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Employment Contracts in the Australian High Court.

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1. Preliminary remarks. 2. The 'totality of the relationship' versus 'primacy of contract'. 3. *Personnel Contracting* – defining employment. 4. *Jamsek* and the power of contract. 5. Lessons for new forms of worker engagement. 6. Final remarks.

Abstract

The contribution explains the approach taken by the Australian High Court in recent years to construing and interpreting employment contracts. It focuses on the Australian court's rejection of principles accepted by the United Kingdom's Supreme Court, and the court's assertion of the primacy of the parties' own written contract in determining whether a work contract is one of employment, and what terms will govern that relationship. It argues that a statutory solution is necessary to ensure that protective labour statutes continue to cover those workers who are the proper objects of those laws.

Keyword: Common Law; Employment Contracts; High Court of Australia; Precarious work.

1. Preliminary remarks.

Ever since the High Court of Australia's decision in *Commonwealth Bank of Australia v Barker*[1] in 2014, it has been clear that the common law of employment in Australia is evolving in a different direction from the jurisprudence of the United Kingdom. That decision saw Australia's highest court reject the existence of any mutual duty of 'trust and confidence' in employment contracts, notwithstanding the sure establishment of such a duty in English jurisprudence by the House of Lords decision in *Malik and Mahmud v Bank of Credit and Commerce International SA (in liq)*[2] in 1998.[3]

Three more recent decisions of the Australian High Court have affirmed that Australian employment law is departing from English jurisprudence, and in particular, will not adopt

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[1] (2014) 253 CLR 169.

[2] [1998] AC 20. For an explanation of the evolution of this implied obligation in English law *see* Brodie D., Fair Dealing and the World of Work, in *Industrial Law Journal*, 43, 1, 2014, 29.

[3] For a discussion of *Commonwealth Bank of Australia v Barker*, *see* Carter J., Courtney W., Peden E., Riley J., Tolhurst G., *Terms Implied in Law: "Trust and Confidence" in the High Court of Australia*, in *Journal of Contract Law*, 32, 3, 2015, 203.

the approach taken by the United Kingdom Supreme Court in *Autoclenz Ltd v Belcher*.[4] In that case, the United Kingdom's highest court paid regard to the true economic relationship between a hirer and workers when determining whether the workers met the common law definition of 'employee' for the purpose of coverage by certain protective labour statutes. This contribution explains the three recent Australian decisions -- *Workpac Pty Ltd v Rossato*,[5] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*,[6] and *ZG Operations Pty Ltd v Jamsek*[7] -- in which a majority of the High Court emphasized the primacy of the parties' own written contract in determining a worker's classification for the purposes of statutory labour laws. Australia's principal statute, the Fair Work Act 2009 (Cth), continues to defer to the common law definition of employment to determine which workers are covered by most of its protections. The High Court's deference to the parties' own contract invites hirers to avoid the application of the Act by strategic contracting practices. If statutory protections are to be afforded to the growing number of workers engaged on precarious work contracts, statutory amendment will be necessary. No solution appears to be available from the common law.

2. The 'totality of the relationship' v 'primacy of contract'.

The *Autoclenz* decision of the United Kingdom's Supreme Court has been an important decision in the common law world, in warning hirers against using artificial contracting strategies in attempts to avoid the application of protective employment statutes to their engagements of workers. In *Autoclenz*, a hirer had engaged workers as valeters (automobile detailers) on written contracts that described them as independent contractors, and included a provision permitting them to delegate their work to others. This provision was clearly included in the contract to take advantage of one aspect of the common law definition of employment.[8] As employment is a relationship requiring personal service, a worker who is permitted to subcontract the work to others cannot be an employee. In *Autoclenz*, the court was prepared to look behind this express contractual term to the reality of the relationship between the parties. In reality, the workers were not intended to be able to subcontract the work to others, and did not do so. When viewed in its entirety, the relationship between the hirers and the workers was one of employment, and the court made some clear statements to the effect that it is legitimate for a court to glean the 'true agreement' from 'all the circumstances of the case, of which the written agreement is only part'.[9]

