'WHY CAN'T I BE PAID IN PIZZA?'—COMPARING S 323 OF THE *FAIR WORK ACT 2009* (CTH) AND CONSIDERATION AT COMMON LAW

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This article compares s 323 of Australia's Fair Work Act 2009 *(Cth) with the doctrine of consideration at common law. Section 323 requires that employees be paid their wage in money, not other forms of payment in kind, including food. Instances of payment in food are the principal focus of this article. The operation of s 323 is considered, followed by analysis of relevant contraventions of s 323. The doctrine of consideration at common law becomes the subject of detailed attention and is contrasted with the s 323 requirement to be paid in money, not food. Overall, if an employee is paid in food for work they perform, that directly contravenes s 323, giving rise to a civil penalty. This result serves a protective purpose, particularly for vulnerable employees. Nevertheless, this form of payment would otherwise be permissible under the doctrine of consideration, and an employee may even prefer it.*

CONTENTS

I INTRODUCTION

There are defined limits under s 323(1) of Australia's *Fair Work Act 2009* (Cth) (**FW Act**), requiring that employees be paid in money—not in other benefits, including food, no matter how delicious and appealing it may be. Nevertheless, under common law doctrine, consideration constitutes an exchange of promises, which need only be of sufficient value. Absent the s 323 requirement for payment in money, payment in food for the performance of work by an employee would otherwise constitute adequate consideration for common law purposes. Of course, we recognise that a statutory provision will always prevail over and above an equivalent rule at common law, as would the requirement that employees be paid in money under s 323 in this context. Even so, it is worth considering the ambit of s 323, as compared with the doctrine of consideration at common law, insofar as it

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relates to recent stirring cases concerning underpayment claims wherein employees were paid in food, rather than in money, for the performance of work for their employer. There is clear utility and scope for considering the operation of s 323, as compared with the common law doctrine of consideration, especially insofar as it relates to employees (especially those employed in the restaurant or fast food industries) being paid in food, rather than in money. It does not appear that the kind of comparison presented in this article has taken place elsewhere, including in other common law jurisdictions with similar legislative provisions to s 323, including (among others) the United Kingdom, New Zealand, and Canada. The main arguments presented will therefore be of interest to labour and contract lawyers in other common law jurisdictions, in the sense that useful comparisons can be drawn, given the similarity in payment regimes. This approach reenergises the vocation of the legal comparatist to expand knowledge; to understand that comparative law is an *ecole de verite*, extending and enriching the 'supply of solutions'.[1]

This article does not seek to engage with broader theoretical debates concerning the complexity of the interplay in adjudication between contractual rights and statutory rights. Those broader debates are beyond the scope of the present exercise. Rather, the comparison presented here emphasises the utility of a statutory rule overriding a common law rule vulnerable to exploitation. The practical utility served by this comparison highlights the tension between what an employee may desire (and would otherwise be permissible as payment under common law), and what statute mandates as an appropriate form of payment, potentially in spite of an employee's subjective preference.

We split our discussion in this article over four parts. Part I opens with a consideration of the requirement under s 323 of the FW Act that employees be paid in money. A portion of that assessment will also encompass the operation of Australia's workplace relations framework governed by the National Employment Standards (**NES**), Modern Awards and enterprise agreements, and what is permissible as payment for employees under those instruments, noting that they too are underpinned by s 323. The underlying purpose of s 323 will also be considered; in essence, it will probe the underlying rationale behind employees needing to be paid in money, as opposed to other benefits.

Part II comprises an assessment of recent instances where employees have been paid in food and their employer has been found to have contravened s 323, giving rise to a civil penalty under the FW Act. In traversing those matters, rather than providing a summary alone, we identify common threads that appear throughout them—in the main, the commonality is that the cases appear to involve

[1] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd ed, Clarendon Press, 1998) 15.

young employees who are vulnerable and performing low-paid work in the fast food or restaurant industry.

Part III diverts from the discussion of statutory instruments and case law examples, moving to considering the application of the doctrine of consideration to the notion of employees being paid in food. That discussion shows that, historically, the application of the doctrine allowed food as a permissible form of consideration in exchange for the performance of work, and would still hold as an acceptable form of payment for common law purposes only. Clearly, however, it remains unacceptable, because of s 323.

Part IV then comprises a detailed discussion of the divide between employment and contract law, as well as statute and the common law. Ultimately, the point there is that if an employee is paid in food for work that they perform, that will directly contravene s 323, and become subject to a civil penalty for a breach of the FW Act. That outcome is notwithstanding the fact that it would otherwise be permissible pursuant to the doctrine of consideration at common law, and the employee may even prefer that method of payment. We finish with some concluding comments in view of the detailed comparison made between s 323 and the doctrine of consideration that has taken place over the smorgasbord of this article.

II DIGESTING THE LIMITS OF S 323

Section 323 of the FW Act sets out an important requirement that any amounts payable to an employee for their performance of work must be paid in full (save for permissible deductions under s 324(1)), and at least monthly. We must emphasise at this point that the requirement to be paid in full is not the key concern of our discussion in this article. Rather, it is the added requirement under s 323 that employees must be paid in 'money', which must be by one or more of the methods identified in s 323(2) (namely cash, cheque, money order, postal or similar order, electronic funds transfer, or another method specified in a Modern Award or enterprise agreement). Our concern lies with the specific requirement of s 323 that an employer cannot permissibly provide other benefits in lieu of wages, including food. Specific instances where that indiscretion is alleged to have occurred are considered later in Part II. Where a Modern Award or enterprise agreement specifies a particular method for payment, the employer is required to pay employees by that method only (s 323(3)). Likewise, where either of those instruments specifies that payment must occur in intervals of less than a month, the employer must adhere to that requirement.

Section 327(a) provides that any 'payments in kind' are taken to never have been made. Moreover, the 'amount payable' in s 323(1) does not just comprise

wages. It also includes loadings, overtime, leave payments, bonuses and commissions.[2] If an employer contravenes s 323, that will amount to a breach of a civil penalty provision, potentially forming the basis for the grant of relief under s 545 and the award of penalties under s 546, noting that an employer may be liable to a fine of up to 60 penalty units for a contravention.

As for the FW Act's basis for requiring payment in money, not other payments 'in kind' (including food) under s 323, the Explanatory Memorandum to the Fair Work Bill 2008 (Cth) does little to elaborate on the basis as to the avoidance of payments in kind. Instead, the explanatory focus is on the former need to tie together differing requirements under state and territory legislation to achieve a common approach for employers to provide payment to employees across the country.[3]

Beyond the Explanatory Memorandum, turning to the genesis of s 323 is informative and a useful insight into its overarching purpose and function. Andrew Stewart and others note that s 323 is derived from the 'principal evil' addressed by the *Truck Act 1831* (UK) s III,[4] which required that people be paid 'the entire Amount of the Wages earned … in the current Coin of this Realm'. These kinds of practices have a lengthy history, with truck enactments dating from as early as 1465 in England.[5] In a brief commentary on this historical provision, Ewan McGaughey explains that the purpose of such Acts was to ensure that people were paid with money, not exploitatively in food or non-exchangeable goods (ie, in 'truck'),[6] valued at the master's discretion.[7] The 1887 and 1896 updates to the 1831 Act, requiring that any deductions be 'fair and reasonable, having regard to all the circumstances of the case' lasted until the *Wages Act 1986* (UK). That later Act substituted the current rules in English law, which set default requirements in terms

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[2] See, eg, *Murrihy v Betezy.com.au Pty Ltd* (2013) 228 IR 307, [119], [163].
[3] See, eg, Explanatory Memorandum, Fair Work Bill 2008 (Cth) [323].
[4] See, eg, Andrew Stewart et al, *Creighton and Stewart's Labour Law* (6th ed, Federation Press, 2016) 447.
[5] See, eg, United Kingdom, *Parliamentary Debates,* House of Commons, 14 December 1830, vol 1, col 1137 (Edward Littleton).
[6] See, eg, Ewan McGaughey, *A Casebook on Labour Law* (Hart, 2019) 258. It was common for employers to pay workers in groceries, the employer's own products, or vouchers redeemable for goods in any store owned by the employer: see, eg, George W Hilton, 'The British Truck System in the Nineteenth Century' (1957) 65 *Journal of Political Economy* 237, 237; Christopher Frank, 'Cash Pay, Deductions from Wages, and the Repeal of the Truck Acts in Great Britain, 1945-1986' (2020) 61 *Labor History* 122, 122. See also Ministry of Labour of Great Britain, Report of the Committee of the Truck Acts (1961) 3, where the Committee noted that the Truck Acts were designed to protect workers against abuses associated with payment of wages in kind and that payments in kind frequently resulted in workers receiving goods of inferior quality at exorbitant prices.
[7] As to master and servant laws in operation at this time, see further, Ken Foster, 'The Legal Form of Work in the Nineteenth Century: The Myth of Contract?' (Paper presented at The History of Law, Labour and Crime Conference, University of Warwick, 1983). See also, Alfred William Brian Simpson, *A History of the Common Law of Contract* (Clarendon Press, 1986) 148, 153, which traces the law from the 1400s.

of transparency rather than limits.[8] In the Australian context, s 323 now forms an equivalent provision under the FW Act. Nevertheless, in both the English and Australian contexts, these changes in statutory conditions do not seem to affect common law limits as to what constitutes consideration for work performed.

