THE 'ENTREPRENEURSHIP APPROACH' TO DETERMINING EMPLOYMENT STATUS: A NORMATIVE AND PRACTICAL CRITIQUE

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Recently, the concept of entrepreneurship has attracted increased attention in the Australian case law on employment status. Some judges have adopted an 'entrepreneurship approach' in determining whether a worker is an employee or an independent contractor, while others have rejected this approach. Although the concept of entrepreneurship has appeared increasingly frequently in the cases, it remains an under-theorised concept. This article critically evaluates the concept from a normative worker-protective perspective. It assesses the entrepreneurship approach by reference to theories of power and vulnerability in the employment relationship, and critically examines cases from the United States of America ('US') that illustrate the nature and practical operation of the entrepreneurship approach. The article argues that an entrepreneurship approach that operates in a manner similar to the 'ABC' test in the US warrants consideration by those seeking to revitalise the tests for employment status in Australia.

I INTRODUCTION

In their recent treatise on the common law of employment, Professors Gordon Anderson, Douglas Brodie and Joellen Riley observed that there is a need to 'revitalize the tests used to identify the contract of employment, so that they guard against the inappropriate use of self-employment'.[1] This need has become particularly pressing in recent years, as changes in the nature of working relationships have presented challenges to the traditional architecture for determining whether a worker is an employee or an independent contractor.[2] This

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1 Gordon Anderson, Douglas Brodie and Joellen Riley, *The Common Law Employment Relationship: A Comparative Study* (Edward Elgar, 2017) 68.

2 See, eg, Brishen Rogers, 'Employment Rights in the Platform Economy: Getting back to Basics' (2016) 10(2) *Harvard Law and Policy Review* 479, 480–3; Sandra Fredman and Darcy du Toit, 'One Small Step towards Decent Work: *Uber v Aslam* in the Court of Appeal' (2019) 48(2) *Industrial Law Journal* 260, 260–1; Joellen Riley, 'The Definition of the Contract of Employment and its Differentiation from Other Contracts

article argues that the 'entrepreneurship approach'[3] to determining employment status is a promising candidate for the task of revitalisation. In substantiating this argument, this article adopts a normative perspective, critically analysing the entrepreneurship approach through a worker-protective lens. Critiquing legal doctrine from a worker-protective perspective is a well-established technique of labour law scholars.[4] As Professor Anne Davies has observed, '[t]he impact of a particular development – whether common law or statutory – on workers' interests will always be central to labour lawyers' concerns'.[5]

In undertaking a normative critique of the entrepreneurship approach to employment status, this article extends the literature in two ways. First, it examines and elucidates the relationship between the concepts of vulnerability and entrepreneurship in the employment context. In the Australian context, a worker-protective approach to determining employment status, and indeed a worker-protective approach to labour law more generally, is predicated upon the assumption that employees possess certain characteristics that render them in need of protection.[6] As Professor Andrew Stewart has observed, there is a distinction between 'those workers who prima facie require protection from the consequences of their lack of bargaining power, or who should have access to social benefits paid for (at least in part) by those who hire their services, from those who do not merit such protection or benefits'.[7]

Theorists of employment law have articulated these characteristics or vulnerabilities in various ways. For example, Sir Otto Kahn-Freund identified the relevant vulnerability as an inequality of bargaining power between the employer and the employee.[8] Professor Hugh Collins examined the asymmetry of power between the employer and the employee through the concepts of market power and bureaucratic power.[9] Professor Guy Davidov captured the relevant vulnerabilities

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and Other Work Relations' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 321, 326; Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2nd ed, 2011) 165–6, 197–9; Committee of Experts on the Application of Conventions and Recommendations, *Promoting Employment and Decent Work in a Changing Landscape*, 109th sess, ILO Doc ILC109/III(B) (25 February 2020) 82 [158] ('*Promoting Employment and Decent Work*').

3 See, eg, *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation [No 3]* (2011) 214 FCR 82, 122–3 (Bromberg J) ('*On Call Interpreters*'); *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346, 389–92 (North and Bromberg JJ) ('*Quest*'); *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631, 637–8 (Allsop CJ) ('*Personnel Contracting*').

4 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, 95.

5 Ibid.

6 Guy Davidov, *A Purposive Approach to Labour Law* (Oxford University Press, 2016) ch 3; Guy Davidov, 'The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection' (2002) 52(4) *University of Toronto Law Journal* 357, 376–94; Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15(3) *Australian Journal of Labour Law* 235, 260 ('Redefining Employment?').

7 Stewart, 'Redefining Employment?' (n 6) 260.

8 Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law* (Stevens & Sons, 3rd ed, 1983) 18.

9 Hugh Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (1986) 15(1) *Industrial Law Journal* 1 ('Market Power').

in the concepts of democratic deficits and dependency.[10] This article evaluates the entrepreneurship approach to determining employment status by reference to these theories of power and vulnerability in the employment relationship. The legal tests for employment status should, on a worker-protective approach, be able to identify accurately those workers who exhibit the vulnerabilities that justify the conferral of employment status and the concomitant protections of labour law.[11] This article contends that the entrepreneurship approach is capable of identifying as employees those workers who exhibit the relevant vulnerabilities.

The second way in which this article extends the literature is through its comparative analysis of cases on the entrepreneurship approach in the United States of America ('US'). This comparative study reveals insights about the nature and practical operation of the entrepreneurship approach that would not be discerned simply by examining the emerging Australian case law on this approach. This article explores two distinct judicial approaches to entrepreneurship in US cases concerning the distinction between employees and independent contractors. The first approach is located in a line of case law from the United States Court of Appeals for the District of Columbia Circuit ('DC Circuit Court').[12] In these cases, the DC Circuit Court adopted the 'entrepreneurial opportunity' test.[13] This article critically analyses these cases and uses this analysis to demonstrate that the entrepreneurship approach can, if applied by reference to the existence of entrepreneurial opportunities as opposed to the actual exercise of entrepreneurial functions,[14] lead to the exclusion from employment status of those who exhibit the vulnerabilities of employees. The second approach that is examined is that of the Supreme Court of California in *Dynamex Operations West Inc v Superior Court of Los Angeles County* ('*Dynamex*').[15] In this case, the Court adopted the 'ABC' test for determining employment status.[16] The ABC test invokes the concept of entrepreneurship in a way that enables the test to bring within the protective scope of labour law those workers who are vulnerable in the relevant sense. To this author's knowledge, the approach of the DC Circuit Court has not received any scholarly attention in Australia, and the ABC test has been referred to only briefly in the Australian literature.[17]

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10 Davidov, *A Purposive Approach to Labour Law* (n 6) ch 3.

11 Ibid ch 6.

12 See, eg, *Corporate Express Delivery Systems v National Labor Relations Board*, 292 F 3d 777 (DC Cir, 2002) ('*Corporate Express Delivery Systems*'); *FedEx Home Delivery v National Labor Relations Board*, 563 F 3d 492 (DC Cir, 2009) ('*FedEx Home Delivery*'); *Lancaster Symphony Orchestra v National Labor Relations Board*, 822 F 3d 563 (DC Cir, 2016) ('*Lancaster Symphony Orchestra*').

13 *Corporate Express Delivery Systems*, 292 F 3d 777, 780 (Ginsburg J for the Court) (DC Cir, 2002); *FedEx Home Delivery*, 563 F 3d 492, 497–8 (Brown J) (DC Cir, 2009); *Lancaster Symphony Orchestra*, 822 F 3d 563, 569–70 (Tatel J for the Court) (DC Cir, 2016).

14 See below Part III(A).

15 416 P 3d 1, 34–40 (Cantil-Sakauye CJ for the Court) (Cal, 2018) ('*Dynamex*').

16 Ibid. See below Part III(B).

17 The author has found references to the ABC test in the footnotes of the following Australian scholarly works: 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) 294 n 18; Andrew Stewart and Shae McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?'

The entrepreneurship approach to determining whether a worker is an employee or an independent contractor has recently attracted increased attention in Australia. In the *Report of the Inquiry into the Victorian On-Demand Workforce*, which was released in July 2020, it was recommended that the *Fair Work Act 2009* (Cth) be amended to include a definition of employment that enshrines the entrepreneurship approach.[18] The Victorian report referred, among other things, to diverging judicial views about the proper approach to the application of the multifactorial test for employment status in Australia.[19] The multifactorial test for employment status comprises a range of factors, including the nature and extent of the control that the hiring organisation exercises over the worker,[20] the extent to which the worker is integrated into the organisation's business, whether the worker is paid on the basis of time or on the basis of task completion, whether the worker is permitted to delegate the work to another party, whether the organisation supplies the tools and equipment required for performance of the work, and whether the worker is permitted to work for others.[21] A court is required to weigh up these factors to determine whether the worker is an employee or an independent contractor.[22] The conclusion that a worker is an employee carries with it several important consequences, including that the worker is eligible for a range of statutory rights and protections that are conferred upon employees only.[23] Workers who are not categorised as employees, such as independent contractors, are usually not able to access these statutory rights and protections.[24]

In some cases, courts invoke the concept of entrepreneurship in their application of the multifactorial test for employment status.[25] In essence, this involves asking whether the worker is carrying on a business of their own.[26] If the question is answered in the negative, then it is likely that the worker is an employee.[27] The courts' conceptualisation of entrepreneurship is based upon the following proposition, which was articulated by Windeyer J in *Marshall v Whittaker's*

(2019) 32(1) *Australian Journal of Labour Law* 4, 8 n 24 ('Labour Regulation and the Great Divide'). In these footnotes, it was stated that there are similarities between the entrepreneurship approach in the Australian cases and the ABC test in the United States.

