CONTRACT, LABOUR LAW AND REALITY IN THE HIGH COURT OF AUSTRALIA

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The recent turn towards legal formalism and the common law of contract in the High Court of Australia's landmark redefinition of the employment relationship in Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd *and* ZG Operations Australia Pty Ltd v Jamsek *(a companion appeal), has concerning ramifications for workers. This article explains this decision through critical contract theory, contextualising it as the latest edition to a series of cases that have applied formalist legal reasoning to redefine key areas within Australian labour law including: implied terms; adverse action; prohibited matters; and industrial action. It argues that eclipsing the reality of work with the 'form' of an employer's contract or other narrow, individualistic forms of reasoning, undermines the protective purposes of labour law, enhancing employer power while marginalising workers. The paper concludes with an analysis of proposals — mostly legislative in nature — to stem the destructive influence of formalism and the law of contract upon labour law.*

'I'm not crazy about reality but it's still the only place to get a decent meal.'[1]

Groucho Marx

I INTRODUCTION

For all the talk of the death of contract and formalist legal reasoning toward the end of the last century,[2] little appears to have changed. Far removed from the reality of working life for most Australians, the recent landmark decision of the High Court of Australia in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* ('*Personnel Contracting*')[3] and *ZG Operations*

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1 Attributed to Groucho Marx by Harry Windsor, '"Ready Player One": A Candy-Coloured Lesson on VR's Dangers', *The Monthly* (online, 10 April 2018) <https://www.themonthly.com.au/blog/harry-windsor/2018/10/2018/1523328076/ready-player-one-candy-coloured-lesson-vr-s-dangers>.

2 Grant Gilmore, *The Death of Contract* (Ohio State University Press, 1974); PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979). Australian commentators, Peter Drahos and Stephen Parker, discussed an 'alleged crisis in Australian contract' associated with its 'indeterminacy': Peter Drahos and Stephen Parker, 'Critical Contract Law in Australia' (1990) 3(1) *Journal of Contract Law* 30, 31.

3 (2022) 398 ALR 404 ('*Personnel Contracting*').

Australia Pty Ltd v Jamsek ('*Jamsek*')[4] (a companion appeal), has flagged a return to formalist legal reasoning to redefine the employment relationship. The reasoning in this decision taps into a convenient and longstanding fantasy of 'freedom of contract' and imagined 'equality' between contractual parties that primarily serves the legal and material interests of employers.[5] But as this article shows, the thread of formalism and its adherence to the common law of contract runs through some of the most important and defining aspects of Australian employment and labour law, experiencing only a brief reprieve during the 1980s and '90s. In this respect, the resurgence of legal formalism and the common law of contract within labour law requires sustained critique and contextualisation. In this respect, *Personnel Contracting* and *Jamsek* should not be seen in isolation, but rather as yet another major area of Australian labour law in which formalism and contract — rather than the realities of working life — have become a dominant and marginalising trend.

This paper deploys an analytical approach to a series of High Court decisions across a range of areas of labour law. These are: (i) the definition of employment (including casual employment); (ii) employer and employee duties; (iii) adverse action; (iv) prohibited matters in agreements; and (v) protected industrial action. This divergent array of labour law has been selected because each area has been moulded in the ideological image of legal formalism and the common law of contract. Formalism is the Blackstonian notion that judges merely find, declare and apply common law, rather than controlling its production by making law within a distinct social and political context.[6] Regarding law as a distinctly social and political product, on the other hand, is often thought of as the basis of theories of legal realism, discussed further below. Such a broad approach, ranging across labour law, necessitates an analytical perspective — an equally broad view of legal doctrine that distinguishes legal norms from social norms in order to classify or determine what the law is.[7] The utility of such an approach enables an understanding of often contradictory strands of formalist reasoning across labour law that nevertheless arrive at similar conclusions, favouring a similar array of social and political interests — generally those of employers.

The starting point for the argument in this paper is, as numerous labour lawyers and heterodox scholars of contract have argued before, that the formalist conception of the employment contract ensures that the contractual label or form disguises the economic reality of the labour exchange.[8] In other words, the legal

4 (2022) 398 ALR 603 ('*Jamsek*').

5 *Personnel Contracting* (n 3) 463 [216] (Steward J).

6 Frank Carrigan, 'A Blast from the Past: The Resurgence of Legal Formalism' (2003) 27(1) *Melbourne University Law Review* 163, 163–4.

7 See, eg, *Australian Legal Dictionary* (3rd ed, 2017) 'legal formalism', 'legal positivism', 'legal realism'.

8 Richard Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships* (Federation Press, 2012) 196; Hugh Collins, *Employment Law* (Oxford University Press, 2nd ed, 2010) ch 1; Peter Gabel and Jay M Feinman, 'Contract Law As Ideology' in David Kairys (ed), *The Politics of Law: A Progressive Critique* (Pantheon Books, 1982) 172, 182–3; Roberto

classification of the worker dictates the terms of the relationship, rather than the provision of work.[9] Denying reality through contractual classification in this way normalises unilateral employer power in the employment relationship, all the while refuting its existence through a discourse of 'freedom of contract' and 'equality' between the parties.[10]

Such a critical theory of contract has great explanatory power in respect to the common law contract of employment, including the definition of employment, implied contractual terms and even extends to an explanation of recent High Court decisions regarding statutory industrial action provisions (as argued here). However, the application of critical contract theory to other aspects of labour law, such as adverse action and prohibited terms in collective bargaining agreements, is less clear and therefore requires reference to the broader critical realist critique of legal formalism from which it is derived (discussed further below). Adverse action, it should be added, is a variety of discrimination proscribed by statute.[11] While a multitude of conduct can now be classified as adverse action, much of the significant case law concerns employees who claim discrimination by employers on the basis of union membership. Since Federation, all major Australian industrial legislation has contained statutory provisions preventing discrimination on the basis of union membership.[12]

Indeed, the High Court has eschewed contractual reasoning, particularly when interpreting statutory schemes involving 'adverse action' and 'collective bargaining'. In respect to adverse action, the Court has favoured subjective understandings of employer behaviour, rather than objective or external appraisals which are typically derived from 'orthodox' contract law.[13] And in the realm of collective bargaining, the Court's protection of employers from well-unionised workers who are truly able to bargain on equal terms, has seen it adopt a peculiarly restrictive notion of freedom of contract. But, lest we are tempted to explain this departure from the 'freedom of contract' through simple deference to statutory interpretation, it is important to remember that the High Court has recently reasserted the primacy of contract law in its interpretation of statutory industrial action provisions (discussed below).

Managabeira Unger, *The Critical Legal Studies Movement: Another Time, a Greater Task* (Verso, 3rd ed, 2015) 16, 144–70; Otto Kahn-Freund, *Labour and the Law* (Stevens & Sons, 1972) 5. See Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016); Karl Marx, *Capital: A Critique of Political Economy*, tr Samuel Moore and Edward Aveling (Progress Publishers, 1st ed, 1887) vol 1, 60.

9 Johnstone et al (n 8) 196.

10 Gabel and Feinman (n 8) 172, 175–6.

11 *Fair Work Act 2009* (Cth) s 342 ('*FW Act*').

12 See, eg, *Conciliation and Arbitration Act 1904* (Cth) s 9(1) ('*Conciliation and Arbitration Act*').

13 A similar approach is taken in the UK: ACL Davies, 'The Relationship between the Contract of Employment and Statute' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 73, 75–80.

From an analytical perspective, therefore, there is limited coherence in the High Court's approach to statute or common law. There is rather more coherence, however, in the Court's adoption of a strict formalist approach across all five areas of labour law outlined in this paper — with the specific result of recognising employer interests and power. Such a predicament resounds with the observation by UK labour lawyers, Alan Bogg and Ruth Dukes, that dominant 'judicial ideolog[ies]' surrounding the contract of employment are 'unduly draconian to employees and permissive to employers, and in urgent need of rationalization'.[14] Accordingly, this paper argues that legal formalism is a strong predictor and determinant of Australian labour law in the High Court. More specifically, it argues that formalist conceptions of contract mostly determine these outcomes, but that where contract has failed to deliver outcomes favouring employers, other types of formalist reasoning have been invoked.

To make this argument, this paper reviews the current state of critical legal realism and critical contract theory and its application to legal formalism (Part II). It then uses strands of this theory to analyse the five key areas of employment law (Part III) that exemplify the dominance of what critical realist scholar, Roberto Unger, has described as 'retro doctrinal'[15] or retro formalist understandings of contract, within the realm of employment law. The final section of the paper (Part IV) proposes to extend protective labour legislation to the areas of employment law identified in the previous section, to fix the fantasies and resulting injustices of formalist judicial method.

Before returning to the subject of this paper, a number of concessions and acknowledgements are in order. First, it is acknowledged that the five areas of law raised in this paper are each the subject of extensive jurisprudence. At first glance, the notion of addressing all five doctrines in a single journal article appears ambitious. However, it is not the author's intention to exhaustively describe each doctrine. Rather, this paper confines its contribution to understanding how Australian employment and labour law has been shaped by legal formalism and liberal notions of contract: identifying the places where contractual doctrine runs through labour law, so that it might be contained and reformed. A second acknowledgment is that parts of the common law of employment are entangled to varying degrees with its codification under Australia's current principal industrial legislation, the *Fair Work Act 2009* (Cth) ('*FW Act*') — legislation which also provides a range of protective labour law rights.[16] Hence, the five areas dealt with in this paper are not the exclusive province of common law doctrine. Indeed, recognising this entanglement between contract law and statutory schemes of

14 Alan Bogg and Ruth Dukes, 'The Contract of Employment and Collective Labour Law' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 96, 113.

15 Unger (n 8) 32, 37–41.

16 'Labour law' is used in this paper to refer to various protective legislative schemes that regulate and counteract inequality in bargaining power inherent in relationships between workers and employers: see, eg, Kahn-Freund (n 8) 8. Such schemes commonly involve a combination of collective bargaining and minimum standards regimes, derived from multiple sources, including Australian legislation from the late 19th and early 20th centuries, the International Labour Organization ('ILO'), as well as international and domestic jurists.

labour law, including discrimination (or adverse action) and collective bargaining law, has been one of the great contributions of labour lawyer, Mark Freedland and his 2016 edited collection.[17] In an Australian context, such an approach has recently been taken up by scholars such as Pauline Bomball, whose observations regarding the High Court's preference for 'contractual autonomy' or contract law, over the protective public policy purposes of labour law, came close to predicting the outcome in *Personnel Contracting*, shortly before the decision was handed down.[18] Third, comparatively more attention has been devoted to the definition of employment, where it has only recently re-emerged in Australian labour law and is the premise of this article, necessitating broader understanding of the interaction between contract and labour law.

II THEORY

A *A Heterodox Critique of Formalism and Contract*

Critiques of legal formalism and doctrinal contract law range across a broad spectrum heterodox legal scholarship. By far the most influential is critical contract theory — a form of legal realism that offers a theory of law based on social and economic fact. It is purposive in its method and consequentialist in its cognisance of social outcomes. In other words, it emphasises public policy reasons behind the making of law while recognising inequalities in power between contractual parties as well as those inherent in legal decision-making — inequalities that are frequently masked by formalist and orthodox approaches to law and contract. Legal realism emerged at a distinct time and place — New Deal America — when the jurists of Harvard Law School[19] proved influential in changing the way in which FDR-appointed judges and other lawmakers interpreted the law.[20] These jurists revealed that the prevailing doctrinal methods of legal interpretation up to that point were based on sham — a 19th century liberal fantasy of a society and labour market, cleansed of unequal imperfections. As 'relational' labour contract scholar, Hugh Collins, has said more recently, nowhere are such fantasies more pronounced than in the law of contract.[21] As realism ascended throughout the 1930s and 1940s in the US, dominant contractual imagery or doctrine such as

17 Freedland et al (n 8); Davies (n 13).

18 Pauline Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (2020) 44(2) *Melbourne University Law Review* 502, 507–8; Hugh Collins, 'Contractual Autonomy' in Alan Bogg et al (eds), *The Autonomy of Labour Law* (Hart Publishing, 2015) 45. For similar approaches, see Andrew Stewart, 'Redefining Employment: Meeting the Challenge of Contract and Agency Labour' (2002) 15(3) *Australian Journal of Labour Law* 235; Cameron Roles and Andrew Stewart, 'The Reach of Labour Regulation: Tackling Sham Contracting' (2012) 25(3) *Australian Journal of Labour Law* 258.

