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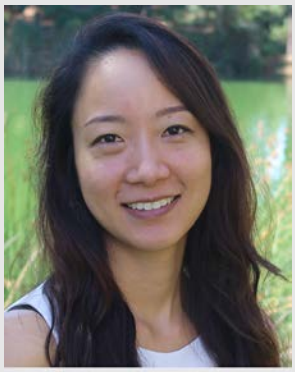

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In this article, Allen analyzes two recent judgments from the High Court of Australia that offer a revised framework for characterizing worker-hirer relationships based on contractual rights and duties rather than a multifactor test, and she examines their implications for tax and superannuation law.

On February 9 the High Court of Australia handed down two decisions in *Personnel No. 1*[1] and *Jamsek*.[2] In dealing with issues under the industrial relations law, the decisions set out a new common law framework for characterizing the relationship between a worker and the business that hires the worker. They carry significant consequences in various statutory contexts, including tax and superannuation laws.

Australia's federal income tax law uses the term "employee," when its meaning is construed as the common law technical meaning. An employer, according to common law, is obliged to withhold tax from any amount paid or payable from salary, wages, commissions, bonuses, or allowances[3] and pay tax on the benefits provided to its employees or their associates.[4] An employer is statutorily obligated to pay payroll tax under the law and regulation of the state in which it is situated. All states except Western Australia include a relevant contract[5] clause that deems all payments made under a relevant contract to be wages and the person in receipt of the deemed wages as an employee. Under the Superannuation Guarantee (Administration) Act 1992 (Cth) (SG Act), an employer also makes superannuation contributions for eligible employees to a complying superannuation fund or retirement savings account. Under the SG Act, any worker hired under contract wholly or principally to provide labor is entitled to employer contributions.[6]

For several decades, the Australian courts applied a multifactor test to characterize the relationship between worker and hirer. This test, however, raised uncertainty over which factors are to be considered relevant and how to weigh each factor to conclude a balance in different scenarios. In doing so, unlike the Supreme Court of Canada and the U.S. Supreme Court, Australia's courts gave limited regard to a purposive approach to the legislative interpretation of the term "employee" or "employ."[7] The principled approach has been one

[1] *Construction, Forestry, Maritime, Mining and Energy Union v. Personnel Contracting Pty. Ltd.*, [2022] HCA 1 (hereinafter, "*Personnel No. 1*").

[2] *ZG Operations Australia Pty. Ltd. v. Jamsek*, [2022] HCA 2.

[3] Tax Administration Act 1953 (Cth), schedule 1, section 12-35.

[4] Fringe Benefit Tax Assessment Act 1986 (Cth), section 136 (definitions of employee, employer, and fringe benefit).

[5] Generally, a relevant contract refers to a contract under which services are supplied for, or in relation to, a performance of work; or works are performed on goods supplied by a business for resupply of those goods to the business in a modified form.

[6] Superannuation Guarantee (Administration) Act 1992 (Cth), section 12(3) (meaning of the term "employee").

[7] Pauline Bomball, "Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work," 42(2) *Melb. U. L. Rev.* 370-405 (2019).

espoused in *Pemsel*[8]: The judicial meaning should be imported for interpreting an undefined statutory term unless the statute provides a technical meaning. Accordingly, the common law concept of employment had wide implications in various statutory contexts. This was shown in proceedings involving the German-founded food delivery service company Foodora.

A complaint was brought against Foodora for unfair dismissal of a worker.[9] Three months before the court handed down the decision to characterize the company as an employer, Foodora went into voluntary liquidation.[10] The decision not only imposed liability under industrial law; the Australian Taxation Office and state governments were also awaiting the decision to recover unpaid taxes, superannuation, and related penalties arising from late or overdue payments.

Departing from the decades-long multifactor test, early this year the High Court set a new path for the common law characterization of a worker-hirer relationship. The new approach relies on the rights and duties of the parties created by a written agreement. Given the uncertainties involved in applying the multifactor test, this approach was welcomed as a guide to facts and circumstances admissible in court.

However, as with any new test, more litigation is likely to arise to understand its application under different scenarios. Because the new test is centered on contractual terms, some businesses may use contract drafting technicalities to classify workers as independent contractors, making them ineligible for common law and statutory employee entitlements. This calls for statutory remedies in the form of statutorily defined terms to characterize the worker-hirer relationship under the legislation in question and the power to set aside a contract when it has been entered into in an unfair manner.

