

# CLASS ANALYSIS AND THE CONTRACT OF EMPLOYMENT

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## ABSTRACT

*The aim of the article is to establish how class analysis has underpinned common law contract of employment cases. It was axiomatic that judges would turn to class analysis in this field of law. For, in each case, the question that had to be resolved was whether someone was an employee or independent contractor. These two groups shared many similar characteristics and in order to settle a case people had to be put in their right class and this factor drove judges to engage in class analysis. The article will pinpoint how the successive rules that have evolved to distinguish whether a person was an employee or independent contractor casts a light on how sociological forces have played a fundamental role in shaping legal tests in labour contract law.*

## I. INTRODUCTION

In this paper, I want to tackle two related tasks. First, I will seek to illuminate how, over a long historical period at common law, judges have utilised class analysis to draw a distinction between an employee and an independent contractor. Second, I will examine how well the law of employment has operated in dealing with the dichotomy between an employee and independent contractor. In brief, the paper will examine whether the class analysis adopted by judges in defining the common law of contract of employment has resulted in a clear exposition of the legal status of an employee and independent contractor.

The fundamental aim of the paper is to show how, in the field of the common law contract of employment, judges engage in class analysis. This is not a matter of voluntarism. The inescapable reality of having to allocate people to a social class as part of the settlement of cases ensures judges engage in class analysis. A distinction between those who buy and sell labour hours has to be established in the course of a labour contract case and thus, judges simply cannot avoid sociological reasoning being part of their reasoning process.

From the outset, the judges had to distinguish whether a person was an employee or independent contractor, for these two groups shared many

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similar characteristics in their work relationship. In order to settle a case, people had to be put in their right class and this empirical reality drove judges to engage in class analysis.

Strict legalism with its theory that law is a system of rules proved flexible enough in practice to allocate for the reality that judges were engaged in categorising classes when they gradually adapted or updated the common law test for employment in line with the changing dynamics of class composition. Facts are stubborn things and judges were adroit enough to understand that their task in labour contract cases was to put people in a class if an employment case was to be cogently addressed. The theoretical niceties of strict legalism had to adapt to the material reality of a social structure based on class distinctions when employment cases came before the judiciary.

Judges are not immune to the influences of extra-legal factors but they also operate within the strictures of legal reasoning. However, through a glass darkly, it is possible to view their legal reasoning as a form of concentrated economics and politics. Also, the cultural superstructure plays a role in shaping legal principles. In the case of the common law employment test, Australia's status as a British Empire client state ensured English law impacted strongly on shaping the contours of the Australian common law employment test. The interconnection between English law and its Australian counterpart in the field of the legal test for employment will be a feature of this paper.

Beginning in the late Middle Ages, master and servant statutes legally regulated the wage-labour form.<sup>1</sup> But, as capitalism developed and the coercive obligations of status and punitive rules central to the master and servant statutes became anachronistic, the organising principles of contract law, with its theme of liberal individualism and free labour operating in a market economy, became the conceptual framework of the employment relationship in the common law world.<sup>2</sup> The common law was less oppressive than the supplanted master and servant statutes but it was not to be free of expressing power relationships. The class dimensions of the common law contract of employment and how judges have dealt with that problematic issue when undertaking the classification task of identifying those caught up in a wage-labour relationship is central to this paper.

## II. THE LAW OF CLASS IDENTIFICATION

The individual employment relationship has, in the modern era, been the pivot of labour law. Sir Otto Kahn-Freund has depicted the contract of

1 Christopher Frank *Master and Servant Law: Chartists, Trade Unions, Radical Lawyers and the Magistracy in England, 1840-1865* (Ashgate, Farnham, 2010) at 6. Douglas Hay and Paul Craven (eds) *Masters, Servants, And Magistrates in Britain and the Empire, 1562-1955* (The University of North Carolina Press, Chapel Hill, 2004) at 1.

2 Hugh Collins *The Law of Contract* (Lexis Nexis, London, 2003) 4.

employment as the “cornerstone” of labour law.<sup>3</sup> Common law rules permeate individual employment contracts, whilst statutes in the employment field turn upon establishing work relationships that are based on the common law definitions of “employees, or employers or contracts of employment or wages.”<sup>4</sup> The common law distinction between an employee and an independent contractor is accepted as the guiding principle for legislation designed to protect individual workers.<sup>5</sup> Social legislation governing the workplace tends to exclude independent contractors. The process of incorporating common law concepts into employment legislation occurs in both the UK and Australia.<sup>6</sup> Statutory entitlements dependent on meeting the common law definition of an employee highlight the sweeping importance of the judicial role in categorising work relationships.

Since the mid to late 19th century, when the master and servant statutes were displaced by the common law contract of employment, judges have been engaged in accumulating a body of law that distinguished employees and independent contractors. The work of categorising these two groups of paid workers has been a thorny issue for the adjudicators of what constitutes a labour contract. The courts, at various junctures, have struggled to achieve clarity in applying contract doctrine to differentiate an independent contractor undertaking paid work from an employee engaged in wage work on a contract of employment. The work relationship of an independent contractor is put into a different legal category to that occupied by an employee. History has borne witness to the fact that demarcating different forms of labour relationships has proved a daunting task for judges.

The mantra of freedom of contract in employment law obscures wide disparities of power between the classes that comprise the economic formation. Class is the most important explanatory category in the social sciences. It mediates employment relations. It is the central agency regulating the relationship between those that are bound together by the selling and buying of labour hours. It is unsurprising that the real work of judges in employment law is dedicated to correctly categorising the groups that comprise the class structure. And the major question should be how well judges differentiate social classes. In particular, what degree of success have they achieved in formulating a legal test for separating employees and independent contractors, for these two classes share some common characteristics that present a difficult challenge to judges charged with distinguishing them? In effect, the theoretical boundaries of the common law contract of employment is set by judges deciding the contours of the actual parties engaged in the buying and selling of labour hours. The very nature of the judicial task in defining a contract of employment forces them to undertake class analysis. The legal

3 Otto Kahn-Freund “Legal Framework” in Alan Flanders and Hugh Clegg (eds) *The System of Industrial Relations in Britain* (Basil Blackwell, Oxford, 1954) 47.

4 Breen Creighton and Andrew Stewart *Labour Law* (Federation Press, Sydney, 2010) at 163–4.

5 At 163–4.

6 Simon Deakin and Gillian Morris *Labour Law* (Hart Publishing, Oxford, 2009) at 121.

rules in this field of law are expressed in an abstract legalism form but the content of the rules is established in class-specific form, and thus the judicial interpretation of the common law contract of employment is circumscribed by capitalist relations of production.

It was in the turbo-charged economic climate of the mid-19th century and the rapid growth of wage-labour that common law judges in Britain increasingly focused on drawing a distinction between an employee and independent contractor. This was no easy task, for, on the surface, the difference between an employee and independent contractor appeared paper thin. This categorisation exercise took place in an age when the legal system began to treat the employment relationship like any other contract in a burgeoning market economy.<sup>7</sup> Establishing the organising principles for distinguishing an employee and independent contractor was necessary in order to handle disputes connected with the employment contract. Litigation based on the contract of employment required judges to understand and interpret the different types of socio-economic relationships that existed within the workplace. In fulfilling this task, judges sidestepped the ethos of the formal equality of labour and capital that theoretically formed the bedrock of the labour contract. Instead, the judicial focal point was on an anatomy of class and the stratified nature of the relationship between those bound together by the wage-labour relationship.

Right from the outset, the basis of contractarian ideology collapsed before the realpolitik of judges who understood that asymmetrical power relations underpinned the employment contract. Instead of pursuing the will-of-the-wisp equality line, judges adopted a class-based analysis, and took their doctrinal bearings from the issue of control when determining what constituted an employment contract.

The control factor provided the conceptual framework for defining the legal characteristic of the wage contract. Control became the epicentre of the rule that was applied for determining an employment contract. The rule emerged from a judicial understanding of the lopsided nature of the social relations of work. Judges, in formulating the control test, were operating as the creative ideologists of the capitalist class and pinpointing how economic power relationships can be expressed in a legal form. The ghost of the authoritarian master and servant legal regime haunted the common law legal test of employment. Control was a cardinal feature of working lives and it seeped into the workplace legal rule for distinguishing a capitalist from a worker.