Returning now exclusively to s 323 in the Australian context—under the former *Industrial Relations Act 1988* (Cth), employees on the federal minimum wage, or who were covered by an industrial award, were entitled to receive their wages in money.[9] This was due to the fact that they continued to enjoy the benefits of truck legislation—which had its genesis in English law as described above—operating within the states and territories.[10] Then came the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) amendments to the *Workplace Relations Act 1996* (Cth). These amendments superseded state and territory industrial legislation as applicable to incorporated employers within the private sector. Exception was made, however, in respect of state and territory laws addressing (1) the frequency and method of wage payments; and (2) wage deductions.[11] The outcome was that employers could permissibly use Australian Workplace Agreements to justify practices of paying employees in kind (potentially in food), so long as they provided workers with their minimum Australian Fair Pay and Conditions Standard entitlements. This possibility only arose because any Australian Workplace Agreement could override an inconsistent state or territory law. The 'fairness test' introduced during the final months of the Howard Government (and which lasted barely a year) contained no clear prohibition of payment in kind arrangements, provided the workers received some form of valuable compensation in return for the reduction in real pay.[12] Public attention was especially drawn to the precarity of this situation through the Australian Council of Trade Union's 'Your Rights at Work: Worth Fighting For' campaign.[13] As Joellen Riley so aptly asked of this former time: 'Who is to say whether a pizza (albeit a

[8] See, eg, *Bristow v City Petroleum* [1987] IRLR 529, 532, where Lord Ackner held that 'The Old Truck enactments were very numerous and date from about the year 1464. The particular evil intended to be remedied was the system of payments by masters of their men's wages wholly or in part with goods – a system open to various abuse'. This was a case about a petrol service station attendant who successfully brought a complaint against his employer for deducting till shortages from his wages. See also, Tamara Goriely, 'Arbitrary Deductions from Pay and the Proposed Repeal of the Truck Acts' (1983) 12 *Industrial Law Journal* 236.

[9] Joellen Riley, 'Outlawing "Pizza Pay": Fair Payment Under the Fair Work Act' (Web Page, 14 April 2011) <https://www.aierights.com.au/2011/04/outlawing-%E2%80%98pizza-pay%E2%80%99-fair-payment-under-the-fair-work-act/>.

[10] Ibid.

[11] Ibid.

[12] Ibid.

[13] See generally, Kathie Muir, '"Your Rights at Work" Campaign: Australia's "Most Sophisticated Political Campaign"' (2010) 51 *Labor History* 55.

stale one, at the end of the day) is worth more or less than half an hour's cleaning time by a junior casual kitchen hand?'.[14]

It is clear, in the wake of the 2009 enactment of the FW Act, that payment in food is not a legitimate method by which to pay staff—'at least, not in substitution of wages due for ordinary or overtime hours under a Modern Award or enterprise agreement'.[15] As set out at the opening of this part, s 323 now requires that employers must pay their staff fully in money. There is no longer provision in the FW Act for contracting out of this obligation on an individual basis, as with the former Australian Workplace Agreements. Even if an employer does purport to pay an employee in food, the effect of the aforementioned s 327 is to permit the employee to recover their full wage, 'without any set-off for the value of the [food]'.[16] The fall-out is that employers who offer up food to staff must now treat these benefits as gratuitous bonuses.[17]

At this point, it is important to recognise that the operation of s 323 is not to say that wage deductions for food and drink cannot lawfully occur. While the legality of such deductions is not the focus of this article,[18] for completeness, we wish to mention briefly that certain Modern Awards and enterprise agreements may lawfully permit deductions from an employee's wage for food and accommodation, for example, depending on the nature of the work performed and an employee's classification under the relevant industrial instrument. Taking just one example, in *Fair Work Ombudsman v Golden Vision Food and Beverage Services Pty Ltd (No 2)*,[19] the employee, Ms Lee was provided with shared accommodation located at the Tangalooma Island Resort and three meals per day by her employer, Golden Vision. The Award that covered her employment was the Hospitality Industry (General) Award 2010, which provided under clause 39.2 that Golden Vision was lawfully entitled to deduct from Ms Lee's wages an amount of $181.89 per week for the provision of accommodation and meals to her.[20]

It is also worth briefly mentioning that notwithstanding the now well-established operation of s 323, Australia has not ratified the International Labour Organisation's (**ILO**) *Protection of Wages Convention 1949* (c 95), which controls

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[14] Riley (n 9).
[15] Ibid.
[16] Ibid.
[17] See further, Stewart et al (n 4) [15.04].
[18] For further dedicated commentary on the legality of deductions from an employee's wage, see, eg, Stewart et al (n 4) [15.67]–[15.75]. For an examination of the operation of s 323 as it relates to permitted deductions from an employee's wage pursuant to s 324, see further, Nadia Stojanova, 'Employer Deductions from Amounts Payable under the *Fair Work Act 2009* (Cth): Restrictions on being both the Payer and Payee' (2017) 36 *University of Tasmania Law Review* 1, 4–6. The interaction of s 323 with contractual entitlements is examined in Tae Kim, Section 323 of the *Fair Work Act 2009* (Cth): Can It Enforce Contractual Entitlements? (2022) 35 *Australian Journal of Labour Law* 206.
[19] [2016] FCCA 1721.
[20] Ibid [20].

deductions and payments in kind. Contrary to s 323, the Convention allows 'for the partial payment of wages in the form of allowances in kind in industries or occupations in which payment in the form of such allowances is customary or desirable because of the nature of the industry or occupation concerned' (Article 4.1). In such cases, however, the Convention specifically calls for measures to ensure that: (a) 'such allowances are appropriate for the personal use and benefit of the worker and his family'; and (b) 'the value attributed to such allowances is fair and reasonable'. In the eyes of the ILO, it must be remembered that payment in kind tends to limit the financial income of workers. The ILO's *System of National Accounts* (1993) captures this sentiment at [7.38]:

> Income in kind may bring less satisfaction than income in cash because employees are not free to choose how to spend it. Some of the goods or services provided to employees may be of a type or quality which the employee would not normally buy.

ILO commentary also makes it apparent that there remains a risk of abuse where payments in kind occur, 'even in those industries or occupations in which such a method of payment is long established and well received by the workers concerned'.[21] Consequently, there is a need for adequate safeguards and protection. Such protection can be achieved in a variety of different ways, including prohibiting in kind payments as part of the minimum wage, as Australia has achieved through the enactment of s 323, albeit without necessarily ratifying the Convention.

III THE APPETITE FOR PURSUING CLAIMS UNDER S 323

With the above background to s 323 in mind, this part assesses cases where employees have been paid in food, with their employer being found to have contravened certain civil penalty provisions under the FW Act.[22] As will be seen in the cases discussed below (of which two are factually related), the common theme is that they each involve the non-payment of workers who are particularly vulnerable as younger workers, or as foreign visa holders, employed precariously (ie, as casuals and/or in very junior positions) in the restaurant and fast food industries.[23] The protective mechanism offered by s 323 serves a clear and beneficial purpose in these instances of employee vulnerability.

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[21] ILO, 'Minimum Wage Policy Guide' (Policy Guide, 2021) 11 <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_508566.pdf>.

[22] There are a number of other leading Federal Court and High Court decisions which assess the operation of FW Act s 323: see, eg, *APESMA v Wollongong Coal Ltd* [2014] FCA 878 (payment of bonuses); *CFMEU v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, [45] (payment during industrial action); and *Whelan v Cigarette & Gift Warehouse Pty Ltd* [2017] FCA 1534, [155]–[161] (withholding of entitlements owed).