19 For instance, Roscoe Pound (pre-1937), Oliver Wendall Holmes Jr and Karl Llewellyn.

20 Frans L Leeuw, 'American Legal Realism: Research Programme and Policy Impact' (2017) 13(3) *Utrecht Law Review* 28, 29.

21 Hugh Collins, 'Contract and Legal Theory' in William Twining (ed), *Legal Theory and Common Law* (Basil Blackwell, 1986) 136.

'freedom of contract' and 'equality between parties' were restrained by notions such as protective labour law, equities and purposive interpretation.[22]

Australian courts have generally been slow to adopt legal realist method, if at all. Although federal judicial officers such as Henry Bourne Higgins, Michael Kirby, Peter Gray and Mordy Bromberg, each exhibiting strong empathy for the labour movement, are notable exceptions to the dominant expression of doctrinal interpretations of contract law in Australia. In the UK, meanwhile, influenced by 'third-way' aspects of Collins' relational approach, the realist approach to employment contracts has mostly been accepted by superior courts since the 1990s.[23] When overtures toward this approach were made by Australia's highest court during the 1980s and 1990s, the enlightenment was short-lived and piecemeal.[24] Indeed, this paper documents the High Court's reversion to an entrenched doctrinal method or 'retro formalist' approach to contract (defined below) in the realm of employment law. Tension nevertheless endures between this doctrinal revisionism in the High Court and a commitment to realist method by lower appellate courts such as the current Federal Court.

In the 1960s, the next generation of 'critical' legal realists reacted to what they perceived had become the entrenched hegemony of legal realism — a compact with capital, subjecting organised labour to too many concessions and whose social conservatism had not kept pace with social liberation struggles of that period. For Unger, the problem presented by the scission between contract and labour law was two-fold and circular. First, the distinction between contract and labour law remained unclear. It appeared as if the clash between realism and doctrinal contract law had merely 'hiv[ed] off' labour law from contract in such a way that presented employers with a constant incentive to prefer contract over labour laws.[25] Second, was a further lack of clarity surrounding the extent to which managerial prerogative was limited by state systems of collective bargaining.[26] Ultimately, this was theorised as a related problem.[27] Accordingly, critical contract scholars sought

22 Gabel and Feinman (n 8) 180–1.

23 See, eg, the decisions of the UK Supreme Court in *Autoclenz Ltd v Belcher* [2011] UKSC 41, [22]–[23] (Lord Clarke) ('*Autoclenz*') and *Uber BV v Aslam* [2021] UKSC 5, [62]–[69] (Lord Leggatt) ('*Aslam*'). Since the early 1990s, the work of Hugh Collins has changed the labour law discourse in the UK by championing a 'third-way' approach that makes fairness at work contingent upon business competitiveness: see, eg, Hugh Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10(3) *Oxford Journal of Legal Studies* 353; Hugh Collins, *Regulating Contracts* (Oxford University Press, 1999); Hugh Collins, 'Regulating the Employment Relation for Competitiveness' (2001) 30(1) *Industrial Law Journal* 17. His work is reflected in Blair Government legislation, particularly in relation to unfair dismissal and statutory minimum standards: Joanna Howe, *Rethinking Job Security: A Comparative Analysis of Unfair Dismissal Law in the UK, Australia and the USA* (Routledge, 2017) 76–7. This legislative approach was in turn reflected in the *Autoclenz* (n 23) and *Aslam* (n 23) [62]–[69] decisions regarding the definition of employment.

24 Drahos and Parker (n 2) 48–9; Carrigan (n 6) 180–1. Cases from that era, such as, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, took a decisively realist view of contract.

25 Drahos and Parker (n 2) call it 'displacing': at 38. Unger (n 8) 158.

26 Unger (n 8) 160. Drahos and Parker (n 2) call it 'rhetoric': at 39.

27 Unger (n 8) 160.

deeper institutional change and reform. Not content with a mere alteration in judicial method (from formalism to realism), critical legal realists sought the development of new legal institutions and reforming legislation.

In 2015, Unger returned to critique of judicial method, addressing what he identified as 'retro doctrinalism' within the superior courts of liberal capitalist nation states such as the US and, as this author asserts, Australia.[28] Reflecting the work of earlier critical contract theorists in the 1980s,[29] Unger defined this shift as a return to 19th century liberal ideology. At the centre of this ideology is a doctrine of contract that upholds contract law as a reflection of market relations. Such a development, Unger added, represents a 'darkening' in judicial method.[30] With the benefit of hindsight (the teachings of realism before it), this is a form of legal practice that knows better, existing as a form of 'half-belief' in its own methods.[31] But that due to: (i) an entrenched cynicism regarding postmodern escapism and 'anything goes' attitudes in law and the wider humanities,[32] as well as; (ii) a calculated neoliberal approach in which the mantra of 'there is no alternative' ('TINA') has become gospel,[33] and; (iii) the need for superior court judges to maintain legal coherence in the interests of advancing their own powerful careers;[34] Unger asserts that doctrinalism or formalism has re-emerged as the dominant legal approach of the neoliberal era within the US and, as this author argues, in Australia. In the realm of contract law, retro doctrinalism pays lip service to 19th century concepts such as 'freedom of contract' and 'equality between the parties' but is empty of any utopian meaning that these epithets once held for 19th century liberals.[35]

In Australia, the rise of retro or neo-formalism has accompanied an increasing 'judicialization'[36] of labour law — an expansion of judicial power in such a way as to render labour law less transparent and more indeterminate. As commentators such as John Howe, Tess Hardy and Eugene Schofield-Georgeson have observed,[37]

28 Ibid 32, 37–41.

29 See, eg, Gabel and Feinman (n 8).

30 Unger (n 8) 19–23.

31 Ibid 20.

32 Ibid 26–8, 37, 40.

33 Ibid 37–40.

34 Ibid 19–20.

35 Ibid 19–20, 38–9.

36 In the context of the US: C Neal Tate and Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press, 1995) 2. In the European context: Lars Chr Blichner and Anders Molander, 'What is Juridification?' (Working Paper No 14, Arena Centre for European Studies, University of Oslo, March 2005). Keith Ewing has observed a similar phenomenon in the UK and Europe, which he has called law by 'juristocracy': KD Ewing, 'The Bill of Rights Debate: Democracy or Juristocracy in Britain?' in KD Ewing, CA Gearty and BA Hepple (eds), *Human Rights and Labour Law. Essays for Paul O'Higgins* (Mansell, 1994) 147.

37 Tess Hardy and John Howe, 'Partners in Enforcement: The New Balance between Government and Trade Union Enforcement of Employment Standards in Australia' (2009) 22(3) *Australian*

this trend parallels a range of neoliberal labour market interventions since the 1990s, involving deregulation or ('reregulation'[38]) of collective bargaining from the industry to the enterprise level, accompanied by largescale decline in union density. This has seen a concomitant rise in individualised labour protections enforced by the judiciary and its common law, rather than collective labour law, administered by industrial tribunals.[39] This individualising shift follows, almost to the letter, the theories and recommendations of neoliberal Chicago School jurists such as Richard Epstein and Richard Posner in the 1980s.[40] Since this time, labour lawyers have formulated a responsive critique that problematises common law in this context.[41] This critique largely reflects heterodox and critical realist theory, implicating classical liberalism, formalist legal method and its fantasies of equal bargaining power between the parties in the employment relationship.

III LAW

This Part of the paper demonstrates how legal formalism and the common law of contract have shaped five specific areas of labour and employment law. Here, the heterodox critique of formalism and contract, developed above, is applied to each area before turning to the subject of reform, discussed in Part IV.

A *Definition of Employment (Including Casual Employment)*

The contract of employment and its definition has been a central battleground between the common law of contract and statutory labour law. In the 19th century,

Journal of Labour Law 306, 306–9, 315–20; Eugene Schofield-Georgeson, 'The Emergence of Coercive Federal Australian Labour Law, 1901–2020' (2022) 64(1) *Journal of Industrial Relations* 52 ('The Emergence of Coercive Federal Australian Labour Law').

38 'Reregulation' is often used to denote a process by which governments increase the volume and complexity of statutory labour law, on the pretext of 'deregulating' or reducing the volume and complexity of labour law: Schofield-Georgeson, 'The Emergence of Coercive Federal Australian Labour Law' (n 37) 52.

39 Ibid 53.

40 Rose Ryan and Pat Walsh, 'Common Law v Labour Law: The New Zealand Debate' (1993) 6(3) *Australian Journal of Labour Law* 230, 235. The recommendations of these 'law and economics' jurists are well-rehearsed: see, eg, Richard A Epstein, 'A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation' (1983) 92(8) *Yale Law Journal* 1357; Richard A Posner, *Economic Analysis of Law* (Aspen Publishing, 9th ed, 2014).

41 Shae McCrystal, 'The Right to Strike and the "Deadweight" of the Common Law' (2019) 50(2) *Victoria University of Wellington Law Review* 281; Gordon Anderson, 'Strikes and the Law: The Problems of Legal Intervention in Labour Disputes' (1988) 13(1) *New Zealand Journal of Industrial Relations* 21, 21; Lord Wedderburn, 'Labour Law: Autonomy from the Common Law?' (1988) 9(2) *Comparative Labor Law Journal* 219, 234; Bob Hepple, 'Restructuring Employment Rights' (1986) 15(2) *Industrial Law Journal* 69, 82; KD Ewing, 'The Right to Strike' (1986) 15(3) *Industrial Law Journal* 143, 151, 156.

when common law contracts replaced feudal master-servant relationships,[42] the dominant political thought of that period, classical liberalism, and its formalist doctrine of 'freedom of contract' considered contracting parties equal in power, knowledge and their ability to bargain for fair contractual terms.[43] Such a fiction proved convenient to employers, because if the bargain was free and equal from the outset, laissez-faire contractual doctrine logically forbade courts or the state from intervening, correcting or 'subverting' the 'affairs of the parties' — their unbridled freedom to bargain as equals in the marketplace. In reality, the formal contract of employment has almost always been the employer's document: authored by the employer's lawyers in the interests of the employer and offered to an employee on a take-it-or-leave-it basis.

In the 1890s in Australia (at least two decades before the formation of the International Labour Organization ('ILO') in 1919) this contractual doctrine was unjustifiable in most employment relationships due to the gross and obvious disparity in bargaining power between the parties. Throughout the 1890s, common law restrictions against collective bargaining (designed to equalise bargaining power) had resulted in mass strike action across the eastern seaboard of Australia, crippling the economy and producing shortages of basic goods.[44] This in turn, resulted in a state-enforced class compromise between labour and capital in which the employment contract was 'hived-off' into separate statutory systems of collective bargaining.[45] This new system of 'conciliation and arbitration' required employers to bargain on a more equal basis with employees, represented by registered trade unions.[46] In these circumstances, liberals accepted that labour laws

42 While common law contracts became the dominant legal form of employment by the late 19th century, master and servant laws remained on the statute books in some Australian state jurisdictions until the late 20th century. This is the time that most Australian 'master and servant acts' were repealed: Adrian Merritt, 'The Historical Role of Law in the Regulation of Employment: Abstentionist or Interventionist?' (1982) 1(1) *Australian Journal of Law and Society* 56, 57, 61, 83; Douglas Hay and Paul Craven, 'Introduction' in Douglas Hay and Paul Craven (eds), *Masters, Servants, and Magistrates in Britain and the Empire, 1562–1955* (University of North Carolina Press, 2004) 1, 237–45. Some scholars contest whether the feudal relationship has ever ended in the contemporary employment relationship: see, eg, Gabrielle Golding, 'Terms Implied by Law into Employment Contracts: Are They Necessary?' (2015) 28(2) *Australian Journal of Labour Law* 113, 127–9; Karl Klare, 'Critical Theory and Labor Relations Law' in David Kairys (ed), *The Politics of Law: A Progressive Critique* (Pantheon Books, 1982) 65, 75. Klare describes it as a 'double movement'.