18 Natalie James, *Report of the Inquiry into the Victorian On-Demand Workforce* (Report, 12 June 2020) 192.

19 Ibid 105–6, 185–7.

20 The term 'hiring organisation' or 'hirer' is used throughout this article as a neutral term referring to the person or organisation that hires a worker to perform work: see Stewart, 'Redefining Employment?' (n 6) 235 n 2.

21 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.

22 *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939, 944 (Mummery J); *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2010) 184 FCR 448, 460 (The Court).

23 Joellen Riley Munton, 'Judge-Made Law in the Common Law World: A Conservative Influence on the Transformation of Labour Law by Statute' in Tamás Gyulavári and Emanuele Menegatti (eds), *The Sources of Labour Law* (Wolters Kluwer, 2020) 75, 78.

24 Ibid.

25 See cases cited at above n 3. See also Stewart and McCrystal, 'Labour Regulation and the Great Divide' (n 17) 8; Anderson, Brodie and Riley (n 1) 34–7.

26 *On Call Interpreters* (2011) 214 FCR 82, 123–7 (Bromberg J); *Quest* (2015) 228 FCR 346, 389–92 (North and Bromberg JJ).

27 See above n 26.

Building Supply Co[28] and subsequently embraced by a majority of the High Court of Australia in *Hollis v Vabu Pty Ltd*:[29] '[T]he distinction between [an employee] and an independent contractor is … rooted 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]

Three distinct approaches to the concept of entrepreneurship are discernible from the Australian case law on employment status.[31] Under the first approach, the concept of entrepreneurship is treated as a separate test for determining employment status.[32] Under the second approach, the concept of entrepreneurship is regarded as an overarching framework or organising principle that informs the evaluation of the various factors in the multifactorial test.[33] According to this approach, the factors are assessed to determine whether the worker is carrying on a business of their own. Under the third approach, the concept of entrepreneurship is regarded as simply one factor that is to be weighed against others in the multifactorial test.[34] In cases that have adopted the third approach, it has been emphasised that the central question is not whether the worker is an entrepreneur, but rather whether the worker is an employee.[35] Focusing on the issue of entrepreneurship is, according to this view, likely to distract from that central question.[36] This article is not concerned with discerning the proper approach to the multifactorial test as a matter of legal doctrine. That issue is the subject of a separate article.[37] In that article, it is argued that the proper approach is the one that treats the concept of entrepreneurship as the organising principle that informs the evaluation of the factors in the multifactorial test.[38] This article adopts that view of the role of entrepreneurship in the legal determination of employment status.

Leaving those doctrinal issues to one side, this article asks and answers a different question: does the entrepreneurship approach accurately capture those workers who possess the characteristic vulnerabilities of employees? The answer to this question is relevant to the broader issue addressed in this article, which is whether the entrepreneurship approach is a promising candidate for the project of

28 (1963) 109 CLR 210.

29 (2001) 207 CLR 21.

30 *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210, 217.

31 Pauline Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (2021) 43(1) *Sydney Law Review* 83, 89–93 ('Vicarious Liability').

32 Ibid 85 n 17, citing *On Call Interpreters* (2011) 214 FCR 82, 123–7 (Bromberg J); *Quest* (2015) 228 FCR 346, 389–92 (North and Bromberg JJ).

33 Bomball, 'Vicarious Liability' (n 31) 86 n 26, citing *Personnel Contracting* (2020) 279 FCR 631, 637–40 (Allsop CJ).

34 Bomball, 'Vicarious Liability' (n 31) 85 n 21, citing *Tattsbet Ltd v Morrow* (2015) 233 FCR 46, 61 (Jessup J) ('*Tattsbet*'); *Fair Work Ombudsman v Ecosway Pty Ltd* [2016] FCA 296, [78] (White J); *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114, 118 (Perram J), 147 (Anderson J); *Dental Corp Pty Ltd v Moffet* (2020) 278 FCR 502, 518 (Perram and Anderson JJ); *Eastern Van Services Pty Ltd v Victorian WorkCover Authority* (2020) 296 IR 391, 399–400 (The Court). See also Bomball 'Vicarious Liability' (n 31) 92–3.

35 See, eg, *Tattsbet* (2015) 233 FCR 46, 61 (Jessup J).

36 Ibid.

37 Bomball, 'Vicarious Liability' (n 31).

38 Ibid 101–4.

revitalising the legal tests for determining employment status. One point about the scope of this article should be noted at the outset. In order for a person who has been engaged to perform work to fall within the 'employee' category, it must be established that there is a contract between the hirer and the person performing the work.[39] It must also be shown that the contract is a contract of employment (as opposed to some other type of contract, such as an independent contract).[40] This article focuses on the second issue and does not consider the antecedent question of whether there is a contract between the hirer and the worker.

The article proceeds in the following way. Part II of the article explores the concept of vulnerability in employment relations at a theoretical level. It examines two related bodies of theoretical work. The first body of work builds an account of the nature of power within the employment relationship.[41] An understanding of the power dynamics within an employment relationship is vital to understanding the concept of vulnerability in this relationship. The second body of work directly considers the vulnerabilities of employees.[42] This article engages with these two bodies of work in order to build a theoretical framework for assessing the entrepreneurship approach to determining employment status. Turning from theory to practice, Part III of the article analyses two different judicial approaches to the concept of entrepreneurship in the US: the 'entrepreneurial opportunity test' enunciated by the DC Circuit Court,[43] and the 'ABC' test adopted by the Supreme Court of California in *Dynamex*.[44] Part IV of the article harnesses the insights from the theoretical analysis in Part II and the comparative study in Part III to demonstrate the worker-protective potential of the entrepreneurship approach to determining employment status.

This article subjects to close scrutiny the use of the concept of entrepreneurship as the overarching framework for the application of the indicia in the multifactorial test. Judicial use of the concept of entrepreneurship in the inquiry as to employment status remains the subject of significant contestation in Australian law.[45] In a recent article on employment status in the United Kingdom, Professor Simon Deakin argued that, while the legal inquiry as to employment status directs attention to a myriad of indicia that need to be weighed and balanced, that inquiry is not simply a fact-dependent exercise that is devoid of any coherence at a conceptual level.[46]

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39 Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6th ed, 2016) 204, citing *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95.

40 Stewart et al, (n 39) 204.

41 Collins, 'Market Power' (n 9); Orsola Razzolini, 'The Need to Go beyond the Contract: "Economic" and "Bureaucratic" Dependence in Personal Work Relations' (2010) 31(2) *Comparative Labor Law and Policy Journal* 267 ('The Need to Go beyond the Contract'); Davies and Freedland, *Kahn-Freund's Labour and the Law* (n 8) 18.

42 Davidov, *A Purposive Approach to Labour Law* (n 6) ch 3, ch 6; Lisa Rodgers, *Labour Law, Vulnerability and the Regulation of Precarious Work* (Edward Elgar Publishing, 2016).

43 See cases cited at above n 12.

44 *Dynamex*, 416 P 3d 1 (Cal, 2018).

45 See above nn 25–38 and accompanying text.

46 Simon Deakin, 'Decoding Employment Status' (2020) 31(2) *King's Law Journal* 180, 193. See also Alan Bogg, Michael Ford and Tania Novitz, 'Introduction to the Special Issue' (2020) 31(2) *King's Law Journal* 167, 169–70.

Professor Deakin considered a number of overarching tests in his article, discerned from the cases in the United Kingdom, including 'control, integration, economic reality and mutuality of obligation'.[47] As Professor Deakin demonstrated, the particular overarching test or approach that is applied has a significant bearing on how a court attributes weight to particular factors, and on how the court groups particular factors together into 'clusters'.[48] The manner in which factors are clustered together is important 'because the way in which the individual indicators are grouped together influences the relative weight which a court or tribunal is likely to accord to any one of them'.[49] As this clustering and weighting process is influenced by the overarching approach, it is important that the overarching approach be critically evaluated. This article selects one of those overarching approaches (the entrepreneurship approach) and subjects it to close analysis.

II CONCEPTUALISING VULNERABILITY IN THE EMPLOYMENT RELATIONSHIP

This part of the article builds the theoretical framework that will be used to assess the worker-protective potential of the entrepreneurship approach to determining employment status. The normative critique undertaken by this article is anchored in the concept of vulnerability. Employees are vulnerable in ways that are distinctive and that justify the intervention of labour law.[50] It is this quality of vulnerability that justifies the conferral of protection upon employees.[51] This normative vision of the beneficiary of labour law is consistent with Sir Otto Kahn-Freund's seminal articulation of the purpose of labour law. In an oft-quoted passage, Sir Otto Kahn-Freund observed that 'the main object of labour law has always been, and … will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship'.[52]

The concept of inequality of bargaining power captures one aspect of the vulnerability of employees. It directs attention more generally to the notion of power within the employment relationship. An understanding of the power relations between employers and employees is of assistance in developing an exposition of the concept of vulnerability in the employment relationship. Accordingly, this part of the article turns first to theories of power before examining the interaction between the concepts of power and vulnerability in the employment relationship.

47 Deakin, 'Decoding Employment Status' (n 46) 191.
48 Ibid 185.
49 Ibid.
50 Davidov, *A Purposive Approach to Labour Law* (n 6) ch 3.
51 Ibid 48.
52 Davies and Freedland, *Kahn-Freund's Labour and the Law* (n 8) 18. See also Joellen Riley, 'The Evolution of the Contract of Employment post WorkChoices' (2006) 29(1) *University of New South Wales Law Journal* 166, 172–3.