[23] Claims for underpayment of wages are all too common in such industries. See, eg, claims for underpayment of wages in the following cases involving burger restaurants: see, eg, *Downes v FB's 2 Pty*

The first and most recent matter concerns a case brought by the Fair Work Ombudsman (**FWO**) in the Federal Circuit Court, where the operator of a Brisbane café was found to have partially paid some of its employees in food and drink, rather than in money, in contravention of s 323.[24] The outcome of that finding was that Timi Trading Pty Ltd, which operated Café 63 Chermside at the Westfield Chermside shopping centre in Brisbane, was subject to a penalty of $95,000. Timi Trading's company director and manager, Mr Tien Hoang Le, along with company manager, Ms Minh Vo Duy Nguyen, were also penalised $20,000 each for their involvement in all of the contraventions by the company.[25] Hamish Watson, owner of the Café 63 brand, was also penalised $4,800 for his involvement in one of the company's contraventions. Mr Le and Ms Nguyen were involved in breaches relating to all 11 workers and Mr Watson was involved in breaches relating to six of the workers.[26]

'The Federal Circuit Court found that 11 employees at Café 63 Chermside were paid part of their wages in food and drink during two periods between August 2017 and January 2018'.[27] The court found that 'eight of the 11 employees were paid according to Individual Flexibility Agreements (**IFA**) that provided for flat hourly rates and a list of "bonuses" and "allowances"', rather than being paid penalty rates and overtime under the Restaurant Industry Award 2010.[28] The IFA 'allowances' included employees being allowed food and drink for the most part up to the value of $42 per day when working, including $20 in meals, $7 in desserts and $15 in drinks.[29]

Timi Trading's conduct also breached the FW Act, in that it failed to ensure that the IFAs passed the better-off-overall test—a test requiring employers to ensure employees are better off overall under an IFA than under the relevant Award—and failing to detail in the IFAs how each individual was better off overall. Timi Trading was also found to have breached the FW Act by providing the FWO with false and misleading records, failing to make and keep proper records, and failing to enter into written part-time agreements.[30]

Ltd t/as Fancy Burgers [2015] SAIRC 25; *Fair Work Ombudsman v Rum Runner Trading Pty Ltd* [2018] FCCA 1129.

[24] *Fair Work Ombudsman v Timi Trading Pty Ltd as Trustee for the Nguyen Vo Trust* [2021] FCCA 527, [53]. It must be noted that since 1 September 2021 the Federal Circuit Court of Australia has merged with the Family Court of Australia to create the Federal Circuit and Family Court of Australia: see, eg, *Federal Circuit and Family Court of Australia Act 2021* (Cth).

[25] [2021] FCCA 527, [53].

[26] Ibid.

[27] FWO, 'Café Penalised for Paying Workers in Food and Drink' (Web Page, 3 December 2020) <https://www.fairwork.gov.au/about-us/news-and-media-releases/2020-media-releases/december-2020/20201203-timi-trading-penalty-media-release>.

[28] Ibid.

[29] Ibid.

[30] Ibid.

Overall, s 323 served an important protective purpose in this matter. Most of the affected workers would be considered vulnerable in their respective positions. They included visa holders, as well as they included seven juniors aged under 21, who worked as cooks, kitchen attendants and food and beverage attendants.

The second matter concerns two related Federal Circuit Court proceedings,[31] wherein teenage employees were given free and discounted pizzas and soft drink, rather than wages—a practice that the presiding Federal Circuit Court judge labelled as one that belonged 'in the dark ages rather than twenty first century Australia'.[32] Judge O'Sullivan determined that Mr Ruby Chand, owner of two companies operating La Porchetta pizza and pasta restaurant franchises in Melbourne's outer east, underpaid more than 100 young employees in the amount of $258,000 over a period of almost three years (from July 2009 and February 2012).[33] His Honour held that 'on any description of the conduct involved here the nature and extent of it warrants severe sanction by way of penalty'.[34]

As to imposing the pizza operator a total of $335,000 in fines, his Honour added that the penalty served a strong deterrent factor, given the fundamental nature of the companies' breaches.[35] It so happened that following an investigation by the FWO, the relevant companies admitted to a number of failures, including those to: pay both (1) correct minimum pay rates and casual loadings and (2) outstanding annual leave entitlements on termination; accrue personal or annual leave; and keep and maintain accurate records as required under the FW Act.[36] Judge O'Sullivan was especially concerned that the companies claimed tens of thousands of dollars from the Federal Government to employ trainees to whom they then failed to provide the minimum number of hours required by the relevant traineeship contracts.[37] His Honour went on to say that the 'irresistible inference was the conduct engaged in was part of a deliberate course of conduct by the [companies] as to how the business (if it could be called that) was run'.[38] His Honour also noted that compliance audits conducted from 2007 to 2009 and again in 2012 had also detected issues with unpaid wages and entitlements and that Mr Chand was cautioned as to his legal obligations in respect of these requirements.[39] Judge

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[31] See, eg, *Fair Work Ombudsman v Bound for Glory Enterprises* [2014] FCCA 432; *Fair Work Ombudsman v Zillion Zenith International Pty Ltd* [2014] FCCA 433.
[32] [2014] FCCA 432, [1]; [2014] FCCA 433, [1].
[33] Pendlebury Workplace Law, 'Court Frowns on Rewarding Workers with Coke and Pizza – and Issues Penalties' (Web Page, 11 June 2014) <https://pendleburyworkplacelaw.wordpress.com/2014/06/11/court-frowns-on-rewarding-workers-with-coke-and-pizza-and-issues-penalties/>.
[34] [2014] FCCA 432, [48]; [2014] FCCA 433, [48].
[35] [2014] FCCA 432, [81]; [2014] FCCA 433, [81].
[36] Pendlebury Workplace Law (n 33).
[37] [2014] FCCA 432, [40]; [2014] FCCA 433, [44].
[38] [2014] FCCA 432, [66]; [2014] FCCA 433, [66].
[39] [2014] FCCA 432, [53]; [2014] FCCA 433, [53].

O'Sullivan held that while the companies had not previously been convicted of contraventions, 'it could hardly be contended that the [companies] hadn't previously come to the attention of the authorities'.[40] Ultimately, his Honour fined the two companies $139,507.50 each, with Mr Chand receiving a personal fine in the amount of $27,901.50 for his conduct.[41] A further order was made that some $120,000 in outstanding underpayments (including wages and entitlements) be paid to those employees awaiting full reimbursement.[42] As with the case considered at the beginning of this part, the employees affected by the contraventions were particularly vulnerable and precariously employed; they were mostly 'teenage part-time and casual cooks, kitchen attendants and waiting staff', with underpayments ranging from less than $20 to a staggering $25,358.[43]

Beyond the abovementioned decisions concerning payments in kind by way of food and drink, it is worth briefly mentioning the Full Court of the Federal Court's decision in *Nield v Mathieson*.[44] The Full Court agreed that a Swan Hill shop assistant was entitled keep almost half a million dollars in back pay and interest after it confirmed that she had not agreed to work for nothing. The shop assistant had started working as a casual in a mixed milk bar and take away food shop run by a married couple in May 2006.[45] She initially worked seven to eight hours a day, and received award wages.[46] However, in August 2006, she moved into a bedroom adjoining the shop, and continued to work for the couple.[47] From that time, however, she was not paid wages. Instead, the business provided her with free board and lodging, and paid her $25, plus a pack of cigarettes, per day.[48]

It so happened that the couple stopped paying her the $25 in December 2006, after she told them she was receiving Centrelink benefits. In fact, she had received Centrelink benefits between June and July 2006, and not again until April 2007 when she began receiving a widow's allowance.[49] In April 2007, she gave $20,000 to the couple. Federal Circuit Court Judge Philip Burchardt ruled in late 2013 that this was a loan in anticipation of purchasing a share in the business, but it never eventuated, ordering the couple to pay it back, plus more than $3,000 in interest.[50]

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[40] [2014] FCCA 432, [56]; [2014] FCCA 433, [56].
[41] [2014] FCCA 432, [100]; [2014] FCCA 433, [100].
[42] [2014] FCCA 432, [102]; [2014] FCCA 433, [102].
[43] [2014] FCCA 432, Schedule 4; [2014] FCCA 433, Schedule 4; Pendlebury Workplace Law (n 33).
[44] [2014] FCAFC 74.
[45] Ibid [7].
[46] Ibid [36].
[47] Ibid [8].
[48] Ibid [9].
[49] Ibid [10].
[50] See, eg, *Mathieson v South End Mixed Business* [2013] FCCA 1749.