The politics of the workplace merged with rule-based decision-making to provide a class-based test for the common law contract of employment. Subordination to orders became the litmus test for defining an employee. This state of affairs was contrasted with a voluntaristic and egalitarian agreement being struck between a principal and independent contractor where the latter

7 Collins, above, n 2, at 4.

provided a service paid for from the revenue of the client. Furthermore, independent contractors owned their own tools, and their labour was not appropriated in the form of surplus value or profit by an employer. The independent contractor set their own work pattern, and yielded no surplus labour that was transmuted into profit for a second party. The reward for work they received went fully into their own pocket. Guided by knowledge of the factors that distinguished employees and independent contractors the judiciary were ready to establish a body of cases based on the control test. Even the very word, control, evokes that behind the veil of formal equality the legal test of employment resonates with class power. Through the control test the economic hegemony of the capitalist class was being given a judicial imprimatur.

In 1855, Crompton J in *Sadler v Henlock*, stated an employer “retains the power of controlling the work.”<sup>8</sup> This early exposition of the right of one party to exercise authority over another in the workplace became the constituent element of the common law contract of employment test. Following *Regina v Walker* (1858), it became known as the control test.<sup>9</sup> Baron Bramwell in *Regina v Walker*, fashioned a test for categorising an employee that focused on the employer having the right to control the manner in which the work was done.<sup>10</sup> In 1880, in *Yewens v Noakes*, Baron Bramwell refined the common law test and crystallised the keynote theme of subordination. He stated that “a servant is a person subject to the command of his master as to the manner in which he shall do his work.”<sup>11</sup> The control test expressed the duty of obedience in relation to obeying orders about how the work is to be done and the manner of execution of any task. It entailed the employee being under an obligation of subordination to the will of the employer. Here, in its genesis, the common law contract of employment test reflected a wage-labour relationship based on economic and social inequality. The judiciary picked up on the word control in their search for a legal concept to define the relationship between employer and employee. It was the beginning of contractarian legal forms in the buying and selling of labour hours expressing unequal economic relationships. The nominal equality of the contracting parties was subsumed by judges entrenching the economic domination of those purchasing labour hours. It was the onset of judges engaging in class analysis with the purpose of perpetuating class rule in the sphere of labour relations.

In formulating control as the constituent element of the common law employment test in the 1850s, the English judges of that period exhibited a capacity to grasp the nature of the embryonic class structure that was emerging in the first nation to undergo an Industrial Revolution.<sup>12</sup> It was a transition stage when the “basis of wealth changed from merchant and

8 *Sadler v Henlock* (1855) 4 E and B 570 at 578 or 119 E R 209 at 212.

9 *Regina v Walker* (1858) 27 LJ M C 207.

10 *Regina v Walker*, above.

11 *Yewens v. Noakes* (1880) LR 6 QBD 530, at 532-533.

12 Isaac Rubin *A History of Economic Thought* (Pluto Press, London, 1989) at 224.

agricultural capitalism to industrial capitalism.”<sup>13</sup> By the 1850s, the British Industrial Revolution had created three new major classes.<sup>14</sup> The degree of control in a web of social relationships based on property rights was the nexus that both bound together and distinguished the three major classes brought into existence by the earliest phase of the Industrial Revolution. To begin with, a new property rights regime had brought into being a capitalist class that owned the instruments of production and employed and controlled the property-less wage worker class which sold its labour power to the captains of industry. Alongside these two major classes, there existed a petty bourgeoisie who owned and used their own instruments of production whilst not hiring people who sold labour hours. The backbone of this class comprised small traders, artisans and shopkeepers.<sup>15</sup> The petty bourgeoisie controlled their work routine and sold a service in return for a financial sum.<sup>16</sup> This intermediate group was defined, in the most basic sense, by its relationship to the means of production. It was a middle class. It was a petty bourgeoisie made up of self-employed or independent contractors. This class was not deprived of ownership or control of the means of production and thus was not forced into servitude to the ruling class in the way wage-labour was. It was a class that owned small amounts of property but it did not live by the extraction of surplus labour from wage-labour.<sup>17</sup> This class earned their own living utilising their own labour and their own property whilst those who purchase labour hours live off the work of others. The capitalist class control the labour power of an exploited class. The petty bourgeoisie are producers making a living outside the dominant relationship that constitutes the capitalist mode of production.<sup>18</sup> They exploit nobody as they live off the sweat of their own labour.

Tasked with mediating relations between social classes, the judicial apparatus of the British state in the field of employment contract began establishing a rule-based regime that was circumscribed by the dominant economic relations of the day. Perhaps not surprisingly, in this new industrial civilisation, common law judges adapted to the political economy of their day. They mirrored the empirical reality of the social and power relationships of the class structure that confronted them when forging a contract of employment test that distinguished the petty bourgeoisie from wage workers. And, in picking out the control factor as the key to work categorisation, they exhibited a pragmatic and nuanced view of the emerging class structure. Not only did they pick up on how capitalism was predicated on the subordination

13 Tony Lane *The Unions Make Us Strong* (Arrow Books, London, 1974) at 38.

14 Eric Hobsbawm *Industry and Empire* (Penguin, London, 1975) at 66–7.

15 J-F Bergier “The Industrial Bourgeoisie and the Rise of the Working Class 1700-1914” in C M Cipolla (ed) *The Fontana Economic History of Europe: The Industrial Revolution* (Fontana, New York 1973) 403.

16 Erik Olin Wright *Class Counts* (Cambridge University Press, Cambridge, 1997) at 17.

17 Hal Draper *Karl Marx’s Theory of Revolution: Volume 2, The Politics of Social Classes* (Monthly Review Press, New York, 1978) 289.

18 At 291.

of the worker to the capitalist enterprise, but also how the criterion of control legitimised managerial prerogatives. The control test was a sharp-edged assessment of a class structure in formation. And using control as the principal criterion opened up a path for the judiciary to distinguish the three basic classes that were opening up a new epoch in British history. In particular, control was an empirically valid organising principle for separating employees from independent contractors. Kahn-Freund believed the control test was an anachronism. He thought the control test would have been more suited to the pre-capitalist era, when the personal ties between masters and servants were stronger.<sup>19</sup> This was a serious miscalculation on the part of Kahn-Freund of the size and scope of early industrialism. Capitalism was only in its infancy when the control test was formulated and the hallmark of the British economy was its decentralised and miniaturised nature. In actuality, the control test captured the close physical bond that bound the bourgeoisie and the emerging proletariat.

One needs to note that the small-scale nature of the business structure in the early phase of the British Industrial Revolution blurred the lines between the three major classes. The class structure was a shifting mosaic that made it difficult to compartmentalise the three major classes. Classes tended to shade into one another. Factory capitalism and an urban proletariat were in their infancy. Only a small minority of workers were toiling in factories.<sup>20</sup> Cottage industries predominated.<sup>21</sup> These cottage industries were small-scale ventures but, contrary to surface appearance, they were not places for housing petty bourgeois producers. They were venues for exploiting wage-labour. In these small-scale businesses, employers were able to individually watch over and patrol their miniature empire of capital. Workers toiled in close proximity to their bosses. The control test, with its credo of personal service and domination, reflected to a large degree the empirical reality of the economic formation of this period but it was an intricate socio-economic scene. Even in the large factories, mills and coal pits that existed sizeable numbers of the workers appeared to be members of the petty bourgeoisie. They were not employed by the owners, for sub-contracting featured heavily.<sup>22</sup> The plethora of domestic workers involved in handicraft work in their own homes added to the complex web facing the judicial apparatus in categorising work relationships. The principal criterion of control was apposite for an era when a bourgeois employer could patrol the physical perimeter of his factory or the four walls of his cottage business. It was a cogent guiding principle in the hands of judges when they had to categorise work relationships. It

19 Otto Kahn-Freund "Servants and independent contractors" (1951) 14 *Modern Law Review* 504-9. Simon Deakin "The evolution of the contract of employment, 1900-1950: the influence of the welfare state" in Noel Whiteside and Robert Salais (eds) *Governance, Industry and Labour Markets in Britain and France* (Routledge, London, 1998) 217-18.

