# Redefining Employment? Meeting the Challenge of Contract and Agency Labour

*Andrew Stewart**

*Despite a complex patchwork of definitions and deeming provisions, the common law conception of employment is still the starting point for determining the application of most Australian labour legislation. This article discusses three ways in which the common law allows what may in substance be an employment arrangement to be disguised: through a contract which is carefully drafted to look like a contract for services; through the use of a labour hire agency; or through the interposition of some other kind of entity such as a personal company. It is argued that the regulatory responses to the growth of such devices have been piecemeal and unsatisfactory. What is needed is a standard definition of employment which provides a more realistic basis than the common law for distinguishing between someone who in substance is an employee and someone who is genuinely in business on their own account. Adoption of a definition such as that proposed here would reaffirm the basic proposition that it should not be possible to contract out of labour regulation.*

## Introduction

> There can be few if any pieces of legal technology which command more attention, one might almost say affection, from employment lawyers than the basic apparatus for determining the personal scope of employment law. There can be none which combine that degree of respect with an almost complete dysfunctionality.[1]

This article examines a topic that in a sense is 'old hat' for labour lawyers, but nonetheless continues to present significant challenges: how 'employment' is defined for regulatory purposes.

Over the past century a particular conception of employment has come to act as the primary trigger for various forms of regulation. That conception, rooted in the common law but consistently adopted and legitimated by legislation, requires or assumes the existence of a contract of employment (or contract of service) between the person who pays for work to be performed (the 'hirer')[2] and the person who is to perform that work (the 'worker'). As such, it excludes a range of work relationships which either (a) are not contractual in nature at all, as where work is performed voluntarily or for

* Flinders University of South Australia and Piper Alderman Lawyers; email andrew.stewart@flinders.edu.au. This article has its origins in a seminar presented in October 2000 at the Centre for Business Research, University of Cambridge. My thanks go to Simon Deakin at the Centre for his hospitality and insights, and also to Erin McCarthy for research assistance.

1 P Davies and M Freedland, 'Employed or Self-Employed? The Role and Content of the Legal Distinction — Labor Markets, Welfare and the Personal Scope of Employment Law' (1999) 21 *Comparative Labor Law & Policy Jnl* 231 at 234.

2 'Hirer' is not the most elegant of terms, but is nonetheless used in this article as a neutral way of referring to a person or organisation that wishes to obtain the benefit of a person's labour.

purely domestic purposes; (b) do not involve a contract directly between the hirer and the worker; or (c) involve a contractual relationship between hirer and worker which is characterised as something other than a contract of employment, as where the worker is said to be an 'independent contractor' engaged pursuant to a 'contract for services'.

Labour law scholars have long expressed dissatisfaction with the common law conception of employment.[3] As often as not, their criticisms have extended beyond the role played by the contract of employment as an identifier of the kind of work relationship to which regulation should apply — what we may call its *definitional* function. They have also found fault with two other functions that the contract of employment can be seen to have in modern labour law, as both a legal and a social institution.[4]

One (the *conceptual* function) is to provide a particular juristic basis for waged work arrangements. In rationalising such arrangements as 'voluntary' agreements, the common law has not merely excluded other possibilities, such as to see employment in terms of status rather than contract,[5] it has also had a powerful effect on political discourse concerning the scope and content of labour law. In effect, it makes it easier for those who oppose regulation protective of workers' interests to present it as unwarranted intervention by the state in the 'natural order of things', which is to say the negotiation of terms between hirer and individual worker. Those who resist the notion of unconstrained 'freedom of contract' are left with the rather harder task of talking about 'legal fictions' and the exercise of economic and social power.[6]

The remaining function of the contract of employment is to embody some (though by no means all) of the legal and social norms governing the relationship between hirer and worker (the *governance* function). Some of these norms are internally generated, through the parties' explicit or tacit acceptance of contractual terms proposed by one or other (usually the hirer),

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3 See, eg, H W Arthurs, 'The Dependent Contractor: A Study of the Legal Problems of Countervailing Power' (1965) 16 *University of Toronto L Jnl* 89; R W Rideout, 'The Contract of Employment' [1966] *Current Legal Problems* 111; I T Smith, 'Is Employment Properly Analysed in Terms of a Contract?' (1975) 6 *New Zealand Universities L Rev* 341; B A Hepple, 'Restructuring Employment Rights' (1986) 15 *Industrial L Jnl* 69; Lord Wedderburn, 'Labour Law: From Here to Autonomy?' (1987) 16 *Industrial L Jnl* 1; A Brooks, 'Myth and Muddle — An Examination of Contracts for the Performance of Work' (1988) 11 *University of New South Wales L Jnl* 48; G F Smith, 'An Uneven Playing Field: The Contract of Employment and Labour Market Regulation' (1992) 3(1) *Economic and Labour Relations Review* 103; B Creighton, 'Reforming the Contract of Employment' in A Frazer, R McCallum and P Ronfeldt (Eds), *Individual Contracts and Workplace Relations*, Working Paper No 50, Australian Centre for Industrial Relations Research and Training, Sydney, 1997; P Benjamin, 'Who Needs Labour Law? Defining the Scope of Labour Protection' in J Conagahan, R M Fischl and K Klare (Eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities*, OUP, Oxford, 2002, p 75.

4 As to the notion of the contract of employment as an evolving institution, see S Deakin, 'The Many Futures of the Contract of Employment' in Conaghan, Fischl and Klare, above n 3, p 177.

5 Or to analyse employment relations in terms of the exercise of bureaucratic power which should, even in a private sector setting, be subject to principles drawn from administrative law: see H Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (1986) 15 *Industrial L Jnl* 1.

6 The competing philosophies of labour law are discussed further in a later section of this article.

or more broadly through expectations that shape the parties' attitudes to the nature and conduct of their relationship (what is sometimes referred to as the 'implicit contract'). But other norms are effectively imported from sources external to the parties and given contractual force, especially through the fiction (that word again!) of implied agreement. This is a crucial element of UK labour law, since it is often the only way in which a collectively negotiated agreement in that country may be rendered enforceable.[7] Implied terms have also provided the legal basis for a wide range of rules formulated by the judiciary as being necessary and appropriate to the conduct of the parties' relationship, and which generally apply to the extent the parties have not expressly excluded them. These rules extend to matters as diverse and significant as the duration of the hiring, the necessity of the worker doing what they are told, the circumstances in which wages must be paid, the consequences of causing injury or loss through negligent acts or omissions, the remedies available for breach of obligations, and so on.[8] They have frequently attracted criticism as being biased in favour of employer interests, notwithstanding the more recent development of an implied obligation that requires an employer not to engage in unreasonable conduct which might damage the relationship of 'trust and confidence' between the parties.[9]

In any event, it is the definitional function of the contract of employment that has over the years perhaps attracted most ire from commentators. The criticism is partly a reflection of the uncertainty generated by the absence of a single test for distinguishing employees from independent contractors and other types of worker. But it stems more particularly from a concern that reliance on the common law conception potentially excludes a wide range of workers from the benefit of protective regulation, when logic, fairness and indeed the purpose underlying the regulation in question might suggest they should have access to its benefits.

This concern has been exacerbated by a recent upsurge in arrangements which explicitly seek to confer on the worker the status of being 'self-employed' and thus in effect treat them as being in business on their own account. According to a research paper prepared for the Productivity Commission,[10] the number of self-employed contractors (defined as persons operating their own businesses, with no employees and predominantly

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7 See S Deakin and G S Morris, *Labour Law*, 2nd ed, Butterworths, London, 1998, pp 258–66. The position is different in Australia, where it is now clear that obligations imposed by industrial awards and registered workplace agreements — each of which, unlike UK collective agreements, may be enforced by recourse to (limited) statutory remedies — do not become incorporated into individual employment contracts in the absence of express agreement by the parties: *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410; 131 ALR 422.

8 See B Creighton and A Stewart, *Labour Law: An Introduction*, 3rd ed, Federation Press, Sydney, 2000, chs 9, 11.2.

9 See, eg, *Malik v Bank of Credit & Commerce International SA* [1998] AC 20; [1997] 3 All ER 1; *Transco plc v O'Brien* [2002] ICR 721; *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186; D Brodie, 'Beyond Exchange: The New Contract of Employment' (1998) 27 *Industrial L Jnl* 79.

10 M Waite and L Will, *Self-Employed Contractors in Australia: Incidence and Characteristics*, Productivity Commission Staff Research Paper, Melbourne, 2001. See further A VandenHeuvel and M Wooden, 'Self-Employed Contractors in Australia: How

providing labour services to their clients) has grown by at least 15% in the past two decades. By 1998, over 10% of all employed persons fell into this category, and of those at least a quarter were 'dependent contractors' whose work arrangements were consistent with them being an employee, without being legally categorised as such.

The emergence of such 'newly dominant models of employment relationships', to borrow a term from Alain Supiot,[11] can be analysed from, and explained by reference to, a number of different perspectives. One is that of the 'flexible firm', in which a 'core' of permanent full-time employees is combined with a 'periphery' of contract and casual labour to allow the hirer to respond more readily to fluctuations in demand or the dictates of technology.[12] Another is the growth in post-Fordist forms of work organisation that are gradually seeing the demise of mass production in large, integrated organisations in favour of smaller firms that can reap the benefits of 'flexible specialisation'.[13] In the 'network society' that is said to be emerging, and which can perhaps best be seen right now in the information technology sector, individuals can be expected to have greater mobility and flexibility in their dealings with hirers and hence be more readily characterised as self-employed.[14]

But what cannot also be discounted as an explanation for the apparent growth in the ranks of the self-employed is the very fact that so much labour regulation hinges on the existence of an employment contract. The cost savings associated with avoiding that regulation — and those savings may be considerable, as will be explained — may provide an obvious economic incentive for a particular form of 'vertical disintegration' in which employees are replaced by contract labour.[15] This is especially likely if the change can be effected without altering the substance of the economic relationship between hirer and worker.

In what follows, I will look at a number of different ways in which it is possible in practice for hirers to do exactly that: to take on workers who in reality have all the attributes of employees, but who can legally be classified as something else. I will also examine various ways in which regulators have sought to respond to the challenge posed by the growth in self-employment. For the most part, these have the effect either of extending labour regulation

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Many and Who Are They?' (1995) 37 *Jnl of Industrial Relations* 263; M Wooden and A VandenHeuvel, 'The Use of Contractors in Australian Workplaces' (1996) 8 *Labour Economics & Productivity* 163.

11 A Supiot, 'The Transformation of Work and the Future of Labour Law in Europe: A Multidisciplinary Perspective' (1999) 138 *International Labour Rev* 31 at 36.

12 For a critical view of this model and the literature it has generated, see J Burgess, 'The Flexible Firm and the Growth of Non-Standard Employment' (1997) 7(3) *Labour & Industry* 85.

13 See, eg, M J Piore and C F Sabel, *The Second Industrial Divide: Possibilities for Prosperity*, Basic Books, New York, 1984.

14 But cf *Redrock Holdings Pty Ltd v Hinkley* (2001) 50 IPR 565, where a programmer was held to be an employee of the company for whom he had been engaged to develop software. Interestingly, it was the hirer here who was arguing that the relationship was one of employment, in order to assert presumptive ownership of copyright in the software written by the programmer: see Copyright Act 1968 (Cth) s 35(6).

15 See H Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *Oxford Jnl of Legal Studies* 353.

beyond the category of employment, or (especially from a taxation perspective) of lessening the incentives to prefer contract labour over employment. As I will argue, however, the responses to date do not meet what seems to me to be the most fundamental need: to reconsider the common law definition of employment itself. This does not mean discarding altogether the category of employment, as some have suggested, but simply ensuring that it is redefined to reflect not only the modern realities of work relationships, but the fundamental principles underlying the need for labour regulation in the first place.

## The Importance of the 'Traditional' Conception of Employment

There are many legal contexts in which it may be necessary to distinguish employees from independent contractors, or indeed from other categories of worker such as unpaid volunteers or persons seeking work experience,[16] those who perform work under a partnership agreement,[17] certain kinds of agent,[18] taxi drivers who drive someone else's cab as a 'bailee in a joint venture',[19] some ministers of religion,[20] and certain public sector workers.[21]

The employee/contractor distinction most obviously finds its origin in the common law doctrine of vicarious liability. Since the middle of the nineteenth century it has been established that, at least as a general principle, a person can only be held responsible for the acts and omissions of their employees, not for anything done by independent contractors engaged by them to carry out work.[22]

As it happens, this and the other distinctions just mentioned seem scarcely relevant now to other parts of the common law. In the cases dealing with the implication of certain contractual duties by reason of law, for example, it is often hard to see any difference between the treatment of employees and of contractors.[23] Even in relation to vicarious liability, there are many situations now in which it may be imposed regardless of the lack of an employment contract between hirer and worker. One reason is the steadily expanding

16 See, eg, *Teen Ranch Pty Ltd v Brown* (1995) 87 IR 308.
17 See, eg, *Clark v Evans* (1989) 32 AILR ¶352.
18 See, eg, *Australian Mutual Provident Society Ltd v Chaplin* (1978) 18 ALR 385.
19 See, eg, *Commissioner of Taxation v De Luxe Red & Yellow Cabs Co-op Trading Society Ltd* (1998) 82 FCR 507; 78 IR 349; but cf *McDougal v Castlemaine Taxis Pty Ltd* (2002) 116 IR 78.
20 See, eg, *Davies v Presbyterian Church of Wales* [1986] ICR 280; but cf *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 187 ALR 92.
21 Such as police officers (see, eg, *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)* (1955) 92 CLR 113; 59 ALR 699) and members of the armed forces (see, eg, *Coutts v Commonwealth* (1985) 157 CLR 91; 59 ALR 699).
22 *Quarman v Burnett* (1840) 6 M & W 499; 151 ER 509.
23 For instance in the case of the implied (or equitable) duty to respect the confidentiality of information relating to the hirer's business acquired in the course of performing work for them: see, eg, *Broadwater Taxation & Investment Services Pty Ltd v Hendriks* (1993) 51 IR 221; *Fortuity Pty Ltd v Barcza* (1995) 32 IPR 517. See also *Wesoky v Village Cinemas International Pty Ltd* [2001] FCA 32 (unreported, 3 February 2001, BC200100100) (implied duty of 'employer' to provide work to managing director where contract was with director's personal company); and see further A Brooks, 'Myth and Muddle — An Examination of Contracts for the Performance of Work' (1988) 11 *University of New South Wales L Jnl* 48;

number of situations in which persons are held to have a 'non-delegable' duty of care, requiring them to avoid causing harm in relation to certain activities regardless of whether those activities are entrusted to an employee, an independent contractor or anyone else.[24] There are also situations, as will appear from the discussion of agency labour later in the article, where a person may be held liable for the acts of a 'borrowed' worker who is not their employee.

