

STATUTORY NORMS AND COMMON LAW CONCEPTS IN THE CHARACTERISATION OF CONTRACTS FOR THE PERFORMANCE OF WORK

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While the relationship between statute and common law has attracted increased interest in the labour law field, limited attention has been directed at exploring this relationship in cases involving the characterisation of contracts for the performance of work. The characterisation of a work contract as an employment contract or an independent contract carries significant consequences in a number of different contexts, including tort law, employment law and taxation law. Many Australian statutes invoke the common law concept of employment as a criterion by which to confer rights and impose obligations. In determining whether a contract is one of employment and thereby covered by the relevant statute, Australian courts have not generally had regard to the purposes of the statute. However, in some Australian cases, it has been suggested that statutory purpose can, and should, guide the characterisation exercise. This article explores that suggestion, focusing particularly on statutes that confer rights and entitlements upon employees. In doing so, it draws upon decisions of the Supreme Courts of Canada and the United States that have adopted a 'purposive approach' to the employment concept. This article seeks to begin a conversation about the utility and viability of a purposive approach to the employment concept in Australia. It does so by canvassing the arguments in favour of a purposive approach and identifying some of the primary barriers to the adoption of such an approach by Australian courts.

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I INTRODUCTION

In recent years, the relationship between statute and common law has attracted increased interest.¹ In the labour law context, a burgeoning body of academic work has examined the interaction between statute and common law in relation to the implied term of mutual trust and confidence in

¹ See, eg, Anthony Mason, 'A Judicial Perspective on the Development of Common Law Doctrine in the Light of Statute Law' in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing, 2016) 119; Elise Bant, 'Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence' (2015) 38(1) *University of New South Wales Law Journal* 367; Stephen McLeish, 'Challenges to the Survival of the Common Law' (2014) 38(2) *Melbourne University Law Review* 818; Mark Leeming, 'Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room' (2013) 36(3) *University of New South Wales Law Journal* 1002; Andrew Burrows, 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 (April) *Law Quarterly Review* 232; Paul Finn, 'Statutes and the Common Law: The Continuing Story' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 52; Paul Finn, 'Statutes and the Common Law' (1992) 22(1) *University of Western Australia Law Review* 7; J Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 (April) *Law Quarterly Review* 247; WMC Gummow, *Change and Continuity: Statute, Equity, and Federalism* (Oxford University Press, 1999) ch 1; Jack Beatson, 'Has the Common Law a Future?' (1997) 56(2) *Cambridge Law Journal* 291; PS Atiyah, 'Common Law and Statute Law' (1985) 48(1) *Modern Law Review* 1; Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982); Roscoe Pound, 'Common Law and Legislation' (1908) 21(6) *Harvard Law Review* 383.

employment contracts.² Far less attention, however, has been directed at exploring this interaction² in cases involving the characterisation of contracts for the performance of work.³

The characterisation of a work contract as an employment contract, under which a worker performs work as an employee, or an independent contract, under which a worker performs work as an independent contractor, carries significant consequences in a range of contexts.⁴ The distinction between employees and independent contractors is important in the law of vicarious liability, because employers are vicariously liable for the torts of their employees but principals are not vicariously liable for the torts of their independent contractors.⁵ The distinction is also relevant to the operation of various statutes that confer rights or impose obligations by reference to the

² See, eg, Joellen Riley, 'The Future of the Common Law in Employment Regulation' (2016) 32(1) *International Journal of Comparative Labour Law and Industrial Relations* 33; Douglas Brodie, 'The Dynamics of Common Law Evolution' (2016) 32(1) *International Journal of Comparative Labour Law and Industrial Relations* 45; 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; Alan Bogg and Hugh Collins, 'Lord Hoffmann and the Law of Employment: The Notorious Episode of *Johnson v Unisys Ltd*' in Paul S Davies and Justine Pila (eds), *The Jurisprudence of Lord Hoffmann: A Festschrift in Honour of Lord Leonard Hoffmann* (Hart Publishing, 2015) 185; Alan Bogg, 'Express Disciplinary Procedures in the Contract of Employment: Parliamentary Intention and the Supreme Court' (2015) 131 (January) *Law Quarterly Review* 15; Joellen Riley, 'Uneasy or Accommodating Bedfellows? Common Law and Statute in Employment Regulation' (Phillipa Weeks Lecture in Labour Law, Australian National University, 25 September 2013); Catherine Barnard and Louise Merrett, 'Winners and Losers: *Edwards* and the Unfair Law of Dismissal' (2013) 72(2) *Cambridge Law Journal* 313; Douglas Brodie, 'Legal Coherence and the Employment Revolution' (2001) 117 (October) *Law Quarterly Review* 604. Some contributions have addressed the relationship between statute and common law in the labour law context more generally: see, eg, Breen Creighton and Richard Mitchell, 'The Contract of Employment in Australian Labour Law' in Lammy Betten (ed), *The Employment Contract in Transforming Labour Relations* (Kluwer Law International, 1995) 129; Steven Anderman, 'The Interpretation of Protective Employment Statutes and Contracts of Employment' (2000) 29(3) *Industrial Law Journal* 223.

³ Two exceptions are Alan Bogg, 'Common Law and Statute in the Law of Employment' (2016) 69(1) *Current Legal Problems* 67; ACL Davies, 'The Relationship between the Contract of Employment and Statute' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 73. These contributions consider the interaction between statute and common law in a range of different contexts in labour law in the United Kingdom, including the characterisation of work contracts.

⁴ Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6th ed, 2016) 196–7; Carolyn Sappideen et al, *Macken's Law of Employment* (Lawbook, 8th ed, 2016) 18–20 [2.50].

⁵ *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161, 167 [12] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*Sweeney*').

concept of employment. For example, the *Fair Work Act 2009* (Cth) ('*FW Act*'), which is the primary labour statute in Australia, generally confers rights upon employees only.⁶ Workers who are not employees, such as independent contractors, are generally not entitled to these rights. As a result, the employment concept operates as a gateway to the rights in the *FW Act*.

The employment concept is also used in other statutes, such as those dealing with superannuation and taxation. For example, state payroll taxation statutes impose tax upon the wages that employers pay to their employees.⁷ Under the *Superannuation Guarantee (Administration) Act 1992* (Cth), employers must make superannuation payments on behalf of their employees.⁸ Employers must also withhold income taxation from the wages of their employees under the *Taxation Administration Act 1953* (Cth).⁹

Despite their widespread adoption by statutes, the terms 'employee' and 'employer' are often left undefined, or are only minimally defined, by those statutes. For example, s 15 of the *FW Act*, headed '[o]rdinary meanings of *employee* and *employer*', simply states that '[a] reference in this Act to an employee within its ordinary meaning: (a) includes a reference to a person who is usually such an employee; and (b) does not include a person on a vocational placement', and '[a] reference in this Act to an employer with its ordinary meaning includes a reference to a person who is usually such an employer'.¹⁰ The Explanatory Memorandum that accompanied the Fair Work Bill 2008 (Cth) stated that the terms 'employee' and 'employer' in the legislation referred to those concepts as understood 'at common law'.¹¹

The 'common law concept of employment'¹² was developed primarily in tort law cases involving claims of vicarious liability.¹³ Australian courts have

⁶ See, eg, *Fair Work Act 2009* (Cth) pts 2-2 (National Employment Standards), 2-3 (Modern Awards), 2-4 (Enterprise Agreements), 3-2 (Unfair Dismissal) ('*FW Act*'). *FW Act* pt 3-1, which contains the 'General Protections' provisions, extends its coverage beyond employees and employers.

⁷ *Payroll Tax Act 2007* (NSW) ss 6, 11.

⁸ *Superannuation Guarantee (Administration) Act 1992* (Cth) s 12(1), pt 3.

⁹ *Taxation Administration Act 1953* (Cth) sch 1 s 12-35.

¹⁰ *FW Act* (n 6) s 15 (emphasis in original).

¹¹ Explanatory Memorandum, Fair Work Bill 2008 (Cth) 5 [28]. See also *C v Commonwealth* (2015) 234 FCR 81, 87 [34]–[36] (Tracey, Buchanan and Katzmman JJ); Stewart et al, *Creighton and Stewart's Labour Law* (n 4) 196 [8.04]; Cameron Roles and Andrew Stewart, 'The Reach of Labour Regulation: Tackling Sham Contracting' (2012) 25(3) *Australian Journal of Labour Law* 258, 258–9.

¹² *ACE Insurance Ltd v Trifunovski* (2011) 200 FCR 532, 543 [28] (Perram J) ('*Trifunovski Trial*').

had recourse to this common law concept when determining whether a worker is an employee for the purposes of a statute that invokes the term 'employee' as a criterion for its operation. For example, in *ACE Insurance Ltd v Trifunovski*,¹⁴ a case involving a claim by a group of workers to certain leave entitlements under the *Workplace Relations Act 1996* (Cth),¹⁵ Perram J stated that the question of whether these workers were 'employees', and thereby covered by the Act, was to be answered by reference to the common law concept of employment. The question was, therefore, to be 'approached from the common law's perspective on the imposition of vicarious liability and with it a subsisting policy debate about the distributive allocation of losses between tortfeasors and their victims'.¹⁶ His Honour observed that the common law concept of employment was unaffected by the purposes underpinning any statute that engaged the concept.¹⁷

There is, however, reason to question such an approach to the employment concept in statutory contexts. In the special leave hearing in *ACE Insurance Ltd v Trifunovski*, Hayne J suggested that there may be a 'deeper question of principle'¹⁸ relating to whether 'the question of employment for the purposes of entitlements of the kind now in issue was to be determined according to considerations that made, for example, the vicarious responsibility cases irrelevant'.¹⁹ The application for special leave was ultimately refused,²⁰ and the deeper question of principle that Hayne J identified lingers, unanswered, in Australian law.

¹³ Ibid 542 [25] (Perram J). See also Joellen Riley, 'The Definition of the Contract of Employment and its Differentiation from Other Contracts and Other Work Relations' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 321, 324; Roles and Stewart (n 11) 259.

¹⁴ *Trifunovski* (Trial) (n 12).

¹⁵ The *Workplace Relations Act 1996* (Cth) was a precursor to the *FW Act* (n 6). The workers also relied upon the *Insurance Industry Award 1998* (Cth). It is not necessary for present purposes to discuss the Award.

¹⁶ *Trifunovski* (Trial) (n 12) 543 [28]. See also *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146, 149 [14] (Lander J), 182 [126]–[127] (Buchanan J) ('*Trifunovski* (Appeal)').

¹⁷ *Trifunovski* (Trial) (n 12) 542–3 [27].

¹⁸ Transcript of Proceedings, *ACE Insurance Ltd v Trifunovski* [2013] HCATrans 190, 21 ('*Trifunovski* (Special Leave Hearing)').

¹⁹ Ibid 9–12.

