Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law

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Abstract

The concept of employment at common law serves as a gateway to a wide range of statutory labour rights in Australia. Despite its significance in labour law and its frequent invocation before the courts, the concept remains the subject of significant contestation. A major point of disagreement concerns the notion of entrepreneurship. In some cases, judges have stated that entrepreneurship should be determinative of the inquiry as to whether a worker is an employee or an independent contractor. In other cases, entrepreneurship has been treated as simply one factor to be weighed against many others in the multifactorial test for employment status. This article explores the issue from a theoretical and a doctrinal perspective. It draws upon theories and case law on the doctrine of vicarious liability for guidance on the test for employment status. It argues that the proper approach is to treat entrepreneurship as the organising principle for the inquiry into whether a worker is an employee or an independent contractor. It contends that the adoption of such an approach would bring a greater degree of conceptual and analytical coherence to the complex task of distinguishing employees from independent contractors.

I Introduction

The 'entrepreneur' has attracted increased interest in recent times. The rise of the gig economy has drawn attention to the notion of entrepreneurship and its concomitant suite of characteristics, including innovation, flexibility, autonomy and profit-making.[1] Those who perform work in the gig economy are often branded as self-employed entrepreneurs by the organisations that hire them.[2] Yet, some workers

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1 For a comprehensive analysis of gig economy work in Australia, see Paula McDonald, Penny Williams, Andrew Stewart, Robyn Mayes and Damian Oliver, *Digital Platform Work in Australia: Prevalence, Nature and Impact* (Report, November 2019).

2 'Platforms suggested to the Inquiry that self-employment is a hallmark of their systems.': Natalie James, *Report of the Inquiry into the Victorian On-Demand Workforce* (Report, June 2020) 112 [777]. Stewart and Stanford have referred to the 'common assumption that gig economy workers are self-employed or operating as independent contractors': Andrew Stewart and Jim Stanford,

in the gig economy do not exhibit the characteristics of entrepreneurs.[3] Instead, they resemble employees who are subordinate to and dependent upon the organisations that engage them.[4] The emergence of the gig economy has drawn into sharp focus an important, and unresolved, debate about the notion of entrepreneurship and its relevance to the legal determination of employment status. This article makes a contribution to the resolution of that debate.

Employment status in Australian law is important for a range of reasons.[5] It is a crucial element of the doctrine of vicarious liability. An employer is vicariously liable for the torts committed by an employee in the course of his or her employment, whereas a principal cannot be held vicariously liable for the tortious conduct of an independent contractor.[6] Employment status also marks out the boundaries of labour law's protection.[7] This is because many labour statutes in Australia, including the *Fair Work Act 2009* (Cth), generally confer rights and protections upon employees only.[8] Workers who are not employees, such as independent contractors, usually fall outside labour law's regime of protection.

In Australia, courts apply a multifactorial test to determine whether a worker is an employee or an independent contractor. This test, which the High Court of Australia enunciated in *Stevens v Brodribb Sawmilling Co Pty Ltd*[9] and subsequently affirmed in *Hollis v Vabu Pty Ltd*,[10] requires a court to examine and balance a range of indicia,[11] including:

- the nature and extent of control that the hiring party exercises over the worker;[12]
- the existence or otherwise of a right on the part of the worker to delegate his or her work to a third party;
- whether the worker assumes the risk of loss or has an opportunity for profit;
- whether the hiring party supplies the equipment and tools required to perform the work;

'Regulating Work in the Gig Economy: What are the Options?' (2017) 28(3) *Economic and Labour Relations Review* 420, 426.

3 See, eg, Valerio De Stefano, 'The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig-Economy"' (2016) 37(3) *Comparative Labor Law and Policy Journal* 471, 491–3.

4 Ibid.

5 Carolyn Sappideen, Paul O'Grady and Joellen Riley, *Macken's Law of Employment* (Thomson Reuters, 8th ed, 2016) 20–1; Andrew Stewart, Anthony Forsyth, Mark Irving, Richard Johnstone and Shae McCrystal, *Creighton and Stewart's Labour Law* (Federation Press, 6th ed, 2016) 194–7.

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

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

8 See, eg, *Fair Work Act 2009* (Cth) pts 2-2–2-4.

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

10 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 ('*Hollis*').

11 Mark Irving, *The Contract of Employment* (LexisNexis Butterworths, 2nd ed, 2019) ch 2; Stewart et al (n 5) 204–13; Sappideen, O'Grady and Riley (n 5) 33–53.

12 The term 'hiring party' or 'hirer' is used in this article to refer to the entity that engages the worker to perform work: Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15(1) *Australian Journal of Labour Law* 235, 235 n 2.

- whether the hiring party makes arrangements on behalf of the worker in relation to matters such as insurance, superannuation and taxation; and
- whether the worker is integrated into the hiring party's organisation.

In affirming this test, the majority in *Hollis* referred with approval[13] to the following statement of Windeyer J in *Marshall v Whittaker's Building Supply Co*:

> [T]he distinction between [an employee] and an independent contractor is … rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own.[14]

In subsequent cases, this reference to carrying on a business of one's own has been encapsulated in the notion of entrepreneurship.[15]

There are currently diverging judicial approaches to the notion of entrepreneurship in Australian cases concerning the distinction between employees and independent contractors.[16] In some cases, entrepreneurship is regarded as a separate legal test.[17] According to this approach, an employee is someone who is not an entrepreneur.[18] The court is to determine whether the worker in question is carrying on a business of his or her own.[19] If the question is answered in the negative, then the worker is not an entrepreneur, and is likely to be an employee.[20] In other cases, judges have noted that this approach is erroneous, on the basis that focusing attention on whether the worker is an entrepreneur diverts a court's attention from the true inquiry, which is whether the worker is an employee.[21]

In some cases, judges have stated that an approach that treats entrepreneurship as determinative is inconsistent with the nature of the multifactorial test for employment status.[22] That test involves a weighing up and balancing of

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13 *Hollis* (n 10) 39 [40] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

14 *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210, 217.

15 See, eg, *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)* (2011) 214 FCR 82, 122–3 [207] ('*On Call Interpreters*'); *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346, 389–92 ('*Quest*').

16 Stewart et al (n 5) 211–2; Andrew Stewart and Shae McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (2019) 32(1) *Australian Journal of Labour Law* 4, 8.

17 See, eg, *On Call Interpreters* (n 15); *Quest* (n 15).

18 *On Call Interpreters* (n 15) 123–7; *Quest* (n 15) 389–92.

19 *On Call Interpreters* (n 15) 123–7; *Quest* (n 15) 389–92.

20 *On Call Interpreters* (n 15) 123–7; *Quest* (n 15) 389–92.

21 See, eg, *Tattsbet Ltd v Morrow* (2015) 233 FCR 46, 61 [61] ('*Tattsbet*'); *Fair Work Ombudsman v Ecosway Pty Ltd* [2016] FCA 296, [78] ('*Ecosway*'); *Jamsek v ZG Operations Australia Pty Ltd* (2020) 297 IR 210, 216 [8] (Perram J), 245–6 [181] (Anderson J) ('*Jamsek*'); *Dental Corporation Pty Ltd v Moffet* (2020) 297 IR 183, 199–200 [68] (Perram and Anderson JJ) ('*Moffet*'); *Eastern Van Services Pty Ltd v Victorian WorkCover Authority* (2020) 296 IR 391, 399–400 [35] ('*Eastern Van*').

