THE SCOPE OF LABOUR LAW AND THE WORLD OF COMMERCE

Douglas Brodie

University of Stiling, UK

The Scope of Labour Law and the World of Commerce

Introduction

This paper concerns the scope of labour law and reviews the orthodoxy that we are primarily concerned with workers who perform work in person. The paper draws on the experience of the Australian courts and legislatures and in particular the operation of the Industrial Relations Act 1996 (NSW). S 106 extends the jurisdiction of the Industrial Relations Commission to regulate contracts which relate to the performance by a person of work in an industry. The jurisprudence which has emerged under this provision challenges the utility of the commercial law/ labour law dichotomy. Against that backdrop the question is raised of whether those protected by labour law should be a less homogeneous class than has previously been considered and, by the same token, whether the protection afforded should be much more varied. Would it make more sense to view working relationships as being located on points of a continuum? The point at which a relationship is placed determining the response of the courts and legislature and the degree of protection afforded.

Orthodoxy

The relationship between labour law and other areas of law that concern the governance of an enterprise has long been seen as problematic: `labour law must operate alongside other laws governing business and employer behaviour including contract and tort law, corporations and trade/commerce laws. Tensions between these two bodies of law are longstanding…'.[1] Traditionally there was a strict dichotomy between labour and commercial law; they regulated relationships which were different in nature and were underpinned by different values. However, in recent years recognition has emerged that there are significant elements of commonality. Both deal, to varying extents, with relationships where there may well be a marked disparity in bargaining power. In the case of the employment contract the norm is for such a disparity to be present; the position with commercial contracts is far more varied. Over 20 years ago in *Slaight Communications v Ron Davidson*, the Canadian Supreme Court endorsed the following passage from Kahn-Freund's seminal work, *Labour and the Law*: 'The relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power'.[2] The House of Lords spoke in similar terms in *Malik v*

[1] M. Quinlan `Contextual Factors Shaping the Purpose of Labour Law' in C. Arup et al (eds) Labour Law and Labour Market Regulation' 24.
[2] [1989] 1 SCR 1038.

BCCI.[3] What should be done in the face of such disparities very much turns on the nature of the contract. Where commercial parties are involved, there may have been, up until recently, something of a presumption that the terms of the exchange are satisfactory and that judicial intervention is unlikely to be appropriate. This is reflected in the following dictum of Lord Wilberforce which addresses how exemption clauses should be approached given the enactment of the Unfair Contract Terms Act 1977: 'After this Act, in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions'. Matters are increasingly seen as much more diffuse. Various forms of commercial relations present risks of unfairness arising comparable to those found in employment. Franchises provide an excellent example: `Despite their apparently independent status, however, the typical franchisee is vulnerable to the same risks as the typical employee. Arbitrary termination of the franchise will be just as devastating as an unfair dismissal – perhaps more so, as the typical franchisee has also been required to sink a considerable amount of capital into the franchise, and this investment will often be lost with the franchise contract. In short, the typical franchise relationship demonstrates the same inequalities in power as are customarily ascribed to the employment relationship.'[4] As with employment there is much scope for unfair exercise of prerogative power on the part of the employer.[5] This can happen in a wide variety of ways: `The incentive that causes a business with sunk costs to stay in operation despite losses makes franchisees vulnerable to franchisor behaviour known as 'opportunism'. Because the franchisee will continue to operate even if it is not recovering its sunk investments, the franchisor can make decisions that induce such losses without the franchisee going out of business. When these decisions benefit the franchisor at the expense of the franchisee, the franchisor opportunistically extracts a portion of the franchisee's sunk costs. A franchisor can potentially extract this value from the franchise directly in a number of ways: it can raise the price of goods sold to franchisees, increase rent, boost royalties through an increase in the required volume of a franchise, levy fees or divert advertising funds to general corporate uses. Extractions can occur indirectly as well. To increase the price of new franchises, a franchisor could require franchisees to make excessive advertising investments, to participate in promotional programs which are not cost effective, or to undertake unnecessary

[3] [1998] AC 20.
[4] J.Riley, `Regulating Unequal Work Relationships for Fairness and Efficiency: A Study of Business Format Franchising' in C. Arup et al (eds) Labour Law and Labour Market Regulation' 561
[5] Some franchisees face a double jeopardy in that they are both franchisees and tenants.

renovations.'[6]