The Old Multifactor Test

These days, the common law's interest in employment is largely confined to vicarious liability in tort law. Earlier, the court had asked that question also to discern whether a criminal offense was committed by an employee in the course of employment.[11] The nature and degree of control was a significant factor for characterizing the relationship,[12] and was not confined to directing a worker — the manner in which the work was performed was also considered. Referring to control in characterizing a worker-hirer relationship, the High Court said that its importance was "not so much in its actual exercise, although clearly that is relevant, as in the right of the employer to exercise it."[13]

Control was long rejected in the Australian court as a prominent factor in characterizing an employment relationship under tort law. In *Stevens*,[14] Mason J said control was merely "one of a number of indicia"[15] and that "it is the totality of the relationship between the parties which must be considered."[16] The judge mentioned other factors that may be relevant, such as "the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee."[17]

Some of the factors taken to be relevant in later cases show close connections to a hirer's control over the worker. These factors were often found in the contract. For the provision of services, a contract creating an independent contractor relationship requires payments upon achieving a specific result for the delivery of work; whereas a contract creating an employment relationship

[8] *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] AC 531.

[9] *Klooger v. Foodora Australia Pty. Ltd.*, [2018] FWC 6836.

[10] Announced on August 20, 2018. *See* Dominic Powell, "As Foodora Leaves Australia, Who's Left? A Brief History of Australian Food Delivery Services," *SmartCompany*, Aug. 3, 2018.

[11] As mentioned in *ACE Insurance Ltd. v. Trifunovski*, (2011) 200 FCR 532, at 542 [25]. *See also Sweeney v. Boylan Nominees Pty. Ltd.*, (2006) 226 CLR 161, at 171-172 [27].

[12] *The Catholic Child Welfare Society v. Various Claimants*, [2012] UKSC 56, at [36].

[13] *Stevens v. Brodribb Sawmilling Co. Pty. Ltd.*, (1986) 160 CLR 16, 24 (Mason J, referring to *Zuijis v. Wirth Bros Pty. Ltd.*, (1955) 93 CLR 561, at 571: "What matters is lawful authority to command so far as there is a scope for it.").

[14] *Id.*

[15] *Id.* at 24 (Mason J). Similarly, control was outweighed in *Roy Morgan Research Pty. Ltd. v. Commissioner*, [2010] FCAFC 52, at 21 [49].

[16] *Id.* at 29 (Mason J).

[17] *Id.* at 24 (Mason J).

stipulates that payment is made in reference to the days and hours worked. In other words, employees work under obligations, whether legal or practical, directed by the hirer.[18] They do not have the right to work as much or little as they want or take leave as often or as long as they want.[19] They cannot delegate work to others unless agreed otherwise.

While the foregoing points to the duties and obligations of the parties, other rights and contractual terms may be considered. It is important to see them in balance, however, with the central question in mind: whether the relationship is one of employment or independent contractor. For example, the right to accept or reject work appears to be one of an independent contractor, but it is also an essential right of an employee. Both can choose to work or not to work, although an employee's choice tends to be confined to the whole of the work while an independent contractor may have the choice over parts of the work. The mode of remuneration is another factor that requires caution. Although the recurrence of payments generally belongs to an employment relationship, independent contractors can also be paid regularly and on a recurrent basis. Flexible work arrangements can inappropriately detract from the characterization of an employment relationship.

In *Stevens*, the court regarded the provision and maintenance of equipment, such as trucks, as an indication of an independent contractor relationship.[20] However, other facts and circumstances also pointed to independent contractors, such as the ability to set their own work hours, and payment by reference to the volume of timber delivered rather than as a fixed salary or wage. It is therefore difficult to predicate how much weight should be given to the provision and maintenance of equipment when more factors point the relationship to one of employment.

Over time the Australian court has developed a conventional view that if equipment supplied is of high value, the worker supplying the equipment would be an independent contractor.[21] To illustrate, two decisions involving Vabu Pty. Ltd. are relevant.

In the first, Vabu was brought to court for unpaid superannuation for its employees.[22] However, the New South Wales Court of Appeal held that Vabu was not an employer on the basis that its workers supplied their own equipment — vehicles, motorcycles, and bicycles — to provide courier services.

