JUDGING THE EMPLOYMENT STATUS OF WORKERS: AN ANALYSIS OF COMMONSENSE REASONING

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When judges make decisions about the employment status of workers, they are often required to draw on commonsense reasoning to resolve contested issues. These findings are typically drawn from the judges' general knowledge or intuition and may be presented as 'obvious' or 'well-known' commercial or social realities. Given the consequences that flow from categorising a worker as an employee, it is important that these assumptions represent an understanding of workplace relationships that is both contemporary and socially inclusive. Drawing on Australian court decisions, this article identifies three examples of commonsense assumptions and argues that these should be subjected to a process of critical reflection that takes into account changing sociocultural contexts and the experience and expectations of the wider community.

CONTENTS

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I Introduction: 'Common Sense' and Judicial Assumptions

The 'common sense' of judges has typically played a crucial role in developing common law principles. 'Common sense' draws upon judges' knowledge of everyday life in the community in which the courts operate to ensure that the common law reflects shared community values.[1] This is illustrated in Australian judicial decisions that determine employment status by categorising a worker as either: an employee, who is entitled to a safety net of statutory protections; or an independent contractor, who is running a business on their own account and cannot access these protections.[2] In these decisions, judges often rely on intuition to apply a multi-factorial test to a wide range of contexts.[3] When determining that particular facts point towards a classification of one status or another, and by placing particular weight on one factor over another, judges draw heavily on values and assumptions that are drawn from their own experience as proxies for values and assumptions in the wider community. Assumptions drawn from judges' own experience are typically presented as 'common sense' and signalled by reference to common knowledge, well-known phenomena and notorious understandings.[4] However, rapid changes in business models, and the selection of judges from a narrow socio-economic pool, make it difficult for judges to maintain an up-to-date understanding of the everyday reality of workplaces. As a consequence, the 'common sense' of judges may fall out of step with the 'common sense' of the broader community. Where this

[1] See below Part II(A).

[2] Some judges have insisted that the question should be confined to whether or not a worker is an employee and that it is not necessary to address whether the worker falls into the alternative category of independent contractor or entrepreneur: see, eg, *Tattsbet Ltd v Morrow* (2015) 233 FCR 46, 61 [61] (Jessup J, Allsop CJ agreeing at 49 [3]) ('*Tattsbet*'); *Eastern Van Services Pty Ltd v Victorian WorkCover Authority* (2020) 296 IR 391, 399–400 [35], 411–12 [92] (Tate, Kyrou and Niall JJA) ('*Eastern Van Services (Court of Appeal)*'). However, the High Court has recently affirmed the usefulness of the 'own business–employer's business' dichotomy in determining worker status: *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 398 ALR 404, 414–15 [39] (Kiefel CJ, Keane and Edelman JJ) ('*Personnel Contracting (High Court)*'). See below nn 68–75 and accompanying text.

[3] See, eg, *On Call Interpreters & Translators Agency Pty Ltd v Federal Commissioner of Taxation [No 3]* (2011) 214 FCR 82, 121–2 [204] (Bromberg J) ('*On Call Interpreters*').

[4] See below Part III(C).

results in judicial reliance on commonsense knowledge that is discriminatory and partial, the legitimacy of legal judgment may be called into question.[5]

Court decisions about the status of workers (as either employees or independent contractors) provide a useful context in which to explore the capacity of the common law to evolve to accommodate the realities of contemporary life.[6] These cases tap into the contest of ideas over the economic and social effects of modern work arrangements. For example, the rise of the gig economy as a consequence of rapid advances in technology produces conflicting narratives about the capacity of the model to either exploit workers or to provide new and desirable options for flexible work.[7] To resolve disputes about worker status, it is important that courts explicitly engage with these and other underpinning assumptions about the nature of work. Scholarly analysis of judicial decisions about the status of workers suggests that courts are not meeting this challenge. The decisions have been criticised for incoherence in both judicial reasoning and outcomes.[8] Lizzie Barmes argues that problems of inconsistency and even illogicality reflect the difficulty that courts face in 'fitting the law to the reality of working lives'.[9]

[5] Patricia Cochran, *Common Sense and Legal Judgment: Community Knowledge, Political Power, and Rhetorical Practice* (McGill-Queen's University Press, 2017) 33.

[6] In addition to the Australian courts, the Fair Work Commission makes decisions about the status of workers for the purpose of determining whether they are entitled to the protections provided to employees: see *Fair Work Act 2009* (Cth) s 576 ('*Fair Work Act*'). It is worth noting that judges and tribunal members occupy very different roles in determining worker status. In *Kaseris v Rasier Pacific VOF* (2017) 272 IR 289 ('*Kaseris*'), Fair Work Commission Deputy President Gostencnik suggested that the tests for determining worker status were 'outmoded' and needed to 'evolve to catch pace with the evolving nature of the digital economy': see at 310 [66]. However, the Fair Work Commission does not have the authority to bring about this evolution: see *Fair Work Act* (n 6) s 576. Members of the tribunal are required to apply the common law tests in their existing form until such time as they are modified by the courts or the legislature: see, eg, *Kaseris* (n 6) 302 [46] (Deputy President Gostencnik). This article is confined to an examination of the decision-making role of judges rather than tribunal members.

[7] Igor Dosen and Michael Graham, 'Labour Rights in the Gig Economy: An Explainer' (Research Note No 7, Parliamentary Library & Information Service, Parliament of Victoria, June 2018) 1–2.

[8] See, eg, Andrew Stewart and Shae McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (2019) 32(1) *Australian Journal of Labour Law* 4, 8, 22 ('Labour Regulation and the Great Divide'); Adrian Brooks, 'Myth and Muddle: An Examination of Contracts for the Performance of Work' (1988) 11(2) *University of New South Wales Law Journal* 48, 59; Lizzie Barmes, 'Common Law Confusion and Empirical Research in Labour Law' in Alan Bogg et al (eds), *The Autonomy of Labour Law* (Hart Publishing, 2015) 107, 107–8 ('Common Law Confusion'); Patricia Leighton and Michael Wynn, 'Classifying Employment Relationships: More Sliding Doors or a Better Regulatory Framework?' (2011) 40(1) *Industrial Law Journal* 5, 5–6, 23, 31.

[9] Barmes, 'Common Law Confusion' (n 8) 111.

This article is concerned with commonsense assumptions for two reasons: first, because those assumptions may be hidden in judicial reasoning, reducing transparency; and second, because the content of those assumptions is often shaped by the feudal roots of the contract of employment and the (often narrow) sociocultural experiences of judges, reinforcing rather than combating the imbalance of power between capital and labour. As a consequence, commonsense reasoning may fall out of step with community expectations about justice in labour law.

This article aims to identify and, where appropriate, challenge the assumptions that underpin judicial reasoning. It will pay particular attention to the language used by judges and highlight instances where this language perpetuates notions that appear obvious and inevitable, but are in fact outmoded, inaccurate or misaligned with the values of the wider community. When judges draw on commonsense reasoning (explicitly or implicitly), there is a risk that their assumptions will reinforce a conservatism that overlooks the lived experience of workers. Ultimately, the ideal is to subject commonsense assumptions to a process of critical reflection by judges, and to broaden the range of perspectives that are reflected in legal judgments to ensure the continued relevance of labour law to all participants in the labour market.

This article is divided into five parts, commencing with this introduction (Part I). Part II examines the nature of commonsense reasoning by exploring the relationship between 'common sense' and the common law, and by considering the potential for commonsense reasoning to either undermine or enhance good judgment. Part III provides the context for the analysis of cases about the status of workers: first, by explaining the legal criteria for categorising workers as either employees or independent contractors; second, by justifying the analytical focus of the paper on judicial language and reasoning, rather than on doctrinal coherence and outcomes; and finally, by identifying the ways in which examples of commonsense reasoning can be identified.

Part IV examines selected decisions of Australian courts that deal with the characterisation of workers as either employees or independent contractors. This analysis highlights three examples of assumptions that influence decisions in this context: first, that free enterprise and market-based solutions produce optimal outcomes for society as a whole; second, that a worker's investment in capital indicates a desire to be an entrepreneur; and third, that the demands of modern business arrangements necessitate the exercise of high levels of control over independent contractors (without transforming their status into one of employment). The final section of this article (Part V) concludes by highlighting reflective practices of judging. These practices prompt judges to question whether their assumptions are drawn from historical and cultural contexts that

may be outdated or exclusionary, and to consider whether matters that are taken to be 'common sense' are, in reality, commonly held and aligned with the views of the wider community.

II Commonsense Reasoning

A *'Common Sense' and the Common Law*

One of the perceived strengths of the common law is its capacity to adapt to a changing social context. As articulated by McHugh J of the High Court:

> The genius of the common law is that the first statement of a common law rule or principle is not its final statement. Rules and principles are modified and expanded by the pressure of changing social conditions and the experience of their practical application in the life of the community.[10]

Renowned United States evidence scholar Ronald Allen goes further, arguing that the law is, and must be, 'the embodiment of common sense'.[11] Given its interaction with 'virtually all of life', if the law 'were not generated largely from and consistent with the conventional interactions of individuals, it would not survive'.[12] This expectation that the law will be generated and maintained to reflect evolving social conditions suggests that judges must actively monitor those conditions in order to meet the demands of justice in common law cases. In addition, there may be cases where conventional interactions within the community are exclusionary and outdated.[13] In such cases, one legitimate role of the judiciary might be to mete out justice that challenges the conventional, dominant view.[14]

The demands of justice may also require judges to consider whether the application of 'common sense' reinforces existing power structures or challenges those structures.[15] This will depend on whether judges are alert to the possibility that their knowledge will, at times, reflect their place within the dominant

[10] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 585.

[11] Ronald J Allen, 'Common Sense, Rationality, and the Legal Process' (2001) 22(5–6) *Cardozo Law Review* 1417, 1426.

[12] Ibid.

[13] See Tanya Josev, *The Campaign against the Courts: A History of the Judicial Activism Debate* (Federation Press, 2017) 121–4.

[14] In Australia, judges who have challenged the status quo have been accused of 'judicial activism', a term which has typically been used in a derogatory sense to criticise judges for policy-based decision-making: ibid 3–4.

[15] Kylie Burns, 'Judges, "Common Sense" and Judicial Cognition' (2016) 25(3) *Griffith Law Review* 319, 329–30.

classes, and whether they are willing to proceed in a way that 'imaginatively references' the broader, everyday experiences of workers.[16] The factual accounts of workers' experiences are often presented to judges in considerable detail.[17] To maintain the connection between law and the community, it is important that workers' accounts are reproduced in judgments in ways that reflect, rather than dismiss, those experiences. But this is unlikely to happen where the lived experience of workers, particularly those in a weak labour market position, are overlooked in judicial accounts — either because they do not readily align with judges' experience of the world, or because they do not easily fit within the established legal tests.[18]

Those who support formal legalist approaches to judging may object that the role of judges is not to supplant the legislative function by changing the legal tests (to accommodate workers' needs), but to implement the existing law.[19] According to American jurist, Richard Posner, such approaches are 'premised on a belief that all legal issues can be resolved by logic, text, or precedent, without a judge's personality, values, ideological leanings, background and culture, or real-world experience playing any role'.[20] However, it is widely recognised that judicial decision-making in a common law system may legitimately involve creativity and choice.[21] More than 80 years ago, Harlan Stone of the Supreme Court of the United States suggested that the task of the common law system was to provide 'suitable protection and control of the varying interests which a dynamic society creates'.[22] In performing this task, a judge has 'liberty of choice of the rule which [they] appl[y]' — a choice that will depend on 'the relative weights of the social and economic advantages which will finally turn the scales

[16] Cochran (n 5) 12.