The shop assistant fell out with the husband and wife and ceased working for them in February 2011. Describing the case as 'extraordinary',[51] Judge Burchardt rejected the business' argument that she had worked for them as a volunteer and awarded her $388,688 in back pay under the Fast Food Industry Award 2010, plus $61,965 in interest.[52]

Dismissing the couple's appeal, the Full Court of the Federal Court, comprising Justices Tracey, Bromberg and Mortimer, agreed with the primary Judge's description.[53] The Full Court said it was open on the evidence for him to decide that 'a contract of employment was entered into between the [couple] and [the assistant] in March 2006 and continued in operation uninterrupted until February 2011'.[54] The court added that it followed that the applicable industrial instruments applied to her employment throughout the relevant period, as the couple had conceded.[55]

When completing her application for the widow's allowance in March 2007, the shop assistant had answered 'no' to the question whether she had 'worked 20 hours or more in a week in the last 12 months?'.[56] She had explained to the primary Judge that her answer was based on the fact that, although she had been working, she was not being paid. However, on appeal, the Full Court held that it was difficult to see what bearing the allowance had on the existence or otherwise of an employment contract.[57] The Full Court said that if no contract of employment had existed, it would have awarded the assistant similar compensation, based on her alternative claim of unjust enrichment with deductions for the $25 payments, the cigarettes, and the board and lodging.[58]

Overall, notwithstanding the factual obscurity in this case, the circumstances still saw the shop assistant who was effectively paid in cigarettes, boarding and a small amount of money, in a position of vulnerability. She was reliant on her employing couple for accommodation and was employed to perform relatively menial work. As above, the requirement to be paid in money along, pursuant to s 323, served a protective purpose in the context of this matter too.

To close this part, the utility of s 323 in protecting vulnerable workers employed in the restaurant and fast food industries is without question. It ensures that employees have the benefit of being paid in money and not in kind by way of food and drink, which may be of insignificance in comparison to what they are

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[51] Ibid [1].
[52] See, eg, *Mathieson v South End Mixed Business (No 2)* [2014] FCCA 2910.
[53] [2014] FCAFC 74.
[54] Ibid [43].
[55] Ibid [30].
[56] Ibid [39].
[57] Ibid [44].
[58] Ibid [76].

actually owed in money. With that in mind, it is therefore interesting, perhaps distasteful, that fast food giant, McDonalds, has recently suggested that Australia's Fair Work Commission should be compelled to consider non-monetary benefits—such as Happy Meals, chicken nuggets and Big Macs—when asking if a pay deal under a newly negotiated enterprise agreement leaves workers better off.[59]

There are two obvious concerns with a suggestion that the provision of fast food could amount to employees being 'better off overall' than they otherwise would have been under a previously negotiated enterprise agreement or otherwise applicable Modern Award.[60] First, the employer is capitalising on its elevated bargaining position by suggesting that there is any inherent value in such non-monetary benefits. In the example given, McDonalds appears to be of the view that its menu items are of sufficiently high quality, so as to amount to an employee covered by any newly negotiated agreement being 'better off overall' when provided with those items. This outcome is not necessarily so. It is nearly impossible to objectively quantify the nonfiscal value of foodstuffs, meaning it is not actually simple to determine whether an employee is better off overall under any newly negotiated agreement for having received food in lieu of more 'orthodox' non-monetary benefits. Secondly, the concept of taking food (as a non-monetary benefit) into account when evaluating if a pay deal under a newly negotiated enterprise agreement leaves workers better off overall assumes that the food offered is optimal (ie, fresh and tasty). The notorious—albeit anecdotal—reality in the hospitality sector is that, in many cases, the free meals offered are not necessarily fresh but rather 'leftovers' that might even have gone cold or stale. At the very least, it is known that some restaurants do not prioritise cooking fresh meals when they are for staff.[61]

Departing with this sentiment, discussion now turns from statute to common law in Part III, which considers the common law doctrine of consideration

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[59] McDonald's made this suggestion in a submission to the Senate inquiry on the Coalition's industrial relations omnibus bill, the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021 (Cth). That Bill specified that the Fair Work Commission may have regard to overall benefits including non-monetary benefits when deciding whether to approve a pay deal. However, in its submission, McDonalds intimated that the change did not go far enough. It called on the Federal Government to ensure 'the Commission must consider the overall benefits including non-monetary benefits (rather than being a discretionary factor)': Paul Karp, '"Would you like Fries with That?" McDonald's Australia Wants Staff Meals Considered in Pay Talks', *The Guardian* (Online, 11 February 2021) <https://www.theguardian.com/australia-news/2021/feb/11/would-you-like-fries-with-that-mcdonalds-australia-wants-food-its-staff-eat-considered-in-pay-talks>.

[60] As to the application of the 'better off overall' test under FW Act s 193, see further, *Re Armacell Australia Pty Ltd* (2010) 202 IR 38, [41]; *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo* [2016] FWCFB 2887, [6]; *Re Australia Western Railroad Pty Ltd T/A ARG – A QR Company* [2011] FWAA 8555, [5]. An illustrative example is provided in Explanatory Memorandum, Fair Work Bill 2008 (Cth) [824].

[61] Jonas Mikka Luster, 'Do Restaurant Staff Eat the Kitchen's Leftovers?' (Web Page, 18 July 2015) <https://slate.com/human-interest/2015/07/do-restaurant-staff-eat-the-kitchens-leftovers.html>.

as it intersects with the statutory protections provided under s 323. It will be explained that the doctrine has historically endorsed a different approach to quantifying the value of consideration exchanged between parties to contracts (including employment contracts); an approach that would regard payment of a worker's wages in food as perfectly acceptable, but which s 323 firmly rejects.

IV THE DOCTRINE OF CONSIDERATION AT COMMON LAW

The doctrine of consideration (or, at least, its ancestral principles) emerged in England during the latter part of the Middle Ages, some 800 years ago. Its critical purpose was to determine which promises should be actionable through the law of contract and which should not attract legal liability.[62] The precise basis for such determinations was never entirely clear from the ancient and inconsistent body of precedent that developed in England. As Alfred Simpson notes, the doctrine of consideration 'developed piecemeal in the typical manner of common law doctrines, and the evolution of succinct statements of the requirement was retrospective'.[63] Workable principles often needed to be 'gleaned from what was recorded in the disorderly law reports of the sixteenth and seventeenth centuries'.[64]

One requirement to gradually emerge was that each party promise either to confer a benefit upon the other or to impose a detriment upon themselves.[65] The substance of the transaction had to have measurable legal value 'in the eyes of the law'[66] in order to form the basis of a contract. Justice Lush in *Currie v Misa*[67] famously expressed the classic indicia of consideration in these terms: '[a] valuable consideration, in the sense of the law, may consist in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other'.[68] If the parties exchanged things fitting one or more of these descriptions, and subject to ancillary rules as to the capacity of the parties and the legality of what they were exchanging, they would have formed a valid contract. This requirement of benefit or detriment eventually ossified into an established principle of English and, subsequently, Australian contract law.

An additional requirement to evolve was that the benefit or detriment be given *in return* for the promise in question. Put simply, it must be 'bargained' for.

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[62] See, eg, Alfred William Brian Simpson, *A History of the Common Law of Contract* (Clarendon Press, 1975) 316.
[63] Ibid 485.
[64] Ibid.
[65] For some of the earliest judicial expressions of this requirement, see, eg, *Richards v Bartlett* (1584) 1 Leon. 19; *Stone v Wythipol* (1588) Cro. Eliz. 126; 78 ER 383.
[66] *Thomas v Thomas* (1842) 2 QB 851, 859.
[67] (1875) LR 10 Ex 153.
[68] Ibid 162.

This approach has come to be known, appropriately, as the 'bargain theory' of consideration. The theory was cogently expressed by Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd*[69]: 'An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable'.[70] Requiring proof of some reciprocal exchange of something of legal value was regarded as the most effective method of determining whether a promise should attract legal liability.

The bargain theory of consideration was expressly approved by the High Court of Australia in *Australian Woollen Mills Pty Ltd v Commonwealth*:[71]

> [I]t is necessary, in order that a contract may be established, that it should be made to appear that the statement or announcement which is relied on as a promise was really offered as consideration for the doing of the act, and that the act was really done in consideration of a potential promise inherent in the statement or announcement.