²⁰ Ibid 188–96 (Hayne J). Hayne and Keane JJ, who determined the application, concluded that there would be insufficient prospects of success on an appeal to the High Court. In light of the way the arguments had been put at trial and on appeal to the Full Federal Court, Hayne and Keane JJ were of the view that this case was not a suitable vehicle for exploring the deeper question of principle to which Hayne J alluded.

Some judges have addressed the point briefly in obiter dicta. For example, in *Day v The Ocean Beach Hotel Shellharbour Pty Ltd*, Leeming JA stated that ‘a conclusion that a person is an “employee” or “independent contractor” for a particular purpose (such as payroll tax, or superannuation, or employment law) cannot determine whether the relationship is such as to engage the rules of vicarious liability’.²¹ More recently, in *Tattsbet Ltd v Morrow*, Allsop CJ observed that ‘[t]he statutory and factual context will always be critical in a multifactorial process of characterisation of a legal and human relationship: employment’.²² His Honour referred to the approach of the United States Court of Appeals for the Second Circuit (‘US Second Circuit Court of Appeals’) in *Lehigh Valley Coal Co v Yensavage* (‘*Lehigh Valley*’),²³ one of the early cases in the United States (‘US’) that expounded a purposive approach to the employment concept. Allsop CJ did not, however, elaborate upon why or how the statutory context was relevant to the characterisation exercise.

A purposive approach to the employment concept has been adopted by courts in some overseas jurisdictions, including the Supreme Court of Canada²⁴ and, for a time, the Supreme Court of the United States (‘US Supreme Court’).²⁵ Under such an approach, the purposes underpinning a common law doctrine (for example, the doctrine of vicarious liability) that engages the employment concept, or the purposes underpinning a statute that operates by reference to the employment concept, are taken into account in determining whether a worker is an employee in a particular context.²⁶ One consequence of adopting a purposive approach to the employment concept is that a worker may be an employee in one context but not another.²⁷ For example, a worker may be characterised as an employee for the purposes of a labour statute conferring employment rights and protections, but an independent contractor for the purposes of a taxation statute or

²¹ (2013) 85 NSWLR 335, 341–2 [15] (Meagher JA agreeing at 337 [1], Emmett JA agreeing at 338 [4]).

²² (2015) 233 FCR 46, 50 [5] (‘*Tattsbet*’).

²³ 218 F 547 (2nd Cir, 1914) (‘*Lehigh Valley*’).

²⁴ See, eg, *McCormick v Fasken Martineau DuMoulin LLP* [2014] 2 SCR 108 (‘*McCormick*’).

²⁵ *National Labor Relations Board v Hearst Publications Inc*, 322 US 111 (1944) (‘*Hearst Publications*’); *United States v Silk*, 331 US 704 (1947) (‘*Silk*’); *Rutherford Ford Corp v McComb*, 331 US 722 (1947).

²⁶ See Guy Davidov, *A Purposive Approach to Labour Law*, ed Paul Davies, Keith Ewing and Mark Freedland (Oxford University Press, 2016) ch 6.

²⁷ Brian A Langille and Guy Davidov, ‘Beyond Employees and Independent Contractors: A View from Canada’ (1999) 21(1) *Comparative Labor Law and Policy Journal* 7, 18.

vicarious liability in tort law, or vice versa.²⁸ The reason for this is that different statutes with different purposes operate by reference to the employment concept.²⁹ These purposes also differ from the purposes informing the common law doctrine of vicarious liability.

Purposive approaches to labour law have attracted interest in other jurisdictions³⁰ but received limited attention from the judiciary and scholars in Australia.³¹ This article seeks to begin a conversation about the utility and viability of a purposive approach to the employment concept in Australia. It does so by canvassing the arguments in favour of a purposive approach and identifying some of the primary barriers to the adoption of such an approach by Australian courts. It critically evaluates several strands of reasoning in the Australian case law, both within and outside of the labour law context, that have a bearing upon the viability of a purposive approach to the employment concept. It also draws upon Canadian and US case law for comparative insights. This article focuses on statutes that confer employment entitlements and protections, such as leave entitlements and protections from unfair dismissal, upon those who are ‘employees’. These statutes will be referred to as ‘protective labour statutes’.³² The reason for focusing on these statutes is that much of the Canadian and US case law on the purposive approach to the

²⁸ Ibid.

²⁹ Ibid.

³⁰ See, eg, Davidov, *A Purposive Approach to Labour Law* (n 26); Julie McClelland, ‘A Purposive Approach to Employment Protection or a Missed Opportunity?’ (2012) 75(3) *Modern Law Review* 427; Alan L Bogg, ‘Sham Self-Employment in the Supreme Court’ (2012) 41(3) *Industrial Law Journal* 328; Guy Davidov, ‘A Purposive Interpretation of the National Minimum Wage Act’ (2009) 72(4) *Modern Law Review* 581; Guy Davidov, ‘The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection’ (2002) 52(4) *University of Toronto Law Journal* 357.

³¹ Exceptions include Adrian Merritt, ‘“Control” v “Economic Reality”: Defining the Contract of Employment’ (1982) 10(2) *Australian Business Law Review* 105; 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. There is a brief discussion of the purposive approach in Stewart et al, *Creighton and Stewart’s Labour Law* (n 4) 220–1 [8.56]. For Australian cases that have referred to the relevance of statutory purpose in the characterisation of work contracts, see above nn 21–3 and accompanying text; below nn 90–8 and accompanying text.

³² See Steven Anderman, ‘The Interpretation of Protective Employment Statutes and Contracts of Employment’ (2000) 29(3) *Industrial Law Journal* 223. The present article refers to ‘protective labour statutes’ because it discusses cases dealing with collective bargaining statutes as well as those dealing with statutes that confer employment rights and entitlements. The term ‘labour statutes’ is used broadly to capture both types of statutes.

employment concept involves protective labour statutes.³³ Despite this focus, some of the arguments made in this article have implications for other types of statutes in Australia that engage the employment concept.

This article proceeds in three parts. Part II critically analyses Australian cases concerning the characterisation of work contracts. It demonstrates that in determining whether a worker is an employee in respect of a particular statute that engages the employment concept, courts have generally applied the common law concept of employment as expounded in vicarious liability cases without regard to the purposes underlying the relevant statute. In several cases, however, this approach has been called into question and it has been suggested that statutory purpose should be taken into account in the characterisation exercise.³⁴ Part III and Part IV of this article assess the utility and viability of this alternative approach. To this end, Part III undertakes a comparative analysis, drawing upon decisions of the Supreme Court of Canada and the US Supreme Court that have adopted a purposive approach to the employment concept in respect of protective labour statutes. Part IV then identifies and examines some of the key barriers to the adoption of such an approach by Australian courts.

II THE AUSTRALIAN APPROACH TO THE CHARACTERISATION OF WORK CONTRACTS

A *The Common Law Concept of Employment*

The common law concept of employment was developed primarily in vicarious liability cases.³⁵ Historically, the ‘control test’ was applied to distinguish employees from independent contractors.³⁶ Under this test, courts had regard to the ‘nature and degree’³⁷ of control that the ‘hirer’³⁸ exercised over the worker. If the worker was subject to the hirer’s control in respect of the manner in which the work was to be performed, then the

³³ See below Part III(B).

³⁴ See above nn 21–3 and accompanying text; below nn 90–8 and accompanying text.

³⁵ See above nn 12–13 and accompanying text.

³⁶ See *Performing Right Society Ltd v Mitchell & Booker Ltd* [1924] 1 KB 762, 767–8 (McCardie J) (*Performing Right Society*).

³⁷ *Ibid* 767 (McCardie J).

³⁸ The term ‘hirer’ is used as a neutral term to refer to a person or entity who hires a person to perform work: Andrew Stewart, ‘Redefining Employment? Meeting the Challenge of Contract and Agency Labour’ (2002) 15(1) *Australian Journal of Labour Law* 235, 235 n 2.

worker was an employee.³⁹ An independent contractor was a worker who '[undertook] to produce a given result, but ... in the actual execution of the work ... [was] not under the order or control of the hirer.'⁴⁰

Australian courts no longer apply the control test. Instead, in determining whether a worker is an employee or an independent contractor, the courts apply a multi-factor test.⁴¹ This multi-factor test requires a court to assess and balance a range of factors against each other. These factors include: whether the hirer exercises control over the worker; whether the worker is required to provide personal service; whether the worker is responsible for the supply and maintenance of tools and equipment; whether the worker assumes the risk of loss and has an opportunity for profit; whether the worker is paid on a time basis or a piece rate; and whether the hirer has assumed responsibility for matters such as leave, superannuation, insurance and taxation.⁴² Although control remains a significant factor, it is not the only one, and the High Court of Australia has stated that 'it is the totality of the relationship between the parties which must be considered'.⁴³ None of the factors, apart from the requirement of personal service,⁴⁴ is alone conclusive.⁴⁵ Instead, in arriving at a conclusion on the character of a work contract, the court considers the factors holistically.⁴⁶

³⁹ *Performing Right Society* (n 36) 768 (McCardie J).

⁴⁰ *Ibid.*

⁴¹ See, eg, *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 ('Stevens'); *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 ('Hollis'); *Trifunovski (Appeal)* (n 16).

⁴² See *Stevens* (n 41) 24 (Mason J), 36–7 (Wilson and Dawson JJ).

⁴³ *Ibid* 29 (Mason J). See also *Hollis* (n 41) 33 [24] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

⁴⁴ Personal service is an essential aspect of the employment relationship. Accordingly, if the contract confers upon the worker a genuine and unqualified right to delegate the work to a third party, then this will generally preclude a finding of employment: *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385, 391 (Lord Fraser for the Court); *Stevens* (n 41) 38 (Wilson and Dawson JJ); *Trifunovski (Appeal)* (n 16) 150 [25] (Buchanan J).

⁴⁵ Mark Irving, *The Contract of Employment* (LexisNexis Butterworths, 2012) 40.