22 See, eg, *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806, [153] ('*Personnel Contracting Trial*'): '[I]t is inconsistent with a multi-factorial assessment to say that the absence of one factor (or the presence of it, for that matter), should for practical purposes dictate a result.' See also *Jensen v Cultural Infusion (Int) Pty Ltd* [2020] FCA 358, [89] ('*Jensen*').

multiple factors to form an overall impression of the character of the relationship.[23] Courts are to assess the 'totality of the relationship'.[24] The elevation of one of the factors (entrepreneurship) above others is, it is said, incompatible with that injunction.[25] A third approach involves treating the notion of entrepreneurship as the organising principle that informs the court's assessment of the indicia in the multifactorial test.[26]

There is yet to be a sustained scholarly analysis of the proper role or function of the notion of entrepreneurship in the inquiry as to employment status. In providing that analysis, this article takes as its starting point two related propositions about the 'common law concept of employment'.[27] The first proposition is that this concept is anchored in the doctrine of vicarious liability.[28] The second proposition is that when a statute, such as the *Fair Work Act 2009* (Cth), refers to the common law concept of employment, the statute is referring to this concept as understood in the law of vicarious liability.[29] Acceptance of these two propositions carries with it the consequence that the rationales underlying the doctrine of vicarious liability are relevant to the exposition of the common law concept of employment.[30] This approach is supported by the majority's reasoning in *Hollis*. In that case, the majority observed that the common law concept of employment is shaped by 'various matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability'.[31] Some cases concerning the concept of employment involve a claim by a worker to certain protections and entitlements under labour statutes that operate by reference to this common law concept.[32] Other cases involve claims of vicarious liability by third parties against organisations for injuries suffered due to torts committed by workers performing work for those organisations.[33] In both types of cases, the applicable conception of employment that is applied is that anchored in the concerns of vicarious liability.

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23 *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939, 944 ('*Lorimer*'); *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2010) 184 FCR 448, 460 [31]–[32].

24 See, eg, *Brodribb* (n 9) 29 (Mason J); *Hollis* (n 10) 33 [24], 41 [44] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

25 See, eg, *Personnel Contracting Trial* (n 22) [153]; *Jensen* (n 22) [89].

26 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 381 ALR 457, 461–3 [13]–[21] (Allsop CJ) ('*Personnel Contracting*').

27 *ACE Insurance Ltd v Trifunovski* (2011) 200 FCR 532, 543 ('*Trifunovski Trial*'); Pauline Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (2019) 42(2) *Melbourne University Law Review* 370, 373.

28 *Trifunovski Trial* (n 27) 542–3. See also *Personnel Contracting* (n 26) 503–4 [176]–[179] (Lee J), referring to the submission of Counsel for the appellants (M Irving QC); Bomball (n 27) 377–9; Irving (n 11) 58.

29 *Trifunovski Trial* (n 27) 542–3; *C v Commonwealth* (2015) 234 FCR 81, 87 [34]; *Personnel Contracting* (n 26) 475 [64] (Lee J). See also *Personnel Contracting* (n 26) 503–4 [176]–[179], referring to the submission of Counsel for the appellants (M Irving QC); *Jamsek* (n 21) 215 [3] (Perram J); Bomball (n 27) 379–82: Irving (n 11) 58.

30 See *Personnel Contracting* (n 26) 503–4 [176]–[179], referring to the submission of Counsel for the appellants (M Irving QC); Bomball (n 27) 379; Irving (n 11) 58.

31 *Hollis* (n 10) 41 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). See also Bomball (n 27) 379; Irving (n 11) 58–9.

32 See, eg, *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146 ('*Trifunovski*'); *Jamsek* (n 21).

33 See, eg, *Hollis* (n 10); *Sweeney* (n 6).

It remains unclear how the rationales underlying the doctrine of vicarious liability may bear upon the multifactorial test for employment status. The matter was left open in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*,[34] a recent decision of the Full Court of the Federal Court of Australia that involved claims made pursuant to the *Fair Work Act 2009* (Cth). In that case, Lee J referred to the proposition that two key rationales underpinning vicarious liability, enterprise risk and agency, favour the view that entrepreneurship should be the central focus of the test for employment status.[35] Lee J, with whom Allsop CJ and Jagot J agreed, observed that such considerations were 'beyond the scope of this judgment'.[36] This article analyses the proposition in detail and uses this analysis to illuminate the proper approach to the notion of entrepreneurship in cases concerning employment status. In so doing, it examines four principal theoretical justifications for vicarious liability: enterprise risk, deterrence, just compensation and loss distribution, and agency.[37] After engaging with the justifications at a theoretical level, the article examines key decisions of the High Court of Australia on vicarious liability to evaluate the extent to which the Court has embraced these justifications.[38]

It is important to make some observations at the outset about the orientation of this article. While this article considers the doctrine of vicarious liability, it does so as part of a broader analysis of the concept of employment. It does not provide a comprehensive account of the law of vicarious liability. Furthermore, it does not critique the justifications for vicarious liability or catalogue those justifications.[39] This article is, in essence, a labour law article that engages with the theory and cases on vicarious liability only to the extent that these assist in resolving questions regarding employment status. It should also be noted that the article focuses on the multifactorial test for distinguishing employees and independent contractors. In order for a worker to be categorised as an employee, it must be established that there is a contract in existence between the worker and the hirer,[40] and that the contract has the character of a contract of employment.[41] The two issues are distinct.[42] This

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34 *Personnel Contracting* (n 26) 503–4 [177]–[179], 506 [189].

35 Ibid 504 [178]–[179], referring to the submission of Counsel for the appellants (M Irving QC).

36 Ibid 506 [189].

37 For an examination and critique of the theoretical justifications, see Harold J Laski, 'The Basis of Vicarious Liability' (1916) 26(2) *Yale Law Journal* 105; T Baty, *Vicarious Liability* (Clarendon Press, 1916); Guido Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts' (1961) 70(4) *Yale Law Journal* 499; P S Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967); Glanville Williams, 'Vicarious Liability and the Master's Indemnity' (1957) 20(3) *Modern Law Review* 220 ('Vicarious Liability I'); Glanville Williams, 'Vicarious Liability and the Master's Indemnity' (1957) 20(5) *Modern Law Review* 437 ('Vicarious Liability II'); JW Neyers, 'A Theory of Vicarious Liability' (2005) 43(2) *Alberta Law Review* 287; Douglas Brodie, *Enterprise Liability and the Common Law* (Cambridge University Press, 2010); Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010); Anthony Gray, *Vicarious Liability: Critique and Reform* (Hart Publishing, 2018).

38 *Hollis* (n 10); *Sweeney* (n 6); *New South Wales v Lepore* (2003) 212 CLR 511 ('*Lepore*'); *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 ('*Prince Alfred College*').

39 See above at n 37.

40 Stewart et al (n 5) 204.

41 Ibid.

42 Ibid, citing *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95.

article is concerned with the latter issue regarding characterisation of the work contract; it does not address the former issue.

The arguments in this article are developed as follows. Part II critically analyses divergent judicial approaches to the notion of entrepreneurship in the case law on employment status. It argues that three different approaches are discernible, which it terms 'entrepreneurship as a separate test', 'entrepreneurship as the organising principle' and 'entrepreneurship as a single factor'. The article argues that the first approach, entrepreneurship as a separate test, is not supported by decisions of the High Court on employment status. Accordingly, the question that remains for consideration is whether entrepreneurship is to be treated as the organising principle or as a single factor to be weighed against others in the multifactorial test. In searching for an answer to this question, Part III considers theoretical justifications for the doctrine of vicarious liability, and then examines the extent to which the High Court has embraced these justifications.

