

**LAWS5009:
EMPLOYMENT
LAW**

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1. INTRODUCTION TO EMPLOYMENT LAW

1.1 COMPLEXITY OF EMPLOYMENT LAW

'Work' defined in *Macquarie Dictionary* as 'the exertion directed to produce or accomplish something: labour, toil'.

There is a modern expectation that we be 'married to our jobs' and receive a bit more compensation for that.

Most people have an ideological stance with regard to employment, and quite often this will govern how this relationship is viewed and regulated.

- E.g. "work to live" or "live to work"

EMPLOYMENT LAW IS COMPLEX:

- This is because of ideological differences - should employees be protected or left to their own devices? (Namely freedom of contract - an *individualistic approach*)
 - Human resources management is now greatly focused on mediation
 - An individual employee battling against their employer is not very fair
 - Unless they are part of a union
- Employment law is constantly changing, for example the legislation
 - *Fair Work Act 2009*
 - Report on Workplace Relations by the Productivity Commission
 - Changing because of the different views people have of work
- Tension between Federal control or State control as to who has control of workplace relations law
 - Federal government has won this
 - Constitutional Law
 - Tension between collective rights and individual rights
 - The use of different legislative schemes that impact on employment e.g. Work Health Safety, Discrimination, Welfare Laws

1.2 HISTORICAL PERSPECTIVE

- Master and servant relationship

- Based on ownership
- Based on status

- Impetus for Change
 - Black Death, 1348
 - Industrial revolution, 18th century

As a result, over time the concept of ownership and status changed to the concept of a **contract of employment**.

A unique situation existed in Australia:

- Conciliation and arbitration was the method adopted to resolve workplace problems into the 20th century
- Before an industrial dispute, employees would go to a third party who would mediate the dispute between the two parties (conciliation)
- If this doesn't work they would go to arbitration (a court) who would make the decision
 - Placing it in the constitution resulted in the apparent potential for discouraging industrial disputes (extending beyond the limits on any one state - if there was a dispute between NSW and QLD you could use the federal system, instead of the state system, to arbitrate a dispute)
 - However, this actually increased the number of disputes so people could go straight to Court
 - **THIS IS NO LONGER POSSIBLE**

1.3 TYPES OF EMPLOYMENT

1.3.1 THE OLD-FASHIONED SITUATION:

The 'normal' employment relationship [Burgess (1994)] is an old-fashioned notion:

- Full-time, capable of generating an income level to support a minimum standard of living
- Waged employment with rights, income and working conditions guaranteed
- Ongoing employment that is secure and continuous
- Work is located at one place at premises owned by the employer

1.3.2 THE MODERN SITUATION:

[Kuhl (1990)]:

- Part-time
- Casual
- Self-employment
- Contracting
- Outwork

- Agency

Why have new ways of working developed?

- The employer mantra of:
 - Flexibility
 - Productivity
 - Efficiency
- Employer's desire to be able to respond to economic fluctuations
- To evade obligations imposed by awards, enterprise agreements and statutes
 - E.g. penalty rates now claimed to be 'too high'
- Growth in new forms of getting work done
 - E.g. the independent contractor or outsourcing

1.3.3 OTHER WAYS OF WORKING:

a) Part-time work:

- A part-time worker will have all of the rights of a full-time worker but on a pro rata basis, i.e. it will still be a single, on-going contract of indefinite duration
- Example:
 - Holidays: A part-timer working 0.6 of a full-time load will be entitled to 4 weeks holiday paid at a rate of 0.6

b) Casual work:

Characteristics of a true casual:

- A separate contract exists for each period over which work is performed
- There is no guarantee of future work
- A casual can accept or reject each offer of work
- They are not entitled to employment benefits, a greater rate of pay compensates for this loss

Reed v Blue Line Cruises (1996):

'Casual' defined as "employment on an informal, uncertain and irregular basis"
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Problems:

- Employees being described as casuals when they are really part-time employees
- Hybrid rights i.e. an employee having some rights that would suggest they are a part-time worker and other rights that would suggest they are a casual worker

Test comes from ***CPSU v Victoria (2000):***

The court looks at the facts and circumstances to determine whether particular employees are casuals

c) Outworkers:

- A worker who performs work for another from the worker's home or outside the normal workplace
- Issues arise as to whether the worker is an independent contractor or an employee

d) Sub-contracting:

- Hypothetical: A consultant who comes to the workplace and starts to direct employees who are not their own
- Issue: Who is the employer?

e) Labour hire:

Building Workers Industrial Union & Others v Odco Pty Ltd (The Troubleshooters Case) (1991):

- Established the 'Odco' Relationship or 'Odco System'
 - Bypasses legislation
 - Interposes a third party between the person who wants work done and the person who is actually doing the work with the idea to take away the risk of the company or the business that wants work done
- This system does not want employees to be in an employment relationship but rather an agency relationship
- Workers were not considered to be employees so they were not being paid award wages, and their unions did not like this
- Troubleshooters said they did not have to as there was no contract of employment
 - They won
 - *Held:* No rights & obligations that pertained to the workers