⁴⁶ *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939; *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2010) 184 FCR 448, 460 (Keane CJ, Sundberg and Kenny JJ); *Stevens* (n 41) 29 (Mason J); *Hollis* (n 41) 33 [24] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). Recently, a disagreement has emerged between members of the Federal Court of Australia as to the proper approach to the test for characterising work contracts. It is not necessary for present purposes to examine these divergent approaches. None of these approaches direct attention to the purpose of the relevant statute. See *On Call Interpreters & Translators Agency Pty Ltd v Federal Commissioner of Taxation [No 3]* (2011) 214 FCR 82 ('On Call Interpreters'); *Trifunovski (Appeal)* (n 16); *Tattsbet* (n 22). For a

The common law concept of employment is informed and moulded by the policy considerations underlying the doctrine of vicarious liability. The High Court made this clear in *Hollis v Vabu Pty Ltd* ('*Hollis*'), where the issue was whether a company which ran a courier business was vicariously liable for the negligent conduct of one of its bicycle couriers.⁴⁷ The majority stated that '[t]erms such as "employee" and "independent contractor", and the dichotomy which is seen as existing between them, do not necessarily display their legal content purely by virtue of their semantic meaning'.⁴⁸ Rather, the content of these terms 'will reflect, from the facts of case to case, the particular force given to the considerations supporting the doctrine of vicarious liability',⁴⁹ and 'guidance' on whether a worker is an employee or an independent contractor 'is provided by various matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability'.⁵⁰

B *The Characterisation of Work Contracts in Statutory Contexts*

The common law concept of employment is purposive, in the sense that it is moulded by the purposes of the vicarious liability doctrine.⁵¹ The remainder of this article is concerned with whether this concept can be moulded by the purposes of a statute that engages the concept. Unless otherwise indicated, references in the rest of the article to a purposive approach should be understood as references to this *statutory* purposive approach.

Two key points can be discerned from Australian cases involving the characterisation of work contracts in statutory contexts. The first is that when a statute uses the term 'employee' as a criterion for its operation, recourse is had to the common law concept of employment to determine whether a worker is an employee or an independent contractor in respect of the statute. In *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd* ('*Foster*'), Dixon, Fullagar and Kitto JJ stated that the terms 'employee' and 'employer', when used in s 4 of the *Conciliation and Arbitration Act 1904* (Cth), referred to the 'relation called at common law master and servant'.⁵²

discussion of these divergent approaches, see Stewart et al, *Creighton and Stewart's Labour Law* (n 4) 211–13 [8.35]–[8.39].

⁴⁷ *Hollis* (n 41) 35 [29] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

⁴⁸ *Ibid* 38 [36] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

⁴⁹ *Ibid*.

⁵⁰ *Ibid* 41 [45] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

⁵¹ *Ibid*.

⁵² (1952) 85 CLR 138, 153 ('*Foster*').

Stephen J took the same approach in *Federal Commissioner of Taxation v Barrett*, which involved a taxation statute that used the term ‘employee’ as a criterion of liability.⁵³ His Honour stated:

The Act thus employs the term ‘employee’, unaffected by statutory definition, as the ultimate touchstone of liability of tax; it relies for its operation upon the meaning of this term of art in the law and in doing so necessarily refers to a concept which owes its origin and refinement to the common law and the meaning of which is to be found in the decisions of the courts and cannot be divorced from them. So long as those decisions are not affected by special statutory context they will be decisive of the meaning of ‘employee’ or of its more ancient but now somewhat anachronistic synonym, ‘servant’.⁵⁴

The second and related point is that the common law concept of employment is unaffected by statutory context. That is, it is not moulded or informed by the purposes of any of the statutes that engage it. In *ACE Insurance Ltd v Trifunovski*, Perram J observed that the term ‘employee’ in the *Workplace Relations Act 1996* (Cth) referred to the common law concept of employment, and that the various statutes which engage the employment concept ‘do not have any impact upon the common law’s content which remains concerned with, and focused upon, the imposition of vicarious liability’.⁵⁵

More recently, in *C v Commonwealth*, the Full Federal Court stated that the terms ‘employee’ and ‘employer’ in the *FW Act* ‘are rooted in the common law’ and that the ‘terms refer to parties to a contract of service or employment’.⁵⁶ The Court referred in this regard to *Hollis*, where the High Court had observed that the common law concept of employment is informed by the policy considerations underpinning the doctrine of vicarious liability.⁵⁷ Significantly, the Court in *C v Commonwealth* also distinguished an earlier Full Federal Court decision, *Konrad v Victoria* (*‘Konrad’*), in which a purposive approach had been taken to the term ‘employee’ in a statutory context.⁵⁸

⁵³ (1973) 129 CLR 395.

⁵⁴ Ibid 403. See also *Mutual Life v Citizens’ Assurance Co Ltd v A-G (Qld)* (1961) 106 CLR 48, 55, 57 (Dixon CJ), 58 (Kitto J), 58–9 (Taylor J), 59 (Windeyer J).

⁵⁵ *Trifunovski (Trial)* (n 12) 542–3 [27].

⁵⁶ (2015) 234 FCR 81, 87 [34] (Tracey, Buchanan and Katzmann JJ).

⁵⁷ *Hollis* (n 41) 41 [45] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

⁵⁸ (1999) 91 FCR 95 (*‘Konrad’*).

The issue in *Konrad* was whether members of the Victorian police force were entitled to the protections of the termination of employment provisions in div 3 of pt VIA of the *Industrial Relations Act 1988* (Cth) ('*IR Act*').⁵⁹ This turned upon whether they were 'employees' for the purposes of these statutory provisions.⁶⁰ The constitutional underpinning of these provisions was the external affairs power in s 51(xxix) of the *Australian Constitution*.⁶¹ Finkelstein J had regard, among other things, to s 170CA(1) of the *IR Act*,⁶² which stated that the object of these provisions was to give effect to the *Termination of Employment Convention*⁶³ and the *Termination of Employment Recommendation*.⁶⁴ His Honour also had regard to s 170CB of the *IR Act*, which stated that '[a]n expression has the same meaning ... [in the termination of employment provisions] as in the *Termination of Employment Convention*'.⁶⁵ There were cases that indicated that police officers were not 'employees' under Australian common law.⁶⁶ Finkelstein J observed, however, that the term 'employee' in div 3 of pt VIA of the *IR Act* should not be 'confined to its common law meaning'.⁶⁷ Rather, the term should be interpreted with regard to its purpose, which was to give effect to the *Termination of Employment Convention*.⁶⁸ His Honour concluded that the term captured the police officers in this case.⁶⁹ In adopting this purposive approach to the interpretation of the term 'employee', Finkelstein J referred, among other things, to the US Supreme Court's decision in *National Labor Relations Board v Hearst Publications Inc* ('*Hearst Publications*').⁷⁰ In *Hearst*

⁵⁹ *Ibid* 97 [2] (Ryan J).

⁶⁰ *Ibid* 101 [13] (Ryan J).

⁶¹ See *ibid* 118 [71] (Finkelstein J).

⁶² *Ibid* 110 [43], 120 [81].

⁶³ *Convention concerning Termination of Employment at the Initiative of the Employer*, opened for signature 22 June 1982, 1412 UNTS 159 (entered into force 23 November 1985).

⁶⁴ *Recommendation concerning Termination of Employment at the Initiative of the Employer*, ILC, 68th sess, ILO Doc R166 (22 June 1982).

⁶⁵ *Konrad* (n 58) 118 [71].

⁶⁶ *Ibid* 120–1 [83]–[84] (Finkelstein J).

⁶⁷ *Ibid* 127 [103] (Ryan J agreeing at 101–2 [14]–[15], North J agreeing at 104 [22]). North J disagreed only in one respect that was irrelevant to the characterisation of the work contract: at 104 [22]. See also *New South Wales v Briggs* (2016) 95 NSWLR 467, 481–3 [50]–[57] (Leeming JA), which discusses the status of police officers in various statutory contexts.

⁶⁸ *Konrad* (n 58) 118 [71], 127 [103] (Finkelstein J).

⁶⁹ *Ibid* 127 [104].

⁷⁰ *Hearst Publications* (n 25).

Publications, which will be discussed below, the Court adopted a purposive approach to the employment concept in a protective labour statute.⁷¹

The Court in *C v Commonwealth* distinguished *Konrad* on the basis that the *FW Act* does not contain a section such as s 170CB of the *IR Act*.⁷² Rather, the Court noted that the relevant provisions of the *FW Act* refer to the 'ordinary meaning'⁷³ of employer and employee, and this 'narrower definition'⁷⁴ was to be taken as a reference to the common law concept of employment.⁷⁵ Further, the Court in *C v Commonwealth* stated that pt 3-1 of the *FW Act*,⁷⁶ upon which the applicant relied, is for the large part underpinned by the corporations power in s 51(xx) of the *Australian Constitution*.⁷⁷ Unlike the provisions under consideration in *Konrad*, pt 3-1 of the *FW Act* is not supported by the external affairs power. As a result, the Court also rejected the argument that a broader approach to the concept of employment was needed to comply with Australia's international obligations.⁷⁸

Courts have not engaged with the purposes of the relevant statute, even in those cases where it has been stressed that regard should be had to the reality of the relationship in determining whether a worker is an employee or an independent contractor.⁷⁹ In order to develop this point, it is necessary to examine briefly the cases that have addressed matters of form and substance in the characterisation of work contracts. An approach that privileges form over substance in characterisation accords primacy to the terms of the contract and disregards, or places limited weight upon, how the parties conduct their relationship in practice.⁸⁰ An approach to characterisation that

⁷¹ See below Part III(B).

⁷² *C v Commonwealth* (n 11) 87 [33]–[34] (Tracey, Buchanan and Katzmann JJ).

⁷³ *FW Act* (n 6) ss 15, 335.

⁷⁴ *C v Commonwealth* (n 11) 87 [34] (Tracey, Buchanan and Katzmann JJ).

⁷⁵ *Ibid* 87 [36] (Tracey, Buchanan and Katzmann JJ).

⁷⁶ Part 3-1 of the *FW Act* (n 6) contains the 'General Protections' provisions.

⁷⁷ *C v Commonwealth* (n 11) 87 [37] (Tracey, Buchanan and Katzmann JJ), citing *New South Wales v Commonwealth* (2006) 229 CLR 1.

⁷⁸ *C v Commonwealth* (n 11) 87 [37] (Tracey, Buchanan and Katzmann JJ).

⁷⁹ See below n 89.

⁸⁰ See *Tobiassen v Reilly* (2009) 178 IR 213; *Australian Air Express Pty Ltd v Langford* (2005) 147 IR 240; *Young v Tasmanian Contracting Services Pty Ltd* [2012] TASFC 1. Reference is made to these cases, among others, in Stewart et al, *Creighton and Stewart's Labour Law* (n 4) 212–13 [8.38], 212 n 150.

focuses on the substance or reality of the relationship directs attention to the way the parties conduct themselves in practice.

In *Hollis*, a majority of the High Court stated that ‘the relationship between the parties ... is to be found not merely from [the] contractual terms’ but also from ‘[t]he system which was operated thereunder and the work practices imposed by Vabu’.⁸¹ Some scholars have regarded this statement as an endorsement of an approach to characterisation that focuses on the substance of the relationship,⁸² though others have pointed to alternative interpretations of it.⁸³ Following *Hollis*, some judges of the Federal Court have explicitly adopted an approach to the characterisation of work contracts that focuses on the substance of the relationship. For example, in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*, North and Bromberg JJ observed that ‘when determining whether a relationship is one of employment’, it is necessary ‘to ensure that form and presentation do not distract the Court from identifying the substance of what has been truly agreed’.⁸⁴ It should be acknowledged that there have been decisions of other Australian courts, subsequent to *Hollis*, which have adhered to an approach that privileges form over substance.⁸⁵

It is important to note that an approach to characterisation that focuses on the substance of the relationship is not the same as a purposive approach to characterisation. The two are related; indeed, an approach that focuses on substance over form is a component of the purposive approach. However, a purposive approach goes further than an approach that is attentive to the substance of the relationship. Professor Guy Davidov made this point in his seminal work on purposive approaches to labour law.⁸⁶ He observed that

⁸¹ *Hollis* (n 41) 33 [24] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). See also *Trifunovski (Appeal)* (n 16) 174 [107]–[108] (Buchanan J).