Identifying the presence of inequality of bargaining power does not carry us very far in the context of a scoping exercise. Consumer contracts, to take an obvious example, display this characteristic too. Labour law is also about contracts for the provision of work; once again so are a number of commercial contracts. There will often be no doubt that the characterisation of such contracts as commercial is genuine. It is though also generally said that labour law encompasses contracts where there is a commitment to provide work personally. Davidov expresses the orthodoxy in stating that ` a small business that depends on a single large business for most of its income may be in need of some kinds of protection, but generally it should not be grouped together with employees, who, as human beings dealing directly with employers, have unique vulnerabilities that require separate treatment. It should then be a starting point that an 'employee' is a worker who generally performs the work in person.'[7] Again, Freedland draws attention to the position of the `multi-personal small-scale enterprise': `This might occur, for example, where an individual entrepreneurial worker in, let us say, the plumbing trade…takes on assistants and begins to function as a very small-scale employer. The institutional forms for this kind of functioning as a very small enterprise vary considerably between European countries; but I think they would have this in common, that the work relations of the individual entrepreneur with the purchasers or users of his or her services cease to be personal work relations. In legal terms, such relations move from the primary form of personal contracts for services to the primary form of non-personal contracts for services, i.e. ordinary commercial or business contracts…'.[8]

What though are the `unique vulnerabilities that require separate treatment'? If one focusses on economic vulnerability then the category of individuals requiring protection immediately becomes much wider than employees. The owner of a small business will often perform work in person. This is unlikely to be a stipulation of the contract but will often constitute the practical reality. However, even

[6] `Finding a Balance: Towards Fair Trading in Australia' (Reid)

[7] G. Davidov, `The 3 axes of Employment Relationships: A Characterisation of Workers in Need of Protection' (2002) 52 UTLJ 357. Similarly Freedland states that `It should, however, be stressed that the category of personal work contracts, albeit significantly larger than that of the contract of employment, is nevertheless still confined to contracts wholly or primarily for performance by the worker personally, that is to say by himself or herself. As such these contracts are contra-distinguished from commercial contracts for services which are not necessarily or even primarily for performance by the worker personally.' `Application of labour and employment law beyond the contract of employment' (2007) 146 ILR 3.

[8] Freedland, n 7 above. It would often be the case that the individual will continue to personally perform some of the work for contracts which are entered into. What do we then expect to change because the MPSEE emerges? Sometimes there will be a multiplicity of hirers; sometimes there will be dependency on one or two. In the latter position, prior to the MPSEE emerging, the plumber would probably be viewed as having employment status with one or more employers. To what extent should employment protection rights be forfeited?

if he does not do so he remains, at least economically, highly vulnerable. Once economic dependency is looked to the owner may be in a position which is in many ways similar to an employee.

Where then do we find the unique vulnerabilities? Are they to be found in the economics of the relationship or the personal dimension? It seems doubtful whether they're to be found in the former. A significant disparity in bargaining power will always leave the weaker party exposed to unreasonable treatment whether in the basis upon which the relationship is formed, operated or terminated. If the relationship is the means of livelihood little turns on whether it is one of employment. Is the key in the social dimension? The employment relationship governs personal relations and this then leads to a focus on safeguarding dignity and so on. Yet the owner of the small business may well be treated in a humiliating way by the larger concern to which he sells; either by a particular individual with whom a relationship has built up or more anonymously. The fact that employment contracts are now styled as relational in nature should remind us that other relational contracts also govern situations where personal relationships emerge over time. Macneil accepts that the 'whole person' is liable to be more important in an ongoing relationship: parties 'derive complex personal non-economic satisfactions and engage in social exchange, as well as … economic exchange'.[9] In a similar vein, Bird has said that relational incorporates planning, trust and solidarity that far exceed the terms of the original document. Relational contract theory emphasises the importance of terms outside of the written document that may arise through interpersonal relationships between the parties'.[10] It may be said though that the element of personal relations is a universal characteristic of contracts for the personal provision of work; a claim which cannot be maintained in other contexts. This may well be true but we should not disregard this dimension when it arises elsewhere.

The benefits that are to be gained from the personal performance of work also come into play; the right to work dimension. The expression `the right to work' is capable of bearing differing meanings but is probably most commonly invoked to denote `an abstract `background' right of the individual requiring the State to maintain a full employment policy...'.[11] Here we are concerned with a more narrow meaning of the right to work in that it deals with the position of the individual who, whilst employed under a contract of employment, finds that his employer does not wish to give him actual work to do. The intangible benefits of work are considerable: `: first, work enables people to interact, meet, and be with one another; second, work has an intrinsic meaning for the individual as a source of identity, self-realization, and fulfilment.'[12] However, if this dimension is seen as a key point of

[9] I. R. Macneil, *The New Social Contract* (New Haven: Yale University Press, 1980) 72.

[10] R. C. Bird (2005-06) 8 U Pa J Lab & Emp L 149

[11] B.Hepple `A Right to Work ?' (1981) 10 ILJ 65, 69.

[12] Davidov, n 7 above.

distinction, it seems odd that the right to work, at least in the UK, is seen as very much the exception by the law of the employment contract. Admittedly, the Court of Appeal recognised such a right in *William Hill v Tucker* but that has not led to a transformation in the overall picture. There it was held that there was an obligation to provide the plaintiff with actual work to do. Where work was 'there to be done and the employee was appointed to do it and is ready and willing to do so, then the employer must permit him to do so' It was said that:

> the skills necessary to the proper discharge of such duties did require their frequent exercise. Though it is not a case comparable to a skilled musician who requires regular practice to stay at concert pitch I have little doubt that frequent and continuing experience of the spread betting market, what it will bear and the subtle changes it goes through, is necessary to the enhancement and preservation of the skills of those who work in it.