All this hardly matters, however, given the hold that the category of employment has assumed at the level of statutory regulation.

As a number of writers have pointed out,[25] it took well into the twentieth century for the concept of a 'contract of employment' to emerge as a catch-all way of signifying the type of worker who should be regarded as subject to various forms of legislation. Before then, it was common to find distinctions being drawn between, for example, 'workmen' (manual workers) and 'employees' (professionals). However, for many years now, terms such as 'employee', 'servant' and even 'worker' (despite the more generic sense in which it is used in this article) have all, when included in legislation and not otherwise defined, come to signify a person working under a contract of employment, rather than under some other kind of arrangement.[26]

Thus, we find today that both industrial awards, and the formal workplace

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M Freedland, 'The Role of the Contract of Employment in Modern Labour Law' in L Betten (Ed), *The Employment Contract in Transforming Labour Relations*, Kluwer, The Hague, 1995.

24 See, eg, *Kondis v State Transport Authority* (1984) 154 CLR 672; 55 ALR 225; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313; 146 ALR 572; and see J P Swanton, 'Non-delegable Duties: Liability for the Negligence of Independent Contractors (Parts I and II)' (1991) 4 *Jnl of Contract Law* 183, (1992) 5 *Jnl of Contract Law* 26. Cf *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; 181 ALR 263, discussed in the next section, where the majority of the High Court regarded it as unnecessary to determine whether a courier company could be vicariously liable for the negligence of one its bicycle couriers, even if the courier was an independent contractor. Of the judges who did express a view, McHugh J would have found vicarious liability on this basis, while Callinan J (who dissented) would have upheld the NSW Court of Appeal's ruling (itself a split decision) that the company owed no duty of care to the plaintiff (see *Hollis v Vabu Pty Ltd* (1999) 31 MVR 49).

25 See S Deakin, 'The Evolution of the Contract of Employment, 1900-1950: The Influence of the Welfare State' in N Whiteside and R Salais (Eds), *Governance, Industry and Labour Markets in Britain and France*, Routledge, London, 1998; J Howe and R Mitchell, 'The Evolution of the Contract of Employment in Australia: A Discussion' (1999) 12 *AJLL* 113.

26 Cf the US and Canadian authorities discussed in *Konrad v Victoria Police* (1999) 91 FCR 95 at 123–6; 165 ALR 23 at 48–51. In *Konrad*, the Full Court of the Federal Court held that the term 'employee', when used in the unfair termination provisions in Div 3 of Pt VIA of the Industrial Relations Act 1988 (Cth), comprehended police officers, regardless of whether the common law would recognise them as such. The court's main reason for departing from the usual approach to the interpretation of such terms was that, as s 170CA(1) of the Act made clear, Div 3 was intended to give effect to the terms of ILO Convention 158 on Termination of Employment at the Initiative of the Employer. This instrument referred to the conferral of appropriate rights on 'workers', a term which the court considered was intended to cover the police and other such groups in the public sector. Significantly, however, subsequent decisions have refused to apply the *Konrad* reasoning in relation to the current provisions in the Workplace Relations Act 1996 (which puts much less emphasis on giving effect to the Convention), preferring instead to make the usual assumption that the term 'employee' bears its common law meaning: *Williams v Commonwealth* (unreported, AIRC, Full Bench, Print T2042, 17 October 2000); *Sammartino v Mayne Nickless* (2000) 98 IR 168.

agreements that may exclude their operation if certain conditions are met, are typically applicable only to employees in the common law sense.[27] The same is true (to a greater or lesser degree) of a range of federal and State legislation that imposes obligations or liability on employers in relation to matters such as annual holidays, long service leave, parental leave, unfair dismissal and workers compensation.[28]

It is true that many statutory regimes extend in various ways to workers other than employees, such that there is indeed 'no universal dividing-line of general application between employees, who are protected by legislation, and the rest who are not'.[29] There is for instance a well established tradition of 'deeming' workers in various occupations or situations to be employees for specific purposes, or at least of clarifying that they are (or in some cases are not) employees where doubt might otherwise exist on that score.[30] In some instances the list of such deemed employees (or deemed non-employees) can run to extraordinary lengths, as with many workers compensation statutes.[31]

A recent innovation in Queensland has been to confer on the State's Industrial Relations Commission a general power to declare 'a class of persons who perform work in an industry under a contract for services' to be employees.[32] Hence, rather than waiting until the legislature intervenes (or the executive, where a statute confers the power to make appropriate regulations), a concerned party such as a trade union can invite the tribunal to take action in relation to a particular group. The first successful use of this provision involved security guards hired by a company under terms that (according to the commission) made them contractors, but who in functional terms were indistinguishable from employees.[33] The New South Wales and Victorian governments have to date been unable to secure parliamentary support for similar provisions in those States.[34]

A different kind of extension has been adopted in legislation dealing with compulsory contributions by employers to their workers' superannuation

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27 At the federal level, for example, see the definitions of 'employee' and 'employer' in s 4(1) of the Workplace Relations Act 1996 (Cth), and the incorporation of those terms both in the definition of 'industrial dispute' (s 4(1)) and the provisions relating to Div 2 certified agreements (s 170LI) and AWAs (s 170VF). See further *Sammartino v Mayne Nickless* (2000) 98 IR 168 at 179–84.

28 In New South Wales, for example, see Annual Holidays Act 1944 s 2(1); Long Service Leave Act 1955 s 3; Industrial Relations Act 1996 (NSW) ss 5, 6 and Dictionary; Workplace Injury Management and Workers Compensation Act 1998 s 4(1).

29 Deakin and Morris, above n 7, p 150.

30 See A Clayton and R Mitchell, *Study on Employment Situations and Worker Protection in Australia: A Report to the International Labour Office*, Centre for Employment and Labour Relations Law, University of Melbourne, 1999.

31 See A Clayton, R Johnstone and S Sceats, 'The Legal Concept of Work-Related Injury and Disease in Australian OHS and Workers' Compensation Systems' (2002) 15 *AJLL* 105 at 116–23.

32 Industrial Relations Act 1999 (Qld) s 275. As to the breadth of the term 'class of persons', see *Transport Workers' Union of Australia, Union of Employees (Queensland Branch) v Australian Document Exchange Pty Ltd* [2001] 1 Qd R 659.

33 *Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees v Bark Australia Pty Ltd* [2001] QIRComm 22 (unreported, 28 February 2001).

34 See Industrial Relations Amendment (Independent Contractors) Bill 2000 (NSW); Fair Employment Bill 2000 (Vic) cl 6.

schemes and (formerly) the deduction of income tax. The provisions in question apply not only to employees, but to salary or wages received under any contract that is 'wholly or principally for the labour of the person to whom the payments are made'.[35] Statutes dealing with discrimination of various kinds also tend to apply to both employees and independent contractors,[36] and legislation dealing with occupational health and safety likewise imposes duties that extend beyond the traditional concept of employment in a variety of ways.[37] It is also notable that for the purpose of determining payroll tax obligations, account may be taken of contractors who are engaged to perform work other than pursuant to a trade or business which they regularly carry on, and who do not subcontract the work or employ others to perform it all.[38] Some workers compensation statutes likewise apply to such contractors, as well as to 'workers' in the more traditional sense.[39]

Despite these extensions, however, the common law conception of employment remains of fundamental relevance to the operation of most labour legislation. Even where other formulae are used, or lists of deemed employees are added, it is the common law that generally remains the starting point. The next section of the article accordingly examines three particular ways in which an employment relationship in the common law sense can be avoided between a hirer and a worker who supplies labour to that hirer, no matter how much the worker might appear to have the characteristics of an employee rather than a person in business in their own right.

## Three Ways to Avoid an Employment Relationship

### Manipulating the indicia of employment

In this first situation there is a contract directly between the hirer and the worker, but the contract is (preferably) a written one, with the terms carefully drawn up (almost invariably by the hirer's legal advisers) in such a way as to persuade a court or tribunal to find that the worker is an independent contractor or some other kind of non-employee.[40]

This strategy relies on the formalistic approach adopted by most courts in applying the common law principles as to employment status, as determined

35 Superannuation Guarantee (Administration) Act 1992 (Cth) s 12(3). A similar extension used to apply in relation to the obligation to deduct income tax from the payment of 'salary or wages': Income Tax Assessment Act 1936 (Cth) ss 221A, 221C. However, the new Pay As You Go (PAYG) system that took effect on 1 July 2000 applies only to 'employees' in the common law sense: Taxation Administration Act 1953 (Cth) Sch 1 s 12-35.

36 See Workplace Relations Act 1996 (Cth) Pt XA; and see the definition of 'employment' in Racial Discrimination Act 1975 (Cth) s 3(1), Sex Discrimination Act 1984 (Cth) s 4 and Disability Discrimination Act 1992 (Cth) s 4.

37 See R Johnstone, 'Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking' (1999) 12 *AJLL* 73.

38 See, eg, Pay-roll Tax Act 1971 (NSW) s 3A; Pay-Roll Tax Act 1971 (Vic) s 3C. Some categories of contractor are specifically excluded, such as owner/drivers of vehicles.

39 See, eg, Workplace Injury Management and Workers Compensation Act 1998 (NSW) Sch 1 cl 2; Accident Compensation Act 1985 (Vic) ss 8, 9.

40 It is possible to hire someone under a verbal arrangement and still argue that the terms point towards a contract for services, but from the hirer's viewpoint the risk of an adverse finding is likely to be higher.

by the High Court in cases such as *Stevens v Brodribb Sawmilling Co Pty Ltd*.[41] These principles do not embody a definition of employment as such. They rely instead on a test which involves the consideration of a number of established factors or indicia, some of which are characteristic of a contract of service and others of which suggest a non-employment relationship. The task of the court or tribunal which must assess the employment status of a worker is to consider the parties' relationship in light of each of these indicia and to determine, on balance, into which legal category the relationship falls. The approach is necessarily impressionistic, since there is no universally accepted understanding of how many indicia, or what combination of indicia, must point towards a contract of service before the worker can be characterised as an employee.[42] In effect, this 'multi-factor' test proceeds on the assumption that the courts will know an employment contract when they see it.

As to the indicia themselves, the extent of the hirer's right to control not just what work is done, but the way it is done, is 'very important, perhaps the most important of such indicia'.[43] The greater the capacity for control, the more likely it is that the worker is an employee. Other relevant indicia can be summarised on the following checklist, which indicates whether a positive answer to each question points to the worker being an employee or a contractor:

| **Indicia** | **Employee** | **Contractor** |
|---|---|---|
| Is the worker 'integrated' into the hirer's organisation? | Yes | |
| Must the worker supply/maintain any tools or equipment? | | Yes |
| Is the worker paid according to task completion, rather than receiving wages based on time worked? | | Yes |
| Does the worker bear any risk of loss, or conversely have any chance of making a profit from the job? | | Yes |
| Is the worker free to work for others at the same time? | | Yes |
| Can the worker subcontract the work or delegate performance to others? | | Yes |
| Is taxation deducted by the hirer from the worker's pay? | Yes | |
| Is the worker responsible for insuring against work-related injury they might suffer? | | Yes |

41 (1986) 160 CLR 16; 63 ALR 513.

42 See *Sammartino v Mayne Nickless* (2000) 98 IR 168 at 189.

43 *R v Allan; Ex parte Australian Mutual Provident Society Ltd* (1977) 16 SASR 237 at 248; *Australian Mutual Provident Society Ltd v Chaplin* (1978) 18 ALR 385 at 387. As to how a right to control is to be assessed in the context of skilled employment, where the nature of the work may be such as to leave very little scope for detailed control by the hirer, see *Zuijs v Wirth Bros* (1955) 93 CLR 561; [1956] ALR 123; *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 187 ALR 92 at 114–15.

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|---|---|
| Does the worker receive paid holidays or sick leave? | Yes |

Of these, the last three should arguably (and indeed generally do) receive relatively little weight in the balancing equation, since the matters in question are governed by legislation whose application itself depends on how the worker is characterised.[44] Typically, if the worker is an employee then the hirer is legally obliged to deduct tax, pay workers compensation premiums and (unless the worker is a casual) provide various forms of leave. The fact that the employment contract stipulates otherwise may simply mean that the hirer is acting illegally. Nevertheless, the inclusion in a contract of provisions to that effect, while in a sense risky, may help to support an impression created by other aspects of the relationship that the contract is not one of service.

As a final note on the individual indicia, it is important to stress the significance of the worker having a power to delegate or subcontract. Notwithstanding judicial emphasis on the significance of the question of control, this is arguably the single most determinative factor. It is clear from the case law that an employment relationship is viewed as essentially personal in nature, and that no amount of authority to control the way in which work is done can make a person an employee if they are not contracting to supply their own personal labour.[45] Hence, if a worker is free to delegate or subcontract, that is almost inevitably regarded as inconsistent with the presence of a contract of service.[46]

Now any competent employment lawyer knows how to 'exploit' these indicia so as to arrive at the right result for their client. Typically, the lawyer is asked to draw up a contract for a hirer to obtain labour from a person who will be made to resemble an independent contractor, but over whom the hirer will retain maximum control. The trick is to ensure that as many of the indicia as possible point in the desired direction: for instance, by obliging the worker to supply their own tools or equipment, submit an invoice as a precondition to being paid, obtain an Australian Business Number (ABN) from the Australian Tax Office and pass it on to the hirer,[47] acknowledge that (in theory at least) they are free to work for others, and assume responsibility for payment of tax

44 *Re Porter* (1989) 34 IR 179 at 185. Cf *Vabu Pty Ltd v Commissioner of Taxation* (1996) 81 IR 150 at 152, where Meagher JA regarded it as significant that the Tax Office had accepted that the workers concerned were independent contractors for income tax purposes, but was now trying to argue that they were employees. It seems doubtful, however, that any formal evaluation had been made in relation to their income tax situation: the sheer volume of tax returns has for many years now forced the Tax Office to accept most taxpayers' self-assessment of their status, with audits being conducted only in selected cases: see *Bearings Incorporated (Australia) Pty Ltd v Treloar* (1999) 95 IR 169 at 194, where Meagher JA's analysis was described as 'unconvincing' for this reason.

45 See, eg, *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539; [1945] ALR 273.

46 *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385 at 391; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 26, 38; 63 ALR 513.