⁸² See, eg, Ian Neil and David Chin, *The Modern Contract of Employment* (Lawbook, 2nd ed, 2017) 22–3 [1.100]; Sappideen et al (n 4) 47 [2.260]; Rosemary Owens, ‘Decent Work for the Contingent Workforce in the New Economy’ (2002) 15(1) *Australian Journal of Labour Law* 209, 221.

⁸³ See, eg, Stewart, ‘Redefining Employment? Meeting the Challenge of Contract and Agency Labour’ (n 38) 250–1, quoting *Express & Echo Publications Ltd v Tanton* [1999] ICR 693, 697 (Gibson LJ); Irving (n 45) 62–3; Pauline Bomball, ‘Subsequent Conduct, Construction and Characterisation in Employment Contract Law’ (2015) 32(2) *Journal of Contract Law* 149, 156–7.

⁸⁴ (2015) 228 FCR 346, 378 [142] (‘Quest’). See also *On Call Interpreters* (n 46) 119–21 [189]–[200] (Bromberg J); *Trifunovski (Appeal)* (n 16) 174 [107]–[108] (Buchanan J).

⁸⁵ See above n 80.

⁸⁶ Davidov, *A Purposive Approach to Labour Law* (n 26).

'sensitivity to economic realities, with a focus on the real arrangements between the parties instead of a formalistic reliance on the written terms of the contract' is 'important' but 'not sufficient'.⁸⁷ As the analysis of the US and Canadian cases in Part III of this article will show, a purposive approach that is attentive to statutory purpose goes further and results in a reorientation of the multi-factor test.⁸⁸ For now, it suffices to note that even in those cases where courts have focused on the substance of the relationship in the characterisation exercise, the purposes of the relevant statute have not been taken into account.⁸⁹

The preceding analysis demonstrates that Australian courts have generally not had regard to statutory purpose when determining whether a worker is an employee or an independent contractor. There are, however, several exceptions.⁹⁰ In *Articulate Restorations & Development Pty Ltd v Crawford*, a decision of the New South Wales Supreme Court, the issue was whether a worker was an employee or an independent contractor for the purposes of the *Workers Compensation Act 1987* (NSW).⁹¹ Mahoney JA stated that 'the *Workers Compensation* legislation should, in my opinion, be regarded as beneficial legislation in the sense at least that it is directed to ensuring that industry bears the burden, or most of the burden, of the accidents which, as experience has shown, it inevitably produces'.⁹² His Honour observed that '[i]n such legislation, it is proper that the entitlements of the injured person not depend upon distinctions which are too nice'.⁹³

Borg v Olympic Industries Pty Ltd dealt with the distinction between employees and independent contractors for the purposes of the *Industrial*

⁸⁷ Ibid 115.

⁸⁸ Ibid 117.

⁸⁹ See *Quest* (n 84); *Trifunovski (Appeal)* (n 16); *On Call Interpreters* (n 46). In *On Call Interpreters*, Bromberg J mentioned in passing that 'the Supreme Court of the United States (at least in the context of defining "employee" in industrial legislation) has applied what has been called the economic reality test, a test which is focused on the economic facts of the relationship': at 120 [195]. His Honour cited two US Supreme Court cases, *Hearst Publications* (n 25) and *Silk* (n 25), which applied the statutory purpose approach to the characterisation of work contracts. His Honour did not return to the reasoning in these cases in the course of his judgment.

⁹⁰ In addition to the cases discussed here, see above nn 21–3 and accompanying text. See also Stewart et al, *Creighton and Stewart's Labour Law* (n 4) 221 nn 206–7.

⁹¹ (1994) 57 IR 371.

⁹² Ibid 380.

⁹³ Ibid.

Conciliation and Arbitration Act 1972 (SA).⁹⁴ In this case, the Industrial Court of South Australia suggested that ‘the answer to the question’ of whether a worker is an employee or an independent contractor ‘appears sometimes to depend on the purpose or reason behind the question’.⁹⁵ The Court observed that the answer to the question in the context of a taxation matter might be different to the answer reached in a vicarious liability case.⁹⁶

In *R v Allan; Ex parte Australian Mutual Provident Society*, Bray CJ observed that matters ‘of legislative policy are involved’ in the question of whether a worker is an employee or an independent contractor ‘for the purpose of fiscal statutes or statutes of social, economic or industrial regulation’.⁹⁷ The Full Federal Court adopted these statements in *Rowe v Capital Territory Health Commission*.⁹⁸ Despite these judicial observations, limited attention has been directed at ascertaining why or how statutory purpose may be relevant to the characterisation exercise. Is a purposive approach to the employment concept in statutory contexts viable in Australia? What does a purposive approach entail? The next part of this article turns to Canadian and US cases for guidance on these issues. It focuses on cases where statutory purpose has been used to guide the characterisation of a work contract in respect of a protective labour statute.

III A PURPOSIVE APPROACH TO THE EMPLOYMENT CONCEPT IN PROTECTIVE LABOUR STATUTES

A Justifying the Comparators

Those who engage in comparative analysis must exercise caution. As Sir Otto Kahn-Freund has observed, ‘any attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection’.⁹⁹ In a similar vein, French CJ, Bell and Keane JJ stated in *Commonwealth Bank of Australia v Barker* (*Barker*) that ‘[j]udicial decisions about employment contracts in other common law jurisdictions ... attract the cautionary observation that Australian judges must “subject [foreign rules] to inspection

⁹⁴ (1984) 26 ALJR ¶363.

⁹⁵ *Ibid* ¶364 (Di Fazio IM).

⁹⁶ *Ibid*.

⁹⁷ (1977) 16 SASR 237, 247 (Hogarth J agreeing at 252).

⁹⁸ (1982) 2 IR 27, 28 (Northrop, Deane and Fisher JJ).

⁹⁹ O Kahn-Freund, ‘On Uses and Misuses of Comparative Law’ (1974) 37(1) *Modern Law Review* 1, 27.

at the border to determine their adaptability to native soil”¹⁰⁰. Those advocating for the adoption of a particular principle or approach from a different jurisdiction need to be mindful of the context in which that principle or approach was developed.¹⁰¹ Comparative law is misused when ‘it is informed by a legalistic spirit which ignores this context of the law’.¹⁰²

There are three contextual matters that suggest that the Canadian and US cases serve as appropriate comparators here. The first is that in each of Australia, Canada and the US, the common law concept of employment was developed primarily in vicarious liability cases.¹⁰³ In all three countries, a multi-factor test is applied to determine whether a worker is an employee or an independent contractor for the purposes of vicarious liability.¹⁰⁴ The second is that in all three countries, multiple statutes invoke the employment concept as a criterion for their operation. The types of statutes engaging the employment concept are also similar, including labour statutes and taxation statutes.¹⁰⁵ The third is that in all three countries, the statutes that engage the employment concept generally leave the term ‘employee’ either undefined or

¹⁰⁰ (2014) 253 CLR 169, 185 [18] (*Barker*), quoting Paul Finn, ‘Statutes and the Common Law’ (1992) 22(1) *University of Western Australia Law Review* 7, 13, quoting Roger J Traynor, ‘Statutes Revolving in Common Law Orbits’ (1968) 17(4) *Catholic University Law Review* 401, 409.

¹⁰¹ Kahn-Freund (n 99) 27.

¹⁰² *Ibid.*

¹⁰³ As to Australia, see above nn 12–13 and accompanying text. As to the US, see Richard R Carlson, ‘Why the Law Still Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying’ (2001) 22(2) *Berkeley Journal of Employment and Labor Law* 295, 305–6. As to Canada, see HW Arthurs, ‘The Dependent Contractor: A Study of the Legal Problems of Countervailing Power’ (1965) 16(1) *University of Toronto Law Journal* 89, 94–5; Langille and Davidov (n 27) 15–16.

¹⁰⁴ As to Australia, see above nn 41–6 and accompanying text. As to the US, see *Nationwide Mutual Insurance Co v Darden*, 503 US 318, 323–4 (Souter J for the Court) (1992) (*Darden*), quoting *Community for Creative Non-Violence v Reid*, 490 US 730, 751–2 (Marshall J for the Court) (1989). As to Canada, see *671122 Ontario Ltd v Sagaz Industries Canada Inc* [2001] 2 SCR 983, 1000–5 (Major J for the Court) (*Sagaz Industries*).

¹⁰⁵ For a discussion of the Canadian statutes, see Judy Fudge, Eric Tucker and Leah F Vosko, ‘Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada’ (2003) 10 *Canadian Labour and Employment Law Journal* 193; Langille and Davidov (n 27). As to the US statutes, see Marc Linder, ‘Dependent and Independent Contractors in Recent US Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness’ (1999) 21(1) *Comparative Labor Law and Policy Journal* 187; Carlson (n 103).

only minimally defined.¹⁰⁶ The similarities with respect to these three matters indicate that it is appropriate to have regard to Canadian and US cases to assess the utility and viability of a purposive approach to the employment concept in Australia.

It is necessary, too, to explain why the approach of the Supreme Court of the United Kingdom ('UK Supreme Court') in *Autoclenz Ltd v Belcher* ('*Autoclenz*')¹⁰⁷ is not examined in this article. In *Autoclenz*, the Court explicitly adopted a 'purposive approach'¹⁰⁸ in determining whether workers were employees or independent contractors for the purposes of protective labour legislation.¹⁰⁹ The purposive approach examined in this article is different from the purposive approach propounded in *Autoclenz*. This article considers whether the employment concept can be moulded by reference to the purposes of a statute that engages the concept. The core aspect of *Autoclenz* was its privileging of substance over form in characterisation. In characterising the work contract, the UK Supreme Court focused on the substance of the relationship, as revealed by how the parties conducted themselves in practice, rather than the form of the relationship, as set out in the contractual documentation.¹¹⁰ As noted above,¹¹¹ a focus on substance is only one aspect of the purposive approach examined in this article.