One might ask whether they required to be practised more than in any other skilled job. It might be argued that the skills of all such workers would benefit from regular practice. It would be much more comprehensible if an exception were based on an assessment of whether the skills involved in a particular job would be diminished by lack of application. It is suggested that there is much to be said for the following proposition advanced by counsel for *Tucker* that:

> It is a guiding principle (not a universal rule) when construing a contract of employment that the employees interest in doing his job, as well as being paid his salary, is now recognised; in particular in the case of skilled workers and others who benefit from practising them skills either because their remuneration depends on it or because their career prospects would be thereby advance.[13]

The court in *Tucker* was strongly motivated by pragmatic concerns: in particular the needs of the employee to maintain skills. They may also have been inspired by a particular vision of the employment relationship. The view may well have been taken that the interests of the employees in the employer's enterprise went significantly beyond the payment of wages. Ultimately, it remains odd that if personal performance is significant the right to work does not feature in the content of most employment contracts. The right to work may matter less to someone who is self-employed and who gains satisfaction through the successful running of the business; matters

[13] [1999] ICR 291.

are also more within his control and he may be able to choose to perform tasks that are particularly satisfying.

Common Problems

I would suggest that contracts for the provision of work (irrespective of whether personal performance is required), in their myriad of forms, present calls for legal intervention for very similar reasons. Inequality of bargaining power means that the weaker party is at risk of oppressive treatment in the way that, for example, discretionary provisions are exercised. Concerns which are unique to the employment contract are hard to find. I suggest that it would make more sense to focus on commonality rather than elusive demarcation lines. Judicial and legislative efforts might be better directed to the creation of measures that address fundamental concerns irrespective of where they might be found.

Employees: A Homogeneous Class? [14]

A more inclusive approach to those who fall within a reconfigured labour law may make it increasingly likely that a much more differentiated approach will be taken to the protection afforded. There are in fact a number of indications that the law is moving in this direction. There does appear to be some evidence that the obligations arising under the employment contract, in the case of more senior staff,

[14] Traditionally the law proceeds on this basis which explains why the benefits of the Australian legislation on unfair contracts has been tempered where highly paid employees are concerned. S 108A of the Industrial Relations Act 1996 (NSW) precludes a claim by an employee whose remuneration package (which is payable to or received by the employee) exceeds the remuneration cap in the 12 month period immediately preceding, the application or termination of the contract of employment, whichever is applicable.[14] Viewed as a form of employment protection legislation this seems justifiable: `The commission has awarded former highly paid executives far greater benefits for termination of employment than other workers can expect to receive. In particular, the restrictions on the compensation that can be awarded to employees with more limited bargaining power under the unfair dismissal provisions of the Industrial Relations Act do not apply when unfair contracts claims from highly paid executives are being considered.'

are moving closer to those owed by a fiduciary; the implied obligation of fidelity, for instance, may demand more by way of propriety where a senior employee is concerned. More fundamentally, but perhaps questionably, some jurisdictions now hold that senior managers are fiduciaries. Admittedly, there is no reason in principle why the common law obligations owed by employees should be the same irrespective of the role played by them or their place in the organisational hierarchy. Why should the obligations imposed by law as a consequence of entry into a contract of employment be the same in respect of both a member of the senior management team and a junior salesperson? Certainly in *University of Western Australia v Gray* the Australian Federal Court recognised that: `while one type of term may quite appropriately be implied in a class of contract cast in very general terms, e.g. in a contract of employment the employee's duty to obey lawful and reasonable directions given by the employer that fall within the scope of the employment, … another term may be of such a character as to be implied only into a recognisable sub-category of that larger class.'[15]

Where disclosure is concerned an employee in a managerial position may come under a more extensive obligation than his colleagues; what is seen as incidental to the contract of employment may vary depending upon the employee's place in the structure of the organisation. The Canadian courts though have adopted a much more radical stance by extending the full range of fiduciary obligations to those who can be categorised as senior managers. In *Canadian Aero Service v O'Malley,* the Supreme Court approved the view of Gower in his seminal work on Company Law that fiduciary "duties, except in so far as they depend on statutory provisions expressly limited to directors, are not so restricted but apply equally to any officials of the company who are authorised to act on its behalf, and in particular to those acting in a senior managerial capacity".[16] It is worthy of note that Gower did not cite any authority for this proposition and the current editor of Gower has felt compelled to insist that the employment relationship is not a fiduciary relationship "so that it would be inappropriate to apply the full range of director's duties to even senior employees". An individual affected by the *O'Malley*

[15] [2009] FCAFC 116
[16] (1973) 40 DLR (3d) 371.

doctrine owes the full range of fiduciary duties; in *O'Malley* itself the application of the "corporate opportunity" doctrine restricted the capacity of the defendant from pursuing a number of business opportunities.