The High Court emphasised that there must, between the promises of the parties, subsist the relation of *quid pro quo*.[72] Numerous cases since have stressed that bargain theory remains an essential feature of the consideration doctrine and is critically dependent upon reciprocal exchange, not any subjective notions of reliance or morality.[73]

Accordingly, the current position under English and Australian contract law is that an enforceable contract must involve an exchange between parties of consideration consisting of legally sufficient benefits or detriments. That consideration must be bargained for in the sense that what one party pledges amounts to the price paid for what the other party has pledged. Importantly, the mere promise to exchange is sufficient.[74] A contract can be, and often is, founded upon executory promises to eventually exchange whatever is bargained for. The pertinent question for the purposes of this article is whether food (promised or delivered) could otherwise constitute consideration under the general law of contract, which underpins employment contracts,[75] leaving aside the statutory

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[69] [1915] AC 847.
[70] Ibid 855. Lord Dunedin was citing the words of Sir Frederick Pollock in his work *Pollock on Contracts* (8th ed, Stevens & Sons, 1911) 175.
[71] (1954) 92 CLR 424, 456–7.
[72] Ibid.
[73] See, eg, *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460, 478 (Barwick CJ), 498 (Windeyer J); *Placer Development Ltd v Commonwealth* (1969) 121 CLR 353, 373 (Windeyer J); *Beaton v McDivitt* (1987) 13 NSWLR 162, 168 (Kirby P), 181–2 (McHugh JA).
[74] See, eg, *Gower v Capper* (1596) Cro. Eliz. 543, 543; 78 ER 790, 790: '[A] promise against a promise is a sufficient ground for an action'.
[75] As to the interrelationship between 'contract law' and 'employment contract law', see further, Douglas Brodie, 'The Autonomy of the Common Law of the Contract of Employment from the General Law of Contract' in Mark Freedland (ed), *The Contract of Employment* (Oxford University Press, 2016) 124. We acknowledge the ongoing academic debate as to whether employment contract law ought to be treated as separate and distinct from the general law of contract, and whether the former should endeavour to tailor its own specific contractual rules, rather than borrow from the latter. We do not engage with this separate

prohibition imposed by s 323. The answer, quite clearly, is 'yes', and is best explained through analysis both of the guiding principle of legal sufficiency that is central to the consideration doctrine and of the many common examples of foods being goods the subject of contracts, including employment contracts.

Earlier in this part, it was explained that consideration must have value which is sufficient in 'the eyes of the law'. Therefore, in order for food or any other thing to be valid consideration, it must be established whether or not the law ascribes value to it. The test, which is distinctly objective, is one of sufficiency, not adequacy.[76] The common law is not concerned with whether you are getting a good bargain, but rather whether you are getting any bargain at all. As Cecil Fifoot observes, this approach has been established in legal principle since at least the 15th century.[77]

Many cases aptly demonstrate contract law's indifference to the equivalence of legal bargains. In *Thomas v Thomas*,[78] for example, an annual rent of £1, together with a promise to keep premises in good repair, was regarded as sufficient consideration for lifelong occupancy of the premises. Similarly, in *Hancock v Wilson*,[79] the Supreme Court of Queensland readily accepted that an easement—a valuable property right—could be purchased for just one shilling. In some cases, the disparity between the actual worth of consideration and what is paid for it is quite stark. This was the case in *Midland Bank & Trust Co Ltd v Green*,[80] where a husband sold his farm, valued at around £40,000, to his wife for just £500. It is demonstrable of the fact that the courts simply do not inquire as to the adequacy of consideration.[81] This is a matter which 'is for the parties to consider at the time of making the agreement, not for the Court when it is sought to be enforced'.[82]

Accordingly, a transaction need only involve the exchange of something of quantifiable worth, 'be it ever so small'.[83] This practice has come to be known as the 'peppercorn principle' in homage to Lord Somervell's famous observation in *Chappell & Co Ltd v Nestlé Co Ltd*[84] that '[a] peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will

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debate for the purposes of this article. For a synthesis of the various perspectives in that regard, see further, Gabrielle Golding, 'The Distinctiveness of the Employment Contract' (2019) 32 *Australian Journal of Labour Law* 170, 174–6.

[76] See, eg, *Haigh v Brooks* (1839) 10 Ad. & E. 309, 320; 113 ER 119; *Thomas v Thomas* (1842) 2 QB 851, 859; 114 ER 330, 333–4.

[77] Cecil Fifoot, *History and Sources of the Common Law* (Stevens, 1949) 402. For an early case of the period providing authority for this principle, see, eg, *Andrew v Boughey* (1552) 1 Dyer 75a.

[78] (1842) 2 QB 851.

[79] [1956] St R Qd 266.

[80] [1981] AC 513.

[81] See, eg, *Westlake v Adams* (1858) 5 C.B. (N.S.) 248, 265; 141 ER 99, 106.

[82] See, eg, *Bolton v Madden* (1873) LR 9 QB 55, 57.

[83] See, eg, *Sturlyn v Albany* (1587) Cro. Eliz. 67; 78 ER 327, 328.

[84] [1960] AC 97, 114.

throw away the corn'. This statement emphasises once more the objective nature of consideration. Provided the law regards it valuable, even if the parties themselves do not, it will be sufficient for the purposes of making a contract.

What is obvious from the case law is that the bar for sufficiency is considerably low. The courts have recognised objective value in the most trivial of things from empty chocolate wrappers[85] to promises not to drink alcohol,[86] smoke until the age of 21,[87] or be generally annoying.[88] They have done so in recognition of the fact that the value of a bargain is inherently subjective and that the principle of economic liberty underlying the parties' autonomy to ascribe such value should not lightly be infringed.[89] It also avoids the unfavourable prospect of an influx of litigation in which judges must exhaustively survey an extensive body of evidence in order to determine whether a party received anything of adequate worth.[90] Other legal doctrines, such as the doctrine of unconscionability, serve to challenge the adequacy of a bargain where it has been procured through improper conduct.[91]

As foreshadowed at the beginning of this part, we now apply the principles of consideration to the context of food in exchange for the performance of work. It is uncontroversial and obvious that food is a form of legally sufficient consideration for the purposes of contract law generally and employment contract law specifically. It has evident legal value as an essential source of sustenance. The many undisputed instances of members of society contracting for food attests to its status as valuable consideration. People routinely buy groceries from markets and dine out at restaurants. Each of these transactions is a contract[92] in which money[93] is exchanged in return for food. Food is also a 'good' for the purposes of the Australian Consumer Law (**ACL**)[94] and the Sale of Goods Acts in each state and territory.[95] It is ordinarily acquired for personal, domestic or household use or

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[85] See, eg, ibid.
[86] See, eg, *Hamer v Sidway* 124 NY 538 (1891).
[87] Ibid.
[88] See, eg, *Jamieson v Renwick* (1891) 17 VLR 124.
[89] See, eg, *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189, 193–4.
[90] Ibid, 193.
[91] Ibid 193–4.
[92] In commercial settings, such as shop sales or restaurants, legal intent is presumed. This presumption is rebutted only with difficulty: see, eg, *Helmos Enterprises Pty Ltd v Jaylor Pty Ltd* [2005] NSWCA 235.
[93] This might be in the form of traditional hard currency or in digital form.
[94] Section 2(1) of the *Australian Consumer Law*, contained in Schedule 2 of the *Competition and Consumer 2010* (Cth), defines 'goods' as including, among other things, 'animals, including fish' and 'crops'. On that basis, it must clearly apply to food: Pelma Jacinth Rajapakse, 'Contamination of Food and Drinks: Product Liability in Australia (2016) 21 *Deakin Law Review* 45, 63. Indeed, some cases make this clear, such as *Australian Competition and Consumer Commission v Snowdale Holdings Pty Ltd* [2016] FCA 541 (eggs).
[95] The Sale of Goods Acts in each of the states and territories provide inclusive definitions of 'goods', which cover 'all chattels personal other than things in action and money': see, eg, *Sale of Goods Act 1954* (ACT) Dictionary; *Sale of Goods Act 1923* (NSW) s 5(1); *Sale of Goods Act 1972* (NT) s 5(1); *Sale of Goods Act 1896* (Qld) s 3(1); *Sale of Goods Act 1895* (SA) s A2(1); *Sale of Goods Act 1896* (Tas) s 3(1); *Goods Act 1958* (Vic) s 3(1); *Sale of Goods Act 1895* (WA) s 60(1). For case examples demonstrating that

consumption, meaning that the ACL Consumer Guarantees govern transactions involving the sale of food.[96] This outcome clearly presupposes that food has inherent value as a consumable good.