B Reasons for Adopting a Purposive Approach to the Employment Concept

1 Vicarious Liability and Protective Labour Statutes: Different Purposes

There are difficulties with applying, to different statutory contexts, a common law concept of employment that is rooted in the policy considerations underpinning the doctrine of vicarious liability. Leading labour law scholars in Australia have suggested that 'the application of a universal test, with little regard for the context in which the existence of a contract of service falls to be determined, may arguably defeat the policy objectives of the different

¹⁰⁶ For a discussion of the Canadian statutes, see Fudge, Tucker and Vosko (n 105); Langille and Davidov (n 27). As to the US statutes, see Linder (n 105); Carlson (n 103). See also above nn 10–11 and accompanying text.

¹⁰⁷ [2011] 4 All ER 745 (*Autoclenz*).

¹⁰⁸ *Ibid* 757 (Lord Clarke JSC for the Court).

¹⁰⁹ See Bogg, 'Sham Self-Employment in the Supreme Court' (n 30) 341–4; Bogg, 'Common Law and Statute in the Law of Employment' (n 3) 99–100; Davies (n 3) 84–6.

¹¹⁰ *Autoclenz* (n 107) 756–9 (Lord Clarke JSC).

¹¹¹ See above nn 86–8 and accompanying text.

regulatory schemes involved'.¹¹² In *ACE Insurance Ltd v Trifunovski*, Buchanan J alluded to the challenges of applying a concept developed in vicarious liability cases to questions of employment for the purposes of statutory employment entitlements:

The two areas where the distinction [between employees and independent contractors] is important concern the duties and obligations owed by the contracting parties to each other and the duties and obligations that one of them may owe to third parties. It is in the latter field that much of the learning has been expressed, although that circumstance has introduced some difficulties into the former.¹¹³

Buchanan J did not elaborate upon these difficulties. One of these difficulties is the disjunction between the purposes of the vicarious liability doctrine and the purposes of protective labour statutes that engage the employment concept. Professor Harry Arthurs made this point in 1965 in a highly influential article concerning, among other things, judicial approaches to the employment concept in collective bargaining legislation in Canada.¹¹⁴ He noted that the concerns of vicarious liability, which centre upon the allocation of losses between a person or entity who engages another to perform work and the third party who has been injured as a result of the worker's negligence, are unconnected to the purposes underlying protective labour statutes.¹¹⁵ He expressed concern about the failure of the Canadian courts to adopt a purposive approach to the employment concept in statutory contexts and observed that '[s]urely any meaningful definition [of employee] must be formulated in light of ... statutory purpose'.¹¹⁶

Courts in Canada and, for a time, the US identified the disjunction between the purposes of the vicarious liability doctrine and the purposes of protective labour statutes as a reason for taking a different approach to the term 'employee' in cases involving such statutes. In a series of cases, the US Supreme Court adopted an approach to the characterisation of work contracts that was informed by the purpose of the relevant statute. Influential in these cases was an early exposition of the purposive approach to

¹¹² Stewart et al, *Creighton and Stewart's Labour Law* (n 4) 220–1 [8.56], citing Brooks (n 31) 90–101.

¹¹³ *Trifunovski (Appeal)* (n 16) 151 [26].

¹¹⁴ Arthurs (n 103).

¹¹⁵ *Ibid* 94–5.

¹¹⁶ *Ibid* 95.

characterisation in *Lehigh Valley*, a decision of the US Second Circuit Court of Appeals.¹¹⁷

The issue in *Lehigh Valley* was whether a worker was an employee for the purposes of a protective labour statute.¹¹⁸ Learned Hand J stated that the term ‘employed’ in the legislation ‘must be understood with reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given’.¹¹⁹ His Honour observed that ‘the whole purpose of such statutes ... [is] to protect those who are at an economic disadvantage’¹²⁰ and that ‘[s]uch statutes are partial; they upset the freedom of contract ... they should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them’.¹²¹

The reasoning in *Lehigh Valley* was influential in the US Supreme Court’s judgment in *Hearst Publications*, which concerned the *National Labor Relations Act* (‘NLRA’).¹²² At issue in *Hearst Publications* was whether newsboys who distributed newspapers for the defendant newspaper companies were employees for the purposes of the NLRA, such as to require the defendant companies to bargain collectively with the union that represented the newsboys.¹²³ The term ‘employee’ was defined in the NLRA to ‘include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise’.¹²⁴ In determining whether the newsboys were employees, Rutledge J, who delivered the opinion of the Court, adopted and applied a purposive approach.

In his elaboration of the purposive approach, Rutledge J reiterated the statement of Learned Hand J in *Lehigh Valley* that ‘[w]here all the conditions of the relation require protection, protection ought to be given’.¹²⁵ Rutledge J

¹¹⁷ *Lehigh Valley* (n 23).

¹¹⁸ *Ibid* 552 (Learned Hand J). As Professor Carlson observed, ‘[t]he exact nature of the statute is unclear’: Carlson (n 103) 312 n 78; although it ‘apparently provided compensation for work-place accidents’: at 312. The reason for this lack of clarity is that the statute is not identified by name in the judgment: at 312 n 78.

¹¹⁹ *Lehigh Valley* (n 23) 552.

¹²⁰ *Ibid*.

¹²¹ *Ibid* 553.

¹²² 29 USC §§ 151–69 (1940).

¹²³ *Hearst Publications* (n 25) 113 (Rutledge J for the majority).

¹²⁴ 29 USC § 152(3) (1940), as amended by *Labor Management Relations Act*, Pub L No 80-101, § 101, 61 Stat 136, 136–52 (1947).

¹²⁵ *Hearst Publications* (n 25) 129.

observed that ‘technical concepts pertinent’ to an employer’s vicarious liability should not be invoked ‘to restrict the scope of the term “employee” in the *NLRA*.¹²⁶ Adoption of the restrictive common law test would not be ‘consistent with the statute’s broad terms and purposes’.¹²⁷ Instead, the term ‘employee’ in the *NLRA* “takes color from its surroundings ... [in] the statute where it appears”¹²⁸ ... and derives meaning from the context of that statute, which “must be read in the light of the mischief to be corrected and the end to be attained”’.¹²⁹

In this case, the newsboys worked full time and were subject to supervision in the performance of their work by the companies’ district managers.¹³⁰ This supervision and control extended to matters such as their hours and location of work and the sales techniques they adopted (including how to advertise and display the papers).¹³¹ Poor performance could result in sanctions of varying severity, including dismissal.¹³² The defendant companies supplied the newsboys with the relevant sales equipment, such as advertising placards and racks.¹³³ The newsboys received the difference between the price they paid the companies for the newspapers and the price at which they sold the newspapers, both of which were controlled by the company.¹³⁴ The companies also controlled the number of papers that each newsboy was allocated.¹³⁵ Accordingly, the defendant companies effectively dictated the remuneration of the newsboys. Viewing these facts as a whole, Rutledge J concluded that the newsboys were employees of the defendant companies.¹³⁶ Rutledge J observed that ‘the particular workers in these cases

¹²⁶ *Ibid.*

¹²⁷ *Ibid* 125 (Rutledge J for the majority).

¹²⁸ *Ibid* 124 (Rutledge J for the majority), quoting *United States v American Trucking Ass’ns Inc*, 310 US 534, 545 (Reed J for the majority) (1940).

¹²⁹ *Hearst Publications* (n 25) 124 (Rutledge J for the majority), quoting *South Chicago Coal & Dock Co v Bassett*, 309 US 251, 259 (Hughes CJ for the Court) (1940), quoting *Warner v Goltra*, 293 US 155, 158 (Cardozo J for the Court) (1934).

¹³⁰ *Hearst Publications* (n 25) 116 (Rutledge J for the majority).

¹³¹ *Ibid* 118–19.

¹³² *Ibid.*

¹³³ *Ibid* 119.

¹³⁴ *Ibid* 117.

¹³⁵ *Ibid.*

¹³⁶ *Ibid* 132.

are subject, as a matter of economic fact, to the evils the statute was designed to eradicate'.¹³⁷

In *United States v Silk* ('*Silk*'),¹³⁸ the US Supreme Court followed the approach in *Hearst Publications*. Reed J delivered the opinion of the Court in *Silk*. The issue in that case was whether the workers in question were employees for the purposes of the *Social Security Act* ('SSA').¹³⁹ The term 'employment' was defined in the SSA to mean 'any service, of whatever nature, performed ... by an employee for his employer ...'¹⁴⁰ but, as Reed J noted, '[n]o definition of employer or employee applicable to these cases' appeared in the SSA.¹⁴¹ Reed J stated that the term 'employee' was 'to be construed to accomplish the purposes of the legislation'.¹⁴² The factors in the multi-factor test for employment were applied, but they were approached with the understanding that the statute favoured broader coverage and protection.¹⁴³ Reed J observed that '[a]s the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose'.¹⁴⁴

Following the decisions in *Hearst Publications* and *Silk*, amendments to the *NLRA* and the *SSA* were passed by the US Congress. These amendments made it clear that the common law concept of employment, uncoloured by reference to statutory purpose, was to be applied to determine whether a worker was an employee for the purposes of these statutes.¹⁴⁵ These amendments prompted the US Supreme Court to abandon the purposive approach to the employment concept.¹⁴⁶ Despite its abandonment in the US, the purposive approach articulated in *Hearst Publications* influenced the

¹³⁷ Ibid 127.

¹³⁸ *Silk* (n 25).

¹³⁹ 42 USC §§ 301–1307 (1946), as repealed by Act of 30 October 1972, Pub L 92-603, § 303(a), 86 Stat 1484, 1484.

¹⁴⁰ 42 USC § 410 (1946), as repealed by Act of 30 October 1972, Pub L 92-603, § 303(a), 86 Stat 1484, 1484.

¹⁴¹ *Silk* (n 25) 711.

¹⁴² Ibid 712.

¹⁴³ Ibid 712–16 (Reed J for the majority).

¹⁴⁴ Ibid 712.

¹⁴⁵ *National Labor Relations Board v United Insurance Co of America*, 390 US 245, 256 (Black J for the Court) (1968); *Darden* (n 104) 324–5 (Souter J for the Court); *Carlson* (n 103) 321–5; *Linder* (n 105) 191–5.