47 Failure to do this means that the recipient of the work must deduct 48.5% of the remuneration and remit it to the Tax Office, to be credited against the contractor's income tax liability: Taxation Administration Act 1953 (Cth) s 12-190. An ABN is in any event required if a self-employed service-provider is to charge GST on top of their fee, something they must generally do if their business turns over more than $50,000 per year: A New Tax

and arrangement of appropriate insurance.

Often the process of drafting a contract of this kind will involve the lawyer in negotiation with their client over just how far the hirer can go in securing a degree of control and/or organisational integration without compromising the objective of denying employment status. The hirer may wish, for example, to write in requirements that the worker wear a company uniform, or comply with a code of behaviour, or attend work at times of the hirer's choosing, each of which makes the worker look more like an employee.

The hirer may also be unwilling to concede a power on the part of the worker to delegate or subcontract, especially if they are concerned not just about the quality of the work done (which can be the subject of appropriate contractual specifications), but about the suitability of the person performing it, in terms of their qualifications, experience, behaviour or manner of dealing with the hirer's customers. One compromise that is sometimes adopted is to permit delegation, but subject to the hirer approving the identity of the delegee. However, there is no definitive ruling on the extent to which a power of delegation may be qualified in this way, yet remain effective to deny employment status.

In *Express & Echo Publications Ltd v Tanton*,[48] the English Court of Appeal quoted McKenna J to the effect that although 'freedom to do a job either by one's own hand or by another's is inconsistent with a contract of service . . . a limited or occasional power of delegation may not be'.[49] Nevertheless, the court went on to find that the arrangement before it, which obliged a driver to arrange a replacement at his own expense when he was unable or unwilling to work, could not be characterised as a contract of employment as there was no obligation of personal service. This was despite the fact that the terms obliged the driver to demonstrate to the hirer's satisfaction that any replacement was both appropriately trained and 'suitable'. A similar arrangement was also found to be a contract for services in *Bowerman v Sinclair Halvorsen Pty Ltd*,[50] where it was held that the driver in question could not bring an unfair dismissal claim under New South Wales legislation. According to Bishop C:

> The fact that any substitute driver had to be *approved* by the company does not give the respondent control over the delegation. In terms of the contract I don't believe approval of an appropriate person was such an unreasonable condition, the company surely had the right to be confident that any substitute driver was competent to do the work and maintain the integrity of the company as Mr Coombs [the company's State Manager] put it. What must not be forgotten is that it would have been *Mr Bowerman's responsibility* to seek a replacement if necessary (or indeed have someone else do part of his work on a permanent basis and take a reduced profit). This is not the action of an employee.[51]

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System (Goods and Services Tax) Act 1999 (Cth) ss 23-5–23-15. See generally C Lavermicocca, 'Employees, Contractors, Goods and Services Tax and Fringe Benefits Tax' (2000) 34 *Taxation in Australia* 658.

48 [1999] ICR 693 at 698.

49 *Ready Mixed Concrete (South East) Ltd v Minister of Pensions & National Insurance* [1968] 2 QB 497 at 515. On the facts of *Ready Mixed*, the capacity to delegate was a key reason for finding an owner/driver to be a contractor rather than an employee.

50 [1999] NSWIRComm 21 (unreported, 2 February 1999).

51 Ibid.

These decisions may be contrasted with *Sammartino v Mayne Nickless*,[52] where a clause in a driver's contract allowed him to use an 'approved relief driver' in the event of losing his licence, provided he accompanied the relief driver and maintained responsibility for dealing with the hirer's clients. A Full Bench of the Australian Industrial Relations Commission thought that such a limited degree of delegation was 'a circumstance that weighs against a personal service relationship', but not significantly so.[53] In the event, the driver was found to be an employee.

The same result ensued in *McFarlane v Glasgow City Council*,[54] despite the fact that the gymnastic instructors concerned were obliged to find replacements when they were unable to take a class. Aside from the fact that the replacements were required to come from a list maintained by the council, thus effectively allowing it to veto any instructors it didn't like, the replacements were paid directly by the council rather than being taken on as employees (or subcontractors) of the instructors. Similarly, in *Byrne Bros (Formwork) Ltd v Baird*[55] builders who worked exclusively for the defendant contractor were held to have contracted to supply their personal labour, despite a delegation provision in the 'subcontractor' agreements they had signed. This provided that they were 'free to employ at [their] own cost whatever suitably trained additional labour which may be necessary to fulfil the requirements of the agreement' and that where unable to provide the services they might 'provide an alternative worker to undertake the services but only having first obtained the express approval of the contractor'. Despite the width of the first part of this provision, the UK Employment Appeal Tribunal held that the power to appoint a substitute was 'qualified and exceptional'.[56]

Although this last decision in particular seems hard to reconcile with the Court of Appeal's ruling in *Express & Echo*, cases such as this do illustrate that there are limits as to how far hirers can go in seeking to 'disguise' employment relationships as something else. Indeed the courts have repeatedly insisted that if a relationship is in substance one of employment, the parties cannot alter that fact merely by having the contract state, or the worker acknowledge, that their status is that of independent contractor.[57] As

52 (2000) 98 IR 168.

53 Ibid, at 210.

54 [2001] IRLR 7.

55 [2002] ICR 667. This case was decided under the extended definition of 'worker', discussed later in the article, that now appears in many UK employment statutes, in this instance reg 2(1)(b) of the Working Time Regulations 1998. However, the judgment makes it clear that the reasoning adopted would have been equally applicable to the common law definition of a contract of service.

56 [2002] ICR 667 at 676.

57 *Cam & Sons Pty Ltd v Sargent* (1940) 14 ALJR 163; *Narich v Commissioner of Pay-roll Tax (NSW)* [1983] 2 NSWLR 597; (1983) 50 ALR 417; though cf *Merceica v Wade* [2000] SASC 441 (unreported, 21 December 2000, BC200008092). The label attached by the parties to their relationship may, on the other hand, have some relevance where the equation is otherwise finely balanced: *Australian Mutual Provident Society Ltd v Chaplin* (1978) 18 ALR 385 at 389–90. Note also the reluctance of some courts (especially in Britain) to let a worker get away with obtaining the tax advantages of being self-employed and then turning around and claiming to be an employee for some other purpose: see, eg, *Massey v Crown Life Insurance Ltd* [1978] ICR 591 at 596. This is notwithstanding the fact that on orthodox

Gray J so memorably put it in *Re Porter*,[58] 'the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck'.

The fact is though that it *is* possible under Australian law to do just that. If the contract that governs the parties' relationship has enough duck-like features, most courts and tribunals will be persuaded that they are looking at a duck — even if the underlying reality of the relationship would suggest a rooster.[59] The key to this, and to the success of the drafting strategy just described, is the preoccupation that most judges have with the formal terms of the arrangement they are scrutinising. Hence, we have decisions such as in *Vabu Pty Ltd v Commissioner of Taxation*,[60] where couriers working for Vabu (which traded as Crisis Couriers) were held to be independent contractors for the purpose of the superannuation guarantee legislation. Now it beggared belief to suggest that these workers were each in business on their own account. The company insisted on their exclusive services and controlled their hours of work, their appearance, their behaviour while on the job, and even their pay (which inevitably depended on the amount and type of work they were given). Yet because they were contractually required to supply their own mode of transport, and because their remuneration was not in formal terms linked to the time they spent at work, but rather to their number of successful deliveries, the New South Wales Court of Appeal saw no reason to quarrel with the status accorded them under their contracts.

As it happens, Gray J's judgment in *Re Porter* is one of the relatively few exceptions to this pattern of ignoring the reality of the parties' relationship. In finding a group of owner-drivers to be employees, he commented:

> Some difficulty may arise where the practical constraints on a party conflict with the express stipulations in the contract. For instance, a party may be described as an independent contractor, and the contract may even provide expressly that he or she is at liberty to provide services to other persons, outside of the contract. The reality may be that economic considerations dictate that work will only be accepted from the other party to the contract . . . In such circumstances, there is no particular reason why a court should ignore the practical circumstances, and cling to the theoretical niceties. The level of economic dependence of one party upon another, and the

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principles a person cannot be estopped from enforcing a statutory entitlement: see, eg, in the context of award entitlements, *Textile, Clothing and Footwear Union of Australia v Givoni Pty Ltd* [2002] FCA 1406 (unreported, 15 November 2002); *Kidd v Savage River Mines* (1984) 6 FCR 398; 9 IR 362; though cf *Metropolitan Health Service Board v Australian Nursing Federation* (2000) 99 FCR 95; 98 IR 390. The notion that a worker might be estopped from challenging a status that they had freely accepted was considered in *Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v R B Exclusive Pools Pty Ltd* (1996) 70 IR 393, but rejected on the facts of the case.

58 (1989) 34 IR 179 at 184.

59 See, eg, *Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees v Bark Australia Pty Ltd* [2001] QIRComm 22 (unreported, 28 February 2001), and note the explicit recognition by the commission of the superiority in bargaining power which effectively allowed Bark to insist on its workers 'choosing' to be contractors.

60 (1996) 81 IR 150.

> manner in which that economic dependence may be exploited, will always be relevant factors in the determination whether a particular contract is one of employment.[61]

While it is not entirely unknown for other Australian judges to acknowledge the economic realities of many work arrangements,[62] however, most remain content to focus on what the parties have formally 'agreed', not the substance of their relationship.

There seems to be a view in some quarters that the High Court's recent decision in *Hollis v Vabu Pty Ltd*[63] has marked a major shift in the courts' approach to the characterisation of work relationships. A close analysis of the decision, however, belies any such conclusion. The case once again involved Crisis Couriers, though on this occasion the question was whether the company could be vicariously liable for the actions of one of its bicycle couriers in knocking down the plaintiff on a Sydney footpath. By majority, the court held that the bicycle couriers were employees and accordingly found Vabu to be liable. In reaching this conclusion, Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ in their joint judgment applied 'existing principle' in a way that was 'informed by a recognition of the fundamental purposes of vicarious liability'.[64] One of those purposes was said to be that:

> In general, under contemporary Australian conditions, the conduct by the defendant of an enterprise in which persons are identified as representing that enterprise should carry an obligation to third persons to bear the cost of injury or damage to them which may fairly be said to be characteristic of the conduct of that enterprise.[65]

Among the factors that swayed the majority judges in favour of finding an employment relationship were that the couriers were 'not providing skilled labour or labour which required special qualifications'; they had 'little control over the manner of performing their work'; they were 'presented to the public and to those using the courier service as emanations of Vabu' because they had to wear Crisis Courier uniforms; and Vabu 'superintended' their finances.[66] Their Honours also downplayed the significance of the couriers' obligation to supply their own tools and equipment. Although a 'more beneficent employer might have provided bicycles for its employees and undertaken the cost of their repairs', the fact that the couriers were responsible for their own equipment did not of itself indicate a contract for services. This was 'all the more so because the capital outlay was relatively small and because bicycles are not tools that are inherently capable of use only for courier work but

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61 (1989) 34 IR 179 at 184–5. See also *Transport Workers Union of Australia v Glynburn Contractors (Salisbury) Pty Ltd* (1990) 34 IR 138.

62 See, eg, *Konrad v Victoria Police* (1999) 91 FCR 95 at 121–6; 165 ALR 23 at 46–51, where Finkelstein J, with the concurrence of the other members of the Full Court of the Federal Court, subjected the established common law principles as to the meaning of the term 'employee' to a lengthy critique. Besides describing them (at 48) as 'unsettled, and in some respects outdated', he endorsed (at 51) the concerns expressed by Arthurs, above n 3, as to the way in which the common law allows employees to be transformed into dependent contractors by the 'magic of contractual language'. See also *Bearings Inc (Australia) Pty Ltd v Treloar* (1999) 95 IR 169 at 181–4.

63 (2001) 207 CLR 21; 181 ALR 263.

64 Ibid, at CLR 46; ALR 280.

65 Ibid, at CLR 40; ALR 275.

66 Ibid, at CLR 42–5; ALR 277–9.

provide a means of personal transport or even a means of recreation out of work time'.[67]

The most striking feature of the joint judgment is the language in which the conclusion as to employment status is summarised, that '[v]iewed as a practical matter, the bicycle couriers were not running their own business or enterprise, nor did they have independence in the conduct of their operations'.[68] Taken on its own, this might indeed suggest some sort of adoption of the 'practical reality' approach favoured by Gray J in *Re Porter*. It seems clear from the remainder of their judgment, however, that their Honours were not intending to depart from the established principle that the legal characterisation of a work relationship is to be determined on the basis of the contractual framework adopted to regulate that relationship, not its underlying reality.[69] Hence, we find, immediately following the statement just quoted, a reference to deriving this conclusion from a 'consideration of the nature of [the couriers'] engagement, as evidenced by the [contractual] documents to which reference has been made and by the work practices imposed by Vabu'.[70] Although emphasising the need to look at 'the totality of the relationship' between the parties,[71] this was apparently intended simply to highlight the fact that, as the trial judge had found, the terms of this particular contract were partly oral and partly in writing.

Furthermore, their Honours specifically denied that 'considerations respecting economic independence' could be 'determinative of the legal character of the relationship'.[72] To be fair, this comment was made in rebuttal of certain suggestions advanced in the dissenting judgment of Callinan J as to the policy consequences of imposing vicarious liability in such a case.[73] What their Honours were apparently intending to re-emphasise was that a relationship may be found to be one of employment even where the parties have intended otherwise. Nevertheless, the phrasing of the comment is instructive.

The fact is that the majority judgment in *Hollis* embodies what is essentially an orthodox application of the principles derived from *Stevens v Brodribb*

67 Ibid, at CLR 44; ALR 279.
68 Ibid, at CLR 41; ALR 277.
69 See further on this point *Belcaro v Sheahan* [2002] SAIRComm 29 (unreported, 27 May 2002).
70 (2001) 207 CLR 21 at 42; 181 ALR 263 at 277.
71 Ibid, at CLR 33, 41; ALR 270, 276, quoting Mason J in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 29; 63 ALR 513; and see also *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 187 ALR 92 at 114–15. Mason J, it may be noted, used the term 'totality of the relationship' in his judgment merely to emphasise that factors other than control had to be considered.
72 (2001) 207 CLR 21 at 41; 181 ALR 263 at 276.
73 According to Callinan J (ibid, at CLR 69; ALR 298–9), it 'might be to the overall economic advantage of the community that couriers operate as independent contractors efficiently, quickly and competitively'; even unskilled workers might wish to retain the 'freedom to work or not to work' and the 'measure of independence' associated with being a contractor; and given increases in the 'cost of directly employing people', to 'impose upon the respondent and couriers the rigidities of a contract of service might perhaps be to destroy an avenue of work for people who might find it difficult to gain remunerative employment otherwise'.

