# SHIFTING AND IGNORING THE BALANCE OF POWER: THE HIGH COURT'S NEW RULES FOR DETERMINING EMPLOYMENT STATUS

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*In 2022 the High Court rewrote the rules for determining whether a worker is an employee, favouring a contract-centric approach that confines attention to agreed rights and obligations, not substance or reality. We explain how previous debates and disagreements were resolved, and examine how the new rules are being applied. By ignoring the balance of power in work relations, and the protective purpose of labour laws, the Court has made it much easier to contract out of labour standards. To protect the integrity of those standards, and prevent a growth in arrangements that disguise what is functionally employment as independent contracting, a new statutory definition of employment is needed.*

## I INTRODUCTION

If there is one thing that those who study labour laws think they know, it is why such laws exist. In Otto Kahn-Freund's classic words, '[t]he main object of labour law [is] … to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship'.[1] While not all workers are vulnerable to the exercise of the 'market power'[2] or

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1 Sir Otto Kahn-Freund, *Labour and the Law*, ed Paul Davies and Mark Freedland (Stevens & Sons, 3rd ed, 1983) 18.

2 Hugh Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (1986) 15(1) *Industrial Law Journal* 1 <https://doi.org/10.1093/ilj/15.1.1>. Christopher Arup, drawing on the work of Ruth Dukes and Zoe Adams, emphasises the need to look beyond the particulars of the labour contract and 'consider the structures which shape where power and responsibility are distributed among employers, workers, and governments [in the] contemporary political economy': Christopher Arup, 'Liberty or Protection? Making Law for Employment and Social Security' (2022) 31(3) *Griffith Law Review* 361, 363 <https://doi.org/10.1080/10383441.2022.2096967>. See also Ruth Dukes, 'The Economic Sociology of Labour Law' (2019) 46(3) *Journal of Law and Society* 396 <https://doi.org/10.1111/jols.12168>; Zoe Adams, 'Labour Law, Capitalism and the Juridical Form: Taking a Critical

'domination'[3] of hiring organisations, information asymmetries, transaction costs, barriers to worker mobility and monopsonistic practices often leave workers at a disadvantage and enable hirers to exert significant control over the terms on which work is performed. That imbalance justifies the state in setting 'regulatory floors' for wages or working conditions and, up to a point, in allowing 'collective action [to] act as an efficient countervailing power to the bargaining power of employers'.[4] But so too does a further implicit factor: the inadequate protection the common law offers the disempowered and vulnerable. Other than through largely equitable doctrines with very limited application in employment, the general law of contract leaves the parties to extract whatever terms the other party will accept.[5]

It is these twin basic rationales – inequality of bargaining power and inadequate common law protection from exploitation of that power – which explain why labour laws such as the *Fair Work Act 2009* (Cth) ('*FW Act*') set minimum employment standards, allow workers to contest managerial decisions, and provide for collective bargaining through trade unions. One fundamental issue, however, is whether the very mischiefs labour law is intended to address can be used to undermine the statutory cure it is designed to administer.[6] That may happen when the method used to determine who is statutorily protected incorporates the common law principles (along with the common law protections they afford) that a labour statute is designed to displace. Those principles may not just influence the operation of the statute,[7] but undermine it – a capacity powerfully and disturbingly illustrated by the High Court's recent decisions in *Construction, Forestry, Maritime, Mining and*

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Approach to Questions of Labour Law Reform' (2021) 50(3) *Industrial Law Journal* 434 <https://doi.org/10.1093/indlaw/dwaa024>.

3 David Cabrelli and Rebecca Zahn, 'Theories of Domination and Labour Law: An Alternative Conception for Intervention?' (2017) 33(3) *International Journal of Comparative Labour Law and Industrial Relations* 339 <https://doi.org/10.54648/IJCL2017015>; Aditi Bagchi, 'Nondomination and the Ambitions of Employment Law' (2023) 24(1) *Theoretical Inquiries in Law* 1 <https://doi.org/10.1515/til-2023-0003>.

4 Productivity Commission, *Workplace Relations Framework* (Inquiry Report No 76, 30 November 2015) vol 1, 87–8. See also at 85–6; Productivity Commission, *Workplace Relations* (Inquiry Report No 76, 30 November 2015) vol 2, 1137–49 ('*Workplace Relations* vol 2').

5 It may be possible to imagine a version of contract law which is capable of empowering workers, rather than just operating for the benefit of the stronger party: see, eg, Hanoch Dagan and Michael Heller, 'Can Contract Emancipate? Contract Theory and the Law of Work' (2023) 24(1) *Theoretical Inquiries in Law* 49 <https://doi.org/10.1515/til-2023-0005>. But that does not capture the reality of modern Australian contract law, especially in the wake of the High Court's rejection of an implied duty of mutual trust and confidence in *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169: see 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 <https://doi.org/10.54648/IJCL2016005>; Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6th ed, 2016) 9–10 [1.20]–[1.21], 524–6 [17.47]–[17.50].

6 Jeremias Adams-Prassl, '*Uber BV v Aslam*: "[W]ork Relations … Cannot Safely Be Left to Contractual Regulation"' (2022) 51(4) *Industrial Law Journal* 955, 960 <https://doi.org/10.1093/indlaw/dwac027>, quoting *Uber BV v Aslam* [2021] ICR 657, 677 [76] (Lord Leggatt JSC) ('*Uber*').

7 See Phillipa Weeks, 'Employment Law: A Test of Coherence between Statute and Common Law' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 166; Joellen Riley, 'Uneasy or Accommodating Bedfellows? Common Law and Statute in Employment Regulation' (Legal Studies Research Paper No 13/82, Sydney Law School, November 2013) <https://doi.org/10.2139/ssrn.2356032>.

*Energy Union v Personnel Contracting Pty Ltd* ('*Personnel Contracting*')[8] and *ZG Operations Australia Pty Ltd v Jamsek* ('*Jamsek*').[9]

Part II of this article examines the background to the High Court decisions, explaining the importance of determining who is an employee and the state of the law prior to the Court's intervention. In Part III we outline the facts and findings in the two cases, before going on in Part IV to take a closer look at the Court's new approach to determining employment status. We assess how debates and disagreements evident in previous case law were resolved, before proceeding in Part V to explore various qualifications and exceptions noted by the majority, some of which have been considered in subsequent cases. Part VI examines the potential implications of the decisions, and in particular whether the new approach is as much an invitation to engage in 'sham contracting' as it might appear. In Part VII we conclude that statutory intervention is needed to protect the integrity of Australia's system of labour standards, through the adoption of a test that privileges substance and reality over contractual form. When the common law creates an incongruity between a statutory object and the achievement of that object, reform is necessary to preserve the integrity of the statutory regime.

## II BACKGROUND TO *PERSONNEL CONTRACTING* AND *JAMSEK*

The cases involved the fundamental question of who qualifies for the protection of labour standards. While it is increasingly common to find legislation dealing with workplace safety or human rights applying to a broad category of 'workers', including independent contractors and volunteers,[10] most labour statutes continue to accord rights and protections only, or primarily, to *employees*.[11]

Businesses or other organisations seeking to obtain labour will always have a strong incentive to avoid the costs associated with labour law regulation and to disguise what might in substance be employment arrangements. A hirer may wish to reap the financial and practical benefits from having someone work for them in a subordinated capacity, without incurring the costs of being an employer in relation to matters such as minimum wages, the scheduling of work hours, the provision of leave, fair treatment in dismissal, insurance against work-related injury, or superannuation.[12] The potential savings from disguised employment or 'sham contracting' arrangements mean that the grey area that will always exist

8 (2022) 96 ALJR 89 ('*Personnel Contracting*').

9 (2022) 96 ALJR 144 ('*Jamsek*').

10 For a recent example, see the provisions dealing with sexual harassment at work in *Fair Work Act 2009* (Cth) pt 3-5A ('*FW Act*'), inserted by *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) sch 1 pt 8.

11 Stewart et al, *Creighton and Stewart's Labour Law* (n 5) 196–9 [8.04]–[8.10].

12 Hugh Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10(3) *Oxford Journal of Legal Studies* 353 <https://doi.org/10.1093/ojls/10.3.353>; Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15(3) *Australian Journal of Labour Law* 235 ('Redefining Employment?').

between employment and independent contracting becomes both larger and (in a policy sense) more contentious. Employment is the gateway to protection by most labour laws. A central issue in the cases before the Court was the extent to which an employer could utilise the common law governing contracts to close that gate.

Prior to the High Court rulings, three things seemed tolerably clear. First, in the absence of statutory definitions, the term 'employee', as with cognates such as 'employer' or 'employment', must generally be given its meaning at common law.[13] Only rarely will a peculiar statutory context demand a different approach.[14]

Second, the common law had developed no single definitive factor or 'bright line' test for identifying employment. Courts, tribunals and administrative agencies were required to apply the impressionistic, multi-factor test endorsed by the High Court in cases such as *Stevens v Brodribb Sawmilling Co Pty Ltd* ('*Brodribb*')[15] and *Hollis v Vabu Pty Ltd* ('*Hollis*').[16] This involves asking a series of questions about a work arrangement, assessing whether the answers point towards or away from employment, and then reaching an overall conclusion.[17] In addition to the hiring organisation's capacity to control the worker, other relevant factors include 'the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee'.[18]

Third, a worker is not an organisation's employee unless they have entered into an enforceable contract with that organisation which commits them to supply their own labour.[19] That has particular implications for trilateral work arrangements. If A contracts to supply B's labour to C, on the basis that B is engaged and paid by A and has no contract with C, then B is not an employee of C. That is true even when C provides the money to pay B and work is performed under C's direction. It does not matter whether A is a labour hire agency,[20] a personal company established by B,[21] or any other type of contractor that subcontracts with B.[22]

But if those things were clear enough, much else was uncertain coming into 2022. The complex exercise required by the common law may produce outcomes

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13 See, eg, *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346, 388 [173] (North and Bromberg JJ) ('*Quest*'); *C v Commonwealth* (2015) 234 FCR 81, 87 [34] (Tracey, Buchanan and Katzmann JJ).

14 Cf *Konrad v Victoria* (1999) 91 FCR 95; *Ryan v Commissioner of Police* (2022) 290 FCR 369.

15 (1986) 160 CLR 16 ('*Brodribb*').

16 (2001) 207 CLR 21 ('*Hollis*').

17 For overviews of the common law approach: see, eg, Mark Irving, *The Contract of Employment* (LexisNexis Butterworths, 2nd ed, 2019) ch 2; Carolyn Sappideen, Paul O'Grady and Joellen Riley, *Macken's Law of Employment* (Lawbook, 9th ed, 2022) ch 2.

18 *Brodribb* (n 15) 24 (Mason J).

19 *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95. See also *Muthu v Radeshar Pty Ltd* [2022] FCA 1157.

20 See, eg, *Mason and Cox Pty Ltd v McCann* (1999) 74 SASR 438; *Wilton v Coal & Allied Operations Pty Ltd* (2007) 161 FCR 300.

21 See, eg, *Richtsteiger v Century Geophysical Corp [No 3]* (1996) 70 IR 236; *Blake v Sitefate Pty Ltd* (1997) 74 IR 466; *Zoltaszek v Downer EDI Engineering Pty Ltd* [2011] FCA 744, [49]–[53] (Flick J).

22 See, eg, *Eastern Van Services Pty Ltd v Victorian WorkCover Authority* (2020) 296 IR 391 ('*Eastern Van Services*').

which, while not arbitrary,[23] can be difficult to predict, especially given what are often unarticulated values or assumptions on the part of adjudicators.[24] As Lee J put it in one of the decisions under appeal to the High Court: 'Such an impressionistic and amorphous exercise is susceptible to manipulation and its application is inevitably productive of inconsistency, in that courts can apply the same legal test to similar facts, but reach a different conclusion.'[25]

An important reason for divergences, especially over the past two decades, has been the different approaches taken to three critical issues. The first is whether the focus should be on what the parties have formally agreed (through contractual terms almost invariably drafted by the hirer), or on the substance and practical reality of the relationship.[26] The former attributes rights and obligations through the medium of the common law of contract; the latter may take into account (among other things) any inequality and misuse of bargaining power. The second is the degree of significance attached to whether the worker can credibly be described as an 'entrepreneur', and whether a person can be classed as an independent contractor without a business of their own.[27] The third, on which disagreement has perhaps been less overt, is whether the determination of employment status should be affected by the context in which the issue arises – and more especially, the need to respect the 'protective' role of labour statutes.[28] The different approaches taken to these issues made them ripe for determination by the High Court.

The contestable nature of decisions in this area and the differences in the judicial methods that produce them were on display in four rulings by intermediate courts of appeal in 2020, in cases with genuinely difficult features.[29] In two, involving the labour hire business Personnel Contracting and the lighting company

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23 Simon Deakin, 'Decoding Employment Status' (2020) 31(2) *King's Law Journal* 180, 193 <https://doi.org/10.1080/09615768.2020.1789432>.

24 See Carolyn Sutherland, 'Judging the Employment Status of Workers: An Analysis of Commonsense Reasoning' (2022) 46(1) *Melbourne University Law Review* 281. As Sutherland notes, a judge's background may often include having been 'a self-employed barrister in a relatively strong position in the labour market', as well as belonging to a 'dominant ethnic and/or gender group': at 318.

25 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631, 655 [76] ('*Personnel Contracting (FCAFC)*').

26 Pauline Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (2015) 32(2) *Journal of Contract Law* 149 ('Subsequent Conduct'); Irving (n 17) 48–54 [2.2]–[2.4], 95–111 [2.36]–[2.46]; 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, 7–8; Pauline Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (2021) 44(2) *Melbourne University Law Review* 502 ('Contractual Autonomy').

27 Stewart and McCrystal (n 26) 8; Pauline Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (2021) 44(4) *University of New South Wales Law Journal* 1336 <https://doi.org/10.53637/OGLB7881>; Pauline Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (2021) 43(1) *Sydney Law Review* 83 ('Vicarious Liability').

28 See 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 ('Statutory Norms'); Bomball, 'Contractual Autonomy' (n 26).

29 *Eastern Van Services* (n 22); *Dental Corporation Pty Ltd v Moffet* (2020) 278 FCR 502 ('*Moffet*'); *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 ('*Jamsek (FCAFC)*'); *Personnel Contracting (FCAFC)* (n 25).