[4] [2011] UKSC 41; [2011] ICR 1157 ('*Autoclenz*').
[5] [2021] HCA 23 ('*Rossato*').
[6] [2022] HCA 1 ('*Personnel Contracting*').
[7] [2022] HCA 2 ('*Jamsek*').
[8] For an explanation of the common law tests for determining employment *see* Riley J., *The Definition of the Contract of Employment and Its Differentiation from Other Contracts and Other Work Relations*, in Freedland M., Bogg A., Cabrelli D., Collins H., Countouris N., Davies A.C.L., Deakin S., Prassl J. (eds.), *The Contract of Employment*, Oxford University Press, Oxford, 2016, 321.
[9] *Autoclenz* [2011] UKSC 41, [35].

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The approach taken in *Autoclenz*, paying regard to the 'real' relationship rather than the documented terms of a contract of engagement, also assisted the Supreme Court in *Uber BV v Aslam*[10] to find that Uber drivers were 'workers' within the terms of the Working Time Regulations 1998 regulation 36(1) and the National Minimum Wages Act 1998, section 54(3). In the earlier *Aslam* decision upheld by the Supreme Court, the court readily saw through the form of Uber's contract, describing it as using 'fictions, twisted language, and even a brand new terminology' requiring 'a degree of scepticism'.[11] Unfortunately, no such scepticism appears in the decisions of the Australian High Court. On the contrary, utmost respect is paid to the terms of any written contract imposed by the hirer when engaging workers.

In the earliest of the three decisions under review, *Workpac Pty Ltd v Rossato*,[12] the court was called upon to determine whether an employee who had been posted to a host employer by a labour hire agency was engaged as a casual (with no paid leave entitlements) or as a permanent employee with the full suite of employment entitlements provided by the Fair Work Act 2009 (Cth).[13] The terms of the written contract described the worker as a 'casual' employee, and included a statement of 'General Conditions' stating that he was engaged on 'an assignment by assignment' basis, and would not be compelled to accept any particular offer of work. This stipulation in the contract was clearly designed to bring the contract within the definition of 'casual employment' in Australia. Casual employment involves the 'absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work'.[14] In order to demonstrate that the employee is a permanent, or 'continuing', employee and not a casual, it must be shown that the employer and employee are mutually committed to an ongoing work relationship.

Notwithstanding the provision in the General Conditions forswearing any ongoing commitment to provide or accept assignments, the employee could demonstrate that he had worked regular hours, according to a roster created up to 12 months in advance by the host employer to whom he had been posted.[15] The General Conditions included a clause imposing an obligation upon the employee to reimburse the hirer for any expenses lost as a result of the employee failing to complete an assignment. (Recall that this was a labour hire arrangement, whereby the labour hire agency employer placed the employee with host employers, and was therefore at risk of breaching its own commercial contracts with host employers if the employees abandoned their jobs.) In the Federal Court, it was held that this clause made it 'implausible' that the employee had no contractual obligation to complete his rostered shifts.[16] Since the host employer published its shift roster 12 months in advance, and the employee's name appeared on those rosters, the Federal Court held that the

[10] [2021] UKSC 5.
[11] *Aslam, Farrer and Ors v Uber BV, Uber London, Uber Britannia Ltd*, Case No 2202551/2015 (12 October 2016), [87].
[12] [2021] HCA 23 ('*Rossato*').
[13] For an explanation of the phenomenon of long term 'casual' employment in Australia, *see* Owens R., *The "Long-term or Permanent Casual" – An Oxymoron or "A Well Enough Understood Australianism" in the Law?*, in *Australian Bulletin of Labour*, 27, 2, 2001, 118.
[14] *Hamzy v Tricon International Restaurants* (2001) 115 FCR 78, [38].
[15] *Rossato* [2021] HCA 23, [62].
[16] *Rossato* [2021] HCA 23, [91].

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employee did, in reality, have a legitimate expectation of continuing work according to a regular pattern, so was not a casual employee.

The High Court rejected this finding. A six member majority of the court focused on another clause in the General Conditions providing that the contract could be terminated by either party with one hour's notice. They held that the punitive clause requiring reimbursement of any costs incurred by the employer if the employee abandoned his assignment must be read down to mean that he would only be required to compensate the employer for any inconvenience caused by a failure to give one hour's notice of his cessation of work.

