70) 20–5; Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 91, 101–5.

[500] See above nn 238–252.

status. The attributes of employment are the factors in the multifactorial test.[501] These factors pull in different directions and are to be weighed and balanced against each other. Under the entrepreneurship approach to determining employment status, the concept of entrepreneurship provides an overarching framework for the evaluation of those factors.[502] The overarching question is whether the worker is in business on his or her own account; the factors are analysed with a view to answering this question.[503] A negative answer to the question inclines the court towards the conclusion that the worker is an employee.[504]

Labour law scholars have long drawn attention to the imprecision of the multifactorial test that courts apply and the uncertainty that this test engenders.[505] One criticism that has been levelled at the current multifactorial test, as expounded in *Brodribb* and endorsed in *Hollis*, is that it does not provide guidance as to the number or combination of factors that are required in order to lead to a finding of employment.[506] Moreover, it does not provide an overarching framework for the analysis.[507] These critiques of the test were captured succinctly in *Ellis v Wallsend District Hospital*, where Samuels JA of the New South Wales Court of Appeal stated:

> The problem is that this approach, tending as it does to define the relationship only in terms of its elements, does not provide any external test or requirement by which the materiality of the elements may be assessed. The assertion that a working relationship between A and B will constitute one of employment, provided that it manifests the elements of such a B relationship, may be unhelpful unless those elements are certain in number, character, quality and importance, in which case their presence in the prescribed measure will establish the character of the relationship.[508]

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[501] See above n 260.
[502] *Personnel Contracting* (n 172) 461–3 (Allsop CJ); *Trifunovski* (n 4) 170, 182–6 (Buchanan J).
[503] Ibid.
[504] Ibid.
[505] See, eg, Stewart et al, *Creighton and Stewart's Labour Law* (n 1) 205–6.
[506] Ibid. For a critique of the tests for determining employment status in the UK, see, eg, Freedland, *The Personal Employment Contract* (n 51) 18–22; Lord Wedderburn, *The Worker and the Law* (Sweet & Maxwell, 1986) 110–16.
[507] Ian Neil and David Chin, *The Modern Contract of Employment* (Lawbook, 2nd ed, 2017) 16–7.
[508] (1989) 17 NSWLR 553, 597 (Samuels JA, with Meagher JA agreeing), quoted in Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 104 n 187. See also Neil and Chin, *The Modern Contract of Employment* (n 507) 16–17.

The current approach has been referred to as an 'amorphous exercise'.[509] The proposal that this thesis makes to adopt the entrepreneurship approach to determining employment status seeks, among other things, to provide some structure to that exercise.[510] It will not eradicate uncertainty, as some uncertainty is inherent in a test that comprises multiple factors, and there will be always be grey areas at the margins.[511] However, the adoption of an overarching framework might bring greater precision to the characterisation exercise.[512]

The following sections draw together and summarise the arguments that this thesis puts forward in support of the adoption of the entrepreneurship approach to determining employment status. The first argument, which is set out in Chapter 7, is a normative one, based on the worker-protective perspective outlined earlier.[513] The second argument, which is developed in Chapter 8, is a doctrinal one. One reason for the uncertainty surrounding the entrepreneurship approach in Australian law is the absence of a clear doctrinal basis for it. This thesis presents a doctrinal basis for the entrepreneurship approach.

(a) A Normative Critique of the Entrepreneurship Approach

The concept of entrepreneurship has become increasingly prominent in both the case law[514] and in policy debates[515] concerning the distinction between employees and independent contractors in Australia. Whether or not entrepreneurship should be determinative of the inquiry as to employment status has been identified as one of the major 'tensions'[516] in the Australian case law. This thesis is not the first contribution to consider the entrepreneurship approach. The *Report of the Inquiry into the Victorian On-Demand Workforce*, which was released in 2020, recommended that the entrepreneurship approach to determining employment

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[509] *Personnel Contracting* (n 172) 478 (Lee J).
[510] Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 104–5, citing *Personnel Contracting* (n 172) 461 (Allsop CJ); Neil and Chin, *The Modern Contract of Employment* (n 507) 22.
[511] Simon Deakin, 'The Comparative Evolution of the Employment Relationship' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Hart Publishing, 2006) 89, 104. See also Stewart et al, *Creighton and Stewart's Labour Law* (n 1) 205–6.
[512] Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 104–5, citing *Personnel Contracting* (n 172) 461 (Allsop CJ); Neil and Chin, *The Modern Contract of Employment* (n 507) 22.
[513] See above Part IV(A).
[514] See, eg, *On Call Interpreters* (n 4) 123 (Bromberg J); *Quest* (n 4) 389–92 (North and Bromberg JJ); *Personnel Contracting* (n 172) 461–3 (Allsop CJ); *Trifunovski* (n 4) 170, 182–6 (Buchanan J); *Tattsbet* (n 200) 61 (Jessup J); *Ecosway* (n 251) [78] (White J); *Jamsek* (n 251) 216 (Perram J), 245–6 (Anderson J); *Moffet* (n 251) 199–200 (Perram and Anderson JJ); *Eastern Van* (n 172) 399–400 (Tate, Kyrou and Niall JJA).
[515] *Report of the Inquiry into the Victorian On-Demand Workforce* (n 35) 105–6.
[516] *Personnel Contracting* (n 172) 479 (Lee J).

status be enshrined in statute, by way of an amendment to the *Fair Work Act 2009* (Cth).[517] In so doing, it adopted the statutory reform proposal that has been put forward by Professor Stewart.[518] Professor Stewart has argued in favour of statutory implementation of an approach that presumes that a worker is an employee unless it can be established that he or she is, in practice, carrying on a business of his or her own.[519]

Chapter 7 of this thesis complements and extends those existing contributions by evaluating the entrepreneurship approach through normative and comparative lenses. In Chapter 8, the thesis makes a more significant original contribution with respect to the entrepreneurship approach by proposing a doctrinal basis for it. Professor Stewart makes a proposal for statutory reform. This thesis considers whether the entrepreneurship approach might instead be operationalised by way of the common law.

The concept of entrepreneurship, as it relates to the characterisation exercise, 'remains … under-theorised.'[520] Chapter 7 critiques the concept of entrepreneurship from a normative perspective. The normative perspective that this thesis adopts is grounded in the preservation of the protective scope of labour law, with that scope being defined by reference to the common law concept of employment.[521] The practice of disguised employment erodes the protective scope of labour law because it extrudes from the realm of labour law those workers who are in substance employees and thereby warrant its protections. Chapter 7 builds a theoretical framework that is directed towards identifying the characteristic vulnerabilities of employees than render them in need of the protection of labour law.[522] That theoretical framework was set out earlier in this integrative chapter and will not be discussed here.[523] Chapter 7 uses this framework to evaluate critically the entrepreneurship approach to determining employment status. The chapter explicates the conceptual relationship between vulnerability and

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[517] *Report of the Inquiry into the Victorian On-Demand Workforce* (n 35) 192.
[518] See, eg, Stewart, 'Redefining Employment?' (n 2) 270–6. See further Roles and Stewart, 'The Reach of Labour Regulation: Tackling Sham Contracting' (n 50) 279–80; Stewart and McCrystal, 'Labour Regulation and the Great Divide' (n 50) 21–2.
[519] Ibid.
[520] Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (Thesis Chapter 7) (n 70) 1.
[521] Ibid 1–2. See above Part IV(A).
[522] Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (Thesis Chapter 7) (n 70) 6–10.
[523] See above Part IV(B).

entrepreneurship.[524] In so doing, it argues that the entrepreneurship approach to determining employment status has appeal, from a normative worker-protective perspective, because the entrepreneurship approach captures, and brings within the protective domain of labour law, those workers who exhibit the characteristic vulnerabilities of employees.[525]

Chapter 7 also considers the operation of the entrepreneurship approach in practice. In order to do so, it adopts a comparative methodology, drawing upon cases in the US that have invoked the concept of entrepreneurship in the inquiry as to employment status. It considers two separate tests. The first is the 'entrepreneurial opportunity test', which emanated from decisions of the United States Court of Appeals for the District of Columbia Circuit ('DC Circuit Court').[526] The second is the 'ABC' test that the Supreme Court of California adopted in *Dynamex Operations West Inc v Superior Court of Los Angeles County* ('*Dynamex*').[527] As Chapter 7 notes, '[t]his comparative study reveals insights about the nature and practical operation of the entrepreneurship approach that would not be discerned simply by examining the emerging Australian case law on this approach.'[528]

Chapter 7 draws out several lessons from that comparative study, which it uses to evaluate the entrepreneurship approach. The first lesson it draws from the study pertains to the manner in which the legal test for entrepreneurship is framed and applied.[529] The framing of the entrepreneurship test affects its ability to capture accurately those workers who possess the characteristic vulnerabilities of employees. The decisions of the DC Circuit Court, particularly *FedEx Home Delivery v NLRB*,[530] demonstrate that an entrepreneurship approach that focuses on 'entrepreneurial potential'[531] or the 'right to engage in entrepreneurial activity'[532] rather

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[524] Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (Thesis Chapter 7) (n 70) 10–11.
[525] Ibid.
[526] See *Corporate Express Delivery Systems v NLRB*, 292 F 3d 777 (DC Cir 2002) ('*Corporate Express Delivery Systems*'); *FedEx Home Delivery* (n 79); *Lancaster Symphony Orchestra v NLRB*, 822 F 3d 563 (DC Cir 2016) ('*Lancaster Symphony Orchestra*'), cited in Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (Thesis Chapter 7) (n 70) 3 n 12.
[527] *Dynamex* (n 80).
[528] Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (Thesis Chapter 7) (n 70) 2.
[529] Ibid 20–1.
[530] *FedEx Home Delivery* (n 79).
[531] Ibid 498.
[532] Ibid 516, quoting *CC Eastern Incorporated v NLRB*, 60 F 3d 855, 860 (DC Cir 1995)

than the 'exercise of entrepreneurial functions in practice',[533] is a restrictive approach. It has the effect of excluding from the domain of labour law those who warrant its protections.[534]

The ABC test, on the other hand, focuses on the exercise of entrepreneurial functions in practice rather than rights to engage in entrepreneurial activity that are set out in the written contract.[535] Scholars in the US have shown that the ABC test is a broad and inclusive test for employment status.[536] The ABC test was formulated in *Dynamex* as follows:

> Under this test, a worker is properly considered an independent contractor … only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.[537]

Significantly, the comparative analysis presented in Chapter 7 reveals the utility, for the purposes of addressing instances of disguised employment, of an approach to characterisation that combines a focus on substantivism with the touchstone of entrepreneurialism. That is the approach that this thesis seeks to place on a secure conceptual and doctrinal footing in Australian law.

(b) A Doctrinal Basis for the Entrepreneurship Approach

The doctrinal basis is presented in Chapter 8. Before explaining the conceptual and doctrinal arguments that are advanced in Chapter 8, it is useful to revisit the distinction between the normative perspective of this thesis on the one hand, and the doctrinal arguments that it makes

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[533] Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (Thesis Chapter 7) (n 70) 18.
[534] Ibid 20–1.
[535] *Dynamex* (n 80) 7 (Cantil-Sakauye CJ for the Court).
[536] See Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (n 34) 204–5; Anna Deknatel and Lauren Hoff-Downing, 'ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes' (2015) 18(1) *University of Pennsylvania Journal of Law and Social Change* 53, 66–74, 79–102, cited in Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (Thesis Chapter 7) (n 70) 22 nn 231–4.
[537] *Dynamex* (n 80) 7 (Cantil-Sakauye CJ for the Court).

on the other.[538] From a normative worker-protective perspective, this thesis favours the entrepreneurship approach to determining employment status because this approach (when combined with the substantivist approach) is conducive to preserving the protective scope of labour law. However, the doctrinal basis that this thesis proposes for the entrepreneurship approach is not couched in the language of labour law's protective scope or the protective purposes of labour statutes. Instead, this thesis grounds its doctrinal justification for the entrepreneurship approach in the law of vicarious liability.[539]

Chapter 8 commences by noting that the common law concept of employment, and the distinction between employees and independent contractors, play a vital role in delineating the scope of the doctrine of vicarious liability in tort law.[540] This is because vicarious liability is generally only imposed upon an employer for torts committed by an employee in the course of employment.[541] Vicarious liability does not arise in respect of the acts of an independent contractor.[542] Australian courts have drawn attention to the fact that 'much of the learning'[543] about the nature and content of the common law concept of employment has been propounded in cases involving claims of vicarious liability.

Importantly for present purposes, Australian courts have held that when a labour statute, such as the *FW Act*, invokes the concept of employment at common law, it is referring to that concept as developed in vicarious liability cases, untempered by the purposes of the labour statute.[544] The courts have stated that the determination of employment status, in a case involving a claim under such a statute, is to be 'approached from the common law's perspective on the imposition of vicarious liability and with it a subsisting policy debate about the distributive allocation of losses between tortfeasors and their victims'.[545] The High Court of Australia has made it clear that the rationales or purposes underlying the doctrine of vicarious liability inform the common

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[538] See above nn 390–393.
[539] Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 101–4.
[540] Ibid 86.
[541] *Sweeney* (n 68) 167 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
[542] Ibid.
[543] *Trifunovski* (n 4) 151 (Buchanan J).
[544] *Trifunovski Trial* (n 68) 542–3 (Perram J); *Trifunovski* (n 4) 149 (Lander J), 182 (Buchanan J); *C v Commonwealth* (n 7) 87 (Tracey, Buchanan and Katzmann JJ). See also Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 86; Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (Thesis Chapter 3) (n 54) 379–84; Irving, *The Contract of Employment* (2nd ed) (n 108) 58–9.
[545] *Trifunovski Trial* (n 68) 543 (Perram J); *Trifunovski* (n 4) 149 (Lander J), 182 (Buchanan J).

law concept of employment.[546] In *Hollis*, a majority of the High Court stated that the contours of the concept of employment are moulded by the 'various matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability.'[547]

In constructing a doctrinal basis for the entrepreneurship approach, Chapter 8 considers an argument that Lee J alluded to, but did not address, in *Personnel Contracting*.[548] The argument was based on two of the rationales that have been put forward for the imposition of vicarious liability, namely enterprise risk and agency.[549] The argument was that these two rationales support the proposition that entrepreneurship should be the core framing conception for the distinction between employees and independent contractors.[550] Justice Lee declined to express a view on the argument.[551] Chapter 8 of the thesis interrogates this argument by reference to the cases and literature on the doctrine of vicarious liability in tort law.[552]

Chapter 8 examines theories of vicarious liability to identify the rationales that have been put forward in respect of the doctrine.[553] It then considers whether and to what extent these rationales have found favour with members of the High Court of Australia.[554] A clear test for the imposition of vicarious liability has not yet been propounded by the Court,[555] and the

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[546] *Hollis* (n 7) 41 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).
[547] Ibid, quoted in Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 86; Irving, *The Contract of Employment* (2nd ed) (n 108) 58–9.
[548] *Personnel Contracting* (n 172). The discussion in this paragraph is based on Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 87.
[549] *Personnel Contracting* (n 172) 504 (Lee J) (referring to the submission of Counsel for the appellants (M Irving QC)), cited in Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 87 n 35.
[550] Ibid.
[551] *Personnel Contracting* (n 172) 506 (Lee J).
[552] Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 87.
[553] See, eg, Harold J Laski, 'The Basis of Vicarious Liability' (1916) 26(2) *Yale Law Journal* 105; T Baty, *Vicarious Liability* (Clarendon Press, 1916); Guido Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts' (1961) 70(4) *Yale Law Journal* 499; PS Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967); Glanville Williams, 'Vicarious Liability and the Master's Indemnity' (1957) 20(3) *Modern Law Review* 220 ('Vicarious Liability I'); Glanville Williams, 'Vicarious Liability and the Master's Indemnity' (1957) 20(5) *Modern Law Review* 437 ('Vicarious Liability II'); JW Neyers, 'A Theory of Vicarious Liability' (2005) 43(2) *Alberta Law Review* 287; Douglas Brodie, *Enterprise Liability and the Common Law* (Cambridge University Press, 2010); Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010); Anthony Gray, *Vicarious Liability: Critique and Reform* (Hart Publishing, 2018), cited in Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 87 n 37.
[554] Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 88, 96–101.
[555] See *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, 148–50 ('*Prince Alfred College*'); Paula Giliker, 'Analysing Institutional Liability for Child Sexual Abuse in England and Wales and Australia: Vicarious Liability,

rationales underpinning vicarious liability have not yet been comprehensively articulated by the Court.[556] Chapter 8 therefore draws upon scholarly expositions of the theories of vicarious liability for foundational concepts and ideas that can be used to understand and evaluate the observations that particular members of the High Court have made, in different judgments, about the rationales for vicarious liability.[557]

Chapter 8 considers four potential rationales for the doctrine of vicarious liability that have been put forward in the literature and commanded varying degrees of support from members of the High Court.[558] These four rationales are 'enterprise risk, deterrence, just compensation and loss distribution, and agency'.[559] This thesis considers how these rationales have been addressed and conceptualised in the cases concerning vicarious liability.[560] This analysis demonstrates that the essence of the distinction between employees and independent contractors is grounded in the distinction between working in another's business, and carrying on a business on one's own account.[561] In other words, the rationales for vicarious liability 'are not engaged when the worker is carrying on a business of his or her own'.[562]

This argument is discussed in detail in Chapter 8. One example regarding the enterprise risk rationale serves to illustrate the point. Broadly speaking, the enterprise risk justification for vicarious liability is based upon the idea that 'where the employee's conduct is closely tied to a risk that the employer's enterprise has placed in the community, the employer may justly be held vicariously liable for the employee's wrong.'[563] The enterprise risk rationale, as

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Non-Delegable Duties and Statutory Intervention' (2018) 77(3) *Cambridge Law Journal* 506, cited in Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 93 n 99.

[556] See *Hollis* (n 7) 37 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Sweeney* (n 68) 166–7 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), cited in Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 96 n 120.

[557] Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 94.

[558] Ibid 93–101.

[559] Ibid 94.

[560] Ibid 96–101. See particularly *Hollis* (n 7); *Sweeney* (n 68); *New South Wales v Lepore* (2003) 212 CLR 511 ('*Lepore*'); *Prince Alfred College* (n 555); *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41.

[561] Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 101, citing *Personnel Contracting* (n 172) 504 (Lee J) (who was referring to the submission of Counsel for the appellants (M Irving QC)).

[562] Ibid.

[563] *Bazley v Curry* [1999] 2 SCR 534, 548–9 (McLachlin J for the Court), quoted in *Hollis* (n 7) 40 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). See further Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts' (n 553) 500–15; Brodie, *Enterprise Liability and the Common Law* (n 553) 9.

explicated in decisions of the High Court of Australia, centres upon the conduct of the employer's business.[564] Chapter 8 argues that '[t]he relevant concerns are not enlivened when the worker is carrying on a business of his or her own'.[565]

The analysis in Chapter 8 of the rationales underpinning vicarious liability, as explained in the case law, supports the proposition that the concept of entrepreneurship captures the essence of the distinction between employees and independent contractors.[566] Chapter 8 contends that the proper approach to the inquiry as to employment status, as a matter of legal doctrine, is therefore the approach that treats the concept of entrepreneurship as the organising principle for the inquiry.[567] That is, the proper approach is the entrepreneurship approach to determining employment status. Chapter 8 contends that the adoption of this approach would '[align] the concept of employment with the rationales underlying the body of law in which it is anchored [namely, the law of vicarious liability], thereby bringing a degree of conceptual coherence to the exercise of distinguishing employees from independent contractors.'[568]

C *Reconceptualising Characterisation: The Proposed Analytical Framework for the Interventionist Approach to Characterisation*

This thesis proposes a reconceptualisation of the characterisation framework for work contracts in Australia. The elements of this framework, and the supporting cases, are discussed in detail in Chapters 2, 4, 5 and 8 of the thesis. The fundamental aspects of the framework are set out here. This discussion is succinct because these elements have been discussed earlier in this integrative chapter. The interventionist approach to characterisation that this thesis proposes combines the substantivist approach with the entrepreneurship approach.

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[564] Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 101–3 citing, in particular, *Personnel Contracting* (n 172) 504 (Lee J) (who was referring to the submission of Counsel for the appellants (M Irving QC)); *Sweeney* (n 68); *Lepore* (n 560).
[565] Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 101, citing, *Personnel Contracting* (n 172) 504 (Lee J) (who was referring to the submission of Counsel for the appellants (M Irving QC)).
[566] Ibid.
[567] Ibid.
[568] Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 104.

Under the proposed reconceptualisation, the framework for characterisation involves the following two stages:[569]

> (1) Ascertain the actual rights and obligations of the parties.
>
> (2) Determine the legal character of the contract by reference to the attributes of employment.

As to the first stage, the court is to adopt a substantivist approach.[570] The court is to take into account all of the relevant evidence, including the post-contractual conduct of the parties and the terms of the written contract.[571] Where there is a disjunction between a particular term of the written contract and the post-contractual conduct of the parties, the latter prevails. For example, if the written contract confers a right to delegate, but there is no right to delegate in practice, then that term of the written contract is disregarded for the purposes of determining the legal character of the contract that takes place at the second stage of the framework.[572]

Once the court has ascertained the actual rights and obligations of the parties, the court moves to the second stage of the characterisation framework. The court construes the parties' actual rights and obligations (their actual agreement) and determines the legal character of their agreement by evaluating those rights and obligations by reference to the attributes of employment.[573] The attributes of employment are the factors in the multifactorial test that was adopted in *Brodribb* and endorsed in *Hollis*.[574] The concept of entrepreneurship operates as the organising principle at this second stage.[575] That is, the overarching question for the court, in assessing the parties' actual rights and obligations by reference to the attributes of

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[569] Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (Thesis Chapter 4) (n 27) 166–7; Bomball, 'Intention, Pretence and the Contract of Employment' (Thesis Chapter 5) (n 28) 256–9.
[570] Ibid. See also Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 21.
[571] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 21, 27–33; Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (Thesis Chapter 4) (n 27) 160–1, 166–8; Bomball, 'Intention, Pretence and the Contract of Employment' (Thesis Chapter 5) (n 28) 252–4, 256–9.
[572] Ibid.
[573] Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (Thesis Chapter 4) (n 27) 166.
[574] Bomball, 'Intention, Pretence and the Contract of Employment' (Thesis Chapter 5) (n 28) 257–8.
[575] Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 91.

employment, is whether the worker is carrying on a business of his or her own.[576] A negative answer to this question is to incline the court to the conclusion that the worker is an employee.[577]

Under the proposed model, express terms in the written contract that seek to assign a particular characterisation to the contract ('labels') are of limited relevance to the characterisation exercise.[578] As Chapter 5 demonstrates, the characterisation of a contract turns upon its legal operation, and the legal operation of a contract turns upon an evaluation of the actual rights and obligations of the parties by reference to the attributes of the particular type of contract.[579] Those attributes are set by precedent.[580] In addition, as Chapter 2 contends, any terms in the written contract that deny workers access to leave entitlements, superannuation and other benefits, as well as terms that require the workers to make their own arrangements as to taxation and insurance, are to be accorded limited weight.[581] In some cases, these terms, which militate against a finding of employment, have been accorded some significance.[582] This thesis favours the view of Buchanan J in *Trifunovski* on this point.[583] His Honour observed that such terms 'are reflections of a view by one party (or both) that the relationship is, or is not, one of employment'[584] and accordingly, these terms 'are in the same category as declarations by the parties in their contract (from which they often proceed).'[585]

In order to illustrate the practical operation of the proposed framework, this section of the integrative chapter will now demonstrate how application of the framework might have led to different outcomes in two recent Australian cases. The first case is *Gupta v Portier Pacific Pty Ltd* ('*Gupta*'),[586] a decision of the Full Bench of the Fair Work Commission. The issue in this

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[576] Ibid.
[577] Ibid.
[578] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 21.
[579] Bomball, 'Intention, Pretence and the Contract of Employment' (Thesis Chapter 5) (n 28) 256–9.
[580] Ibid 257.
[581] Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 21.
[582] See, eg, *Tattsbet* (n 200) 63–4. See further Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) 20–1.
[583] *Trifunovski* (n 4).
[584] Ibid 153 (Buchanan J).
[585] Ibid. See also Stewart et al, *Creighton and Stewart's Labour Law* (n 1) 206–7; Irving, *The Contract of Employment* (2nd ed) (n 108) 92–5.
[586] *Gupta* (n 36). This decision is discussed in Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 88–9. The Uber Eats driver, Ms Gupta, brought unfair dismissal claims against both Portier Pacific Pty Ltd and Uber Australia Pty Ltd. On appeal to the Full

case was whether an Uber Eats driver, Ms Gupta, was eligible to bring an unfair dismissal claim against Uber pursuant to the provisions of the *Fair Work Act 2009* (Cth). This turned upon whether she was an employee or an independent contractor. In determining this issue, President Ross and Hatcher VP had regard to both the terms of the written contract and the manner in which the parties conducted their relationship in practice.[587] *Gupta* is invoked here to illustrate how application of the entrepreneurship approach might make a practical difference in cases concerning employment status.

President Ross and Hatcher VP observed that Uber 'engaged Ms Gupta to perform delivery services for it, and paid her for them, as part of a business by which it delivered restaurant meals to the general public.'[588] Significantly, President Ross and Hatcher VP observed that Ms Gupta was not carrying on a business of her own:

> There was no aspect of her work which would permit it to be characterised as the carrying on of an independent business or enterprise: she had no means of independently expanding her customer base or generating additional work within the Uber Eats business or of establishing goodwill with any of the restaurants or customers with whom she dealt.[589]

Despite concluding that Ms Gupta was not in business on her own account, President Ross and Hatcher VP concluded that Ms Gupta was an independent contractor.[590] As a result, she was not able to access the unfair dismissal provisions of the *FW Act*. Application of the entrepreneurship approach to determining employment status might have led to a different outcome in this case. In light of the finding that Ms Gupta was not running her own business, application of the entrepreneurship approach might have led to the conclusion that Ms Gupta was an employee.[591]

Bench of the Fair Work Commission, Ms Gupta's claim proceeded against Portier Pacific Pty Ltd: *Gupta* (n 36) 250. It was noted that 'Portier Pacific and Uber Australia are constituent corporate elements of' the 'Uber Eats business': *Gupta* (n 36) 250. In this case, attention was directed, among other things, to analysing 'the contractual relationship between Ms Gupta and Portier Pacific/Uber': *Gupta* (n 36) 264. For simplicity and ease of explication, this brief discussion of the decision will refer to the respondent as 'Uber'.

[587] *Gupta* (n 36) 265–7 (President Ross and Hatcher VP).

[588] Ibid 268.

[589] Ibid 275.

[590] Ibid 276. The worker, Ms Gupta, sought judicial review of the decision of the Fair Work Commission, but the matter was ultimately settled out of court.

[591] Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) 88–9.

The second case considered here is *Personnel Contracting*,[592] a decision of Allsop CJ, Jagot and Lee JJ of the Full Federal Court of Australia. In this case, the issue was whether a labour hire worker, Mr McCourt, was an employee of a labour hire agency and thereby entitled to certain labour rights and protections. Mr McCourt had been engaged by the labour hire agency and assigned to work as a labourer on the construction site of the host company. The written work contract between the labour hire agency and Mr McCourt contained multiple terms that pointed towards an independent contract. The written contract also referred to Mr McCourt as a 'self-employed contractor'.[593]

The Full Federal Court concluded that Mr McCourt was an independent contractor, primarily on the basis of considerations of precedent and judicial comity.[594] In order to understand the conclusion reached in this case, it is necessary to explain briefly two previous cases. Those two cases are *Young v Tasmanian Contracting Services Pty Ltd* ('*Young*'),[595] a decision of the Full Court of the Supreme Court of Tasmania, and *Personnel Contracting Pty Ltd t/as Tricord Personnel v Construction, Forestry, Mining and Energy Union of Workers* ('*Tricord*'), a decision of the Western Australian Industrial Appeal Court.[596] The majority in *Tricord* and the Court in *Young* each held that a labour hire worker in a position similar to Mr McCourt in *Personnel Contracting* was an independent contractor.[597] In reaching their conclusions, the

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[592] *Personnel Contracting* (n 172). On 12 February 2021, the High Court of Australia granted the application for special leave to appeal this decision: Transcript of Proceedings, *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2021] HCATrans 30. The appeal will be heard in the latter half of 2021. As at 16 April 2021, the hearing date had not yet been published on the High Court of Australia's website. The two appellants in this matter are the Construction, Forestry, Maritime, Mining and Energy Union and Mr McCourt (a labour hire worker). Three of the articles included in this thesis have been cited by the legal team representing the appellants in their written submissions to the High Court of Australia: Bret Walker SC, Mark Irving QC and Thomas Dixon, Appellants' Submissions, High Court of Australia, Appeal from *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 381 ALR 457. Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (Thesis Chapter 2) (n 5) is cited at 10 n 35 of the Appellants' Submissions; Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (Thesis Chapter 3) is cited at 10 n 36 of the Appellants' Submissions; Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (Thesis Chapter 8) (n 52) is cited at 4 n 6, 8 n 31 of the Appellants' Submissions. In Australia, written submissions are filed in advance of hearings before the High Court.

[593] See *Personnel Contracting* (n 172) 469–71 (Lee J).

[594] Ibid 466–7 (Allsop CJ); 489–493, 505–6 (Lee J). Jagot J agreed with Allsop CJ and Lee J (at 467).

[595] *Young* (n 3).

[596] (2004) 141 IR 31 ('*Tricord*'). As Allsop CJ noted, the Western Australian Industrial Appeal Court was 'effectively the Full Court of the Supreme Court of Western Australia, the Court of Appeal coming into existence a month [after *Tricord* was handed down]': *Personnel Contracting* (n 172) 466 (Allsop CJ).

[597] The same labour hire agency was involved in both *Personnel Contracting* and *Tricord*: see *Personnel Contracting* (n 172) 466 (Allsop CJ).

majority in *Tricord* and the Court in *Young* gave primacy to the terms of the written contract, which included terms stipulating that the workers were independent contractors as well as terms that pointed away from employment and towards independent contracting.[598]

While the Full Federal Court in *Personnel Contracting* followed the outcomes in *Tricord* and *Young*, the judges expressed reservations about both the reasoning and the conclusions in those two cases.[599] Chief Justice Allsop stated, in *Personnel Contracting*, that his Honour would, '[u]nconstrained by authority,'[600] have reached the conclusion that Mr McCourt was an employee of the labour hire agency rather than an independent contractor.[601] Likewise, Lee J stated that 'if approached *tabula rasa*, [his Honour] would have concluded that the notion of Mr McCourt being an independent contractor [was] somewhat less than intuitively sound.'[602]

Importantly for present purposes, Allsop CJ attributed the contrast between his Honour's preferred approach and the approaches adopted in *Tricord* and *Young* to the weight accorded to the written contract in each case, observing that '[e]mbedded in my difference with the majority in [*Tricord*] is the approach to the contract.'[603] His Honour observed that the majority in *Tricord* and the Court in *Young* had reached their conclusions 'by reference substantially to the terms of the contract'[604] rather than the reality of the relationship. Chief Justice Allsop, on the other hand, accorded primacy to the post-contractual conduct of the parties.[605] Chief Justice Allsop's observations in *Personnel Contracting* illustrate the practical significance of adopting a substantivist, as opposed to a formalist, approach to the characterisation of work contracts.

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[598] *Young* (n 3) [21]–[23], [43]–[44] (Tennent J, with whom Blow and Wood JJ agreed); *Tricord* (n 596) 40–1 (Steytler J), 61–3 (Simmonds J).
[599] *Personnel Contracting* (n 172) 465–7 (Allsop CJ), 488–9, 493, 504–6 (Lee J).
[600] Ibid 465 (Allsop CJ).
[601] In particular, Allsop CJ would have concluded that Mr McCourt was a casual employee of the labour hire agency: *Personnel Contracting* (n 172) 465–6 (Allsop CJ). The problems for casual workers in the UK emanating from the concept of 'mutuality of obligation' do not arise in Australia. As to the problems in the UK, see Nicola Countouris, 'Uses and Misuses of "Mutuality of Obligations" and the Autonomy of Labour Law' in Alan Bogg et al (eds), *The Autonomy of Labour Law* (Hart Publishing, 2015) 169. As to the Australian position, see Anderson, Brodie and Riley, *The Common Law Employment Relationship* (n 8) 56–7 (citations omitted): 'The position is different in Australia, where there is no concept of mutuality of obligation particular to the employment contract. … Australia does not require a commitment to future performance before an employment contract can come into being. It is also significantly easier for an employee to demonstrate that employment is ongoing, despite there being periods of time when no work is undertaken.'
[602] *Personnel Contracting* (n 172) 505 (Lee J).
[603] Ibid 467 (Allsop CJ).
[604] Ibid 466.
[605] Ibid 463.

The practical consequences of adopting an entrepreneurship approach are also illustrated by contrasting the reasoning in *Personnel Contracting* with that in *Tricord* and *Young*. In observing that his Honour's preferred conclusion (in the absence of contrary authority) was that Mr McCourt was an employee, Allsop CJ in *Personnel Contracting* made reference to the fact that Mr McCourt was 'an unskilled builder's labourer'[606] who 'had no aspect of a business'.[607] Likewise, Lee J in *Personnel Contracting* stated that 'there is merit in the argument that … the majority in [*Tricord*] did not give sufficient weight to focussing upon whether the workers were conducting a business on their own account.'[608] *Tricord* and *Young*, like *Personnel Contracting*, involved labour hire workers in a similar position to Mr McCourt. It is difficult to argue that these workers were carrying on a business on their own account. Had the entrepreneurship approach to determining employment status been adopted in *Tricord* and *Young* (along with a substantivist approach, which might have led those courts to attribute greater weight to the way the parties carried out their relationship in practice), a different conclusion might have been reached in those cases. The courts in those cases might have concluded that the workers were employees rather than independent contractors.

VII FUTURE DIRECTIONS FOR RESEARCH

This thesis has focused on the common law principles governing the characterisation of work contracts. It has adopted doctrinal and comparative research methodologies in its project of clarification and reconceptualisation. Future work in this area might adopt an empirical research methodology, along the lines of projects that have been conducted in the area of discrimination law, to determine why workers have been successful or unsuccessful in their claims.[609] This empirical project would involve an analysis of a large body of cases, with the cases being treated as data. Such a project might shed further light upon modes of judicial reasoning that either facilitate or impede the detecting and addressing of disguised employment.

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[606] Ibid 465.
[607] Ibid.
[608] Ibid 493 (Lee J).
[609] See, eg, Alysia Blackham, 'Why Do Employment Age Discrimination Cases Fail? An Analysis of Australian Case Law' (2020) 42(1) *Sydney Law Review* 1. See generally Lizzie Barmes, 'Common Law Confusion and Empirical Research in Labour Law' in Alan Bogg et al (eds), *The Autonomy of Labour Law* (Hart Publishing, 2015) 107; Lizzie Barmes, *Bullying and Behavioural Conflict at Work: The Duality of Individual Rights* (Oxford University Press, 2015); Amy Ludlow and Alysia Blackham (eds), *New Frontiers in Empirical Labour Law Research* (Hart Publishing, 2015).

A second potential avenue for future research relates to the use that this thesis makes of the law of vicarious liability. This thesis has invoked that body of law to provide a doctrinal basis for the entrepreneurship approach to determining employment status. A fruitful line of inquiry might involve considering whether the common law concept of employment could be developed and expanded by reference to developments in the law of vicarious liability, including the concept of a relationship 'akin to employment'[610] that has emerged in the case law on vicarious liability.[611]

VIII CONCLUSION

In their analysis of the law of work, Professor Rosemary Owens, Professor Joellen Riley and Associate Professor Jill Murray made the following observation:

> While problems of classification are not new, there is a new urgency to these issues: the new forms of work arrangements and the tendency to commercialise work relations are challenging labour law's protective purposes as never before. The disappearance of the traditional subject of labour law threatens labour law itself.[612]

These observations, which were made in 2011, remain equally apposite today. Changes in work practices and structures, fuelled more recently by the emergence of the gig economy, have brought into focus the problem of disguised employment. In Australia, disputes concerning employment status fall to be determined by reference to the principles governing the characterisation of work contracts. In spite of the practical importance of the common law's framework for distinguishing employees from independent contractors, core aspects of that framework remain the subject of ongoing contestation.

The absence of clarity with respect to core aspects of that framework renders less stable the interventionist approach to the characterisation of work contracts. This in part explains the current judicial vacillations between deferential and interventionist approaches to

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[610] See, eg, *JGE v Portsmouth Roman Catholic Diocesan Trust* [2012] IRLR 846.
[611] See, eg, Jeremias Prassl, 'Autonomous Concepts in Labour Law? The Complexities of the Employing Enterprise Revisited' in Alan Bogg et al (eds), *The Autonomy of Labour Law* (Hart Publishing, 2015) 151, 160–1, where some observations were made on this point. On the role of tort law in the employment context, see generally Riley, 'The Future of the Common Law in Employment Regulation' (n 388) 43; Brodie, 'The Dynamics of Common Law Evolution' (n 350) 62–4.
[612] Owens, Riley and Murray, *The Law of Work* (n 33) 198.

characterisation in Australia. This thesis has examined the principles of characterisation by reference to three broader conceptual lenses concerning the formalist-substantivist dichotomy, the interaction of common law and statute, and the normative tensions that arise from the channelling of statutory protections through the vehicle of private law. It has harnessed the insights that flowed from this broader analysis to construct conceptual and doctrinal justifications for the interventionist approach to the characterisation of work contracts, along with an analytical framework for its application by the courts. In clarifying the principles of characterisation, and reconceptualising the framework for characterisation, this thesis has sought to place the interventionist approach on a more solid conceptual and doctrinal footing.

In addition to the original contributions that are outlined in each of the articles that comprise this thesis, these articles when read as a whole make two key original contributions to the existing literature in this field. The first concerns the clarification of the characterisation principles and the proposed reconceptualisation of the characterisation framework. The second concerns the conceptual and doctrinal justifications that this thesis develops for the substantivist approach to the ascertainment of the parties' actual rights and obligations, and the entrepreneurship approach to determining employment status.

The principles governing the characterisation of work contracts occupy a central place in labour law.[613] These principles identify those workers who fall within labour law's domain, and thereby delimit the protective boundaries of labour law. The increasing diversity of work arrangements in the modern economy has placed strains upon the common law's architecture for distinguishing employees from independent contractors. Leading labour law scholars have drawn attention to the need to 'revitalize the tests used to identify the contract of employment, so that they guard against the inappropriate use of self-employment.'[614] This thesis has sought to make a contribution to the important project of revitalising the common law's architecture for identifying the beneficiary of labour law's protections.

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[613] Ibid 152–3.
[614] Anderson, Brodie and Riley, *The Common Law Employment Relationship* (n 8) 68.

CHAPTER 2

Pauline Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (2020) 44(2) *Melbourne University Law Review* (advance)

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Pauline Bomball

CONTRACTUAL AUTONOMY, PUBLIC POLICY AND THE PROTECTIVE DOMAIN OF LABOUR LAW

PAULINE BOMBALL*

Recent changes in the nature of work relationships have drawn into sharp focus the way that employing entities may disguise employees as independent contractors and thereby remove those employees from the protective domain of labour law. In many cases, the avoidance of labour statutes is facilitated by the use of contractual terms that disclaim employment status. Clarity is required as to the circumstances in which a court may intervene to thwart such avoidance techniques, particularly by disregarding, or assigning limited weight to, the express terms of a work contract. An analysis of the Australian case law reveals inconsistencies in the judicial treatment of express terms in work contracts. This article argues that these inconsistencies are symptomatic of an underlying tension between the concepts of contractual autonomy and public policy in the law of the employment contract. When a court places limited weight upon, or disregards altogether, some of the express terms of a work contract, the court is engaged in a form of judicial intervention in a private bargain. This article analyses the concepts of contractual autonomy and public policy, and uses this analysis to develop a conceptual framework that rationalises and justifies such judicial intervention.

CONTENTS

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I Introduction

In his treatise on the personal employment contract, Professor Mark Freedland observed that there is 'continuing doubt about how far [a court is] to defer to the expressed intentions of the parties themselves' when the court is determining the legal characterisation of a contract for the performance of work.[1] This statement, which was made in the context of English law, applies with equal force in the Australian context. An analysis of the Australian case law concerning the characterisation of work contracts reveals uncertainties and inconsistencies in the judicial treatment of express terms in work contracts. In some cases, courts accord significance to express terms in the characterisation process;[2] in others, these terms are given limited weight.[3]

This article argues that the uncertainties and inconsistencies in the case law are symptomatic of an underlying tension between the concepts of contractual autonomy and public policy in the law of the employment contract in Australia. It is contended that a deeper understanding of these two concepts, as well as their interaction, may assist in the principled and coherent development of the law pertaining to the treatment of express terms in work contracts in particular, and the law pertaining to the characterisation of work contracts more generally. When a court places limited weight upon, or disregards altogether, some of the

[1] Mark R Freedland, *The Personal Employment Contract* (Oxford University Press, 2003) 21. See also Simon Deakin, 'Interpreting Employment Contracts: Judges, Employers and Workers' in Sarah Worthington (ed), *Commercial Law and Commercial Practice* (Hart Publishing, 2003) 433, 436: 'It is not a straightforward matter in general to determine how far the parties to an employment relationship are free to determine the status of the supplier of labour.'

[2] See, eg, *Howard v Merdaval Pty Ltd* [2020] FCA 43, [27] (O'Callaghan J) ('*Howard*'); *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806, [176]–[178] (O'Callaghan J) ('*CFMMEU v Personnel Contracting*'); *Fair Work Ombudsman v Personnel Contracting Pty Ltd* [2019] FCA 1807, [96] (O'Callaghan J) ('*FWO v Personnel Contracting*'); *Tattsbet Ltd v Morrow* (2015) 233 FCR 46, 62 [65]–[66] (Jessup J) ('*Tattsbet*'); *Tobiassen v Reilly* (2009) 178 IR 213, 233–4 [100]–[103], 235–6 [111]–[117] (Steytler P, Miller JA and Newnes AJA) ('*Tobiassen*'); *Young v Tasmanian Contracting Services Pty Ltd* [2012] TASFC 1, [43]–[44] (Tennent J) ('*Young*'); *Australian Air Express Pty Ltd v Langford* (2005) 147 IR 240, 256–7 [67]–[71] (McColl JA) ('*Langford*').

[3] See, eg, *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346, 379 [148] (North and Bromberg JJ) ('*Quest*'); *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146, 153–4 [36] (Buchanan J) ('*Trifunovski*'); *On Call Interpreters & Translators Agency Pty Ltd v Federal Commissioner of Taxation [No 3]* (2011) 214 FCR 82, 119–20 [188]–[193] (Bromberg J) ('*On Call Interpreters*').

express terms of a work contract, the court is engaged in a form of judicial intervention in a private bargain between the parties. This article analyses the concepts of contractual autonomy and public policy in the employment law context and uses this analysis to develop a conceptual framework that rationalises and justifies such judicial intervention.

The characterisation of contracts for the performance of work is a significant issue in labour law. The main reason for its significance is that many statutory labour rights and protections, including those pertaining to collective bargaining, minimum wages, unfair dismissal and various forms of leave, are conferred upon employees only.[4] Other types of workers, such as independent contractors, generally fall outside the scope of labour statutes. Accordingly, while a contract for the performance of work is a private bargain, it also has a public dimension.[5] The contractual principles and techniques of characterisation play a crucial role in determining the protective scope of labour regulation. When a court is engaged in the process of characterising a work contract, it is simultaneously giving effect to the 'intention' of the parties, in line with contract doctrine, and determining the scope of protection of the labour statute.[6] This duality of function of the characterisation exercise — one that is private in orientation; the other, public — gives rise to difficulties and tensions.

These difficulties and tensions manifest in inconsistent statements in the case law concerning whether and to what extent courts engaged in the characterisation exercise are to defer to the expressed intention of the parties. In some characterisation cases, courts insist that the common law must 'proceed by acknowledging the *contractual autonomy* of the parties'[7] and that the issue 'is characterisation of relationships and not judicial social engineering to encourage one form rather than another'.[8] Parties are free to enter into employment contracts or independent contracts as they see fit, and '[p]ublic policy has nothing to say either way'.[9] The task of the court, according to this view, is simply to

[4] For example, most of the rights and protections in the *Fair Work Act 2009* (Cth) ('*FW Act*'), Australia's primary labour statute, are conferred upon employees only.

[5] See Alan Bogg, 'The Common Law Constitution at Work: *R (On the Application of UNISON) v Lord Chancellor*' (2018) 81(3) *Modern Law Review* 509, 522 ('The Common Law Constitution at Work').

[6] Ibid.

[7] *National Transport Insurance Ltd v Chalker* [2005] NSWCA 62, [61] (Mason P) ('*Chalker*') (emphasis added).

[8] Ibid, citing *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681, 698 (Cooke P).

[9] *Calder v H Kitson Vickers & Sons (Engineers) Ltd* [1988] ICR 232, 250 (Ralph Gibson LJ) ('*Calder*').

discern and give effect to the expressed intention of the parties as to the nature of their relationship.

In other cases, courts take a more interventionist approach, mindful of the financial incentives that employing entities have to structure their work arrangements in such a way as to avoid statutory employment-related obligations, and of the control that such entities generally have over the drafting of work contracts.[10] In these cases, courts are attentive to the need to scrutinise carefully the contractual terms to determine whether they reflect the 'substance or reality of the relationship' between the parties.[11] Terms that do not reflect the reality of the relationship are given limited weight or disregarded. The approach taken in these cases is consistent with the view that '[t]here is no legitimacy in arrangements'[12] that are designed to facilitate avoidance of employment-related obligations, and that it 'would be contrary to the public interest' if parties could, 'by a mere expression of intention as to what the legal relationship should be', determine the legal character of their relationship.[13]

It is contended that these conflicting judicial approaches are manifestations of the tension between the concepts of contractual autonomy and public policy that inheres in the characterisation exercise. An interventionist judicial approach is aligned with a concern for public policy, which in this context entails the detection and thwarting of avoidance techniques used to remove work contracts from the domain of protective labour law. A deferential judicial approach emphasises the value of contractual autonomy. From the perspective of labour law scholars who are steeped in the normative tradition of worker protection,[14] the interventionist approach is preferable, lest the protections of labour regulation be eroded by contractual fiat of the stronger party. It must, however, be acknowledged that the interventionist approach is not without controversy. As Sir Patrick Elias observed in a recent article, '[t]here is a limit to how far the courts can legitimately interfere with the express terms of the contract'.[15] Judges are constrained in the discharge of their function; they 'cannot rewrite the contract; they cannot strike down a bargain because they would prefer it to have been formulated in a different way or because they think it in some general

[10] *Quest* (n 3) 377–8 [140] (North and Bromberg JJ).

[11] *On Call Interpreters* (n 3) 119 [190] (Bromberg J). See also above n 3 and accompanying text; *Autoclenz Ltd v Belcher* [2011] 4 All ER 745 ('*Autoclenz*').

[12] *Damevski v Giudice* (2003) 133 FCR 438, 450 [60] (Marshall J).

[13] *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 1 WLR 1213, 1222 (Megaw LJ) ('*Ferguson*').

[14] See, eg, Hugh Collins, 'Labour Law as a Vocation' (1989) 105 (July) *Law Quarterly Review* 468.

[15] Patrick Elias, 'Changes and Challenges to the Contract of Employment' (2018) 38(4) *Oxford Journal of Legal Studies* 869, 872.

sense inequitable'.[16] Any judicial intervention in privately agreed bargains must be clearly and fully justified.[17] A sustained and reasoned justification for the interventionist approach, which engages with both the conceptual and doctrinal dimensions of judicial intervention, remains absent from the Australian case law and literature on the characterisation of work contracts.[18] This article seeks to provide that justification.

There are many ways in which courts may intervene in a work contract. This article limits its consideration to cases where courts disregard or give limited weight to express terms in the course of characterising a contract as one of employment or independent contracting. In presenting the justification for the interventionist judicial approach, this article explores cases in the areas of taxation and tenancy law, as well as those in labour law, which deal with the sham doctrine.[19] An analysis of these cases and the associated literature[20] reveals two possible justifications for judicial intervention in contracts, including contracts

[16] Ibid 885–6.

[17] Sarah Worthington, 'Common Law Values: The Role of Party Autonomy in Private Law' in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing, 2016) 301, 301–2.

[18] In Pauline Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (2015) 32(2) *Journal of Contract Law* 149 ('Subsequent Conduct'), there is an analysis of the legal rules supporting the use of evidence of subsequent conduct in the characterisation of work contracts. That article does not, however, examine the underlying justifications for judicial intervention in work contracts.

[19] In the areas of taxation and tenancy law, see *Street v Mountford* [1985] 1 AC 809; *AG Securities v Vaughan* [1990] 1 AC 417 ('*Vaughan*'); *Raftland Pty Ltd v Federal Commissioner of Taxation* (2008) 238 CLR 516 ('*Raftland*'). In the labour law context, see *Cam & Sons Pty Ltd v Sargent* (1940) 14 ALJ 162 (High Court of Australia) ('*Cam & Sons*'); *Autoclenz* (n 11). On the sham doctrine generally, see *Hawke v Edwards* (1947) 48 SR (NSW) 21; *Snook v London & West Riding Investments Ltd* [1976] 2 QB 786, 802 (Diplock LJ) ('*Snook*'); *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449 ('*Sharrment*'); *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471; *Australian Securities and Investments Commission v Fast Access Finance Pty Ltd* [2015] ASC ¶155–204 ('*Fast Access Finance*').

[20] See, eg, Edwin Simpson and Miranda Stewart (eds), *Sham Transactions* (Oxford University Press, 2013); Matthew Conaglen, 'Sham Trusts' (2008) 67(1) *Cambridge Law Journal* 176; Justice Michael Kirby, 'Of "Sham" and Other Lessons for Australian Revenue Law' (2008) 32(3) *Melbourne University Law Review* 861; Susan Bright, 'Avoiding Tenancy Legislation: Sham and Contracting Out Revisited' (2002) 61(1) *Cambridge Law Journal* 146; Susan Bright, 'Beyond Sham and into Pretence' (1991) 11(1) *Oxford Journal of Legal Studies* 136; PV Baker, 'Shams or Schemes of Avoidance' (1989) 105 (April) *Law Quarterly Review* 167; ACL Davies, 'Sensible Thinking about Sham Transactions' (2009) 38(3) *Industrial Law Journal* 318 ('Sensible Thinking'); ACL Davies, 'Employment Law' in Edwin Simpson and Miranda Stewart (eds), *Sham Transactions* (Oxford University Press, 2013) 176; Alan L Bogg, 'Sham Self-Employment in the Supreme Court' (2012) 41(3) *Industrial Law Journal* 328; Alan L Bogg, 'Sham Self-Employment in the Court of Appeal' (2010) 126 (April) *Law Quarterly Review* 166; John Vella, 'Sham Transactions' [2008] (4) *Lloyd's Maritime and Commercial Law Quarterly* 488; Andrew Nicol, 'Outflanking Protective Legislation: Shams and Beyond' (1981) 44(1) *Modern Law Review* 21.

for the performance of work.[21] One prominent justification, which this article will term the 'protective statutory purpose justification', anchors the legitimacy of judicial intervention in the labour law sphere in the protective purpose of labour statutes. This justification proceeds on the basis that labour statutes that confer rights upon workers pursue a protective purpose, and that courts should be attentive to this protective dimension when characterising work contracts.[22] As a matter of public policy, courts should give full effect to these protective statutes.[23] This means that a court should, so far as reasonably possible, interpret a work contract in a manner that results in its characterisation as an employment contract, such as to enable the worker to have the benefit of the labour statute.[24] While there is great force in this approach, it is, as this article will contend, contingent upon the acceptance of a number of propositions that may not be readily embraced by the Australian judiciary.[25]

This article accordingly explores an alternative justification that emerges from the case law and literature on the sham doctrine, which it terms the 'contractual intention justification'. It will be demonstrated that this justification is not anchored in the protective purposes of labour statutes. It is, instead, grounded in the notion that judicial imprimatur will not be given to the con-

[21] Writing generally on the sham doctrine, Professors Edwin Simpson and Miranda Stewart referred to the distinction between 'reasoning based on the conduct and intentions of the parties' on the one hand, and 'approaches involving statutory construction' on the other: Edwin Simpson and Miranda Stewart, 'Introduction: "Sham" Transactions' in Edwin Simpson and Miranda Stewart (eds), *Sham Transactions* (Oxford University Press, 2013) 3, 13 [1.34], [1.36] ('Introduction'). In the labour law context, see Davies, 'Employment Law' (n 20) 186–7 [10.41]–[10.43]; below nn 122–5 and accompanying text. In a recent case note analysing the English Court of Appeal's approach to the 'worker' concept, Professor Alan Bogg and Professor Michael Ford also referred to the 'statutory' and 'contractual' approaches: Alan Bogg and Michael Ford, 'Between Statute and Contract: Who Is a Worker?' (2019) 135 (July) *Law Quarterly Review* 347, 349–53. The intermediate 'worker' concept discussed in that case note is a creature of statute in the UK: see, eg, *Employment Rights Act 1996* (UK) s 230(3)(b) ('*Employment Rights Act*'). The 'worker' concept is beyond the scope of this article.

[22] In the labour law context, see Alan Bogg, 'Common Law and Statute in the Law of Employment' (2016) 69(1) *Current Legal Problems* 67 ('Common Law and Statute'); Bogg, 'Sham Self-Employment in the Supreme Court' (n 20); Bogg, 'The Common Law Constitution at Work' (n 5); ACL Davies, 'The Relationship between the Contract of Employment and Statute' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 73, 85–6 ('The Contract of Employment and Statute'); Davies, 'Employment Law' (n 20) 190–1 [10.54]–[10.56]. On shams and purposive statutory construction more generally, see Edwin Simpson, 'Sham and Purposive Statutory Construction' in Edwin Simpson and Miranda Stewart (eds), *Sham Transactions* (Oxford University Press, 2013) 86.

[23] Bogg, 'The Common Law Constitution at Work' (n 5) 523.

[24] Ibid.

[25] See below nn 147–66 and accompanying text.

scription of contractual rules in aid of transactions or documents that are deceitful or that mask the true agreement of the parties.[26] In elucidating this justification for the interventionist judicial approach, this article makes two further arguments that extend the current literature on the characterisation of work contracts. First, it is argued that such a justification is not based on the notion that employment contracts are to be treated differently from commercial contracts.[27] Second, and having regard to the tension between the concepts of contractual autonomy and public policy, it argues that the 'contractual intention justification' is more secure than justifications that are grounded in protective statutory purposes or a view that employment contracts are special and warrant distinctive rules. In developing these points, this article advances an unorthodox argument. It argues that the interventionist judicial approach, which is more conducive to worker protection than the deferential approach, is best justified not by reference to the protective purposes of labour law, but rather by reference to the norms and values of general contract law.

The article proceeds as follows. Part II of the article interrogates the concepts of contractual autonomy and public policy in the employment context. Part III explores the inconsistent approaches that Australian courts engaged in the characterisation exercise have taken to express terms in work contracts. There is a spectrum of approaches ranging from deferential to interventionist. The analysis of the private and public dimensions of the characterisation exercise in Part II is used to explain the uncertainties and inconsistencies in the case law and the judicial vacillations between deference and intervention. Part IV then examines two possible justifications for the interventionist judicial approach to the characterisation of work contracts. It evaluates the 'protective statutory purpose justification' and explores some of the challenges that proponents of this

[26] Justice WMC Gummow, 'Form or Substance?' (2008) 30(3) *Australian Bar Review* 229, 233; Miranda Stewart, 'The Judicial Doctrine in Australia' in Edwin Simpson and Miranda Stewart (eds), *Sham Transactions* (Oxford University Press, 2013) 51, 66–7 [3.55]–[3.57].

[27] Cf Bogg, 'Sham Self-Employment in the Supreme Court' (n 20) 335, 344; Bogg, 'The Common Law Constitution at Work' (n 5) 519–20; Davies, 'Employment Law' (n 20) 190 [10.56]; Bomball, 'Subsequent Conduct' (n 18) 169. On the idea that there is a distinctive body of employment contract law in the UK, see Douglas Brodie, 'The Autonomy of the Common Law of the Contract of Employment from the General Law of Contract' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 124 ('Autonomy of the Common Law of the Contract of Employment'); Mark Freedland, 'Otto Kahn-Freund, the Contract of Employment and the Autonomy of Labour Law' in Alan Bogg et al (eds), *The Autonomy of Labour Law* (Hart Publishing, 2015) 29; Hugh Collins, 'Contractual Autonomy' in Alan Bogg et al (eds), *The Autonomy of Labour Law* (Hart Publishing, 2015) 45. For a recent critical evaluation of the proposition that employment contracts are distinctive, see Gabrielle Golding, 'The Distinctiveness of the Employment Contract' (2019) 32(2) *Australian Journal of Labour Law* 170.

approach may encounter in the Australian context. It then examines the 'contractual intention justification' and argues that this justification is a promising one that warrants serious consideration by those advocating for an interventionist judicial approach to the characterisation of work contracts.

The conceptual and doctrinal analysis presented in this article has important practical ramifications. Changes in the nature of work relationships in recent decades have re-enlivened concerns about the use of work arrangements to disguise employment.[28] 'Disguised employment' describes work relationships in which workers who are in substance employees are treated as independent contractors.[29] The courts have a role to play in detecting and addressing disguised employment.[30] It is, however, the case that such judicial intervention must be rationalised by reference to the existing fabric of the common law.[31] This article seeks to provide a clear conceptual framework for rationalising and justifying the interventionist judicial approach to the characterisation of work contracts. It contends that the most secure justification for such intervention may be found not in labour law's normative vision of worker protection, but rather in contract law's aversion to the conscription of its rules and doctrines in aid of transactions or documents that are deceitful or that mask the true agreement of the parties.

[28] See generally Hugh Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10(3) *Oxford Journal of Legal Studies* 353 ('Independent Contractors'); Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15(3) *Australian Journal of Labour Law* 235 ('Redefining Employment?'); Cameron Roles and Andrew Stewart, 'The Reach of Labour Regulation: Tackling Sham Contracting' (2012) 25(3) *Australian Journal of Labour Law* 258; Andrew Stewart and Shae McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (2019) 32(1) *Australian Journal of Labour Law* 4.

[29] *On Call Interpreters* (n 3) 120 [196] (Bromberg J).

[30] Ibid.

[31] See, eg, *Breen v Williams* (1996) 186 CLR 71, 115 (Gaudron and McHugh JJ) (citation omitted):

> Advances in the common law must begin from a baseline of accepted principle and proceed by conventional methods of legal reasoning. Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles. Any changes in legal doctrine, brought about by judicial creativity, must 'fit' within the body of accepted rules and principles. The judges of Australia cannot, so to speak, 'make it up' as they go along. It is a serious constitutional mistake to think that the common law courts have authority to 'provide a solvent' for every social, political or economic problem. The role of the common law courts is a far more modest one.

II The Tension between Contractual Autonomy and Public Policy

A *Contractual Autonomy: The Private Dimension*

Autonomy is a core value of the common law generally and of contract law in particular.[32] The value of individual freedom is instantiated in the fabric of the common law, through its principles and doctrines.[33] Transmuted into the apparatus of contract law, the value of autonomy involves, fundamentally, the central tenet of contractual autonomy or party autonomy. Autonomy connotes freedom, and in essence, contractual autonomy involves the idea that the parties are free to determine the terms upon which they contract.[34] This is captured in the following statement of Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd*:

> A basic principle of the common law of contract … is that parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and, where they do, the statement is determinative …[35]

Professor Patrick Atiyah identified two aspects of contractual autonomy or freedom of contract.[36] The first is that the contract is the product of the agreement of the parties.[37] The second is that each party genuinely consented to or exercised 'free choice' in relation to entry into the contract.[38] These two ideas also provide a foundation for the enforcement of contracts: 'The agreement between the parties is upheld only *because* the parties, as autonomous individuals, have agreed to be bound.'[39]

The centrality of contractual autonomy or freedom of contract has implications for the role of the court. The role of the court is to enforce the parties' agreement.[40] As Sir Patrick Elias noted in his recent article, the court cannot rewrite the parties' contract.[41] This principle is well established in the case law.

[32] Worthington (n 17) 302–3.

[33] Ibid 301.

[34] See generally PS Atiyah, *An Introduction to the Law of Contract* (Clarendon Press, 5th ed, 1995) 8–15.

[35] [1980] AC 827, 848, quoted in Worthington (n 17) 303.

[36] Atiyah (n 34) 9.

[37] Ibid.

[38] Ibid. See also Worthington (n 17) 304.

[39] Worthington (n 17) 304 (emphasis in original).

[40] Atiyah (n 34) 8.

[41] Elias (n 15) 885–6.

In *Proctor & Gamble Co v Svenska Cellulosa Aktiebolaget SCA*, for example, Moore-Bick LJ stated:

> [T]he starting point must be the words the parties have used to express their intention and in the case of a carefully drafted agreement of the present kind the court must take care not to fall into the trap of re-writing the contract in order to produce what it considers to be a more reasonable meaning.[42]

These notions of contractual autonomy are reflected in a range of contractual principles and doctrines.[43] For example, Professor Sarah Worthington draws a connection between the rules of contractual construction and the centrality of contractual autonomy, observing that the rules of construction 'favour party autonomy'.[44] The role of a court engaged in the exercise of contractual construction is to discern the intention of the parties and to give effect to it.[45] The rules of contractual construction focus the court's attention on the intention of the parties.

The notion that courts are to enforce contracts rather than intervene in them is, as Professor Hugh Collins has observed, reflective of a 'basic disposition in favour of freedom of contract'.[46] Importantly, there is a connection between such an approach and the legitimacy of judicial decision-making. The legitimacy of decisions in the contract law sphere is derived from the notion that the courts are giving effect to the agreement of the parties.[47] This point is related to the one made by Professor Worthington as to the basis for enforcement of contracts.[48] Contracts are enforced because they are the product of agreement between free and truly consenting parties. In this context, the proper function of the courts is to enforce that agreement.

The preceding discussion of contractual autonomy helps shed light on the approaches taken by courts to the characterisation of work contracts. A deferential judicial approach, which places significance on the express terms of the contract and downplays other considerations (including the reality of the relationship), privileges the notion of contractual autonomy. The centrality of contractual autonomy provides one explanation for the reluctance of some courts to interfere with the parties' agreement. Indeed, courts that adopt a deferential

[42] [2012] EWCA Civ 1413 [22], quoted in Worthington (n 17) 307.

[43] Worthington (n 17) 303–5.

[44] Ibid 305.

[45] JW Carter, *The Construction of Commercial Contracts* (Hart Publishing, 2013) [2-11].

[46] Collins, 'Independent Contractors' (n 28) 375.

[47] Ibid.