ZG Operations, the unsuccessful parties successfully obtained leave to appeal to the High Court.[30] The prospects for a significant restatement of the law were subsequently heightened by *WorkPac Pty Ltd v Rossato* ('*WorkPac*'),[31] a case on the meaning of casual employment.[32] In determining whether there was any 'firm advance commitment' of continuing work, Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ stressed that the answer must be found in the contractual terms governing the employment relationship, not the parties' non-contractual 'expectations or understandings'.[33] They also suggested a similar approach should be taken to the determination of employment status, and cast doubt as to what had been said in *Hollis* about the need to consider the 'totality of the relationship',[34] at least in the case of an arrangement comprehensively documented in writing.[35]

In the result, the decisions in *Personnel Contracting* and *Jamsek* resulted in two successful appeals, with employment found in the first case but not the second. But what is more important than the outcomes is the reasoning adopted by five of the seven judges. Taking the approach foreshadowed in *WorkPac*, Kiefel CJ, Keane, Edelman, Gordon and Steward JJ all made it clear that where an agreement to perform work is set out in writing, the characterisation of the parties' relationship must (with certain limited exceptions) be undertaken solely by reference to their agreed rights and obligations, not the reality of how the arrangement is put into practice.

## III THE DECISIONS IN *PERSONNEL CONTRACTING* AND *JAMSEK*

*Personnel Contracting* concerned the engagement of Mr Daniel McCourt, a 22-year-old backpacker on a working holiday visa. He was engaged by Personnel Contracting, a labour hire company trading as Construct, and signed an Administrative Services Agreement ('ASA') and Induction Manual. The ASA required him to '[c]o-operate in all respects' with any builder to which he was assigned, and contained a characterisation term stating the relationship as not one of employment. He was offered work at Hanssen Pty Ltd, a builder largely of high-rise residential apartments. He worked there as a general labourer under close supervision, principally cleaning and moving materials, for about 50 hours

30 In another of the cases, *Moffet* (n 29), leave to appeal to the High Court on a different aspect of the decision was refused: *Dental Corporation Pty Ltd v Moffet* [2021] HCATrans 16.

31 (2021) 271 CLR 456 ('*WorkPac*').

32 The High Court's decision on that issue had already been overtaken by the enactment of a new (and retrospective) definition of the term 'casual employee' in the *FW Act* (n 10), as part of broader reforms introduced by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth): see Andrew Stewart et al, 'The (Omni)bus That Broke Down: Changes to Casual Employment and the Remnants of the Coalition's Industrial Relations Agenda' (2021) 34(3) *Australian Journal of Labour Law* 132, 140–55.

33 *WorkPac* (n 31) 477 [57].

34 *Hollis* (n 16) 33 [24] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ), quoting *Brodribb* (n 15) 29 (Mason J).

35 *WorkPac* (n 31) 489–90 [101].

per week over six days from July to November 2016 and then, after a holiday, from March to June 2017. Under clause 4 of the Labour Hire Agreement ('LHA') between Construct and Hanssen, workers supplied to the builder were 'under the client's direction and supervision from the time they report to the client and for the duration of each day on the assignment'.

McCourt and the Construction, Forestry, Maritime, Mining and Energy Union ('the Union') commenced proceedings in the Federal Court, alleging that McCourt was employed by Construct, who had contravened the *FW Act* by not paying him in accordance with what at the time was the Building and Construction General On-site Award 2010. McCourt had been paid about 75% of what the Award required.[36]

McCourt was held to be an independent contractor at first instance.[37] The trial judge (O'Callaghan J) held that there was no contractual right of control in the ASA, treated the fact that McCourt was not conducting his own business as one indicator of employment, and regarded McCourt's lack of integration within Construct's business, as well as his right to work for others and the casual nature of his engagement, as slightly contraindicating employment.[38] The characterisation term was treated as a tiebreaker, given that other factors were balanced.[39] An appeal to the Full Court of the Federal Court (Allsop CJ, Jagot and Lee JJ) was dismissed.[40] A previous appellate decision, *Personnel Contracting Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers* ('*Personnel Contracting No 1*'),[41] involving essentially the same facts and where the labour hire worker was held to be an independent contractor, was considered to be neither distinguishable nor plainly wrong.[42] Each member of the Full Court made it clear, however, that they would have decided the case differently if *Personnel Contracting No 1* had not prevented them from doing so.[43]

The High Court, by majority, granted the appeal, with Steward J dissenting. Four sets of reasons were delivered: one by Kiefel CJ, Keane and Edelman JJ ('the plurality'), one by Gageler and Gleeson JJ, and separate reasons of Gordon J and Steward J.

On the fundamental issues of what was being characterised and what was relevant in that process, the Court was divided between the plurality, Gordon J and Steward J (together referred to in this article as the 'formalist majority'), and Gageler and Gleeson JJ (the 'substantivist minority'). Where there is a wholly written contract, and subject to certain exceptions, the former held that the character of a working relationship must be determined *only* by reference to the parties'

36 *Personnel Contracting* (n 8) 96–7 [1]–[5], 98 [12], 98–100 [14], 100 [17] (Kiefel CJ, Keane and Edelman JJ); *Personnel Contracting (FCAFC)* (n 25) 636–7 [4], 680 [174] (Lee J).

37 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806, [177] (O'Callaghan J) ('*Personnel Contracting (FCA)*').

38 Ibid [145]–[147], [157], [164].

39 Ibid [170]–[180].

40 *Personnel Contracting (FCAFC)* (n 25).

41 *Personnel Contracting Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers* (2004) 141 IR 31 ('*Personnel Contracting No 1*').

42 *Personnel Contracting (FCAFC)* (n 25) 666–70 [121]–[134] (Lee J).

43 Ibid 642 [31] (Allsop CJ, Jagot J agreeing at [41]), 682 [185] (Lee J, Jagot J agreeing at [41]).

legal rights and obligations. That requires construction of the contract's terms, to be undertaken in accordance with orthodox contractual principles. Post-formation conduct is not relevant in assessing the nature of the relationship, unless it affects the parties' rights and duties. McCourt and the Union, it was noted, had not alleged that the ASA terms were a 'sham' or that they had subsequently been varied.

The plurality held that McCourt was an employee as he served in the business of Construct and was subject to their control under the ASA, the characterisation terms were irrelevant, the casual nature of the employment did not contraindicate employment, and *Personnel Contracting No 1* was wrongly decided.[44] Gordon J came to a similar conclusion, noting that the ASA terms requiring personal performance and governing the mode of remuneration were consistent with employment, while the characterisation terms were relevant but not determinative.[45] Steward J agreed with Gordon J's expression of the tests for determining employment status,[46] but would nonetheless have dismissed the appeal as the case was materially the same as the arrangement in an earlier case, *Building Workers' Union of Australia v Odco Pty Ltd*,[47] and longstanding authorities which had important legislative and commercial impact should not be overruled unless plainly wrong.[48]

The approach of Gageler and Gleeson JJ was very different. Their Honours held that the nature of a relationship is a question of fact, and the relationship was not to be conflated with the contract.[49] On this approach, the terms and any variation to them are relevant but not determinative. The relationship also consists of conduct outside of the terms, including here the performance of the engagement and its interaction with the LHA. McCourt was an employee because he was supplying nothing but his labour, he was not conducting his own business, and, when supplying his labour, he was the subject of control. That control occurred both through the ASA and the LHA.[50]

What the plurality and Gordon J termed the 'multifactorial' test was applied by all members of the court. They agreed that multiple factors or indicia are relevant in the characterisation process,[51] and that no one factor should be treated as determinative.[52] But they differed on two issues, as discussed further below: the facts relevant in applying the multifactorial test, and in particular the role played by post-formation conduct; and the relevance of entrepreneurship, or the own business/employer's business dichotomy.

Turning now to *Jamsek*, in 1977 Mr Martin Jamsek was employed as a truck driver by a lighting company whose business was later taken over by ZG

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44 *Personnel Contracting* (n 8) 110 [72], 111 [77], [79], 112 [84], 113 [85]–[86].
45 Ibid 136–8 [192]–[201].
46 Ibid 138 [203].
47 (1991) 29 FCR 104.
48 *Personnel Contracting* (n 8) 138 [205], 141 [215].
49 Ibid 117 [111].
50 Ibid 126–7 [158].
51 Ibid 103 [32], 107–8 [55], 109 [61], 113 [89]–[90] (Kiefel CJ, Keane and Edelman JJ), 117 [113], 117–8 [114], 119 [119] (Gageler and Gleeson JJ), 129–30 [174]–[175] (Gordon J).
52 Ibid 110 [73], 113 [89]–[90] (Kiefel CJ, Keane and Edelman JJ), 117–8 [114], 119 [119] (Gageler and Gleeson JJ), 129–30 [174]–[175] (Gordon J).

Operations.[53] In late 1985, the company insisted Jamsek purchase his own truck and become an independent contractor. Jamsek set up a partnership with his wife, which purchased a truck and entered into a comprehensive written contract under which it agreed to provide the truck and a driver, and cart goods to places as directed. The partnership paid the maintenance and operational costs of the truck, issued invoices for work done and divided the income between Jamsek and his wife. Another driver, Mr Robert Whitby, was engaged under the same arrangements. Now and again, the partnerships updated the truck used. Whitby also used a small ute for some deliveries. His partnership was dissolved in 2012 after his divorce from his wife. On the termination of the arrangements, Jamsek and Whitby claimed annual and long service leave.[54] They also claimed superannuation contributions, on the basis either that they were employees as a matter of common law, or had worked under contracts 'wholly or principally for [their] labour' within the meaning of section 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (Cth).[55]

The trial judge (Thawley J) rejected Jamsek and Whitby's claims.[56] On appeal, the Full Court of the Federal Court (Perram, Wigney and Anderson JJ) overturned the finding that the drivers were not employees.[57] The Court devoted significant attention to how the parties conducted themselves over the decades of their relationship, the parties' expectations under the contracts and the lack of goodwill generated by the drivers. A disparity of bargaining power affected the contracts, so that the substance and reality of the relationship was in each case one of employment.[58]

The High Court unanimously granted ZG Operations' appeal. Three joint sets of reasons were delivered, by Kiefel CJ, Keane and Edelman JJ (again, the plurality), Gageler and Gleeson JJ, and Gordon and Steward JJ. On the fundamental issues, each member adopted the same reasoning as in *Personnel Contracting*, except that Steward J agreed here with Gordon J in relation to both principles and outcome.

The plurality held that Jamsek and Whitby were not employees because they were engaged in the conduct of their own businesses and not in any other capacity.[59] The genesis and purpose of the contract told against any relationship of employment, the disparity of bargaining power did not bear on the meaning of the agreed terms, and ZG's control was limited to what work was to be done and not

53 The fact that the initial engagement was with a different corporation did not matter for the purposes of the case: see *Jamsek* (n 9) 147 [1] (Kiefel CJ, Keane and Edelman JJ).

54 Ibid 147 [2]–[3], 149 [15]–[16], 152 [27] (Kiefel CJ, Keane and Edelman JJ).

55 The application of section 12(3) was not ultimately considered by the High Court, which remitted the issue to the Full Court. The drivers' claim under that provision, which is beyond the scope of this article to consider, was subsequently rejected: *Jamsek v ZG Operations Australia Pty Ltd [No 3]* [2023] FCAFC 48. A similar claim failed in *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76 ('*JMC*').

56 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934.

57 *Jamsek (FCAFC)* (n 29).

58 Ibid 151–2 [196]–[201] (Anderson J).

59 *Jamsek* (n 9) 156 [60].

how it was to be done.[60] In each case, it was the partnership, not the drivers, that was contracted to carry goods. Gordon and Steward JJ came to a similar conclusion.

Gageler and Gleeson JJ found that the Full Court had correctly considered post-formation conduct, even when not amounting to a variation, but disagreed with the evaluative conclusion reached below for two reasons.[61] First, the contract was for the provision of a valuable piece of equipment, and questions of scale are important in this context.[62] Second, in each case it was the partnership that was contracted to carry goods, not to provide a truck and separately for Jamsek or Whitby personally to drive it.[63]

## IV UNDERSTANDING THE HIGH COURT'S NEW APPROACH

### A The Primacy of the Contract

Two starkly different approaches to the characterisation process were adopted in *Personnel Contracting*. For the substantivist minority, the employment relationship is one that exists in fact, not simply as a bundle of legal rights and duties. It is one established and 'maintained under' the contractual relationship and does not subsist simply 'in' the contract.[64] But the formalist majority's approach was that a court determines the character of an employment relationship *only* by reference to matters that regulate legal rights and obligations.[65] Where written terms comprehensively[66] regulate the relationship, the character of the relationship is determined by those terms alone.[67] However, they added that post-formation conduct *may* be relevant to ascertaining whether the parties have effected a variation to the original terms, whether by subsequent agreement,[68] or their subsequent conduct.[69] Post-formation conduct is also relevant to assessing whether there is an estoppel,[70] a waiver,[71] or a novation of the contract and its replacement

60 Ibid 156–7 [61]–[62], 158 [68].
61 Ibid 160–1 [85]–[86].
62 Ibid 161 [88].
63 Ibid 161–2 [89]–[90].
64 *Personnel Contracting* (n 8) 115 [103], 115 [105] (Gageler and Gleeson JJ), *Jamsek* (n 9) 159 [80], 160 [82] (Gageler and Gleeson JJ). Cf *Personnel Contracting* (n 8) 105 [44] (Kiefel CJ, Keane and Edelman JJ).
65 *Personnel Contracting* (n 8) 104–5 [43], 108 [56], 108 [59], 109 [61] (Kiefel CJ, Keane and Edelman JJ), 127 [162], 129 [172] (Gordon J).
66 The plurality used the terms 'comprehensively' and 'entirely' interchangeably: ibid 105 [44], 105 [47], 107–8 [55]–[59] (Kiefel CJ, Keane and Edelman JJ). Cf *Narich Pty Ltd v Commissioner of Pay-roll Tax* [1983] 2 NSWLR 597, 600–1 (Lord Brandon for the Court); *Personnel Contracting* (n 8) 104–5 [43]–[47] (Kiefel CJ, Keane and Edelman JJ), speaking merely of a 'written' contract.
67 *Personnel Contracting* (n 8) 100 [18], 104–5 [43]–[45], 108 [59] (Kiefel CJ, Keane and Edelman JJ); *Jamsek* (n 9) 148 [8] (Kiefel CJ, Keane and Edelman JJ).
68 *Personnel Contracting* (n 8) 104 [42] (Kiefel CJ, Keane and Edelman JJ), 130–1 [177] (Gordon J). See also *Jamsek* (n 9) 165 [110] (Gordon and Steward JJ) ('changes to the pay rates which were agreed').
69 *Personnel Contracting* (n 8) 104 [42], 105–6 [48], 107 [54], 134–5 [188] (Kiefel CJ, Keane and Edelman JJ).
70 Ibid 104 [42], 105–6 [48] (Kiefel CJ, Keane and Edelman JJ), 130–1 [177] (Gordon J).
71 Ibid 104 [42], 105–6 [48].

with other terms.[72] When it is alleged that a contract or a term of it are a sham, later conduct is likewise relevant in assessing the correctness of that claim.[73] Post-formation conduct may also be admissible to prove that the contract is ineffective under a statute,[74] or that its written terms should be rectified,[75] or that equitable doctrines (such as unconscionable conduct) would apply.[76] These exceptions are explored further in Part V.