*Sawmilling*.[74] It does, it is true, suggest a willingness to promote the significance of certain indicia (notably association with the hirer through 'badges of origin' such as company uniforms, at least in the context of vicarious liability), and to downplay others (in particular any requirement on the worker to supply their own tools and equipment, unless the capital outlay is substantial and significant skill and training is required to operate them). But if the judgment stands for anything, it is that the extent of the control reserved to the hirer remains a crucial consideration — and that is hardly a radical proposition.

The relatively conservative nature of the judgment given by Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ is evident in their unwillingness to overrule or even criticise the New South Wales Court of Appeal's decision to find that the Crisis couriers were contractors in the first *Vabu* case. They stressed instead that the earlier decision was made in a different context (a statutory requirement to make superannuation contributions as opposed to the common law doctrine of vicarious liability), and that it had focused on couriers who drove cars and motorbikes as opposed to bicycles, the suggestion apparently being that the additional expense associated with such equipment might justify a different conclusion in their case.[75] They may also have been conscious of the fact that special leave to appeal to the High Court against the earlier decision had been denied, though they somewhat curiously neglected to mention this in their judgment. By contrast, that earlier denial of leave loomed large in the judgments of McHugh and Callinan JJ, who were in the minority on this point.[76]

It may yet be that some of the statements in *Hollis* will be seen to have sown the seeds for an approach that is rooted more firmly in the economic realities of work relationships. At the very least, the emphasis in the majority judgment of categorising relationships by reference to the underlying purpose(s) of the regulation in question perhaps suggests a greater degree of sensitivity to issues of social policy than the High Court has previously displayed in this context.[77] But for the time being, *Hollis* does not alter or even challenge the orthodox principle that courts are not concerned with what has 'actually occurred' in a

74 (1986) 160 CLR 16; 63 ALR 513.

75 (2001) 207 CLR 21 at 28–32; 181 ALR 263 at 266–9. Cf the views expressed by McHugh J on this subject: ibid, at CLR 49–50; ALR 283.

76 According to McHugh J, to find now that the couriers were employees would effectively overturn the earlier decision. He also commented that 'extending the classical tests or their application to make the couriers employees of Vabu . . . would be likely to unsettle many established business arrangements and have far-reaching consequences . . . It would be likely to make employers retrospectively guilty of a number of statutory offences': ibid, at CLR 49–50; ALR 282–3. Callinan J would not even have permitted the point to be argued, since he found that the plaintiff should be bound by counsel's concession in the Court of Appeal (quite proper in light of the earlier decision) that the couriers were not employees.

77 The US Supreme Court, by contrast, seems to have moved in the opposite direction: see M Linder, 'Employed or Self-Employed? The Role and Content of the Legal Distinction — Dependent and Independent Contractors in Recent US Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness' (1999) 21 *Comparative Labor Law & Policy Jnl* 187, criticising the 'denial of socio-economic purpose' evident in decisions such as *Nationwide Mutual Insurance Co v Darden* 503 US 318 (1992), compared to earlier rulings such as *National Labor Relations Board v Hearst Publications, Inc* 322 US 111 (1944).

relationship, but rather with 'the obligations by which the parties [are] bound'.[78] Decisions such as *Hollis* indicate that it may be risky for hirers who exert significant control over their workers to label them contractors and expect to get away with it.[79] But what needs to be stressed is that the contracts considered in this case were not as carefully constructed as they might have been. Lawyers who are asked to prepare contracts for services that will stand up to judicial scrutiny can still feel confident of being able to do so, especially if they incorporate a theoretically unfettered power of delegation.

## Hiring labour through an agency

During the first half of the 1990s the number of agency workers in Australia more or less doubled.[80] According to recent figures issued by the Australian Bureau of Statistics, nearly 10% of employees reported having obtained their current job through an employment agency, and over 2% were still being paid through an agency or labour hire firm.[81] The use of agencies is part of a clear trend for both public and private sector organisations to outsource their labour requirements.[82] Rather than engage workers directly (whether as employees or contractors), the organisation may use the services of an intermediary who will supply the work required. In some instances, the organisation may contract out the provision of certain services altogether, especially where those services (cleaning, payroll administration, information technology support, for instance) are regarded as peripheral to the organisation's main activities and the organisation feels it can safely entrust them to an external provider. While agencies can and do perform this sort of function, their role is also to supply workers who are used *within* the client organisation, often working alongside employees of the client who are performing similar tasks. In days gone by, agencies were primarily used to meet short-term labour needs, for example by supplying 'temps' who could fill in until permanent staff returned from leave or a vacancy could be filled. Increasingly, however, many skilled workers supplied by agencies can find themselves working for a particular client on an ongoing basis.[83]

Some agencies do no more than broker employment contracts, by in effect introducing client and worker and leaving them to enter into contractual relations. If we leave aside such recruitment or placement services, however, the more pertinent arrangement for present purposes involves a triangular relationship between agency, worker and client. The agency enters into a contract with the worker, and agrees to hire out their services to a client, or to

78 *Express & Echo Publications Ltd v Tanton* [1999] ICR 693 at 697.

79 For other recent examples, see *Sammartino v Mayne Nickless* (2000) 98 IR 168; *J A & B M Bowden & Sons Pty Ltd v Chief Commissioner of State Revenue* (2001) 105 IR 66; *Cooke v Workcover Corp* [2001] SAWCT 110 (unreported, 26 September 2001).

80 A Morehead, M Steele, M Alexander, K Stephen and L Duffin, *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey*, Longman, Melbourne, 1997, p 46.

81 *Forms of Employment, November 2001*, Cat 6359.0, ABS, Canberra, p 18. See also the figures set out in Labour Hire Task Force, *Final Report*, NSW Department of Industrial Relations, Sydney, 2001, p 18.

82 For a useful review of some of the literature on both the reasons and effects of outsourcing, see S Young, 'Outsourcing: Lessons from the Literature' (2000) 10(3) *Labour & Industry* 97.

83 See generally R Hall, *Labour Hire in Australia: Motivation, Dynamics and Prospects*, Working Paper 76, ACIRRT, University of Sydney, 2002.

a series of clients. The worker generally performs these services at the client's premises, and may be supervised (if their work requires supervision at all) either by the client's staff or by other workers supplied by the agency. The worker is paid by the agency, but aside from any requirement to submit timesheets may have relatively little contact with the agency while working for a particular client. The client, on the other hand, pays a fee to the agency which covers the worker's remuneration and any associated on-costs, together with a profit margin. It is stipulated as part of the contract between agency and client that the client may dispense with the worker's services either whenever they wish or in certain defined circumstances. Thus, the worker may be 'dismissed' by the client, though in formal terms any action is taken by the agency at the client's request. Whether the worker is reassigned to work elsewhere after such a 'dismissal' depends on whether they have an ongoing contract with the agency.

Courts have generally held in this situation (a) that in the absence of any contract between the worker and the client, the worker cannot be regarded as an employee of the client, and (b) that such a contract will not be inferred merely because the client exercises what may be a considerable degree of control over the worker.[84] As Doyle CJ of the Supreme Court of South Australia put it in *Mason & Cox Pty Ltd v McCann*,[85] what matters for this purpose is 'the legal right to control, rather than the practical fact of control'. In this case, which illustrates a potential downside (at least in some jurisdictions) in the use of agency labour, the plaintiff was an agency worker who was injured while working at a foundry operated by Mason & Cox. He sued Mason & Cox, claiming that they were either in breach of their duty of care to provide a safe workplace, or vicariously liable for the negligence of their own workers. Under the workers compensation system in South Australia, employees are barred from seeking common law damages from their employers and must accordingly rely on their statutory entitlements alone.[86] However, the plaintiff successfully argued that since he had no contract with Mason & Cox, they could not be his employer. Accordingly, he was not caught by this restriction.[87]

Curiously enough, the absence of any contract between them may not prevent the client being vicariously liable for the worker's actions, provided 'entire and absolute control' has passed to the client.[88] Although it has been

84 See, eg, *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104; 99 ALR 735; *Skilled Engineering Pty Ltd v Gill* (unreported, SA SC, Full Court, No 2962, 11 July 1991); *Advanced Australian Workplace Solutions Pty Ltd v Kangan Batman TAFE* (unreported, AIRC, Full Bench, Print S0253, 30 June 1999); *Swift Placements Pty Ltd v WorkCover Authority of New South Wales* (2000) 96 IR 69; *McMahon Services Pty Ltd v Cox* (2001) 78 SASR 540.

85 (1999) 74 SASR 438 at 443.

86 Workers Rehabilitation and Compensation Act 1986 (SA) s 54.

87 The result of this decision, it may be noted, has been to force South Australian firms using outsourced labour to review the wisdom of their strategy — or at least to ensure that they obtain an appropriate contractual indemnity from the agency for the cost of any liability arising from work injuries. See M Crawley, 'Labour Hire and the Employment Relationship' (2000) 13 *AJLL* 291.

88 *Mersey Docks & Harbour Board v Coggins* [1947] AC 1 at 18; *Bhoomidas v Port of Singapore Authority* [1978] 1 All ER 956 at 959–60.

stressed in cases dealing with other kinds of 'lent' workers that the burden of shifting responsibility from the 'general employer' (the agency) to the hirer 'is a heavy one and can only be discharged in quite exceptional circumstances',[89] it is by no means unknown for a hirer to be found liable on this basis.[90] Importantly, however, it is generally asserted that even the level of control sufficient for vicarious liability to arise does not of itself justify the inference that a contract of service exists between the worker and the hirer.[91] It is a fundamental principle at common law that a worker cannot be transferred from the service of one employer to another without the worker's consent.[92] Accordingly, unless there is some evidence that the worker has entered into a contract with the client firm, either expressly or impliedly, there can be no employment relationship between them. Where the agency continues to pay the worker for the work they perform and there is no formal communication between the worker and the client as to the terms on which they are employed or the remuneration they are to receive, it will be difficult to find evidence of any new contract.

This is not to say that it is impossible to envisage a situation where a court might find the existence of such a contract. In *Building Workers Industrial Union of Australia v Odco Pty Ltd*,[93] the Full Court of the Federal Court, in considering the legal status of building workers supplied to client firms by Odco (trading as Troubleshooters Available), acknowledged that it is possible for there to be a contract of employment where wages are paid by a third party or 'intermediary'. In such a case, however, 'the essential enquiry . . . is whether the presumptive employer remains liable to pay the worker if, for any reason, the intermediary fails to do so'. On the facts, it could 'discern no term of any contract between the builder and the worker in the present case which imposes any such liability on the builder in the event of Troubleshooters failing to make an appropriate payment to the worker'.[94]

The possibility of a contract arising between client and worker was also considered in *Melbourne v JC Techforce Pty Ltd*.[95] Here a worker was engaged by an agency and then placed in a client's manufacturing operation. Her work for the client was initially sporadic, but she was then informed by the client that she was required until further notice and spent six months working there on a regular basis. When the client told her that her services

89 *Mersey Docks*, ibid, at 10; and see also *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1985) 160 CLR 626 at 641, 646; 66 ALR 29.

90 See, eg, *McDonald v Commonwealth* (1945) 46 SR (NSW) 129. Cf *Deutz Australia Pty Ltd v Skilled Engineering Ltd* (2001) 162 FLR 173.

91 *Denham v Midland Employers Mutual Assurance Ltd* [1955] 2 QB 437; [1955] 2 All ER 561; *McNiece Bros Pty Ltd v National Employers Mutual General Insurance Association Ltd* (1985) 3 ANZ Ins Cas 60-631.

92 *Nokes v Doncaster Amalgamated Collieries* [1940] AC 1014 at 1026; *Ford v Lismore City Council* (1989) 28 IR 68; *McCluskey v Karagiozis* [2002] FCA 1137 (unreported, 12 September 2002).

93 (1991) 29 FCR 104; 99 ALR 735: see C Fenwick, 'Shooting for Trouble? Contract Labour-hire in the Victorian Building Industry' (1992) 5 *AJLL* 237; N L Wallace-Bruce, 'Shooting for Trouble: When a Union Member is Not an Employee' (1992) 5 *Corporate & Business L Jnl* 291.

94 (1991) 29 FCR 104 at 119; 99 ALR 735.

95 [1998] SAIRComm 62 (unreported, 23 July 1998).

were no longer required, she successfully sued the agency for unfair dismissal. In considering her claim Hampton DP of the South Australian Industrial Relations Commission noted that no argument had been put to him by the parties that she was really employed by the client rather than the agency. However, he observed that if the point had been raised he might well have found there to be an employment relationship with the client, notwithstanding that she had been initially engaged by the agency and continued to be paid by it during her time with the client. What particularly struck the Deputy President was that once she was assigned to the client she had virtually no contact at all with the agency. Her dealings were almost exclusively with the client, who gave clear instructions as to when and on what basis she was required to work. The judgment seems to suggest that in some circumstances at least what is initially constructed as a contract between agency and worker may implicitly come to be superseded by an arrangement of the type adverted to in *Odco*, where the contract is really with the client and the agency is merely paying the worker's remuneration on their behalf.[96]

Assuming in any event that an agency worker is not an employee of the clients for whom they perform services, does this mean that they are *necessarily* employed by the agency? That the answer is no is apparent from decisions such as *Odco* in Australia, and the earlier UK case of *Construction Industry Training Board v Labour Force Ltd*.[97] In both cases the contracts that the agencies had with the workers on their books made it clear that the latter were not to be regarded as employees, and the agencies were of course able to point to the fact that they were not in a position to exert control over how the workers performed their tasks — any control was rather exercised by the clients. So, contract but no control on one side of the triangle (agency/worker), control but no contract on the second (client/worker), and a purely commercial relationship on the third (agency/client).[98]

That said it appears to be quite common for many agencies to treat their staff as employees — even though it would not be hard to use the *Odco/Construction Industry Training Board* reasoning to deny them that status. In *Mason & Cox*, for instance, the agency concerned made superannuation contributions on behalf of its workers, deducted tax from their wages, and also paid workers compensation premiums and payroll tax in respect of them. Some (though by no means all) of the major agencies in Australia make a virtue of this point, organising training and social activities for their staff and encouraging them to see themselves as part of an

96 Interestingly, Hampton DP went on to decide in this case that the employment relationship between the agency and the worker had become entirely focused upon the assignment to this particular client, such that when the assignment finished the worker was in effect 'dismissed' by the agency. This was so notwithstanding the fact that the agency had kept the worker on its books and maintained that she might still be offered other assignments.