¹⁴⁶ *Darden* (n 104) 324–5 (Souter J for the Court).

writings of leading labour law scholars, including Professor Harry Arthurs and Professor Guy Davidov.¹⁴⁷ Their work on the purposive approach has, in turn, been influential in Canada.¹⁴⁸

Canadian courts have adopted a purposive approach to the employment concept in respect of protective labour statutes. This approach is informed more generally by the way Canadian courts view the purposes of statutes that confer employment rights and protections. In *Machtlinger v HOJ Industries Ltd*, the Supreme Court of Canada observed that the purpose of such statutes is ‘to protect the interests of employees’.¹⁴⁹ In *Dynamex Canada Inc v Mamona*,¹⁵⁰ the Federal Court of Appeal of Canada made a similar point in respect of the *Canada Labour Code*.¹⁵¹ The Court stated that ‘[a] review of Part III [of the *Canada Labour Code*] as a whole indicates that it falls into the category of labour standards legislation’.¹⁵² The Court observed that while the ‘terms and conditions of employment were once considered a private matter ... exploitation in the workplace’ had prompted the Canadian Parliament to pass legislation providing for minimum standards in respect of matters such as wages, leave, protection upon dismissal and hours of work.¹⁵³ Such legislation was intended, among other things, to ‘protect individual workers and create certainty in the labour market by providing minimum labour standards and mechanisms for the efficient resolution of disputes arising from its provisions’.¹⁵⁴ The provisions in protective labour statutes are given a broad and liberal interpretation consistent with the beneficial nature of these statutes.¹⁵⁵

¹⁴⁷ Arthurs (n 103); Davidov, ‘The Three Axes of Employment Relationships’ (n 30).

¹⁴⁸ In *McCormick* (n 24), the Supreme Court of Canada adopted a purposive approach to the employment concept. In doing so, the Court referred, among other things, to the work of Professor Arthurs and Professor Davidov: at 122–3 [22]–[24] (Abella J for the Court), citing Davidov, ‘The Three Axes of Employment Relationships’ (n 30) 377–94; Arthurs (n 103) 89–90.

¹⁴⁹ [1992] 1 SCR 986, 1003 (Iacobucci J for La Forest, L’Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ) (*Machtlinger*). This case dealt with the *Employment Standards Act*, RSO 1980, c 137. The Supreme Court of Canada made the same point in *Re Rizzo & Rizzo Shoes Ltd* [1998] 1 SCR 27, 41–2 (Iacobucci J for the Court) (*Re Rizzo*).

¹⁵⁰ (2003) 228 DLR (4th) 463 (*Dynamex Canada*’).

¹⁵¹ *Canada Labour Code*, RSC 1985, c L-2.

¹⁵² *Dynamex Canada* (n 150) 478 [31] (Sharlow JA for the Court).

¹⁵³ *Ibid* (citations omitted).

¹⁵⁴ *Ibid* 479 [35] (Sharlow JA for the Court).

¹⁵⁵ *Machtlinger* (n 149) 1003 (Iacobucci J for La Forest, L’Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ), quoted in *Re Rizzo* (n 149) 42 (Iacobucci J for the Court). See also *Dynamex Canada* (n 150) 477–9 [28]–[35] (Sharlow JA for the Court).

Canadian courts apply this beneficial interpretive stance to the term ‘employment’ in protective labour statutes.¹⁵⁶ Importantly, while they take the common law concept of employment as a starting point for characterisation of the work contract, they mould this multi-factor test by reference to the protective purpose of these statutes.¹⁵⁷ Whereas in vicarious liability cases the considerations underpinning that doctrine are used to inform the application of the multi-factor test,¹⁵⁸ in cases involving statutory labour protections, the factors in the test are assessed by reference to the purposes underlying the relevant legislation.

A recent example of this approach at ultimate appellate level is *McCormick v Fasken Martineau DuMoulin LLP* (‘*McCormick*’),¹⁵⁹ a case involving the term ‘employment’ in the British Columbia *Human Rights Code*.¹⁶⁰ The Supreme Court of Canada observed that the various factors in the multi-factor test ‘are unweighted taxonomies, a checklist that helps explore different aspects of the relationship’.¹⁶¹ The Court noted that these factors are ‘helpful in framing the inquiry [but] they should not be applied formulaically’.¹⁶² Instead, these factors are to be viewed through the ‘animating themes’¹⁶³ of control and dependency and ‘[w]hat is more defining than any particular facts or factors is the extent to which they illuminate the essential character of the relationship and the underlying control and dependency’.¹⁶⁴ The existence of control and dependency indicates that the particular worker possesses the ‘kind of vulnerability’ that the statute ‘intended to bring under its protective scope’.¹⁶⁵ In explaining these concepts of control and dependency, the Court made the following observation:

Deciding who is in an employment relationship for the purposes of the *Code* means, in essence, examining how two synergetic aspects function in an employment relationship: control exercised by an employer over working

¹⁵⁶ *McCormick* (n 24) 119–20 (Abella J for the Court).

¹⁵⁷ *Ibid* 119–24 (Abella J for the Court).

¹⁵⁸ *Sagaz Industries* (n 104) 998–1005 [33]–[46] (Major J for the Court).

¹⁵⁹ *McCormick* (n 24).

¹⁶⁰ *Human Rights Code*, RSBC 1996, c 210.

¹⁶¹ *McCormick* (n 24) 125 [28] (Abella J for the Court).

¹⁶² *Ibid*.

¹⁶³ *Ibid* 124 [26] (Abella J for the Court).

¹⁶⁴ *Ibid* 125 [28] (Abella J for the Court).

¹⁶⁵ *Ibid* 120 [19] (Abella J for the Court).

conditions and remuneration, and corresponding dependency on the part of a worker. In other words, the test is who is responsible for determining working conditions and financial benefits and to what extent does a worker have an influential say in those determinations? The more the work life of individuals is controlled, the greater their dependency and, consequently, their economic, social and psychological vulnerability in the workplace.¹⁶⁶

The Supreme Court stated that this broad and liberal approach to the employment concept was consistent with the remedial and protective purposes of the *Human Rights Code*.¹⁶⁷ The concept was broader than the ‘unduly restrictive traditional test for employment’ developed in the vicarious liability cases.¹⁶⁸ Importantly, while this approach was expounded in respect of a human rights statute, the Court noted that it applied more generally to other protective labour statutes, subject to any unique features of the particular statute.¹⁶⁹ Indeed, in articulating the approach, the Court in *McCormick* cited *Pointe-Claire v Labour Court (Quebec)* (*Pointe-Claire*), an earlier decision of the Supreme Court of Canada dealing with collective bargaining legislation.¹⁷⁰ In *Pointe-Claire*, the Court stated that in approaching the characterisation exercise, regard should be had to the purposes of the labour statute.¹⁷¹

The purposive approach to protective labour statutes adopted in Canada and, for a time, the US, moulds the common law concept of employment by reference to the protective purposes of those statutes. Drawing principally upon the work of Professor Guy Davidov,¹⁷² the Supreme Court of Canada identified control and dependency as the ‘kind of vulnerability’ that is targeted by protective labour statutes.¹⁷³ As Professor Davidov has argued, employees are different from independent contractors because they are

¹⁶⁶ Ibid 122 [23] (Abella J for the Court), citing Davidov, ‘The Three Axes of Employment Relationships’ (n 30) 377–94, Arthurs (n 103) 89–90, *International Woodworkers of America v Atway Transport Inc* [1989] OLRB Rep 540 and *Pointe-Claire v Labour Court (Quebec)* [1997] 1 SCR 1015 (*Pointe-Claire*).

¹⁶⁷ *McCormick* (n 24) 119–22 (Abella J for the Court).

¹⁶⁸ Ibid 121 [21] (Abella J for the Court).

¹⁶⁹ Ibid 123–4 [25] (Abella J for the Court).

¹⁷⁰ *Pointe-Claire* (n 166), cited in *McCormick* (n 24) 122 [23] (Abella J for the Court).

¹⁷¹ *Pointe-Claire* (n 166) 1052 (Lamer CJ, La Forest, Gonthier and Cory JJ agreeing).

¹⁷² The Supreme Court of Canada cited, among other things, Davidov, ‘The Three Axes of Employment Relationships’ (n 30): *McCormick* (n 24) 122 [23], 123 [25] (Abella J for the Court).

¹⁷³ *McCormick* (n 24) 120 [19] (Abella J for the Court).

vulnerable, with the concept of ‘vulnerability’ comprising subordination¹⁷⁴ and dependency.¹⁷⁵ This conception of vulnerability captures what is unique about employees and thus is tailored to the questions that courts should be seeking to answer when they engage in the characterisation of work contracts for the purposes of protective labour statutes.¹⁷⁶ In the words of Learned Hand J in *Lehigh Valley*, it captures the ‘conditions of the relation [that] require protection’.¹⁷⁷

This section has discussed the shortcomings of applying an employment concept moulded by the concerns of vicarious liability to protective labour statutes. These shortcomings have been identified in Canadian and US cases as a reason for adopting a broader and more beneficial approach to the employment concept in respect of these statutes. A related reason for adopting such an approach is that it coheres with the prevailing approach to statutory interpretation in Australia, which requires courts to have regard to statutory purpose.

2 *The Purposive Approach to Statutory Interpretation in Australia*

In the Canadian and US cases discussed above, courts placed primary emphasis on the need to construe the words of a statute, such as the term ‘employee’, in a manner consistent with the purposes of the statute. For example, in *Hearst Publications*, Rutledge J stated that the term ‘employee’ ‘derives meaning from the context of [the NLRA], which “must be read in light of the mischief to be corrected and the end to be attained”’.¹⁷⁸ This is consistent with the prevailing approach to statutory interpretation in Australia.¹⁷⁹

¹⁷⁴ Professor Davidov argues that employment involves ‘a structure of governance with democratic deficits’: Davidov, *A Purposive Approach to Labour Law* (n 26) 36 (emphasis omitted). This emerges from the power of employers to control employees: at 38. Control is conceptualised broadly; it is not limited to the employer’s control over the work to be performed, but rather refers ‘generally to the superior power of the employer vis-à-vis the employee within their relationship, and the ensuing inability of the employee to control her own (working) life’: at 39. Professor Davidov uses the term ‘subordination’, broadly conceived, to capture these democratic deficits in the employment relationship.

¹⁷⁵ Davidov, ‘The Three Axes of Employment Relationships’ (n 30) 375–95. See also Davidov, *A Purposive Approach to Labour Law* (n 26) chs 3, 6.

¹⁷⁶ Davidov, ‘The Three Axes of Employment Relationships’ (n 30) 398–409; Davidov, *A Purposive Approach to Labour Law* (n 26) chs 3, 6.

¹⁷⁷ *Lehigh Valley* (n 23) 552.

¹⁷⁸ *Hearst Publications* (n 25) 124.

¹⁷⁹ Stephen Gageler, ‘Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process’ (2011) 37(2) *Monash University Law Review* 1, 2.