The conceptual framework adopted by the formalist majority implicitly demands adjudicators follow what is effectively a set of three steps in the characterisation process:

1. *Ascertain the governing rights and duties*, principally in any validly agreed terms but also in any governing statutes. This involves identifying the written and oral terms, assessing if any are a sham, or if any are legally ineffective due to inconsistency with statute or by the application of equitable doctrines. Where the contract is not comprehensive, post-formation conduct can be used to identify the agreed terms.
2. *Consider whether any rights and duties have been added, changed or varied*, as the result of post-formation conduct. This will principally involve determining if there has been variation by agreement or conduct, but may also involve estoppel, waiver, or novation. This second step addresses the questions – did the parties' conduct during the relationship change their legal rights and duties, and in what way?
3. *Assess the nature of the relationship*, but only by reference to the governing legal rights and duties identified under steps 1 and 2.

### B Characterisation Terms or 'Labels'

Contracts for services may explicitly describe a worker as an independent contractor, or record that the contract is not one of employment. Approaches have differed as to the weight to be given to such characterisation terms or 'labels'.[77] In some cases, such as *ACE Insurance Ltd v Trifunovski*,[78] they have been given limited weight in the characterisation exercise. In others, such as *Tattsbet Ltd v Morrow* ('*Tattsbet*'),[79] they have been accorded more significance. In some instances, courts have adopted the view, endorsed by the Privy Council in *Australian Mutual Provident Society v Chaplin* ('*Chaplin*'), that a label can act as a 'tiebreaker'.[80] According to this approach, while labels are not determinative of the character of

72 Ibid 131 [178] (Gordon J); *Jamsek* (n 9) 148 [8] (Kiefel CJ, Keane and Edelman JJ), 164–5 [108]–[109] (Gordon and Steward JJ).

73 *Personnel Contracting* (n 8) 104–5 [43], 105–6 [48], 107 [54], 108 [59] (Kiefel CJ, Keane and Edelman JJ), 130 [175], 130–1 [177] (Gordon J). See also *Jamsek* (n 9) 148 [8] (Kiefel CJ, Keane and Edelman JJ).

74 *Personnel Contracting* (n 8) 108 [59] (Kiefel CJ, Keane and Edelman JJ); *Jamsek* (n 9) 148 [8] (Kiefel CJ, Keane and Edelman JJ).

75 *Personnel Contracting* (n 8) 130–1 [177] (Gordon J).

76 *Jamsek* (n 9) 148 [8] (Kiefel CJ, Keane and Edelman JJ).

77 See Bomball, 'Contractual Autonomy' (n 26) 520–1.

78 (2013) 209 FCR 146, 152–3 [36] (Buchanan J) ('*ACE Insurance*').

79 (2015) 233 FCR 46, 62 [65]–[66] (Jessup J) ('*Tattsbet*').

80 (1978) 18 ALR 385, 389 (Lord Fraser for the Court) ('*Chaplin*').

a work contract, they can be decisive where the indicia are finely balanced,[81] and it is not clear whether the contract is one of service or for services.

In *Personnel Contracting*, all members of the court agreed that labels are not determinative.[82] But Kiefel CJ, Keane and Edelman JJ went further:

> Even if it be accepted that there may be cases where descriptive language chosen by the parties can shed light on the objective understanding of the operative provisions of their contract, the cases where the parties' description of their status or relationship will be helpful to the court in ascertaining their rights and duties will be rare.[83]

Their Honours specifically rejected the passage from *Chaplin* endorsing the use of labels as a 'tiebreaker'.[84]

By contrast, Gordon J, with Steward J agreeing, observed that labels are to be taken into account but are 'not determinative'.[85] Gageler and Gleeson JJ took a similar traditional approach.[86] According then to four of the judges in *Personnel Contracting* (Gageler and Gleeson JJ, and Gordon J and Steward J), labels remain relevant, although if the parties' rights and obligations are consistent with an employment contract, an 'independent contractor' label will not change that conclusion.

### C Rights versus Expectations

According to the formalist majority, a work relationship is characterised by reference to the governing legal rights and duties, not the parties' expectations.[87] This reflects the approach in *WorkPac*, discounting any 'amorphous, innominate hope or expectation falling short of a binding promise enforceable by the courts'.[88] Courts do not reshape the agreed bargain to synthesise a new, fairer concord, because it is not part of the judicial function to do so. Drawing the distinction between rights and expectations is also necessary to 'avoid the descent into the obscurantism' that examining the parties' hopes and expectations would involve.[89] In contrast, in the United Kingdom ('UK'), the significance in the characterisation process of rights conferred by the written terms is attenuated by the parties' expectations about how those rights, properly construed, will operate and have operated in practice.[90]

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81 Ibid. This was the approach adopted at first instance in *Personnel Contracting (FCA)* (n 37) at [170], [172], [176]–[178] (O'Callaghan J).

82 *Personnel Contracting* (n 8) 108 [58], 109 [63]–[65], 111 [79] (Kiefel CJ, Keane and Edelman JJ), 120 [127] (Gageler and Gleeson JJ), 133 [184] (Gordon J).

83 Ibid 109–10 [66] (Kiefel CJ, Keane and Edelman JJ).

84 Ibid 109–10 [65]–[66].

85 Ibid 133 [184] (Gordon J, Steward J agreeing at 138 [203]).

86 Ibid 120 [127] (Gageler and Gleeson JJ).

87 *Jamsek* (n 9) 155 [52]–[53], 156 [55] (Kiefel CJ, Keane and Edelman JJ).

88 *WorkPac* (n 31) 478 [61]. See also at 487–8 [95]–[96] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ). Kiefel CJ, Keane and Edelman JJ adopted and applied this approach in *Jamsek* (n 9) 155 [53].

89 *WorkPac* (n 31) 478–9 [62]–[64] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).

90 *Consistent Group Ltd v Kalwak* [2007] IRLR 560, [57]–[59] (Elias J) ('*Consistent Group*'), approved in *Autoclenz Ltd v Belcher* [2011] ICR 1157, 1165–8 [25]–[35] (Lord Clarke JSC) ('*Autoclenz*'); *Protectacoat Firthglow Ltd v Szilagyi* [2009] ICR 835, 846–7 [52]–[57] (Smith LJ); ACL Davies, 'Sensible Thinking about Sham Transactions' (2009) 38(3) *Industrial Law Journal* 318, 325–8.

This rights-expectations distinction will affect how courts approach post-formation conduct in a number of ways. First, rights and duties are not created or altered simply by an expectation about the parties' conduct. In *Jamsek*, the employer expected the workers to adorn their trucks with the company's logo and wear company-branded shirts. However, the majority emphasised the distinction between conduct that creates an expectation and a mandatory imposition of a work practice that can create a duty.[91] The fact that the workers had little choice but to meet the expectation in the hope of retaining the work was to Kiefel CJ, Keane and Edelman JJ 'quite consistent with a sensible, self-interested response of an independent contractor to legitimate commercial pressure from its best customer'.[92] This accords with the formalist majority's disregard for any disparity of bargaining power or degree of economic dependence,[93] as discussed below.

Second, rights and duties are not created or altered simply from the constant repetition of non-binding conduct. A persistent, customary practice is not converted into a right or duty merely as the result of repetition.[94] The fact that a worker attends at work every day for 20 years at 9am does not mean they are obliged to do so.

Third, subjective beliefs and understandings of the parties about the nature of the contract, and the rights created by it, are not relevant to the characterisation process. Previously courts had treated as relevant their beliefs and understandings, whether communicated or uncommunicated to the other party, or communicated with third parties (such as in tax returns or comments made to the worker's wife).[95] But such beliefs and understandings are not themselves rights and duties,[96] nor often objective facts known to both parties.[97] The opinion of a party on the nature of the relationship concerns a matter of law and is irrelevant.[98] The orthodox approach in contract law is to regard the parties' extra-contractual beliefs and understandings as irrelevant.[99]

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91 *Jamsek* (n 9) 155 [52]–[53] (Kiefel CJ, Keane and Edelman JJ). See also *WorkPac* (n 31) 470 [64], 487–8 [95]–[96] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).

92 *Jamsek* (n 9) 155 [53] (Kiefel CJ, Keane and Edelman JJ). Cf the relevance afforded to economic dependence in *Re Porter* (1989) 34 IR 179, 184–5 (Gray J).

93 *Jamsek* (n 9) 156 [56] (Kiefel CJ, Keane and Edelman JJ).

94 Ibid 156 [55]–[56]. See also *WorkPac* (n 31) 487–8 [96] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ); *Neale v Atlas Products (Vic) Pty Ltd* (1955) 94 CLR 419, 428 (Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ) ('*Neale*').

95 See, eg, *Rus v Comcare* (2017) 71 AAR 478; *ACE Insurance* (n 78) 149 [16], 152–3 [36]–[37], 180–1 [122]–[123], 186 [148] (Buchanan J); *Commissioner of Taxation v De Luxe Red & Yellow Cabs Co-operative (Trading) Society Ltd* (1998) 82 FCR 507, 521 (Beaumont, Foster and Sackville JJ). See also *Brodribb* (n 15) 26 (Mason J).

96 See also *WorkPac* (n 31) 487 [95] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).

97 *Personnel Contracting* (n 8) 130 [175], 134 [187] (Gordon J). See also at 109 [61] (Kiefel CJ, Keane and Edelman JJ).

98 Ibid 109–10 [66] (Kiefel CJ, Keane and Edelman JJ); *Connelly v Wells* (1994) 55 IR 73, 74 (Gleeson CJ) ('*Connelly*').

99 *Connelly* (n 98) 74; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 461–2 [22] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471, 483 [34] (Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ).

Finally, the effect of the non-exercise of certain rights, or the failure to insist on the performance of certain duties, may be that they have been varied, waived or abandoned. But the continued existence of some rights will be unaffected by their non-exercise. Examples include substitution clauses, permitting the worker to substitute another worker to perform the service,[100] or clauses permitting the worker to engage in another business. In the UK, and to a certain extent previously in Australia, the significance afforded to such clauses has depended on whether the rights they conferred were exercised, or whether they reflected the parties' expectations about how the relationship operates.[101] On the approach taken by the formalist majority, however, dormant rights and duties, never expected to be used or never used over decades of work, will retain their significance in the characterisation process.

### D The Substance or Reality of the Relationship

In some previous Australian cases, judges had emphasised the need to have regard to the 'reality' of the relationship.[102] A core aspect of this approach involved looking not just at the contract but also at how the parties have carried out their relationship in practice. Some judges referred explicitly to the risk that the opposing approach – one that confines the characterisation enquiry to the terms of the written contract – enables hiring organisations to disguise what are in reality employment relationships as independent contracting relationships.[103] For example, in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* ('*Quest*'), North and Bromberg JJ referred to observations by the International Labour Organization ('ILO'), as well of those of leading labour law scholars, about the prevalence of disguised employment in emphasising the importance of having regard to the 'reality' of the relationship.[104]

The Supreme Court of the United Kingdom ('UKSC') has also emphasised the importance of ascertaining the 'true agreement'[105] or reality of the relationship when characterising a work contract. In *Autoclenz Ltd v Belcher* ('*Autoclenz*'), the UKSC stated that 'the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part'.[106] More recently, the UKSC confirmed this focus on reality and privileging of substance over form, emphasising the importance of 'looking beyond the terms

100 Note the discussion in *Personnel Contracting* (n 8) 110 [69]–[70] (Kiefel CJ, Keane and Edelman JJ) of *Lehigh Valley Coal Co v Yensavage*, 218 F 547, 552–3 (2nd Cir, 1914), a case that concerned a right of a worker to hire 'helpers'.

101 *Autoclenz* (n 90) 1167 [29]–[31] (Lord Clarke JSC); *Express & Echo Publications Ltd v Tanton* [1999] ICR 693, 697–8 (Gibson LJ); *On Call Interpreters & Translators Agency Pty Ltd v Commissioner of Taxation [No 3]* (2011) 214 FCR 82, 140 [283] (Bromberg J) ('*On Call Interpreters*').

102 See, eg, *On Call Interpreters* (n 101) 121 [200] (Bromberg J); *Quest* (n 13) 378 [142]–[144] (North and Bromberg JJ).

103 See, eg, *On Call Interpreters* (n 101) 121 [200] (Bromberg J); *Quest* (n 13) 378 [142] (North and Bromberg JJ).

104 *Quest* (n 13) 377–8 [138]–[142] (North and Bromberg JJ).

105 *Autoclenz* (n 90) 1168 [35] (Lord Clarke JSC).

106 Ibid.

of any written agreement' in *Uber BV v Aslam* ('*Uber*').[107] The Court explicitly acknowledged that this approach applies even where there is a wholly written contract that records the entire agreement of the parties.[108] The judicial techniques of preferring substance over form, uncloaking disguises, and focusing on reality each limit the use of power by a hirer of labour to circumvent statutory regulation by dictating the contract's terms.