97 [1970] 3 All ER 220. See also *Ironmonger v Movefield Ltd* [1988] IRLR 461; *Montgomery v Johnson Underwood Ltd* [2001] ICR 819; but cf *McMeechan v Secretary of State for Employment* [1997] ICR 549.

98 But cf *Drake Personnel Ltd v Commissioner of State Revenue* (2000) 2 VR 635, where the Victorian Court of Appeal held that an agency-worker contract was one of employment and rather unconvincingly distinguished *Odco* on the basis that the contract in question had not been labelled as a contract for services. See also *Slater v Workcover Corp* [2002] SAWCT 27 (unreported, 14 March 2002), a decision which is currently on appeal.

organisation providing a quality service to its clients. It is precisely because certain agencies either accept the responsibility of being an employer, or at least do not endeavour to structure their arrangements so as to mimic those adopted by Odco and its ilk, that those agencies may for instance be sued for unfair dismissal when a worker's engagement is ended, whether at the behest of the agency itself or one of its clients.[99]

It is significant too that legislation may in certain circumstances deem agency workers to be employed by their agency.[100] Indeed, the Troubleshooters workers, who were found by the Federal Court in *Odco* not to be employees as a matter of common law, had previously been held by the High Court of Australia to have employment status by virtue of deeming provisions in the Victorian Accident Compensation Act 1985.[101]

In the recent case of *Morgan v Kittochside Nominees Pty Ltd*,[102] a Full Bench of the Australian Industrial Relations Commission canvassed a more radical way of analysing agency employment. The case concerned an unfair dismissal application brought by a pharmacy assistant. She had been employed, not by the pharmacist who ran the business (a Mr Reid) but by a company (Kittochside) which turned out to be the trustee of his family trust and which had a service agreement to provide him with staff. In order to bring her claim under the Workplace Relations Act 1996 (Cth), the applicant had to show that her employer was bound by a federal award. She eventually succeeded, on the basis that an award that was apparently binding only on Reid did in fact also apply to Kittochside. However, at the end of its judgment the Full Bench noted that an 'alternative but more novel path of reasoning to the same conclusion' would have been to regard the applicant as being employed by *both* Kittochside (as 'a labour service provider') and Reid (as 'a client contractor exercising control over work performed').[103]

The Full Bench drew for this purpose on the doctrine of 'joint employment' developed by the US courts, whereby two employers who each exercise significant control over a worker and 'co-determine' their terms of employment may both be held to be the worker's employer for the purposes of the National Labor Relations Act and the collective bargaining regime it establishes. The Bench commented that while it was unnecessary to decide the point, they 'would incline to the view that no substantial barrier should exist to accepting that a joint employment relationship might be found and given effect for certain purposes under the [Workplace Relations] Act'.[104] However, while the suggestion that it is possible to perform the same duties for two employers simultaneously is not entirely without judicial support in this

99 Aside from *Melbourne v JC Techforce*, discussed above, see, eg, *Australasian Meat Industry Employees' Union, NSW Branch v Peter Stoitse Transport Pty Ltd* [2002] NSWIRComm 185 (unreported, 8 August 2002); *Fary v Clements Techforce Pty Ltd* [2002] SAIRComm 56 (unreported, 30 September 2002).

100 See, eg, Pay-roll Tax Act 1971 (NSW) s 3C.

101 *Accident Compensation Commission v Odco Pty Ltd* (1990) 95 ALR 641; 64 ALJR 606.

102 Unreported, PR918793, 13 June 2002.

103 Ibid, at [72].

104 Ibid, at [75].

country,[105] acceptance of such a proposition could only be regarded as a radical step in light of existing authority.

It is perhaps notable that this case involved a significant variation on the use of an employment agency, where the provider is not in the business of supplying labour to a range of clients, but is rather an entity effectively controlled by the client/host.[106] As the 1998 waterfront dispute revealed, there may indeed be a range of reasons besides tax minimisation for a business to have the staff it needs employed by a separate entity from that actually operating the business.[107]

## Interposing another kind of entity

The use of an agency is one way of putting a legal entity between the worker and the person for whom they ultimately perform work, thus (at least on the orthodox analysis) precluding the existence of an employment relationship between them. The same objective can be attained by the hirer insisting that the worker establish a personal company,[108] or form a partnership with other workers, or operate through a family trust. The hirer then contracts to obtain the services they need from the company or partnership or trust, once again avoiding a contractual relationship with the worker and hence ensuring that the worker cannot be their employee.[109] This process of legal (if not factual) distancing can be taken to absurd lengths, as is evident from a recent UK case in which a computer consultant went to work for a building society, via a chain of agreements which saw the society contract to obtain his services from an agency, which in turn contracted with his personal company, which in turn employed him![110]

Occasionally, a court will find that an arrangement involving a personal company is a 'sham', and that the real contract is between hirer and worker.[111] A less pejorative assessment, though one that has the same effect in practice,

105 See, eg, *Oceanic Crest Shipping Company v Pilbara Harbour Services Pty Ltd* (1985) 160 CLR 626 at 668; 66 ALR 29; and see also *Misheva v Spicers Paper Ltd* (1998) 44 AILR ¶3-904.

106 For a further example, see *Muir Electrical Co Pty Ltd v Commissioner of State Revenue* (2001) 4 VR 70.

107 See *Patrick Stevedores Operations (No 2) Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1; 153 ALR 643, where the MUA successfully established an arguable case that Patrick Stevedores had engaged in a corporate restructure so as to allow it to dismiss its unionised workforce and hire non-unionists instead; and see further H J Glasbeek, 'The MUA Affair: The Role of Law vs The Rule of Law' (1998) 9 *Economic and Labour Relations Rev* 188.

108 This is, for example, a common practice in the building industry: see Royal Commission into the Building and Construction Industry, *Working Arrangements — Their Effect on Workers' Entitlements and Public Revenue*, Discussion Paper 11, 2002, p 14.

109 See, eg, *Climaze Holdings Pty Ltd v Dyson* (1995) 58 IR 260; *Richtsteiger v Century Geophysical Corp (No 3)* (1996) 70 IR 236; *Blake v Sitefate Pty Ltd* (1997) 74 IR 466; *Parkinson v Department of Primary Industries and Energy* (1998) 43 AILR ¶3-775; *Wesoky v Village Cinemas International Pty Ltd* [2001] FCA 32 (unreported, 3 February 2001, BC200100100).

110 *MHC Consulting Services Ltd v Tansell* [2000] ICR 789. It was either held or assumed by both the EAT and the Court of Appeal that the society did not employ the consultant, though that was not the primary issue in the case. The question was rather whether s 12 of the Disability Discrimination Act 1995 (UK), which prohibits discrimination against workers hired through a third party, applied in this situation, it being held in the end that it did.

111 See, eg, *Hartnett v Aardvark Security Services Pty Ltd* (1998) 85 IR 315.

is that although the parties may have agreed that any remuneration is to be paid to the worker's personal company, they have nonetheless entered into a direct contractual relationship.[112] However, as long as the parties take sufficient care about the way in which their arrangement is expressed, there is nothing to stop the device being successfully used to avoid an employment relationship. There may of course be (and often is) an employment relationship between the worker and their own company,[113] but in most instances any right on the part of the worker to recover accrued entitlements, sue for unfair dismissal and so on will be meaningless in practice — if for no other reason than a typical lack of assets on the part of the company.

The 'interposed entity' strategy is premised on the well established assumption that a legal entity other than a natural individual cannot be an employee.[114] Where the entity is an agency carrying on its own business and entering into numerous arrangements to supply labour, the assumption seems a reasonable one. It is less obvious why a company which is no more than a vehicle for the supply of a single person's labour could not be treated as an employee. However, while the notion is tempting, many of the entitlements attracted by employment status seem in the end too obviously personal in nature (for example, those relating to working hours, leave, safety or work-related injury) to be allocated to an artificial entity.

A better line of argument, and one pursued later in the article, may be to pierce the corporate veil and treat the worker as effectively being employed by the ultimate hirer, regardless of the interposed entity. There are already at least two significant examples of this being done in Australian law.

One arises under payroll tax legislation. It has already been noted that in some States contractors may be counted as employees where they perform all the relevant work personally and do not engage anyone else to assist them. Under the relevant provisions, this will be so even where a contractor is working through a personal company.[115] A similar provision applies in Victoria, though not in other States, in relation to the operation of the workers compensation system.[116]

A more recent innovation is the alienation of personal services income legislation which took effect (at least for most workers) in July 2000.[117] The

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112 See, eg, *Burke v Reander Pty Ltd* (1996) 69 IR 346; *Bearings Inc (Australia) Pty Ltd v Treloar* (1999) 95 IR 169; *Nouss-Ade Corp Ltd v Ivkovic* (unreported, Industrial Relations Commission of South Australia, Full Commission, I.19/1999, 27 April 1999); and see also *Bibic v First Interstate Security* (unreported, AIRC, Full Bench, Print S7290, 22 June 2000).

113 There is no bar to a sole or dominant shareholder being an employee of their own company: *Secretary of State for Trade & Industry v Bottrill* [1999] ICR 592; *Connolly v Sellers Arenascene Ltd* [2001] ICR 760; though cf *Albert J Parsons & Sons Ltd v Parsons* [1979] ICR 271.

114 See *Australian Mutual Provident Society Ltd v Chaplin* (1978) 18 ALR 385 at 391-2. Cf *Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees v Bark Australia Pty Ltd* [2001] QIRComm 22 (unreported, 28 February 2001), where it was noted that despite the 'conceptual difficulty' in treating a corporation as an employee, this might nonetheless be a permissible outcome of an order under s 275 of the Industrial Relations Act 1999 (Qld) deeming a class of persons to be employees.

115 See, eg, Pay-roll Tax Act 1971 (NSW) s 3A; Pay-Roll Tax Act 1971 (Vic) s 3C.

116 Accident Compensation Act 1985 (Vic) s 9.

117 Income Tax Assessment Act 1997 (Cth) Divs 84–87, as originally introduced by the New

legislation stemmed from recommendations made by the Ralph Report on business taxation, in particular to the effect that there should be a crackdown on the use of interposed entities such as personal companies, partnerships and family trusts to avoid employment relationships and move income out of the PAYE tax system.[118]

The personal services income provisions have two main objectives. The first is to ensure that where an individual person is deriving income from the supply of their labour other than as an employee, they can only claim certain tax deductions associated with running a business if indeed that is what they are really doing. The second, and more significant for present purposes, is that income generated from the supply of personal labour by an entity will be attributed to the individual or individuals who are actually providing that labour, unless once again the entity is a genuine business. In each case, the legislation makes it clear that a person who is caught by these provisions does not thereby become an employee of the person or entity to whom the services are ultimately rendered.[119] Nevertheless, the effect will be to tax that person as if they were an employee of the recipient of their labour, regardless of their status for the purpose of other laws.

To escape this consequence, it will need to be shown that the contractor (whether an individual or an interposed entity through which they are operating) is running a *personal services business*. This can be established in any one of three ways.

The first possibility is that less than 80% of personal services income in the relevant year has been obtained by the contractor from a single entity (or associates of that entity), *and* one of three tests is satisfied:

(a) *the unrelated clients test* — services have been rendered to two or more entities that are not associated (either with each other or with the contractor), as a result of the services being offered or advertised to the public; or
(b) *the employment test* — at least 20% of the contractor's principal work has been performed by one or more other persons or entities engaged by the contractor and not associated with them; or
(c) *the business premises test* — the contractor performs work throughout the year from premises of which the contractor has exclusive use, and which are physically separate from any premises belonging to a client of the contractor or used by the contractor or their associates for private purposes.

Secondly, even if 80% or more of personal services income in a given year is received from a single source, the contractor may obtain a personal services

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Business Tax System (Alienation of Personal Services Income) Act 2000. For workers covered by the old prescribed payments system (PPS), the commencement date was July 2002. As to the interpretation of these provisions, see Taxation Rulings TR 2001/7 and TR 2001/8; and see further J Cassidy, 'Impact of the New Business Tax System (Alienation of Personal Services Income) Act 2000' (2002) 30 *Australian Business L Rev* 90; K Burton, 'Alienation of Personal Services Income (PSI) Through a Structure' (2002) 30 *Australian Business L Rev* 258.

118 J Ralph, *Review of Business Taxation: A Tax System Redesigned*, Treasury, Canberra, 1999, pp 286–93.

119 Income Tax Assessment Act 1997 (Cth) s 84-10.

business determination from the Commissioner of Taxation, based on being able to satisfy either the employment test or the business premises test (but not the unrelated clients test)

Thirdly, and regardless of the proportion of income derived from any one source, a contractor will be a personal services business if they can satisfy *the results test*. For this to apply, the contractor must derive at least 75% of their personal services from contracting to produce a result rather than to supply labour, provided they also supply their own tools or equipment for the purpose and are obliged to rectify any defective work. The results test was not part of the personal services income provisions as originally enacted, but was added (with retrospective effect) after persistent lobbying from business groups.[120]

It is also important to appreciate that under the new provisions, income will not be taken to be derived from personal labour, and hence will not be personal services income in the first place, where the primary purpose of an arrangement is to supply the use of an asset, or to produce goods for sale, and the supply of a worker's labour is considered merely to be an incidental feature of that arrangement. In such cases, it is irrelevant that the contractor might not otherwise satisfy the tests for operating a personal services business.

## Some Points of Principle

The use of employment-avoidance devices, such as the three just discussed, poses a fundamental challenge to the integrity of the labour law system. To justify that statement, it is necessary to remind ourselves of why we have labour law in the first place.

The standard explanation, advanced in its most cogent and oft-quoted form by Kahn-Freund, is that labour law is necessary as 'a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship'.[121] Because most workers are unable to bargain effectively with employers, through a combination of lack of bargaining skills, lack of information and lack of alternatives, they can be expected to fare very poorly in negotiating the conditions of their engagement: indeed, in most instances, if they want a job badly enough, they will simply agree to whatever terms the employer proposes. Acceptance of this fundamental truth by liberal democracies during the late nineteenth and early to mid twentieth centuries led them to pass laws which, to varying degrees, legitimated (or even promoted) collective representation of worker interests by unions and instituted minimum labour standards.