In Australia, purposive statutory construction has been statutorily enshrined in s 15AA of the *Acts Interpretation Act 1901* (Cth) and its state and territory counterparts.¹⁸⁰ Section 15AA provides that '[i]n interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation'. The High Court of Australia has on numerous occasions directed attention to the importance of having regard to purpose in statutory construction. For example, in *Federal Commissioner of Taxation v Unit Trend Services Pty Ltd*,¹⁸¹ French CJ, Crennan, Kiefel, Gageler and Keane JJ quoted the following passage from French CJ and Hayne J's judgment in *Certain Lloyd's Underwriters v Cross*:

The context and purpose of a provision are important to its proper construction because, as the plurality said in *Project Blue Sky Inc v Australian Broadcasting Authority*, '[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of *all* the provisions of the statute' ... That is, statutory construction requires deciding what is the legal meaning of the relevant provision 'by reference to the language of the instrument viewed as a whole', and 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'.¹⁸²

In the labour law context, the High Court of Australia has in a recent case interpreted s 357(1) of the *FW Act*¹⁸³ in a purposive manner and referred explicitly to the mischief that was sought to be remedied. In *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*, a unanimous Court

¹⁸⁰ See, eg, *Interpretation Act 1987* (NSW) s 33; *Interpretation of Legislation Act 1984* (Vic) s 35(a). See also Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 41–53.

¹⁸¹ (2013) 250 CLR 523.

¹⁸² *Ibid* 539–40 [47], quoting *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 389 [24] (citations omitted).

¹⁸³ *FW Act* (n 6) s 357(1) provides:

A person (the *employer*) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.

See also Caroline Kelly, 'Sham Arrangements, Third Parties and s 357 of the Fair Work Act 2009: *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*' (2016) 29(1) *Australian Journal of Labour Law* 110.

focused on the ‘purpose of the prohibition’¹⁸⁴ in s 357(1) and concluded that ‘[t]he misrepresentation attributed to Quest was squarely within the scope of the *mischief* to which the prohibition in s 357(1) was directed and is caught by its terms’.¹⁸⁵ Thus, the concepts of purpose and mischief, which are central to the operation of the statutory purpose approach in the Canadian and US cases, are not foreign concepts to Australian law. Rather, they form the foundations of the prevailing approach to statutory construction in Australia.

The purposive approach to the employment concept coheres with the general approach to statutory interpretation in Australia. Despite the apparent utility of the purposive approach to the employment concept, there are some barriers to the adoption of it by Australian courts. The final part of this article identifies and examines these barriers.

IV BARRIERS TO ADOPTING A PURPOSIVE APPROACH TO THE EMPLOYMENT CONCEPT IN AUSTRALIA

A Statutory Terms with Common Law Meanings: The Interpretive Principle

Where a statute invokes a term that has a technical meaning at common law, then, in the absence of a contrary intention, the statutory term is to be understood in that technical legal sense.¹⁸⁶ In giving content to that statutory term, recourse is to be had to the relevant common law doctrine or concept. This is an established principle of statutory interpretation.¹⁸⁷ In *Commissioners for Special Purposes of the Income Tax v Pemsel* (*‘Pemsel’*), a majority of the House of Lords held that the word ‘charitable’ in a taxation statute was to be taken as a reference to the concept of a charity as understood in the law of equity.¹⁸⁸ Lord Macnaghten held that the word “‘charity’” in its legal sense comprises four principal divisions’ and went on to identify the four ‘heads’ of charity.¹⁸⁹ The Privy Council adopted the same interpretive approach in *Chesterman v Federal Commissioner of Taxation* (*‘Chesterman’*).¹⁹⁰

¹⁸⁴ (2015) 256 CLR 137, 145 [20] (French CJ, Kiefel, Bell, Gageler and Nettle JJ).

¹⁸⁵ *Ibid* 146 [22] (French CJ, Kiefel, Bell, Gageler and Nettle JJ) (emphasis added).

¹⁸⁶ See, eg, *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531, 580 (Lord Macnaghten) (*‘Pemsel’*). See also Pearce and Geddes (n 180) 161; Matthew Harding, ‘Equity and Statute in Charity Law’ (2015) 9(2) *Journal of Equity* 167, 172–7.

¹⁸⁷ Pearce and Geddes (n 180) 161.

¹⁸⁸ *Pemsel* (n 186).

¹⁸⁹ *Ibid* 583. Lord Macnaghten set out the four ‘heads’ of charity at 583: ‘trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion;

More recently, in *Aid/Watch Inc v Federal Commissioner of Taxation* ('*Aid/Watch*'),¹⁹¹ a majority of the High Court followed the interpretive approach in *Pemsel* and *Chesterman* and held that the word 'charitable' in several taxation statutes was to be understood in its technical legal sense.¹⁹² The majority made two important statements that are relevant here. First, their Honours stated:

Where statute picks up as a criterion for its operation a body of the general law, such as the equitable principles respecting charitable trusts, then, in the absence of a contrary indication in the statute, the statute speaks continuously to the present, and picks up the case law as it stands from time to time.¹⁹³

Second, their Honours stated:

[W]here, as here, the general law comprises a body of doctrine with its own scope and purpose, the development of that doctrine is not directed or controlled by a curial perception of the scope and purpose of any particular statute which has adopted the general law as a criterion of liability in the field of operation of that statute.¹⁹⁴

The interpretive principle laid down in *Pemsel*, and elaborated upon by the majority in *Aid/Watch*, appears to preclude a purposive approach to the common law concept of employment. It prevents the purpose of any statute that engages the employment concept from moulding or informing the development of the concept. This interpretive principle has, however, been questioned.¹⁹⁵ Professor Matthew Harding, a leading equity scholar, has argued that while this interpretive principle is well accepted,¹⁹⁶ it is also the case that 'contemporary understandings of statutory interpretation, according to which interpreters must look to the ordinary meaning of the statutory text in context, and to relevant legislative purposes,

and trusts for other purposes beneficial to the community, not falling under any of the preceding heads'.

¹⁹⁰ (1925) 37 CLR 317, 319–20 (Lord Wrenbury for the Court). See also Harding (n 186) 173–5.

¹⁹¹ (2010) 241 CLR 539 (*Aid/Watch*).

¹⁹² *Ibid* 550 [24] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

¹⁹³ *Ibid* 549 [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also Chief Justice Robert French, 'Trusts and Statutes' (2015) 39(2) *Melbourne University Law Review* 629, 640; Gummow (n 1) 7.

¹⁹⁴ *Aid/Watch* (n 191) 549 [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

¹⁹⁵ Harding (n 186) 172–7.

¹⁹⁶ *Ibid* 172. Professor Harding referred, among other things, to *Aid/Watch* (n 191): Harding (n 186) 173 n 30.

have ... received the imprimatur of the High Court of Australia in highly authoritative terms'.¹⁹⁷

Pemsel was handed down prior to the rise of the purposive approach to statutory interpretation. Professor Harding suggested that the interpretive principle in *Pemsel* 'may now need to be revisited in light of those understandings'¹⁹⁸ and that further analysis was required by courts in future cases to determine whether, and how, the *Pemsel* principle could be 'reconciled with the contemporary understandings of statutory interpretation'.¹⁹⁹ The same argument could be made in respect of the current Australian approach to the employment concept in statutory contexts. In *ACE Insurance Ltd v Trifunovski*, Perram J held that the term 'employee', when used in a statute, is to be understood in its technical legal sense.²⁰⁰ In this regard, his Honour followed the approach of the High Court in *Foster*.²⁰¹ However, *Foster*, like *Pemsel*, was decided before the ascension of the purposive approach to the construction of statutes in Australia.

It is important, then, to consider the impact of the purposive approach to statutory interpretation upon the *Pemsel* interpretive principle. Professor Harding did not put forward a definitive position on this issue, but he did suggest that Kirby J's judgment in *Central Bayside General Practice Association Ltd v Commissioner of State Revenue (Vic)* ('*Central Bayside*')²⁰² provided a useful starting point.²⁰³ *Central Bayside* involved the interpretation of the phrase 'charitable body' in the *Pay-Roll Tax Act 1971* (Vic). The plurality did not address the relationship between the *Pemsel* interpretive principle and the purposive approach to statutory construction. The parties had assumed that the *Pemsel* interpretive principle applied, and the plurality observed that there was 'no occasion to call the rule in question'.²⁰⁴ Accordingly, the plurality proceeded on the basis that the term 'charitable' in the statute was to be given its technical legal meaning.²⁰⁵

Although Kirby J ultimately agreed with the conclusion of the plurality in *Central Bayside*, his Honour questioned the *Pemsel* interpretive principle, as

¹⁹⁷ Harding (n 186) 177 (citations omitted).

¹⁹⁸ *Ibid* 175.

¹⁹⁹ *Ibid* 177.

²⁰⁰ *Trifunovski (Trial)* (n 12) 541–3 [23]–[29].

²⁰¹ *Foster* (n 52).

²⁰² (2006) 228 CLR 168 ('*Central Bayside*').

²⁰³ Harding (n 186) 175–7.

²⁰⁴ *Central Bayside* (n 202) 179 n 28 (Gleeson CJ, Heydon and Crennan JJ).

²⁰⁵ *Ibid* 178–9 n 28 (Gleeson CJ, Heydon and Crennan JJ).

well as the meaning of ‘charity’ expounded in *Pemsel*.²⁰⁶ As to the interpretive principle, Kirby J suggested that ‘there is no reason, in principle, why the problem of statutory interpretation presented by the present appeal should be approached in a way different from other cases involving statutory interpretation’.²⁰⁷ This meant that in discerning the meaning of ‘charity’ in the taxation statute, the ‘starting point [was] the statute’, including the language itself, as well as ‘the context of the contested phrase’ and ‘the general purpose and object of the statute’.²⁰⁸ His Honour concluded, however, that the *Pemsel* interpretive principle (and the meaning of charity propounded in that case) should be followed in *Central Bayside*.²⁰⁹ There were several reasons for this conclusion. Two of those reasons are instructive in assessing the viability of a purposive approach to the employment concept in Australia. These reasons relate to the limits of judicial lawmaking.

B *The Limits of Judicial Lawmaking*

In *Central Bayside*, Kirby J observed that a re-expression of the term ‘charity’ would ‘have wide-ranging implications’²¹⁰ for those who had arranged their affairs to come within the meaning of charity in *Pemsel*. Furthermore, his Honour had regard to the decision of the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue*.²¹¹ This case involved the meaning of the word ‘charitable’ in a taxation statute. The Supreme Court of Canada acknowledged the shortcomings of adopting the meaning of charity laid down in *Pemsel*,²¹² but rejected an invitation to depart from that meaning.²¹³ Importantly for present purposes, this refusal was made, in part, on the basis that ‘for the Court to attempt a re-expression of the law, having so many applications of great variety, would go beyond the proper judicial function to

²⁰⁶ Ibid 195–205 [76]–[109].

²⁰⁷ Ibid 200 [91].

²⁰⁸ Ibid.

²⁰⁹ Ibid 205–8 [110]–[120].

²¹⁰ Ibid 206 [114].

²¹¹ [1999] 1 SCR 10 (*Vancouver Society of Immigrant Women*).

²¹² Ibid 106–7 [149] (Iacobucci J for Cory, Iacobucci, Major and Bastarache JJ).