In according primacy to the written contract, however, the formalist majority in the High Court has rejected that approach.[109] In *Jamsek*, the plurality condemned the use of an appeal to the 'reality' or 'substance' of the relationship as a disguised sham submission. A sham must be specifically alleged and not 'made by stealth under the obscurantist guise of a search for the "reality" of the situation'.[110] By contrast, Gageler and Gleeson JJ were prepared to embrace the notion that the 'reality' or 'substance' can be considered to ascertain the 'true' or 'real' relationship. Their Honours referred, in *Jamsek*, to the 'real relationship', results that accord 'with reality', and extracted passages from earlier decisions that drew a distinction between the agreement as recorded in the terms, and the 'substance' of the relationship and the 'real' and 'true' relation.[111]

In critiquing the approach adopted by the formalist majority in *Personnel Contracting*, it is useful to have regard to the rationale provided by Kiefel CJ, Keane and Edelman JJ for downplaying the utility of labels in the characterisation exercise. Their Honours observed that according significance to labels would confer upon the parties 'a power to alter the operation of statute law to suit themselves or, as is more likely, to suit the interests of the party with the greater bargaining power'.[112]

Use of a label is, however, only one way that the party with superior bargaining power (the hiring organisation) can remove a worker who is in reality an employee from the ambit of a labour statute. As Anne Davies has observed, there are 'more subtle' techniques,[113] such as including a substitution clause in the written contract. As employment is a relationship of personal service, the inclusion of a substitution clause, which enables workers to delegate the performance of their work to a third party, has traditionally been a strong indicator of independent contracting.[114] As Elias J has put it, confining the characterisation inquiry to the terms of the written contract may lead 'armies of lawyers [to] simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship'.[115]

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107 *Uber* (n 6) 678 [78] (Lord Leggatt JSC). Strictly speaking, this was a decision about the scope of a statutory category of 'worker' that goes beyond the common law concept of employment. But the Court's reasoning nonetheless accords with that adopted in *Autoclenz* (n 90).

108 *Uber* (n 6) 680 [85] (Lord Leggatt JSC).

109 *Personnel Contracting* (n 8) 113 [88] (Kiefel CJ, Keane and Edelman JJ), 133–5 [186]–[189] (Gordon J).

110 *Jamsek* (n 9) 157 [62] (Kiefel CJ, Keane and Edelman JJ). As to what constitutes a 'sham', see the discussion in Part IV(C) below.

111 Ibid 159 [80], 160 [82] (Gageler and Gleeson JJ); *Personnel Contracting* (n 8) 121–2 [134]–[135], 126 [155] (Gageler and Gleeson JJ).

112 *Personnel Contracting* (n 8) 108 [58] (Kiefel CJ, Keane and Edelman JJ).

113 Davies (n 90) 320. See also Stewart, 'Redefining Employment?' (n 12) 244–5.

114 See, eg, *Chaplin* (n 80) 391 (Lord Fraser for the Court).

115 *Consistent Group* (n 90) [57].

The rights-expectations dichotomy adopted by the formalist majority in *Personnel Contracting* further reinforces an approach that privileges form over substance or reality. As rights are relevant and expectations are not, a hirer of labour who enjoys the benefits of a disparity of power might express their demands in the non-binding terms of expectations rather than rights and duties. It is not clear what the court would have done in *Personnel Contracting* if the cooperation term said to the unemployed, unskilled, casual backpacker: 'we expect, but do not require, you to do the work in the manner directed by us or the builder'. Such a term does not on its face create a duty, even if its result in practice is to ensure the worker is the subject of direction.

Workers whose contracts are terminable on short notice, or who are casual employees, are often in an economically vulnerable position. On the approach of the formalist majority there is a legal difference, though there is little practical difference, for those who have low job security, between the hirer requiring performance in a particular manner and the hirer stating that it expects performance in that manner. This approach in practice permits the hirers of labour to claim and exercise a right of control cloaked in the language of expectation.

## E The Multifactorial Test

The view seems to have taken hold in some quarters that the High Court has dispensed with the multifactorial test.[116] But in our view, a close reading of the judgments in *Personnel Contracting* indicates that the test remains the one to be applied when determining employment status.[117] In order to explain, it is useful to distinguish between the factors that comprise the multifactorial test on the one hand and, on the other, the evidence that may be taken into account in determining whether a particular factor is present or absent in any given case.[118]

As endorsed in cases such as *Brodribb* and *Hollis*, the multifactorial test directs attention to a range of factors that are relevant to determining whether a worker is an employee or independent contractor. When, in *Brodribb*, Mason J referred to the need to examine the 'totality of the relationship', his Honour was referring to the fact that control was no longer the only relevant factor distinguishing employment from independent contracting, and that a multiplicity of factors must be examined.[119] Crucially, that view was endorsed in all judgments in *Personnel Contracting*.[120] For example, Kiefel CJ, Keane and Edelman JJ observed that characterisation of a work contract involves a consideration of '"the totality of the relationship between the parties" by reference to the various indicia of employment

116 See, eg, *Secretary, Attorney-General's Department v O'Dwyer* (2022) 318 IR 216, 225 [28] (Goodman J) ('*O'Dwyer*'); *Leach v Prestige Real Estate Services Pty Ltd* [2022] FedCFamC2G 1022, [73] (Obradovic J) ('*Leach*').

117 *Personnel Contracting* (n 8) 103 [32], 107–8 [55], 109 [61], 113 [89]–[90] (Kiefel CJ, Keane and Edelman JJ), 117–8 [113]–[114], 119 [119] (Gageler and Gleeson JJ), 129–30 [174]–[175] (Gordon J).

118 See Stewart, 'Redefining Employment?' (n 12) 249; Bomball, 'Subsequent Conduct' (n 26) 156–7.

119 *Brodribb* (n 15) 29; *Personnel Contracting* (n 8) 108 [56] (Kiefel CJ, Keane and Edelman JJ). See also Stewart, 'Redefining Employment?' (n 12) 249 n 71; Bomball, 'Subsequent Conduct' (n 26) 156–7.

120 *Personnel Contracting* (n 8) 103 [34], 108 [56], 109 [61] (Kiefel CJ, Keane and Edelman JJ), 119 [121] (Gageler and Gleeson JJ), 127 [162], 129 [172]–[173], 137–8 [200] (Gordon J).

that have been identified in the authorities'.[121] They were, it is true, critical of the impressionistic nature of the multifactorial test and the uncertainty it can create.[122] But when regard is had to their judgment as a whole, it seems clear to us that the plurality did not in the end reject the test itself, but rather a *particular approach* to the test that involves looking at the post-formation conduct of the parties.[123] The same can be said of Gordon J's observation that 'the multifactorial approach *applied in previous authorities* must be put to one side'.[124] Her Honour indeed considered multiple indicia in the case before her, such as by finding that the terms concerning personal performance and the mode of remuneration are relevant in the characterisation process.[125] What she was rejecting was an approach to the multifactorial test that involved 'a roaming inquiry beyond the contract'.[126]

Following *Personnel Contracting*, then, courts are still required to apply the multifactorial test to determine whether a contract is one of employment or independent contracting. Where the contract is wholly in writing (and subject to the exceptions discussed below), application of the multifactorial test involves an evaluation of the 'totality of the relationship'. This entails assessing the rights and duties in the written contract against the various indicia of employment.[127] According to the formalist majority, however, the 'totality of the relationship' is not a reference to the relationship as performed in practice.[128] The substantivist minority, on the other hand, used 'totality' in the broader sense of all post-formation conduct, including evidence of the performance of the contract.[129]

In *Personnel Contracting*, the plurality observed that the multifactorial test is not to be applied mechanistically, as though the court were proceeding through a checklist.[130] This echoed a point made in many previous cases, that '[t]he object of the exercise is to paint a picture from the accumulation of detail'.[131] It reinforces the point that application of the multifactorial test involves an 'impressionistic'

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121 Ibid 109 [61] (Kiefel CJ, Keane and Edelman JJ).

122 Ibid 103 [33] (Kiefel CJ, Keane and Edelman JJ).

123 This is also the view adopted by Joellen Riley Munton, 'Boundary Disputes: Employment v Independent Contracting in the High Court' (2022) 35(1) *Australian Journal of Labour Law* 79, 89–90 ('Boundary Disputes'). Cf Anthony Gray, 'Determining Whether an Employment or Independent Contractor Relationship Exists and the Relevance of Contractual Performance to Its Interpretation' (2022) 50(4) *Australian Business Law Review* 270, 287–9, expressing more doubt as to whether the test survives, but defending its use nonetheless as a matter of principle.

124 *Personnel Contracting* (n 8) 135 [189] (emphasis added). See also at 133 [185].

125 Ibid 137 [198]. See also at 129 [174].

126 Ibid 134–5 [188].

127 *Murphy v Chapple* [2022] FCAFC 165, [29] ('*Murphy*'); *JMC Pty Ltd v Commissioner of Taxation* (2022) 114 ATR 795, 800–1 [21]–[22], cited with apparent approval in *JMC* (n 55) [8]–[9] (Bromwich, Thawley and Hespe JJ). The test is also still 'useful' for informal contracts: *EFEX Group Pty Ltd v Bennett* [2023] FCA 508, [89]–[94] (Besanko J) ('*EFEX*').

128 *Personnel Contracting* (n 8) 108 [56] (Kiefel CJ, Keane and Edelman JJ), 129 [172]–[173] (Gordon J).

129 Ibid 119 [121] (Gageler and Gleeson JJ); *Jamsek* (n 9) 159 [80] (Gageler and Gleeson JJ).

130 *Personnel Contracting* (n 8) 103 [34], 104 [39] (Kiefel CJ, Keane and Edelman JJ).

131 *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939, 944 (Mummery LJ) ('*Hall*'), quoted in a range of Australian cases, including *On Call Interpreters* (n 101) 122 [205] (Bromberg J) and *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (2010) 184 FCR 448, 460 [31] (Keane CJ, Sundberg and Kenny JJ).

exercise, even if that engenders uncertainty. It was also noted that none of the factors are of themselves determinative[132] and that the case law provides limited guidance as to the significance or weight of each factor.[133] At the same time, the High Court did address whether there is an overarching framework that might guide this evaluation of the various factors and thereby provide some structure and coherence to the characterisation exercise. It is to this matter that the following section turns.

## F Entrepreneurship and the 'Own Business/Employer's Business' Dichotomy

What is the essence of the distinction between employment and independent contracting? One prominent answer, given by Windeyer J in *Marshall v Whittaker's Building Supply Co*, is that it lies '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'.[134] But there have been diverging views as to how much relevance to accord the concept of 'entrepreneurship'.[135] In *On Call Interpreters & Translators Agency Pty Ltd v Commission of Taxation*, Bromberg J stated that whether the worker is carrying on a business of their own is a key question.[136] If the question is answered affirmatively, then the worker is an 'entrepreneur', and is likely not an employee.[137] In other cases, by contrast, entrepreneurship has been given more limited significance. For example, in *Tattsbet*, Jessup J stated that to ask whether the worker is an entrepreneur is to distract attention from the real question, which is whether they are an employee.[138] Other judges have effectively used the concept of entrepreneurship as an overarching framework through which to evaluate and balance the various factors in the multifactorial test.[139]

In *Personnel Contracting*, the plurality referred to the utility of the 'own business/employer's business' dichotomy.[140] Their Honours observed that asking whether the worker is carrying on his or her own business, and using this question as a framework through which to examine and weigh the various factors in the multifactorial test, provides some coherence to an exercise which is otherwise largely amorphous in nature.[141] In particular, their Honours noted that the dichotomy provides guidance on the relative weight and significance of the various factors in the multifactorial test; those factors that pertain to whether the worker is carrying

132 *Personnel Contracting* (n 8) 110 [73], 113 [89]–[90] (Kiefel CJ, Keane and Edelman JJ), 129–30 [174]–[175] (Gordon J). See also *Hall* (n 131) 117–8 [114], 119 [119] (Gageler and Gleeson JJ). Cf *Jamsek* (n 9) 156 [60] (Kiefel CJ, Keane and Edelman JJ).

133 *Personnel Contracting* (n 8) 103 [33]–[34] (Kiefel CJ, Keane and Edelman JJ), 133–4 [186] (Gordon J).

134 (1963) 109 CLR 210, 217 (Windeyer J). See also Stewart, 'Redefining Employment?' (n 12) 261; Cameron Roles and Andrew Stewart, 'The Reach of Labour Regulation: Tackling Sham Contracting' (2012) 25(3) *Australian Journal of Labour Law* 258, 279–80.

135 Bomball, 'Vicarious Liability' (n 27) 89–93.

136 *On Call Interpreters* (n 101) 123 [208] (Bromberg J).

137 Ibid; *Quest* (n 13) 391 [184] (North and Bromberg JJ).

138 *Tattsbet* (n 79) 61 [61] (Jessup J).

139 See, eg, *Personnel Contracting* (*FCAFC)* (n 25) 637 [13] (Allsop CJ).

140 *Personnel Contracting* (n 8) 103 [36], 104 [39], 110 [73] (Kiefel CJ, Keane and Edelman JJ).

141 Ibid 103 [36], 104 [39].

on their own business or working in the owner's business are of greater significance in the characterisation process.[142] Their Honours acknowledged, however, that the dichotomy 'may not be perfect so as to be of universal application for the reason that not all contractors are entrepreneurs'.[143]

Gageler and Gleeson JJ held that the own business/employer's business dichotomy was one of two key considerations informing the determination of employment status (the other being control).[144] Their Honours also referred to 'integration' as a 'third consideration' identified in some cases, though noted that this may simply be the same dichotomy expressed in another way.[145] They observed that '[e]ach consideration is a matter of degree' and '[n]one is complete in itself'.[146]

Gordon J was of the view that 'it is not necessary to ask whether the purported employee conducts their own business' and that 'the inquiry is not to be reduced to a binary choice between employment or own business'.[147] Her Honour observed that '[t]he better question to ask is whether, by construction of the terms of the contract, the person is contracted to work in the business or enterprise of the purported employer'.[148] In framing the overarching question in this way, her Honour downplayed the significance of carrying on one's own business in the determination of employment status. However, this formulation of the overall question to be answered has similarities to that put forward by the plurality, in that it directs attention to whether the worker is working in the putative employer's business.