43 Subject to a range of legislative discrepancies for different categories of workers: John Howe and Richard Mitchell, 'The Evolution of the Contract of Employment in Australia: A Discussion' (1999) 12 *Australian Journal of Labour Law* 113, 128–9; Richard Johnstone and Richard Mitchell, 'Regulating Work' in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 101, 106–7.

44 Stuart Macintyre and Richard Mitchell, 'Introduction' in Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890–1914* (Oxford University Press, 1989) 1, 15–16.

45 See generally Stuart Macintyre, 'Neither Capital Nor Labour: The Politics of the Establishment of Arbitration' in Stuart Macintyre and Richard Mitchell (eds), *Foundation of Arbitration: The Origins of State Compulsory Arbitration 1890–1914* (Oxford University Press, 1989) 178.

46 Richard Mitchell and Esther Stern, 'The Compulsory Arbitration Model of Industrial Dispute Settlement: An Outline of Legal Developments' in Stuart Macintyre and Richard Mitchell (eds),

providing minimum standards, as well as collective bargaining schemes, were necessary to realise equality between the parties and freedom of contract.[47] No longer was the contract of employment 'autonomous'[48] from protective schemes of labour law and such schemes supplemented individual contracts of employment between employers and employees. Their generosity to workers varied between jurisdictions, directly correlative to the number of unionised workers in key industries within the location. Despite these developments, common law employment contracts as well as 'contracts for services' (between a contractor and contractee) persisted and their governance at common law by the judiciary stood in competition with the power of specialist statutory labour tribunals.

Over the course of the 20th century the judiciary invented a range of legal 'tests' to distinguish between contracts of employment and contracts for services. The tests imposed this distinction for different purposes, mainly to determine an employer's liability in tort, for taxation, or more often than not because employment contracts entitled employees to the benefits of statutory labour laws, imposing minimum standards, while contracts for services rendered workers self-governing, without access to most entitlements such as minimum rates of pay, annual leave, and sick leave. The dominant Australian tests have been: the control test;[49] the multi-indicia test;[50] and, most recently in 2022, the contractual 'rights and duties' test.[51]

The critical difference between each test has predominantly been the degree of emphasis that each has placed upon the employer's formal written contract on one hand (adherence to legal formalism), and on the other, a willingness to engage with the reality of the employee's working conditions or 'the labour process' (realism). The control test, in the early 20th century, combined both formalist and realist legal methods, but took a very narrow authoritarian view of the labour process. Informed by the law of master and servant that had immediately preceded it, as well as the prevailing industrial labour process of the time, an employer's control over the worker was the only reality of working life recognised by the test.[52] By the 1930s, the High Court had begun to articulate this duality in their approach, which combined a close examination of the employer's contract (formalism) with an assessment of the reality of the employee's working conditions or 'relationship of employment', on the other.[53] Combined with relative labour scarcity in the early

Foundations of Arbitration: The Origins of State Compulsory Arbitration 1890–1914 (Oxford University Press, 1989) 104, 105.

47 Macintyre (n 45) 182.

48 Collins, 'Contractual Autonomy' (n 18) 66; Bomball (n 18) 515.

49 *Colonial Mutual Life Assurance Society Ltd v The Producers and Citizens Co-Operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 ('*Colonial Mutual*'); *Logan v Gilchrist* (1927) 33 Arg LR 321; *Re Wilks* (Supreme Court of New South Wales, Lutwyche J, 2 December 1859).

50 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 ('*Vabu*').

51 *Personnel Contracting Pty Ltd* (n 3).

52 *Colonial Mutual* (n 49) 48.

53 *Mynott v Barnard* (1939) 62 CLR 68, 91 (Dixon J); *Cam & Sons Pty Ltd v Sargent* (1940) 14 ALJ 162, 163 (Rich, Dixon and Evatt JJ) ('*Cam & Sons*'); *R v Foster; Ex parte The*

20th century, the control test was a means of classifying dependent labour, with the effect of bonding workers to employers to a much greater degree.[54]

Such secure employment conditions, together with an emerging domestic manufacturing economy in the immediate postwar period, saw trade unions enjoy the high point of their density and power. Supported by the reformist social-democratic Chifley Labor government, the labour movement was embroiled in conflict with a conservative-dominated High Court (mostly concerning a raft of new social and economic policy designed to create the bedrock of the early Australian welfare state). It was in this climate that conservatives on the bench such as Dixon J and Latham CJ intervened to alter the test of employment, with Dixon J announcing the 'multi-indicia' test of employment in *Queensland Stations Pty Ltd v Commissioner of Taxation (Cth)*,[55] before extensively developing it in *Humberstone v Northern Timber Mills*.[56] Justice Dixon's test heralded two key changes. First, it retained the control test but officially freed employers from the constraints of an exclusive appraisal of 'control' — which had favoured a finding of employment (as opposed to an independent contract) under the prevailing labour market conditions of the time.[57] This, in turn, permitted employers greater flexibility in the classification of workers as contractors,[58] allowing capital to defray the costs of employment that had emerged during the early 20th century: wage floors, entitlements and benefits. Second, in a moment that might be said to symbolise the emerging 'class compromise' of the post-war period, the multi-indicia test consolidated and combined both formalist and emerging realist methods.[59] The formalist component of the test examined the contract of employment, while the realist limb analysed degrees of employer control over the performance of tasks, codes of conduct, hours of work, exclusivity of employment, dress codes, remuneration, ownership and use of plant and equipment. On one view, such an approach might be characterised as judicial 'Taylorism'.[60] But on another, more enduring view, the realist aspect of the multi-indicia test gives legal recognition to the way in which workers experience work.[61]

Commonwealth Life (Amalgamated) Assurances Ltd (1952) 85 CLR 138, 153–4 (Dixon, Fullagar and Kitto JJ).

54 Simon Deakin, 'Legal Origins of Wage Labour: The Evolution of the Contract of Employment from Industrialisation to the Welfare State' in Linda Clarke, Peter de Gijsel and Jörn Janssen (eds), *The Dynamics of Wage Relations in the New Europe* (Springer, 2000) 32, 38–42; Brian Langille and Guy Davidov, 'Beyond Employees and Independent Contractors: A View from Canada' (1999) 21(1) *Comparative Labor Law and Policy Journal* 7, 13, 15–16 emphasise the importance of historical and social context in the formulation of employment tests.

55 (1945) 70 CLR 539 ('*Queensland Stations*').

56 (1949) 79 CLR 389 ('*Humberstone*'); Carrigan (n 6) 167–70.

57 Carrigan (n 6) 167–70; Deakin (n 54) 38–42; Langille and Davidov (n 54) 13, 15–16.

58 *Humberstone* (n 56) 404 (Dixon J); *Queensland Stations* (n 55) 552 (Dixon J); Carrigan (n 6) 167–9.

59 See also *Cam & Sons* (n 53); *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561.

60 Carrigan (n 6) 167–70 might be said to adopt this view.

61 *Recommendation Concerning the Employment Relationship*, Employment Relationship Recommendation No 198, 95th sess, ILO Doc R198 (15 June 2006) [11], [13].

Neoliberal labour market interventions from offshoring to 'reregulation', privatisation and austerity, have since ensured the decline of the golden age and the era of full employment, from the mid-1970s.[62] These reforms were reciprocated by a stable unemployment rate or labour surplus, favouring employers.[63] Nevertheless, at the beginning of the 21st century, the multi-indicia test was reaffirmed as the dominant Australian test of the employment relationship,[64] with employer 'control', its most crucial aspect.[65] In this way, the High Court continued to endorse a blend of formalism and realism, further acknowledging that the premise of control is indicative of unilateral power within the employment relationship, necessitating protective labour law.[66] In each case, the Court engaged with a thorough and detailed examination of the labour process, coming to terms with the reality and experience of work for employees.[67]

In 2022, however, there has been something of 'silent revolution'[68] in the test for employment. In the recent companion appeal of *Personnel Contracting*[69] and *Jamsek*,[70] a majority of the High Court distanced itself from the multi-indicia test, replacing it with what it termed, the contractual 'rights and duties' approach[71] —

62 *William* Mitchell and Thomas Fazi, *Reclaiming the State: A Progressive Vision of Sovereignty for a Post-Neoliberal World* (Pluto Press, 2017) ch 2. 'Offshoring' involves shifting production from a developed jurisdiction to a less developed jurisdiction, where wages are lower, in order to increase profits. It inevitably involves job losses in the developed jurisdiction: Ann Harrison and Margaret McMillan, 'Offshoring Jobs: Multinationals and US Manufacturing Employment' (2011) 93(3) *The Review of Economics and Statistics* 857, 857–8. 'Reregulation' is defined above: see above n 38. 'Privatisation' involves transferring a public business or service to private ownership or control, often with the result of cutting jobs in order to boost private profits: Damian Cahill and Phillip Toner (eds), *Wrong Way: How Privatisation and Economic Reform Backfired* (La Trobe University Press, 2018). 'Austerity' involves cutting government expenditure on public services, often resulting in large-scale job losses: Troy Henderson, 'Public Sector Austerity and Its Spill-Over Effects' in Andrew Stewart, Jim Stanford and Tess Hardy (eds), *The Wages Crisis in Australia: What It Is and What to Do about It* (University of Adelaide Press, 2018) 115.

63 Mitchell and Fazi (n 62) 53, 103, 122.

64 *Vabu* (n 50).

65 Ibid 40–1 [43]–[45] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 24 (Mason J) ('*Stevens*').

66 *Vabu* (n 50) 53–4 [84]–[85] (McHugh J).

67 In *Stevens* (n 65) an injured worker was found to be an independent contractor but the Court nevertheless found that the de facto employer owed him a duty of care and was liable for his injuries. Similarly, in *Vabu* (n 50), a bicycle courier who injured a pedestrian was found to be an employee of the courier company, sued by the pedestrian.

68 *Personnel Contracting* (n 3). Kiefel CJ, Keane and Edelman JJ (the plurality), specifically disavowed such a notion all the while apparently doing the opposite in their judgment: at 418 [52].

69 *Personnel Contracting* (n 3).

70 *Jamsek* (n 4).

71 *Personnel Contracting* (n 3) 420–1 [58]–[59] (Kiefel CJ, Keane and Edelman JJ). This approach resembled the suggestions of Collins, 'Contractual Autonomy' (n 18) and Bomball (n 18) to

a clear example of retro formalism. In condemning the 'reality' approach that had preceded it,[72] two Justices went so far as to say that they need not even scrutinise whether performance of the contract resembled the contractual terms (ie the labour process, conduct of the parties, the 'indicia of employment', or any other reality outside that constructed by the employer's lawyers who had drafted the contract).[73] All that was needed, they said, was to examine the contractual terms.[74]

The plurality, led by Kiefel CJ, were somewhat less extreme but nevertheless, endorsed a similarly formalist approach that significantly diminished the place of reality.[75] Instead, the plurality looked only to the 'rights and duties' of each party under the contract or rather the relationship, as described by the contract. They determined that the *right* of control (broader than actual control) was the most important contractual term,[76] adding that conduct, performance or reality may only be considered to determine control, or where it *changes* the contractual relationship in some way.[77] Such an approach is derived from commercial contract law and is mostly foreign to labour law. It was certainly not pleaded by any of the employee parties in this case.[78] Indeed, such contractual change is often difficult to prove because it commonly relies upon an implied contractual term[79] — the test for which is notoriously difficult to satisfy.[80] Meanwhile, other realities of the employment relationship, such as those considered by the 'multi-indicia' test, were removed from consideration; the plurality added the rhetorical caveat that they may be considered where they form part of the written contract of employment.[81] But clearly, the practice of work — traditionally, a worker's evidence in such cases — no longer counts. Reality is now subservient to the employer's contract and control.

In doing so, the Court has constructed a test that favours an employer's evidence — the 'rights and duties' written into the employer's contract — over the practice of work, as experienced by the employee. Unlike the multi-indicia test, the rights and duties test distances itself from a detailed appraisal of reality in the labour

> determine the employee/contractor distinction by affording the contract greater autonomy from the employment relationship. On Collins' and Bomball's view, however, such an approach would have required the implication of genuine contractual 'equality' and 'freedom' between the parties. Unfortunately, however, the five out of seven judges emphasised 'freedom' at the expense of 'equality' and took a very narrow formalist view of contract.

72 *Personnel Contracting* (n 3) 426–7 [87]–[88] (Kiefel CJ, Keane and Edelman JJ).