Commonality: Solutions

Where commercial contracts are concerned the courts have responded to calls for more equitable behaviour in a way that is not dissimilar to the way in which they have developed common law regulation of the employment contract in recent years. In the *`Product Star'*, for instance, it was said that `Where A and B contract with one another to confer a discretion on A, that does not render B subject to A's uninhibited whim. In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it must be conferred, it must not be exercised arbitrarily, capriciously, or unreasonably. That entails a proper consideration of the matter after making any necessary enquiries. To these principles, little is added by the concept of fairness: it does no more than describe the result achieved by their application.'[17] The Australian courts have responded in a similar way to, for instance, concerns expressed over clauses that confer discretion on the franchisor. Imbalance of power is not inevitable in such relationships in the way that it is where employment is concerned. Nevertheless, it is feature of common occurrence and, should it arise, the weaker party may be the subject of abuse of power. The Australian courts have held that the franchisor is required to act reasonably and honestly (to an objective standard), not to act for an ulterior motive, to recognise and have regard to the legitimate interest of both parties in the enjoyment of the fruits of the contact, and to avoid rendering the franchisee's interest under the agreement nugatory or worthless or seriously undermining it.[18] Clauses which given rise to concern include those in respect of termination; the franchisor's discretion will be

[17] [1993] 1 Lloyd's Rep 397.

[18] *J F Keir v Priority Management Systems* [2007] NSWSC 789. In the UK *Fleet Mobile Tyres v Stone* [2006] EWCA Civ 1209 uses the concept of derogation right to restrict the capacity of the franchisor to alter the manner of operation of the franchise to the detriment of the franchisee.

constrained on the basis of fair dealing. This may mean that a termination is found to be wrongful if not in good faith. In the United States, in *In re Vylene Enterprises Inc*, the Ninth Circuit held that a restaurant chain franchiser had breached an implied covenant of good faith by opening a new outlet within a mile and a half of the franchisee's restaurant. The court said the franchisee was "entitled to expect that the franchiser would 'not act to destroy the right of the franchisee to enjoy the fruits of the contract'."[19]

Other common law doctrines may also be deployed to promote fair dealing. The concept of derogation from grant was used to protect the licensee in *JLCS v Squires Loft* where they had been granted permission to operate a restaurant using a trade mark belonging to the defendants.[20] Judicial intervention took place to stop the holder of the trade mark behaving oppressively. It was held that there was an implied term that the holder were entitled to use the mark without undue interference. This meant there was an obligation upon the defendant ` that prohibits JLCS from using, or authorising or permitting any other entity to use the mark " Squires Loft " in relation to any steak restaurant located in such close proximity to the City restaurant that it would prevent, hinder or impede Harold and Saul from enjoying the full benefit and advantaged conferred upon them by their licence.' The same outcome could have been achieved by the application of the implied obligation of co-operation.

A common problem where the employment contract is concerned is that of unilateral variation. Sometime this will occur unlawfully but even where the contract expressly empowers the employer to alter the bargain concerns still surface. In Australia the Reid committee noted that `the widespread practice of including a clause in franchise agreements stipulating that a franchisee will comply with an operations manual supplied by the franchisor, the contents of which are subject to change at any time.'[21] It is of course the case that variation may be essential: `As a relational contract, it is clear that various commercial elements of a franchise agreement will need to be modified from time to time in

[19] 90 F 3d 1472, 1477 (9th Cir 1996)
[20] [2008] FCA 867.
[21] `Finding a Balance: Towards Fair Trading in Australia' (Reid)

order to reflect the dynamic nature of a franchise business system. The concept of "unilateral variation" could be capable of extending to changes in programs, strategies, presentation, policies, models and brands and other elements essential to the efficient operation of a franchise system. Modifications of this kind are a necessary part of the business relationship between the franchisor and the franchisee.'[22] Where the employment contract is concerned the exigencies of the business are accepted but the courts will provide regulation. It has been said that ` The general position is that contracts of employment can only be varied by agreement. However, in the employment field an employer or for that matter an employee can reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party as part of the contract that this is the situation. However, clear language is required to reserve to one party an unusual power of this sort. In addition, the court is unlikely to favour an interpretation which does more than enable a party to vary contractual provisions with which that party is required to comply. If, therefore the provisions of the code which the council were seeking to amend in this case were of a contractual nature, then they could well be capable of unilateral variation as the counsel contends. In relation to the provisions as to appeals the position would be likely to be different. To apply a power of unilateral variation to the rights which an employee is given under this part of the code could produce an unreasonable result and the courts in construing a contract of employment will seek to avoid such a result."[23] It seems likely that the foregoing approach will be applied more widely.