A Power in the Employment Relationship

In his scholarship on the notion of power within the employment relationship, Professor Hugh Collins identified two dimensions of the power wielded by employers.[53] He referred to these as 'market power' and 'bureaucratic power'.[54] Market power arises at the point of entry into the employment contract, whereas bureaucratic power subsists for the duration of the contract.[55] In more recent work,[56] Professor Collins developed these concepts by reference to Sir Otto Kahn-Freund's distinction between the notions of submission and subordination within the employment relationship.[57] Professor Collins captured the employee's position at the point of entry into the contract in the notion of 'submission'.[58] This submission arises in part by virtue of the employer's market power, and the employer's market power is in turn primarily a product of market forces.[59] On the other hand, the employee's position during the subsistence of the employment contract is one of 'subordination',[60] created primarily by contractual duties imposed upon the employee that implement and support a structure of bureaucratic control over the employee.[61] The following sections explore these two aspects of the power relation between employers and employees through these concepts of market power and bureaucratic power.

In a recent contribution, Professor Mark Freedland drew attention to the control that hiring organisations have over the terms upon which they contract with their workers.[62] Professor Collins explored the market forces that give rise to this inequality of bargaining power between the parties, including asymmetric knowledge and resources, and transaction costs.[63] The employer generally has, relative to the employee, greater access to resources that can be directed towards the negotiation of the contract, and greater knowledge and experience in entering contracts for the performance of work.[64] This enables the employer to exert significant control over the terms of the contract, and enables the employer to structure the contract in a way that is favourable to the employer rather than to the employee.[65] Asymmetric information also leaves the employee in a position where they are not fully informed about the relevant terms and conditions that are

53 Collins, 'Market Power' (n 9).
54 Ibid.
55 Ibid 1–2.
56 Hugh Collins, 'Is the Contract of Employment Illiberal?' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press, 2019) 48.
57 Davies and Freedland, *Kahn-Freund's Labour and the Law* (n 8) 18, quoted in ibid 51 n 8.
58 Collins, 'Is the Contract of Employment Illiberal?' (n 56) 51–2.
59 Ibid.
60 Ibid 52–6.
61 Ibid.
62 Mark Freedland, 'General Introduction: Aims, Rationale, and Methodology' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 3, 11–18.
63 Collins, 'Market Power' (n 9) 1–2. See also David Cabrelli, 'The Role of Standards of Review in Labour Law' (2019) 39(2) *Oxford Journal of Legal Studies* 374, 384–8; Razzolini, 'The Need to Go beyond the Contract' (n 41) 279–80; Davidov, *A Purposive Approach to Labour Law* (n 6) 48–54.
64 Collins, 'Market Power' (n 9) 1–2.
65 Ibid.

available and of their 'value' in the market,[66] leaving the employee in an inferior position in the negotiation. Moreover, in a significant number of cases, there may be no negotiation at all, with contracts offered on a take it or leave it basis.[67] Prospective employees are often not in a position to reject an unfavourable offer and look for alternative work.[68] There are costs associated with looking for jobs and negotiating contracts, and the existence of alternative opportunities may be limited.[69] The market forces that are in play at the point of entry into the contract explain Sir Otto Kahn-Freund's observation that the contract of employment is, '[i]n its inception … an act of submission'.[70]

Sir Otto Kahn-Freund also opined that 'in its operation [the contract of employment] is a condition of subordination'.[71] Professor Collins drew a connection between the idea of bureaucratic power and the employee's condition of subordination during the subsistence of the employment contract.[72] The employee works within a bureaucratic organisation with a hierarchical structure.[73] This hierarchy, with its system of direction and control, is necessary for the effective and efficient operation of the organisation.[74] This bureaucratic power is vested in the employer by the contract of employment.[75] A suite of terms are implied by law into the employment contract.[76] Of particular relevance are the employee's duty of fidelity and duty to obey lawful and reasonable directions of the employer.[77] The employment contract institutionalises and supports a bureaucratic power structure in which employees are subordinate to their employers.[78]

Importantly, bureaucratic power exists regardless of the bargaining power of the employee at the point of entry into the contract of employment.[79] That is, the employee's subordination exists even if there is an absence of submission on the part of the employee in the negotiation of the terms of the contract. There are some employees who, because of their unique skills or attributes, are not in an inferior bargaining position relative to their employers.[80] However, regardless of

66 Ibid. See also Rodgers, *Labour Law, Vulnerability and the Regulation of Precarious Work* (n 42) 59.
67 See Owens, Riley and Murray, *The Law of Work* (n 2) 164; Hugh Collins, 'Legal Responses to the Standard Form Contract of Employment' (2007) 36(1) *Industrial Law Journal* 2.
68 Collins, 'Market Power' (n 9) 1–2; Davidov, *A Purposive Approach to Labour Law* (n 6) 49.
69 Collins, 'Market Power' (n 9) 1–2; Davidov, *A Purposive Approach to Labour Law* (n 6) 49.
70 Davies and Freedland, *Kahn-Freund's Labour and the Law* (n 8) 18, quoted in Collins, 'Is the Contract of Employment Illiberal?' (n 56) 51 n 8.
71 Davies and Freedland, *Kahn-Freund's Labour and the Law* (n 8) 18.
72 Collins, 'Is the Contract of Employment Illiberal?' (n 56) 52–6.
73 Ibid.
74 Ibid.
75 Ibid.
76 For an analysis of implied terms in the contract of employment, see Hugh Collins, 'Implied Terms in the Contract of Employment' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 471; Gabrielle Golding, 'Terms Implied by Law into Employment Contracts: Are They Necessary?' (2015) 28(2) *Australian Journal of Labour Law* 113; Gabrielle Golding, 'The Origins of Terms Implied by Law into English and Australian Employment Contracts' (2020) 20(1) *Oxford University Commonwealth Law Journal* 163.
77 Collins, 'Is the Contract of Employment Illiberal?' (n 56) 52.
78 Ibid 52–6.
79 Ibid 52; Collins, 'Market Power' (n 9) 1–2.
80 Collins, 'Is the Contract of Employment Illiberal?' (n 56) 52; Collins, 'Market Power' (n 9) 1–2.

the employee's bargaining power at the outset, upon entry into the employment contract, the employer's bureaucratic power arises.[81] Professor Collins' theoretical exposition of the power structure in the employment relationship is of significance in articulating the vulnerabilities of employees that warrant their protection, through means of 'counteraction'[82] of the asymmetry of power, by labour law. Those vulnerabilities, which emerge because of the employer's market power and bureaucratic power, are captured in the concepts of submission and subordination.

B Vulnerability in the Employment Relationship

In his account of the employment relationship, Professor Davidov identified two types of vulnerabilities that employees characteristically possess, which he termed 'democratic deficits' (or 'subordination') and 'dependency'.[83] Professor Davidov contended that these two vulnerabilities comprise the 'unique characteristics'[84] of employees that render them in need of the protection of labour law, and that the tests for determining employment status should capture these characteristics.[85] Turning first to the notion of democratic deficits, Professor Davidov referred to the necessity, within an organisation, for the employer to exert control over employees.[86] This control, which is often effected through the use of managers, is essential in order for the employer to coordinate work within the organisation.[87] It is not feasible for individual employees to participate in the making of the myriad decisions that need to be made in order for the organisation to operate effectively.[88]

Professor Davidov observed that the control that an employer exerts over its employees may be rationalised in two ways. The first explanation for the employer's control is founded in the power theory.[89] According to this theory, the employer's ascendency and wielding of power represents the domination of capital over labour in the struggle between the two groups.[90] The second explanation is grounded in economic theories of efficiency.[91] Drawing upon Coase's theory of the firm[92] and subsequent developments of that theory by other scholars,[93] Professor

81 Collins, 'Is the Contract of Employment Illiberal?' (n 56) 52; Collins, 'Market Power' (n 9) 1–2. See also Razzolini, 'The Need to Go beyond Contract' (n 41) 280–2.

82 Davies and Freedland, *Kahn-Freund's Labour and the Law* (n 8) 18.

83 Davidov, *A Purposive Approach to Labour Law* (n 6) 35–6.

84 Ibid 35.

85 Ibid ch 3, ch 6.

86 Ibid 37–8.

87 Ibid.

88 Ibid.

89 Ibid 40.

90 Ibid. See also Rodgers, *Labour Law, Vulnerability and the Regulation of Precarious Work* (n 42) 21–2.

91 Davidov, *A Purposive Approach to Labour Law* (n 6) 40–3.

92 RH Coase, 'The Nature of the Firm' (1937) 4(16) *Economica* 386, cited in Davidov, *A Purposive Approach to Labour Law* (n 6) 41 nn 33–4.

93 Armen A Alchian and Harold Demsetz, 'Production, Information Costs, and Economic Organization' (1972) 62(5) *American Economic Review* 777; Oliver E Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (Free Press, 1975) ch 4; Oliver E Williamson, *The Economic Institutions of Capitalism* (Free Press, 1985); Oliver E Williamson, 'Transaction-Cost Economics: The Governance of Contractual Relations' (1979) 22(2) *Journal of Law and Economics* 233, all cited in Davidov, *A Purposive Approach to Labour Law* (n 6) 41–2 nn 35–6.

Davidov observed that a hierarchical structure of governance promotes the efficient operation of the organisation through a reduction in transaction costs and through the mitigation of shirking and opportunism.[94]

Both theories aid in explaining the governance structure of the organisation, a structure that institutionalises the employer's control over the employee. Professor Davidov contended that this governance structure impedes the democratic participation of employees in decisions that affect their working lives.[95] In a democracy, those to whom decisions apply are to have a right to participate in the making of those decisions.[96] The structure of governance imposed upon those in an employment relationship is such that they have limited opportunity to participate in decisions that have a substantial impact upon their lives.[97] Professor Davidov invoked the phrase 'democratic deficits',[98] which he used interchangeably with the term 'subordination',[99] to capture this aspect of the employment relationship. Employees are subordinate because they are subject to the employer's control.[100] The absence of an ability of the part of employees to control decisions that affect their working lives renders employees subordinate and thereby vulnerable.