Having identified the key rationales underpinning vicarious liability, Part IV argues that these rationales demonstrate that the distinction between employees and independent contractors rests, in essence, on the basis that the former are working in the service of another while the latter are carrying on a business of their own.[43] Accordingly, the article argues that the proper approach to the multifactorial test for employment status is the one that treats entrepreneurship as the organising principle around which the indicia are assessed.[44] Such an approach would, by aligning the concept of employment with the relevant rationales, bring a degree of conceptual coherence to the exercise of distinguishing employees from independent contractors. Part IV of the article also engages with the view, expressed in some cases,[45] that the elevation of one factor above others is inconsistent with the nature of the multifactorial test. It suggests, with respect, that an alternative view, and the view that should be favoured, is that adoption of an organising principle would bring a degree of analytical coherence to the application of a test involving multiple factors that pull in different directions.[46]

The ideas advanced in this article have important practical ramifications for workers. An example from the gig economy is illustrative. In *Gupta v Portier Pacific Pty Ltd*,[47] the Full Bench of the Fair Work Commission rejected an Uber Eats driver's unfair dismissal claim on the basis that she was not an employee and thereby ineligible to bring a claim under the relevant provisions of the *Fair Work Act 2009* (Cth).[48] The Commission concluded that she was not running a business of her own,[49] but nevertheless held that she was not employed by Uber.[50] Had the Commission regarded entrepreneurship as the organising principle in its application

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43 See *Personnel Contracting* (n 26) 503–4 [177]–[179] (Lee J), referring to the submission of Counsel for the appellants (M Irving QC).

44 Ibid 461 [13] (Allsop CJ).

45 See, eg, *Personnel Contracting Trial* (n 22) [153]; *Jensen* (n 22) [89].

46 *Personnel Contracting* (n 26) 461 [13] (Allsop CJ); Ian Neil and David Chin, *The Modern Contract of Employment* (Lawbook, 2nd ed, 2017) 22.

47 *Gupta v Portier Pacific Pty Ltd* (2020) 296 IR 246 ('*Gupta*').

48 Ibid 276 [70], [72] (President Ross and Vice President Hatcher).

49 Ibid 275–6 [68], [71]–[72] (President Ross and Vice President Hatcher).

50 Ibid 276 [70], [72] (President Ross and Vice President Hatcher).

of the multifactorial test for employment status, it is possible that it would have reached the opposing conclusion.

Cases such as *Gupta* have, along with other matters, prompted the authors of the *Report of the Inquiry into the Victorian On-Demand Workforce* to recommend that the Commonwealth Parliament amend the *Fair Work Act 2009* (Cth) so as to include a statutory test for employment that identifies as employees those workers who are not carrying on a business of their own.[51] There is, with respect, great force in this recommendation. Unless and until such a recommendation is adopted by the Parliament, however, the courts must continue to apply the common law concept of employment, and it is that concept that forms the subject of this article.

II Three Competing Approaches to Entrepreneurship in the Legal Determination of Employment Status

This part of the article examines the case law dealing with the distinction between employees and independent contractors. Disagreement as to the role and function of entrepreneurship in the multifactorial inquiry turns primarily upon diverging approaches to the statement of Windeyer J in *Marshall* that was identified in the introduction to this article.[52] In *Brodribb*, Wilson and Dawson JJ referred to Windeyer J's statement as the 'ultimate question',[53] but it is important to note that their Honours did not regard the statement as a separate legal test. Their Honours noted that Windeyer J 'was really posing the ultimate question in a different way rather than offering a definition which could be applied for the purpose of providing an answer'.[54]

While the majority in *Hollis* referred with approval to Windeyer J's statement,[55] their Honours did not express a view as to its treatment in *Brodribb* and did not provide explicit guidance on how, if at all, Windeyer J's statement was to be incorporated into the multifactorial test for employment status. Nevertheless, a holistic reading of the judgment in *Hollis* indicates that Windeyer J's statement in *Marshall* informed the majority's analysis of the various indicia.[56] For example, the majority observed that the bicycle couriers in *Hollis*, whom they concluded were employees, 'were not running their own business or enterprise'.[57] The majority in *Hollis* did not treat Windeyer J's statement as a separate legal test.

Recently, members of the Federal Court of Australia have adopted competing approaches to Windeyer J's statement. Parts II(A)–(D) below traverse the case law to demonstrate the existence of these approaches.

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51 James (n 2) 192.
52 See above n 14 and accompanying text.
53 *Brodribb* (n 9) 35.
54 Ibid.
55 *Hollis* (n 10) 39 [40] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). See also above n 14 and accompanying text.
56 Ibid 39–45 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).
57 Ibid 41 [47] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

A *Entrepreneurship as a Separate Test*

In *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)*,[58] Bromberg J referred to Windeyer J's statement in *Marshall* and observed that it supplies 'a focal point around which relevant indicia can be examined'.[59] In the course of his Honour's reasons, however, Bromberg J appeared to go further. Instead of treating the notion of entrepreneurship as a focal point for the application of the indicia, his Honour developed a separate test of entrepreneurship. The test that Bromberg J articulated for determining whether a worker is an independent contractor was framed in the following manner:

> Viewed as a 'practical matter':
>
> (i) is the person performing the work an entrepreneur who owns and operates a business; and,
>
> (ii) in performing the work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work?
>
> If the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee.[60]

Bromberg J stated that the indicia traditionally considered in the application of the multifactorial test were relevant at the second stage of the analysis.[61] According to this approach, then, the court first asks whether the worker is carrying on a business of his or her own, and the considerations relevant to the multifactorial test come into play after the court has determined the answer to that antecedent question. Furthermore, the various indicia are relevant not to determining whether the worker is carrying on a business, but rather to determining whether the work is being performed for the worker's business, as opposed to the business of the person or entity that has engaged the worker.[62]

In *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*,[63] a decision of the Full Court of the Federal Court, North and Bromberg JJ explicitly endorsed Bromberg J's approach in *On Call Interpreters.* Importantly, North and Bromberg JJ stated that '[w]here the hallmarks of a business are absent, it will be a short step to the conclusion that the worker is an employee.'[64] In this regard, their Honours referred to Lander J's observation in *ACE Insurance Ltd v Trifunovski* that '[i]f the

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58 *On Call Interpreters* (n 15).
59 Ibid 122 [207].
60 Ibid 123 [208].
61 Ibid 125–7 [218]–[220]. See also *Quest* (n 15) 392 [186] (North and Bromberg JJ) (citations omitted): [T]he second question does not need to be answered in this case, but where relevant that question will need to be assessed in the context of the totality of the relationship. A range of indicia identified in the authorities may need to be examined in an exercise which is not to be performed mechanically because different significance may attach to the same indicators in different cases.
62 *On Call Interpreters* (n 15) 125–7 [218]–[220]; *Quest* (n 15) 392 [186] (North and Bromberg JJ).
63 *Quest* (n 15).
64 Ibid 391 [184].

respondents were not conducting their own business then logically it followed that they must have been working in the appellant's business.'[65]

It might be argued, with respect, that the approach expounded in *On Call Interpreters* and endorsed in *Quest* is not supported by the reasoning in *Brodribb*.[66] Moreover, it is not supported by the majority's judgment in *Hollis*, where the ultimate question of whether the worker was carrying on a business of his or her own was answered by reference to the multifactorial analysis.[67] In other cases, which will be considered in Part II(B) below, the notion of entrepreneurship is accorded central importance, but assigned a different function. Instead of functioning as a separate test, entrepreneurship is treated as the organising principle around which the indicia in the multifactorial test are assessed.

