Precarious Work in the High Court

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Abstract

Three recent High Court decisions dealing with forms of precarious work have reaffirmed the 'primacy of contract' in determining the rights of workers to the protections of the *Fair Work Act 2009* (Cth) ('*Fair Work Act*'). The court's approach represents a turn towards what critical contract theorist Roberto Unger has called 'retro formalism', curtailing any prospect for the common law of employment to recognise the economic reality of working relationships in determining employment status. This article argues that three aspects of the Court's reasons produce this outcome: (i) the articulation of a 'rights and duties' rule to distinguish employment from independent contracting; (ii) the application of strict commercial contract principles to employment relationships; and (iii) the likelihood that the Court's emphasis on the primacy of written contracts will thwart the exercise of some statutory powers of the Fair Work Commission under the *Fair Work Act*'s protective provisions. This development signals the urgency for statutory reform to ensure that the most precarious forms of work are captured in statutory labour laws.

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I Introduction

In three recent cases — *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*,[1] *ZG Operations Australia Pty Ltd v Jamsek*,[2] and *WorkPac Pty Ltd v Rossato*[3] — a majority of the High Court of Australia has asserted the primacy of commercial contract law and rejected a developing jurisprudence that allowed consideration of the totality of the relationship when assessing the character of an employment relationship.[4] All three cases concerned forms of precarious employment: work that is usually low paid, and invariably insecure or 'on demand'. *Personnel Contracting* concerned a backpacker engaged by a labour hire company as a builder's labourer. *Jamsek* involved a pair of truck drivers, required by their employer to resign from secure employment in order that they be rehired as independent contractors.[5] Rossato concerned casual employees engaged by a labour hire agency and placed on long-term assignments with a mining company.[6] In each case, the hirer had purported to contract out of the imposition of various labour standards afforded to permanent employees by statute. In *Personnel Contracting*, the labour hire agency sought to avoid the application of the Building and Construction On-Site Award 2010 made under the *Fair Work Act 2009* (Cth) ('*Fair Work Act*'), by treating the worker as an independent contractor.[7] In *Jamsek*, the employer rejected any obligation to pay accrued annual leave and long service leave entitlements, or to make superannuation contributions on behalf of the workers, on the basis that they were contractors.[8] In *Rossato*, the employer asserted that an employed worker had been engaged as a casual and was therefore not entitled to paid leave entitlements under ss 86, 95 and 106 of the *Fair Work Act*, notwithstanding that the employee had worked the roster appropriate to a full-time employee from his first assignment in 2014 until his retirement in 2018.[9] In each case, a majority of the High Court determined the contest between hirer and worker according to the terms of a written contract between the parties, and expressly rejected arguments based on the conduct of the parties in pursuing their working relationships.[10] Taken together, these cases mean that precarious workers may no longer challenge their

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1 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 398 ALR 404 ('*Personnel Contracting*').

2 *ZG Operations Australia Pty Ltd v Jamsek* (2022) 398 ALR 603 ('*Jamsek*').

3 *WorkPac Pty Ltd v Rossato* (2021) 271 CLR 456 ('*Rossato*').

4 See *Personnel Contracting* (n 1) 416 [44] (Kiefel CJ, Keane and Edelman JJ), 445 [162] (Gordon J); *Jamsek* (n 2) 605–6 [8] (Kiefel CJ, Keane and Edelman JJ), 624 [95] (Gordon and Steward JJ). Note that Gageler and Gleeson JJ dissented on this point, holding that courts may consider the 'manner of performance of the contract' in determining whether a contract should be classified as one of employment: see *Personnel Contracting* (n 1) 440–1 [143].

5 *Jamsek* (n 2) 606 [11].

6 *Rossato* (n 3) 465–8 [11]–[22].

7 *Personnel Contracting* (n 1) 405–6 [1]–[7].

8 The workers' entitlement to superannuation contributions was yet to be determined at the time of writing, because the *Superannuation Guarantee (Administration) Act 1992* (Cth) s 12(3) includes a broader definition of coverage than the common law definition of employment. This question was returned to the Federal Court for determination: see *Jamsek* (n 2) 619 [76].

9 *Rossato* (n 3) 465–7 [13]–[21].

10 Ibid 479 [63]–[64] (Kiefel CJ, Keane, Gordon, Edelman, Steward, Gleeson JJ); *Jamsek* (n 2) 606 [9] (Kiefel CJ, Keane and Edelman JJ); *Personnel Contracting* (n 1) 420–1 [59] (Kiefel CJ, Keane and Edelman JJ), 447–8 [172] (Gordon J).

classification as a contractor or casual employee by reference to the objective reality of their working relationship, provided that their employer has clearly formalised their terms and conditions of engagement in a written contract.

In this respect, the cases paint a bleak future for workers in precarious work, particularly the growing armies of on-demand workers in the so-called 'gig economy'.[11] By emphasising the freedom of hirers to fix their terms of engagement in written contract documents, these cases invite the reinvention of forms of engagement that escape employment regulation, and leave many precarious workers in a largely unregulated wilderness of insecure work, at least until such time as Parliament legislates an alternative solution.[12] By focusing on a 19th century notion of 'freedom of contract' the Court has ensured that the common law in Australia will play no role in addressing the challenges articulated in the Senate Committee of Inquiry's *Job Insecurity Report*.[13] This article discusses the impact of the three decisions upon the treatment of precarious work under the common law by applying critical contract theory to the reasoning of the Court.

The High Court's renewed emphasis on 'freedom of contract' in employment relationships leads the authors to argue that these cases represent a turn towards what critical legal scholar Roberto Unger has called 'retro formalism' (a term discussed in more detail, below). In this respect, the cases intensify the risk that formal contract documentation will be used by hirers to disguise the economic reality of the labour exchange. While ever labour statutes such as the *Fair Work Act* continue to rely on the common law to define which workers are covered by their protections, the reasons of the majority in these cases (discussed below) will entrench the exclusion of many workers from those protections. In Australia, large numbers of the labour force are already engaged as casuals, or independent contractors.[14] The majority reasons in these cases may expose even greater numbers of workers to the vicissitudes of the free market, by permitting hirers to classify them as contractors and casuals, without any risk that the reality of their working arrangements will attract the protections of 20th century labour laws.

We suggest that three aspects of these decisions are likely to produce this outcome. First, and most starkly, the decisions introduce a 'rights and duties' rule to the determination of when a relationship is properly characterised as one of

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[11] Uber now claims to be the second largest employer in Australia, based on its engagement of more than 120,000 drivers: Tony Sheldon, 'The Precarious Grind of Casual Work Is No "Made-Up" Issue' *Australian Financial Review* (online, 18 April 2022) <https://www.afr.com>.

[12] Calls for legislative intervention by extending the definition of employment have been made for many decades now: see Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15(1) *Australian Journal of Labour Law* 235. In the United Kingdom, the *Employment Rights Act 1996* (UK) s 230(3) provides an extended definition of 'worker'. See *Uber BV v Aslam* [2021] UKSC 5 for a case determining that Uber drivers were 'workers' within this extended definition.

[13] Senate Select Committee on Job Security, Parliament of Australia, *The Job Insecurity Report* (Fourth Interim Report, February 2022) ('*Job Insecurity Report*').

[14] See Australian Bureau of Statistics, *Characteristics of Employment, Australia, August 2021* (14 December 2021); Geoff Gilfillan, 'Recent and Long-Term Trends in the Use of Casual Employment' (Research Paper, Parliamentary Library, Parliament of Australia, 24 November 2021); *Job Insecurity Report* (n 13) ch 2.

employment.[15] This rule elevates the significance of the employer's contract documentation, setting the contractually binding 'rights and duties' of the parties at the time of engagement above workers' evidence of the reality of the performance of work throughout the employment relationship.

Secondly, the decisions cement the law of commercial contract as the means to determine the fundamental question in labour law: 'who is an employee?'. Workers claiming that the reality of their working arrangements should be taken into account in determining the proper classification of their relationship will now be put to the complex task of proving implied terms, contract variation or, possibly, the even more arcane doctrine of estoppel by convention.[16] The same commercial contract principles are to be applied when interpreting whether an employee has been employed on a casual or a fixed-term contract rather than on a continuing employment contract.[17] Casuals and fixed-term employees are afforded more limited protections by statutory labour laws, so employers have financial incentives to define their hiring contracts with employees as casual or fixed-term contracts.[18]

Thirdly, and as a consequence of the first two aspects, Fair Work Commissioners exercising some of their statutory powers under the *Fair Work Act* are likely to adopt a similarly deferential attitude to the employer's written contract documentation when determining whether a worker is entitled to a particular statutory benefit. While many rights in the *Fair Work Act* are afforded only to employees, as defined by the common law (leaving the Fair Work Commission no option but to apply High Court jurisprudence), there are some provisions in the Act which allow Fair Work Commissioners (many of whom are not trained commercial or even industrial lawyers) to look past the contracting arrangements made by the parties in order to determine an employee's entitlement to access a statutory benefit. For example, a Commissioner determining whether an employee is entitled to bring an unfair dismissal claim under s 382 of the *Fair Work Act* may need to consider whether the employee was engaged on a fixed-term or fixed-task contract, because terminations of employment at the end of such contracts are not 'dismissals' for the purposes of the unfair dismissal protections.[19] Sub-section 386(3) provides an exception to this exclusion for contracts which are entered into in order to avoid the employer's obligations under unfair dismissal provisions. This necessitates a judgment by the Fair Work Commissioner about the underlying motives of the employer, and in the past has allowed recourse to the actual practices of the

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15 *Personnel Contracting* (n 1) 415–16 [43]–[44], 422 [66] (Kiefel CJ, Keane and Edelman JJ).

16 Estoppel was raised as a potential avenue for employees to challenge the application of a written contract in *Personnel Contracting* (n 1) 415–16 [43] (Kiefel CJ, Keane and Edelman JJ), 449–50 [177] (Gordon J). For an explanation of estoppel by convention, see Rory Derham, 'Estoppel by Convention: Part I' (1997) 71 *Australian Law Journal* 860; Rory Derham, 'Estoppel by Convention: Part II' (1997) 71 *Australian Law Journal* 976.

17 *Rossato* (n 3) 487 [96], 491 [105]–[106].