73 Ibid 451–2 [182], 453–5 [187]–[188] (Gordon J, Steward J agreeing at 458 [203]).

74 Ibid.

75 *Personnel Contracting* (n 3).

76 Ibid 412 [26], 415 [42] (Kiefel CJ, Edelman and Keane JJ).

77 Ibid 417 [47], 418 [52] (Kiefel CJ, Edelman and Keane JJ).

78 Ibid 442 [149] (Gageler and Gleeson JJ).

79 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283 (Lord Simon, Viscount Dilhorne, Lord Keith).

80 See, eg, *Network Ten Pty Ltd v Rowe* (2005) 149 IR 262, in which Simpson J refused to imply a term into an employment contract.

81 *Personnel Contracting* (n 3) 421 [61] (Kiefel CJ, Keane and Edelman JJ).

process. Instead, it emphasises the significance of the (employer's) contract, while relegating consideration of the (employee's) employment relationship to only those cases where an employee argues that conduct *changed* the contractual relationship (argued by neither employee in these test cases). As the minority in these cases, Gageler and Gleeson JJ argued, the process of looking to the contract rather than the relationship will likely vindicate sham contracts or the practice of employers falsely labelling employees, 'independent contractors' to escape protective labour law.[82] Citing Allsop CJ of the Federal Court in the matter before them, they said:

> This perspective and proper approach to the characterisation of the whole is likely to be distorted, not advanced, by an overly weighted importance being given to emphatic language crafted by lawyers in the interests of the dominant contracting party. The distortion will likely see formal legalism of the chosen language of such party supplant a practical and intuitively sound assessment of the whole of a relationship by reference to the elements of the informing conceptions.[83]

Returning primacy to 'the dominant contracting party' or employer, in this way, reasserts authoritarian contractual relations of a bygone era, at the outset of the 20th century. But unlike that time, gone is any pretence to 19th century notions of 'equality' between contracting parties. Such retro formalism is all the more concerning, given that the labour market and power to which this decision corresponds is far removed from the militancy of the labour movement of the late 19th and early 20th century, or the union density and secure employment of the mid-20th century. In fact, the decision has much to do with classifying precarious and vulnerable 'gig economy' workers in the road transport industry as independent contractors[84] (and the effects of independent contracting for workers are stark and well-documented, invariably reducing pay, conditions and safety).[85] Arguably, a majority of Fair Work Commission decisions, invoking the previous multi-indicia test, were already headed in this direction,[86] despite any obvious or compelling 'indicia' suggesting that these workers are in fact small business-people.[87]

82 Ibid 437 [130]–[131] (Gageler and Gleeson JJ). See also Bomball (n 18) 505.

83 *Personnel Contracting* (n 3) 437 [131] (Gageler and Gleeson JJ), quoting *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631, 640 [21] (Allsop CJ).

84 Ibid 451 [181] (Gordon J), 459 [204] (Steward J).

85 Michael Rawling and Joellen Riley Munton, *Proposal for Legal Protections of On-Demand Gig Workers in the Road Transport Industry* (Final Report, January 2021); Igor Nossar, 'Protecting "Gig Economy" Workers through Regulatory Innovation: Controlling Contract Networks within Digital Networks', in Peter Sheldon et al (eds), *The Regulation and Management of Workplace Health and Safety: Historical and Emerging Trends* (Routledge, 2021) 100. For historical context, see Michael Quinlan, 'Precarious Employment, Ill Health, and Lessons from History: The Case of Casual (Temporary) Dockworkers 1880–1945' (2013) 43(4) *International Journal of Health Services* 721.

86 *Kaseris v Raiser Pacific VOF* (2017) 272 IR 289; *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807; *Gupta v Portier Pacific Pty Ltd* (2020) 296 IR 246.

87 As Commissioner Cambridge has found in two respective and notable exceptions to the majority of such cases: *Klooger v Foodora Pty Ltd* (2018) 283 IR 168; *Franco v Deliveroo Australia Pty Ltd* (2021) 305 IR 255.

Accordingly, the rights and duties test renders a contractualised, 'on-demand' workforce inevitable in the absence of regulatory intervention (discussed in Part IV, below).

The 'rights and duties' approach was prefaced by the High Court in its decision in *Workpac Pty Ltd v Rossato* ('*Rossato*') the previous year.[88] In this case, along with *WorkPac Pty Ltd v Skene* three years earlier,[89] the Federal Court had pioneered a realist approach to casual employment, engaging in a detailed appraisal of the labour process to find against employers who had labelled their employees as 'permanent casuals' (instead determining the workers to be ongoing employees, entitled to unpaid annual leave).[90] Before *Rossato* was determined by the High Court, however, the Federal Morrison government reversed the Federal Court's decisions confirming in legislation that an employer's label (rather than reality), is determinative of the casual status of an employment relationship.[91] In *Rossato*, the High Court stated a similar common law rule, reasserting the primacy of freedom of contract in the determination of casual contractual employment rights and liabilities, while shunning the realist approach of the Federal Court.[92] The High Court approach has led to at least one employee/contractor dispute being abandoned in the Fair Work Commission for want of jurisdiction over a 'commercial' contractor arrangement.[93] In other words, an employer may now simply assert that the matter concerns a contractor arrangement in order to avoid proceeding in the tribunal — a relatively quick and inexpensive mode of redress for workers — compared to judicial proceedings. Such 'contractualisation' is, in effect, the judicialisation of labour law, applying equally to the recent developments in *Personnel Contracting* and *Jamsek*, discussed above.

In this respect, the replacement of the multi-indicia test as a medium between contract and employment with the employer's label or description is a fait accompli for employers. Such an openly unilateral approach stands to the political right of the 19th century doctrine of freedom of contract which, if not in practice, has, at least in theory, embraced the idea of an 'equal' bargain between the parties. Liberal fantasies of equality between the parties nevertheless continue to dominate other areas of employment law — such as in the realm of employer and employee duties — with ongoing problems for the actualisation of fairness between the parties, as discussed in the following section of this paper.

88 (2021) 392 ALR 39 ('*Rossato [No 2]*'), inferred by the references to 'freedom of contract': at 52 [58], 61 [99] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).

89 (2018) 264 FCR 536 ('*Skene*').

90 *WorkPac Pty Ltd v Rossato* (2020) 278 FCR 179 ('*Rossato [No 1]*').

91 *FW Act* (n 11) s 15A; Eugene Schofield-Georgeson, 'Industrial Legislation in Australia, 2020' (2021) 63(3) *Journal of Industrial Relations* 377, 381–2.

92 *Rossato [No 2]* (n 88) 52–4 [57]–[67] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).

93 *Alouani-Roby v National Rugby League Ltd* [2021] FWC 6282.

B *Employer and Employee Duties (Implied Terms)*

Implied terms are an integral component of common law employment contracts. As Collins has made clear, implied terms are a necessary component of contract, existing as 'gap fillers' in the absence of express contractual terms.[94] Common law employer and employee duties are also among the oldest implied terms prescribing the employment relationship and have their basis in hierarchical feudal social relations and the law of master and servant. For this reason, it is intriguing that these duties are said to be implied within the common law employment contract,[95] given the contradictory contractual emphasis placed upon equality between the parties. In this respect, common law duties demonstrate how the contractual form disguises the reality of the labour exchange as one of parity, when beneath the surface the contract quite clearly speaks of subordination.[96]

Among the most persistent and recurring common law duties in the Australian law of employment law are those owed exclusively by employees to employers. These include a warranty of skill and competence[97] and duties to obey lawful and reasonable orders[98] and to serve an employer with good faith and fidelity.[99] Workers toil under these duties outside of work time[100] and they can operate, subject to an employer's reasonable discretion, for a considerable period after an employment relationship has ended.[101] By comparison, there are relatively few, if any, reciprocal common law duties owed by employers to employees in common use. The 19th century duty of employer care has, for the most part, been subsumed into legislation, such as work, health and safety acts (in which workers too may now be held liable for a breach of these provisions).[102] The duty to cooperate and maintain good faith performance has been mostly restricted to enforcement of existing employment contracts[103] and is rarely used.

94 Collins, *Regulating Contracts* (n 23) 160–1; Collins, *Employment Law* (n 8) 9–11.

95 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 423 (Brennan CJ, Dawson and Toohey JJ), 450 (McHugh and Gummow JJ) ('*Byrne*'); *Visscher v Giudice* (2009) 239 CLR 361.

96 Andrew Frazer, 'The Employee's Contractual Duty of Fidelity' (2015) 131(1) *Law Quarterly Review* 53; Ronald McCallum and Andrew Stewart, 'Employee Loyalty in Australia' (1999) 20(2) *Comparative Labor Law and Policy Journal* 155.

97 *Printing Industry Employees Union of Australia v Jackson and O'Sullivan Pty Ltd* (1957) 1 FLR 175.

98 *Lee v Superior Wood Pty Ltd* (2019) 286 IR 368; *Nielsen v Brisbane Tramways Co Ltd* [1912] QWN 20.

99 *Victoria University of Technology v Wilson* (2004) 60 IPR 392*; Spencer Industries Pty Ltd v Collins* (2003) 58 IPR 425.

100 *Anderson v Sullivan* (1997) 78 FCR 380 concerning drug-taking outside of work hours. *Hallwright v Forsyth Barr Ltd* [2013] NZEmpC 202 is a New Zealand case, indicative of the law in Australia, concerning a road rage incident outside of work hours.

101 For post-employment restraint cases: see, eg, *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317; *Barrett v Ecco Personnel Pty Ltd* [1998] NSWSC 545.

102 See, eg, *Work Health and Safety Act 2011* (NSW) ss 7, 28, 30–3.

103 *Silverbrook Research Pty Ltd v Lindley* [2010] NSWCA 357.

Recent developments in the UK, however, have meant that common law equality between employers and employee duties have been less one-sided in that country. Informed by Collins' 'relational' or 'third-way' theory of contract, evolving since the 1980s, appellate courts in the UK have developed and applied a new and reciprocal implied duty of 'mutual trust and confidence'.[104] In practice, the duty mostly applies to employers, requiring them not to subject employees to unfair treatment and improper exploitation.[105] While recognised to a limited degree by the Federal Court of Australia between the 1990s and the early 2000s,[106] in 2014, the High Court of Australia conclusively extinguished any notion of such a duty from the Australian common law of employment.[107] Not least among the reasons for its rejection was the High Court's allegation that it represented a departure from contractual formalism and would involve judicial policymaking, despite its acceptance by UK courts.[108] The High Court's expression of contract in this way bears resemblance to the feudal notion of unilateral employer power, buried and disguised by the 19th century notion of 'equality' of contract.

While the Australian common law of employment has resisted progressive reform, it has nevertheless been resurgent against statutory schemes of labour law. In the realist-progressive period of the High Court of Australia, cases such as *Byrne v Australian Airlines Ltd* recognised the traditionally subservient role of common law contract to statutory schemes.[109]

104 Hugh Collins, 'Legal Responses to the Standard Form Contract of Employment' (2007) 36(1) *Industrial Law Journal* 2, 7–10; Simon Deakin and Frank Wilkinson, 'Labour Law and Economic Theory: A Reappraisal' in Hugh Collins, Paul Davies and Roger Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer Law International, 2000) 29, 42–7.

105 See, eg, *Malik v Bank of Credit and Commerce International SA* [1998] AC 20; *Scally v Southern Health and Social Services Board* [1992] 1 AC 294; *Gogay v Hertfordshire County Council* [2000] IRLR 703; *Spring v Guardian Assurance plc* [1995] 2 AC 296; *BG plc v O'Brien* [2001] IRLR 496, affd *Transco plc v O'Brien* [2002] IRLR 444; *Clark v BET plc* [1997] IRLR 348; *Clark v Nomura International plc* [2000] IRLR 766; *Horkulak v Cantor Fitzgerald International* [2005] ICR 402; Douglas Brodie, 'Fair Dealing and the World of Work' (2014) 43(1) *Industrial Law Journal* 29; Douglas Brodie, 'Mutual Trust and Confidence: Catalysts, Constraints and Commonality'(2008) 37(4) *Industrial Law Journal* 329; Mark Freedland, 'Constructing Fairness in Employment Contracts' (2007) 36(1) *Industrial Law Journal* 136.