In the course of its reasons, the majority asserted the primacy of the parties' freedom of contract,[17] and criticized arguments that the reality of the performance of work should be taken into account as a 'descent into … obscurantism'.[18] *Rossato* was, however, a case in which the parties had already agreed that their contract was an employment contract. The issue at stake was whether the written terms of the contract created a casual employment relationship or whether the practical reality of the performance of work indicated a permanent employment relationship. Casual employees enjoy no entitlements to paid personal leave (to deal with illness or carer's responsibilities) nor any paid recreation leave. Under the National Employment Standards in the Fair Work Act 2009 (Cth), permanent employees are entitled to ten days of paid personal leave and 20 days of annual leave each year, and they are also eligible for a range of other benefits not available to casuals.[19] Casuals do nevertheless enjoy the status of employment for a range of other purposes, such as entitlements to minimum wages, workers' compensation coverage, and unfair dismissal protection.[20]

While casual employment is precarious, it is generally not so precarious as independent contracting arrangements. Independent contractors have no guarantees of a minimum wage, and no access to unfair dismissal protection in the Fair Work Commission. The next two cases, *Personnel Contracting* and *Jamsek*, tested the High Court's approach to the construction and interpretation of work contracts in the context of disputes over whether workers were employees or contractors. The majority in *Personnel Contracting* reasserted that a court must regard only the terms of the parties' own contract in determining the status of the worker,[21] and in *Jamsek*, they repeated the complaint that any search for the 'reality' of an employment relationship was 'obscurantist' and must be avoided.[22]

[17] [2021] HCA 23, [58], [99].
[18] [2021] HCA 23, [63].
[19] *See* Fair Work Act 2009 (Cth) s 87 (annual leave); ss 95-96 (personal/carer's leave); s 116 (paid public holidays); s 117 (notice of termination); s 119 (redundancy pay).
[20] Fair Work Act 2009 (Cth) s 384(2)(a).
[21] [2022] HCA 1, [59] (Kiefel CJ, Keane and Edelman JJ); [189] (Gordon J).
[22] [2022] HCA 2, [62].

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3. *Personnel Contracting* – defining employment.

Personnel Contracting also involved a labour hire arrangement. A labour hire agency called Construct hired a 22 year old backpacker named McCourt and placed him with a host employer called Hanssen. McCourt performed basic builders' labouring tasks, such as sweeping up rubbish and moving bricks for the trades people on site.[23] According to the written contract provided by Construct, Hansen was a 'contractor' and not an employee.[24] As a contractor, he was not covered by the *Building and Construction General On-Site Award 2020* that mandates minimum wage rates and other conditions for employed builders' labourers. Hence, Construct set his hourly rate of pay at approximately 75 per cent of what he would have earned as a minimum under the Award.[25] Unsurprising, when the notoriously militant Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) discovered these circumstances, it brought proceedings against both Construct and Hanssen seeking compensation for McCourt, and penalties for breach of the Award.

McCourt and the union faced a major obstacle in this litigation. They failed at trial in the Federal Court,[26] and on appeal to a Full Court, because of an earlier decision of the West Australian Court of Appeal[27] which had considered the contract that Construct used for hiring workers, and decided that it was properly characterized as an independent contract.[28] Although the members of the Federal Court decided that they were bound to follow this decision,[29] two members of the Federal Court appeal bench, Allsop CJ and Lee J, expressed concerns that the decision permitted serious underpayment of a young, unskilled worker. It was a decision which lacked any intuitive sense of justice, notwithstanding that it conformed with earlier authority.

The matter was appealed to the High Court, and this provided the opportunity for the High Court to determine whether the principles it had set out in the *Rossato* decision (concerning the primacy of the parties' own contract), should also prevail when the matter to be determined was the classification of the working relationship as employment or contracting. A majority of the High Court (comprising a joint judgment written by Kiefel CJ, Keane and Edelman JJ, and separate judgments written by Gordon J and Steward J), held that in classifying the nature of a work relationship, courts must assess the 'totality of the relationship between the parties', but where the parties have made a written contract, can

[23] *See Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631, [2020] FCAFC 122, [42], [51]-[60] (Lee J) for a description of McCourt's duties.