In addition to subordination, Professor Davidov identified a second vulnerability within the employment relationship, which he called dependency.[101] He argued that there are two key aspects of this notion of dependency, which he termed economic dependency and social/psychological dependency.[102] Economic dependency refers to an employee's dependence upon the employer for the employee's economic livelihood.[103] Social/psychological dependency refers to the employee's dependence upon the employer for the employee's social and psychological wellbeing.[104] Work provides people with a forum for social connectedness as well as an outlet for the expression of their identity, the direction of their creative and productive energies, the refinement of their skills, the development of their self-worth, and the promotion of their sense of dignity.[105] Core to these economic and social/psychological dependencies is the absence of an ability on the part of the employee to spread their risks.[106] An employee is usually dependent upon the one employing entity for the fulfilment of their work-related social/psychological and economic needs.[107] Independent contractors, on the other hand, can generally spread these risks among different clients, suppliers, products and workers, thereby providing themselves

94 Davidov, *A Purposive Approach to Labour Law* (n 6) 41–2.
95 Ibid 38–9.
96 Ibid.
97 Ibid.
98 Ibid.
99 Ibid 35, 39–40.
100 Ibid 38–40.
101 Ibid 43.
102 Ibid.
103 Ibid 45–8.
104 Ibid 43–5.
105 Ibid.
106 Ibid 44–5, 47–8.
107 Ibid.

with a degree of self-insurance from these risks.[108] It should be acknowledged that dependency is not necessarily a distinguishing attribute of employees. As Professor Davidov observed, there are employees who work multiple jobs and are not dependent upon the one employer for the fulfilment of their social/psychological and economic dependencies.[109] Likewise, there are independent contractors who are dependent upon one client for most or all of their work.[110]

C The Interaction between Vulnerability and Entrepreneurship

The entrepreneurship approach directs attention to whether the worker is carrying on a business of their own, as opposed to working in the business of the organisation that has engaged the worker.[111] In those Australian cases where the concept of entrepreneurship has been treated as the central inquiry for the purposes of determining employment status, it has been recognised that there are significant differences between working for another and working in one's own business.[112] Professor Andrew Stewart, who has advocated for statutory enshrinement of the entrepreneurship approach to employment status,[113] has similarly embraced the proposition that there are important differences between these two modes of working.[114] Professor Stewart observed that '[t]here does seem to be a fundamental difference, in a capitalist system, between running your own business and working for somebody else's'.[115]

The differences between the two forms of work arrangements may be explained by reference to the theories of power and vulnerability discussed above. This explanation demonstrates the utility of the entrepreneurship approach to determining employment status. As noted at the outset of this article, the entrepreneurship approach treats the concept of entrepreneurship as the overarching framework or prism through which to evaluate the various indicia in the multifactorial test.[116] The present author contends that the use of entrepreneurship as the touchstone for the inquiry has much to commend it. The entrepreneur is not brought within the bureaucratic structure of the organisation for which they perform work. The entrepreneur, by virtue of carrying on a business of their own, stands outside that bureaucratic structure. The degree

108 Ibid.
109 Ibid 45.
110 Ibid.
111 *On Call Interpreters* (2011) 214 FCR 82, 122–3 (Bromberg J); *Quest* (2015) 228 FCR 346, 389–92 (North and Bromberg JJ); *Personnel Contracting* (2020) 279 FCR 631, 637–8 (Allsop CJ).
112 See above n 111. See also *Marshall v Whittaker's Building Supply Company* (1963) 109 CLR 210, 217 (Windeyer J).
113 See Stewart, 'Redefining Employment' (n 6) 270–6; Cameron Roles and Andrew Stewart, 'The Reach of Labour Regulation: Tackling Sham Contracting' (2012) 25(3) *Australian Journal of Labour Law* 258, 279–80; Stewart, Stanford and Hardy (eds), *The Wages Crisis in Australia: What It Is and What to Do about It* (n 17) 291; Stewart and McCrystal, 'Labour Regulation and the Great Divide' (n 17) 21–2.
114 Stewart, 'Redefining Employment' (n 6) 261.
115 Ibid.
116 This is the approach to the concept of entrepreneurship that has been adopted by the present author. As noted above, there are competing approaches to the concept of entrepreneurship in cases concerning employment status. These competing approaches are considered above at nn 31–8 and accompanying text, and in Bomball, 'Vicarious Liability' (n 31).

of bureaucratic power that may be exerted over the entrepreneur is significantly attenuated in this context. In this regard, the entrepreneur does not occupy a position of subordination vis-à-vis the organisation, in the sense that Professor Collins conceived of subordination.[117] Nor does the entrepreneur exhibit the characteristics of subordination identified by Professor Davidov.[118] The entrepreneur makes the decisions as to the running of the business and as to their working life.

From a normative perspective, an approach to identifying employment that focuses on the notion of entrepreneurship is desirable. The worker-protective critique in this article proceeds on the basis that there are certain vulnerabilities exhibited by employees that warrant their protection by labour law.[119] Accordingly, in order for the entrepreneurship approach to be of utility from a worker-protective perspective, it must be able to capture accurately the characteristics of employees that render them vulnerable vis-à-vis their employers. The theoretical analysis presented above suggests that the entrepreneurship approach is able to designate as employees those workers who exhibit the relevant vulnerabilities, and to exclude from protection those who are capable of protecting themselves within the realm of commercial law. The following part of this article turns from the theoretical to the practical. It explores how the entrepreneurship approach has operated in practice in the US, and draws from this comparative analysis several lessons for Australia.

III VULNERABILITY AND ENTREPRENEURSHIP: A COMPARATIVE LENS

This part of the article examines two different judicial approaches to the concept of entrepreneurship in the US. The US has been selected for this comparative analysis because there is a well-developed body of case law in that jurisdiction on the concept of entrepreneurship in the employment context.[120] More generally, the US is a suitable comparator on the legal test for determining employment status because of a number of similarities between the Australian and US labour law frameworks.[121] These include the fact that the distinction between employees and independent contractors arises in similar contexts, including in relation to the law of vicarious liability, and in respect of the application of statutes that operate by reference to the concept of employment, such as labour statutes and taxation statutes.[122] In addition, in both Australia and the US, the content of the concept of

117 See above nn 71–81 and accompanying text.

118 See above nn 83–100 and accompanying text.

119 See above nn 50–2 and accompanying text.

120 See, eg, *Corporate Express Delivery Systems*, 292 F 3d 777 (DC Cir, 2002); *FedEx Home Delivery*, 563 F 3d 492 (DC Cir, 2009); *Lancaster Symphony Orchestra*, 822 F 3d 563 (DC Cir, 2016); *Dynamex*, 416 P 3d 1 (Cal, 2018).

121 Pauline Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (2019) 42(2) *Melbourne University Law Review* 370, 386–7 ('Statutory Norms and Common Law Concepts').

122 Ibid, citing Marc Linder, 'Dependent and Independent Contractors in Recent US Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness' (1999) 21(1) *Comparative Labor*

employment is in many instances left to the judiciary, with legislation generally leaving the concept of employment undefined.[123] In both jurisdictions, courts also apply variously formulated multifactorial tests to determine whether a worker is an employee or an independent contractor.[124]

Before presenting the analysis of the US case law, it is important to explain the purpose of this comparative exercise. In an article on the methodology and objectives of comparative contract law, Professor Hugh Collins identified four ways in which legal scholars might approach the task of comparative analysis.[125] The third and fourth approaches are of relevance here. The third approach involves the scholar examining the law of an overseas jurisdiction for solutions to domestic problems.[126] This approach often involves exploring and recommending the transplantation of a common law or statutory development in the overseas jurisdiction that has addressed effectively a problem that remains unresolved in the domestic jurisdiction.[127] The success of such an approach depends upon a range of factors, including the suitability of the selected comparator.[128] A proposed legal transplant must be examined not in isolation but rather in the context, including the social and political context, in which it originated.[129] The similarity of these contextual factors across the two jurisdictions is an important determinant of the success of the transplantation.[130] The fourth approach that Professor Collins identified is one that involves exploring the law of an overseas jurisdiction in order to understand better certain aspects of domestic law.[131] This approach requires, among other things, that the comparative law scholar be sufficiently attentive to the function and effect of legal doctrines, rather than simply the label assigned to the doctrines.[132] Both approaches require the scholar to identify with precision the relevant social problem to be addressed.[133]

The comparative analysis undertaken in this article may be explained by reference to those two approaches. The particular social problem explored in this article is that of the misclassification of employees as independent contractors. The Supreme Court of California encapsulated the problem succinctly in *Dynamex Operations West Inc v Superior Court of Los Angeles County*:

Law and Policy Journal 187; Richard R Carlson, 'Why the Law Still Can't Tell an Employee when It Sees One and How It Ought to Stop Trying' (2001) 22(2) *Berkeley Journal of Employment and Labor Law* 295, 305–6.

123 Bomball, 'Statutory Norms and Common Law Concepts' (n 121) 386–7.

124 Ibid 386, citing *Nationwide Mutual Insurance Co v Darden*, 503 US 318, 323–4 (Souter J for the Court) (1992), quoting *Community for Creative Non-Violence v Reid*, 490 US 730, 751–2 (Marshall J for the Court) (1989). See also below nn 161–4 and accompanying text.