18 Section 86 of the *Fair Work Act 2009* (Cth) ('*Fair Work Act*') excludes casuals from paid annual leave; s 95 excludes casuals from paid personal/carer's leave. Employees engaged on casual and fixed-term contracts have limited entitlements to access the unfair dismissal protections under *Fair Work Act* pt 3-2: see particularly ss 384(2)(a), 386(2)(a). For a study of casual employment in Australia, see Raymond Markey and Joseph McIvor, 'Regulating Casual Employment in Australia' (2018) 60(5) *Journal of Industrial Relations* 593.

19 *Fair Work Act* (n 18) s 386(2)(a).

employer, particularly those strategically using a rolling series of fixed-term contracts to avoid the application of the statute.[20] We have already begun to see members of the Commission citing *Rossato* for the proposition that the tribunal must now defer to the employer's contract in cases such as this, as we explain below.

The Fair Work Commission is not a court, but a tribunal making administrative decisions in the interests of 'equity, good conscience and the merits of the matter'.[21] It would be unfortunate to see the Commission exercising all of its statutory powers under a protective regime, in deference to the strict terms of contracts strategically drafted to avoid the Commission's jurisdiction. The Commission has itself expressed regret that the High Court's findings in *Personnel Contracting* require Commissioners to 'ignore certain realities' and 'close [their] eyes' to the reality of how working relationships operate in practice when determining whether the worker is an employee at all.[22]

The impact of the High Court decisions in these cases indicates the need for legislative intervention to allow the Commission to exercise its powers without undue regard to the contractual stratagems of hirers, and to ensure that the *Fair Work Act* extends its protections to workers engaged in precarious subordinated work.[23]

We explain our argument in several parts. First (in Part II) we provide a brief explanation of the High Court majority's reasoning in *Personnel Contracting* and *Jamsek*. Next (in Part III) we look through a critical contract theory lens, and review the literature on critical contract theory pertaining to employment law. This theoretical perspective assists in understanding the significance of the three aspects referred to above, and explained in Part IV. They are: (i) the application of the rights and duties rule to the employee/contractor distinction; (ii) recourse to strict commercial contractual doctrines in construing the terms of work relationships; and (iii) disturbance of the industrial tribunal's jurisdiction to determine matters on the substantive merits of a case. These aspects are well illustrated in the outcomes of the cases, explained in Part V. In Part VI we consider potential legislative solutions to the risk that these effects will exacerbate the growth of precarious forms of work. Potential legislative solutions include the extension of a safety net of wages and entitlements, along with access to industry-level collective bargaining, to particular categories of contractors and on-demand workers. We propose this kind of legislative solution so that contracting stratagems cannot succeed in defeating the application of protective labour law statutes to those precarious workers who most need those protections.

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[20] See, eg, *D'Lima v Board of Management, Princess Margaret Hospital for Children* (1995) 64 IR 19 (Industrial Relations Court of Australia) ('*D'Lima*').

[21] *Fair Work Act* (n 18) s 578(b).

[22] *Deliveroo Australia Pty Ltd v Franco* (2022) 317 IR 253, 279 [54] (Fair Work Commission Full Bench) ('*Franco*').

[23] Calls for legislative amendment have been made by others: see Stewart (n 12); Andrew Stewart and Jim Stanford, 'Regulating Work in the Gig Economy: What Are the Options?' (2017) 28(3) *The Economic and Labour Relations Review* 420; 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.

II Majority Reasoning in *Personnel Contracting* and *Jamsek*: Ignoring Reality for Contractual Form

In *Personnel Contracting*, the High Court needed to determine whether a backpacker engaged by a labour hire company to undertake builder's labourer's duties for one of its clients was an employee or a contractor.[24] A full Bench of the Federal Court of Australia had found that the backpacker must be a contractor, but only because the standard form contract under which he had been engaged had already been assessed by an appellate-level court, and had been found to be a genuine independent contract.[25] The decision that the backpacker was a contractor allowed his employer to pay him approximately 75% of the minimum wage under the relevant modern award. On appeal, six of the seven members of the High Court Bench overturned this decision (Steward J dissenting). The reasons of most relevance to our argument are those of Kiefel CJ, Keane and Edelman JJ (writing together), and (Gordon J), because these reasons formed the majority on the approach to be applied in determining the proper classification of a work relationship.

Kiefel CJ, Keane and Edelman JJ held that in determining the status of a person hired under a written contract, courts must regard only the terms of the written contract to assess the nature of the working relationship, and cannot regard the reality of that relationship manifested by the way the parties have performed their respective obligations.[26] Recourse to any subsequent conduct of the parties could only be relied upon where a contract was proven not to be wholly in writing, or where there was evidence that the contract had been varied, or discharged and replaced by a new contract.[27] They said that the essential question for the court was to determine whether the worker was serving the hirer in the hirer's business, or carrying on a trade or business of their own.[28] While the multiple indicia set out in the earlier High Court decision in *Stevens v Brodribb Sawmilling Co Pty Ltd*[29] should be considered in order to answer this essential question, those indicia should be applied only to an analysis of the text of the written contract. Cases in which lower courts and tribunals had applied these indicia as a kind of 'mechanistic checklist' and regarded the parties' actual conduct were roundly criticised.[30] This did not mean that the parties' own labels in contract documentation should determine the issue.[31] Simply calling workers 'contractors' would not be sufficient to make them so.

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24 For a note on the case, see Joellen Riley Munton, 'Boundary Disputes: Employment v Independent Contracting in the High Court' (2022) 35(1) *Australian Journal of Labour Law* 79.

25 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631, 643 [34] (Allsop CJ), 682 [185] (Lee J) ('*CFMMEU*'). The Court relied on the Industrial Appeal Court of Western Australia's decision in *Personnel Contracting Pty Ltd v Construction Forestry Mining & Energy Union of Workers* (2004) 141 IR 31 and also referred to the Tasmanian Supreme Court's decision in *Young v Tasmanian Contracting Service Pty Ltd* [2012] TASFC 1.

26 *Personnel Contracting* (n 1) 413–21 [32]–[60].

27 Ibid 415–16 [43]. A further qualification was that parties may attempt to raise an estoppel argument.

28 Ibid 414–15 [36]–[39], citing *Braxton v Mendelson*, 233 NY 122, 124 (Andrews J) (1922) and *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210, 217 (Windeyer J).

29 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 29 ('*Brodribb*').

30 *Personnel Contracting* (n 1) 413–14 [34], 414 [36].

31 Ibid 421–2 [63]–[66], 424–5 [79].

Nevertheless, where contract terms indicated that the hirer had a right to control the worker, and that the worker was a subordinate in the hirer's business and did not operate any business of their own, the worker was properly characterised as an employee.

Kiefel CJ, Keane and Edelman JJ applied the same reasoning in *Jamsek* to find that two truck drivers who had been driving exclusively for the same business for about 32 years were contractors and not employees, as a full Bench of the Federal Court had found.[32] The Federal Court decision found that they had been given no choice but to resign from their employed positions to be re-engaged as contractors, and that their work as contractors had not differed substantially from their earlier employment. On an assessment of the totality of their long relationship with the hirer, it was held that they were in fact employees and were entitled to payment for accrued employment entitlements, such as annual leave and long service leave. The High Court overturned this decision unanimously. Kiefel CJ, Keane and Edelman JJ, again writing together, considered only the terms of the written contract between the parties to find that the drivers were properly characterised as independent contractors, and they stated that the court below had erred in paying regard to the way that 'the parties actually conducted themselves over the decades of their relationship'.[33] They emphasised that Anderson J had made a grave error in finding that the inequality of bargaining power between the hirer and the drivers was at all relevant in determining the respective rights of the parties.[34] Only where parties have argued that a contract should be rescinded for some vitiating factor such as unconscionable dealing, or attacked under some statutory provision dealing with unfair contracts, might such an argument be countenanced, and no such claim had been made in this case.[35] The terms of the written contracts provided that the drivers were contracting through partnerships with their spouses, so these could not be personal services contracts, even though the drivers were the only ones providing any services.[36] The workers were responsible for providing their own vehicles, even though they had been required to purchase these vehicles from the hirer when resigning their employment and accepting the new contract.[37] The contracts allowed the drivers to determine their own delivery routes, evidencing their own 'control' over their work.[38] The contracts permitted them to undertake other work, even though their long working hours for the hirer left them no opportunity to do so.[39]

Throughout their reasons, the majority (including Gordon J who agreed in substance with these aspects of the Kiefel CJ, Keane and Edelman JJ reasons) emphasised that Australian courts ought not to follow the approach taken by the United Kingdom ('UK') Supreme Court in *Autoclenz Ltd v Belcher*.[40] In *Autoclenz* the Supreme Court found that a group of car detailers who had been engaged on

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32 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114.
33 *Jamsek* (n 2) 605 [6].
34 Ibid 617 [62].
35 Ibid.
36 Ibid 610 [25].
37 Ibid 607 [14]–[16], 617 [63].
38 Ibid 609 [22].
39 *Personnel Contracting* (n 1) 429–30 [103].
40 *Autoclenz Ltd v Belcher* [2011] 4 All ER 745 ('*Autoclenz*').

contracts purporting to treat them as independent contractors were in fact employees. Clauses had been included in the contracts permitting the workers to delegate the work to subcontractors.[41] Such a clause is generally conclusive in finding that the worker is a contractor, not an employee, because the right to delegate contradicts the notion of a contract for personal service. The Supreme Court found that the workers enjoyed no genuine right to subcontract their work, so the written contract did not represent the reality of the agreement between the parties. In reality, the workers were engaged as employees.[42] This decision was rejected by the majority in *Personnel Contracting* and *Jamsek*, on the basis that it adopted a heterodox view that employment contracts are a special class of contract, and are not governed by orthodox principles of commercial contract law.[43]

In rejecting *Autoclenz*, the majority of the High Court has asserted that Australian employment law is to be governed by the strict principles of commercial contract law. We turn now to reflect upon that assertion through the lens of critical contract theory.

III Critical Contract Theory

The notion that the orthodox form of contract disguises an oppressive reality between parties to a labour exchange[44] is not a new one. It was observed by Marx at the time of the emergence of industrial capitalism and its modern law of contract in the mid-19th century.[45] And it has been at the heart of heterodox approaches to contract law — 'realist',[46] 'labourist',[47] 'critical',[48] 'deconstructionist'[49] and

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41 Ibid (n 40) 750, [6].

42 Ibid 759 [38]–[39].

43 *Personnel Contracting* (n 1) 421 [60].