From these three different approaches, there may be no clear ratio. However, there is support from Kiefel CJ, Keane and Edelman JJ, and from Gordon J (and therefore also Steward J), for the proposition that when assessing the significance of legal rights and duties in the characterisation process, the court should consider the extent to which the right or duty bears directly or obliquely on whether the worker is contracted to work in the employer's business rather than part of an independent enterprise. The more directly it bears on that issue, the more significant it is. Critically, however, there was no support for the proposition that, in order to be a contractor, a worker *must* have a business of their own.

### G The Relevance of Superior Bargaining Power

As noted in Part I, one of the central purposes of labour law is to protect workers from the consequences of an inequality of bargaining power. In some previous Australian cases, courts had accepted that in characterising a work arrangement it is relevant to consider what is typically a disparity of bargaining power between the

142 Ibid 104 [39]. See also *Jamsek* (n 9) 156 [60] (Kiefel CJ, Keane and Edelman JJ).
143 *Personnel Contracting* (n 8) 104 [39] (Kiefel CJ, Keane and Edelman JJ).
144 Ibid 117 [113] (Gageler and Gleeson JJ).
145 Ibid. Anthony Gray has suggested that the plurality were effectively adopting an 'organisational' test, though this may overstate the relevance attributed by the plurality to the question of integration: Gray (n 123) 289.
146 *Personnel Contracting* (n 8) 117–18 [114] (Gageler and Gleeson JJ), quoting *Brodribb* (n 15) 35 (Wilson and Dawson JJ).
147 *Personnel Contracting* (n 8) 132 [180] (emphasis omitted).
148 Ibid 132–3 [183] (emphasis omitted).

parties. For example, in *Quest*, North and Bromberg JJ noted that 'most contracts for the performance of work are "contracts of adhesion"; that is, the terms are set by [the dominant party] and presented to the other on a "take it or leave it" basis'.[149] It was therefore important for courts to have regard to the reality of the relationship as it played out in practice rather than simply the terms of the written contract.[150]

The UKSC has also drawn attention to the superior bargaining power of the hiring organisation in articulating an approach to characterisation that privileges reality over form. In *Autoclenz*, the UKSC observed that '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'.[151] The Court 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'.[152] More recently, in *Uber*, the UKSC again referred to the disparity of bargaining power between the parties.[153]

Against this background, the plurality's rejection of the relevance of superior bargaining power in *Personnel Contracting* and *Jamsek* is particularly stark. In *Personnel Contracting*, the plurality endorsed the approach of Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ in *WorkPac*,[154] which, among other things, disregarded the relevance of the employer's superior bargaining power in determining whether an employee should be characterised as a casual.[155] In *Jamsek*, the plurality observed that '[t]he circumstance that entry into the contract between the company and the partnerships may have been brought about by the exercise of superior bargaining power by the company did not alter the meaning and effect of the contract'.[156] The Full Federal Court's focus on the reality of the relationship and the effect that the disparity of bargaining power had on the terms of the written contract was, in the plurality's view, one of two key errors that marred the decision of the Full Court (the other being the focus on post-formation conduct).[157] In a statute designed to address disparity of bargaining power, the Court has determined that the fact there is such a disparity, and the consequences of any disparity, are irrelevant in the enquiry into whether the statute provides protection. In the absence of statutory reform, the *FW Act*'s capacity to remedy the consequences of that disparity will inevitably be circumscribed.

Strikingly, however, in *Personnel Contracting* the plurality at least did choose to accord relevance to disparities in bargaining power for one specific

149 *Quest* (n 13) 377–8 [140] (North and Bromberg JJ), citing Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2nd ed, 2011) 164.
150 *Quest* (n 13) 377–8 [138]–[142] (North and Bromberg JJ).
151 *Autoclenz* (n 90) 1168 [34] (Lord Clarke JSC), quoting *Autoclenz Ltd v Belcher* [2010] IRLR 70, [92] (Aikens LJ) ('*Autoclenz (Court of Appeal)*').
152 *Autoclenz* (n 90) 1168 [35] (Lord Clarke JSC).
153 *Uber* (n 6) 677 [76] (Lord Leggatt JSC).
154 *Personnel Contracting* (n 8) 109 [62] (Kiefel CJ, Keane and Edelman JJ).
155 *WorkPac* (n 31) 479 [63] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).
156 *Jamsek* (n 9) 148 [8] (Kiefel CJ, Keane and Edelman JJ).
157 Ibid 148 [6].

purpose. As previously highlighted, in downplaying the relevance of labels in the characterisation process the plurality noted that giving weight to labels would enable those with superior bargaining power to 'alter the operation of statute law to suit themselves'.[158] The thinking here is difficult to fathom. If it is relevant to consider the role of superior power in drafting and imposing one type of contractual term (a label) that is intended to affect the characterisation of a work arrangement, why not all the other types of term (such as a never-to-be-used power to delegate or subcontract) that can be included for the exact same purpose? And if the plurality were truly concerned with the capacity of those with power to 'alter the operation of statute law to suit themselves', why in every other respect did they choose to adopt a formalistic approach to the characterisation process that is likely (as we discuss in Part VI) to have precisely that effect in practice?

### H Purposive Construction of Labour Statutes

Guy Davidov has argued that where a statute invokes the term 'employee' as a criterion for its operation, the purpose underlying the statute should guide the process for determining employment status.[159] In adopting an approach to characterisation that is rooted in the reality of the relationship, the UKSC in *Autoclenz* explicitly termed this a 'purposive approach'.[160] In *Uber* the UKSC took the matter further by stressing that the rights at issue 'were not contractual rights but were created by legislation',[161] and that 'the primary question was one of statutory interpretation, not contractual interpretation'.[162] The Court emphasised the protective purpose of labour statutes and observed 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'.[163] This type of purposive approach to characterisation has also been adopted in Canada[164] and, in some cases, in the United States ('US').[165]

In *Personnel Contracting* and *Jamsek*, by contrast, the High Court eschewed a purposive approach to the characterisation exercise. No reference whatsoever was made to the protective purpose of the *FW Act* or the other legislation at issue. Noting that the statutes in question adopted the common law concept of employment, the judges stressed that it was the 'ordinary meaning' of terms such as 'employee' or

158 *Personnel Contracting* (n 8) 108 [58] (Kiefel CJ, Keane and Edelman JJ).

159 Guy Davidov, *A Purposive Approach to Labour Law* (Oxford University Press, 1st ed, 2016) ch 6 <https://doi.org/10.1093/acprof:oso/9780198759034.003.0001>. See also 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 <https://doi.org/10.2307/825934>; 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.

160 *Autoclenz* (n 90) 1168 [35] (Lord Clarke JSC).

161 *Uber* (n 6) 674 [69] (Lord Leggatt JSC).

162 Ibid. See Alan Bogg and Michael Ford, 'Between Statute and Contract: Who Is a Worker?' (2019) 135 *Law Quarterly Review* 347; Adams-Prassl (n 6).

163 *Uber* (n 6) 677 [76] (Lord Leggatt JSC).

164 *McCormick v Fasken Martineau DuMoulin* [2014] 2 SCR 108, 122 [23] (Abella J).

165 For a discussion of some of the leading decisions, see Bomball, 'Statutory Norms' (n 28).

'employer' that had to be applied.[166] Where an Act extended or limited the meaning of a term such as 'employee', then those modifications would take effect according to their terms.[167]

The High Court's implicit rejection of a purposive approach to characterisation for the purposes of a labour statute may be contrasted to the approach that it has previously taken to the concept of an employee in the context of vicarious liability. In *Personnel Contracting*, the plurality referred to the 'policy-based' conception of such liability.[168] In *Hollis*, a case involving that doctrine, the majority had recognised that the concept of an employee is moulded by the policy considerations or rationales that underlie the doctrine of vicarious liability.[169]

The High Court's decisions are certainly consistent with what Dan Meagher calls an established presumption that the meaning and development of a common law concept incorporated into a statute are not, in the absence of any clear indication to the contrary, to be 'directed or controlled by a curial perception of the scope and purpose of [the] particular statute which has adopted [it]'.[170] But even if that principle is accepted, the fact was that in these two cases there was no settled understanding of the 'ordinary meaning' of employment. As the division in opinion on the Court and the conflicting precedents cited by the majority and minority made clear, the Court had a choice before it. Why, in that circumstance, should it be at all improper to prefer a view of the ordinary meaning that was more consistent with the purposes of the statutes concerned?

The High Court's refusal to even consider the question of statutory purpose contrasts starkly with the approach it has taken to the consequences of conduct which breaches a statute that does not spell out the impact on rights and duties that might otherwise arise at common law. Where the terms, performance or purpose of a contract conflict with legislative requirements, the contract will only be treated as unenforceable to the extent that denying any remedy for breach would be consistent with the scope and purposes of the statute.[171] A similar approach is

166 *Personnel Contracting* (n 8) 114–15 [93]–[99] (Gageler and Gleeson JJ), 127 [161], 129 [171] (Gordon J); *Jamsek* (n 9) 147–8 [4] (Kiefel CJ, Keane and Edelman JJ).

167 See, eg, *FW Act* (n 10); *Superannuation Guarantee (Administration) Act 1992* (Cth) s 12, noted in *Jamsek* (n 9) 147–8 [4] (Kiefel, Keane and Edelman JJ).

168 *Personnel Contracting* (n 8) 112 [82] (Kiefel CJ, Keane and Edelman JJ). The other conception of vicarious liability to which their Honours referred is the 'traditional "agency"' exception, which is not relevant here.

169 *Hollis* (n 16) 38 [36], 41 [45] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). For a case based on a vicarious liability claim that may (if it goes to trial) explore the extent to which those policy concerns should drive an approach at variance to that adopted in *Personnel Contracting* and *Jamsek*, see *Kelly v Commonwealth* [2023] FCA 69.

170 Dan Meagher, 'Common Law in Statute' (2022) 52(1) *Australian Bar Review* 79, 93, citing *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539, 549 (French CJ, Gummow, Hayne, Crennan and Bell JJ). Meagher justifies this presumption both as a principle of statutory interpretation and by reference to the constitutional separation of powers.

171 *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, 413 (Gibbs ACJ), 423 (Mason J), 434 (Jacobs J); *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215, 227 (McHugh and Gummow JJ), 242–3 (Kirby J); *Gnych v Polish Club Ltd* (2015) 255 CLR 414, 424–5 [35]–[40] (French CJ, Kiefel, Keane and Nettle JJ) ('*Gnych*').

adopted in determining whether equitable rights may be asserted,[172] or a tortious duty of care may arise,[173] or restitution may be sought of benefits transferred under a contract made in breach of a statutory requirement.[174] In each of these contexts the High Court has emphasised that 'the central policy consideration at stake is the coherence of the law'.[175]

The same applies in the context of an agreement to surrender or waive the rights otherwise granted by legislation. As French CJ, Crennan, Kiefel and Bell JJ explained in *Westfield Management Ltd v AMP Capital Property Nominees Ltd*:

> It is the policy of the law that contractual arrangements will not be enforced where they operate to defeat or circumvent a statutory purpose or policy according to which statutory rights are conferred in the public interest, rather than for the benefit of an individual alone.[176]

Whether the rights created by a statute are to be treated as being of a purely 'private' nature is inevitably a matter of construction, requiring consideration of the 'scope and policy' of the legislation.[177]

The principle that rights created for the public benefit cannot be voluntarily surrendered explains why an employee cannot validly agree to work for less than the minimum wage set by or under legislation such as the *FW Act*, or to forego statutory leave entitlements.[178] Strictly speaking, the principle had no application in *Personnel Contracting* or *Jamsek*. If the contracts in question were characterised as being for the provision of services rather than employment, then the statutes in question would simply not apply and there would be no rights to surrender. Yet in substance and effect there is little difference between agreeing to take less than is due to an employee, and agreeing to work for someone else's business in a subordinate capacity under an agreement designed to circumvent the application of employment standards.

In articulating and defending what he calls the basic principle of 'non-waivability',[179] Davidov sets out three sets of justifications for preventing workers

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172 *Nelson v Nelson* (1995) 184 CLR 538.

173 *Miller v Miller* (2011) 242 CLR 446 ('*Miller*'). For a further example of the High Court emphasising the importance of coherence with a statutory framework in determining the scope of a duty of care, see *Electricity Networks Corp v Herridge Parties* (2022) 96 ALJR 1106.

174 *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 ('*Haxton*').

175 *Miller* (n 173) 454 [15] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), quoted in *Haxton* (n 174) 513–14 [23]–[34] (French CJ, Crennan and Kiefel JJ) and *Gnych* (n 171) 434–5 [72]–[73] (Gageler J). As to this concept of coherence, see 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; Ross Grantham and Darryn Jensen, 'Coherence in the Age of Statutes' (2016) 42(2) *Monash University Law Review* 360; Andrew Fell, 'The Concept of Coherence in Australian Private Law' (2018) 41(3) *Melbourne University Law Review* 1160.

176 (2012) 247 CLR 129, 143–4 [46].

177 *Price v Spoor* (2021) 270 CLR 450, 460 [11] (Kiefel CJ and Edelman J), 478 [76] (Steward J), citing *Commonwealth v Verwayen* (1990) 170 CLR 394, 405 (Mason CJ).

178 See, eg, *Textile, Clothing and Footwear Union of Australia v Givoni Pty Ltd* (2002) 121 IR 250 ('*Givoni*'); *WorkPac Pty Ltd v Rossato* (2020) 278 FCR 179, 231 [230], 334 [801] (White J), 364–5 [956] (Wheelahan J).