Asymmetry of information about the risks of the venture and so on is more likely to crop up where imbalance of power exists. Disclosure requirements within the employment relationship have evolved in recent years. The pensions case of *Scally v Southern Health Board* might be depicted as one where it would have been an abuse of power for the employer not to divulge the information in question.[24] It was only proper that the worker got the full benefit of the work-wage bargain and the information required to be supplied by the employer was necessary to "… render efficacious the very benefit which

[22]

[23] *Wandsworth London Borough Council v D'Silva* [1998] IRLR 193

[24] [1992] 1 AC 294.

the contractual right to purchase added years was intended to confer". The court in *Scally* sought to define the obligation in that case in rather narrow terms. However, it may be that in future an obligation of disclosure will apply where one side possesses information that the other could not reasonably be expected to know and where the information would serve to protect the interests of the other side. Such an obligation would be consistent with mutual trust's affinities with good faith. It would also be consistent with contemporary judicial recognition that "contracts of employment are no longer regarded as purely commercial contracts entered into between free and equal agents". Again the issue has come to the fore in commercial arrangements such as franchises. The employer or franchisor is much more likely to have access to the information necessary to make a fully informed decision to enter a long term relationship. In Australia, extensive requirements in respect of disclosure also now exist by virtue a statutory code: *Franchising Code of Conduct*. Requirements in respect of a range of matters exist: a) change in majority ownership or control of the franchisor; (b) proceedings by a public agency, a judgment in criminal or civil proceedings or an award in an arbitration against the franchisor or a franchisor director in Australia alleging: (i) breach of a franchise agreement; or (ii) contravention of trade practices law; or (iii) contravention of the *Corporations Act 2001*; or (iv) unconscionable conduct; (v) misconduct; or (vi) an offence of dishonesty.[25]

A more inclusive view of contracts for the provision of work might encourage common solutions to be applied to common problems. Some measures will of course remain specific to particular types of contract.[26] It should be said that the contract of employment already has much in common with other forms of contract for the provision of work. At common law, the content of contracts for services and employment display a considerable degree of commonality. There is a core of default rules which apply to both relationships. This is more likely to be the case where the economic elements of the bargain are concerned rather than the more personal ones. In the negligent misrepresentation case of *Spring v*

25

[26] A cooling off period is provided for – as in consumer protection law- which reflects the fact that franchisees should not be treated as normal commercial parties. Clause 13 of the code provides that a franchisee may terminate an agreement within 7 days. Disparity of bargaining power is also acknowledged by explicit recognition of the legitimacy of association and the need to protect against this being undermined.

Guardian Assurance which dealt with employment references a broad notion of employment was embraced so that the obligation in respect of references extends beyond those working under an employment contract to include the self-employed.[27] On the hand, in neither relation, is there a general obligation to protect the economic interests of the other side. It also may be said that there is a great deal of similarity between a contract of service and one for services where the default rules in respect of allocation of risk are concerned. By way of example both contracts require that performance will be discharged with reasonable care which ensures that the risk of poor performance lies with either the employee or independent contractor.

Matters become more problematic where the issue is whether the personal or social elements of the employment contract would be extended to other forms of contract for the provision of work. The question is posed in acute form if one considers the position of the implied term of mutual trust and confidence. One might say that a 'genuine' relationship of self-employment involves a contract that is purely commercial, entered into at arms length, and, in consequence, does not contain the term. The obligation of mutual trust and confidence is at odds with a relationship formed on this basis. In contrast the implication of the term is premised on the basis that personal relations are involved. On the other hand, it is more than debateable whether there is a clear dichotomy here. There is still likely to be an implied obligation of fair dealing. It is also the case that, in fact at least if not in law, mutual trust and confidence may underpin the parties' relationship. In the Australian case of *Bamco Villa v Montedeen* the franchise agreement required personal performance by the franchisee.[28] It was held that the agreement did not create a fiduciary relationship but `involves a real degree of mutual trust and confidence'.

The Influence of Tort

It is also the case that the employer owes the self-employed worker less extensive obligations in terms of health and safety than are owed to the employee. The reason why a more restricted duty is owed may be that 'the risk of accident is incidental to the contractor's enterprise rather than his employer's'. However, such an allocation of risk is based upon certain assumptions which come under challenge from judicial notions of `enterprise liability.'[29] Over 20 years ago, in *Stevens v Brodribb Sawmilling,* the High Court of Australia took the view that where the work being carried out for the main contractor involves interdependent activities safety can only be assured if he takes on a co-ordination role.[30] The

[27] [1995] 2 AC 296.
[28] [2001] VSC 192.
[29] See D.Brodie, Enterprise Liability and the Common Law.
[30] (1986) 160 CLR 16.

undertaking of that role was in turn compelled by the duty said to owed in negligence. Mason J stating that `If an entrepreneur engages independent contractors to do work which might as readily be done by employees in circumstances where there is a risk to them of injury arising from the nature of the work and where there is a need for him to give directions as to when and where the work is to be done and to co-ordinate the various activities, he has an obligation to prescribe a safe system of work.'[31] Mason J was of the view that interdependency of activity gave rise to a responsibility to co-ordinate. However, Mason J also regarded it as relevant that the contractors involved were hired `to do work which might as readily be done by employees.' The focus of concern may therefore be in the realms of `disguised employment.' Where an employer exploits his superior bargaining power to structure the relationship as self-employment (when it might just as readily have been one of employment) he will thereby avoid the duties set out in *Wilson*. Mason J, perfectly understandably, may have been anxious to avoid this conclusion.