B *Entrepreneurship as the Organising Principle*

In *Personnel Contracting*, Allsop CJ identified a need for there to be 'principles or organising conceptions that inform the relevant binary distinction'[68] between employees and independent contractors. In identifying those principles or organising conceptions, Allsop CJ referred to Windeyer J's statement in *Marshall*.[69] In elucidating the nature of the judicial exercise involved in determining the character of a contract for the performance of work,[70] Allsop CJ referred to the reasoning of Mummery J in *Hall (Inspector of Taxes) v Lorimer*.[71] Mummery J had, in turn, referred to the judgment of Cooke J in *Market Investigations Ltd v Minister for Social Security*,[72] where it was posited that the ultimate question in cases involving employment status was whether the worker was carrying on a business of his or her own. In answering that ultimate question, Mummery J observed that '[i]n order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity.'[73]

This approach to the multifactorial test treats entrepreneurship as an organising principle. The various indicia are examined and balanced to determine whether the worker is in business on his or her own account. A similar approach can be discerned from the judgment of Buchanan J in *Trifunovski*.[74] Buchanan J, with whom Lander and Robertson JJ agreed, had regard to Windeyer J's statement in *Marshall*,[75] but did not treat it as a separate legal test. Instead, Buchanan J used it to inform his Honour's analysis of the various indicia in the multifactorial test.[76]

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65 *Trifunovski* (n 32) 149 [15].
66 See *Personnel Contracting* (n 26) 503 [176] (Lee J), referring to the submission of Counsel for the appellants (M Irving QC).
67 *Hollis* (n 10) 41–5 [46]–[57]. See also Neil and Chin (n 46) 8–9; *Personnel Contracting* (n 26) 503 [176] (Lee J), referring to the submission of Counsel for the appellants (M Irving QC).
68 *Personnel Contracting* (n 26) 461 [13].
69 Ibid quoting *Marshall* (n 14) 217.
70 *Personnel Contracting* (n 26) 462 [18].
71 *Lorimer* (n 23) 944.
72 *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173, 184–5.
73 *Lorimer* (n 23) 944.
74 *Trifunovski* (n 32).
75 Ibid 170 [93] (Buchanan J; Lander J agreeing at 148 [2]; Robertson J agreeing at 190 [172]).
76 Ibid 182–6 [126]–[149].

C *Entrepreneurship as a Single Factor*

The third approach, which accords no particular significance to the notion of entrepreneurship, is illustrated by Jessup J's judgment in *Tattsbet Ltd v Morrow*.[77] Jessup J stated that to inquire whether the worker is an entrepreneur is 'to deflect attention from the central question, whether the person concerned is an employee or not'.[78] His Honour emphasised that '[t]he question is not whether the person is an entrepreneur: it is whether he or she is an employee.'[79] This approach treats entrepreneurship as simply one factor to be balanced against the others in the multifactorial test. Subsequently, in *Fair Work Ombudsman v Ecosway Pty Ltd*,[80] White J adopted Jessup J's approach in *Tattsbet.*[81] The Victorian Court of Appeal also adopted this approach in *Eastern Van Services Pty Ltd v Victorian WorkCover Authority*.[82]

In *Personnel Contracting*, Lee J observed that a focus on entrepreneurship 'might, in some cases, have the potential to detract attention from the central question'.[83] Nevertheless, his Honour stated that this 'is not to say that the reasoning of North and Bromberg JJ in … *Quest* [is] not of real assistance.'[84] Lee J noted that to ask, as their Honours did, whether the worker is carrying on his or her own business 'is likely to be a useful way of approaching the broader inquiry in many cases'.[85] Ultimately, Lee J observed that 'the weight to be afforded to whether the worker is conducting a business on their own account is to be assessed in the light of the *whole* picture and will, of course, vary on a case by case basis'.[86]

In *Jamsek v ZG Operations Australia Pty Ltd*, a decision of the Full Court of the Federal Court of Australia, Perram J stated that '[n]o doubt understanding whose business is being conducted is a valuable aid to comprehension but it is not the central inquiry and an answer to it, one way or the other, is not necessarily decisive.'[87] In the same case, Anderson J observed that 'the appropriate question is not whether the person is conducting their own business; the question is whether the person is an employee'.[88] In *Dental Corporation Pty Ltd v Moffet*, another decision of the Full Federal Court, Perram and Anderson JJ, with whom Wigney J agreed, stated that 'the central question to be answered is whether the person is employed'[89]

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77 *Tattsbet* (n 21).
78 Ibid 61 [61].
79 Ibid. White J agreed with Jessup J: at 80 [140]. Allsop CJ declined to comment on this issue, noting that it was 'unnecessary' to determine whether the test enunciated in *On Call Interpreters* (n 15) and adopted in *Quest* (n 15) is 'likely to be generally determinative': at 49 [3]. *Tattsbet* (n 21) was handed down before *Personnel Contracting* (n 26) and Allsop CJ made his views clear in the subsequent decision: see above Part II(B).
80 *Ecosway* (n 21).
81 Ibid [78].
82 *Eastern Van* (n 21) 399–400 [30]–[36].
83 *Personnel Contracting* (n 26) 484 [96].
84 Ibid.
85 Ibid.
86 Ibid (emphasis in original).
87 *Jamsek* (n 21) 216 [8].
88 Ibid 245–6 [181].
89 *Moffet* (n 21) 199 [68].

and '[c]onsiderations of who is conducting what business and for whom does the goodwill inure are but aids to that analysis.'[90]

D *Summary of the Competing Approaches to Entrepreneurship*

Part II has examined diverging approaches to the notion of entrepreneurship in cases concerning employment status. It identified three competing approaches: entrepreneurship as a separate test; entrepreneurship as the organising principle; and entrepreneurship as a single factor. It argued that the first approach appears to be inconsistent with High Court authorities on the multifactorial test. The issue that remains unresolved is which of the latter two approaches is the proper approach. In answering that question, it is instructive to consider the justifications or rationales underlying the doctrine of vicarious liability. These justifications are explored in Part III below.

III Justifications for the Doctrine of Vicarious Liability

The common law concept of employment has its basis in the law of vicarious liability.[91] Generally, a person who has suffered harm as a result of a worker's wrongful act must surmount two hurdles in order to establish vicarious liability on the part of the organisation that engaged that worker.[92] First, it must be established that the worker was an employee of the organisation (as opposed to an independent contractor).[93] Second, it must be shown that the wrongful act occurred in that employee's course of employment.[94] The common law concept of employment arises at the first stage of the analysis. In *Hollis*, the majority stated that the common law concept of employment is shaped by the 'concerns'[95] or 'considerations'[96] that underpin the doctrine of vicarious liability. Accordingly, in giving content to that concept, it is instructive to have regard to the rationales underlying vicarious liability.

Before discussing those rationales, two contextualising matters should be noted. First, the nature, scope and contours of the doctrine of vicarious liability are the subject of significant contestation in the courts[97] and within the literature.[98] As discussed below in Part III(B), the High Court of Australia is yet to articulate a unified view on vicarious liability,[99] and the approach that it adopts at present departs

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90 Ibid.

91 See above nn 27–33 and accompanying text.

92 For an overview of the law of vicarious liability in Australia, see Harold Luntz, David Hambly, Kylie Burns, Joachim Dietrich, Neil Foster, Genevieve Grant and Sirko Harder, *Torts: Cases and Commentary* (LexisNexis, 8th ed, 2017) ch 17.

93 See, eg, *Hollis* (n 10); *Sweeney* (n 6).

94 See, eg, *Lepore* (n 38); *Prince Alfred College* (n 38).

95 *Hollis* (n 10) 41 [45] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

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

97 See discussion below at Part III(B).

98 See above n 37 and discussion and sources cited below in Part III(A).

99 *Prince Alfred College* (n 38) 148–50 [38]–[47]. See also Paula Giliker, 'Analysing Institutional Liability for Child Sexual Abuse in England and Wales and Australia: Vicarious Liability, Non-Delegable Duties and Statutory Intervention' (2018) 77(3) *Cambridge Law Journal* 506.

from the approaches adopted by courts in other common law jurisdictions, including the United Kingdom[100] and Canada.[101] This article is concerned with the proper approach to determining employment status in the Australian context. Accordingly, the focus will be on decisions of the High Court of Australia rather than upon those from overseas. Decisions from other jurisdictions will be discussed only to the extent necessary to illuminate the reasoning in the Australian cases.