[24] *See Personnel Contracting* [2022] HCA 1, [14] for the full terms of the contract.

[25] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631; [2020] FCAFC 122, [4] (Allsop CJ).

[26] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806.

[27] *Personnel Contracting Pty Ltd t/as Tricord Personnel v Construction, Forestry, Mining and Energy Union of Workers* (2004) 141 IR 31; [2002] WASC 312. See also *Young v Tasmanian Contracting Services Pty Ltd* [2012] TASFC 1.

[28] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631; [2020] FCAFC 122, [34] (Allsop CJ); [185] (Lee J).

[29] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631; [2020] FCAFC 122, [31] (Allsop CJ); [181] (Lee J).

regard only the terms of that contract, and not any subsequent conduct of the parties in performing the work.[30]

This does not mean that the parties are at liberty to simply label their agreement as an independent contract, and expect that a court will defer to that description. All members of the High Court affirmed that the classification of work contracts is a matter for the courts, who will ignore any false labels applied by parties to their contracts.[31] In this respect, they found that the court had erred in the earlier West Australian Court of Appeal decision in *Personnel Contracting Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers ('Personnel (No 1)),*[32] because too great a weight had been afforded to the label given to the contract by the parties themselves.[33] It does mean, however, that if (as was the case in *Autoclenz*) the parties agree in their contract that the worker may delegate work to others, that contractual term will indicate an independent contract, even though the parties never choose to act upon it. So long as the contract terms are not a sham (within the limited meaning of that term[34]) the terms set out in a written contract when the parties commence their relationship will prevail over any evidence of subsequent conduct. In *Personnel Contracting*, several contractual terms indicated that the working relationship was one of employment. Notably, the employer (Construct) was entitled to direct where the employee, McCourt, must attend for work, and McCourt had no right to refuse.[35] Construct's right to exert control over McCourt's provision of labour was described by the court as a 'key asset' of Construct's labour hire business.[36] In Australia, it is the labour hire entity, and not any host employer to which the worker is posted, who is considered to be the employer of labour hire workers.[37]

There was a vigorous dissent on the question of whether the reality of the relationship as performed by the parties, could be taken into account in assessing the character of a working relationship. Gageler and Gleeson JJ cited the earlier High Court decision in *Hollis v Vabu Pty Ltd*,[38] as authority for the proposition that work practices, and not only contract terms, could be taken into account, even in cases where parties have committed their agreement to writing.[39] Gageler and Gleeson JJ said that *Rossato* decided only that the parties' own contract must be consulted to determine whether an employment relationship was casual or

[30] *Personnel Contracting* [2022] HCA 1, [32]-[60]. The court cited early authority for this proposition: *Logan v Gilchrist* (1927) 33 ALR 321; *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 79 CLR 389; *Humberstone v Northern Timber Mills* (1949) 79 CLR 389; *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210, *Australian Mutual Provident Society v Chaplin* (1978) 52 ALJR 407; 18 ALR 385; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; and also the decision of the Privy Council in *Narich Pty Ltd v Commissioner of Pay-roll Tax* [1983] 2 NSWLR 597.

[31] *Personnel Contracting* [2022] HCA 1, [63]-[66], [79].

[32] (2004) 141 IR 31.

[33] *Personnel Contracting* [2022] HCA 1, [86].

[34] *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786.

[35] *Personnel Contracting* [2022] HCA 1, [75]-[77].

[36] *Personnel Contracting* [2022] HCA 1, [76].

[37] *Personnel Contracting* [2022] HCA 1, [78]. *See* also *Drake Personnel Ltd v Commissioner of State Revenue* (2000) 2 VR 635; 105 IR 122, [54]; *Staff Aid Services v Bianchi* (2004)133 IR 29; *Costello v Allstaff Industrial Personnel (SA) Pty Ltd and Bridgestone TG Australia Pty Ltd* [2004] SAIRComm 13. *See* Bomball P., *The Attribution of Responsibility in Trilateral Work Relationships: A Contractual Analysis*, in *Australian Journal of Labour Law*, 29, 3, 2016, 305-326.