Five years later, the High Court distinguished the foregoing decision in *Hollis*.[23] In this case, Vabu was held to be an employer of a bicycle courier and accountable for the courier's negligence committed in the course of employment. The majority said that "in the present case, guidance for the outcome is provided by various matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability."[24] It shows that the decision was drawn in part because of the law concerned.[25] Damages that can be sought by virtue of vicarious liability in the law of tort could have been greatly constricted had the court decided on the characterization of Vabu as a non-employer. Nevertheless, the court noted that the decision was inferred by reference to the multifactor test,[26] noting that the equipment provided in this instance was an inexpensive bicycle, not a vehicle or motorcycle.

Hollis brought to the fore another factor that could be considered significant for characterizing a relationship in later cases. In the earlier case, *Colonial Mutual Life Assurance*,[27] Dixon J (he later became chief justice) said that an independent

[18] *Dental Corps. Pty. Ltd. v. Moffet*, [2020] FCAFC 118, at 13 [40].

[19] *Id.*

[20] *See Stevens*, (1986) 160 CLR 16.

[21] *Jamsek*, HCA 2 at 28-29 [88] (Gageler and Glesson JJ).

[22] *Vabu Pty. Ltd. v. Commissioner (Cth)*, (1996) 33 ATR 537. The special leave application to appeal to the High Court was rejected in *Commissioner (Cth) v. Vabu Pty. Ltd.*, (1997) 35 ATR 340.

[23] *Hollis v. Vabu Pty. Ltd.*, (2001) 207 CLR 21.

[24] *Id.* at 41 [45] (Gleeson CJ; Gaudron, Gummow, Kirby, and Hayne JJ).

[25] In *Catholic Child Welfare Society*, [2012] UKSC 56; [2013] 2 AC 1, Lord Phillips listed the reasons why vicarious liability exists (at [35]), of which the first reason is: "Employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against the liability."

[26] *See* the judicial assessment under the multifactor test, which followed from the mention of the doctrine of vicarious liability, in *Hollis*, 207 CLR at 41-46 [46]-[60].

[27] *Colonial Mutual Life Assurance Society Ltd. v. Producers and Citizens Co-Operative Assurance Co. of Australia Ltd.*, (1931) 46 CLR 41, 48 (Dixon J).

contractor "carries out his work, not as a representative but as a principal," whereas an employee is "representative (of the employer) standing in his place and, therefore, identified with him."[28] In *Hollis*, the High Court endorsed this distinction and agreed that an independent contractor does not represent or identify with the alleged employer.[29] The Court said that the distinction between an employee and an independent contractor was "fundamentally in the difference between a person who serves his employer in his, the employer's business, and a person who carries on a trade or business of his own."[30]

While the High Court appeared to take the matter in a binary sense, the question of whose business a worker represents or identifies with may not be answered in a clear dichotomy. This was illustrated in *Moffet*,[31] which concerned a doctor and the medical center to which the doctor belonged. The court found that the doctor was an independent contractor but by virtue of goodwill that he inured for the medical center. In its decision to characterize him as an independent contractor, the court departed from the binary approach to goodwill and said that two sets of distinct goodwill simultaneously existed in this case: goodwill for each doctor in the medical center and goodwill for the medical center itself.[32] The case illustrates that considerations of who is conducting what business, must not supplant the central inquiry of whether a relationship is one of employment or independent contractor.

The last point to the discussion of the multifactor test is taxation arrangements. The court has considered how one manages personal tax affairs, such as whether a worker files income tax returns as a sole trader or an employee, has an Australian business number, or is registered for goods and services tax and issues GST invoices. Notably, these have not been a determining factor but a checkpoint to reinforce the conclusion reached.[33] Tax consequences can vary because of the judicial characterization of the worker status.

The New Contract-Based Approach

The High Court's first two decisions in 2022 were *Personnel No. 1* and *Jamsek*, respectively. Both cases dealt with the industrial relations law, in which the Court set out a new approach to characterizing a relationship between hirer and worker.

The individual concerned in *Personnel No. 1* is a 22-year-old U.K. backpacker, Daniel Robert McCourt, working on construction sites under the direct supervision of the builder, Hanssen Pty. Ltd. Hanssen had labor hire arrangements with the appellant, Construct, that hired McCourt as a laborer. No agreement was written between McCourt and Hanssen. The facts, that McCourt provided unskilled labor and had limited work experience in running his own business, were not disputed.