20 Lane, above, n 13, at 40.

21 At 40.

22 At 40.

was a legal test that captured a stage of capitalism. A utility calculus test was applied that captured the disparity of power that underpinned the close personal ties that existed in the early phase of factory capitalism. The control factor became a useful mechanism for judges to differentiate social classes, and it was exercised with some sociological aplomb.

### III. CHANGING WHEN THE FACTS CHANGE

Justice Michael Kirby has averred that the “structure of the common law” is shaped by “judgment and opinion” and that its rich tapestry is supported by a creative judiciary capable of adapting its principles to a shifting social landscape.<sup>23</sup> Mason J expressed a similar view in *Stevens v Brodribb* when he noted “the common law has been sufficiently flexible to adapt to changing social conditions.”<sup>24</sup> Everything these two judges say comports with the central tenets of strict legalism. They are not denying that the fundamental role of a judge is to discover the relevant facts and apply the applicable rule. Moreover, they are not setting themselves against the axioms of a rule-based approach to adjudication.<sup>25</sup> They are simply acknowledging that changed circumstances can open up the space for creative judicial judgment without any impairment to the precepts of strict legalism. Even Gava, who is a stern and lucid champion of strict legalism, accepts that force of circumstances can impact on the certainty of an extant rule and then:<sup>26</sup>

... the proper path for a judge to follow is to use analogy and the underlying principle behind the rule to develop it in a fashion that is consistent with the aims and effects of that rule.

Gava could have added that it is not inconsistent with analogical reasoning and the underlying principle behind a legal test for the rule to develop in tandem with changing social relations. The history of a rule can keep track with the evolution of a society. That is the great accolade that can be laid at the feet of the common law.

Gava’s service to the cause of strict legalism has been mirrored by Justice Dyson Heydon. Both Gava and Justice Dyson Heydon have been responsible for burnishing the legacy of Justice Dixon, Australia’s greatest strict legalist judge. In speaking of Justice Dixon, Justice Dyson Heydon states: “He

23 Michael Kirby *Judicial Activism* (Sweet & Maxwell, London, 2004) 15.

24 *Stevens v Brodribb* (1986) 160 CLR 16, 19.

25 John Smillie “Formalism, Fairness and Efficiency: Civil Adjudication in New Zealand” (1996) *New Zealand Law Review* 255.

26 John Gava “Another Blast From The Past Or Why The Left Should Embrace Strict Legalism: A Reply To Frank Carrigan” (2003) 27 *Melbourne University Law Review* 190.

contemplated change in the law as entirely legitimate.”<sup>27</sup> Justice Heydon goes so far as to list an evolving business landscape as the spark for the development of a rule. As he observes:<sup>28</sup>

When new cases arose, existing principles could be extended to deal with them, or limited if their application to the new cases was unsatisfactory. As business or technical conditions changed, the law could be moulded to meet them. The changes could be effected by analogical reasoning, or incremental growth in existing rules, or a rational extension of existing rules to new instances not foreseen when the existing rule was first developed.

This is a sharp insight and it is four-square with the history of the rule determining when someone was either an employee or independent contractor. The history of the rule was forged by those who understood the dynamism of business life and the changing patterns of the hierarchical power relations within the workplace. Over the years, judges were to grapple with shifts in business life and make incremental changes to the rule to account for a fluctuating labour market landscape. The basis of the test was putting people in specific classes, and extending the rule when the class structure altered, and analogical reasoning supported this process. The history of the rule was to show, at various junctures, a rational and incremental adaption of the test to allocate for “new instances not foreseen when the existing rule was first developed.”<sup>29</sup> In line with the gradualism of strict legalism, control was to remain a key organising concept of the rule guiding the common law of contract of employment. Other indicia were to be added over time by judges as social relations evolved. The craft tradition hallowed by Gava, Justice Dixon and Justice Dyson Heydon was central to doctrinal change. It was evident in the morphing of the test as new circumstances emerged and the form of legal reasoning that guided the incremental filling in of the gaps that changes in the class structure called forth. The creative judicial judgment aspect that is an inherent part of strict legalism segued into class analysis because, at its root, the judges were engaged in categorising classes when they gradually adapted or updated the test in line with the changing dynamics of class composition. The canon of strict legalism met class analysis and the upshot was changes to the employment test over time. The flexible nature of the common law was tested in Britain as the accelerated tempo of economic development during the latter part of the 19th-century had an impact on every aspect of the class structure. The contract of employment was not immune from the creative destruction wrought by changing economic relations. The challenge would be how the judiciary responded to a changing

27 Justice D Heydon “Judicial Activism and the Death of the Rule of Law” (2003) 23 *Australian Bar Review* 115.

28 At 116.

29 At 116.

landscape, and what modifications would be introduced to bring the control test into line with new facts.

#### IV. THE WINDS OF CHANGE

The class conditions that brought the control test into being began to undergo a transformation in the latter part of the 19th-century. In the closing decades of the 19th-century, the structure of British industry began to change. The rapid accumulation of capital led directly to the rise of the limited liability company as the normal mechanism for organising production.<sup>30</sup> The scale and capital investment required in this new era began to put pressure on the class structure and in particular the intermediate stratum. The petty bourgeoisie was being pushed to the margins of the class structure as it lacked the resources to keep pace with large scale capital.<sup>31</sup> Small shopkeepers were the first to feel the competitive pressure. Department chains such as Selfridges and John Lewis sprang up and exposed the precarious position of the petty bourgeoisie.<sup>32</sup> The business rhythm of the High Street changed as price competition fuelled a retail revolution that sparked market share shifting to burgeoning tycoons.<sup>33</sup> It was not just shopkeepers that felt the wind of change. Small business in every sector continued to exist but industry began experiencing the incipient signs of centralisation.

Yet it was only during the course of the First World War that fundamental economic changes led to the reconfiguration of the class structure of Britain. The war provided a fillip to the monopolisation of the economy. With foreign imports restricted, the conditions were ripe for bigger companies to rapidly increase their market and profit share.<sup>34</sup> Hobsbawm states that, while in 1914, Britain was “perhaps the least concentrated of the great industrial economies,” by 1939 it was in the vanguard of economic concentration.<sup>35</sup> By 1939, in a development that was a bad omen for the petty bourgeoisie that thrives in an open economy, “free competition had nearly disappeared from the British scene.”<sup>36</sup> The age of giant corporations, duopolies and monopolies had arrived in the former citadel of free trade. As a gap opened up between the working class and the captains of industry, the relationship between

30 Andrew Gamble and Gavin Kelly “The Politics of the Company” in John Parkinson, Andrew Gamble and Gavin Kelly (eds) *The Political Economy of the Company* (Hart Publishing, Oxford, 2000) 32.

31 Geoffrey Crossick “The petty bourgeoisie in 19th-century Britain: the urban and liberal case” in Geoffrey Crossick and Heinz-Gerhard Haupt (eds) *Shopkeepers and Master Artisans in 19th-Century Europe* (Methuen, London, 1984) 64.

32 At 64.

33 At 65.

34 John Foster “British Imperialism and the Labour Aristocracy” in Jeffrey Skelley (ed) *The General Strike 1926* (Lawrence and Wishart, London, 1976) 8.