[48] See above n 39 and accompanying text.

judicial approach sometimes refer directly to the notion of contractual autonomy. For example, in *National Transport Insurance Ltd v Chalker* ('*Chalker*'), Mason P observed:

> The Court is not blind to the general trend towards … 'outsourcing' that is occurring in an increasingly de-regulated labour market. The common law … should nevertheless proceed by acknowledging the contractual autonomy of the parties involved in cases such as the present. The issue in the present case is characterisation of relationships and not judicial social engineering to encourage one form rather than another.[49]

Similarly, in *Calder v H Kitson Vickers & Sons (Engineers) Ltd* ('*Calder*'), Ralph Gibson LJ stated that a person 'is without question free under the law to contract to carry out certain work for another without entering into a contract of service' and that '[p]ublic policy has nothing to say either way'.[50]

An interventionist judicial approach to characterisation involves a court either disregarding or giving limited weight to the express terms of the contract. Such judicial interference requires justification. It is not the case that any deviation from contractual autonomy lacks legitimacy. As Professor Roger Brownsword has observed, a range of values underpin the law of contract.[51] Contractual autonomy is not the only, or even the most important, value of contract law.[52] However, it is the case that contractual autonomy is a fundamental value, such that any judicial interference with contractual autonomy must be fully justified.[53]

Professor Worthington has observed that while there is 'an increasing tendency to favour paternalism over autonomy', there is 'very little argument from principle or policy to support that trend'.[54] In some cases, autonomy is respected; in others, it is disregarded.[55] Professor Worthington argued that without clearly principled justifications for judicial intervention in various contexts in contract law, there would continue to be inconsistencies in the outcomes of cases.[56] While Professor Worthington made these comments in the context of

[49] *Chalker* (n 7) [61] (citations omitted).

[50] *Calder* (n 9) 250.

[51] Roger Brownsword, 'The Law of Contract: Doctrinal Impulses, External Pressures, Future Directions' (2014) 31(1) *Journal of Contract Law* 73, 75–6, cited in Worthington (n 17) 302 n 7.

[52] Worthington (n 17) 301.

[53] Ibid 301–2.

[54] Ibid 301.

[55] Ibid.

[56] Ibid 302.

a paper about general contract law rather than the law of the contract of employment, they are equally apt in the latter context. The absence of a clearly articulated and principled justification for deviating from contractual autonomy in cases involving the characterisation of work contracts is one reason for the inconsistent outcomes in these cases. There is a need for clarity as to when and why courts will disregard or accord limited weight to the express terms of the contract. As Mark Irving has noted, '[v]ague cajoling to examine the reality of the relationship needs to be placed within a conceptually sound legal framework'.[57] The following Parts of the article seek to develop such a framework.

The discussion in the remaining Parts of this article is predicated upon the assumption that contract forms the basis of employment. In Australia, this proposition is axiomatic. As McHugh and Gummow JJ observed in *Byrne v Australian Airlines Ltd* ('*Byrne*'), while employment was historically based on the concept of status, it is now clear that contract forms the foundation of the employment relationship.[58] The contractual basis of employment has been subject to trenchant criticism, and there have been suggestions that the juridical basis of employment should be status rather than contract.[59] While these arguments are compelling, it is unlikely that Australian courts will revert to a status-based conception of employment. Accordingly, this article will proceed on the basis that employment is a contractual relationship.

The acceptance of such a proposition brings with it certain consequences. One consequence is that it brings into play the values and norms of general contract law, including the value of contractual autonomy. There is a body of case law and literature that distinguishes employment contract law from general contract law and justifies judicial intervention in employment contracts on the basis that employment contracts are special and governed by distinctive rules.[60] In the Australian context, the argument for differentiation is rendered more difficult, though not impossible, following the decision of the High Court in *Commonwealth Bank of Australia v Barker* ('*Barker*').[61] In this case, the Court left open the issue of whether employment contracts are relational[62] and rejected the 'transformative approach to the contract of employment'[63] that has

[57] Mark Irving, *The Contract of Employment* (LexisNexis Butterworths, 2012) 58.

[58] (1995) 185 CLR 410, 436 ('*Byrne*'), citing *A-G (NSW) v Perpetual Trustee Co (Ltd)* (1955) 92 CLR 113, 122–3 (Viscount Simonds for the Court).

[59] See, eg, Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford University Press, 2001).

[60] See above n 27.

[61] (2014) 253 CLR 169 ('*Barker*').

[62] Ibid 194 [37] (French CJ, Bell and Keane JJ).

[63] Ibid 195 [41].

been embraced in the United Kingdom ('UK').[64] This discussion will be developed further below.[65] For now, it suffices to note that the foundation of employment in the institution of contract requires courts, as Sir Patrick Elias has pointed out forcefully, to operate within the framework of contract law, and to have regard to the foundational value of contractual autonomy.[66] Deviations from contractual autonomy must be justified, including by reference to other values.[67] In the next Part, this article explores the concept of public policy. It argues that in some cases, adherence to contractual autonomy must be tempered by the concerns of public policy.

B *The Public Dimension of Characterisation*

Before turning directly to the issue of characterisation, it is instructive to consider the public dimension of labour law more generally. The public dimension of labour law, and the influence of public law concepts on labour law, has been the subject of scholarly analysis.[68] While the foundation of the employment relation is contractual and in this sense labour law regulates a 'private' relationship, it is also the case that labour law serves public goals.[69] Moreover, at a broad level of generality, there are some similarities between the power wielded by employers and that wielded by the state, and accordingly there is some utility in the assimilation of public law concerns and concepts into labour law.[70]

More fundamentally for present purposes, the contract of employment itself serves multiple functions, some of which are private, and others of which are

[64] See, eg, *Johnson v Unisys Ltd* [2003] 1 AC 518, 539 [35]–[36] (Lord Hoffmann) ('*Unisys*'):

> But over the last 30 years or so, the nature of the contract of employment has been transformed. It has been recognised that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem. The law has changed to recognise this social reality. … The contribution of the common law to the employment revolution has been by the evolution of implied terms in the contract of employment.

[65] See below nn 147–66 and accompanying text.

[66] Elias (n 15) 885–6.

[67] Worthington (n 17) 303.

[68] See, eg, John Laws, 'Public Law and Employment Law: Abuse of Power' [1997] (Autumn) *Public Law* 455; Paul Davies and Mark Freedland, 'The Impact of Public Law on Labour Law, 1972–1997' (1997) 26(4) *Industrial Law Journal* 311; Stephen Sedley, 'Public Law and Contractual Employment' (1994) 23(3) *Industrial Law Journal* 201; ACL Davies, 'Judicial Self-Restraint in Labour Law' (2009) 38(3) *Industrial Law Journal* 278 ('Judicial Self-Restraint').

[69] Bogg, 'The Common Law Constitution at Work' (n 5) 516.

[70] Joellen Riley, *Employee Protection at Common Law* (Federation Press, 2005) 83. See also Bogg, 'The Common Law Constitution at Work' (n 5) 516.

public. One useful way of conceptualising the various functions of the employment contract has been put forward by Professor Andrew Stewart in his seminal article on the redefining of employment.[71] Professor Stewart refers to the definitional function, the conceptual function and the governance function of the contract of employment.[72] The contract of employment performs a definitional function in the sense that it marks out the category of work contracts to which labour statutes apply.[73] As noted at the outset of this article,[74] labour statutes generally apply only to employment contracts and not to other contracts for the performance of work, such as independent contracts. The conceptual function of the employment contract identifies the institution of contract as the juridical basis of the employment relationship.[75] Finally, the governance function of the contract of employment conceptualises it as a vehicle for the imposition of various 'legal and social norms'[76] upon the parties, including those arising from the contractual terms themselves.

As noted above,[77] the conception of employment as a contractual relationship carries with it a range of implications, including a commitment to the value of contractual autonomy. Yet unbridled adherence to the concept of contractual autonomy is problematic in the employment context. One reason for this is that the value of contractual autonomy is grounded in the assumption that the parties are free and autonomous, and have equal bargaining power.[78] This assumption is generally incorrect in many employment contexts. As Professor Otto Kahn-Freund observed, the contract of employment, with its aura of neutrality and equality, masks the 'inequality of bargaining power which is inherent and must be inherent in the employment relationship'.[79]

A further problem with untempered adherence to contractual autonomy in the employment context can be explained by reference to the definitional function of the contract of employment. As many of the rights and protections in labour statutes apply only to those who perform work pursuant to a contract of employment, the characterisation of a contract as one of employment or some other type of work contract has significant implications for the coverage of la-

[71] Andrew Stewart, 'Redefining Employment?' (n 28).

[72] Ibid 236–7.

[73] Ibid 236.

[74] See above nn 4–6 and accompanying text.

[75] Andrew Stewart, 'Redefining Employment?' (n 28) 236.

[76] Ibid 236–7.

[77] See above nn 58–67 and accompanying text.

[78] Atiyah (n 34) 14.

[79] Otto Kahn-Freund, *Labour and the Law* (Stevens & Sons, 1972) 8.

bour law. The characterisation exercise performs a dual function. It simultaneously enforces the private agreement of the parties and determines whether the worker engaged pursuant to that private agreement falls within the scope of 'public' labour legislation.[80]

If courts adhere strictly to the value of contractual autonomy and adopt a posture of complete deference to the expressed intention of the parties as to the legal character of their contract, this may undermine the efficacy of such legislation. This is because hiring entities[81] have an incentive to reduce costs by minimising their employment-related obligations.[82] Providing employees with superannuation, wages that at least meet the minimum wage, leave entitlements and protection from unfair dismissal involves costs. Hiring entities seeking to avoid such costs have an incentive to draft their contracts in such a way as to take the relationship outside the purview of such labour regulation, by casting workers as independent contractors.[83] In some cases, the relationship between the hiring entity and the particular worker may, in reality, bear all the characteristics of an employment relationship — including a significant degree of control on the part of the hiring entity, and subordination and dependence on the part of the worker — and yet the worker may be classified, according to the express contractual terms, as an independent contractor. There may be a disjunction between the form of the relationship, as set out in the contractual documentation, and its substance or reality, as evidenced by how the relationship is carried out in practice.

In addition to having an incentive to enter into such disguised employment arrangements, hiring entities also exercise significant control over the drafting of the contract, and thereby the mode of contracting.[84] As North and Bromberg JJ observed in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* ('*Quest*'), 'most contracts for the performance of work are "contracts of adhesion" — that is, contracts the terms of which are set by the dominant party on a "take-it-or-leave-it" basis'.[85] In such circumstances, the notion of freedom

[80] Bogg, 'The Common Law Constitution at Work' (n 5) 522.

[81] In this article, 'hiring entity' and 'employing entity' are used interchangeably to refer to the entity that engages the worker to perform work.

[82] *Quest* (n 3) 377–8 [140] (North and Bromberg JJ).

[83] Ibid 377–8 [139]–[140].

[84] Mark Freedland, 'General Introduction: Aims, Rationale and Methodology' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 3, 12–13 ('General Introduction').

[85] *Quest* (n 3) 377 [140], citing Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2nd ed, 2011) 164.

of contract is attenuated and a judicial stance of deference to expressed intention is problematic. Such an approach does not adequately address avoidance techniques used by hiring entities. This is problematic from the perspective of public policy because there are certain public goods associated with protective labour regulation.[86] The Supreme Court of the United Kingdom recently highlighted the public aspect of protective labour regulation in *R (UNISON) v Lord Chancellor* ('*UNISON*').[87] In this case, Lord Reed JSC stated:

> When Parliament passes laws creating employment rights, for example, it does so not merely in order to confer benefits on individual employees, but because it has decided that it is in the public interest that those rights should be given effect. … [A]lthough it is often desirable that claims arising out of alleged breaches of employment rights should be resolved by negotiation or mediation, those procedures can only work fairly and properly if they are backed up by the knowledge on both sides that a fair and just system of adjudication will be available if they fail. Otherwise, the party in the stronger bargaining position will always prevail.[88]

Professor Alan Bogg gives the example of minimum wages legislation.[89] While such legislation provides benefits to the individual worker, there is also a public interest in the 'culture of decent work' to which such legislation contributes.[90] Allowing hiring entities to use private bargains to contract out of and defeat the statutory regimes that provide such public goods is undesirable as a matter of public policy. Such concerns may motivate a more interventionist judicial approach to characterisation. In *Ferguson v John Dawson & Partners (Contractors) Ltd* ('*Ferguson*'), for example, Megaw LJ stated:

> I find difficulty in accepting that the parties, by mere expression of intention as to what the legal relationship should be, can in any way influence the conclusion of law as to what the relationship is. I think that it would be contrary to the public interest if that were so …[91]

There is, accordingly, a tension between the concepts of contractual autonomy and public policy in the employment context. The duality of function performed by the characterisation process locates it at the heart of this tension. This duality of function, and the tension between contractual autonomy and

[86] Bogg, 'The Common Law Constitution at Work' (n 5) 516.

[87] [2020] AC 869 ('*UNISON*').

[88] Ibid 897–8 [72].

[89] Bogg, 'The Common Law Constitution at Work' (n 5) 516.

[90] Ibid.

[91] *Ferguson* (n 13) 1222.

public policy that arises therefrom, in part explains the contradictory approaches that Australian courts have taken to express terms in the characterisation exercise. Professor Collins has made a similar point in the English context. He observed that 'rival strands of legal reasoning — respect for freedom of contract and paternalist controls over the employer's power to evade legislation — generate contradictory statements of principle'.[92]

As noted above, courts that adopt a deferential interpretive posture tend to emphasise the value of contractual autonomy and the private dimension of the contract of employment.[93] On the other hand, courts that take an interventionist stance are more likely to acknowledge the public policy dimension of the characterisation exercise. For example, in adopting an interventionist approach in *On Call Interpreters & Translators Agency Pty Ltd v Federal Commissioner of Taxation [No 3]* ('*On Call Interpreters*'), Bromberg J referred explicitly to the risk that a 'contrary approach would place many workers who are in truth employees, beyond the protective reach of labour law'.[94] The following Part of this article explores in greater detail the divergent approaches that Australian courts have taken to express terms in the characterisation exercise.

III Divergent Approaches in Australia: Judicial Deference and Judicial Intervention

In determining whether a contract for the performance of work has the character of an employment contract or an independent contract, Australian courts apply a multifactorial test that directs attention to a range of factors.[95] These include: the nature and degree of control that the hiring entity exercises over the worker; whether the worker is obliged to perform the work personally or is instead permitted to delegate the work to a third party; whether the hiring entity is responsible for the supply and maintenance of the tools and equipment required for the work to be performed; the extent to which the worker has been integrated into the hiring entity's business; whether the worker has an opportunity for profit or assumes the risk of loss; whether the hiring entity makes arrangements for matters such as taxation, insurance and superannuation on

[92] Collins, 'Independent Contractors' (n 28) 375.

[93] See above nn 49–50 and accompanying text.

[94] *On Call Interpreters* (n 3) 121 [200].

[95] See, eg, *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 ('*Hollis*').

behalf of the worker; and whether the hiring entity provides certain leave benefits to the worker.[96] Save for the requirement of personal service, which is regarded as an inherent aspect of employment,[97] none of these factors is alone determinative.[98] Courts are required to weigh the factors against each other.[99]

In undertaking the characterisation exercise, Australian courts have regard to the terms of the contract. For example, courts consider the contractual terms regarding the nature and degree of control that the hiring entity is empowered to exercise over the worker, and the ability or otherwise of the worker to delegate his or her work. In taking into account the contractual terms, courts will have regard to any label that the parties have assigned to their contractual relationship.[100] Generally, Australian courts also take into account how the parties carry out their relationship in practice. For example, courts consider the nature and degree of control that the hiring entity *in fact* exercises over the worker and whether the worker is *in fact* permitted to delegate his or her work to a third party.[101]

Various courts, however, weight the express terms and the conduct of the parties differently.[102] Some courts accord significance to the express terms.[103] Other courts give limited weight to the express terms and focus more on how the parties conduct their relationship in practice.[104] The approach adopted by the court has significant practical consequences. For example, the existence of

96 See generally Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6th ed, 2016) 204–13 [8.21]–[8.39]; Carolyn Sappideen et al, *Macken's Law of Employment* (Lawbook, 8th ed, 2016) 36–53 [2.160]–[2.370]; Irving (n 57) 40–65.

97 If the worker has an unqualified right to delegate the work to a third party, then this is 'almost conclusive against' an employment relationship: *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385, 391 (Lord Fraser for the Court). In *Trifunovski* (n 3), the Full Federal Court observed that 'a contract which truly permits discharge … by another person, is not a contract of employment': at 150 [25] (Buchanan J, Lander J agreeing at 148 [2], Robertson J agreeing at 190 [172]). See also Andrew Stewart et al (n 96) 207–9 [8.26]–[8.28]; Irving (n 57) 52–3.

98 See, eg, *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939, 944 (Mummery J); *On Call Interpreters* (n 3) 121–2 [204]–[205] (Bromberg J); *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2010) 184 FCR 448, 460 [31]–[32] (Keane CJ, Sundberg and Kenny JJ), quoting *Roy Morgan Centre Pty Ltd v Commissioner of State Revenue (Vic)* (1997) 37 ATR 528, 533 (Winneke P).

99 See Andrew Stewart et al (n 96) 205–6 [8.23].

100 See below nn 105–10 and accompanying text.

101 See, eg, *Quest* (n 3) 378 [142] (North and Bromberg JJ); *Trifunovski* (n 3) 174 [107] (Buchanan J); *On Call Interpreters* (n 3) 119–21 [188]–[200].

102 See Andrew Stewart et al (n 96) 209 [8.29]. For a discussion of the different ways in which the multifactorial test has been applied by Australian courts, see Stewart and McCrystal (n 28) 6–8.

103 See above n 2.

104 See above n 3.

an unqualified right to delegate the work to a third party is likely to preclude a finding of employment. The contract may state explicitly that the worker has an unqualified right of delegation. In practice, however, the worker's right to delegate may be fettered, or the worker may not have the right to delegate at all. If a court were to take the delegation clause in the contract at face value, it would likely conclude that the contract is not one of employment, whereas a different outcome may be reached if the court took into account and accorded significance to the way the relationship was carried out in practice.

The tension between contractual autonomy and public policy manifests itself in inconsistent judicial treatment of 'labels' and other terms in a work contract that are incompatible with or seek to disclaim employment status (such as a term providing that the worker has an unqualified right to delegate the work). A 'label' is a contractual term that assigns a particular categorisation to the contractual relationship. In some cases, a work contract may contain a label that stipulates that the contract is an independent contract rather than an employment contract. The basic principle that applies in such cases is that the label that the parties assign to their contract is not conclusive.[105] If the relationship created by the contract is an employment contract, then a label that disclaims employment will be disregarded. Yet the principle is easier to state than to apply, with varying weight being accorded to labels in different cases. As Professor Simon Deakin has observed in the English context, an

> intractable problem is that, for all their talk of disregarding 'labels', the courts have also reiterated that there is nothing to prevent the parties *voluntarily* accepting an arrangement which, *objectively speaking*, is one of self-employment …[106]

In *ACE Insurance Ltd v Trifunovski* ('*Trifunovski*'), a decision of the Full Federal Court, Buchanan J stated that a label is to be given limited weight because it generally 'merely accords with what is thought to be the characterisation of greatest convenience to one party, or both'.[107] A different approach was taken in *Tattsbet Ltd v Morrow* ('*Tattsbet*'), another decision of the Full Federal Court.[108] In this case, Jessup J accorded greater weight to the 'independent contractor'

[105] See, eg, *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, 512–13 (MacKenna J); *Massey v Crown Life Insurance Co* [1978] 1 WLR 676, 679 (Lord Denning MR); *Trifunovski* (n 3) 152–3 [36] (Buchanan J).

[106] Deakin (n 1) 437 (emphasis in original).

[107] *Trifunovski* (n 3) 153 [36].

[108] *Tattsbet* (n 2).

label included in the contract.[109] Labels have also been accorded significance in several other cases.[110]

The same inconsistency is apparent in relation to other terms that point towards an independent contracting relationship. For example, if the hiring entity does not make arrangements for taxation on behalf of the worker, then that is a factor that points towards independent contracting.[111] Similarly, where the entity does not make arrangements as to insurance or superannuation for the worker, or does not provide the worker with leave benefits, this points towards independent contracting.[112] In *Trifunovski*, Buchanan J stated that contractual terms pertaining to taxation, superannuation and insurance are to be given limited weight because they, like labels, are 'reflections of a view by one party (or both) that the relationship is, or is not, one of employment'.[113] In *Tattsbet*, however, Jessup J regarded as important the fact that the hiring entity did not make arrangements for taxation on behalf of the worker.[114] His Honour observed that 'in contemporary Australia, it is impossible to ignore, and difficult to depreciate, the taxation implications of the mode of operation which parties to a relationship have voluntarily adopted'.[115]

An acknowledgement that the reality of the relationship or the way the parties carry out their relationship is important may not provide clear answers. For example, in *Fair Work Ombudsman v Ecosway Pty Ltd*, White J of the Federal Court recognised that the way the parties conduct their relationship in practice is important, while simultaneously observing that the express terms are 'fundamental'.[116] This may be unproblematic where the express terms and the parties' conduct are consistent. Where, however, there is a conflict between the express terms and the parties' conduct, there must be a principled way of assigning a hierarchy to these and of determining which should be given precedence.

The cases discussed above may be seen as examples of judicial deference or judicial intervention in relation to characterisation. Courts that accord greater weight to contractual terms such as labels or other terms that point towards

[109] Ibid 62 [65]–[66] (Jessup J).

[110] See, eg, *Howard* (n 2) [27] (O'Callaghan J); *CFMMEU v Personnel Contracting* (n 2) [177]–[178] (O'Callaghan J); *FWO v Personnel Contracting* (n 2) [96] (O'Callaghan J); *Tobiassen* (n 2) 235–6 [111]–[117] (Steytler P, Miller JA and Newnes AJA); *Young* (n 2) [43]–[44] (Tennent J); *Langford* (n 2) 256–7 [67]–[71] (McColl JA).

[111] See Andrew Stewart et al (n 96) 206–7 [8.25].

[112] Ibid.

[113] *Trifunovski* (n 3) 153 [37].

[114] *Tattsbet* (n 2) 63–4 [70].

[115] Ibid 63 [70].

[116] [2016] FCA 296 [76].

independent contracting — such as clauses permitting delegation or clauses pertaining to taxation, superannuation and insurance — exhibit greater deference to the intentions of the parties as set out in the contractual documentation. Courts that accord these terms less weight and instead focus on how the parties conduct their relationship are more interventionist. The choice between these two approaches is illustrative of the tension between contractual autonomy and public policy.

What is required is the development of a clear conceptual framework for rationalising when and why judicial intervention is justified. Approaching such a task through the lens of contractual autonomy and public policy is helpful. As employment is a contractual relationship, a court is not able simply to ignore the contract when engaging in the process of characterisation.[117] The contractual autonomy of the parties must be acknowledged. However, a court cannot also take the terms at face value, because this would render it unable to detect and thwart avoidance techniques that undermine the efficacy of the legislation.[118] For the reasons canvassed above in the discussion of public policy, such an approach is undesirable. A balance is required. That balance is best struck when courts begin with the terms of the contract and then determine whether some of those terms, such as a term providing that the worker has an unlimited right to delegate the work, truly reflect what takes place in practice.[119] If it does not, then the term is to be disregarded and the weighing process then takes place without that contractual term being taken into account.[120] For the reasons given by Buchanan J in *Trifunovski*, it should also be the case that terms such as labels and terms pertaining to taxation, superannuation, insurance and leave entitlements should be given limited weight.[121] The issue, then, is: what is the justification for deviating from the express terms of the contract? That is, what is the justification for this proposed approach to characterisation? The following Part explores two possible justifications.

IV Justifying the Interventionist Judicial Approach to Characterisation

This Part of the article will explore two potential justifications for the interventionist judicial approach to characterisation, which it will term the 'protective

[117] Elias (n 15) 885–6.

[118] See above nn 81–91 and accompanying text.

[119] See Bomball, 'Subsequent Conduct' (n 18) 166.

[120] Ibid.

[121] See above nn 107, 113 and accompanying text. See also Andrew Stewart et al (n 96) 206–7 [8.25]; Irving (n 57) 54–5.

statutory purpose justification' and the 'contractual intention justification'. These two potential justifications are located in the cases and literature on the sham doctrine.[122] The sham doctrine operates in a range of areas, including tenancy law, taxation law, and labour law.[123] The case law and literature on the sham doctrine are relevant because they deal with circumstances where there is a disjunction between form and substance, generally due to a desire on the part of one or both parties to avoid a particular characterisation of their relationship (in order to avoid certain obligations).

Writing generally on the sham doctrine, Professor Miranda Stewart and Professor Edwin Simpson observed that

> [a]n important distinction in the context of avoidance transactions … is that between judicial approaches (such as the *Snook* formulation of sham) based on the intentions of the parties, and others founded in a construction of relevant legislation.[124]

This distinction has been explored in several contexts, including in the labour law context. Professor Anne Davies and Professor Bogg have argued that the statutory justification is the more compelling one in the labour law context.[125] The next Part explores this justification and outlines some potential obstacles to its acceptance by Australian courts. The following Part then examines the contractual intention justification and argues that this justification may have greater force in the Australian context.

A *The Protective Statutory Purpose Justification*

In *Autoclenz Ltd v Belcher* ('*Autoclenz*'), the Supreme Court of the United Kingdom held that a group of car valeters were employees and thereby entitled to the benefit of minimum wage and leave regulations.[126] In reaching this conclusion, the Supreme Court disregarded certain terms of the written contract that it regarded as being inconsistent with the 'true agreement' of the parties.[127] The

[122] See above nn 19–20.

[123] See above n 19.

[124] Simpson and Stewart, 'Introduction' (n 21) 13 [1.34], citing *Snook* (n 19) 802 (Diplock LJ). See also Simpson (n 22). On Diplock LJ's statement of the sham doctrine in *Snook*, see below nn 188–9.

[125] See below nn 133–46 and accompanying text.

[126] *Autoclenz* (n 11) 759 [39] (Lord Clarke JSC for the Court). The claimants were entitled to benefits under the *National Minimum Wage Regulations 1999* (UK) SI 1999/584 and the *Working Time Regulations 1998* (UK) SI 1998/1833.

[127] *Autoclenz* (n 11) 757 [35].

true agreement was discerned by reference to all of the evidence,[128] including how the parties conducted their relationship in practice.[129] The Supreme Court referred to its approach to characterisation of the work contract as a 'purposive approach'.[130] Leading labour law scholars in the UK have noted that the purposive approach expounded in *Autoclenz* is ambiguous.[131] One reason for the ambiguity is that the Court did not clarify the 'purpose' to which it was referring.[132]

In an early contribution, Professor Bogg suggested that the 'purposive approach' in *Autoclenz* is anchored in the protective purpose of labour statutes.[133] He argued that *Autoclenz* mandated an approach whereby a court should, so far as possible, reach a conclusion that the worker is an employee 'so as to further the protective reach of the specific statutory right being claimed'.[134] He subsequently noted that the *Autoclenz* approach involves the court 'developing the common law tests for "employee" … in support of a general legislative policy of worker protection'.[135] Professor Davies has similarly argued that the judicial intervention in *Autoclenz*, while justified in the case by reference to contractual conceptions of 'true agreement', would be more compellingly justified by reference to the existence of the protective labour statute.[136] In Professor Davies' view, the Court's approach was directed towards preventing the hiring entity from avoiding the protective statute.[137]

More recently, Professor Bogg has developed further his arguments on the purposive approach in *Autoclenz*. Drawing upon the recent decision of the Supreme Court of the United Kingdom in *UNISON*,[138] Professor Bogg has argued that there is a constitutional underpinning to the common law tests that courts

[128] Ibid.

[129] Ibid 756 [31], quoting *Autoclenz v Belcher* [2010] IRLR 70, 77 [53] (Smith LJ) ('*Autoclenz (Court of Appeal)*').

[130] *Autoclenz* (n 11) 757 [35].

[131] See, eg, Bogg, 'Sham Self-Employment in the Supreme Court' (n 20) 341; Bogg, 'Common Law and Statute' (n 22) 100; Julie McClelland, 'A Purposive Approach to Employment Protection or a Missed Opportunity?' (2012) 75(3) *Modern Law Review* 427, 431.

[132] Bogg, 'Sham Self-Employment in the Supreme Court' (n 20) 341; Bogg, 'Common Law and Statute' (n 22) 100.

[133] Bogg, 'Sham Self-Employment in the Supreme Court' (n 20) 343.

[134] Ibid.

[135] Bogg, 'Common Law and Statute' (n 22) 100. See also Bogg and Ford (n 21) 349–53, where a similar argument was made in relation to the statutory 'worker' concept in the UK.

[136] Davies, 'The Contract of Employment and Statute' (n 22) 85–6; Davies, 'Employment Law' (n 20) 187 [10.43].

[137] Davies, 'Employment Law' (n 20) 187 [10.43].

[138] *UNISON* (n 87).

apply to determine whether a worker is an employee or an independent contractor.[139] In *UNISON*, the Supreme Court held that a Fees Order introducing fees for claims in employment tribunals was unlawful on the basis that the order infringed the constitutional right of access to the courts.[140] Professor Bogg drew a connection between the characterisation exercise in employment law and the reasoning in *UNISON* on access to justice, noting that employment status determines whether a worker is able to access the rights and protections in labour statutes.[141] He argued that there is a constitutional dimension to the characterisation exercise, and that this should orient the courts towards a protective approach to characterisation.[142]

Professor Bogg observed that *UNISON* and *Autoclenz* reflect a normative approach that is attentive to the inequality of bargaining power in employment relationships.[143] The judgments demonstrate a commitment to the proposition that 'the common law's principles and doctrines should be progressively refashioned so as to protect the weaker party in the contractual relation'.[144] The purposive approach expounded in *Autoclenz* involves a court reaching the conclusion that the worker is an employee where such a conclusion is '*possible* … on a reasonable construction of the working arrangements'.[145] Such an approach to the characterisation process involves 'judges developing the common law to support protective statutory norms'.[146]

There is significant force in these arguments. They align closely with the discussion above regarding the public dimension of the characterisation exercise. Characterisation determines access to statutory protection, and accordingly courts, while engaged in the characterisation exercise, should be mindful of this statutory purpose and incline towards a worker protective outcome. In essence,

139 Bogg, 'The Common Law Constitution at Work' (n 5) 515–24.

140 Ibid 509; *UNISON* (n 87) 905 [98] (Lord Reed JSC).

141 Bogg, 'The Common Law Constitution at Work' (n 5) 518–20. In the UK, there is, in addition to employees, an additional statutory category of 'workers': see, eg, *Employment Rights Act* (n 21) s 230(3). Those falling within the statutory category of 'workers' are entitled to some rights and protections at work but not all of the rights and protections that are accorded to employees: see Davies, 'Employment Law' (n 20) 179 [10.12]. There is no 'worker' category in Australia. For the purposes of this article, no further discussion of the 'worker' category is required.

142 Bogg, 'The Common Law Constitution at Work' (n 5) 521.

143 Ibid 520.

144 Ibid.

145 Ibid 523 (emphasis in original).

146 Ibid 521, citing Aileen Kavanagh, 'The Role of the Courts in the Joint Enterprise of Governing' in NW Barber, Richard Ekins and Paul Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing, 2016) 121.

characterisation involves weighing a group of factors. Courts should, in weighing those factors, make a finding of employment status where possible as this would be consistent with the protective purpose of labour statutes.

Such arguments are compelling in the English context, in particular following *UNISON*.[147] In this case, the Court emphasised the protective purpose of labour statutes as well as the imbalance of power between employees and employers.[148] It is also the case that, in the UK, worker protective concepts have been imbued not only in the legislation but also, by way of symbiotic and dynamic interplay between legislation and common law, in the common law.[149] The common law of the employment contract in the UK has, in some respects, undergone a revolution or transformation, rendering it more attentive to worker protective ideas.[150] In *Autoclenz*, the Supreme Court acknowledged the distinctive nature of employment contracts and the need to treat these contracts differently from commercial contracts.[151]

By contrast, the High Court has maintained a separation between common law and statute in Australian labour law,[152] as evidenced by cases such as *Automatic Fire Sprinklers Pty Ltd v Watson*,[153] *Byrne*,[154] and more recently, *Barker*.[155] In *Barker*, the High Court rejected the implied term of mutual trust and confidence. The Court also left open whether the employment contract could be viewed as a relational contract[156] and rejected the proposition that the law of the employment contract in Australia had been transformed in the way that it had been in the UK.[157]

147 *UNISON* (n 87).

148 Ibid 882 [6] (Lord Reed JSC).

149 See, eg, Freedland, *The Personal Employment Contract* (n 1) 154–70.

150 *Unisys* (n 64) 539 [35]–[36] (Lord Hoffmann). See also Freedland, 'General Introduction' (n 84).

151 *Autoclenz* (n 11) 757 [34] (Lord Clarke JSC for the Court), quoting *Autoclenz (Court of Appeal)* (n 129) 80 [92] (Aikens LJ).

152 Joellen Riley, 'Developments in Contract of Employment Jurisprudence in Other Common Law Jurisdictions: A Study of Australia' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 273, 283, 291–4 ('Developments in Contract of Employment Jurisprudence'). See generally Breen Creighton and Richard Mitchell, 'The Contract of Employment in Australian Labour Law' in Lammy Betten (ed), *The Employment Contract in Transforming Labour Relations* (Kluwer Law International, 1995) 129.

153 (1946) 72 CLR 435.

154 *Byrne* (n 58).

155 *Barker* (n 61).

156 Ibid 194 [37] (French CJ, Bell and Keane JJ).

157 Ibid 195 [41].

It is more difficult, therefore, to argue that there is a specialised form of employment contract law that is protective in orientation in Australia.[158] The basic approach, as articulated by Rothman J in *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney*, is that an employment contract is to be treated as 'any other contract',[159] such that the general rules of contract law apply. In some respects, where differentiation is required because of the distinctive aspects of employment, such distinctive developments in the law of the employment contract must cohere with general contract law.[160] The same point was made more recently by the Full Federal Court in *Quest*, where North and Bromberg JJ observed that developments in the law of characterisation must cohere with the principles of general contract law.[161]

Furthermore, an approach rooted in protective statutory purposes may be susceptible to challenge on the ground that the protection of workers is only one aspect of labour regulation,[162] or of the particular labour statute in question, and that the protective purpose needs to be balanced with other purposes.[163] The present author subscribes to the protective view of labour statutes, but it must be acknowledged that alternative arguments may be made. The *Fair Work Act 2009* (Cth) ('*FW Act*'), for example, refers in its 'objects' provision to the protection of workers but also to the ideas of flexibility, productivity and social inclusion.[164] In *C v Commonwealth*, a decision of the Full Federal Court, an argument that the term 'employee' in the *FW Act* should be construed broadly and beneficially was rejected in part on the basis that not all provisions of the statute were beneficial in nature.[165] Furthermore, judges undertaking the characterisation exercise may find appeals to worker protection to constitute 'judicial social engineering',[166] preferring instead to justify and frame their analyses as a neutral exercise in the application of orthodox contract law principles rather than as a normative exercise in advancing worker protection.

158 Riley, 'Developments in Contract of Employment Jurisprudence' (n 152) 291–4.

159 (2007) 69 NSWLR 198, 224 [102].

160 Ibid 224 [104]. See also Golding (n 27) 174–6.

161 *Quest* (n 3) 378 [143].

162 On the multiplicity of purposes that can be ascribed to labour law, see generally Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011).

163 See, eg, Ruth Dukes, 'Identifying the Purposes of Labor Law: Discussion of Guy Davidov's *A Purposive Approach to Labour Law*' (2017) 16(1) *Jerusalem Review of Legal Studies* 52, 59–60.

164 *FW Act* (n 4) s 3.

165 (2015) 234 FCR 81, 90 [51] (Tracey, Buchanan and Katzmann JJ).

166 *Chalker* (n 7) [61] (Mason P).

In light of these potential obstacles to the acceptance of the protective statutory purpose justification in Australia,[167] those interested in providing a justification for the interventionist judicial approach to characterisation might look elsewhere. It is the contention of this article that, in addition to the arguments based on protective statutory purposes, labour law scholars should turn to an unexpected source — the principles and values of general contract law, untempered by any ideas of worker protection — to advocate for the interventionist approach.

B *The Contractual Intention Justification*

1 *A Public Policy Justification*

As noted above,[168] the sham cases and literature reveal two competing approaches to justifying judicial intervention in contracts on the basis that the contracts do not reflect the reality of the relationship between the parties. One justification is based on purposive statutory construction,[169] and this justification resonates with the ideas put forward by Professor Bogg and Professor Davies that were canvassed in the previous Part. A second, and distinct, justification is grounded instead in contract doctrine and contractual intention.[170] The underlying value embraced here is not the advancement of worker protection in line with protective statutory purposes, but rather the idea that the rules of contract law will not be conscripted in aid of transactions or documents that are deceitful or that mask the true agreement of the parties.[171]

Although not generally conceived of as such in the sham literature,[172] this contractual intention justification is also a public policy justification. When the courts speak of discerning the 'intention' of the parties in cases involving the allegation of a sham, they are not speaking of the expressed intention of the parties as embodied in the written contract. Instead, they are speaking of the actual intention[173] of the parties as discerned by reference to 'all the relevant

[167] See also 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, 397–404 ('Statutory Norms and Common Law Concepts').

[168] See above nn 122–25 and accompanying text.

[169] See, eg, Simpson (n 22).

[170] Simpson and Stewart, 'Introduction' (n 21) 13 [1.34]–[1.36].

[171] Gummow (n 26) 233; Miranda Stewart (n 26) 66–7 [3.55]–[3.57].

[172] Exceptions include the two sources listed in the preceding footnote.

[173] As to the notions of 'expressed intention', 'actual intention' and 'true agreement' in this context, see Pauline Bomball, 'Intention, Pretence and the Contract of Employment' (2019) 35(3) *Journal of Contract Law* 243.

evidence',[174] including evidence of how the parties conducted their relationship in practice, which would not generally be permitted under the 'normal rules of [contractual] construction'.[175] Furthermore, the relevant intention is the actual intention of the parties with respect to their rights and obligations, rather than their intention (expressed or actual) with respect to the legal character of their agreement.[176] The 'true agreement'[177] of the parties is the bundle of 'rights and obligations to which the parties have actually agreed'.[178] The court examines all of the relevant evidence, including the practical operation of the work relationship, to identify that bundle of rights and obligations.[179] The court then determines the legal character of the agreement (in this context, whether the agreement is an employment contract or an independent contract) by applying the multifactorial test for employment status.[180]

What empowers the court to sidestep the normal rules of construction which, as Professor Worthington observed, 'favour party autonomy'?[181] In these circumstances, there is a tension between contractual autonomy and public policy. Justice Gummow stated that 'the disclosure of intention may produce results which are contrary to the interests of the relevant actors' but that 'the disregarding of the outward forms adopted by the parties serves a higher purpose or value and it is this which the policy of the law prefers'.[182] This public policy may be stated in various ways, one of which is that the rules of contract law (here, the usual rules of contractual construction) are not to be conscripted in aid of transactions or documents that are deceitful or that mask the true agreement of the parties.[183] The same public policy sentiment was expressed at

[174] *Autoclenz* (n 11) 756 [31] (Lord Clarke JSC for the Court), quoting *Autoclenz (Court of Appeal)* (n 129) 77 [53] (Smith LJ).

[175] Conaglen, 'Sham Trusts' (n 20) 182. See also Matthew Conaglen, 'Trusts and Intention' in Edwin Simpson and Miranda Stewart (eds), *Sham Transactions* (Oxford University Press, 2013) 122, 125 [7.10]; Lord Neuberger, 'Company Charges' in Edwin Simpson and Miranda Stewart (eds), *Sham Transactions* (Oxford University Press, 2013) 158, 169–70 [9.53]–[9.54]; Bomball, 'Intention, Pretence and the Contract of Employment' (n 173) 252–3.

[176] Bomball, 'Intention, Pretence and the Contract of Employment' (n 173) 252–3, 256–9.

[177] *Autoclenz* (n 11) 757 [35] (Lord Clarke JSC for the Court).

[178] Bomball, 'Intention, Pretence and the Contract of Employment' (n 173) 257. See also *Autoclenz* (n 11) 753 [21], quoting *Autoclenz (Court of Appeal*) (n 129) 80 [89] (Aikens LJ).

[179] Bomball, 'Intention, Pretence and the Contract of Employment' (n 173) 256–9.

[180] See above nn 95–101 and accompanying text; Bomball, 'Intention, Pretence and the Contract of Employment' (n 173) 257–8.

[181] Worthington (n 17) 305.

[182] Gummow (n 26) 233.

[183] Miranda Stewart (n 26) 66–7 [3.55]–[3.57].

a higher level of generality by Kirby J in *Raftland Pty Ltd v Federal Commissioner of Taxation* ('*Raftland*').[184] His Honour said:

> For a court to call a transaction a sham is not just an assertion of the essential realism of the judicial process, and proof that judicial decision-making is not to be trifled with. It also represents a principled liberation of the court from constraints imposed by taking documents and conduct solely at face value. In this sense, it is yet another instance of the tendency of contemporary Australian law to favour substance over form.[185]

The statements above were made in the context of the sham doctrine. It has been argued that the sham doctrine is of limited utility in the employment context.[186] The Supreme Court recognised this point in *Autoclenz*.[187] The Court referred to the classic statement of the sham doctrine in *Snook v London & West Riding Investments Ltd* ('*Snook*').[188] In *Snook*, Diplock LJ stated that a 'sham' refers to

> acts done or documents executed by the parties … which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.[189]

In order for a sham to be established, 'all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating'.[190]

In *Autoclenz*, the Court observed that the narrow *Snook* sham doctrine is not the only technique that judges can invoke to disregard terms that do not reflect the reality of the relationship.[191] The Court developed a broader approach to disregarding such terms. While the Court did not assign a label to this approach, Professor Davies has said that given the reference to the tenancy

184 *Raftland* (n 19).

185 Ibid 563 [152].

186 Davies, 'Sensible Thinking' (n 20) 318–19.

187 *Autoclenz* (n 11) 755 [28] (Lord Clarke JSC for the Court).

188 *Snook* (n 19).

189 Ibid 802.

190 Ibid.

191 *Autoclenz* (n 11) 753–4 [23].

cases, including *AG Securities v Vaughan* ('*Vaughan*'),[192] the Court was applying the pretence concept.[193] There is agreement in the cases and literature that the pretence concept is broader than the sham doctrine in that there is no need to show that the parties colluded to deceive third parties as to the nature of their relationship.[194] Such a doctrine is more suited to the employment context where it has been noted that the worker is often a 'victim of the deceit', or not aware of it at all, rather than a colluder in it.[195]

While the sham doctrine has been established in Australia, there has been no definitive acceptance of the pretence doctrine.[196] The core formulation of the sham doctrine in Australia is found in the following passage from Lockhart J's judgment in *Sharrment Pty Ltd v Official Trustee in Bankruptcy* ('*Sharrment*'):

> A 'sham' is therefore, for the purposes of Australian law, something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not. It is something which is false or deceptive.[197]

This formulation is narrow and akin to the *Snook* statement. A precursor to the broader pretence doctrine appears to have been adopted by the High Court in *Cam & Sons Pty Ltd v Sargent* ('*Cam & Sons*'),[198] though the term 'pretence' was not used. In this case, the defendant company contracted with a master and crewpersons in respect of the use of a vessel. The master and crewpersons were to use the vessel to carry cargoes of coal for the defendant.[199] Under the contract, the relationship between them and the defendant company was labelled a 'partnership'.[200] The High Court found that the master and crewpersons were in reality employees of the defendant company, having regard to the way the parties conducted their relationship in practice.[201] There was no enquiry, as a

192 *Vaughan* (n 19).

193 Davies, 'Employment Law' (n 20) 185 [10.37]. See also Bomball, 'Intention, Pretence and the Contract of Employment' (n 173) 250.

194 See, eg, *Autoclenz* (n 11) 753–4 [23]; Davies, 'Sensible Thinking' (n 20) 320.

195 Davies, 'Sensible Thinking about Sham Transactions' (n 20) 319.

196 Bomball, 'Intention, Pretence and the Contract of Employment' (n 173) 244–5.

197 *Sharrment* (n 19) 454. See also Roles and Stewart (n 28) 264–6.

198 *Cam & Sons* (n 19).

199 Ibid 163.

200 Ibid 162.

201 Ibid 163 (Rich J), 163 (Dixon J), 163 (Evatt J), 163 (McTiernan J).

narrow sham doctrine would have required, into whether the parties had colluded to deceive third parties as to the nature of their relationship. There have been references to the pretence doctrine in more recent Australian cases. In *Raftland*, for example, where a taxation transaction was found to be a sham,[202] three members of the High Court referred to the 'less pejorative' version of the sham doctrine.[203] In this context, 'less pejorative' was used to refer to the fact that the broader doctrine does not involve suggestions of fraud on the part of one or both of the parties.[204]

Importantly, the public policy justification identified above, which was articulated in relation to the sham doctrine, is equally apt in the respect of the broader pretence doctrine. The existence of both doctrines may be rationalised by reference to a 'higher purpose or value',[205] that of ensuring that the principles of contractual construction are not used in aid of transactions or documents that are deceitful or that mask the true agreement of the parties.

2 *Justification by Reference to the Values of General Contract Law*

In *Autoclenz*, the Supreme Court referred explicitly to the special nature of employment contracts.[206] The Court recognised that 'while employment is a matter of contract, the factual matrix in which the contract is cast is not ordinarily the same as that of an arm's-length commercial contract'[207] and that in the employment context 'the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed'.[208] Professor Bogg has pointed to *Autoclenz* as a prime example of judicial recognition, in the UK, of a distinctive law of the contract of employment, one that is differentiated from the general law of contract.[209] This distinctive body of law is attentive to the protective purposes of labour legislation and the inequality of bargaining power between employers and employees.[210] Importantly, Professor Bogg has argued that in *Autoclenz*, the

202 *Raftland* (n 19) 532 [36] (Gleeson CJ, Gummow and Crennan JJ), 545 [86] (Kirby J).

203 Ibid 532 [36].

204 Ibid. See also *Fast Access Finance* (n 19) 202381–4 [265]–[277] (Dowsett J).

205 Gummow (n 26) 233.

206 *Autoclenz* (n 11) 757 [34] (Lord Clarke JSC for the Court), quoting *Autoclenz (Court of Appeal)* (n 129) 80 [92] (Aikens LJ).

207 *Autoclenz* (n 11) 757 [33], quoting *Autoclenz (Court of Appeal)* (n 129) 81 [103] (Sedley LJ).

208 *Autoclenz* (n 11) 757 [35].

209 Bogg, 'The Common Law Constitution at Work' (n 5) 519–20; Bogg, 'Sham Self-Employment in the Supreme Court' (n 20) 335, 344.

210 Bogg, 'The Common Law Constitution at Work' (n 5) 519–20; Bogg, 'Sham Self-Employment in the Supreme Court' (n 20) 344.

Court's recognition of the distinctiveness of employment contracts led the Court to relax the parol evidence rule and the signature rule, two orthodox rules of contract law.[211]

Where a contract is wholly in writing, the parol evidence rule prevents a court from taking into account evidence of other terms.[212] As to the signature rule, Scrutton LJ stated in *L'Estrange v F Graucob Ltd*: 'When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether [they have] read the document or not.'[213] These rules were both relaxed in *Autoclenz*.[214] The Court looked beyond the written terms and found the true agreement on the basis of all the evidence, contrary to the parol evidence rule.[215] Furthermore, the Court disregarded certain terms of the work contracts notwithstanding that the workers had signed these written contracts, contrary to the signature rule.[216]

One way of justifying the interventionist judicial approach to characterisation in *Autoclenz* is by reference to the protective nature of labour regulation. As noted above,[217] however, Australian courts may be slow to embrace the idea of a distinctive law of the contract of employment based on protective statutory purposes. Importantly, the 'contractual intention justification' is not anchored in these propositions. According to the contractual intention justification developed above, the interventionist judicial approach is not justified by reference to protective statutory purposes; it is instead rationalised fully by reference to contract law's aversion to transactions or documents that are deceitful or that mask the true agreement of the parties.[218]

Furthermore, the relaxation of particular contractual rules, such as the parol evidence rule and the signature rule, need not be explained by reference to protective statutory purposes. It can instead be explained by reference to orthodox principles of contract law. Application of the sham and pretence doctrines involve a departure from the parol evidence rule and the signature rule.[219] When

211 Bogg, 'Sham Self-Employment in the Supreme Court' (n 20) 332–5.

212 *Hoyt's Pty Ltd v Spencer* (1919) 27 CLR 133, 143–4 (Isaacs J), cited in *Raftland* (n 19) 531 [33] (Gleeson CJ, Gummow and Crennan JJ).

213 [1934] 2 KB 394, 403. See also *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 180–3 [42]–[48] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

214 Bogg, 'Sham Self-Employment in the Supreme Court' (n 20) 332–5.

215 Ibid 333–5.

216 Ibid 332–3.

217 See above nn 147–66 and accompanying text.

218 Gummow (n 26) 233; Miranda Stewart (n 26) 66–7 [3.55]–[3.57].

219 Bogg, 'Sham Self-Employment in the Supreme Court' (n 20) 332–5.

there is an allegation of sham or pretence, the parol evidence rule does not apply and the court can have regard to all the evidence to discern the parties' true agreement.[220] Furthermore, where, in so doing, the court disregards one or more of the express terms of the contract notwithstanding that those contracts were signed,[221] the court is also departing from the signature rule. These principles form part of general contract law.

There is an advantage to justifying the interventionist judicial approach to characterisation by reference to general contract law principles and values. According to the contractual intention justification, the interventionist judicial approach is not a unique or controversial form of intervention anchored in the protective purposes of the relevant labour statute or statutes. It is, rather, an established approach forming part of the existing fabric of general contract law[222] that empowers judges to address situations where there is a disjunction between contractual form and substance. Judges, according to the contractual intention justification, are not engaging in judicial social engineering based on appeals to worker protection in a way that might enliven the concerns articulated by the High Court in *Barker*.[223] They are, instead, engaging in orthodox contractual analysis. In this regard, the contractual intention justification may be more secure than justifications that are grounded in protective statutory purposes. Such a justification is particularly worthy of consideration in a jurisdiction such as Australia, where the judiciary has not embraced the view that there is a distinctive law of the contract of employment informed by protective statutory purposes.

V Conclusion

The approach that the judiciary takes to characterising work contracts is of crucial importance to the protective scope of labour law. Hiring entities have not only the incentive to draft contracts in such a way as to remove them from the domain of labour law, but also the power and the resources to do so. In such circumstances, if judges adopt a deferential approach to characterisation, which involves taking the express terms of the contract at face value or according significant weight to these terms, then employer avoidance of statutory obligations will go unchecked. An interventionist judicial approach to characterisation is

[220] *Raftland* 531 [33]–[35] (Gleeson CJ, Gummow and Crennan JJ).

[221] See, eg, *Vaughan* (n 19).

[222] See above n 31 and accompanying text.

[223] See Bomball, 'Statutory Norms and Common Law Concepts' (n 167) 401–3, discussing *Barker* (n 61).

required if the protective scope of labour law is to be preserved. Such an approach is consistent with the public dimension of the characterisation exercise. It is the case, however, that employment is a contractual relationship, thereby carrying with it the suite of contract law values, including the fundamental value of contractual autonomy.

This article has argued that the inconsistencies in the judicial treatment of express terms in work contracts are a manifestation of the contestation between the concepts of contractual autonomy and public policy. Judicial vacillations between deference and intervention can be analysed by reference to these concepts. This article has explored the concepts of contractual autonomy and public policy and used this analysis to construct a conceptual framework that rationalises and justifies judicial intervention in work contracts. In so doing, it has critically analysed two possible justifications for the interventionist judicial approach to characterisation. The first justification, which was termed the 'protective statutory purpose justification', has much to commend it. It was argued, however, that while this justification may have force in the United Kingdom, there are obstacles to its acceptance in Australia. Accordingly, the article explored a second justification, termed the 'contractual intention justification'. It argued that this justification was the more compelling one in the Australian context, having regard to the current approach of the High Court to the nature of the employment contract.

In developing the 'contractual intention justification', this article adopted an unorthodox approach to advocating for the preservation of labour law's protective scope. In particular, it grounded the justification for an interventionist judicial approach to characterisation not in labour law's worker protective vision, but rather in contract law's aversion to the conscription of its rules in aid of transactions or documents that are deceitful or that mask the true agreement of the parties. The appeal to private law may seem counterintuitive, no less because private law has traditionally been seen as antithetical to workers' interests.[224] However, as this article has sought to demonstrate, a justification that is anchored in worker protective concerns may be susceptible to challenge on the basis that it is not sufficiently attentive to the contractual dimension of employment and its concomitant commitment to contractual autonomy. Furthermore, certain judges may be reluctant to embrace a justification framed in the language of worker protection on the basis that it appears to involve a form of judicial social engineering. The justification advanced in this article, which is framed in the language of general contract law doctrine and values, thereby

[224] Douglas Brodie, 'The Dynamics of Common Law Evolution' (2016) 32(1) *International Journal of Comparative Labour Law and Industrial Relations* 45, 45; Davies, 'Judicial Self-Restraint' (n 68) 278–9.

warrants serious consideration by those advocating for an interventionist judicial approach to the characterisation of work contracts.

CHAPTER 3

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

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STATUTORY NORMS AND COMMON LAW CONCEPTS IN THE CHARACTERISATION OF CONTRACTS FOR THE PERFORMANCE OF WORK

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While the relationship between statute and common law has attracted increased interest in the labour law field, limited attention has been directed at exploring this relationship in cases involving the characterisation of contracts for the performance of work. The characterisation of a work contract as an employment contract or an independent contract carries significant consequences in a number of different contexts, including tort law, employment law and taxation law. Many Australian statutes invoke the common law concept of employment as a criterion by which to confer rights and impose obligations. In determining whether a contract is one of employment and thereby covered by the relevant statute, Australian courts have not generally had regard to the purposes of the statute. However, in some Australian cases, it has been suggested that statutory purpose can, and should, guide the characterisation exercise. This article explores that suggestion, focusing particularly on statutes that confer rights and entitlements upon employees. In doing so, it draws upon decisions of the Supreme Courts of Canada and the United States that have adopted a 'purposive approach' to the employment concept. This article seeks to begin a conversation about the utility and viability of a purposive approach to the employment concept in Australia. It does so by canvassing the arguments in favour of a purposive approach and identifying some of the primary barriers to the adoption of such an approach by Australian courts.

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I Introduction

In recent years, the relationship between statute and common law has attracted increased interest.[1] In the labour law context, a burgeoning body of academic work has examined the interaction between statute and common law in relation to the implied term of mutual trust and confidence in

[1] See, eg, Anthony Mason, 'A Judicial Perspective on the Development of Common Law Doctrine in the Light of Statute Law' in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing, 2016) 119; Elise Bant, 'Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence' (2015) 38(1) *University of New South Wales Law Journal* 367; Stephen McLeish, 'Challenges to the Survival of the Common Law' (2014) 38(2) *Melbourne University Law Review* 818; Mark Leeming, 'Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room' (2013) 36(3) *University of New South Wales Law Journal* 1002; Andrew Burrows, 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 (April) *Law Quarterly Review* 232; Paul Finn, 'Statutes and the Common Law: The Continuing Story' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 52; Paul Finn, 'Statutes and the Common Law' (1992) 22(1) *University of Western Australia Law Review* 7; J Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 (April) *Law Quarterly Review* 247; WMC Gummow, *Change and Continuity: Statute, Equity, and Federalism* (Oxford University Press, 1999) ch 1; Jack Beatson, 'Has the Common Law a Future?' (1997) 56(2) *Cambridge Law Journal* 291; PS Atiyah, 'Common Law and Statute Law' (1985) 48(1) *Modern Law Review* 1; Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982); Roscoe Pound, 'Common Law and Legislation' (1908) 21(6) *Harvard Law Review* 383.

employment contracts.[2] Far less attention, however, has been directed at exploring this interaction in cases involving the characterisation of contracts for the performance of work.[3]

The characterisation of a work contract as an employment contract, under which a worker performs work as an employee, or an independent contract, under which a worker performs work as an independent contractor, carries significant consequences in a range of contexts.[4] The distinction between employees and independent contractors is important in the law of vicarious liability, because employers are vicariously liable for the torts of their employees but principals are not vicariously liable for the torts of their independent contractors.[5] The distinction is also relevant to the operation of various statutes that confer rights or impose obligations by reference to the

[2] See, eg, Joellen Riley, 'The Future of the Common Law in Employment Regulation' (2016) 32(1) *International Journal of Comparative Labour Law and Industrial Relations* 33; Douglas Brodie, 'The Dynamics of Common Law Evolution' (2016) 32(1) *International Journal of Comparative Labour Law and Industrial Relations* 45; Gabrielle Golding, 'The Role of Judges in the Regulation of Australian Employment Contracts' (2016) 32(1) *International Journal of Comparative Labour Law and Industrial Relations* 69; Alan Bogg and Hugh Collins, 'Lord Hoffmann and the Law of Employment: The Notorious Episode of *Johnson v Unisys Ltd*' in Paul S Davies and Justine Pila (eds), *The Jurisprudence of Lord Hoffmann: A Festschrift in Honour of Lord Leonard Hoffmann* (Hart Publishing, 2015) 185; Alan Bogg, 'Express Disciplinary Procedures in the Contract of Employment: Parliamentary Intention and the Supreme Court' (2015) 131 (January) *Law Quarterly Review* 15; Joellen Riley, 'Uneasy or Accommodating Bedfellows? Common Law and Statute in Employment Regulation' (Phillipa Weeks Lecture in Labour Law, Australian National University, 25 September 2013); Catherine Barnard and Louise Merrett, 'Winners and Losers: *Edwards* and the Unfair Law of Dismissal' (2013) 72(2) *Cambridge Law Journal* 313; Douglas Brodie, 'Legal Coherence and the Employment Revolution' (2001) 117 (October) *Law Quarterly Review* 604. Some contributions have addressed the relationship between statute and common law in the labour law context more generally: see, eg, Breen Creighton and Richard Mitchell, 'The Contract of Employment in Australian Labour Law' in Lammy Betten (ed), *The Employment Contract in Transforming Labour Relations* (Kluwer Law International, 1995) 129; Steven Anderman, 'The Interpretation of Protective Employment Statutes and Contracts of Employment' (2000) 29(3) *Industrial Law Journal* 223.

[3] Two exceptions are Alan Bogg, 'Common Law and Statute in the Law of Employment' (2016) 69(1) *Current Legal Problems* 67; ACL Davies, 'The Relationship between the Contract of Employment and Statute' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 73. These contributions consider the interaction between statute and common law in a range of different contexts in labour law in the United Kingdom, including the characterisation of work contracts.

[4] Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6th ed, 2016) 196–7; Carolyn Sappideen et al, *Macken's Law of Employment* (Lawbook, 8th ed, 2016) 18–20 [2.50].

[5] *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161, 167 [12] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*Sweeney*').

concept of employment. For example, the *Fair Work Act 2009* (Cth) ('*FW Act*'), which is the primary labour statute in Australia, generally confers rights upon employees only.[6] Workers who are not employees, such as independent contractors, are generally not entitled to these rights. As a result, the employment concept operates as a gateway to the rights in the *FW Act*.

The employment concept is also used in other statutes, such as those dealing with superannuation and taxation. For example, state payroll taxation statutes impose tax upon the wages that employers pay to their employees.[7] Under the *Superannuation Guarantee (Administration) Act 1992* (Cth), employers must make superannuation payments on behalf of their employees.[8] Employers must also withhold income taxation from the wages of their employees under the *Taxation Administration Act 1953* (Cth).[9]

Despite their widespread adoption by statutes, the terms 'employee' and 'employer' are often left undefined, or are only minimally defined, by those statutes. For example, s 15 of the *FW Act*, headed '[o]rdinary meanings of *employee* and *employer*', simply states that '[a] reference in this Act to an employee within its ordinary meaning: (a) includes a reference to a person who is usually such an employee; and (b) does not include a person on a vocational placement', and '[a] reference in this Act to an employer with its ordinary meaning includes a reference to a person who is usually such an employer'.[10] The Explanatory Memorandum that accompanied the Fair Work Bill 2008 (Cth) stated that the terms 'employee' and 'employer' in the legislation referred to those concepts as understood 'at common law'.[11]

The 'common law concept of employment'[12] was developed primarily in tort law cases involving claims of vicarious liability.[13] Australian courts have

[6] See, eg, *Fair Work Act 2009* (Cth) pts 2-2 (National Employment Standards), 2-3 (Modern Awards), 2-4 (Enterprise Agreements), 3-2 (Unfair Dismissal) ('*FW Act*'). *FW Act* pt 3-1, which contains the 'General Protections' provisions, extends its coverage beyond employees and employers.

[7] *Payroll Tax Act 2007* (NSW) ss 6, 11.

[8] *Superannuation Guarantee (Administration) Act 1992* (Cth) s 12(1), pt 3.

[9] *Taxation Administration Act 1953* (Cth) sch 1 s 12-35.

[10] *FW Act* (n 6) s 15 (emphasis in original).

[11] Explanatory Memorandum, Fair Work Bill 2008 (Cth) 5 [28]. See also *C v Commonwealth* (2015) 234 FCR 81, 87 [34]–[36] (Tracey, Buchanan and Katzmann JJ); Stewart et al, *Creighton and Stewart's Labour Law* (n 4) 196 [8.04]; Cameron Roles and Andrew Stewart, 'The Reach of Labour Regulation: Tackling Sham Contracting' (2012) 25(3) *Australian Journal of Labour Law* 258, 258–9.

[12] *ACE Insurance Ltd v Trifunovski* (2011) 200 FCR 532, 543 [28] (Perram J) ('*Trifunovski (Trial)*').

had recourse to this common law concept when determining whether a worker is an employee for the purposes of a statute that invokes the term 'employee' as a criterion for its operation. For example, in *ACE Insurance Ltd v Trifunovski*,[14] a case involving a claim by a group of workers to certain leave entitlements under the *Workplace Relations Act 1996* (Cth),[15] Perram J stated that the question of whether these workers were 'employees', and thereby covered by the Act, was to be answered by reference to the common law concept of employment. The question was, therefore, to be 'approached from the common law's perspective on the imposition of vicarious liability and with it a subsisting policy debate about the distributive allocation of losses between tortfeasors and their victims'.[16] His Honour observed that the common law concept of employment was unaffected by the purposes underpinning any statute that engaged the concept.[17]

There is, however, reason to question such an approach to the employment concept in statutory contexts. In the special leave hearing in *ACE Insurance Ltd v Trifunovski*, Hayne J suggested that there may be a 'deeper question of principle'[18] relating to whether 'the question of employment for the purposes of entitlements of the kind now in issue was to be determined according to considerations that made, for example, the vicarious responsibility cases irrelevant'.[19] The application for special leave was ultimately refused,[20] and the deeper question of principle that Hayne J identified lingers, unanswered, in Australian law.

[13] Ibid 542 [25] (Perram J). See also Joellen Riley, 'The Definition of the Contract of Employment and its Differentiation from Other Contracts and Other Work Relations' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 321, 324; Roles and Stewart (n 11) 259.

[14] *Trifunovski (Trial)* (n 12).

[15] The *Workplace Relations Act 1996* (Cth) was a precursor to the *FW Act* (n 6). The workers also relied upon the *Insurance Industry Award 1998* (Cth). It is not necessary for present purposes to discuss the Award.

[16] *Trifunovski (Trial)* (n 12) 543 [28]. See also *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146, 149 [14] (Lander J), 182 [126]–[127] (Buchanan J) ('*Trifunovski (Appeal)*').

[17] *Trifunovski (Trial)* (n 12) 542–3 [27].

[18] Transcript of Proceedings, *ACE Insurance Ltd v Trifunovski* [2013] HCATrans 190, 21 ('*Trifunovski (Special Leave Hearing)*').

[19] Ibid 9–12.

[20] Ibid 188–96 (Hayne J). Hayne and Keane JJ, who determined the application, concluded that there would be insufficient prospects of success on an appeal to the High Court. In light of the way the arguments had been put at trial and on appeal to the Full Federal Court, Hayne and Keane JJ were of the view that this case was not a suitable vehicle for exploring the deeper question of principle to which Hayne J alluded.