44 Richard Johnstone, Shae McCrystal, Igor Nossar, Michael Quinlan, Michael Rawling and Joellen Riley, *Beyond Employment: The Legal Regulation of Work Relationships* (Federation Press, 2012) 186.

45 Karl Marx, *Capital*, tr Samuel Moore and Edward Aveling, ed Frederick Engels (Progress Publishers, 2015) vol 1 [trans of: *Das Kapital* (1867)]. It was crucial to his theories of: (i) exploitation or 'surplus-value' (at 122–3); as well as (ii) employer power or 'the subsumption of labour to capital's command' (at 126–58).

46 See, eg, Roosevelt-era reformers and jurists such as Roscoe Pound (pre-1937), Karl Llewellyn and Wendell-Holmes Jnr: Marcus Curtis, 'Realism Revisited: Reaffirming the Centrality of the New Deal in Realist Jurisprudence' (2015) 27(1) *Yale Journal of Law and the Humanities* 157, 165–7.

47 See, eg, Australian Labor-appointed High Court judges, particularly those associated with drafting the *Australian Constitution* and the *Commonwealth Conciliation and Arbitration Act 1904* (Cth), as well as making many foundational decisions, such as the *Harvester* decision (*H v McKay* (1907) 2 CAR 1). These include Henry Bourne Higgins, Sir Isaac Isaacs and (more recently) Mary Gaudron.

48 Predominantly scholars from the Americas (see, eg, Duncan Kennedy, 'Critical Labor Law Theory: A Comment' (1981) 4 *Berkeley Journal of Employment and Labor Law* 503; Duncan Kennedy and Karl E Klare, 'A Bibliography of Critical Legal Studies' (1984) 94(2) *Yale Law Journal* 461) led chiefly by the writing of Roberto Unger in the 1970s and 1980s (see, eg, *The Critical Legal Studies Movement* (Harvard University Press, 1983) also prominently including Jay Feinman (eg, 'Critical Approaches to Contract Law' (1983) 30(4) *UCLA Law Review* 829; Peter Gabel and Jay M Feinman, 'Contract Law As Ideology' in David Kairys (ed), *The Politics of Law: A Progressive Critique* (Pantheon, 1982) 182).

49 See, eg, Clare Dalton, 'An Essay in the Deconstruction of Contract Doctrine' (1985) 94(5) *Yale Law Journal* 997 and other post-structuralists in the 1980s and 1990s.

'relational'[50] — ever since. Among the timeliest and most visionary of these heterodox approaches is critical contract theory, as explained by its leading proponent, Roberto Unger.

Unger's recent work[51] draws attention to the return of orthodox contract law across the common law world. Unger was a founding member of the critical legal studies movement in North America in the 1970s, and served as a Minister within a social-democratic Brazilian government (2007–09). As such, his work is rooted in the contextual study of law — its embeddedness within relations of social and economic power — and its reform. According to Unger, the merit of this approach in the current political climate is to understand 'the reorganisation of labor in the guise of decentralised networks of contractual relations and the consequent danger of universal economic insecurity', in turn permitting the formulation of an alternative set of values and institutions.[52]

The recent restoration of orthodox contractual relations is directly related to what Unger has termed 'retro-doctrinalism' (or, in an Australian context, 'retro formalism'): a return to pre-realist or non-purposive judicial method, similar to that which dominated 19th century legal thought, in which legal rules and doctrines are represented as having an 'inherent logic' or 'in-built structure', while context is largely downplayed or disregarded.[53] Such a logic, says Unger, has returned for three primary reasons: (i) the constancy of private law as a basis for rational economic and social relations over the course of the 20th century; and (ii) an erosion of faith in realist or purposive legal thought; primarily due to (iii) the reign of subjectivity in the humanities — an escapist post-structuralism disconnected from reimagining and remaking society.[54] Within a political climate mired in the Thatcherite mantra of 'there is no alternative [(TINA)]', 'retro-doctrinalism represent[s] … a return to normalcy in legal thought when normalcy mean[s] giving up on fundamental transformation' of society.[55]

This loss of faith in law as a progressive social project is key to retro-doctrinalism. Echoing the earlier critical contract scholarship of Gabel and Feinman,[56] Unger has recently written that the 'defining feature' of retro-doctrinalism is simply 'the legal rationalization of the existing institutional form of the market economy';[57] in other words, merely cementing customary forms of contractual relations — regardless of ethical or material consequences — into law. For retro-doctrinalism, law is a mirror to dominant social and contractual relations. Law does not attempt change or redirection. In this respect, retro-doctrinalism differs

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[50] See, eg, Hugh Collins, *Regulating Contracts* (Oxford University Press, 2002); Hugh Collins, 'Is There a Third Way in Labour Law?' in Joanne Conaghan, Richard Michael Fischl and Karl Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford University Press, 2002) 449.

[51] Roberto Mangabeira Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (Verso, 2015).

[52] Ibid 16.

[53] Ibid 37.

[54] Ibid 37–40.

[55] Ibid 40.

[56] Gabel and Feinman (n 48).

[57] Unger (n 51) 39.

from 19th century formalism, in which the doctrine of freedom of contract between equal parties, for instance, expounded the norms of 'freedom' and 'equality' to justify transformation of markets and social life. Neoliberal doctrinalism, by contrast, pays lip service to these concepts without any such good intentions.[58]

Accordingly, Unger says that retro-doctrinalism represents a 'darkening' within legal discourse in which post-structuralism has endowed lawmakers with a willing 'readiness to defy the consensus regarding the substance of law and its method', while maintaining a 'half-belief' in its practice — an ironic, self-interested and instrumental attitude. Legal theory, sometimes invoked in conjunction with retro-doctrinalism, says Unger, is vacuously detached from any notion of postwar-era social progress and class compromise. He labels this theory a form of 'high-minded minimalism'[59] committed to discourses such as European human rights and minimum standards (mostly in the realm of constitutional law). Such theory sees rights as a shield, rather than a sword, acting as the night watch over only the most basic enlightenment gains. The Australian High Court's recent rediscovery of the doctrine of 'freedom of contract' within the realm of Australian labour law is a fitting local example. Such a position advances nothing and may even have regressive consequences.

As heterodox 'relational' contract scholar Hugh Collins has said, orthodox contract law sits at the pinnacle of formalist or doctrinal approaches to law, embodied by a belief in neutral and 'clear rules and logical derivatives'.[60] Foremost among these neutral rules for the conduct of market relations are two key doctrines: freedom *to* contract (to enter or refuse to enter into contracts and to choose contractual partners) and freedom *of* contract (to select the terms of agreement). As Unger has theorised, both orthodox doctrines contain a series of counter-principles that frame the 'form' or systemic logic of each.[61] His theory runs like this:

Freedom *to* contract is premised upon a key legal counter-principle: an 'intention to create legal relations'.[62] This principle discourages contractual relations among family and friends, who are assumed to lack any intention to conduct business or make contracts.[63] Intrinsic to this assumption is a separation between public and private spheres and, in particular, the preservation of patriarchal authority in the private sphere (upon which the pre-contractual law of master and servant was

58 Ibid 37–39; Henry E Smith, 'Property as the Law of Things' (2012) 125(7) *Harvard Law Review* 1691.

59 Unger (n 51) 33.

60 Hugh Collins, 'Contract and Legal Theory' in William Twining (ed), *Legal Theory and Common Law* (Basil Blackwell, 1986).

61 Unger (n 51) 146.

62 Another counter-principle to freedom to contract is: freedom to choose a contract partner will not be permitted to work in ways that subvert communal aspects of social life (eg, compulsory contracts, precontractual dealing, special responsibilities regarding position: Unger (n 51) 147). Yet another is: there are obligations for another's justified reliance upon promises (promissory estoppel and restitution for unjust enrichment — 'quasi-contract'): Unger (n 51) 147. The current common law on the intention to create legal relations is stated in *Banque Brussels Lambert SA v Australian National Industries Ltd* (1989) 21 NSWLR 502; *Rose & Frank Co v JR Crompton & Bros Ltd* [1925] AC 445.

63 Unger (n 51) 148.

based).[64] In the public sphere, meanwhile, an intention to create legal relations prescribes ultimate authority to the intentions of the parties. This is because in the public sphere, parties are imagined to be equal in power and knowledge (this imagined equality is also key to the principle of 'fairness', discussed further below). Therefore, orthodox approaches to contract law will always read 'intention' to protect justified reliance on a bargain.[65] Such an observation is particularly astute in light of the *Rossato* decision, discussed below, in which the intentions of the parties were a battleground between first instance and appellate judges and their respective heterodox and orthodox approaches to contract. In this respect, a retro-doctrinalist approach held the parties to their perceived intentions at the outset of the contract, regardless of any obvious inequality in bargaining power, or indeed of any evidence of their intentions or expectations derived from the performance of their relationship.

In respect to freedom *of* contract, Unger posits the counter-principle of 'fairness': that unfair bargains should not be enforced.[66] This counter-principle is the formal legal acknowledgement of the classical liberal assumption that when entering into a transaction, parties in the market have equal access to knowledge and power.[67] To be clear, in the 19th century, doctrinal contractual approaches assumed or merely imagined such equality between parties by virtue of their freedom to contract.[68] Such doctrinalism manifestly denied the oppressive character of the market and lack of real personal agency experienced by most workers as parties to bargains.[69] Owing to this formalist legal reasoning, nothing other than the parties' intention, expressed by the terms of the contract, could be considered by lawmakers when interpreting the terms of the bargain. It is precisely this approach that the majority of the Australian High Court has adopted in its turn towards retro-doctrinalism in the *Personnel Contracting* and *Jamsek* decisions described above.

In the 20th century, heterodox approaches to contract introduced reality to the legal fictions of freedom and equality of contract.[70] Introducing reality to bargains involving an obvious disparity in bargaining power — for example, the relationship between labour and capital — immediately undermines the 19th century assumption

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64 On this point, see also Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2011) ch 1.

65 Unger (n 51) 148.

66 Ibid 153. The common law's response to the principle of 'fairness' is limited to the doctrine permitting the vitiation of contracts for 'unconscionable dealing', encapsulated in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. This doctrine prevents predatory exploitation of another's special weakness, but does not go so far as to adjust rights purely on the basis of an inequality of bargaining power.