[38] (2001) 207 CLR 21.

[39] *Personnel Contracting* [2022] HCA 1, [143].

permanent, and did not apply any new test for characterising work contracts as employment and independent contracting. [40]

In *Personnel Contracting*, the application of the principle that where the parties have committed the terms of their agreement to writing, a court may have regard only to the terms of the written contract, resulted in a finding in favour of the worker. The contractually binding obligations of the parties to the contract indicated an employment contract, notwithstanding a label to the contrary. In the next of the decisions, however, disregarding the reality of a relationship in favour of the terms of a written contract resulted in a finding that two truck drivers who had worked exclusively for the same business for decades were, in fact, contractors.

4. *Jamsek* and the power of contract.

Jamsek concerned a claim brought by two truck drivers (Jamsek and Whitby) for payment of various accrued entitlements when their work contracts were terminated after decades of service. Both had commenced work in a road transport delivery business as employees in the late 1970s, but in about 1985, after several years' service, they were told that the employer would no longer engage them as employees. If they wanted to keep their jobs, they were told that they must agree to resign and sign on again as independent contractors. These days, the Fair Work Act 2009 (Cth) s 358 prohibits an employer from threatening to dismiss an employee so as to 'engage the individual as an independent contract to perform the same, or substantially the same, work under a contract for services', but no such provision prevented this strategy in 1985.

Jamsek and Whitby were persuaded to form partnerships with their respective spouses, and to purchase the trucks from the employer, so that they could continue to perform their usual services for the business. They continued to work full-time for the business. Their trucks continued to bear the trademarks of the business, and they accepted whatever assignments the business gave them. Their remuneration changed to include an amount in respect of the cost of maintaining the trucks themselves.[41] A significant fact, which influenced the court's determination that Jamsek and Whitby were contractors and not employees, was that payments for their service was made to their family partnerships. This allowed them to enjoy a tax benefit.[42] They continued to work for the business (which changed hands a number of times during their tenure) until 2017 when their contracts were terminated.

Jamsek and Whitby brought claims for the kinds of benefits that they would have enjoyed as employees: accrued annual leave,[43] payment for working on public holidays, overtime rates of pay mandated by the relevant modern award, redundancy compensation of 12 weeks, long

[40] *Personnel Contracting* [2022] HCA 1, [141].
[41] *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114, [2020] FCAFC 119, [41].
[42] After his divorce, Mr Whitby lost this benefit, but this did not influence the outcome of the case: *see Jamsek*, [108] (Gordon and Steward JJ).
[43] Under Fair Work Act 2009 (Cth) s 87.

service leave entitlements,[44] and superannuation contributions.[45] These claims were rejected at trial, on a finding that they were contractors. Only employees enjoy these benefits.[46] A full bench of the Federal Court allowed their appeal, on the basis that the 'substance and reality of the relationship, rather than its mere legal form'[47] indicated that they were in fact employees.[48] Anderson J said that the 'respective bargaining positions of each party,[49] was such that any weight given to the terms of the written contracts signed by the workers should be discounted in this analysis.

This decision was overturned on appeal to the High Court. A majority in *Jamsek* held that it was impermissible to take account of how 'the parties actually conducted themselves over the decades of their relationship'.[50] Importantly, the workers in this case (and in *Personnel Contracting*) had not argued that the contracts were 'shams'. Nor had they argued that the contracts should have been rescinded for any kind of unconscionable dealing at the time they were made. The majority said that mere inequality of bargaining power was irrelevant.[51] This being so, the court must have regard only to the terms of the contract. These contracts were made with partnerships, and not with individual workers, and provided for the provision of vehicles and not merely the labour of the drivers.[52] As such, these were commercial contracts with independent contractors.[53]

Gageler and Gleeson JJ agreed in this result, although not in the basis of the majority's reasons. They stated that the full court of the Federal Court had applied the correct approach in regarding the reality of the relationship, but had reached the wrong conclusion on the facts, because two elements of the agreement between the hirer and the workers in this matter indicated 'inexorably' that it was not a personal services contract.[54] The first was that it involved the provision of fully-maintained vehicles,[55] and the second was that the contracting party was a partnership, not an individual.[56]