Some judges have addressed the point briefly in obiter dicta. For example, in *Day v The Ocean Beach Hotel Shellharbour Pty Ltd*, Leeming JA stated that 'a conclusion that a person is an "employee" or "independent contractor" for a particular purpose (such as payroll tax, or superannuation, or employment law) cannot determine whether the relationship is such as to engage the rules of vicarious liability'.[21] More recently, in *Tattsbet Ltd v Morrow*, Allsop CJ observed that '[t]he statutory and factual context will always be critical in a multifactorial process of characterisation of a legal and human relationship: employment'.[22] His Honour referred to the approach of the United States Court of Appeals for the Second Circuit ('US Second Circuit Court of Appeals') in *Lehigh Valley Coal Co v Yensavage* ('*Lehigh Valley*'),[23] one of the early cases in the United States ('US') that expounded a purposive approach to the employment concept. Allsop CJ did not, however, elaborate upon why or how the statutory context was relevant to the characterisation exercise.

A purposive approach to the employment concept has been adopted by courts in some overseas jurisdictions, including the Supreme Court of Canada[24] and, for a time, the Supreme Court of the United States ('US Supreme Court').[25] Under such an approach, the purposes underpinning a common law doctrine (for example, the doctrine of vicarious liability) that engages the employment concept, or the purposes underpinning a statute that operates by reference to the employment concept, are taken into account in determining whether a worker is an employee in a particular context.[26] One consequence of adopting a purposive approach to the employment concept is that a worker may be an employee in one context but not another.[27] For example, a worker may be characterised as an employee for the purposes of a labour statute conferring employment rights and protections, but an independent contractor for the purposes of a taxation statute or

[21] (2013) 85 NSWLR 335, 341–2 [15] (Meagher JA agreeing at 337 [1], Emmett JA agreeing at 338 [4]).

[22] (2015) 233 FCR 46, 50 [5] ('*Tattsbet*').

[23] 218 F 547 (2nd Cir, 1914) ('*Lehigh Valley*').

[24] See, eg, *McCormick v Fasken Martineau DuMoulin LLP* [2014] 2 SCR 108 ('*McCormick*').

[25] *National Labor Relations Board v Hearst Publications Inc*, 322 US 111 (1944) ('*Hearst Publications*'); *United States v Silk*, 331 US 704 (1947) ('*Silk*'); *Rutherford Ford Corp v McComb*, 331 US 722 (1947).

[26] See Guy Davidov, *A Purposive Approach to Labour Law*, ed Paul Davies, Keith Ewing and Mark Freedland (Oxford University Press, 2016) ch 6.

[27] Brian A Langille and Guy Davidov, 'Beyond Employees and Independent Contractors: A View from Canada' (1999) 21(1) *Comparative Labor Law and Policy Journal* 7, 18.

vicarious liability in tort law, or vice versa.[28] The reason for this is that different statutes with different purposes operate by reference to the employment concept.[29] These purposes also differ from the purposes informing the common law doctrine of vicarious liability.

Purposive approaches to labour law have attracted interest in other jurisdictions[30] but received limited attention from the judiciary and scholars in Australia.[31] This article seeks to begin a conversation about the utility and viability of a purposive approach to the employment concept in Australia. It does so by canvassing the arguments in favour of a purposive approach and identifying some of the primary barriers to the adoption of such an approach by Australian courts. It critically evaluates several strands of reasoning in the Australian case law, both within and outside of the labour law context, that have a bearing upon the viability of a purposive approach to the employment concept. It also draws upon Canadian and US case law for comparative insights. This article focuses on statutes that confer employment entitlements and protections, such as leave entitlements and protections from unfair dismissal, upon those who are 'employees'. These statutes will be referred to as 'protective labour statutes'.[32] The reason for focusing on these statutes is that much of the Canadian and US case law on the purposive approach to the

[28] Ibid.

[29] Ibid.

[30] See, eg, Davidov, *A Purposive Approach to Labour Law* (n 26); Julie McClelland, 'A Purposive Approach to Employment Protection or a Missed Opportunity?' (2012) 75(3) *Modern Law Review* 427; Alan L Bogg, 'Sham Self-Employment in the Supreme Court' (2012) 41(3) *Industrial Law Journal* 328; Guy Davidov, 'A Purposive Interpretation of the National Minimum Wage Act' (2009) 72(4) *Modern Law Review* 581; Guy Davidov, 'The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection' (2002) 52(4) *University of Toronto Law Journal* 357.

[31] Exceptions include Adrian Merritt, '"Control" v "Economic Reality": Defining the Contract of Employment' (1982) 10(2) *Australian Business Law Review* 105; Adrian Brooks, 'Myth and Muddle: An Examination of Contracts for the Performance of Work' (1988) 11(2) *University of New South Wales Law Journal* 48. There is a brief discussion of the purposive approach in Stewart et al, *Creighton and Stewart's Labour Law* (n 4) 220–1 [8.56]. For Australian cases that have referred to the relevance of statutory purpose in the characterisation of work contracts, see above nn 21–3 and accompanying text; below nn 90–8 and accompanying text.

[32] See Steven Anderman, 'The Interpretation of Protective Employment Statutes and Contracts of Employment' (2000) 29(3) *Industrial Law Journal* 223. The present article refers to 'protective *labour* statutes' because it discusses cases dealing with collective bargaining statutes as well as those dealing with statutes that confer employment rights and entitlements. The term 'labour statutes' is used broadly to capture both types of statutes.

employment concept involves protective labour statutes.[33] Despite this focus, some of the arguments made in this article have implications for other types of statutes in Australia that engage the employment concept.

This article proceeds in three parts. Part II critically analyses Australian cases concerning the characterisation of work contracts. It demonstrates that in determining whether a worker is an employee in respect of a particular statute that engages the employment concept, courts have generally applied the common law concept of employment as expounded in vicarious liability cases without regard to the purposes underlying the relevant statute. In several cases, however, this approach has been called into question and it has been suggested that statutory purpose should be taken into account in the characterisation exercise.[34] Part III and Part IV of this article assess the utility and viability of this alternative approach. To this end, Part III undertakes a comparative analysis, drawing upon decisions of the Supreme Court of Canada and the US Supreme Court that have adopted a purposive approach to the employment concept in respect of protective labour statutes. Part IV then identifies and examines some of the key barriers to the adoption of such an approach by Australian courts.

II The Australian Approach to the Characterisation of Work Contracts

A *The Common Law Concept of Employment*

The common law concept of employment was developed primarily in vicarious liability cases.[35] Historically, the 'control test' was applied to distinguish employees from independent contractors.[36] Under this test, courts had regard to the 'nature and degree'[37] of control that the 'hirer'[38] exercised over the worker. If the worker was subject to the hirer's control in respect of the manner in which the work was to be performed, then the

[33] See below Part III(B).

[34] See above nn 21–3 and accompanying text; below nn 90–8 and accompanying text.

[35] See above nn 12–13 and accompanying text.

[36] See *Performing Right Society Ltd v Mitchell & Booker Ltd* [1924] 1 KB 762, 767–8 (McCardie J) ('*Performing Right Society*').

[37] Ibid 767 (McCardie J).

[38] The term 'hirer' is used as a neutral term to refer to a person or entity who hires a person to perform work: Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15(1) *Australian Journal of Labour Law* 235, 235 n 2.

worker was an employee.[39] An independent contractor was a worker who '[undertook] to produce a given result, but … in the actual execution of the work … [was] not under the order or control of' the hirer.[40]

Australian courts no longer apply the control test. Instead, in determining whether a worker is an employee or an independent contractor, the courts apply a multi-factor test.[41] This multi-factor test requires a court to assess and balance a range of factors against each other. These factors include: whether the hirer exercises control over the worker; whether the worker is required to provide personal service; whether the worker is responsible for the supply and maintenance of tools and equipment; whether the worker assumes the risk of loss and has an opportunity for profit; whether the worker is paid on a time basis or a piece rate; and whether the hirer has assumed responsibility for matters such as leave, superannuation, insurance and taxation.[42] Although control remains a significant factor, it is not the only one, and the High Court of Australia has stated that 'it is the totality of the relationship between the parties which must be considered'.[43] None of the factors, apart from the requirement of personal service,[44] is alone conclusive.[45] Instead, in arriving at a conclusion on the character of a work contract, the court considers the factors holistically.[46]

[39] *Performing Right Society* (n 36) 768 (McCardie J).

[40] Ibid.

[41] See, eg, *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 ('*Stevens*'); *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 ('*Hollis*'); *Trifunovski (Appeal)* (n 16).

[42] See *Stevens* (n 41) 24 (Mason J), 36–7 (Wilson and Dawson JJ).

[43] Ibid 29 (Mason J). See also *Hollis* (n 41) 33 [24] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

[44] Personal service is an essential aspect of the employment relationship. Accordingly, if the contract confers upon the worker a genuine and unqualified right to delegate the work to a third party, then this will generally preclude a finding of employment: *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385, 391 (Lord Fraser for the Court); *Stevens* (n 41) 38 (Wilson and Dawson JJ); *Trifunovski (Appeal)* (n 16) 150 [25] (Buchanan J).

[45] Mark Irving, *The Contract of Employment* (LexisNexis Butterworths, 2012) 40.

[46] *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939; *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2010) 184 FCR 448, 460 (Keane CJ, Sundberg and Kenny JJ); *Stevens* (n 41) 29 (Mason J); *Hollis* (n 41) 33 [24] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). Recently, a disagreement has emerged between members of the Federal Court of Australia as to the proper approach to the test for characterising work contracts. It is not necessary for present purposes to examine these divergent approaches. None of these approaches direct attention to the purpose of the relevant statute. See *On Call Interpreters & Translators Agency Pty Ltd v Federal Commissioner of Taxation [No 3]* (2011) 214 FCR 82 ('*On Call Interpreters*'); *Trifunovski (Appeal)* (n 16); *Tattsbet* (n 22). For a

The common law concept of employment is informed and moulded by the policy considerations underlying the doctrine of vicarious liability. The High Court made this clear in *Hollis v Vabu Pty Ltd* ('*Hollis*'), where the issue was whether a company which ran a courier business was vicariously liable for the negligent conduct of one of its bicycle couriers.[47] The majority stated that '[t]erms such as "employee" and "independent contractor", and the dichotomy which is seen as existing between them, do not necessarily display their legal content purely by virtue of their semantic meaning'.[48] Rather, the content of these terms 'will reflect, from the facts of case to case, the particular force given to the considerations supporting the doctrine of vicarious liability',[49] and 'guidance' on whether a worker is an employee or an independent contractor 'is provided by various matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability'.[50]

B *The Characterisation of Work Contracts in Statutory Contexts*

The common law concept of employment is purposive, in the sense that it is moulded by the purposes of the vicarious liability doctrine.[51] The remainder of this article is concerned with whether this concept can be moulded by the purposes of a statute that engages the concept. Unless otherwise indicated, references in the rest of the article to a purposive approach should be understood as references to this *statutory* purposive approach.

Two key points can be discerned from Australian cases involving the characterisation of work contracts in statutory contexts. The first is that when a statute uses the term 'employee' as a criterion for its operation, recourse is had to the common law concept of employment to determine whether a worker is an employee or an independent contractor in respect of the statute. In *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd* ('*Foster*'), Dixon, Fullagar and Kitto JJ stated that the terms 'employee' and 'employer', when used in s 4 of the *Conciliation and Arbitration Act 1904* (Cth), referred to the 'relation called at common law master and servant'.[52]

discussion of these divergent approaches, see Stewart et al, *Creighton and Stewart's Labour Law* (n 4) 211–13 [8.35]–[8.39].

47 *Hollis* (n 41) 35 [29] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

48 Ibid 38 [36] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

49 Ibid.

50 Ibid 41 [45] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

51 Ibid.

52 (1952) 85 CLR 138, 153 ('*Foster*').

Stephen J took the same approach in *Federal Commissioner of Taxation v Barrett*, which involved a taxation statute that used the term 'employee' as a criterion of liability.[53] His Honour stated:

> The Act thus employs the term 'employee', unaffected by statutory definition, as the ultimate touchstone of liability of tax; it relies for its operation upon the meaning of this term of art in the law and in doing so necessarily refers to a concept which owes its origin and refinement to the common law and the meaning of which is to be found in the decisions of the courts and cannot be divorced from them. So long as those decisions are not affected by special statutory context they will be decisive of the meaning of 'employee' or of its more ancient but now somewhat anachronistic synonym, 'servant'.[54]

The second and related point is that the common law concept of employment is unaffected by statutory context. That is, it is not moulded or informed by the purposes of any of the statutes that engage it. In *ACE Insurance Ltd v Trifunovski*, Perram J observed that the term 'employee' in the *Workplace Relations Act 1996* (Cth) referred to the common law concept of employment, and that the various statutes which engage the employment concept 'do not have any impact upon the common law's content which remains concerned with, and focused upon, the imposition of vicarious liability'.[55]

More recently, in *C v Commonwealth*, the Full Federal Court stated that the terms 'employee' and 'employer' in the *FW Act* 'are rooted in the common law' and that the 'terms refer to parties to a contract of service or employment'.[56] The Court referred in this regard to *Hollis*, where the High Court had observed that the common law concept of employment is informed by the policy considerations underpinning the doctrine of vicarious liability.[57] Significantly, the Court in *C v Commonwealth* also distinguished an earlier Full Federal Court decision, *Konrad v Victoria* ('*Konrad*'), in which a purposive approach had been taken to the term 'employee' in a statutory context.[58]

[53] (1973) 129 CLR 395.

[54] Ibid 403. See also *Mutual Life v Citizens' Assurance Co Ltd v A-G (Qld)* (1961) 106 CLR 48, 55, 57 (Dixon CJ), 58 (Kitto J), 58–9 (Taylor J), 59 (Windeyer J).

[55] *Trifunovski (Trial)* (n 12) 542–3 [27].

[56] (2015) 234 FCR 81, 87 [34] (Tracey, Buchanan and Katzmann JJ).

[57] *Hollis* (n 41) 41 [45] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

[58] (1999) 91 FCR 95 ('*Konrad*').

The issue in *Konrad* was whether members of the Victorian police force were entitled to the protections of the termination of employment provisions in div 3 of pt VIA of the *Industrial Relations Act 1988* (Cth) ('*IR Act*').[59] This turned upon whether they were 'employees' for the purposes of these statutory provisions.[60] The constitutional underpinning of these provisions was the external affairs power in s 51(xxix) of the *Australian Constitution*.[61] Finkelstein J had regard, among other things, to s 170CA(1) of the *IR Act*,[62] which stated that the object of these provisions was to give effect to the *Termination of Employment Convention* [63] and the *Termination of Employment Recommendation*.[64] His Honour also had regard to s 170CB of the *IR Act*, which stated that '[a]n expression has the same meaning … [in the termination of employment provisions] as in the *Termination of Employment Convention*'.[65] There were cases that indicated that police officers were not 'employees' under Australian common law.[66] Finkelstein J observed, however, that the term 'employee' in div 3 of pt VIA of the *IR Act* should not be 'confined to its common law meaning'.[67] Rather, the term should be interpreted with regard to its purpose, which was to give effect to the *Termination of Employment Convention*.[68] His Honour concluded that the term captured the police officers in this case.[69] In adopting this purposive approach to the interpretation of the term 'employee', Finkelstein J referred, among other things, to the US Supreme Court's decision in *National Labor Relations Board v Hearst Publications Inc* ('*Hearst Publications*').[70] In *Hearst*

[59] Ibid 97 [2] (Ryan J).

[60] Ibid 101 [13] (Ryan J).

[61] See ibid 118 [71] (Finkelstein J).

[62] Ibid 110 [43], 120 [81].

[63] *Convention concerning Termination of Employment at the Initiative of the Employer*, opened for signature 22 June 1982, 1412 UNTS 159 (entered into force 23 November 1985).

[64] *Recommendation concerning Termination of Employment at the Initiative of the Employer*, ILC, 68th sess, ILO Doc R166 (22 June 1982).

[65] *Konrad* (n 58) 118 [71].

[66] Ibid 120–1 [83]–[84] (Finkelstein J).

[67] Ibid 127 [103] (Ryan J agreeing at 101–2 [14]–[15], North J agreeing at 104 [22]). North J disagreed only in one respect that was irrelevant to the characterisation of the work contract: at 104 [22]. See also *New South Wales v Briggs* (2016) 95 NSWLR 467, 481–3 [50]–[57] (Leeming JA), which discusses the status of police officers in various statutory contexts.

[68] *Konrad* (n 58) 118 [71], 127 [103] (Finkelstein J).

[69] Ibid 127 [104].

[70] *Hearst Publications* (n 25).

Publications, which will be discussed below, the Court adopted a purposive approach to the employment concept in a protective labour statute.[71]

The Court in *C v Commonwealth* distinguished *Konrad* on the basis that the *FW Act* does not contain a section such as s 170CB of the *IR Act*.[72] Rather, the Court noted that the relevant provisions of the *FW Act* refer to the 'ordinary meaning'[73] of employer and employee, and this 'narrower definition'[74] was to be taken as a reference to the common law concept of employment.[75] Further, the Court in *C v Commonwealth* stated that pt 3-1 of the *FW Act*,[76] upon which the applicant relied, is for the large part underpinned by the corporations power in s 51(xx) of the *Australian Constitution*.[77] Unlike the provisions under consideration in *Konrad*, pt 3-1 of the *FW Act* is not supported by the external affairs power. As a result, the Court also rejected the argument that a broader approach to the concept of employment was needed to comply with Australia's international obligations.[78]

Courts have not engaged with the purposes of the relevant statute, even in those cases where it has been stressed that regard should be had to the reality of the relationship in determining whether a worker is an employee or an independent contractor.[79] In order to develop this point, it is necessary to examine briefly the cases that have addressed matters of form and substance in the characterisation of work contracts. An approach that privileges form over substance in characterisation accords primacy to the terms of the contract and disregards, or places limited weight upon, how the parties conduct their relationship in practice.[80] An approach to characterisation that

[71] See below Part III(B).

[72] *C v Commonwealth* (n 11) 87 [33]–[34] (Tracey, Buchanan and Katzmann JJ).

[73] *FW Act* (n 6) ss 15, 335.

[74] *C v Commonwealth* (n 11) 87 [34] (Tracey, Buchanan and Katzmann JJ).

[75] Ibid 87 [36] (Tracey, Buchanan and Katzmann JJ).

[76] Part 3-1 of the *FW Act* (n 6) contains the 'General Protections' provisions.

[77] *C v Commonwealth* (n 11) 87 [37] (Tracey, Buchanan and Katzmann JJ), citing *New South Wales v Commonwealth* (2006) 229 CLR 1.

[78] *C v Commonwealth* (n 11) 87 [37] (Tracey, Buchanan and Katzmann JJ).

[79] See below n 89.

[80] See *Tobiassen v Reilly* (2009) 178 IR 213; *Australian Air Express Pty Ltd v Langford* (2005) 147 IR 240; *Young v Tasmanian Contracting Services Pty Ltd* [2012] TASFC 1. Reference is made to these cases, among others, in Stewart et al, *Creighton and Stewart's Labour Law* (n 4) 212–13 [8.38], 212 n 150.

focuses on the substance or reality of the relationship directs attention to the way the parties conduct themselves in practice.

In *Hollis*, a majority of the High Court stated that 'the relationship between the parties … is to be found not merely from [the] contractual terms' but also from '[t]he system which was operated thereunder and the work practices imposed by Vabu'.[81] Some scholars have regarded this statement as an endorsement of an approach to characterisation that focuses on the substance of the relationship,[82] though others have pointed to alternative interpretations of it.[83] Following *Hollis*, some judges of the Federal Court have explicitly adopted an approach to the characterisation of work contracts that focuses on the substance of the relationship. For example, in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*, North and Bromberg JJ observed that 'when determining whether a relationship is one of employment', it is necessary 'to ensure that form and presentation do not distract the Court from identifying the substance of what has been truly agreed'.[84] It should be acknowledged that there have been decisions of other Australian courts, subsequent to *Hollis*, which have adhered to an approach that privileges form over substance.[85]

It is important to note that an approach to characterisation that focuses on the substance of the relationship is not the same as a purposive approach to characterisation. The two are related; indeed, an approach that focuses on substance over form is a component of the purposive approach. However, a purposive approach goes further than an approach that is attentive to the substance of the relationship. Professor Guy Davidov made this point in his seminal work on purposive approaches to labour law.[86] He observed that

[81] *Hollis* (n 41) 33 [24] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). See also *Trifunovski (Appeal)* (n 16) 174 [107]–[108] (Buchanan J).

[82] See, eg, Ian Neil and David Chin, *The Modern Contract of Employment* (Lawbook, 2nd ed, 2017) 22–3 [1.100]; Sappideen et al (n 4) 47 [2.260]; Rosemary Owens, 'Decent Work for the Contingent Workforce in the New Economy' (2002) 15(1) *Australian Journal of Labour Law* 209, 221.

[83] See, eg, Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (n 38) 250–1, quoting *Express & Echo Publications Ltd v Tanton* [1999] ICR 693, 697 (Gibson LJ); Irving (n 45) 62–3; Pauline Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (2015) 32(2) *Journal of Contract Law* 149, 156–7.

[84] (2015) 228 FCR 346, 378 [142] ('*Quest*'). See also *On Call Interpreters* (n 46) 119–21 [189]–[200] (Bromberg J); *Trifunovski (Appeal)* (n 16) 174 [107]–[108] (Buchanan J).

[85] See above n 80.

[86] Davidov, *A Purposive Approach to Labour Law* (n 26).

'sensitivity to economic realities, with a focus on the real arrangements between the parties instead of a formalistic reliance on the written terms of the contract' is 'important' but 'not sufficient'.[87] As the analysis of the US and Canadian cases in Part III of this article will show, a purposive approach that is attentive to statutory purpose goes further and results in a reorientation of the multi-factor test.[88] For now, it suffices to note that even in those cases where courts have focused on the substance of the relationship in the characterisation exercise, the purposes of the relevant statute have not been taken into account.[89]

The preceding analysis demonstrates that Australian courts have generally not had regard to statutory purpose when determining whether a worker is an employee or an independent contractor. There are, however, several exceptions.[90] In *Articulate Restorations & Development Pty Ltd v Crawford*, a decision of the New South Wales Supreme Court, the issue was whether a worker was an employee or an independent contractor for the purposes of the *Workers Compensation Act 1987* (NSW).[91] Mahoney JA stated that 'the *Workers Compensation* legislation should, in my opinion, be regarded as beneficial legislation in the sense at least that it is directed to ensuring that industry bears the burden, or most of the burden, of the accidents which, as experience has shown, it inevitably produces'.[92] His Honour observed that '[i]n such legislation, it is proper that the entitlements of the injured person not depend upon distinctions which are too nice'.[93]

Borg v Olympic Industries Pty Ltd dealt with the distinction between employees and independent contractors for the purposes of the *Industrial*

[87] Ibid 115.

[88] Ibid 117.

[89] See *Quest* (n 84); *Trifunovski (Appeal)* (n 16); *On Call Interpreters* (n 46). In *On Call Interpreters*, Bromberg J mentioned in passing that 'the Supreme Court of the United States (at least in the context of defining "employee" in industrial legislation) has applied what has been called the economic reality test, a test which is focused on the economic facts of the relationship': at 120 [195]. His Honour cited two US Supreme Court cases, *Hearst Publications* (n 25) and *Silk* (n 25), which applied the statutory purpose approach to the characterisation of work contracts. His Honour did not return to the reasoning in these cases in the course of his judgment.

[90] In addition to the cases discussed here, see above nn 21–3 and accompanying text. See also Stewart et al, *Creighton and Stewart's Labour Law* (n 4) 221 nn 206–7.

[91] (1994) 57 IR 371.

[92] Ibid 380.

[93] Ibid.

Conciliation and Arbitration Act 1972 (SA).[94] In this case, the Industrial Court of South Australia suggested that 'the answer to the question' of whether a worker is an employee or an independent contractor 'appears sometimes to depend on the purpose or reason behind the question'.[95] The Court observed that the answer to the question in the context of a taxation matter might be different to the answer reached in a vicarious liability case.[96]

In *R v Allan; Ex parte Australian Mutual Provident Society*, Bray CJ observed that matters 'of legislative policy are involved' in the question of whether a worker is an employee or an independent contractor 'for the purpose of fiscal statutes or statutes of social, economic or industrial regulation'.[97] The Full Federal Court adopted these statements in *Rowe v Capital Territory Health Commission*.[98] Despite these judicial observations, limited attention has been directed at ascertaining why or how statutory purpose may be relevant to the characterisation exercise. Is a purposive approach to the employment concept in statutory contexts viable in Australia? What does a purposive approach entail? The next part of this article turns to Canadian and US cases for guidance on these issues. It focuses on cases where statutory purpose has been used to guide the characterisation of a work contract in respect of a protective labour statute.

III A Purposive Approach to the Employment Concept in Protective Labour Statutes

A *Justifying the Comparators*

Those who engage in comparative analysis must exercise caution. As Sir Otto Kahn-Freund has observed, 'any attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection'.[99] In a similar vein, French CJ, Bell and Keane JJ stated in *Commonwealth Bank of Australia v Barker* ('*Barker*') that '[j]udicial decisions about employment contracts in other common law jurisdictions … attract the cautionary observation that Australian judges must "subject [foreign rules] to inspection

[94] (1984) 26 AILR ¶363.

[95] Ibid ¶364 (Di Fazio IM).

[96] Ibid.

[97] (1977) 16 SASR 237, 247 (Hogarth J agreeing at 252).

[98] (1982) 2 IR 27, 28 (Northrop, Deane and Fisher JJ).

[99] O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37(1) *Modern Law Review* 1, 27.

at the border to determine their adaptability to native soil"'.[100] Those advocating for the adoption of a particular principle or approach from a different jurisdiction need to be mindful of the context in which that principle or approach was developed.[101] Comparative law is misused when 'it is informed by a legalistic spirit which ignores this context of the law'.[102]

There are three contextual matters that suggest that the Canadian and US cases serve as appropriate comparators here. The first is that in each of Australia, Canada and the US, the common law concept of employment was developed primarily in vicarious liability cases.[103] In all three countries, a multi-factor test is applied to determine whether a worker is an employee or an independent contractor for the purposes of vicarious liability.[104] The second is that in all three countries, multiple statutes invoke the employment concept as a criterion for their operation. The types of statutes engaging the employment concept are also similar, including labour statutes and taxation statutes.[105] The third is that in all three countries, the statutes that engage the employment concept generally leave the term 'employee' either undefined or

[100] (2014) 253 CLR 169, 185 [18] ('*Barker*'), quoting Paul Finn, 'Statutes and the Common Law' (1992) 22(1) *University of Western Australia Law Review* 7, 13, quoting Roger J Traynor, 'Statutes Revolving in Common Law Orbits' (1968) 17(4) *Catholic University Law Review* 401, 409.

[101] Kahn-Freund (n 99) 27.

[102] Ibid.

[103] As to Australia, see above nn 12–13 and accompanying text. As to the US, see Richard R Carlson, 'Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying' (2001) 22(2) *Berkeley Journal of Employment and Labor Law* 295, 305–6. As to Canada, see HW Arthurs, 'The Dependent Contractor: A Study of the Legal Problems of Countervailing Power' (1965) 16(1) *University of Toronto Law Journal* 89, 94–5; Langille and Davidov (n 27) 15–16.

[104] As to Australia, see above nn 41–6 and accompanying text. As to the US, see *Nationwide Mutual Insurance Co v Darden*, 503 US 318, 323–4 (Souter J for the Court) (1992) ('*Darden*'), quoting *Community for Creative Non-Violence v Reid*, 490 US 730, 751–2 (Marshall J for the Court) (1989). As to Canada, see *671122 Ontario Ltd v Sagaz Industries Canada Inc* [2001] 2 SCR 983, 1000–5 (Major J for the Court) ('*Sagaz Industries*').

[105] For a discussion of the Canadian statutes, see Judy Fudge, Eric Tucker and Leah F Vosko, 'Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada' (2003) 10 *Canadian Labour and Employment Law Journal* 193; Langille and Davidov (n 27). As to the US statutes, see Marc Linder, 'Dependent and Independent Contractors in Recent US Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness' (1999) 21(1) *Comparative Labor Law and Policy Journal* 187; Carlson (n 103).

only minimally defined.[106] The similarities with respect to these three matters indicate that it is appropriate to have regard to Canadian and US cases to assess the utility and viability of a purposive approach to the employment concept in Australia.

It is necessary, too, to explain why the approach of the Supreme Court of the United Kingdom ('UK Supreme Court') in *Autoclenz Ltd v Belcher* ('*Autoclenz*')[107] is not examined in this article. In *Autoclenz*, the Court explicitly adopted a 'purposive approach'[108] in determining whether workers were employees or independent contractors for the purposes of protective labour legislation.[109] The purposive approach examined in this article is different from the purposive approach propounded in *Autoclenz*. This article considers whether the employment concept can be moulded by reference to the purposes of a statute that engages the concept. The core aspect of *Autoclenz* was its privileging of substance over form in characterisation. In characterising the work contract, the UK Supreme Court focused on the substance of the relationship, as revealed by how the parties conducted themselves in practice, rather than the form of the relationship, as set out in the contractual documentation.[110] As noted above,[111] a focus on substance is only one aspect of the purposive approach examined in this article.

B *Reasons for Adopting a Purposive Approach to the Employment Concept*

1 *Vicarious Liability and Protective Labour Statutes: Different Purposes*

There are difficulties with applying, to different statutory contexts, a common law concept of employment that is rooted in the policy considerations underpinning the doctrine of vicarious liability. Leading labour law scholars in Australia have suggested that 'the application of a universal test, with little regard for the context in which the existence of a contract of service falls to be determined, may arguably defeat the policy objectives of the different

[106] For a discussion of the Canadian statutes, see Fudge, Tucker and Vosko (n 105); Langille and Davidov (n 27). As to the US statutes, see Linder (n 105); Carlson (n 103). See also above nn 10–11 and accompanying text.

[107] [2011] 4 All ER 745 ('*Autoclenz*').

[108] Ibid 757 (Lord Clarke JSC for the Court).

[109] See Bogg, 'Sham Self-Employment in the Supreme Court' (n 30) 341–4; Bogg, 'Common Law and Statute in the Law of Employment' (n 3) 99–100; Davies (n 3) 84–6.

[110] *Autoclenz* (n 107) 756–9 (Lord Clarke JSC).

[111] See above nn 86–8 and accompanying text.

regulatory schemes involved'.[112] In *ACE Insurance Ltd v Trifunovski*, Buchanan J alluded to the challenges of applying a concept developed in vicarious liability cases to questions of employment for the purposes of statutory employment entitlements:

> The two areas where the distinction [between employees and independent contractors] is important concern the duties and obligations owed by the contracting parties to each other and the duties and obligations that one of them may owe to third parties. It is in the latter field that much of the learning has been expressed, although that circumstance has introduced some difficulties into the former.[113]

Buchanan J did not elaborate upon these difficulties. One of these difficulties is the disjunction between the purposes of the vicarious liability doctrine and the purposes of protective labour statutes that engage the employment concept. Professor Harry Arthurs made this point in 1965 in a highly influential article concerning, among other things, judicial approaches to the employment concept in collective bargaining legislation in Canada.[114] He noted that the concerns of vicarious liability, which centre upon the allocation of losses between a person or entity who engages another to perform work and the third party who has been injured as a result of the worker's negligence, are unconnected to the purposes underlying protective labour statutes.[115] He expressed concern about the failure of the Canadian courts to adopt a purposive approach to the employment concept in statutory contexts and observed that '[s]urely any meaningful definition [of employee] must be formulated in light of … statutory purpose'.[116]

Courts in Canada and, for a time, the US identified the disjunction between the purposes of the vicarious liability doctrine and the purposes of protective labour statutes as a reason for taking a different approach to the term 'employee' in cases involving such statutes. In a series of cases, the US Supreme Court adopted an approach to the characterisation of work contracts that was informed by the purpose of the relevant statute. Influential in these cases was an early exposition of the purposive approach to

[112] Stewart et al, *Creighton and Stewart's Labour Law* (n 4) 220–1 [8.56], citing Brooks (n 31) 90–101.

[113] *Trifunovski (Appeal)* (n 16) 151 [26].

[114] Arthurs (n 103).

[115] Ibid 94–5.

[116] Ibid 95.

characterisation in *Lehigh Valley*, a decision of the US Second Circuit Court of Appeals.[117]

The issue in *Lehigh Valley* was whether a worker was an employee for the purposes of a protective labour statute.[118] Learned Hand J stated that the term 'employed' in the legislation 'must be understood with reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given'.[119] His Honour observed that 'the whole purpose of such statutes … [is] to protect those who are at an economic disadvantage'[120] and that '[s]uch statutes are partial; they upset the freedom of contract … they should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them'.[121]

The reasoning in *Lehigh Valley* was influential in the US Supreme Court's judgment in *Hearst Publications*, which concerned the *National Labor Relations Act* ('*NLRA*').[122] At issue in *Hearst Publications* was whether newsboys who distributed newspapers for the defendant newspaper companies were employees for the purposes of the *NLRA*, such as to require the defendant companies to bargain collectively with the union that represented the newsboys.[123] The term 'employee' was defined in the *NLRA* to 'include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise'.[124] In determining whether the newsboys were employees, Rutledge J, who delivered the opinion of the Court, adopted and applied a purposive approach.

In his elaboration of the purposive approach, Rutledge J reiterated the statement of Learned Hand J in *Lehigh Valley* that '[w]here all the conditions of the relation require protection, protection ought to be given'.[125] Rutledge J

[117] *Lehigh Valley* (n 23).

[118] Ibid 552 (Learned Hand J). As Professor Carlson observed, '[t]he exact nature of the statute is unclear': Carlson (n 103) 312 n 78; although it 'apparently provided compensation for work-place accidents': at 312. The reason for this lack of clarity is that the statute is not identified by name in the judgment: at 312 n 78.

[119] *Lehigh Valley* (n 23) 552.

[120] Ibid.

[121] Ibid 553.

[122] 29 USC §§ 151–69 (1940).

[123] *Hearst Publications* (n 25) 113 (Rutledge J for the majority).

[124] 29 USC § 152(3) (1940), as amended by *Labor Management Relations Act*, Pub L No 80-101, § 101, 61 Stat 136, 136–52 (1947).

[125] *Hearst Publications* (n 25) 129.

observed that 'technical concepts pertinent' to an employer's vicarious liability should not be invoked 'to restrict the scope of the term "employee"' in the *NLRA*.[126] Adoption of the restrictive common law test would not be 'consistent with the statute's broad terms and purposes'.[127] Instead, the term 'employee' in the *NLRA* '"takes color from its surroundings … [in] the statute where it appears"[128] … and derives meaning from the context of that statute, which "must be read in the light of the mischief to be corrected and the end to be attained"'.[129]

In this case, the newsboys worked full time and were subject to supervision in the performance of their work by the companies' district managers.[130] This supervision and control extended to matters such as their hours and location of work and the sales techniques they adopted (including how to advertise and display the papers).[131] Poor performance could result in sanctions of varying severity, including dismissal.[132] The defendant companies supplied the newsboys with the relevant sales equipment, such as advertising placards and racks.[133] The newsboys received the difference between the price they paid the companies for the newspapers and the price at which they sold the newspapers, both of which were controlled by the company.[134] The companies also controlled the number of papers that each newsboy was allocated.[135] Accordingly, the defendant companies effectively dictated the remuneration of the newsboys. Viewing these facts as a whole, Rutledge J concluded that the newsboys were employees of the defendant companies.[136] Rutledge J observed that 'the particular workers in these cases

126 Ibid.

127 Ibid 125 (Rutledge J for the majority).

128 Ibid 124 (Rutledge J for the majority), quoting *United States v American Trucking Ass'ns Inc*, 310 US 534, 545 (Reed J for the majority) (1940).

129 *Hearst Publications* (n 25) 124 (Rutledge J for the majority), quoting *South Chicago Coal & Dock Co v Bassett*, 309 US 251, 259 (Hughes CJ for the Court) (1940), quoting *Warner v Goltra*, 293 US 155, 158 (Cardozo J for the Court) (1934).

130 *Hearst Publications* (n 25) 116 (Rutledge J for the majority).

131 Ibid 118–19.

132 Ibid.

133 Ibid 119.

134 Ibid 117.

135 Ibid.

136 Ibid 132.

are subject, as a matter of economic fact, to the evils the statute was designed to eradicate'.[137]

In *United States v Silk* ('*Silk*'),[138] the US Supreme Court followed the approach in *Hearst Publications*. Reed J delivered the opinion of the Court in *Silk*. The issue in that case was whether the workers in question were employees for the purposes of the *Social Security Act* ('*SSA*').[139] The term 'employment' was defined in the *SSA* to mean 'any service, of whatever nature, performed … by an employee for his employer …'[140] but, as Reed J noted, '[n]o definition of employer or employee applicable to these cases' appeared in the *SSA*.[141] Reed J stated that the term 'employee' was 'to be construed to accomplish the purposes of the legislation'.[142] The factors in the multi-factor test for employment were applied, but they were approached with the understanding that the statute favoured broader coverage and protection.[143] Reed J observed that '[a]s the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose'.[144]

Following the decisions in *Hearst Publications* and *Silk*, amendments to the *NLRA* and the *SSA* were passed by the US Congress. These amendments made it clear that the common law concept of employment, uncoloured by reference to statutory purpose, was to be applied to determine whether a worker was an employee for the purposes of these statutes.[145] These amendments prompted the US Supreme Court to abandon the purposive approach to the employment concept.[146] Despite its abandonment in the US, the purposive approach articulated in *Hearst Publications* influenced the

[137] Ibid 127.

[138] *Silk* (n 25).

[139] 42 USC §§ 301–1307 (1946), as repealed by Act of 30 October 1972, Pub L 92-603, § 303(a), 86 Stat 1484, 1484.

[140] 42 USC § 410 (1946), as repealed by Act of 30 October 1972, Pub L 92-603, § 303(a), 86 Stat 1484, 1484.

[141] *Silk* (n 25) 711.

[142] Ibid 712.

[143] Ibid 712–16 (Reed J for the majority).

[144] Ibid 712.

[145] *National Labor Relations Board v United Insurance Co of America*, 390 US 245, 256 (Black J for the Court) (1968); *Darden* (n 104) 324–5 (Souter J for the Court); Carlson (n 103) 321–5; Linder (n 105) 191–5.

[146] *Darden* (n 104) 324–5 (Souter J for the Court).

writings of leading labour law scholars, including Professor Harry Arthurs and Professor Guy Davidov.[147] Their work on the purposive approach has, in turn, been influential in Canada.[148]

Canadian courts have adopted a purposive approach to the employment concept in respect of protective labour statutes. This approach is informed more generally by the way Canadian courts view the purposes of statutes that confer employment rights and protections. In *Machtinger v HOJ Industries Ltd*, the Supreme Court of Canada observed that the purpose of such statutes is 'to protect the interests of employees'.[149] In *Dynamex Canada Inc v Mamona*,[150] the Federal Court of Appeal of Canada made a similar point in respect of the *Canada Labour Code*.[151] The Court stated that '[a] review of Part III [of the *Canada Labour Code*] as a whole indicates that it falls into the category of labour standards legislation'.[152] The Court observed that while the 'terms and conditions of employment were once considered a private matter … exploitation in the workplace' had prompted the Canadian Parliament to pass legislation providing for minimum standards in respect of matters such as wages, leave, protection upon dismissal and hours of work.[153] Such legislation was intended, among other things, to 'protect individual workers and create certainty in the labour market by providing minimum labour standards and mechanisms for the efficient resolution of disputes arising from its provisions'.[154] The provisions in protective labour statutes are given a broad and liberal interpretation consistent with the beneficial nature of these statutes.[155]

147 Arthurs (n 103); Davidov, 'The Three Axes of Employment Relationships' (n 30).

148 In *McCormick* (n 24), the Supreme Court of Canada adopted a purposive approach to the employment concept. In doing so, the Court referred, among other things, to the work of Professor Arthurs and Professor Davidov: at 122–3 [22]–[24] (Abella J for the Court), citing Davidov, 'The Three Axes of Employment Relationships' (n 30) 377–94; Arthurs (n 103) 89–90.

149 [1992] 1 SCR 986, 1003 (Iacobucci J for La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ) ('*Machtinger*'). This case dealt with the *Employment Standards Act*, RSO 1980, c 137. The Supreme Court of Canada made the same point in *Re Rizzo & Rizzo Shoes Ltd* [1998] 1 SCR 27, 41–2 (Iacobucci J for the Court) ('*Re Rizzo*').

150 (2003) 228 DLR (4th) 463 ('*Dynamex Canada*').

151 *Canada Labour Code*, RSC 1985, c L-2.

152 *Dynamex Canada* (n 150) 478 [31] (Sharlow JA for the Court).

153 Ibid (citations omitted).

154 Ibid 479 [35] (Sharlow JA for the Court).

155 *Machtinger* (n 149) 1003 (Iacobucci J for La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ), quoted in *Re Rizzo* (n 149) 42 (Iacobucci J for the Court). See also *Dynamex Canada* (n 150) 477–9 [28]–[35] (Sharlow JA for the Court).

Canadian courts apply this beneficial interpretive stance to the term 'employment' in protective labour statutes.[156] Importantly, while they take the common law concept of employment as a starting point for characterisation of the work contract, they mould this multi-factor test by reference to the protective purpose of these statutes.[157] Whereas in vicarious liability cases the considerations underpinning that doctrine are used to inform the application of the multi-factor test,[158] in cases involving statutory labour protections, the factors in the test are assessed by reference to the purposes underlying the relevant legislation.

A recent example of this approach at ultimate appellate level is *McCormick v Fasken Martineau DuMoulin LLP* ('*McCormick*'),[159] a case involving the term 'employment' in the British Columbia *Human Rights Code*.[160] The Supreme Court of Canada observed that the various factors in the multi-factor test 'are unweighted taxonomies, a checklist that helps explore different aspects of the relationship'.[161] The Court noted that these factors are 'helpful in framing the inquiry [but] they should not be applied formulaically'.[162] Instead, these factors are to be viewed through the 'animating themes'[163] of control and dependency and '[w]hat is more defining than any particular facts or factors is the extent to which they illuminate the essential character of the relationship and the underlying control and dependency'.[164] The existence of control and dependency indicates that the particular worker possesses the 'kind of vulnerability' that the statute 'intended to bring under its protective scope'.[165] In explaining these concepts of control and dependency, the Court made the following observation:

> Deciding who is in an employment relationship for the purposes of the *Code* means, in essence, examining how two synergetic aspects function in an employment relationship: control exercised by an employer over working

156 *McCormick* (n 24) 119–20 (Abella J for the Court).

157 Ibid 119–24 (Abella J for the Court).

158 *Sagaz Industries* (n 104) 998–1005 [33]–[46] (Major J for the Court).

159 *McCormick* (n 24).

160 *Human Rights Code*, RSBC 1996, c 210.

161 *McCormick* (n 24) 125 [28] (Abella J for the Court).

162 Ibid.

163 Ibid 124 [26] (Abella J for the Court).

164 Ibid 125 [28] (Abella J for the Court).

165 Ibid 120 [19] (Abella J for the Court).

> conditions and remuneration, and corresponding dependency on the part of a worker. In other words, the test is who is responsible for determining working conditions and financial benefits and to what extent does a worker have an influential say in those determinations? The more the work life of individuals is controlled, the greater their dependency and, consequently, their economic, social and psychological vulnerability in the workplace.[166]

The Supreme Court stated that this broad and liberal approach to the employment concept was consistent with the remedial and protective purposes of the *Human Rights Code*.[167] The concept was broader than the 'unduly restrictive traditional test for employment' developed in the vicarious liability cases.[168] Importantly, while this approach was expounded in respect of a human rights statute, the Court noted that it applied more generally to other protective labour statutes, subject to any unique features of the particular statute.[169] Indeed, in articulating the approach, the Court in *McCormick* cited *Pointe-Claire v Labour Court (Quebec)* ('*Pointe-Claire*'), an earlier decision of the Supreme Court of Canada dealing with collective bargaining legislation.[170] In *Pointe-Claire*, the Court stated that in approaching the characterisation exercise, regard should be had to the purposes of the labour statute.[171]

The purposive approach to protective labour statutes adopted in Canada and, for a time, the US, moulds the common law concept of employment by reference to the protective purposes of those statutes. Drawing principally upon the work of Professor Guy Davidov,[172] the Supreme Court of Canada identified control and dependency as the 'kind of vulnerability' that is targeted by protective labour statutes.[173] As Professor Davidov has argued, employees are different from independent contractors because they are

166 Ibid 122 [23] (Abella J for the Court), citing Davidov, 'The Three Axes of Employment Relationships' (n 30) 377–94, Arthurs (n 103) 89–90, *International Woodworkers of America v Atway Transport Inc* [1989] OLRB Rep 540 and *Pointe-Claire v Labour Court (Quebec)* [1997] 1 SCR 1015 ('*Pointe-Claire*').

167 *McCormick* (n 24) 119–22 (Abella J for the Court).

168 Ibid 121 [21] (Abella J for the Court).

169 Ibid 123–4 [25] (Abella J for the Court).

170 *Pointe-Claire* (n 166), cited in *McCormick* (n 24) 122 [23] (Abella J for the Court).

171 *Pointe-Claire* (n 166) 1052 (Lamer CJ, La Forest, Gonthier and Cory JJ agreeing).

172 The Supreme Court of Canada cited, among other things, Davidov, 'The Three Axes of Employment Relationships' (n 30): *McCormick* (n 24) 122 [23], 123 [25] (Abella J for the Court).

173 *McCormick* (n 24) 120 [19] (Abella J for the Court).

vulnerable, with the concept of 'vulnerability' comprising subordination[174] and dependency.[175] This conception of vulnerability captures what is unique about employees and thus is tailored to the questions that courts should be seeking to answer when they engage in the characterisation of work contracts for the purposes of protective labour statutes.[176] In the words of Learned Hand J in *Lehigh Valley*, it captures the 'conditions of the relation [that] require protection'.[177]

This section has discussed the shortcomings of applying an employment concept moulded by the concerns of vicarious liability to protective labour statutes. These shortcomings have been identified in Canadian and US cases as a reason for adopting a broader and more beneficial approach to the employment concept in respect of these statutes. A related reason for adopting such an approach is that it coheres with the prevailing approach to statutory interpretation in Australia, which requires courts to have regard to statutory purpose.

2 *The Purposive Approach to Statutory Interpretation in Australia*

In the Canadian and US cases discussed above, courts placed primary emphasis on the need to construe the words of a statute, such as the term 'employee', in a manner consistent with the purposes of the statute. For example, in *Hearst Publications*, Rutledge J stated that the term 'employee' 'derives meaning from the context of [the *NLRA*], which "must be read in light of the mischief to be corrected and the end to be attained"'.[178] This is consistent with the prevailing approach to statutory interpretation in Australia.[179]

[174] Professor Davidov argues that employment involves 'a structure of governance with democratic deficits': Davidov, *A Purposive Approach to Labour Law* (n 26) 36 (emphasis omitted). This emerges from the power of employers to control employees: at 38. Control is conceptualised broadly; it is not limited to the employer's control over the work to be performed, but rather refers 'generally to the superior power of the employer vis-à-vis the employee within their relationship, and the ensuing inability of the employee to control her own (working) life': at 39. Professor Davidov uses the term 'subordination', broadly conceived, to capture these democratic deficits in the employment relationship.

[175] Davidov, 'The Three Axes of Employment Relationships' (n 30) 375–95. See also Davidov, *A Purposive Approach to Labour Law* (n 26) chs 3, 6.

[176] Davidov, 'The Three Axes of Employment Relationships' (n 30) 398–409; Davidov, *A Purposive Approach to Labour Law* (n 26) chs 3, 6.

[177] *Lehigh Valley* (n 23) 552.

[178] *Hearst Publications* (n 25) 124.

[179] Stephen Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37(2) *Monash University Law Review* 1, 2.

In Australia, purposive statutory construction has been statutorily enshrined in s 15AA of the *Acts Interpretation Act 1901* (Cth) and its state and territory counterparts.[180] Section 15AA provides that '[i]n interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation'. The High Court of Australia has on numerous occasions directed attention to the importance of having regard to purpose in statutory construction. For example, in *Federal Commissioner of Taxation v Unit Trend Services Pty Ltd*,[181] French CJ, Crennan, Kiefel, Gageler and Keane JJ quoted the following passage from French CJ and Hayne J's judgment in *Certain Lloyd's Underwriters v Cross*:

> The context and purpose of a provision are important to its proper construction because, as the plurality said in *Project Blue Sky Inc v Australian Broadcasting Authority*, '[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of *all* the provisions of the statute' … That is, statutory construction requires deciding what is the legal meaning of the relevant provision 'by reference to the language of the instrument viewed as a whole', and 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'.[182]

In the labour law context, the High Court of Australia has in a recent case interpreted s 357(1) of the *FW Act*[183] in a purposive manner and referred explicitly to the mischief that was sought to be remedied. In *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*, a unanimous Court

[180] See, eg, *Interpretation Act 1987* (NSW) s 33; *Interpretation of Legislation Act 1984* (Vic) s 35(a). See also Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 41–53.

[181] (2013) 250 CLR 523.

[182] Ibid 539–40 [47], quoting *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 389 [24] (citations omitted).

[183] *FW Act* (n 6) s 357(1) provides:

> A person (the *employer*) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.

See also Caroline Kelly, 'Sham Arrangements, Third Parties and s 357 of the Fair Work Act 2009: *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*' (2016) 29(1) *Australian Journal of Labour Law* 110.

focused on the 'purpose of the prohibition'[184] in s 357(1) and concluded that '[t]he misrepresentation attributed to Quest was squarely within the scope of the *mischief* to which the prohibition in s 357(1) was directed and is caught by its terms'.[185] Thus, the concepts of purpose and mischief, which are central to the operation of the statutory purpose approach in the Canadian and US cases, are not foreign concepts to Australian law. Rather, they form the foundations of the prevailing approach to statutory construction in Australia.

The purposive approach to the employment concept coheres with the general approach to statutory interpretation in Australia. Despite the apparent utility of the purposive approach to the employment concept, there are some barriers to the adoption of it by Australian courts. The final part of this article identifies and examines these barriers.

IV Barriers to Adopting a Purposive Approach to the Employment Concept in Australia

A *Statutory Terms with Common Law Meanings: The Interpretive Principle*

Where a statute invokes a term that has a technical meaning at common law, then, in the absence of a contrary intention, the statutory term is to be understood in that technical legal sense.[186] In giving content to that statutory term, recourse is to be had to the relevant common law doctrine or concept. This is an established principle of statutory interpretation.[187] In *Commissioners for Special Purposes of the Income Tax v Pemsel* ('*Pemsel*'), a majority of the House of Lords held that the word 'charitable' in a taxation statute was to be taken as a reference to the concept of a charity as understood in the law of equity.[188] Lord Macnaghten held that the word '"charity" in its legal sense comprises four principal divisions' and went on to identify the four 'heads' of charity.[189] The Privy Council adopted the same interpretive approach in *Chesterman v Federal Commissioner of Taxation* ('*Chesterman*').[190]

184 (2015) 256 CLR 137, 145 [20] (French CJ, Kiefel, Bell, Gageler and Nettle JJ).

185 Ibid 146 [22] (French CJ, Kiefel, Bell, Gageler and Nettle JJ) (emphasis added).

186 See, eg, *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531, 580 (Lord Macnaghten) ('*Pemsel*'). See also Pearce and Geddes (n 180) 161; Matthew Harding, 'Equity and Statute in Charity Law' (2015) 9(2) *Journal of Equity* 167, 172–7.

187 Pearce and Geddes (n 180) 161.

188 *Pemsel* (n 186).

189 Ibid 583. Lord Macnaghten set out the four 'heads' of charity at 583: 'trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion;

More recently, in *Aid/Watch Inc v Federal Commissioner of Taxation* ('*Aid/Watch*'),[191] a majority of the High Court followed the interpretive approach in *Pemsel* and *Chesterman* and held that the word 'charitable' in several taxation statutes was to be understood in its technical legal sense.[192] The majority made two important statements that are relevant here. First, their Honours stated:

> Where statute picks up as a criterion for its operation a body of the general law, such as the equitable principles respecting charitable trusts, then, in the absence of a contrary indication in the statute, the statute speaks continuously to the present, and picks up the case law as it stands from time to time.[193]

Second, their Honours stated:

> [W]here, as here, the general law comprises a body of doctrine with its own scope and purpose, the development of that doctrine is not directed or controlled by a curial perception of the scope and purpose of any particular statute which has adopted the general law as a criterion of liability in the field of operation of that statute.[194]

The interpretive principle laid down in *Pemsel*, and elaborated upon by the majority in *Aid/Watch*, appears to preclude a purposive approach to the common law concept of employment. It prevents the purpose of any statute that engages the employment concept from moulding or informing the development of the concept. This interpretive principle has, however, been questioned.[195] Professor Matthew Harding, a leading equity scholar, has argued that while this interpretive principle is well accepted,[196] it is also the case that 'contemporary understandings of statutory interpretation, according to which interpreters must look to the ordinary meaning of the statutory text in context, and to relevant legislative purposes,

and trusts for other purposes beneficial to the community, not falling under any of the preceding heads'.

190 (1925) 37 CLR 317, 319–20 (Lord Wrenbury for the Court). See also Harding (n 186) 173–5.

191 (2010) 241 CLR 539 ('*Aid/Watch*').

192 Ibid 550 [24] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

193 Ibid 549 [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also Chief Justice Robert French, 'Trusts and Statutes' (2015) 39(2) *Melbourne University Law Review* 629, 640; Gummow (n 1) 7.

194 *Aid/Watch* (n 191) 549 [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

195 Harding (n 186) 172–7.

196 Ibid 172. Professor Harding referred, among other things, to *Aid/Watch* (n 191): Harding (n 186) 173 n 30.

have … received the imprimatur of the High Court of Australia in highly authoritative terms'.[197]

Pemsel was handed down prior to the rise of the purposive approach to statutory interpretation. Professor Harding suggested that the interpretive principle in *Pemsel* 'may now need to be revisited in light of those understandings'[198] and that further analysis was required by courts in future cases to determine whether, and how, the *Pemsel* principle could be 'reconciled with the contemporary understandings of statutory interpretation'.[199] The same argument could be made in respect of the current Australian approach to the employment concept in statutory contexts. In *ACE Insurance Ltd v Trifunovski*, Perram J held that the term 'employee', when used in a statute, is to be understood in its technical legal sense.[200] In this regard, his Honour followed the approach of the High Court in *Foster*.[201] However, *Foster*, like *Pemsel*, was decided before the ascension of the purposive approach to the construction of statutes in Australia.

It is important, then, to consider the impact of the purposive approach to statutory interpretation upon the *Pemsel* interpretive principle. Professor Harding did not put forward a definitive position on this issue, but he did suggest that Kirby J's judgment in *Central Bayside General Practice Association Ltd v Commissioner of State Revenue (Vic)* ('*Central Bayside*')[202] provided a useful starting point.[203] *Central Bayside* involved the interpretation of the phrase 'charitable body' in the *Pay-Roll Tax Act 1971* (Vic). The plurality did not address the relationship between the *Pemsel* interpretive principle and the purposive approach to statutory construction. The parties had assumed that the *Pemsel* interpretive principle applied, and the plurality observed that there was 'no occasion to call the rule in question'.[204] Accordingly, the plurality proceeded on the basis that the term 'charitable' in the statute was to be given its technical legal meaning.[205]

Although Kirby J ultimately agreed with the conclusion of the plurality in *Central Bayside*, his Honour questioned the *Pemsel* interpretive principle, as

[197] Harding (n 186) 177 (citations omitted).

[198] Ibid 175.

[199] Ibid 177.

[200] *Trifunovski (Trial)* (n 12) 541–3 [23]–[29].

[201] *Foster* (n 52).

[202] (2006) 228 CLR 168 ('*Central Bayside*').

[203] Harding (n 186) 175–7.

[204] *Central Bayside* (n 202) 179 n 28 (Gleeson CJ, Heydon and Crennan JJ).

[205] Ibid 178–9 n 28 (Gleeson CJ, Heydon and Crennan JJ).

well as the meaning of 'charity' expounded in *Pemsel*.[206] As to the interpretive principle, Kirby J suggested that 'there is no reason, in principle, why the problem of statutory interpretation presented by the present appeal should be approached in a way different from other cases involving statutory interpretation'.[207] This meant that in discerning the meaning of 'charity' in the taxation statute, the 'starting point [was] the statute', including the language itself, as well as 'the context of the contested phrase' and 'the general purpose and object of the statute'.[208] His Honour concluded, however, that the *Pemsel* interpretive principle (and the meaning of charity propounded in that case) should be followed in *Central Bayside*.[209] There were several reasons for this conclusion. Two of those reasons are instructive in assessing the viability of a purposive approach to the employment concept in Australia. These reasons relate to the limits of judicial lawmaking.

B *The Limits of Judicial Lawmaking*

In *Central Bayside*, Kirby J observed that a re-expression of the term 'charity' would 'have wide-ranging implications'[210] for those who had arranged their affairs to come within the meaning of charity in *Pemsel*. Furthermore, his Honour had regard to the decision of the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue*.[211] This case involved the meaning of the word 'charitable' in a taxation statute. The Supreme Court of Canada acknowledged the shortcomings of adopting the meaning of charity laid down in *Pemsel*,[212] but rejected an invitation to depart from that meaning.[213] Importantly for present purposes, this refusal was made, in part, on the basis that 'for the Court to attempt a re-expression of the law, having so many applications of great variety, would go beyond the proper judicial function to

206 Ibid 195–205 [76]–[109].

207 Ibid 200 [91].

208 Ibid.

209 Ibid 205–8 [110]–[120].

210 Ibid 206 [114].

211 [1999] 1 SCR 10 ('*Vancouver Society of Immigrant Women*').

212 Ibid 106–7 [149] (Iacobucci J for Cory, Iacobucci, Major and Bastarache JJ).

213 Ibid 107 [150], 134–7 [200]–[203] (Iacobucci J for Cory, Iacobucci, Major and Bastarache JJ).

re-express the general law'[214] and, accordingly, 'any such re-expression should be left to Parliament'.[215] Kirby J observed that these considerations militated against a departure from the *Pemsel* interpretive principle and meaning of charity in *Central Bayside*.[216]

Kirby J's references to the wide-ranging consequences of any re-expression of the term 'charity', and the concern that such a re-expression would extend beyond the proper boundaries of judicial lawmaking, find parallels in a recent decision of the High Court of Australia in the area of employment contract law. In *Barker*, the High Court rejected the implied term of mutual trust and confidence.[217] This term has been accepted at ultimate appellate level in the United Kingdom.[218] The term is implied as a matter of law into all employment contracts in that jurisdiction.[219]

In *Barker*, French CJ, Bell and Keane JJ observed that the implication of this term into Australian employment contracts would involve an 'exercise of the judicial power in a way that may have a significant impact upon employment relationships and the law of the contract of employment in this country'.[220] Their Honours stated that the term is rooted in 'a view of social conditions and desirable social policy that informs a transformative approach to the contract of employment in law'.[221] The wide-ranging consequences of accepting the term and the 'complex policy considerations'[222] involved meant that implication of such a term was beyond the limits of judicial lawmaking.[223]

The reasoning in *Barker* may not necessarily prevent Australian courts from adopting a purposive approach to the employment concept in statutory contexts. It could be argued that the exercise in which a court engages when

[214] *Central Bayside* (n 202) 207 [115] (Kirby J), summarising part of the reasons in *Vancouver Society of Immigrant Women* (n 211) 107 [150] (Iacobucci J for Cory, Iacobucci, Major and Bastarache JJ).

[215] *Central Bayside* (n 202) 207 [115] (Kirby J).

[216] Ibid 206–7 [115].

[217] *Barker* (n 100) 195 [40]–[41] (French CJ, Bell and Keane JJ), 214 [109] (Kiefel J), 216–17 [115]–[118] (Gageler J).

[218] *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20 ('*Malik*'); *Eastwood v Magnox Electric plc* [2005] 1 AC 503 ('*Eastwood*').

[219] *Malik* (n 218); *Eastwood* (n 218).

[220] *Barker* (n 100) 194 [36].

[221] Ibid 195 [41].

[222] Ibid 195 [40] (French CJ, Bell and Keane JJ).

[223] Ibid 178 [1], 195 [40]–[41] (French CJ, Bell and Keane JJ). See also Riley, 'The Future of the Common Law in Employment Regulation' (n 2) 34; Golding (n 2) 70–1.

interpreting the employment concept purposively is different from the exercise that the High Court was invited to undertake in *Barker*. In *Barker*, the High Court was invited to create, by way of development of the common law, a 'broadly framed normative standard'[224] of conduct for employees and employers.[225] This 'new standard' was to be 'embodied in a new contractual term implied in law' into all contracts of employment.[226] French CJ, Keane and Bell JJ were of the view that the implication of a term in law is, by its very nature, a process that involves judicial lawmaking. Their Honours observed that 'implications in law … are a species of judicial law-making and are not to be made lightly'.[227] For the reasons outlined above,[228] the implication that the High Court was asked to make in *Barker* was a 'step beyond the legitimate law-making function of the courts'.[229]

On the other hand, a purposive approach to the employment concept does not involve the kind of judicial lawmaking at issue in *Barker*. The purposive approach involves a court applying well-accepted principles of statutory interpretation to give meaning and content to a term in a statute. A court engaged in a process of purposive statutory interpretation is not acting beyond the limits of the judicial function. It is, instead, performing a judicial function that has received, by way of s 15AA of the *Acts Interpretation Act 1901* (Cth) and its counterparts,[230] the express endorsement of the legislature. Accordingly, the reasoning in *Barker*, insofar as it relates to implied terms, does not lead inexorably to the conclusion that the purposive approach to the employment concept is beyond the limits of judicial lawmaking.

It should be acknowledged, however, that the adoption of a purposive approach to the employment concept might still engage the broader concerns raised in *Barker* about the limits of judicial lawmaking where complex matters of social policy are at stake. As the comparative analysis above

224 *Barker* (n 100) 185 [20] (French CJ, Bell and Keane JJ).

225 An employee already owes his or her employer a duty of fidelity: *Barker* (n 100) 190 [30] (French CJ, Bell and Keane JJ). The duty of fidelity requires an employee to refrain from conduct that 'impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee': *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66, 81 (Dixon and McTiernan JJ), quoted in *Barker* (n 100) 190 [30] (French CJ, Bell and Keane JJ).

226 *Barker* (n 100) 185 [20] (French CJ, Bell and Keane JJ).

227 Ibid 189 [29]. Cf JW Carter et al, 'Terms Implied in Law: "Trust and Confidence" in the High Court of Australia' (2015) 32(3) *Journal of Contract Law* 203, 223–4.

228 See above nn 220–3 and accompanying text.

229 *Barker* (n 100) 178 [1] (French CJ, Bell and Keane JJ).

230 See above Part III(B)(2).

demonstrates,[231] a purposive approach to the employment concept in respect of protective labour statutes results, in essence, in a broadening of the coverage of these statutes. The broad and beneficial approach taken by the Canadian and US courts extends the boundaries of coverage to capture 'a wider field than the narrow technical legal relation'[232] expounded in the vicarious liability cases. In light of the approach taken in *Barker* to the boundary between legislative and judicial lawmaking, Australian courts might form the view that extensions of coverage are a matter that should be left to the legislature.