The second contextualising point concerns the fact that the High Court has drawn a distinction between the rationales or justifications for the doctrine of vicarious liability on the one hand, and the legal principles or 'criterion of liability'[102] that guide the imposition of vicarious liability on the other.[103] This article considers the underlying rationales or justifications for vicarious liability. It does not seek to discern the legal principles or tests for the imposition of vicarious liability. Furthermore, this article is concerned with the rationales underpinning vicarious liability only to the extent that they provide guidance on the function of the notion of entrepreneurship in the legal test for employment status.

Before examining the relevant High Court authorities, this article considers the theoretical justifications for vicarious liability as elucidated in the scholarly literature. This discussion is useful in situating the observations of the High Court as to those rationales. It is particularly important because the High Court has not provided comprehensive guidance on the relevant justifications.[104] The theoretical discussion provides an overarching framework through which to analyse more specific statements made at various times by different members of the High Court.

A *Theoretical Justifications*

Four key theoretical justifications for vicarious liability are enterprise risk, deterrence, just compensation and loss distribution, and agency.

1 *Enterprise Risk*

According to the enterprise risk theory,[105] the running of an enterprise or business inevitably involves the introduction of certain risks into the community, or an enhancement of certain existing risks. The employer derives benefits from running such an enterprise and should, therefore, bear the concomitant costs and burdens.[106]

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100 See, eg, *Lister v Hesley Hall Limited* [2002] 1 AC 215; *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1; *Cox v Ministry of Justice* [2016] AC 660; *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677.

101 See, eg, *Bazley v Curry* [1999] 2 SCR 534 ('*Bazley*'); *Jacobi v Griffiths* [1999] 2 SCR 570; *John Doe v Bennett* [2004] 1 SCR 436; *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia* [2005] 3 SCR 45.

102 *Hollis* (n 10) 38 [36] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

103 Ibid.

104 *Prince Alfred College* (n 38) 148–50 [38]–[47].

105 Calabresi (n 37); Simon Deakin, '"Enterprise-Risk": The Juridical Nature of the Firm Revisited' (2003) 32(2) *Industrial Law Journal* 97; Douglas Brodie, 'Enterprise Liability: Justifying Vicarious Liability' (2007) 27(3) *Oxford Journal of Legal Studies* 493; Brodie (n 37).

106 Calabresi (n 37) 500–15; Brodie (n 37) 9.

When a risk associated with conducting the business materialises and causes harm to a third party, it is fair for the law to impose upon the employer the costs associated with the materialisation of that risk.[107] One risk associated with running a business is the risk that an employee may engage in negligent conduct or intentional wrongdoing in the course of his or her employment. Some scholars have explained the enterprise risk theory by reference to economic theories.[108] The enterprise risk approach facilitates the internalisation of the costs of conducting a business.[109] Imposing liability on the employer means that this particular cost of running the enterprise is accurately captured; failing to capture it would mean that the true costs of running the enterprise are understated, leading to overproduction and a suboptimal allocation of resources.[110]

2 *Deterrence*

The deterrence theory posits that it is the employers (that is, the persons or entities running the businesses) who are in the best position to implement systems and processes within their workplaces that mitigate the risk of harm.[111] It is the employers who have control over their systems and processes. If employers are made to bear the burden of any harm arising from the conduct of their businesses, then this will provide them with an incentive to put in place measures to reduce the risk of harm.[112] There are a range of possible measures that can be adopted, including those pertaining to the selection, training, supervision and discipline of employees. According to this theory, then, the imposition of vicarious liability is justified because of its deterrent effect.

It should be acknowledged that this theory is not based on the view that vicarious liability is imposed because there are flaws within an employer's work systems that equate to negligence on the part of the employer.[113] Vicarious liability is imposed in the absence of fault on the part of the employer.[114] The theory is simply based upon the idea that if employers are made to bear the costs associated with the risks arising from their businesses, then they will be incentivised to take precautionary measures to mitigate those risks.

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107 Calabresi (n 37) 500–1; Brodie (n 37) 9.

108 Calabresi (n 37) 500–15.

109 Ibid.

110 Ibid.

111 Giliker (n 37) 241–3.

112 Ibid.

113 *Hollis* (n 10) 43 [53] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ), quoting *Bazley* (n 101) 554–5:

> Fixing the employer with responsibility for the employee's wrongful act, even where the employer is not negligent, may have a deterrent effect. … Beyond the narrow band of employer conduct that attracts direct liability in negligence lies a vast area where imaginative and efficient administration and supervision can reduce the risk that the employer has introduced into the community. Holding the employer vicariously liable for the wrongs of its employee may encourage the employer to take such steps, and hence, reduce the risk of future harm.

114 *Prince Alfred College* (n 38) 148 [39] (French CJ, Kiefel, Bell, Keane and Nettle JJ): 'Vicarious liability is imposed despite the employer not itself being at fault.'

3 *Just Compensation and Loss Distribution*

There are generally three relevant parties to a case involving a claim of vicarious liability: the employer, the employee and the third party who has suffered harm as a result of the wrongful act of the employee. According to the just compensation theory, the innocent victim of harm should not have to shoulder the burden of the loss suffered. The law should facilitate compensation for the victim by imposing liability upon the party most able to bear the burden.[115] The employer has 'deep pockets'[116] and is thereby in the best position to compensate the plaintiff. The employer also has the ability to spread the losses.[117] This rationale was encapsulated in Williams' observation that '[h]owever distasteful the theory may be, we have to admit that vicarious liability owes its explanation, if not its justification, to the search for a solvent defendant.'[118]

4 *Agency*

Another proposed theoretical justification for vicarious liability has its basis in the concept of agency, broadly conceived to refer to the situation where one party is acting on behalf of another.[119] According to this theory, the imposition of vicarious liability upon the employer is justified because the employee is acting on the employer's behalf. If harm occurs while the employee is acting on the employer's behalf (that is, in the course of that employee's employment) then it is fair for the employer to bear the cost.

Part III(A) has discussed four key theoretical justifications for the doctrine of vicarious liability. Part III(B) below explores several leading High Court authorities on vicarious liability to determine the extent to which members of the Court have embraced these justifications.

B *Justifications Advanced in the Case Law*

The High Court of Australia is yet to provide definitive guidance on the justifications for the doctrine of vicarious liability. As the majority recognised in *Hollis*, '[a] fully satisfactory rationale for the imposition of vicarious liability in the employment relationship has been slow to appear in the case law.'[120] In the High Court's most

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115 Williams, 'Vicarious Liability I' (n 37) 232.

116 Baty (n 37) 154.

117 Williams, 'Vicarious Liability II' (n 37) 440–3; Calabresi (n 37) 517–27.

118 Williams, 'Vicarious Liability I' (n 37) 232.

119 Oliver Wendell Holmes Jr, 'Agency' (1891) 4(8) *Harvard Law Review* 345; Oliver Wendell Holmes Jr, 'Agency II' (1891) 5(1) *Harvard Law Review* 1; Gray (n 37); Anthony Gray, 'Liability of Educational Providers to Victims of Abuse: A Comparison and Critique' (2017) 39(2) *Sydney Law Review* 167 ('Liability of Educational Providers to Victims of Abuse').

120 *Hollis* (n 10) 37 [35] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). Similarly, in *Sweeney*, the majority acknowledged that there is an absence of 'any clear or stable principle which may be understood as underpinning the development of this area of the law': *Sweeney* (n 6) 166–7 [11] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

recent decision on vicarious liability, *Prince Alfred College Inc v ADC*,[121] the plurality stated that 'common law courts have struggled to identify a coherent basis' for imposing vicarious liability.[122] Instead of seeking to identify the rationales that underpin the doctrine of vicarious liability, the plurality in *Prince Alfred College* adopted an incremental approach to the development of the doctrine, discerning particular features in previous cases that had favoured the imposition of liability.[123] The plurality eschewed the rationales and principles of vicarious liability adopted by ultimate appellate courts in Canada and the United Kingdom, although the features in those cases that favoured liability were of significance in the plurality's reasoning.[124] Parts III(B)(1)–(3) below draw upon the Canadian decisions because they shed light upon the reasoning in the Australian cases.