67 Unger (n 51) 153, 156.

68 Gabel and Feinman (n 48) 175–7.

69 Ibid 177.

70 Gabel and Feinman (n 48) 175–7; Dalton (n 49); Peter Drahos and Stephen Parker, 'Critical Contract Law in Australia' (1990) 3(1) *Journal of Contract Law* 30, 31. These authors describe four techniques by which this has been achieved, including: (i) *privileging*: privileging form over substance, writing over words, words over silence and signature over non-signature; (ii) *displacing*: or 'hiving off' an area of contract law for special treatment (eg, labour law or equity); (iii) *rhetoric*: deploying 'objective tests' — cloaking a judicial decision with that of the metaphorical 'person in the street'; and (iv) *duty creation*: creating a duty, pretending it was anterior to the facts, and then enforcing it (creating an equity or a fiduciary or constructive notice are similar concepts: Drahos and Parker at 38–9).

of 'fairness' between the parties. Conveniently for labour lawyers, this problem had mostly been circumvented in the early- to mid-20th century across the common law world by 'hiving off'[71] the most contested areas of contract law — such as those involving labour and capital — by creating statutory collective bargaining schemes and statutory minima. Through a technocratic common law lens, these interventions exist as states of exception to orthodox contract, providing new legal standards, protections, and specialist channels for negotiation and bargaining. Indeed, enabling workers to face capital on more equal terms ultimately validates the contractual counter-principle of fairness between equal parties to a bargain.[72] The system of specialised laws created mandatory terms for labour engagements. And over time, this system brought unprecedented levels of industrial peace and job security to workers, forming the basis of a post-war or 'golden-age' compact between labour and capital within Western liberal democracies. In Australia, this was achieved by the enactment of laws enabling the setting of mandatory minimum terms of employment by a process of conciliation and arbitration of collective industrial disputes.[73]

As Unger has observed, however, the process of hiving off labour law from orthodox contract law has created two enduring and interrelated problems. First, the more powerful party always has an incentive to escape these statutory labour laws and revert to the common law of contract wherever possible.[74] This is manifested when a hirer chooses a contractual form to hire labour that avoids the coverage provisions of labour laws. And second, operating under liberal capitalist constraints, statutory labour laws can never completely replace managerial discretion — the rights and power of employers to direct and command labour within their own firms.[75] This means that the boundaries of collective agreement, labour standards and managerial prerogative, or the 'retained rights' of employers, remain unclear.[76] In legal practice, the judicial language of 'contract' protects employer power (in turn, derived from employer ownership of productive capacity) from being completely usurped by statutory and executive labour law. Indeed, the first aspect of this problem is directly implicated in the turn to retro-doctrinalism in precarious employment cases. This awkward coexistence of statutory labour law alongside orthodox contract has recently seen the High Court permit employers to escape the aspirations of labour law, and revert to freedom to determine their own obligations

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71 Drahos and Parker (n 70) 38; Unger (n 51) 154, 158–60; Gabel and Feinman (n 48) 180–2.

72 Karl E Klare, 'Critical Theory and Labor Relations Law' in David Kairys (ed), *The Politics of Law: A Progressive Critique* (Pantheon, 1982) 65, 66; Unger (n 51) 156–60.

73 The first federal enactment of this kind in Australia was the *Conciliation and Arbitration Act 1904* (Cth), underpinned by the labour power in the *Australian Constitution*, s 51(xxxv). Conciliation and arbitration was retained in the *Industrial Relations Act 1988* (Cth), and was abandoned only with the enactment of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth). For a history of the system, see Michael Kirby and Breen Creighton, 'The Law of Conciliation and Arbitration' in Joe Isaac and Stuart Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration* (Cambridge University Press, 2004) 98; Richard Naughton, *The Shaping of Labour Law Legislation: Underlying Elements of Australia's Workplace Relations* (LexisNexis Butterworths, 2017) 60–119.

74 Unger (n 51) 158–60.

75 See Karl Renner, *The Institutions of Private Law and Their Social Functions* (Routledge, 1976) ch 2, discussing a nexus between property and contract.

76 Unger (n 51) 158–60.

under contract. As mentioned at the outset, the consequences of this process are threefold, and are discussed in the ensuing section.

IV Three Consequences

A *'Rights and Duties' Rule and the Definition of Employment*

The definition of employment is the gatekeeper at the threshold between the jungle of commercial contract law, on one hand, and a haven of secure and protective labour law rights, on the other.[77] As such, the definition of employment determines which disputes about work belong in the territory of labour law, and which remain subject to the law of the jungle. To use Unger's terminology, the definition of employment determines which aspects of labour law are 'hived off' from contract. The authors suggest that the High Court's reasoning in *Personnel Contracting*, and the affiliated decisions in *Jamsek* and *Rossato*, reorient courts towards contract law, enabling hirers to avoid obligations under protective labour laws to precarious workers. The High Court has done so by favouring a 'retro-formalist' or 19th century approach to defining employment that privileges the form of the contract over the reality of the employment relationship.

In delivering this new approach, the plurality of the Court in *Personnel Contracting* — Kiefel CJ, Keane and Edelman JJ — introduced the 'right and duties' rule to the test of employment.[78] The rights and duties rule derives from general commercial and contract law and embodies the notion of freedom of contract. The plurality made this clear by eliding both concepts in a 'freedom to agree upon the rights and duties which constitute [the parties'] relationship'.[79] In practice, the rights and duties rule simply requires a court to examine the terms of the parties' own contract, and where the contract is in writing (and not alleged to be a 'sham'), only the written terms can be consulted, without consideration of the practical reality of the relationship. As the plurality put it,

> there is no reason why the legal rights and obligations so established should not be decisive of the character of the relationship. … there [is] no reason why, subject to statutory provisions or awards, established legal rights and obligations in a contract that is entirely in writing should not exclusively determine the relationship between the parties … there is every reason why they should. The 'only kinds of rights with which courts of justice are concerned are legal rights'. The employment relationship with which the common law is concerned must be a *legal* relationship. It is not a social or

[77] For a study of the common law definition of employment undertaken prior to these High Court decisions, 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, 377–85. See also Mark Irving, *The Contract of Employment* (LexisNexis Butterworths, 2012) 36–65; Joellen Riley, 'The Definition of the Contract of Employment and Its Differentiation from Other Contracts and Other Work Relations' in Mark Freedland, Alan Bogg, David Cabrelli, Hugh Collins, Nicola Countouris, ACL Davies, Simon Deakin and Jeremias Prassl (eds), *The Contract of Employment* (Oxford University Press, 2016) 321.

[78] *Personnel Contracting* (n 1) 415–16 [43]–[44], 417 [48], 419–20 [56], 421–2 [58]–[59], 421 [61], 422 [66], 424–5 [79], 427 [88].

[79] Ibid 421 [58].

> psychological concept like friendship. There is nothing artificial about limiting the consideration of legal relationships to legal concepts such as rights and duties.[80]

Gordon and Steward JJ agreed with this proposition.[81] Only Gageler and Gleeson JJ supported the view taken in earlier decisions that it is legitimate to consider the totality of a working relationship, including the way it has been performed, in determining whether the relationship should be characterised as one of employment.[82]

The veneration of written contracts in the majority's reasoning is problematic for a range of reasons. A key problem is that it relies on an assumption, buried in passing in the opening sentence of the above-quoted passage, that an employment contract can be 'entirely in writing', without recourse to conduct or reality. The assumption arises because the Court has conflated the contract of employment with general commercial contract law, in which exclusively written contracts are the norm, rather than the exception. In other words, the Court has ignored the separate evolution of protective labour laws that have sought to distinguish employment relationships from commercial bargains. For over a century, labour laws have ameliorated the harsh consequences of commercial contract law principles for vulnerable workers, in support of the principle that labour ought not to be commoditised.[83]

Another problem arising from this reversion to 19th century contractual doctrine is that, in Unger's words, it merely imagines 'fairness' or equality between the parties. In this respect, it pays insufficient regard to the risk that 'freedom of contract' may disguise economic coercion. The classic formulation of freedom of contract was stated by Sir George Jessel MR, at the height of the industrial revolution, in *Printing & Numerical Registering Co v Sampson*, where Sir George expounded that

> men [sic] of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.[84]

This begs the question of what free and voluntary service means for many precarious workers, in a world where one must work to live, and must accept whatever terms are offered, at the risk of starvation. The High Court majority made a brief concession to the potential for a contract to be set aside for duress, or unconscionable dealing, or under some statutory provision prohibiting misleading and deceptive or unconscionable terms,[85] but these doctrines and statutory provisions have proven to be of little benefit to workers pressed only by their impecunious circumstances and lack of legal knowledge into accepting the employer's contract. This is precisely why earlier Australian High Courts expressly excluded 'freedom of contract' as a

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80 Ibid 415–16 [43]–[44] (Kiefel CJ, Keane and Edelman JJ) (emphasis in original) (citations omitted).
81 Ibid 448 [173] (Gordon J), 458 [203] (Steward J).
82 Ibid 429–30 [102]–[103], 435 [121], 437–8 [132].
83 See Paul O'Higgins, '"Labour is Not a Commodity": An Irish Contribution to International Labour Law' (1997) 26 *Industrial Law Journal* 225.
84 *Printing & Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 465.
85 *Jamsek* (n 2) 605–6 [8] (Kiefel CJ, Keane and Edelman JJ).

factor to be taken into consideration in their application of the 'multi-indicia' test for characterising work relationships.[86] The application of the multi-indicia or multifactorial test to the totality of the employment relationship required consideration of the worker's experience of the labour process (reality) together with the terms of the employer's contract (form).[87] Accordingly, the application of freedom of contract by the Court in *Personnel Contracting* is a remarkably clear example of Unger's concept of 'retro-formalism'. The Court has returned to a 19th century understanding of employment, bereft of any good (if misconceived) intentions such as 'equality' between the parties or freedom from coercion that 19th century liberal law once proposed. It has adopted what Unger refers to as 'retro' formalism. The result is a test — the rights and duties rule — that largely permits employers to determine the character of the relationship under which they engage labour, by avoiding acknowledgement of circumstances in the relationship that would signify employment.