106 Joellen Riley, 'The Boundaries of Mutual Trust and Good Faith' (2009) 22(1) *Australian Journal of Labour Law* 73; Joellen Riley, 'Siblings but Not Twins: Making Sense of "Mutual Trust" and "Good Faith" in Employment Contracts' (2012) 36(2) *Melbourne University Law Review* 521; Andrew Stewart, 'Good Faith: A Necessary Element in Australian Employment Law?' (2011) 32(3) *Comparative Labor Law and Policy Journal* 521.

107 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169.

108 Ibid 195 [40] (French CJ, Bell and Keane JJ), discussed in Golding (n 42) and JW Carter et al, 'Terms Implied in Law: "Trust and Confidence" in the High Court of Australia' (2015) 32(3) *Journal of Contract Law* 203.

109 *Byrne* (n 95) 421 (Brennan CJ, Dawson and Toohey JJ). The traditional position is also clearly stated in *Amalgamated Collieries of WA Ltd v True* (1938) 59 CLR 417, 422–3 (Latham CJ); *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237, 254–5 (Stephen J), 287–8 (Wilson J). As Bomball (n 18) points out, in *Byrne*, both McHugh and Gummow JJ acknowledged that the contract of employment 'forms the foundation of the employment relationship': at 513.

More recent retro formalist decisions such as *Visscher v Giudice* ('*Visscher*'), have maintained this distinction between the 'employment relationship', governed by a statutory scheme of collective agreements, and the 'contract of employment', an individual bargain between the parties.[110] In doing so, however, they have permitted private bargains to trump statutory collective agreements.[111] The *Visscher* decision demonstrates the increasing power of the common law of contract over established statutory labour law on an arbitrary and unprecedented basis.[112]

C *Adverse Action*

As we have seen, formalist readings of contract deny context or indicia outside the formation of the contract, from their interpretation of contractual relations. This deliberately blinkered approach has guided the High Court's prevailing formalist attitude towards adverse action claims. But unlike the other areas of labour law examined so far (the definition of employment and implied terms), in respect to adverse action, the High Court has eschewed contractual reasoning in favour of another formalist approach. Ironically, the Court has favoured subjective understandings of employer behaviour, rather than objective or external appraisals, such as those derived from 'orthodox' contract law. All irony is lost, however, when it is revealed that the results of such an approach almost always favour employers.

Adverse action is a statutory labour law intervention in the law of contract that has existed in Australia since the first federal labour protections were enacted under the *Conciliation and Arbitration Act 1904* (Cth).[113] It was originally designed to prevent employers from discriminating against workers on the basis of union membership by, for instance, dismissing them from employment. When enacted, the law of adverse action was thought to be integral to the functioning of the conciliation and arbitration system, based as it was on the mass mobilisation of workers through unions whose industrial power was in turn regulated by the state.[114]

Since the decline of trade union power and density in the 1990s, however, there has been a dramatic expansion in the range of discriminatory employer conduct permitting individual adverse action claims. Under the current Act, any form of discrimination or 'singling out' of an individual or group of workers (whether employees or contractors) by an employer, potential employer or an agent of an employer, causing a form of disadvantage recognised by a 'workplace

110 *Visscher* (n 95) 379 [53] (Heydon, Crennan, Kiefel and Bell JJ).

111 Louise Keats, 'What Shall We Do with a Demoted Sailor: The High Court Decides in *Visscher*' (2010) 23(2) *Australian Journal of Labour Law* 121, 135–6.

112 A view put by Gummow J's dissent in *Visscher* (n 95) 368 [13].

113 See, eg, *Conciliation and Arbitration Act* (n 12) s 9(1).

114 Macintyre and Mitchell (n 44) 1, 16–19.

instrument',[115] can form the basis of a claim.[116] This latitudinous range of potentially discriminatory employer conduct appears, on its face, to favour the individual rights of employees over employers. But a formalist approach to the test for adverse action has significantly undermined the legal power of these employment protections.

Adverse action provisions have always been accompanied by a reverse onus of proof, requiring defendant-employers to provide reasons justifying discriminatory conduct, in lieu of a finding of adverse action against them. In 1917, the High Court split as to the operation of this reverse onus and the majority view has prevailed ever since. The divergent positions advanced by the Court in *Pearce v WD Peacock & Co Ltd* ('*Pearce*'),[117] are now well traversed in labour history.[118] They are covered here only briefly. In this case, a large employer who had received legal advice, dismissed an employee who was the general secretary of a union during a largescale industrial dispute. The employer required the employee to sign a statement saying that he was satisfied with his wages which, of course, the employee refused. Accordingly, the employer claimed that dismissal was for this ulterior reason, rather than the obvious (that he was a union leader during an industrial dispute). A majority of the court accepted that the ulterior reason — the employer's subjective intention — was determinative of the action taken and that dismissal was therefore not 'adverse'.[119] The minority, by contrast, consisting of Higgins J and Isaacs CJ, accepted that the obvious and overriding objective context of industrial disputation made the employer's excuse a contrived convenience.[120]

In *Pearce*, the High Court was presented with a choice to as to how to adjudicate adverse action claims. On the one hand, was the option of an objective test, reliant on contractual or private law mechanisms of assessing external behaviour.[121] Here, such a method would have required an assessment of 'reasonableness' by reference to objective circumstances or reality. On the other hand, was the option of a subjective test, reliant on public or criminal law mechanisms of assessing internal

115 *FW Act* (n 11) ss 340(1), 341(1). Common law contracts are not considered 'workplace instruments' for the purposes of contemporary adverse action claims (ie they do not give rise to adverse action): *Barnett v Territory Insurance Office* (2011) 196 FCR 116, 121–2 [29]–[32] (Mansfield J); *Daw v Schneider Electric (Australia) Pty Ltd* (2013) 280 FLR 361, 381–3 [106]–[114] (Judge Jarrett).

116 *FW Act* (n 11) ss 338–42.

117 (1917) 23 CLR 199 ('*Pearce*').

118 Anna Chapman, Kathleen Love and Beth Gaze, 'The Reverse Onus of Proof Then and Now: The *Barclay* Case and the History of the *Fair Work Act*'s Union Victimisation and Freedom of Association Provisions' (2014) 37(2) *University of New South Wales Law Journal* 471, 488–9; Joellen Riley Munton, *Labour Law: An Introduction to the Law of Work* (Oxford University Press, 2021) 206–7.

119 *Pearce* (n 117) 203–4 (Barton ACJ, Gavan Duffy and Rich JJ agreeing at 213–14).

120 Ibid 209–10 (Isaacs J, Higgins J agreeing at 213).

121 *Pearce* (n 117). The methods and tests of contractual law, vis-a-vis public law, are also discussed by Davies: see above n 13.

behaviour.[122] Such a method requires detailed evidence of an employer's internal decision-making process. The result is that without an employer's admission, adverse action is almost impossible to prove. And the consequence of this is that the statutory scheme is rendered close to a nullity. But such an approach clearly preserves employer prerogative and is entirely contiguous with formalist legal method in that it willingly entertains the inventions and fantasies of employers. As Isaacs J put it at the time, '[s]uch an excuse seems to me to have about as much validity as an excuse by a person accused of stealing a horse, that he only intended to take the halter, and not the horse to which it was attached'.[123] As scholars such as Anna Chapman, Kathleen Love and Beth Gaze point out, Isaacs J's compelling realist critique resonates with a more recent approach of Gray and Bromberg JJ.[124] These Federal Court judges determined that courts should appraise the 'real reason'[125] for the conduct. They said:

> The real reason for a person's conduct is not necessarily the reason that the person asserts, even where the person genuinely believes he or she was motivated by that reason. The search is for what actuated the conduct of the person, not for what the person thinks he or she was actuated by. In that regard, the real reason may be conscious or unconscious, and where unconscious or not appreciated or understood, adverse action will not be excused simply because its perpetrator held a benevolent intent. It is not open to the decision-maker to choose to ignore the objective connection between the decision he or she is making and the attribute or activity in question.[126]

The realist approach of the Federal Court was quickly overturned by the High Court, which applied and confirmed the formalist approach of the majority in *Pearce* from the outset of the 20th century. The *Barclay [No 2]* case was one of two similar High Court rulings on the issue within the last decade,[127] reversing the realist approach of the Federal Court and reinstating a retro formalist approach, looking only to the subjective and convenient reasons provided by an employer for taking adverse action, over and above any objective appraisal of reality.

In practice, this test usually requires detailed counterevidence of subjective intention (premised as it is in contract law), in turn requiring significant legal resources.[128] This, in turn, advantages employers by restricting adverse action

122 *Pearce* (n 117).

123 Ibid 207.

124 Chapman, Love and Gaze (n 118) 489.

125 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, 221 [28] (Gray and Bromberg JJ) ('*Barclay*').

126 Ibid.

127 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 2]* (2012) 248 CLR 549; *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243.

128 Giri Sivaraman and Hanna Schutz, 'High Court Clarifies Adverse Action is Subjective' (2012) 50(10) *Law Society Journal* 67, 67–8.

claims to executive employees and high-paid workers, while trade unions often abstain from running such matters due to limited resourcing.[129]

A further consequence of the formalist subjective test is that it excuses blatant employer discrimination on the basis of 'mistakes' both as to fact[130] and / or law,[131] no matter how unreasonable. One such case concerned the dismissal of an employee who rightfully and lawfully took sick leave, evidenced by a medical certificate.[132] Another, shielded an employer who mistakenly dismissed a worker for refusing to perform duties that he was neither qualified, nor required to perform under the terms of an enterprise agreement.[133] This common law approach to employer mistakes is compared with that taken in respect to trade union mistakes, discussed below in section (v), regarding industrial action.

D *'Objectionable Terms' in Collective Agreements*

Like adverse action, in matters involving collective bargaining, the Court has curiously shied away from its own hallowed notion of 'freedom of contract' — which is the centrepiece of the doctrine of contract. Indeed, it would seem that when the contractual notion of 'equality between the parties' actually comes to fruition through well-unionised workers who are truly able to bargain on equal terms, the High Court has restricted freedom of contract, relying on other strands of formalist reasoning to neutralise worker power in the interests of employers. In this respect, the Court has limited the content or terms that may be freely negotiated between the parties during collective bargaining. It has specifically identified terms favourable to unions, such as those relating to 'bargaining fees', rendering them invalid, along with any subsequent industrial action in pursuit of them.[134]

Terms relating to bargaining fees are provisions within a collective agreement requiring non-unionised workers to pay the union for its work in bargaining for collective agreements on their behalf. Such fees are typically designed to prevent 'free-riding' — the problem of non-unionised workers unjustly benefitting from the union membership and representation of their colleagues, without contributing

129 Peter Gray, 'Keynote Address' (Speech, Union Lawyers and Industrial Officers New South Wales, Annual Labour Law Conference, 21 February 2014).

130 *Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd* (2015) 238 FCR 273, 281–2 [36]–[37] (Jessup J), 302–3 [136] (Rangiah J, Buchanan J dissenting at 288–9 [63]–[65]) ('*Anglo Coal*').

131 *Qube Ports Pty Ltd v McMaster* (2016) 248 FCR 414, 425 [41] (Jessup J) ('*Qube Ports*').

132 *Anglo Coal* (n 130).

133 *Qube Ports* (n 131).

134 *Electrolux Home Products Pty Ltd v The Australian Workers' Union* (2004) 221 CLR 309 ('*Electrolux*').

to their collective representation.[135] Bargaining fees are also a means to enhance union density, in turn, enhancing the efficacy of collective bargaining schemes.[136]

Historically, the contractual doctrine of 'privity of contract' has failed to recognise trade unions and their representation of workers in common law contracts.[137] Conveniently, it restricts 'third parties' from negotiating or being party to a contract between two imaginary free and equal parties.[138] This has necessitated statutory collective bargaining schemes that overcome these common law limitations by intervening in the law of contract to regulate for collective bargaining, ensuring fairness and industrial peace and contractual freedom in a very broad sense.[139] The collective labour contracts produced by such schemes involve or require trade unions to represent the interests of workers, as against those of employers.[140] That parties to such collective bargains should enjoy freedom of contract is specifically recognised by the ILO.[141]

Despite these well-recognised differences between common law and statutory employment contracts, the High Court of Australia has intervened to redefine significant parts of statutory bargaining regimes, restricting the freedom to bargain by invoking legal formalism. The Court has done so by invoking the somewhat obscure notion of privity of contract to limit freedom of contract in collective bargaining — relying on narrow formalist and individualist reasoning to do so. This redesign limits the role of trade unions in collective bargaining by restricting the terms that may be agreed upon in a collective contract or 'enterprise agreement'. The Court's approach has since been codified and such terms are now considered by statute to be 'unlawful' and 'objectionable'.[142]

135 David Peetz, 'Co-Operative Values, Institutions and Free Riding in Australia: Can It Learn from Canada?' (2005) 60(4) *Relations Industrielles* 709, 712–3, 726 ('Co-Operative Values').