There are many examples of Australian legislatures broadening the scope of labour statutes explicitly by using deeming provisions or other provisions that extend coverage beyond employees.[233] For example, the *FW Act* contains a provision that deems 'outworker[s] in the textile, clothing or footwear industry'[234] to be employees for the purposes of the Act.[235] The *Industrial Relations Act 1996* (NSW) deems a large number of workers to be employees, such as carpenters performing certain contract work and deliverers of bread and milk.[236] In the superannuation context, the *Superannuation Guarantee (Administration) Act 1992* (Cth) extends its coverage beyond the employee at common law to a person who 'works under a contract that is wholly or principally for the labour of the person'.[237]

A further relevant consideration is the fact that a wide range of statutes engage the employment concept. As noted in the introduction to this article, many statutes, including those pertaining to employment, taxation and superannuation, invoke the employment concept as a criterion for their operation. Adoption of a purposive approach to the employment concept would lead to different judicial formulations of the concept in each statutory context, because each statute has a different purpose. The fact that the employment concept has 'so many applications of great variety'[238] is another

[231] See above Part III(B).

[232] *Hearst Publications* (n 25) 124 (Rutledge J for the majority).

[233] See Stewart et al, *Creighton and Stewart's Labour Law* (n 4) 198–9 [8.07]–[8.10].

[234] *FW Act* (n 6) s 12 (definition of 'TCF outworker').

[235] Ibid ss 789BA–789BB. See also Stewart et al, *Creighton and Stewart's Labour Law* (n 4) 254 [10.18].

[236] *Industrial Relations Act 1996* (NSW) s 5(3), sch 1. See also Stewart et al, *Creighton and Stewart's Labour Law* (n 4) 198 n 36.

[237] *Superannuation Guarantee (Administration) Act 1992* (Cth) s 12(3). See also Stewart et al, *Creighton and Stewart's Labour Law* (n 4) 198–9 [8.09].

[238] *Central Bayside* (n 202) 207 [115] (Kirby J).

matter that Australian courts would likely take into account in considering the 'wide-ranging implications'[239] that may follow from the adoption of a purposive approach. In *Sweeney v Boylan Nominees Pty Ltd*, Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ observed that the distinction between employees and independent contractors is 'now too deeply rooted to be pulled out'.[240] Any extrication of these well-entrenched concepts or any significant adjustments to the boundary between them might, following *Barker*, be regarded by Australian courts as being within the realm of legislative, rather than judicial, lawmaking.

V Conclusion

This article has addressed one aspect of the interaction between statute and common law in the characterisation of work contracts. There are shortcomings with the current Australian approach, which eschews statutory purpose in the characterisation exercise. The 'deeper question of principle' that Hayne J identified in the special leave hearing in *ACE Insurance Ltd v Trifunovski*[241] is an important one. There is force in the proposition that 'employment' for the purposes of statutory employment entitlements should be assessed by reference to considerations that are different from those invoked to assess 'employment' for the purposes of vicarious liability. There is a need for further and sustained scholarly analysis of the viability of a purposive approach to the employment concept in Australia. This article has sought to lay a foundation for that analysis by drawing together and critically evaluating various lines of reasoning from the Australian cases, both within and beyond the labour law context, that are of relevance to the viability of this purposive approach. In doing so, it has identified some of the key barriers to the adoption of such an approach by Australian courts. The strength of these barriers, and the arguments that may be advanced against them, warrant further examination.

The characterisation of contracts for the performance of work is an important issue. The common law concept of employment lies at the heart of the characterisation exercise. The fact that this concept is 'consistently adopted and legitimated by legislation'[242] gives rise to challenging questions

[239] Ibid 206 [114] (Kirby J).

[240] *Sweeney* (n 5) 173 [33].

[241] *Trifunovski (Special Leave Hearing)* (n 18) 21.

[242] Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (n 38) 235.

about the relationship between statute and common law in that exercise. As labour statutes invoke the employment concept as a gateway to many employment rights and entitlements, the concept is of 'fundamental' importance in determining the scope of labour law's protection.[243] In the era of the 'fissured workplace',[244] in which there has been increasing use of alternative work arrangements such as labour hire and subcontracting, the erosion of labour law's protection is a matter of pressing concern. Such concerns are compounded by the emergence of new forms of work relationships in the gig economy.[245] A purposive approach to the employment concept might go some way to addressing these concerns.[246] This approach thereby merits further attention and analysis from Australian labour law scholars.

[243] Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2nd ed, 2011) 153.

[244] David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014).

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

[246] See Davidov, *A Purposive Approach to Labour Law* (n 26) ch 6.

CHAPTER 4

Pauline Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (2015) 32(2) *Journal of Contract Law* 149

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Pauline Bomball

Subsequent Conduct, Construction and Characterisation in Employment Contract Law

*Pauline Bomball**

It is an established rule of English and Australian contract law that evidence of subsequent conduct cannot be used for the purpose of construing a written contract. This exclusionary rule has been applied to written contracts in the work context, thereby precluding the use of such evidence for the purpose of determining whether a contract is one of service (employment) or for services (independent contracting). In some Australian cases, it has been suggested that evidence of subsequent conduct can, and should, be taken into account in the characterisation of a work contract. How can this be reconciled with the exclusionary rule? In this article, it is argued that the use of evidence of subsequent conduct for the purpose of characterising a work contract does not fall within the scope of the exclusionary rule.

Introduction

Evidence of how contracting parties conducted themselves after entry into a written contract cannot be used as an aid to the construction of that contract. This is an established rule of contract law in both England[1] and Australia.[2] In *Australian Mutual Provident Society v Chaplin*,[3] the Privy Council applied this rule in the work context. Lord Fraser, who delivered judgment, held that evidence of subsequent conduct cannot be taken into account for the purpose

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1 *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 at 603 per Lord Reid ('it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made'), 606 per Lord Hodson, 611 per Viscount Dilhorne, 614–15 per Lord Wilberforce; *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 252 per Lord Reid, 260 per Lord Morris, 261 per Lord Wilberforce, 269 per Lord Simon, 272 per Lord Kilbrandon. For an analysis of this rule, see Gerard McMeel, 'Prior Negotiations and Subsequent Conduct — The Next Step Forward for Contractual Interpretation?' (2003) 119 *LQR* 272 at 290–3; Lord Nicholls, 'My Kingdom for a Horse: The Meaning of Words' (2005) 121 *LQR* 577 at 588–9; David McLauchlan, 'Contract Formation, Contract Interpretation, and Subsequent Conduct' (2006) 25 *UQLJ* 77; J Edward Bayley, 'Prior Negotiations and Subsequent Conduct in Contract Interpretation: Principles and Practical Concerns' (2011–12) 28 *JCL* 179.

2 *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at 582; 251 ALR 322 at 330; [2008] HCA 57 at [35] per Gummow, Hayne and Kiefel JJ; *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 at 615 per Allsop P, 625 per Giles JA, 630, 680–1 per Campbell JA; 264 ALR 15 at 22–3, 32–3, 37–8, 88; [2009] NSWCA 407 at [10]–[11], [58], [90], [314]–[318]; *Current Images Pty Ltd v Dupack Pty Ltd* [2012] NSWCA 99 at [32] per Bathurst CJ (with whom Macfarlan JA and Sackville AJA agreed); *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* (2012) 45 WAR 29 at 37; 294 ALR 550 at 553; [2012] WASCA 216 at [10] per McLure P (with whom Newnes JA and Le Miere J agreed).

3 (1978) 18 ALR 385.

of characterising a written contract for the performance of work — that is, in determining whether such a contract is a contract *of service* (employment) or a contract *for services* (independent contracting).[4] Subsequently, in *Narich Pty Ltd v Commissioner of Pay-Roll Tax*,[5] Lord Brandon reaffirmed the approach in *Chaplin*. His Lordship observed[6] that:

> . . . where there is a written contract between the parties whose relationship is in issue, a court . . . in determining the nature of that relationship . . . is not entitled to consider . . . the manner in which the parties subsequently acted in pursuance of such contract.

More recently, it has been suggested that evidence of subsequent conduct can (and, indeed, 'should')[7] be used for the purpose of characterising a written work contract. For example, in *ACE Insurance Ltd v Trifunovski*,[8] Buchanan J (with whom Lander and Robertson JJ agreed) said:

> Gleeson CJ in *Connelly v Wells*,[9] and the Privy Council in *Chaplin*[10] and *Narich*,[11] expressed the view that the terms of the contract establishing the legal parameters of the relationship were the appropriate point of reference, and that post-contractual conduct was not relevant. The principle is, of course, well-established in contract law. However, in cases of the present kind, where it is necessary to examine whether a particular relationship is one of employment, or of a different character, it now seems established in Australian law that all the circumstances should be taken into account.

The approach in *Chaplin* and *Narich* has, however, been applied in other recent cases. In *Tobiassen v Reilly*,[12] for example, the Court of Appeal of Western Australia adopted the passage from *Narich* set out above. In light of these diverging approaches, it has been observed[13] that the 'application of the parol evidence rule in determining the nature of the contract between the parties is somewhat contentious, particularly regarding the role of the parties' subsequent conduct'.

This article seeks to clarify the role of evidence of subsequent conduct in the characterisation of work contracts in Australia. It does so by dissecting the process of characterisation into two distinct stages. This is not the approach currently adopted by Australian courts. Yet, such an approach is important if the rules pertaining to the admissibility of evidence of subsequent conduct are

4 (1978) 18 ALR 385 at 392–3. Lord Fraser referred explicitly to the decisions in *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 and *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235.

5 [1983] 2 NSWLR 597; 50 ALR 417.

6 [1983] 2 NSWLR 597 at 601; 50 ALR 417 at 420.

7 *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146 at 174; 295 ALR 407 at 433; [2013] FCAFC 3 at [107] per Buchanan J (with whom Lander and Robertson JJ agreed). See also *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* (2011) 214 FCR 82 at 119–21; 279 ALR 341 at 376–9; [2011] FCA 366 at [188]–[200] per Bromberg J.

8 (2013) 209 FCR 146 at 174; 295 ALR 407 at 433; [2013] FCAFC 3 at [107].

9 (1994) 55 IR 73.

10 (1978) 18 ALR 385.

11 [1983] 2 NSWLR 597; 50 ALR 417.

12 (2009) 178 IR 213 at 233–4; [2009] WASCA 26 at [101] per Steytler P, Miller JA and Newnes AJA.

13 M Irving, *The Contract of Employment*, LexisNexis Butterworths, Sydney, 2012, §2-30.

to be elucidated clearly. In his treatise on the construction of commercial contracts, Professor Carter said[14] that a 'very good reason for distinguishing the various stages in construction is that the admissible raw material varies'. This article demonstrates that the same may be said of the stages in the characterisation of a work contract: the admissible raw material varies at each stage.[15]

The article commences with an examination of the legal test that Australian courts apply to determine the character of a work contract. It identifies two different approaches to the use of evidence of subsequent conduct for the purpose of characterisation: a narrow approach and a broad approach. Under the narrow approach, evidence of subsequent conduct cannot be taken into account for the purpose of characterisation. Under the broad approach, evidence of subsequent conduct plays a crucial role in determining the character of the contract. The article analyses considerations of policy which indicate that the broad approach to characterisation is preferable in the work context.

The article then seeks to reconcile the use of evidence of subsequent conduct in characterisation with the exclusionary rule in respect of such evidence. To this end, it is argued that the process of characterising a work contract consists of two stages: first, ascertaining the 'actual agreement'[16] of the parties; and, second, construing the terms of that agreement. It is contended that subsequent conduct can, and should, be taken into account at the first stage of the characterisation process. It is argued that the first stage does not involve an exercise in construction. The exclusionary rule in respect of evidence of subsequent conduct applies when such evidence is used for the purpose of construction.[17] As the first stage of characterisation does not involve construction, the use of evidence of subsequent conduct at this first stage is not subject to the exclusionary rule.

The characterisation of work contracts is an important process which Australian courts undertake on a frequent basis. The analysis presented in this article has significant implications for that process. It has been observed[18] that 'for every decision in which a court has been prepared to find that a carefully constructed contract does not reflect the reality of the underlying relationship, many others can be cited where this has not been done' and in this latter group of cases, 'judges have been prepared to take contractual terms at face value'. The arguments advanced in this article indicate that the approach adopted in the former group of cases — those focusing on the 'reality' of the relationship — is the better approach.

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14 J W Carter, *The Construction of Commercial Contracts*, Hart Publishing, Oxford, 2013, §1-21.

15 In this article, 'admissibility' is used in a substantive, rather than a procedural, sense: see Carter, above, n 14, §6-05 ('[t]he law in relation to the use of extrinsic raw material is substantive, not procedural'). The admissibility of such material is determined by reference to a substantive rule of contract law, which, in line with Professor Carter's analysis, this article will call the 'exclusionary rule': see Carter, above, n 14, §§6-05, 8-04.

16 The concept of 'actual agreement' is explained below. See text at nn 84ff.

17 Carter, above, n 14, §§8-36, 9-02–9-03.

18 Cameron Roles and Andrew Stewart, 'The Reach of Labour Regulation: Tackling Sham Contracting' (2012) 25 *AJLL* 258 at 267–8.

The Characterisation of Work Contracts

The need to characterise a work contract arises in a range of different contexts. For example, in determining whether certain labour statutes apply to the parties to a work contract, courts need to determine whether the contract is one of service or for services. This is because many of these statutes apply only to employees working under a contract of service, rather than independent contractors working under a contract for services.[19] Determining the character of a work contract is also important for the operation of the doctrine of vicarious liability. Employers are vicariously liable for the negligence of their employees arising in the course of employment; principals are not vicariously liable for the negligence of their independent contractors.[20]

In determining the character of a work contract, Australian courts apply a 'multi-factor' test which the High Court of Australia adopted in *Stevens v Brodribb Sawmilling Co Pty Ltd*[21] and subsequently affirmed in *Hollis v Vabu Pty Ltd*.[22] Under this test, courts are to take into account and weigh up various factors. Whilst the right of the hirer[23] to exercise control over the worker is a 'prominent factor',[24] it is not the only one.[25] Other factors include, for example, the right of the worker to substitute another person to perform the work, the mode of remuneration, the provision of equipment, and arrangements pertaining to superannuation, taxation and leave.[26]

In a particular case, there may be some factors which point towards employment and others which point towards independent contracting. For example, the right to exercise control over the worker, time-based remuneration and provision of equipment by the hirer point towards employment. Conversely, the absence of a right to exercise control (or a limited one), remuneration based on output produced and provision of equipment by the worker point towards independent contracting.

Generally speaking, no one factor is determinative of the character of the relationship. Courts are required to balance the various factors. In many Australian cases,[27] the following observations of Mummery LJ in *Hall*

19 See eg Fair Work Act 2009 (Cth), Pts 2-2, 2-3, 2-4, 3-2.

20 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; 63 ALR 513; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; 181 ALR 263; [2001] HCA 44; *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161; 227 ALR 46; [2006] HCA 19.

21 (1986) 160 CLR 16; 63 ALR 513.

22 (2001) 207 CLR 21; 181 ALR 263; [2001] HCA 44. See B Creighton and A Stewart, *Labour Law*, 5th ed, Federation Press, Sydney, 2010, §§7-44–7-50; C Sappideen et al, *Macken's Law of Employment*, 7th ed, Lawbook, Sydney, 2011, §§2-180–2-340.

23 In this article, the term 'hirer' is used to refer to an entity which engages a person to perform work. The term is used because of its neutrality: see Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *AJLL* 235 at n 2.

24 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 24; 63 ALR 513 at 517 per Mason J.

25 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 41–5; 181 ALR 263 at 276–9; [2001] HCA 44 at [44]–[57] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ.

26 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 23–4 per Mason J, 36–7 per Wilson and Dawson JJ; 63 ALR 513 at 517, 526.

27 See eg *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* (2011) 214 FCR 82 at 122; 279 ALR 341 at 380; [2011] FCA 366 at [205] per

(Inspector of Taxes) v Lorimer[28] have been adopted: 'This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail'. If, however, a contract confers upon the worker an unqualified right to substitute another person to perform the work, then this is 'almost conclusive against the contract being a contract of service'.[29] This is because an essential feature of employment is the provision of personal service.

The process of characterisation involves a search for the 'substance' of the relationship created by the contract.[30] In *Curtis v Perth and Fremantle Bottle Exchange Co Ltd*,[31] a case involving a contract for the hiring of bottles, Isaacs J said:

> Where parties enter into a bargain with one another whereby certain rights and obligations are created, they cannot by a mere consensual label alter the inherent character of the relations they have actually called into existence. Many cases have arisen where courts have disregarded such labels, because in law they were wrong, and have looked beneath them to the real substance.

The same point has been made in cases involving work contracts. In *Massey v Crown Life Insurance Co*,[32] for example, Lord Denning MR said that 'if the true relationship of the parties is that of master and servant under a contract of services, the parties cannot alter the truth of that relationship by putting a different label upon it'.

The contentious issue is *what evidence is admissible* to determine the substance of the relationship. Below, it is demonstrated that the injunction to

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Bromberg J; *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2010) 184 FCR 448 at 460; 268 ALR 232 at 242; [2010] FCAFC 52 at [31] per Keane CJ, Sundberg and Kenny JJ; *Wilton v Coal & Allied Operations Pty Ltd* (2007) 161 FCR 300 at 322–3; [2007] FCA 725 at [30] per Conti J; *Green v Victorian Workcover Authority* [1997] 1 VR 364 at 375 per Tadgell JA (with whom Phillips and Charles JJA agreed on this point).

28 [1992] 1 WLR 939 at 944.

29 *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385 at 391, cited in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 38; 63 ALR 513 at 528 per Wilson and Dawson JJ. In England, the existence of an unqualified right to substitute another person to perform the work is 'inconsistent' with a finding of employment: *Autoclenz Ltd v Belcher* [2011] 4 All ER 745 at 752; [2011] UKSC 41 at [19] per Lord Clarke (with whom Lord Hope, Lord Walker, Lord Collins and Lord Wilson agreed). As is evident from the statement set out in the text above ('almost conclusive against'), Australian courts have generally used less definitive language: see I Neil and D Chin, *The Modern Contract of Employment*, Thomson Reuters, Sydney, 2012, §1-130. But see *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146 at 150; 295 ALR 407 at 410; [2013] FCAFC 3 at [25] per Buchanan J (with whom Lander and Robertson JJ agreed): 'The requirement for personal service has the effect that a contract which truly permits discharge . . . by another person is not a contract of employment'.

30 See eg *McEntire v Crossley Brothers Ltd* [1895] AC 457 at 462–3 per Lord Herschell LC; *Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710 at 725; [2001] UKPC 28 at [32] per Lord Millett (with whom Lord Bingham, Lord Nicholls, Lord Hoffmann and Lord Hobhouse agreed); *IIG Capital LLC v Van Der Merwe* [2008] 2 Lloyd's Rep 187 at 190; [2008] EWCA Civ 542 at [7] per Waller LJ (with whom Lawrence Collins and Rimer LLJ agreed).

31 (1914) 18 CLR 17 at 25; 20 ALR 313.

32 [1978] 1 WLR 676 at 679. See also *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 512–3 per MacKenna J.

have regard to substance has been understood in two different ways. Under the narrow approach to determining the substance of the relationship, the court confines itself to an examination of the terms of the contract, read as a whole. Under the broad approach, in addition to examining the terms of the contract, the court looks at how the parties carry out their relationship in practice after entry into the contract.

The Narrow Approach

In *Chaplin*, Lord Fraser said[33] that a label that the parties assign to their contractual relationship 'cannot receive effect according to its terms if they contradict the effect of the agreement as a whole'. If the contractual terms, read as a whole, and in light of the surrounding circumstances,[34] indicate that the relationship is one of employment, then a label stipulating that the relationship is one of independent contracting will not be given effect.

The decision of the Privy Council in *Narich* is a good example of the application of the narrow approach. The issue in this case was whether lecturers engaged by Weight Watchers to deliver weight-control classes were employees or independent contractors. Clause 3 of the contracts under which the lecturers were engaged said: 'The Lecturer is not an employee of the Company but is an independent contractor'. In determining the character of the relationship created by the contract, Lord Brandon examined the terms of the contract as a whole. His Lordship paid particular attention to a number of clauses, including those setting out the information and skills that the company possessed in relation to weight control, requiring classes to be held at times and locations identified by the company, requiring the lecturers to teach in accordance with instructions set out in the company handbook, and empowering the company to end a lecturer's engagement if the lecturer did not discharge her duties properly or if the lecturer's weight rose above her goal weight.[35]

In Lord Brandon's view, the company had, by virtue of these contractual clauses, a significant degree of control over the manner in which the lecturers carried out their work. His Lordship concluded that the contract created a relationship of employment and that cl 3 could not be given effect:[36]

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33 (1978) 18 ALR 385 at 389.

34 *Narich Pty Ltd v Commissioner of Pay-Roll Tax* [1983] 2 NSWLR 597 at 601; 50 ALR 417 at 420. In Australia, there is uncertainty as to whether there needs to be ambiguity in the document before surrounding circumstances may be taken into account in the construction of a contract. A consideration of this point is beyond the scope of this article. See J W Carter and Andrew Stewart, 'Interpretation, Good Faith and the "True Meaning" of Contracts: The Royal Botanic Decision' (2002) 18 *JCL* 182 at 186–190; David McLauchlan and Matthew Lees, 'Construction Controversy' (2011) 28 *JCL* 101; Andrew Stewart, 'What's Wrong with the Australian Law of Contract?' (2012) 29 *JCL* 74 at 82–4; David McLauchlan and Matthew Lees, 'More Construction Controversy' (2012) 29 *JCL* 97; Ryan Catterwell, 'The "Indirect" Use of Evidence of Prior Negotiations and the Parties' Intentions in Contract Construction: Part of the Surrounding Circumstances' (2012) 29 *JCL* 183 at 187–9; J W Carter, 'Context and Literalism in Construction' (2014) 31 *JCL* 100 at 108–11.

35 *Narich Pty Ltd v Commissioner of Pay-Roll Tax* [1983] 2 NSWLR 597 at 604–5; 50 ALR 417 at 425.

36 [1983] 2 NSWLR 597 at 606; 50 ALR 417 at 426–7.

> Having regard to the statement of principle by Lord Fraser of Tullybelton in [*Chaplin*], it is impossible for cl 3 of the later contract to receive effect according to its terms if they contradict the effect of the agreement as a whole. In their Lordships' view, for the reasons which have been given, the effect of the contract as a whole does contradict cl 3, and effect cannot therefore be given to that clause according to its terms.

Significantly, his Lordship observed that this conclusion did not involve a finding that cl 3 was a sham.[37] His Lordship said:[38]

> The effect of the contract as a whole is to create between Narich and the lecturer the relationship of employer and employee, and, in so far as cl 3 purports to provide otherwise, it must be treated as failing in its purpose: This is so, even though there has never been any suggestion . . . that cl 3 was a sham . . .

It is important to note that, under the narrow approach, evidence of subsequent conduct cannot be taken into account for the purpose of determining the character of the relationship as a matter of substance.[39] In *Narich*, Lord Brandon observed[40] that much of the evidence that had been adduced at first instance pertained to 'how the . . . contracts had in practice been performed, and to what extent the lecturers were in practice supervised, directed or controlled by Narich during the performance of their work'. His Lordship said[41] that '[i]n relation to this kind of evidence the first principle stated in [*Chaplin*] . . . applies, with the consequence that a great deal of such evidence is irrelevant and should be disregarded'. Under the narrow approach, the focus is on the language used by the parties. As Lord Herschell LC said in *McEntire v Crossley Brothers Ltd*,[42] 'the agreement must be regarded as a whole — its substance must be looked at' and it 'is only by a study of the whole of the language that the substance can be ascertained'.

The Broad Approach

Under the broad approach, the character of a work relationship is determined (as a matter of substance) by taking into account the subsequent conduct of the parties as well as the terms of the contract. In some cases,[43] this approach to characterisation has involved a consideration of the 'economic reality' of the relationship. Central to the 'economic reality' enquiry is the following question: is the worker running his or her own business, rather than working in the business of the hirer? If this question is answered in the affirmative, then it is 'likely'[44] that the contract will be regarded as a contract for services.

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37 See also Carter, above, n 14, §§2-27, 2-31; J W Carter, 'Commercial Construction and Contract Doctrine' (2009) 25 *JCL* 83 at 90.

38 [1983] 2 NSWLR 597 at 606; 50 ALR 417 at 427.

39 *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385 at 392–3; *Narich Pty Ltd v Commissioner of Pay-Roll Tax* [1983] 2 NSWLR 597 at 601; 50 ALR 417 at 420; *Connelly v Wells* (1994) 55 IR 73 at 74–5.

40 [1983] 2 NSWLR 597 at 604; 50 ALR 417 at 424.

41 [1983] 2 NSWLR 597 at 604; 50 ALR 417 at 424.

42 [1895] AC 457 at 462–3.

43 *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* (2011) 214 FCR 82 at 120–3; 279 ALR 341 at 378–81; [2011] FCA 366 at [195]–[209].

44 *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* (2011) 214 FCR 82 at 123; 279 ALR 341 at 381; [2011] FCA 366 at [208].

A key example of the application of the broad approach is the decision of the Full Federal Court in *Trifunovski*.[45] As set out in the introduction to this article, Buchanan J there observed[46] that the exclusionary rule regarding evidence of subsequent conduct did not apply in relation to the characterisation of a work contract. Buchanan J invoked[47] the following passage from the majority judgment in *Hollis* as authority for the proposition that evidence of subsequent conduct can be taken into account for the purpose of characterising a written work contract:[48]

> It should be added that the relationship between the parties, for the purposes of this litigation, is to be found not merely from these contractual terms. The system which was operated thereunder and the work practices imposed by Vabu go to establishing 'the totality of the relationship' between the parties; it is this which is to be considered.

However, it is not clear that *Hollis* supports the proposition advanced by Buchanan J. There are two reasons for this lack of clarity. First, the written document in *Hollis* was not a complete record of the terms of the agreement between the parties. One way of viewing *Hollis* is that it was a case where the parol evidence rule did not apply because the contract was partly oral and partly written, and as a result the court was able to take into account extrinsic evidence.[49] Although the High Court did not refer to *Carmichael v National Power plc*,[50] the approach adopted in *Hollis* may be justified by what was said in that case. There, the House of Lords held that letters which had passed between the worker and the hirer did not constitute a complete record of the agreement between them. As the contract was partly oral and partly written, regard could be had to evidence of the parties' subsequent conduct.[51]

Second, the phrase 'totality of the relationship' does not, of itself, indicate that evidence of subsequent conduct may be taken into account when characterising a work relationship. This becomes clearer once regard is had to the context in which the phrase was originally articulated. The majority in *Hollis* adopted this phrase from Mason J's judgment in *Brodribb*. Mason J had said:[52] '[C]ontrol is not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered'. Mason J appeared to use 'totality of the relationship' simply to indicate that the legal test for characterisation involves an analysis of a variety of factors (such as the mode of remuneration, the provision of equipment and the right to delegate), only one of which is control. This is not tantamount to saying that, in determining whether such factors are present or absent, regard must be

45 (2013) 209 FCR 146; 295 ALR 407; [2013] FCAFC 3.

46 (2013) 209 FCR 146 at 174; 295 ALR 407 at 433; [2013] FCAFC 3 at [107]. See also *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* (2011) 214 FCR 82 at 119–121; 279 ALR 341 at 376–9; [2011] FCA 366 at [188]–[200] per Bromberg J.

47 (2013) 209 FCR 146 at 174; 295 ALR 407 at 433; [2013] FCAFC 3 at [107].

48 (2001) 207 CLR 21 at 33; 181 ALR 263 at 270; [2001] HCA 44 at [24] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ.

49 Irving, above, n 13, §2-31.

50 [1999] 1 WLR 2042.

51 [1999] 1 WLR 2042 at 2047 per Lord Irvine, 2051 per Lord Hoffmann. Lord Goff, Lord Jauncey and Lord Browne-Wilkinson agreed. See also Carter, above, n 14, §10-16.

52 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 29; 63 ALR 513 at 521.

had to the way the parties conducted themselves after entry into the contract. Mason J's statement is equally consistent with the narrow approach identified above.

In light of these two points, there is, with respect, force in Professor Stewart's view[53] that *Hollis* 'does not alter or even challenge the orthodox principle that courts are not concerned with what has "actually occurred" in a relationship, but rather with "the obligations by which the parties [are] bound"'. *Hollis* does not settle the question as to whether evidence of subsequent conduct can be taken into account for the purpose of characterising a written work contract. Neither does the passage from *Curtis* set out above, which has also been relied upon as supporting the use of evidence of subsequent conduct in characterisation.[54]

The passage from *Curtis* is equally consistent with the narrow approach. Indeed, a few lines down from that passage in *Curtis*, Isaacs J said:[55] 'In the present case, however, if you look at the actual terms of the written bargain it is not in substance a sale, but is exactly what it professes to be'. His Honour also quoted[56] the following passage from Fletcher Moulton LJ's judgment in *Weiner v Harris*:[57] '[Y]ou must look at what the contract is and not at what the parties say it is. Of course in ascertaining the contract you must give weight to all the phrases in the letter, but it is upon the whole letter that you have to decide what the contract is'. No reference is made to the subsequent conduct of the parties.

The remaining sections of this article seek to clarify the role of evidence of subsequent conduct in the characterisation of work contracts. It is helpful to begin the process of clarification by examining the considerations of policy which indicate that such evidence should be taken into account in characterisation.

Considerations of Policy

There are costs associated with being an employer, such as those pertaining to superannuation, insurance, taxation and compliance with minimum standards regarding remuneration and leave. Hirers have an incentive to avoid these costs by seeking to avoid a finding of employment.[58] In light of the inequality of bargaining power that exists in many (though not all) relationships between a hirer and a worker, there is a concern that hirers may use their superior

53 Stewart, above, n 23 at 250–1, quoting *Express & Echo Publications Ltd v Tanton* [1999] ICR 693 at 697. But cf Rosemary Owens, 'Decent Work for the Contingent Workforce in the New Economy' (2002) 15 *AJLL* 209 at 221; Neil and Chin, above, n 29, §1-100.

54 See eg *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* (2011) 214 FCR 82 at 119; 279 ALR 341 at 377; [2011] FCA 366 at [189] per Bromberg J.

55 (1914) 18 CLR 17 at 26; 20 ALR 313.

56 (1914) 18 CLR 17 at 25–6; 20 ALR 313.

57 [1910] 1 KB 285 at 292.

58 *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* (2011) 214 FCR 82 at 121; 279 ALR 341 at 379; [2011] FCA 366 at [199] per Bromberg J. See also Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work*, 2nd ed, Oxford University Press, Melbourne, 2011, p 164; Stewart, above, n 23; Roles and Stewart, above, n 18 at 274–5.

bargaining power to insert terms into the contract which point towards an independent contracting relationship but which do not reflect the actual agreement of the parties.[59]

Some English and Australian courts are alert to these concerns. In *Autoclenz Ltd v Belcher*,[60] for example, Lord Clarke (with whom the other members of the Supreme Court of the United Kingdom agreed) adopted the following passage from the judgment of Aikens LJ in the court below:

> [T]he circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so.

Similarly, in *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)*,[61] Bromberg J of the Federal Court of Australia referred to 'the increasing world trend towards the prevalence of what the [International Labour Organisation] calls "disguised employment relationships"'. His Honour observed[62] that the terms of most work contracts 'are set by the dominant party on a take-it-or-leave-it basis' and '[i]n that context, contractual arrangements may often be imposed by the dominant party for its own purposes'.

The narrow approach to characterisation explained above will be effective to defeat the use of labels as a method of disguising an employment relationship. If the terms of the contract, when read as a whole, indicate that the contract has the character of employment, the court will disregard the label. This approach will not, however, address 'more subtle devices'.[63]

A more subtle approach to disguising employment is to insert terms into the contract which point towards independent contracting even though these terms do not reflect how the parties carry out their relationship in practice. A key example of such a term is a 'substitution clause', which confers upon the worker an unqualified right to delegate the work to another person. Another example is a 'no obligations' clause, which provides that the worker is not obliged to accept any offers of work from the hirer. The narrow approach will not be effective in relation to contracts which contain these more subtle devices: the contractual terms, read as a whole, will reinforce rather than contradict the label. The problem with applying the narrow approach to these situations was captured well by Elias J in *Kalwak v Consistent Group Ltd*,[64] who said that the 'concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses [or no obligations clauses] in

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59 A C L Davies, 'Sensible Thinking about Sham Transactions' (2009) 38 *ILJ* 318 at 318.

60 [2011] 4 All ER 745 at 757; [2011] UKSC 41 at [34], quoting *Autoclenz Ltd v Belcher* [2010] IRLR 70 at 80; [2009] EWCA Civ 1046 at [92].

61 (2011) 214 FCR 82 at 120; 279 ALR 341 at 378; [2011] FCA 366 at [196].

62 (2011) 214 FCR 82 at 121; 279 ALR 341 at 378; [2011] FCA 366 at [199].

63 Davies, above, n 59 at 320.

64 [2007] IRLR 560 at 566. See also *Autoclenz Ltd v Belcher* [2011] 4 All ER 745 at 754; [2011] UKSC 41 at [25].

employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship'.

This is where the broader approach discussed above, which allows regard to be had to evidence of how the parties conducted themselves after entry into the contract, becomes important. How, though, is the use of evidence of subsequent conduct to be reconciled with the rule that precludes such evidence from being used as an aid to the construction of a written contract? In developing an answer to this question, it is helpful to begin by elucidating the differences between construction and characterisation.

Construction and Characterisation

In *On Call Interpreters*, Bromberg J said[65] that the question whether a contract is one of service or for services 'is often a question which may not be easy to answer' and it 'is important that in attempting to arrive at the right answer, the correct interpretative tools are utilised'. The process of construction forms an integral part of the process of characterisation. However, characterisation is not coterminous with construction.[66]

In respect of the process of construction, Professor Carter said:[67]

> Conventionally, 'construction' is spoken of as the process by which the 'meaning' of a contract is determined. However, that is only part of the story. Where a contract is construed, the construction of the contract may determine the meaning of the contract, its legal effect or the scope of its application to a given set of facts.

The process of characterisation 'will often depend critically upon the meaning of the terms in the contract'[68] and determining the meaning of the terms is certainly an exercise in construction. The use of construction to determine legal effect is also relevant to the process of characterisation. Professor Carter said[69] that the 'legal effect of a particular decision on meaning is largely governed by contract doctrine, rather than rules of construction'. A classic example here is the rule establishing the proposition that a contract of employment involves personal service, such that an unqualified right to substitute another worker will generally preclude a finding of employment.[70] This rule is relevant to characterisation: a work contract which includes a clause conferring such a right on the worker will not have the character of employment.

There is another significant dimension to characterisation, one that arises out of the policy concerns raised above. As Professor McMeel observed[71] (in a general, rather than a work-specific, context) questions relating to

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65 (2011) 214 FCR 82 at 119; 279 ALR 341 at 377; [2011] FCA 366 at [188].

66 *Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710 at 725; [2001] UKPC 28 at [32] per Lord Millett (with whom Lord Bingham, Lord Nicholls, Lord Hoffmann and Lord Hobhouse agreed); McMeel, above, n 1 at 291–2.

67 Carter, above, n 14, §1-07. See also Elisabeth Peden and J W Carter, 'Taking Stock: The High Court and Contractual Construction' (2005) 21 *JCL* 172 at 179.

68 Alan L Bogg, 'Sham Self-Employment in the Supreme Court' (2012) 41 *ILJ* 328 at 340.

69 Carter, above, n 14, §1-19.

70 See above, text at n 29.

71 G McMeel, 'The Principles and Policies of Contractual Construction' in A Burrows and E Peel, eds, *Contract Terms*, Oxford University Press, Oxford, 2007, pp 36–7. See also Bogg, above, n 68 at 340–1.

characterisation 'are not pure questions of construction because policy factors may be more prominent'. The prominence of policy factors arises because 'one or more parties responsible for drafting the instrument may have the intention of ensuring that it is classified by the judges as one particular species of legal transaction'.[72]

The process of characterisation is not simply a process of construction. This point was made clearly in *Agnew v Commissioner of Inland Revenue*,[73] a decision of the Privy Council. This decision involved the characterisation of a charge. The issue was whether it was a fixed charge or a floating charge. Lord Millett rejected the argument that the issue turned simply on a construction of the terms used in the contract. His Lordship said:[74]

> The question is not merely one of construction. In deciding whether a charge is a fixed charge or a floating charge, the court is engaged in a two-stage process. At the first stage it must construe the instrument of charge and seek to gather the intentions of the parties from the language they have used. But the object at this stage of the process is not to discover whether the parties intended to create a fixed or a floating charge. It is to ascertain the nature of the rights and obligations which the parties intended to grant each other in respect of the charged assets.

As to the second stage, Lord Millett said:[75]

> Once these have been ascertained, the court can then embark on the second stage of the process, which is one of categorisation. This is a matter of law. It does not depend on the intention of the parties. If their intention, properly gathered from the language of the instrument, is to grant the company rights in respect of the charged assets which are inconsistent with the nature of a fixed charge, then the charge cannot be a fixed charge however they may have chosen to describe it.

This explanation of the second stage accords with the point, made in numerous other cases,[76] that the character of a contract is to be determined as a matter of substance; by construction of the terms as a whole rather than by reference to the label the parties have assigned to the contract.

The first stage identified by Lord Millett warrants further exploration. At this stage, the court is to ascertain the rights and obligations that the parties intended to grant to each other. His Lordship said[77] that this exercise is to be undertaken by way of construction: by determining 'the intentions of the parties from the language they have used'. At a subsequent point in the judgment, Lord Millett said[78] that 'it is not enough to provide in the debenture that the account is a blocked account if it is not operated as one in fact'. His Lordship did not explain where (if at all) an examination of the operation of the account 'in fact' fits within the two-stage process.

This article argues that an examination of the 'facts' (or, in other words, an examination of how a transaction or relationship created by a contract was

72 McMeel, above, n 71, pp 36–7.
73 [2001] 2 AC 710; [2001] UKPC 28.
74 [2001] 2 AC 710 at 725; [2001] UKPC 28 at [32].
75 [2001] 2 AC 710 at 725; [2001] UKPC 28 at [32].
76 See above, text at n 30.
77 [2001] 2 AC 710 at 725; [2001] UKPC 28 at [32].
78 [2001] 2 AC 710 at 730; [2001] UKPC 28 at [48]. Professor McMeel said that this statement from *Agnew* 'appears to admit subsequent conduct as relevant to the interpretation of contracts which create charges over book debts': McMeel, above, n 1 at 292.

carried out in practice) takes place at a stage antecedent to construction. It takes place when the court is determining the rights and obligations that the parties intended to grant each other.[79] Characterisation (at least in relation to work contracts) may be conceptualised as a process involving two stages. The first stage involves ascertaining the 'actual agreement' of the parties. The second stage involves construing the terms of that agreement. The exercise undertaken at the first stage is explored further in the following section.

Ascertaining the Terms of the Actual Agreement

The *Autoclenz* Approach

The exercise that is undertaken to ascertain the 'actual agreement' of the parties has been explored in several English cases. Before examining these cases in detail, it is helpful to begin with a brief overview of the English approach to characterising work contracts. Over the years, the English courts have formulated a variety of different tests to determine the character of a work contract.[80] For present purposes, it suffices to note that in *Autoclenz Ltd v Belcher*,[81] Lord Clarke adopted, as the 'classic description of a contract of employment',[82] the following statement from MacKenna J's judgment in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*:[83]

> A contract of service exists if the following three conditions are fulfilled: (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service . . . Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be.

In *Autoclenz*, Lord Clarke said[84] that the issue for determination in the case was 'whether and in what circumstances [a court] may disregard the terms which were included in a written agreement between the parties and instead base its decision on a finding that the documents did not reflect what was actually agreed between the parties'. In this case, the claimants worked as car valeters for Autoclenz Ltd, a company which provided car-cleaning services. The written contract under which each valeter was engaged included the following statement: 'any contractual relationship between Autoclenz and yourself is one of client and independent contractor and not one of employer/employee'. The contract contained a 'substitution clause' which

79 For a similar point made in a different context (in respect of the sham doctrine), see Matthew Conaglen, 'Sham Trusts' (2008) 67 *CLJ* 176 at 180.

80 See S Deakin and G S Morris, *Labour Law,* 6th ed, Hart Publishing, Oxford, 2012, pp 159–171; H Collins, K D Ewing and A McColgan, *Labour Law*, Cambridge University Press, Cambridge, 2012, pp 189–194.

81 [2011] 4 All ER 745; [2011] UKSC 41.

82 [2011] 4 All ER 745 at 752; [2011] UKSC 41 at [18].

83 [1968] 2 QB 497 at 515.

84 [2011] 4 All ER 745 at 751–2; [2011] UKSC 41 at [17].

conferred upon the valeter a right to engage other people to perform the work. It also contained a 'no obligations clause' which denied an obligation on the part of Autoclenz to offer work or an obligation on the part of the valeter to provide his or her services in respect of any particular occasion.

Lord Clarke had regard to the findings of fact made at first instance by the Employment Tribunal (ET). Of significance were the findings (based on evidence given by Mr Hassall, a manager of Autoclenz Ltd) that the valeters were expected to turn up to work every day to perform the work personally. The ET held[85] that the substitution clause in the contract did not reflect 'what was actually agreed between the parties'. The ET also held[86] that the no obligations clause was 'wholly inconsistent with the practice' adopted by the parties, which required the valeters to provide Mr Hassall with prior notice if they were going to be absent from work. In light of these findings, among others (including the finding that Autoclenz Ltd exercised a significant degree of control over the valeters), Lord Clarke held that the car valeters were employees. His Lordship said[87] that the 'ET was entitled to disregard the terms of the written documents, in so far as they were inconsistent' with the true agreement between the parties.

Subsequent Conduct and Actual Agreement

In *Autoclenz*, Lord Clarke said[88] that 'in each case the question the court has to answer is: what contractual terms did the parties actually agree?' His Lordship made it clear that evidence of subsequent conduct is relevant to the process of ascertaining the actual agreement of the parties. His Lordship said:[89]

> [W]here there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. To carry out that exercise, the tribunal will have to examine all the relevant evidence. That will, of course, include the written term itself, read in the context of the whole agreement. *It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were*. Evidence of how the parties conducted themselves in practice may be so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties.

Lord Clarke did not explain the basis on which evidence of subsequent conduct was admissible. In identifying a basis, it is helpful to examine two decisions of the House of Lords which were referred to, though not examined,

85 See *Autoclenz Ltd v Belcher* [2011] 4 All ER 745 at 758; [2011] UKSC 41 at [37].
86 See *Autoclenz Ltd v Belcher* [2011] 4 All ER 745 at 759; [2011] UKSC 41 at [37].
87 [2011] 4 All ER 745 at 759; [2011] UKSC 41 at [38].
88 [2011] 4 All ER 745 at 753; [2011] UKSC 41 at [21], quoting Aikens LJ in the court below: *Autoclenz Ltd v Belcher* [2010] IRLR 70 at 80; [2009] EWCA Civ 1046 at [89].
89 [2011] 4 All ER 745 at 756; [2011] UKSC 41 at [31] (emphasis added), quoting Smith LJ in the court below: *Autoclenz Ltd v Belcher* [2010] IRLR 70 at 77; [2009] EWCA Civ 1046 at [53]. The mere non-exercise of a contractual right (such as a right of substitution) does not lead inevitably to the conclusion that the right is not genuine and is to be disregarded: [2011] 4 All ER 745 at 752, 756; [2011] UKSC 41 at [19], [31]; *Kalwak v Consistent Group Ltd* [2007] IRLR 560 at 566 per Elias J.

in *Autoclenz*: *Street v Mountford*[90] and *A-G Securities v Vaughan; Antoniades v Villiers*.[91]

In *Street v Mountford*, the issue was whether a contract between the owner and the occupier of residential premises had the character of a lease or a licence. The contract contained a clause which labelled it a licence. The owner of the residential premises conceded that the occupier had been granted exclusive possession of the premises.[92] Lord Templeman held[93] that the contract was a lease because it granted exclusive possession of the premises for a term in exchange for periodical payments of rent. Lord Templeman said[94] that '[i]f the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence'.

In *A-G Securities v Vaughan; Antoniades v Villiers*, the House of Lords heard two appeals simultaneously. The one relevant for present purposes is the second appeal: *Antoniades v Villiers*. In this case, the owner entered into two agreements with a couple under which the couple were to occupy the owner's one-bedroom flat. The agreements contained a clause purporting to negate a right of exclusive possession on the part of the couple. The relevant clause (cl 16) provided that the owner, or third parties nominated by the owner, could occupy the flat along with the couple. The agreements also contained clauses labelling the agreements as 'licences'.

The House of Lords held that the agreements created a lease. Their Lordships reached this conclusion[95] on the basis that '[n]o one could have supposed that [cl 16 was] ever intended to be acted on'. It was clear between the parties that the couple were to live in the flat as a married couple.[96] Due to the size and configuration of the flat, it was suitable only for occupation by one couple.[97] The owner never exercised the right in cl 16. Lord Templeman and Lord Bridge described[98] cl 16 as a 'pretence'. Lord Bridge observed[99] that the clause was 'introduced into the agreement for no other purpose than as an attempt to disguise the true character of the agreement'. Lord Jauncey said[100] that it was 'mere dressing up in an endeavour to clothe the agreement with a legal character which it would not otherwise have possessed'.

Of particular interest is what the House of Lords said of the permissible use

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90 [1985] 1 AC 809.
91 [1990] 1 AC 417.
92 [1985] 1 AC 809 at 816.
93 [1985] 1 AC 809 at 827. Lord Scarman, Lord Keith, Lord Bridge and Lord Brightman agreed.
94 [1985] 1 AC 809 at 819.
95 [1990] 1 AC 417 at 454 per Lord Bridge; see also [1990] 1 AC 417 at 462 per Lord Templeman, 468 per Lord Oliver, 476–7 per Lord Jauncey. Lord Ackner agreed with Lord Templeman and Lord Oliver (at 466).
96 The couple were not, in fact, married but were to live together as a married couple: [1990] 1 AC 417 at 467 per Lord Oliver, 475 per Lord Jauncey.
97 [1990] 1 AC 417 at 454 per Lord Bridge, 463 per Lord Templeman, 467 per Lord Oliver, 476–7 per Lord Jauncey.
98 [1990] 1 AC 417 at 454 per Lord Bridge, 462–3 per Lord Templeman. See Susan Bright, 'Beyond Sham and Into Pretence' (1991) 11 *OJLS* 136; Susan Bright, 'Avoiding Tenancy Legislation: Sham and Contracting Out Revisited' (2002) 61 *CLJ* 146.
99 [1990] 1 AC 417 at 454.
100 [1990] 1 AC 417 at 477.

of subsequent conduct in this case. Lord Oliver said:[101] 'But though subsequent conduct is irrelevant as an aid to construction, it is certainly admissible as evidence on the question of whether the documents were or were not genuine documents giving effect to the parties' true intentions'. Similarly, Lord Jauncey said:[102]

> [A]lthough the subsequent actings of the parties may not be prayed in aid for the purposes of construing the agreements they may be looked at for the purposes of determining whether or not parts of the agreements are a sham in the sense that they were intended merely as 'dressing up' and not as provisions to which any effect would be given.

These passages support the distinction, developed below in this article, between ascertaining the actual agreement of the parties on the one hand (including a determination of whether or not certain written terms reflect the actual agreement), and construction of the terms on the other.

The similarities between the employment/independent contracting and the lease/licence cases are clear.[103] In both, courts have drawn attention to the inequality of bargaining power between the parties and the ability of the dominant party to include terms in the written document that do not reflect the reality of the relationship.[104] For example, in *A-G Securities v Vaughan; Antoniades v Villiers* Lord Templeman said:[105] 'A person seeking residential accommodation may concur in any expression of intention in order to obtain shelter . . . A person seeking residential accommodation may sign a document couched in any language in order to obtain shelter'.

There are parallels between this passage and the concern expressed by Elias J in *Kalwak* (set out above) that armies of lawyers would insert substitution clauses into contracts for the performance of work. It is perhaps unsurprising then that in *Autoclenz*, the Supreme Court of the United Kingdom followed a path of reasoning similar to that in *A-G Securities v Vaughan; Antoniades v Villiers* (albeit without explicit reference to 'pretence')[106] instead of applying the stricter sham doctrine in *Snook v London and West Riding Investments Ltd*.[107] In *Snook*, Diplock LJ explained the term 'sham' in the following way:[108]

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101 [1990] 1 AC 417 at 469; see also [1990] 1 AC 417 at 463 per Lord Templeman. In *Aslan v Murphy* [1990] 1 WLR 766 at 770, Lord Donaldson MR said that 'the courts would be acting unrealistically if they did not keep a weather eye open for pretences, taking due account of how the parties have acted in performance of their apparent bargain'.

102 [1990] 1 AC 417 at 475.

103 Davies, above, n 59 at 322.

104 See eg *Autoclenz Ltd v Belcher* [2011] 4 All ER 745 at 757; [2011] UKSC 41 at [35].

105 [1990] 1 AC 417 at 458.

106 Irving, above, n 13, §2-28. See also Davies, above, n 59 at 324.

107 [1967] 2 QB 786. See P V Baker, 'Shams or Schemes of Avoidance' (1989) 105 *LQR* 167; Bright, 'Beyond Sham', above, n 98; Bright, 'Sham and Contracting Out Revisited', above, n 98; Conaglen, above, n 79; Alan L Bogg, 'Sham Self-Employment in the Court of Appeal' (2010) 126 *LQR* 166.

108 [1967] 2 QB 786 at 802. See *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449; 82 ALR 530; *Raftland Pty Ltd v Federal Commissioner of Taxation* (2008) 238 CLR 516; 246 ALR 406; [2008] HCA 21; *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174; [2011] FCA 1176.

> [I]t means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.

Diplock LJ said[109] that an important requirement of a sham was that 'all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating'.

There are differences between a 'sham' and a 'pretence'.[110] In *Aslan v Murphy*,[111] Lord Donaldson MR (delivering the judgment of the English Court of Appeal) said that the 'identification and exposure of . . . pretences does not necessarily lead to the conclusion that [the] agreement is a sham, but only to the conclusion that the terms of the true bargain are not wholly the same as those of the bargain appearing on the face of the agreement'. In establishing that a particular clause in a written document is a pretence, it is not necessary to show that both parties intended to mislead a court or a third party as to the nature of the rights and obligations to which they have agreed. It is enough to show that the parties never intended to act upon the clause.[112]

In an article published prior to *Autoclenz*, Professor Davies said[113] that it would be very difficult to establish the 'common intention to mislead' requirement in *Snook* in work contexts. She observed[114] that the *Snook* doctrine 'is not helpful in the employment context because the employee is usually either ignorant of the deceit or a victim of it'. In *Autoclenz*, Lord Clarke referred[115] to Professor Davies's observations and held that the narrow sham doctrine enunciated in *Snook* does not exhaust the circumstances in which a court may disregard a written term on the basis that it was not what was actually agreed between the parties. His Lordship held[116] that *Snook* 'is too narrow an approach to an employment relationship of this kind' and rejected explicitly[117] the requirement that a written term could be disregarded only if it could be shown that both parties intended to mislead third parties about their rights and obligations.

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109 [1967] 2 QB 786 at 802.

110 *Welsh Development Agency v Export Finance Co Ltd* [1992] BCC 270 at 278–9. See also Bright, 'Sham and Contracting Out Revisited', above, n 98 at 152.

111 [1990] 1 WLR 766 at 770–1.

112 *A-G Securities v Vaughan; Antoniades v Villiers* [1990] 1 AC 417 at 454 per Lord Bridge, 462 per Lord Templeman, 468 per Lord Oliver, 476–7 per Lord Jauncey; Bright, 'Sham and Contracting Out Revisited', above, n 98 at 153.

113 Davies, above, n 59 at 319.

114 Davies, above, n 59 at 318.

115 [2011] 4 All ER 745 at 753–5; [2011] UKSC 41 at [23]–[28].

116 [2011] 4 All ER 745 at 755; [2011] UKSC 41 at [28]. See also *Kalwak v Consistent Group Ltd* [2007] IRLR 560; *Protectacoat Firthglow Ltd v Szilagyi* [2009] IRLR 365; [2009] EWCA Civ 98.

117 [2011] 4 All ER 745 at 755; [2011] UKSC 41 at [28] (rejecting the reasoning of Rimer LJ in *Consistent Group Ltd v Kalwak* [2008] IRLR 505 at 510–11; [2008] EWCA Civ 430 at [28]).

Distinguishing Ascertainment of Actual Agreement from Construction

Further observations may now be made about the two-stage approach to characterisation proposed by this article. At the first stage, the court determines whether the terms of the written document reflect what was actually agreed between the parties, having regard to the way they carried out their relationship after entry into the contract. If the court decides that a particular written term does not reflect the actual agreement of the parties, then it may be disregarded.

Once all of the terms of the actual agreement have been ascertained, the court embarks on an exercise of construction to determine the meaning and the legal effect of those terms. As explained above, this stage also involves recourse to precedent. The character of the contract is determined by construing the terms as a whole.

How is the use of evidence of subsequent conduct at the first stage to be reconciled with the exclusionary rule in respect of subsequent conduct? Some assistance may be derived from the following passage in Lord Hoffmann's judgment in *Chartbrook Ltd v Persimmon Homes Ltd*:[118]

> The [exclusionary] rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it.

In addition, the exclusionary rule does not exclude the use of evidence of subsequent conduct for the purpose of determining 'whether a contract was formed'.[119]

Professor Carter's explanation of the scope of the exclusionary rule and the concept of 'extrinsic evidence', which draws upon the passage from *Chartbrook* set out above, is also of great assistance.[120] Professor Carter said[121] that '[a]ccount must . . . be taken of the *purpose* for which the evidence is sought to be used' and that 'evidence is "extrinsic" only if sought to be used for a purpose proscribed by the exclusionary rule'. In respect of evidence of subsequent conduct, the proscribed purpose, as noted at the outset of this article, is use for the purpose of construing a written contract. If, however,

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118 [2009] 1 AC 1101 at 1121; [2009] UKHL 38 at [42].

119 *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153 at 163–4; [2001] NSWCA 61 at [25] per Heydon JA. See also *Howard Smith and Co Ltd v Varawa* (1907) 5 CLR 68 at 77–8 per Griffith CJ (with whom O'Connor J agreed); *Barrier Wharfs Ltd v W Scott Fell & Co Ltd* (1908) 5 CLR 647 at 669 per Griffith CJ, 672 per Isaacs J; *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 551 per Gleeson CJ (with whom Hope and Mahoney JJA agreed); *Sagacious Procurement Pty Ltd v Symbion Health Ltd* [2008] NSWCA 149 at [99]–[100] per Giles JA (with whom Hodgson and Campbell JJA agreed); *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 at 616 per Allsop P, 683 per Campbell JA; 264 ALR 15 at 23, 90; [2009] NSWCA 407 at [13], [326]; *Lederberger v Mediterranean Olives Financial Pty Ltd* [2012] VSCA 262 at [26]–[31] per Nettle, Redlich JJA and Beach AJA.

120 Carter, above, n 14, §§9-02–9-03, 9-12.

121 Carter, above, n 14, §9-02 (emphasis in original).

such evidence is used for a purpose *other than* construction, then it will not fall within the scope of the exclusionary rule.[122]

This article argues that the first stage — ascertaining the actual agreement of the parties — does not involve an exercise in construction. At this point, the court is not *construing* the terms of the contract, but rather *determining what those terms are*. It is clear that 'the question of what terms comprise a contract ("what the contract really was") is by definition distinct from the question of what those terms mean ("what the contract . . . really meant")'.[123] Although this distinction is not made clear in *Autoclenz*, it may be gleaned from Lord Clarke's observation[124] that the court was making 'a finding on the prior question of what the contracts were'. As the first stage of characterisation does not involve construction, the use of evidence of subsequent conduct at this stage is not subject to the exclusionary rule.

A Foundation for the *Autoclenz* Approach in Australia

Two points about the *Autoclenz* approach should be noted. First, in ascertaining the actual agreement of the parties, a court is not restricted to the terms of the contract. It can, and indeed *should*, take into account the way the parties conducted themselves in practice subsequent to entry into the contract. Second, unlike the sham doctrine, there is no need to show a common intention to deceive a third party or a court as to the rights and obligations created by the contract. It has been observed[125] that '[i]t remains to be seen whether Australian courts are prepared to follow the approach taken in *Autoclenz*'. Below, it is suggested that there are certain passages from Australian authorities which could be invoked by Australian courts to develop an approach similar to that adopted in *Autoclenz*.

In *R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd*,[126] Dixon, Fullagar and Kitto JJ suggested that the way the parties conducted themselves in practice was relevant to characterisation. Their Honours said:[127]

> For, if *in practice* the company assumes the detailed direction and control of the agents in the daily performance of their work and the agents tacitly accept a position of subordination to authority and to orders and instructions as to the manner in which they carry out their duties, a clause designed to prevent the relation receiving the legal complexion which it truly wears would be ineffectual.

Importantly, *R v Foster* has been understood as permitting the practice of the parties to be taken into account without the need to satisfy the *Snook* sham doctrine. The approach in *R v Foster* was applied in *Ex parte Robert John Pty Ltd; Re Fostars Shoes Pty Ltd*,[128] which involved a question as to whether a

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122 Carter, above, n 14, §8-36.
123 Carter, above, n 34 at 106.
124 [2011] 4 All ER 745 at 757; [2011] UKSC 41 at [36], quoting Sedley LJ in the court below: *Autoclenz Ltd v Belcher* [2010] IRLR 70 at 81; [2009] EWCA Civ 1046 at [106]. See also Bogg, above, n 68 at 339.
125 Roles and Stewart, above, n 18 at 270.
126 (1952) 85 CLR 138; (1952) ALR 182.
127 (1952) 85 CLR 138 at 151; (1952) ALR 182 (emphasis added).
128 [1963] SR (NSW) 260.

deed which had been labelled a licence was in fact a lease. In *Re Fostars*, Sugerman J said:[129]

> [I]t is necessary to have regard to the real character of the relationship of the parties if this be found, *as their relations worked out in fact*, to have differed from the relationship which might be taken as intended to be constituted by the deed of licence if considered alone.

Sugerman J distanced this approach from the sham doctrine, observing[130] that '[i]t is not necessary to go so far as to find the documents a sham. It is simply a matter of finding the true relationship of the parties'.

In *Pitcher v Langford*,[131] the Court of Appeal of New South Wales applied the approach in *R v Foster* and *Re Fostars*. After observing that the trial judge had not applied the sham doctrine, Priestley JA said:[132]

> Rather, his reasoning was on the basis that whatever the parties had agreed between themselves, as evidenced by various documents which came into existence, they in fact conducted themselves not pursuant to their agreement, but upon the basis of the arrangements in force upon earlier shearings. This kind of approach is sanctioned by such authoritative cases as *R v Foster; Ex parte Commonwealth Life (Amalgamated Assurances) Ltd* and *Ex parte Robert John Pty Ltd; Re Fostars Shoes Pty Ltd*.

Handley JA made a similar point.[133] These passages provide strong support for the development, in Australia, of an approach to the characterisation of work contracts akin to that adopted in *Autoclenz*.

Central to the reasoning in *Autoclenz* was the proposition that employment contracts are sufficiently different from general commercial contracts to warrant 'relatively autonomous'[134] rules. Lord Clarke referred to[135] the 'critical difference between this type of case and the ordinary commercial dispute' and observed[136] that 'while employment is a matter of contract, the factual matrix in which the contract is cast is not ordinarily the same as that of an arm's-length commercial contract'. His Lordship also said:[137]

> Nothing in this judgment is intended in any way to alter those principles, which apply to ordinary contracts and, in particular, to commercial contracts. There is, however, a body of case law in the context of employment contracts in which a different approach has been taken.

Acceptance of the distinctive nature of employment contracts underpinned Lord Clarke's approach not only to the admissibility of evidence of

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129 [1963] SR (NSW) 260 at 272 (emphasis added).
130 [1963] SR (NSW) 260 at 269.
131 (1991) 23 NSWLR 142.
132 (1991) 23 NSWLR 142 at 155 (citations omitted).
133 (1991) 23 NSWLR 142 at 161–2. Handley JA has also supported such an approach in extra-judicial writings. See K R Handley, 'Sham Self-Employment' (2011) 127 *LQR* 171 at 173: '[A] narrow focus on the sham question should not be the end of the enquiry. The court should consider the subsequent conduct of the parties to determine the real status of persons who provided services to another for reward'.
134 Bogg, above, n 68 at 344.
135 *Autoclenz Ltd v Belcher* [2011] 4 All ER 745 at 757; [2011] UKSC 41 at [34].
136 *Autoclenz Ltd v Belcher* [2011] 4 All ER 745 at 757; [2011] UKSC 41 at [33], quoting Sedley LJ in the court below: *Autoclenz Ltd v Belcher* [2010] IRLR 70 at 81; [2009] EWCA Civ 1046 at [103].
137 *Autoclenz Ltd v Belcher* [2011] 4 All ER 745 at 753; [2011] UKSC 41 at [21].

subsequent conduct, but also to the signature rule.[138] It is an established rule of English[139] and Australian[140] contract law that a person who has signed a document which contains contractual terms is bound by those terms, regardless of whether he or she has read the terms. In *Autoclenz*, Lord Clarke held[141] that certain terms in the written work contracts should be disregarded, even though the workers had signed the contracts. Professor Bogg has observed[142] that '[f]ollowing *Autoclenz* . . . the signature rule no longer operates conclusively in the context of personal employment contracts'.

Adoption of the *Autoclenz* approach in Australia depends, in part, on Australian courts accepting the proposition that employment contracts are sufficiently distinctive to warrant the development of 'employment-specific'[143] rules which modify, or deviate from, the 'ordinary' rules of general contract law.

Conclusion

The role of evidence of subsequent conduct in the characterisation of written work contracts becomes clearer once the distinct stages of characterisation are identified and elucidated. This article has demonstrated that characterisation may be conceptualised as a process which consists of two stages: ascertaining the 'actual agreement' of the parties; and construing the terms of that agreement. At the first stage, evidence of subsequent conduct is important. A court should take such evidence into account when determining whether the written terms reflect what was actually agreed between the parties. Once the terms of the actual agreement are ascertained, the character of the agreement is to be determined by construing the terms as a whole. By clarifying the rules regarding evidence of subsequent conduct, this article has sought to lay a foundation for the development of a more robust approach to the characterisation of work contracts in Australia, in line with that currently adopted by English courts.

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138 Bogg, above, n 68 at 333–5.

139 *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 at 403–4 per Scrutton LJ, 407 per Maugham LJ.

140 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 180–3; 211 ALR 342 at 352–4; [2004] HCA 52 at [42]–[48] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471 at 483; 211 ALR 101 at 108; [2004] HCA 55 at [33] per Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ.

141 *Autoclenz Ltd v Belcher* [2011] 4 All ER 745 at 759; [2011] UKSC 41 at [38].

142 Bogg, above, n 68 at 333.

143 Bogg, above, n 68 at 344. Whether Australian courts would accept such a proposition remains an open question. On the distinctiveness of employment contracts, see Irving, above, n 13, §§1-5–1-19.