The approach of Mason J in *Brodribb* may take an unduly narrow view of the situation given that interdependence might be thought to bring about risks which go beyond concerns over disguised employment. Further issues in respect of multi- employer activity were taken on board by Brennan J in *Brodribb* who formulated the duty at issue somewhat differently: `An entrepreneur who organizes an activity involving a risk of injury to those engaged in it is under a duty to use reasonable care in organizing the activity to avoid or minimize that risk, and that duty is imposed whether or not the entrepreneur is under a further duty of care to servants employed by him to carry out that activity.'[32] Brennan J states the obligation in broader terms and does not seek to differentiate in any way between different categories of sub- contractors. Discharge of that obligation may require both supervision and co-ordination: `the circumstances may make it necessary for the entrepreneur to retain and exercise a supervisory power or to prescribe the respective areas of responsibility of independent contractors if confusion about those areas involves a risk of injury.'[33] It is submitted that the approach of Brennan J is to be preferred to that taken in the UK in that it is much more attuned to the myriad of ways in which work is organised. It is also much more closely aligned to the demands of public policy as

[31] Ibid at 31.
[32] *Brodribb,* n 44 above 47. Brennan J added, with reference to *Sutherland Shire Council v Heyman* (1985) 59 ALJR 564, 587, that the entrepreneur's duty arises simply because he is creating the risk and his duty is more limited than the duty owed by an employer to an employee.
[33] Ibid.

reflected in the requirements imposed by modern health and safety legislation.

The position in *Brodribb* may be justifiable on policy grounds simply because it furthers the safety of workers. It may be correct that the burden on the main contractor be increased. He will often be best placed to ensure that safety measures are taken; indeed it may be impracticable for anyone else to assume that role. Such pragmatic considerations are reinforced by the logic of enterprise liability which seeks to attribute responsibility to the enterprise for activities which it has undertaken that carry risks. The pursuit of any particular activity may require the services not just of an entity's own employees but also those who contract on a different basis. It is submitted that it follows from this that the duty of care owed to the sub-contractor's employees should be in line with that owed to the enterprise's actual employees. Both groups of staff encounter risks created by the enterprise whilst furthering its aims. It would seem equitable that parity of treatment in terms of safety obligations exist. Recent cases suggest that the Australian courts are moving in this direction in that the main contractor may be found to have `quasi-employer' responsibility towards the employees of a sub-contractor depending upon the control exercised over those staff.

The Challenge of Cross-Fertilisation

A broader approach to the relationships falling within the labour law umbrella will encourage cross-fertilisation between different branches of contract law; the law it must be said is moving more firmly in this direction already. It is important to have regard to the manner in which developments in contracts of specific types lead to cross-fertilisation. A good example is furnished by the recent decision in *Yam Seng v ITC* whereby developments in a number of areas – including the law of the employment contract – allowed an implied term of good faith to be inserted into a commercial contract.[34] The term was viewed as an implied term in fact as the law of commercial contracts was not seen at a stage of development whereby it could apply as a matter of generality and therefore be an

[34] [2013] EWHC 111.

implied term in law. [35] In any event, it is debateable whether commercial contracts can be viewed as a homogeneous class.[36] The decision to apply a development arising more widely requires care. There is a significant measure of judicial discretion in such cases but, I would argue, that a development should only be adopted where it can be seen as making sense in the context of the type of contract under consideration. *Yam Seng* involved a distribution agreement and provides a very good illustration of how such cases should be approached. The question of implication, as with questions of construction, was determined on a contextual basis. Crucially, the values of the commercial parties (`reasonable commercial standards of fair dealing'[37]) helped inform that context: `the relevant background against which contracts are made includes not only matters of fact known to the parties but also shared values and norms of behaviour. Some of these are norms that command general social acceptance; others may be specific to a particular trade or commercial activity…'. The decision in favour of implication was seen as according with the values of the world of commerce. The court in *Yam Seng* also categorised the contract concerned as relational and implication was seen as furthering the norms of such contracts: ` The parties are not aiming at utility-maximisation directly through the performance of specified obligations; rather, they are aiming at utility-maximisation indirectly through long term co-operative behaviour manifested in trust and not in reliance on obligations specified in advance'. This justification is somewhat questionable given that the court based implication on the `business efficacy' test and the particular circumstances of the contract in question. It is not though immediately apparent that the behaviours attributed to relational contracts are universally present in all contracts of this type. Reasonable people will differ over what is required by ` reasonable commercial standards of fair dealing,'[38] Is it fair to assume that the values of all contracts which are both relational and commercial are the same? It is certainly the case that parties who enter into distribution agreement or any type of relational contract behave in a variety of ways. Some may be typical than others but a court

[35] This would appear to be correct: *Mid Essex v Compass Group* [2013] EWCA Civ 200. And see *Insight Oceania Pty Ltd v Philips Electronics Australia Ltd* [2008] NSWSC 710
[36] R.Hooley, `Controlling Contractual Discretion' (2013) 72 CLJ 65.
[37] *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch)
[38] *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch)

decides which behaviours are deemed sufficiently normative to be elevated into legal obligations.