35 Hobsbawm, above, n 14, at 214.

36 At 216.

the workers and petty bourgeoisie was reconfigured. The concentration of production winnowed the self-employed. Growing specialisation and new technologies led to deskilling and what was once skilled work became semi-skilled.<sup>37</sup> As a result, large numbers of the petty bourgeoisie lost the capacity to offer a boutique product and were forced into the ranks of the working class.<sup>38</sup> The petty bourgeoisie were in decline. Britain in the 1930s became a proletarian nation with 90 per cent of the workforce employed on contracts of employment.<sup>39</sup> The percentage of the workforce that was self-employed shrank to 6 per cent.<sup>40</sup> The percentage of petty bourgeois workers plummeted to single digit figures and stabilised at that level in all the major capitalist economies. According to the most recent data collected in 2013 by the Australian Bureau of Statistics, the self-employed account for 9 per cent of the Australian workforce.<sup>41</sup> Self-employment rates in other advanced capitalist societies such as the US, France and Germany match Australian figures.<sup>42</sup> A further demarcation between the working class and the petty bourgeoisie during the inter-war years was the expansion of trade union membership. In the post-First World War period, as waves of economic struggle gripped Britain, millions flocked to the union banner.<sup>43</sup>

The control test that had stood for generations in governing the status of workers came under pressure in the period between the wars as class relations experienced a quiet revolution. The control test had been forged in an epoch when small-scale production predominated. Bosses and workers stood cheek by jowl. Control was individually exerted by omnipresent employers in frock coats and top hats. Now the economic landscape was dominated by large limited liability companies with shareholders reduced to passive investors whilst administrators managed production.<sup>44</sup> At the apex of the social pyramid stood the owners of share capital and the white-collar specialists who controlled the labour process of giant firms. Petty bourgeoisie numbers had shrunk under the impact of monopolisation. As petty bourgeois numbers tumbled their economic identification and differences with wage workers was muddled by the growth of white collar work. This phenomenon narrowed the visible gap between these two classes.

The 1920s witnessed a judicial attempt in Britain to adjust to changing times by updating the control test. There had been a period of rapid socio-economic change and a new burst of creative judicial judgment was required to put people in social classes when employment contract issues were at stake.

37 Lane, above, n 13, at 103.

38 Eric Hobsbawm *Labouring Men* (Weidenfeld & Nicolson, 1968) 324-5.

39 Maurice Dobb *Studies in the Development of Capitalism* (International Publishers, 1975) 349.

40 At 349.

41 Australian Bureau of Statistics "Forms of Employment, Australia" November 2013, Cat No 6359.0, ABS, Canberra, 2014, 2.

42 Olin Wright above, n 16, at 123.

43 Arthur Morton and George Tate *The British Labour Movement* (Lawrence & Wishart, 1973) 289.

44 Leslie Hannah *The Rise of the Corporate Economy* (Methuen, London, 1983) at 1-2.

And strict legalism was capable of accommodating the new social terrain. Strict legalism is misunderstood when it is viewed as a system of autonomous rules. Gava, Justice Dyson Heydon and Justice Dixon make that point. Analogical reasoning can cope with the facts changing and incrementally adapt a legal rule to the new empirical circumstances.

It must be stated that the faith of Kirby J and Mason J in the versatility of the common law is not misplaced. For, when it came to adjusting to changing social conditions in the inter-war years, the common law in one sphere unquestionably showed its flexibility. The power of control over the execution of work and how it operated differently for the self-employed and wage workers was the focal point of the doctrinal initiative in the new monopolistic age of capital. This step forward was matched by the endeavour to depict the nature of the work undertaken by the petty bourgeoisie. In 1922, in *Underwood v Perry & Son Ltd*, the judge in the case stipulated that contracting to supply a product, or how work was procured, was not a characteristic evident in a contract of employment.<sup>45</sup> In other words, such market behaviour was the province of the petty bourgeoisie. Here was evidence of how class analysis could potentially be threaded through the legal reasoning involved in distinguishing the labour contract. In 1923, in *Binding v Great Yarmouth Port & Haven Commissioners*, the ambit of control was revamped.<sup>46</sup> This transformation took place against the backdrop of a more complex division of labour. In large production units, where personal supervision was no longer feasible, the rigour of the control test had to be relaxed. With the growth of specialised workers, it was now held that it was not whether control was actually exercised but if the power to control existed.<sup>47</sup> This step was an empirical recognition that there was a burgeoning of white collar workers who on any sensible examination could not be categorised as self-employed.<sup>48</sup> They were white collar wage workers who had a degree of independence in how they executed tasks but were, in the final analysis, hostage to the edicts of corporate managers

In contrast, the petty bourgeoisie owned their own means of production, and did not sell their labour power on the labour market.<sup>49</sup> The petty bourgeoisie operated outside the circuit of capital dominated by selling labour hours and, also, they individually procured clients who they provided a service to, whilst retaining autonomy over the execution of work. The boundary lines determining those encapsulated by a contract of employment was made more expansive to accommodate a growing privileged fraction of the wage-earning working class who had a large degree of discretion in their working life and who operated at arm's length from those remunerating them. Refining the control test to focus on the right to control rather than its exercise was designed to

45 *Underwood v Perry & Son Ltd* (1922) 15 BWCC 131.

46 *Binding v Great Yarmouth Port & Haven Commission* (1923) 16 BWCC 28.

47 *Binding v Great Yarmouth Port & Haven Commission*, above.

48 Dobb, above, n 39, at 348.

49 Wright, above, n 16, at 121.

give clarity on the growing army of white collar wage workers and hopefully ensure they were not misclassified as members of the petty bourgeoisie. This judicial shifting of the line on those members of the workforce that fitted within a labour contract was a step forward but continuing with a single-factor test that concentrated on the level of subordination was problematic. Having a single-issue test may be appealing to those wanting clarity of the law but, in an increasingly complex technological world, with many workers having ostensible control of their work regime, it was unclear whether a control test in any form would provide a definitive way forward for distinguishing the petty bourgeoisie and those snared by wage-work. Moreover, control can be a feature of the working life of both the employee and independent contractor. It is a double-edged sword. Not every independent contractor is unequivocally free of some form of control. It was not hard to imagine difficult cases where it would be a herculean task to determine if the power to control existed. The potential for getting it wrong existed, particularly when judges would be confronted by unscrupulous employers bent on sidestepping the control test so that they could mislabel employees as independent contractors and thus circumvent employment protection benefits and social legislation. Whether a single-factor test would suffice in the long run or a basket of factors would better capture the dividing line between an independent contractor and an employee was something that loomed on the horizon. What was certain was that a change to a legal rule had taken place and it presented a classic example of how a change could be effected by analogical reasoning that resulted in a rational extension of an existing rule to a new set of circumstances not foreseen when the existing rule was first developed.

## V. THE CONTROL TEST IN ANOTHER COUNTRY

In keeping with its client state relationship with the Mother Country, judicial developments in Australia remained in lockstep with Britain. In 1929, Napier J, in the South Australian case *Haupt v Haupt*, picked up on British authority to proclaim that it was the supply of a product and the way work was procured that separated the self-employed from employees.<sup>50</sup> Also, as long as there was even an indirect capacity to direct what work was to be done this sufficed to satisfy the control test.<sup>51</sup> Without any right to control there was no contract of employment. At no stage did the Australian judiciary ever deliberate on whether economic conditions in Britain had driven the redesign of the control test and whether similar events had unfurled in the Antipodes. This state of affairs highlights not only the overarching role of following precedent but also the relative autonomy of law. Legal developments can lag behind or even sometimes prefigure socio-economic changes. Judges

50 *Haupt v Haupt* (1929) SASR 393, 396.

51 *Haupt v Haupt*, above.

are not immune to the influences of extra-legal factors but they also operate within the strictures of legal reasoning. The upshot is that the needs of judicial reasoning can trump sociological reality. Australian judges following British precedent was testimony to how the need to follow precedent eclipsed a close analysis of the changing nature of inter-class relations being a guiding light for doctrinal shifts in the labour contract.

In sum, this was an age of Pax Britannica and the legal concepts of the metropolitan power ruled in Australia. During the inter-war years, the rural economy remained important. Politicians spoke of Australia's plentiful natural resources and "how it had a secure future as the food-bin of the world."<sup>52</sup> Agrarian capitalism was the dominant form of production in Australia.<sup>53</sup> But, in a spin-off from rural expansion, the tempo of manufacturing industries were quickening and a factory proletariat expanding in numbers.<sup>54</sup> In that sense, the updating of the control test was, in Australia, supported by technological change and the growth of machine industries. The bush had elements of the petty bourgeoisie, but it is factory capitalism that has traditionally been the springboard for the expansion of this intermediate stratum. Given the growing industrialisation of Australia in the inter-war years, keeping in line with British authority on labour contract doctrine was not as economically implausible as it looked at first blush.<sup>55</sup> The economic structure of Australia was coming into line with its British imperial parent as primary production was balanced by "a considerable manufacturing industry."<sup>56</sup> As the economic structure began to resemble a mature British style capitalist economy the same type of class formation became evident in Australia.<sup>57</sup> Given the increasing identity of economic landscapes it was unsurprising that British and Australian doctrinal shifts regarding the control test mirrored one another.<sup>58</sup> The fine tweaking of the control test in Britain and Australia in the 1920s ushered in a long period of judicial passivity on who was self-employed and who was on a contract of employment.