There is by contrast a strand of libertarian/laissez-faire philosophy, exemplified in the writings of Hayek and Epstein,[122] that largely rejects the argument for protective regulation. According to this view, which effectively

120 See Taxation Laws Amendment Act (No 6) 2001 (Cth) Sch 6. The amendments also modified the operation of the 80% threshold in relation to agents deriving income predominantly from commissions.

121 P Davies and M Freedland, *Kahn-Freund's Labour and the Law*, 3rd ed, Stevens, London, 1983, p 18.

122 See, eg, F A Hayek, *The Constitution of Liberty*, Routledge & Kegan Paul, London, 1960, ch 18; R Epstein, 'A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation' (1983) 92 *Yale L Jnl* 1357; 'The Common Law and the Labour Market', available at <www.hrnicholls.com.au/Special/Epstein.html>.

treats labour as very little different from any other commodity to be bought and sold on the open market, the law's role should simply be to facilitate the process whereby employer and worker agree on conditions for the supply of labour. This can be done through the ordinary law of contract. Any attempt by the legislature to 'interfere' in these individual transactions, whether by prescribing minimum standards, or a fortiori by conferring 'privileges' on unions that might allow them to exert collective power against employers, is prima facie to be regarded as not just inappropriate, but economically harmful.

The reality though is that while conservative politicians around the world can now be found using 'freedom of contract' rhetoric of this sort, in none of the industrialised market economies has there been any move to abolish protective regulation altogether.[123] It seems inherently unlikely that the protective view will fall so far out of favour that we will see labour law reduced to nothing more than the law of contract. There are in any event powerful reasons to believe that some level of regulation is justifiable, not just in the interests of social justice, but on economic grounds as well.[124]

It is especially important in this context not to confuse arguments about particular forms of regulation with the larger issue of whether any degree of legislative intervention at all in the labour market can be justified. Opinions might legitimately differ, for instance, as to whether the State and/or the individual worker should alone be responsible for bearing the financial burden of making provision for the worker's retirement, rather than compelling the employer to contribute a set percentage of the worker's wage to a superannuation scheme or to a national insurance fund. There might also be disagreement as to whether the State should regulate minimum wages, or set limits on working hours, or indeed (as the Australian award system does) impose standards on matters as diverse as job classifications, penalty rates for work at anti-social times, meal breaks and dispute resolution procedures. It is enough, for present purposes, that we accept what can be described as the two fundamental planks of modern labour law: that some types of protective regulation are warranted, and also that it is appropriate in some situations to ask employers to bear the burden of delivering social benefits to workers.

That being so, there is a need to find some way of distinguishing those workers who prima facie require protection from the consequences of their lack of bargaining power, or who should have access to social benefits paid for (at least in part) by those who hire their services, from those who do not merit such protection or benefits. Within the realm of paid work, that distinction has generally come to be drawn (whether consciously or not) by reference to the concepts of subordination and dependence. It is the employed, those who put

123 Even in New Zealand, the radical reforms ushered in by the Employment Contracts Act 1991 still left some forms of protective regulation in place, notably unfair dismissal laws: see generally G Anderson, 'Individualising the Employment Relationship in New Zealand: An Analysis of Legal Developments' in S Deery and R Mitchell (Eds), *Employment Relations: Individualisation and Union Exclusion*, Federation Press, Sydney, 1999.

124 For attempts to put the economic case for different forms of regulation, see, eg, P C Weiler, *Governing the Workplace: The Future of Labor and Employment Law*, Harvard University Press, Cambridge, 1990; S Deakin and F Wilkinson, 'Labour Law and Economic Theory: A Reappraisal' in H Collins, P Davies and R Rideout (Eds), *Legal Regulation of the Employment Relation*, Kluwer Law International, London, 2000, p 29.

themselves under the command of an employer and work for them rather than on their own account, who as a general rule attract labour regulation. Those who contract to supply their services through a business of their own, operating independently of those who pay for their work, are excluded from such regulation.

The question is whether this distinction, between being an employed worker and being an entrepreneur, can and should be maintained. The answer would seem to be yes, though the reason for saying so perhaps depends as much on instinct as it does on reason. There does seem to be a fundamental difference, in a capitalist system, between running your own business and working for somebody else's. It is a distinction that has not only been articulated in these terms by the courts,[125] but that most people in the community would implicitly understand and accept. The entrepreneur risks whatever capital they have been able to accumulate in a bid to profit from their venture. They may earn a little or a lot, or indeed they may lose money. Within whatever constraints are imposed by the need to raise finance and/or the conditions of the relevant product market, the entrepreneur makes their own decisions as to how the business is to operate. As Leighton notes, the distinction between being in business and being employed is as much as anything else a matter of *attitude*:

> The genuine self-employed are risk tolerant, want autonomy in decision making and accept risk, costs, insecurity, etc, as constant features of their work. They see themselves, generally, as detached and self-reliant. They offer their services widely and are disinterested in employing organisations, labour market policies and macro-economic issues generally.[126]

The employed worker, on the other hand, generally works on the basis that some remuneration at least will be received for their efforts, even if (as in the case of piecework or other performance-based pay arrangements) the amount is uncertain. They are also aware that someone else is ultimately responsible for making the decisions that will determine whether they continue to be given a chance to earn that remuneration.

It is true, as Mark Freedland has pointed out, that many work relationships 'are not easily and sharply differentiated', and that 'the spectrum of dependency on which they sit is not a simple monolinear one'.[127] But that does not of itself justify abandoning the entrepreneur/employee distinction. Many of the examples cited by Freedland can still clearly be categorised as one or other: it is just that there are some employees who are less in need of protection than others, while equally some types of entrepreneur (franchisees being a classic example) arguably have greater claims than others to a degree

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125 See, eg, *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at 217; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 39, 41; 181 ALR 263 at 275, 277.

126 P Leighton, 'The European Employment Guidelines, "Entrepreneurism" and the Continuing Problem of Defining the Genuinely Self-Employed' in Collins, Davies and Rideout (Eds), above n 124, pp 301–2.

127 Freedland, above n 23, p 22; and see further P Davies and M Freedland, 'Employees, Workers and the Autonomy of Labour Law' in Collins, Davies and Rideout (Eds), above n 124, p 267.

of statutory control over the fairness of their contractual arrangements.[128]

This is not to deny that there is a grey area between the categories of employed worker and entrepreneur, or that this area may be growing in size. It may be genuinely difficult to say in some cases whether a person is employed or in business. One example is the skilled professional such as the freelance journalist or film technician who may provide services to a wide variety of clients within a short period of time, and hence looks to be running a business, yet who has few if any business assets and no identifiable business name or identity.[129]

But the mere fact that hard cases exist should not obscure the fact that the overwhelming majority of working people are as a matter of practical reality quite firmly in one category or the other — and mostly indeed they are employed, no matter what the common law might say. Owner-drivers, agency workers, the couriers in the *Vabu* cases — with few exceptions, these are people who work for someone else. They are not in any sense of the word entrepreneurs. If we strip away the 'disguised employees' who are denied employment status as a result of the common law's preoccupation with form over substance, the grey area becomes that much smaller.

We should also be sceptical about suggestions that work relationships are somehow in the process of being fundamentally transformed in the 'new economy' by the combined effects of new technology and evolving economic structures.[130] Despite emphasising the importance of neither understating nor overstating the pace of change in socio-economic structures, this is a trap into which Alain Supiot perhaps falls in summarising the work of a study group convened by the European Commission to look at the future of work and the changing demands on labour law.[131] He speaks of a breakdown in 'the quid pro quo that originally underpinned wage-employment status', that being the offer by the employer of a secure position in return for the worker undertaking to serve under their command. With increasing 'career individualisation and mobility', he suggests, the traditional conception of employment needs to be 'superseded by a new occupational status for individuals' that would protect 'the continuity of a lifelong trajectory rather than the stability of particular jobs'.[132]

Now it may be that employment is becoming less stable and secure,[133] and

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128 See, eg, Trade Practices (Industry Codes — Franchising) Regulations 1998 (Cth). Note also s 51AC of the Trade Practices Act 1974 (Cth), which prohibits unconscionable conduct in relation to certain 'small business transactions' (those which involve the supply of goods or services for a price of less than $3 million, and where the 'business consumer' is not a publicly listed company).

129 See, eg, *Hall v Lorimer* [1994] ICR 218. Cf B A Langille and G Davidov, 'Employed or Self-Employed? The Role and Content of the Legal Distinction — Beyond Employees and Independent Contractors: A View from Canada' (1999) 21 *Comparative Labor Law & Policy Jnl* 7 at 30–5, discussing the position of what they call 'non-self-dependent contractors'.

130 Cf D Grant, 'Commentary: Changing Forms of Organisation and Management' in R Callus and R D Lansbury (Eds), *Working Futures: The Changing Nature of Work and Employment Relations in Australia*, Federation Press, Sydney, 2002, p 227.

131 For the report of the study group itself, see A Supiot (Ed), *Au-delà de l'emploi*, Flammarion, Paris, 1999.

132 Supiot, above n 11, at 36.

133 Or then again, it may not be: see M Wooden, *The Transformation of Australian Industrial*

that the typical labour market participant will in the future work for shorter periods for a larger number of organisations over their lifetime. It may also be appropriate to rethink the design and coverage of various forms of labour regulation in light of the casualisation of a large sector of the workforce, the growth of part-time work and the increasing willingness of organisations to engage in regular restructuring and downsizing. There seems merit, from this perspective, in Supiot's suggestion of developing 'social drawing rights' for individuals which would span the divide between employment, training, voluntary or domestic work, and unemployment.[134] As the editors of a recent collection of essays on the global challenges facing labour law point out, however, there are 'signs that the "new" boss is very much like the "old" boss, and that the era of flattened work hierarchies, co-operative employment relations and fluid labour markets is not yet upon us'.[135]

In any event, acceptance of Supiot's proposal does not mean that there would no longer be any point in maintaining regulation which is particularly applicable to those periods when an individual is being paid to work — or in distinguishing, for the purpose of such regulation, those working on an employed basis from those running their own businesses.

Which brings us back to this fundamental point of principle: if the purpose of labour regulation is to protect workers against the consequences of what is typically a lack of bargaining power vis-à-vis those who would hire their services, and if that regulation should in principle apply where the worker is employed but not where they are supplying labour as part of their own business, what constraints if any should the law place on the worker's capacity to opt for self-employment?

Some years ago, in an article decrying the ease with which Australian workers could be denied employment status, I conceded that 'it must be a fundamental tenet of any democratic, capitalist system that each person is free to choose to be an entrepreneur if they so desire'. Although adding the caveat that 'any such decision be made freely and with full awareness of the consequences', I felt then that labour law must perforce accept the principle of 'flexibility of status'.[136] On further reflection, I am not sure I am still willing to make that concession, or at least not in those terms. It is after all an accepted feature of most forms of statutory labour regulation that a worker cannot contract out of benefits or rights to which they would otherwise be entitled.[137] Why then should it be possible to make a contract which is designed to have precisely that effect, albeit through the indirect device of constituting the worker as something other than an employee?

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*Relations*, Federation Press, Sydney, 2000, pp 126–35; though cf J Isaac, 'The Changing Labour Market and its Impact on Work and Employment Relations' in *Working Futures*, above n 130, pp 80–3.

134 See further R Callus and R D Lansbury, 'Working Futures: Australia in a Global Context' in *Working Futures*, above n 130, pp 246–8.

135 Conagahan, Fischl and Klare, above n 3, p xxviii.

136 A Stewart, '"Atypical" Employment and the Failure of Labour Law' (1992) 18 *Australian Bulletin of Labour* 217 at 222.

137 This is sometimes explicitly stated by the legislature (see, eg, Industrial Relations Act 1999 (Qld) s 135), though more often it is simply inferred that an agreement inconsistent with the statute in question would be contrary to public policy and hence unenforceable, as for example with a contract to pay less than award wages.

What I would say now is that while the freedom to go into business should be recognised, it must be a freedom to do just that: to go into a *business* of one's own. The principle of freedom of contract should not protect arrangements which clothe workers in the trappings of independence, but do not in any meaningful sense make them entrepreneurs. Whether the worker acquiesces or not, and whether they understand what they are doing or not, a contract or chain of contracts which purports to deny them employment status should not be regarded as having that effect if the practical reality of the arrangement is that they are being employed to perform work. People should have the right to become entrepreneurs, if that is how they wish to make a living — but not to disguise employment.

## Adjusting Regulation: Some Different Models

Against that background, and as a prelude to suggesting a preferred model for giving effect to the principle just articulated, it is instructive to look at various ways in which regulators have sought to meet the challenges posed by the growing use of contract labour.

Trade unions have in some instances endeavoured to seek agreed restrictions on the use of contractors through collective bargaining with employers.[138] But with the declining (or indeed non-existent) relevance of unions in many workplaces, and with even established unions often lacking in bargaining power, few are in a position to secure such a concession. It has been left therefore predominantly to legislators to find ways of preserving the integrity of labour regulation. Each of the strategies adopted to date, however, has its problems.

### Deeming provisions

As we have seen, a number of regulatory regimes have been extended through the use of 'deemed employee' provisions. These are clearly very useful in some circumstances, especially where the type of work in question is well outside the ordinary concept of employment but needs to be brought within the scope of a particular regulatory regime: for example, ensuring that volunteer firefighters are covered by workers compensation. But relying on them to stem the tide of disguised employment arrangements has two key drawbacks. In the first place, it is usually a reactive strategy, relying on someone to identify a particular class of workers and take steps to invoke the relevant deeming mechanism. Secondly, deeming provisions are generally directed at the status of a class of workers and do not address the reality that *any* individual worker, no matter what their job, can readily be converted into what the common law would regard as a non-employee. Although, the Queensland legislation referred to earlier has introduced greater flexibility by

138 Unions in some jurisdictions may have the option of asking their State tribunal to impose such restrictions through awards. However, the federal tribunal has long been precluded from doing this, owing to a narrow interpretation of its powers by the High Court: see *R v Commonwealth Industrial Court; Ex parte Cocks* (1968) 121 CLR 313; [1969] ALR 161; Creighton and Stewart, above n 8, paras 4.34–4.35.

conferring the deeming power on a tribunal rather than relying on statutory amendments or the promulgation of regulations, it can still be regarded as a second or third best option.[139]

A more effective and generally applicable form of deeming provision is the one that, as was mentioned earlier, appears in some payroll tax and workers compensation statutes, under which contractors are treated as employees when performing all the relevant work personally — in some cases even when operating through a personal company. The same legislation also tends to deem agencies to be the employers of any workers whose services they hire out. The greatest drawback with these provisions though is their drafting, which is so convoluted that only the most dedicated of lawyers can make sense of them — and even then the full extent of their application is far from clear.[140]

## Intermediate categories

A number of countries have sought to tackle the problem of disguised employment not through deeming provisions aimed at workers of particular kinds, but through the recognition of a general intermediate category that effectively sits in between the traditional forms of employee and contractor. Typically, this intermediate type is treated in the same way as an employee for some but not all legal purposes.