The *Jamsek* decision is particularly poignant because it illustrates the way in which a hirer can so structure their labour engagement practices as to avoid the imposts of protective labour statutes, while also enjoying the benefit of passing some of the risk of the business onto the workers. By requiring the workers to purchase the trucks from the business owners, and to give a commitment to paying for the maintenance costs of the vehicles, the business was shifting the risk of one aspect of running a road transport delivery business to its

[44] Under the Long Service Leave Act 1955 (NSW).
[45] *See Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114, [2020] FCAFC 119 at [126] (Anderson J) for a full list of the claims.
[46] *See Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934.
[47] *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114, [2020] FCAFC 119, [182] (Anderson J).
[48] *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114; [2020] FCAFC 119, [243].
[49] *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114; [2020] FCAFC 119, [196].
[50] *Jamsek* [2022] HCA 2, [6].
[51] *Jamsek* [2022] HCA 2, 62.
[52] *Jamsek* [2022] HCA 2, [14]-[16], [63].
[53] *Jamsek* [2022] HCA 2, [25].
[54] *Jamsek* [2022] HCA 2, [86]-[88].
[55] *Jamsek* [2022] HCA 2, [88].
[56] *Jamsek* [2022] HCA 2,[89].

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workers.[57] Recall that these men worked exclusively for the business for several decades, so were not genuinely running any business of their own. The partnership arrangements were also undoubtedly artificial. There was no evidence in the case that the spouses played any part in providing the services.

5. Lessons for new forms of worker engagement.

The most concerning aspect of these three High Court decisions and their focus on the primacy of the parties' own contract in determining employment status, is that they offer an invitation to hirers to set up their labour engagement arrangements in way that will avoid the impost of most employment regulation.[58] A contract which forswears any entitlement to demand that a worker attend for shifts, and permits the worker to delegate, will ensure that the worker is a contractor, even if in practice the worker will never forfeit the opportunity to earn wages by failing to attend or sending a substitute. The worker's own desperation for work provides sufficient guarantee that the hirer's business will be conducted. In days gone by, before the establishment of standard jobs with guaranteed weekly wages, on demand work ensured that ships were loaded and unloaded at the docks along Sydney's 'Hungry Mile', where itinerant labourers presented each morning in the hope of securing a few hours of work. An approach to labour regulation that looks only to the parties' own contracts permits a return to this kind of labour engagement, particularly in the most unskilled sectors of our labour market. We are already seeing this phenomenon in the spread of platform enabled on demand work in many sectors: passenger transport (Uber); food delivery (UberEats, Foodora, Deliveroo, Menulog, Hungry Panda and others); odd jobs (Airtasker); home care services (Mabel). To date, most of the contracts made by these platforms with their workers have been found to be independent contractors under Australian law.[59] This indicates a need for reform.

It is clear that reform will not come from the common law, and while common law definitions are relied upon to determine which workers benefit from protective labour statutes, solutions will be elusive. One solution is to amend statutory definitions to ensure a wider coverage of protective labour statutes by expanding the definition of employment.[60] Another is to create an additional category of worker attracting some, but not all, benefits of

[57] *See* Johnstone R., McCrystal S., Nossar I., Quinlan M., Rawling M., Riley J., *Beyond Employment: The Legal Regulation of Work Relationships*, The Federation Press, Sydney, 2012, 78 and 88-91.

[58] Note that state-based workers' compensation legislation in Australia includes provisions extending coverage to some kinds of non-employed work. *See* for example Workplace Injury and Management and Workers' Compensation Act 1998 (NSW) s 5 and Sched 1; Workers' Compensation Act 1958 (Vic) s 3. The Superannuation.

[59] *See Gupta v Portier Pacific Pty Ltd; Uber Australia trading as UberEats* [2020] FWCFB 1698; *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579 and *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807. But *see* also *Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818 where a food delivery cyclist was found to be an employee. This decision is subject to an appeal.