136 Ibid. Indeed, that high union density contributed to the efficacy of collective bargaining was recognised by the Australian legislators in drafting and passing the *Conciliation and Arbitration Act* (n 12) at the turn of the 20th century: Macintyre and Mitchell (n 44) 16.

137 Andrew Stewart and Joellen Riley, 'Working around Work Choices: Collective Bargaining and the Common Law' (2007) 31(3) *Melbourne University Law Review* 903, 920–4. The contractual doctrines of 'consideration' and 'intention to create legal relations' have also been implicated in preventing common law contractual protection of employees: see, eg, *Ryan v Textile Clothing and Footwear Union of Australia* [1996] 2 VR 235 ('*Ryan*').

138 JW Carter, LexisNexis, *Carter on Contract* (online at 26 August 2022) ch 17; *Ryan* (n 137) 239–43 (Brooking JA).

139 Tim Rowse, 'Elusive Middle Ground: A Political History' in Joe Isaac and Stuart Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration* (Cambridge University Press, 2004) 17, 18.

140 Macintyre and Mitchell (n 44) 15–16.

141 *Right to Organise and Collective Bargaining Convention*, ILO Doc C098 (entered into force 18 July 1951, adopted 1 July 1949) art 4.

142 *FW Act* (n 11) s 12 defines an 'objectionable term' as one that either breaches the general protections (pt 3-1) or involves 'payment of a bargaining services fee'. Section 194(b) provides that it is 'unlawful' to include such terms in an enterprise agreement and s 356 provides that 'objectionable terms' have no effect in any industrial instrument or arrangement, including an award or agreement.

These employment laws raise Unger's concern with ambiguity, arising when labour law is siloed off from the common law of contract. That is: without well-defined boundaries, which aspects of the employment relationship are governed by state collective bargaining regimes, and which remain subject to managerial prerogative?[143] As Unger's theory suggests, and as Australian industrial commentators confirm,[144] the opacity surrounding this distinction has been a vexed issue in the common law for over half a century. The case law has centred on the definition of the kinds of 'matters'[145] that can be the subject of collective agreements — 'matters pertaining to the employment relationship'.[146] The original Australian legal formalists, Latham CJ and Dixon J, pioneered a definition of such matters that was unsurprisingly narrow and contractual, accruing maximum power to employers in the negotiation of collective common rule bargains. A well-trodden example is a case in which shop trading hours and thereby, working hours, were said *not* to be 'industrial matters' — matters prohibited within a collectively bargained agreement or award.[147] Despite an intervening period of broad and purposive interpretation of matters that could be governed by collective agreement,[148] in 2004 the High Court returned to a narrow 'retro-formalist' approach in the *Electrolux* decision.[149]

At stake in *Electrolux* was whether a collective enterprise agreement could include a term authorising the payment of 'bargaining fees'. Incidentally, the statutory collective agreement provisions were structured such that contractual irregularities (like 'prohibited matters' within the agreement) rendered 'unprotected', industrial action[150] taken by the union in relation to the agreement. Industrial action would not be afforded statutory protection from common law prosecution under the private law of contract and tort. A 6:1 majority of the High Court found that bargaining fee provisions were not 'matters pertaining to the employment relationship'.

143 Unger (n 8) 160.

144 Stewart and Riley (n 137) 906–7, 937; Jason Harris, 'Federal Collective Bargaining after *Electrolux*' (2006) 34(1) *Federal Law Review* 45, 65–7.

145 *Conciliation and Arbitration Act* (n 12) s 4, referred to 'industrial matters'. The current formulation involves 'permitted matters', which are in turn defined as 'matters pertaining to the employment relationship': *FW Act* (n 11) s 172(1)(a). This is a similar formulation to the *Workplace Relations Act 1996* (Cth) s 170LI ('*WR Act*'), as inserted by *Workplace Relations and Other Legislation Amendment Act 1996* (Cth), later repealed by *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

146 *FW Act* (n 11) s 172(1)(a).

147 *R v Kelly; Ex parte Victoria* (1950) 81 CLR 64, 84 (Latham CJ, Dixon, McTiernan, Williams, Webb and Fullagar JJ).

148 Harris distinguishes between a 'narrow' and 'broad' interpretation of the issue: Harris (n 144) 47.

149 *Electrolux* (n 134). The Australian Industrial Relations Commission had reached a similar decision, the previous year, in *Re National Union of Workers* (2003) 120 IR 438.

150 The term 'industrial action' is defined by the Act to include both employer and employee action such as strikes and lockouts: *FW Act* (n 11) s 19(1). In practice, it is mostly used by employees and unions through strike action.

As the majority explained, they had interpreted the statutory collective bargaining scheme through the lens of formalist contract. In doing so, the majority reinstated the view of the first instance judge (Merkel J), over the view of a Full Bench of the Federal Court who had, in turn, reversed that decision to instate a realist or broad view of the matter. On this formalist view, the relationship between Electrolux and the union was seen as 'essentially, one of agency; Electrolux is to contract with its employees on behalf of the relevant union, as its agent. The agency so created is for the benefit of the union, rather than for the benefit of the employee upon whom the contractual liability is to be involuntarily imposed'.[151]

The High Court's reasoning in *Electrolux* merely followed the narrowest of contractual formalist precedent from *Re Alcan*,[152] a case about union dues, not bargaining fees. The opening pages of Gleeson CJ's decision, for instance, cites the opinion of arch conservative Barwick CJ, in which the former Chief Justice rests on the laurels of privity to declare that 'the demand that the employer should pay out of earned wages some amounts to persons nominated by the employee is not a matter affecting the relations of employer and employee'.[153]

This approach clearly reflects the doctrine of privity of contract, rather than a broader notion of 'freedom of contract'. The rule is rooted in a 19th century, individualistic approach to the social relations of production and consumption, in which unions were forbidden and manufacturers were able to distance themselves from injured consumers on the basis that they had not contracted with them directly.[154] It is also on this basis that modern common law refuses to enforce worker claims arising from unregistered agreements between employers and unions.[155]

On a realist view, however, non-union employees are the clear and obvious beneficiaries of a bargaining service provided by a union resulting in additional benefits by way of higher pay and better working conditions.

151 *Electrolux* (n 134) 337 [56] (McHugh J), 371–2 [165] (Gummow, Hayne and Heydon JJ), quoting *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2001] FCA 1600, [41] (Merkel J). Gleeson CJ's judgment in *Electrolux* (n 134) was predicated on the correctness of *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 ('*Re Alcan*') and *R v Portus; Ex parte Australia and New Zealand Banking Group Ltd* (1972) 127 CLR 353 ('*Portus*'), both deduction of union dues cases that have now been reversed by statute: at *Electrolux* (n 134) 323–5 [7]–[8] (Gleeson CJ). Justice McHugh's position (as well as Gummow, Hayne and Heydon JJ's) was based on a combination of these cases and Merkel J's conception of the relationship as one of contract: at *Electrolux* (n 134) 337 [56], 347 [82] (McHugh J).

152 *Electrolux* (n 134). In *Re Alcan*, the High Court had prohibited agreement terms requiring employers to deduct union dues directly from the pay of union members.

153 *Electrolux* (n 134) 325 [9] (Gleeson CJ), quoting *Portus* (n 151) 357 (Barwick CJ).

154 See, eg, *Winterbottom v Wright* (1842) 10 M & W 109; 152 ER 402.

155 *Ryan* (n 137) 239 (Brooking JA), 273 (Hayne JA, Tadgell JA agreeing at 251); Stewart and Riley (n 137) 921–2.

And the fact that non-union employees have not voluntarily sought union services, as argued by the High Court, is not the consequence of the agreement (as the Court would have it), but a statutory regime imposing mandatory coverage of the workforce within an enterprise by a collective agreement.

Clearly, the formalist view of contract is at odds with a statutory system of registrable agreements that explicitly recognises the role of trade unions as bargaining agents on behalf of workers, encouraging their freedom of contract. Commentators such as David Peetz[156] and Peter Sheldon,[157] for instance, have remarked on the authoritarian nature of the current bargaining framework, comparing it to that of countries undergoing 'democratic trauma'.[158] At the time of the *Electrolux* decision, commentators such as Braham Dabscheck described this denial of reality as a form of legal 'doublethink' in which 'collective bargaining … [has been found] not [to] pertain to the employer–employee relationship'.[159] Interpreting collective bargaining through the lens of formalism in this way is clearly a judicial intervention, 'ensur[ing] that [they] are "loaded" in favour of employers'.[160] This approach was codified by the conservative Howard government, prohibiting terms in collective agreements enabling unions to be compensated for their work through employer deductions from worker pay.[161] Ironically, in the language of contract, this means that unions are required to enter into bargains made without due consideration (payment) passing from one party to the other — breaking a cardinal rule of contract law. Clearly, retro formalism is a one-way street, containing a vested and specific set of (employer) interests. Since this time, the *FW Act* has permitted agreements to include terms prescribing deductions for union dues.[162] But bargaining fees remain an 'unlawful' and 'objectionable term'.[163] Unsurprisingly, the problem of 'free riders' persists. So too does the arbitrariness surrounding matters that may be included in agreements — with downstream effects for the enforceability of collective agreements as well as protected industrial action (discussed next).

156 David Peetz, Submission No 23 to Senate Education and Employment Legislation Committee, *Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 [Provisions]* (29 August 2019) ('Submission No 23'), cited in 'Union Deregistration Bill Violates International Law: Think Tank', *Workplace Express* (online, 10 September 2019) ('Union Deregistration Bill Violates International Law').

157 Peter Sheldon, 'What Collective Bargaining Future for Australia: Lessons from International Experience' in Joellen Riley and Peter Sheldon (eds), *Remaking Australian Industrial Relations* (CCH Australia, 2008) 235.

158 Peetz, 'Submission No 23' (n 156) 16, cited in 'Union Deregistration Bill Violates International Law' (n 156).

159 Braham Dabscheck, 'Two and Two Make Five: Industrial Relations and the Gentle Art of Doublethink' (2005) 15(2) *Economic and Labour Relations Review* 181, 191.

160 Braham Dabscheck, 'The Contract Regulation Club' (2006) 16(2) *Economic and Labour Relations Review* 3, 4.

161 *WR Act* (n 145) ss 298Y–298Z, as inserted by *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) and *Workplace Relations and Other Legislation Amendment Act 1997* (Cth), later repealed by *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

162 *FW Act* (n 11) s 172(1)(c).

163 *FW Act* (n 11) ss 12 (definition of 'objectionable term'), 194(b), 356.

E *Protected Industrial Action: Section 413*

In a case with similar consequences to *Electrolux*, the High Court decision in *Esso Australia Pty Ltd v Australian Workers' Union* ('*Esso*')[164] interpreted protected industrial action under s 413(5) of the *FW Act* in accordance with formalist notions of contract law. Section 413(5) provides statutory immunity from common law prosecution, but not unless the party taking industrial action has complied with a lengthy and complex set of rules and procedures. Before reaching the High Court, the matter was heard by two appeal courts. Both lower courts read s 413(5) from a realist perspective in its statutory context — as the linchpin within a legislative system of collective bargaining that is reliant on industrial action for its effective operation, and therefore requiring a broad interpretation. This was reversed by the High Court, which defined s 413(5) as a 'privilege', not by reference to the statutory system of collective bargaining, but rather, the common law of contract.[165] The plurality in *Esso* commenced their decision by saying:

> At common law, industrial action in the form of strikes and lock-outs was and is, generally speaking, unlawful. In the scheme of things, it is likely to involve a breach of contract and one or more of the industrial torts of nuisance, besetting or inducing breach of contract, or other forms of tortious interference with economic relations.[166]

As Shae McCrystal has argued, defining a statutory protection as a 'privilege' is problematic because it misunderstands the significance of the statutory scheme of collective bargaining and industrial action, of which protected industrial action can be considered a fulcrum.[167] Such a development might also be characterised as judicial overreach: a radical resuscitation of contract within a democratic statutory system that has intentionally hived-off labour law from contract due to the latter's overtly unfair outcomes, particularly when applied to the employment relationship.