Whether or not we believe that the outcome in *Yam Seng* was correct it should be applauded in terms of methodology. The decision to transplant a doctrinal developments which had emerged elsewhere in contract law was taken on the basis of whether or not it would further the norms of the contract in question. Where the employment contract is concerned policy issues will come to the fore as decisions on development may ` have significant social and economic implications.' It should also be borne in mind that the policy motivation in a different branch of contract law may be odds with the needs of the employment contract.

Demarcation Lines

Whatever philosophy is adopted the question of demarcation lines must be addressed. The approach in NSW deserves attention. The Industrial Relations Commission possessing extensive regulatory powers in respect of unfair contracts. The legislative history is of significance. Section 88F of the Industrial Arbitration Act 1940, the predecessor of the current regime, was initially interpreted as being concerned with arrangements which were a sham in the sense that they were disguised forms of employment. It was aimed at contracts which were in some way thought to be subversive of the scheme of industrial regulation achieved by the 1940 Act. It has been said that "The section is clearly intended to confer a comprehensive power upon the Commission to go to the substance of an arrangement made for a person to perform work in an industry - and to do so in disregard of the legal dress in which the arrangement has been clothed - in order to put such a worker in no worse a position than if he had been working under a contract of employment protected by award conditions. The central power conferred is to avoid or vary the contract or arrangement for work actually made, upon proof of one of the grounds stated. These have in common the element that advantage has been taken of a worker to obtain cheap labour."

The original scope of the legislation was conservative in that it simply aimed to capture individuals who were, in substance, employees. The current provision is much wider and more radical thereby. It is clear that commercial dealings fall within its scope. A provision of this sort may find justification in a variety of rationales. It may simply represent a move to a generic form of unfair contracts legislation. However, s 106 is not of that ilk as it is confined to contracts involving the performance of work: `any contract or arrangement or any condition or collateral arrangement relating thereto whereby a person performs work in any industry.'[39] Barwick CJ found the impact dramatic: `Notwithstanding the wide language of s. 88F, I have found difficulty in becoming convinced that it was within the contemplation

[39] As a result a contract for the sale of a business would not be caught where the vendor retained no interest in the conduct of the business after the sale: *Jennings v Auto Plaza* NSWIRComm 111.

of the legislature that agreements for business ventures, of which the present may be a specimen, freely entered into by parties in equal bargaining positions, should be so far placed within the discretion of the Industrial Commission as to be liable to be declared void. However, I have come to the conclusion that the language of s. 88F of the Act is intractable and must be given effect according to its width and generality. The legislature has apparently left it to the good sense of the Industrial Commission not to use its extensive discretion to interfere with bargains freely made by a person who was under no constraint or inequality, or whose labour was not being oppressively exploited.' [40] This makes a good deal of sense as attempts by a legislature to demarcate an area worthy of protection overly precisely will provoke drafters of contracts into frenetic activity to circumvent legislative intention. S 106 encompasses both sham arrangements and those which are genuinely commercial.

The legislation of New South Wales (NSW) provides much food for thought. The Industrial Relations Commission has extensive powers where unfair contracts are concerned. The definition of an unfair contract includes contracts that are unfair, harsh or unconscionable, or against the public interest. The Commission can determine that an unfair contract is void, in whole or in part. They also have power to vary the terms of a contract. In comparison with UK labour laws, the NSW scheme seems very radical. An entirely different picture emerges when account is taken of UCTA 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 given that there is a crucial element of similitude. All three models contain what amounts to an open-textured central criterion of fairness. In the case of the 1999 Regulations, a term will be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. When this wider comparison is made s 106 appears radical when viewed as a labour law measure but not as an instance of unfair contracts legislation. I would suggest that provisions such as s 106 are necessary to ensure that those providing labour are not exploited even where the governing contract is genuinely commercial in nature. The Privy Council decision in *Caltex* dealt with a solus agreement and illustrates this very well.[41] The claimants agreeing to supply petrol bought from Caltex at a service station leased from them. *Caltex* illustrates how the scheme can regulate contracts which would be categorised as commercial but which have an element which obliges one side to provide labour (a key being whether it is their labour). The Privy Council found that `it may be attractive to operate through a composite agreement as labour costs may be less than where employees are hired directly. The benefit obtained by Caltex from the solus contract in addition to the licence fee and rental of goodwill, was an assured and profitable outlet for their products without incurring the expense of

[40] *Stevenson v Barham* 192
[41] [1981] 1 WLR 1003.

paying wages to employees for doing what, under the solus contract, the Feenans had bound themselves to do instead.'