[17] See, eg, *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934, [13]–[120] (Thawley J) ('*Whitby*').

[18] See, eg, Barmes's criticism of the 'abstracted, convoluted' accounts of the lived experience of workers in judicial decisions about worker status: Lizzie Barmes, 'Learning from Case Law Accounts of Marginalised Working' in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012) 303, 305 ('Learning from Case Law Accounts').

[19] See, eg, LJM Cooray, 'The High Court in Mabo: Legalist or L'Égotiste' (1993) 65(4) *Australian Quarterly* 82, 88–9.

[20] Richard A Posner, *Reflections on Judging* (Harvard University Press, 2013) 1.

[21] 'What Is Judicial Activism Anyway?', *The Law Report* (ABC Radio National, 11 March 1997) <https://wbachive.nla.gov.au/awa/19990204010931/http://www.abc.net.au/rn/talks/8.30/lawrpt/lstories/lr970311.htm>, archived at <https://perma.cc/9S3K-6S3A>, quoted in Josev (n 13) 161.

[22] Harlan F Stone, 'The Common Law in the United States' (1936) 50(1) *Harvard Law Review* 4, 5.

of judgment in favour of one rule rather than another'.[23] Here, we find acknowledgement of the vital role that the judiciary can play in balancing competing interests within society. It is well-established that, in categorising workers as employees or independent contractors, judges in common law countries are required to perform a substantial policymaking function because of the rapidly evolving contexts in which these decisions are made, and the lack of legislative guidance about this distinction.[24] In cases about worker status, judges are typically required to assess detailed facts and balance the interests of capital and labour.[25] In so doing, judges frequently rely on 'common sense' to connect legal reasoning to the values of the community.[26]

In the context of a landmark case about worker status in the High Court, *Stevens v Brodribb Sawmilling Co Pty Ltd*, Mason J articulated the view that the common law is 'sufficiently flexible to adapt to changing social conditions'.[27] This view has more recently been endorsed in a different context by Kirby J of the High Court, who confirmed that the 'common law does not exist in a vacuum. It is expressed by judges to respond to their perceptions of the requirement of justice, fairness and reasonableness in their society'.[28] However, the principles developed by the common law to address these requirements are necessarily vague to allow adaptation to the particular facts of the case, requiring judges to draw heavily on intuitive assumptions to apply those principles. These assumptions are derived from a number of sources, including the

[23] Ibid 20.

[24] Gordon Anderson, Douglas Brodie and Joellen Riley, *The Common Law Employment Relationship: A Comparative Study* (Edward Elgar, 2017) 24–5.

[25] This is a familiar role for judges in labour law cases. See, eg, discussion of the balancing exercise performed by judges when deciding a dispute over reasonable hours of work under s 226 of the *Workplace Relations Act 1996* (Cth): Carolyn Sutherland, 'Interdisciplinarity in Judicial Decision-Making: Exploring the Role of Social Science in Australian Labour Law Cases' (2018) 42(1) *Melbourne University Law Review* 232, 233 n 2, 265–6 ('Interdisciplinarity'), discussing *MacPherson v Coal & Allied Mining Services Pty Ltd [No 2]* (2009) 189 IR 50.

[26] See Burns, 'Judges, "Common Sense" and Judicial Cognition' (n 15) 319.

[27] (1986) 160 CLR 16, 29 (Mason J) ('*Stevens*').

[28] *Cattanach v Melchior* (2003) 215 CLR 1, 43 [106] (Kirby J). For a further discussion of the role of judges in facilitating the organic development of the common law, see also Gabrielle Golding, 'The Role of Judges in the Regulation of Australian Employment Contracts' (2016) 32(1) *International Journal of Comparative Labour Law and Industrial Relations* 69, 80–2.

experiences of each judge in their private life,[29] and common law values that are drawn from counsels' submissions and from judicial immersion in precedent.[30]

Reliance on judicial experience can be problematic because judges are often drawn from a demographically narrow group that is not representative of the broader community. As an illustration of the limits of judicial experience, Barmes highlights Baroness Hale's declaration in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* that her Ladyship was 'the only member of this court to have spent a substantial proportion of her working life as an employee rather than as a self-employed barrister or tenured office holder'.[31] Common law values in employment cases tend to reflect the historical influence of master and servant legislation on the contract of employment, giving precedence to the owner of capital to manage labour in a way that suits their own objectives.[32] Both sources of judicial assumptions (personal experience and the values that are embedded in common law precedents) tend to constrain the rapid evolution of the common law and its capacity to support the progressive aims of labour law legislation, particularly the need to address structural inequality between capital and labour.

B *Commonsense Reasoning and Its Consequences*

Commonsense reasoning has the potential to either undermine or enhance good judgment. Writing about judicial decision-making in poverty law cases in Canada, Patricia Cochran warns against the tendency for commonsense reasoning to 'harbour stereotypes, reproduce unjust power relations, and silence marginalized people'.[33] In employment law cases, judicial reliance on stereotypes can limit expectations about what an employee or an independent contractor in a modern workplace might look like. Judges sometimes rely on stereotypes based on their own limited knowledge to make findings about matters

[29] While judges may claim to be neutral, they will inevitably be influenced by their own experience: see Heather Douglas et al, 'Reflections on Rewriting the Law' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 19, 24–5.

[30] For a discussion of common law values, see, eg, James B Atleson, *Values and Assumptions in American Labor Law* (University of Massachusetts Press, 1983) 2, 7–9 ('*Values and Assumptions*').

[31] [2012] 2 AC 22, 58 [110] (Baroness Hale JSC) ('*Edwards*'), quoted in Barmes, 'Common Law Confusion' (n 8) 118 n 34.

[32] Anderson, Brodie and Riley (n 24) 18–19.

[33] Cochran (n 5) 5.

which are capable of verification via social science evidence.[34] This creates problems of accuracy where judicial findings may be contradicted by the latest empirical studies.[35] Judges may also cling to the status quo because of a lack of understanding of potential alternatives. When stereotypical thinking is presented in judicial reasoning as an aspect of 'common sense', the implication is that this knowledge is 'self-evident',[36] leading to reasoning and outcomes that may baffle workers who experience working life differently.

For example, in cases about worker status, judges may defer to the choices made by workers to become self-employed and may emphasise the opportunities available for the worker to make a profit.[37] It may seem self-evident to judges that the parties should be held to their choices, particularly given the importance of freedom of contract as a common law principle.[38] In contrast, a reflective approach would require an investigation into the worker's economic dependence on a single business for work and a recognition of the significant limitations that govern their choices as a practical reality.

There is also a danger that the use of commonsense reasoning may prioritise the views of those whose socio-economic status is similar to that of most judges, and overlook the perspectives of workers from a lower socio-economic class.[39] In her in-depth qualitative analysis of a United Kingdom ('UK') decision dealing with worker status,[40] Barmes illustrates the 'muting, distracting effect' of the legal process in which an employer's harsh treatment of Polish migrant workers was dispassionately recounted by judges whose reasoning was narrowly focused on the legal distinction between employees and independent contractors rather than the significance of the workers' stories.[41]

Margaret Davies has highlighted that the UK Feminist Judgments Project was similarly concerned with the need to introduce into judicial reasoning a

[34] See Kylie Burns, 'The Australian High Court and Social Facts: A Content Analysis Study' (2012) 40(3) *Federal Law Review* 317, 317–19 ('The Australian High Court and Social Facts').

[35] See ibid 336–8; Sutherland, 'Interdisciplinarity' (n 25) 250.

[36] Cochran (n 5) 15.

[37] See, eg, *Eastern Van Services (Court of Appeal)* (n 2) 423 [171], 424 [173]–[174] (Tate, Kyrou and Niall JJA). See also *TNT Wordwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681, 697, 698 (Casey J) ('*TNT Worldwide Express*').

[38] See below Part IV(A).

[39] Barmes, 'Common Law Confusion' (n 8) 118.

[40] For an analysis of the Court of Appeal decision in *Consistent Group Ltd v Kalwak* [2008] EWCA Civ 430 and the decisions of the Employment Tribunal and Employment Appeals Tribunal below, see generally Barmes, 'Learning from Case Law Accounts' (n 18).

[41] Barmes, 'Learning from Case Law Accounts' (n 18) 318.

'thick description' of human relationships,[42] and to recognise the influence of various forms of social power on these relationships.[43] Both Barmes and Davies acknowledge that judges are constrained by the requirements of the relevant legal framework and the litigation process, but Davies nevertheless envisions the potential for judges to push against these constraints by consciously incorporating marginalised perspectives into their decisions.[44]

Despite the potential pitfalls of commonsense reasoning, this article does not argue for its elimination in judicial decisions. There are many circumstances in which judicial reliance on 'common sense' is both necessary and beneficial. Efficiency in the litigation process is perhaps the most obvious benefit that flows from the adoption of commonsense reasoning.[45] The doctrine of judicial notice recognises this benefit by allowing judges to draw upon common knowledge that is indisputable and capable of verification without formally proving that knowledge.[46]

It is also worth recognising that judicial reliance on commonsense assumptions is, to some extent, unavoidable.[47] Rather than rejecting those assumptions, the intuitive aspect of commonsense reasoning can be harnessed to enhance judgment. For example, 'common sense' makes an important contribution to decision-making when it is used by a judge as a check against absurd reasoning or outcomes. In cases about the status of workers, this typically occurs where the application of the legal tests points towards a particular characterisation of the status of the worker, but the judge applies an additional lens (sometimes described as a 'smell test')[48] to challenge that characterisation.[49]

It is nevertheless important to ensure that intuitive reasoning is checked by careful deliberation and to guard against the incorporation of out-of-date or

[42] Margaret Davies, 'The Law Becomes Us: Rediscovering Judgment' (2012) 20(2) *Feminist Legal Studies* 167, 176, 178 ('The Law Becomes Us'), drawing on Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books, 1973). 'Thick description' is an approach used by anthropologists to provide the social and cultural context of data collected during fieldwork: at 9–10.

[43] Davies, 'The Law Becomes Us' (n 42) 176.

[44] Ibid 176–8. See also Barmes, 'Common Law Confusion' (n 8) 118; Barmes, 'Learning from Case Law Accounts' (n 18) 318, 320.

[45] Burns, 'The Australian High Court and Social Facts' (n 34) 335.

[46] Australian Law Reform Commission, *Uniform Evidence Law* (Report No 102, December 2005) 583–4 [17.1]–[17.6], 585–8 [17.9]–[17.25]. See, eg, *Evidence Act 2008* (Vic) s 144.

[47] Michael J Saks, 'Judicial Attention to the Way the World Works' (1990) 75(4) *Iowa Law Review* 1011, 1014–15. See also Chris Guthrie, Jeffrey J Rachlinski and Andrew J Wistrich, 'Blinking on the Bench: How Judges Decide Cases' (2007) 93(1) *Cornell Law Review* 1, 5.