179 Guy Davidov, 'Non-waivability in Labour Law' (2020) 40(3) *Oxford Journal of Legal Studies* 482 <https://doi.org/10.1093/ojls/gqaa016> ('Non-waivability'). See also Vladimir Bogoeski, 'Nonwaivability

from agreeing to forego the benefit of labour standards, even though their choice may be genuine rather than coerced. They are to prevent self-harm (for example when a waiver is ill-judged or based on incomplete information); to prevent harm to others (such as by creating a 'race to the bottom' that creates detriment for other workers and perhaps society as a whole); and the practical difficulties in distinguishing between free and coerced waivers, or between those that create harm and those which do not. He uses the example of a 'waiver of employee status' to show how each of these arguments can be deployed to justify limiting a worker's freedom to choose not to be an employee. Importantly, however, he emphasises that any such restriction on individual autonomy is not designed to stop a worker from being an independent contractor – merely from choosing to be treated as a contractor when they are in fact an employee.[180]

It may of course be argued that if Parliament had wanted to limit the use of contracts that disguise what are in reality employees as contractors, it could and should have defined employment in a way that precluded such sleight of hand. Yet as Joellen Riley has observed, it is perfectly possible that the reason why legislatures have not codified the definition of employment is precisely so that courts might have the freedom to adapt it 'to meet the social, economic and technological circumstances of the age'.[181] By refusing to engage with that task, or to consider how competing approaches to the 'usual meaning' of employment might either serve or undermine the purposes of a labour statute, the High Court is arguably, she suggests, abrogating its 'constitutional role in developing the common law'.[182]

## I The Distinctiveness of Employment Contracts

Questions about the 'distinctiveness' of employment contracts have been the subject of scholarly interest and judicial consideration in recent years.[183] The central question in this regard is whether employment contracts are or should be distinguished from general commercial contracts.[184] To what extent is there, or should there be, a special body of rules or principles that are tailored to contracts of employment, which are different from those of orthodox contract law? The UKSC has explicitly drawn attention to the difference between employment contracts and general commercial contracts. In *Autoclenz*, as previously mentioned, it acknowledged that 'the circumstances in which contracts relating to work or

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of Employment Rights, Individual Waivers and the Emancipatory Function of Labour Law' (2023) 52(1) *Industrial Law Journal* 179 <https://doi.org/10.1093/indlaw/dwac020>.

180 Davidov, 'Non-waivability' (n 179) 501–3.

181 Riley Munton, 'Boundary Disputes' (n 123) 93.

182 Joellen Riley Munton, 'Employment Contracts in the Australian High Court' (2022) 15(2) *Italian Labour Law e-Journal* 173, 182.

183 Irving (n 17) ch 1; Gabrielle Golding, 'The Distinctiveness of the Employment Contract' (2019) 32(2) *Australian Journal of Labour Law* 170; 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, 1st ed, 2016) 124 <https://doi.org/10.1093/acprof:oso/9780198783169.003.0006>; Hugh Collins, 'Contractual Autonomy' in Alan Bogg et al (eds), *The Autonomy of Labour Law* (Hart Publishing, 2015) 45.

184 Collins, 'Contractual Autonomy' (n 183) 47.

services are concluded are often very different from those [involving] commercial contracts between parties of equal bargaining power'.[185] The Court specifically alluded to the superior bargaining power of the hiring organisation and the ability of the hiring organisation to determine the terms of the written contract.[186]

Alan Bogg has argued that there was, in *Autoclenz*, the development of distinctive principles tailored to the employment context that are 'relatively autonomous from general contract law'.[187] In *Uber*, the UKSC reaffirmed that employment contracts are distinctive from general commercial contracts. The court stated that characterisation of a work contract is not to proceed by reference to 'ordinary principles of contract law'.[188]

Writing prior to the decisions in *Personnel Contracting* and *Jamsek*, Riley noted that Australian courts have generally refrained from developing distinctive principles for employment contracts, with courts generally applying general principles of contract law in disputes concerning employment contracts.[189] The majority view emerging from *Personnel Contracting* confirms that it is the orthodox principles of contract law, rather than any special or distinctive principles, that apply to the characterisation of work contracts. The formalist majority emphasised that they were applying to contracts of employment the 'orthodox' principles governing contracts, such as the principles governing the use of post-formation conduct and variations.[190] Reviewing past authorities, the plurality considered that '[i]n case after case after case, this Court can be seen to be applying basic established principles of contract law'.[191] The contrary approach taken in the UK was rejected.[192]

## V QUALIFICATIONS AND EXCEPTIONS

As we have noted, the formalist majority's emphasis on the primacy of contractually agreed terms in determining the status of a work arrangement came with a number of caveats about purposes for which it may still be possible to rely

185 *Autoclenz* (n 90) 1168 [34] (Lord Clarke JSC), quoting *Autoclenz (Court of Appeal)* (n 151) [92] (Aikens LJ).

186 *Autoclenz* (n 90) 1168 [34] (Lord Clarke JSC), quoting *Autoclenz (Court of Appeal)* (n 151) [92] (Aikens LJ).

187 Alan Bogg, 'Sham Self-Employment in the Supreme Court' (2012) 41(3) *Industrial Law Journal* 328, 344 <https://doi.org/10.1093/indlaw/dws021>.

188 *Uber* (n 6) 674 [68] (Lord Leggatt JSC).

189 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, 1st ed, 2016) 273, 291–4 <https://doi.org/10.1093/acprof:oso/9780198783169.003.0013>.

190 *Personnel Contracting* (n 8) 106–7 [51] (Kiefel CJ, Keane and Edelman JJ), 130 [176] (Gordon J); *Jamsek* (n 9) 155 [51] (Kiefel CJ, Keane and Edelman JJ).

191 *Personnel Contracting* (n 8) 107 [52] (Kiefel CJ, Keane and Edelman JJ). Cf the different view of Gageler and Gleeson JJ on those authorities in *Jamsek* (n 9) 159 [80] (Gageler and Gleeson JJ).

192 *Personnel Contracting* (n 8) 108–9 [60], 113 [88] (Kiefel CJ, Keane and Edelman JJ); *Jamsek* (n 9) 155 [51] (Kiefel CJ, Keane and Edelman JJ).

on evidence of post-formation conduct, as well as possible arguments that had not been advanced in *Personnel Contracting* or *Jamsek*.

### A Contracts Not Wholly in Writing

Given the types of contract at issue in the two cases, the principles expounded by the High Court focused on the effect of wholly written contracts.[193] When responding to the argument that the prior judgments in *Brodribb* and *Hollis* permitted recourse to post-formation conduct, the formalist majority pointed out that the work contract in *Brodribb* had not been reduced to writing, and that the contract in *Hollis* was partly oral and partly written.[194] Their Honours did not provide direct guidance as to the principles that would apply in such cases. However, it was noted that when a contract is not wholly in writing, regard may be had to post-formation conduct for the purposes of ascertaining the terms of the parties' agreement.[195] A court may also take into account post-formation conduct to determine whether a contract has been made,[196] and the time of formation.[197] Nonetheless, these permissible uses of post-formation conduct should not turn into an unbounded inquiry into how the relationship evolved: it is directed to establishing the rights and duties of the parties.[198]

Consistently with that view, it has been accepted in subsequent cases that the contract-centric approach taken by the High Court is just as applicable to oral or partly written contracts as it is to those that have been comprehensively documented.[199] As Goodman J put it in *O'Dwyer*:

> [T]he fundamental task – the ascertainment and construction of the terms of the legal rights and obligations of the parties, rather than an assessment of the history of the relationship between the parties throughout the life of the contract, including the manner of performance of the contract – remains the same regardless of the form of the contract in question.[200]

The question, nevertheless, is how willing courts may be, in the case of oral or partly oral contracts, to rely on post-formation conduct to establish terms that point to employment. This is especially important in relation to the key issue of control. In *Personnel Contracting*, the plurality noted the possibility that

> the imposition by a putative employer of its work practices upon the putative employee manifests the employer's contractual right of control over the work situation; or a putative employee's acceptance of the exercise of power may show that the putative employer has been ceded the right to impose such practices.[201]

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193 *Personnel Contracting* (n 8) 104–6 [42]–[48] (Kiefel CJ, Keane and Edelman JJ), 136 [193] (Gordon J).

194 Ibid 108 [56]–[57] (Kiefel CJ, Keane and Edelman JJ), 135 [190] (Gordon J).

195 Ibid 104 [42], 105–6 [48] (Kiefel CJ, Keane and Edelman JJ), 130–1 [177] (Gordon J).

196 Ibid 130–1 [177], 134–5 [188]–[189] (Gordon J). See also 131 [178] concerning proving a course of dealings.

197 Ibid 135 [190].

198 Ibid 108 [57] (Kiefel CJ, Keane and Edelman JJ), 131 [178] (Gordon J).

199 *Pruessner v Caelli Constructions Pty Ltd* [2022] FedCFamC2G 206, [42]–[43] (McNab J); *O'Dwyer* (n 116) 225–6 [29]–[33] (Goodman J); *Muller v Timbecon Pty Ltd* [2023] FWCFB 42, [39]–[41] (Catanzariti V-P, Clancy DP and Commissioner Yilmaz) ('*Muller*').

200 *O'Dwyer* (n 116) 226 [33] (Goodman J).

201 *Personnel Contracting* (n 8) 104 [42] (Kiefel CJ, Keane and Edelman JJ).

As this makes clear, it may be possible to infer a right to control from the work practices of the parties.[202] It is important to note, however, that it is the *right* to control, and not the mere exercise of control, that is significant.[203] In *Jamsek*, for example, the plurality noted that the parties' practice supported an inference that they *expected* certain conduct, but not that the employer had a *right* to direct that conduct.[204] On the other hand, some businesses effectively require the coordination of labour in a manner that necessitates control.[205] That context may make it easier to draw the inference of a right of control.

### B Variation by Conduct

The potential difficulty in translating practice and expectation into contractual obligation is also apparent in relation to the possibility of identifying a variation by conduct. *Personnel Contracting* and *ZG Operations* were not cases which involved an allegation that the parties had by their practice departed from the originally agreed terms. It was accepted, however, that post-formation conduct that evidences a variation is admissible and relevant in the characterisation process.[206]

For many years, courts had considered such conduct when there was a discrepancy between what was recorded in written terms and the practice of the parties. 'Discrepancy' in this context included both direct inconsistency, as well as the terms being silent on the issue addressed by the practice. There was rarely any explicit application of the contractual rules governing variation. Rather, post-formation conduct tended simply to be considered as part of the totality of relevant material and relied on to reach an intuitive, evaluative judgment. With the formalist majority in the High Court now eschewing such an approach to characterisation, however, the role of variation will inevitably grow in prominence.

The requirements for a variation are the same as for the formation of a contract: there must be agreement, both parties must provide consideration,[207] the terms of the variation must be certain and complete, and there must be an intention to vary the contract.[208] Written terms often contain a 'no oral modification' clause,

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202 See, eg, *EFEX* (n 127).

203 *Personnel Contracting* (n 8) 111 [74], 113 [88] (Kiefel CJ, Keane and Edelman JJ), 129 [172] n 278 (Gordon J); *Brodribb* (n 15) 24 (Mason J), 36 (Wilson and Dawson JJ); *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561, 571 (Dixon CJ, Williams, Webb and Taylor JJ) ('*Zuijs*'). Cf *Personnel Contracting* (n 8) 117 [113] (Gageler and Gleeson JJ).

204 *Jamsek* (n 9) 155 [52]–[53], 156 [55] (Kiefel CJ, Keane and Edelman JJ).

205 See, eg, *Federal Commissioner of Taxation v J Walter Thompson (Aust) Pty Ltd* (1944) 69 CLR 227 (production of radio play); *Hollis* (n 16) [57] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) (delivery system); *Zuijs* (n 203) (circus performer).

206 *Personnel Contracting* (n 8) 104 [42], 105 [46] (Kiefel CJ, Keane and Edelman JJ), 130–1 [177], 132–3 [183], 134–5 [188] (Gordon J).

207 As to the willingness of courts to identify consideration even for variations that appear on their face to affect only one party's obligations, including through the concept of 'practical benefit', see Andrew Stewart, *Stewart's Guide to Employment Law* (Federation Press, 7th ed, 2021) 119 [6.9].

208 *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* (1957) 98 CLR 93, 135 (Kitto J), 144 (Taylor J); *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520, 533–4 [22]–[24] (Gleeson CJ, Gaudron, McHugh and Hayne JJ); *Dan v Barclays Australia Ltd* (1983) 57 ALJR 442, 448 (Wilson and Dawson JJ). See Irving (n 17) 471–7 [8.22]–[8.26].

requiring that any variations be in writing, and/or executed in a particular form. But the current position in Australia, unlike the UK, is that such a provision cannot prevent an oral variation taking effect or a variation being inferred from conduct, provided the parties have manifested an intention to depart from their originally agreed rights and obligations.[209] In practice then, the key issue in identifying a variation will usually be whether it can be inferred that the parties are not merely choosing to perform their obligations in a particular way, or not to exercise certain rights conferred by the original contract, but *have agreed and intend* to alter those rights and obligations.

The practical difficulties facing a worker who wishes to draw on the conduct or reality of a work relationship to establish a variation to the terms of their engagement are demonstrated by the decision of a Full Bench of the Fair Work Commission ('FWC') in *Muller v Timbecon Pty Ltd*.[210] Mr Muller, an experienced photographer, was engaged by a company operating a hardware store to create photographic and video content for the company's website and marketing channels. The arrangement was initially for three days' work per week. Muller was content to be a contractor, since he wanted to continue to perform work for other clients. After a few months, however, he was persuaded to increase his hours and work full-time for the company. After that he largely stopped doing work for other clients, other than at the direction of the company as part of his duties (and without additional payment). He gradually started doing other work around the store, including cleaning, attended daily meetings and took to wearing a company uniform. When he asked if his wife (also a photographer) could help do some of the work assigned to him, he was told he must do it all himself.

The facts as found by the FWC paint the clearest possible picture of what was initially a commercial arrangement gradually evolving into an employment relationship. But under the influence of the High Court rulings, that was not what was found and Muller was denied the right to bring an unfair dismissal claim under Part 3-2 of the *FW Act* when his engagement was terminated. The terms of his initial engagement were found to be consistent with a contract for services, and he was unable to show that there had been any subsequent variation, other than the increase in his days of work. In particular, he could not show that he was now *obliged* to follow the directions with which he had routinely come to comply. It was clear, as Bull DP observed when dealing with the claim at first instance, that there were 'work practices suggestive of an increased level of control or power' on the part of the company.[211] But the evidence as to the parties' conduct during this period did not rise to such a level as to manifest 'an assumption of a *right* of control

209 *Sara Stockham Pty Ltd v WLD Practice Holdings Pty Ltd* [2021] NSWCA 51, [15] (Leeming JA). Cf *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2019] AC 119, 127 [10]–[11] (Lord Sumption JSC).

210 *Muller* (n 199).