125 Hugh Collins, 'Methods and Aims of Comparative Contract Law' (1991) 11(3) *Oxford Journal of Legal Studies* 396.

126 Ibid 397–8.

127 Ibid.

128 Ibid.

129 Ibid.

130 Ibid.

131 Ibid 398–9.

132 Ibid.

133 Ibid 397–9.

> In recent years, the relevant regulatory agencies of both the federal and state governments have declared that the misclassification of workers as independent contractors rather than employees is a very serious problem, depriving federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled.[134]

The problem of worker misclassification has also been highlighted in the Australian case law and literature.[135] The problem may be explained using the language of vulnerability. Some workers who possess the characteristic vulnerabilities of employees are not being captured by the legal tests for determining employment status. This article considers whether a particular judicial approach, which identifies entrepreneurship as the overarching framework for application of the multifactorial test, captures workers who exhibit the relevant vulnerabilities. To be clear, this article is not proposing a reformulation of the multifactorial test to incorporate an element of vulnerability into it. It is, instead, critically examining a judicial approach to the multifactorial test, which is currently the subject of contestation in Australian law, to determine whether it accurately captures the relevant workers. The previous part of this article considered the issue from a theoretical perspective. The analysis of US law in this part of the article is used to shed light on the issue from a practical perspective.

In assessing the practical operation of the entrepreneurship approach, this article is mindful of the cautionary note, sounded by Professor Collins, that the comparative scholar needs to take into account the effect and function of a legal principle and not just the label assigned to it.[136] In this regard, this article selects for comparison not only the 'entrepreneurial opportunity test' propounded by the DC Circuit Court,[137] but also the 'ABC' test adopted by the Supreme Court of California in *Dynamex*.[138] While the ABC test does not refer explicitly to the term 'entrepreneurship' or its variants, two of the three limbs of the test direct attention to whether the worker is carrying on a business of their own as opposed to working in the business of the hiring organisation.[139] The concept of entrepreneurship is therefore central to the operation of the ABC test. The following sections of the article examine the entrepreneurial opportunity test and the ABC test.

A The Entrepreneurial Opportunity Test

In *Corporate Express Delivery Systems v National Labor Relations Board* ('*Corporate Express Delivery Systems*'),[140] the DC Circuit Court considered whether owner-drivers who worked for Corporate Express Delivery Systems were employees of that company for the purposes of a claim concerning unfair labour

134 *Dynamex*, 416 P 3d 1, 5 (Cantil-Sakauye CJ for the Court) (Cal, 2018).
135 See, eg, *On Call Interpreters* (2011) 214 FCR 82, 120–1 (Bromberg J); *Quest* (2015) 228 FCR 346, 378 (North and Bromberg JJ); Roles and Stewart (n 113).
136 Collins, 'Methods and Aims of Comparative Contract Law' (n 125) 399.
137 See, eg, *Corporate Express Delivery Systems*, 292 F 3d 777 (DC Cir, 2002); *FedEx Home Delivery*, 563 F 3d 492 (DC Cir, 2009); *Lancaster Symphony Orchestra*, 822 F 3d 563 (DC Cir, 2016).
138 416 P 3d 1 (Cal, 2018).
139 Ibid 35 (Cantil-Sakauye CJ for the Court). See also above n 17.
140 292 F 3d 777 (DC Cir, 2002).

practices under the *National Labor Relations Act* ('*NLRA*').[141] The National Labor Relations Board ('NLRB') had concluded that the owner-drivers were employees. The employer petitioned the DC Circuit Court for a review of the NLRB's decision. Chief Judge Ginsburg, who delivered the opinion of the Court, upheld the NLRB's decision. In concluding that the owner-drivers were employees, Ginsburg CJ endorsed the NLRB's reasoning which focused 'not upon the employer's control of the means and manner of the work but instead upon whether the putative independent contractors have a "significant entrepreneurial opportunity for gain or loss"'.[142] Chief Judge Ginsburg stated that the entrepreneurial opportunity test 'better captures the distinction between an employee and an independent contractor'.[143]

In explaining the entrepreneurial opportunity test, Ginsburg CJ referred to the examples of the 'full-time cook',[144] the 'corporate executive' and the provider of 'lawn-care' services.[145] His Honour observed that the cook and the corporate executive are employees, notwithstanding that the person or entity who employs them exercises very limited control over their work.[146] The provider of lawn-care services who works at multiple sites, on the other hand, is an independent contractor regardless of the degree of control exercised over their work by the person or entity who has engaged the provider.[147] Chief Judge Ginsburg stated:

> The full-time cook and the executive are employees and the lawn-care provider is an independent contractor not because of the degree of supervision under which each labors but because of the degree to which each functions as an entrepreneur – that is, takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder.[148]

Of significance to Ginsburg CJ's conclusion that the owner-drivers were employees was the fact that the company prohibited them from delegating their work to others and from using their vehicles to perform delivery work for other companies.[149] His Honour stated that entrepreneurs are generally able to work for others and to engage others to carry out their work.[150] His Honour held that the owner-drivers in this case 'lacked all entrepreneurial opportunity and consequently functioned as employees'.[151]

Subsequently, in *FedEx Home Delivery v National Labor Relations Board* ('*FedEx Home Delivery*'),[152] the DC Circuit Court adopted and applied the

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141 29 USC §§ 151–69 (1935).
142 *Corporate Express Delivery Systems*, 292 F 3d 777, 780 (DC Cir, 2002).
143 Ibid.
144 Ibid. Chief Judge Ginsburg took this example from the reasoning of the National Labor Relations Board below, which in turn took it from the American Law Institute, *Restatement (Second) of Agency* (1958) § 202(1).
145 *Corporate Express Delivery Systems*, 292 F 3d 777, 780 (DC Cir, 2002).
146 Ibid.
147 Ibid.
148 Ibid.
149 Ibid.
150 Ibid.
151 Ibid 780–1.
152 563 F 3d 492 (DC Cir, 2009).

entrepreneurial opportunity test. *FedEx Home Delivery* is a leading decision on the entrepreneurial opportunity test. The decision is, for this reason, discussed at length in this article. *FedEx Home Delivery* illustrates how a test that focuses on the mere existence of entrepreneurial opportunities, as opposed to the actual exercise of entrepreneurial functions, can be narrow and restrictive in its operation. The case involved an unfair labour practices claim under the *NLRA*. The issue was whether owner-drivers engaged by FedEx Ground Package System Inc were employees or independent contractors for the purposes of the *NLRA*. The owner-drivers in question delivered parcels for FedEx as part of FedEx's Home Delivery Division and were based in Wilmington, Massachusetts. The NLRB found that the drivers were employees and FedEx petitioned the DC Circuit Court for a review of the NLRB's decision. Circuit Judge Brown delivered the Court's opinion.[153] Her Honour concluded that the owner-drivers were independent contractors, and thereby granted FedEx's petition. Circuit Judge Garland delivered a forceful dissenting opinion that will be considered later in this article.[154]

Judge Brown recognised that the NLRB and the Court were to apply the 'common-law agency test'[155] when determining whether a worker was an employee or an independent contractor. In so doing, her Honour referred[156] to the decision of the Supreme Court of the United States in *National Labor Relations Board v United Insurance Co of America*,[157] in which the Court had held that courts were to apply the common-law agency test in cases concerning employment status under the *NLRA*.[158] This is a multifactorial test comprising a range of indicia. It is similar to the multifactorial test that was enunciated by the High Court of Australia in *Stevens v Brodribb Sawmilling Co Pty Ltd*[159] and endorsed in *Hollis v Vabu Pty Ltd*.[160] The non-exhaustive list of indicia in the US common-law agency test was encapsulated in the *Restatement (Second) of Agency* ('*Restatement*').[161] The relevant section of the *Restatement* provides:

> In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
>
> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

153 Judge Brown and Senior Circuit Judge Williams were in the majority. Judge Garland filed an opinion dissenting in part.

154 See below Part IV(A).

155 *FedEx Home Delivery*, 563 F 3d 492, 496 (DC Cir, 2009).

156 Ibid 496.

157 390 US 254 (1968).

158 Ibid 254, 256 (Black J for the Court).

159 (1986) 160 CLR 16.

160 (2001) 207 CLR 21.

161 American Law Institute, *Restatement (Second) of Agency* (1958) § 220(2), quoted in *FedEx Home Delivery*, 563 F 3d 492, 496 n 1 (Brown J), 506 n 3 (Garland J) (DC Cir, 2009).