Food has been used as a commodity in trade for centuries. Spices, salt and sugar were used as currency within ancient trade routes, and many trading cities even accepted such foodstuffs in satisfaction of rents or taxes owed.[97] The Mayans and Aztecs used cocoa beans as money right through to the 1500s.[98] There are also plentiful examples of food being used in the specific context of employment at all points of developed history. In Ancient Egypt, for example, the standard basic wage for an average worker was ten loaves of bread and one to two pitchers of beer per day.[99] Roman legionnaires were frequently paid in salt, given its exceptionally high value throughout the Middle Ages.[100] During the 19th century, the Chinese paid Mongolian troops in bricks of tea.[101] In the same era, and right up until the 1930s, some regions in Russia commonly saw employers pay their workers in jam.[102] Seldom was it ever disputed, in these jurisdictions at least, that food could legitimately comprise one's compensation for services performed.

As already mentioned in Part I, the English position has differed since the introduction of the Truck Acts. The principal concern that motivated statutory intervention was that the truck system could be used as a tool of exploitation. Coupled with the fact that employers of this era also 'routinely took heavy deductions from wages for disciplinary fines, for damaged work, for the rental of tools and materials, and for providing heat, light or standing room in the workshop', employees often failed to receive the full value of their wages.[103] The High Court of Australia in *Construction Forestry Mining and Energy Union v Mammoet*

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food counts as 'goods' for the purposes of the Sale of Goods Acts, see, eg, *Regal Pearl Pty Ltd v Stewart* [2002] NSWCA 291 (prawns); *Dowdell v Knispel Fruit Juices Pty Ltd* [2003] FCA 851 (oranges); *Hannaford v Australian Farmlink* [2008] FCA 1591 (cherries). For international examples considering equivalent Sale of Goods legislation, see, eg, *Frost v Aylesbury Dairy Co Ltd* [1905] 1 KB 608 (milk); *Heil v Hedges* [1951] 1 TLR 512 (pork meat); *Hardwick Game Farm v Suffolk Agricultural and Poultry Producers Association Ltd* [1969] 2 AC 31 (Brazilian ground nut extract).

[96] Pursuant to s 3 of the Australian Consumer Law, a person is taken to acquire goods as a consumer if those goods were 'of a kind ordinarily acquired for personal, domestic or household use or consumption'. The consumer guarantees provisions contained in *Competition and Consumer Act 2010* (Cth) Part 3-2, Div 1 will therefore apply to acquisitions of food.

[97] See, eg, Nancy Chen, *Food, Medicine, and the Quest for Good Health* (Columbia University Press, 2009) 36.

[98] See, eg, Thomas Bishop, *Money, Banking and Monetary Policy* (Lulu.com, 2012) 24.

[99] See, eg, Peter Lacovara, *The World of Ancient Egypt* (ABC-CLIO, 2016) 73–4.

[100] See, eg, Shilpa Mehta-Jones, *Life in Ancient Rome* (Crabtree Publishing, 2005) 19. Salt's use as a preserving agent for foodstuffs at risk of perishing in hot weather is primarily what made it so valuable. It was often described as 'white gold'. The modern word 'salary' derives from the Latin word *salaria*, meaning salt.

[101] See, eg, Larry Allen, *The Encyclopedia of Money* (ABC-CLIO, 2009) 401.

[102] Ibid.

[103] Frank (n 6) 122–3.

Australia Pty Ltd observed that s 323 of the FW Act 'addresses the same mischief' as the Truck Acts; namely, 'that an employee's entitlement to payment for work might be compromised by an employer requiring the employee to accept some form of payment in kind of less value than the payment of money forgone'.[104]

Clearly, therefore, s 323 effectively overrides the common law by refusing to recognise an employer's promise of food as consideration for their worker's performance of a service under the employment contract subsisting between them. While the provision does not explicitly prohibit payment in food, it inevitably has this effect through its stipulation that payment be in money only. Again, as discussed in Part I, we acknowledge that s 324(1) permits certain authorised deductions—which might include, for example, meals provided to an employee by an employer—from an employee's wage. However, this approach is quite separate from an employee being directly remunerated in food, which is the practice this article focusses upon. We also acknowledge the possibility under s 324(1)(a) that a deduction that is 'principally for the employee's benefit' might extend to one offset by the provision of food. As explained further in Part IV, one can conceive of scenarios in which employees might prefer that such deductions to be made, such as where they lack the skills or time to prepare meals for their day and find the provision of ready-made meals in lieu of a portion of their wage an enormous convenience. Despite this possibility, we must reiterate that we are focussing here upon the indirect prohibition against payment of wages in food contained in s 323.

We now turn to critically considering this conflict between the statutory rule and the common law doctrine of consideration. Notwithstanding the important protective role that s 323 plays, particularly for vulnerable workers precariously employed in industries prone to paying employees in food,[105] it is recognised that there may be certain drawbacks to this strict statutory approach, coupled with some merit in the notion of permitting the payment of wages in food.

V RECONCILING S 323 AND CONSIDERATION AT COMMON LAW

There is a clear and obvious conflict between the common law doctrine of consideration and s 323 of the FW Act in terms of what each recognises as valid consideration for an employee's services. This conflict between approaches is familiar and arises in many other contexts. For example, at common law, the sale of real property can occur via oral contract. Yet, this position has been modified by statute, such that contracts to sell real property must be in writing.[106] The rationale

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[104] (2013) 248 CLR 619, 633–4.

[105] As to that prevalence, see the earlier discussion in Part II.

[106] One of the earliest statutes to prescribe a writing requirement for contracts for the sale of land is England's *Statute of Frauds 1677* (UK). In Australia, this requirement is stipulated in the Law of Property Acts in each state and territory: *Civil Law (Property) Act 2006* (ACT) s 204(1); *Conveyancing Act 1919*

in most contexts is the same: statutory intervention protects contracting parties from abuses that might otherwise be facilitated through the common law (in this case, contract law). This is largely the reason that statutes have been introduced over time to regulate the content and effect of employment contracts and protect the rights of workers; contract law is omnipresent and informs all specific categories of contract, including employment contracts.

Returning to the real estate example, oral contracts for the sale of land (a typically high-priced asset) might be subsequently denied by the promisor and cause both despair and possibly detriment to the proofless promisee.[107] Alternatively, in the employment setting, a worker might be stronghanded by their employer into accepting all or part of their wages in non-monetary forms as a consequence of the power imbalance inherent in the relationship between them as contracting parties.[108] Those workers who are vulnerable and precariously employed in industries such as hospitality (where, as seen in Part II, payment of wages in food is seemingly more common) have lesser bargaining power *vis-à-vis* their employer. Section 323 of the FW Act has therefore interceded to safeguard workers such as these who would otherwise likely be at the mercy of their employer with respect to their mode of payment.[109]

The problem with this paternalistic statutory-driven approach to lawmaking is that it assumes that contracting parties are not capable of looking after themselves. By extension, measures to restrain the bargaining process or the terms of any resultant contract, including employment contracts, are deemed essential. In many cases, it is certainly true that statutory provisions, including s 323 of the FW Act, serve to protect the vulnerable. Workers in the restaurant and fast food industries are prime examples; they are sometimes shamefully exploited, being paid

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(NSW) s 54A(1); *Law of Property Act 2000* (NT) s 62; *Property Law Act 1974* (Qld) s 59; *Law of Property Act 1936* (SA) s 26(1); *Conveyancing and Law of Property Act 1884* (Tas) s 36(1); *Instruments Act 1958* (Vic) s 126(1); *Property Law Act 1958* (Vic) s 53(1)(a); *Property Law Act 1969* (WA) s 33(1).

[107] There may be other avenues for enforcement in this situation, such as promissory or proprietary estoppel.

[108] This imbalance is evident in the managerial prerogative that subsists in the employment relationship. The managerial prerogative describes the inherent discretion of an employer to manage its workforce by being empowered to issue instructions (either directly to employees individually or via authorised delegates to a wider group) and to have those instructions followed: see, eg, Stewart et al (n 4) 245–6. Implied into every employment contract is a general duty owed by an employee to obey their employer's lawful and reasonable instructions: see, eg, *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698; *McManus v Scott-Charlton* (1996) 70 FCR 16; *Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday and Sullivan* (1938) 60 CLR 601, 621–2; Greg McCarry, 'The Employee's Duty to Obey Unreasonable Orders' (1984) 58 *Australian Law Journal* 327; Gabrielle Golding, 'The Origins of Terms Implied by Law into English and Australian Employment Contracts' (2020) 20 *Oxford University Commonwealth Law Journal* 163, 171–3.