CHAPTER 5

Pauline Bomball, 'Intention, Pretence and the Contract of Employment' (2019) 35(3) *Journal of Contract Law* 243

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Pauline Bomball

Intention, Pretence and the Contract of Employment

*Pauline Bomball**

In Autoclenz Ltd v Belcher*, the Supreme Court of the United Kingdom held that certain terms in a written work contract should be disregarded because they did not reflect the 'true agreement' of the parties. In doing so, the Supreme Court adopted the pretence doctrine in the context of employment law. Several uncertainties surround the pretence doctrine. This article argues that some of those uncertainties might be resolved if closer attention were paid to the way the concept of intention operates in relation to the pretence doctrine. In particular, greater clarity as to three matters is required. First, whose intention is relevant for the purposes of the pretence doctrine? Second, which intention is relevant? Finally, to what must the intention relate? This article seeks to provide answers to these questions.*

Introduction

When there is a contest about the character of a contract to do work ('work contract'), a claim may be made that the document stating the terms of the contract does not accurately reflect the 'reality of the relationship'[1] between the parties. In *Autoclenz Ltd v Belcher*,[2] the Supreme Court of the United Kingdom considered and developed the legal principles that are to be applied when such a claim is made. Lord Clarke[3] said that the question to be answered in these cases is, 'what was the true agreement between the parties?';[4] in other words, 'what contractual terms did the parties actually agree?'[5] The material that can be taken into account in ascertaining the true agreement of the parties is not limited to the written contract and the context of the contract. Instead, Lord Clarke said that regard must be had to 'all the circumstances of the case',[6] including evidence of the subsequent conduct of the parties.[7] While Lord Clarke did not assign a label to the approach expounded in *Autoclenz*, his Lordship in essence adopted the pretence doctrine that had been developed in cases involving tenancy law.[8]

Some uncertainties surround the pretence doctrine developed in *Autoclenz*.

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1 *Autoclenz Ltd v Belcher* [2011] 4 All ER 745 at 753; [2011] UKSC 41 at [22] (*Autoclenz*).

2 [2011] 4 All ER 745; [2011] UKSC 41.

3 Lord Hope, Lord Walker, Lord Collins and Lord Wilson agreed.

4 [2011] 4 All ER 745 at 755; [2011] UKSC 41 at [29].

5 [2011] 4 All ER 745 at 753; [2011] UKSC 41 at [21], quoting Aikens LJ in the court below: [2010] IRLR 70; [2009] EWCA Civ 1046 at [89].

6 [2011] 4 All ER 745 at 757; [2011] UKSC 41 at [35].

7 [2011] 4 All ER 745 at 756; [2011] UKSC 41 at [31].

8 Anne Davies, 'Employment Law' in Edwin Simpson and Miranda Stewart, eds, *Sham Transactions*, Oxford University Press, Oxford, 2013, p 185.

The concept of 'true agreement' is nebulous. It has been said[9] that while *Autoclenz* directs courts to determine the terms upon which the parties actually agreed, 'little guidance [is offered] as to how this is done'. Professor Anne Davies has also drawn attention[10] to the uncertainties arising from the decision in *Autoclenz*. Professor Davies welcomed the decision on the basis that it was more attuned to 'the realities of working relationships'[11] than the traditional English approach to the characterisation of work contracts, under which courts had accorded primacy to the document stating the terms of the contract. She acknowledged,[12] however, that some might regard the concept of 'true agreement' as being 'too elusive to offer any real control over the courts' decision-making'. She also drew attention to the fact that the Supreme Court in *Autoclenz* did not provide a clear justification for privileging certain aspects of the evidence over others. Professor Davies said:[13]

> The written contract offered strong evidence that the firm did not wish to incur the obligations of an employer towards the valeters, because it had prepared (and revised) its contractual documentation with a view to securing this result. Of course, the parties' subjective intentions are not conclusive, but there was no real discussion at any stage in *Autoclenz* of the impact of this piece of evidence or of why other aspects of the factual background were to be preferred.

This article seeks to resolve some of the uncertainties surrounding the pretence doctrine by examining how the concept of intention operates in relation to this doctrine. In his book on contractual construction,[14] Professor John Carter developed an account of the concept of intention in contract law. Professor Carter drew attention to the need to ask specific questions, including *which* and *whose* intention is relevant, and to consider the matters to which the intention of the parties may be directed.[15] This article uses these questions as a framework for exploring the nature and role of the concept of intention as it operates in relation to the pretence doctrine. The article asks and seeks to provide answers to three questions. First, whose intention is relevant for the purposes of the pretence doctrine? Second, which intention is relevant? Finally, to what must the intention relate?

This article focuses on English law because the pretence doctrine is most developed in that jurisdiction. The High Court of Australia is yet to consider the pretence doctrine as articulated in *Autoclenz*. The reasoning in *Autoclenz* was, however, adopted by the majority of the Full Court of the Federal Court of Australia in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*.[16] In *Quest*, North and Bromberg JJ referred[17] to the pretence doctrine as

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9 Julie McClelland, 'A Purposive Approach to Employment Protection or a Missed Opportunity' (2012) 75 *MLR* 427 at 431.

10 Davies, above, n 8, pp 186–7.

11 Davies, above, n 8, p 177. See also Alan L Bogg, 'Sham Self-Employment in the Supreme Court' (2012) 41 *ILJ* 328, cited in Davies, above, n 8, p 186, n 71.

12 Davies, above, n 8, p 186.

13 Davies, above, n 8, p 187.

14 J W Carter, *The Construction of Commercial Contracts*, Hart Publishing, Oxford, 2013.

15 Carter, above, n 14, §§2-07–2-08.

16 (2015) 228 FCR 346; [2015] FCAFC 37. The decision of the Full Federal Court was overturned on appeal on an unrelated issue: see *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 256 CLR 137; [2015] HCA 45.

one of the bases for disregarding a term of a written work contract. The pretence doctrine has also been referred to, though not examined in any detail, in other Australian cases outside of the work context. For example, in *Raftland Pty Ltd v Federal Commissioner of Taxation*,[18] Gleeson CJ, Gummow and Crennan JJ observed that a 'part of an instrument may be a pretence'. Their Honours cited[19] *A-G Securities v Vaughan*,[20] the leading House of Lords decision on the pretence doctrine in the tenancy context, for this proposition.

There has been a recognition of the need for courts to privilege substance over form when they are characterising contracts for the performance of work.[21] Giving effect to the substance, rather than to the form, of a transaction may entail the disregarding of certain clauses in a document stating the contract. It has been acknowledged that there must be greater clarity as to the principles that permit a court to engage in such an exercise.[22] This article seeks to make a contribution to the coherent and principled development of the pretence doctrine, one of the doctrines that a court may invoke to deal with cases where there is a discrepancy between the form and the substance of a contract.

The Concept of Intention in Contract Law

This section of the article provides an overview of Professor Carter's account of the concept of intention in contract law. The intention of the parties is ascertained by way of construction of the contract.[23] Usually, 'intention' in contract law refers to an objective common intention rather than to the subjective intentions of the parties.[24] Where the contract is stated in writing, the intention of the parties is 'constructed'[25] by way of an examination of the words in the document, read as a whole and in light of the 'context' of the contract.[26] This exercise is undertaken from the perspective of a reasonable person in the position of the parties.[27] The court is concerned with determining

17 (2015) 228 FCR 346 at 378–9; [2015] FCAFC 37 at [146]–[147].

18 (2008) 238 CLR 516 at 535; [2008] HCA 21 at [47]. See also *Australian Securities and Investments Commission v Fast Access Finance Pty Ltd* [2015] FCA 1055 at [265]–[277] per Dowsett J.

19 (2008) 238 CLR 516 at 535; [2008] HCA 21 at [47], n 10.

20 [1990] 1 AC 417 at 462–3.

21 *Autoclenz* [2011] 4 All ER 745 at 757; [2011] UKSC 41 at [34]–[35]. See also Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *AJLL* 235; A C L Davies, 'Sensible Thinking about Sham Transactions' (2009) 38 *ILJ* 318; Alan L Bogg, 'Sham Self-Employment in the Court of Appeal' (2010) 126 *LQR* 166; Alan L Bogg, 'Sham Self-Employment in the Supreme Court' (2012) 41 *ILJ* 328; Cameron Roles and Andrew Stewart, 'The Reach of Labour Regulation: Tackling Sham Contracting' (2012) 25 *AJLL* 258.

22 See Mark Irving, *The Contract of Employment*, LexisNexis Butterworths, Sydney, 2012, §2-24.

23 Carter, above, n 14, §1-04.

24 *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 996; Carter, above, n 14, §2-18.

25 Carter, above, n 14, §1-03,

26 Carter, above, n 14, §2-11. See also J W Carter, 'Context and Literalism in Construction' (2014) 31 *JCL* 100; J W Carter, Wayne Courtney and Gregory Tolhurst, '"Reasonable Endeavours" in Contract Construction' (2014) 32 *JCL* 36 at 45–52.

27 Carter, above, n 14, §2-18.

what a reasonable person would have understood the parties to intend from the words that they have used, having regard to the relevant context.[28]

This article focuses on three questions concerning the concept of intention in cases where the pretence doctrine is invoked: whose intention is relevant, which intention is relevant and to what must the intention relate? Professor Carter's account of the concept of intention is of assistance in answering each of these questions. In respect of whose intention is relevant, Professor Carter observed[29] that as a contract creates a bilateral or multilateral relationship, the relevant intention is the common intention of the parties rather than the unilateral intention of any one of those parties.

As to which intention is relevant, Professor Carter identified[30] three different types of intention: expressed intention, actual intention and inferred intention. 'Expressed intention' is 'the stated intention of the parties'.[31] Where the terms of the contract are stated in a document, the expressed intention of the parties is 'the intention expressly stated in the document'.[32] The expressed intention of the parties is determined objectively by reading the contract as a whole, in light of the context of the contract.[33] There is a presumption that the expressed intention of the parties, constructed by way of this objective exercise, corresponds to the actual intention of the parties.[34]

'Actual intention' is 'the subjective intention of the parties to the contract'.[35] Generally, courts will not consider directly the actual intention of the parties.[36] This is not to say that courts are unconcerned with the parties' actual intention. Indeed, identification of the parties' actual intention is the aim of the exercise of construction.[37] The parties' actual intention is ascertained by indirect means, through the objective approach to construction.[38] The third category of intention is 'inferred' intention.[39] Where the parties have not expressed an intention as to a particular matter, their intention with respect to the matter may be inferred.[40]

Professor Carter also said[41] that the intention of the parties might be

28 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912–13 per Lord Hoffmann (Lord Goff, Lord Hope and Lord Clyde agreed); Carter, above, n 14, §2-11, §2-18.

29 Carter, above, n 14, § 2-03, §2-16.

30 Carter, above, n 14, §2-09.

31 Carter, above, n 14, §2-11.

32 J W Carter, *Contract Law in Australia,* 7th ed, LexisNexis, Butterworths, Sydney, 2018, §256. See also Carter, above, n 14, §2-11.

33 Carter, above, n 14, §2-11.

34 Carter, above, n 14, §2-11, citing *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 263 per Lord Simon (who, in turn, quoted R F Norton, *Norton on Deeds*, Sweet & Maxwell, London, 1906, p 43).

35 Carter, above, n 14, §2-10.

36 Carter, above, n 14, §2-10.

37 J W Carter, Wayne Courtney and Gregory Tolhurst, '"Reasonable Endeavours" in Contract Construction' (2014) 32 *JCL* 36 at 44. See also David McLauchlan, 'The Contract that Neither Party Intends' (2012) 29 *JCL* 26; David McLauchlan, 'Contract Formation and Subjective Intention' (2017) 34 *JCL* 41.

38 Carter, above, n 14, §§2-09–2-10.

39 Carter, above, n 14, §2-15.

40 Carter, above, n 14, §2-15. See also J W Carter and Wayne Courtney, 'Unexpressed Intention and Contract Construction' (2017) 37 *OJLS* 326.

41 Carter, above, n 14, §2-07.

directed towards different matters. This sheds light upon the third question raised by this article: to what must the intention relate? In respect of some issues, it may be the intention of the parties as to the meaning of their contract that is at issue.[42] In relation to others, the focus may instead be on the intention of the parties as to the legal effect of their contract.[43] As the analysis below[44] will demonstrate, it is important to be precise when identifying the matters to which the intention of the parties must relate for the purposes of the characterisation exercise. The remaining sections of this article will draw upon Professor Carter's account of the concept of intention to answer some of the questions left unresolved by the Supreme Court in *Autoclenz*. Before examining these issues of intention in further detail, the decision in *Autoclenz* will be discussed.

The Decision in *Autoclenz*

The decision in *Autoclenz* concerned a contest about the characterisation of a work contract. The characterisation of a work contract is an important matter because it governs, among other things, eligibility for statutory labour rights, such as rights to minimum wages and paid leave, and protection from unfair dismissal. In England, most of these statutory labour rights are generally conferred upon employees only; those who are independent contractors are generally not eligible for such rights.[45] There is, in England, an intermediate category called the 'worker' category. A common statutory formulation of the worker category is set out in the following paragraph. Those who fall within the worker category are entitled to some statutory labour rights,[46] though not the full suite of labour rights that are accorded to those who fall into the employee category.

The proceedings in *Autoclenz* were brought by a group of car valeters who had been engaged by Autoclenz Ltd to provide cleaning services to its customers. The valeters claimed entitlements to minimum wages and paid leave under the National Minimum Wage Regulations 1999 (UK) and the Working Time Regulations 1998 (UK) respectively. Only those who fell within the concept of a 'worker', as defined in the regulations, were eligible for these entitlements. The term 'worker' was defined in each of the regulations as follows:[47]

> 'worker' . . . means an individual who has entered into or works under . . . (a) a contract of employment; or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual . . .

In *Autoclenz*, Lord Clarke concluded that the valeters fell within limb (a) of

42 Carter, above, n 14, §2-07.
43 Carter, above, n 14, §2-07.
44 See below, text at nn 135–41.
45 Alan Bogg, 'Sham Self-Employment in the Court of Appeal' (2010) 126 *LQR* 166 at 166.
46 Davies, above, n 8, p 180.
47 National Minimum Wage Regulations 1999 (UK), reg 2(1); Working Time Regulations 1998 (UK), reg 2(1). See also Employment Rights Act 1996 (UK), s 230(3).

the definition. They performed work for Autoclenz Ltd under contracts of employment and were thereby entitled to minimum wages and paid leave under the regulations. Lord Clarke adopted the following test for the existence of a contract of employment:[48]

> A contract of service exists if the following three conditions are fulfilled: (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service . . . Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be.

The final point from that statement of the test is significant. Employment is a contractual relationship that requires the rendering of personal service.[49] Accordingly, if a work contract includes a 'substitution clause', which is a clause that gives a worker an unqualified right to delegate his or her work to another, then that will prevent the court from concluding that the contract is one of employment.[50] A worker claiming that he or she is an employee may try to persuade the court to disregard the clause. Another type of clause that points against employment status in England is a 'no obligations' clause. Such a clause generally provides that the hirer is under no obligation to offer work to the worker and the worker is under no obligation to accept offers of work. The clause indicates that there is no 'mutuality of obligation' between the parties. On one view, mutuality of obligation, in the sense of ongoing obligations of the hirer to offer work and of the worker to accept offers of work, is an essential element of an employment contract in England.[51] Accordingly, the existence of a clause that precludes mutuality of obligation will defeat a finding of employment.[52] Again, a worker seeking to establish that his or her contract is one of employment may try to persuade the court to disregard such a term. Clarity as to the bases for disregarding terms in written contracts is therefore important in the employment context.

The written contracts in *Autoclenz* included substitution clauses as well as 'no obligations' clauses. They also contained the following clauses:[53] 'The Sub-contractor and Autoclenz agree and acknowledge that the Sub-contractor is not, and that it is the intention of the parties that the Sub-contractor should

48 *Autoclenz* [2011] 4 All ER 745 at 752; [2011] UKSC 41 at [18], quoting *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515 per MacKenna J.

49 *Autoclenz* [2011] 4 All ER 745 at 752; [2011] UKSC 41 at [18]–[19]; *Express & Echo Publications Ltd v Tanton* [1999] ICR 693. See below, text at nn 133–4.

50 Davies, above, n 8, p 178.

51 There is an ongoing debate in England about the nature of the 'mutuality of obligation' concept. This debate is beyond the scope of this article. See Mark Freedland, *The Personal Employment Contract*, Oxford University Press, Oxford, 2003, pp 91–2; A C L Davies, 'The Contract for Intermittent Employment' (2007) 36(1) *ILJ* 102; Nicola Countouris, 'Uses and Misuses of "Mutuality of Obligations" and the Autonomy of Labour Law' in A Bogg, C Costello, A C L Davies and J Prassl, eds, *The Autonomy of Labour Law*, Hart Publishing, Oxford, 2015, ch 7.

52 Alan Bogg, 'Sham Self-Employment in the Court of Appeal' (2010) 126 *LQR* 166 at 166.

53 See *Autoclenz* [2011] 4 All ER 745 at 749, 750; [2011] UKSC 41 at [4], [6].

not become, an employee of Autoclenz' and 'any contractual relationship between Autoclenz and yourself is one of client and independent contractor and not one of employer/employee'. Such clauses, which state the intention of the parties as the legal effect of their agreement, are sometimes referred to as 'labels'.[54]

In concluding that the contract between Autoclenz and each valeter was a contract of employment, Lord Clarke disregarded the labels, the substitution clause and the no obligations clause on the basis that these clauses did not reflect the 'true agreement' of the parties.[55] Instead, viewing the evidence as a whole, including evidence of the parties' subsequent conduct, Lord Clarke upheld[56] the findings of the Employment Tribunal at first instance. These included the findings that the workers were obliged to turn up to work each day (contrary to the 'no obligations clause') and to perform work for Autoclenz personally (contrary to the 'substitution clause'). Accordingly, these clauses were not 'genuine' and were to be disregarded.[57]

The concepts of 'true agreement' and 'genuineness' in *Autoclenz* are, with respect, attended by some ambiguity. As one scholar has observed,[58] '[t]he barrier to demonstrate a sham clause was lowered, but has the nature of the hurdle just changed to demonstrate whether clauses are genuine or not?' There is limited guidance on this issue from the decision in *Autoclenz*. Lord Clarke acknowledged that non-enforcement of a clause in a contract does not, of itself, establish that the clause is not genuine. His Lordship said:[59] 'If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement'. Subsequently in the judgment, Lord Clarke discussed the matter by reference to the parties' expectations. His Lordship said[60] that 'if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered', then the substitution clauses and no obligations clauses can be disregarded. On the other hand, 'if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless'.[61]

There is, with respect, some lack of clarity concerning the notion of the parties' serious or realistic expectations. This lack of clarity is compounded by the fact that later in the judgment, Lord Clarke cautioned against using the language of the parties 'true intentions' or 'true expectations'.[62] How does the concept of serious or realistic expectations interact with the concept of

54 Carter, above, n 14, §2-30; J W Carter, 'Commercial Construction and Contract Doctrine' (2009) 25 *JCL* 83 at 89–91.

55 *Autoclenz* [2011] 4 All ER 745 at 759; [2011] UKSC 41 at [38].

56 *Autoclenz* [2011] 4 All ER 745 at 757–9; [2011] UKSC 41 at [36]–[38].

57 *Autoclenz* [2011] 4 All ER 745 at 759; [2011] UKSC 41 at [38].

58 Julie McClelland, 'A Purposive Approach to Employment Protection or a Missed Opportunity' (2012) 75 *MLR* 427 at 436.

59 *Autoclenz* [2011] 4 All ER 745 at 752; [2011] UKSC 41 at [19].

60 *Autoclenz* [2011] 4 All ER 745 at 754; [2011] UKSC 41 at [25], quoting with approval Elias J in *Kalwak v Consistent Group Ltd* [2007] IRLR 560 at [58].

61 *Autoclenz* [2011] 4 All ER 745 at 754; [2011] UKSC 41 at [25], quoting with approval Elias J in *Kalwak v Consistent Group Ltd* [2007] IRLR 560 at [58].

62 *Autoclenz* [2011] 4 All ER 745 at 756; [2011] UKSC 41 at [32]. See below, text at nn 161–3.

intention? Are the serious or realistic expectations of the parties relevant to determining their common intention? More fundamentally, are courts concerned with the common intention of the parties in cases involving the application of the pretence doctrine?

It is instructive to note that the House of Lords alluded to the idea of serious or realistic expectations in *A-G Securities v Vaughan*,[63] the leading decision on the pretence doctrine in the tenancy context. Scholars who have analysed this doctrine in the tenancy context have suggested[64] that '[i]n most [pretence] cases the courts focus on evidence not as to joint intentions but as to the *owner's* intention, looking for evidence that the grantor never intended the provisions denying exclusive possession to be acted on'.

Is it the case, then, that the *Autoclenz* approach requires attention to be directed to the intention of one of the parties only? How is this to be reconciled with the idea of a contract as a bilateral or multilateral relationship where it is the common intention of the parties that is to be taken into account?[65] More generally, *Autoclenz* does not provide clear guidance on why the evident intention of the firm (to create an independent contracting arrangement) was not accorded significance in the characterisation process. As Professor Davies observed,[66] 'there was no real discussion . . . of the impact of [the firm's intention] or of why other aspects of the factual background were to be preferred'.

The following sections of this article address these questions. In order to provide some clarity as to the issues of intention pertaining to the pretence doctrine, this article first explains how courts approach issues of intention in cases where it is alleged that a label assigned to an agreement is incorrect or that the whole or part of a document stating the contract is a sham. In such cases, the claim is that the substance of the agreement has been disguised.[67] An understanding of how the concept of intention operates in respect of these cases will enable the issues of intention relating to the pretence doctrine to be elucidated more clearly.

Intention and Labelling

The parties to a contract may assign a label to their agreement. For example, a contract for the occupancy of residential premises may be labelled a 'licence'[68] or a contract for the performance of work may be labelled an 'independent contracting arrangement'.[69] The label that the parties assign to their contract is not determinative. Instead, the legal characterisation of their

63 [1990] 1 AC 417 at 463 per Lord Templeman, 454 per Lord Bridge, 468 per Lord Oliver, 476 per Lord Jauncey. Lord Ackner agreed with Lord Templeman and Lord Oliver.

64 See Susan Bright, Hannah Glover and Jeremias Prassl, 'Tenancy Agreements' in Edwin Simpson and Miranda Stewart, eds, *Sham Transactions*, Oxford University Press, Oxford, 2013, p 111.

65 See above, text at n 29.

66 Davies, above, n 8, p 187.

67 Susan Bright, 'Avoiding Tenancy Legislation: Sham and Contracting Out Revisited' (2002) 61 *CLJ* 146 at 149.

68 See eg *Street v Mountford* [1985] 1 AC 809.

69 See eg *Autoclenz* [2011] 4 All ER 745; [2011] UKSC 4; *Massey v Crown Life Insurance Co* [1978] 1 WLR 676.

contract is a matter of law.[70] If the terms of the contract, read as a whole, create a relationship of employment, then a contrary label assigned by the parties will be disregarded. As MacKenna J said in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*,[71] '[w]hether the relation between the parties to the contract is that of master and servant or otherwise is a conclusion of law dependent upon the rights conferred and the duties imposed by the contract' and '[i]f these are such that the relation is that of master and servant, it is irrelevant that the parties have declared it to be something else'.

The label will be accorded significance where the nature of the relationship created by the contract is ambiguous, in the sense that it is not clear whether the relationship is one of employment or independent contracting. As Lord Denning MR said in *Massey v Crown Life Insurance Co*,[72] where such ambiguity exists the label 'may be a very important factor in defining what the true relation was between them' and 'may be decisive'. Where it is clear, however, that the contract creates an employment relationship, then a conflicting label will be disregarded.

There is a difference between the sham doctrine and the approach to labels discussed above. Finding that a label is to be disregarded because it is at odds with the legal effect of the contract, discerned from reading the contract as a whole, is not tantamount to finding that the label is a 'sham'.[73] Accordingly, a court need not find that a label is a sham in order to disregard it. This point was made clear in *Australian Mutual Provident Society v Chaplin*.[74] In this case, Lord Fraser pointed out[75] that the label was not a sham, but observed that the label would be disregarded if it contradicted the contract as a whole.

The courts' approach to labels can be explained in terms of the concept of intention. A label embodies the expressed intention of the parties as to the legal effect of their agreement.[76] The parties' expressed intention will be disregarded where it is inconsistent with the 'legal operation'[77] of the contract. The legal operation of a contract is discerned by analysing as a whole the rights and obligations of the parties under the contract, by reference to precedent.[78] In explaining how the concept of intention works in relation to the pretence doctrine, it is useful to have regard to the proposition that it is the legal operation of the contract, rather than the expressed intention of the parties, that determines the legal character of the contract. Further assistance as to the role and nature of the concept of intention in respect of the pretence

70 *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, 512–3; Carter, above, n 14, §2-30.
71 [1968] 2 QB 497, 512–3.
72 [1978] 1 WLR 676.
73 Carter, above, n 14, §2-27; J W Carter, 'Commercial Construction and Contract Doctrine' (2009) 25 *JCL* 83 at 90–1; Matthew Conaglen, 'Sham Trusts' (2008) 67 *CLJ* 176 at 186; Matthew Conaglen, 'Trusts and Intention' in Edwin Simpson and Miranda Stewart, eds, *Sham Transactions*, Oxford University Press, Oxford, 2013, p 125.
74 (1978) 18 ALR 385.
75 (1978) 18 ALR 385 at 389–90.
76 Carter, above, n 14, §2-30.
77 Carter, above, n 14, §2-27.
78 Carter, above, n 14, §2-26; J W Carter, 'Commercial Construction and Contract Doctrine' (2009) 25 *JCL* 83 at 90–1.

doctrine may be derived from an analysis of the sham doctrine.

Intention and the Sham Doctrine

The classic statement of the sham doctrine is set out in the judgment of Lord Diplock in *Snook v London and West Riding Investments Ltd*.[79] His Lordship said:[80]

> [I]f [the word 'sham'] has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities . . . [F]or acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.

A finding of a sham may be made with respect to the whole of a contract or a part of the contract.[81] The requisite intention for a finding of a sham is a common intention on the part of each of the contracting parties to deceive a third party or a court as to the legal rights and obligations of the parties. It is helpful to analyse the sham doctrine in terms of the concepts of expressed intention and actual intention. Where a sham is established, the document stating the contract, or part of that document, does not accurately reflect the actual legal rights and obligations of the parties. There is a discrepancy between the expressed intention of the parties that is set out in the document and the actual (subjective) intention of the parties. In these circumstances, there is a rebuttal of the presumption that the expressed intention of the parties corresponds to the actual intention of the parties.[82]

In order to determine the actual intention of the parties, the court steps 'outside of the normal process of construction'.[83] As noted above,[84] the normal process of construction involves the court discerning the common

79 [1967] 2 QB 786.

80 [1967] 2 QB 786 at 802. In Australia, an oft-cited statement of the sham doctrine may be found in Lockhart J's judgment in *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449 at 454: 'A "sham" is therefore, for the purposes of Australian law, something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not. It is something which is false or deceptive'. For a discussion of the sham doctrine in the Australian context, see Miranda Stewart, 'The Judicial Doctrine in Australia' in Edwin Simpson and Miranda Stewart, eds, *Sham Transactions*, Oxford University Press, Oxford, 2013, ch 3. See also *Raftland Pty Ltd v Federal Commissioner of Taxation* (2008) 238 CLR 516; [2008] HCA 21; *Millar v Federal Commissioner of Taxation* (2016) 243 FCR 302; [2016] FCAFC 94.

81 *Hitch v Stone (Inspector of Taxes)* [2001] EWCA Civ 63.

82 Carter, above, n 14, §2-12.

83 Matthew Conaglen, 'Sham Trusts' (2008) 67 *CLJ* 176 at 182; Matthew Conaglen, 'Trusts and Intention' in Edwin Simpson and Miranda Stewart, eds, *Sham Transactions*, Oxford University Press, Oxford, 2013, p 125; Lord Neuberger, 'Company Charges' in Edwin Simpson and Miranda Stewart, eds, *Sham Transactions*, Oxford University Press, Oxford, 2013, p 169.

84 See above, text at nn 23–8.

intention of the parties objectively. Where the contract is stated in writing, the court ascertains the intention of the parties by having regard to the terms of the contract as a whole, read in light of the context of the contract. There is a substantive rule of contract law, which Professor Carter refers to as the 'exclusionary rule',[85] that prevents evidence of the parties' prior negotiations and subsequent conduct and direct evidence of the parties' actual intentions from being taken into account in the construction of a contract.

Where there is a claim that the whole or part of a document stating the contract is a sham, the court, in determining the actual intention of the parties, is not limited to the normal process of construction. In addition to the context of the contract, the court can take into account evidence that would generally be excluded by the exclusionary rule.[86] One way of explaining why recourse to evidence of the parties' prior negotiations and subsequent conduct and direct evidence of their actual intention is permitted is to say that, when there is a claim that the whole or part of a document is a sham, the task for the court is not merely one of construction.[87] Before construing the terms of the contract, the court must first work out what those terms are.[88]

At this first stage, the court is not engaged in an exercise of construction. It is concerned with ascertaining the terms upon which the parties have agreed. It is determining what the contract is, rather than what the terms of the contract mean.[89] These two questions are analytically distinct.[90] At the first stage of the analysis, evidence of the parties' prior negotiations and subsequent conduct and direct evidence of their actual intentions may be taken into account. The exclusionary rule prohibits such evidence from being taken into account for the purposes of construing a contract.[91] It does not prohibit the evidence from being taken into account for a different purpose, namely, ascertaining the terms of the agreement of the parties. Accordingly, the exclusionary rule does not apply at this first stage of the analysis.[92]

In an article published prior to the decision of the Supreme Court in *Autoclenz*, Professor Davies surveyed a series of UK decisions that had applied the *Snook* sham doctrine in the work context. She observed[93] that the *Snook* doctrine was of limited utility in this context because it requires a common intention on the part of both contracting parties to deceive others as to the parties' rights and obligations. Professor Davies pointed to the inequality of bargaining power that is inherent in many work relationships.

85 Carter, above, n 14, Pt V.

86 Matthew Conaglen, 'Sham Trusts' (2008) 67 *CLJ* 176 at 182; Matthew Conaglen, 'Trusts and Intention' in Edwin Simpson and Miranda Stewart, eds, *Sham Transactions*, Oxford University Press, Oxford, 2013, p 125.

87 Pauline Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (2015) 32 *JCL* 149.

88 *Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710 at 725; [2001] UKPC 28 at [32] per Lord Millett; Bomball, above, n 87, at 166–7; Lord Neuberger, above, n 83, p 168–71.

89 Bomball, above, n 87, at 167.

90 J W Carter, 'Context and Literalism in Construction' (2014) 31 *JCL* 100 at 106, quoted in Bomball, above, n 87, at 167.

91 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at 1121; [2009] UKHL 38 at [42] per Lord Hoffmann; Carter, above, n 14, §§9-02–9-03, 9-11–9-12.

92 Bomball, above, n 87, at 166–7.

93 Davies, above, n 21, at 318.

She said that in such circumstances it is unlikely that there would be an intention to deceive on the part of the worker because he or she is 'usually either ignorant of the deceit or a victim of it'.[94] Professor Davies referred[95] to the tenancy cases, including *Street v Mountford*[96] and *A-G Securities v Vaughan*.[97] In the latter case, the House of Lords disregarded a term in a written contract in circumstances where the *Snook* requirements would not have been satisfied.[98] In *Autoclenz*, Lord Clarke cited[99] these tenancy cases but did not analyse them in any detail. These cases, which provide some insight into how the concept of intention operates in respect of the pretence doctrine, will be examined in the following section of this article.

Intention and the Pretence Doctrine

Pretence in the Tenancy Cases

In *Street v Mountford*,[100] Lord Templeman sowed the seeds for the development of the pretence doctrine. This case involved the use of a label in a contract for the occupancy of residential premises. The contract was labelled a 'licence'. Under the contract, the occupier was granted a right to exclusive possession and was required to make periodical rent payments. Lord Templeman held[101] that these were the defining characteristics of a lease. As a result, his Lordship concluded[102] that the contract created a lease, and the label was disregarded. In the course of reasoning to this conclusion, Lord Templeman said[103] that 'the court should . . . be astute to detect and frustrate sham devices and artificial transactions whose only object is to disguise the grant of a tenancy and to evade the Rents Acts'. Subsequently, in *A-G Securities v Vaughan*,[104] his Lordship said: '[i]t would have been more accurate and less liable to give rise to misunderstandings if I had substituted the word "pretence" for the references to "sham" devices and "artificial transactions"'.

In *A-G Securities v Vaughan; Antoniades v Villiers*,[105] the issue was whether certain contracts created leases or licences. In the second appeal, *Antoniades v Villiers*, an owner of a one-bedroom flat entered into separate contracts with a man and a woman who were to live in the flat as a married couple. The contracts were identical in their terms. Clause 16 of each contract provided:[106] 'The licensor shall be entitled at any time to use the rooms together with the licensee and permit other persons to use all of the rooms together with the licensee'. If the House of Lords had taken into account cl 16

94 Davies, above, n 21, at 318.
95 Davies, above, n 21, at 320–2.
96 [1985] 1 AC 809.
97 [1990] 1 AC 417.
98 See Susan Bright, 'Beyond Sham and Into Pretence' (1991) 11 *OJLS* 136 at 139.
99 *Autoclenz* [2011] 4 All ER 745 at 754; [2011] UKSC 41 at [23].
100 [1985] 1 AC 809.
101 [1985] 1 AC 809 at 826.
102 [1985] 1 AC 809 at 819, 826–7.
103 [1985] 1 AC 809 at 825.
104 [1990] 1 AC 417 at 462.
105 [1990] 1 AC 417.
106 [1990] 1 AC 417 at 457.

in the process of characterising the contract, their Lordships would have concluded that the contract created a licence. This is because cl 16 denied the right to exclusive possession of the premises.

The House of Lords concluded that the contract created a lease. In doing so, their Lordships disregarded cl 16. Various terms were used to describe cl 16. Lord Templeman referred[107] to cl 16 as a 'pretence'. Lord Bridge also used[108] the term 'pretence' to describe the proposition (advanced by the owner) that the two contracts entered into with the couple in respect of the flat that they were to share created separate and independent rights. Lord Oliver said[109] that cl 16 was a 'sham' and Lord Jauncey said[110] that it was 'mere dressing up'. Regardless of the terminology used, it is clear that the House of Lords did not apply the *Snook* sham doctrine in *Antoniades*. *Snook* was not referred to anywhere in *Antoniades.*[111] *Antoniades* established a separate basis, independent of the *Snook* sham doctrine, for disregarding a clause in a document stating the contract.[112] Despite various terms being invoked in this case, the approach in *Antoniades* has been referred to as the 'pretence' doctrine subsequently.[113] There is no succinct statement in *Antoniades* of the requirements of the pretence doctrine. Instead, these may be gleaned from a synthesis of the judgments. Three points emerge from the judgments in *Antoniades*. The first relates to the inferences that were drawn from the layout and size of the flat. The second concerns the relevance of the owner's non-exercise of cl 16. The final point relates to the perceived desire of the owner to avoid the Rent Act 1977 (UK). All three points can be rationalised by reference to the concept of intention that has been discussed throughout this article.

The House of Lords had regard[114] to the fact that the one-bedroom flat was suitable for occupation by the couple only. In addition to the bedroom, which contained one double bed that was shared by the couple, the flat consisted of a kitchen, a bathroom and a sitting room. The flat was not suitable for sharing with additional third parties. The Law Lords drew an inference as to the intention of the parties from these facts. As the flat was not suitable for sharing with additional third parties, their Lordships concluded[115] that cl 16 was never intended to have any effect.

In addition to considering the nature of the flat to determine the intention of

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107 [1990] 1 AC 417 at 463.
108 [1990] 1 AC 417 at 454.
109 [1990] 1 AC 417 at 470.
110 [1990] 1 AC 417 at 477.
111 Susan Bright, 'Avoiding Tenancy Legislation: Sham and Contracting Out Revisited' (2002) 61 *CLJ* 146 at 152.
112 See Susan Bright, 'Beyond Sham and Into Pretence' (1991) 11 *OJLS* 136 at 139; Davies, above, n 8, p 185. Cf Alan Bogg, 'Sham Self-Employment in the Supreme Court' (2012) 41 *ILJ* 328 at 328.
113 See eg *Aslan v Murphy* [1990] 1 WLR 766. See also Susan Bright, 'Beyond Sham and Into Pretence' (1991) 11 *OJLS* 136; Susan Bright, 'Avoiding Tenancy Legislation: Sham and Contracting Out Revisited' (2002) 61 *CLJ* 146; Davies, above, n 21, at 320– 2; Davies, above, n 8, p 185.
114 [1990] 1 AC 417 at 454 per Lord Bridge, 463 per Lord Templeman, 467 per Lord Oliver, 476 per Lord Jauncey.
115 [1990] 1 AC 417 at 454 per Lord Bridge, 463 per Lord Templeman, 467–70 per Lord Oliver, 476–7 per Lord Jauncey.

the parties with respect to cl 16, Lord Templeman, Lord Oliver and Lord Jauncey also had regard to the fact that the owner had never exercised his rights under cl 16. Lord Templeman said[116] that the non-exercise of cl 16 was 'significant' to his Lordship's conclusion that the owner never intended for cl 16 to have any effect. Lord Oliver said[117] that 'the fact that the [owner] . . . never sought to introduce anyone else is at least some indication' that cl 16 was a 'smoke-screen'. Similarly, after observing that the nature of the premises made it clear that the parties did not contemplate that others would be introduced to the flat, Lord Jauncey said[118] '[w]hen subsequent events are looked at the matter becomes even clearer'. These passages from *Antoniades* indicate that non-exercise of a clause can be used to support an inference that the parties never intended for the clause to have any effect. However, as Lord Clarke noted[119] in *Autoclenz*, non-exercise will not, of itself, establish that the clause was intended to have no effect.

Two Law Lords in *Antoniades* also referred to the desire of the owner to avoid the operation of the Rent Act 1977 (UK). The Act conferred certain rights upon tenants (those who occupied premises pursuant to a lease). Licensees, on the other hand, were not entitled to these rights. In *Antoniades*, Lord Bridge said[120] that cl 16 was included in the contracts in order to 'prevent the [occupiers] enjoying the protection of the Rent Acts'. Similarly, Lord Templeman said[121] that cl 16 'was only intended to deprive [the occupiers] of the protection of the Rent Acts'.

Whose Intention, Which Intention and to What Must the Intention Relate?

This section addresses the three questions raised in the introduction to this article: whose intention is relevant, which intention is relevant and to what must the intention relate for the purposes of the pretence doctrine? The section will begin with a consideration of the latter two questions, because the answers to these questions provide guidance on the first question. It is helpful to commence with a restatement of two core propositions pertaining to characterisation. These propositions are derived from cases involving a claim that a label assigned to an agreement is incorrect.[122] The first is that it is the legal operation of the contract, rather than the expressed intention of the parties, that determines the legal character of the contract. The second is that the legal operation of the contract is discerned by analysing as a whole the 'rights conferred and the duties imposed by the contract'[123] by reference to precedent.

These propositions are equally applicable to cases involving an allegation that a clause in a document stating the contract is a pretence. When such an

116 [1990] 1 AC 417 at 463.
117 [1990] 1 AC 417 at 469.
118 [1990] 1 AC 417 at 476.
119 *Autoclenz* [2011] 4 All ER 745 at 752; [2011] UKSC 41 at [19].
120 [1990] 1 AC 417 at 454.
121 [1990] 1 AC 417 at 465.
122 See above, text at nn 76–8.
123 *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 513.

allegation is made, the court takes into account 'all the relevant evidence,'[124] including evidence that would generally be excluded by the exclusionary rule,[125] in order to identify the rights and obligations to which the parties have actually agreed. This includes evidence of how the parties conducted themselves in practice, subsequent to their entry into the contract. In other words, the court examines how the parties carried out their relationship in fact.[126]

The same point has been made in cases concerning the pretence doctrine in the tenancy context. For example, in *Aslan v Murphy*, Lord Donaldson MR said[127] that 'courts would be acting unrealistically if they did not keep a weather eye open for pretences, taking due account of how the parties have acted in performance of their apparent bargain'. In *Antoniades*, Lord Templeman said[128] that 'where the language of licence contradicts the reality of the lease, the facts must prevail'. Clauses in the written document that do not reflect the parties' 'true agreement'[129] are disregarded. Once the court has discerned the true agreement of the parties (that is, the rights and obligations to which the parties actually agreed), the court then determines the legal operation of the contract by assessing those rights and obligations as a whole, by reference to precedent.[130]

Some observations should be made about the relevance of precedent in this process. Precedents that establish the core attributes of particular kinds of relationships are relevant. For example, precedent in the tenancy law context establishes that the core attributes of a lease are 'exclusive possession at a rent for a term'.[131] If these attributes are present, then the contract will be characterised as a lease. In determining whether the parties are in an employment relationship, a court will have regard to a range of 'indicia' of employment including, for example, the right of the hirer to exercise control over the worker, the integration of the worker into the hirer's organisation, supply by the hirer of the equipment required to perform the work, payment of the worker on a time basis as opposed to a piece-rate basis and a requirement that the worker perform the work personally.[132] These indicia are established by precedent. The legal operation of the contract is determined by assessing the bundle of rights and obligations of the parties by reference to these indicia.

The assessment is a holistic one; no single indicium, apart from personal service, is conclusive.[133] If the worker has an unqualified right to delegate the work to a third party, then this will preclude a conclusion that the relationship

124 *Autoclenz* [2011] 4 All ER 745 at 756; [2011] UKSC 41 at [31], quoting Smith LJ in the court below: [2010] IRLR 70; [2009] EWCA Civ 1046 at [53].
125 See above, text at nn 83–92.
126 Bomball, above, n 87; Carter, above n 14, §§18-33–18-34.
127 [1990] 1 WLR 766 at 770.
128 *A-G Securities v Vaughan* [1990] 1 AC 417 at 463.
129 [2011] 4 All ER 745 at 755; [2011] UKSC 41 at [29].
130 Carter, above, n 14, §2-26; J W Carter, 'Commercial Construction and Contract Doctrine' (2009) 25 *JCL* 83 at 90–1.
131 *Street v Mountford* [1985] 1 AC 809 at 825, 827 per Lord Templeman.
132 For a detailed examination of the various factors, see Simon Deakin and Gillian S Morris, *Labour Law,* 6th ed, Hart Publishing, Oxford, 2012, §§3.26–3.30.
133 *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939 at 944.

is one of employment, because personal service is an essential attribute of an employment relationship.[134] However, while the absence of a requirement of personal service precludes a finding of employment, its presence does not, of itself, lead inescapably to the conclusion that the relationship is one of employment. Where a requirement of personal service is present, it will be considered along with the other indicia before a court can reach a conclusion on the legal operation of the contract.

The preceding analysis provides some assistance with understanding how the concept of intention operates in relation to the pretence doctrine. The relevant intention, for the purposes of determining whether a clause in the document stating the contract is a pretence, is an intention relating to the effect or practical operation of that particular clause.[135] If the parties never intended for the clause to have any effect, then the clause is to be disregarded on the basis that it is a pretence. Importantly, as the exclusionary rule does not apply, a court may have regard to all of the relevant evidence to discern the parties' intention as to the effect of the clause.[136]

Clarity as to the nature of the intention at issue provides some assistance with Professor Davies's question. As noted earlier in the article,[137] Professor Davies observed[138] that there was limited explanation in *Autoclenz* of why other pieces of evidence were given preference over evidence of the firm's subjective intention that the contracts be characterised as independent contracts. An explanation might proceed as follows. The intention of the parties as to the characterisation of their contract (whether expressed or subjective) is not conclusive and the reason for this is that characterisation turns ultimately upon the legal operation of the contract. This is not to say that the intention of the parties is irrelevant. It is relevant in a narrower way. Part of the process of determining the legal operation of the contract involves identifying the bundle of rights and obligations to which the parties have agreed. Where, as in *Autoclenz*, it is contended that one or more clauses in the document stating the contract is a pretence, the court has regard to all of the relevant evidence to decide whether the right or obligation set out in a particular clause forms part of this bundle. At this stage, the court has regard to the intention of the parties, but it is an intention relating to the effect of the particular clause or clauses in question. Professor Davies's question refers to an intention relating to a different matter, namely, an intention relating to the legal characterisation of the contract.

An example serves to illustrate the point. It will be recalled that the written contract in *Autoclenz* contained a 'no obligations' clause, which provided that Autoclenz Ltd was not obliged to offer any work to the workers and the

134 *Autoclenz* [2011] 4 All ER 745 at 752; [2011] UKSC 41 at [18], quoting *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515 per MacKenna J.

135 *A-G Securities v Vaughan* [1990] 1 AC 417 at 454 per Lord Bridge, 462 per Lord Bridge, 470 per Lord Oliver, 476 per Lord Jauncey; Susan Bright, 'Avoiding Tenancy Legislation: Sham and Contracting Out Revisited' (2002) 61 *CLJ* 146 at 153.

136 *Autoclenz* [2011] 4 All ER 745 at 756; [2011] UKSC 41 at [31], quoting Smith LJ in the court below: [2010] IRLR 70; [2009] EWCA Civ 1046 at [53].

137 See above, text at n 13.

138 Davies, above, n 8, p 187.

workers were not obliged to accept offers of work. At first instance, Employment Judge Foxwell in the Employment Tribunal found that the workers were required to give notice to one of the managers of Autoclenz Ltd if the workers were not able to attend work. Employment Judge Foxwell said[139] that this practice 'indicate[d] that there *was* an obligation to attend for work unless a prior arrangement had been made' and accordingly the right to refuse work was 'unrealistic' and 'not truly in the contemplation of the parties when they entered into their agreements'. These findings and conclusions were upheld on appeal.[140] The parties in Autoclenz never intended for the no obligations clause in the document to have any effect. Accordingly, the clause was disregarded. It did not form part of the bundle of rights and obligations that was then analysed (by reference to precedent) for the purposes of determining the legal operation of the contract. Instead, the relevant obligation that did form part of that bundle was an obligation on the part of Autoclenz to offer work and an obligation on the part of the workers to accept those offers of work.[141]

This leads to the final point to be addressed in this article, namely, *whose* intention is relevant when it is alleged that a clause is a pretence? Is it the *common* intention of the parties as to the effect of the clause? It is helpful to reiterate the view of some scholars as to the nature of the intention required for the pretence doctrine. Professor Susan Bright, Hannah Glover and Associate Professor Jeremias Prassl have considered this issue in the tenancy context. They argue that when a court applies the pretence doctrine, it is not generally searching for the common intention of the parties.[142] In making this point, they contrasted the pretence doctrine with the sham doctrine, noting that the latter requires a common intention on the part of both contracting parties to deceive others as to the legal rights and obligations of the parties.[143] They observed that in the pretence cases, the courts focus on the intention of the owner of the premises.[144] If the owner never intended that a particular clause should have any effect, then the clause is a pretence and can be disregarded on that basis.

Professor Bright, Ms Glover and Associate Professor Prassl refer[145] to Lord Templeman's observation[146] in *Antoniades* that the owner 'did not genuinely intend to exercise the powers [in cl 16]'. They argued[147] that his Lordship proceeded 'on the basis that the occupiers either do not understand what the provision means, or assume that the owner does not intend to enforce it; in neither scenario could the parties be deemed to have a common intention to deceive'. Professor Davies has made similar arguments in the employment context. As noted above,[148] Professor Davies observed that the *Snook* sham

139 *Autoclenz* [2011] 4 All ER 745 at 759; [2011] UKSC 41 at [37].
140 *Autoclenz* [2011] 4 All ER 745 at 759; [2011] UKSC 41 at [38].
141 *Autoclenz* [2011] 4 All ER 745 at 759; [2011] UKSC 41 at [38].
142 Bright, Glover and Prassl, above, n 64, p 111.
143 Bright, Glover and Prassl, above, n 64, p 111.
144 Bright, Glover and Prassl, above, n 64, p 111.
145 Bright, Glover and Prassl, above, n 64, p 111.
146 [1990] 1 AC 417 at 462.
147 Bright, Glover and Prassl, above, n 64, p 111.
148 See above, text at nn 93–5.

doctrine would be difficult to satisfy in the employment context because it would be rare for the worker to have an intention to deceive others. In *Autoclenz,* Lord Clarke endorsed[149] Professor Davies's observations and used these in support of his Lordship's conclusion that the *Snook* doctrine does not provide the only basis for a court to disregard a term of a written contract. The pretence doctrine was developed in *Autoclenz* as an independent basis for disregarding written terms.[150]

There is, with respect, force in the view that the pretence doctrine is concerned with the intention of one of the parties only (that of the party in the dominant bargaining position). In *Burdis v Livsey*,[151] the English Court of Appeal adopted a similar interpretation of *Antoniades*. The Court of Appeal said[152] that 'complicity by all those involved is not however a prerequisite to rejection of agreements which are a [pretence]'. The Court of Appeal in *Burdis* said that the focus in *Antoniades* was on the intention of the owner. The Court of Appeal noted[153] that in *Antoniades*, '[t]he landlord did not genuinely intend to exercise his right of occupation'.

It could, however, be argued that what was relevant in *Antoniades* was the *common* intention of the parties. While it is true that Lord Templeman spoke of[154] the 'owner's' intention, Lord Jauncey used the language of the parties' intentions. Lord Jauncey said[155] that the 'situation certainly does not suggest that the parties ever contemplated that other persons would be nominated to share the flat'. His Lordship concluded[156] that 'the parties never intended that cl 16 should operate'. Lords Bridge and Oliver were less clear in identifying the repository of the relevant intention. Lord Bridge noted[157] that '[n]o one could have supposed that those provisions were ever intended to be acted on'. Lord Oliver observed[158] that '[i]t cannot realistically have been contemplated' that additional persons would be introduced to the flat' and therefore cl 16 'cannot be considered as seriously intended to have any practical operation'. It is not clear from the language used by the remaining members of the House of Lords in *Antoniades* that they were concerned only with the intention of the owner as opposed to the common intention of the parties.

How can this line of reasoning be reconciled with the view that the pretence doctrine is different from the *Snook* sham doctrine? The absence of a need to establish a common intention to deceive third parties or a court as to the legal rights and obligations of the parties is often identified as a key aspect that distinguishes the pretence doctrine from the sham doctrine.[159] One way of explaining the difference is to say that the pretence doctrine is concerned with the intention of only one of the parties. Another way of explaining this

149 *Autoclenz* [2011] 4 All ER 745 at 755; [2011] UKSC 41 at [28].
150 See above, text at nn 112–113.
151 [2003] QB 36; [2002] EWCA Civ 510.
152 [2003] QB 36 at 62; [2002] EWCA Civ 510 at [32].
153 [2003] QB 36 at 63; [2002] EWCA Civ 510 at [32].
154 [1990] 1 AC 417 at 462.
155 [1990] 1 AC 417 at 476.
156 [1990] 1 AC 417 at 476.
157 [1990] 1 AC 417 at 454.
158 [1990] 1 AC 417 at 470.
159 See *Aslan v Murphy* [1990] 1 WLR 766 at 770–1; [1989] 3 All ER 130 at 133 per Lord Donaldson MR; *Burdis v Livsey* [2003] QB 36 at 62–3; [2002] EWCA Civ 510 at [31]–[32].

difference, however, is by focusing on the element of deception.

The better view is that the pretence doctrine is concerned with the parties' common intention, but unlike the sham doctrine it is not concerned with a common intention *to deceive*. Accordingly, for the purposes of the pretence doctrine, it need not be shown that both (or, indeed, either) of the parties intended to deceive others. In order for a pretence to be established, it must be shown that there was a common intention that the particular clause in question would not have any effect. The proposition that the pretence doctrine is concerned with the common intention of the parties is consistent with the notion of a contract as a bilateral or multilateral agreement.[160] Furthermore, the reasoning in *Autoclenz* arguably supports the view that the relevant intention is the common intention of the parties rather than the individual intention of one of the parties. In *Autoclenz*, Lord Clarke observed[161] that Aikens LJ in the court below[162] had 'correctly warned against focusing on the "true intentions" or "true expectations" of the parties because of the risk of concentrating too much on what were the private intentions of the parties'. Lord Clarke adopted the following passage from Aikens LJ's reasons:[163]

> What the parties privately intended or expected (either before or after the contract was agreed) *may* be evidence of what, objectively discerned, was actually agreed between the parties. But ultimately what matters is only what was agreed, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded. I accept, of course, that the agreement may not be express; it may be implied. But the court or tribunal's task is still to ascertain what was agreed.

The emphasis on what was agreed between the parties suggests that the focus is on the parties' common intention.

Conclusion

Professor Carter has observed[164] that 'intention is a very slippery concept'. One of the reasons for this slipperiness is that the courts are not always clear about the senses in which they use the term 'intention'. There is, at times, an absence of guidance on the three key questions considered in this article: *whose* intention is relevant, *which* intention is relevant, and *to what* must the intention relate? This article has used these three questions to guide an analysis of how the concept of intention operates in relation to the pretence doctrine.

A core proposition, derived from cases involving a claim that a label assigned to an agreement is incorrect, is that it is the legal operation of the contract, rather than the expressed intention of the parties, that is

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See also Susan Bright, 'Avoiding Tenancy Legislation: Sham and Contracting Out Revisited' (2002) 61 *CLJ* 146 at 153; Davies, above, n 21; Bright, Glover and Prassl, above, n 64, pp 110–11.

160 See above, text at n 29.

161 *Autoclenz* [2011] 4 All ER 745 at 756; [2011] UKSC 41 at [32].

162 *Autoclenz* [2010] IRLR 70; [2009] EWCA Civ 1046.

163 *Autoclenz* [2011] 4 All ER 745 at 756; [2011] UKSC 41 at [32], quoting Aikens LJ in the court below: [2010] IRLR 70; [2009] EWCA Civ 1046 at [91] (citations omitted).

164 Carter, above, n 14, §1-28.

determinative of the legal character of the contract. When the pretence cases are examined by reference to this proposition, the concept of 'true agreement' that lies at the heart of these cases becomes less 'elusive'.[165] Where there is an allegation that one or more of the clauses in the document stating the contract is a pretence, the true agreement is discerned by looking not just at the document but also at all of the relevant evidence. The concept of intention is relevant here. In determining whether a clause is a pretence, the court is concerned with ascertaining the common intention of the parties in relation to the effectiveness of the clause. If the parties never intended for the clause to have any effect, then the clause is a pretence and will be disregarded.

In some cases, the disregarding of particular clauses in a written contract is necessary if a court is to give effect to the substance, rather than the form, of an agreement. However, the ability of a court to engage in such an exercise must be justified clearly. In exploring how the concept of intention operates in relation to the pretence doctrine, this article has sought to provide some clarity as to the nature and scope of a doctrine that forms an important part of the courts' suite of tools for privileging substance over form in the characterisation of work contracts.

165 Davies, above, n 8, p 186.

CHAPTER 6

Pauline Bomball, 'The Attribution of Responsibility in Trilateral Work Relationships: A Contractual Analysis' (2016) 29(3) *Australian Journal of Labour Law* 305

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Pauline Bomball

The attribution of responsibility in trilateral work relationships: A contractual analysis

*Pauline Bomball**

Cases concerning the attribution of responsibility in trilateral work relationships have become increasingly common in Australia. A common example of a trilateral work relationship is a labour hire arrangement, where a labour hire agency engages a worker and then allocates the worker to a host company. This article considers whether employment-related responsibility can be imposed upon a host company consistently with orthodox principles of contract law. In doing so, it analyses Australian cases as well as a body of case law from the United Kingdom which has developed the concept of an 'implied contract of employment'. It is argued that the concept is compatible with orthodox principles of Australian contract law. The article explores the circumstances that may give rise to an implied contract between a host company and a labour hire worker. It also examines the limitations of the concept.

Introduction

Cases concerning the attribution of responsibility in trilateral work relationships have become increasingly common in Australia.[1] A common example of a trilateral work relationship is a labour hire arrangement, where a labour hire agency engages a worker and then allocates the worker to a host company.[2] In a standard labour hire arrangement, there are two contracts. There is a contract for the supply of labour between the labour hire agency and

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1 See, eg, *Swift Placements Pty Ltd v WorkCover Authority of New South Wales* (2000) 96 IR 69; [2000] NSWIRComm 9 (*Swift*); *Damevski v Giudice* (2003) 133 FCR 438; 202 ALR 494; [2003] FCAFC 252 (*Damevski*); *Re Nguyen* (2003) 128 IR 241; [2003] NSWIRComm 1006 (*Nguyen*); *Country Metropolitan Agency Contracting Services Pty Ltd v Slater* (2003) 124 IR 293; [2003] SAWCT 57 (*Slater*); *Forstaff Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2004) 144 IR 1; [2004] NSWSC 573 (*Forstaff*); *Costello v Allstaff Industrial Personnel (SA) Pty Ltd* (2004) 71 SAIR 249; [2004] SAIRComm 13 (*Costello*); *Staff Aid Services v Bianchi* (2004) 133 IR 29; [2004] AIRC 428 (*Bianchi*); *Construction, Forestry, Mining & Energy Union of Workers v BHP Billiton Iron Ore Pty Ltd* (2005) 85 WAIG 1924; [2005] WAIRComm 1797 (*CFMEU v BHP*); *Wilton v Coal & Allied Operations Pty Ltd* (2007) 161 FCR 300; 162 IR 264; [2007] FCA 725 (*Wilton*); *Dickson v Origin Energy Ltd* [2007] AIRC 1040; *Homecare Direct Shopping Pty Ltd v Gray* [2008] VSCA 111 (*Homecare*); *Orlikowski v IPA Personnel Pty Ltd* (2009) 185 IR 127; [2009] AIRC 565 (*Orlikowski*); *Fair Work Ombudsman v Eastern Colour Pty Ltd* (2011) 209 IR 263; [2011] FCA 803 (*Eastern Colour*); *Henry v FP Group Pty Ltd* [2013] FWC 2813 (*Henry*) affirmed on appeal in *FP Group Pty Ltd v Tooheys Pty Ltd* (2013) 238 IR 239; [2013] FWCFB 9605 (*FP Group*).

2 In August 2014, there were around 124,400 labour hire workers (defined by the Australian Bureau of Statistics as workers who are 'paid by a labour hire agency') in Australia, comprising approximately 1.07% of all employed persons in Australia: Australian Bureau of Statistics, *Forms of Employment*, *August 2014*, Cat No 6359.0, ABS, Canberra, August 2014.

the host company. There is also a contract between the labour hire agency and the worker under which the worker is engaged as an employee.[3] There is no express contract of any type between the worker and the host company.

In the standard labour hire arrangement, the agency has the obligation to pay the worker and is responsible for matters such as leave, taxation, superannuation and insurance. Pursuant to the contract between the agency and the host company, the agency confers upon the host company some of its power of control over the worker. The host company exercises day-to-day control in the form of direction and supervision of the worker.[4] The agency exercises 'legal control'[5] over the worker, which includes the power to discipline and dismiss the worker. Accordingly, in the standard labour hire arrangement, both the agency and the host company exercise control over the worker.

A host company may exercise significant control over powers which are formally (that is, by virtue of the contractual documentation) reposed in the agency. For example, recent research indicates that while the agency has the formal power to dismiss a labour hire worker, it is often the host company that makes the decision to dismiss the worker.[6] It has been observed that the agency's actions 'are often a response to the demands of hosts'[7] and that 'host employers play a critical role in determining the employment conditions of

3 The most common form of labour hire arrangement in Australia involves the agency engaging the worker as an employee: House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, *Making it Work: Inquiry into Independent Contracting and Labour Hire Arrangements*, Parliament of Australia, Canberra, 2005, at [3.11]; L Brennan, M Valos and K Hindle, *On-hired Workers in Australia: Motivations and Outcomes*, RMIT Occasional Research Report, RMIT University, 2003, at 49. Another common arrangement involves the agency engaging the worker as an independent contractor: see, eg, *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104; 99 ALR 735. Some cases have involved more complex arrangements, with a worker creating a personal company which then supplies the worker's services to the agency (which, in turn, supplies the worker's services to the host company): see, eg, *Cable & Wireless Plc v Muscat* [2006] ICR 975; [2006] IRLR 354; [2006] EWCA Civ 220 (*Muscat*); *Tilson v Alstom Transport* [2011] IRLR 169; [2010] EWCA Civ 1308 (*Tilson*).

4 Once assigned to the host company, the worker performs work which is of direct benefit to the host company. An employer (here, the agency) may require an employee to perform work which benefits another entity: *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 300.

5 In *Swift* (2000) 96 IR 69; [2000] NSWIRComm 9 at [44], 'legal control' was said to be 'control over the person to require him to properly and effectively exercise his skill in the performance of the work allocated in default of which disciplinary measures may be adopted, including the final step of dismissal'.

6 C Dowling, *The Concept of Joint Employment in Australia and the Need for Statutory Reform*, Masters Thesis, University of Melbourne, 2008; T Malone, *Vulnerability in the Fair Work-Place: Why Unfair Dismissal Laws Fail to Adequately Protect Labour-Hire Employees in Australia*, Student Working Paper No 6, Centre for Employment and Labour Relations Law, University of Melbourne, 2011; P Thai, 'Unfair Dismissal Protection for Labour Hire Workers? Implementing the Doctrine of Joint Employment in Australia' (2012) 25 *AJLL* 152.

7 E Underhill, 'Should Host Employers Have Greater Responsibility for Temporary Agency Workers' Employment Rights?' (2010) 48 *Asia Pacific Journal of Human Resources* 338 at 344.

agency workers while bearing little responsibility for them'.[8] Courts and tribunals in Australia and the United Kingdom have demonstrated an awareness of these problems. In *James v London Borough of Greenwich*,[9] for example, Elias J observed that 'many agency workers are highly vulnerable and need to be protected from the abuse of economic power by the end-users'.[10]

In the absence of a contract between the host company and the worker, the rules of privity prevent the worker from suing the host company in contract.[11] The absence of a contractual relationship between the host company and the worker also prevents the worker from asserting statutory rights, such as unfair dismissal rights, against the host company.[12] This is because most employment statutes attach rights and obligations only to those who are in a relationship of employment.[13] The common law concept of an employment contract[14] is a gateway to these statutory rights and obligations. Most of the cases involving trilateral work relationships concern the attribution of responsibility arising under such statutes.[15]

In this article, 'attribution of responsibility' refers to the attribution of contractual responsibility and responsibility arising under statutes which use

8 Ibid, at 349. See also H Collins, K D Ewing and A McColgan, *Labour Law*, Cambridge University Press, Cambridge, 2012, p 219.

9 [2007] ICR 577; [2006] UKEAT 0006/06 (*James* (*EAT*)). This decision of the UK Employment Appeal Tribunal was affirmed by the English Court of Appeal in *James v London Borough of Greenwich* [2008] ICR 545; [2008] IRLR 302; [2008] EWCA Civ 35 (*James*).

10 *James (EAT)*, ibid, at [61]. The difficulties to which trilateral work relationships give rise have also been acknowledged by leading scholars: see especially M Freedland, *The Personal Employment Contract*, Oxford University Press, Oxford, 2003, p 40; General Editors' Preface to M Freedland and N Kountouris, *The Legal Construction of Personal Work Relations*, Oxford University Press, Oxford, 2011, p ix; S Deakin and G Morris, *Labour Law*, 6th edn, Hart, Oxford, 2012, p 182.