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.[162]

In *FedEx Home Delivery*, Judge Brown observed that the indicia in the common-law agency test had, '[f]or a time', been applied by reference to the 'meta-question' of control.[163] The notion of control had provided an overarching framework by which the various indicia in the test had been evaluated.[164] Judge Brown stated that the judgment in *Corporate Express Delivery Systems*[165] had modified the approach to determining employment status by shifting the focus from control to entrepreneurialism.[166] Her Honour summarised the modified approach as follows:

> [W]hile all the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism.[167]

Significantly, in assessing whether the owner-drivers exhibited the characteristics of entrepreneurs, Judge Brown focused on their potential to exercise entrepreneurial opportunities, rather than their actual exercise of entrepreneurial functions. Her Honour stated that 'it is the worker's retention of the right to engage in entrepreneurial activity rather than his regular exercise of that right that is most relevant for the purpose of determining whether he is an independent contractor'.[168]

In determining that the owner-drivers had 'entrepreneurial potential'[169] and were thereby independent contractors, Judge Brown focused on some factors and gave less weight to others. Judge Brown accorded significance to the terms of the contract.[170] The contract expressly stated that the owner-drivers were independent contractors.[171] Other contractual terms that her Honour regarded as important included those which stipulated that the drivers 'are not subject to reprimands or other discipline',[172] that the drivers could provide substitutes to perform their

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162 *Restatement (Second) of Agency* § 220(2).
163 *FedEx Home Delivery*, 563 F 3d 492, 496 (DC Cir, 2009).
164 Ibid.
165 *Corporate Express Delivery Systems*, 292 F 3d 777 (DC Cir, 2002).
166 *FedEx Home Delivery*, 563 F 3d 492, 497 (DC Cir, 2009).
167 Ibid.
168 Ibid 502, quoting *CC Eastern Inc v National Labor Relations Board*, 60 F 3d 855, 860 (Ginsburg J) (DC Cir, 1995).
169 Ibid 498.
170 Ibid 498, 504.
171 Ibid.
172 Ibid 498.

deliveries, that the drivers could elect to be assigned multiple routes, that the drivers were to supply and maintain their own vehicles, that the drivers were permitted to use their vehicles for other purposes outside of the hours they worked for FedEx, and that FedEx did not direct the workers as to their start and end times on a particular day nor when they were to take breaks.[173] Judge Brown regarded as particularly significant the right that FedEx drivers had to sell their routes to others, which her Honour stated was indicative of entrepreneurialism because it provided an opportunity for profit.[174] It was also relevant that one of the owner-drivers had been able to negotiate payment rates with FedEx.[175]

Judge Brown accorded less weight to the factors that were indicative of an employment relationship. The owner-drivers were required to display the FedEx logo on their delivery vehicles and to wear a FedEx uniform.[176] Although the drivers supplied their own vehicles, these vehicles had to comply with FedEx's requirements as to size and colour.[177] While delivering parcels for FedEx, the owner-drivers were not permitted to use their vehicles for other work or activities.[178] The drivers were permitted to use their vehicles for other purposes, including other work, during times that they were not working for FedEx, so long as they removed or covered the FedEx logo on their vehicles.[179] The evidence indicated, however, that the schedule of deliveries that FedEx maintained for each driver was such that there was limited opportunity for a driver to perform other work.[180] Moreover, there was only evidence of one driver (out of the 36 drivers) taking up the opportunity to perform other delivery work.[181]

The owner-drivers were required to perform deliveries for FedEx (either themselves or through the use of substitute drivers) from Tuesday through to Saturday of each week.[182] While they were permitted to use substitute drivers, the evidence revealed that many of the owner-drivers who used substitute drivers sourced the latter from an existing pool of approved drivers that FedEx had established.[183] FedEx required owner-drivers who had no previous experience to undergo training.[184] FedEx drivers were required to comply with standards of conduct set by the company.[185] FedEx also monitored the performance of its owner-drivers through its system of customer service rides; each driver was required to submit to two of these audits each year.[186] The owner-drivers' engagement with the company could be terminated for want of compliance with FedEx's standards

173 Ibid 498–9.
174 Ibid 500.
175 Ibid 499.
176 Ibid 500.
177 Ibid.
178 Ibid 498 (Brown J), 510 (Garland J).
179 Ibid 498 (Brown J).
180 Ibid 514 (Garland J).
181 Ibid 499 (Brown J), 514 (Garland J).
182 Ibid 501 (Brown J).
183 Ibid 499 (Brown J), 515 (Garland J).
184 Ibid 500 (Brown J).
185 Ibid 501 (Brown J).
186 Ibid 500–1 (Brown J).

of conduct, and they could be counselled in relation to non-compliance.[187] While FedEx did not direct the owner-drivers as to how they structured their working hours and breaks, FedEx allocated the drivers a set number of parcels at the beginning of a particular day and required the drivers to deliver all of those parcels by the end of the day.[188] FedEx allocated routes to the owner-drivers and was able unilaterally to reconfigure the routes that the drivers had been assigned.[189] The NLRB had also observed that the work performed by the owner-drivers (the delivery of parcels) was integral to FedEx's business.[190]

FedEx set the payment rates for deliveries, and only in one instance had there been an owner-driver who negotiated his own payment rate.[191] FedEx also offered incentive-based payments.[192] FedEx had various schemes to insulate their owner-drivers to some degree from the risk of losses, including reimbursements when there were sharp increases in petrol prices.[193] In addition,

> FedEx [insulated] its contractors from loss to some degree by means of the vehicle availability payment, which they receive[d] just for showing up, and the temporary core zone density payment, both of which payments guarantee[d] contractors an income level predetermined by FedEx, irrespective of the contractors' personal initiative.[194]

While FedEx permitted the owner-drivers to sell their routes, there were constraints on this exercise.[195] Moreover, the evidence showed that only one driver had possibly profited from selling a route, and the evidence as to profit was tenuous.[196] While the owner-drivers could elect to have multiple routes assigned to them, and they could engage other drivers to service the additional routes, the evidence showed that only three of the drivers had taken up this opportunity.[197] In any event, the NLRB below had held that those three drivers were not employees.[198]

The analysis of *FedEx Home Delivery* above indicates that the entrepreneurial opportunity test is a narrow test for employment status. By focusing on entrepreneurial opportunities rather than upon the actual exercise of entrepreneurial functions, this test can operate to exclude from labour law's protection those who are not truly entrepreneurs. The entrepreneurial opportunity test has been applied in subsequent decisions of the DC Circuit Court.[199] An alternative approach, which also treats entrepreneurship as central but focuses on the exercise of entrepreneurial functions in practice rather than upon the existence of entrepreneurial opportunities

187 Ibid 513 (Garland J).
188 Ibid 510–11 (Garland J).
189 Ibid 501 (Brown J).
190 Ibid 502 (Brown J).
191 Ibid 499 (Brown J), 512 (Garland J).
192 Ibid 501 (Brown J).
193 Ibid.
194 Ibid 512 (Garland J).
195 Ibid 515 (Garland J).
196 Ibid 500 (Brown J), 515–16 (Garland J).
197 Ibid 515 (Garland J).
198 Ibid.
199 See, eg, *Lancaster Symphony Orchestra*, 822 F 3d 563 (DC Cir, 2016). See also American Law Institute, *Restatement (Third) of Employment Law* (2006) § 1.01(a)(1)–(3).

specified in the contract, is the ABC test. This test provides a broader and more inclusive approach to employment status.[200]

B The ABC Test

In *Dynamex Operations West Inc v Superior Court of Los Angeles County*,[201] the Supreme Court of California adopted the ABC test. At issue in this case was the appropriate test for distinguishing between employees and independent contractors for the purposes of the relevant California wage order (*Industrial Welfare Commission Wage Order No 9*) which regulated the wages, working hours and certain working conditions of employees in the transportation industry.[202] Under the order, the word 'employee' was defined as 'any person employed by an employer'.[203] The definition of the word 'employ' was to 'engage, suffer, or permit to work'.[204]

Dynamex Operations West Inc operated a courier business and hired delivery drivers to carry out the deliveries. Until 2004, the delivery drivers were engaged as employees. Thereafter, the company changed its contractual arrangements with its drivers, classifying them as independent contractors.[205] Two of the delivery drivers brought this claim against Dynamex, with the primary allegation being that the company had contravened the wage order.[206] The claim was brought on behalf of a class of delivery drivers that were said to be in a similar position to the two drivers who brought the claim, as well as on behalf of the drivers themselves. Dynamex brought a motion to decertify the class. When the matter reached the Supreme Court of California, the only issue to be determined was the appropriate test to be applied to distinguish between employees and independent contractors for the purposes of the wage order.[207]

Chief Justice Cantil-Sakauye delivered the opinion of the Court. Her Honour explained the ABC test in the following way:

> Under this test, a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.[208]

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200 See David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014) 204–5 ('*The Fissured Workplace*'); Anna Deknatel and Lauren Hoff-Downing, 'ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes' (2015) 18(1) *University of Pennsylvania Journal of Law and Social Change* 53, 66–74 ('ABC on the Books and in the Courts').

201 416 P 3d 1 (Cal, 2018).

202 Ibid 5 (Cantil-Sakauye CJ for the Court).

203 *California Code Regulations*, tit 8 § 11090(2)(E).

204 Ibid § 11090(2)(D).

205 *Dynamex*, 416 P 3d 1, 8 (Cantil-Sakauye CJ for the Court) (Cal, 2018).

