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ARTICLES

Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd: Contracts as Trumps – *Thomas Dixon*

In *CFMMEU v Personnel Contracting*, the High Court held that workers designated as contractors under tripartite labour hire arrangements were properly characterised as employees. In so deciding, the Court brought to an end its doctrinal approach to characterisation based on an empirical exercise focused on the "true nature" of the relationship. The majority reduced adjudication to an interpretive exercise fixed solely on the formal contract, and eschewed inquiries into the practical reality of the parties' relationship. This approach, which gives primacy to laissez-faire notions of freedom of contract, is necessarily premised on the theoretical assumption of formal equality between workers and employers. It is to be contrasted with the focus on legal and economic realism that underpins the treatment of the relationship-contract dichotomy in the US and the UK, and the objectives of modern Australian industrial legislation which establish safeguards against exploitation and place collective bargaining at the heart of the workplace relations system. 135

Freedom of Contract or Freedom to Exploit – A Lochner-esque Future? A Comparative Analysis of Recent Australian Cases on the Employee/Independent Contractor Distinction – *Charlie Gonzalez*

This article compares the recent Australian High Court cases of *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* and *ZG Operations Australia Pty Ltd v Jamsek* to the jurisprudence of the Lochner era in the United States. While Australian jurisprudence has moved towards a black-letter, conservative view of the primacy of contract in employment relationships, such a re-balancing has not been venerated as a constitutional principle so as to override legislative protections, unlike what occurred in the United States. This is largely due to differences in the legal history of both countries. It also reflects the development of the Australian "safety net", most recently expressed legislatively in the Fair Work Act 2009 (Cth). Although this safety net has been whittled down, it nevertheless still affords some protections to Australian workers above and beyond the global average. 144

Primacy of the Contract for Gig Economy Workers – *Nicola Nygh and Katariina Hatakka*

For over 20 years courts have applied the multifactorial test to determine whether a worker is an employee or contractor. The High Court has now held that where there is a comprehensive written contract, the terms of the contract alone determine the worker's status as an employee or contractor. This approach affords greater certainty than the multifactorial test. However, it has significant implications for workers in the gig economy where businesses generally try to characterise their workers as subcontractors which limits their workplace rights and protections. 157

Pandemic, War, Inflation, Strikes – *Craig Ryan*

In 1919 the First World War had just come to an end. Australian service people and warships were returning home through the port of Fremantle in Western Australia and the world was afflicted by the "Spanish flu" pandemic. It was a time of intensely converging circumstances and interests. In Fremantle there was a waterfront industrial dispute. An immediate issue was the unloading of a ship carrying goods for quarantine-stricken communities. The dispute culminated in violent clashes between Western Australian State authorities and waterside workers. One person was fatally injured in the conflict which became known as the "Battle of the Barricades". 162

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