[48] *On Call Interpreters* (n 3) 121–2 [204] (Bromberg J).

[49] See, eg, *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 42 [48] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) ('*Hollis*').

'elite' assumptions that may form part of an intuitive judicial response. American cultural anthropologist, Clifford Geertz, points out that 'common sense remains more an assumed phenomenon than an analyzed one'.[50] Drawing on an anthropological perspective, Geertz suggests that

> [i]f we look at the views of people who draw conclusions different from our own by the mere living of their lives … we will rather quickly become aware that common sense is both a more problematical and a more profound affair than it seems …[51]

This article will identify examples of commonsense assumptions that should be challenged because of their capacity to reinforce unequal power structures between hirers and workers and thereby undermine the purposes of labour law. It will also identify examples where 'common sense' is turned into 'good sense' through a process of reflection that broadens the field of enquiry to include an examination of how the social context and power dynamics have contributed to the matrix of facts that are presented to the judge.[52]

III Background to the Analysis of Cases about Employment Status

A *The Legal Criteria for Categorisation of Workers*

This article focuses on judicial decisions that determine the employment status of individual workers. This is a crucial issue for both employers and workers, because characterisation of the relationship as one of employment provides a gateway to beneficial employment legislation which is designed to address the imbalance of bargaining power between capital and labour.[53] These labour law protections include minimum wages, leave entitlements, superannuation, and protection from unfair dismissal.[54] Despite the significance of this context, when deciding these cases, Australian courts do not typically take into account the purpose of the statutory provisions that the worker seeks to access.[55] This

[50] Clifford Geertz, 'Common Sense as a Cultural System' (1975) 33(1) *Antioch Review* 5, 9.

[51] Ibid 9–10.

[52] The term 'good sense' is adopted by Patricia Cochran as a useful aspect of commonsense reasoning, drawing on the work of the Marxist theorist Antonio Gramsci: Cochran (n 5) 11, 40.

[53] For example, the minimum employment conditions in the *Fair Work Act* (n 6) are only provided to 'employees': ss 60–1.

[54] See generally *Fair Work Act* (n 6).

[55] The High Court has confirmed that the term 'employee' in the *Fair Work Act* (n 6) has its ordinary common law meaning: *Personnel Contracting (High Court)* (n 2) 428 [93] (Gageler and

results in cases where the courts view workers as commercial entities that should be firmly held to their contractual commitments unless there is evidence of sham contracting.[56] In contrast, a purposive approach to the facts would recognise that the workers are often in reality the weaker bargaining party, with little agency in creating their contractual arrangements, and in need of the very protections that are the subject of the dispute.[57]

In deciding whether workers are 'employees', the courts apply a multi-factorial approach.[58] This approach allows courts to 'paint a picture from the accumulation of detail'.[59] In theory, the relevant factors that determine worker status remain open, so that new factors may be added as business models and workplace contexts evolve.[60] In practice, there are three central tests that originated in the 19th century and, while there have been changes in emphasis over time,[61] the content of these tests has remained remarkably stable.

In no particular order, the three central tests are: first, does the business retain the right to exercise control over the manner in which the work is performed (the 'control' test);[62] second, is the worker part and parcel of the organisation for which they provide work (the 'integration' test);[63] and third, is the

Gleeson JJ), 445 [161] (Gordon J). This meaning is not altered by the statutory context: at 428–9 [93]–[97] (Gageler and Gleeson JJ); *ZG Operations Australia Pty Ltd v Jamsek* (2022) 398 ALR 603, 605 [4] (Kiefel CJ, Keane and Edelman JJ) ('*Jamsek (High Court)*'). 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, 384.

56 See *Personnel Contracting (High Court)* (n 2) 415–16 [43], 420 [59] (Kiefel CJ, Keane and Edelman JJ).

57 See also below nn 129–32 and accompanying text. In contrast, the UK Supreme Court has adopted an approach that recognises the significance of any disparity of bargaining power between a hirer and a worker when determining the 'true agreement' between them: *Autoclenz Ltd v Belcher* [2011] 4 All ER 745, 757 [34]–[35] (Lord Clarke JSC, Lord Hope DPSC and Lords Walker, Collins and Wilson JJSC agreeing) ('*Autoclenz*').

58 See, eg, *Stevens* (n 27) 24, 29 (Mason J), 36–7 (Wilson and Dawson JJ).

59 *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939, 944 (Mummery J), quoted in *On Call Interpreters* (n 3) 122 [205] (Bromberg J).

60 *Stevens* (n 27) 29 (Mason J); *ACE Insurance Pty Ltd v Trifunovski* (2013) 209 FCR 146, 153 [38] (Buchanan J) ('*ACE Insurance*').

61 *ACE Insurance* (n 60) 153–73 [38]–[104] (Buchanan J).

62 *Stevens* (n 27) 24 (Mason J), 36 (Wilson and Dawson JJ); *Hollis* (n 49) 41 [45] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Narich Pty Ltd v Commissioner of Pay-Roll Tax* [1983] 2 NSWLR 597, 601 (Lord Brandon for the Court) (Privy Council) ('*Narich*').

63 *Stevenson Jordan & Harrison Ltd v MacDonald & Evans* [1952] 1 TLR 101, 111 (Denning LJ). But see *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114, 166 [247] (Anderson J) ('*Jamsek (Full Federal Court)*').

worker serving their employer or operating on their own account (the 'fundamental' or 'economic reality' test).[64]

The multi-factorial test has been criticised for lacking a settled set of organising conceptions that explain which factors should be given the most weight.[65] As a consequence, the application of these tests 'usually comes down to a very subjective matter of individual impression'.[66] This has meant that particular tests have assumed greater or lesser importance depending on the context and the intuitive response of the judge.[67] The High Court has recently attempted to clarify the correct approach in two decisions handed down in February 2022: *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* ('*Personnel Contracting (High Court)*')[68] and *ZG Operations Australia Pty Ltd v Jamsek* ('*Jamsek (High Court)*').[69]

In *Personnel Contracting (High Court)*, to address the concern that the multi-factorial test involves either 'impressionistic and subjective judgment' or 'the mechanistic counting of ticks',[70] the plurality judgment suggested that the 'own business–employer's business' dichotomy should shape the inquiry.[71] This approach considers the aspects of the contract 'which bear more directly upon whether the putative employee's work was so subordinate to the employer's business that it can be seen to have been performed as an employee of that business rather than as part of an independent enterprise'.[72] This provides a useful lens, but it is difficult to see how it will avoid impressionistic judgments, given the extent to which ideas about the 'own business–employer's business' dichotomy have been contested in the cases to date.[73]

[64] *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173, 184–5 (Cooke J) ('*Market Investigations*'); *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721, 735–6 [32]–[33] (Blanchard J for the Court); *Hollis* (n 49) 39 [40] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

[65] See, eg, the recent judicial debates about the significance of the factor of entrepreneurship in determining employment status: Pauline Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (2021) 43(1) *Sydney Law Review* 83, 89–93.

[66] *Commissioner of Pay-Roll Tax v Mary Kay Cosmetics Pty Ltd* [1982] VR 871, 878 (Gray J), quoted in *ACE Insurance* (n 60) 163 [76] (Buchanan J).

[67] See, eg, *Stevens* (n 27) 37 (Wilson and Dawson JJ):

> The ultimate question will always be whether a person is acting as the servant of another or on [their] own behalf and the answer to that question may be indicated in ways which are not always the same and which do not always have the same significance.

[68] *Personnel Contracting (High Court)* (n 2).

[69] *Jamsek (High Court)* (n 55).

[70] *Personnel Contracting (High Court)* (n 2) 415 [39] (Kiefel CJ, Keane and Edelman JJ).

[71] Ibid 414–15 [36]–[39].

[72] Ibid 415 [39].

[73] See also the cases discussed below in Part IV.

Significantly, the plurality judgments in both *Personnel Contracting (High Court)* and *Jamsek (High Court)* adopted a contract-centric approach that focused on the legal rights and obligations of the parties that are found in the terms of the contract.[74] This represents a substantial shift because of the explicit rejection of any emphasis on the practical reality of the contractual arrangements or on the disparity of bargaining power between the parties.[75] Where the written contract is comprehensive, as it was in each of these cases involving large, well-resourced companies, it will only be necessary to look beyond the contract where the contractual terms are legally ineffective or where there has been a variation by conduct during the course of the engagement.[76] However, a substantial proportion of workers are engaged by small- and medium-sized enterprises and their contracts may well contain gaps and ambiguities that can only be resolved by examining the parties' conduct. It is also the case that contracts for the supply of labour typically evolve over time.[77] The conduct of the parties will remain relevant in these cases in determining any contractual variations.

B *Analytical Approach*

The approach taken in this article is to illustrate reflective and inclusive practices of judging and to contrast these with practices that marginalise and exclude. Accordingly, the focus is as much on judicial reasoning as on outcomes.[78] A judgment that reaches the same outcomes as the majority, while adopting alternative reasoning, has the potential to introduce into the legal discourse

[74] *Personnel Contracting (High Court)* (n 2) 420–1 [59] (Kiefel CJ, Keane and Edelman JJ), 448 [174] (Gordon J); *Jamsek (High Court)* (n 55) 605–6 [6]–[8] (Kiefel CJ, Keane and Edelman JJ).

[75] *Personnel Contracting (High Court)* (n 2) 416 [44]–[46], 421 [62], 427 [88] (Kiefel CJ, Keane and Edelman JJ); *Jamsek (High Court)* (n 55) 605–6 [6]–[8], 613–14 [45]–[48], 617 [62] (Kiefel CJ, Keane and Edelman JJ).

[76] *Jamsek (High Court)* (n 55) 605–6 [8] (Kiefel CJ, Keane and Edelman JJ), discussing *Personnel Contracting (High Court)* (n 2) 415–16 [42]–[46], 420 [59] (Kiefel CJ, Keane and Edelman JJ). Justices Gageler and Gleeson formed part of the majority in deciding the outcome in *Personnel Contracting (High Court)* (n 2), but on the basis of alternative reasoning which examined the nature of the relationship between the parties and drawing on evidence outside of the contract: at 429–30 [103], 437–8 [132].

[77] See Victorian Government, *Report of the Inquiry into the Victorian On-Demand Workforce* (Report, 12 June 2020) 104 [724].

[78] The approach follows in the vein of the Feminist Judgments Project where some of the feminist judgments changed the reasoning but not the outcome of the cases under review: Davies, 'The Law Becomes Us' (n 42) 169.

experiences that would otherwise be marginalised.[79] Similarly, a judgment that questions but (of necessity) follows the approach taken in binding precedents opens up space for a new approach to be considered in higher courts.[80] The reasoning in a dissenting judgment may also be important if it introduces ideas that are taken up in subsequent cases.[81]

In this way, the approach of this article is consistent with, but diverges from, traditional doctrinal analysis which is concerned with coherence in judicial reasoning and outcomes. Instead, a form of discourse analysis is employed which involves examination of the language of the judgment to draw out underpinning assumptions and to highlight the varieties of worker experience that may be excluded by these assumptions.[82] The article draws its inspiration from the Feminist Judgments Project, which analyses the roles of gender and power in judicial reasoning, highlighting the ways in which judicial reasoning fails to engage with the reality of women's lives.[83] This approach respects the need for doctrinal coherence, but reflects on the exercise of power in judicial decision-making and examines the extent to which the experiences of workers in a weak labour market position are taken into account in legal judgments. In cases that determine whether workers should have access to basic labour law protections, it is important that judicial rhetoric does not reinforce stereotypes or silence those who are most marginalised in the labour market.