206 Ibid 5 (Cantil-Sakauye CJ for the Court).

207 Ibid 5–7 (Cantil-Sakauye CJ for the Court).

208 Ibid 7.

Her Honour stated that this test creates a presumption of employment, observing that '[t]he ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies each of three conditions'.[209] Of particular relevance are Cantil-Sakauye CJ's observations about parts (B) and (C) of the test. As to part (B), her Honour regarded as significant those 'who would ordinarily be viewed by others as working in the hiring entity's business and not as working, instead, in the worker's own independent business'.[210] This captures the essence of the entrepreneurship approach. Chief Justice Cantil-Sakauye gave several examples to illustrate the concept. A plumber or electrician engaged by the owner of a retail store to fix a leak or perform electrical works would not be performing work in the usual course of that retail store's business.[211] On the other hand, cake decorators working for a bakery, and seamstresses working for a clothing company, do perform work that is in the usual course of the bakery's and the clothing company's businesses respectively.[212]

As to part (C) of the test, Cantil-Sakauye CJ stated that

> [a]s a matter of common usage, the term 'independent contractor,' when applied to an individual worker, ordinarily has been understood to refer to an individual who independently has made the decision to go into business for himself or herself … Such an individual generally takes the usual steps to establish and promote his or her independent business – for example, through incorporation, licensure, advertisements, routine offerings to provide the services of the independent business to the public or to a number of potential customers, and the like.[213]

Her Honour also noted that it will generally be useful for a court to start with parts (B) or (C) as they are 'easier and clearer'[214] to apply than part (A). In disposing of the appeal, Cantil-Sakauye CJ stated that both parts (B) and (C) were, in the context of this claim, 'amenable to resolution on a class basis',[215] with reference to the class of delivery drivers that had been certified by the trial court.[216]

IV THE WORKER-PROTECTIVE POTENTIAL OF THE ENTREPRENEURSHIP APPROACH: A CRITICAL EVALUATION

This part of the article harnesses the insights from the theoretical analysis and comparative study presented earlier to evaluate the worker-protective potential of the entrepreneurship approach. Those engaged in the project of revitalising the legal tests for employment status in Australia may discern valuable lessons from the US experience. The comparative analysis presented above demonstrated that

209 Ibid 34 (emphasis omitted).
210 Ibid 37.
211 Ibid.
212 Ibid.
213 Ibid 39.
214 Ibid 40.
215 Ibid 42.
216 Ibid. A version of the ABC test has recently been enshrined in statute in California: Worker Status: Employees and Independent Contractors, AB 5, 2019–20 Leg, 1st Reg Sess, ch 296 (Cal 2019).

there are some benefits, viewed from a worker-protective perspective, to using entrepreneurship as the overarching approach in cases concerning employment status. At the same time, the comparative study revealed some cautionary tales regarding the use of the concept of entrepreneurship. These insights would not be discerned simply by examining the emerging Australian case law on the entrepreneurship approach. The following section critically evaluates the US case law and draws out key lessons for the Australian context.

A Vulnerability and Entrepreneurship: Lessons from the US Case Law

The decision of the DC Circuit Court in *FedEx Home Delivery* demonstrates that the entrepreneurship approach is not necessarily worker-protective (in the sense of being able accurately to capture workers who exhibit the characteristic vulnerabilities of employees) in practice. In that case, there were multiple factors that indicated that the workers possessed the unique vulnerabilities of employees, yet they were held to be independent contractors primarily on the basis that they had a contractual right to engage in entrepreneurial opportunities. The focus on the right to engage in entrepreneurial opportunities, as opposed to the actual exercise of entrepreneurial functions, is problematic when one has regard to the power relations between the worker and the organisation. The theories of power discussed earlier in this article are illuminating here.[217] There is an inequality of bargaining power between the parties at the point of entry into the contract, one result of which is that the organisation has significant control over the drafting of the contract. An approach that focuses on contractual rights conferred in relation to entrepreneurial opportunities, as opposed to the actual exercise of those rights, is likely to lead to an exclusion from employment status of workers who in practice possess the vulnerabilities of employees. In his Honour's dissenting opinion in *FedEx Home Delivery*, Judge Garland expressed strong reservations about an approach that focuses on entrepreneurial opportunity or potential.[218]

A second important lesson that may be discerned from the DC Circuit Court's judgment in *FedEx Home Delivery* is that it is important for courts to identify with precision the factors that are of significance to demonstrating entrepreneurialism. Judge Garland disagreed with the relevance that the majority attributed to some factors, and with the majority's downplaying of other factors.[219] His Honour pointed out that several of the factors that Judge Brown invoked in aid of the conclusion that these workers had entrepreneurial opportunity were of limited relevance to the entrepreneurialism inquiry.[220] Judge Garland noted, for example, that Judge Brown had pointed to the label stipulating that the relationship was one of independent

217 See above Part II(A).

218 *FedEx Home Delivery*, 563 F 3d 492, 516–17 (DC Cir, 2009). In his Honour's dissenting opinion, Judge Garland disagreed with the majority's reasoning on multiple grounds, including that the entrepreneurial opportunity test was not supported by the precedents: at 507–10. In addition, Judge Garland pointed out that many of the factors that the majority invoked in favour of a finding that the workers had entrepreneurial opportunities were not relevant to entrepreneurialism: at 510–17. See the discussion in this article at below nn 219–28 and accompanying text.

219 *FedEx Home Delivery*, 563 F 3d 492, 510–17 (DC Cir, 2009).

220 Ibid 510–13.

contracting.[221] Judge Garland observed that the existence of the label had no bearing upon whether the workers had entrepreneurial opportunity.[222]

Judge Garland also observed that FedEx's absence of control over the worker's hours of work and break time, and the absence of a formal system of reprimand, were not relevant to the issue of entrepreneurial opportunity but rather to 'the extent of the employer's control'.[223] Judge Garland also noted, '[i]n any event',[224] that 'although FedEx does not fix specific hours or break times, it does require its contractors to provide delivery services every day, Tuesday through Saturday, and to finish each day's deliveries by the end of the day',[225] and that FedEx 'does deny drivers bonuses if they fail release audits and uses both counselling and termination as tools to ensure compliance with work rules'.[226] As to the risk of loss, an important aspect of entrepreneurship, Judge Garland was of the view that the various schemes that FedEx had in place, including those providing reimbursements when there were sharp rises in petrol prices, and providing payments to workers simply for making their vehicles available, did 'much to limit the drivers' risk of loss'.[227] Judge Brown accorded less significance to these factors.[228]

According significance to factors that have limited bearing on entrepreneurialism, or giving limited weight to factors that militate against a finding of entrepreneurialism, may lead to the exclusion from employment status of those workers who exhibit the characteristic vulnerabilities of employees. The decision in *FedEx Home Delivery*, then, illustrates two modes of reasoning that may render an entrepreneurship-oriented approach to determining employment status incapable of capturing those workers who are in need of labour law's protection. The first is a focus on the right to engage in entrepreneurial opportunities rather than the actual exercise of entrepreneurial functions; the second is the according of limited weight to facts that militate against a finding of entrepreneurialism, and the attribution of relevance to facts that are not relevant to entrepreneurialism in support a conclusion that the workers possess entrepreneurial opportunity.

The ABC test does not exhibit either of these shortcomings because it comprises questions that are apt to identify those workers who are, in practice, operating as entrepreneurs in business on their own account. The test directs the attention of the court to how the parties conduct their relationship in practice, in addition to the terms of their contract, and it focuses the court's analysis, in limbs (B) and (C), upon whether the worker is running their own independent business. These two aspects of the ABC test enable it to capture within the concept of employment those workers who possess the characteristic vulnerabilities of employees. The

221 Ibid 512–13.
222 Ibid.
223 Ibid 513.
224 Ibid.
225 Ibid.
226 Ibid.
227 Ibid 514.
228 Ibid 502.

ABC test has been adopted in a number of US states.[229] Researchers in the US have studied the practical operation of the ABC test and compared it to other tests for determining employment status in the US.[230] This research has indicated that the ABC test is broad and inclusionary in its operation, and more effective at addressing worker misclassification than other tests.[231] It has, for this reason, been favoured by several labour law scholars in that country.[232] The US experience with the ABC test supports the proposition, advanced in the present article, that the entrepreneurship approach is a promising candidate for the project of revitalising the tests for employment status.

B The Entrepreneurship Approach: A Promising Candidate for the Project of Revitalisation

The preceding analysis suggests that a worker-protective approach to determining employment status involves at least two core features.[233] The first is that it focuses upon substance rather than form.[234] That is, it directs the court's attention to how the parties conduct their relationship in practice rather than just to the terms of the contract. The second is that it focuses attention upon whether the worker is carrying on a business of their own. Importantly, the seeds of such an approach are already located in the Australian case law, though it must be acknowledged that the second proposition remains the subject of significant contestation in the courts.

In a recent article that considers whether a new category of worker is required for those working in the gig economy, Professor Andrew Stewart and Professor Shae McCrystal observed that there are inconsistent judicial approaches to the determination of employment status in Australia.[235] They identified three different approaches to the application of the multifactorial test in the Australian case law. The first approach, which they termed the 'formalistic approach' involves a focus on the terms of the employment contract.[236] That is, the court examines the contract of employment to determine whether the indicia of employment are present. Professors Stewart and McCrystal observed that this approach still prevails

229 Weil, *The Fissured Workplace* (n 200) 204–5; Deknatel and Hoff-Downing, 'ABC on the Books and in the Courts' (n 200) 66–74.

230 See, eg, Deknatel and Hoff-Downing, 'ABC on the Books and in the Courts' (n 200).

231 Ibid 66–74, 79–101.

232 Weil, *The Fissured Workplace* (n 200) 205; Deknatel and Hoff-Downing, 'ABC on the Books and in the Courts' (n 200) 101–2. Professor Simon Deakin, writing in the context of the United Kingdom, has also expressed support for the ABC test: Deakin, 'Decoding Employment Status' (n 46) 191–3.

233 As noted above at n 113 and accompanying text, Professor Stewart has advocated for statutory enshrinement of the entrepreneurship approach to determining employment status, with the focus of the test being on the substance of the relationship: see Stewart, 'Redefining Employment?' (n 6) 270–6; Roles and Stewart (n 113) 279–80; Stewart and McCrystal, 'Labour Regulation and the Great Divide' (n 17) 21–2.

234 See below nn 244–6 and accompanying text. See also Pauline Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (2015) 32(2) *Journal of Contract Law* 149 ('Subsequent Conduct'); Pauline Bomball, 'Intention, Pretence and the Contract of Employment' (2019) 35(3) *Journal of Contract Law* 243.