[109] Interventions such as this raise a broader question as to whether the courts or parliament should make rules with respect to employment contracts. For an insightful discussion of the various perspectives in this regard, see, eg, Gabrielle Golding, 'The Role of Judges in the Regulation of Australian Employment Contracts' (2016) 32 *International Journal of Comparative Labour Law and Industrial Relations* 163.

minimal wages or even underpaid and subjected to dreadful—potentially dangerous—working conditions.[110] However, with more stringent controls imposed by operation of statute,[111] better detection efforts,[112] harsher penalties for contraventions,[113] and effective media exposure of exploitative employers,[114] these instances are hopefully less likely to occur than they once were. In fact, the High Court in *Commonwealth Bank of Australia v Barker*[115] maintained that the prevalence of Australia's statutory employment protections was a reason for denying the necessity of an implied term of mutual trust and confidence.

There is another angle to the debate as to the utility of statutory rules such as s 323 of the FW Act. While this rule serves a critical protective function by ensuring workers are not exploited, it overlooks a very real possibility: that workers might actually prefer to be paid for their work in something other than money—say, pizza. There may be no exploitation whatsoever involved in this arrangement. Rather, it may be the case that a worker simply favours—and perhaps even requests—compensation in the form of food fit for consumption because, subjectively, they value that particular form of consideration most highly. It seems improbable, but individuals quantify the worth of consideration very differently and s 323 might therefore be seen as presumptuous in assuming that all workers, whether vulnerable or not, expect and require payment in money. As Kirby P (as he then was) explained in *Woolworths Ltd v Kelly*:[116]

> In the marketplace, in the myriad of situations which lead to contracts, different participants will put different values upon the bargain they are getting. The subject of a

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[110] See, eg, Part II.

[111] See, eg, FW Act; *Fair Work Regulations 2009* (Cth); *Modern Slavery Act 2018* (Cth). The NES, Modern Awards and enterprise agreements also add to the layers of statutory-based control.

[112] The FWO, established in 2009, is charged with ensuring compliance with Australian workplace laws. In March 2020, the FWO concluded its rolling compliance activity audit (which commenced in April 2018), involving an investigation of a random sample of 1217 businesses across Australia. The audit tested compliance with 'basic' obligations, such as correctly paying employees and fulfilling payslip and record-keeping requirements. 48% of the sample was found to be non-compliant, with nearly a quarter (23%) not paying their workers correctly. A number of enforcement actions were implemented, including the issue of 457 contravention letters, 56 formal cautions, 26 infringement notices, and recovery of more than $1.3 million in unpaid wages for affected workers. See also, FWO, 'Workplace Basics Campaign Report' (Report, March 2020) <https://www.fairwork.gov.au/ArticleDocuments/1151/workplace-basics-campaign-report.pdf.aspx>.

[113] See, eg, the civil remedy provisions contained in FW Act Part 4.

[114] See, eg, Hannah Moore, 'Aged Care Employees in NSW Underpaid $3 Million by Major Charity', *The Australian* (Online, 13 August 2020) <https://www.theaustralian.com.au/breaking-news/aged-care-employees-in-nsw-underpaid-3m-by-major-charity/news-story/1ec9ca63b78cd7f4867aecf1c7b3f7c7>; Rebecca Le May, 'Asian Café a Repeat Offender for Underpaying Staff, Slugged $230,000', *News.com.au* (Online, 14 November 2020) <https://www.news.com.au/finance/work/at-work/asian-cafe-a-repeat-offender-for-underpaying-staff-slugged-230000/news-story/50de06e31478ea89cd287bc7d89f5ac1>; Mahalia Dobson and Rhiannon Tuffield, 'Agri Labour Australia Forced to Pay More Than $50,000 to Vanuatu Labourers Working in Northern Victoria', *Australian Broadcasting Corporation* (Online, 24 April 2019) <https://www.abc.net.au/news/2019-04-24/agri-labour-forced-to-pay-workers/11042048>.

[115] (2014) 253 CLR 169, [18].

[116] (1991) 22 NSWLR 189, 193.

> bargain may be specially important to a party. It may be valued for idiosyncratic, sentimental, ethical and other reasons as well as economic reasons.

Section 323 of the FW Act therefore arbitrarily removes a worker's autonomy to determine how they would like to be paid for their services. There is clearly a public policy interest in doing so, in order to guard against exploitation, but this repercussion is at the expense of the equally defensible interest to ensure that workers enjoy the privilege of valuing their services as they see fit.

Even the law of contract, for all its flexibility in terms of recognising sufficient consideration to find a bargain, can in other ways be seen as dogmatic. This outcome is highlighted by the difficulty of objective valuation of the subject matter of a contract. It was discussed earlier that consideration need be sufficient, not adequate, and that food would likely be valid. However, it must be queried why the assessment is objective in the first place. Given the arguably lower risk of exploitation in modern times, it is at least questionable why parties cannot be left to subjectively assign values to their bargains. Food might be an undesirable form of payment to a worker who is well-fed, but to those workers in urgent need of food, it is both favourable and essential.[117]

This preference may even be driven by practical convenience. What, for example, if a worker prefers to eat during shifts to save preparing meals for themselves during the day? Could an affluent worker with little need or desire for money instead favour payment-in-kind? Section 323 dismisses all of these possibilities, and the law of contract might similarly strike down a payment made in food if it objectively determines that a particular slice of pizza, for example, has no legal value to a worker. In this way, the objective test can itself be a faulty instrument for construing the value of bargains from the perspective of the 'reasonable worker' (who is placed in the worker's position for the purposes of deducing whether such a fictitious person received something of sufficient legal value).[118]

Effectively, the artificial construct in contract law of the 'reasonable person' disregards any and all idiosyncratic qualities of the parties to a bargain. Even if a worker saw value in a piece of pizza, if a court was of the view that a reasonable person in that worker's position would not do the same, it would be deemed to be insufficient consideration. The absurdity of this position speaks for

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[117] As Lord Denning MR explained in *Lloyds Bank Ltd v Bundy* [1975] QB 326, the circumstances surrounding a contractual bargain will often dictate what each party regards as sufficient consideration. His Lordship stated (at 336): 'No bargain will be upset which is the result of the ordinary interplay of forces. There are many hard cases which are caught by this rule. Take the case of a poor man who is homeless. He agrees to pay a high rent to a landlord just to get a roof over his head. The common law will not interfere'.

[118] See, eg, Richard George Wright, 'Objective and Subjective Tests in the Law' (2017) 16 *University of New Hampshire Law Review* 121, 126.

itself. It is also highly ironic given the English law of contract has not always subscribed to an objective method for the appraisal of consideration. Indeed, for at least a century, a subjective test was preferred. This test derived from the civilian doctrine of *causa promissionis*. The *causa* doctrine featured heavily in the Roman legal tradition[119] and, broadly speaking, examined the parties' motives or reasons for making a contract in determining the validity of the consideration exchanged.[120] The 'cause' of a contractual promise was the purpose for which it was made; 'not the immediate, personal motive of the actual promisor, but an abstract conventional purpose recognized by the law for the type of contract promise intended'.[121] If the courts deemed any promise to be of sufficient significance, it was said to generate a moral duty to fulfil the promisee's expectation, and they would enforce that duty.[122]

One of the earliest authorities reflecting this approach to evaluating the sufficiency of consideration is *Coggs v Bernard*.[123] In that case, the defendant, William Bernard, promised to safely transport casks of brandy belonging to the plaintiff, John Coggs, between two cellars approximately 800 metres apart. It was understood that Bernard was not to be compensated for his efforts and that they were purely gratuitous. During transport, one of the casks was broken and several gallons of brandy were lost. Coggs brought an action on the case—a derivative of the ancient writ of assumpsit and predecessor to what would now be referred to simply as a breach of contract—against Bernard. The court held that Bernard's mere promise to safely take possession of and transport Coggs' brandy was good consideration and that violation of that promise rendered him liable for the loss that followed. According to Gould J, 'if a man takes upon him expressly to [hold another's goods] safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him'.[124] In similar vein, Holt CJ felt that 'the owner's trusting [Bernard] with the goods [was] a sufficient consideration to oblige him to a careful management'.[125]

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[119] Alfred William Brian Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 *Law Quarterly Review* 247, 262.
[120] James Gordley, *The Enforceability of Promises in European Contract Law* (Cambridge University Press, 2001) 10. The doctrine arose as a reconciliation between the canonical law (which assumed that a promise was in itself binding upon the conscience and simultaneously made with God) and the Roman civil law maxim *ex nudo pacto non oritur actio* (no cause of action arises from a bare promise): Kenneth Owen Shatwell, 'The Doctrine of Consideration in the Modern Law' (1954) 1 *Sydney Law Review* 289, 319.
[121] Malcolm S Mason, 'The Utility of Consideration—A Comparative View' (1941) 41 *Columbia Law Review* 825, 826.
[122] Sir Percy H Winfield, *Pollock's Principles of Contract* (13th ed, Stevens, 1950) 136. 'In the civil law, agreement *without more* equals contract, as long as the agreement is a lawful one': J Denson Smith, 'A Refresher Course in *Cause*' (1951) 12 *Louisiana Law Review* 2, 4 (emphasis in original).
[123] (1703) 2 Ld Raym 909; 92 ER 107.
[124] Ibid.
[125] (1703) 2 Ld Raym 919; 92 ER 113.