This is not a systematic study of cases dealing with the status of workers, or of cases dealing with commonsense reasoning. Instead, from a review of cases about employment status in the Australian courts, individual cases have been selected to illuminate some of the underpinning assumptions that appear to be influencing judicial findings about the status of workers.[84] The purpose is not to criticise the approach taken by individual judges but to reveal trends in judicial reliance on commonsense reasoning and to identify examples of reflective judicial practices.

[79] Rosemary Hunter, 'The Power of Feminist Judgments?' (2012) 20(2) *Feminist Legal Studies* 135, 140.

[80] See, eg, *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting* (2020) 279 FCR 631, 666 [117] (Lee J) ('*Personnel Contracting (Full Federal Court)*'). See below nn 132–53 and accompanying text.

[81] Hunter, 'The Power of Feminist Judgments?' (n 79) 140.

[82] See Rosemary Hunter, 'Analysing Judgments from a Feminist Perspective' (2015) 15(1) *Legal Information Management* 8, 8; Davies, 'The Law Becomes Us' (n 42) 168.

[83] Davies, 'The Law Becomes Us' (n 42) 168. Unlike the Feminist Judgments Project, this article does not take the next step of academic activism, which goes beyond critiquing the law to performing the role of a judge by rewriting decisions.

[84] See below Part IV.

Because many of the selected cases have been heard on appeal by higher courts, the relevant judges have not received direct evidence from the workers themselves. This means that it is rare for the voices of those workers to be incorporated into judicial reasoning. As a consequence, the complexity of workers' experience tends to be lost in the narrow arguments that are presented on appeal. Nevertheless, the analysis of these decisions of higher courts is important because of the influence of these decisions on the evolution of common law principles.

C *Identifying Commonsense Reasoning*

Some of the cases that are cited in this article explicitly refer to 'common sense' as a signal that the judge is drawing on knowledge that is assumed to be shared by the broader community.[85] In other cases, the values and assumptions held by judges are found in between the lines. Previous studies have identified the types of phrases that are typically used in judicial decisions to introduce commonsense reasoning. In an attempt to make sense of labour law cases in the United States ('US'), James Atleson looked for sentences that began, '[o]f course, blah, blah, blah'.[86] He found that these sentences told the reader 'where the court was going' and revealed 'the pictures [the judges] had about work'.[87] Kylie Burns, in her systematic study of negligence cases in the High Court of Australia, found that commonsense reasoning was often used to make findings which supported judicial development of the law.[88] This commonsense reasoning was signalled by phrases which included the following: '[i]t is notorious that'; '[e]xperience tells'; '[b]ut few would contend that'; '[t]hey are a well-known and natural phenomenon'; 'as is common knowledge'; and '[i]n the ordinary course'.[89] In contrast, Cochran's analysis of 'common sense' in Canadian legal judgments confines itself to judgments in which the exact phrase 'common sense' appears in order to examine how the use of this language invokes different meanings in different contexts.[90] Drawing on these

[85] See, eg, *Personnel Contracting (Full Federal Court)* (n 80) 641 [28] (Allsop CJ).

[86] Interview with James Atleson (Fred Konefsky, University at Buffalo School of Law, University at Buffalo, 22 October 2007) ('Interview with James Atleson'), quoted in Dianne Avery and Alfred S Konefsky, 'James B Atleson and the World of Labor Law Scholarship' (2009) 57(3) *Buffalo Law Review* 629, 630. See also Atleson, *Values and Assumptions* (n 30) 10, 24.

[87] Interview with James Atleson (n 86), quoted in Avery and Konefsky (n 86) 630–1. From these statements, Atleson identified a hidden set of values that helped to explain the outcomes in these cases: Atleson, *Values and Assumptions* (n 30) 7–9.

[88] Burns, 'The Australian High Court and Social Facts' (n 34) 318, 322.

[89] Ibid 334–5.

[90] Cochran (n 5) 38–9.

previous approaches, this article selects decisions that use the phrase 'common sense' as well as phrases (such as those detected by Atleson and Burns) that indicate the judge is drawing on assumptions and other aspects of intuition and 'common sense'.

IV Analysis of Assumptions in Cases about the Status of Workers

In the analysis of cases that determine the status of workers, there are three assumptions that can be identified. The first assumption is that free enterprise solutions are best for society as a whole (including workers). The second assumption is that workers who invest in capital have chosen to risk their investment and to forego secure employment in order to make a profit. The final assumption is that the nature of modern business arrangements requires independent contractors to give up their autonomy (while retaining their status as independent contractors).

Each of these three assumptions could be criticised for reflecting a 'dominant cultural consensus',[91] and for a conservatism that harks back to feudal norms, rather than reflecting the views of the broader community and the diversity of interests that exist in the workplace.[92] These are not the only assumptions that can be found in the decisions, but they are illustrative of the ways in which 'common sense' can influence judicial reasoning and of a general trend towards reinforcing the preferences of the employing organisation rather than those of the individual worker.

This is not to say that judges should abandon the use of commonsense assumptions, but that implicit assumptions should be made explicit and weighed in the judgment. The three assumptions that have been identified in the selected cases reveal the ways in which commonsense knowledge draws on the experience of the decision-maker and is consequently influenced by the socio-economic status of judges.[93] If the historically and culturally contingent nature of 'common sense' is highlighted, this may create more space for the common law to evolve by incorporating a wider range of perspectives.

[91] Ibid 36.

[92] Leighton and Wynn (n 8) 5.

[93] See Cochran (n 5) 88.

A *Assumption One: Free Enterprise Produces Optimal Outcomes for Society*

The first example of an assumption in the cases is the neoliberal notion that free enterprise produces optimal outcomes for society as a whole. This assumption has previously been identified in negligence cases decided by the High Court in a systematic study conducted by Kylie Burns.[94] One of the cases identified in this study, *Hollis v Vabu Pty Ltd* ('*Hollis*'), which concerned a claim in tort rather than a claim for employment benefits, became the leading authority for the determination of employment status.[95] For the purpose of deciding whether the courier company was vicariously liable for the negligent conduct of a bicycle courier, a majority of the High Court classified the courier as an employee.[96] In dissent, Callinan J made the following statements in support of his conclusion that the worker was correctly classified as an independent contractor:

> It might be to the overall economic advantage of the community that couriers operate as independent contractors efficiently, quickly and competitively, that they continue to provide a service that in the past large, centralised organisations were unable or unwilling to provide, or provided less efficiently. It might also be in the interests of the community, the respondent, its customers and the couriers that the last have a direct financial incentive to deliver articles quickly under the present arrangements.[97]

This examination of the interests of the community overlooks an obvious pitfall of incentivising fast deliveries: the potential harm to pedestrians. The discussion also fails to give adequate weight to the interests of the individual courier, who takes on the risks that would otherwise be borne by the courier company.

An assumption in favour of market-based entrepreneurialism is supported by the common law principle of freedom of contract, which emphasises the parties' autonomy to choose for themselves the terms of their relationship.[98] Australian courts have been inconsistent in the extent to which they have been persuaded by the terms of the contract when determining employment status.[99] Some judges have adopted an interventionist approach that looks beyond the

[94] Kylie Louise Burns, 'Judicial Use and Construction of Social Facts in Negligence Cases in the Australian High Court' (PhD Thesis, Griffith University, November 2011) 230–3.

[95] *Hollis* (n 49).

[96] Ibid 46 [61] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

[97] Ibid 69 [117].

[98] PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979) 408.

[99] Pauline Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (2020) 44(2) *Melbourne University Law Review* 502, 519–22 ('Contractual Autonomy').

terms of the contract to consider the practical reality of the relationship.[100] Others have adopted a formalist approach that holds the parties firmly to their apparent choice to enter into contractual arrangements for their mutual convenience.[101] The recent decisions in *Personnel Contracting (High Court)* and *Jamsek (High Court)* support this formal approach.[102] While recognising that the label given to the relationship in the contract will not determine the matter,[103] this approach relies primarily on the wording of the terms of the contract when applying the multi-factorial test.[104]

In cases about worker status, judges who favour the formalist approach are often careful to hold the worker to their 'choice' to enter into an independent contractor relationship. In its recent decision in *Eastern Van Services v Victorian WorkCover Authority* ('*Eastern Van Services (Court of Appeal)*'), the Victorian Court of Appeal decided that Mr Barca, a car mechanic, was an independent contractor.[105] Mr Barca provided roadside assistance to members of the Royal Automobile Club of Victoria ('RACV'). He drove an RACV-branded van and wore the RACV uniform. His role was carefully circumscribed by both Eastern Van Services ('EVS') and RACV. However, the formal arrangements were designed to ensure that Mr Barca had no contractual relationship with RACV, but was instead engaged by EVS, which in turn entered into a contract with RACV to provide mechanical services.

The trial judge had classified Mr Barca as an employee despite a term of his contract with EVS which stated that he was an independent contractor running a mobile mechanics business.[106] The trial judge concluded that Mr Barca's

[100] See, eg, *On Call Interpreters* (n 3) 121 [200] (Bromberg J). This approach is typically taken by judges who wish to emphasise the public policy underpinning employment protection legislation: ibid 517–18.

[101] See, eg, *Australian Air Express Pty Ltd v Langford* (2005) 147 IR 240, 257 [76] (McColl JA) ('*Australian Air Express*'); *National Transport Insurance Ltd v Chalker* [2005] NSWCA 62, [61] (Mason P); *Eastern Van Services (Court of Appeal)* (n 2) 423 [170]–[171] (Tate, Kyrou and Niall JJA).

[102] *Personnel Contracting (High Court)* (n 2) 416 [44]–[45], 421 [62], 427 [88] (Kiefel CJ, Keane and Edelman JJ); *Jamsek (High Court)* (n 55) 605–6 [6]–[8], 613–14 [45]–[48], 617 [62] (Kiefel CJ, Keane and Edelman JJ). See below nn 156–8 and accompanying text.

[103] *Personnel Contracting (High Court)* (n 2) 420 [58], 421–2 [63]–[65], 424–5 [79] (Kiefel CJ, Keane and Edelman JJ), 436–7 [127] (Gageler and Gleeson JJ), 452–3 [184] (Gordon J). Prior to these decisions, the weight given to the label selected by the parties has varied substantially between judges: Bomball, 'Contractual Autonomy' (n 99) 520–1.

[104] See also Stewart and McCrystal, 'Labour Regulation and the Great Divide' (n 8) 7; Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15(3) *Australian Journal of Labour Law* 235, 242–51 ('Redefining Employment?').

[105] *Eastern Van Services (Court of Appeal)* (n 2) 424 [173]–[177] (Tate, Kyrou and Niall JJA).