1 *Enterprise Risk*

One of the most influential judicial expositions of the enterprise risk rationale is located in the judgment of the Supreme Court of Canada in *Bazley v Curry*.[125] In delivering the Court's judgment, McLachlin J made the following observation:

> Underlying the cases holding employers vicariously liable for the unauthorized acts of employees is the idea that employers may justly be held liable where the act falls within the ambit of the risk that the employer's enterprise creates or exacerbates.[126]

In *Hollis*, the majority appeared to endorse the enterprise risk theory as one rationale underpinning the doctrine of vicarious liability.[127] Their Honours referred to McLachlin J's judgment in *Bazley*[128] and stated that

> [i]n general, under contemporary Australian conditions, the conduct by the defendant of an enterprise in which persons are identified as representing that enterprise should carry an obligation to third persons to bear the cost of injury or damage to them which may fairly be said to be characteristic of the conduct of that enterprise.[129]

Subsequently, in *New South Wales v Lepore*,[130] several members of the High Court also considered the enterprise risk theory. In analysing *Lepore*, it is important to acknowledge that the judges in this case adopted differing views on vicarious

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121 *Prince Alfred College* (n 38).
122 Ibid 148 [39] (French CJ, Kiefel, Bell, Keane and Nettle JJ).
123 Ibid 150 [46]–[47].
124 Ibid 153–60 [57]–[83]. As Gageler and Gordon JJ observed in the same case (at 172 [130]), the approach adopted by the plurality

> does not adopt or endorse the generally applicable 'tests' for vicarious liability for intentional wrongdoing developed in the United Kingdom or Canada (or the policy underlying those tests), although it does draw heavily on various factors identified in cases involving child sexual abuse in those jurisdictions.

125 *Bazley* (n 101).
126 Ibid 557 [37].
127 *Hollis* (n 10).
128 Ibid 39 [41], citing *Bazley* (n 101) 552–5.
129 *Hollis* (n 10) 40 [42] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).
130 *Lepore* (n 38).

liability.[131] Gleeson CJ drew a distinction between the rationales underlying the doctrine on the one hand, and the criterion of liability or principles that determine liability on the other.[132] His Honour stated that '[a]s a test for determining whether conduct is in the course of employment, as distinct from an explanation of the willingness of the law to impose vicarious liability, [enterprise risk reasoning] has not been taken up in Australia'.[133] His Honour did not, however, eschew enterprise risk reasoning altogether. Gleeson CJ approached the course of employment test by reference to the question of whether there was a sufficiently close connection between the employment and the employee's wrongdoing.[134] His Honour stated that

> in most cases, the considerations that would justify a conclusion as to whether an enterprise materially increases the risk of an employee's offending would also bear upon an examination of the nature of the employee's responsibilities, which are regarded as central in Australia.[135]

In a joint judgment in *Lepore*, Gummow and Hayne JJ expressed reservations about the enterprise risk theory adopted in *Bazley*. Their Honours observed that '[c]reation and enhancement of risk … may distract attention from what meaning should be given to course of employment.'[136] In the same case, Kirby J stated that the enterprise risk theory articulated in *Bazley* was 'persuasive'.[137] More recently, the plurality in *Prince Alfred College* observed that 'the risk-allocation aspect of the theory is based largely on considerations of policy, in particular that an employer should be liable for a risk that its business enterprise has created or enhanced',[138] and that '[s]uch policy considerations have found no real support in Australia or the United Kingdom.'[139]

The reasoning in *Prince Alfred College* might, on one reading, support an approach that is similar to that based on the enterprise risk theory.[140] The plurality in that case developed an approach that distinguished between the concepts of 'opportunity' and 'occasion' to guide the analysis of whether the employee's wrongful act occurred in the course of his or her employment.[141] According to the plurality, the fact that the employment provided the mere opportunity for the employee's wrongful act would not be sufficient to render the act one that occurred within the course of employment.[142] On the other hand, if the employment provided the 'occasion' for the commission of the wrong, then that would be sufficient to

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131 As the plurality observed in *Prince Alfred College* (n 38) 158 [75], '[i]t is well known that different approaches were taken to the question of vicarious liability in *New South Wales v Lepore*.' See also Jane Wangmann, 'Liability for Institutional Child Sexual Assault: Where Does Lepore Leave Australia?' (2004) 28(1) *Melbourne University Law Review* 169.

132 *Lepore* (n 38) 543–4 [65].

133 Ibid 543 [65].

134 Ibid 543–4 [65].

135 Ibid 544 [65].

136 Ibid 586 [214].

137 Ibid 613 [303].

138 *Prince Alfred College* (n 38) 153 [59].

139 Ibid.

140 Gray, 'Liability of Educational Providers to Victims of Abuse' (n 119) 186–7.

141 *Prince Alfred College* (n 38) 159–61 [80]–[85].

142 Ibid 159 [80].

ground the conclusion that the wrong was committed in the course of employment.[143] The plurality in *Prince Alfred College* stated that

> it is possible for a criminal offence to be an act for which the apparent performance of employment provides the occasion. Conversely, the fact that employment affords an opportunity for the commission of a wrongful act is not of itself a sufficient reason to attract vicarious liability.[144]

It has been suggested that the reference to employment providing the 'occasion' for the commission of the wrong is similar to the notion of enterprise risk, based as it is on the idea that the conduct of the enterprise gives rise to certain risks of harm.[145]

2 *Deterrence*

In *Hollis*, the majority referred explicitly to the deterrence theory in reaching their conclusion that a bicycle courier was an employee, as opposed to an independent contractor.[146] The bicycle courier had negligently injured a member of the public while performing his courier duties. Along with a range of other factors, the majority observed that the company that engaged the bicycle courier knew of the risks that were posed to the public by the way its bicycle couriers carried out their duties.[147] Quoting from McLachlin J's exposition of the deterrence theory in *Bazley*, the majority observed that one rationale for imposing vicarious liability was that it would incentivise employers to put in place precautionary measures to mitigate risks of harm.[148]

In *Lepore*, Gummow and Hayne JJ were unpersuaded by the deterrence theory.[149] Their Honours' observations were made in the context of a case involving an employee's intentional criminal act. Their Honours stated that '[i]f the criminal law will not deter the wrongdoer there seems little deterrent value in holding the employer of the offender liable in damages for the assault committed.'[150] In the same case, Kirby J also acknowledged the shortcomings of the deterrence theory.[151] His Honour noted that deterrence was 'neither the main nor only factor'[152] underpinning vicarious liability, and that it should instead 'be taken together with the risk analysis … and with a candid acknowledgment that vicarious liability is a loss distribution device'.[153]

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143 Ibid 159–60 [80]–[81]. See also Desmond Ryan, 'From Opportunity to Occasion: Vicarious Liability in the High Court of Australia' (2017) 76(1) *Cambridge Law Journal* 14; James Goudkamp and James Plunkett, 'Vicarious Liability in Australia: On the Move?' (2017) 17(1) *Oxford University Commonwealth Law Journal* 162.

144 *Prince Alfred College* (n 38) 159 [80] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

145 Gray, 'Liability of Educational Providers to Victims of Abuse' (n 119) 186–7.

146 *Hollis* (n 10) 39 [41], 43 [53].

147 Ibid 43 [53].

148 Ibid, quoting *Bazley* (n 101) 554–5.

149 *Lepore* (n 38) 587–8 [217]–[219].