This means that the employer need only assert, in the terms of the written contract, that the worker is to undertake tasks in the manner of an independent contractor. The kinds of clauses which will achieve this end include that the worker need not provide the services personally, but may delegate tasks to another, even though in reality the worker desperately needs to do all the work to earn a living and has no intention of subcontracting. The plurality in *Personnel Contracting* expressly denied that a mere label, 'contractor', will determine the character of the relationship.[88] It is for the court and not the parties themselves to determine the legal character of a relationship. It made a similar finding in *Rossato* (concerning the definition of casual employment)[89] in which the Court first asserted the return to 'freedom of contract' in employment law.[90] Nevertheless, it is within the power of employers (or the lawyers drafting their contracts) to include provisions typical of a genuine independent contract: a right to delegate work; an obligation to provide capital equipment; an apparent freedom to refuse tasks. They may include a requirement that the worker contract through a small corporation or partnership (as was the case in *Jamsek*). These 'boilerplate' clauses enable employers to evade the risk of engaging workers in employment relationships by legitimising what Unger has called 'decentralised contractual networks'.[91] In practice, such a process provides larger firms with greater access to lawyers — such as platform companies

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[86] *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 41 [46] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) ('*Hollis*'). The Court referred to the exclusion of 'considerations respecting economic independence [of the parties, ie, without coercion] and freedom of contract'.

[87] *Brodribb* (n 29); *Hollis* (n 86); *On Call Interpreters & Translators Agency Pty Ltd v Commissioner of Taxation [No 3]* (2011) 214 FCR 82, 123 [208] (Bromberg J); *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146.

[88] *Personnel Contracting* (n 1) 421–2 [63]–[64] (Kiefel CJ, Keane and Edelman JJ).

[89] *Rossato* (n 3) 488 [97]. In the month before the High Court handed down its decision in *Rossato*, the Parliament amended the *Fair Work Act* (n 18) by inserting new s 15A, reversing the decision of the Full Federal Court in the matter on appeal (known as the '*Skene* principle' from *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536) for future casual employment cases. Section 15A diverges from the High Court's perspective on contractual labels in that it appears to confirm that the label 'casual' *is* influential, as one of the four matters listed in s 15A(2) that can be considered in determining casual employment status.

[90] *Rossato* (n 3) 477 [58], 489 [99].

[91] Unger (n 51) 16.

in the gig economy — with a defensible business structure as well as an excuse to circumvent sham contracting provisions within the *Fair Work Act*.[92]

To be clear, the Court's assertion of contractual orthodoxy in *Personnel Contracting* was not absolute. The plurality permitted limited consideration of reality and context outside the written contract ('post-formation conduct'), in a number of discrete circumstances. These were:

- in determining whether the contract is wholly in writing, or includes oral terms.[93] The parties' conduct may be relevant to establishing oral terms of the contract, so long as the conduct is used to construe the contractual commitments made by the parties at the inception of their relationship;[94]
- in establishing that the initial contract has been varied, or discharged and replaced by a new contract;[95]
- in establishing that the written contract is a sham;[96] and
- in establishing a new claim based on the doctrine of estoppel by convention.[97]

None of these arguments were raised in *Personnel Contracting* or *Jamsek*. Given that in *Jamsek* the plurality stated that 'claims of sham cannot be made by stealth under the obscurantist guise of a search for the "reality" of the situation',[98] it is unlikely that any of these concessions will be of assistance to workers seeking to rely only on the practical reality of their working arrangements to establish that written contract terms should be ignored.[99] We reflect on the difficulty of establishing a contractual variation in the face of an extensive written contract below.

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92 *Fair Work Act* (n 18) ss 357–9. Section 357 prohibits an employer from knowingly or recklessly misrepresenting an employment relationship as an independent contractor relationship. Section 358 prohibits an employer from dismissing an employee and rehiring them as a contractor, while s 359 prohibits the employer from making false statements to persuade an employee to re-engage with the employer as an independent contractor. These provisions are subject to penalties of up to 60 penalty units for individuals and 300 penalty units for corporations: ss 539, 545–6.

93 *Personnel Contracting* (n 1) 415 [42] (Kiefel CJ, Keane and Edelman JJ), 449–50 [177] (Gordon J).

94 Ibid 416 [44] (Kiefel CJ, Keane and Edelman JJ), 448 [174] (Gordon J). Carter states that consideration of post-formation conduct does 'not necessarily conform to orthodox principles' of contractual formation. He nevertheless suggests that courts will occasionally consider post-formation conduct subject to a high legal threshold: John Carter, *Carter on Contract* (LexisNexis, 2022) [02-060].

95 *Personnel Contracting* (n 1) 415–16 [43] (Kiefel CJ, Keane and Edelman JJ), 449–50 [177] (Gordon J).

96 Ibid.

97 Ibid.

98 *Jamsek* (n 2) 617 [62] (Kiefel CJ, Keane and Edelman JJ). The majority in *Rossato* (n 3) also criticised recourse to expectations arising from performance as a 'descent into … obscurantism': at 479 [63].

99 For discussion of the narrow doctrine of 'sham' contracts, see Gordon Anderson, Douglas Brodie and Joellen Riley, *The Common Law Employment Relationship: A Comparative Study* (Edward Elgar, 2017) 53, citing *Snook v London & West Riding Investments Ltd* [1967] 2 QB 786.

1 *Significance of Control*

All members of the majority in *Personnel Contracting* reaffirmed the importance of the control test in characterising employment contracts.[100] The control test hails from 19th century 'master and servant' law and determines employment status by reference to the nature and extent of an employer's control over a worker.[101] Since the High Court's decision in *Brodribb*, the test had been relegated to being merely one of a number of multiple indicia used to determine the existence of employment, although one which bore considerable weight in later cases, including *Hollis v Vabu Pty Ltd*.[102] The majority in *Personnel Contracting* emphasised the significance of the control test;[103] however, they looked no further than the written terms of the contract to determine an employer's 'right to control'.[104] The majority roundly condemned the approach of looking to the 'totality' of the relationship itself (as opposed to the written contract) in assessing an employment relationship.[105] This means that workers' evidence of the way in which the relationship was performed is ignored in the face of a written contract including terms that set up an independent contracting arrangement.

Applying the control test to the contract alone is a curious and arguably contradictory judicial practice. Control acknowledges and condones an obvious disparity in power between the parties, yet restricting its application to the contract holds fast to the ideology of equality between them. Such doctrine resembles what Unger has described as cynical and convenient judicial practice that lies at the heart of his notion of retro-formalism.[106] In effect, it means that a written clause permitting delegation of work will prevail over the reality that delegation was never a genuine option for workers who needed to keep the work themselves. This point was clearly made in the minority judgment of Gageler and Gleeson JJ, citing Allsop CJ in the matter below. Quoting Allsop CJ, they said

> the [totality approach] is likely to be distorted, not advanced, by an overly weighted importance being given to emphatic language crafted by lawyers in the interests of the dominant contracting party. The distortion will likely see formal legalism of the chosen language of such party supplant a practical and intuitively sound assessment of the whole of a relationship by reference to the elements of the informing conceptions.[107]

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[100] *Personnel Contracting* (n 1) 423–4 [73]–[78] (Kiefel CJ, Keane and Edelman JJ), 433 [115], 444 [157] (Gageler and Gleeson JJ), 456 [193] (Gordon J).

[101] *Queensland Stations Pty Ltd v Commissioner of Taxation (Cth)* (1945) 70 CLR 539, 551; *Humberstone v Northern Timber Mills* (1949) 79 CLR 389, 404; *Brodribb* (n 29).

[102] Owens, Riley and Murray (n 64) 155–65.

[103] See, eg, *Personnel Contracting* (n 1) 447–8 [172]–[174] (Gordon J).

[104] Ibid 423–4 [73]–[78] (Kiefel CJ, Keane and Edelman JJ).

[105] Ibid 417–18 [50], 427 [88] (Kiefel CJ, Keane and Edelman JJ) 451 [181] (Gordon J), 458 [203] (Steward J).

[106] Unger (n 51) 37–40.

[107] *Personnel Contracting* (n 1) 437 [131], quoting *CFMMEU* (n 25) 639–40 [21].

B *The Primacy of Commercial Contract Law*

The second concern raised by these cases is the assertion that employment contracts should be construed and interpreted according to the principles of commercial contract law. That is, these decisions narrow the means by which precariously employed workers can challenge the terms of a written contract of engagement, for instance, on the basis that there has been a 'contractual variation', as suggested by the majority in *Personnel Contracting*. The requirement that orthodox principles of commercial contract law must be met before establishing there has been any variation means that workers' grievances about how they have been required to perform their contracts will need to engage with complex contract law and equitable arguments. As Unger explains, orthodox contract law will always read the intention of the parties (committed to contract) to justify reliance on the bargain. The reality of its performance, meanwhile, will be treated as an irrelevance.[108]

Accordingly, after the orthodox formalist approach adopted by the plurality in *Personnel Contracting*, discharge of a written contract by oral agreement is not an easy matter to establish, where the argument is based on conduct alone and there is no proof of new express terms. Likewise, it is difficult to establish that a hirer should be estopped from relying on the express terms of a contract because of a sufficiently certain representation that the worker has relied upon to their detriment, or because of a mutually agreed course of conduct, when something more than a course of subsequent conduct must be proved to establish such a claim.[109]

Although the majority conceded that the conduct of the parties may be called in evidence of any argument that the contract has been varied, or the hirer should be estopped from relying on written terms, it is unlikely in the extreme that any such argument would prove useful for precarious workers. These doctrines, all developed in commercial law, present difficult challenges for any precarious worker seeking to make such an argument. With a few notable exceptions (such as the case of *Quinn v Jack Chia (Australia) Ltd*[110] involving a very senior manager) it has been difficult to argue a contractual variation, in the face of a detailed written contract, particularly without evidence of a long passage of time, and significant changes to the employee's duties since the initiation of the original contract. No such argument was made in either *Personnel Contracting* or *Jamsek*.

The difficulty in arguing variation of a contract is well illustrated by *Rossato*, a case concerning whether an employee was a casual employee, or a permanent employee entitled to paid leave entitlements. The employee in that case, Mr Rossato,

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108 Unger (n 51) 148.

109 For authorities on estoppel by convention, see *Thompson v Palmer* (1933) 49 CLR 507, 547; *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641; *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226, 244; *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 8. See *Leggett v Hawkesbury Race Club [No 3]* (2021) 317 IR 1 (Federal Court), [158] (Rares J) for a recent application of this doctrine in an employment context. See also Derham (n 16); Joellen Riley, 'Estoppel in the Employment Context: A Solution to Standard Form Unfairness?' [2007] *University of New South Wales Faculty of Law Research Series* 49.