The primary judge and the full court held that McCourt was an independent contractor and did not operate his own business. However, the reasoning was markedly different over control. The primary judge conceded that Construct had no control over the manner in which McCourt performed work and that he was neither integrated into the business of Construct nor represented himself as an employee of Construct.[34] Conversely, the full court identified control in a trilateral relationship and departed from the use of control as a significant factor. It said that control "may not be particularly helpful in the characterization of multilateral arrangements."[35] The full court recognized

[28] *Id*. This distinction was earlier made by Andrew J in *Braxton v. Mendelson*, (1922) 233 NY 122, 124: "Ordinarily no one fact is decisive. The payment of wages; the right to hire or discharge; the right to direct the servant where to go, and what to do; the custody or ownership of the tools and appliances he may use in his work; the business in which the master is engaged or that of him said to be a special employer; none of these things give us an infallible test. At times any or all of them may be considered. The question remains: In whose business was the servant engaged at the time?"

[29] *Hollis*, 207 CLR at 39 [40]. See also *ACE Insurance Ltd. v. Trifunovski*, [2013] FCAFC 3; 209 FCR 146, in which the court characterized insurance agents on the basis that they did not obtain goodwill in their own business even though they supplied cars and issued invoices for goods and services tax purposes.

[30] *See Hollis*, 207 CLR at 39 [40], quoting Windeyer J's passage in *Marshall v. Whittaker's Building Supply Co.*, (1963) 109 CLR 201 at 217.

[31] *See Moffet*, [2020] FCAFC 118.

[32] *Id.* at 22 [69].

[33] *Id.* at 15-16 [47].

[34] *Construction, Forestry, Maritime, Mining and Energy Union v. Personnel Contracting Pty. Ltd.*, [2019] FCA 1806.

[35] *Construction, Forestry, Maritime, Mining and Energy Union v. Personnel Contracting Pty. Ltd.*, [2020] FCAFC 122; (2020) 279 FCR at 658 [87]-[88] (Lee J).

tensions in applying various factors under the multifactor test but finally concluded that McCourt was an independent contractor. This decision was not because the relevant factors strongly pointed to his being an independent contractor. Rather, no clear error was found in the earlier decision in *Personnel No. 2*.[36]

In *Personnel No. 2*, the supreme court of Western Australia dealt with materially identical facts and circumstances in which the labor hirer in this case was held to be an independent contractor.

The High Court overturned the full court's decision to characterize the relationship between McCourt and Construct as one of employment. Kiefel CJ, Keane, and Edelman JJ said that the multifactor test is not a checklist to count ticks and crosses to determine a balance.[37] The judges then reiterated that the common law is concerned with a legal relationship, saying, "There is nothing artificial about limiting the consideration of legal relationships to legal concepts such as rights and duties."[38] They referenced *Narich*,[39] which approved the earlier decision in *Chaplin*[40] and established a long line of precedence in the Australian court. In *Narich*, Lord Brandon of Oakbrook said:

> Where there is a written contract between the parties whose relationship is in issue, a court is confined, in determining the nature of that relationship, to a consideration of the terms, express or implied, of that contract in the light of the circumstances surrounding the making of it; and it is not entitled to consider also the manner in which the parties subsequently acted in pursuance of such contract.[41]

Following this principle, the High Court established a new test: "where the parties have comprehensively committed the terms of their relation to a written contract the validity of which is not in dispute, the characterization of their relationship as one of employment or otherwise proceeds by reference to the rights and obligations of the parties under the contract."[42] This contract-based approach, the High Court asserted, was never superseded by the multifactor test, but actual work practices were sought only for common law questions on the rights and duties of the parties.[43]

The exception to the contract-based approach arises when the parties have not comprehensively committed the terms of their relation to a written contract. In this case substance beyond the contractual terms may be invited, as in *Stevens* and *Hollis*.[44] Examples include a situation in which the contract is partly in writing and partly oral; or where subsequent agreement or conduct effects a variation or waiver to the terms of the original contract.[45] Conversely, the contract-based approach cannot apply if the efficacy of a contract is challenged as either a sham or comes under equable doctrines such as those relating to unconscionable conduct under the general law or statute.[46] If so, a relevant legal issue surrounding the efficacy of a contract must be addressed first.