2. THE CONSTITUTIONAL FRAMEWORK OF AUSTRALIAN EMPLOYMENT LAW

2.1 THE CURRENT SITUATION

- 4 states have referred their industrial relations powers in relation to private sector employees to the federal government
 - NSW, Queensland, Tasmania & South Australia

s 51(xxxvii.) of the Constitution provides that the Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law

- Exceptions:
 - WA has not referred its powers
 - Victoria referred their powers in 1996
 - Here, the public vs. private employment relationship issue does not matter, as they handed *everything* over

2.2 HOW DID WE GET HERE?

2.2.1 THE PROBLEM:

- The old system was based on the Commonwealth's industrial relations power

s 51(xxxv)

The Commonwealth has the power to make laws with respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'

Limitations:

- Could only use conciliation and arbitration to resolve disputes
- In practice the only disputes settled were disputes in existence despite word 'prevention' in section 51(xxxv)
- Disputes had to be industrial - confusion over what 'industrial' meant
- Disputes had to relate to industrial matters (concept of managerial prerogative)
- Disputes had to extend beyond the limits of one State - interstate disputes were manufactured to fall within jurisdiction

2.2.2 THE SOLUTION:

- The *Workplace Relations Amendment (WorkChoices) Act 2005* (Cth) provided that certain employers and their employees would be covered by the workplace laws of the Federal government

What employers?

s 6 Workplace Relations Act (Cth) 1996

Any Employer that was:

- (a) a constitutional corporation; or
- (b) the Commonwealth; or
- (c) a Commonwealth authority; or
- (d) a person or entity that employs an individual as:

- (i) a flight crew officer; or
- (ii) a maritime employee; or
- (iii) a waterside worker; or
- (e) a body corporate incorporated in a Territory; or
- (f) a person or entity in a Territory in Australia.

2.2.3 WHAT AUTHORITY?

a) Commonwealth's corporation power:

s 51(xx)

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

'Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'

b) Commonwealth's public service power:

s 52

The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(ii) Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government or the Commonwealth

c) Commonwealth's trade and commerce power:

s 51(i)

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

Trade and commerce with other countries, and among the States

d) Commonwealth's territory power:

s 122

The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

2.2.4 NATIONAL SYSTEM EMPLOYER:

- Howard's government predicted that 85% of employees would be covered by WorkChoices
- Studies showed that only 70-75% of employees were

- Those excluded were:
 - Sole traders, partnerships, state public servants and non-constitutional employers e.g. local councils, educational institutions
- Rudd government scrapped some of it but kept the idea of a *National System Employer*
- Thus, the *Fair Work Act 2009* came about
 - *Fair Work Act 2009* ss 13-14

Section 14 Meaning of *national system employer*

A *national system employer* is:

- (a) a constitutional corporation, so far as it employs, or usually employs, an individual; or
- (b) the Commonwealth, so far as it employs, or usually employs, an individual; or
- (c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or
- (d) a person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:
 - (i) a flight crew officer; or
 - (ii) a maritime employee; or
 - (iii) a waterside worker; or
- (e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or
- (f) a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.

2.3 A PRACTICAL PROBLEM

How do employers and employees determine what laws apply to them, i.e. Federal or State?

1. Determine what state the employment relationship is in.
2. If NSW, Queensland, South Australia or Tasmania determine whether employment relationship is in public or private sector
 - Hence, which legislation do you use?
 - For example:
 - Universities were created by the state govt.
 - E.g. a nurse at John Hunter Hospital is in the public system, and a nurse at Newcastle Private Hospital is in the private system. Most people in retail trade are in private employment and therefore the private sector.
3. If Victoria, distinction between public and private sector is of no consequence
4. If Western Australia, determine whether an employer is a National system employer (s.14 *Fair Work Act 2009* (Cth))

NSW legislation that may still apply to national system employers and employees:

- *Anti-discrimination Act 1977* (NSW)
- *Work Health and Safety Act 2011* (NSW)
- *Workers Compensation Act 1987* (NSW)

- *Annual Holidays Act 1944 (NSW)*
- *Long Service Leave Act 1955 (NSW)*
- *Workplace Surveillance Act 2005 (NSW)*
- *Restraints Of Trade Act 1976 (NSW)*

2.4 SUMMARY

- For an employment relationship in NSW you will need to figure out if there's a contract of employment
- Once there's an established contract:
 - Public or private?
 - If public - NSW State legislation
 - If private/federal system - Federal legislation
 - Unless under certain circumstances you look to ss 26 and 27 FWA to see which State legislation will apply

How do we figure out what our rights and obligations are?

- Look to the **legislation**
 - This will apply to anybody in an employment relationship in the federal system
- Then there are **industrial instruments** such as modern awards (150-ish) and enterprise agreements (which only applies to a particular workplace)
- If you don't find an answer by looking at these, then you go to the **contract of employment** which will apply to an employee and employer
 - Express terms & implied terms which are very important in the employment contract