11 Thai, above n 6, at 157.

12 See generally P Davies and M Freedland, 'The Complexities of the Employing Enterprise', in G Davidov and B Langille (Eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work,* Hart, Oxford, 2006, p 298; J Fudge, 'Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation' (2006) 44 *OHLJ* 609; S Deakin, 'The Changing Concept of the "Employer" in Labour Law' (2001) 30 *ILJ* 72.

13 A Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *AJLL* 235 at 235–6. Some statutes are not limited, in their application, to those in an employment relationship. See, eg, legislation dealing with discrimination such as the Anti-Discrimination Act 1977 (NSW) Part 2 Div 2, and legislation dealing with work health and safety such as the Work Health and Safety Act 2011 (Cth) s 19. The general protections provisions in Part 3–1 of the Fair Work Act 2009 (Cth) (FW Act) are not limited, in their application, to employees and employers: see FW Act s 342 which refers, among other things, to principals and independent contractors.

14 In Australia, it is axiomatic that employment is a contractual relationship: *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 436; 131 ALR 422 at 439.

15 For example, *Nguyen* (2003) 128 IR 241; [2003] NSWIRComm 1006 and *Bianchi* (2004) 133 IR 29; [2004] AIRC 428 involved unfair dismissal claims (brought under the Industrial Relations Act 1996 (NSW) and the Workplace Relations Act 1996 (Cth) respectively); *Eastern Colour* (2011) 209 IR 263; [2011] FCA 803 involved alleged award breaches in contravention of provisions of the Workplace Relations Act 1996 (Cth); *Slater* (2003) 124 IR 293; [2003] SAWCT 57 involved a workers' compensation claim under the Workers Rehabilitation and Compensation Act 1986 (SA).

employment as a gateway (the term 'employment-related responsibility' will be used to capture both types of responsibility). This article is concerned with the question of whether employment-related responsibility can be imposed upon a host company consistently with orthodox principles of contract law. While this question has been touched upon by some scholars,[16] there has, to date, been limited academic consideration of current techniques invoked by Australian courts when addressing the question.

The article will proceed as follows. First, it will argue that one of the existing techniques for resolving questions of responsibility-attribution in trilateral work arrangements — application of the legal test for distinguishing between employees and independent contractors — is, with respect, erroneous. Second, the article will explore the concept of an implied contract of employment,[17] an alternative technique for attributing responsibility to host companies.[18] The article will draw upon and critically analyse a body of UK cases which has developed this concept.[19] While some Australian courts and tribunals have referred to the concept,[20] it has not been the subject of sustained academic consideration in this country.[21] Judicial views have diverged on the question of whether such a concept is compatible with

16 See Stewart, above n 13.

17 Prior to the decision of the High Court of Australia in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; 69 ALR 577 the notion of an 'implied contract' was regarded as the basis of a quantum meruit claim (broadly, a claim for reasonable remuneration for work performed in the absence of an enforceable contract). In *Pavey*, the High Court rejected the 'implied contract' basis for quantum meruit. The notion of an implied contract developed in the quantum meruit context is different from the implied contract discussed in this article.

18 Another device that may be used to attribute responsibility to host companies is the doctrine of joint employment. Support for such a doctrine in Australia has been limited: see *FP Group* [2013] FWCFB 9605 at [41]–[44]; cf *Eastern Colour* (2011) 209 IR 263; [2011] FCA 803 at [78]. A discussion of joint employment is beyond the scope of this article. See Dowling, above n 6; Thai, above n 6.

19 *Dacas v Brook Street Bureau (UK) Ltd* [2004] ICR 1437; [2004] IRLR 358; [2004] EWCA Civ 217 (*Dacas*); *Royal National Lifeboat Institution v Bushaway* [2005] IRLR 674; [2005] UKEAT 0719/04; *Muscat* [2006] ICR 975; [2006] IRLR 354; [2006] EWCA Civ 220; *Wood Group Engineering (North Sea) Ltd v Robertson* [2007] UKEAT 0081/06; *Heatherwood and Wexham Park Hospitals NHS Trust v Kulubowila* [2007] UKEAT 0633/06; *Astbury v Gist Ltd* [2007] UKEAT 0619/06; *Cairns v Visteon UK Ltd* [2007] ICR 616; [2007] IRLR 175; [2006] UKEAT 0494/06; *National Grid Electricity Transmission Plc v Wood* [2007] UKEAT 0432/07 (*Wood*); *James* [2008] ICR 545; [2008] IRLR 302; [2008] EWCA Civ 35; *East Living Ltd v Sridhar* [2008] UKEAT 0476/07; *Tilson* [2011] IRLR 169; [2010] EWCA Civ 1308; *Smith v Carillion (JM) Ltd* [2015] IRLR 467; [2015] EWCA Civ 209 (*Carillion*).

20 See, eg, *Forstaff* (2004) 144 IR 1; [2004] NSWSC 573 at [61]–[66]; *CFMEU v BHP* (2005) 85 WAIG 1924; [2005] WAIRComm 1797 at [128]–[152], [175], [195]–[207], [233] per Sharkey P, at [313]–[325] per Beech CC, at [338]–[347] per Kenner C (appeal decided on different grounds: see *BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining & Energy Union of Workers* (2006) 151 IR 361; [2006] WASCA 549); *Wilton* (2007) 161 FCR 300; 162 IR 264; [2007] FCA 725 at [83]–[92], [157]–[173], [182]–[183]; *Homecare* [2008] VSCA 111 at [60]–[78]; *Henry* [2013] FWC 2813 at [656], [725], [741] [749], affirmed on appeal in *FP Group*, ibid (see [36] on implied contract); *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346; 321 ALR 404; [2015] FCAFC 37 (*Quest* (*FCA*)) at [151]–[171] (overturned on a different point, unrelated to the implied contract of employment, on appeal: see *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 256 CLR 137; 326 ALR 470; [2015] HCA 45).

21 A short piece on the implied contract of employment appears in *Keeping Good Companies*:

orthodox principles of contract law in Australia.[22] It will be argued that the concept is compatible with these principles. The article will explore the circumstances that may give rise to an implied contract of employment. It will also examine the limitations of the concept.

In a significant work, the authors of *Beyond Employment: The Legal Regulation of Work Relationships*[23] identified the need for further scholarly engagement with the challenges arising from work relationships that fall outside the traditional paradigm.[24] This article takes up that invitation and seeks to make a contribution by way of doctrinal analysis.[25]

Two Key Questions: Existence and Characterisation

This part of the article examines the current Australian approach to identifying a contract of employment. This discussion will demonstrate the difficulties with applying traditional tests, which were developed in the context of bilateral work structures, to trilateral work arrangements. As Lamer CJ of the Supreme Court of Canada observed in *Pointe-Claire (City) v Quebec (Labour Court)*,[26] '[t]he tripartite relationship does not fit very easily into the classic pattern of bilateral relationships'.[27]

The traditional work relationship consists of two parties — the worker and the entity for whom work is performed — bound together by a contract. The only question for the court is whether the contract should be characterised as a contract of employment or an independent contract (pursuant to which the worker performs work as an independent contractor). In Australia, a 'multi-factor test' is used to distinguish employees from independent contractors.[28] Under this test, courts take into account a range of factors, including the nature and extent of control exercised by the entity for whom work is performed, who provides the equipment, how the remuneration is paid, whether the worker is able to delegate the work[29] and how matters such as leave, insurance, superannuation and taxation are addressed.

An additional, and antecedent, step must be built into the analysis of a trilateral work relationship. Before proceeding to characterisation, a court or tribunal must first determine whether a contract exists at all.

When determining whether there is a contract of employment between the host company and the worker, a court or tribunal must ask two questions:

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see D McEvoy, 'Employment Law: Labour Hire — Can a Contract of Employment be Implied?' (2009) 61 *Keeping Good Companies* 227.

22 See below nn 102-9 and accompanying text.

23 R Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships*, Federation Press, Sydney, 2012.

24 Ibid, p 200.

25 As to the value of doctrinal analysis in this area, see A C L Davies, 'The Contract for Intermittent Employment' (2007) 36 *ILJ* 102 at 102. That article was concerned with casual workers.

26 [1997] 1 SCR 1015.

27 Ibid, at 1055.

28 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; 63 ALR 513 (*Brodribb*); *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; 181 ALR 263; [2001] HCA 44 (*Hollis*).

29 *Australian Air Express Pty Ltd v Langford* (2005) 147 IR 240; [2005] NSWCA 96; *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146; 295 ALR 407; [2013] FCAFC 3 at [25]; *Brodibb*, ibid, at CLR 26, 38; ALR 519, 528.

(1) Does a contract exist between the parties?
(2) If a contract does exist between the parties, then what is the proper characterisation of that contract? In other words, is it a contract of employment or an independent contract?[30]

The need to focus on the question of existence in cases involving trilateral work arrangements has been acknowledged in some cases. For example, in *Mason & Cox Pty Ltd v McCann*,[31] a case involving a labour hire relationship, Perry J stated:

> Most of the decided cases proceed on the premise that there was a contract between the parties, the central question being whether or not the terms of the contract and other relevant indicia point to the characterisation of the contract either as one of service or for services. Here, the problem is quite different, in that a central question is whether or not there was a contract *at all* as between [the worker] and the [host company].[32]

Yet, in other cases, the characterisation test has been invoked to answer the question of existence. As Mark Irving observes, '[f]or reasons that are not clear, courts tend to approach the question of whether a contract exists between two parties by applying the principles developed to determine the nature of the legal relationship between the parties'.[33] For example, in *Finance Sector Union of Australia v Commonwealth Bank of Australia*,[34] Moore J said:

> [I]n many of the recent Australian cases in which this issue has arisen, the Court has adopted the approach of determining which of two possible employers is the employer by applying the principles developed for determining whether a person was an employer at all.[35]

Application of the characterisation test to the question of existence is, with respect, erroneous. The questions are analytically distinct. The factors relevant to the question of characterisation are not the same as those relevant to the question of existence. In respect of the existence question, the issue is whether the basic elements of contractual formation, including agreement,[36]

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30 The distinction between existence and characterisation has been recognised in some cases: see, eg, *Homecare* [2008] VSCA 111 at [11]: 'The real issue is the existence of a contract, not its characterisation'. See also B Hepple, 'Restructuring Employment Rights' (1986) 15 *ILJ* 69 at 71; M Irving, *The Contract of Employment*, LexisNexis Butterworths, Sydney, 2012, p 75.

31 (1999) 74 SASR 438; [1999] SASC 544 (*Mason*).

32 Ibid, at [101]–[102] (emphasis in original). Similar observations were made more recently in *Wilton* (2007) 161 FCR 300; 162 IR 264; [2007] FCA 725 at [160].

33 Irving, above n 30, p 76.

34 (2001) 111 IR 241; [2001] FCA 1613 (appeal decided on different grounds: see *Commonwealth Bank of Australia v Finance Sector Union of Australia* (2002) 125 FCR 9; 190 ALR 497; [2002] FCAFC 193).

35 *Finance Sector Union of Australia v Commonwealth Bank of Australia*, ibid, at [61], cited in Irving, above n 30, p 76 n 238. See also *Golden Plains Fodder Australia Pty Ltd v Millard* (2007) 99 SASR 461; [2007] SASC 391 at [32] and [69], cited in Irving, above n 30, p 76 n 238.

36 The focus of this article is on contracts formed by conduct. In order for a contract to be formed by conduct, there need not be an identifiable offer and acceptance. The conduct of the parties needs to demonstrate that they have reached agreement: J W Carter, *Contract Law in Australia*, 6th edn, LexisNexis Butterworths, Sydney, 2013, at [3.03], [3.05];

consideration and intention to create legal relations,[37] have been established. Where there is no contract between the host company and the labour hire worker, the relationship between them cannot be one of employment. This is so, even where the features of employment, such as control by the host company and integration of the worker into the company, are present.[38] As Elias LJ[39] of the English Court of Appeal observed in *Tilson*,[40] there is 'error [in] asserting that because someone looks and acts like an employee, it follows that in law he must be an employee'.[41]

The body of case law on the implied contract of employment in the UK provides a useful starting point for analysis because it is attentive to the distinctiveness of these existence and characterisation questions. In *James*,[42] for example, Mummery LJ made it clear that the characterisation question only arises once it is determined that a contractual relationship exists between the host company and the labour hire worker.[43] In some cases, the concept of an implied contract of employment has been invoked to attribute employment-related responsibility to a host company. The next part of the article examines the key cases in this area.

The Implied Contract of Employment in the United Kingdom

Initial development

Dacas[44] is a key decision in the line of UK cases which developed the concept of an implied contract of employment. In this case, the English Court of Appeal considered whether there was an implied contract of employment between Mrs Dacas, a labour hire worker, and a local authority (the host company)[45] for which she worked as a cleaner. Brook Street Bureau, a labour hire agency, engaged Mrs Dacas as an independent contractor and assigned her to the host company. There was no express contract between Mrs Dacas

N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot's Law of Contract*, 10th Australian edn, LexisNexis Butterworths, Sydney, 2012, at [3.5]–[3.9]; M Furmston and G J Tolhurst, *Contract Formation: Law and Practice*, Oxford University Press, Oxford, 2010, [1.17]–[1.19]. In the employment context, see *Damevski* (2003) 133 FCR 438; 202 ALR 494; [2003] FCAFC 252 at [78]–[88]; *Abbott v Women's & Children's Hospital Inc* (2003) 86 SASR 1; [2003] SASC 145 at [34] (affirmed in *Abbott v Women's & Children's Hospital Inc* [2004] SASC 67); *Ormwave Pty Ltd v Smith* [2007] NSWCA 210 at [68]–[76]; *Quest (FCA)* (2015) 228 FCR 346; 321 ALR 404; [2015] FCAFC 37 at [149]; *Gothard v Davey* (2010) 80 ACSR 56; [2010] FCA 1163 at [184]–[199].

37 On the elements of contractual formation, see Carter, ibid, chaps 3–9; Seddon et al, ibid, chaps 3–5; Furmston and Tolhurst, ibid.

38 *Mason* (1999) 74 SASR 438; [1999] SASC 544 at [26]; M Crawley, 'Labour Hire and the Employment Relationship' (2000) 13 *AJLL* 291 at 295; Stewart, above n 13, at 252. See also below nn 92–4 and accompanying text.

39 Pitchford and Arden LJJ agreed.

40 *Tilson* [2011] IRLR 169; [2010] EWCA Civ 1308.

41 Ibid, at [44].

42 *James* [2008] ICR 545; [2008] IRLR 302; [2008] EWCA Civ 35.

43 Ibid, at [41]–[45].

44 *Dacas* [2004] ICR 1437; [2004] IRLR 358; [2004] EWCA Civ 217.

45 The local authority will be referred to as the 'host company' for ease of comprehension and consistency throughout the article.

and the host company. As in most labour hire arrangements, the host company had the power to terminate Mrs Dacas' assignment pursuant to a clause in the contract between the host company and the labour hire agency. The host company exercised this power after Mrs Dacas had worked for it for 4 years. The labour hire agency had the 'formal' power to dismiss Mrs Dacas pursuant to the contract between Mrs Dacas and the labour hire agency. While the host company made the decision to terminate Mrs Dacas' assignment, the labour hire agency formally exercised the power to dismiss her.

Mrs Dacas commenced unfair dismissal proceedings against both the host company and the labour hire agency under the Employment Rights Act 1996 (UK) (ER Act (UK)). In order to succeed in her claim, she needed to establish, as a first step, that either the host company or the labour hire agency was her employer. At first instance, the UK Employment Tribunal rejected her claim, concluding that neither the host company nor the agency was her employer. The UK Employment Appeal Tribunal allowed the appeal and held that the labour hire agency was her employer. Before the Employment Appeal Tribunal, Mrs Dacas no longer pressed her claim against the host company. The labour hire agency then appealed the decision to the English Court of Appeal.

All three members of the English Court of Appeal[46] held that there could not be a contract of employment between Mrs Dacas and the labour hire agency because, first, the agency did not exercise control over her and second, there was no mutuality of obligation between the agency and the worker.[47] The appeal was dismissed on this ground, and the Court of Appeal's observations as to an implied contract of employment between Mrs Dacas and the host company were therefore obiter dicta.[48]

On the implied contract issue, Mummery LJ commenced by observing that the phrase 'contract of employment' was defined in s 230(2) of the ER Act (UK) as a 'contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'.[49] His Lordship stated that 'a contract of service may be implied — that is deduced — as a necessary inference from the conduct of the parties and from the circumstances surrounding the parties and the work done'.[50]

Mummery LJ's observations about the weight to be given to the contractual documentation are also significant. His Lordship stated that the 'construction of the contract documents is important'[51] but 'not necessarily determinative',[52] and that 'the totality of the triangular arrangements may lead

46 The members of the court were Mummery and Sedley LJJ, and Munby J.

47 *Dacas* [2004] ICR 1437; [2004] IRLR 358; [2004] EWCA Civ 217 at [64] per Mummery LJ, at [78]–[79] per Sedley LJ, at [80] per Munby J. See below n 61 for a discussion of the concept of mutuality of obligation.

48 See further M Wynn and P Leighton, 'Will the Real Employer Please Stand Up? Agencies, Client Companies and the Employment Status of the Temporary Agency Worker' (2006) 35 *ILJ* 301 at 306.

49 *Dacas* [2004] ICR 1437; [2004] IRLR 358; [2004] EWCA Civ 217 at [4] and [16], quoting ER Act (UK) s 230(2).

50 Ibid, at [16].

51 Ibid, at [17].

52 Ibid.

to the necessary inference of a contract between such parties'.[53]

Sedley LJ agreed that an implied contract of employment could exist between a host company and a labour hire worker. His Lordship stated that 'once arrangements like these had been in place for a year or more, I would have thought that the same inexorable inference [that the host company was the employer of the labour hire worker] would have arisen'.[54] The relevance of the passage of time had been alluded to in an earlier decision of the English Court of Appeal. In *Franks v Reuters Ltd*,[55] Mummery LJ[56] had observed that '[d]ealings between parties over a period of years, as distinct from the weeks or months typical of temporary or casual work, are *capable* of generating an implied contractual relationship'.[57]

Munby J dissented on the implied contract issue,[58] expressing 'serious misgivings'[59] about the approach favoured by Mummery and Sedley LJJ. His Lordship acknowledged that 'the mere fact that there is a contract between the worker and the agency, and another contract between the agency and the end-user, plainly does not prevent there also being a contract between the worker and the end-user. Nor, of itself, does it prevent any contract between the worker and the end-user being a contract of service'.[60] However, Munby J stated:

> If the obligation to remunerate the worker is imposed on the agency, there cannot be a contract of service between the worker and the end-user. And if, at the same time, control is vested in the end-user, then there equally cannot be a contract of service between the worker and the agency.[61]

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53 Ibid.

54 Ibid, at [77]. See the discussion of passage of time below nn 77-81 and accompanying text.

55 [2003] ICR 1166; [2003] IRLR 423; [2003] EWCA Civ 417 (*Franks*).

56 Thorpe LJ and Butler-Sloss P agreed.

57 *Franks* [2003] ICR 1166; [2003] IRLR 423; [2003] EWCA Civ 417 at [29] (emphasis in original).

58 Munby J dissented and held that it was not possible for there to be an implied contract of employment between the host company and the labour hire worker. His Lordship agreed in the outcome of the case, which was that there was no contract of employment between the worker and the labour hire agency.

59 *Dacas* [2004] ICR 1437; [2004] IRLR 358; [2004] EWCA Civ 217 at [81].

60 Ibid, at [83].

61 Ibid, at [89]. Munby J discussed the concept of 'mutuality of obligation' and said that 'if there is any obligation it will typically be the obligation to remunerate': at [87]. Munby J held that there was no mutuality of obligation between Mrs Dacas and the host company because the host company had no obligation to remunerate; the agency had that obligation: at [102]–[103]. The more common position in the United Kingdom (which differs from that adopted by Munby J) is that in order for mutuality of obligation to be established the employer must be obliged to provide work and the employee must be obliged to accept work offered: see, eg, *Carmichael v National Power Plc* [1999] 4 All ER 897 at 901–2. There are different conceptions of mutuality of obligation and a discussion of these is beyond the scope of this article: see especially N Countouris, 'Uses and Misuses of "Mutuality of Obligations" and the Autonomy of Labour Law', in A Bogg et al (Eds), *The Autonomy of Labour Law*, Hart, Oxford, 2015, p 169. In cases subsequent to *Dacas* [2004] ICR 1437; [2004] IRLR 358; [2004] EWCA Civ 217, it has been acknowledged that the concept of mutuality of obligation is of limited relevance to determining whether there is an implied contract of employment between the host company and the worker. As Elias J stated in *James* (*EAT*) [2007] ICR 577; [2006] UKEAT 0006/06 at [54] (affirmed on appeal in *James* [2008] ICR 545; [2008] IRLR 302; [2008] EWCA Civ 35 at [29]–[30]): 'In the casual worker cases, where the issue is whether there is an umbrella or global contract in the

Accordingly, Munby J concluded that there was no implied contract of employment between Mrs Dacas and the host company.

The necessity test

The approach of Mummery and Sedley LJJ in *Dacas* was affirmed in a subsequent decision, *Muscat*.[62] In *Muscat*, the English Court of Appeal stated that 'the view of the majority in the *Dacas* case was correct'.[63] Mr Muscat was initially employed by Exodus Internet Ltd. Exodus then dismissed him and rehired him through a personal company (E-Nuff Comms Ltd) that Exodus asked him to create. Cable & Wireless then took over Exodus. Mr Muscat continued to work for Cable & Wireless, which subsequently asked him to supply his services through a labour hire agency called Abraxas plc. Mr Muscat agreed. As a result of these arrangements, Mr Muscat supplied his services to Cable & Wireless pursuant to a contract between E-Nuff and Abraxas. Cable & Wireless became the 'host company' under these arrangements. The Court of Appeal held that there was an implied contract of employment between Mr Muscat and Cable & Wireless.

Counsel for Cable & Wireless argued that the proper test for implication of a contract was that set out in *The Aramis*,[64] in which Bingham LJ had stated that a contract cannot be implied

> unless it is necessary to do so; necessary, that is to say, in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist.[65]

Counsel for Cable & Wireless observed that Mummery LJ had not had regard to this 'necessity test' in *Dacas*. The English Court of Appeal (in *Muscat*) accepted that the necessity test was the proper test for implication of a contract of employment, but said that Mummery LJ had implicitly adopted the test in *Dacas* when his Lordship referred to an implied contract being 'deduced . . . as a necessary inference'.[66]

Counsel for Cable & Wireless also argued that a contract between Mr Muscat and Cable & Wireless could not be implied because their conduct was 'entirely consistent'[67] with the express arrangements in place. The English Court of Appeal rejected that argument. The court examined the way the parties conducted their relationship in practice and observed that prior to the introduction of the labour hire agency (Abraxas) to the arrangements, Mr Muscat was in a relationship of employment with Cable & Wireless. After

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non-work periods, the relevant question for the tribunal to pose is whether the irreducible minimum of mutual obligations exists. It is not particularly helpful to focus on the same question when the issue is whether a contract can be implied between the worker and end-user'. Instead, as explained below (see below nn 62–85 and accompanying text), the UK implied contract cases focus on the test of necessity.

62 *Muscat* [2006] ICR 975; [2006] IRLR 354; [2006] EWCA Civ 220.

63 Ibid, at [35] per Sir Anthony Clarke MR, Smith and Maurice Kay LJJ.

64 [1989] 1 Lloyd's Rep 213.

65 Ibid, at 224, quoted in *Muscat* [2006] ICR 975; [2006] IRLR 354; [2006] EWCA Civ 220 at [43].

66 *Muscat*, ibid, at [45].

67 Ibid, at [46].

Mr Muscat was asked to supply his services through the agency, the parties continued on as before, with the exception that Mr Muscat was then paid by the agency. Adopting the words from *The Aramis*, the court said that 'it was necessary to infer the continuing existence of the employment contract in order to give business reality to the relationship'.[68]

When the implied contract of employment next arose for consideration by the English Court of Appeal, the relevant principles were clarified and narrowed. In *James*,[69] Mummery LJ[70] held that there was no implied contract of employment in existence between a host company and a labour hire worker who had worked for the host company for 3 years. Mummery LJ confirmed that the proper test for implication of an employment contract is the necessity test from *The Aramis*.[71] Mummery LJ drew attention to passages from *The Aramis* in which Bingham LJ had said that a contract cannot be implied 'if the conduct relied upon is no more consistent with an intention to contract than with an intention not to contract'[72] and that 'it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract'.[73]

Mummery LJ said that a contract of employment cannot be implied unless it is 'necessary to imply one in order to explain the work undertaken by the worker for the end user.'[74] Turning to the facts of *James*, his Lordship observed that the express arrangements (the contract between the agency and the host company, and the contract between the agency and the worker) fully explained the work undertaken by the labour hire worker, her payment by the agency, and the host company's payment of the agency.[75] As a result, it was not necessary to imply a contract between the worker and the host company to explain the conduct of the parties.

In *James*, there were some important reflections on what had been said earlier in *Dacas* and *Muscat*. Mummery LJ said that *Dacas* had simply 'raised the possibility'[76] of an implied contract existing between a host company and a labour hire worker, and was not to be taken as having decided that an implied contract would automatically arise where a labour hire worker had worked for the same host company for an extended period.[77] Mummery LJ adopted several observations of Elias J below in the Employment Appeal Tribunal in *James (EAT)*, including those pertaining to time.[78]

Elias J had observed that '[t]ypically the mere passage of time does not justify any such implication to be made as a matter of necessity, and we respectfully disagree with Sedley LJ's analysis in *Dacas* on this point'.[79]

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68 Ibid, at [51].
69 *James* [2008] ICR 545; [2008] IRLR 302; [2008] EWCA Civ 35.
70 Thomas and Lloyd LJJ agreed.
71 *James* [2008] ICR 545; [2008] IRLR 302; [2008] EWCA Civ 35 at [23].
72 *The Aramis* [1989] 1 Lloyd's Rep 213 at 224, quoted in *James*, ibid, at [24].
73 *The Aramis*, ibid.
74 *James* [2008] ICR 545; [2008] IRLR 302; [2008] EWCA Civ 35 at [51]. See also *Tilson* [2011] IRLR 169; [2010] EWCA Civ 1308 at [8].
75 *James*, ibid, at [42]–[43].
76 Ibid, at [47].
77 Ibid.
78 Ibid, at [29], endorsing *James (EAT)* [2007] ICR 577; [2006] UKEAT 0006/06 at [53]–[61].
79 *James (EAT)*, ibid, at [59].

There may be many reasons why the same labour hire worker is allocated to work for a host company for an extended period of time. The host company may prefer a worker who is already familiar with the company's operations and the worker may prefer to work in the same place on a regular basis. Accordingly, it is not necessary to imply a contract on the basis of time alone because the length of time 'may be wholly explicable by considerations of convenience for all parties'.[80] The point has recently been reiterated by the English Court of Appeal in *Carillion*.[81]

In *James*, Mummery LJ also reflected on the decision in *Muscat*. His Lordship said that the significance of *Muscat* was its guidance on the requirement of necessity.[82] There was a much greater emphasis on the requirement of necessity in *James* than in *Dacas* and *Muscat*. It has been observed that 'in reality, *James* indicates a radical departure from previous authority: the interventionist approach adopted in *Dacas* and *Muscat* has been eschewed in favour of a laisser-faire approach which seeks to preserve the autonomy of the commercial parties'.[83]

Following *James*, arguments based on the period of time served with the host company, control by the host company over the worker, and the worker's integration into the host company's organisation, have been rejected.[84] The necessity test — in particular, its focus on determining whether the conduct of the parties is explicable by reference to the express arrangements — has been referred to in this regard. The decision of the English Court of Appeal in *Tilson*[85] provides a good example.

In *Tilson*, there were three contracts. There was a contract between the worker, Mr Tilson, and Silversun Solutions Ltd, pursuant to which Silversun was paid Mr Tilson's remuneration and channelled it through to him.[86] Under a different contract, Silversun agreed to provide Mr Tilson's services to a labour hire agency, Morson Human Resources Ltd. Morson then entered into a contract with Alstom Transport, the host company, under which Morson supplied Mr Tilson's services to Alstom.

Following his dismissal from Alstom, Mr Tilson commenced unfair dismissal proceedings and argued that there was an implied contract of employment between him and Alstom. Elias LJ[87] rejected his submission. Elias LJ recognised that Mr Tilson 'was performing work in just the same way

80 Ibid.

81 [1989] 1 Lloyd's Rep 213 at [36].

82 *James* [2008] ICR 545; [2008] IRLR 302; [2008] EWCA Civ 35 at [48].

83 M Wynn and P Leighton, 'Agency Workers, Employment Rights and the Ebb and Flow of Freedom of Contract' (2009) 72 *MLR* 91 at 94. See further Deakin and Morris, above n 10, p 184; E Brown, 'Protecting Agency Workers: Implied Contract or Legislation?' (2008) 37 *ILJ* 178 at 182; D Brodie, 'How Relational Is the Employment Contract?' (2011) 40 *ILJ* 232 at 249–51; P Leighton and M Wynn, 'Classifying Employment Relationships — More Sliding Doors or a Better Regulatory Framework?' (2011) 40 *ILJ* 5 at 15.

84 *Tilson* [2011] IRLR 169; [2010] EWCA Civ 1308; *Carillion* [1989] 1 Lloyd's Rep 213.

85 *Tilson*, ibid. See also *Muschett v HM Prison Service* [2010] IRLR 451; [2010] EWCA Civ 25.

86 Silversun was paid 3% of Mr Tilson's salary as a service charge under this arrangement: *Tilson*, ibid, at [12].

87 Pitchford and Arden LJJ agreed.

as any other employee would do'[88] and would have been held to be an employee of Alstom were it not for the labour hire arrangements.[89] However, the labour hire contracts in place 'fully explained why he was working for Alstom',[90] rendering it unnecessary to imply a contract to explain the conduct of the parties. The fact that Mr Tilson had to make an application to the line manager at Alstom for annual leave did not alter the conclusion.[91]

Elias LJ also said that the worker's integration into the organisation is 'a factor of little, if any, weight when considering whether there is a contract in place at all'.[92] His Lordship stated that 'the mere fact that there is a significant degree of integration of the worker into the organisation'[93] and 'control over what is done'[94] does not give rise to an implied contract between the worker and the host company because it is entirely consistent with, and explicable by reference to, the contracts that are in place between the agency and the host company and the agency and the worker respectively.

A clause in the contract between Silversun and Morson stipulated that Morson would not exercise any control over Mr Tilson. Elias LJ observed that this was, effectively, a representation on the part of Morson that Alstom would not exert control over Mr Tilson.[95] In reality, Alstom exercised significant control over him. However, Elias J considered that while the clause 'plainly did misrepresent in a blatant way the extent of the control which Alstom would exercise over [Mr Tilson]',[96] Alstom *itself* had never represented or undertaken not to control Mr Tilson; rather the 'representation was made by Morson to Silversun'.[97] Elias LJ concluded that 'even if it can be said that there was a representation or contractual promise effectively made to the appellant, through Silversun, that does not create any inconsistency between Alstom's conduct with respect to the appellant and any undertakings it has given'.[98] The point remained that there was no need to imply a contract to explain Alstom's and Mr Tilson's conduct.

The recent decision of the English Court of Appeal in *Carillion*[99] reinforces the approach in *James* and *Tilson*. In this case, it was acknowledged that the necessity test is a 'difficult hurdle'.[100] Counsel for the labour hire worker pointed to the fact that the worker had worked for the host company for an extended period, was subject to the host company's control, and was integrated into the host company's organisation. Elias LJ held that these factors were not sufficient to give rise to an implied contract between the host company and the worker.[101]

88 *Tilson* [2011] IRLR 169; [2010] EWCA Civ 1308 at [4].
89 Ibid.
90 Ibid, at [47].
91 Ibid, at [48].
92 Ibid, at [44].
93 Ibid.
94 Ibid.
95 Ibid, at [14].
96 Ibid, at [45].
97 Ibid, at [46].
98 Ibid.
99 *Carillion* [1989] 1 Lloyd's Rep 213.
100 Ibid, at [28].
101 Ibid, at [32]–[36].

The Implied Contract of Employment in Australia

There are divergent judicial views as to whether the concept of an implied contract of employment is compatible with orthodox principles of contract law in Australia. In *Wilton*[102] Conti J of the Federal Court expressed doubts about such a notion. His Honour referred to 'the controversial notion of implied relationships of employment'[103] and observed that 'there is no good reason for any imputation to the present circumstances of any such notion, assuming that notion to be rightly cognisable in the general law of Australia, to the extent and for the purpose indicated in the *Brook Street* context of labour hire arrangements, being an association which I think to be at best doubtful'.[104]

In *Homecare*,[105] Forrest AJA[106] of the Victorian Court of Appeal said that the reasoning in *Dacas* and subsequent UK cases on the implied contract of employment is consistent with Australian law.[107] The issue was recently considered in *Quest (FCA)*,[108] a decision of the Full Federal Court. North and Bromberg JJ referred to the UK line of cases and preferred the approach taken in *Homecare* (over that in *Wilton*) to these cases.[109] *Quest (FCA)* was subsequently overturned by the High Court of Australia on a different point. The High Court did not provide any guidance on the issue of implied contracts of employment. The following section considers the question from first principles.

Implied contracts: Orthodox principles

The concept of an implied contract of employment is compatible with orthodox principles of contract law in Australia. It is a well-established principle of contract law that 'a contract may be inferred from the acts and conduct of parties'.[110] The conduct must be viewed objectively.[111] In *Integrated Computer Services*,[112] McHugh JA stated:

> The question in this class of case is whether the conduct of the parties, viewed in the light of the surrounding circumstances, shows a tacit understanding or agreement. The conduct of the parties, however, must be capable of proving all the essential elements of an express contract.[113]

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102 (2007) 161 FCR 300; 162 IR 264; [2007] FCA 725.
103 Ibid, at [182].
104 Ibid.
105 [2008] VSCA 111.
106 Neave and Kellam JJA agreed.
107 *Homecare* [2008] VSCA 111 at [67]. The dispute was determined on the basis of the principles of agency and accordingly the passages dealing with the notion of an implied contract were obiter dicta.
108 (2015) 228 FCR 346; 321 ALR 404; [2015] FCAFC 37.
109 Ibid, at [166].
110 *Integrated Computer Services Pty Ltd v Digital Equipment Corporation (Aust) Pty Ltd* (1988) 5 BPR 11,110 at 11,117 (*Integrated Computer Services)*. See generally Carter, above n 36, at [3.03], [3.05]; Seddon, Bigwood and Ellinghaus, above n 36, at [3.5]–[3.9]; Furmston and Tolhurst, above n 36, at [1.17]–[1.19].
111 *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95; 187 ALR 92; [2002] HCA 8 at [25].
112 *Integrated Computer Services* (1988) 5 BPR 11,110.
113 Ibid, at 11,117. See also *Laidlaw v Hillier Hewitt Elsley Pty Ltd* [2009] NSWCA 44 at [5].

These principles have been applied in a number of Australian cases concerning commercial contracts.[114] There are no apparent barriers to their invocation in the employment context. In *Damevski*,[115] Marshall J[116] applied the principles in these general commercial contract law cases[117] to an employment situation. Marshall J stated that a 'court may imply a contract by concluding that the parties intended to create contractual relations after examining extrinsic evidence, including what the parties said and did'.[118] The judges in *Homecare* and *Quest (FCA)* were, with respect, correct to conclude that there are no doctrinal obstacles to recognising the concept of an implied contract of employment in Australia.

It is possible to reconcile Conti J's observations in *Wilton* with this conclusion. Some assistance with this task may be derived from North and Bromberg JJ's judgment in *Quest (FCA)*. Their Honours observed that 'the doubt expressed . . . by Conti J about the applicability of an implied contract analysis to establish a contract between a worker and end-user in a labour-hire setting is a doubt, as we see it, about the capacity for such an implication to be made where the hallmarks of a genuine labour-hire arrangement exists'.[119] It might be argued that Conti J was not concerned about the notion of an implied contract of employment per se. Rather, his Honour's reservations were, as noted by North and Bromberg JJ, directed at the possibility that such a contract could be found to exist in a fact scenario involving a 'genuine' labour hire relationship.[120] Conti J appears to have been concerned with the application of the concept to particular facts rather than with the issue of doctrinal compatibility.

Another relevant issue is the absence of a statutory anchor in the Fair Work Act 2009 (Cth) (FW Act). It will be recalled that in *Dacas*, Mummery LJ noted that the Employment Rights Act 1996 (UK) referred explicitly to 'implied' contracts of employment.[121] The relevant Australian statute, the FW Act, does not include a reference to implied contracts. However, the lack

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114 See, eg, *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523; *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153; [2001] NSWCA 61.

115 (2003) 133 FCR 438; 202 ALR 494; [2003] FCAFC 252.

116 Wilcox J agreed.

117 *Damevski* (2003) 133 FCR 438; 202 ALR 494; [2003] FCAFC 252 at [82], citing *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153; [2001] NSWCA 61; *Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309; ASC 55–408; *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25 at 31 per Bingham LJ; *Orion Insurance Co Plc v Sphere Drake Insurance Plc* [1990] 1 Lloyd's Rep 465 at 492–4 per Hirst J.

118 Ibid. At the time that *Damevski*, ibid, was decided, the judgment of the English Court of Appeal in *Dacas* [2004] ICR 1437; [2004] IRLR 358; [2004] EWCA Civ 217 had not yet been handed down. There is a brief discussion of the Employment Appeal Tribunal's decision (*Dacas v Brook Street Bureau (UK) Ltd* [2003] IRLR 190) in *Damevski* at [57].

119 *Quest (FCA)* (2015) 228 FCR 346; 321 ALR 404; [2015] FCAFC 37 at [166]. See also *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174; 214 IR 306 63; [2011] FCA 1176 (*Ramsey*) at [68] and *Damevski*, ibid, at [174], cited in *Quest (FCA)* at [166].

120 See the discussion of genuine labour hire relationships below nn 175-81 and accompanying text.

121 *Dacas* [2004] ICR 1437; [2004] IRLR 358; [2004] EWCA Civ 217 at [4] and [16], quoting ER Act (UK) s 230(2).

of a reference in the statute does not, of itself, preclude recognition of such a concept in Australian law. *Damevski* supports this point. There, a contract of employment was implied in the absence of a statutory anchor.

Further assistance on this point may be derived from *McDonald v Ontrack Infrastructure Ltd*,[122] a decision of the Full Court of the New Zealand Employment Court. In *Ontrack*, the court was required to determine whether there was a contract of employment between a labour hire worker and a host company. This was the first case in New Zealand which raised this issue.[123] The court recognised that, 'unlike the English provisions,'[124] the Employment Relations Act 2000 (NZ) does not contain a reference to implied contracts. The court regarded an implied contract of employment as one that is formed in accordance with orthodox principles pertaining to contracts formed by conduct.[125] The court accepted the concept and used it to analyse the trilateral work arrangement.[126] A similar approach is likely to be adopted in Australia.

The preceding sections demonstrate that the notion of an 'implied contract' is compatible with orthodox principles of contract law in Australia. The following section draws upon UK and Australian case law to provide examples of the circumstances in which such a contract may arise between a host company and a labour hire worker.

Circumstances giving rise to an implied contract of employment

(1) A critique of the necessity test

It will be recalled that in the UK, an implied contract of employment will arise between the host company and the worker only if the 'necessity' test is satisfied. On one view, adoption of the necessity test in this context is justified. It aligns the approach to implying contracts in the employment context with that in the commercial context.[127] Yet, there are differences between these two contexts which may suggest that different approaches are warranted. The Supreme Court of the United Kingdom acknowledged these differences in *Autoclenz Ltd v Belcher*.[128] That case did not involve a labour hire relationship but the observations of the court are instructive here.

In *Autoclenz*, the UK Supreme Court had regard to the disparity of bargaining power which exists in many situations where contracts for the performance of work are negotiated.[129] The court said that in the employment context, 'it may be more common [than in the commercial context] for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and

122 [2010] NZEmpC 132 (*Ontrack*).
123 Ibid, at [1].
124 Ibid, at [37].
125 Ibid, at [39].
126 Ibid.
127 *The Aramis* [1989] 1 Lloyd's Rep 213 involved a commercial shipping transaction.
128 [2011] 4 All ER 745; [2011] UKSC 41 (*Autoclenz*).
129 Ibid, at [34]–[35].

worldly wise when it does so'.[130] The Supreme Court stated that the written documentation is not determinative and that 'all the circumstances of the case'[131] must be taken into account in determining the 'true agreement'[132] between the parties. This emphasis on the circumstances of the case — on substance over form — is reminiscent of the approach of Mummery LJ in *Dacas*.

In light of the observations in *Autoclenz*, there may be grounds for arguing that the necessity test, which was conceived in the commercial context, should not be applied in the employment context. Instead, a court confronted with the question whether there is an implied contract of employment between the host company and the worker should examine all of the circumstances of the case, including (but not limited to) the express arrangements, to determine the 'true agreement'[133] of the parties. This approach would be consistent not only with the general observations in *Autoclenz* about the differences between commercial and employment contracts, but also with the specific approach in *Autoclenz* to the strictness of the sham doctrine. In *Autoclenz*, the UK Supreme Court recognised that the notion of a sham enunciated in the commercial context (in *Snook v London and West Riding Investments Ltd*)[134] is 'too narrow an approach'[135] in the employment context. The court applied the broader notion of 'pretence'[136] in this case. Similarly, it could be argued that the necessity test, which poses a 'difficult hurdle',[137] should be abandoned in favour of an approach which is more consistent with the UK Supreme Court's injunction to be 'realistic and worldly wise'[138] in the employment context.

Regardless of the approach taken in the UK, there has been no unequivocal adoption of the necessity test in Australia. North and Bromberg JJ examined the necessity test in *Quest (FCA)* in the context of discussing the search for the 'substance' or 'reality' of the relationship.[139] In *Damevski*, a contract was implied on the basis of the principles concerning contracts formed by conduct. The court looked beyond the express contractual arrangements and examined the conduct of the parties. The court focused on the reality of the relationship.[140] The worker was not required to show that implication of the contract was also 'necessary' in the circumstances.

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130 Ibid, at [34], quoting with approval *Autoclenz Ltd v Belcher* [2010] IRLR 70; [2009] EWCA Civ 1046 at [92] per Aikens LJ.
131 Ibid, at [35].
132 Ibid.
133 See also Brodie, above n 83, at 250–1.
134 [1967] 2 QB 786; [1967] 1 All ER 518 (*Snook*).
135 *Autoclenz* [2011] 4 All ER 745; [2011] UKSC 41 at [28]. Shams and pretences are discussed below nn 143-62 and accompanying text.
136 The court did not use the word 'pretence' but the reasoning of the court is consistent with cases in which the concept was developed. See below n 146.
137 *Carillion* [1989] 1 Lloyd's Rep 213 at [28].
138 *Autoclenz* [2011] 4 All ER 745; [2011] UKSC 41 at [34].
139 *Quest (FCA)* (2015) 228 FCR 346; 321 ALR 404; [2015] FCAFC 37 at [159]–[164].
140 *Damevski* (2003) 133 FCR 438; 202 ALR 494; [2003] FCAFC 252 at [55]–[56] per Marshall J.

(2) Substance over form

When determining whether an implied contract has arisen between a host company and a labour hire worker, Australian courts are concerned with the reality of the relationship.[141] A contract is implied when the express arrangements do not accurately represent the reality of the relationship between the host company and the worker. There are several circumstances in which the reality of the relationship may differ from the express arrangements. Some guidance on these circumstances may be derived from the judgment of North and Bromberg JJ in *Quest (FCA)*.[142]

In *Quest (FCA)*, North and Bromberg JJ observed that in some cases, the reality of the relationship differs from the express arrangements because those arrangements are a sham.[143] In order for a court to find that the express arrangements are a sham (and, therefore, to disregard them), it must be shown that all of the parties intended to deceive third parties as to the nature of their relationship.[144] In *Autoclenz*, the UK Supreme Court acknowledged that this common intention is difficult to establish in the employment context. The court referred to the work of Professor Anne Davies, who had observed that in many cases the worker will not have an intention to deceive because he or she is 'either ignorant of the deceit or a victim of it'.[145] In light of these difficulties, the UK Supreme Court had regard to the doctrine of pretence.[146]

As North and Bromberg JJ noted in *Quest (FCA)*, a court may disregard terms included in express arrangements when they are a pretence.[147] The notion of a pretence was developed in cases concerning the landlord-tenant relationship.[148] This relationship, like the employment relationship, is generally characterised by a disparity of bargaining power.[149] In some cases, the stronger party (the landlord) may have an incentive to set up the express arrangements in a particular way, including by inserting terms that are not consistent with the reality of the relationship, to prevent the weaker party from

141 Not all Australian courts have adopted an approach to work contracts which focuses on the reality of the relationship. In some cases, courts have accorded significant weight to the express arrangements and placed less emphasis on the reality of the relationship. See C Roles and A Stewart, 'The Reach of Labour Regulation: Tackling Sham Contracting' (2012) 25 *AJLL* 258 at 267–8, who cite, eg, *Australian Air Express Pty Ltd v Langford* (2005) 147 IR 240; [2005] NSWCA 96 and *Tobiassen v Reilly* (2009) 178 IR 213; [2009] WASCA 26.

142 (2015) 228 FCR 346; 321 ALR 404; [2015] FCAFC 37 at [142]–[149].

143 Ibid, at [144].

144 *Snook* [1967] 2 QB 786 at 802; [1967] 1 All ER 518 at 528 at 802.

145 A C L Davies, 'Sensible Thinking about Sham Transactions' (2009) 38 *ILJ* 318 at 318, referred to in *Autoclenz* [2011] 4 All ER 745; [2011] UKSC 41 at [28].

146 The word 'pretence' is not used in *Autoclenz*, ibid. However, UK Supreme Court applied the principles enunciated in *Street v Mountford* [1985] AC 809; [1985] 2 All ER 289 (*Street*) and *AG Securities v Vaughan; Antoniades v Villiers* [1990] 1 AC 417; [1988] 3 All ER 1058 (*AG Securities*), cases which developed the notion of a 'pretence' in the landlord-tenant context. In *Quest (FCA)* (2015) 228 FCR 346; 321 ALR 404; [2015] FCAFC 37 at [146], North and Bromberg JJ regarded *Autoclenz* as a case in which the doctrine of pretence was applied in the employment context.

147 *Quest (FCA)*, ibid, at [146]–[147].

148 *Street*, [1985] AC 809; [1985] 2 All ER 289; *AG Securities* [1990] 1 AC 417; [1988] 3 All ER 1058.

149 *AG Securities*, ibid, at AC 458; All ER at 1064.

accessing a benefit under a statutory scheme.[150] When a pretence is established, the court can disregard such terms.[151] Importantly, there is no need to show that all parties to the express arrangements intended to deceive third parties as to the nature of their relationship.[152]

In *Wood*,[153] in a passage endorsed by the English Court of Appeal in *James*,[154] Elias J stated that a contract of employment between the host company and the worker will be implied where the express arrangements 'are a sham'.[155] In *James (EAT)*, Elias J provided an illuminating example of a sham in the labour hire context. Following *Autoclenz*, it may, with respect, now be more appropriate to regard this example as one involving a 'pretence' (where it cannot be shown that the worker had an intention to deceive). Elias J referred to cases (such as *Muscat*)[156] where a worker is employed directly by a company but is then dismissed and immediately rehired through a labour hire agency. In *James (EAT)*, Elias J made the following observation in respect of *Muscat*:

> It may be appropriate, depending on the circumstances, to conclude that the arrangements were a sham and that the worker and end-user have simply remained in the same contractual relationship with one another, or that even if the intention was to alter the relationship that has not in fact been achieved . . . However, in these cases the tribunal is not strictly implying a contract as such but is rather concluding that the agency arrangements have never brought the original contract to an end.[157]

Similar observations might be made in respect of *Damevski*,[158] a decision of the Full Federal Court of Australia. In *Damevski*, the worker (Mr Damevski) was initially employed by Endoxos Pty Ltd. Endoxos required Mr Damevski to 'resign'[159] and then immediately rehired him through MLC Workplace Solutions Pty Ltd, a labour hire agency. Marshall J[160] held that there was an implied contract of employment between Mr Damevski and Endoxos (the host company). Merkel J pursued a different line of reasoning based on the principles of agency.[161] A simpler route to the same conclusion in cases such as *Damevski* may be, as Elias J pointed out in *James (EAT)*, to find that the initial contract continued to operate between the worker and the 'host company'.[162]

In *Quest (FCA)*, North and Bromberg JJ observed that, aside from circumstances involving shams or pretences,[163] a court will not give effect to express arrangements unreservedly where these arrangements contradict the

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150 Ibid.
151 *Autoclenz* [2011] 4 All ER 745; [2011] UKSC 41 at [38].
152 Ibid, at [28]; *Quest (FCA)* (2015) 228 FCR 346; 321 ALR 404; [2015] FCAFC 37 at [145].
153 [2007] UKEAT 0432/07.
154 [2008] ICR 545; [2008] IRLR 302; [2008] EWCA Civ 35 at [29].
155 *Wood* [2007] UKEAT 0432/07 at [21], citing *James (EAT)* [2007] ICR 577; [2006] UKEAT 0006/06 at [58]. See also Brown, above n 83, at 182.
156 [2006] ICR 975; [2006] IRLR 354; [2006] EWCA Civ 220.
157 *James (EAT)* [2007] ICR 577; [2006] UKEAT 0006/06 at [60].
158 (2003) 133 FCR 438; 202 ALR 494; [2003] FCAFC 252.
159 Ibid, at [12].
160 Wilcox J agreed.
161 *Damevski* (2003) 133 FCR 438; 202 ALR 494; [2003] FCAFC 252 at [172].
162 *James (EAT)* [2007] ICR 577; [2006] UKEAT 0006/06 at [60].
163 *Quest (FCA)* (2015) 228 FCR 346; 321 ALR 404; [2015] FCAFC 37 at [148].

reality of the relationship[164] or are inconsistent with the subsequent practice of the parties.[165] In respect of the latter, two UK cases provide useful examples.

In *Harlow District Council v O'Mahony*,[166] the UK Employment Appeal Tribunal held that an implied contract of employment existed between the host company and the worker. Facts significant to the finding of an implied contract of employment included that the host company had entered into direct negotiations with the worker about a pay rise, the host company disciplined the worker, the host company asked the worker directly when it needed him to work overtime, the worker was not able to take leave for holidays without the host company's permission, and the worker was required to inform the host company when he was unable to attend work due to illness.[167]

In *Wood*, the UK Employment Appeal Tribunal held that there was an implied contract of employment between a worker and a host company who had entered into 'direct face to face negotiations on classic features of the contract'[168] which differed from the express arrangements originally in place between the agency and the host company, and the agency and the worker. The '[m]ost significant'[169] fact was that there had been 'direct negotiations about pay [a pay rise was negotiated one year into the relationship between the host company and the worker], notice and when holidays may be taken'.[170] The tribunal observed that the host company had 'altered the original arrangements in a significant way'[171] and 'chosen to put itself in a direct relationship with the individual, affecting the future conduct between them'.[172]

Not all discussions between the host company and the worker would result in an implied contract arising between these two parties. An example may help to illustrate the point. Suppose the worker is a forklift driver. Pursuant to the express contract between the agency and the host company, the agency agrees to supply the host company with a forklift driver to perform work as directed by the host company. Pursuant to the express contract between the agency and the worker, the agency directs the worker (who has been engaged by the agency on the basis that he is a forklift driver) to perform work as a forklift driver for the host company. The host company's directions to the worker as to what forklift tasks to perform would not give rise to an implied contract between the host company and the worker. Such directions are given in the host company's exercise of its power to supervise and direct the worker on a day-to-day basis, as agreed in the express contract between the agency and the host company.[173]

A change to the worker's agreed duties might, however, give rise to an

164 Ibid, at [148].
165 Ibid, at [149].
166 [2007] UKEAT 0144/07 (*Harlow*).
167 Ibid, at [23].
168 *Wood* [2007] UKEAT 0432/07 at [40]. See also Brown, above n 83, at 184; Wynn and Leighton, 'Agency Workers, Employment Rights and the Ebb and Flow of Freedom of Contract', above n 83, at 95–6.
169 *Wood*, ibid, at [39].
170 Ibid.
171 Ibid, at [40].
172 Ibid.
173 *Tilson* [2011] IRLR 169; [2010] EWCA Civ 1308 at [44]. See also Brown, above n 83, at 184.

implied contract.[174] Continuing with the example above, suppose that the host company directs the worker to perform work as a truck driver, and the worker agrees to do so. This change is not explicable as an exercise of control by the agency pursuant to the agency-worker contract, because the worker only agreed to work as a forklift driver under that contract. The change is also not explicable as an exercise of control by the host company, because the agency-host contract only confers authority on the host company to control the worker in his capacity as a forklift driver. The change cannot be explained as a variation to the agency-host contract, because there has been no communication between the agency and the host company on the issue, and there is no authority in the worker to vary the contract. Nor can the change be explained as a variation to the agency-worker contract, because there has been no communication between the agency and the worker on the issue, and there is no authority in the host company to vary the contract. One way to explain this change is to find that an implied contract has arisen between the host company and the worker.

(3) 'Genuine' labour hire relationships

In *Quest (FCA)*, North and Bromberg JJ observed that an implied contract of employment will not arise when the parties have entered into a 'genuine'[175] labour hire relationship and their conduct adheres to the terms of that arrangement.[176] UK decisions subsequent to *Dacas* and *Muscat* also support the proposition that an implied contract of employment will not arise in such circumstances.[177]

In *Damevski*, Merkel J provided some guidance on the key features of a 'genuine' labour hire relationship. His Honour made the following observations:

> In those cases, in general, the hiring agency interviewed and selected the workers, and determined their remuneration, without reference to the client. Usually, a client requesting a worker with particular skills was provided with one, who may or may not have been 'on the books' of the hiring agency at the time the order was placed. The workers of such hiring agencies were usually meant to keep the agency informed of their availability to work, and in many cases were not to agree to undertake work for the client which had not been arranged or directed by the hiring agency. Equipment was either supplied by the worker themselves, or by the hiring agency, except for specialist safety equipment which the client often supplied. Dismissal of a worker was only able to be effected by the hiring agency. The client can only advise the hiring agency that the particular worker is no longer required by it.[178]

These observations have been adopted in subsequent Australian cases.[179]

From a policy perspective, judicial acknowledgement of 'genuine' labour

174 See also Brown, ibid.

175 *Quest (FCA)* (2015) 228 FCR 346; 321 ALR 404; [2015] FCAFC 37 at [166]–[167].

176 Ibid.

177 See *James (EAT)* [2007] ICR 577; [2006] UKEAT 0006/06 at [58], endorsed on appeal in *James* [2008] ICR 545; [2008] IRLR 302; [2008] EWCA Civ 35 at [29].

178 *Damevski* (2003) 133 FCR 438; 202 ALR 494; [2003] FCAFC 252 at [174].

179 See, eg, *Wilton* (2007) 161 FCR 300; 162 IR 264; [2007] FCA 725 at [34]; *Arcadia v Accenture Australia* (2008) 170 IR 288; [2008] AIRC 108 at [10]; *Ramsey,* above n 119, at [68]; *Quest (FCA)* (2015) 228 FCR 346; 321 ALR 404; [2015] FCAFC 37 at [166].

hire relationships is important. As Professor Andrew Stewart has pointed out, labour hire arrangements are not illegitimate per se.[180] There are many reasons why businesses may use these arrangements, such as to deal with increases in workload demands.[181] It would be undesirable, from a policy perspective, for the implied contract doctrine to undermine genuine arrangements that accurately reflect the reality of the relationship between the parties. Its confinement to circumstances where there is a disjunct between form and substance (discussed above) is justified.

Conclusion

This article has analysed some important doctrinal issues that attend the attribution of responsibility in trilateral work relationships. In the course of doing so, it has also sought to provide greater clarity to a concept that has generated divergent views within the Australian judiciary. The implied contract of employment has gained increased attention in recent years. It is a useful mechanism for courts seeking to give effect to the reality of the relationship between the parties in a trilateral work relationship. From a policy perspective, its limitation to situations where the express arrangements differ from the reality is justified. The concept is compatible with orthodox principles of Australian contract law and will be of assistance to courts and tribunals as they confront the challenges arising from trilateral work relationships.

180 Stewart, above n 13, at 273–4.
181 Ibid.

CHAPTER 7

Pauline Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (2021) 44(4) *University of New South Wales Law Journal* (forthcoming)

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Pauline Bomball

THE 'ENTREPRENEURSHIP APPROACH' TO DETERMINING EMPLOYMENT STATUS: A NORMATIVE AND PRACTICAL CRITIQUE

PAULINE BOMBALL*

Abstract

Recently, the concept of entrepreneurship has attracted increased attention in the Australian case law on employment status. In some cases, courts have adopted an 'entrepreneurship approach' in determining whether a worker is an employee or an independent contractor. In other cases, such an approach has been rejected. In the policy arena, the authors of the Report of the Inquiry into the Victorian On-Demand Workforce, released in July 2020, recommended that the Fair Work Act 2009 (Cth) be amended to include a definition of employment that enshrines the entrepreneurship approach. While the concept of entrepreneurship has appeared increasingly frequently in the cases and in policy discussions, it remains an under-theorised concept. This article critically evaluates the concept from a normative worker-protective perspective. It assesses the entrepreneurship approach by reference to theories of power and vulnerability in the employment relationship. It argues that the entrepreneurship approach accurately captures the characteristic vulnerabilities of employees that render them in need of the protection of labour law. This article also critically examines the practical operation of the entrepreneurship approach from a worker-protective perspective. In so doing, it explores judicial approaches to the concept of entrepreneurship in cases concerning employment status in the United States. The article discerns from this comparative analysis important lessons for the Australian context about the nature and operation of the entrepreneurship approach to determining employment status. It contends that an entrepreneurship approach that operates in a manner similar to the 'ABC' test in the United States warrants consideration by those seeking to revitalise the tests for employment status in Australia.

I Introduction

In their recent treatise on the common law of employment, Professors Gordon Anderson, Douglas Brodie and Joellen Riley observed that there is a need to 'revitalize the tests used to identify the contract of employment, so that they guard against the inappropriate use of self-employment.'[1] This need has become particularly pressing in recent years, as changes in the nature of working relationships have presented challenges to the traditional architecture for determining whether a worker is an employee or an independent contractor.[2] This article argues that the 'entrepreneurship approach'[3] to determining employment status is a promising

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[1] Gordon Anderson, Douglas Brodie and Joellen Riley, *The Common Law Employment Relationship: A Comparative Study* (Edward Elgar, 2017) 68.

[2] See, eg, Brishen Rogers, 'Employment Rights in the Platform Economy: Getting Back to Basics' (2016) 10(2) *Harvard Law and Policy Review* 479, 480–3; Sandra Fredman and Darcy Du Toit, 'One Small Step Towards Decent Work: *Uber v Aslam* in the Court of Appeal' (2019) 48(2) *Industrial Law Journal* 260, 260–1; Joellen Riley, 'The Definition of the Contract of Employment and its Differentiation from Other Contracts and Other Work Relations' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 321, 326; Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2nd ed, 2011) 165–6, 197–9; Committee of Experts on the Application of Conventions and Recommendations, *Report on Promoting Employment and Decent Work in a Changing Landscape*, 109th sess, ILO Doc ILC109/III(B) (2020) [158].

[3] See, eg, *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* (2011) 214 FCR 82, 122–3 ('*On Call Interpreters*'); *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015)

candidate for the task of revitalisation. In substantiating this argument, this article adopts a normative perspective, critically analysing the entrepreneurship approach through a worker-protective lens. Critiquing legal doctrine from a worker-protective perspective is a well-established technique of labour law scholars.[4] As Professor Anne Davies has observed, '[t]he impact of a particular development – whether common law or statutory – on workers' interests will always be central to labour lawyers' concerns.'[5]

In undertaking a normative critique of the entrepreneurship approach to employment status, this article extends the literature in two ways. First, it examines and elucidates the relationship between the concepts of vulnerability and entrepreneurship in the employment context. In the Australian context, a worker-protective approach to determining employment status, and indeed a worker-protective approach to labour law more generally, is predicated upon the assumption that employees possess certain characteristics that render them in need of protection.[6] As Professor Andrew Stewart has observed, there is a distinction between 'those workers who prima facie require protection from the consequences of their lack of bargaining power, or who should have access to social benefits paid for (at least in part) by those who hire their services, from those who do not merit such protection or benefits.'[7]

Theorists of employment law have articulated these characteristics or vulnerabilities in various ways. For example, Sir Otto Kahn-Freund identified the relevant vulnerability as an inequality of bargaining power between the employer and the employee.[8] Professor Hugh Collins examined the asymmetry of power between the employer and the employee through the concepts of market power and bureaucratic power.[9] Professor Guy Davidov captured the relevant vulnerabilities in the concepts of democratic deficits and dependency.[10] This article evaluates the entrepreneurship approach to determining employment status by reference to these theories of power and vulnerability in the employment relationship. The legal tests for employment status should, on a worker-protective approach, be able to identify accurately those workers who exhibit the vulnerabilities that justify the conferral of employment status and the concomitant protections of labour law.[11] This article contends that the entrepreneurship approach is capable of identifying as employees those workers who exhibit the relevant vulnerabilities.

The second way in which this article extends the literature is through its comparative analysis of cases on the entrepreneurship approach in the United States ('US'). This comparative study reveals insights about the nature and practical operation of the entrepreneurship approach that would not be discerned simply by examining the emerging Australian case law on this approach. This article explores two distinct judicial approaches to entrepreneurship in US

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228 FCR 346, 389–92 ('*Quest*'); *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 381 ALR 457, 461 (Allsop CJ) ('*Personnel Contracting*').

[4] A C L Davies, 'The Relationship between the Contract of Employment and Statute' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 73, 95.

[5] Ibid.

[6] Guy Davidov, *A Purposive Approach to Labour Law* (Oxford University Press, 2016) ch 3; Guy Davidov, 'The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection' (2002) 52(4) *University of Toronto Law Journal* 357; Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15(3) *Australian Journal of Labour Law* 235, 260.

[7] Stewart, 'Redefining Employment?' (n 6) 260.

[8] Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law* (Stevens & Sons, 3rd ed, 1983) 18.

[9] Hugh Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (1986) 15(1) *Industrial Law Journal* 1.

[10] Davidov, 'A Purposive Approach to Labour Law' (n 6) ch 3.