[60] *See* Stewart A., *Redefining Employment? Meeting the challenge of contract and agency labour*, in *Australian Journal of Labour Law*, 15, 3, 2002, 235-276; Roles C., Stewart A., *The Reach of Labour Regulation: Tackling Sham Contracting*, in *Australian Journal of Labour Law*, 25, 3, 2012, 258-283.

employment, much in the way that the United Kingdom has adopted an extended definition of 'worker' in the Working Time Regulations 1998 and the National Minimum Wages Act 1998 to capture dependent workers who fall outside the common law definition of employment. This solution has been criticized as inviting hirers to opt for the less protected category wherever feasible, and to draft their engagement contracts accordingly.[61] A further proposal is to introduce labour regulation designed to escape the risk of hirers' contracting stratagems, so that all forms of labour engagement are subject to oversight by an appropriate tribunal empowered to ensure that certain fundamental protections are provided to workers, regardless of the form of the contract used to engage them. The kinds of basic protections that all workers require are a decent minimum rate of pay, insurance against the risk of workplace injury, and protection from capricious termination of their work contracts.[62] A form of regulation that specifically authorizes a tribunal to regard the economic reality of the labour exchange, rather than its contractual form, may go some way to addressing the rise in precarious forms of worker engagement.

6. Final remarks.

The consistent rejection by the Australian High Court of any scope for development in the common law of employment means that we must rely on Parliaments to pass statutes, if our laws are to take any steps to curtail employers' strategies to avoid protective labour laws. The High Court itself has observed that any development must come from the legislature, because such development is a matter of policy, inappropriate for judicial determination.[63] With respect, this view allows the judiciary to abrogate its constitutional role in developing the common law. One must assume that Parliament expected the courts to play a role in keeping the definition of 'employment' current with contemporary labour market practices when it decided to adopt the common law definition of employment as the basis for application of most of the protections in the Fair Work Act 2009 (Cth), as indeed was the practice in former industrial statutes in Australia, including the Workplace Relations Act 1996 (Cth) and the Industrial Relations Act 1988 (Cth). This is by no means an unreasonable expectation, given the steady evolution of the definition of employment over time with changes in industrial circumstances.[64] Lord Goff of Chieveley's view of 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' appears to have lost

[61] Stewart A., McCrystal S., *Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?*, in *Australian Journal of Labour Law*, 32, 1, 2019, 4-22.
[62] *See* Rawling M., Riley Munton J., *Constraining the Uber-Powerful Digital Platforms: A Proposal for a New Form of Regulation of On-Demand Road Transport Work*, in *The University of New South Wales Law Journal*, 45, 1, 2022, 7-34, for an elaboration of this proposal.
[63] *See Commonwealth Bank of Australia Ltd v Barker* (2014) 253 CLR 169, [38]-[41]; *Rossato* [2021] HCA 23, [62].
[64] *See* Merritt A., *The Historical Role of Law in the Regulation of Employment – Abstention or Interventionist?*, in *Australian Journal of Law and Society*, 1, 1, 1982, 56-86; Deakin S., Wilkinson F., *The Law of the Labour Market: Industrialisation, Employment and Legal Evolution*, Oxford University Press, Oxford, 2005, 306-307; Howe J., Mitchell R., *The Evolution of the Contract of Employment in Australia: A Discussion*, in *Australian Journal of Labour Law*, 12, 2, 1999, 113-130.

its currency in Australia.[65] So if the common law cannot evolve 'down under', as it has in the United Kingdom, we must seek legislative solutions to current labour market problems.

An emerging problem is the rise in platform-enabled on demand work. Notwithstanding the terms of contracts that define these workers as contractors without the protections of employment status, these workers also need the basic protections of minimum rates of pay, insurance against workplace injury, and protection from capricious dismissal. The facts of the *Personnel Contracting* case demonstrate how readily hirers will exploit workers with contractor status. We need a form of regulation that does not privilege the contractual forms chosen by hirers, but regards the underlying economic reality of the labour engagement, and affords workers fundamental rights accordingly.

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[65] *Kleinwort Benson Ltd v Lincoln CC* [1998] 2 AC 349, 377.

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