²¹³ Ibid 107 [150], 134–7 [200]–[203] (Iacobucci J for Cory, Iacobucci, Major and Bastarache JJ).

re-express the general law'²¹⁴ and, accordingly, 'any such re-expression should be left to Parliament'.²¹⁵ Kirby J observed that these considerations militated against a departure from the *Pemsel* interpretive principle and meaning of charity in *Central Bayside*.²¹⁶

Kirby J's references to the wide-ranging consequences of any re-expression of the term 'charity', and the concern that such a re-expression would extend beyond the proper boundaries of judicial lawmaking, find parallels in a recent decision of the High Court of Australia in the area of employment contract law. In *Barker*, the High Court rejected the implied term of mutual trust and confidence.²¹⁷ This term has been accepted at ultimate appellate level in the United Kingdom.²¹⁸ The term is implied as a matter of law into all employment contracts in that jurisdiction.²¹⁹

In *Barker*, French CJ, Bell and Keane JJ observed that the implication of this term into Australian employment contracts would involve an 'exercise of the judicial power in a way that may have a significant impact upon employment relationships and the law of the contract of employment in this country'.²²⁰ Their Honours stated that the term is rooted in 'a view of social conditions and desirable social policy that informs a transformative approach to the contract of employment in law'.²²¹ The wide-ranging consequences of accepting the term and the 'complex policy considerations'²²² involved meant that implication of such a term was beyond the limits of judicial lawmaking.²²³

The reasoning in *Barker* may not necessarily prevent Australian courts from adopting a purposive approach to the employment concept in statutory contexts. It could be argued that the exercise in which a court engages when

²¹⁴ *Central Bayside* (n 202) 207 [115] (Kirby J), summarising part of the reasons in *Vancouver Society of Immigrant Women* (n 211) 107 [150] (Iacobucci J for Cory, Iacobucci, Major and Bastarache JJ).

²¹⁵ *Central Bayside* (n 202) 207 [115] (Kirby J).

²¹⁶ *Ibid* 206–7 [115].

²¹⁷ *Barker* (n 100) 195 [40]–[41] (French CJ, Bell and Keane JJ), 214 [109] (Kiefel J), 216–17 [115]–[118] (Gageler J).

²¹⁸ *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20 ('*Malik*'); *Eastwood v Magnox Electric plc* [2005] 1 AC 503 ('*Eastwood*').

²¹⁹ *Malik* (n 218); *Eastwood* (n 218).

²²⁰ *Barker* (n 100) 194 [36].

²²¹ *Ibid* 195 [41].

²²² *Ibid* 195 [40] (French CJ, Bell and Keane JJ).

²²³ *Ibid* 178 [1], 195 [40]–[41] (French CJ, Bell and Keane JJ). See also Riley, 'The Future of the Common Law in Employment Regulation' (n 2) 34; Golding (n 2) 70–1.

interpreting the employment concept purposively is different from the exercise that the High Court was invited to undertake in *Barker*. In *Barker*, the High Court was invited to create, by way of development of the common law, a 'broadly framed normative standard'²²⁴ of conduct for employees and employers.²²⁵ This 'new standard' was to be 'embodied in a new contractual term implied in law' into all contracts of employment.²²⁶ French CJ, Keane and Bell JJ were of the view that the implication of a term in law is, by its very nature, a process that involves judicial lawmaking. Their Honours observed that 'implications in law ... are a species of judicial law-making and are not to be made lightly'.²²⁷ For the reasons outlined above,²²⁸ the implication that the High Court was asked to make in *Barker* was a 'step beyond the legitimate law-making function of the courts'.²²⁹

On the other hand, a purposive approach to the employment concept does not involve the kind of judicial lawmaking at issue in *Barker*. The purposive approach involves a court applying well-accepted principles of statutory interpretation to give meaning and content to a term in a statute. A court engaged in a process of purposive statutory interpretation is not acting beyond the limits of the judicial function. It is, instead, performing a judicial function that has received, by way of s 15AA of the *Acts Interpretation Act 1901* (Cth) and its counterparts,²³⁰ the express endorsement of the legislature. Accordingly, the reasoning in *Barker*, insofar as it relates to implied terms, does not lead inexorably to the conclusion that the purposive approach to the employment concept is beyond the limits of judicial lawmaking.

It should be acknowledged, however, that the adoption of a purposive approach to the employment concept might still engage the broader concerns raised in *Barker* about the limits of judicial lawmaking where complex matters of social policy are at stake. As the comparative analysis above

²²⁴ *Barker* (n 100) 185 [20] (French CJ, Bell and Keane JJ).

²²⁵ An employee already owes his or her employer a duty of fidelity: *Barker* (n 100) 190 [30] (French CJ, Bell and Keane JJ). The duty of fidelity requires an employee to refrain from conduct that 'impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee': *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66, 81 (Dixon and McTiernan JJ), quoted in *Barker* (n 100) 190 [30] (French CJ, Bell and Keane JJ).

²²⁶ *Barker* (n 100) 185 [20] (French CJ, Bell and Keane JJ).

²²⁷ *Ibid* 189 [29]. Cf JW Carter et al, 'Terms Implied in Law: "Trust and Confidence" in the High Court of Australia' (2015) 32(3) *Journal of Contract Law* 203, 223–4.

²²⁸ See above nn 220–3 and accompanying text.

²²⁹ *Barker* (n 100) 178 [1] (French CJ, Bell and Keane JJ).

²³⁰ See above Part III(B)(2).

demonstrates,²³¹ a purposive approach to the employment concept in respect of protective labour statutes results, in essence, in a broadening of the coverage of these statutes. The broad and beneficial approach taken by the Canadian and US courts extends the boundaries of coverage to capture ‘a wider field than the narrow technical legal relation’²³² expounded in the vicarious liability cases. In light of the approach taken in *Barker* to the boundary between legislative and judicial lawmaking, Australian courts might form the view that extensions of coverage are a matter that should be left to the legislature.

There are many examples of Australian legislatures broadening the scope of labour statutes explicitly by using deeming provisions or other provisions that extend coverage beyond employees.²³³ For example, the *FW Act* contains a provision that deems ‘outworker[s] in the textile, clothing or footwear industry’²³⁴ to be employees for the purposes of the Act.²³⁵ The *Industrial Relations Act 1996* (NSW) deems a large number of workers to be employees, such as carpenters performing certain contract work and deliverers of bread and milk.²³⁶ In the superannuation context, the *Superannuation Guarantee (Administration) Act 1992* (Cth) extends its coverage beyond the employee at common law to a person who ‘works under a contract that is wholly or principally for the labour of the person’.²³⁷

A further relevant consideration is the fact that a wide range of statutes engage the employment concept. As noted in the introduction to this article, many statutes, including those pertaining to employment, taxation and superannuation, invoke the employment concept as a criterion for their operation. Adoption of a purposive approach to the employment concept would lead to different judicial formulations of the concept in each statutory context, because each statute has a different purpose. The fact that the employment concept has ‘so many applications of great variety’²³⁸ is another

²³¹ See above Part III(B).

²³² *Hearst Publications* (n 25) 124 (Rutledge J for the majority).

²³³ See Stewart et al, *Creighton and Stewart’s Labour Law* (n 4) 198–9 [8.07]–[8.10].

²³⁴ *FW Act* (n 6) s 12 (definition of ‘TCF outworker’).

²³⁵ *Ibid* ss 789BA–789BB. See also Stewart et al, *Creighton and Stewart’s Labour Law* (n 4) 254 [10.18].

²³⁶ *Industrial Relations Act 1996* (NSW) s 5(3), sch 1. See also Stewart et al, *Creighton and Stewart’s Labour Law* (n 4) 198 n 36.

²³⁷ *Superannuation Guarantee (Administration) Act 1992* (Cth) s 12(3). See also Stewart et al, *Creighton and Stewart’s Labour Law* (n 4) 198–9 [8.09].

²³⁸ *Central Bayside* (n 202) 207 [115] (Kirby J).

matter that Australian courts would likely take into account in considering the ‘wide-ranging implications’²³⁹ that may follow from the adoption of a purposive approach. In *Sweeney v Boylan Nominees Pty Ltd*, Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ observed that the distinction between employees and independent contractors is ‘now too deeply rooted to be pulled out’.²⁴⁰ Any extrication of these well-entrenched concepts or any significant adjustments to the boundary between them might, following *Barker*, be regarded by Australian courts as being within the realm of legislative, rather than judicial, lawmaking.

V CONCLUSION

This article has addressed one aspect of the interaction between statute and common law in the characterisation of work contracts. There are shortcomings with the current Australian approach, which eschews statutory purpose in the characterisation exercise. The ‘deeper question of principle’ that Hayne J identified in the special leave hearing in *ACE Insurance Ltd v Trifunovski*²⁴¹ is an important one. There is force in the proposition that ‘employment’ for the purposes of statutory employment entitlements should be assessed by reference to considerations that are different from those invoked to assess ‘employment’ for the purposes of vicarious liability. There is a need for further and sustained scholarly analysis of the viability of a purposive approach to the employment concept in Australia. This article has sought to lay a foundation for that analysis by drawing together and critically evaluating various lines of reasoning from the Australian cases, both within and beyond the labour law context, that are of relevance to the viability of this purposive approach. In doing so, it has identified some of the key barriers to the adoption of such an approach by Australian courts. The strength of these barriers, and the arguments that may be advanced against them, warrant further examination.

The characterisation of contracts for the performance of work is an important issue. The common law concept of employment lies at the heart of the characterisation exercise. The fact that this concept is ‘consistently adopted and legitimated by legislation’²⁴² gives rise to challenging questions

²³⁹ Ibid 206 [114] (Kirby J).

²⁴⁰ *Sweeney* (n 5) 173 [33].

²⁴¹ *Trifunovski (Special Leave Hearing)* (n 18) 21.

²⁴² Stewart, ‘Redefining Employment? Meeting the Challenge of Contract and Agency Labour’ (n 38) 235.

about the relationship between statute and common law in that exercise. As labour statutes invoke the employment concept as a gateway to many employment rights and entitlements, the concept is of 'fundamental' importance in determining the scope of labour law's protection.²⁴³ In the era of the 'fissured workplace',²⁴⁴ in which there has been increasing use of alternative work arrangements such as labour hire and subcontracting, the erosion of labour law's protection is a matter of pressing concern. Such concerns are compounded by the emergence of new forms of work relationships in the gig economy.²⁴⁵ A purposive approach to the employment concept might go some way to addressing these concerns.²⁴⁶ This approach thereby merits further attention and analysis from Australian labour law scholars.

²⁴³ Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2nd ed, 2011) 153.

²⁴⁴ David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014).

²⁴⁵ See, eg, Andrew Stewart and Jim Stanford, 'Regulating Work in the Gig Economy: What Are the Options?' (2017) 28(3) *Economic and Labour Relations Review* 420.

²⁴⁶ See Davidov, *A Purposive Approach to Labour Law* (n 26) ch 6.