211 *Muller v Timbecon Pty Ltd* [2022] FWC 1685, [134].

over Mr Muller by the Respondent that was sufficiently different from the terms of the Contract originally agreed'.[212]

### C Shams

If it is difficult to show that the parties have tacitly agreed to vary the original terms of their work contract, can it be demonstrated instead that those terms were never the 'true' agreement? As with the possibility of variation, the formalist majority in *Personnel Contracting* and *Jamsek* made much of the fact that no argument had been advanced that either the written terms governing the workers' engagements, or the partnerships created by Jamsek and Whitby, were shams.[213] But what *is* a sham for this purpose?

The term can clearly have different meanings.[214] In its broadest sense (including as we use it in this article), the phrase 'sham contracting' can refer to the practice of seeking to disguise what in substance is an employment relationship as a contract for services, whether successfully or not. This appears to be the sense in which it is used in the *FW Act*. The heading to Division 6 of Part 3-1 speaks of 'sham arrangements' in grouping a series of prohibitions that form part of the Act's 'general protections'.[215] They include section 357, which covers misrepresenting an employment contract as an independent contracting arrangement; and section 358, which deals with dismissing or threatening to dismiss an employee in order to rehire them as a contractor. The first provision operates on the basis that the sham is unsuccessful, because if the worker is not an employee there can be no breach.[216] The second, however, assumes the worker is capable of being converted from one status to the other.

As a matter of common law, by contrast, the concept of 'sham' has traditionally been limited to circumstances in which a 'disguise' or a 'facade' has been deliberately and deceptively constructed in order to conceal a 'real' transaction.[217] But this would be hard to establish in the case of arrangements of the type considered in this article, since the intent of the hirer (and often the worker as well) is usually to avoid employment, not to conceal it. The hirer may wish to enjoy the benefit of someone working for them in a subordinate capacity, but their overall intent is generally to create the very kind of relationship that their written terms describe: a contract for services, not one of employment.

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212 Ibid [135] (emphasis added). The Full Bench found no error in that finding: *Muller* (n 199) [44]–[45] (Catanzariti V-P, Clancy DP and Commissioner Yilmaz).

213 *Personnel Contracting* (n 8) 104–5 [43], 108 [59] (Kiefel CJ, Keane and Edelman JJ), 128 [166] (Gordon J), 141 [216] (Steward J); *Jamsek* (n 9) 148 [8], 154–5 [49], 157 [62] (Kiefel CJ, Keane and Edelman JJ).

214 Roles and Stewart (n 134) 264–6.

215 See also paragraph (c)(vi) of the definitions of 'referred subject matters' in sections 30A(1) and 30K(1), which speak of 'sham independent contractor arrangements'.

216 See, eg, *Tattsbet* (n 79); *Murphy* (n 127) [78]–[81] (Jagot, Banks-Smith and Jackson JJ).

217 *Scott v Federal Commissioner of Taxation [No 2]* (1966) 40 ALJR 265, 279 (Windeyer J); *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449, 454 (Lockhart J); *Raftland Pty Ltd v Federal Commissioner of Taxation* (2008) 238 CLR 516, 531–2 [35] (Gleeson CJ, Gummow and Crennan JJ), 553 [111]–[112] (Kirby J) ('*Raftland*').

In the two High Court decisions, only Gordon J in *Personnel Contracting* gave any direct clue as to how the concept of a 'sham' should be understood. Her Honour spoke of something 'brought into existence as "a mere piece of machinery" to serve some purpose other than that of constituting the whole of the arrangement'[218] – a clear reference to the common law concept.

Strangely, however, Gordon J also used the idea of a sham to explain the High Court's willingness in *R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd* ('*Foster*')[219] to hear evidence as to the 'reality' of an arrangement to engage insurance agents.[220] This was despite the Court making no mention of that being the basis for their approach, and there being nothing to suggest a mutual intention to disguise the nature of the relationship. The plurality made a similar point about the decision in *Foster*,[221] while also suggesting (again without any obvious support from the original source) that the evidence as to practical reality may have been received for the purpose of considering a variation by conduct.[222] Their Honours likewise identified a sham allegation as the basis for the Court's readiness in *Neale v Atlas Products (Vic) Pty Ltd* ('*Neale*')[223] to consider a discrepancy between the terms on which roof tilers had been engaged and the actual conduct of the parties.[224] Again, this was despite any allegation in that case of an intention to disguise the true relationship.

The formalist majority appear to have chosen to treat *Foster* and *Neale* as being sham cases in order to avoid confronting the inconvenient truth that, as the substantivist minority pointed out,[225] the decisions can be more naturally read as supporting the use of evidence as the reality and conduct of a work arrangement, not merely the agreed terms.[226]

In theory, a party eager to adduce such evidence might seek to use the treatment of *Foster* and *Neale* as supporting a much broader conception of 'sham' than the traditional common law definition might suggest. But it is hard to see how that could be accepted without effectively undermining the majority's insistence on giving primacy to the contract. As noted earlier, the plurality in *Jamsek* spoke of an allegation of sham having to be made 'specifically', and not 'by stealth under the obscurantist guise of a search for the "reality" of the situation'.[227] In recent cases in which sham arguments have been pressed, they have been rejected on the

218 *Personnel Contracting* (n 8) 130–1 [177] (Gordon J), citing *Raftland* (n 217) 531–2 [34]–[35] (Gleeson CJ, Gummow and Crennan JJ).
219 (1952) 85 CLR 138 ('*Foster*').
220 *Personnel Contracting* (n 8) 131–2 [179].
221 Ibid 106 [49]–[50] (Kiefel CJ, Keane and Edelman JJ).
222 Ibid 106–7 [51].
223 *Neale* (n 94).
224 *Personnel Contracting* (n 8) 107 [54] (Kiefel CJ, Keane and Edelman JJ).
225 Ibid 121–2 [132]–[136] (Gageler and Gleeson JJ).
226 We are grateful to Tom Williamson for helpful analysis on this point, undertaken for his LLB Honours dissertation at the University of Adelaide.
227 *Jamsek* (n 9) 148 [62] (Kiefel CJ, Keane and Edelman JJ).

basis that the necessary intention on both parties to conceal the 'true' nature of the transaction has not been established.[228]

A further option, not specifically addressed in *Personnel Contracting* or *Jamsek* or subsequent cases, might be to use the doctrine of 'pretence' to attack the validity of individual terms, rather than a contract as a whole.[229] In the context of distinguishing between a lease and licence of real property, it is accepted that a court may disregard a term included to influence the characterisation but not genuinely intended to have any effect.[230] This approach was also used by the UKSC in *Autoclenz*[231] to negate the effect of provisions which, for example, permitted the relevant workers (car valeters) to engage someone else to perform their work. But given the formalist majority's rejection of the UKSC's approach to characterisation and its clear preference for contract over reality, it is difficult to imagine this idea being taken up in the context of employment classification disputes in Australia.

### D Other Exceptions

Various other possible arguments or exceptions noted by the High Court may be briefly mentioned, though they are unlikely to have any practical relevance. In theory, for example, a worker might be able to invoke the equitable doctrine of unconscionable bargains to set aside the terms on which they agreed to be engaged.[232] But given that a lack of bargaining power is not regarded as a sufficiently 'special' disadvantage to attract equitable relief,[233] it is unsurprising that workers have rarely succeeded in pleading unconscionability.[234] Even if such a claim had some basis, it is hard to see how a worker who had been performing their obligations and receiving payment could then seek to rescind the contract, given the practical impossibility of returning the parties to their original position.[235] It would presumably also need to be argued that a new contract should be implied in place of the old one, with no guarantee as to what the terms might be.

A more feasible argument might be that a novation of the original contract had occurred.[236] But this would be just as difficult to establish as variation by conduct.

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228 *Deliveroo Australia Pty Ltd v Franco* (2022) 317 IR 253 ('*Deliveroo*'); *Robinson v BMF Pty Ltd (in liq) [No 2]* [2022] FCA 1191 ('*Robinson*').

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

230 See, eg, *AG Securities v Vaughan* [1990] 1 AC 417, 462 (Lord Templeman); *Raftland* (n 217) 535 [47] (Gleeson CJ, Gummow and Crennan JJ).

231 *Autoclenz* (n 90).

232 *Jamsek* (n 9) 148 [8] (Kiefel CJ, Keane and Edelman JJ).

233 *Mulcahy v Hydro–Electric Commission* (1998) 85 FCR 170, 243 (Heerey J); *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 64 [11]–[13] (Gleeson CJ); Irving (n 17) 272–4 [5.10]–[5.12].

234 See, eg, *Downe v Sydney West Area Health Service [No 2]* (2008) 71 NSWLR 633; *Flageul v WeDrive Pty Ltd* [2020] FCA 1666.

235 See, eg, *Health Solutions (WA) Pty Ltd v Foley* [2014] WASC 197.

236 See Irving (n 17) 487–9 [8.37]. Evidence of post-formation conduct is permissible to establish novation: *Personnel Contracting* (n 8) 131 [178] (Gordon J); *Jamsek* (n 9) 148 [8] (Kiefel CJ, Keane and Edelman JJ), 164–5 [108]–[109] (Gordon and Steward JJ).

It would likewise be hard to argue that the original terms should be rectified,[237] whether to remove terms pointing away from employment or to add provisions suggesting a greater degree of control on the part of the hirer. Such a plea generally requires evidence of a common intention to contract on terms different to those recorded in writing,[238] something that the hirer would obviously deny. The formalist majority also mentioned the possibility of post-formation conduct being relied upon to support some kind of estoppel.[239] But again, the worker would need to show that they had been led to believe that the terms to which they had agreed would be interpreted or applied in a certain way, that they had relied upon that belief to their detriment, and that it would be unjust to allow the hirer to act differently. Whatever the merits of estoppel as a mechanism for protecting and enforcing worker expectations,[240] it seems unlikely it could be invoked in this context. If anything, it would more likely be the hirer seeking to estop a worker from claiming to be an employee after agreeing to work as a contractor. But such an argument should not be tenable. For the reasons of public policy mentioned earlier, an employee entitled to the benefit of legislative rights enacted for their protection cannot be estopped from asserting them, regardless of how willingly they have agreed to forego them.[241]

## VI THE PRACTICAL IMPACT OF THE NEW RULES: A CHARTER FOR SHAM CONTRACTING?

Even before *Personnel Contracting* and *Jamsek*, it was common (especially in certain industries) for hiring organisations to seek to exploit their control of the drafting process and superior bargaining power to create terms of engagement which present workers as contractors while in practice expecting them to supply their labour on a subordinate basis.[242] The approach taken by the formalist majority of the High Court does not merely fail to curb that tendency, it effectively endorses and incentivises that practice. An emphasis on freedom of contract may

237 *Personnel Contracting* (n 8) 130–1 [177] (Gordon J).

238 *Simic v New South Wales Land and Housing Corp* (2016) 260 CLR 85, 117 [103] (Gageler, Nettle and Gordon JJ).

239 *Personnel Contracting* (n 8) 104–5 [42]–[43], 105–6 [48] (Kiefel CJ, Keane and Edelman JJ), 130–1 [177] (Gordon J). The plurality also mentioned the possibility of some form of waiver: at 104 [42], 105–6 [48] (Kiefel CJ, Keane and Edelman JJ). The scope of that concept is far from clear: see Jeremy Stoljar, 'The Categories of Waiver' (2013) 87 *Australian Law Journal* 482. But to the extent it rests on the communication of a decision not to exercise a right or power, it is rarely to be treated as being irrevocable: *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2022) 97 ALJR 1, 11–12 [29]–[32] (Kiefel CJ, Edelman, Steward and Gleeson JJ).

240 See Joellen Riley, *Employee Protection at Common Law* (Federation Press, 2005) ch 4.

241 *Walsh v Commercial Travellers' Association* [1940] VLR 259; *Kidd v Savage River Mines* (1984) 6 FCR 398; *Givoni* (n 178); *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241, 286–7 [144] (Callinan J); *ACE Insurance Ltd v Trifunovski* (2011) 200 FCR 532.

242 As to evidence of this in the building industry, see, eg, TNS Social Research, *Working Arrangements in the Building and Construction Industry: Further Research Resulting from the 2011 Sham Contracting Inquiry* (Report, December 2012).

well promote 'commercial certainty'.[243] But it also promotes a particular type of 'liberty' which enables employers 'to undermine [workers'] security, not just for functional operational reasons [but] to arbitrage between regulatory requirements, thus avoiding responsibility for tenure, rosters, hours, leave, rates, payments and the like'.[244]

As the decision in *Personnel Contracting* to find McCourt to be an employee illustrates, it is still possible for such arrangements to fail to achieve their stated goal.[245] Sometimes a contract may simply have too many indicia of control and integration.[246] Likewise, the ruling in *Jamsek* cannot be taken to mean that requiring a worker to operate through a partnership, or a personal company, will automatically preclude a finding of employment. It may still be possible to identify the relevant contract as being with the worker personally, even if their pay is going elsewhere.[247] It is also unclear whether the High Court decisions require reconsideration of the principles for determining the identity of a worker's employer when performing work for a corporate group.[248]

Most cases to date have concerned contracts drafted prior to the High Court decisions. Over time, however, it seems likely that as hirers and their lawyers refine their standard form contracts, and learn what to put in the contract and what to leave to practical reality and the power of 'expectation', it will become less

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243 See Ryan Haddrick, 'The Centrality of Contractual Terms in Employment Law: *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*; *ZG Operations Australia Pty Ltd v Jamsek*' (2022) 11(2) *Workplace Review* 79, 96, defending the policy underpinning the High Court's new direction.

244 Arup (n 2) 362.

245 It is unclear to what extent the ruling spells the end of the particular model of labour hire being used by Construct, which is often called the 'Odco system': see Stewart et al, *Creighton and Stewart's Labour Law* (n 5) 258–9 [10.28]. The plurality considered that *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104, the first major case to uphold the idea of treating labour hire workers as independent contractors, was wrongly decided: *Personnel Contracting* (n 8) 113 [86] (Kiefel CJ, Keane and Edelman JJ). But Gageler and Gleeson JJ were content to distinguish that decision (at 126 [157]), while Gordon J did not address it. Steward J considered that the decision should not be overturned because, among other things, of the many businesses who had come to rely on it: at 142 [218], 143 [222].