110 *Quinn v Jack Chia (Australia) Ltd* [1992] 1 VR 567.

was hired by WorkPac for placement with host employers in the mining industry.[111] As a labour hire employee, he was able to be paid a rate different from (and almost certainly lower than) the rates of pay that the host employer's directly hired employees were entitled to receive. One of the benefits host employers seek in using labour hire firms to supply staff is that they can avoid paying the rates that have been negotiated by unions for directly employed staff. This is a consequence of the *Fair Work Act*'s requirements that (with very limited exceptions) collective bargaining must take place at the single enterprise level.[112] WorkPac initiated this litigation following its defeat in a case involving another of its casual employees. In *WorkPac Pty Ltd v Skene*,[113] a full Bench of the Federal Court affirmed an earlier decision that one of WorkPac's employees who had been engaged as a casual, was in fact a permanent member of staff, entitled to paid leave entitlements. By pursuing the *Rossato* matter, WorkPac sought to test whether the labour hire industry's wide-spread practice of hiring workers as casuals to place on long-term assignments with host employers was a legitimate means of avoiding the costs associated with permanent employment.

The *Rossato* case provides a clear illustration of the way in which contractual formalism is at odds with the reality of worker engagement, particularly in the labour hire industry. The contract arrangements set up by WorkPac were complex, and were designed to characterise its staff as casuals engaged on a series of separate contracts, none of which promised continuing work. Mr Rossato initially applied for work with WorkPac through an online portal, and then attended WorkPac's offices to sign a single-page document entitled 'Casual or Maximum Term Employee Terms & Conditions of Employment — Employee Declaration'.[114] These were subsequently referred to as the General Conditions. They described Mr Rossato as a casual employee who would be employed on an 'assignment by assignment' basis, and stated that his contract could be terminated on one hour's notice. Subsequently, WorkPac placed Mr Rossato with its mining industry clients, and he was provided with fresh contract documentation for each assignment, each contract adopting the General Conditions. So, viewed through the prism of strict commercial contract law, Mr Rossato was engaged on a series of discrete contracts, and none of these contracts offered him any guarantee of continuing work. This is why the High Court found that he was a casual employee, with no commitment to ongoing employment.

Viewed through Mr Rossato's eyes, however, he was a regular employee who was committed to full-time hours in continuing employment, by virtue of his inclusion on the mining client's rosters, made up 12 months in advance by the host employer.[115] Moving from one contract assignment to another made little practical difference to Mr Rossato's work routine. The Federal Court paid regard to the practical reality of his working arrangements, and found that the existence of the long-term rosters indicated that Rossato had a reasonable expectation of continuing

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[111] *Rossato* (n 3) 462–3 [2].
[112] *Fair Work Act* (n 18) s 172.
[113] *WorkPac Pty Ltd v Skene* (n 89). For an earlier and similar finding, under equivalent provisions in the *Workplace Relations Act 1996* (Cth), see *Williams v MacMahon Mining Services Pty Ltd* (2010) 201 IR 123 (Federal Court).
[114] *Rossato* (n 3) 465 [12].
[115] Ibid 478 [62]

work, according to a regular pattern of work. This satisfied the definition of permanent employment.[116] The High Court overturned this finding, and held that the General Conditions in Mr Rossato's initial engagement contract with the labour hire agency left no room for the host employer's roster to determine his status.[117] Those General Conditions providing that his engagement was on 'an assignment by assignment' basis meant that he was under no legal compulsion to accept shifts according to the host employer's roster.[118]

One of the clauses in the General Conditions appeared to support a finding that Mr Rossato was in fact obliged to complete his assignments, and was not at liberty to quit on an hour's notice. This clause required him to 'complete an assignment' or else bear the risk of paying any of WorkPac's costs for his failure to do so.[119] In the Federal Court, White J found that this clause meant that it was 'implausible' that Mr Rossato had no contractual obligation to attend for his rostered shifts.[120] The High Court said that White J erred in this conclusion.[121] They held that the obligation to complete assignments must be read down in the light of the clause in the General Conditions allowing the parties to terminate the contract with one hour's notice.[122] In that case, the obligation to compensate WorkPac for leaving an assignment must be limited to compensation for the inconvenience of removing Rossato from the worksite, or the costs incurred as a result of his failure to provide an hour's notice.[123]

If the regular replacement of his assignment contracts, and the rostering arrangements settling his working hours a year in advance, could be given no weight in interpreting Mr Rossato's contractual obligations to show up for his assignments, even in the light of an apparent penalty for non-attendance, one wonders how it would ever be possible to demonstrate that subsequent conduct has effected a variation to the initial contract terms. If the creation of a documented 12-months roster did not create a variation in the contract term describing the arrangement as temporary, one wonders what kind of subsequent conduct would ever be deemed sufficient to support an argument for variation of a contract. It would appear that nothing short of new written terms, forswearing the application of the original contract terms, would be sufficient, given the High Court's assertion that it is only legal rights and duties, and not mere 'reasonable expectations', that create a contract.[124] What is clear from *Rossato* is that a hirer can easily acquire the services of a long-term employee on discounted rates by adopting a practice of offering a series of separate contracts.

The application of commercial contract principles also means that it will be extremely difficult, if not impossible, for a worker to establish that a term should be

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116 *WorkPac Pty Ltd v Rossato* (2020) 278 FCR 179, 188 [10]–[12], 245 [292].
117 *Rossato* (n 3) 487–8 [96].
118 Ibid 485 [88].
119 Ibid 486–7 [91]–[92].
120 Ibid 486 [91].
121 Ibid.
122 Ibid 486 [92].
123 Ibid.
124 Ibid 487–8 [96].

implied in fact or by law into a contract of engagement, to give contractual effect to any reasonable expectations that have evolved between the parties during the course of their relationship. The *BP Refinery* test[125] applied consistently in cases of written employment contracts provides very little room to assert that an expectation of continuing work is necessary to give a contract 'business efficacy', given the propensity for hirers (or their lawyers) to draft extensive written contracts. Inclusion of a term that the contract provides casual engagement and can be terminated upon short notice leaves no room for the implication in fact of any term reflecting a practice of continuous engagement, bearing in mind that terms implied in fact can never contradict an express term.

Likewise, the High Court has left little room for the development of any new term implied by law that employers must honour any reasonable expectations of continuity of employment engendered by their practices in continually renewing casual contracts. In *Commonwealth Bank of Australia v Barker*,[126] the High Court held that Australian employment law did not accept the existence of any implied term of 'mutual trust and confidence' in employment contracts.[127] This English invention was held to be too 'indeterminate' for Australian law. Any new term implied by law needed to meet the test of necessity in commercial law, meaning that the contract must be rendered 'nugatory' without it.[128]

The majority decision in *Personnel Contracting* is a formalist common law response to the lack of any statutory definition permitting recourse to the practical reality of the parties' relationship in distinguishing employees from contractors. In terms of Unger's theory, it results from a legislative failure to sufficiently define the coverage of the specialist labour law system to prevent the escape of hirers who wish to avoid its application. By relying on the common law definition of employment for coverage, the *Fair Work Act* allows hirers some discretion to choose instead to be governed by the common law of contract, that largely benefits the hirers of labour at the expense of precarious workers.

C *The Influence on the Decisions of the Fair Work Commission*

The third concern raised by these cases is that the High Court's strident assertion of the primacy of contract in employment law will further erode the power and jurisdiction of the specialist labour law system, thereby expanding what Unger has described as its inherent problem — the ability of employers to evade its jurisdiction by asserting their managerial prerogative to contract out of it.[129] The Fair Work Commission maintains statutory authority to determine matters within its jurisdiction according to 'equity, good conscience and the merits of the matter'.[130] In performing its functions, the Commission is expressly authorised to avoid

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[125] From *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (Privy Council).

[126] *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 ('*Barker*').

[127] Ibid 195 [41]. For an explanation of this implied obligation in the law of employment in the United Kingdom, see Douglas Brodie, 'Fair Dealing and the World of Work' (2014) 43(1) *Industrial Law Journal* 29.

[128] *Barker* (n 126) 189 [29].

[129] Unger (n 51) 158–60.

[130] *Fair Work Act* (n 18) s 578(b).

'unnecessary technicalities'.[131] Unfortunately, the confluence of a statutory reliance on the common law definition of employment in the Act, and the High Court majority's recent assertion that only the written contract can determine the existence or otherwise of an employment relationship, means that the Fair Work Commission's opportunities to determine matters according to these principles has been restricted. In a string of cases since the High Court's decision in *Personnel Contracting*, members of the Fair Work Commission have noted the High Court decisions and their influence in restricting the Commission's jurisdiction.[132] Deference to the terms of an employer's contract documentation has left little room for the Commission (which is an administrative body and not a court) to honour its statutory obligation to ensure a 'fair go all round' in employment disputes.[133] This is the third and final way in which the High Court's retro-formalist decision in *Personnel Contracting* reasserts the primacy of an employer's private bargain or contract over a statutory scheme of labour law.

The majority's assertion of the ideology of 'freedom of contract' has overridden a useful common law tool, applying a checklist of factors to assist Commissioners in performing their statutory role in maintaining the boundary between their own jurisdiction over employment relationships, and the independent contracting arrangements outside of their purview. The tribunal's own checklist in *Abdalla v Viewdaze Pty Ltd*[134] (derived from earlier High Court authority in *Brodribb* and *Hollis*) provided a convenient template for tribunal members (some of whom are not trained commercial lawyers) to use to draw a practical distinction between those workers within the contemplation of the industrial statute's protections, and those outside of it. They used this to assess the totality of the relationship, informed largely by the parties' contract, but also by the way the parties performed their obligations. As has often been noted, the boundary between employment and contracting is not always easy to discern.[135] Despite criticism, the multi-indicia checklist provided a useful guide for commissioners charged with a duty to make difficult decisions. In a somewhat high-handed manner, the High Court majority poured scorn on this useful checklist, as a 'mechanistic counting of ticks

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131 Ibid s 577(b).

132 See, eg, *Franco* (n 22); *Gu v Geraldton Fishermen's Co-operative Pty Ltd* (2022) 320 IR 109 (Fair Work Commission); *Alouani-Roby v National Rugby League Ltd* [2021] FWC 6282 ('*Alouani-Roby*'), affd (2022) 318 IR 389 (Fair Work Commission Full Bench).