[106] *Eastern Van Services Pty Ltd v Victorian WorkCover Authority* [2019] VSC 581, [102], [129] (Cavanough J).

contractual obligations to comply with the detailed policies and manuals of both RACV and EVS meant that the services he provided to RACV members were 'so specialised and confined' that he could not really be considered to be conducting an independent business.[107] Nor was he seeking to make a profit as a reward for risk. Instead, the judge highlighted the reality of the arrangement whereby EVS created invoices based on work performed by Mr Barca, resulting in a 'reasonably predictable, regular amount of remuneration'.[108]

In contrast, the Court of Appeal gave weight to the terms of the contract that exposed Mr Barca 'to a degree of risk that [was] atypical for an employee', including the capacity to delegate work (with approval from EVS) and to work for others, and the lack of a requirement to commit to minimum hours of work.[109] While there were some facts that suggested Mr Barca was an employee, in the face of ambiguity, Mr Barca's status 'was clarified by the parties through the agreement' and the Court stressed that '[t]he parties were entitled to achieve that result'.[110]

Another area where the Court of Appeal placed greater weight on formal arrangements than the trial judge was in the area of taxation. The Court noted that Mr Barca had treated his income from EVS as business income for taxation purposes.[111] The Court emphasised that '[i]n many cases, a party will have deliberately chosen the particular type of arrangements for his or her own reasons and ought bear the consequences of that election'.[112] The Court of Appeal did not closely examine the assumption that Mr Barca had *deliberately chosen* both the label of independent contractor and the taxation arrangements that flowed from that label.[113] The Court noted that 'both parties took the benefit' of the contractual arrangements between Mr Barca and EVS.[114] But the extent to which Mr Barca had chosen these arrangements or benefited from them was not investigated. From Mr Barca's point of view, that 'choice' might be more appropriately characterised as an election to accept work from EVS on its standard terms rather than to seek work elsewhere.

[107] Ibid [107].

[108] Ibid [123].

[109] *Eastern Van Services (Court of Appeal)* (n 2) 424 [174] (Tate, Kyrou and Niall JJA).

[110] Ibid 424 [176].

[111] Ibid 422 [164].

[112] Ibid 422 [163].

[113] Cf ibid 422 [163]–[165]. Nor did the Court examine whether Mr Barca's income could be classified as personal services income under divs 84–7 of the *Income Tax Assessment Act 1997* (Cth), thereby removing the claimed taxation benefits associated with these arrangements: ibid 422 [164].

[114] *Eastern Van Services (Court of Appeal)* (n 2) 423 [171] (Tate, Kyrou and Niall JJA).

The emphasis by the Victorian Court of Appeal on the parties' choice to benefit from the taxation arrangements that flowed from the worker's status as an independent contractor echoed an earlier decision of the New South Wales Court of Appeal in *Australian Air Express Pty Ltd v Langford* ('*Australian Air Express*').[115] In that case, the fact that a delivery driver had been treated by the hirer as a Prescribed Payments System ('PPS') taxpayer rather than a Pay As You Earn ('PAYE') taxpayer was deemed 'highly significant', particularly given the context that the employer was a Commonwealth authority.[116] The Court was concerned that any ruling that the driver was an employee would result in the hirer being in breach of income tax legislation.[117] In classifying the worker as an independent contractor, the Court concluded that 'each party was genuinely trading off benefits under one relationship for perceived advantages under the other'.[118]

Similarly, in *Tattsbet Ltd v Morrow* ('*Tattsbet*'), a worker who ran a betting agency was held by a Full Court of the Federal Court to be an independent contractor, largely because of the arrangements she had carefully put in place (at the behest of the principal) under an agency agreement.[119] These included hiring other workers and receiving revenue, not only from her own labour, but from the profit that was generated by the business. Despite these factors that supported the characterisation of Ms Morrow as an independent contractor, her autonomy was extensively curtailed by Tattsbet's directives.[120] In the course of his judgment in favour of Tattsbet, Allsop CJ highlighted the importance of the statutory context when applying the multi-factorial test, noting that labour law statutes may well 'upset the freedom of contract'.[121] However, his Honour reasoned that this statutory context needs to be weighed against the arrangements made by a worker 'who wishes, or is prepared to bargain for, or accept, a sufficient degree of independence that tends to deny a characterisation of employment'.[122] Justice Jessup similarly emphasised that Ms Morrow understood 'exactly what was proposed' when she signed an acknowledgement that she was

115 *Australian Air Express* (n 101) 254 [54] (McColl JA, Ipp JA agreeing at 242 [1], Tobias JA agreeing at 242 [2]).

116 Ibid 254 [54] (McColl JA).

117 Ibid.

118 Ibid 257 [76], quoting *TNT Worldwide Express* (n 37) 695 (Casey J).

119 *Tattsbet* (n 2) 62 [65]–[66], 64 [72] (Jessup J, Allsop CJ agreeing at 49 [1], White J agreeing at 80 [140]).

120 Carolyn Sutherland and Joellen Riley, 'Major Court and Tribunal Decisions in Australia in 2015' (2016) 58(3) *Journal of Industrial Relations* 388, 390–1.

121 *Tattsbet* (n 2) 50 [4]–[5], quoting *Lehigh Valley Coal Co v Yensavage*, 218 F 547, 553 (Learned Hand J) (2nd Cir, 1914).

122 *Tattsbet* (n 2) 50 [5].

an independent contractor as part of the agency agreement and went on to structure her business arrangements to reflect that status.[123] In particular, his Honour highlighted the taxation implications of these arrangements, which were 'voluntarily adopted' by Ms Morrow and reflected 'her own conscious, well-informed, intentions'.[124] While Ms Morrow may well have understood the implications of the business arrangements on offer, there is no evidence that she sought out the option of self-employment, only that she was engaged to manage an agency.[125] To do so, she was required to accept an arrangement where she was characterised as an independent contractor but where in fact she had very little autonomy.

The reality for many workers is that self-employment is a pathway out of unemployment, rather than an explicit choice in favour of this model.[126] There is some recognition of this reality in Callinan J's judgment in *Hollis*, where his Honour noted that imposing an employment relationship on the parties in the context of courier work 'might perhaps be to destroy an avenue of work for people who might find it difficult to gain remunerative employment otherwise'.[127] However, this statement suggests that it is acceptable to engage a worker as an independent contractor (earning wages that are less than those payable to a worker engaged as an employee) because the alternative is for the hirer not to offer the work at all. It would be helpful for such assumptions to be made explicit and the implications for the workers involved to be examined and weighed with care. If judicial decisions are to reflect the reality of workers' lives, there needs to be greater recognition that, rather than 'choosing' these arrangements, workers have acceded to them on a 'take it or leave it' basis.[128]

There are a number of significant cases where judges have acknowledged the inequality of bargaining power between hirers and workers and the lack of genuine choice on the part of workers when they enter into contractual relationships. In the High Court's decision in *Hollis*, the majority looked beyond contractual terms to examine the reality of the arrangements between a courier firm and its unskilled bicycle couriers. The practical matters that were factored

123 Ibid 62 [66].

124 Ibid 63–4 [70].

125 Ibid 51–2 [10].

126 See Izzy Hatfield, *Self-Employment in Europe* (Report, Institute for Public Policy Research, January 2015) 4, 18.

127 *Hollis* (n 49) 69 [117].

128 As Bromberg J highlighted in *On Call Interpreters* (n 3), 'most contracts for the performance of work are "contracts of adhesion" … set by the dominant party on a take it or leave it basis': at 121 [199], citing Rosemary Owens and Joellen Riley, *The Law of Work* (Oxford University Press, 2007) 144.

into the High Court's decision-making (beyond the contract) included that the couriers were unskilled and that they had no realistic opportunity to generate goodwill or develop an independent business.[129] Significantly, the majority found that it was 'intuitively unsound' to categorise those workers as independent contractors once this reality was taken into account.[130] Drawing on this 'practical and realistic approach', the Federal Court in *On Call Interpreters & Translators Agency Pty Ltd v Federal Commissioner of Taxation* de-emphasised the terms of the contracts between a firm and the interpreters it engaged, focusing instead on the 'day-to-day facts of the relationship'.[131]

More recently, in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting* ('*Personnel Contracting (Full Federal Court)*'), a Full Court of the Federal Court recognised the reality that a 22-year-old labourer had very little choice when offered a contract by a labour hire agency.[132] The Court nevertheless upheld a lower court decision that the worker was an independent contractor.[133] This conclusion was reached somewhat reluctantly by the Court in the context of a trilateral labour hire arrangement that had been 'artfully structured' to ensure that the unskilled and closely supervised labourer did not have any type of contractual relationship with the construction company, but rather was engaged by a labour hire company, Personnel Contracting (trading as Construct).[134]

Justice Lee recognised that employment is a relationship that is 'susceptible to contractual obfuscation',[135] and that the words of the contract could be chosen to bolster 'a narrative sought to be promoted by the commercially dominant contractual party'.[136] His Honour also warned against treating contractual terms as a 'default' against which other aspects of the relationship should be tested, or of turning to contractual terms as a 'tie-break' once all the other factors are considered.[137] Chief Justice Allsop similarly emphasised that it was important not to give too much weight to 'emphatic language crafted by lawyers in the interests of the dominant contracting party' in such a way as to 'supplant a practical and intuitively sound assessment of the whole of a relationship'.[138]

129 *Hollis* (n 49) 42 [48] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

130 Ibid.

131 *On Call Interpreters* (n 3) 119–21 [190]–[200] (Bromberg J).

132 See *Personnel Contracting (Full Federal Court)* (n 80) 666 [117] (Lee J).

133 Ibid 670 [134] (Lee J, Allsop CJ agreeing at 643 [33], Jagot J agreeing at 644 [41]).

134 Ibid 678 [170] (Lee J).

135 Ibid 661 [100].

136 Ibid 666 [117].

137 Ibid.

138 Ibid 640 [21].

In this case, we can see the Court grappling with the assumption made by appellate courts in earlier cases that parties should be held to the 'choices' they have made in setting up their contractual arrangements in a particular way. The following account by Lee J speaks to the reality of these working arrangements:

> A 22-year-old British lad travels to Australia on a working holiday visa. The experience he carries with him is eight months as part-time bricklayer in his teens and work as a barman in an airport pub in Liverpool … Looking for a source of income, he contacts a labour hire company and is later interviewed. Successful at the interview, he is presented with the relevant paperwork, signs it, and is told to wait for a call-up. The next day, he is told about the opportunity of work with one of the company's clients. He accepts the offer, turns up to the address provided, accompanied with nothing but motivation for engaging in work, steelcapped boots, a 'hi-vis' shirt and a hard hat. For a period of months, he engages in basic labouring tasks; he takes out the bins, cleans workspaces and moves materials. He is not an entrepreneur nor a skilled artisan; he is paid by the hour, and when at work, is told what to do and how to do it.[139]

Nevertheless, the Court was influenced by the trilateral nature of the contractual arrangement, which meant that the hirer, Construct, did not exercise direct control over the worker. This particular arrangement had been examined by other Australian intermediate appellate courts and found to be effective in establishing an independent contracting arrangement.[140] In one decision, *Personnel Contracting Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers* ('*Personnel Contracting (WAIAC)*'), the Western Australian Industrial Appeal Court had examined 'essentially the same dispute between the same parties', finding that the trilateral arrangement did not create an employment relationship between the labour hire agency and the worker.[141] Despite some discomfort with the finding that the labourer was an independent contractor, the Court concluded in *Personnel Contracting (Full Federal Court)* that there was no significant error that would justify a departure from the precedent that had been established and relied upon by labour hire companies, including by Personnel Contracting.[142]

On appeal in the High Court, Gageler and Gleeson JJ acknowledged that the Full Federal Court had been correct to follow earlier decisions that concluded that labour hire triangular relationships do not establish a

[139] Ibid 644 [42].