235 Stewart and McCrystal, 'Labour Regulation and the Great Divide' (n 17) 6–8.

236 Ibid 7.

among many of the state courts.[237] The second approach, which they termed the 'economic reality approach', involves the court looking not just at the contractual terms but also at how the parties have carried out their relationship in practice to determine whether the indicia of employment are present.[238] Precedence is given to how the relationship operates in practice where there is a conflict between reality and contractual form.[239] Professors Stewart and McCrystal noted that this approach has at least commanded the support of members of the Federal Court of Australia.[240] The third approach that Professors Stewart and McCrystal identified is the entrepreneurship approach.[241] As noted above, this approach involves asking whether the worker is carrying on a business of their own.[242] Professors Stewart and McCrystal observed that this approach remains the subject of disagreement in Australia.[243]

The present author contends that the entrepreneurship approach should be adopted if one is concerned with promoting a worker-protective approach to the legal determination of employment status. As stated above,[244] this article argues that a worker-protective approach requires courts to privilege reality over form and to identify as employees those workers who are not carrying on a business of their own. There is judicial and scholarly support for the first proposition concerning substance-oriented characterisation.[245] The International Labour Organization has also advocated for an approach 'guided primarily by the facts', emphasising that regard must be had to the reality of the relationship between the hirer and the worker.[246] This article has sought to build a case in support of the second proposition concerning the entrepreneurship approach. It has done so by constructing normative arguments. The doctrinal arguments in support of the entrepreneurship approach are considered in a separate article.[247]

The combination of these two core features – substance-oriented characterisation, and the adoption of entrepreneurship as the overarching framework for application of the multifactorial test – is important. Simply adopting a substance-oriented approach to characterisation, which focuses on how the parties carry out their

237 Ibid 7 n 13, citing, by way of example, *Australian Air Express Pty Ltd v Langford* (2005) 147 IR 240; *Tobiassen v Reilly* (2009) 178 IR 213; *Commissioner of State Revenue v Mortgage Force Australia Pty Ltd* [2009] WASCA 24; *Young v Tasmanian Contracting Services Pty Ltd* [2012] TASFC 1.

238 Stewart and McCrystal, 'Labour Regulation and the Great Divide' (n 17) 7–8, citing at n 18 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; at n 18 *Re Porter* (1989) 34 IR 179.

239 Stewart and McCrystal, 'Labour Regulation and the Great Divide' (n 17) 7–8. See also Bomball, 'Subsequent Conduct' (n 234); Bomball, 'Intention, Pretence and the Contract of Employment' (n 234).

240 Stewart and McCrystal, 'Labour Regulation and the Great Divide' (n 17) 7 n 20, citing, by way of example, *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2010) 184 FCR 448; *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146. The authors also refer to Bomball, 'Subsequent Conduct' (n 234): at 7 n 20.

241 Stewart and McCrystal, 'Labour Regulation and the Great Divide' (n 17) 8.

242 Ibid. See above nn 26–7 and accompanying text.

243 Stewart and McCrystal, 'Labour Regulation and the Great Divide' (n 17) 8.

244 See above n 234 and accompanying text.

245 See above nn 234, 238–40.

246 *Employment Relationship Recommendation*, 95th sess, ILO Doc 198 (15 June 2006) [9]; *Promoting Employment and Decent Work* (n 2) [230].

247 Bomball, 'Vicarious Liability' (n 31).

relationship in practice, will not be of assistance in all cases. This is because in some cases, the issue is not simply that there is a divergence between the terms of the contract and the reality of the relationship, but rather that the reality of the relationship itself falls within the grey zone between employment and independent contracting. Some of the indicia of employment are present, as are some indicia that point towards independent contracting. In such cases, the overarching approach that is adopted may tip the scales one way or the other because it affects the court's balancing exercise and how the court assigns weight to various factors.[248] This article has sought to demonstrate that an entrepreneurship approach is desirable from a worker-protective perspective because it inclines the balancing and weighing exercise towards a finding of employment where the worker possesses the characteristic vulnerabilities of an employee.

The recent decision of the Supreme Court of the United Kingdom in *Uber BV v Aslam* ('*Uber*')[249] provides a good illustration of this point. As Professor Alan Bogg and Professor Michael Ford observed in an article that analysed the decision of the court below, *Uber* was not a straightforward case where there was simply a disjunction between the terms of the contract and how the parties carried out their relationship in practice.[250] *Uber* was a difficult case because the reality of the relationship between the parties fell within the grey zone.[251] As Professors Bogg and Ford observed, '*Uber* highlights the uncertain effect of *Autoclenz* where the discrepancy between written terms and factual circumstances is less palpable than it was in *Autoclenz* itself'.[252]

One way of resolving these difficult cases is to argue, as Professors Bogg and Ford did with significant force, that the court should have regard to the protective purpose of labour legislation and incline towards a conclusion that would bring the particular worker within the protective scope of the legislation where it is possible

248 Deakin, 'Decoding Employment Status' (n 46) 185.

249 [2021] UKSC 5 ('*Uber*').

250 Alan Bogg and Michael Ford, 'Between Statute and Contract: Who Is a Worker?' (2019) 135 *Law Quarterly Review* 347, 348–50. This article preceded the decision of the Supreme Court of the United Kingdom in *Uber* [2021] UKSC 5. In this article, Professors Bogg and Ford analysed the decision of the English Court of Appeal below: *Uber BV v Aslam* [2018] EWCA Civ 2748.

251 Bogg and Ford, 'Between Statute and Contract: Who Is a Worker?' (n 250) 348–50. It should be noted that the decision of the Supreme Court of the United Kingdom in *Uber* [2021] UKSC 5 concerned the 'limb (b) worker' category in the United Kingdom: Bogg and Ford, 'Between Statute and Contract: Who Is a Worker?' (n 250) 347. In *Uber* [2021] UKSC 5, the Supreme Court concluded that the Uber drivers fell within the limb (b) worker category. The limb (b) worker category is an intermediate category of worker, created by statute, that falls between employees and independent contractors. There is no intermediate worker category in Australia.

252 Bogg and Ford, 'Between Statute and Contract: Who Is a Worker?' (n 250) 348, referring to *Autoclenz Ltd v Belcher* [2011] 4 All ER 745 ('*Autoclenz*'). In *Autoclenz* [2011] 4 All ER 745, the Supreme Court of the United Kingdom disregarded the terms of a written work contract that were at odds with the reality of the relationship between the parties. For an analysis of the *Autoclenz* [2011] 4 All ER 745 decision, see Alan L Bogg, 'Sham Self-Employment in the Supreme Court' (2012) 41(3) *Industrial Law Journal* 328; ACL Davies, 'Employment Law' in Edwin Simpson and Miranda Stewart (eds), *Sham Transactions* (Oxford University Press, 2013) 176; 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, 84–6; Bomball, 'Subsequent Conduct' (n 234) 161–7.

to do so.[253] The approach that the Supreme Court of the United Kingdom ultimately adopted in *Uber* which, among other things, emphasised the protective purpose of the labour statutes under consideration, may be rationalised in this way.[254] Another way of dealing with these difficult cases that fall within the grey zone is to encourage the courts to adopt the entrepreneurship approach which, as US scholars examining the ABC test have demonstrated,[255] also inclines the court to a broad and inclusive approach to employment status. There are some barriers to the adoption of an approach that focuses upon protective statutory purposes in Australia.[256] In light of these barriers, alternative routes to securing a worker-protective approach to the determination of employment status should be considered by those engaged in the project of revitalising the tests for employment status. The analysis presented in this article suggests that the entrepreneurship approach, which has received some judicial support in Australia, is a promising candidate for the revitalisation project.

V CONCLUSION

The categorisation of a worker as an employee brings that worker within the realm of labour law.[257] In Australia, there is a debate about the approach that should be taken to determining employment status. One principal aspect of this debate concerns the entrepreneurship approach. This article has made a contribution to that debate by critically analysing the entrepreneurship approach from a normative worker-protective perspective. It has developed a theoretical framework, by reference to the work of leading theorists of employment law, to undertake this normative critique. This article has proceeded on the basis that a worker-protective approach to the determination of employment status is one that accurately captures the characteristic vulnerabilities of employees that render them in need of the protection of labour law. Accordingly, in constructing the theoretical framework by which to evaluate the worker-protective potential of the entrepreneurship approach, this article has drawn upon theories of power and vulnerability within the employment relationship. It has argued that the entrepreneurship approach does, at a theoretical level, accurately capture those workers who exhibit the characteristic vulnerabilities of employees.

The article then considered the worker-protective potential of the entrepreneurship approach by examining its operation in practice. In so doing, it considered two bodies of case law in the US that have invoked the concept of entrepreneurship for the purpose of distinguishing employees from independent contractors. This article discerned from the comparative study several lessons for the Australian context about the nature and operation of the entrepreneurship

253 Bogg and Ford, 'Between Statute and Contract: Who Is a Worker?' (n 250) 350–3.
254 See *Uber* [2021] UKSC 5, [58]–[78].
255 Weil, *The Fissured Workplace* (n 200) 205; Deknatel and Hoff-Downing, 'ABC on the Books and in the Courts' (n 200).
256 See Bomball, 'Statutory Norms and Common Law Concepts' (n 121).
257 Owens, Riley and Murray, *The Law of Work* (n 2) 152.

approach. The comparative study demonstrated that the entrepreneurship approach is worker-protective in its operation if courts adopting such an approach are attentive to the realities of the working relationship between the parties. The project of revitalising the legal tests for determining employment status is of crucial importance to the ongoing operation and effectiveness of labour law.[258] One significant step in such a project entails an articulation of the relevant underlying theoretical justifications and practical consequences of any proposed reorientation. It is hoped that the theoretical and practical analysis offered in this article might be of some assistance to others who are engaged in the project of revitalisation.

258 Anderson, Brodie and Riley, *The Common Law Employment Relationship: A Comparative Study* (n 1) 25, 68.