133 A similar finding was reached by the Federal Court in *Pruessner v Caelli Constructions Pty Ltd* [2022] FedCFamC2G 206. The concept of the 'fair go all round' derives from *Re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95, and is still referred to in *Fair Work Act* (n 18) s 381(2).

134 *Abdalla v Viewdaze Pty Ltd* (2003) 122 IR 215 (Australian Industrial Relations Commission), 229–31.

135 The literature critiquing the tests for employment is extensive. For a small sample of some of the more recent scholarship, see Orsola Razzolini, 'The Need to Go beyond the Contract: "Economic" and "Bureaucratic" Dependence in Personal Work Relations' (2010) 31(2) *Comparative Labor Law and Policy Journal* 267; Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (Oxford University Press, 2011); Riley (n 77) 321; Pauline Bomball, 'Intention, Pretence and the Contract of Employment' (2019) 35(3) *Journal of Contract Law* 243; Pauline Bomball, 'The "Entrepreneurship Approach" to Determining Employment Status: A Normative and Practical Critique' (2021) 44(4) *UNSW Law Journal* 1336; Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (n 77).

on a multifactorial checklist'.[136] In its place, the Court deposited the new formalist 'rights and duties' approach which it said would ensure 'cogency and coherence'.[137] With respect, this is an ambitious claim, given the history of difficulty in this field.[138] By contrast, courts across most of the liberal democratic world have accepted that the cost of fairness in appraising the employer/contractor distinction is a logical, albeit nuanced and difficult multifactorial test.[139]

The High Court majority did acknowledge that the multiple indicia from *Brodribb* and *Hollis* can be useful in assessing the terms of a written contract. Although they roundly criticised the 'mechanistic checklist' approach, they did apply the various indicia (including control, ownership of vehicles, and permission to delegate work) when analysing the contract in *Jamsek*. The plurality said:

> The foregoing should not be taken to suggest that it is not appropriate, in the characterisation of a relationship as one of employment or of principal and independent contractor, to consider the 'totality of the relationship between the parties' by reference to the various indicia of employment that have been identified in the authorities.[140]

This somewhat confusing statement appears to suggest that the 'various indicia' are relevant to determining the answer to the two key questions: whether the worker serves in the business of the hirer, and whether the worker was subject to the control of the hirer.[141] The significant difference between the High Court's approach and that adopted by the Commission prior to *Personnel Contracting*, is that the Commission cannot apply these indicia to the performance of the employment relationship but only to the terms of a written contract, and nor should they weigh conflicting factors against each other.

It is unfortunate that the High Court majority has directed Fair Work Commissioners away from their former practice, and has instead instructed them to apply commercial contract law principles to determine the character of the contract, rather than the true nature of the relationship.

We have already seen a Deputy President of the Fair Work Commission defer to the terms of the employer's contract when deciding whether a football coach, who had been employed continuously from January 2015 to November 2020, was

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[136] *Personnel Contracting* (n 1) 414–15 [39] (Kiefel CJ, Keane and Edelman JJ).

[137] Ibid.

[138] See KW Wedderburn and J Clark, 'Modern Law: Problems, Functions and Policies' in KW Wedderburn, R Lewis and J Clark (eds), *Labour and Industrial Relations* (Clarendon Press, 1983); Hugh Collins, 'Market Power, Bureaucratic Power and the Contract of Employment (1986) 15 *Industrial Law Journal* 1; Adrian Brooks, 'Myth and Muddle: An Examination of Contracts for the Performance of Work' (1988) 11(2) *UNSW Law Journal* 48; Hugh Collins, 'Independent Contractors and the Challenge of Vertical Disintegration' (1990) 10(3) *Oxford Journal of Legal Studies* 353; Stewart (n 12); Mark Freedland, *The Personal Work Contract* (Oxford University Press, 2003); Guy Davidov and Brian Langille, *Boundaries and Frontiers of Labour Law* (Hart, 2006); Mark Freedland 'From the Contract of Employment to the Personal Work Nexus' (2006) 35 *Industrial Law Journal* 1, and the more recent scholarship noted above (n 135).

[139] Paul Benjamin, 'Who Needs Labour Law? Defining the Scope of Labour Protection' in Conaghan, Fischl and Klare (n 50) 75–93, 76.

[140] *Personnel Contracting* (n 1) 421 [62] (Kiefel CJ, Keane and Edelman JJ), citing *Brodribb* (n 29) 29 and *Hollis* (n 86) 33 [24], 37 [33].

[141] *Personnel Contracting* (n 1) 422 [68], 423 [73].

nevertheless employed on a one-year fixed-term contract at the time his employment was terminated.[142] Cross DP cited the *Rossato* decision for the proposition that the character of the legal relationship between parties is to be 'determined only by reference to the legal rights and obligations which constitute that relationship', and these obligations must be determined by reference to the written contract between the parties.[143]

This finding was made notwithstanding the express permission granted by s 386(3) of the *Fair Work Act* to ignore a contractual term stipulating a fixed term of employment

> if a substantial purpose of the employment of a person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part.

In earlier decisions of the federal industrial tribunal, employers who have engaged employees on a rolling series of fixed-term contracts have often been found to be subject to the provisions guarding against unfair and unlawful dismissals, because the focus of the enquiry was on the duration of the whole employment relationship, and not merely on the most recent contract document.[144] A focus on the relationship rather than the contract is justified by the wording of s 386(1) of the *Fair Work Act*, which refers to a person's 'employment' being terminated at the employer's initiative, not the 'contract' being terminated. Australian law has consistently distinguished between the concept of the employment relationship, and the employment contract.[145] This is an important distinction. It recognises that the 'employment relationship' describes the phenomena, and the 'employment contract' describes only one form of regulation that is applied to determine the rights and duties of parties to the employment relationship. The High Court — including the majority in *Personnel Contracting* — recognised this. In *Personnel Contracting*, the plurality stated:

> An employment relationship will not always be defined exclusively by a contract between the parties. Historically, the employment relationship was recognised and regulated by the law before the law of contract came to govern the relationship. An employment relationship, though principally based in contract, may be affected by statutory provisions and by awards made under statutes. It may also be that aspects of the way in which a relationship plays out 'on the ground' are relevant for specific statutory purposes. So for example, a statute may operate upon an expectation generated in one party by the conduct of another, even though that expectation does not give rise to a binding agreement.[146]

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[142] *Alouani-Roby* (n 132).

[143] Ibid [50].

[144] *D'Lima* (n 20). In *NSW Trains v James* (2022) 316 IR 1, a majority of a full Bench of the Fair Work Commission has stated that s 386(1) contemplates both termination of the employment relationship, and termination of the employment contract: at [46].

[145] See *Automatic Fire Sprinklers v Watson* (1946) 72 CLR 435; *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312; *Visscher v Giudice* (2009) 239 CLR 361; *Personnel Contracting* (n 1) 432 [111] (Gageler and Gleeson JJ).

[146] *Personnel Contracting* (n 1) 415 [41] (citations omitted). They cite as an example *Fair Work Act* (n 18) s 65(2)(b)(ii), dealing with the rights of casuals who have a 'reasonable expectation of continuing employment' to make requests for flexible working arrangements.

It is important to ensure that members of the Commission are reminded of this when called upon to exercise their powers in matters where they do have authority to look beyond the contractual stratagems of hirers. The very purpose of statutory regulation of labour law is to ameliorate the risks inherent in allowing the law of the commercial jungle to prevail in employment law, especially when the worker is the kind of worker intended to be protected by the legislation. The *Fair Work Act* provides a 'high income threshold' — presently set at a salary level of $162,000 per annum — for applicants for unfair dismissal protection who are not covered by awards or enterprise agreements.[147] Likewise, a person on a salary above that threshold can agree to forego the benefits of a modern award.[148] The *Fair Work Act* reserves the majority of its protections for low to middle income earners who are rarely in a position to assert their own 'freedom to contract' or 'freedom of contract'. They must accept employment, and they are rarely invited to negotiate the terms of their contracts. Where the Fair Work Commission has been given powers that override the employer's prerogative to dictate terms, it is important that members of the Commission are not overawed by imperious statements from the High Court asserting the primacy of contract.

V Outcomes

The outcome in *Personnel Contracting* was a 6:1 finding that a labour hire worker, classified as an independent contractor by a labour hire firm and paid below award rates, was in fact an employee of the firm. Even from a formalist perspective, such a finding might have been ineluctable, given that the worker was an unskilled 22-year-old backpacker performing day-labour on construction sites without his own tools.[149] Accordingly, it is the reasoning, rather than the finding in this case, that presents problems for other precariously employed workers. Indeed, the application of this reasoning premised upon the logic of freedom of contract, has already begun to cause problems for precarious workers who have arguably been misclassified as 'contractors' and 'casuals' in cases such as *Jamsek* and *Rossato.* The outcome in *Rossato* has been discussed above. *Jamsek* concerned two truck drivers who worked exclusively for the same firm from 1977 to 2017. They were hired as employees but reclassified as contractors in 1986, when they were required to purchase their trucks from their employer. They were encouraged to establish partnerships with their wives, and to contract for work through these partnerships. A full Bench of the Federal Court applied a realist approach, declaring that the obvious inequality in bargaining power between the workers and the employer was a form of coercion that vitiated the possibility of the workers' free and equal consent to the 'contractor' arrangement in 1986.[150] However, this decision was reversed by the High Court. In this case, all members of the Court focused on the terms of the new contract between

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[147] *Fair Work Act* (n 18) s 382(b)(iii). See also *Fair Work Regulations 2009* (Cth) reg 3.05 for calculations of the high-income threshold.

[148] *Fair Work Act* (n 18) s 47(2).

[149] This view was expressed by a full Bench of the Federal Court at second instance, where Lee J commented that the worker's classification as a contractor, pursuant to existing authority regarding labour hire arrangements, was 'somewhat less than intuitively sound': *CFMMEU* (n 25) 682 [185] (Lee J, Allsop CJ agreeing at 641–2 [26]–[28], Jagot J agreeing at 644 [41]).