150 Ibid 587 [219].

151 Ibid 613–14 [305]–[306].

152 Ibid 614 [306].

153 Ibid.

3 *Just Compensation and Loss Distribution*

As noted in the immediately preceding discussion, Kirby J accepted loss distribution as a rationale for vicarious liability in *Lepore*. His Honour observed that '"[f]air and efficient" compensation is concerned with the search for a solvent defendant whom it is just and reasonable to burden with the legal liability for damages.'[154] His Honour drew a connection between the just compensation rationale and the enterprise risk theory, observing that '[t]he basis upon which the Canadian Supreme Court concluded that a party can be justly burdened is through the application of an "enterprise risk" analysis.'[155] Gummow and Hayne JJ referred to the deep pockets justification in *Lepore* without expressly endorsing it. Their Honours noted that the justification

> finds other, less pejorative, expression as a 'principle of loss-distribution' or as the need to provide a 'just and practical remedy' for harm suffered as a result of wrongs committed in the course of the conduct of the defendant's enterprise.[156]

4 *Agency*

In Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd,[157] Dixon J observed that

> [t]he rule which imposes liability upon a master for the wrongs of his servant committed in the course of his employment is commonly regarded as part of the law of agency: indeed, in our case-law the terms principal and agent are employed more often than not although the matter in hand arises upon the relation of master and servant.[158]

In addition, Gummow and Hayne JJ's judgment in *Lepore* draws on the language of agency,[159] with their Honours making the following statement by reference to Dixon J's judgment in *Deatons Pty Ltd v Flew*:

> [T]here are two elements revealed by what his Honour said that are important for present purposes. First, vicarious liability may exist if the wrongful act is done in *intended pursuit* of the employer's interests or in *intended performance* of the contract of employment. Secondly, vicarious liability may be imposed where the wrongful act is done in *ostensible pursuit* of the employer's business or in the *apparent execution of authority* which the employer holds out the employee as having.[160]

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154 Ibid 612 [303].

155 Ibid.

156 Ibid 581 [197] (citations omitted).

157 *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 ('*Colonial Mutual Life Assurance*'). For a comprehensive discussion of the judicial statements that identify agency as the basis for vicarious liability, see Gray (n 37) 159–88; Gray, 'Liability of Educational Providers to Victims of Abuse' (n 119) 190–7.

158 *Colonial Mutual Life Assurance* (n 157) 49.

159 Gray, 'Liability of Educational Providers to Victims of Abuse' (n 119) 191 n 172.

160 *Lepore* (n 38) 591–2 [231] (emphasis in original) discussing *Deatons Pty Ltd v Flew* (1949) 79 CLR 370. For a comprehensive analysis of Gummow and Hayne JJ's approach in *Lepore*, see Christine Beuermann, *Reconceptualising Strict Liability for the Tort of Another* (Hart Publishing, 2019);

In *Lepore*, Gaudron J put forward the proposition that the doctrine of vicarious liability has its basis in the law of agency. Her Honour stated:

> To the extent that vicarious liability is imposed on employers by reason that an employee has either done something that the employer has authorised or has done something in the course of his or her employment, it is referable to the general law of principal and agent.[161]

IV The Proper Approach: Entrepreneurship as the Organising Principle

A *Conceptual Coherence*

In the introduction to this article, it was noted that the Full Federal Court in *Personnel Contracting* had recently left open an important proposition about the concept of employment at common law. The relevant proposition was that two of the rationales underpinning vicarious liability, enterprise risk and agency, favour the view that entrepreneurship should be treated as the organising principle for the inquiry as to employment status.[162] The basis for this proposition was that these rationales are not engaged when the worker is carrying on a business of his or her own. The rationales support the view that the distinction between employees and independent contractors is rooted in the distinction between working in the service of another and carrying on a business of one's own.[163]

The theoretical and doctrinal analysis of the rationales for vicarious liability presented in Part III above provides a basis for evaluating the proposition. It is the contention of this article that the proposition is, with respect, correct. In substantiating this contention, it is instructive to consider the enterprise risk, deterrence, just compensation and loss distribution, and agency justifications for vicarious liability.

The enterprise risk theory focuses on the risks that are introduced into the community as a result of the conduct of the employer's enterprise. The relevant concerns are not enlivened when the worker is carrying on a business of his or her own. Calabresi has observed that the exception carved out for independent contractors from the law of vicarious liability is 'clearly justified' by reference to theories of risk distribution.[164] Even if the broader approach to enterprise risk adopted in the Canadian cases does not ultimately find favour in Australia, a narrower approach that is consistent with notions of enterprise risk is discernible

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Christine Beuermann, 'Conferred Authority Strict Liability and Institutional Child Sexual Abuse' (2015) 37(1) *Sydney Law Review* 113.

161 *Lepore* (n 38) 554 [108].

162 See *Personnel Contracting* (n 26) 504 [178]–[179] (Lee J), 506 [189], referring to the submission of Counsel for the appellants (M Irving QC).

163 Ibid 504 [178]–[179], referring to the submission of Counsel for the appellants (M Irving QC). See also Stewart (n 12) 261.

164 Calabresi (n 37) 547.

from the judgments in *Sweeney v Boylan Nominees Pty Ltd*[165] and *Lepore*.[166] The majority in *Sweeney*[167] and Gummow and Hayne JJ in *Lepore*[168] regarded as significant Pollock's explanation of the basis of vicarious liability.[169] In *Sweeney*, the majority stated:

> Pollock identified the element common to cases of vicarious liability as being that 'a man has for his own convenience brought about or maintained some state of things which in the ordinary course of nature may work mischief to his neighbours'. Pollock further concluded that where an employer conducted a business, and for that purpose employed staff, the employer brought about a state of things in which, if care was not taken, mischief would be done. But the liability to be imposed on the employer was liability for the way in which the business (that is, the employer's business) was conducted. Conduct of the business and the employee's actions in the course of employment in that business were the only state of things which the employer created and for which the employer would be responsible.[170]

The focus of this narrower version of the enterprise risk theory remains on the conduct of the employer's business. In *Lepore*, Gummow and Hayne JJ made several important observations about Pollock's justification. Their Honours stated:

> Conducting any enterprise carries with it a variety of risks. The paradigm kind of risk of which Pollock spoke was the risk that an employee, setting out on the employer's business, carried out a task carelessly and injured a third party. … The risk, for the occurrence of which the employer was to be held liable, was, therefore, the risk of injury caused by an employee in pursuing the *employer's* venture.[171]

It appears that the explanation given by Pollock of the basis for imposing vicarious liability is very similar to the enterprise risk theory propounded in *Bazley*. Gummow and Hayne JJ stated:

> Where the analysis made in *Bazley* departs from the proposition identified by Pollock is that the risks to be considered are not confined to those risks which attend the *furtherance* of the venture but include the risks of conduct that is directly antithetical to those aims.[172]

The preceding observations shed light upon the connection between the enterprise risk theory and the notion of entrepreneurship, and on the relevance of the notion of entrepreneurship to the inquiry as to employment status. These observations demonstrate that the focus of the enterprise risk theory, either broadly or narrowly conceived, is on the business conducted by the employer and the venture of the employer. The concerns are not engaged when the worker is conducting a business of his or her own. The significance of the worker conducting his or her own business was addressed explicitly in *Sweeney*, with the majority stating that the

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165 *Sweeney* (n 6).
166 *Lepore* (n 38).
167 *Sweeney* (n 6) 170–1 [21]–[23] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
168 *Lepore* (n 38) 588 [220]–[221].
169 Frederick Pollock, *Essays in Jurisprudence and Ethics* (Macmillan and Co, 1882).
170 *Sweeney* (n 6) 170–1 [23] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) (emphasis omitted) (citations omitted). See also *Lepore* (n 38) 582 [200]–[202] (Gummow and Hayne JJ).
171 *Lepore* (n 38) 588 [221] (emphasis in original).
172 Ibid 588 [222] (emphasis in original).

worker, who was held to be an independent contractor, 'did what he did not as an employee of the respondent but as a principal pursuing his own business or as an employee of his own company pursuing its business'.[173]

The version of the just compensation and loss distribution theories that has the most promising foundation in the Australian case law is the one that links just compensation and loss distribution with the enterprise risk theory. As explained above,[174] Kirby J made this connection in *Lepore*, observing that it is fair to impose the burden of losses suffered on the party who has introduced into the community, through the conduct of an enterprise, the relevant risk that led to the losses.[175] The connection between loss distribution and enterprise risk is also noted in the literature on theories of vicarious liability.[176] On this basis, the reasoning in the immediately preceding paragraph, which addressed the relationship between the enterprise risk theory and the notion of entrepreneurship, applies equally to the rationales of just compensation and loss distribution.