In the United Kingdom, for example, it has become increasingly common in recent years to find statutory rights being accorded not just to employees, but to 'workers'. This term is typically defined to mean those working either under contracts of employment or under:

> any other contract . . . whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.[141]

The 'worker' concept looks quite promising on the face of it, in that it is more general in its application than most of the deeming provisions just mentioned and ought to be capable of picking up arrangements to supply labour that the common law would or might classify as contracts for services but which are functionally similar to employment.[142] Again, however, there are drawbacks.

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139 There is also the problem that where State legislation results in a worker being deemed to be an employee, this would in most instances have no effect on the categorisation of the worker for the purpose of federal statutes. There is also some doubt as to whether the Commonwealth Parliament could validly legislate to deem persons to be employees, given the constitutional limitations on its powers — though the problems concerned may be more apparent than real: see Creighton and Stewart, above n 8, p 80.

140 This is amply illustrated by the first part of the judgment of Phillips JA in *Drake Personnel Ltd v Commissioner of State Revenue* (2000) 2 VR 635.

141 See, eg, National Minimum Wage Act 1998 (UK) s 54(3); Employment Rights Act 1996 (UK) s 230(3); Trade Union and Labour Relations (Consolidation) Act 1992 (UK) s 296(1). See further K D Ewing, *Working Life: A New Perspective on Labour Law*, Lawrence & Wishart/Institute of Employment Rights, London, 1996, ch 2.

142 See, eg, *Broadbent v Crisp* [1974] ICR 248 (football pools collector); *Robertson v Blackstone Franks Investment Management Ltd* [1998] IRLR 377 ('self-employed consultant' providing investment advice on a commission basis). Note that the definition

One stems from the proviso that the services in question must not be supplied to 'a client or customer'. The point is clear enough: it is to avoid any suggestion that a householder who pays a self-employed plumber or electrician to do some work around their house must somehow be regarded as an 'employer' and hence be subject to labour law obligations; and also, more generally, to make it clear that those who are genuinely running their own businesses do not need to be protected in relation to the terms on which they offer their services.

The potential difficulty is that in the hands of an unsympathetic judiciary, the proviso is capable of being interpreted so broadly that virtually no extension is effected at all beyond the common law category of employment.[143] This is what has happened to the formula (also quoted earlier) used in Australian tax and superannuation legislation, referring to contracts 'wholly or principally for the labour of the person to whom the payments are made'. In interpreting this formula, the courts have held that a contract for services falls outside its scope if the principal aim of the contract is to 'produce a given result', such as the provision of legal, medical or other professional services.[144] Since virtually every contract to provide services can be so characterised, especially if the contract is drawn up in the right way, the interpretation has robbed the provisions in question of any effective content.[145]

It is not hard to imagine something similar happening with the UK 'worker' definition. Some courts and tribunals might, for example, be willing to assume that if a worker is an independent contractor in the common law sense, they must by that very token have their own business and hence anyone paying for their work must be a 'client' or 'customer'.[146] The term 'profession' has even broader possibilities, since it is not too great a stretch to suggest that any person to whom a 'professional' worker supplies their services is in effect a 'client'.[147] All this suggests that whether the 'worker' concept turns out to have its intended effect of extending the common law definition of

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also appears to be intended to catch casuals operating under 'as required' or 'zero hours' contracts. British courts have tended to deny that such contracts are capable of being contracts of employment at common law, for lack of any element of 'mutuality': see H Collins, 'Employment Rights of Casual Workers' (2000) 20 *Industrial L Jnl* 73 and the cases discussed therein.

143 Cf S Anderman, 'The Interpretation of Protective Employment Statutes and Contracts of Employment' (2000) 29 *Industrial L Jnl* 223, looking more broadly at the tendency of UK courts to interpret what are meant to be protective statutes by reference to the contractual concepts with which the courts are more familiar or comfortable.

144 *Neale v Atlas Products (Vic) Pty Ltd* (1955) 94 CLR 419; [1955] ALR 426; *World Book (Australia) Pty Ltd v Commissioner of Taxation* (1992) 27 NSWLR 377; 108 ALR 510; *Vabu Pty Ltd v Commissioner of Taxation* (1996) 81 IR 150.

145 Cf *World Book*, ibid, at 381, where Meagher JA commented that although the legislation in question had evidently been amended in an attempt to overcome the earlier decision in *Neale*, this did not justify construing the provisions so that they 'mean something they intended to say but do not say'.

146 Cf the reasoning upheld in *O'Kelly v Trusthouse Forte plc* [1984] QB 90; [1983] ICR 728 as to the non-employment status of the wine waiters at issue there. But see *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667, where a commendably broad view was taken of the 'worker' definition in finding that builders working as 'subcontractors' could not be said to be operating their own businesses.

147 See, eg, *Edmonds v Lawson* [2000] QB 501; [2000] 2 WLR 1091.

employment is very much still to be seen.

In Canada, by contrast, the relevant category is that of the 'dependent contractor'. Under the Canadian Labour Code 1985, for example, dependent contractors may engage in collective bargaining in the same way as employees. A dependent contractor is defined in s 3(1) as including:

> any . . . person who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that they are, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person . . .

Although this definition contains some welcome elements, notably in its emphasis on looking at the reality of a relationship, the problem with the whole concept is that, as with the deeming provisions already discussed, it continues to legitimate the common law definition. As Langille and Davidov put it, the introduction of this new category in the context of collective bargaining purposes has simply 'served to perpetuate existing failures regarding the definition of "employee" for other purposes'.[148]

## Unfair contracts legislation

Since 1959, when legislation was first introduced to empower the New South Wales Industrial Commission to review the fairness of arrangements for the performance of work, it has been possible for contractors in that State (or unions acting on their behalf) to complain about receiving remuneration that would be less than an employee would get for doing the same work, or indeed to argue that the very reason for engagement as a contractor was to take the worker outside the scope of the award system.[149] Indeed, one of the original purposes of the jurisdiction was to 'cover transactions which may be in intention or effect subversive of the scheme and purpose of industrial legislation'.[150] Unfair contracts provisions have also now been introduced in Queensland[151] and, albeit in a more restricted form, the federal system.[152] Yet while applications of this sort used to be quite common, at least under the New South Wales provisions, there have been many fewer examples in recent years.[153]

The explanation doubtless lies in the fact that the onus is placed on individual workers to lodge a complaint. Especially for those who are unable or unwilling to turn to a union for support, this will often be asking too much, at least while the relationship remains on foot. It is no coincidence that the

148 Above, n 129, at 27. Cf R McCallum, 'Legal Aspects of the Changing Social Contract at Work' in *Working Futures*, above n 130, pp 96–7.

149 See Industrial Arbitration Act 1940 (NSW) s 88F; and see, eg, *Federated Miscellaneous Workers Union (NSW) v Wilson Parking (NSW) Pty Ltd* (1980) 22 AILR ¶280. See now Industrial Relations Act 1996 (NSW) s 106.

150 *Re Becker and Harry M Miller Attractions Pty Ltd (No 2)* [1972] AR (NSW) 298 at 305.

151 See Industrial Relations Act 1999 (Qld) s 276.

152 See now Workplace Relations Act 1996 (Cth) ss 127A–127C. Note in particular that these provisions may only be invoked where the contract in question involves the performance of work by an independent contractor who is a natural person rather than a corporation.

153 But see *Smith v Botany Council* (1998) 81 IR 97; *Buchmueller v Allied Express Transport Pty Ltd* (1999) 88 IR 465; *Massart v Kentlands Pty Ltd* [2001] QIRComm 221 (unreported, 4 December 2001).

issue of employment status is most frequently raised by those who have already lost their jobs, and are seeking compensation for unfair dismissal or the payout of leave entitlements. Unfair contracts proceedings can certainly be commenced after the working relationship has ended — indeed, in recent years this has become the most common type of litigation in New South Wales, though usually at the suit of high-paid employees seeking greater severance benefits, rather than contractors.[154] But it seems unlikely that they would or could ever become a standard measure for challenging disguised employment arrangements.

### Taxation reform

Since the present Federal Government took power in 1996, the only measures it has introduced to combat the growth in disguised employment arrangements have been in the field of taxation — a clear sign that the problem is being conceived in terms of a threat to the revenue base,[155] rather than to the protection or entitlements of workers.[156] The alienation of personal services income provisions, even in the watered down form that now appears on the statute book, have certainly lessened the incentives for some workers to agree to be hired as an independent contractor rather than as an employee, or to operate through an interposed entity such as a personal company, partnership or family trust.[157] The requirement to obtain and quote an ABN may also cause some to think twice — even more so if they have to charge GST, with all its attendant paperwork and reporting requirements. But these changes do not affect the status of workers for other purposes, and hence do not in any way lessen the incentives for hirers to seek to obtain their labour from non-employees. For an organisation that has the bargaining power to make it a condition of obtaining work that the worker sign a contract for services or incorporate a personal company, the introduction of the new tax system will have had little or no effect.

## A Better Way: Redefining the Concept of Employment

The principal shortcoming of most of the strategies discussed in the preceding section is that even when effective they represent a piecemeal solution to the problem of disguised employment. Deeming provisions may well ensure that

154 See, eg, *Westfield Holdings v Adams* [2001] NSWIRComm 293 (unreported, 21 December 2001); but cf the changes introduced by the Industrial Relations Amendment (Unfair Contracts) Act 2002 to restrict such actions.

155 As to the revenue implications of the growth in self-employment, see, eg, J Buchanan and C Allan, 'The Growth of Contractors in the Construction Industry: Implications for Tax Reform' in J Buchanan (Ed), *Taxation and the Labour Market*, Working Paper 55, ACIRRT, University of Sydney, 2002, p 13.

156 The government did announce in 1999 that it was considering amending the Workplace Relations Act 1996 to include a definition of 'employee' in order to provide more certainty on the matter: see P Reith, *The Continuing Reform of Workplace Relations: Implementation of More Jobs, Better Pay*, Parliament House, Canberra, 1999, p 40. However, nothing seems to have come of this.

157 See also Burton, above n 117, at 268–71, noting that even where the use of these devices is not caught by the new personal services income provisions, they may be struck down under the anti-avoidance provisions in Pt IVA of the Income Tax Assessment Act 1936 (Cth).

particular classes of worker are treated as employees for certain purposes. Unfair contracts provisions may allow contractors who have completed their engagement to issue a retrospective challenge to their status in a bid to obtain greater severance benefits. Tax legislation such as personal services income provisions may lessen the incentives for workers to agree to be contractors or operate through interposed entities in the first place. But many disguised employment arrangements will still slip through the net.

A more effective approach, it is suggested, is to tackle the problem at source — the common law definition of employment itself. What is needed is to adopt a standard or model definition of employment that can be included in any legislation where it is considered necessary to apply obligations or extend entitlements to or in respect of those who work for someone else in a subordinate and dependent capacity, but not those who are genuinely in business in their own account. The aim of such a definition would be to draw a more realistic boundary than the common law test has done between those two categories, and to reduce the ease with which hirers can presently disguise what are in substance employment arrangements.

Two points should be made right away about this suggested process of redefinition. The first is to recognise that it is simply not possible to arrive at an exhaustive or conclusive definition of what constitutes 'employment', in the sense of a single test or set of criteria which 'must be both inclusive and exclusive, must state elements which will be present in all instances of that something, and which will not be present in other things'.[158] For all that the distinction between the categories of 'employee' and 'entrepreneur' is a meaningful one in broad social terms, it has already been conceded that there will inevitably be marginal cases where the categories blur. Moreover, even where it seems clear on which side of the line a particular case *ought* to fall, it may be very hard to pin down the precise elements that distinguish such an arrangement from one that properly falls into the other category. As Langille and Davidov point out:

> Whether it is control, ownership of tools, length of the contract, ability to subcontract work, chance of profit or risk of loss, etc, we can always imagine a case or a scenario where someone is (or should be) an employee in spite of the absence of that particular factor. There is no golden thread or necessary set of conditions or indicia, or specific factors, which must be present in all cases. But this is not a recipe for radical uncertainty. This is just the way this concept and many important concepts in life and the law work. That judges and labor boards and others are stuck with this task is not problematic or indeed even unusual. In this neck of the legal woods, reasoning is of the 'legs of the chair', rather than the 'links in the chain' variety. In the chain metaphor, a weak link causes the whole enterprise to fail. In the chair metaphor, we can remove any of the four legs and yet the chair will still stand. No particular ingredient is essential to come to the legitimate conclusion that we are in the presence of an employee. Such is life.[159]

To accept that this is so, and that any 'definition' must necessarily rely on a degree of judgment or impressionism, does not mean that we should give up

158 A Brooks, 'Myth and Muddle — An Examination of Contracts for the Performance of Work' (1988) 11 *University of New South Wales L Jnl* 48 at 50.

159 Above n 129, at 13.

on the enterprise, whether by leaving the field to the common law or by adopting the unsustainable position that *all* labour regulation should apply to employees and contractors alike. What we can reasonably endeavour to do is to construct a set of criteria which minimises both the uncertainty and the scope for evasion engendered by the common law approach.

Secondly, to call for a 'standard' definition is not to suggest that the definition should be *universal*. There will always be a case for saying that certain kinds of law — for example, discrimination legislation — should apply to all arrangements for the performance of work, whether by employees or entrepreneurs. And even where a law is generally applicable to employees, there may still be a convincing policy argument as to why a particular type of worker should or should not be covered, as with some of the deeming or exclusionary provisions so often found in workers compensation statutes.

But for all that, there is still considerable value in striving for a definition of employment that can be used in as many contexts as possible, so as to reduce the degree of uncertainty generated by the present patchwork of deeming provisions. As the Royal Commission into the Building and Construction Industry notes in its discussion paper on working arrangements in the industry, there have been frequent calls from business groups for greater harmonisation of laws in this area.[160] The time has surely come to respond to those calls, even if we can expect disagreement as to what a standard definition should look like.

## A Proposed Redefinition

The following, it is suggested, ought to be seen as essential elements in any standard definition of employment:

(1) A person (the worker) who contracts to supply their labour to another is to be presumed to do so as an employee, unless it can be shown that the other party is a client or customer of a business genuinely carried on by the worker.