In the post-World War Two period, pressure was again applied to the concept of the control test being used to gauge whether a labour contract existed. Its reconfiguration in the 1920s proved to be only a stop gap measure before, once again, it was put under the microscope. The locomotive of economic development again fuelled judicial movement. As the labour process driven by technological change continued to evolve, differentiating the petty bourgeoisie and the working class became even more problematic.

52 Peter Cochrane *Industrialization and Dependence* (University of Queensland Press, Brisbane, 1980) 39.

53 Michael Dunn *Australia and the Empire: From 1788 to the Present* (Fontana, Sydney, 1984) 111.

54 Cochrane, above, n 52, at 39.

55 Brian Fitzpatrick *The British Empire In Australia: An Economic History 1834-1939* (Melbourne University Press, Melbourne, 1949) 286.

56 At 286.

57 At 318.

58 At 286.

The post-war boom produced the Golden Age of Capitalism as output, productivity and real wages rose rapidly.<sup>59</sup> This development spawned new troublesome consequences for the legitimacy of the control test. Skilled workers became a labour aristocracy and capable of asserting some autonomy and choice in executing work tasks. The whole legal and political basis of divining personal subordination as the acid test of a contract of employment began to disintegrate. A transformation in business conditions was putting pressure on the control test. In the 1946 House of Lords case, *Mersey Docks and Harbour Board v Coggins and Griffiths (Liverpool) Ltd*, a crane driver at the Liverpool Docks boldly declared that nobody told him how to do his job. In his own words, “I take no orders from anybody.”<sup>60</sup>

The mid 1940s was to prove a watershed period in the history of the control test. It sparked the onset of a proliferation of tests. The myriad tests that emerged highlighted the judicial discomfort with prevailing authority but the way forward became contested territory. Some judges were tempted to believe that if only the control test were tweaked further certitude would follow. In 1947 in *Collins v Hertfordshire County Council*, it was posited that what distinguished a labour contract was that the employer could simultaneously order what was to be done and how it was to be undertaken.<sup>61</sup> In 1951, Somervell LJ, in *Cassidy v Ministry of Health*, shot down this scenario by pointing out that a ship captain could be clearly categorised as an employee, but the shipping line owners were powerless to tell him how to navigate the ship.<sup>62</sup> In 1965, Lord Parker in *Morren v Swinton and Pendlebury Borough Council* went a step further and in a note of realpolitik stated that, with a professional or someone with a particular skill, there was no suggestion that an employer could tell them how to do the job and that the absence of control and direction in such circumstances doomed such variables in setting an applicable legal test.<sup>63</sup> The fluidity of inter-class relations under the impact of economic upheaval was destabilising the extant legal test of employment.

If a bold judicial spirit was needed to break the dominance of a single-factor control test and bring the law in line with changing social and economic conditions, Lord Wright fitted the bill.<sup>64</sup> Lord Wright was an innovative traditionalist judge. He was a traditionalist in the sense that he respected the constraints on judges, and upheld a commitment to rule formalism.<sup>65</sup> But he combined his attachment to law as a system of rules with judicial creativity.

59 Meghnad Desai *Marx's Revenge: The Resurgence of Capitalism and the Death of Statist Socialism* (Verso, London, 2002) at 222. Thomas Piketty *Capital In the Twenty-First Century* (Harvard University Press, Boston, 2014) at 96. Robert Brenner *The Economics of Global Turbulence* (Verso, London, 2006) at 43. Philip Armstrong, Andrew Glyn and John Harrison *Capitalism Since World War II* (Fontana, London, 1984) at 167.

60 *Mersey Docks and Harbour Board v Coggins and Griffiths (Liverpool) Ltd* [1947] AC 1, 20.

61 *Collins v Hertfordshire County Council* [1947] KB 598.

62 *Cassidy v Ministry of Health* [1951] 2 KB 343, 352.

63 *Morren v Swinton and Pendlebury Borough Council* [1965] 1 WLR 576, 582.

64 Neil Duxbury “Lord Wright and Innovative Traditionalism” (2009) 59 *University of Toronto Law Journal* 266.

65 At 277.

His knack was to be conscious of changing socio-economic conditions and respond by extending “particular legal principles in the light of new combination of facts.”<sup>66</sup> New times required a deft move to a refashioned applicable rule. But this was achieved by analogy to the eclipsed principle and remaining faithful to the underlying rationale of that rule by developing the new legal principle in a way that was in keeping with the aims and effects of the superseded rule.<sup>67</sup> As a young man, Lord Wright had taught the contract of employment at the London School of Economics.<sup>68</sup> Years later, and in his role as an eminent Law Lord, he had the opportunity to exercise his labour law expertise and he fashioned a new legal test for categorising an employee and independent contractor. Guided by a deep instinct of what separated the working class from the petty bourgeoisie he was to formulate a legal test that was to resonate down the years.

Lord Wright in 1946 in *Montreal v Montreal Locomotive Works Ltd*<sup>69</sup> caught the wave of the scientific-technical revolution that was transforming the labour process and reshaping the composition of the workforce, by posing a legal test that to some degree matched the extant economic landscape.<sup>70</sup> Lord Wright began by eschewing the single factor of control as being the guiding principle.<sup>71</sup> But importantly, there was not a complete rupture with the past as control remained an important factor. In an astute observation, he noted: “In the more complex conditions of modern industry, more complicated tests have to be applied.”<sup>72</sup> He added: “Control in itself is not always conclusive.”<sup>73</sup> Having established his thesis, Lord Wright presented a four-fold test incorporating “(1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss.”<sup>74</sup> Lord Wright went on to say that:<sup>75</sup>

... it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior.

With this test, Lord Wright was not only drawing a line between the self-employed and employees, but also separating the former from the fraction of capital that bought labour hours. The petty bourgeoisie were not engaged in using their capital to employ wage workers and through this exchange

66 At 266.

67 At 266.

68 At 270.

69 *Montreal v Montreal Locomotive Works Ltd* [1947] 1 DLR 161.

70 On the economic landscape see Armstrong, Glyn and Harrison, above, n 59, at 168. Ernest Mandel *The Second Slump* (New Left Books, London, 1978) 11.

71 *Montreal v Montreal Locomotive Works Ltd*, above n 69, at 169

72 At 169.

73 At 169.

74 At 169.

75 At 169.

reaping the benefit by channelling labour's surplus value to their coffers. Lord Wright was making it clear that the self-employed were separated off from any link to a "superior." They were a genuine intermediate stratum that relied on their own work for the income they generated. By introducing the notion of ownership of tools and profit, Lord Wright erected a Chinese wall between the petty bourgeoisie and employees. It brought into sharp relief that the only commodity owned by workers was the capacity to sell their labour power. The juridical level of class analysis of the wage contract was given a qualitative boost by Lord Wright. Quite simply, it was the case that, for the first time, judicially speaking, the issue of identifying the owner and possessor of the means of production and undertaking an excavation of the source of profit when categorising those on a wage contract was embodied in the judicial process. Under Lord Wright's skilful hand, the class identification of the petty bourgeoisie achieved greater clarity.