An objective test of consideration would have seen the plaintiff's action fail given Bernard seemingly did not receive any material benefit or detriment from Coggs in return for his undertaking to transport the brandy. The undertaking was gratuitous and, *prima facie*, unenforceable. Applying a subjective test constructed upon the principles of the *causa* doctrine, however, the fact the promise was sincerely made for a lawful, commercial purpose and was significant in nature (in that it resulted in the transfer of possession of valuable goods), and that the plaintiff reciprocally vested trust in the defendant to fulfil his promise without incident, meant that consideration was exchanged and a contract was created. Bernard had a moral obligation to make good on his promise, and the court enforced it accordingly.

One of history's most fervent advocates for the 'moral' test of consideration was Lord Mansfield. During the second half of the 18th Century, his Lordship vehemently rejected the suggestion that consideration must be construed objectively to deduce sufficient value. Instead, the strength of the promise itself would determine whether consideration was valid or not. In *Hawkes v Saunders*, he stated: 'Where a man is under a moral obligation, which no Court of Law or Equity can inforce [sic], and promises, the honesty and rectitude of the thing is a consideration ... the ties of conscience upon an upright mind are a sufficient consideration'.[126] Of course, this moral basis for consideration was unequivocally rejected in *Eastwood v Kenyon*.[127] Lord Denman CJ (delivering the leading judgment for the court) opined that the moral basis for the enforcement of promises 'would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise [would create] a moral obligation to perform it'.[128] The doctrine of consideration regressed to its more 'objective' roots, seeking out a mutual exchange of anything with value in the eyes of the law, as opposed to those of the parties.[129]

Although the idea of consideration being subjectively measured has clearly not taken root in modern contract law, there is a body of economic theory which lends support for a reversion to a subjective method. Louis De Alessi and Robert Staaf, for example, criticise the law of contract's approach to remedying contractual

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[126] (1782) 1 Cowp. 289, 290; 98 ER 1091, 1091. Justice Buller concurred, saying: 'The true rule is, that wherever a defendant is under a moral obligation, or is liable in conscience and equity to pay, that is a sufficient consideration': (1782) Cowp. 289, 294; 98 ER 1091, 1093. It has been suggested that Lord Mansfield 'did more than anyone else' to introduce the moral basis for contractual liability into the common law: Hugh E Willis, 'Rational of the Law of Contracts' (1936) 11 *Indiana Law Journal* 227, 233.

[127] (1840) 11 Ad. & E. 438, 450–1; 113 ER 482, 486–7.

[128] Ibid. See also, *Thomas v Thomas* (1842) 2 QB 851, where Patteson J said: 'Motive is not the same thing with consideration. Consideration means something which is of value in the eye of the law, moving from the plaintiff' (at 859). See also, Oliver W Holmes, *The Common Law* (Little, Brown & Co, 1881) 296.

[129] This regression conclusively ended any chance of the more subjective Roman concept of *causa* from prevailing. See the remarks of Kirby P (as he then was) in *Beaton v McDivitt* (1987) 13 NSWLR 162, 168.

breaches where a party has not delivered the consideration they promised. The principal remedy for such breaches, of course, is damages; but damages are calculated using market prices that fail to account for subjective costs.[130] Those costs might be exorbitant and include other gains to be made through the failed exchange, the sentimental value the aggrieved party attaches to the consideration, or the indignity of the non-conforming party successfully pursuing a more valuable opportunity elsewhere. These subjective notions are excluded from the assessment of damages.[131]An aggrieved party might therefore fail in attaining damages adequate to compensate them for their losses. The argument here is that consideration, like beauty, should indeed lie in the eye of the beholder because this approach ensures that a party's losses are fully quantified in the event of the other party's breach.

Section 323 of the FW Act effectively prohibits a worker from being paid in food and *objectively* regards food as having no value as a method of compensation for a worker's services. A *subjective* approach, however, would inquire into a food-for-work arrangement and deduce the worker's personal preferences. Even if the objective approach of contract law was favoured, it would, as explained earlier, be most likely for food to count as sufficient consideration. The only impediment, therefore, seems to be s 323. This result is not necessarily a bad thing. As this article has demonstrated at various points, there are many sound public policy-based reasons for s 323's existence in its current form. Nevertheless, this status is of little consolation to those employers who do the right thing and only attempt to pay their workers in food where this outcome is somehow beneficial to, or preferred by, the worker.

VI CONCLUSION

Section 323 of the FW Act mandates that employees be paid in money—not in other benefits, including food, no matter how delicious or desirable they may be. In contrast, an exchange of promises, including promises to provide food, is sufficient consideration under common law doctrine to give rise to a legally enforceable contract (including an employment contract). This result is because the consideration doctrine requires only that legally sufficient benefits or detriments be

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[130] Louis De Alessi and Robert J Staaf, 'Subjective Value in Contract Law' (1989) 145 *Journal of Institutional and Theoretical Economics* 561, 569.

[131] See, eg, *Butler v Fairclough* (1917) 23 CLR 78, 89. We acknowledge that certain equitable remedies, such as specific performance, may capably account for subjective value placed upon particular consideration by aggrieved parties. However, these remedies are discretionary and rarely granted and usually only where damages are regarded as wholly inadequate to address the contractual breach: *Dougan v Ley* (1946) 71 CLR 142, 150. As such, in the majority of cases, the subjective value placed upon the non-performing party's performance by the aggrieved party is generally not reflected in the forms of redress ordered by the courts.

exchanged between the parties, with food capably satisfying this requirement. Section 323, being a statutory rule, of course takes precedence over the common law rule that would otherwise permit the payment of wages in food under an employment contract. However, contract law is omnipresent and informs all specific categories of contract, including employment contracts, and so any conflicts between statutory and common law rules are of more than academic interest. These conflicts raise significant practical questions, such as whether statutory intercession is necessary or even desirable.

This article has discussed a body of cases in which employers have been found to have paid workers in food, in contravention of s 323. The common thread between these cases appears to be that each involves young employees who are vulnerable and performing low-paid work in the fast food or restaurant industry. These examples clearly support the case for the statutory prohibition of payment of wages in food or anything other than money. However, this article has examined the compelling counterarguments in favour of the approach taken by the consideration doctrine at common law. It was submitted that cases of employee exploitation are arguably less likely to occur in light of the more wide-ranging and stringent controls imposed by the modern statutory framework. A more subjective approach to determining the legal sufficiency of consideration was shown to accommodate worker needs or preferences and to reflect the commercial reality that contracting parties will assign different values to the bargains they are getting for all manner of personal and economic reasons.

Of course, we do not suggest that the law should be changed merely because it inconveniences the few workers who are not being exploited by their employer and who simply desire to be paid in pizza. Those same workers may well cry foul if they are later forced to continue to accept all or part of their wages in food when they desire to be paid entirely in money.[132] In our view, s 323, just like the truck enactments introduced over 500 years ago, correctly errs on the side of caution and obviates the risk of employers exploiting their employees, particularly those who are vulnerable. No matter how desirable at a point in time, workers in favour of being paid in food are reminded that they cannot have their cake and eat it too.

[132] Section 325 of the FW Act does permit an employer to directly or indirectly require an employee to pay some or all their wages on the employer's goods or services. Theoretically, therefore, a pizza restaurant could force an employee to spend their wages on in-store pizza. However, s 325 is qualified by the requirement that any such requirements are reasonable, meaning such a direction would clearly be unenforceable. See also FW Act ss 326–7.