[11] Ibid ch 6.

cases concerning the distinction between employees and independent contractors. The first approach is located in a line of case law from the United States Court of Appeals for the District of Columbia Circuit ('DC Circuit Court').[12] In these cases, the DC Circuit Court adopted the 'entrepreneurial opportunity test'.[13] This article critically analyses these cases and uses this analysis to demonstrate that the entrepreneurship approach can, if applied by reference to the existence of entrepreneurial opportunities as opposed to the actual exercise of entrepreneurial functions,[14] lead to the exclusion from employment status of those who exhibit the vulnerabilities of employees. The second approach that is examined is that of the Supreme Court of California in *Dynamex Operations West Inc v Superior Court of Los Angeles County*.[15] In this case, the Court adopted the 'ABC' test for determining employment status.[16] The ABC test invokes the concept of entrepreneurship in a way that enables the test to bring within the protective scope of labour law those workers who are vulnerable in the relevant sense. To this author's knowledge, the approach of the DC Circuit Court has not received any scholarly attention in Australia, and the ABC test has been referred to only briefly in the Australian literature.[17]

The entrepreneurship approach to determining whether a worker is an employee or an independent contractor has recently attracted increased attention in Australia. In the *Report of the Inquiry into the Victorian On-Demand Workforce*, which was released in July 2020, it was recommended that the *Fair Work Act 2009* (Cth) be amended to include a definition of employment that enshrines the entrepreneurship approach.[18] The Victorian report referred, among other things, to diverging judicial views about the proper approach to the application of the multifactorial test for employment status in Australia.[19] The multifactorial test for employment status comprises a range of factors, including the nature and extent of the control that the hiring organisation exercises over the worker,[20] the extent to which the worker is integrated into the organisation's business, whether the worker is paid on the basis of time or on the basis of task completion, whether the worker is permitted to delegate the work to another party, whether the organisation supplies the tools and equipment required for performance of the work, and whether the worker is permitted to work for others.[21] A court is required to weigh up these factors to determine whether the worker is an employee or an independent contractor.[22] The conclusion that a worker is an employee carries with it several important consequences, including that the worker is eligible for a range of statutory rights and

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[12] See, eg, *Corporate Express Delivery Systems v NLRB*, 292 F 3d 777 (DC Cir 2002) ('*Corporate Express Delivery Systems*'); *FedEx Home Delivery v NLRB*, 563 F 3d 492 (DC Cir 2009) ('*FedEx Home Delivery*'); *Lancaster Symphony Orchestra v NLRB*, 822 F 3d 563 (DC Cir 2016) ('*Lancaster Symphony Orchestra*').

[13] Ibid.

[14] See below Part III(A).

[15] *Dynamex Operations West Inc v Superior Court of Los Angeles County* 4 Cal 5th 903 (2018) 66–81 ('*Dynamex*').

[16] Ibid. See below Part III(B).

[17] The author has found references to the ABC test in the footnotes of the following Australian scholarly works: Andrew Stewart, Jim Stanford and Tess Hardy (eds), *The Wages Crisis in Australia: What It Is and What to Do about It* (University of Adelaide Press, 2018) 294 n 18; 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, 8 n 24. In these footnotes, it was stated that there are similarities between the entrepreneurship approach in the Australian cases and the ABC test in the United States.

[18] Natalie James, *Report of the Inquiry into the Victorian On-Demand Workforce* (June 2020) 192.

[19] Ibid 105–6, 185–7.

[20] The term 'hiring organisation' or 'hirer' is used throughout this article as a neutral term referring to the person or organisation that hires a worker to perform work: see Stewart, 'Redefining Employment?' (n 6) 235 n 2.

[21] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.

[22] *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939, 944; *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2010) 184 FCR 448, 460.

protections that are conferred upon employees only.[23] Workers who are not categorised as employees, such as independent contractors, are usually not able to access these statutory rights and protections.[24]

In some cases, courts invoke the concept of entrepreneurship in their application of the multifactorial test for employment status.[25] In essence, this involves asking whether the worker is carrying on a business of his or her own.[26] If the question is answered in the negative, then it is likely that the worker is an employee.[27] The courts' conceptualisation of entrepreneurship is based upon the following proposition, which was articulated by Windeyer J in *Marshall v Whittaker's Building Supply Company*[28] and subsequently embraced by a majority of the High Court of Australia in *Hollis v Vabu Pty Ltd*:[29] '[T]he distinction between [an employee] and an independent contractor is … rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own.'[30]

Three distinct approaches to the concept of entrepreneurship are discernible from the Australian case law on employment status.[31] Under the first approach, the concept of entrepreneurship is treated as a separate test for determining employment status.[32] Under the second approach, the concept of entrepreneurship is regarded as an overarching framework or organising principle that informs the evaluation of the various factors in the multifactorial test.[33] According to this approach, the factors are assessed to determine whether the worker is carrying on a business of his or her own. Under the third approach, the concept of entrepreneurship is regarded as simply one factor that is to be weighed against others in the multifactorial test.[34] In cases that have adopted the third approach, it has been emphasised that the central question is not whether the worker is an entrepreneur, but rather whether the worker is an employee.[35] Focusing on the issue of entrepreneurship is, according to this view, likely to distract from that central question.[36] This article is not concerned with discerning the proper approach to the multifactorial test as a matter of legal doctrine. That issue is the subject of a separate article.[37] In that article, it is argued that the proper approach is the one that treats the

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[23] Joellen Riley Munton, 'Judge-Made Law in the Common Law World: A Conservative Influence on the Transformation of Labour Law by Statute' in Tamás Gyulavári and Emanuele Menegatti (eds), *The Sources of Labour Law* (Wolters Kluwer, 2020) 75, 78.
[24] Ibid.
[25] See cases cited at above n 3. See also Stewart and McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (n 17) 8; Anderson, Brodie and Riley, 'The Common Law Employment Relationship' (n 1) 36–7.
[26] *On Call Interpreters* (2011) 214 FCR 82, 123–7; *Quest* (2015) 228 FCR 346, 389–92.
[27] Ibid.
[28] (1963) 109 CLR 210.
[29] (2001) 207 CLR 21.
[30] Ibid 217.
[31] Pauline Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (2021) 43(1) *Sydney Law Review* 83.
[32] Ibid 85 n 17, citing *On Call Interpreters* (2011) 214 FCR 82, 123–7; *Quest* (2015) 228 FCR 346, 389–92.
[33] Ibid 86 n 26, citing *Personnel Contracting* (2020) 381 ALR 457, 461–3 (Allsop CJ).
[34] Ibid 85 n 21, citing *Tattsbet Ltd v Morrow* (2015) 233 FCR 46, 61 ('*Tattsbet*'); *Fair Work Ombudsman v Ecosway Pty Ltd* [2016] FCA 296, [78]; *Jamsek v ZG Operations Australia Pty Ltd* (2020) 297 IR 210, 216, 245–6; *Dental Corporation Pty Ltd v Moffet* (2020) 297 IR 183, 119–200; *Eastern Van Services Pty Ltd v Victorian WorkCover Authority* (2020) 296 IR 391, 399–400. See also Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (n 31) 9–10.
[35] See, eg, *Tattsbet* (2015) 233 FCR 46, 61.
[36] Ibid.
[37] Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (n 31).

concept of entrepreneurship as the organising principle that informs the evaluation of the factors in the multifactorial test.[38] This article adopts that view of the role of entrepreneurship in the legal determination of employment status.

Leaving those doctrinal issues to one side, this article asks and answers a different question: does the entrepreneurship approach accurately capture those workers who possess the characteristic vulnerabilities of employees? The answer to this question is relevant to the broader issue addressed in this article, which is whether the entrepreneurship approach is a promising candidate for the project of revitalising the legal tests for determining employment status. One point about the scope of this article should be noted at the outset. In order for a person who has been engaged to perform work to fall within the 'employee' category, it must be established that there is a contract between the hirer and the person performing the work.[39] It must also be shown that the contract is a contract of employment (as opposed to some other type of contract, such as an independent contract).[40] This article focuses on the second issue and does not consider the antecedent question of whether there is a contract between the hirer and the worker.

The article proceeds in the following way. Part II of the article explores the concept of vulnerability in employment relations at a theoretical level. It examines two related bodies of theoretical work. The first body of work builds an account of the nature of power within the employment relationship.[41] An understanding of the power dynamics within an employment relationship is vital to understanding the concept of vulnerability in this relationship. The second body of work considers directly the vulnerabilities of employees.[42] This article engages with these two bodies of work in order to build a theoretical framework for assessing the entrepreneurship approach to determining employment status. Turning from theory to practice, Part III of the article analyses two different judicial approaches to the concept of entrepreneurship in the United States: the 'entrepreneurial opportunity test' enunciated by the DC Circuit Court,[43] and the 'ABC' test adopted by the Supreme Court of California in *Dynamex*.[44] Part IV of the article harnesses the insights from the theoretical analysis in Part II and the comparative study in Part III to demonstrate the worker-protective potential of the entrepreneurship approach to determining employment status.

This article subjects to close scrutiny the use of the concept of entrepreneurship as the overarching framework for the application of the indicia in the multifactorial test. Judicial use of the concept of entrepreneurship in the inquiry as to employment status remains the subject of significant contestation in Australian law.[45] In a recent article on employment status in the United Kingdom, Professor Simon Deakin argued that while the legal inquiry as to employment status directs attention to a myriad of indicia that need to be weighed and balanced, that inquiry

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[38] Ibid 101–4.
[39] Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6th ed, 2016) 204, citing *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95.
[40] Ibid.
[41] Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (n 9); Orsola Razzolini, 'The Need to Go Beyond Contract: "Economic" and "Bureaucratic" Dependence in Personal Work Relations' (2010) 31 *Comparative Labor Law and Policy Journal* 267; Davies and Freedland, 'Kahn-Freund's Labour and the Law' (n 8) 18.
[42] Davidov, 'A Purposive Approach to Labour Law' (n 6) ch 3, ch 6; Lisa Rodgers, *Labour Law, Vulnerability and the Regulation of Precarious Work* (Edward Elgar Publishing, 2016).
[43] See cases cited at above n 12.
[44] *Dynamex*, 4 Cal 5th 903 (2018).
[45] See above nn 25–38 and accompanying text.

is not simply a fact-dependent exercise that is devoid of any coherence at a conceptual level.[46] Professor Deakin considered a number of overarching tests, discerned from the cases in the United Kingdom, in his article, including 'control, integration, economic reality and mutuality of obligation'.[47] As Professor Deakin demonstrated, the particular overarching test or approach that is applied has a significant bearing on how a court attributes weight to particular factors, and on how the court groups particular factors together into 'clusters'.[48] The manner in which factors are clustered together is important 'because the way in which the individual indicators are grouped together influences the relative weight which a court or tribunal is likely to accord to any one of them.'[49] As this clustering and weighting process is influenced by the overarching approach, it is important that the overarching approach be critically evaluated. This article selects one of those overarching approaches (the entrepreneurship approach) and subjects it to close analysis.

II Conceptualising Vulnerability in the Employment Relationship

This part of the article builds the theoretical framework that will be used to assess the worker-protective potential of the entrepreneurship approach to determining employment status. The normative critique undertaken by this article is anchored in the concept of vulnerability. Employees are vulnerable in ways that are distinctive and that justify the intervention of labour law.[50] It is this quality of vulnerability that justifies the conferral of protection upon employees.[51] This normative vision of the beneficiary of labour law is consistent with Sir Otto Kahn-Freund's seminal articulation of the purpose of labour law. In an oft-quoted passage, Sir Otto Kahn-Freund observed that 'the main object of labour law has always been, and … will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.'[52]

The concept of inequality of bargaining power captures one aspect of the vulnerability of employees. It directs attention more generally to the notion of power within the employment relationship. An understanding of the power relations between employers and employees is of assistance in developing an exposition of the concept of vulnerability in the employment relationship. Accordingly, this part of the article turns first to theories of power before examining the interaction between the concepts of power and vulnerability in the employment relationship.

A Power in the Employment Relationship

In his scholarship on the notion of power within the employment relationship, Professor Hugh Collins identified two dimensions of the power wielded by employers.[53] He referred to these

[46] Simon Deakin, 'Decoding Employment Status' (2020) 31(2) *King's Law Journal* 180, 193. See also Alan Bogg, Michael Ford and Tania Novitz, 'Introduction to the Special Issue on Gig Work' (2020) 31(2) *King's Law Journal* 167, 169–70.
[47] Deakin, 'Decoding Employment Status' (n 46) 185.
[48] Ibid.
[49] Ibid.
[50] Davidov, 'A Purposive Approach to Labour Law' (n 6) ch 3.
[51] Ibid.
[52] Davies and Freedland, 'Kahn-Freund's Labour and the Law' (n 8) 18. See also Joellen Riley, 'The Evolution of the Contract of Employment Post WorkChoices' (2006) 29(1) *University of New South Wales Law Journal* 166, 172–3.
[53] Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (n 9).

as 'market power' and 'bureaucratic power'.[54] Market power arises at the point of entry into the employment contract, whereas bureaucratic power subsists for the duration of the contract.[55] In more recent work,[56] Professor Collins developed these concepts by reference to Sir Otto Kahn-Freund's distinction between the notions of submission and subordination within the employment relationship.[57] Professor Collins captured the employee's position at the point of entry into the contract in the notion of 'submission'.[58] This submission arises in part by virtue of the employer's market power, and the employer's market power is in turn primarily a product of market forces.[59] On the other hand, the employee's position during the subsistence of the employment contract is one of 'subordination',[60] created primarily by contractual duties imposed upon the employee that implement and support a structure of bureaucratic control over the employee.[61] The following sections explore these two aspects of the power relation between employers and employees through these concepts of market power and bureaucratic power.

In a recent contribution, Professor Mark Freedland drew attention to the control that hiring organisations have over the terms upon which they contract with their workers.[62] Professor Collins explored the market forces that give rise to this inequality of bargaining power between the parties, including asymmetric knowledge and resources, and transaction costs.[63] The employer generally has, relative to the employee, greater access to resources that can be directed towards the negotiation of the contract, and greater knowledge and experience in entering contracts for the performance of work.[64] This enables the employer to exert significant control over the terms of the contract, and enables the employer to structure the contract in a way that is favourable to the employer rather than to the employee.[65] Asymmetric information also leaves the employee in a position where he or she is not fully informed about the relevant terms and conditions that are available and of his or her 'value' in the market,[66] leaving the employee in an inferior position in the negotiation. Moreover, in a significant number of cases, there may be no negotiation at all, with contracts offered on a take it or leave it basis.[67] Prospective employees are often not in a position to reject an unfavourable offer and look for alternative work.[68] There are costs associated with looking for jobs and negotiating contracts,

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[54] Ibid.
[55] Ibid 1–2.
[56] Hugh Collins, 'Is the Contract of Employment Illiberal?' in Hugh Collins, Gillian Lester, and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press, 2019) 48.
[57] Davies and Freedland, 'Kahn-Freund's Labour and the Law' (n 8) 18, quoted in Collins, 'Is the Contract of Employment Illiberal?' (n 56) 51.
[58] Collins, 'Is the Contract of Employment Illiberal?' (n 56) 51–2.
[59] Ibid.
[60] Ibid 52–6.
[61] Ibid.
[62] Mark Freedland, 'General Introduction – Aims, Rationale, and Methodology' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 3, 12–8.
[63] Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (n 9) 1–2. See also David Cabrelli, 'The Role of Standards of Review in Labour Law' (2019) 39(2) *Oxford Journal of Legal Studies* 374, 384–8; Razzolini, 'The Need to Go Beyond Contract: "Economic" and "Bureaucratic" Dependence in Personal Work Relations' (n 41), 279–80; Davidov, 'A Purposive Approach to Labour Law' (n 6) 48–54.
[64] Ibid.
[65] Ibid.
[66] Ibid. See also Lisa Rodgers, *Labour Law, Vulnerability and the Regulation of Precarious Work* (Edward Elgar Publishing, 2016) 59.
[67] See Owens, Riley and Murray, 'The Law of Work' (n 2) 164; Hugh Collins, 'Legal Responses to the Standard Form Contract of Employment' (2007) 36(1) *Industrial Law Journal* 2.
[68] Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (n 9) 1–2; Davidov, 'A Purposive Approach to Labour Law' (n 6) 49.

and the existence of alternative opportunities may be limited.[69] The market forces that are in play at the point of entry into the contract explain Sir Otto Kahn-Freund's observation that the contract of employment is, '[i]n its inception … an act of submission.'[70]

Sir Otto Kahn-Freund also opined that 'in its operation [the contract of employment] is a condition of subordination.'[71] Professor Collins drew a connection between the idea of bureaucratic power and the employee's condition of subordination during the subsistence of the employment contract.[72] The employee works within a bureaucratic organisation with a hierarchical structure.[73] This hierarchy, with its system of direction and control, is necessary for the effective and efficient operation of the organisation.[74] This bureaucratic power is vested in the employer by the contract of employment.[75] A suite of terms are implied by law into the employment contract.[76] Of particular relevance are the employee's duty of fidelity and duty to obey lawful and reasonable directions of the employer.[77] The employment contract institutionalises and supports a bureaucratic power structure in which employees are subordinate to their employers.[78]

Importantly, bureaucratic power exists regardless of the bargaining power of the employee at the point of entry into the contract of employment.[79] That is, the employee's subordination exists even if there is an absence of submission on the part of the employee in the negotiation of the terms of the contract. There are some employees who, because of their unique skills or attributes, are not in an inferior bargaining position relative to their employers.[80] However, regardless of the employee's bargaining power at the outset, upon entry into the employment contract, the employer's bureaucratic power arises.[81] Professor Collins' theoretical exposition of the power structure in the employment relationship is of significance in articulating the vulnerabilities of employees that warrant their protection, through means of 'counteraction'[82] of the asymmetry of power, by labour law. Those vulnerabilities, which emerge because of the employer's market power and bureaucratic power, are captured in the concepts of submission and subordination.

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[69] Ibid.
[70] Davies and Freedland, 'Kahn-Freund's Labour and the Law' (n 8) 18, quoted in Collins, 'Is the Contract of Employment Illiberal?' (n 56) 51.
[71] Ibid.
[72] Collins, 'Is the Contract of Employment Illiberal?' (n 56) 52–6.
[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] For an analysis of implied terms in the contract of employment, see Hugh Collins, 'Implied Terms in the Contract of Employment' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 471; Gabrielle Golding, 'Terms Implied by Law into Employment Contracts: Are They Necessary? (2015) 28(2) *Australian Journal of Labour Law* 113; Gabrielle Golding, 'The Origins of Terms Implied by Law into English and Australian Employment Contracts' (2020) 20(1) *Oxford University Commonwealth Law Journal* 163.
[77] Collins, 'Is the Contract of Employment Illiberal?' (n 56) 52.
[78] Ibid 52–6.
[79] Ibid 52; Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (n 9) 1–2.
[80] Ibid.
[81] Ibid. See also Razzolini, 'The Need to Go Beyond Contract: "Economic" and "Bureaucratic" Dependence in Personal Work Relations' (n 41) 280–2.
[82] Davies and Freedland, 'Kahn-Freund's Labour and the Law' (n 8) 18.

B Vulnerability in the Employment Relationship

In his account of the employment relationship, Professor Davidov identified two types of vulnerabilities that employees characteristically possess, which he termed 'democratic deficits' (or 'subordination') and 'dependency'.[83] Professor Davidov contended that these two vulnerabilities comprise the 'unique characteristics'[84] of employees that render them in need of the protection of labour law, and that the tests for determining employment status should capture these characteristics.[85] Turning first to the notion of democratic deficits, Professor Davidov referred to the necessity, within an organisation, for the employer to exert control over employees.[86] This control, which is often effected through the use of managers, is essential in order for the employer to coordinate work within the organisation.[87] It is not feasible for individual employees to participate in the making of the myriad decisions that need to be made in order for the organisation to operate effectively.[88]

Professor Davidov observed that the control that an employer exerts over its employees may be rationalised in two ways. The first explanation for the employer's control is founded in the power theory.[89] According to this theory, the employer's ascendency and wielding of power represents the domination of capital over labour in the struggle between the two groups.[90] The second explanation is grounded in economic theories of efficiency.[91] Drawing upon Coase's theory of the firm[92] and subsequent developments of that theory by other scholars,[93] Professor Davidov observed that a hierarchical structure of governance promotes the efficient operation of the organisation through a reduction in transaction costs and through the mitigation of shirking and opportunism.[94]

Both theories aid in explaining the governance structure of the organisation, a structure that institutionalises the employer's control over the employee. Professor Davidov contended that this governance structure impedes the democratic participation of employees in decisions that affect their working lives.[95] In a democracy, those to whom decisions apply are to have a right to participate in the making of those decisions.[96] The structure of governance imposed upon those in an employment relationship is such that they have limited opportunity to participate in decisions that have a substantial impact upon their lives.[97] Professor Davidov invoked the

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[83] Davidov, 'A Purposive Approach to Labour Law' (n 6) 35.
[84] Ibid.
[85] Ibid ch 3, ch 6.
[86] Ibid 37–8.
[87] Ibid.
[88] Ibid.
[89] Ibid 40.
[90] Ibid. See also Lisa Rodgers, *Labour Law, Vulnerability and the Regulation of Precarious Work* (Edward Elgar Publishing 2016) 21–2.
[91] Davidov, 'A Purposive Approach to Labour Law' (n 6) 40–3.
[92] Ronald H Coase, 'The Nature of the Firm' (1937) 4(16) *Economica* 386, cited in Davidov, 'A Purposive Approach to Labour Law' (n 6) 41 nn 33–4.
[93] Armen A Alchian and Harold Demsetz, 'Production, Information Costs, and Economic Organization' (1972) 62 *American Economic Review* 777; Oliver E Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (Free Press, 1975) ch 4; Oliver E Williamson, *The Economic Institutions of Capitalism* (Free Press 1985); Oliver E Williamson, 'Transaction- Cost Economics: The Governance of Contractual Relations' (1979) 22 *Journal of Law and Economics* 233, all cited in Davidov, 'A Purposive Approach to Labour Law' (n 6) 41–2 nn 35–6.
[94] Davidov, 'A Purposive Approach to Labour Law' (n 6) 41–2.
[95] Ibid 38–39.
[96] Ibid.
[97] Ibid.

phrase 'democratic deficits',[98] which he used interchangeably with the term 'subordination',[99] to capture this aspect of the employment relationship. Employees are subordinate because they are subject to the employer's control.[100] The absence of an ability of the part of employees to control decisions that affect their working lives renders employees subordinate and thereby vulnerable.

In addition to subordination, Professor Davidov identified a second vulnerability within the employment relationship, which he called dependency.[101] He argued that there are two key aspects of this notion of dependency, which he termed economic dependency and social/psychological dependency.[102] Economic dependency refers to an employee's dependence upon the employer for the employee's economic livelihood.[103] Social/psychological dependency refers to the employee's dependence upon the employer for the employee's social and psychological wellbeing.[104] Work provides people with a forum for social connectedness as well as an outlet for the expression of their identity, the direction of their creative and productive energies, the refinement of their skills, the development of their self-worth, and the promotion of their sense of dignity.[105] Core to these economic and social/psychological dependencies is the absence of an ability on the part of the employee to spread his or her risks.[106] An employee is usually dependent upon the one employing entity for the fulfilment of his or her work-related social/psychological and economic needs.[107] Independent contractors, on the other hand, can generally spread these risks among different clients, suppliers, products and workers, thereby providing themselves with a degree of 'self-insurance' from these risks.[108] It should be acknowledged that dependency is not necessarily a distinguishing attribute of employees. As Professor Davidov observed, there are employees who work multiple jobs and are not dependent upon the one employer for the fulfilment of their social/psychological and economic dependencies.[109] Likewise, there are independent contractors who are dependent upon one client for most or all of their work.[110]

C The Interaction between Vulnerability and Entrepreneurship

The entrepreneurship approach directs attention to whether the worker is carrying on a business of his or her own, as opposed to working in the business of the organisation that has engaged the worker.[111] In those Australian cases where the concept of entrepreneurship has been treated as the central inquiry for the purposes of determining employment status, it has been recognised that there are significant differences between working for another and working in one's own business.[112] Professor Andrew Stewart, who has advocated for statutory enshrinement of the

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[98] Ibid.
[99] Ibid 35, 39–40.
[100] Ibid 38–40.
[101] Ibid 43.
[102] Ibid.
[103] Ibid 45–8.
[104] Ibid 43–5.
[105] Ibid.
[106] Ibid 44–5, 47–8.
[107] Ibid.
[108] Ibid.
[109] Ibid 45.
[110] Ibid.
[111] *On Call Interpreters* (2011) 214 FCR 82, 122–3; *Quest* (2015) 228 FCR 346, 389–92; *Personnel Contracting* (2020) 381 ALR 457, 461 (Allsop CJ).
[112] Ibid. See also *Marshall v Whittaker's Building Supply Company* (1963) 109 CLR 210, 217.

entrepreneurship approach to employment status,[113] has similarly embraced the proposition that there are important differences between these two modes of working.[114] Professor Stewart observed that '[t]here does seem to be a fundamental difference, in a capitalist system, between running your own business and working for somebody else's.'[115]

The differences between the two forms of work arrangements may be explained by reference to the theories of power and vulnerability discussed above. This explanation demonstrates the utility of the entrepreneurship approach to determining employment status. As noted at the outset of this article, the entrepreneurship approach treats the concept of entrepreneurship as the overarching framework or prism through which to evaluate the various indicia in the multifactorial test.[116] The present author contends that the use of entrepreneurship as the touchstone for the inquiry has much to commend it. The entrepreneur is not brought within the bureaucratic structure of the organisation for which he or she performs work. The entrepreneur, by virtue of carrying on a business of his or her own, stands outside that bureaucratic structure. The degree of bureaucratic power that may be exerted over the entrepreneur is significantly attenuated in this context. In this regard, the entrepreneur does not occupy a position of subordination vis-à-vis the organisation, in the sense that Professor Collins conceived of subordination.[117] Nor does the entrepreneur exhibit the characteristics of subordination identified by Professor Davidov.[118] The entrepreneur makes the decisions as to the running of the business and as to his or her working life.

From a normative perspective, an approach to identifying employment that focuses on the notion of entrepreneurship is desirable. The worker-protective critique in this article proceeds on the basis that there are certain vulnerabilities exhibited by employees that warrant their protection by labour law.[119] Accordingly, in order for the entrepreneurship approach to be of utility from a worker-protective perspective, it must be able to capture accurately the characteristics of employees that render them vulnerable vis-à-vis their employers. The theoretical analysis presented above suggests that the entrepreneurship approach is able to designate as employees those workers who exhibit the relevant vulnerabilities, and to exclude from protection those who are capable of protecting themselves within the realm of commercial law. The following part of this article turns from the theoretical to the practical. It explores how the entrepreneurship approach has operated in practice in the United States, and draws from this comparative analysis several lessons for Australia.

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[113] See Stewart, 'Redefining Employment' (n 6) 270–6; Cameron Roles and Andrew Stewart, 'The Reach of Labour Regulation: Tackling Sham Contracting' (2012) 25 *Australian Journal of Labour Law* 258, 279–80; Stewart, Stanford and Hardy, 'The Wages Crisis in Australia: What It Is and What to Do about It' (n 17) 291; Stewart and McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (n 17) 21–2.

[114] Stewart, 'Redefining Employment' (n 6) 261.

[115] Ibid.

[116] This is the approach to the concept of entrepreneurship that has been adopted by the present author. As noted above, there are competing approaches to the concept of entrepreneurship in cases concerning employment status. These competing approaches are considered above at nn 31–8 and accompanying text, and in Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (n 31).

[117] See above nn 71–81 and accompanying text.

[118] See above nn 83–100 and accompanying text.

[119] See above nn 50–2 and accompanying text.

III Vulnerability and Entrepreneurship: A Comparative Lens

This part of the article examines two different judicial approaches to the concept of entrepreneurship in the United States. The US has been selected for this comparative analysis because there is a well-developed body of case law in that jurisdiction on the concept of entrepreneurship in the employment context.[120] More generally, the US is a suitable comparator on the legal test for determining employment status because of a number of similarities between the Australian and US labour law frameworks.[121] These include the fact that the distinction between employees and independent contractors arises in similar contexts, including in relation to the law of vicarious liability, and in respect of the application of statutes that operate by reference to the concept of employment, such as labour statutes and taxation statutes.[122] In addition, in both Australia and the US, the content of the concept of employment is in many instances left to the judiciary, with legislation generally leaving the concept of employment undefined.[123] In both jurisdictions, courts also apply variously formulated multifactorial tests to determine whether a worker is an employee or an independent contractor.[124]

Before presenting the analysis of the US case law, it is important to explain the purpose of this comparative exercise. In an article on the methodology and objectives of comparative contract law, Professor Hugh Collins identified four ways in which legal scholars might approach the task of comparative analysis.[125] The third and fourth approaches are of relevance here. The third approach involves the scholar examining the law of an overseas jurisdiction for solutions to domestic problems.[126] This approach often involves exploring and recommending the transplantation of a common law or statutory development in the overseas jurisdiction that has addressed effectively a problem that remains unresolved in the domestic jurisdiction.[127] The success of such an approach depends upon a range of factors, including the suitability of the selected comparator.[128] A proposed legal transplant must be examined not in isolation but rather in the context, including the social and political context, in which it originated.[129] The similarity of these contextual factors across the two jurisdictions is an important determinant of the success of the transplantation.[130] The fourth approach that Professor Collins identified is one that involves exploring the law of an overseas jurisdiction in order to understand better certain aspects of domestic law.[131] This approach requires, among other things, that the

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[120] See, eg, *Corporate Express Delivery Systems*, 292 F 3d 777 (DC Cir 2002); *FedEx Home Delivery*, 563 F 3d 492 (DC Cir 2009); *Lancaster Symphony Orchestra*, 822 F 3d 563 (DC Cir 2016); *Dynamex*, 4 Cal 5th 903 (2018).
[121] Pauline Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (2019) 42 *Melbourne University Law Review* 370, 386–7.
[122] Ibid 386–7, citing Marc Linder, 'Dependent and Independent Contractors in Recent US Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness' (1999) 21(1) *Comparative Labor Law and Policy Journal* 187; Richard R Carlson, 'Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying' (2001) 22(2) *Berkeley Journal of Employment and Labor Law 295*, 305–6.
[123] Ibid.
[124] Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (n 121) 386, citing *Nationwide Mutual Insurance Co v Darden*, 503 US 318, 323–4 (1992), quoting *Community for Creative Non-Violence v Reid*, 490 US 730, 751–2 (1989). See also below nn 162–6 and accompanying text.
[125] Hugh Collins, 'Methods and Aims of Comparative Contract Law' (1991) 11(3) *Oxford Journal of Legal Studies* 396.
[126] Ibid 397–8.
[127] Ibid.
[128] Ibid.
[129] Ibid.
[130] Ibid.
[131] Ibid 398–9.

comparative law scholar be sufficiently attentive to the function and effect of legal doctrines, rather than simply the label assigned to the doctrines.[132] Both approaches require the scholar to identify with precision the relevant social problem to be addressed.[133]

The comparative analysis undertaken in this article may be explained by reference to those two approaches. The particular social problem explored in this article is that of the misclassification of employees as independent contractors. The Supreme Court of California encapsulated the problem succinctly in *Dynamex Operations West Inc v Superior Court of Los Angeles County*:[134]

> In recent years, the relevant regulatory agencies of both the federal and state governments have declared that the misclassification of workers as independent contractors rather than employees is a very serious problem, depriving federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled.[135]

The problem of worker misclassification has also been highlighted in the Australian case law and literature.[136] The problem may be explained using the language of vulnerability. Some workers who possess the characteristic vulnerabilities of employees are not being captured by the legal tests for determining employment status. This article considers whether a particular judicial approach, which identifies entrepreneurship as the overarching framework for application of the multifactorial test, captures workers who exhibit the relevant vulnerabilities. To be clear, this article is not proposing a reformulation of the multifactorial test to incorporate an element of vulnerability into it. It is, instead, critically examining a judicial approach to the multifactorial test, which is currently the subject of contestation in Australian law, to determine whether it accurately captures the relevant workers. The previous part of this article considered the issue from a theoretical perspective. The analysis of US law in this part of the article is used to shed light on the issue from a practical perspective.

In assessing the practical operation of the entrepreneurship approach, this article is mindful of the cautionary note, sounded by Professor Collins, that the comparative scholar needs to take into account the effect and function of a legal principle and not just the label assigned to it.[137] In this regard, this article selects for comparison not only the 'entrepreneurial opportunity test' propounded by the DC Circuit Court,[138] but also the 'ABC' test adopted by the Supreme Court of California in *Dynamex Operations West Inc v Superior Court v Los Angeles County*.[139] While the ABC test does not refer explicitly to the term 'entrepreneurship' or its variants, two of the three limbs of the test direct attention to whether the worker is carrying on a business of his or her own as opposed to working in the business of the hiring organisation.[140] The concept of entrepreneurship is therefore central to the operation of the ABC test. The following sections of the article examine the entrepreneurial opportunity test and the ABC test.

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[132] Ibid.
[133] Ibid 397–9.
[134] *Dynamex*, 4 Cal 5th 903 (2018).
[135] Ibid 2.
[136] See, eg, *On Call Interpreters* (2011) 214 FCR 82, 120–1; *Quest* (2015) 228 FCR 346, 378; Roles and Stewart (n 113).
[137] Collins, 'Methods and Aims of Comparative Contract Law' (n 125) 399.
[138] See, eg, *Corporate Express Delivery Systems*, 292 F 3d 777 (DC Cir 2002); *FedEx Home Delivery*, 563 F 3d 492 (DC Cir 2009); *Lancaster Symphony Orchestra*, 822 F 3d 563 (DC Cir 2016).
[139] *Dynamex*, 4 Cal 5th 903 (2018).
[140] Ibid 66–7. See also above n 17.

A The Entrepreneurial Opportunity Test

In *Corporate Express Delivery Systems v National Labor Relations Board*,[141] the DC Circuit Court considered whether owner-drivers who worked for Corporate Express Delivery Systems were employees of that company for the purposes of a claim concerning unfair labor practices under the *National Labor Relations Act*.[142] The National Labor Relations Board ('NLRB') had concluded that the owner-drivers were employees. The employer petitioned the DC Circuit Court for a review of the NLRB's decision. Chief Judge Ginsburg, who delivered the opinion of the Court, upheld the NLRB's decision. In concluding that the owner-drivers were employees, Ginsburg CJ endorsed the NLRB's reasoning which focused 'not upon the employer's control of the means and manner of the work but instead upon whether the putative independent contractors have a "significant entrepreneurial opportunity for gain or loss".'[143] Chief Judge Ginsburg stated that the entrepreneurial opportunity test 'better captures the distinction between an employee and an independent contractor.'[144]

In explaining the entrepreneurial opportunity test, Chief Judge Ginsburg referred to the example of the full-time cook,[145] the corporate executive and the provider of lawn-care services.[146] His Honour observed that the cook and the corporate executive are employees, notwithstanding that the person or entity who employs them exercises very limited control over their work.[147] The provider of lawn-care services who works at multiple sites, on the other hand, is an independent contractor regardless of the degree of control exercised over his or her work by the person or entity who has engaged the provider.[148] Chief Judge Ginsburg stated:

> The full-time cook and the executive are employees and the lawn-care provider is an independent contractor not because of the degree of supervision under which each labors but because of the degree to which each functions as an entrepreneur – that is, takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder.[149]

Of significance to Chief Judge Ginsburg's conclusion that the owner-drivers were employees was the fact that the company prohibited them from delegating their work to others and from using their vehicles to perform delivery work for other companies.[150] His Honour stated that entrepreneurs are generally able to work for others and to engage others to carry out their work.[151] His Honour held that the owner-drivers in this case 'lacked all entrepreneurial opportunity and consequently functioned as employees.'[152]

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[141] 292 F 3d 777 (DC Cir 2002).
[142] 29 USC §§ 151–69 (1935).
[143] *Corporate Express Delivery Systems*, 292 F 3d 777, 780 (DC Cir 2002).
[144] Ibid.
[145] Chief Judge Ginsburg took this example from the reasoning of the NLRB below, which in turn took it from the *Restatement (Second) of Agency* § 202(1) (1957).
[146] *Corporate Express Delivery Systems*, 292 F 3d 777, 780 (DC Cir 2002).
[147] Ibid.
[148] Ibid.
[149] Ibid.
[150] Ibid.
[151] Ibid.
[152] Ibid 780–1.

Subsequently, in *FedEx Home Delivery v National Labor Relations Board*,[153] the DC Circuit Court adopted and applied the entrepreneurial opportunity test. *FedEx Home Delivery* is a leading decision on the entrepreneurial opportunity test. The decision is, for this reason, discussed at length in this article. *FedEx Home Delivery* illustrates how a test that focuses on the mere existence of entrepreneurial opportunities, as opposed to the actual exercise of entrepreneurial functions, can be narrow and restrictive in its operation. The case involved an unfair labor practices claim under the *NLRA*. The issue was whether owner-drivers engaged by FedEx Ground Package System Inc were employees or independent contractors for the purposes of the *NLRA*. The owner-drivers in question delivered parcels for FedEx as part of FedEx's Home Delivery Division and were based in Wilmington, Massachusetts. The NLRB found that the drivers were employees and FedEx petitioned the DC Circuit Court for a review of the NLRB's decision. Circuit Judge Brown delivered the Court's opinion.[154] Her Honour concluded that the owner-drivers were independent contractors, and thereby granted FedEx's petition. Judge Garland delivered a forceful dissenting opinion that will be considered later in this article.[155]

Circuit Judge Brown recognised that the NLRB and the Court were to apply the 'common-law agency test'[156] when determining whether a worker was an employee or an independent contractor. In so doing, her Honour referred[157] to the decision of the Supreme Court of the United States in *National Labor Relations Board v United Insurance Co of America*,[158] in which the Court had held that courts were to apply the common-law agency test in cases concerning employment status under the *NLRA*.[159] This is a multifactorial test comprising a range of indicia. It is similar to the multifactorial test that was enunciated by the High Court of Australia in *Stevens v Brodribb Sawmilling Co Pty Ltd*[160] and endorsed in *Hollis v Vabu Pty Ltd*.[161] The non-exhaustive list of indicia in the US common-law agency test was encapsulated in the *Restatement (Second) of Agency*.[162] The relevant section of the *Restatement* provides:

> In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
>
> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;

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[153] 563 F 3d 492 (DC Cir 2009).
[154] Circuit Judge Brown and Senior Circuit Judge Williams were in the majority. Circuit Judge Garland filed an opinion dissenting in part.
[155] See below Part IV(A).
[156] *FedEx Home Delivery*, 563 F 3d 492, 496 (DC Cir 2009).
[157] Ibid 496.
[158] 390 US 245 (1968).
[159] Ibid 254, 256.
[160] (1986) 160 CLR 16.
[161] (2001) 207 CLR 21.
[162] *Restatement (Second of Agency*) § 220(2), quoted in *FedEx Home Delivery*, 563 F 3d 492, 496 n 1, 506 n 3 (DC Cir 2009).

(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business.[163]

In *FedEx Home Delivery*, Circuit Judge Brown observed that the indicia in the common-law agency test had, 'for a time',[164] been applied by reference to the 'meta-question'[165] of control. The notion of control had provided an overarching framework by which the various indicia in the test had been evaluated.[166] Circuit Judge Brown stated that the judgment in *Corporate Express Delivery Systems*[167] had modified the approach to determining employment status by shifting the focus from control to entrepreneurialism.[168] Her Honour summarised the modified approach as follows: 'While all the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism.'[169] Significantly, in assessing whether the owner-drivers exhibited the characteristics of entrepreneurs, Circuit Judge Brown focused on their potential to exercise entrepreneurial opportunities, rather than their actual exercise of entrepreneurial functions. Her Honour stated that 'it is the worker's retention of the right to engage in entrepreneurial activity rather than his regular exercise of that right that is most relevant for the purpose of determining whether he is an independent contractor.'[170]

In determining that the owner-drivers had 'entrepreneurial potential'[171] and were thereby independent contractors, Circuit Judge Brown focused on some factors and gave less weight to others. Circuit Judge Brown accorded significance to the terms of the contract.[172] The contract expressly stated that the owner-drivers were independent contractors.[173] Other contractual terms that Her Honour regarded as important included those which stipulated that the drivers 'are not subject to reprimands or other discipline',[174] that the drivers could provide substitutes to perform their deliveries, that the drivers could elect to be assigned multiple routes, that the drivers were to supply and maintain their own vehicles, that the drivers were permitted to use their vehicles for other purposes outside of the hours they worked for FedEx, and that FedEx did not direct the workers as to their start and end times on a particular day nor when they were to take breaks.[175] Circuit Judge Brown regarded as particularly significant the right that FedEx drivers had to sell their routes to others, which Her Honour stated was indicative of entrepreneurialism because it provided an opportunity for profit.[176] It was also relevant that one of the owner-drivers had been able to negotiate payment rates with FedEx.[177]

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[163] *Restatement (Second of Agency)* § 220(2).
[164] *FedEx Home Delivery*, 563 F 3d 492, 496 (DC Cir 2009).
[165] Ibid.
[166] Ibid.
[167] *Corporate Express Delivery Systems*, 292 F 3d 777 (DC Cir 2002).
[168] *FedEx Home Delivery*, 563 F 3d 492, 497 (DC Cir 2009).
[169] Ibid 497.
[170] Ibid 516, quoting *CC Eastern Incorporated v NLRB*, 60 F 3d 855, 860 (DC Cir 1995).
[171] Ibid 498.
[172] Ibid 498, 504.
[173] Ibid.
[174] Ibid 498.
[175] Ibid 498–9.
[176] Ibid 500.
[177] Ibid 499.

Circuit Judge Brown accorded less weight to the factors that were indicative of an employment relationship. The owner-drivers were required to display the FedEx logo on their delivery vehicles and to wear a FedEx uniform.[178] Although the drivers supplied their own vehicles, these vehicles had to comply with FedEx's requirements as to size and colour.[179] While delivering parcels for FedEx, the owner-drivers were not permitted to use their vehicles for other work or activities.[180] The drivers were permitted to use their vehicles for other purposes, including other work, during times that they were not working for FedEx, so long as they removed or covered the FedEx logo on their vehicles.[181] The evidence indicated, however, that the schedule of deliveries that FedEx maintained for each driver was such that there was limited opportunity for a driver to perform other work.[182] Moreover, there was only evidence of one driver (out of the 36 drivers) taking up the opportunity to perform other delivery work.[183]

The owner-drivers were required to perform deliveries for FedEx (either themselves or through the use of substitute drivers) from Tuesday through to Saturday of each week.[184] While they were permitted to use substitute drivers, the evidence revealed that many of the owner-drivers who used substitute drivers sourced the latter from an existing pool of approved drivers that FedEx had established.[185] FedEx required owner-drivers who had no previous experience to undergo training.[186] FedEx drivers were required to comply with standards of conduct set by the company.[187] FedEx also monitored the performance of its owner-drivers through its system of customer service rides; each driver was required to submit to two of these audits each year.[188] The owner-drivers' engagement with the company could be terminated for want of compliance with FedEx's standards of conduct, and they could be counselled in relation to non-compliance.[189] While FedEx did not direct the owner-drivers as to how they structured their working hours and breaks, FedEx allocated the drivers a set number of parcels at the beginning of a particular day and required the drivers to deliver all of those parcels by the end of the day.[190] FedEd allocated routes to the owner-drivers and was able unilaterally to reconfigure the routes that the drivers had been assigned.[191] The NLRB had also observed that the work performed by the owner-drivers (the delivery of parcels) was integral to FedEx's business.[192]

FedEx set the payment rates for deliveries, and only in one instance had there been an owner-driver who negotiated his own payment rate.[193] FedEx also offered incentive-based payments.[194] FedEx had various schemes to insulate their owner-drivers to some degree from the risk of losses, including reimbursements when there were sharp increases in petrol prices.[195] In addition, 'FedEx [insulated] its contractors from loss to some degree by means of the vehicle

[178] Ibid 500.
[179] Ibid.
[180] Ibid 510.
[181] Ibid 498.
[182] Ibid 514.
[183] Ibid 499, 514.
[184] Ibid 501.
[185] Ibid 499, 515.
[186] Ibid 500.
[187] Ibid 501.
[188] Ibid 500–1.
[189] Ibid 513.
[190] Ibid 510–11.
[191] Ibid 501.
[192] Ibid 502.
[193] Ibid 499, 512.
[194] Ibid 501.
[195] Ibid.

availability payment, which they receive[d] just for showing up, and the temporary core zone density payment, both of which payments guarantee[d] contractors an income level predetermined by FedEx, irrespective of the contractors' personal initiative.'[196] While FedEx permitted the owner-drivers to sell their routes, there were constraints on this exercise.[197] Moreover, the evidence showed that only one driver had possibly profited from selling a route, and the evidence as to profit was tenuous.[198] While the owner-drivers could elect to have multiple routes assigned to them, and they could engage other drivers to service the additional routes, the evidence showed that only three of the drivers had taken up this opportunity.[199] In any event, the NLRB below had held that those three drivers were not employees.[200]

The analysis of *FedEx Home Delivery* above indicates that the entrepreneurial opportunity test is a narrow test for employment status. By focusing on entrepreneurial opportunities rather than upon the actual exercise of entrepreneurial functions, this test can operate to exclude from labour law's protection those who are not truly entrepreneurs. The entrepreneurial opportunity test has been applied in subsequent decisions of the DC Circuit Court.[201] An alternative approach, which also treats entrepreneurship as central but focuses on the exercise of entrepreneurial functions in practice rather than upon the existence of entrepreneurial opportunities specified in the contract, is the ABC test. This test provides a broader and more inclusive approach to employment status.[202]

B The ABC Test

In *Dynamex Operations West Inc v Superior Court of Los Angeles County*,[203] the Supreme Court of California adopted the ABC test. At issue in this case was the appropriate test for distinguishing between employees and independent contractors for the purposes of the relevant California wage order (Industrial Welfare Commission Wage Order No 9) which regulated the wages, working hours and certain working conditions of employees in the transportation industry.[204] Under the order, the word 'employee' was defined as 'any person employed by an employer'.[205] The definition of the word 'employ' was to 'engage, suffer, or permit to work.'[206]

Dynamex Operations West Inc operated a courier business and hired delivery drivers to carry out the deliveries. Until 2004, the delivery drivers were engaged as employees. Thereafter, the company changed its contractual arrangements with its drivers, classifying them as independent contractors.[207] Two of the delivery drivers brought this claim against Dynamex, with the primary allegation being that the company had contravened the wage order.[208] The

[196] Ibid 512.
[197] Ibid 515.
[198] Ibid 500, 515–16.
[199] Ibid 515.
[200] Ibid.
[201] See, eg, *Lancaster Symphony Orchestra v NLRB*, 822 F 3d 563 (DC Cir 2016). See also *Restatement (Third) of Employment Law* 1.01(a)(1)–(3) (American Law Institute, 2015).
[202] See David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014) 204–5; Anna Deknatel and Lauren Hoff-Downing, 'ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes' (2015) 18(1) *University of Pennsylvania Journal of Law and Social Change* 53, 66–74.
[203] *Dynamex*, 4 Cal 5th 903 (2018).
[204] Ibid 3.
[205] *California Code Regulations,* Title 8 § 11090(2)(E).
[206] Ibid § 11090(2)(D).
[207] *Dynamex*, 4 Cal 5th 903 (2018) 4.
[208] Ibid 3.

claim was brought on behalf of a class of delivery drivers that were said to be in a similar position to the two drivers who brought the claim, as well as on behalf of the drivers themselves. Dynamex brought a motion to decertify the class. When the matter reached the Supreme Court of California, the only issue to be determined was the appropriate test to be applied to distinguish between employees and independent contractors for the purposes of the wage order.[209]

Chief Justice Cantil-Sakauye delivered the opinion of the Court. Her Honour explained the ABC test in the following way:

> Under this test, a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.[210]

Her Honour stated that this test creates a presumption of employment, observing that '[t]he ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies each of three conditions.'[211] Of particular relevance are Cantil-Sakauye CJ's observations about parts (B) and (C) of the test. As to part (B), her Honour regarded as significant those 'who would ordinarily be viewed by others as working in the hiring entity's business and not as working, instead, in the worker's own independent business.'[212] This captures the essence of the entrepreneurship approach. Chief Justice Cantil-Sakauye gave several examples to illustrate the concept. A plumber or electrician engaged by the owner of a retail store to fix a leak or perform electrical works would not be performing work in the usual course of that retail store's business.[213] On the other hand, cake decorators working for a bakery, and seamstresses working for a clothing company, do perform work that is in the usual course of the bakery's and the clothing company's businesses respectively.[214]

As to part (C) of the test, Cantil-Sakauye CJ stated that '[a]s a matter of common usage, the term "independent contractor," when applied to an individual worker, ordinarily has been understood to refer to an individual who independently has made the decision to go into business for himself or herself. … Such an individual generally takes the usual steps to establish and promote his or her independent business — for example, through incorporation, licensure, advertisements, routine offerings to provide the services of the independent business to the public or to a number of potential customers, and the like.'[215] Her Honour also noted that it will generally be useful for a court to start with parts (B) or (C) as they are 'easier and clearer'[216] to apply than part (A). In disposing of the appeal, Cantil-Sakauye CJ stated that both parts (B)

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[209] Ibid 6.
[210] Ibid 7.
[211] Ibid 64.
[212] Ibid 70.
[213] Ibid.
[214] Ibid.
[215] Ibid 74.
[216] Ibid 76.

and (C) were, in the context of this claim, 'amenable to resolution on a class basis',[217] with reference to the class of delivery drivers that had been certified by the trial court.[218]

IV The Worker-Protective Potential of the Entrepreneurship Approach: A Critical Evaluation

This part of the article harnesses the insights from the theoretical analysis and comparative study presented earlier to evaluate the worker-protective potential of the entrepreneurship approach. Those engaged in the project of revitalising the legal tests for employment status in Australia may discern valuable lessons from the US experience. The comparative analysis presented above demonstrated that there are some benefits, viewed from a worker-protective perspective, to using entrepreneurship as the overarching approach in cases concerning employment status. At the same time, the comparative study revealed some cautionary tales regarding the use of the concept of entrepreneurship. These insights would not be discerned simply by examining the emerging Australian case law on the entrepreneurship approach. The following section critically evaluates the US case law and draws out key lessons for the Australian context.

A Vulnerability and Entrepreneurship: Lessons from the US Case Law

The decision of the DC Circuit Court in *FedEx Home Delivery* demonstrates that the entrepreneurship approach is not necessarily worker-protective (in the sense of being able accurately to capture workers who exhibit the characteristic vulnerabilities of employees) in practice. In that case, there were multiple factors that indicated that the workers possessed the unique vulnerabilities of employees, yet they were held to be independent contractors primarily on the basis that they had a contractual right to engage in entrepreneurial opportunities. The focus on the right to engage in entrepreneurial opportunities, as opposed to the actual exercise of entrepreneurial functions, is problematic when one has regard to the power relations between the worker and the organisation. The theories of power discussed earlier in this article are illuminating here.[219] There is an inequality of bargaining power between the parties at the point of entry into the contract, one result of which is that the organisation has significant control over the drafting of the contract. An approach that focuses on contractual rights conferred in relation to entrepreneurial opportunities, as opposed to the actual exercise of those rights, is likely to lead to an exclusion from employment status of workers who in practice possess the vulnerabilities of employees. In his Honour's dissenting opinion in *FedEx Home Delivery*, Judge Garland expressed strong reservations about an approach that focuses on entrepreneurial opportunity or potential.[220]

A second important lesson that may be discerned from the DC Circuit Court's judgment in *FedEx Home Delivery* is that it is important for courts to identify with precision the factors that are of significance to demonstrating entrepreneurialism. Judge Garland disagreed with the

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[217] Ibid 81.

[218] Ibid. A version of the ABC test has recently been enshrined in statute in California: California Assembly Bill 5 2019 (AB5).

[219] See above Part II(A).

[220] *FedEx Home Delivery*, 563 F 3d 492, 516–17 (DC Cir 2009). In his Honour's dissenting opinion, Judge Garland disagreed with the majority's reasoning on multiple grounds, including that the entrepreneurial opportunity test was not supported by the precedents (at 507–10). In addition, Judge Garland pointed out that many of the factors that the majority invoked in favour of a finding that the workers had entrepreneurial opportunities were not relevant to entrepreneurialism (at 510–17). See the discussion in this article at below nn 221–30 and accompanying text.

relevance that the majority attributed to some factors, and with the majority's downplaying of other factors.[221] His Honour pointed out that several of the factors that Circuit Judge Brown invoked in aid of the conclusion that these workers had entrepreneurial opportunity were of limited relevance to the entrepreneurialism inquiry.[222] Judge Garland noted, for example, that Circuit Judge Brown had pointed to the label stipulating that the relationship was one of independent contracting.[223] Judge Garland observed that the existence of the label had no bearing upon whether the workers had entrepreneurial opportunity.[224]

Judge Garland also observed that FedEx's absence of control over the worker's hours of work and break time, and the absence of a formal system of reprimand, were not relevant to the issue of entrepreneurial opportunity but rather to 'the extent of the employer's control.'[225] Judge Garland also noted, 'in any event,'[226] that 'although FedEx does not fix specific hours or break times, it does require its contractors to provide delivery services every day, Tuesday through Saturday, and to finish each day's deliveries by the end of the day'[227] and that FedEx 'does deny drivers bonuses if they fail release audits and uses both counselling and termination as tools to ensure compliance with work rules.'[228] As to the risk of loss, an important aspect of entrepreneurship, Judge Garland was of the view that the various schemes that FedEx had in place, including those providing reimbursements when there were sharp rises in petrol prices, and providing payments to workers simply for making their vehicles available, did 'much to limit the drivers' risk of loss.'[229] Circuit Judge Brown accorded less significance to these factors.[230]

According significance to factors that have limited bearing on entrepreneurialism, or giving limited weight to factors that militate against a finding of entrepreneurialism, may lead to the exclusion from employment status of those workers who exhibit the characteristic vulnerabilities of employees. The decision in *FedEx Home Delivery*, then, illustrates two modes of reasoning that may render an entrepreneurship-oriented approach to determining employment status incapable of capturing those workers who are in need of labour law's protection. The first is a focus on the right to engage in entrepreneurial opportunities rather than the actual exercise of entrepreneurial functions; the second is the according of limited weight to facts that militate against a finding of entrepreneurialism, and the attribution of relevance to facts that are not relevant to entrepreneurialism in support a conclusion that the workers possess entrepreneurial opportunity.

The ABC test does not exhibit either of these shortcomings because it comprises questions that are apt to identify those workers who are, in practice, operating as entrepreneurs in business on their own account. The test directs the attention of the court to how the parties conduct their relationship in practice, in addition to the terms of their contract, and it focuses the court's analysis, in limbs (B) and (C), upon whether the worker is running his or her own independent business. These two aspects of the ABC test enable it to capture within the concept of employment those workers who possess the characteristic vulnerabilities of employees. The

[221] *FedEx Home Delivery*, 563 F 3d 492, 510–17 (DC Cir 2009).
[222] Ibid 510–13.
[223] Ibid 512–13.
[224] Ibid.
[225] Ibid 513.
[226] Ibid.
[227] Ibid.
[228] Ibid.
[229] Ibid 514.
[230] Ibid 502.

ABC test has been adopted in a number of US states.[231] Researchers in the United States have studied the practical operation of the ABC test and compared it to other tests for determining employment status in the US.[232] This research has indicated that the ABC test is broad and inclusionary in its operation, and more effective at addressing worker misclassification than other tests.[233] It has, for this reason, been favoured by several labour law scholars in that country.[234] The US experience with the ABC test supports the proposition, advanced in the present article, that the entrepreneurship approach is a promising candidate for the project of revitalising the tests for employment status.

B The Entrepreneurship Approach: A Promising Candidate for the Project of Revitalisation

The preceding analysis suggests that a worker-protective approach to determining employment status involves at least two core features.[235] The first is that it focuses upon substance rather than form.[236] That is, it directs the court's attention to how the parties conduct their relationship in practice rather than just to the terms of the contract. The second is that it focuses attention upon whether the worker is carrying on a business of his or her own. Importantly, the seeds of such an approach are already located in the Australian case law, though it must be acknowledged that the second proposition remains the subject of significant contestation in the courts.

In a recent article that considers whether a new category of worker is required for those working in the gig economy, Professor Andrew Stewart and Professor Shae McCrystal observed that there are inconsistent judicial approaches to the determination of employment status in Australia.[237] They identified three different approaches to the application of the multifactorial test in the Australian case law. The first approach, which they termed the 'formalistic approach' involves a focus on the terms of the employment contract.[238] That is, the court examines the contract of employment to determine whether the indicia of employment are present. Professors Stewart and McCrystal observed that this approach still prevails among many of the state courts.[239] The second approach, which they termed the 'economic reality approach', involves the court looking not just at the contractual terms but also at how the parties have carried out their relationship in practice to determine whether the indicia of employment

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[231] Weil, 'The Fissured Workplace' (n 202) 204–5; Deknatel and Hoff-Downing, 'ABC on the Books and in the Courts' (n 202) 66–74.
[232] Deknatel and Hoff-Downing, 'ABC on the Books and in the Courts' (n 202).
[233] Ibid 66–74, 79–101.
[234] Weil, 'The Fissured Workplace' (n 202) 205; Deknatel and Hoff-Downing, 'ABC on the Books and in the Courts' (n 202) 101–2. Professor Simon Deakin, writing in the context of the United Kingdom, has also expressed support for the ABC test: Deakin, 'Decoding Employment Status' (n 46) 191–3.
[235] As noted above at n 113 and accompanying text, Professor Stewart has advocated for statutory enshrinement of the entrepreneurship approach to determining employment status, with the focus of the test being on the substance of the relationship: see Stewart, 'Redefining Employment?' (n 6) 270–6; Roles and Stewart (n 113) 279–80; Stewart and McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (n 17) 21–2.
[236] See below nn 246–8 and accompanying text. See also Pauline Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (2015) 32(2) *Journal of Contract Law* 149; Pauline Bomball, 'Intention, Pretence and the Contract of Employment' (2019) 35(3) *Journal of Contract Law* 243.
[237] Stewart and McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (n 17) 6–8.
[238] Ibid 7.
[239] Ibid 7 n 13, citing, by way of example, *Australian Air Express Pty Ltd v Langford* (2005) 147 IR 240; *Tobiassen v Reilly* (2009) 178 IR 213; *Commissioner of State Revenue v Mortgage Force Australia Pty Ltd* [2009] WASCA 24; *Young v Tasmanian Contracting Services Pty Ltd* [2012] TASFC 1.

are present.[240] Precedence is given to how the relationship operates in practice where there is a conflict between reality and contractual form.[241] Professors Stewart and McCrystal noted that this approach has at least commanded the support of members of the Federal Court of Australia.[242] The third approach that Professors Stewart and McCrystal identified is the entrepreneurship approach.[243] As noted above, this approach involves asking whether the worker is carrying on a business of his or her own.[244] Professors Stewart and McCrystal observed that this approach remains the subject of disagreement in Australia.[245]

The present author contends that the entrepreneurship approach should be adopted if one is concerned with promoting a worker-protective approach to the legal determination of employment status. As stated above,[246] this article argues that a worker-protective approach requires courts to privilege reality over form and to identify as employees those workers who are not carrying on a business of their own. There is judicial and scholarly support for the first proposition concerning substance-oriented characterisation.[247] The International Labour Organization has also advocated for an approach anchored in the 'primacy of facts', emphasising that regard must be had to the reality of the relationship between the hirer and the worker.[248] This article has sought to build a case in support of the second proposition concerning the entrepreneurship approach. It has done so by constructing normative arguments. The doctrinal arguments in support of the entrepreneurship approach are considered in a separate article.[249]

The combination of these two core features – substance-oriented characterisation, and the adoption of entrepreneurship as the overarching framework for application of the multifactorial test – is important. Simply adopting a substance-oriented approach to characterisation, which focuses on how the parties carry out their relationship in practice, will not be of assistance in all cases. This is because in some cases, the issue is not simply that there is a divergence between the terms of the contract and the reality of the relationship, but rather that the reality of the relationship itself falls within the grey zone between employment and independent contracting. Some of the indicia of employment are present, as are some indicia that point towards independent contracting. In such cases, the overarching approach that is adopted may tip the scales one way or the other because it affects the court's balancing exercise and how the court assigns weight to various factors.[250] This article has sought to demonstrate that an

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[240] Stewart and McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (n 17) 7–8, citing (at n 18) *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 and (at n 18) *Re Porter* (1989) 34 IR 179.

[241] Ibid. See also Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (n 236); Bomball, 'Intention, Pretence and the Contract of Employment' (n 236).

[242] Stewart and McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (n 17) 7 n 20, citing, by way of example, *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2010) 184 FCR 448; *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146. The authors also refer (at 7 n 20) to Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (n 236).

[243] Stewart and McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (n 17) 8.

[244] Ibid. See above nn 26–7 and accompanying text.

[245] Stewart and McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (n 17) 8.

[246] See above n 236 and accompanying text.

[247] See above nn 236, 240–42.

[248] International Labour Conference, *Employment Relationship Recommendation*, 95th sess, ILO Doc 198/V(1) (2006) [26]; *Report on Promoting Employment and Decent Work in a Changing Landscape* (n 2) [230].

[249] Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (n 31).

[250] Deakin, 'Decoding Employment Status' (n 46) 185.

entrepreneurship approach is desirable from a worker-protective perspective because it inclines the balancing and weighing exercise towards a finding of employment where the worker possesses the characteristic vulnerabilities of an employee.

The recent decision of the Supreme Court of the United Kingdom in *Uber BV v Aslam* ('*Uber*')[251] provides a good illustration of this point. As Professor Alan Bogg and Professor Michael Ford observed in an article that analysed the decision of the court below, *Uber* was not a straightforward case where there was simply a disjunction between the terms of the contract and how the parties carried out their relationship in practice.[252] *Uber* was a difficult case because the reality of the relationship between the parties fell within the grey zone.[253] As Professors Bogg and Ford observed, '*Uber* highlights the uncertain effect of *Autoclenz* where the discrepancy between written terms and factual circumstances is less palpable than it was in *Autoclenz* itself.'[254]

One way of resolving these difficult cases is to argue, as Professors Bogg and Ford did with significant force, that the court should have regard to the protective purpose of labour legislation and incline towards a conclusion that would bring the particular worker within the protective scope of the legislation where it is possible to do so.[255] The approach that the Supreme Court of the United Kingdom ultimately adopted in *Uber* which, among other things, emphasised the protective purpose of the labour statutes under consideration, may be rationalised in this way.[256] Another way of dealing with these difficult cases that fall within the grey zone is to encourage the courts to adopt the entrepreneurship approach which, as US scholars examining the ABC test have demonstrated,[257] also inclines the court to a broad and inclusive approach to employment status. There are some barriers to the adoption of an approach that focuses upon protective statutory purposes in Australia.[258] In light of these barriers, alternative routes to securing a worker-protective approach to the determination of employment status should be considered by those engaged in the project of revitalising the tests

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[251] [2021] UKSC 5 ('*Uber*').

[252] Alan Bogg and Michael Ford, 'Between Statute and Contract: Who is a Worker?' (2019) 135 *Law Quarterly Review* 347, 348–50. This article preceded the decision of the Supreme Court of the United Kingdom in *Uber* (n 251). In this article, Professors Bogg and Ford analysed the decision of the English Court of Appeal below: *Uber BV v Aslam* [2018] EWCA Civ 2748.

[253] Bogg and Ford, 'Between Statute and Contract: Who is a Worker?' (n 252) 348–50. It should be noted that the decision of the Supreme Court of the United Kingdom in *Uber* concerned the 'limb (b) worker' category in the United Kingdom: Bogg and Ford, 'Between Statute and Contract: Who is a Worker?' (n 252) 347. In *Uber*, the Supreme Court concluded that the Uber drivers fell within the limb (b) worker category. The limb (b) worker category is an intermediate category of worker, created by statute, that falls between employees and independent contractors. There is no intermediate worker category in Australia.