Pollock's exposition of vicarious liability also assists in the articulation of the connection between the deterrence theory and the notion of entrepreneurship. In *Lepore*, Gummow and Hayne JJ referred to Pollock's view that one justification for vicarious liability is that employers should be incentivised to select employees, and to create and administer work systems, with due care, even if this means that in particular cases the imposition of liability causes 'some individual hardship'.[177] Pollock adopted a different view in relation to contractors, noting that 'the use of care in choosing a contractor who is likely to be careful is too remote a benefit to the community to be enforced by indiscriminate penalties'.[178] Gummow and Hayne JJ observed that 'the deterrent effect of holding an employer responsible for the negligence of employees'[179] was thus one reason underlying the principle that an employer is vicariously liable for the torts of an employee, but a principal is not vicariously liable for the torts of an independent contractor.[180] The deterrence justification is not engaged when the worker is conducting a business of his or her own.

Finally, the agency theory also supports the view that the notion of entrepreneurship should be the ultimate inquiry in cases concerning employment status. According to the agency theory, the imposition of vicarious liability is justified on the basis that the employee is the employer's agent; the employee is acting on behalf of the employer in the conduct of that employer's business.[181] The relevant concerns are not enlivened when the worker is conducting his or her own business.[182]

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173 *Sweeney* (n 6) 173 [33] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
174 See above Pt III(B)(3).
175 *Lepore* (n 38) 612–13 [303].
176 See, eg, Brodie (n 37) 14, citing C Robert Morris Jr, 'Enterprise Liability and the Actuarial Process: The Insignificance of Foresight' (1961) 70(4) *Yale Law Journal* 554, 584.
177 *Lepore* (n 38) 581 [198], quoting Pollock (n 169) 130.
178 Ibid.
179 *Lepore* (n 38) 581 [198].
180 Ibid.
181 See above Part III(A)(4) and Part III(B)(4).
182 See *Personnel Contracting* (n 26) 504 [178] (Lee J), referring to the submission of Counsel for the appellants (M Irving QC).

The four principal rationales examined above demonstrate that the distinction between employees and independent contractors rests, in essence, upon the basis that the former are working in the service of another, while the latter are carrying on a business of their own.[183] Accordingly, in marking out the boundary between these two categories, the legal test for employment status should adopt, as its ultimate inquiry, the question of whether the worker is carrying on a business of his or her own.[184] The notion of entrepreneurship should provide an overarching framework by reference to which the various indicia in the multifactorial test are assessed. Such an approach aligns the concept of employment with the rationales underlying the body of law in which it is anchored, thereby bringing a degree of conceptual coherence to the exercise of distinguishing employees from independent contractors.

B *Analytical Coherence*

Some judges have observed that the elevation of entrepreneurship above other factors is inconsistent with the nature of the multifactorial test.[185] The test requires an evaluation and balancing of various indicia, none of which are determinative.[186] One advantage of the approach that treats entrepreneurship as the organising principle for the application of the test is that it provides courts with an overarching framework by which to assess a multitude of factors that pull in different directions. In *Ellis v Wallsend District Hospital*, Samuels JA of the New South Wales Court of Appeal, with whom Meagher JA agreed, expressed the following reservations about the multifactorial approach expounded in *Brodribb*:

> The problem is that this approach, tending as it does to define the relationship only in terms of its elements, does not provide any external test or requirement by which the materiality of the elements may be assessed. The assertion that a working relationship between A and B will constitute one of employment, provided that it manifests the elements of such a relationship, may be unhelpful unless those elements are certain in number, character, quality and importance, in which case their presence in the prescribed measure will establish the character of the relationship.[187]

The adoption of entrepreneurship as the organising principle mitigates some of these concerns. Support for this proposition may be derived from Allsop CJ's judgment in *Personnel Contracting.*[188] His Honour observed that there needs to be 'organising conceptions that inform the relevant binary distinction in order that the task is not one to determine a legal category of meaningless reference'.[189] Treating

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183 Ibid 504 [178]–[179], referring to the submission of Counsel for the appellants (M Irving QC).

184 Ibid.

185 See, eg, *Personnel Contracting Trial* (n 22) [153]; *Jensen* (n 22) [89].

186 The one exception is the requirement of personal service. Employment requires the provision of personal service. If a worker has an unqualified right to delegate his or her work to another party, then that will almost invariably lead to the conclusion that the worker is an independent contractor: *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385, 391; *Brodribb* (n 9) 38.

187 *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553, 597. See also Neil and Chin (n 46) 16–17.

188 *Personnel Contracting* (n 26) 461 [13].

189 Ibid referring to Julius Stone, *The Province and Function of Law* (Harvard University Press, rev ed, 1950) 171.

entrepreneurship as the organising principle around which the indicia are assessed may bring some degree of analytical coherence to the task.[190]

V Conclusion

The many and varied ways in which work relationships are structured in the modern economy[191] have brought to the fore existing uncertainties surrounding the multifactorial test for employment status. This article has addressed one of those uncertainties: namely, the role and function of the notion of entrepreneurship in the application of that test. It has critically examined the cases and discerned three competing approaches to entrepreneurship: entrepreneurship as a separate test; entrepreneurship as the organising principle; and entrepreneurship as a single factor. It has argued that the proper approach is to treat entrepreneurship as the organising principle that informs the assessment of the indicia in the multifactorial test.

In advocating for the adoption of this approach, this article has drawn upon theoretical justifications underpinning the doctrine of vicarious liability, as well as the case law on this doctrine. The common law concept of employment is anchored in the law of vicarious liability. The rationales underpinning the doctrine of vicarious liability demonstrate that the distinction between employees and independent contractors rests, in essence, on the basis that employees work in the service of another, while independent contractors carry on their own businesses. The common law concept of employment marks out the boundary between those who are running their own businesses ('entrepreneurs') and those who are not. The determination of whether a worker is an employee or an independent contractor is a complex exercise that has long vexed the judiciary.[192] Delineating the contours of the concept of employment by reference to the rationales underpinning vicarious liability may bring a greater degree of conceptual and analytical coherence to that exercise.

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190 *Personnel Contracting* (n 26) 461 [13]. See also Neil and Chin (n 46) 22.

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

192 See, eg, Hugh Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10(3) *Oxford Journal of Legal Studies* 353; Joellen Riley, 'The Definition of the Contract of Employment and its Differentiation from Other Contracts and Other Work Relations' in Mark Freedland, Alan Bogg, David Cabrelli, Hugh Collins, Nicola Countouris, ACL Davies, Simon Deakin and Jeremias Prassi (eds), *The Contract of Employment* (Oxford University Press, 2016) 321; Simon Deakin, 'Decoding Employment Status' (2020) 31(2) *King's Law Journal* 180.