The facts in the *Esso* case were that a union mistakenly persisted in industrial action by failing to perform a very specific task in the workplace after a court-ordered industrial action to cease. The union realised its mistake and performed the task days later and prior to the first instance proceedings. The High Court's final narrow definition of the section ultimately bans industrial action where a union has breached even the most minor of orders, among a multitude of such conditions placed upon industrial action. It means that even a past and unintended breach of a minor order, about which no issue was taken, could have the unintended consequence of denying protection to industrial action.[168] The High Court made a further finding of 'coercion' against the union for its breach, resulting in a fine or

164 (2017) 263 CLR 551 ('*Esso*').

165 Ibid 583 [53] (Kiefel CJ, Keane, Nettle and Edelman JJ).

166 Ibid 571 [30].

167 McCrystal (n 41) 281; Anderson (n 41) 21; Breen Creighton and Shae McCrystal, '*Esso Australia Pty Ltd v The Australian Workers' Union*: Breaches of Orders, Coercion and Protected Industrial Action under the *Fair Work Act 2009* (Cth)' (2017) 39(2) *Sydney Law Review* 233, 234.

168 *Esso* (n 164) 581–2 [51] (Kiefel CJ, Keane, Nettle and Edelman JJ).

civil penalty. In effect the union received double punishment: the removal of the 'right' to take industrial action compounded by civil penalty.

To determine whether the defendant-union had breached the court order to desist from industrial action (ultimately determining whether industrial action remained protected), the High Court formulated a test. Despite the union's argument that a subjective test would maintain coherence with existing common law on the subject,[169] the Court went beyond even an objective test.[170] Instead, it imposed strict liability, saying that '[t]he fact that a person may be acting under a mistake of law as to whether industrial action is protected industrial action is no more relevant than would be the fact that the person neither knew nor cared whether the industrial action was protected industrial action'.[171]

On this view, a breach is committed wherever a breach is factually determined, regardless of the objective or subjective intention of the union or workers involved. Such a view renders the subjectivities of workers and unions a nullity at law. It is consistent with the established consequences of formalist contract law in which employment relations are governed by employer prerogative and unilateralism.[172]

The High Court's attitude to a mistake by the union in the *Esso* case — resulting in the merest of breaches rectified before hearing — may be contrasted with its approach to employer mistakes. Take once again, the common law approach to statutory adverse action (discussed above), in which the High Court applied a subjective test that looks to the 'internal' intentions or state of mind of the employer. Applied to cases of adverse action taken by employers against employees on the basis of a mistake, this approach has permitted employers an unwarranted degree of discretion, treating employers leniently. In this way, formalist logic imposes a double standard on unions and workers, unreciprocated in respect to employers in other areas of employment law where they more frequently appear as defendants.

IV REFORM

A *What Can Be Done?*

Critical contract theorists such as Unger have suggested a twofold solution to social inequalities arising from formalist legal interpretation and the contractualisation of labour law. First, a weaker strategy, targeting judicial interpretation of employment contracts — replacing retro formalism with a realist and purposive approach, implemented either through common law or required by statute. Indeed, a limited

169 Ibid 586 [62] (Kiefel CJ, Keane, Nettle and Edelman JJ).

170 Ibid 586–7 [62]–[63] (Kiefel CJ, Keane, Nettle and Edelman JJ).

171 Ibid 586 [61] (Kiefel CJ, Keane, Nettle and Edelman JJ).

172 McCrystal (n 41) 286.

version of this approach already exists in Australian interpretive legislation,[173] evidently, with very little effect. This demonstrates that entrusting the judiciary to reform its own interpretation requires reinforcement. Accordingly, a second stronger solution preferred by Unger, is to change the institutional structure or bodies overseeing legal decision-making.[174] In the realm of Australian labour law throughout the course of the 20th century, this solution has been tried and tested. It has generally involved the establishment of specialist tribunals applying statutory criteria to all aspects of labour law.

Over time, the power of these tribunals (some of which were originally labelled 'courts') has been pared back by various conservative constitutional High Court decisions and statutory interventions. Deepening the role of the tribunal system, to cover areas of labour law that are now the province of common law courts, is once again presenting itself as a necessary statutory and possibly, constitutional solution. Just as a conservative High Court required a reformist Chifley Labor government to engage in constitutional change to implement a welfare state, so too may a retro formalist Court require the same from a future reformist government with plans to deepen institutional industrial democracy.

In the meantime, however, examples abound of instances involving reformist legislatures overruling formalist contractual decisions by the High Court in the realm of employment law. Two of the most recent include the reversal of the High Court's decision in *Re Alcan* by the introduction of the *FW Act* in 2009 by a Labor government. In *Re Alcan*, the Court had prohibited the deduction of union dues from employee wages as a matter that could be included in certified enterprise agreements — a decision remarkably similar to *Electrolux* and in fact followed by the Court in that case. Another such decision, reversed by the implementation of the *FW Act*, was the *PP Consultants Pty Ltd v Finance Sector Union of Australia* ('*PP Consultants*')[175] case in which the High Court decided that employees whose work had been outsourced to a new employer would not have their entitlements and conditions protected by transmission of business rules because the new employer's business was of a different legal character, despite their own work remaining the same.[176]

The remainder of this paper briefly canvasses ideas and solutions to the problems of contractual reasoning, raised in the previous section of the paper. Each proposal

173 *Acts Interpretation Act 1901* (Cth) s 15AA.

174 Unger (n 8) 170–4.

175 (2000) 201 CLR 648 ('*PP Consultants*').

176 Ibid 656 [18]–[19] (Gleeson CJ, Gaudron, McHugh and Gummow JJ), 666 [42] (Callinan J); *FW Act* (n 11) pt 2-8. These legislative rules also reversed a related High Court decision in *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* (2005) 222 CLR 194, where the Court reached a similar conclusion against employees of a transferring business, on the basis that there was an insufficient transfer of assets to a new employer: Munton (n 118) 156–7. Part 2-8 operates by classifying as a 'transfer of business' situations where an outgoing employer transfers work to a new employer, such as that in *PP Consultants* (n 175): *FW Act* (n 11) ss 311(3), (6). Section 313 further provides that a 'transferable instrument' (the employees' agreement with the old employer) will cover the incoming employer.

is the evidence-based recommendation of various labour law scholars, broadly replicating Unger's proposals to reform contractualism and formalist approaches to labour law, discussed above.

1 *Employee / Contractor Distinction*

The new 'rights and duties' test of employment is a contractual formalist approach, weighted towards employer preferences to describe workers as contractors to evade employment protections. Suggestions to reform the common law employee/contractor distinction through legislation, range across a spectrum involving: conversion of contractors to employees at one end;[177] and at the other, retaining the 'contractor' classification while extending bargaining, pay and conditions to contractors across whole industries in which they work.[178] At the centre of this spectrum are options such as the UK's 'limb B' worker provisions which reclassify contractors as employees but grant only limited employment rights.[179] Another centre option is to extend particular employment rights to contractors on a case by case basis, such as through an unfair contracts jurisdiction.[180] Owing to the piecemeal nature of the centre options, as well as the weight of political opposition to reclassification of contractors as employees, subjecting contract labour to minimum standards and industry-wide bargaining, is likely to be the most effective option for regulating contract work.

This option is associated with the expansion of tribunal power over 'employee-like' forms of work. In 2021, the Australian Labor Party ('ALP') announced a policy intervention aiming to extend the powers of the Fair Work Commission over 'employee-like' forms of contract work to set minimum safety standards, conditions and pay.[181] This proposal appears to be based on a 2021 report for the Transport Education Audit Compliance Health Organisation ('TEACHO') by academics, Joellen Riley Munton and Michael Rawling.[182] The report conceives of contract work on the basis of a 'Beyond Employment' approach, described by the same authors in 2010, and deployed to describe the employee/contractor distinction at the outset of this paper.[183] The ALP approach is unclear about the crucial suggestion, made by Munton and Rawling, that any extension of the Commission's powers over an expanded unfair contracts jurisdiction include the

177 Andrew Stewart and Shae McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (2019) 32(1) *Australian Journal of Labour Law* 4, 12–15, 21–2.

178 Rawling and Munton (n 85) 49.

179 *Employment Rights Act 1996* (UK) s 230(3).

180 Echoing the *Industrial Relations Act 1996* (NSW) s 106 — currently in abeyance since the enactment of the federal *Independent Contractors Act 2006* (Cth) s 7(2)(b)(i).

181 Australian Labor Party, *Labor's Secure Australian Jobs Plan* (Background Factsheet, 15 October 2021) 1 <https://miltondick.com/media/1rrhe3uf/labor-s-secure-australian-jobs-plan-background-factsheet-1.pdf>; Australian Labor Party, *ALP National Platform: As Adopted at the 2021 Special Platform Conference* (Platform, March 2021) 109–10.

182 Rawling and Munton (n 85). See also reflected in the policy is the work of Nossar (n 85).

183 Rawling and Munton (n 85) 1, citing Johnstone et al (n 8).

power to set pay and conditions on an industry-wide basis in a manner similar to that prescribed by ch 6 of the *Industrial Relations Act 1996* (NSW).[184] This proposal echoes calls for a return to industry-wide bargaining from an array of other labour commentators, including the late Joe Isaac,[185] in order to spread bargaining gains to non-unionised workers pockets within industries and small-business employees, frequently neglected by enterprise bargaining.

Incidentally, the ALP policy also announces a reversal of the High Court's contractual logic in the *Rossato* decision (enacted under s 15A of the *FW Act*), which presently defines casual employment in the interests of employers, or whatever an employer labels it to be. The alternative definition proposed by the ALP policy redefines casual employment in accordance with previous award provisions and the realist approach of the Federal Court.[186] This approach sees casual employment as 'the absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work'.[187] This definition would once again permit casual workers to meaningfully challenge the contractual fiction of 'permanent casual' employment status.

2 *Implied Terms*

As discussed in Part III, while implied terms govern significant aspects of working life for employees, the High Court recently ruled out the possibility of an implied term of 'mutual trust and confidence', applicable to employers. In response, Australian labour law commentator, Gabrielle Golding, suggests that the High Court rethink its approach.[188] She proposes reform to common law interpretation, along the lines of a 'relational' or realist perspective of contract law. A relational perspective, Golding suggests, opens the currently narrow legalistic view of contract, whose outcomes unilaterally favour employers, to a fairer appraisal of the employment relationship in which the mutual obligations of both parties can be recognised.[189] Accordingly, to assist courts towards a realist view of contractual employment relations, the objects clause of the *FW Act*[190] should be amended to ensure that the interpretation of employment relationships recognises 'mutual obligations of trust and confidence between employers and employees'. These sentiments have been echoed more recently by international labour commentator, Guy Davidov, who suggests that a purposive or realist interpretive approach is vital

184 Rawling and Munton (n 85) 18–20.

185 Joe Isaac, 'Why Are Australian Wages Lagging and What Can Be Done about It?' (2018) 51(2) *Australian Economic Review* 175, 185–6; Schofield-Georgeson, 'The Emergence of Coercive Federal Australian Labour Law' (n 37) 60–4.

186 *Skene* (n 89); *Rossato [No 1]* (n 90).

187 *Skene* (n 89) 571 [153] (Tracey, Bromberg and Rangiah JJ), quoting *Hamzy v Tricon International Restaurants* (2001) 115 FCR 78, 89 [38] (Wilcox, Marshall and Katz JJ) ('*Hamzy*'); *Rossato [No 1]* (n 90) 270 [422] (White J), quoting *Hamzy* (n 186) 89 [38] (Wilcox, Marshall and Katz JJ); Australian Labor Party, *Labor's Secure Australian Jobs Plan* (n 181) 2.