[140] Ibid 643 [33]–[34] (Allsop CJ), 669–70 [128]–[132] (Lee J).

[141] (2004) 141 IR 31, cited in ibid 666–7 [121] (Lee J).

[142] *Personnel Contracting (Full Federal Court)* (n 80) 642–4 [31]–[40] (Allsop CJ). A similar conclusion was reached by Lee J: at 669 [132].

relationship of employment between the labour hire agency and the worker.[143] Unconstrained by these precedents, the High Court majority decided that the workers were employees.[144] The plurality judgment found that *Personnel Contracting (WAIAC)* was wrongly decided because it gave 'decisive significance to the parties' description of their relationship'.[145] Once this impediment was removed, the plurality determined that the worker was in fact 'dependent on and subservient to' the labour hire agency (Construct), and was therefore an employee.[146]

In making this finding, the Court examined the terms of the contractual arrangements and emphasised the labourer's promise to work as directed by Construct and its customers in return for pay, noting that this right to control the labourer's work was an essential part of Construct's business as a labour hire agency.[147] The label of 'contractor' that had been 'chosen by the parties' was irrelevant where it was inconsistent with the rights and obligations set out in the contract.[148] Those contractual rights and obligations demonstrated that the relationship was one of employment.[149]

By looking beyond the parties' 'label' and the limitations of a triangular relationship, the Court delivered a victory to this particular worker. However, the approach taken by the plurality judgment permitted little judicial engagement with the worker's narratives. Their Honours rejected the proposition that the disparity of bargaining power between Construct and the labourer was in any way relevant to the application of the multi-factorial test. For the plurality, and for Gordon J, the legal rights and obligations that are found in a comprehensive written contract are conclusive in determining the character of the relationship.[150] The plurality emphasised that the 'employment relationship … must be

143 *Personnel Contracting (High Court)* (n 2) 444–5 [159].

144 Ibid 407 [9] (Kiefel CJ, Keane and Edelman JJ), 429 [102] (Gageler and Gleeson JJ), 445 [162] (Gordon J).

145 Ibid 426 [86] (Kiefel CJ, Keane and Edelman JJ).

146 Ibid 427 [90].

147 Ibid 427 [89].

148 Ibid 424–5 [79].

149 Ibid 427 [89]–[90]. See also at 444 [158] (Gageler and Gleeson JJ), 445 [162] (Gordon J). This approach was foreshadowed by the High Court's previous decision to classify a worker as a casual (rather than ongoing) employee in *WorkPac Pty Ltd v Rossato* (2021) 392 ALR 39. In that case, the Court placed considerable weight on the terms of the worker's contract rather than the practical reality of the relationship: at 52 [57], 53 [62] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).

150 *Personnel Contracting (High Court)* (n 2) 415–16 [43] (Kiefel CJ, Keane and Edelman JJ), 445 [162] (Gordon J).

a *legal* relationship. It is not a social or psychological concept like friendship'.[151] This means that the context of the relationship, and the reality of the relationship that is experienced by the worker, will be largely irrelevant.

Justices Gageler and Gleeson agreed with the conclusion of the plurality but disagreed that the Court's role was limited to characterisation of the contract. Their Honours instead viewed their task as characterising a relationship and observed that the 'true character' of that relationship will, in some instances, only be revealed through the performance of the contract.[152] Justices Gageler and Gleeson reflected that this

> will be especially so where such a contract is a standard form written contract couched in language that might arguably have been chosen by the putative employer to dress up the relationship to be established and maintained as something somewhat different from what it might turn out to be.[153]

While the terms of the contract supported the labourer's status as an employee in this particular case, as recognised in the judgment of Gageler and Gleeson JJ, labour hire agencies retain control over the wording of these contracts.[154] It is likely that these agencies will redraft the terms of their template agreements to ensure that the legal rights set out in the contract do not support a finding of employment, whether or not the practical realities of the relationship bear this out.[155] By restoring the primary place of the contract in determining the employment status of workers, the High Court has perpetuated the fiction that unskilled, low-paid workers have opted for the benefits of entrepreneurialism and should be held to that choice. This decision signals to judges in future cases that it is appropriate to turn a blind eye to the reality of these arrangements in order to apply orthodox contractual principles. Such an approach will necessarily widen the gap between judicial decision-making and the narratives of workers.

B *Assumption Two: Capital Investment Is an Indicator of Entrepreneurial Activity*

A related assumption by courts is that the investment by a worker in capital is an indicator of the worker's intention to make a profit as an entrepreneur. The assumption arises from the 'fundamental' or 'economic reality' test, which is

[151] Ibid 416 [44] (Kiefel CJ, Keane and Edelman JJ) (emphasis in original).

[152] Ibid 437–8 [130], [132], 440–1 [143].

[153] Ibid 437–8 [132].

[154] See ibid.

[155] See ibid.

concerned with whether the worker is serving the employer or operating a business on their own account.[156] When this test was established in 1969 by Cooke J in *Market Investigations Ltd v Minister of Social Security* ('*Market Investigations*'), his Honour applied the test to determine that an interviewer working for a market research firm was an employee rather than an independent contractor.[157] One of the facts that supported this conclusion was that the worker 'did not provide her own tools or risk her own capital'.[158]

The assumption that capital investment is indicative of entrepreneurialism is derived from the circumstances of an earlier era. Justice Gray of the Federal Court explored the evolution of community expectations in the landmark case of *Re Porter*, which concerned the employment status of a number of owner truck drivers.[159] In setting out his reasoning in support of the finding that the truck drivers were employees, his Honour referred to a case decided by the High Court in 1949: *Humberstone v Northern Timber Mills*.[160] In this case, a worker who owned and maintained a truck for the purpose of transporting goods was found to be an independent contractor on the basis that the emphasis of the contract was on 'mechanical traction' rather than 'the supply of the work and skill of a man'.[161] Delivering his judgment in 1989, Gray J noted that

> [t]he social position of a person owning a truck is likely to be viewed very differently now from 1949 … The enormous increase in the ownership of motor vehicles generally, and the common occurrence of vehicle ownership amongst persons who use their vehicles to earn their livings, are likely to have changed the perceptions of many people as to the 'capitalist' status of a truck owner.[162]

This passage illustrates a reflective practice of judging where Gray J has examined the association between capital investment and worker status and identified the historical contingency of the assumptions made in earlier case law.

Justice Gray was not swayed by the employer's argument that a worker's status as an independent contractor was supported by his or her 'decision to go into business, involving the application of capital, and coupled with an entrepreneurial spirit, a pride in independence, and a professionalism in work'.[163] Instead, his Honour drew attention to the perspective of the workers, noting

156 *Market Investigations* (n 64) 184–5 (Cooke J).

157 Ibid 188.

158 Ibid.

159 (1989) 34 IR 179, 185–6 ('*Re Porter*').

160 (1949) 79 CLR 389 ('*Humberstone*'), cited in ibid 181–6.

161 *Humberstone* (n 160) 404–5 (Dixon J), quoted in *Re Porter* (n 159) 182 (Gray J).

162 *Re Porter* (n 159) 185–6.

163 Ibid 186.

that truck ownership 'may result from nothing more than the reality that it is easier to obtain work by owning one than by offering oneself as a driver of vehicles owned by others'.[164] His Honour also identified the potential for opportunism where the hirer seeks to avoid capital expenditure on trucks by shifting the costs onto the drivers.[165] In light of these factors, Gray J classified the drivers as employees.[166]

Despite this compelling view that times have moved on from the era when the owners of capital equipment were seen as 'capitalists', the courts continue to view the purchase of equipment as an important indicator that a worker is in a business of their own, particularly if that equipment involves a substantial investment and/or requires specialist skill for its operation. Twelve years after *Re Porter* was decided, the High Court in *Hollis* overturned a decision of the New South Wales Court of Appeal that bicycle couriers were independent contractors,[167] criticising the earlier decision for 'making too much' of the workers' investment in their own bicycles.[168] Yet the High Court acknowledged the continuing relevance of capital investment as a factor in determining the employment status of workers, noting that it might have decided the case differently if the couriers' investment in capital equipment had been 'more significant', and if the operation of the equipment had required 'greater skill and training'.[169]

Returning to the issue in *Australian Air Express*, the New South Wales Court of Appeal relied heavily on truck ownership as a key factor in support of its finding that a delivery driver was an independent contractor.[170] In the course of her Honour's judgment, McColl JA took issue with the Court's approach in *Re Porter*:

[164] Ibid 185.

[165] Ibid.

[166] Ibid 193, 196, 199.

[167] *Vabu Pty Ltd v Commissioner of Taxation* (1996) 81 IR 150, 152 (Meagher JA, Sheller JA agreeing at 155, Beazley JA agreeing at 156) ('*Vabu*').

[168] *Hollis* (n 49) 41 [47] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

[169] Ibid 41–2 [47]. The context is also relevant. The High Court was determining whether the bicycle courier was an employee of Vabu Pty Ltd in order to hold the company vicariously liable for the courier's negligent conduct in striking down Mr Hollis during the course of the courier's work: at 35 [29]. In a separate decision, the New South Wales Court of Appeal had earlier decided that motor vehicle and bicycle couriers of Vabu were independent contractors for the purposes of deciding that Vabu Pty Ltd was not liable to make superannuation contributions for the couriers: *Vabu* (n 167) 152 (Meagher JA, Sheller JA agreeing at 153, Beazley JA agreeing at 155).

[170] *Australian Air Express* (n 101) 253 [44]–[47], 257 [76] (McColl JA).

> Gray J's observation that contemporary conditions have diminished the significance of the ownership of the motor vehicle which is the principal means by which a person performs work for another does not, with respect, accord with authority. The rationale of attaching significance to the ownership of an expensive piece of capital equipment, as Dixon J explained in *Humberstone*, is that such ownership is inconsistent with the right to control the worker.[171]

The difficulty with this view is that it is based on a further assumption that an owner driver will be more autonomous than a hired driver (who makes use of the hirer's truck). This assumption does not necessarily reflect the experience of workers, as illustrated in a number of cases where the issue of truck ownership has been central. For example, in *Jamsek v ZG Operations Australia Pty Ltd* ('*Jamsek (Full Federal Court)*'), two truck drivers worked for a hirer for 40 years.[172] Initially, they drove the hirer's trucks as employees. However, after nine years of this work, the drivers were offered a new arrangement on a take it or leave it basis. This arrangement required each of them to purchase the hirer's truck, encouraged them to set up a partnership (with their respective spouses), and required them to enter into a 'Contract Carriers Arrangement' between the partnership and the hirer. Both drivers were relatively unskilled, having left school at 14 or 15 years of age.[173] Not surprisingly, they both accepted the new arrangement. The nature of their work, and the control exercised by the hirer, changed very little as a consequence.[174] Although they drove their own trucks, they were expected to cover those trucks in the branding of the hirer and to wear clothing that bore the hirer's logo.[175] They were required to work, or be available for work, during regular hours for the hirer (6am–3pm, Monday to Friday).[176] The constraints on their time and the branding of their trucks meant that they had little opportunity to work for others and, in practice, did not do so.[177]

The primary judge concluded that the workers were independent contractors.[178] In applying the multi-factorial test, the judge placed significant weight

[171] Ibid 251 [36], citing *Humberstone* (n 160) 404–5 (Dixon J).