(2) A contract is not to be regarded as one other than for the supply of labour merely because:
   (a) the contract permits the work in question to be delegated or subcontracted to others; or
   (b) the contract is also for the supply of the use of an asset or for the production of goods for sale.

(3) In determining whether a worker is genuinely carrying on a business, regard should be had to the following factors:
   (a) the extent of the control exercised over the worker by the other party;
   (b) the extent to which the worker is integrated into, or represented to the public as part of, the other party's business or organisation;

160 Above n 108, ch 10. See also ibid, pp 26–7, noting that reports prepared for the New South Wales and Victorian governments have each recommended harmonisation of definitions between payroll tax and workers compensation laws.

(c) the degree to which the worker is or is not economically dependent on the other party;
(d) whether the worker actually engages others to assist in providing the relevant labour;
(e) whether the worker has business premises (in the sense used in the personal services income legislation); and
(f) whether the worker has performed work for two or more unrelated clients in the past year, as a result of the worker advertising their services to the public.

(4) Courts are to have regard for this purpose to:
(a) the practical reality of each relationship, and not merely the formally agreed terms; and
(b) the objects of the statutory provisions in respect to which it is necessary to determine the issue of employment status.

(5) An employment agency[161] which contracts to supply the labour of a person (the worker) to another party (the client) is to be deemed to be that person's employer, except where this results in a direct contract between the worker and the client.

(6) Where:
(a) an arrangement is made to supply the labour of a person (the worker) to another party (the ultimate employer) through a contract or chain of contracts involving another entity (the intermediary), and
(b) it cannot be shown that the intermediary is genuinely carrying on a business in relation to that labour that is independent of the ultimate employer, on the basis of factors similar to those set out in (3) above,

the worker is to be deemed to be the employee of the ultimate employer.

## The Effect of the Proposed Definition

### Contracts with individuals and interposed entities

As far as contracts directly between hirers and individual workers are concerned, the keys to the definition suggested above are firstly to put the onus on a person who wishes to deny that a relationship is one of employment to show that the worker concerned is genuinely carrying on a business, and secondly to set out certain factors to which regard should or should not be had for that purpose.

In regard to those factors, one object of para (2) is to reduce the significance currently attached to delegation provisions in categorising a relationship. Under the proposed definition, it would not be the theoretical scope of the worker's power to delegate or subcontract that would matter, but whether that power was actually exercised (see para (3)(d)). Similarly, the mere fact that a contract which involved the supply of a person's labour also had the function

161 That is, an entity whose business involves or includes the supply of workers to other unrelated businesses or organisations, whether through a contract or a chain of contracts.

of supplying an asset (for example, an owner/driver hiring out their truck, or a clothing outworker handing over completed garments for sale) would not prevent it being characterised as one of employment, if the fundamental basis of the arrangement were one of subordination and dependency.

Of the factors listed in para (3) that *should* be taken into account, the relevance of most should be fairly self-evident. The references to the 'practical reality' of the relationship and to the degree of 'economic dependence' are intended to reflect the approach adopted by Gray J in *Re Porter*,[162] and also draw on elements of the Canadian definition of a 'dependent contractor'.[163] The list also draws on three of the four tests adopted in the personal services income legislation, the results test being the exception. However, it makes no reference to the proportion of income generated from any one source over the previous year (ie, it does not pick up the '80/20 rule'), so as to avoid having the employment status of a worker potentially vary depending on when the question is asked, and indeed so as to simplify the process of inquiry.

If the personal services income legislation were tightened up, in particular by removing the results test and some of the qualifications on what is treated as personal services income, and possibly also by requiring at least two out of the three remaining tests to be satisfied, there might be scope for linking the determination of employment status more strongly with that regime. For example, it might be provided that where a worker or entity had obtained a personal services business determination from the Commissioner of Taxation, and there had been no subsequent change in relevant circumstances, this would be sufficient to rebut the presumption of employment. Seeking such a determination would accordingly become a readily available method of removing any doubt as to the application (or non-application) of various labour laws.

As things stand, however, the legislation has too many loopholes to be used for this purpose. It is capable of conferring business status on the likes of owner-drivers, outworkers in the clothing trades industry, computer programmers and a wide range of others workers (and/or their personal companies), even where those workers are wholly dependent on a single client and do not employ others.

For that reason, para (6) of the proposal does not seek to address the use of interposed entities by extending the personal services income provisions and giving them effect in relation to employment status as well as taxation of income, but rather by simply disregarding such entities (other than employment agencies)[164] where the 'genuine business' test cannot be satisfied. Hence, where a personal company or family trust has only a single person

162 (1989) 34 IR 179 at 184–5.

163 See also Employment Relations Bill 2000 (NZ) cl 6. Although still defining 'employee' by reference to a 'contract of service', this would explicitly have required adjudicators to have regard for this purpose to the extent of the hirer's control and of the worker's integration into the hirer's business. However, these elements were omitted from the final version of the provision (Employment Relations Act 2000 s 6), which merely indicates that adjudicators are to determine the 'real nature' of the relationship and are 'not to treat as a determining matter any statement by the persons that describes the nature of their relationship'.

164 Employment agencies would not be caught by para (6) because although fitting the description of an intermediary, they are clearly operating a genuine business.

performing the relevant work, and is economically dependent on a single client, it would be expected that the worker behind the company would be treated as the client's employee, just as if they had contracted directly.

The proposal in para (6) should also, it may be noted, catch the use of 'service companies' which are controlled by but legally distinct from the operator of a business, as with the pharmacy arrangement that featured in *Morgan v Kittochside*.[165] Although a service company would pass the 'employment test', so long as it engaged more than one person, it would struggle to satisfy any of the other indicia of a genuinely independent business. Again, the effect would be to force the true business operator to assume the responsibility for employing their staff.

## Labour hire

As far as agency workers are concerned, para (5) of the proposal seeks to settle the potential doubts surrounding their employment status by firmly declaring them to be the employee of any agency that has agreed to supply their services to a client and that continues to pay them. This would not impinge on the agencies who are already prepared to employ the staff they hire out, or on the host firms that obtain labour from them. It would only affect those who seek to exploit the reasoning in cases like *Odco*[166] that, merely because of the technicalities of the triangular relationship between agency, host firm and worker, there can be no employment relationship involved.[167] For host firms who currently use Odco-style agencies to obtain workers who are in substance employees, they would cease to reap the cost-savings associated with this form of evasion of employment entitlements. After all, if a firm wished to engage a contractor who was genuinely running their own business, there would be nothing to stop them engaging that contractor directly. And if that firm wished to use a recruitment agency to identify appropriate persons to work for it, whether as employees or contractors, they could still do that as well. A recruitment agency that did not hire out labour on an ongoing basis would not be affected by what has been suggested.

The proposal would also leave undisturbed the principle that staff hired out by an agency are not employed by the host firm, for lack of any contractual relationship. It seems enough in this context that *someone* be identified as the employer — and the agency, as the entity that contracts with and pays the worker, seems the more logical choice. To insist that the host firm is invariably the employer would in effect be to challenge the very practice of hiring agency labour. Unlike the use of some interposed entities such as personal companies,

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165 Unreported, AIRC, Full Bench, PR918793, 13 June 2002.

166 *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104; 99 ALR 735.

167 This can be contrasted with the report of the NSW Labour Hire Task Force which, despite acknowledging the 'confusion, ambiguity and uncertainty regarding the employment status of a labour hire worker' (above n 81, p 44), produced the disappointing recommendation (ibid, pp 52–3) that New South Wales mirror s 6(2)(d) of the Industrial Relations Act 1999 (Qld). This defines 'employer' to include a 'labour hire agency that arranges for an *employee* (who is party to a *contract of service* with the . . . agency) to do work for someone else' (emphasis added). The definition achieves very little, since it remains open for an agency to assert that its workers are contractors rather than employees.

there are clearly reasons for engaging labour through an agency which may be perfectly legitimate and which cannot necessarily be treated as a device for evading labour laws — for example, obtaining temporary replacements for staff on leave. Moreover, the labour hire industry has become firmly established as a feature of the modern labour market and it seems impractical to expect that it could simply be made to disappear through legislative action. Provided the industry is also regulated through the imposition of appropriate licensing requirements,[168] the requirement that agencies employ their staff would seem to be a sufficient step to take.

It is true that there may be concerns in some cases that, by outsourcing labour needs to an agency, a firm may seek to evade the effect of established working conditions enshrined in an award or industrial agreement, and that this aim may be achieved even if the agency operates as the employer of the staff to be supplied. In some cases the award or agreement may in fact 'travel' with the work, either because the award in question is a State award that operates by common rule and is broad enough to cover the agency, or because there is found to be a transmission of business from the firm to the agency for the purpose of provisions such as ss 149(1)(d) or 170MB of the Workplace Relations Act 1996 (Cth).[169] In other cases, a union concerned at the firm's motivations for the change may seek to invoke 'victimisation' provisions such as those contained in Pt XA of the 1996 Act.[170] However, even if these avenues are not open, the possibility remains for unions to seek award regulation of the labour hire industry itself, and indeed moves to do just that are well under way.[171] It may also be worth considering amendments to enterprise agreement provisions to ensure that agreements will 'transmit' to the agency in such a situation. In any event though, the issue of applying award and agreement conditions to agency workers does not of itself seem to be a reason for insisting that the host rather than the agency must be the employer.

As to the notion of dual employment canvassed by the Australian Industrial Relations Commission in *Morgan v Kittochside*,[172] there may indeed be merit in certain contexts of allocating responsibility jointly between agency and host firm, for example, in relation to the rehabilitation of injured workers.[173] However, in relation to many other obligations, such as the provision of leave or the payment of superannuation contributions, the practical difficulties

168 See, eg, NSW Labour Hire Task Force, above n 81, pp 53–4, proposing to extend the more limited regime currently in place under the Employment Agents Act 1996 (NSW).

169 But cf *PP Consultants Pty Ltd v Finance Sector Union of Australia* (2000) 201 CLR 648; 176 ALR 205; *Stellar Call Centres Pty Ltd v CEPU* (2001) 106 FCR 302; 103 IR 220.

170 See, eg, *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1; 153 ALR 643; *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union* (2001) 112 FCR 232; 184 ALR 641.

171 See, eg, *Appeal by Australian Industry Group* (unreported, AIRC, Full Bench, PR921867, 13 September 2002), dismissing a challenge to a dispute finding under the 1996 Act in relation to a log of claims served on a large number of agencies by the AMWU.

172 Unreported, PR918793, 13 June 2002.

173 See the recommendations to this effect by the NSW Labour Hire Task Force, above n 81, pp 66–7. Cf *McMahon Services Pty Ltd v Cox* (2001) 78 SASR 540, rejecting any suggestion that the Workers Rehabilitation and Compensation Act 1986 (SA) contemplates the notion of dual employment as it presently stands.

associated with giving the worker simultaneous rights against two separate and unrelated entities seem manifest. Similarly, while there may be considerable logic in *dividing* employer-related responsibilities between the agency and the host, according to the nature and purpose of the laws in question,[174] it would seem simpler all round to leave the agency with the bulk of the obligations.

## Conclusion

The central arguments of this article are that the time for tackling arrangements which are designed to evade the effect of labour laws is well and truly overdue, and that the most appropriate and effective way to do so is to reaffirm the basic distinction between being employed and being in business. Rather than simply give in to the growing tide of evasive arrangements, or add even further complexity to the existing patchwork of deeming provisions that apply in different contexts and at different times, a standard definition of employment should be adopted which (a) provides a more realistic basis than the common law has done for distinguishing between an employee and an entrepreneur, (b) requires all labour hire agencies to take on the responsibility of employing any staff they hire out, and (c) disregards other interposed entities such as personal companies where the 'genuine business' test cannot be satisfied.

Of course there are going to be objections to such a reform — and quite strident ones at that. Businesses benefiting from present arrangements will no doubt complain about a loss of flexibility, about increased cost, about an increase in government regulation, and so on. But in the end, if they wish to secure labour from a subordinate and dependent workforce, firms should be prepared to bear the cost of the regulation that is associated with employing staff. To insist otherwise, and to maintain some 'right' to contract out of employment entitlements through carefully structured arrangements, is not only to defeat the very purpose of that regulation but to obtain an unfair competitive advantage over businesses that employ their labour directly. If the real complaint is with the content or cost of the regulation they are seeking to avoid, as it so often is, then they should seek to persuade legislators to amend or adjust that regulation.

To repeat a point made earlier, there will inevitably be debate as to whether a given form of regulation is or is not achieving its objectives, or whether the social and economic costs of that law exceed the benefits it is intended to confer. But what ought *not* to be a matter for debate is that *some* degree of regulation is warranted in relation to employment conditions, and that it should not be possible for less scrupulous or more carefully advised businesses to escape that regulation simply by drafting the right kind of contract.

It can also be expected that workers themselves will in some instances decry the impact of any law that seeks to deny them the capacity to operate on a 'self-employed' basis, even where on any objective basis they cannot be said to be genuinely running a business. It is true that many (though certainly

174 See, eg, the analysis in S Deakin, 'The Changing Concept of the "Employer" in Labour Law' (2001) 30 *Industrial L Jnl* 72.

not all) dependent contractors quite happily accept their status. They may believe that they will be better off in financial terms, especially if they are unconcerned with (or fail to take account of) the value of leave entitlements, superannuation contributions and the like, or if they are not fully aware of the recent changes to tax laws. And in symbolic terms, some quite clearly prefer to be regarded as being self-employed, even if in truth their degree of independence is minimal.

Nonetheless, it is important to adhere to the principle that it should not be lawful to contract out of protective regulation.[175] It should not be enough for a worker to want to operate as a contractor, if their arrangements to perform work can objectively be characterised as involving subordination and dependency rather than entrepreneurship. If a contract to pay an employee less than applicable award conditions or to deny them leave entitlements is illegal and unenforceable, why should it be lawful to do exactly the same thing through the device of a delegation clause or an interposed entity — even if the worker freely consents?

## Postscript

Since this article was written, the redefinition of employment proposed in it has been adopted in a review of South Australian industrial legislation commissioned by the Rann Government.[176]

175 For clear expressions of this view, see, eg, *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 1 WLR 1213 at 1222; *R v Allan; Ex parte Australian Mutual Provident Society Ltd* (1977) 16 SASR 237 at 247.

176 G Stevens, *Report of the Review of the South Australian Industrial Relations System*, Workplace Services, Adelaide, 2002, pp 45–6. The report is available at <www.eric.sa.gov.au>.