Like *Personnel No. 1*, *Jamsek* also did not involve the exception noted above. *Jamsek* dealt with truck drivers who initially engaged with the business as employees. When the business restructured to change the workers from employees to independent contractors, each truck driver and spouse formed a partnership to create a tax advantage through split income. Each partnership entered into a contract with the business and invoiced it for services performed. The only significant change to each truck driver was the purchase of a truck. Little changed in terms of the actual work practice. The proceedings were brought forward by a truck

[36] *Personnel Contracting Pty. Ltd. v. Construction, Forestry, Mining and Energy Union*, (2004) 141 IR 31 (hereinafter, "*Personnel No. 2*").

[37] *See Personnel No. 1*, HCA 1 at 15 [34] (Kiefel CJ; Keane and Edelman JJ).

[38] *Id.* at 18 [44] (Kiefel CJ; Keane and Edelman JJ).

[39] *Narich Pty. Ltd. v. Commissioner of Pay-Roll Tax*, [1983] 2 NSWLR 597, 600-601, referred in *Personnel No. 1*, HCA 1 at 19 [45] (*see also* at 20 [47]).

[40] *Australian Mutual Provident Society v. Chaplin*, (1978) 52 ALJR 407 at 409-410.

[41] *Narich Pty. Ltd. v. Commissioner of Pay-Roll Tax*, (1978) 52 ALJR 407 at 409-410 (Lord Brandon).

[42] *See Personnel No. 1*, HCA 1 at 25 [59] (Kiefel CJ; Keane, and Edelman JJ).

[43] *Id.* at 20 [47]-[48].

[44] As noted in *Personnel No. 1*, HCA 1 at 24 [56]-[57].

[45] *See Personnel No. 1*, HCA 1 at 18 [42]-[43]; 20 [48].

[46] *Id.*

driver seeking employee entitlements primarily under industrial relations law.

The primary judge characterized the workers as independent contractors based on the provision and maintenance of trucks that were of substantial value.[47] Overturning this decision, the full court said that trucks were not as significant as other relevant facts and circumstances in this case.[48]

The High Court agreed with the primary judge. It examined the rights and duties created by the written agreements, which comprehensively regulated the relationship between each truck driver and the business. Gordon and Steward JJ said: "Consistent with the principles set out in [*Personnel No. 1*], it was both relevant and admissible to adduce evidence to establish . . . that the [contract] was discharged, that a new contract was formed and what the terms of that contract were. By contrast, however, how the parties exercise their rights, performed their duties or unilaterally conducted themselves . . . was not relevant."[49]

Importantly, Kiefel CJ, Keane, and Edelman JJ pointed out two errors made by the full court in showing how the contract-based test applies in lieu of the multifactor test. The first error was "the significant attention devoted by that Court (and indeed the primary judge) to the manner in which the parties actually conducted themselves over the decades of their relationship."[50] Earlier, the full court considered what the workers were "ostensibly required, or at least expected"[51] to do, such as displaying the hiring company logo and wearing the company-branded clothing, and the expectations that the workers, not their delegates, would perform tasks nine hours a day, five days a week for the company, and that they generated no goodwill of their own. The judges, however, said that such circumstances did not alter the contractual rights and duties that governed the relationship.[52]

The second error was the consideration of "the disparity in bargaining power between the parties affected the contract pursuant to which the partnerships were engaged."[53] On the basis that work practices were substantially unchanged by entering the contract for service, with a proviso that drivers must supply their own trucks, the full court took an expansive approach to determine the relationship based on the "substance and reality," such as the fact that the nature of the work remained the same as when the workers were employees.[54] The judges said that "this expansive approach involves an unjustifiable departure from orthodox contractual analysis."[55]

It is expected that the decisions in *Personnel No. 1* and *Jamsek* will change the judicial scope for characterizing worker-hirer relationships in common law. Based on these decisions, a subjective intention has no bearing on the characterization. It does not matter if a worker entered a contract for service without acknowledging all material consequences, including various employee entitlements in common law and under statutes, or if a worker had significantly less bargaining power. The latter is a separate legal issue and must be dealt with under an appropriate law. Further, the inquiry into whose goodwill was inured, which has been a significant consideration under the multifactor test, is likely to be irrelevant, if not redundant. Goodwill can be built from work and is not a condition to create any worker-hirer relationship.

Also, a worker is likely to be taken as an independent contractor if the worker enters a contract under the name of a partnership, trust, or company. This is distinguishable from the earlier case, *Roy Morgan Research*,[56] in which some interviewers hired under the name of a company were held to be employees. While the court said in this case that incorporation is not a "silver bullet" that automatically renders a worker an

[47] The High Court reiterated the primary judge's conclusion in *Jamsek*, HCA 2 at 13-15 [37]-[43]. The primary judge's decision can be found in *Whitby v. ZG Operations Australia Pty. Ltd.*, [2018] FCA 1934.