188 Golding (n 42).

189 Ibid 128–30.

190 *FW Act* (n 11) s 3.

to realising the protective purpose of labour law more generally, vis-a-vis contract.[191]

3 *Adverse Action*

Unequal results, derived from the application of formalist logic to adverse action provisions, can be addressed through statutory clarification of the interpretive method. In this respect, it has been suggested that the problem with interpretation stems from the use of the word 'because', used in adverse action provisions,[192] which requires a link between the adverse action and a workplace right (eg that the adverse action was taken because of a proscribed reason). Indeed, it is this clause that requires intention to be attributed to the person taking the adverse action (conventionally the employer). As explained above, however, the problem is not that mere intention is required of the employer. In this respect, the words 'because' or 'by reason merely of'[193] are simply logical conjunctions. Rather, the High Court has chosen to apply a *subjective* test of employer intention, rather than an objective test, due to its reliance upon a formalist understanding of employer power. Were an objective test applied, basic reality and fairness for employees would no longer be subordinate to convenient and subjective employer excuses.[194]

Accordingly, the general protections provisions at pt 3-1 div 7 of the *FW Act* should be amended to clarify the term 'because'. The amendment should specify that the test assessing an employer's reason for taking adverse action is strictly objective. While a respondent-employer's reasons for taking such action will no doubt be a relevant consideration, the action must be assessed in a broader context, involving the exercise of workplace rights by the applicant-employees.

It is noteworthy that in the year of the *Barclay* decision, 2012, the adverse action provisions were a key feature of a review of the *FW Act*.[195] Responding to a large volume of submissions urging statutory clarification of these provisions, the review recommended enacting the subjective test — the opposite suggestion to that made here. It concluded that, '[d]espite being aware that this interpretation in theory and perhaps in practice may reduce employee protections, the Panel doubts that this would be significant'.[196] Since the review and the *Barclay* decision, awards of compensation by courts in general protections applications has remained

191 Guy Davidov, *A Purposive Approach to Labour Law* (Oxford University Press, 2016) 4–6, ch 8.

192 The word 'because' appears in the *FW Act* (n 11): at s 340 (generally), s 346 (regarding industrial activities), s 351 (regarding discrimination), s 352 (regarding temporary absence in relation to illness or injury), and s 354 (regarding coverage by particular instruments, including provisions of the National Employment Standards). See Sivaraman and Schutz (n 128) 68–9.

193 'By reason merely of' was the phrase used in the *Conciliation and Arbitration Act* (n 12) s 9(1), as interpreted by the High Court using the subjective test in *Pearce* (n 117) (discussed above).

194 In accordance with the approach of a Full Bench of the Federal Court in *Barclay* (n 125), and as per the minority in *Pearce* (n 117).

195 Ron McCallum, Michael Moore and John Edwards, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (Final Report, 2 August 2012) 235–7.

196 Ibid 237.

remarkably low — probably less than between 8–10%, per annum.[197] This is something that has not escaped the attention of former Federal Court judge, Peter Gray, who has observed that since *Barclay*, many employers have outsourced decision-making that is likely to result in adverse action, to hired consultants in order to evade liability.[198] An objective test, by contrast, would likely overcome this dilemma.

4 *Non-Permitted Matters*

As discussed above, the statutory 'freedom of association' and 'freedom not to associate' were some of the key notions by which the High Court of Australia justified its formalist approach to prohibiting the inclusion of bargaining fees in collective agreements. And while the decision in *Re Alcan* (in which agreement terms requiring employer deduction of union dues from worker pay was held to breach the freedom not to associate) has since been reversed by statute,[199] the prohibition on terms requiring employer deduction of bargaining fees from worker pay remains codified as an 'objectionable term' under the *FW Act*.[200] A solution is clearly to reverse the reasoning in *Electrolux* by deleting the statutory classification of bargaining fees as an 'objectionable term'; thereby permitting enterprise agreements to provide for bargaining fees.

That bargaining fees are not, in fact, 'objectionable', has been declared by no lesser authority than the Canadian Supreme Court, on multiple occasions.[201] In the Canadian case of *Lavigne v Ontario Public Service Employees Union*, the lawful use of bargaining fees was challenged on very similar grounds to that in the *Electrolux* case, albeit in the context of a well-developed *Charter of Rights and Freedoms* prescribing a 'freedom of association', found also to contain a reciprocal 'freedom not to associate'.[202] Three judges concluded that despite burdening the freedom not to associate, bargaining fees (and 'compelled association' more generally) furthered the social good and did not ultimately violate the freedom of

197 This figure is an estimate, based on the number of general protection dismissal applications that proceed from conciliation conference at the Fair Work Commission to litigation in the Federal Circuit Court (around 23%): see Fair Work Commission, *Annual Report 2015–16* (Report, 2016) 51. Given that awards of compensation in comparatively easier unfair dismissal applications are awarded by the Fair Work Commission in less than 1% of cases, the difficulties raised by the threshold test for adverse action are likely to mean that awards of compensation in adverse action cases are even lower: see Fair Work Commission, *Access to Justice 2018–19* (Annual Report, 26 September 2019) 150 <https://asset.fwc.gov.au/documents/documents/annual_reports/ar2019/fwc-annual-report-2018-19.pdf>. These statistics cover general protections dismissals for the years 2015–19. No statistics are available covering the outcomes of general protection claims more broadly.

198 Gray (n 129).

199 It is no longer an 'objectionable term' under federal industrial legislation. Compare *WR Act* (n 145) ss 298Y and 298Z, with the *FW Act* (n 11) ss 12, 194(b), 356.

200 *FW Act* (n 11) ss 12, 194(b), 356.

201 See, eg, *Lavigne v Ontario Public Service Employees Union* [1991] 2 SCR 211 ('*Lavigne*'); *R v Advance Cutting & Coring Ltd* [2001] 3 SCR 209.

202 *Lavigne* (n 201) 316 (La Forest J, for Sopinka and Gonthier JJ).

association.[203] The remaining judges found it unnecessary to consider whether bargaining fees violated freedom of association and simply accepted their legitimacy due to their essentiality to the Canadian system of collective bargaining.[204]

Indeed, in the immediate post-war period, bargaining fees laid the foundation to the strength and integrity of Canadian trade unions and the system of collective bargaining in that country in the latter half of the 20th century.[205] Known as the 'Rand Formula' in Canadian industrial relations (named after the progressive Supreme Court judge who created it) and now codified, all employees who are subject to an agreement bargained for by a union, are required to pay the union for its services.[206] Should a non-union employee object to paying the union on conscientious grounds, they are nevertheless required to pay the amount owing to a registered charity.[207] Similar laws apply in the US across 24 states that remain subject to the New Deal era *National Labor Relations Act*.[208] As Peetz has argued, similar provisions should be enacted in Australia and, at the very least, permitted in Australian enterprise agreements.[209]

5 *Protected Industrial Action*

There are a panoply of commentators who propose expanding the definition of protected industrial action beyond its current narrow formalist and contractual constraints, applied in the *Esso* case. Isaac, for instance, has seen increased use and legitimisation of industrial action by workers as integral to increasing lagging Australian wages and secure employment.[210] Meanwhile, McCrystal has commentated at length on such suggestions. Arguing along similar lines as New Zealand industrial commentator, Gordon Anderson[211] and UK employment scholar, Keith Ewing,[212] McCrystal proposes increased codification of strike

203 Ibid 333–9 (La Forest J, for Sopinka and Gonthier JJ); Debra Parkes, 'The Rand Formula Revisited: Union Security in the *Charter* Era' (2010) 61 *University of New Brunswick Law Journal* 223, 231–2.

204 *Lavigne* (n 201) 259 (Wilson J for L'Heureux-Dube J, Cory J agreeing at 342), 344 (McLachlin J).

205 William Kaplan, 'How Justice Rand Devised His Famous Formula and Forever Changed the Landscape of Canadian Labour Law' (2011) 62 *University of New Brunswick Law Journal* 73, 75.

206 *Canada Labour Code*, RSC 1985, c L-2, s 70(1).

207 Ibid s 70(2).

208 29 USC § 158 (1935). Agency fees remain subject to conscientious objection (as in Canada), following a ruling by the US Supreme Court during the Reagan era in *Communication Workers of America v Beck*, 487 US 735 (1988).

209 Peetz, 'Co-Operative Values' (n 135) 724–6.

210 Isaac (n 185) 183, 185.

211 McCrystal (n 41) 282–3, discussing Anderson (n 41).

212 McCrystal (n 41) 287, discussing Ewing, 'The Right to Strike' (n 41).

law.[213] In particular, she argues for the abandonment of what she has labelled the 'immunity approach' to industrial action in which those participating in industrial action are merely afforded an immunity from common law and contractual prosecution.[214] Instead, McCrystal suggests that industrial action be firmly enshrined as a statutory right, clarifying its place within a statutory framework as integral to the functioning of collective bargaining — rather than a mere common law 'privilege' open to judicial interpretation that may be arbitrarily cancelled whensoever the logic of contract appeals to a conservative judiciary.[215] Given the consequences of contractual logic when applied to striking workers, discussed above, McCrystal's suggestions are sensible intervention to stem judicial interference with labour law made by a democratically elected legislature.

V CONCLUSION

Through the lens of critical contract theory, we can see how the 18th century prism of formalist interpretation and the 19th century law of contract law have been used to refract and bend 20th century principles of labour law to the will of a conservative High Court. Indeed, this article has argued that such a retro formalist turn across labour law underlies significant recent legal change. It holds particular explanatory power in relation to the Court's most recent decision in the *Personnel Contracting* and *Jamsek*.

To reiterate, legal formalism and its narrow understanding of contract has a tendency to subsume reality — the reality of the labour exchange — into a legal fiction or a contractual form designed to favour the interests of employers over employees. This has been demonstrated across five areas of employment law in which we have observed common law courts do the following:

- construe the terms of employment contracts unilaterally, in accordance with a contractual label or description applied by an employer (rather than assessing objective reality);
- refuse to imply reciprocal or mutual employer obligations within employment contracts and arbitrarily replace statutory agreements with common law contracts;
- invent a mechanism for judging employment grievances (or 'adverse action') that mostly favours one party — the employer;
- prohibit matters in 'collective contracts' or statutory agreements permitting employees to improve their bargaining power in relation to employers (the prohibition of bargaining fees);

213 Ibid 300–1.

214 Ibid.

215 Ibid.

- confine the legitimate withdrawal of labour or industrial action to a highly discretionary, specific and narrow range of circumstances subject to punitive consequences unintended by the legislature, thereby reasserting the common law of contract.

Concerningly, the High Court's trend toward understanding employment law through formalism has influenced the legislature to codify some of these judicial interventions against the legitimate democratic interests of workers and unions. 'Objectionable matters' are one example. The pre-emptory definition of 'casual employment' is another. Equally, however, a democratic solution to this judicial trend lies within the power of the legislature to reverse outmoded and unfair legal doctrine and to recognise the reality of the labour exchange. In sum, this paper has proposed the following interventions to curb the problem:

- Extending the unfair contracts jurisdiction of the Fair Work Commission to set industry-wide standards on pay and conditions for 'employee-like' workers; permitting bargaining between employers and 'employee-like workers; and repealing s 15A of the *FW Act* and redefining casual employment under the Act as, 'the absence of a firm advance commitment' to the scheduling and duration of working hours;
- Amending the objects clause of the Act to include an interpretive principle involving a 'mutual duty of trust and confidence' between employers and employees;
- Inserting an additional provision under the 'General Protections' in the Act, defining the word 'because' to import a strictly objective test, rather than a subjective test of employer reasons for taking adverse action;
- Repealing the classification of 'bargaining fees' as an 'objectionable matter' under the Act; and requiring employees who are subject to an agreement bargained for by a union to pay the union for its services. Should a non-union employee object to paying the union on conscientious grounds, they must nevertheless be required to pay the amount owing to a registered charity;
- Clarifying the industrial action provisions under the Act by inserting provisions that define industrial action as a statutory right, crucial to the effective operation of the statutory collective bargaining provisions that precede it in the Act; and that any breach that prohibits future industrial action must be significant, not trivial (perhaps referring to the *Esso* case as an example of such triviality).

Each proposal accommodates the reality of the employment relationship, alongside the respective and mutual needs of both parties within the employment relationship to maximise both productivity and fairness. Whether these proposals become law is most likely contingent upon a change of government.