[254] Bogg and Ford, 'Between Statute and Contract: Who is a Worker?' (n 252) 348, referring to *Autoclenz Ltd v Belcher* [2011] 4 All ER 745. In *Autoclenz*, the Supreme Court of the United Kingdom disregarded the terms of a written work contract that were at odds with the reality of the relationship between the parties. For an analysis of the *Autoclenz* decision, see Alan L Bogg, 'Sham Self-Employment in the Supreme Court' (2012) 41(3) *Industrial Law Journal* 328; ACL Davies, 'Employment Law' in Edwin Simpson and Miranda Stewart (eds), *Sham Transactions* (Oxford University Press, 2013) 176; ACL Davies, 'The Relationship between the Contract of Employment and Statute' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 73, 84–6; Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (n 236) 161–7.

[255] Bogg and Ford, 'Between Statute and Contract: Who is a Worker?' (n 252) 350–3.

[256] See *Uber* (n 251) [58]–[78].

[257] Weil, 'The Fissured Workplace' (n 202) 205; Deknatel and Hoff-Downing, 'ABC on the Books and in the Courts' (n 202).

[258] See Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (n 121).

for employment status. The analysis presented in this article suggests that the entrepreneurship approach, which has received some judicial support in Australia, is a promising candidate for the revitalisation project.

V Conclusion

The categorisation of a worker as an employee brings that worker within the realm of labour law.[259] In Australia, there is a debate about the approach that should be taken to determining employment status. One principal aspect of this debate concerns the entrepreneurship approach. This article has made a contribution to that debate by critically analysing the entrepreneurship approach from a normative worker-protective perspective. It has developed a theoretical framework, by reference to the work of leading theorists of employment law, to undertake this normative critique. This article has proceeded on the basis that a worker-protective approach to the determination of employment status is one that accurately captures the characteristic vulnerabilities of employees that render them in need of the protection of labour law. Accordingly, in constructing the theoretical framework by which to evaluate the worker-protective potential of the entrepreneurship approach, this article has drawn upon theories of power and vulnerability within the employment relationship. It has argued that the entrepreneurship approach does, at a theoretical level, accurately capture those workers who exhibit the characteristic vulnerabilities of employees.

The article then considered the worker-protective potential of the entrepreneurship approach by examining its operation in practice. In so doing, it considered two bodies of case law in the United States that have invoked the concept of entrepreneurship for the purpose of distinguishing employees from independent contractors. This article discerned from the comparative study several lessons for the Australian context about the nature and operation of the entrepreneurship approach. The comparative study demonstrated that the entrepreneurship approach is worker-protective in its operation if courts adopting such an approach are attentive to the realities of the working relationship between the parties. The project of revitalising the legal tests for determining employment status is of crucial importance to the ongoing operation and effectiveness of labour law.[260] One significant step in such a project entails an articulation of the relevant underlying theoretical justifications and practical consequences of any proposed reorientation. It is hoped that the theoretical and practical analysis offered in this article might be of some assistance to others who are engaged in the project of revitalisation.

[259] Owens, Riley and Murray, 'The Law of Work' (n 2) 152.
[260] Anderson, Brodie and Riley, 'The Common Law Employment Relationship: A Comparative Study' (n 1) 25, 68.

CHAPTER 8

Pauline Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (2021) 43(1) *Sydney Law Review* 83

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Pauline Bomball

Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law

Pauline Bomball*

Abstract

The concept of employment at common law serves as a gateway to a wide range of statutory labour rights in Australia. Despite its significance in labour law and its frequent invocation before the courts, the concept remains the subject of significant contestation. A major point of disagreement concerns the notion of entrepreneurship. In some cases, judges have stated that entrepreneurship should be determinative of the inquiry as to whether a worker is an employee or an independent contractor. In other cases, entrepreneurship has been treated as simply one factor to be weighed against many others in the multifactorial test for employment status. This article explores the issue from a theoretical and a doctrinal perspective. It draws upon theories and case law on the doctrine of vicarious liability for guidance on the test for employment status. It argues that the proper approach is to treat entrepreneurship as the organising principle for the inquiry into whether a worker is an employee or an independent contractor. It contends that the adoption of such an approach would bring a greater degree of conceptual and analytical coherence to the complex task of distinguishing employees from independent contractors.

I Introduction

The 'entrepreneur' has attracted increased interest in recent times. The rise of the gig economy has drawn attention to the notion of entrepreneurship and its concomitant suite of characteristics, including innovation, flexibility, autonomy and profit-making.[1] Those who perform work in the gig economy are often branded as self-employed entrepreneurs by the organisations that hire them.[2] Yet, some workers

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1 For a comprehensive analysis of gig economy work in Australia, see Paula McDonald, Penny Williams, Andrew Stewart, Robyn Mayes and Damian Oliver, *Digital Platform Work in Australia: Prevalence, Nature and Impact* (Report, November 2019).

2 'Platforms suggested to the Inquiry that self-employment is a hallmark of their systems.': Natalie James, *Report of the Inquiry into the Victorian On-Demand Workforce* (Report, June 2020) 112 [777]. Stewart and Stanford have referred to the 'common assumption that gig economy workers are self-employed or operating as independent contractors': Andrew Stewart and Jim Stanford,

in the gig economy do not exhibit the characteristics of entrepreneurs.[3] Instead, they resemble employees who are subordinate to and dependent upon the organisations that engage them.[4] The emergence of the gig economy has drawn into sharp focus an important, and unresolved, debate about the notion of entrepreneurship and its relevance to the legal determination of employment status. This article makes a contribution to the resolution of that debate.

Employment status in Australian law is important for a range of reasons.[5] It is a crucial element of the doctrine of vicarious liability. An employer is vicariously liable for the torts committed by an employee in the course of his or her employment, whereas a principal cannot be held vicariously liable for the tortious conduct of an independent contractor.[6] Employment status also marks out the boundaries of labour law's protection.[7] This is because many labour statutes in Australia, including the *Fair Work Act 2009* (Cth), generally confer rights and protections upon employees only.[8] Workers who are not employees, such as independent contractors, usually fall outside labour law's regime of protection.

In Australia, courts apply a multifactorial test to determine whether a worker is an employee or an independent contractor. This test, which the High Court of Australia enunciated in *Stevens v Brodribb Sawmilling Co Pty Ltd*[9] and subsequently affirmed in *Hollis v Vabu Pty Ltd*,[10] requires a court to examine and balance a range of indicia,[11] including:

- the nature and extent of control that the hiring party exercises over the worker;[12]
- the existence or otherwise of a right on the part of the worker to delegate his or her work to a third party;
- whether the worker assumes the risk of loss or has an opportunity for profit;
- whether the hiring party supplies the equipment and tools required to perform the work;

'Regulating Work in the Gig Economy: What are the Options?' (2017) 28(3) *Economic and Labour Relations Review* 420, 426.

3 See, eg, Valerio De Stefano, 'The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig-Economy"' (2016) 37(3) *Comparative Labor Law and Policy Journal* 471, 491–3.

4 Ibid.

5 Carolyn Sappideen, Paul O'Grady and Joellen Riley, *Macken's Law of Employment* (Thomson Reuters, 8th ed, 2016) 20–1; Andrew Stewart, Anthony Forsyth, Mark Irving, Richard Johnstone and Shae McCrystal, *Creighton and Stewart's Labour Law* (Federation Press, 6th ed, 2016) 194–7.

6 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161, 167 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*Sweeney*').

7 Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2nd ed, 2011) 152–3.

8 See, eg, *Fair Work Act 2009* (Cth) pts 2-2–2-4.

9 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 ('*Brodribb*').

10 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 ('*Hollis*').

11 Mark Irving, *The Contract of Employment* (LexisNexis Butterworths, 2nd ed, 2019) ch 2; Stewart et al (n 5) 204–13; Sappideen, O'Grady and Riley (n 5) 33–53.

12 The term 'hiring party' or 'hirer' is used in this article to refer to the entity that engages the worker to perform work: Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15(1) *Australian Journal of Labour Law* 235, 235 n 2.

- whether the hiring party makes arrangements on behalf of the worker in relation to matters such as insurance, superannuation and taxation; and
- whether the worker is integrated into the hiring party's organisation.

In affirming this test, the majority in *Hollis* referred with approval[13] to the following statement of Windeyer J in *Marshall v Whittaker's Building Supply Co*:

> [T]he distinction between [an employee] and an independent contractor is … rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own.[14]

In subsequent cases, this reference to carrying on a business of one's own has been encapsulated in the notion of entrepreneurship.[15]

There are currently diverging judicial approaches to the notion of entrepreneurship in Australian cases concerning the distinction between employees and independent contractors.[16] In some cases, entrepreneurship is regarded as a separate legal test.[17] According to this approach, an employee is someone who is not an entrepreneur.[18] The court is to determine whether the worker in question is carrying on a business of his or her own.[19] If the question is answered in the negative, then the worker is not an entrepreneur, and is likely to be an employee.[20] In other cases, judges have noted that this approach is erroneous, on the basis that focusing attention on whether the worker is an entrepreneur diverts a court's attention from the true inquiry, which is whether the worker is an employee.[21]

In some cases, judges have stated that an approach that treats entrepreneurship as determinative is inconsistent with the nature of the multifactorial test for employment status.[22] That test involves a weighing up and balancing of

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13 *Hollis* (n 10) 39 [40] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

14 *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210, 217.

15 See, eg, *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)* (2011) 214 FCR 82, 122–3 [207] ('*On Call Interpreters*'); *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346, 389–92 ('*Quest*').

16 Stewart et al (n 5) 211–2; Andrew Stewart and Shae McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (2019) 32(1) *Australian Journal of Labour Law* 4, 8.

17 See, eg, *On Call Interpreters* (n 15); *Quest* (n 15).

18 *On Call Interpreters* (n 15) 123–7; *Quest* (n 15) 389–92.

19 *On Call Interpreters* (n 15) 123–7; *Quest* (n 15) 389–92.

20 *On Call Interpreters* (n 15) 123–7; *Quest* (n 15) 389–92.

21 See, eg, *Tattsbet Ltd v Morrow* (2015) 233 FCR 46, 61 [61] ('*Tattsbet*'); *Fair Work Ombudsman v Ecosway Pty Ltd* [2016] FCA 296, [78] ('*Ecosway*'); *Jamsek v ZG Operations Australia Pty Ltd* (2020) 297 IR 210, 216 [8] (Perram J), 245–6 [181] (Anderson J) ('*Jamsek*'); *Dental Corporation Pty Ltd v Moffet* (2020) 297 IR 183, 199–200 [68] (Perram and Anderson JJ) ('*Moffet*'); *Eastern Van Services Pty Ltd v Victorian WorkCover Authority* (2020) 296 IR 391, 399–400 [35] ('*Eastern Van*').

22 See, eg, *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806, [153] ('*Personnel Contracting Trial*'): '[I]t is inconsistent with a multi-factorial assessment to say that the absence of one factor (or the presence of it, for that matter), should for practical purposes dictate a result.' See also *Jensen v Cultural Infusion (Int) Pty Ltd* [2020] FCA 358, [89] ('*Jensen*').

multiple factors to form an overall impression of the character of the relationship.[23] Courts are to assess the 'totality of the relationship'.[24] The elevation of one of the factors (entrepreneurship) above others is, it is said, incompatible with that injunction.[25] A third approach involves treating the notion of entrepreneurship as the organising principle that informs the court's assessment of the indicia in the multifactorial test.[26]

There is yet to be a sustained scholarly analysis of the proper role or function of the notion of entrepreneurship in the inquiry as to employment status. In providing that analysis, this article takes as its starting point two related propositions about the 'common law concept of employment'.[27] The first proposition is that this concept is anchored in the doctrine of vicarious liability.[28] The second proposition is that when a statute, such as the *Fair Work Act 2009* (Cth), refers to the common law concept of employment, the statute is referring to this concept as understood in the law of vicarious liability.[29] Acceptance of these two propositions carries with it the consequence that the rationales underlying the doctrine of vicarious liability are relevant to the exposition of the common law concept of employment.[30] This approach is supported by the majority's reasoning in *Hollis*. In that case, the majority observed that the common law concept of employment is shaped by 'various matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability'.[31] Some cases concerning the concept of employment involve a claim by a worker to certain protections and entitlements under labour statutes that operate by reference to this common law concept.[32] Other cases involve claims of vicarious liability by third parties against organisations for injuries suffered due to torts committed by workers performing work for those organisations.[33] In both types of cases, the applicable conception of employment that is applied is that anchored in the concerns of vicarious liability.

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23 *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939, 944 ('*Lorimer*'); *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2010) 184 FCR 448, 460 [31]–[32].

24 See, eg, *Brodribb* (n 9) 29 (Mason J); *Hollis* (n 10) 33 [24], 41 [44] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

25 See, eg, *Personnel Contracting Trial* (n 22) [153]; *Jensen* (n 22) [89].

26 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 381 ALR 457, 461–3 [13]–[21] (Allsop CJ) ('*Personnel Contracting*').

27 *ACE Insurance Ltd v Trifunovski* (2011) 200 FCR 532, 543 ('*Trifunovski Trial*'); 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, 373.

28 *Trifunovski Trial* (n 27) 542–3. See also *Personnel Contracting* (n 26) 503–4 [176]–[179] (Lee J), referring to the submission of Counsel for the appellants (M Irving QC); Bomball (n 27) 377–9; Irving (n 11) 58.

29 *Trifunovski Trial* (n 27) 542–3; *C v Commonwealth* (2015) 234 FCR 81, 87 [34]; *Personnel Contracting* (n 26) 475 [64] (Lee J). See also *Personnel Contracting* (n 26) 503–4 [176]–[179], referring to the submission of Counsel for the appellants (M Irving QC); *Jamsek* (n 21) 215 [3] (Perram J); Bomball (n 27) 379–82: Irving (n 11) 58.

30 See *Personnel Contracting* (n 26) 503–4 [176]–[179], referring to the submission of Counsel for the appellants (M Irving QC); Bomball (n 27) 379; Irving (n 11) 58.

31 *Hollis* (n 10) 41 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). See also Bomball (n 27) 379; Irving (n 11) 58–9.

32 See, eg, *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146 ('*Trifunovski*'); *Jamsek* (n 21).

33 See, eg, *Hollis* (n 10); *Sweeney* (n 6).

It remains unclear how the rationales underlying the doctrine of vicarious liability may bear upon the multifactorial test for employment status. The matter was left open in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*,[34] a recent decision of the Full Court of the Federal Court of Australia that involved claims made pursuant to the *Fair Work Act 2009* (Cth). In that case, Lee J referred to the proposition that two key rationales underpinning vicarious liability, enterprise risk and agency, favour the view that entrepreneurship should be the central focus of the test for employment status.[35] Lee J, with whom Allsop CJ and Jagot J agreed, observed that such considerations were 'beyond the scope of this judgment'.[36] This article analyses the proposition in detail and uses this analysis to illuminate the proper approach to the notion of entrepreneurship in cases concerning employment status. In so doing, it examines four principal theoretical justifications for vicarious liability: enterprise risk, deterrence, just compensation and loss distribution, and agency.[37] After engaging with the justifications at a theoretical level, the article examines key decisions of the High Court of Australia on vicarious liability to evaluate the extent to which the Court has embraced these justifications.[38]

It is important to make some observations at the outset about the orientation of this article. While this article considers the doctrine of vicarious liability, it does so as part of a broader analysis of the concept of employment. It does not provide a comprehensive account of the law of vicarious liability. Furthermore, it does not critique the justifications for vicarious liability or catalogue those justifications.[39] This article is, in essence, a labour law article that engages with the theory and cases on vicarious liability only to the extent that these assist in resolving questions regarding employment status. It should also be noted that the article focuses on the multifactorial test for distinguishing employees and independent contractors. In order for a worker to be categorised as an employee, it must be established that there is a contract in existence between the worker and the hirer,[40] and that the contract has the character of a contract of employment.[41] The two issues are distinct.[42] This

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34 *Personnel Contracting* (n 26) 503–4 [177]–[179], 506 [189].

35 Ibid 504 [178]–[179], referring to the submission of Counsel for the appellants (M Irving QC).

36 Ibid 506 [189].

37 For an examination and critique of the theoretical justifications, see Harold J Laski, 'The Basis of Vicarious Liability' (1916) 26(2) *Yale Law Journal* 105; T Baty, *Vicarious Liability* (Clarendon Press, 1916); Guido Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts' (1961) 70(4) *Yale Law Journal* 499; P S Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967); Glanville Williams, 'Vicarious Liability and the Master's Indemnity' (1957) 20(3) *Modern Law Review* 220 ('Vicarious Liability I'); Glanville Williams, 'Vicarious Liability and the Master's Indemnity' (1957) 20(5) *Modern Law Review* 437 ('Vicarious Liability II'); JW Neyers, 'A Theory of Vicarious Liability' (2005) 43(2) *Alberta Law Review* 287; Douglas Brodie, *Enterprise Liability and the Common Law* (Cambridge University Press, 2010); Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010); Anthony Gray, *Vicarious Liability: Critique and Reform* (Hart Publishing, 2018).

38 *Hollis* (n 10); *Sweeney* (n 6); *New South Wales v Lepore* (2003) 212 CLR 511 ('*Lepore*'); *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 ('*Prince Alfred College*').

39 See above at n 37.

40 Stewart et al (n 5) 204.

41 Ibid.

42 Ibid, citing *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95.

article is concerned with the latter issue regarding characterisation of the work contract; it does not address the former issue.

The arguments in this article are developed as follows. Part II critically analyses divergent judicial approaches to the notion of entrepreneurship in the case law on employment status. It argues that three different approaches are discernible, which it terms 'entrepreneurship as a separate test', 'entrepreneurship as the organising principle' and 'entrepreneurship as a single factor'. The article argues that the first approach, entrepreneurship as a separate test, is not supported by decisions of the High Court on employment status. Accordingly, the question that remains for consideration is whether entrepreneurship is to be treated as the organising principle or as a single factor to be weighed against others in the multifactorial test. In searching for an answer to this question, Part III considers theoretical justifications for the doctrine of vicarious liability, and then examines the extent to which the High Court has embraced these justifications.

Having identified the key rationales underpinning vicarious liability, Part IV argues that these rationales demonstrate that the distinction between employees and independent contractors rests, in essence, on the basis that the former are working in the service of another while the latter are carrying on a business of their own.[43] Accordingly, the article argues that the proper approach to the multifactorial test for employment status is the one that treats entrepreneurship as the organising principle around which the indicia are assessed.[44] Such an approach would, by aligning the concept of employment with the relevant rationales, bring a degree of conceptual coherence to the exercise of distinguishing employees from independent contractors. Part IV of the article also engages with the view, expressed in some cases,[45] that the elevation of one factor above others is inconsistent with the nature of the multifactorial test. It suggests, with respect, that an alternative view, and the view that should be favoured, is that adoption of an organising principle would bring a degree of analytical coherence to the application of a test involving multiple factors that pull in different directions.[46]

The ideas advanced in this article have important practical ramifications for workers. An example from the gig economy is illustrative. In *Gupta v Portier Pacific Pty Ltd*,[47] the Full Bench of the Fair Work Commission rejected an Uber Eats driver's unfair dismissal claim on the basis that she was not an employee and thereby ineligible to bring a claim under the relevant provisions of the *Fair Work Act 2009* (Cth).[48] The Commission concluded that she was not running a business of her own,[49] but nevertheless held that she was not employed by Uber.[50] Had the Commission regarded entrepreneurship as the organising principle in its application

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43 See *Personnel Contracting* (n 26) 503–4 [177]–[179] (Lee J), referring to the submission of Counsel for the appellants (M Irving QC).

44 Ibid 461 [13] (Allsop CJ).

45 See, eg, *Personnel Contracting Trial* (n 22) [153]; *Jensen* (n 22) [89].

46 *Personnel Contracting* (n 26) 461 [13] (Allsop CJ); Ian Neil and David Chin, *The Modern Contract of Employment* (Lawbook, 2nd ed, 2017) 22.

47 *Gupta v Portier Pacific Pty Ltd* (2020) 296 IR 246 ('*Gupta*').

48 Ibid 276 [70], [72] (President Ross and Vice President Hatcher).

49 Ibid 275–6 [68], [71]–[72] (President Ross and Vice President Hatcher).

50 Ibid 276 [70], [72] (President Ross and Vice President Hatcher).

of the multifactorial test for employment status, it is possible that it would have reached the opposing conclusion.

Cases such as *Gupta* have, along with other matters, prompted the authors of the *Report of the Inquiry into the Victorian On-Demand Workforce* to recommend that the Commonwealth Parliament amend the *Fair Work Act 2009* (Cth) so as to include a statutory test for employment that identifies as employees those workers who are not carrying on a business of their own.[51] There is, with respect, great force in this recommendation. Unless and until such a recommendation is adopted by the Parliament, however, the courts must continue to apply the common law concept of employment, and it is that concept that forms the subject of this article.

II Three Competing Approaches to Entrepreneurship in the Legal Determination of Employment Status

This part of the article examines the case law dealing with the distinction between employees and independent contractors. Disagreement as to the role and function of entrepreneurship in the multifactorial inquiry turns primarily upon diverging approaches to the statement of Windeyer J in *Marshall* that was identified in the introduction to this article.[52] In *Brodribb*, Wilson and Dawson JJ referred to Windeyer J's statement as the 'ultimate question',[53] but it is important to note that their Honours did not regard the statement as a separate legal test. Their Honours noted that Windeyer J 'was really posing the ultimate question in a different way rather than offering a definition which could be applied for the purpose of providing an answer'.[54]

While the majority in *Hollis* referred with approval to Windeyer J's statement,[55] their Honours did not express a view as to its treatment in *Brodribb* and did not provide explicit guidance on how, if at all, Windeyer J's statement was to be incorporated into the multifactorial test for employment status. Nevertheless, a holistic reading of the judgment in *Hollis* indicates that Windeyer J's statement in *Marshall* informed the majority's analysis of the various indicia.[56] For example, the majority observed that the bicycle couriers in *Hollis*, whom they concluded were employees, 'were not running their own business or enterprise'.[57] The majority in *Hollis* did not treat Windeyer J's statement as a separate legal test.

Recently, members of the Federal Court of Australia have adopted competing approaches to Windeyer J's statement. Parts II(A)–(D) below traverse the case law to demonstrate the existence of these approaches.

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51 James (n 2) 192.
52 See above n 14 and accompanying text.
53 *Brodribb* (n 9) 35.
54 Ibid.
55 *Hollis* (n 10) 39 [40] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). See also above n 14 and accompanying text.
56 Ibid 39–45 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).
57 Ibid 41 [47] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

A *Entrepreneurship as a Separate Test*

In *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)*,[58] Bromberg J referred to Windeyer J's statement in *Marshall* and observed that it supplies 'a focal point around which relevant indicia can be examined'.[59] In the course of his Honour's reasons, however, Bromberg J appeared to go further. Instead of treating the notion of entrepreneurship as a focal point for the application of the indicia, his Honour developed a separate test of entrepreneurship. The test that Bromberg J articulated for determining whether a worker is an independent contractor was framed in the following manner:

> Viewed as a 'practical matter':
>
> (i) is the person performing the work an entrepreneur who owns and operates a business; and,
>
> (ii) in performing the work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work?
>
> If the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee.[60]

Bromberg J stated that the indicia traditionally considered in the application of the multifactorial test were relevant at the second stage of the analysis.[61] According to this approach, then, the court first asks whether the worker is carrying on a business of his or her own, and the considerations relevant to the multifactorial test come into play after the court has determined the answer to that antecedent question. Furthermore, the various indicia are relevant not to determining whether the worker is carrying on a business, but rather to determining whether the work is being performed for the worker's business, as opposed to the business of the person or entity that has engaged the worker.[62]

In *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*,[63] a decision of the Full Court of the Federal Court, North and Bromberg JJ explicitly endorsed Bromberg J's approach in *On Call Interpreters.* Importantly, North and Bromberg JJ stated that '[w]here the hallmarks of a business are absent, it will be a short step to the conclusion that the worker is an employee.'[64] In this regard, their Honours referred to Lander J's observation in *ACE Insurance Ltd v Trifunovski* that '[i]f the

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58 *On Call Interpreters* (n 15).
59 Ibid 122 [207].
60 Ibid 123 [208].
61 Ibid 125–7 [218]–[220]. See also *Quest* (n 15) 392 [186] (North and Bromberg JJ) (citations omitted): [T]he second question does not need to be answered in this case, but where relevant that question will need to be assessed in the context of the totality of the relationship. A range of indicia identified in the authorities may need to be examined in an exercise which is not to be performed mechanically because different significance may attach to the same indicators in different cases.
62 *On Call Interpreters* (n 15) 125–7 [218]–[220]; *Quest* (n 15) 392 [186] (North and Bromberg JJ).
63 *Quest* (n 15).
64 Ibid 391 [184].

respondents were not conducting their own business then logically it followed that they must have been working in the appellant's business.'[65]

It might be argued, with respect, that the approach expounded in *On Call Interpreters* and endorsed in *Quest* is not supported by the reasoning in *Brodribb*.[66] Moreover, it is not supported by the majority's judgment in *Hollis*, where the ultimate question of whether the worker was carrying on a business of his or her own was answered by reference to the multifactorial analysis.[67] In other cases, which will be considered in Part II(B) below, the notion of entrepreneurship is accorded central importance, but assigned a different function. Instead of functioning as a separate test, entrepreneurship is treated as the organising principle around which the indicia in the multifactorial test are assessed.

B *Entrepreneurship as the Organising Principle*

In *Personnel Contracting*, Allsop CJ identified a need for there to be 'principles or organising conceptions that inform the relevant binary distinction'[68] between employees and independent contractors. In identifying those principles or organising conceptions, Allsop CJ referred to Windeyer J's statement in *Marshall*.[69] In elucidating the nature of the judicial exercise involved in determining the character of a contract for the performance of work,[70] Allsop CJ referred to the reasoning of Mummery J in *Hall (Inspector of Taxes) v Lorimer*.[71] Mummery J had, in turn, referred to the judgment of Cooke J in *Market Investigations Ltd v Minister for Social Security*,[72] where it was posited that the ultimate question in cases involving employment status was whether the worker was carrying on a business of his or her own. In answering that ultimate question, Mummery J observed that '[i]n order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity.'[73]

This approach to the multifactorial test treats entrepreneurship as an organising principle. The various indicia are examined and balanced to determine whether the worker is in business on his or her own account. A similar approach can be discerned from the judgment of Buchanan J in *Trifunovski*.[74] Buchanan J, with whom Lander and Robertson JJ agreed, had regard to Windeyer J's statement in *Marshall*,[75] but did not treat it as a separate legal test. Instead, Buchanan J used it to inform his Honour's analysis of the various indicia in the multifactorial test.[76]

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65 *Trifunovski* (n 32) 149 [15].
66 See *Personnel Contracting* (n 26) 503 [176] (Lee J), referring to the submission of Counsel for the appellants (M Irving QC).
67 *Hollis* (n 10) 41–5 [46]–[57]. See also Neil and Chin (n 46) 8–9; *Personnel Contracting* (n 26) 503 [176] (Lee J), referring to the submission of Counsel for the appellants (M Irving QC).
68 *Personnel Contracting* (n 26) 461 [13].
69 Ibid quoting *Marshall* (n 14) 217.
70 *Personnel Contracting* (n 26) 462 [18].
71 *Lorimer* (n 23) 944.
72 *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173, 184–5.
73 *Lorimer* (n 23) 944.
74 *Trifunovski* (n 32).
75 Ibid 170 [93] (Buchanan J; Lander J agreeing at 148 [2]; Robertson J agreeing at 190 [172]).
76 Ibid 182–6 [126]–[149].

C *Entrepreneurship as a Single Factor*

The third approach, which accords no particular significance to the notion of entrepreneurship, is illustrated by Jessup J's judgment in *Tattsbet Ltd v Morrow*.[77] Jessup J stated that to inquire whether the worker is an entrepreneur is 'to deflect attention from the central question, whether the person concerned is an employee or not'.[78] His Honour emphasised that '[t]he question is not whether the person is an entrepreneur: it is whether he or she is an employee.'[79] This approach treats entrepreneurship as simply one factor to be balanced against the others in the multifactorial test. Subsequently, in *Fair Work Ombudsman v Ecosway Pty Ltd*,[80] White J adopted Jessup J's approach in *Tattsbet.*[81] The Victorian Court of Appeal also adopted this approach in *Eastern Van Services Pty Ltd v Victorian WorkCover Authority*.[82]

In *Personnel Contracting*, Lee J observed that a focus on entrepreneurship 'might, in some cases, have the potential to detract attention from the central question'.[83] Nevertheless, his Honour stated that this 'is not to say that the reasoning of North and Bromberg JJ in … *Quest* [is] not of real assistance.'[84] Lee J noted that to ask, as their Honours did, whether the worker is carrying on his or her own business 'is likely to be a useful way of approaching the broader inquiry in many cases'.[85] Ultimately, Lee J observed that 'the weight to be afforded to whether the worker is conducting a business on their own account is to be assessed in the light of the *whole* picture and will, of course, vary on a case by case basis'.[86]

In *Jamsek v ZG Operations Australia Pty Ltd*, a decision of the Full Court of the Federal Court of Australia, Perram J stated that '[n]o doubt understanding whose business is being conducted is a valuable aid to comprehension but it is not the central inquiry and an answer to it, one way or the other, is not necessarily decisive.'[87] In the same case, Anderson J observed that 'the appropriate question is not whether the person is conducting their own business; the question is whether the person is an employee'.[88] In *Dental Corporation Pty Ltd v Moffet*, another decision of the Full Federal Court, Perram and Anderson JJ, with whom Wigney J agreed, stated that 'the central question to be answered is whether the person is employed'[89]

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77 *Tattsbet* (n 21).
78 Ibid 61 [61].
79 Ibid. White J agreed with Jessup J: at 80 [140]. Allsop CJ declined to comment on this issue, noting that it was 'unnecessary' to determine whether the test enunciated in *On Call Interpreters* (n 15) and adopted in *Quest* (n 15) is 'likely to be generally determinative': at 49 [3]. *Tattsbet* (n 21) was handed down before *Personnel Contracting* (n 26) and Allsop CJ made his views clear in the subsequent decision: see above Part II(B).
80 *Ecosway* (n 21).
81 Ibid [78].
82 *Eastern Van* (n 21) 399–400 [30]–[36].
83 *Personnel Contracting* (n 26) 484 [96].
84 Ibid.
85 Ibid.
86 Ibid (emphasis in original).
87 *Jamsek* (n 21) 216 [8].
88 Ibid 245–6 [181].
89 *Moffet* (n 21) 199 [68].

and '[c]onsiderations of who is conducting what business and for whom does the goodwill inure are but aids to that analysis.'[90]

D *Summary of the Competing Approaches to Entrepreneurship*

Part II has examined diverging approaches to the notion of entrepreneurship in cases concerning employment status. It identified three competing approaches: entrepreneurship as a separate test; entrepreneurship as the organising principle; and entrepreneurship as a single factor. It argued that the first approach appears to be inconsistent with High Court authorities on the multifactorial test. The issue that remains unresolved is which of the latter two approaches is the proper approach. In answering that question, it is instructive to consider the justifications or rationales underlying the doctrine of vicarious liability. These justifications are explored in Part III below.

III Justifications for the Doctrine of Vicarious Liability

The common law concept of employment has its basis in the law of vicarious liability.[91] Generally, a person who has suffered harm as a result of a worker's wrongful act must surmount two hurdles in order to establish vicarious liability on the part of the organisation that engaged that worker.[92] First, it must be established that the worker was an employee of the organisation (as opposed to an independent contractor).[93] Second, it must be shown that the wrongful act occurred in that employee's course of employment.[94] The common law concept of employment arises at the first stage of the analysis. In *Hollis*, the majority stated that the common law concept of employment is shaped by the 'concerns'[95] or 'considerations'[96] that underpin the doctrine of vicarious liability. Accordingly, in giving content to that concept, it is instructive to have regard to the rationales underlying vicarious liability.

Before discussing those rationales, two contextualising matters should be noted. First, the nature, scope and contours of the doctrine of vicarious liability are the subject of significant contestation in the courts[97] and within the literature.[98] As discussed below in Part III(B), the High Court of Australia is yet to articulate a unified view on vicarious liability,[99] and the approach that it adopts at present departs

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90 Ibid.

91 See above nn 27–33 and accompanying text.

92 For an overview of the law of vicarious liability in Australia, see Harold Luntz, David Hambly, Kylie Burns, Joachim Dietrich, Neil Foster, Genevieve Grant and Sirko Harder, *Torts: Cases and Commentary* (LexisNexis, 8th ed, 2017) ch 17.

93 See, eg, *Hollis* (n 10); *Sweeney* (n 6).

94 See, eg, *Lepore* (n 38); *Prince Alfred College* (n 38).

95 *Hollis* (n 10) 41 [45] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

96 Ibid 38 [36] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

97 See discussion below at Part III(B).

98 See above n 37 and discussion and sources cited below in Part III(A).

99 *Prince Alfred College* (n 38) 148–50 [38]–[47]. See also Paula Giliker, 'Analysing Institutional Liability for Child Sexual Abuse in England and Wales and Australia: Vicarious Liability, Non-Delegable Duties and Statutory Intervention' (2018) 77(3) *Cambridge Law Journal* 506.

from the approaches adopted by courts in other common law jurisdictions, including the United Kingdom[100] and Canada.[101] This article is concerned with the proper approach to determining employment status in the Australian context. Accordingly, the focus will be on decisions of the High Court of Australia rather than upon those from overseas. Decisions from other jurisdictions will be discussed only to the extent necessary to illuminate the reasoning in the Australian cases.

The second contextualising point concerns the fact that the High Court has drawn a distinction between the rationales or justifications for the doctrine of vicarious liability on the one hand, and the legal principles or 'criterion of liability'[102] that guide the imposition of vicarious liability on the other.[103] This article considers the underlying rationales or justifications for vicarious liability. It does not seek to discern the legal principles or tests for the imposition of vicarious liability. Furthermore, this article is concerned with the rationales underpinning vicarious liability only to the extent that they provide guidance on the function of the notion of entrepreneurship in the legal test for employment status.

Before examining the relevant High Court authorities, this article considers the theoretical justifications for vicarious liability as elucidated in the scholarly literature. This discussion is useful in situating the observations of the High Court as to those rationales. It is particularly important because the High Court has not provided comprehensive guidance on the relevant justifications.[104] The theoretical discussion provides an overarching framework through which to analyse more specific statements made at various times by different members of the High Court.

A *Theoretical Justifications*

Four key theoretical justifications for vicarious liability are enterprise risk, deterrence, just compensation and loss distribution, and agency.

1 *Enterprise Risk*

According to the enterprise risk theory,[105] the running of an enterprise or business inevitably involves the introduction of certain risks into the community, or an enhancement of certain existing risks. The employer derives benefits from running such an enterprise and should, therefore, bear the concomitant costs and burdens.[106]

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100 See, eg, *Lister v Hesley Hall Limited* [2002] 1 AC 215; *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1; *Cox v Ministry of Justice* [2016] AC 660; *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677.

101 See, eg, *Bazley v Curry* [1999] 2 SCR 534 ('*Bazley*'); *Jacobi v Griffiths* [1999] 2 SCR 570; *John Doe v Bennett* [2004] 1 SCR 436; *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia* [2005] 3 SCR 45.

102 *Hollis* (n 10) 38 [36] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

103 Ibid.

104 *Prince Alfred College* (n 38) 148–50 [38]–[47].

105 Calabresi (n 37); Simon Deakin, '"Enterprise-Risk": The Juridical Nature of the Firm Revisited' (2003) 32(2) *Industrial Law Journal* 97; Douglas Brodie, 'Enterprise Liability: Justifying Vicarious Liability' (2007) 27(3) *Oxford Journal of Legal Studies* 493; Brodie (n 37).

106 Calabresi (n 37) 500–15; Brodie (n 37) 9.

When a risk associated with conducting the business materialises and causes harm to a third party, it is fair for the law to impose upon the employer the costs associated with the materialisation of that risk.[107] One risk associated with running a business is the risk that an employee may engage in negligent conduct or intentional wrongdoing in the course of his or her employment. Some scholars have explained the enterprise risk theory by reference to economic theories.[108] The enterprise risk approach facilitates the internalisation of the costs of conducting a business.[109] Imposing liability on the employer means that this particular cost of running the enterprise is accurately captured; failing to capture it would mean that the true costs of running the enterprise are understated, leading to overproduction and a suboptimal allocation of resources.[110]

2 *Deterrence*

The deterrence theory posits that it is the employers (that is, the persons or entities running the businesses) who are in the best position to implement systems and processes within their workplaces that mitigate the risk of harm.[111] It is the employers who have control over their systems and processes. If employers are made to bear the burden of any harm arising from the conduct of their businesses, then this will provide them with an incentive to put in place measures to reduce the risk of harm.[112] There are a range of possible measures that can be adopted, including those pertaining to the selection, training, supervision and discipline of employees. According to this theory, then, the imposition of vicarious liability is justified because of its deterrent effect.

It should be acknowledged that this theory is not based on the view that vicarious liability is imposed because there are flaws within an employer's work systems that equate to negligence on the part of the employer.[113] Vicarious liability is imposed in the absence of fault on the part of the employer.[114] The theory is simply based upon the idea that if employers are made to bear the costs associated with the risks arising from their businesses, then they will be incentivised to take precautionary measures to mitigate those risks.

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107 Calabresi (n 37) 500–1; Brodie (n 37) 9.
108 Calabresi (n 37) 500–15.
109 Ibid.
110 Ibid.
111 Giliker (n 37) 241–3.
112 Ibid.
113 *Hollis* (n 10) 43 [53] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ), quoting *Bazley* (n 101) 554–5:

> Fixing the employer with responsibility for the employee's wrongful act, even where the employer is not negligent, may have a deterrent effect. … Beyond the narrow band of employer conduct that attracts direct liability in negligence lies a vast area where imaginative and efficient administration and supervision can reduce the risk that the employer has introduced into the community. Holding the employer vicariously liable for the wrongs of its employee may encourage the employer to take such steps, and hence, reduce the risk of future harm.

114 *Prince Alfred College* (n 38) 148 [39] (French CJ, Kiefel, Bell, Keane and Nettle JJ): 'Vicarious liability is imposed despite the employer not itself being at fault.'

3 *Just Compensation and Loss Distribution*

There are generally three relevant parties to a case involving a claim of vicarious liability: the employer, the employee and the third party who has suffered harm as a result of the wrongful act of the employee. According to the just compensation theory, the innocent victim of harm should not have to shoulder the burden of the loss suffered. The law should facilitate compensation for the victim by imposing liability upon the party most able to bear the burden.[115] The employer has 'deep pockets'[116] and is thereby in the best position to compensate the plaintiff. The employer also has the ability to spread the losses.[117] This rationale was encapsulated in Williams' observation that '[h]owever distasteful the theory may be, we have to admit that vicarious liability owes its explanation, if not its justification, to the search for a solvent defendant.'[118]

4 *Agency*

Another proposed theoretical justification for vicarious liability has its basis in the concept of agency, broadly conceived to refer to the situation where one party is acting on behalf of another.[119] According to this theory, the imposition of vicarious liability upon the employer is justified because the employee is acting on the employer's behalf. If harm occurs while the employee is acting on the employer's behalf (that is, in the course of that employee's employment) then it is fair for the employer to bear the cost.

Part III(A) has discussed four key theoretical justifications for the doctrine of vicarious liability. Part III(B) below explores several leading High Court authorities on vicarious liability to determine the extent to which members of the Court have embraced these justifications.

B *Justifications Advanced in the Case Law*

The High Court of Australia is yet to provide definitive guidance on the justifications for the doctrine of vicarious liability. As the majority recognised in *Hollis*, '[a] fully satisfactory rationale for the imposition of vicarious liability in the employment relationship has been slow to appear in the case law.'[120] In the High Court's most

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115 Williams, 'Vicarious Liability I' (n 37) 232.

116 Baty (n 37) 154.

117 Williams, 'Vicarious Liability II' (n 37) 440–3; Calabresi (n 37) 517–27.

118 Williams, 'Vicarious Liability I' (n 37) 232.

119 Oliver Wendell Holmes Jr, 'Agency' (1891) 4(8) *Harvard Law Review* 345; Oliver Wendell Holmes Jr, 'Agency II' (1891) 5(1) *Harvard Law Review* 1; Gray (n 37); Anthony Gray, 'Liability of Educational Providers to Victims of Abuse: A Comparison and Critique' (2017) 39(2) *Sydney Law Review* 167 ('Liability of Educational Providers to Victims of Abuse').

120 *Hollis* (n 10) 37 [35] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). Similarly, in *Sweeney*, the majority acknowledged that there is an absence of 'any clear or stable principle which may be understood as underpinning the development of this area of the law': *Sweeney* (n 6) 166–7 [11] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

recent decision on vicarious liability, *Prince Alfred College Inc v ADC*,[121] the plurality stated that 'common law courts have struggled to identify a coherent basis' for imposing vicarious liability.[122] Instead of seeking to identify the rationales that underpin the doctrine of vicarious liability, the plurality in *Prince Alfred College* adopted an incremental approach to the development of the doctrine, discerning particular features in previous cases that had favoured the imposition of liability.[123] The plurality eschewed the rationales and principles of vicarious liability adopted by ultimate appellate courts in Canada and the United Kingdom, although the features in those cases that favoured liability were of significance in the plurality's reasoning.[124] Parts III(B)(1)–(3) below draw upon the Canadian decisions because they shed light upon the reasoning in the Australian cases.

1 *Enterprise Risk*

One of the most influential judicial expositions of the enterprise risk rationale is located in the judgment of the Supreme Court of Canada in *Bazley v Curry*.[125] In delivering the Court's judgment, McLachlin J made the following observation:

> Underlying the cases holding employers vicariously liable for the unauthorized acts of employees is the idea that employers may justly be held liable where the act falls within the ambit of the risk that the employer's enterprise creates or exacerbates.[126]

In *Hollis*, the majority appeared to endorse the enterprise risk theory as one rationale underpinning the doctrine of vicarious liability.[127] Their Honours referred to McLachlin J's judgment in *Bazley*[128] and stated that

> [i]n general, under contemporary Australian conditions, the conduct by the defendant of an enterprise in which persons are identified as representing that enterprise should carry an obligation to third persons to bear the cost of injury or damage to them which may fairly be said to be characteristic of the conduct of that enterprise.[129]

Subsequently, in *New South Wales v Lepore*,[130] several members of the High Court also considered the enterprise risk theory. In analysing *Lepore*, it is important to acknowledge that the judges in this case adopted differing views on vicarious

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121 *Prince Alfred College* (n 38).
122 Ibid 148 [39] (French CJ, Kiefel, Bell, Keane and Nettle JJ).
123 Ibid 150 [46]–[47].
124 Ibid 153–60 [57]–[83]. As Gageler and Gordon JJ observed in the same case (at 172 [130]), the approach adopted by the plurality
> does not adopt or endorse the generally applicable 'tests' for vicarious liability for intentional wrongdoing developed in the United Kingdom or Canada (or the policy underlying those tests), although it does draw heavily on various factors identified in cases involving child sexual abuse in those jurisdictions.

125 *Bazley* (n 101).
126 Ibid 557 [37].
127 *Hollis* (n 10).
128 Ibid 39 [41], citing *Bazley* (n 101) 552–5.
129 *Hollis* (n 10) 40 [42] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).
130 *Lepore* (n 38).

liability.[131] Gleeson CJ drew a distinction between the rationales underlying the doctrine on the one hand, and the criterion of liability or principles that determine liability on the other.[132] His Honour stated that '[a]s a test for determining whether conduct is in the course of employment, as distinct from an explanation of the willingness of the law to impose vicarious liability, [enterprise risk reasoning] has not been taken up in Australia'.[133] His Honour did not, however, eschew enterprise risk reasoning altogether. Gleeson CJ approached the course of employment test by reference to the question of whether there was a sufficiently close connection between the employment and the employee's wrongdoing.[134] His Honour stated that

> in most cases, the considerations that would justify a conclusion as to whether an enterprise materially increases the risk of an employee's offending would also bear upon an examination of the nature of the employee's responsibilities, which are regarded as central in Australia.[135]

In a joint judgment in *Lepore*, Gummow and Hayne JJ expressed reservations about the enterprise risk theory adopted in *Bazley*. Their Honours observed that '[c]reation and enhancement of risk … may distract attention from what meaning should be given to course of employment.'[136] In the same case, Kirby J stated that the enterprise risk theory articulated in *Bazley* was 'persuasive'.[137] More recently, the plurality in *Prince Alfred College* observed that 'the risk-allocation aspect of the theory is based largely on considerations of policy, in particular that an employer should be liable for a risk that its business enterprise has created or enhanced',[138] and that '[s]uch policy considerations have found no real support in Australia or the United Kingdom.'[139]

The reasoning in *Prince Alfred College* might, on one reading, support an approach that is similar to that based on the enterprise risk theory.[140] The plurality in that case developed an approach that distinguished between the concepts of 'opportunity' and 'occasion' to guide the analysis of whether the employee's wrongful act occurred in the course of his or her employment.[141] According to the plurality, the fact that the employment provided the mere opportunity for the employee's wrongful act would not be sufficient to render the act one that occurred within the course of employment.[142] On the other hand, if the employment provided the 'occasion' for the commission of the wrong, then that would be sufficient to

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131 As the plurality observed in *Prince Alfred College* (n 38) 158 [75], '[i]t is well known that different approaches were taken to the question of vicarious liability in *New South Wales v Lepore*.' See also Jane Wangmann, 'Liability for Institutional Child Sexual Assault: Where Does Lepore Leave Australia?' (2004) 28(1) *Melbourne University Law Review* 169.

132 *Lepore* (n 38) 543–4 [65].

133 Ibid 543 [65].

134 Ibid 543–4 [65].

135 Ibid 544 [65].

136 Ibid 586 [214].

137 Ibid 613 [303].

138 *Prince Alfred College* (n 38) 153 [59].

139 Ibid.

140 Gray, 'Liability of Educational Providers to Victims of Abuse' (n 119) 186–7.

141 *Prince Alfred College* (n 38) 159–61 [80]–[85].

142 Ibid 159 [80].

ground the conclusion that the wrong was committed in the course of employment.[143] The plurality in *Prince Alfred College* stated that

> it is possible for a criminal offence to be an act for which the apparent performance of employment provides the occasion. Conversely, the fact that employment affords an opportunity for the commission of a wrongful act is not of itself a sufficient reason to attract vicarious liability.[144]

It has been suggested that the reference to employment providing the 'occasion' for the commission of the wrong is similar to the notion of enterprise risk, based as it is on the idea that the conduct of the enterprise gives rise to certain risks of harm.[145]

2 *Deterrence*

In *Hollis*, the majority referred explicitly to the deterrence theory in reaching their conclusion that a bicycle courier was an employee, as opposed to an independent contractor.[146] The bicycle courier had negligently injured a member of the public while performing his courier duties. Along with a range of other factors, the majority observed that the company that engaged the bicycle courier knew of the risks that were posed to the public by the way its bicycle couriers carried out their duties.[147] Quoting from McLachlin J's exposition of the deterrence theory in *Bazley*, the majority observed that one rationale for imposing vicarious liability was that it would incentivise employers to put in place precautionary measures to mitigate risks of harm.[148]

In *Lepore*, Gummow and Hayne JJ were unpersuaded by the deterrence theory.[149] Their Honours' observations were made in the context of a case involving an employee's intentional criminal act. Their Honours stated that '[i]f the criminal law will not deter the wrongdoer there seems little deterrent value in holding the employer of the offender liable in damages for the assault committed.'[150] In the same case, Kirby J also acknowledged the shortcomings of the deterrence theory.[151] His Honour noted that deterrence was 'neither the main nor only factor'[152] underpinning vicarious liability, and that it should instead 'be taken together with the risk analysis … and with a candid acknowledgment that vicarious liability is a loss distribution device'.[153]

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143 Ibid 159–60 [80]–[81]. See also Desmond Ryan, 'From Opportunity to Occasion: Vicarious Liability in the High Court of Australia' (2017) 76(1) *Cambridge Law Journal* 14; James Goudkamp and James Plunkett, 'Vicarious Liability in Australia: On the Move?' (2017) 17(1) *Oxford University Commonwealth Law Journal* 162.

144 *Prince Alfred College* (n 38) 159 [80] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

145 Gray, 'Liability of Educational Providers to Victims of Abuse' (n 119) 186–7.

146 *Hollis* (n 10) 39 [41], 43 [53].

147 Ibid 43 [53].

148 Ibid, quoting *Bazley* (n 101) 554–5.

149 *Lepore* (n 38) 587–8 [217]–[219].

150 Ibid 587 [219].

151 Ibid 613–14 [305]–[306].

152 Ibid 614 [306].

153 Ibid.

3 *Just Compensation and Loss Distribution*

As noted in the immediately preceding discussion, Kirby J accepted loss distribution as a rationale for vicarious liability in *Lepore*. His Honour observed that '"[f]air and efficient" compensation is concerned with the search for a solvent defendant whom it is just and reasonable to burden with the legal liability for damages.'[154] His Honour drew a connection between the just compensation rationale and the enterprise risk theory, observing that '[t]he basis upon which the Canadian Supreme Court concluded that a party can be justly burdened is through the application of an "enterprise risk" analysis.'[155] Gummow and Hayne JJ referred to the deep pockets justification in *Lepore* without expressly endorsing it. Their Honours noted that the justification

> finds other, less pejorative, expression as a 'principle of loss-distribution' or as the need to provide a 'just and practical remedy' for harm suffered as a result of wrongs committed in the course of the conduct of the defendant's enterprise.[156]

4 *Agency*

In Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd,[157] Dixon J observed that

> [t]he rule which imposes liability upon a master for the wrongs of his servant committed in the course of his employment is commonly regarded as part of the law of agency: indeed, in our case-law the terms principal and agent are employed more often than not although the matter in hand arises upon the relation of master and servant.[158]

In addition, Gummow and Hayne JJ's judgment in *Lepore* draws on the language of agency,[159] with their Honours making the following statement by reference to Dixon J's judgment in *Deatons Pty Ltd v Flew*:

> [T]here are two elements revealed by what his Honour said that are important for present purposes. First, vicarious liability may exist if the wrongful act is done in *intended pursuit* of the employer's interests or in *intended performance* of the contract of employment. Secondly, vicarious liability may be imposed where the wrongful act is done in *ostensible pursuit* of the employer's business or in the *apparent execution of authority* which the employer holds out the employee as having.[160]

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154 Ibid 612 [303].

155 Ibid.

156 Ibid 581 [197] (citations omitted).

157 *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 ('*Colonial Mutual Life Assurance*'). For a comprehensive discussion of the judicial statements that identify agency as the basis for vicarious liability, see Gray (n 37) 159–88; Gray, 'Liability of Educational Providers to Victims of Abuse' (n 119) 190–7.

158 *Colonial Mutual Life Assurance* (n 157) 49.

159 Gray, 'Liability of Educational Providers to Victims of Abuse' (n 119) 191 n 172.

160 *Lepore* (n 38) 591–2 [231] (emphasis in original) discussing *Deatons Pty Ltd v Flew* (1949) 79 CLR 370. For a comprehensive analysis of Gummow and Hayne JJ's approach in *Lepore*, see Christine Beuermann, *Reconceptualising Strict Liability for the Tort of Another* (Hart Publishing, 2019);

In *Lepore*, Gaudron J put forward the proposition that the doctrine of vicarious liability has its basis in the law of agency. Her Honour stated:

> To the extent that vicarious liability is imposed on employers by reason that an employee has either done something that the employer has authorised or has done something in the course of his or her employment, it is referable to the general law of principal and agent.[161]

IV The Proper Approach: Entrepreneurship as the Organising Principle

A *Conceptual Coherence*

In the introduction to this article, it was noted that the Full Federal Court in *Personnel Contracting* had recently left open an important proposition about the concept of employment at common law. The relevant proposition was that two of the rationales underpinning vicarious liability, enterprise risk and agency, favour the view that entrepreneurship should be treated as the organising principle for the inquiry as to employment status.[162] The basis for this proposition was that these rationales are not engaged when the worker is carrying on a business of his or her own. The rationales support the view that the distinction between employees and independent contractors is rooted in the distinction between working in the service of another and carrying on a business of one's own.[163]

The theoretical and doctrinal analysis of the rationales for vicarious liability presented in Part III above provides a basis for evaluating the proposition. It is the contention of this article that the proposition is, with respect, correct. In substantiating this contention, it is instructive to consider the enterprise risk, deterrence, just compensation and loss distribution, and agency justifications for vicarious liability.

The enterprise risk theory focuses on the risks that are introduced into the community as a result of the conduct of the employer's enterprise. The relevant concerns are not enlivened when the worker is carrying on a business of his or her own. Calabresi has observed that the exception carved out for independent contractors from the law of vicarious liability is 'clearly justified' by reference to theories of risk distribution.[164] Even if the broader approach to enterprise risk adopted in the Canadian cases does not ultimately find favour in Australia, a narrower approach that is consistent with notions of enterprise risk is discernible

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Christine Beuermann, 'Conferred Authority Strict Liability and Institutional Child Sexual Abuse' (2015) 37(1) *Sydney Law Review* 113.

161 *Lepore* (n 38) 554 [108].

162 See *Personnel Contracting* (n 26) 504 [178]–[179] (Lee J), 506 [189], referring to the submission of Counsel for the appellants (M Irving QC).

163 Ibid 504 [178]–[179], referring to the submission of Counsel for the appellants (M Irving QC). See also Stewart (n 12) 261.

164 Calabresi (n 37) 547.

from the judgments in *Sweeney v Boylan Nominees Pty Ltd*[165] and *Lepore*.[166] The majority in *Sweeney*[167] and Gummow and Hayne JJ in *Lepore*[168] regarded as significant Pollock's explanation of the basis of vicarious liability.[169] In *Sweeney*, the majority stated:

> Pollock identified the element common to cases of vicarious liability as being that 'a man has for his own convenience brought about or maintained some state of things which in the ordinary course of nature may work mischief to his neighbours'. Pollock further concluded that where an employer conducted a business, and for that purpose employed staff, the employer brought about a state of things in which, if care was not taken, mischief would be done. But the liability to be imposed on the employer was liability for the way in which the business (that is, the employer's business) was conducted. Conduct of the business and the employee's actions in the course of employment in that business were the only state of things which the employer created and for which the employer would be responsible.[170]

The focus of this narrower version of the enterprise risk theory remains on the conduct of the employer's business. In *Lepore*, Gummow and Hayne JJ made several important observations about Pollock's justification. Their Honours stated:

> Conducting any enterprise carries with it a variety of risks. The paradigm kind of risk of which Pollock spoke was the risk that an employee, setting out on the employer's business, carried out a task carelessly and injured a third party. … The risk, for the occurrence of which the employer was to be held liable, was, therefore, the risk of injury caused by an employee in pursuing the *employer's* venture.[171]

It appears that the explanation given by Pollock of the basis for imposing vicarious liability is very similar to the enterprise risk theory propounded in *Bazley*. Gummow and Hayne JJ stated:

> Where the analysis made in *Bazley* departs from the proposition identified by Pollock is that the risks to be considered are not confined to those risks which attend the *furtherance* of the venture but include the risks of conduct that is directly antithetical to those aims.[172]

The preceding observations shed light upon the connection between the enterprise risk theory and the notion of entrepreneurship, and on the relevance of the notion of entrepreneurship to the inquiry as to employment status. These observations demonstrate that the focus of the enterprise risk theory, either broadly or narrowly conceived, is on the business conducted by the employer and the venture of the employer. The concerns are not engaged when the worker is conducting a business of his or her own. The significance of the worker conducting his or her own business was addressed explicitly in *Sweeney*, with the majority stating that the

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165 *Sweeney* (n 6).
166 *Lepore* (n 38).
167 *Sweeney* (n 6) 170–1 [21]–[23] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
168 *Lepore* (n 38) 588 [220]–[221].
169 Frederick Pollock, *Essays in Jurisprudence and Ethics* (Macmillan and Co, 1882).
170 *Sweeney* (n 6) 170–1 [23] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) (emphasis omitted) (citations omitted). See also *Lepore* (n 38) 582 [200]–[202] (Gummow and Hayne JJ).
171 *Lepore* (n 38) 588 [221] (emphasis in original).
172 Ibid 588 [222] (emphasis in original).

worker, who was held to be an independent contractor, 'did what he did not as an employee of the respondent but as a principal pursuing his own business or as an employee of his own company pursuing its business'.[173]

The version of the just compensation and loss distribution theories that has the most promising foundation in the Australian case law is the one that links just compensation and loss distribution with the enterprise risk theory. As explained above,[174] Kirby J made this connection in *Lepore*, observing that it is fair to impose the burden of losses suffered on the party who has introduced into the community, through the conduct of an enterprise, the relevant risk that led to the losses.[175] The connection between loss distribution and enterprise risk is also noted in the literature on theories of vicarious liability.[176] On this basis, the reasoning in the immediately preceding paragraph, which addressed the relationship between the enterprise risk theory and the notion of entrepreneurship, applies equally to the rationales of just compensation and loss distribution.

Pollock's exposition of vicarious liability also assists in the articulation of the connection between the deterrence theory and the notion of entrepreneurship. In *Lepore*, Gummow and Hayne JJ referred to Pollock's view that one justification for vicarious liability is that employers should be incentivised to select employees, and to create and administer work systems, with due care, even if this means that in particular cases the imposition of liability causes 'some individual hardship'.[177] Pollock adopted a different view in relation to contractors, noting that 'the use of care in choosing a contractor who is likely to be careful is too remote a benefit to the community to be enforced by indiscriminate penalties'.[178] Gummow and Hayne JJ observed that 'the deterrent effect of holding an employer responsible for the negligence of employees'[179] was thus one reason underlying the principle that an employer is vicariously liable for the torts of an employee, but a principal is not vicariously liable for the torts of an independent contractor.[180] The deterrence justification is not engaged when the worker is conducting a business of his or her own.

Finally, the agency theory also supports the view that the notion of entrepreneurship should be the ultimate inquiry in cases concerning employment status. According to the agency theory, the imposition of vicarious liability is justified on the basis that the employee is the employer's agent; the employee is acting on behalf of the employer in the conduct of that employer's business.[181] The relevant concerns are not enlivened when the worker is conducting his or her own business.[182]

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173 *Sweeney* (n 6) 173 [33] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
174 See above Pt III(B)(3).
175 *Lepore* (n 38) 612–13 [303].
176 See, eg, Brodie (n 37) 14, citing C Robert Morris Jr, 'Enterprise Liability and the Actuarial Process: The Insignificance of Foresight' (1961) 70(4) *Yale Law Journal* 554, 584.
177 *Lepore* (n 38) 581 [198], quoting Pollock (n 169) 130.
178 Ibid.
179 *Lepore* (n 38) 581 [198].
180 Ibid.
181 See above Part III(A)(4) and Part III(B)(4).
182 See *Personnel Contracting* (n 26) 504 [178] (Lee J), referring to the submission of Counsel for the appellants (M Irving QC).

The four principal rationales examined above demonstrate that the distinction between employees and independent contractors rests, in essence, upon the basis that the former are working in the service of another, while the latter are carrying on a business of their own.[183] Accordingly, in marking out the boundary between these two categories, the legal test for employment status should adopt, as its ultimate inquiry, the question of whether the worker is carrying on a business of his or her own.[184] The notion of entrepreneurship should provide an overarching framework by reference to which the various indicia in the multifactorial test are assessed. Such an approach aligns the concept of employment with the rationales underlying the body of law in which it is anchored, thereby bringing a degree of conceptual coherence to the exercise of distinguishing employees from independent contractors.

B *Analytical Coherence*

Some judges have observed that the elevation of entrepreneurship above other factors is inconsistent with the nature of the multifactorial test.[185] The test requires an evaluation and balancing of various indicia, none of which are determinative.[186] One advantage of the approach that treats entrepreneurship as the organising principle for the application of the test is that it provides courts with an overarching framework by which to assess a multitude of factors that pull in different directions. In *Ellis v Wallsend District Hospital*, Samuels JA of the New South Wales Court of Appeal, with whom Meagher JA agreed, expressed the following reservations about the multifactorial approach expounded in *Brodribb*:

> The problem is that this approach, tending as it does to define the relationship only in terms of its elements, does not provide any external test or requirement by which the materiality of the elements may be assessed. The assertion that a working relationship between A and B will constitute one of employment, provided that it manifests the elements of such a relationship, may be unhelpful unless those elements are certain in number, character, quality and importance, in which case their presence in the prescribed measure will establish the character of the relationship.[187]

The adoption of entrepreneurship as the organising principle mitigates some of these concerns. Support for this proposition may be derived from Allsop CJ's judgment in *Personnel Contracting*.[188] His Honour observed that there needs to be 'organising conceptions that inform the relevant binary distinction in order that the task is not one to determine a legal category of meaningless reference'.[189] Treating

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183 Ibid 504 [178]–[179], referring to the submission of Counsel for the appellants (M Irving QC).

184 Ibid.

185 See, eg, *Personnel Contracting Trial* (n 22) [153]; *Jensen* (n 22) [89].

186 The one exception is the requirement of personal service. Employment requires the provision of personal service. If a worker has an unqualified right to delegate his or her work to another party, then that will almost invariably lead to the conclusion that the worker is an independent contractor: *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385, 391; *Brodribb* (n 9) 38.

187 *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553, 597. See also Neil and Chin (n 46) 16–17.

188 *Personnel Contracting* (n 26) 461 [13].

189 Ibid referring to Julius Stone, *The Province and Function of Law* (Harvard University Press, rev ed, 1950) 171.

entrepreneurship as the organising principle around which the indicia are assessed may bring some degree of analytical coherence to the task.[190]

V Conclusion

The many and varied ways in which work relationships are structured in the modern economy[191] have brought to the fore existing uncertainties surrounding the multifactorial test for employment status. This article has addressed one of those uncertainties: namely, the role and function of the notion of entrepreneurship in the application of that test. It has critically examined the cases and discerned three competing approaches to entrepreneurship: entrepreneurship as a separate test; entrepreneurship as the organising principle; and entrepreneurship as a single factor. It has argued that the proper approach is to treat entrepreneurship as the organising principle that informs the assessment of the indicia in the multifactorial test.

In advocating for the adoption of this approach, this article has drawn upon theoretical justifications underpinning the doctrine of vicarious liability, as well as the case law on this doctrine. The common law concept of employment is anchored in the law of vicarious liability. The rationales underpinning the doctrine of vicarious liability demonstrate that the distinction between employees and independent contractors rests, in essence, on the basis that employees work in the service of another, while independent contractors carry on their own businesses. The common law concept of employment marks out the boundary between those who are running their own businesses ('entrepreneurs') and those who are not. The determination of whether a worker is an employee or an independent contractor is a complex exercise that has long vexed the judiciary.[192] Delineating the contours of the concept of employment by reference to the rationales underpinning vicarious liability may bring a greater degree of conceptual and analytical coherence to that exercise.

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190 *Personnel Contracting* (n 26) 461 [13]. See also Neil and Chin (n 46) 22.

191 See generally Richard Johnstone, Shae McCrystal, Igor Nossar, Michael Quinlan, Michael Rawling and Joellen Riley, *Beyond Employment: The Legal Regulation of Work Relationships* (Federation Press, 2012).

192 See, eg, Hugh Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10(3) *Oxford Journal of Legal Studies* 353; Joellen Riley, 'The Definition of the Contract of Employment and its Differentiation from Other Contracts and Other Work Relations' in Mark Freedland, Alan Bogg, David Cabrelli, Hugh Collins, Nicola Countouris, ACL Davies, Simon Deakin and Jeremias Prassi (eds), *The Contract of Employment* (Oxford University Press, 2016) 321; Simon Deakin, 'Decoding Employment Status' (2020) 31(2) *King's Law Journal* 180.

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