Lord Wright dropped a single-factor test and replaced it with a basket of factors. Lord Wright made it clear that his test took the totality of the relationship between the parties as the indicia guiding his test for what constituted the employment contract.<sup>76</sup> It was a four-factor test. There was an implicit recognition that, by extending the ambit of the test, the judiciary would be better placed to circumvent rogue elements in the business class eager to escape the cost of employment protection benefits associated with a wage contract. The power of control was the most important of the indicia. This not only recognised the way workers were economically subordinated, but also the strict code of discipline that operated on the office and factory floor. The legal authority to give orders and control the manner of work, even if only to some degree, was the most important of the basket of factors comprising the test. The capitalist workplace was a pyramid of power and at the bottom of the rung was the wage worker.<sup>77</sup> The control factor captured the asymmetrical relationship intrinsic to the contract of employment. Lord Wright's test came to be known as the entrepreneurial test.<sup>78</sup> It subjected the role and risks borne by the petty bourgeoisie to a new degree of scrutiny in order to separate this class from those on wage contracts. In refining the contours of the relationship between the three basic classes, Lord Wright exhibited his capacity to engage in a subtle analysis of the class structure, and to develop an updated test that provided a rational extension of the existing rule to new circumstances.

76 At 169.

77 Karl Marx *Capital Volume One* (Penguin, London, 1976) at 549.

78 Richard Kidner "Vicarious Liability: For Whom Should the Employer be Liable" (1995) 15 (1) *Legal Studies* 62.

## VI. THE PROFIT COMPONENT GAINS MOMENTUM

Whilst the entrepreneurial test ensured that control remained the core component of the test for employment, the future belonged to a mixed test or, as Kidner puts it, “a mixture of tests.”<sup>79</sup> There appeared to be judicial acceptance of the fact that no test on its own could encapsulate the variety of problems that the cases threw up.<sup>80</sup> The judicial temptation to have a simple, one-factor test was relinquished. The upshot was, that whilst no test on its own could be taken as the sole determinant of employment, innovative judges could seek to add indicia in the pursuit of formulating a mixture of tests. In 1953, Lord Denning came up with an Organisation test. In *Bank voor Handel en Scheepvaart NV v Slatford*, Lord Denning summed up his test by stating: “The test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the Organisation.”<sup>81</sup> This employment test has not been as influential as Lord Denning wished. Lord Denning’s test was aimed at perceiving if someone was outside of an organisation by virtue of performing services on their own account. The desire to draw a distinction between an employee and petty bourgeois was at the root of Lord Denning’s test. In the case of an employee, the yardstick was whether they were employed as part of the business and work was done as integral part of the business; or whether whilst the work was done for the business it was not integrated into it but merely an accessory to it.<sup>82</sup> As Kidner notes, the problem with this formulation is “an activity may be necessary but provided by an obvious independent contractor in business on his own account.”<sup>83</sup> The business activity of the petty bourgeoisie is more multifaceted than Lord Denning imagined.

Through the 1950s and the 1960s, judges in the Anglo-Australian jurisdiction were preoccupied with the type of cases that first surfaced in the 1920s. The issue of how to separate employees and independent contractors by applying the indicia of control in cases where workers had specialised skills or worked in large scale public and private organisations that provided plenty of leeway regarding working hours and the mode of performance taxed judges. The phenomenon that led to judges developing their legal reasoning in connection with the control factor was the advent of the post-Second World War period witnessing a considerable increase in the number of white collar workers.<sup>84</sup> The mantra about the right to control and the balancing point in regard to its exercise when drawing a line between an employee and independent contractor occupied plenty of judicial space. In 1955 in *Zuijs v Wirth Brothers*, the High Court of Australia employed a wide range of

79 At 58.

80 At 58.

81 *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248, 295.

82 Simon Deakin and Gillian Morris *Labour Law* (Hart, Oxford, 2009) 135.

83 Kidner, above, n 70, at 60.

84 Nicos Poulantzas *Classes in Contemporary Capitalism* (Verso, London, 1978) 195.

analogous English and Australian cases stretching from 1920s to the 1950s to help decide whether a circus trapeze artist who fell on the job and injured himself and then sought workers' compensation was an employee or self-employed. The circus sought to escape liability by claiming the acrobat was self-employed. The High Court detailed the cases that summed up the view the exercise of a particular art or special skill was not per simpliciter the basis for categorising someone as an independent contractor.<sup>85</sup> The court held the acrobat was responsible for the choreography and execution of their routine, but the circus owners had power over selection of the acrobats, remuneration was in the form of wages, and the circus had the right to dismiss for misconduct.<sup>86</sup> Moreover, noted the court in relation to the injured acrobat:<sup>87</sup>

... it is obvious that in order to carry out his engagement he would be required to comply with the orders of the management in respect of such matters as the time at which he should attend the circus, the length of time allowed for his act, the frequency of his appearances, and whether he should go on tour with the circus.

In 1969, the English judge, Cooke J, in *Market Investigations Ltd v Minister of Social Security* adopted a sweeping view by focusing on the extant state of the mixture of tests available for defining an employment contract.<sup>88</sup> This case celebrated eclecticism. It was, though, at bottom, a case of a jurist struggling with trying to cut a path through inter-class dynamics. Cooke J accepted that there was no universal test for defining a contract of employment. None of the tests were absolute or conclusive. The correct approach was to examine as exhaustively as possible all the factors in every test and apply them to the facts that were before the court. Certainly, the classic test of control was not regarded as conclusive. It was important in distinguishing an employee from an independent contractor but it was not decisive if other factors trumped it. Cooke J listed a range of cases that pinpointed that people embodying specialised skills were vested with a large degree of discretion in how they executed tasks and it was beyond the capacity of an employer to tell them how to do the work.<sup>89</sup> Given this was the case the "absence of control and direction" was, as Cooke J aptly put it, "of little, if any, use as a test."<sup>90</sup> The promethean technological forces of production unleashed by a corporate economy had created a complex division of labour that had downgraded the importance of a long established classic test.<sup>91</sup> Cooke J surveyed the cases that had adapted the employment test in a way that kept the law abreast

85 *Zuijs v Wirth Brothers* (1955) 93 CLR 561 3.

86 At 5.

87 At 5, McTiernan J judgment.

88 *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173.

89 At 183.

90 At 183.

91 Harry Braverman *Labor and Monopoly Capital* (Monthly Review Press, New York, 1974) at 260, 269.

of changing social and economic conditions.<sup>92</sup> Cooke J noted there was no comprehensive test available to replace the control test but he made the principle he favoured clear.<sup>93</sup> He threw his support behind Lord Wright and Lord Denning's prescription and for good measure he endorsed a US Supreme Court decision.<sup>94</sup> In 1947 in *United States v Silk* the Supreme Court jettisoned the control test in all its guises.<sup>95</sup> The US Supreme Court had dropped considering whether the power of control was exercised directly or indirectly in gauging the categorisation of work.<sup>96</sup> The Justices had shifted the focus to whether individuals were employees "as a matter of economic reality."<sup>97</sup> The US economic reality test gave prime standing to the profit component in determining if one person worked for another.<sup>98</sup> US jurisprudence with its focus on profit and acute understanding of class relationships ran parallel to Lord Wright's test. Cooke J stood firm on the indicia of control retaining a role but in effect, not surprisingly, he championed Lord Wright's entrepreneurial test. He argued that:<sup>99</sup>

The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.

That statement provided solid guidance to future judges seeking to anatomise the petty bourgeoisie. The impact of the shrewd multifactorial approach expounded in the Cooke J judgment was to be felt as far afield as Australia. In 1986, in Australia the issue of the test to utilise in gauging whether a work relationship constitutes employment fell into the lap of the High Court in *Stevens v Brodribb Sawmilling Company Pty Ltd*.<sup>100</sup> Justice Mason's was the leading judgment in this case and he began his task by commenting that the issue confronting the High Court was whether the relationship of the contending parties was one of employer and employee or principal and independent contractor.<sup>101</sup> This was the ultimate question but the

92 *Market Investigations*, above, n 88, at 183.

93 At 184.

94 At 184.

95 *United States v Silk* (1947) 331 US 704.

96 At 713.

97 At 713.

98 At 716.

99 *Market Investigations*, above, n 88, at 185.

100 *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16 ("Stevens").