Provisions such as s 106 are necessary to ensure that those providing labour are not exploited. In a case such as *Caltex* the claimants may find themselves working excessive hours for limited reward: ` Although both worked very long hours, Mr. Feenan 85 to 90 hours per week and Mrs. Feenan, who also ran a snack bar which formed part of the premises, 75 hours per week, they soon found that they were unable to make anything like the promised profit of £20,000 to £24,000 per annum. The solus agreement fell within the legislative scheme as the phrase `performing work in industry' was held to cover `doing anything which a person employed in the same occupation for hire or reward might be expected to be required to do under a contract of employment. So the Feenans when running the service station by their own labours were performing work in industry.' The Privy Council moved on to determine the requisite nexus between the contract and the performance of the work: `In their Lordships' view this provision in the context of contract or arrangement bears its ordinary meaning of "in consequence of which" or "in fulfilment of which." Either meaning is sufficient to bring the solus contract within the description of contracts to which section 88F applies. The Feenans were required to carry on the task of supplying petroleum products to motorists throughout all lawful working hours. In doing so they were fulfilling their contractual obligations to Caltex.' *Caltex* looks behind the nature of the contract to determine, given the practical realities, whether the work required to fulfil the contract will be performed personally; no contractual stipulation is needed. In *Caltex* itself the terms of the contract made it inevitable that the claimants would themselves have to perform the work required to discharge the obligations set out in the solus agreement: `The Feenans undertook to conduct the business on the premises during all lawful hours and to use their best endeavours to secure any necessary authority or permission to secure that those lawful hours should be as long as possible.'

Claimants may be running their own business and still gain protection as a person may be performing work in a business for himself and thereby be performing work in an industry.[42] An example of is provided by the car dealership that was the subject of proceedings in *Gough v Caterpillar.* [43]It being noted that without a dealership network, the respondents would need to set up their own premises at various locations around the country and employ their own staff to sell their products. The degree of

[42] `Finding a Balance: Towards Fair Trading in Australia' (Reid)

[43] [2002] NSWIRComm 354. In Gough it was said that the contracts and arrangements between the applicants and the respondents were in the nature of relational contracts with a strong personal element characterising the relationship. Again, this distinguishes the relationship between the applicants and the respondents from the arm's length relationships that characterise other commercial relationships.

integration was high: ` The agreements require the applicants to set up a business in a certain way; they require the principals of the dealership to use their qualifications and abilities to achieve the primary purpose of the Agreements, for example, the development and promotion of the sale of products; they directly require the applicants to employ personnel to perform work in the business – the business could not operate unless relatively large numbers of personnel were employed to perform work for the business.' In those circumstances it was held that `the agreements lead directly to the performance of work in an industry (indeed, it may be said the agreements lead directly to the performance of work by a person or persons *for another*) and Caterpillar has a real interest in the performance of that work. Moreover, the performance of work is not merely a remote consequence of the agreements but a necessary requirement that, in the absence of the performance of such work, would render the agreements meaningless.' The range of commercial transactions that may be caught by s 106 is extensive. *Jennings v Auto Plaza* demonstrates that a commercial lease may fall within the provisions: `the terms of the lease, and particularly those to which reference has been made, require the lessees to establish the demised premises in restaurant mode and to carry on therein a restaurant business during lawful trading hours. I also consider that the carrying on of such a business in accordance with that obligation necessarily requires and results in the performance of work in the restaurant industry by the lessees themselves and/or by other persons whom the lessees engage to work in the business.'[44]

Conclusions

Currently we operate on the basis of a rather monolithic approach to labour law; both in terms of those who merit protection and the extent of protection that should be conferred. I would suggest that a core aim should be to protect those who provide work and who are vulnerable given the vastly superior power of the employer. The form that the contract takes should count for less. Instead the focus should be on ensuring that the relationship is conducted on the basis of fair dealing. The employer's discretion must be regulated and procedural protection afforded. Terms which are unconscionable should be struck down; very much a current problem given the demise of collective bargaining. An approach which is both more inclusive and nuanced would result in a greater degree of differentiation than currently exists with respect to employment protection rights afforded. What is

[44] NSWIRComm 111

required by way of intervention in the case of a franchisee may be different compared to the case of the employee. Protection may be required against the activities of those other than the employer. For instance, a small business may be adversely affected by suppliers' discriminatory pricing and refusals to deal with small business. [45] We must also accept that some individuals may be treated as an employer for some purposes but, nevertheless, be entitled to the benefit of particular protective measures. In Australia `the aim of franchise regulation is not to protect the employees of franchisees, but to protect the franchisees themselves.'[46] Employees are otherwise protected.

[45] `Finding a Balance: Towards Fair Trading in Australia' (Reid) `Finding a Balance: Towards Fair Trading in Australia' (Reid) 4.2.
[46] S. Marshall, `An Exploration of Control in the Context of Vertical Disintegration' in C. Arup et al (eds) Labour Law and Labour Market Regulation' 557