246 Cf *JMC* (n 55), where a finding by Wigney J to that effect was overturned on appeal by a Full Court of the Federal Court. The case concerned a lecturer engaged to teach courses for a private education provider, which was obliged by accreditation requirements imposed by the Tertiary Education Quality and Standards Agency to direct the lecturer's activities. The Full Court concluded that the extent of the provider's control was not sufficient to indicate an employment relationship: at [90]–[103] (Bromwich, Thawley and Hespe JJ). More contentiously, it also took the view that the lecturer's 'right' to subcontract or assign performance of his teaching responsibilities strongly suggested a contract for services, even though this could only be done with the consent of the provider: at [62]–[89]. The decision conflicts with previous authorities downplaying the relevance of a qualified capacity to delegate or subcontract, or indeed treating it as an indicator of employment: see, eg, *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, 515 (MacKenna J); *Sammartino v Mayne Nickless* (2000) 98 IR 168, 210 [98] (Munro J, Duncan DP and Jones C); *Baker v Markellos* (2012) 114 SASR 379.

247 See, eg, *Chambers v Broadway Homes Pty Ltd* (2022) 317 IR 205, 222–3 [49], 223–4 [52] (Hatcher VP, Clancy and Young DPP). Cf *Leach* (n 116).

248 See *Revill v John Holland Group Pty Ltd* (2022) 321 IR 30, 35–6 [13]–[15] (Bromberg J), 68–9 [152]–[153] (Feutrill J), discussing but not resolving that issue. Cf *Robinson* (n 228) [180]–[192] (Mortimer J); *Resilient Investment Group Pty Ltd v Barnet* [2023] NSWCA 118, [158]–[165] (Gleeson JA).

likely for contrived arrangements to be overturned. As discussed above, we see many practical impediments to invoking the qualifications or exceptions identified by the formalist majority to overturn a carefully drafted and administered contract for services.

The clearest possible example of how the rules have changed is provided by the decision in *Deliveroo Australia Pty Ltd v Franco*.[249] The case involved an unsuccessful unfair dismissal claim by a motorbike rider undertaking food deliveries organised and paid for through Deliveroo's app.[250] His contract with the platform presented him as someone with his own business, who was merely using the app to find work from his (not Deliveroo's) clients. The contract purported to give him complete autonomy over when, where and how to perform this work. The reality, as found by the FWC, was very different. The preferences and incentives built into Deliveroo's system for allocating work gave the platform extensive control over their drivers and riders, who were strongly encouraged to identify themselves with the platform (including through branded clothing). Had the tribunal's Full Bench been permitted to take that reality into account, as it would have prior to *Personnel Contracting* and *Jamsek*, it made it clear that it would have found the rider to be an employee of the platform. But because of the High Court's restatement of the law, and based solely on the rider's contractual rights and obligations, he must be treated as self-employed and denied a remedy for what the Bench regarded as plainly unfair treatment.[251]

A further, mind-boggling example of form triumphing over substance is presented by the decision of the Full Federal Court in *Murphy v Chapple*.[252] After a few months working for a building company as a site supervisor, under a written contract of employment, the applicant was advised by the company's accountant to switch to being an independent contractor, with payments going to a family trust which the accountant established on his behalf. But there was a catch. The *Queensland Building and Construction Commission Act 1991* (Qld) required the company to employ a licensed supervisor. To get around that, it was orally agreed that the applicant would henceforth work for the company in two capacities: as a contractor for the bulk of his time, but as an employee when doing anything for which the licence was required. Payment arrangements aside, however, nothing else changed about his work or the conditions under which he performed it.

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249 *Deliveroo* (n 228).

250 As to the persistent controversy over the status and treatment of digital platform workers, 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 <https://doi.org/10.1177/1035304617722461>; Anthony Forsyth, 'Playing Catch-Up but Falling Short: Regulating Work in the Gig Economy in Australia' (2020) 31(2) *King's Law Journal* 287 <https://doi.org/10.1080/09615768.2020.1789433>; Michael Rawling and Joellen Riley Munton, 'Constraining the Uber-Powerful Digital Platforms: A Proposal for a New Form of Regulation of On-Demand Road Transport Work' (2022) 45(1) *University of New South Wales Law Journal* 7 <https://doi.org/10.53637/DPEI2001>.

251 *Deliveroo* (n 228) 279 [54], 280 [56]–[57] (Hatcher and Catanzarati VPP and Cross DP). For a further example of the effect of the High Court decisions in shifting the line between employment and self-employment, see *Fair Work Ombudsman v Avert Logistics Pty Ltd* (2022) 317 IR 473.

252 *Murphy* (n 127).

The applicant's claim for employment entitlements under the *FW Act* was unsuccessful, except in relation to his limited engagement to do the work needed to maintain his licence. The Court did not question the idea that an employment arrangement could be 'bifurcated' in this way. Nor, despite reciting the principles adopted in *Personnel Contracting*,[253] did it see any need to analyse or even identify the parties' rights and obligations under the 'new and wholly oral contract for services' that was said to have been agreed.[254] It was enough that the applicant had agreed to become an independent contractor. Lest there be any mistake about the governing principle, the Court repeatedly emphasised that 'unless some law provides otherwise, parties are free to contract as they see fit'.[255] That conclusion runs directly counter to the purpose of labour laws discussed in Part I: to counteract the consequences of parties contracting as they see fit.

## VII CONCLUSION: THE NEED FOR A STATUTORY DEFINITION

As we noted in Part II, there has long been uncertainty as to the application of the common law test for determining employment status. The effect of the majority approach in *Personnel Contracting* and *Jamsek* is to increase certainty of outcomes,[256] at least for hirers with carefully drafted terms of engagement. But it is a certainty purchased at the expense of the protective framework that labour statutes are intended to establish.

Paragraph 9 of the ILO's Recommendation No 198 concerning the Employment Relationship (2006) urges that any process for determining the existence of an employment relationship

> should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.

The 'primacy of facts' principle, as it is sometimes called, is one that is widely recognised in labour law systems around the world.[257] But it has now been abandoned in Australia.

In *Personnel Contracting* and *Jamsek*, the High Court had a choice. There was sufficient conflict in the previous case law to support either a formalist or a substantivist approach. As the decision of Gageler and Gleeson JJ in *Jamsek* showed, an approach based on the primacy of facts would not necessarily have meant a finding of employment in both cases. But in opting for formalism, the

253 Ibid [29]–[30] (Jagot, Banks-Smith and Jackson JJ).
254 Ibid [50].
255 Ibid [31]. See also at [40]–[41].
256 *Personnel Contracting* (n 8) 108 [58] (Kiefel CJ, Keane and Edelman JJ), 135 [189] (Gordon J).
257 See, eg, Bernd Waas, 'Comparative Overview' in Bernd Waas and Guus Heerma van Voss (eds), *Restatement of Labour Law in Europe: The Concept of Employee* (Hart Publishing, 2017) xxvii, li–lii. Note also the reliance on Recommendation No 198 in *National Union of Professional Foster Carers v Certification Officer* [2021] ICR 1397, holding that foster carers should be treated as 'workers' for the purpose of eligibility for trade union registration.

majority disregarded the purposes and coherence of the legislation they were meant to be applying. Organisations who wish to avoid the costs of being an employer now have a simple means of achieving that end. By drafting the contracts the right way, it does not matter how much control and subordination exists in practice – or how meaningless the 'freedoms' accorded to workers might be.

In theory, in a tight labour market, workers might be expected to baulk at contracts that commit them to work without the benefit of minimum wages and other labour protections. But as the wage stagnation of the past decade has shown, the 'laws' of supply and demand underpinning the models and assumptions of many labour economists can be no match for superior bargaining power,[258] especially when exercised by firms in markets where genuine competition is limited.[259] Around 8% of employed persons currently work as contractors in their main job,[260] a percentage that has not varied greatly over the past two decades.[261] But in the absence of statutory intervention, the High Court's decisions seem likely to spark an increase.

At the time of writing, the Albanese Government was consulting over the implementation of its policy to empower the FWC to regulate 'employee-like' types of work.[262] This is expected to lead to minimum wage regulation and access to dispute resolution for quasi-employees in the transport and food delivery sectors,[263] as well as (potentially) in other industries. But if this proves to be the only regulatory response to the growth of independent contracting arrangements, whether in the gig economy or beyond, it will merely reduce the gains to be made from sham contracting, not eliminate them. Indeed it might well spur more use of evasive practices, as the adoption of 'intermediate' categories has done elsewhere.[264]

Against that background, there is an urgent need for a statutory definition of employment to be adopted, both for the *FW Act* and other labour statutes. Without it, the principles enunciated by the High Court will continue to be used to undermine the main point of having labour statutes in the first place, which is to protect workers against their typical vulnerability to take-it-or-leave-it terms

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258 See, eg, Andrew Stewart, Jim Stanford and Tess Hardy, *The Wages Crisis: Revisited* (Report, 11 May 2022).

259 Jonathan Hambur, The Treasury, 'Did Labour Market Concentration Lower Wages Growth Pre-COVID?' (Working Paper 2023-01, Australian Government, 2023) <https://doi.org/10.47688/rdp2023-02>.

260 Australian Bureau of Statistics, *Working Arrangements, August 2022* (Catalogue No 6336.0, 14 December 2022).

261 *Workplace Relations* vol 2 (n 4) 800–1.

262 Tony Burke MP, 'Important Step on Rights for Gig Workers' (Media Release, 29 June 2022) <https://ministers.dewr.gov.au/burke/important-step-rights-gig-workers>; Department of Employment and Workplace Relations, '"Employee-Like" Forms of Work and Stronger Protection for Independent Contractors' (Consultation Paper, Australian Government, April 2023). For support for this type of approach, see Rawling and Munton (n 250).

263 In anticipation of this happening, gig companies are already negotiating agreements with the Transport Workers Union, which is expected to have a prominent role under any new system of regulation: see, eg, 'Menulog Backs Broad Gig Worker Regulation', *Workplace Express* (online, 27 March 2023) <https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=62103>.

264 Stewart and McCrystal (n 26).

and the exercise of managerial power – protection which the common law is not capable of providing.

Space constraints preclude us from any detailed exploration of what might be done through statutory reform. The most minimal change would be a definition that takes the law back to where it (arguably) was in February 2022 and allows recourse to the reality of a relationship in categorising it, as the High Court's substantivist minority would have permitted.[265] This might be coupled with an explicit statement that directs adjudicators to resolve status disputes by reference to the purposes of the legislation at issue, not the principle of freedom of contract. But bolder and more far-reaching options are also available.[266] One model centres on a presumption that a person contracting to work is doing so as an employee, unless the other party is a client or customer of a business genuinely carried on by the worker. It also includes directions as to the matters adjudicators should or should not consider, while specifically dealing with arrangements that involve contracting through personal companies, partnerships or trusts, as well as labour hire.[267]

A simpler version of this approach can be seen in the 'ABC' test used by some US courts, which likewise involves a presumption of employment. In the form adopted by the California Supreme Court, for instance, a worker cannot be regarded as an independent contractor unless the 'hiring entity' can satisfy three tests: (a) the worker is free from the hirer's control and direction in relation to the performance of work, both under their contract and in fact; (b) the worker performs work outside the usual course of the hirer's business; and (c) the worker is ordinarily engaged in an independent trade, occupation, or business of their own.[268]

Whichever model is chosen, however, it is vital that the integrity of our system of labour standards is protected. The very reason we do not leave the setting of wages and other core working conditions to the law of contract is also why we must not allow it to dictate who qualifies for statutory protection.

## VIII POSTSCRIPT

Since this article was written, the Albanese Government has introduced the legislation foreshadowed in Part VII. Part 16 of Schedule 1 to the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) would empower the FWC, among other things, to set minimum standards for 'employee-like' workers who are engaged through digital labour platforms, as well as for other types of

265 Joellen Riley Munton, 'Defining Employment and Work Relationships under the *Fair Work Act*' (Policy Brief No 1, Centre for Employment and Labour Relations Law, 2022) 4–6.

266 Ibid 6–8.

267 Stewart, 'Redefining Employment?' (n 12) 270–5; Roles and Stewart (n 134) 279–80.

268 *Dynamex Operations West Inc v Superior Court of Los Angeles County*, 416 P 3d 1 (Cal, 2018). See Guy Davidov and Pnina Alon-Shenker, 'The ABC Test: A New Model for Employment Status Determination?' (2022) 51(2) *Industrial Law Journal* 235 <https://doi.org/10.1093/indlaw/dwac004>. With the support of President Biden, the Democrats have proposed (to date unsuccessfully) the adoption of a Protecting the Right to Organize Act which would incorporate a similar test into federal labour laws: Protecting the Right to Organize Act of 2021, HR 842, 117th Congress (2023).

independent contractors in the road transport industry. Part 15 of Schedule 1, however, goes further. Under a proposed new section 15AA(1) of the *FW Act*, adjudicators would be required, when determining whether a person was an employee or an employer, to ascertain 'the real substance, practical reality and true nature of the relationship'.[269] This would require consideration not only of the contractual terms governing the relationship, but of 'other factors relating to the totality of the relationship', including 'how the contract is performed in practice' (proposed section 15AA(2)).[270]

Both a legislative note and the Explanatory Memorandum for the Bill confirm that the change is a response to the High Court decisions in *Personnel Contracting* and *Jamsek*.[271] However, the new provisions do not offer a definition of employment of the type we have suggested would be valuable. They merely seek to return the law to the position where (at least on one view) it was prior to February 2022 – and then only for limited purposes. Proposed section 15AA(3) makes it clear that the new direction would only affect the status of workers engaged by persons or organisations who qualify as national system employers under section 14 of the *FW Act*. It would not apply to persons (including sole traders and partnerships) who are only classed as national system employers under Divisions 2A or 2B of Part 1-3, pursuant to a referral of legislative powers in the state in which they operate. The common law position declared by the High Court would also still affect the scope of other federal statutes on matters such as taxation or superannuation, as well as state or territory laws on subjects like workers compensation or long service leave.

269 Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) sch 1 cl 237.

270 Ibid.

271 Explanatory Memorandum, Fair Work Amendment (Closing Loopholes) Bill 2023 (Cth) [32], [98], [973], [982], [989].