101 At 9.

Australian judiciary had lagged behind its British counterparts in this sphere of law and needed to catch up. Mason J set out to clarify the law. He correctly asserted that in Australia control was not the sole determining factor.<sup>102</sup> This was true but Australian jurisprudence had followed in the tracks of British judges when shifting the line on the role of control. Next Mason J pointed out that, as far back as 1945, Dixon J in the High Court had downplayed the role of control by noting it was “merely one of a number of indicia which must be considered in the determination of that question.”<sup>103</sup> This was a valid comment but Dixon J in the 1945 case, *Queensland Stations Pty Ltd v Federal Commissioner of Taxation*, adopted a formulation first expounded in 1924 by McCardie J in the King’s Bench Division. The reality was McCardie J in *Performing Right Society Limited v Mitchell and Booker (Palais De Danse) Limited* put forward a few countervailing considerations to control, such as “the magnitude of the contract amount, the manner in which it is to be paid” and Dixon J in 1945 basically followed his lead.<sup>104</sup> The influence of McCardie J is apparent in the references Dixon makes to him.<sup>105</sup> Justice Dixon embellished McCardie J by speaking of whether a drover undertook “the provision of horses, equipment, plant, rations, and a remuneration at a rate per head delivered.”<sup>106</sup> In effect, Dixon J, by emphasising the ownership of the instruments of production, introduces a more telling note in helping to decide whether someone is an employee or independent contractor. The fact that the petty bourgeoisie own their own means of production is one of the defining lines in the sand between this class and the working class. But the reality is that both McCardie J and Dixon J made a rudimentary advance on the classic control test. Neither of them approached the scale and sophistication of Lord Wright’s entrepreneurial test formulated in 1946 in *Montreal v Montreal Locomotive Works*. However, in the case of Dixon J, the telling point was that this guardian of strict legalism had followed other judges by making changes to the classic control test. He also was, when the circumstances dictated it, an innovative traditionalist judge. He understood that judges cannot but help make law when changing the law was required to adapt to altered business conditions. And this could be justified by producing an incremental growth in the existing rule. Viewed through this prism, the mixture of tests for establishing when someone was an employee that had begun to flourish shared a common bond. They stayed faithful to the underlying principle that animated the control test.

In *Stevens*, Mason J genuflected to Dixon J but, in effect, stood on the shoulders of Lord Wright and Cooke J. At one level, the continuing obeisance

102 At 9.

103 At 9.

104 *Performing Right Society Limited v Mitchell and Booker (Palais De Danse) Limited* (1924) 1 KB 767.

105 *Queensland Stations Proprietary Limited v The Federal Commissioner of Taxation* (1945) 70 CLR at 545, 548, 552.

106 At 552.

to British legal authority was strange. By 1986, Australia had pulled out of the orbit of the British Empire. The Second World War signalled the British retreat from Australia. Early in the war, the British were engaged in a desperate struggle to survive and hold on to their client states and the growing realisation of their lack of global reach raised alarm within Australian ruling circles.<sup>107</sup> In late 1941, the imminent danger from militaristic Japan and the loss of confidence in the British Empire to defend Australia broke the local ruling elites' long standing bond of loyalty.<sup>108</sup> The first modern expression of a tentative national independence movement was ushered in as Australia began to move out of Britain's orbit. Henceforth, Australia's political and legal institutions had the space to develop a degree of autonomy previously denied by unswerving loyalty to the British Empire. Jurists no longer had to look over their shoulder and primarily locate their authority in English legal texts. But the spectre of legal imperialism continued to loom large in Australia. The role of tradition and custom in the legal superstructure proved its endurance. But there was more than imperial nostalgia for the continuing reason why the influence of British jurisprudence in the field of categorising employees and independent contractors remained impervious to the declining role of British imperialism in Australia. The Second World War had given a boost to basic industries that had been seeking a footing since the 1920s.<sup>109</sup> In post-war Australia the boom continued and there was "a rapid expansion of industries such as chemicals and explosives, rubber and metal working, arms and munitions, and basic steel production."<sup>110</sup> The Australian industrial sector truly elevated the country into the ranks of developed capitalist nations. Australia had a heavy industry sector, and its workforce composition paralleled Britain. Now, more than ever, there was a material factor why the two countries would approach classifying employees and independent contractors in a similar legal vein. British judges had been engaged in linking analogical reasoning and class analysis for generations when categorising different groups of workers, and now Australian judges could tap fruitfully into their work without it being simply a knee jerk imperial transplantation of legal tests.

In *Stevens*, Mason J echoed the legal reasoning of Lord Wright and Cooke J. He noted that control was still a significant factor but it was not the sole criterion. He affirmed:<sup>111</sup>

Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and

107 Dunn, above, n 53, at 138.

108 At 141.

109 Kevin Rowley "The Political Economy of Australia Since the War" in John Playford and Douglas Kirsner (eds) *Australian Capitalism* (Penguin, London, 1973) 268.

110 Rowley, above.

111 *Stevens*, above n 100, at 9.

provision for holidays, the deduction of income tax and the delegation of work by the putative employer.

This test broke no new ground. It was part of a litany of post-war tests developed outside Australia that bundled together competing indicia and declared this constituted looking at events through the prism of the totality of the relationship between the parties. An interesting insight was provided by Mason J locating Lord Denning's organisation test in a core passage of Lord Wright's *Montreal* decision.<sup>112</sup> Justice Mason stated the Denning test had its genesis in a passage where Lord Wright said:<sup>113</sup>

... the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf  
...

Henceforth, Australia had a mixture of tests. The control test was hitched to the entrepreneurial test. That a farrago of indicia from a number of tests would be applied in employment contract cases was summed up pithily by Mason J, stating "... it is the totality of the relationship between the parties which must be considered."<sup>114</sup> A key omission in the basket of factors put forward by Mason J was an allusion to profit. Lord Wright had made a profit component one of the four pillars of his test. Even after *Stevens*, Australian jurisprudence still lagged behind its British peers on a crucial aspect of how to determine whether one person was employed by another.

The lifeblood of capitalism is profit. It is a profit system. The issue of profits has been of central importance in the debates on political economy. From Smith, Ricardo and Marx onwards, economists of all persuasions have debated the fundamental role of profit in the economic order.<sup>115</sup> By making profit one of the cornerstones of his entrepreneurial test, Lord Wright introduced a key component of class analysis into the judicial task of categorising those on wage contracts. By putting profit into the mix, Lord Wright took the issue of whether a person was an employee or an independent contractor to another conceptual level. Thanks to Lord Wright, an indicium of crucial importance was now open to investigation when judging if one person was employed by another. Fact situations could be scrutinised on a more analytical basis to determine if there was a relationship between two parties where wages were being exchanged for labour with the view to a profit being made or a contract between a client and independent contractor existed in which a service or product was provided. Greater clarity on demarcating the petty bourgeoisie and wage workers was now available to the judiciary. A profit orientated test was now part of the judicial toolkit. The policing of the boundary between

112 At 14.

113 At 14.

114 At 20.

115 S. Cullenberg *The Falling Rate of Profit* (Pluto Press, London, 1994) 3.

two classes had been given a boost in Britain by virtue of Lord Wright's entrepreneurial test. Yet, in Australia, the *Stevens* court had inexplicably left out a reference to profit in their basket of factors.

Just three years after *Stevens* was handed down, an Australian judge gave a much-needed fillip to the employment legal test and helped bridge the gap between the Anglo-Australian judiciary. The economic angle implicit in *Stevens* was given more scope. But even post-*Stevens* and after a gap of three years, an Australian judge passed up on the opportunity to fully align himself with British doctrine by including profit in the basket of factors that determined whether one person was employed by another. The US and Britain had implemented profit as a key indicium, yet Australia neglected to cement this component in its contract of employment test. It marked a signal failure of judicial class analysis in the field of the contract of employment.

In 1989 in *Re Porter; Re Transport Workers Union of Australia*<sup>116</sup>, Gray J provided a fine economic analysis of how to distinguish employees and independent contractors. He was bound by precedent to follow the *Stevens* test but he interpreted it in a wide fashion. He noted:<sup>117</sup>

... there is no prescribed list of factors which will be examined in determining whether a contract is one of employment. Any circumstances which may shed light on the nature of the contract will be taken into account.

