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

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

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## I Introduction

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

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

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

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

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

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

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

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

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

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

[6] Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[16] Ibid 885–6.

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

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

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

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

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

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

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

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

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

[24] Ibid.

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

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

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

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

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

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

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

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

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

[30] Ibid.

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

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

## II The Tension between Contractual Autonomy and Public Policy

### A *Contractual Autonomy: The Private Dimension*

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

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

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

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

[32] Worthington (n 17) 302–3.

[33] Ibid 301.

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

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

[36] Atiyah (n 34) 9.

[37] Ibid.

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

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

[40] Atiyah (n 34) 8.

[41] Elias (n 15) 885–6.

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

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

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

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

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

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

[43] Worthington (n 17) 303–5.

[44] Ibid 305.

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

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

[47] Ibid.

[48] See above n 39 and accompanying text.

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

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

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

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

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

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

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

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

[52] Worthington (n 17) 301.

[53] Ibid 301–2.

[54] Ibid 301.

[55] Ibid.

[56] Ibid 302.

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

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

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

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

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

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

[60] See above n 27.

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

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

[63] Ibid 195 [41].

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

### B *The Public Dimension of Characterisation*

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

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

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

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

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

[66] Elias (n 15) 885–6.

[67] Worthington (n 17) 303.

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

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

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

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

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

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

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

72 Ibid 236–7.

73 Ibid 236.

74 See above nn 4–6 and accompanying text.

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

76 Ibid 236–7.

77 See above nn 58–67 and accompanying text.

78 Atiyah (n 34) 14.

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

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

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

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

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

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

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

[83] Ibid 377–8 [139]–[140].

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

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

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

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

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

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

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

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

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

[88] Ibid 897–8 [72].

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

[90] Ibid.

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

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

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

## III Divergent Approaches in Australia: Judicial Deference and Judicial Intervention

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

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

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

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

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

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

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

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

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

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

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

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

[100] See below nn 105–10 and accompanying text.

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

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

[103] See above n 2.

[104] See above n 3.

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

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

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

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

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

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

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

[108] *Tattsbet* (n 2).

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

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

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

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

109 Ibid 62 [65]–[66] (Jessup J).

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

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

112 Ibid.

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

114 *Tattsbet* (n 2) 63–4 [70].

115 Ibid 63 [70].

116 [2016] FCA 296 [76].

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

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

## IV Justifying the Interventionist Judicial Approach to Characterisation

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

[117] Elias (n 15) 885–6.

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

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

[120] Ibid.

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

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

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

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

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

### A *The Protective Statutory Purpose Justification*

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

[122] See above nn 19–20.

[123] See above n 19.

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

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

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

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

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

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

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

[128] Ibid.

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

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

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

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

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

[134] Ibid.

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

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

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

[138] *UNISON* (n 87).

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

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

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

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

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

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

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

143 Ibid 520.

144 Ibid.

145 Ibid 523 (emphasis in original).

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

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

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

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

147 *UNISON* (n 87).

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

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

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

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

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

153 (1946) 72 CLR 435.

154 *Byrne* (n 58).

155 *Barker* (n 61).

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

157 Ibid 195 [41].

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

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

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

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

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

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

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

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

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

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

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

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

### B *The Contractual Intention Justification*

#### 1 *A Public Policy Justification*

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

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

[167] See also Pauline Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (2019) 42(2) *Melbourne University Law Review* 370, 397–404 ('Statutory Norms and Common Law Concepts').

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[181] Worthington (n 17) 305.

[182] Gummow (n 26) 233.

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

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

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

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

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

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

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

184 *Raftland* (n 19).

185 Ibid 563 [152].

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

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

188 *Snook* (n 19).

189 Ibid 802.

190 Ibid.

191 *Autoclenz* (n 11) 753–4 [23].

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

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

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

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

[192] *Vaughan* (n 19).

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

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

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

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

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

[198] *Cam & Sons* (n 19).

[199] Ibid 163.

[200] Ibid 162.

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

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

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

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

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

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

203 Ibid 532 [36].

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

205 Gummow (n 26) 233.

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

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

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

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

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

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

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

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

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

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

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

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

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

[215] Ibid 333–5.

[216] Ibid 332–3.

[217] See above nn 147–66 and accompanying text.

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

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

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

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

## V Conclusion

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

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

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

222 See above n 31 and accompanying text.

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

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

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

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

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

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