[150] *Jamsek* (n 2) 614 [50].

the employer and the partnerships, and ignored the underlying reality of these arrangements that had been engineered by the employer. Applying this retro-formalist lens, ignoring entirely the inequality of bargaining power between the parties, they found that the contracts were independent contracts. The fact that the contracting party was a partnership with a spouse (even though there was no evidence that the workers' wives were ever actually involved in the businesses), and that the workers (through their partnerships) now provided the use of significant capital equipment (the trucks) in addition to their own labour, was sufficient to legitimise the characterisation of this arrangement as an independent contract. The employer was thereby relieved of any obligation to meet claims for accrued annual and long service leave entitlements. It remains to be determined whether the employer must pay superannuation guarantee contributions for these workers, because s 12 of the *Superannuation Guarantee (Administration) Act 1992* (Cth) relies on a wider definition of worker to determine coverage. The matter has been remitted to the Federal Court to determine this matter. The superannuation regime, involving a matter of considerable importance to the revenue authorities, has been deliberately drafted to ensure that employers cannot escape obligations to contribute to the support of retirement incomes by clever contracting stratagems. This begs the question of why our Fair Work laws should continue to be confined to covering 'employees' according to the common law definition.

The High Court itself has alluded to the need for Parliament to determine these issues, if any solution is required.[151] The Court appears to have set its face against development of the common law to resolve questions concerning the 'fairness' of relationships involving the engagement of workers. While ever employment contract law is constrained to conform with general commercial contract law, a statutory solution is, perhaps, the only answer.

Any system of regulation that permits parties to make their own contracts to determine their respective rights will always favour the more powerful party to the relationship, especially where the principles of contract construction and interpretation favour the terms set out in a written document. In these days of word processing and cloud sharing, it is an easy matter for an employer to download a standard form document for issue to a new employee. Whether this document truly reflects the genuine understandings between the parties as to the terms upon which they agree to engage with each other is a matter of conjecture. But while the parties are not permitted to bring evidence of how their agreement was actually performed, it will be almost impossible to determine whether the written document reflected their 'real' agreement. The High Court plurality in *Jamsek* alluded somewhat scornfully to the notion of the 'reality' of the parties' agreement.[152] It is not, however, a concept unknown to contract theorists.

In *Regulating Contracts* Professor Hugh Collins identified three 'rationalities' which form the basis of any contractual relationship:[153] the business relation, the business deal, and the contract (meaning the written documentation of

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151 *Barker* (n 126) 195 [40] (French CJ, Bell and Keane JJ).
152 *Jamsek* (n 2) 617 [62] (Kiefel CJ, Keane and Edelman JJ).
153 Collins, *Regulating Contracts* (n 50) 173.

the agreement). The 'business relation' refers to the context and reality of the parties' interdependent relationship, and the 'business deal' is the bargain they have made. The contract is a document used to commit the terms of the deal to writing. While the relationship flourishes, the parties make little reference to this document, and indeed, over time, the terms of their relationship may evolve to accommodate changing circumstances, often without anyone revising the written documentation of their bargain. It is only when the parties come into conflict that the document is consulted. Warning against solutions framed by contractual orthodoxy such as those described by Unger, Collins advised that courts ought not to be 'mesmerised by the words of the planning documents'. Like Unger, Collins has implored courts to address reality, specifying that contracts must be read in light of the business relation or the business deal.[154] To privilege the terms of the written documentation over evidence of the true bargain defeats the functional purpose of contract law, which is to support the mutual expectations of parties to voluntary agreements. In the context of evolving relational contracts, such as employment, there is good reason to view the contract documentation with suspicion, especially in the light of evidence as to how the business relation was conducted.

For a time, decisions made at the Federal Court level were taking this approach, inspired by the UK Supreme Court decision in *Autoclenz*.[155] As noted above, *Autoclenz* concerned the engagement of car detailers. The terms of their contracts were deliberately amended by the hirer to include a clause allowing them to present substitutes to perform their duties.[156] This clause was clearly a subterfuge to make the workers look more like independent contractors. Perhaps influenced by the work of Collins, the UK Supreme Court applied an approach that appraised the reality of the employment relationship. The Court looked past the written clauses, and assessed the totality of the working arrangements to find that the written contract did not represent the true agreement between the parties. The workers were found to be employees.[157] The majority in *Personnel Contracting* rejected this approach, and said that it could not 'stand with the statements of the law in [Australian authority]'.[158] In the UK, at least in the field of employment law, the courts appear to have treated the common law as 'a living system of law, reacting to new events and new ideas, and so capable of providing … a system of practical justice, relevant to the times in which [citizens] live'.[159] Unfortunately, the highest court in Australia considers that such an approach risks descent into 'obscurantism'.[160] Our courts require proof of hard-edged 'rights and duties'. Since employers are unlikely to afford those rights and duties voluntarily by contract if they can avoid it, it falls to Parliament to ensure that statutory labour laws remain fit for purpose in an evolving world of work.

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[154] Ibid.
[155] *Autoclenz* (n 40).
[156] Ibid 750 [6].
[157] Ibid 759 [38]–[39].
[158] *Personnel Contracting* (n 1) 421 [60], referring to *Australian Mutual Provident Society v Chaplin* (1978) 52 ALJR 407 and *Narich Pty Ltd v Commissioner of Pay-roll Tax* [1983] 2 NSWLR 597.
[159] *Kleinwort Benson Ltd v Lincoln City Council* [1998] 2 AC 349, 377 (Lord Goff of Chieveley).
[160] *Jamsek* (n 2) 617 [62]; *Rossato* (n 3) 479 [63], 489 [99].

VI Legislative Solutions

If the protections of labour law statutes are to be reliably enjoyed by the most precarious of workers, it will be necessary to find a statutory solution, and at the time of writing in early 2023, the Albanese ALP Government indicated a willingness to consider such reform. There are many options. The most modest would be to provide an extended definition of employment in the *Fair Work Act* that permitted decision-makers to adopt the approach preferred by Gageler and Gleeson JJ in *Personnel Contracting*.[161] A statutory enactment of a version of the multiple indicia test, along with permission for decision-makers to look past the cloud of words in a written contract to the 'lived experience' of the working relationship, would go some way to ensuring that precarious workers who are in fact subjugated to the control of a hirer could benefit from protections, notwithstanding the words in a written contract. More radical proposals include the creation of additional categories of workers who are deemed to be included in certain protections, much in the same way as workers compensation laws presently capture categories of 'deemed' and 'presumed' employees, to ensure that the kinds of vulnerable workers contemplated by these schemes do not fall outside of the net by virtue of clever contracting strategies.[162]

An even more adventurous approach is that proposed by a group of scholars in *Beyond Employment*,[163] that certain fundamental protections (such as minimum wages, protection against capricious dismissal, rights to collective bargaining, and access to affordable dispute resolution) should be available to all workers, regardless of their classification under contract laws.[164] It is not our purpose here to assess each of these proposals, only to state that it is high time that Parliaments gave serious consideration to quarantining statutory labour laws from erosion caused by reliance on common law doctrines to determine coverage.[165]

VII Conclusion

As critical and relational contract law scholars have shown, employment relationships are complex and often develop over time. 'Reality' or the 'business relation' and even the 'business deal' at any given time is not easily captured in the initial contract documentation provided by a hirer. To ignore the reality of the relationship and instead adjudicate the character of the working relationship only on

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161 *Personnel Contracting* (n 1) 434–5 [120].

162 See, eg, *Workers Compensation Act 1951* (ACT) ss 8–15; *Workers Compensation Act 1998* (NSW) s 5, sch 1; *Return to Work Act 1986* (NT) ss 3B(1)–(19); *Workers Compensation and Rehabilitation Act 2003* (Qld) s 11(2), sch 2; *Return to Work Act 2014* (SA) s 4, sch 1; *Workers Rehabilitation and Compensation Act 1988* (Tas) ss 3–4E; *Workers Compensation Act 1958* (Vic) s 3. See also Stewart and McCrystal (n 23) 21–2.

163 Johnstone et al (n 44). For other discussions of proposals, see Stewart and Stanford (n 23) 420–37.

164 See also Michael Rawling and Joellen Riley Munton, 'Proposal for Legal Protections of On-Demand Gig Workers in the Road Transport Industry' (Final Report, Transport Education Audit Compliance Health Organisation, January 2021).

165 For a more detailed discussion of potential legislative solutions, see 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) *UNSW Law Journal* 7.

the basis of one party's written and often 'standard form' documentation, is to weight an important adjudicative process in favour of that party. The characterisation of working relationships is a matter for the law (as the High Court acknowledged in its rejection of mere labels). Much hangs upon this characterisation, because many labour law protections apply only to employees (and those deemed to be such). This article has argued that the approach now adopted by the High Court majority to the employee/contractor distinction permits hirers to evade protective labour law statutes. The majority's approach allows this because of three features of the majority reasoning in *Personnel Contracting*, namely (i) the employer's contract documentation is privileged above the parties' evidence of the performance of the employment relationship (the 'rights and duties rule'); (ii) the restrictive principles of orthodox commercial contract law must be applied in the interpretation of these rights and duties, and will limit the scope for any argument that initial contracts have been varied; and finally (iii) the robust assertion that the parties' own contract document prevails is likely to influence the federal industrial tribunal when exercising its statutory powers.

As palpably unfair as it may seem, stacking the deck against one party in legal proceedings is not out of place in the realm of retro-formalist legal decision-making. As Unger has theorised, the defining features of retro-formalism involve jettisoning evidence of reality and experience in favour of abstract written contracts, in the interests of an alleged 'freedom of contract', even though courts now explicitly acknowledge that the 19th century assumptions of party equality and autonomy which justified this doctrine do not reflect contemporary experience. The High Court majority did not dispute that there was inequality of bargaining power in the *Jamsek* case. They simply asserted that it was none of their business to take it into account when determining the contractual rights and duties of the parties.[166] This approach to defining employment epitomises a *neo*-liberal approach. Given the significance that the definition of 'employment' has to the lowest paid workers, and the Court's refusal to allow development of the common law, legislative intervention is necessary. At the least, the *Fair Work Act* requires a statutory definition which permits adjudicators to consider and assess evidence of the reality of the relationship in determining the appropriate classification of the relationship. Given the inherent inequality of bargaining power between hirers and the most precarious workers, further and more radical reform may be necessary to ensure that the most vulnerable workers cannot be cast into an unregulated jungle by a deliberate decision to define them as independent contractors, notwithstanding the economic reality of their subjugation to a hirer's business interests. Reform measures that ensure the provision of minimum standards to all vulnerable workers, regardless of contractual status, would go some way to removing the incentives for hirers to concoct exploitative contractual arrangements with workers.

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[166] *Jamsek* (n 2) 617 [62] (Kiefel CJ, Keane and Edelman JJ).