Having given himself a leeway of choices to interpret the indicia in *Stevens*, he fettered himself. He failed to raise profit as an issue or suggest it was indicia that could be read into the *Stevens* test. But, putting this important caveat aside, it is a judgment replete with sharp insights. To begin with Gray J eschewed being drawn into accepting the premise that ownership of trucks was the litmus test for declaring truck owners were not employees. Instead Gray J scrutinised the economic relationships that entwined the truck owners involved in the case to discern whether they were employees or independent contractors. He examined the economic reality of their work relationships. Justice Gray was alert to the myriad ways that carefully crafted contracts could convert an employee into an independent contractor. He noted that someone could be held out as an owner-driver when, in fact, they were engaged on a long-term contract for one business, and only carried goods for that person. In such a case, Gray J averred there is no reason why an employment relationship would not exist.<sup>118</sup> Furthermore, buying a truck may make it easier to obtain work rather than "offering oneself as a driver of vehicles owned by others."<sup>119</sup> In such a case, logic must dictate that a contract of employment exists. Also, Gray J notes there may be a contract stipulating the so-called owner-driver is an independent contractor at liberty to work

116 *Re Porter; Re Transport Workers Union of Australia* (1989) 34 IR 179.

117 At 184.

118 At 185.

119 At 185.

for other people outside of the contract. However, Gray J claims that state of affairs may mask the fact that:<sup>120</sup>

The reality may be that economic considerations dictate that work will only be accepted from the other party to the contract. In such circumstances, there is no particular reason why a court should ignore the practical circumstances, and cling to the theoretical niceties.

Gray J also perceives a so-called independent contractor may be in deeper economic bondage to those contracting with them than any employee. He states that:<sup>121</sup>

... an owner-driver who is heavily indebted to a finance company for the hire purchase of a truck is less independent than a person who is employed to drive a truck owned by the employer.

Gray J avows an employee driver can leave and seek a job with another firm and drive any sort of vehicle whilst those who own their own truck have to get work suitable for their type of truck and are kept in line by the need to keep up their hire purchase payments.<sup>122</sup> Also, Gray J claims that the much vaunted autonomy and choice of owner-drivers is often a charade when there is evidence that some owner-drivers rule out exercising even the notional freedom they have to not turn up to work on certain days.<sup>123</sup> Gray J is adamant that any refractory behaviour on the part of those listed as owner-drivers is met by companies withholding work.<sup>124</sup> The corollary of all the caveats listed by Gray J is in his own words:<sup>125</sup>

The level of economic dependence of one party upon another, and the manner in which the economic dependence may be exploited, will always be relevant factors in the determination whether a particular contract is one of employment.

This economic dependency perspective gives empirical aid in putting people in social classes, but Gray J could have refined this insight by pointing out that economic reliance must be seen through the filter of profit if a real grip on distinguishing the petty bourgeoisie and wage workers is to be attained. Gray J teetered on the edge of stamping himself into legal history in Australia by crystallising the line that separated the petty bourgeoisie and working class when categorising an employment contract. He let the chance slip through his hands.

120 At 184.

121 At 184.

122 At 184.

123 At 184.

124 At 184.

125 At 184, 185.

The upshot of being saddled with the limits of the *Stevens* test produced angst in the ranks of lower court judges in Australia. This disenchantment was publicly aired by Finkelstein J in 1999. In *Konrad v Victoria Police*, he stated: “The common law has yet to evolve a satisfactory test for determining whether one person is employed by, or is the servant of, another.”<sup>126</sup> In 2011, judicial unease on what constituted the employment test in Australia was alleviated. In *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation*, Bromberg J closed the circle by including profit in the test.<sup>127</sup> There was, in fact, no judicial barrier to this step being taken, for *Stevens* opened up a leeway for added factors to be put in the mix. Bromberg J prefaced his viewpoint by stating his debt to Lord Wright. He noted that in England “the entrepreneur test seems to be the dominating feature.”<sup>128</sup> He posed the issue of the application of the employment test in words almost identical to the two-step approach used by Lord Wright. When looking at whether a person was an independent contractor, Bromberg J said:<sup>129</sup>

The central question has two elements. The first is whether the person has a business. The second is whether the work or the economic activity being performed is being performed in and for the business of that person.

If the answer to the two propositions is yes, then the person is likely to be an independent contractor. If no, then the likelihood is they are an employee. The control factor and other indicia as Lord Wright made clear will help flesh out the answer. The novelty of Bromberg J in the Australian context is that he added “the pursuit of profit” will be of fundamental importance in separating out the independent contractor from an employee.<sup>130</sup> In pursuit of this categorisation task of nailing down if someone is an independent contractor, Bromberg J is clear that: “The desire to make profit is an important element and generally a business will enter into transactions on a continuous and repetitive basis in the pursuit of profit.”<sup>131</sup> In a nutshell, Bromberg J followed Gray J in accepting that the *Stevens* case allowed scope for other indicia to be added to the formula in order to define when one person was employed by another. But it was Bromberg J who grasped the nettle and gave the class classification of the petty bourgeoisie and working class a whole new dimension when categorising an employment contract. Henceforth, in line with British and US authority, profit entered the picture in Australia when distinguishing between an employee and independent contractor.

126 *Konrad v Victoria Police* [1999] 91 FCA 988, 85.

127 *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation* [2011] FCA 366, 210

128 At 207.

129 At 209.

130 At 210.

131 At 210.

## VII. CONCLUSION

The purpose of this paper has been to pinpoint how class analysis has been the guiding principle in common law contract of employment cases. In a sense, it was axiomatic that judges would turn to class analysis in this field of law. In each case the question was whether one person was employed by another. From the outset, the judges had to distinguish whether a person was an employee or independent contractor for these two groups shared many similar characteristics in their work relationship. In order to settle a case, people had to be put in their right class and this empirical reality drove judges to engage in class analysis. The paper has pinpointed how judges engage in class analysis, but this process is filtered through legal reasoning, rules and precedent. The history of a rule in labour contract law is a combination of juridical and sociological reasoning. The duet between the contending legal and sociological forces that shape the principles in labour contract cases can result in glacial change as the doctrine of precedent impedes rule development. But history has shown that sooner or later the planets align, and the creativity of the common law has led to rule changes that allocate for socio-economic developments.

Modern labour contract case law began with the control test that captured the subordination of the working class in the infancy of capitalist industrialisation, and this factor provided the litmus test of what constituted an employee. But, as capitalism developed and a corporate economy with an advanced division of labour evolved, a more complex test was required. A multifactorial test underpinned by control, ownership of assets and profit was devised to slot people into the classes required by the contract of employment. This paper has argued that, by adding indicia to the test to take account of a changing class composition, judges have ensured a clear exposition of the legal status of an employee and independent contractor. Also by devising a wide set of indicia, judges have armed themselves with a sweeping test that has been of invaluable support in outflanking those seeking to craft contracts in ways that turn an employment relationship into an agreement between a client and independent contractor. In sum, the judiciary have been astute practitioners of class analysis and they have been subtle and nuanced in developing tests to deal with class identity and fundamentally the distinction between an employee and independent contractor. But this adroitness has to be set against the backdrop of judges making law within the terms of the law. In the long history of the search for an appropriate applicable rule to denote when a person is employed by another, generations of judges in the Anglo-Australian jurisdiction adhered to analogical reasoning. They limited their opportunity to be creative to simply making a rational extension to the existing rule to fit a new set of circumstances not foreseen when the existing rule was first developed. Justice Mason made a telling point when he stated that the common law has been sufficiently flexible to adapt to changing social conditions.

In a perfect world, judges could have been relieved of the task of turning themselves into class analysts, for the categorisation of those who buy and sell labour hours could have been passed over to specialist employment tribunals staffed by experts in workplace law. Yet the record shows judges have been up to the task of devising legal tests that have kept pace with the changing workplace landscape and the shifting line on class identity. Credit must also be given for the subtle twists to doctrine that have been introduced to limit scope for creative lawyers and employers bent on putting genuine employees into the basket of independent contractors.