[172] *Jamsek (Full Federal Court)* (n 63) 120 [21] (Anderson J).

[173] Ibid 120–3 [21]–[22], [30]–[40].

[174] As characterised by Wigney J, 'the reality was that, aside from the fact that the men took over the risk and expense of owning and operating the delivery trucks, little else changed': ibid 119 [16].

[175] See ibid 157 [219], 160 [224] (Anderson J).

[176] Ibid 118 [10] (Perram J), 132 [100]–[103], 156–7 [217]–[218], 163 [232], 164 [237] (Anderson J).

[177] Ibid 156–63 [217]–[233] (Anderson J).

[178] See *Whitby* (n 17) [212] (Thawley J).

on the drivers' provision of trucks, particularly given their 'substantial value' and their centrality to the profitability of the workers' activities.[179] On appeal, a Full Federal Court found in favour of the workers, rejecting the proposition that the drivers could be 'characterised as engaging in entrepreneurial or profit-motivated activity, which is a hallmark of an independent business'.[180] In reaching this conclusion, the Court emphasised the drivers' lack of significant skill in operating the trucks,[181] the ostensible requirement to adorn their trucks with the hirer's branding,[182] and the disparity of bargaining power which allowed the hirer to offer the new arrangements on a take it or leave it basis.[183]

The Full Federal Court's decision was overturned on appeal in the High Court.[184] The plurality judgment criticised the 'expansive approach' taken by the Full Federal Court, which mirrored the approach taken in the UK.[185] The plurality viewed this approach as 'an unjustified departure from orthodox contractual analysis'.[186] The error in this approach included the focus on 'the "substance and reality" of the relationship between the parties, and especially the significance attached to the disparity in bargaining power'.[187] In essence, the plurality returned to an understanding of the world (considered out-of-date by Gray J in 1989)[188] where the provision of expensive equipment, and the exercise of skill in the use of that equipment, changed the status of the workers from employees to independent contractors.[189]

By moving away from an 'expansive approach', the High Court has missed an opportunity to ground judicial decision-making in the everyday experience of workers. The court cannot reach a meaningful answer to the important question of whether workers are operating a business of their own if it is confined to the words of a contract, rather than the 'substance and reality' of the working

179 Ibid [156], [166]. At the time they were purchased in 1986, the trucks cost the Whitby partnership and the Jamsek partnership $21,000 and $15,000 respectively: at [153].

180 *Jamsek (Full Federal Court)* (n 63) 165 [244] (Anderson J), citing *On Call Interpreters* (n 3) 142 [291] (Bromberg J); *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346, 390 [181] (North and Bromberg JJ).

181 *Jamsek (Full Federal Court)* (n 63) 154 [207] (Anderson J).

182 Ibid 160 [224].

183 Ibid 151 [196], 152 [201].

184 *Jamsek (High Court)* (n 55) 619 [77] (Kiefel CJ, Keane and Edelman JJ), 624 [91] (Gageler and Gleeson JJ), 628 [111] (Gordon and Steward JJ).

185 Ibid 614 [51] (Kiefel CJ, Keane and Edelman JJ). The plurality was referring to the approach taken in *Autoclenz* (n 57).

186 *Jamsek (High Court)* (n 55) 615 [51] (Kiefel CJ, Keane and Edelman JJ).

187 Ibid 605 [6], 614 [51].

188 See above nn 159–71 and accompanying text.

189 *Jamsek (High Court)* (n 55) 618 [70] (Kiefel CJ, Keane and Edelman JJ).

arrangement. Such an approach creates a schism between the expectations of ordinary workers and judicial narratives. For example, the plurality judgment characterised 'the willingness of the [drivers] to display the company's branding on their trucks' as 'quite consistent with a sensible, self-interested response of an independent contractor to legitimate commercial pressure from its best customer'.[190] Yet the picture is entirely different if evidence of the reality of the drivers' working lives is considered. Then it becomes clear that it would be impossible for the drivers to work for any other customer, or to engage in any type of entrepreneurial or profit-making activity. Similarly, Gageler and Gleeson JJ concluded that in circumstances where workers are contracted to purchase and take full responsibility for items of substantial equipment, 'the personal is overshadowed by the mechanical'.[191] This is unlikely to reflect the experience of the workers where their personal service remains the dominant feature of the relationship both before and after signing a contract that was a condition of ongoing work.

It is not clear how far the courts will be willing to take this proposition that a contractual obligation to provide and operate expensive equipment strongly suggests that a worker is an independent contractor. The proposition was challenged in a different context by an Uber Eats driver in a hearing before a Full Court of the Federal Court in 2020.[192] Although the case was settled before the Court handed down a decision, the submissions of counsel on behalf of the driver are instructive. These submissions argued against the assumption that the provision by the worker of expensive equipment indicates that the worker is 'operating their own business and making an investment in the hope of generating profit or return', especially where the equipment is already available to the worker, given that Uber Eats drivers are likely to own a car before contemplating taking up work as a delivery driver.[193] In reality, the worker's provision of a car is therefore not a factor that supports classification as an independent contractor rather than as an employee.

Again, these submissions illustrate that the changing context in which hirers and workers operate must be examined continually to test the assumptions that are carried forward from earlier cases. It is also necessary to test the assumptions that underpin the arguments put by hirers about the inevitability of their business models and the arrangements that flow from these models. This is examined further in Part IV(C), which considers assumptions made by judges

[190] Ibid 615 [53].

[191] Ibid 623 [88].

[192] Transcript of Proceedings, *Gupta v Portier Pacific Pty Ltd* (Federal Court of Australia, NSD566/2020, Bromberg, Rangiah and White JJ, 27 November 2020) 6 (M Gibian SC).

[193] See ibid 6, 33.

about the nature of modern business arrangements and how these arrangements influence the application of the multi-factorial test.

C *Assumption Three: Modern Business Arrangements Necessitate the Exercise of High Levels of Control over Independent Contractors*

The third assumption is that the nature of modern business arrangements requires the exercise of a high level of control by hirers over their independent contractors. To put this another way, where workers are either governed by strict protocols or otherwise expected to submit to the hirer's direct or indirect control, judges will nevertheless affirm their status as independent contractors on the basis that this degree of control is considered essential to support the business model that has been adopted by the hirer. This is a relatively new contention that displaces the courts' traditional insistence that a worker who is highly subordinated to the hirer should be characterised as an employee, whereas a worker who operates with substantial autonomy should be characterised as an independent contractor.[194]

Australian courts have explicitly adapted their approach to the determination of worker status to reflect the evolving context. Justice Buchanan of the Federal Court has observed that, in applying the multi-factorial test, 'the emphasis on various matters has shifted in response to the changing way work, and society in general, is organised'.[195] This statement creates the impression that society as a whole is in some way involved in selecting these work arrangements and that society must therefore adapt to the consequences that flow from them. In grappling with the evolution of modern workplaces, the courts rarely acknowledge that many of the changes in the organisation of work have been brought about by regulatory arbitrage, where a hirer selects a legal structure solely or predominantly for the purpose of increasing profits by reducing labour costs.[196] There is also scant recognition in judicial decisions that the consequences of these changes in working arrangements typically fall on the shoulders of the worker rather than the hirer.[197]

Historically, the tests that determined the employment status of workers were underpinned by the notion that *independent* contractors retained autonomy over the way they managed their work.[198] Workers who lacked this

[194] See, eg, *Humberstone* (n 160) 404 (Dixon J).

[195] *ACE Insurance* (n 60) 153 [38]. See also *Stevens* (n 27) 29 (Mason J).

[196] See Chris Arup, 'Labour Law Liberalisation and Regulatory Arbitrage' (2020) 33(2) *Australian Journal of Labour Law* 183, 186–8.

[197] See, eg, *Re Porter* (n 159) 185 (Gray J).

[198] See, eg, *Narich* (n 62) 606 (Lord Brandon for the Court).

autonomy were categorised as employees, even in cases where the business model required the hirer to provide detailed direction to a worker. This was illustrated in *Market Investigations*, where Cooke J considered whether a market researcher's opportunity to make a profit depended 'in any significant degree on the way she managed her work'.[199] His Honour classified the worker as an employee because of the degree of control exercised over her via a prescriptive and comprehensive guide that set out how she would conduct market research interviews.[200]

The Privy Council's decision in *Narich Pty Ltd v Commissioner of Pay-Roll Tax* similarly shows the Court applying the traditional approach to worker autonomy, rather than modifying that approach to reflect the commercial constraints that were imposed on the hirer by the adoption of a franchise business model.[201] The case involved a claim by the Commissioner of Pay-Roll Tax for tax to be paid on the wages of a lecturer who was engaged by Narich Pty Ltd ('Narich'), the Australian franchisee for Weight Watchers International ('Weight Watchers'). The worker's task was to run classes for Weight Watchers members according to the strict guidelines set out in the lecturers' handbook. The arrangement could be terminated without notice if the worker failed to follow the guidelines or exceeded her own 'goal weight' by more than two pounds.[202] Narich argued that the worker was an independent contractor on the basis of the written contract between the parties.[203] The Privy Council was sympathetic to Narich's commercial circumstances, noting that it was 'not surprising to find such a close degree of direction and control provided for in a lecturer's contract', given the obligation of Narich to protect the Weight Watchers brand.[204] Nevertheless, the Court found that the high degree of control that was exercised by Narich had the effect of transforming the relationship into one of employment.[205]

However, in more recent cases, the courts have characterised the autonomy of workers in a more flexible way in order to accommodate the business models that have been adopted by firms, often for the express purpose of containing

[199] *Market Investigations* (n 64) 188.

[200] Ibid 185–6. Similarly, in *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2010) 184 FCR 448, market researchers were found to be employees in part because of the level of control exercised over the manner in which they conducted interviews: at 461 [36]–[37] (Keane CJ, Sundberg and Kenny JJ).

[201] *Narich* (n 62) 606 (Lord Brandon for the Court).

[202] Ibid 602, 605.

[203] Ibid 600.

[204] Ibid 605.

[205] Ibid 606.

labour costs. One aspect of this shift has been for courts to adopt a business perspective which permits engagement of independent contractors (either directly or via a labour hire agency) while allowing the business to issue detailed commands to the workers in order to protect their brand, enhance their public profile and/or to ensure the work is performed efficiently.[206] This approach under-emphasises the significance of autonomy and flexibility from the perspective of workers. Not only does autonomy provide workers with the opportunity to manage the work in a way that maximises their income and suits their personal circumstances, it also allows the workers to develop the 'entrepreneurial spirit' and 'pride in independence' that was described by Gray J in *Re Porter*.[207] The significance of autonomy and its contribution to worker satisfaction, as distinct from its contribution to profit-making, is an aspect that is largely overlooked in judicial reasoning in these cases.