[48] *Jamsek v. ZG Operations Australia Pty. Ltd.*, (2020) 279 FCR 114.

[49] *See Jamsek*, HCA 2 at 35-36 [109] (Gordon and Steward JJ).

[50] *Id.* at 2 [6] (Kiefel CJ; Keane and Edelman JJ).

[51] *Id.* at 18 [52], quoting *Jamsek v. ZG Operations*, 279 FCR 114 at 160 [224] (Anderson J).

[52] *Id.* at 18-20 [52]-[58] (Kiefel CJ; Keane and Edelman JJ).

[53] *See id.* at 2 [6].

[54] *Id.* at 17-18 [51].

[55] *Id.*

[56] *Roy Morgan Research*, FCAFC 52.

independent contractor, this remark is no longer unsustainable. In *Jamsek*, the High Court noted that the contracts were entered by partnerships, not individual workers, and the partners in each partnership were jointly and severally liable and entitled to receive a remuneration for the work performed under the respective contract.[57]

Conclusion and Policy Considerations

The recent High Court cases are the latest to chart the ever-changing and often ambiguous and imprecise multifactor test. The decisions in these cases set out a new approach based on contractual rights and duties of the parties, which is expected to provide more judicial certainty in characterizing a worker-hirer relationship. Before settling on the new approach, however, two questions remain.

Policymakers and scholars have long argued that the point of every piece of law is to serve its intended purpose and object. It asks a question of whether the legislative terms such as "employee" and "employ" are appropriately framed in the spirit of the law in question. These terms are significant in determining whether a person falls in or out of the scope of law for payroll tax, superannuation, fringe benefits tax, and, to a lesser degree, how income and expenses can be treated under the income tax law. Now, the same meaning given in common law is used in various statutory contexts, and policy considerations are necessary to evaluate the appropriateness in applying the common law meaning.

As noted, the SG Act extends entitlement to receive superannuation to workers wholly or principally hired for their labor, for which "(a) there should be a 'contract'; (b) which is wholly or principally 'for' the labour of a person; and (c) that the person must 'work' under that contract."[58]

In the past, if a worker guaranteed minimum income for the business that hires him, the worker was generally considered an independent contractor. This followed the decision in *Moffet*, in which the doctor effectively secured a minimum cash flow for the medical center by virtue of the "annual cash flow shortfall" clause contained in the contract between the parties. In this case, the court held that the contract was not one wholly or principally for the labor of the doctor.[59]

A similar approach may be taken in which a worker is required to supply equipment. Although, in *Jamsek*, the High Court did not deal with this matter because the commissioner of taxation was not a party to the proceedings,[60] and equipment of significant value cannot surpass the fact that the benefit accrued to a hirer is primarily for labor. Although some uncertainty remains because of the absence of a judicial decision on this aspect, defining terms such as "employee" and "employ" can better signal the legislative intent, distinct from that of the statutes.

Another and equally valid policy consideration concerns the fundamental feature that laws must be just and fair. While the disparity of bargaining power at the time of entering a contract is irrelevant for characterizing a relationship between worker and hirer, challenging the efficacy of a commercial arrangement as a sham or under equitable doctrines is not an easy task. For example, the doctrine of unconscionable conduct in equity requires conduct to be not merely unfair but also so harsh or oppressive that it goes against good consciences (such as serious misconduct). The onus is on the stronger party to prove that the transaction is "fair, just and reasonable."[61] To prevent workers from entering a contract from undue influence and to promote fair bargaining, legislative remedies can be provided for the identification of a real and substantial bargaining power imbalance in areas that create contractual terms, or even set aside a contract entered into in an unfair manner.

The Australian business community has long waited for clear doctrines for characterizing the worker-hirer relationship. The High Court has finally provided some solutions. They are, however, still a work in progress, with several policy questions still unanswered. ■

[57] *See Jamsek,* HCA 2 at 28-29 [88]-[89].

[58] *See Moffet*, FCAFC 118 at [82] (Perram and Anderson JJ).

[59] *Id*.

[60] *See Jamsek,* HCA 2 at 24 [75].

[61] *Commercial Bank of Australia Ltd. v. Amadio*, (1983) 151 CLR 447, 474 (Deane J).