In *Rogalski v PMP Print Pty Ltd*, Riethmuller J of the Federal Circuit Court took into account 'the context of modern business arrangements' in classifying two distributors of printed material as independent contractors despite their lack of autonomy.[208] In this case, the guidance came in the form of a 47-page manual which directed the distributors' activities. His Honour cited the extent of control exercised by franchisors over franchisees as evidence that a high degree of control may be necessary to ensure that a business achieves 'the level of uniformity that is a central part of the business model'.[209] This reference to 'modern business arrangements' implies that the judge is drawing on shared knowledge that firmly establishes the business imperative to maintain tight control over the workers.[210] The implication is that courts should be reluctant to interfere with this business imperative.

Similarly, in *Australian Air Express*, the New South Wales Court of Appeal recognised that a delivery driver was subjected to a 'degree of control' through the hirer's detailed commands.[211] These included requirements to be available at specified times for specified runs, to follow detailed instructions about how to execute the delivery, to accept pay at specified rates, to wear the hirer's uniform and to paint the hirer's name on the driver's truck.[212] Nevertheless, the Court held that the driver was 'running his own business, one in which he had independence subject to the reservation to the appellant of that degree of

[206] See, eg, *Rogalski v PMP Print Pty Ltd* [2016] FCCA 288, [38]–[42] (Riethmuller J) ('*Rogalski*').

[207] *Re Porter* (n 159) 186.

[208] *Rogalski* (n 206) [39].

[209] Ibid.

[210] Ibid.

[211] *Australian Air Express* (n 101) 257–8 [77] (McColl JA).

[212] Ibid 244 [8].

control necessary to ensure its business operated efficiently'.[213] This statement suggests that where business circumstances make it desirable for a delivery firm to direct the drivers' work to a high degree, it is unreasonable to expect the firm to engage its labour force as employees to accommodate this preference. Instead, the workers are required to adjust to the needs of the business for efficient work by working as independent contractors without the benefits that are traditionally associated with independent contractor status.

Another model that is regularly adopted by firms is the engagement of workers via multi-party relationships, often with the explicit purpose of reducing the firm's obligations to those workers. The creation of these arrangements typically results in a separation between the party who hires the worker and the party who requires the work to be performed and asserts control over the worker. As noted earlier, in *Eastern Van Services (Court of Appeal)*, Mr Barca was hired by EVS but his work as a mobile mechanic was performed under the RACV brand, and his work was highly constrained by directives issued by both EVS and RACV in order to protect that brand. Nevertheless, the exercise of a high level of control was not viewed by the Court as an influential factor in determining the worker's status in circumstances where it was exerted by a third party, not by the direct hirer of the worker.[214]

Similarly, in *Personnel Contracting (Full Federal Court)*, the Court adopted the conventional view of a trilateral labour hire arrangement whereby the host client of the labour hire agency exercises a high level of control over the worker, but neither the agency nor the client is considered to be the employer of the worker: the client does not have a direct contractual relationship with the worker and the agency does not have sufficient control over the worker.[215] In *Personnel Contracting (Full Federal Court)*, this meant that a construction firm could exercise close supervision of an unskilled labourer without enlivening the employment protections that would usually flow to an employee.[216] As discussed in Part IV(A), the High Court overturned this decision.[217] Justices Gageler and Gleeson viewed the degree of control that was held by the labour hire agency over the labourer as 'the most significant indication' that the relationship was one of employment.[218] This control over how the labourer performed

[213] Ibid 258 [82] (McColl JA, Ipp JA agreeing at 242 [1], Tobias JA agreeing at 242 [2]).

[214] *Eastern Van Services (Court of Appeal)* (n 2) 418–19 [136]–[137] (Tate, Kyrou and Niall JJA).

[215] *Personnel Contracting (Full Federal Court)* (n 80) 658 [88] (Lee J).

[216] See above nn 132–40 and accompanying text.

[217] See above Part IV(A).

[218] *Personnel Contracting (High Court)* (n 2) 435 [122].

his work was found in the combination of contracts between the agency and the worker and between the agency and its client.[219]

The plurality judgment in *Personnel Contracting (High Court)* also emphasised the subservience of the worker, observing that the contractual arrangements allowed the agency to determine for whom the labourer would work and allowed the construction firm (as the agency's client) to direct what work he would perform.[220] Their Honours identified that the agency's control over the worker lay at the heart of this model: 'The marketability of Construct's services as a labour hire agency turned on its ability to supply compliant labour; without that subservience, that labour would be of no use to Construct's clients.'[221] This is an important recognition that the labour hire model itself appears to rely on a lack of autonomy and independence on the part of the worker. Nevertheless, the formalist approach adopted by the plurality leaves open the possibility that the template contracts could be redrafted in future to once again obscure the nature of these arrangements.

While one of the strengths of the common law is its capacity to adapt to modern contexts, these shifts in emphasis must take into account the consequences of changes in work and society for *both* hirers and workers. Where a blinkered view is taken, which prioritises the stated needs of the business and omits or minimises the worker's perspective, judicial accounts of these arrangements can become detached from reality. One way to guard against this is to ensure that a more fulsome account of the worker's experience is narrated and assessed in judgments. Judicial emphasis on the needs of the business could also be helpfully offset by explicit consideration of the possibility that these business models have been selected to reduce labour costs. The formalist approach that has been emphasised in recent decisions of the High Court makes it more difficult for Australian courts to expand the scope of the judicial enquiry to include the practical reality of contractual arrangements from a worker's perspective.[222] Nevertheless, courts retain significant discretion in the weighting that is given to the factors that constitute the multi-factorial test. Given the High Court's recent emphasis on the 'own business–employer's business' dichotomy,[223] there is space for courts to consider whether contractual arrangements are likely to provide any real autonomy or entrepreneurial opportunity for the worker.

[219] Ibid.

[220] Ibid 424 [75] (Kiefel CJ, Keane and Edelman JJ).

[221] Ibid 424 [76].

[222] See above Part IV(A).

[223] *Personnel Contracting (High Court)* (n 2) 414–15 [36], [39] (Kiefel CJ, Keane and Edelman JJ).

V Conclusion

This article has critically analysed judicial decisions that determine the status of workers by examining one particular mode of reasoning: assertions or assumptions based on 'common sense'. It has illustrated the argument by considering three examples of assumptions that have underpinned judicial findings in cases about worker status: that free enterprise produces optimal outcomes for society; that a worker's investment in capital indicates a desire to be an entrepreneur; and that modern business arrangements necessitate the exercise of high levels of control over independent contractors. These examples are not intended to be exhaustive, but rather to highlight the ways in which judicial reliance on 'common sense' can be problematic. The purpose of the analysis has been, first, to identify hidden assumptions and subject judicial 'common sense' to critical examination; and, second, to highlight the need for judges to elevate, rather than disregard, factual accounts that describe the experience of workers when determining the question of employment status. This is important to support the legitimacy of the common law to ensure that it remains connected to the everyday reality and values of the community.

The argument that is developed in this article is not that judges should leave their commonsense assumptions at the door of the courtroom. Instead, this article makes the case for the implicit assumptions in judicial reasoning to be made explicit so that they can be weighed and evaluated alongside other explicit findings. Both judges and the litigating parties' legal representatives have a role to play in uncovering and, where appropriate, challenging these assumptions. This includes, for instance, highlighting the difference between the historical view that ownership of a truck signals entrepreneurialism and the modern expectation that gig workers will redeploy commuter vehicles to achieve the exacting specifications of their hirers.[224] The more that judges examine and acknowledge the economic and social reality of contractual arrangements in decisions about employment status, the more that judicial findings will match the workers' own intuitive understandings of their role and status.[225] Despite the contract-centric approach that has been adopted by the High Court in recent cases, judges may identify within the terms of carefully drafted contracts the true essence of a business model. In *Personnel Contracting (High Court)*, the Court recognised that the labour hire model that was enshrined in the

[224] See above Part IV(B).

[225] For case studies of workers' own perceptions of the divide between employment and self-employment: see, eg, Simon Deakin, 'Interpreting Employment Contracts: Judges, Employers and Workers' in Sarah Worthington (ed), *Commercial Law and Commercial Practice* (Hart Publishing, 2003) 433, 443–53.

contractual arrangements involved the commercialisation of subservient labour, leading to a finding of employment.[226]

The use of critical reflection and commonsense judgment is increasingly necessary as judges are required to 'shoehorn' modern working arrangements into the binary categories of independent contractor and employee.[227] Judges and academics have highlighted the inadequacy of the dichotomy and the complexity of the judicial task of fitting the worker into one category or the other.[228] While the common law tests are evolving, there is some truth to the view expressed by employment law scholar Mark Freedland that '[t]he accumulation of case law has added weight rather than wisdom' to the practical application of these tests.[229] But in the absence of legislative intervention,[230] Australian judges are left with the task of performing this categorisation exercise as reflectively as possible.

To assist in this task, judges might engage in practices that examine whether their assumptions are historically or culturally contingent. This would involve asking, first, whether the assumption is drawn from a specific historical context and, if so, whether the assumption is now outdated and can be adjusted or discarded. Second, it would involve examining whether the assumption is influenced by the judge's background. This background might include previous experience as a self-employed barrister in a relatively strong position in the labour market, and membership of the dominant ethnic and/or gender group.[231] It will certainly include an immersion in common law precedents that tend to favour business owners over workers. For judges to engage in this critical process, it may be necessary to set aside the idea that their views are largely shared by the

[226] See above nn 220–1 and accompanying text.

[227] *Personnel Contracting (Full Federal Court)* (n 80) 654 [72] (Lee J).

[228] See, eg, *On Call Interpreters* (n 3) 119 [188], 122 [206] (Bromberg J); *Personnel Contracting (Full Federal Court)* (n 80) 651 [61] (Lee J); Stewart and McCrystal, 'Labour Regulation and the Great Divide' (n 8) 4–6, 8; Brooks (n 8) 48–9, 89, 101; Leighton and Wynn (n 8) 5, 22; Stewart, 'Redefining Employment?' (n 104) 237, 269–71; Paul Davies and Mark Freedland, 'Labor Markets, Welfare and the Personal Scope of Employment Law' (1999) 21(1) *Comparative Labor Law and Policy Journal* 231, 232, 234.

[229] Mark R Freedland, *The Personal Employment Contract* (Oxford University Press, 2003) 20, quoted with approval in *Personnel Contracting (Full Federal Court)* (n 80) 651 [61] (Lee J).

[230] For legislative reform proposals: see, eg, Stewart and McCrystal, 'Labour Regulation and the Great Divide' (n 8) 12–15; Victorian Government (n 77) ch 7; Andrew Stewart and Jim Stanford, 'Regulating Work in the Gig Economy: What Are the Options?' (2017) 28(3) *Economic and Labour Relations Review* 420, 429–31; Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2nd ed, 2011) 199–207; Arup (n 196) 204, 208; Anthony Forsyth, 'Playing Catch-Up but Falling Short: Regulating Work in the Gig Economy in Australia' (2020) 31(2) *King's Law Journal* 287, 298–9; Stewart, 'Redefining Employment?' (n 104) 269–75.

[231] Cf *Edwards* (n 31) 58 [110] (Baroness Hale JSC).

wider community, and therefore represent settled norms or 'common sense'. Instead, judges might adopt an approach that 'imaginatively references' a wider set of views to ensure that the reality of workers' lives is reflected in judicial decisions.[232]

[232] Cochran (n 5) 12.