

## TOPIC 1: MINIMUM EMPLOYMENT STANDARDS

### 1.1 RATIONALE for minimum standards

- Regulation necessary to **overcome/ counter inequity in bargaining power** between employer/ employee;
- Permit **collective action by workers** to improve working conditions and directly imposed **statutory obligations** on employers e.g. minimum wage/ provision of safe workplace

### 1.2 SOURCES OF REGULATION in Australia

- Cth/ Federal legislation (**FWA 2009**);
- State legislation (**Equal Opportunity Act 2010 (Vic)**);
- Common Law (contract of employment);
  - Terms generally better than statutory minimum but only enforceable at CL;
  - More applicable to high-level executives in the form of implied, oral, written K; non-compete clauses etc.
- Equity (fiduciary nature of employment relationship);
- Other sources:
  - i. **Workplace policies** (**Goldman Sachs v Nikolich [2007]**; **Riverwood Int' v McCormick (2000)**; **CBA v Barker [2013]**);
  - ii. **Customs** developed in the workplace/ industry
    - Must be **so 'well-known and acquiesced'** to be reasonably presumed that everyone making a K would import term into K (**Constan Industries**)

### 1.3 **Fair Work Act 2009 (Cth)** and its constitutional basis

- Act principally based on the **corporations power (S 51(xx), Cth Constitution)**;
- Applies to '**national system employees**', not on vocational placements (**S 13, FWA**)

### COVERAGE OF **FWA 2009**

- All employees in NT and ACT (Territories): **S 14(1)(e)- (f), FWA**;
- All employees of the Cth government and authorities;
- All private sector employees in Vic, NSW, Qld, SA and Tas: **S 30D, FWA**;
- All private sector employees in WA who work for constitutional corporations: **S 30D, FWA**;

- Complete referral of power for **public** sector employees in **Vic** since 1 Jan 1997
- Note: **ss 30C** and **30D** apply to all states except WA (because of states referring power to Cth to determine T&Cs of work)

### Is an employee a **national system employee**?

**S 13, FWA:** A NES employee is an individual **employed by a NES employer**, other than on VP

- **S 30C(1)** extends the meaning of a national system **employee** in relation to a referring state: Includes:
  - a. **any individual** in a State that is a referring state to the extent that they are employed by an employer in a referring state; and
  - b. **a law enforcement officer** of the State
- Pursuant to **s 30C**, the **FWA** applies to all employees (private and public sectors) in Vic, with the exception of certain judicial officers and senior public servants

### Is an employer a **national system employer**?

**S 14(1), FWA:** A **national system employer** is:

- a. A **constitutional corporation**; or
  - A **foreign/trading/ financial corporation** formed within the limits of the Cth (**S 51(xx), Cth Constn**);
  - May be a trading corp even if trading  $\neq$  predominant activity; but must be **substantial** and not peripheral activity;
  - Includes trading **services**, with profit-making usually being concomitant;
  - Charitable corps can be trading corporations if there is **substantial** trading activity (**Kathleen McInnes**)
    - ✚ Service provided need not have character of commercial trade in services/ elements of exchange to constitute trading activities;
    - ✚ Activities provided by PPS to community w/o charge;
    - ✚ Any trading activities were *insignificant, peripheral* and *incidental*

- b. The **Commonwealth**; or
- c. **Cth authority**; or
- d. Those who employ: flight crews, maritime ees or waterside workers;
  - Pursuant to **trade and commerce** power (**S 51(1), Cth Constitution**)

Note: **S 30D** extends the meaning of a Nser re referring states

#### 1.4 National Employment Standards: **Part 2-2, FWA 2009**

- Prescribed min. standards cannot be displaced/ excluded by contract of employment, notwithstanding agreement of employee: **S 61(1), FWA**;
- Casuals may be excluded from some standards, in exchange for a salary loading of **20-25%** of the normal hourly rate for work;
- Some standards apply only if **qualifying periods/ evidentiary requirements** etc. are satisfied

### ENFORCEMENT OF NES

- An employer must not contravene the NES: **S 44(1), FWA**;
  - Breach of NES standard will allow a civil remedy: **ss 539; 546**;
  - Penalty may be imposed up to **\$54,000** for corporate er
- Court can make order for underpaid wages; leave entitlements not paid etc.
  - **However**, no court orders regarding **employer's decisions** made on reasonable business grounds:
    - a. Not to grant flexible work arrangement;
    - b. Not to extend parental leave beyond 12 months: **s 44(2), FWA**

### SUMMARY OF MINIMUM STANDARDS: **S 61(2), FWA**

- a. Maximum weekly hours (**Div 3**);
- b. (Requests for) Flexible working arrangements (**Div 4**);
- c. Parental leave and related entitlements (**Div 5**);
- d. Annual leave (**Div 6**);
- e. Personal or carer's leave; and compassionate leave (**Div 7**);
- f. Community service leave (**Div 8**);
- g. Long service leave (**Div 9**);
- h. Public holidays (**Div 10**);
- i. Notice of termination & redundancy pay (**Div 11**);
- j. Fair Work Information Statement (**Div 12**)

## TOPIC 2: EMPLOYEES & INDEPENDENT CONTRACTORS

- Only **employees** to NES, MA, EA will result in employer being liable under **vicarious liability** (reaffirmed in *Sweeney v Boylan Nominees*)
- **NB** Laws that apply equally to employees and independent contractors
  - i. laws dealing with **discrimination** and **victimisation** at work (gender, race, disability);
  - ii. **Work H&S**

### MULTIPLE INDICIA TEST

While the Courts have come to apply an **impressionistic multi factor approach** (*Stevens v Brodribb*; *Hollis v Vabu*), the court in *Victorian Work Cover Authority v Game* held that it is possible for a worker to perform work in the same industry in **different legal capacities**.

In applying the multiple indicia test, no single factor is **conclusive**, with the question being one of **overall impression** and **totality of relationship** (Mason J in *Stevens v Brodribb*; approved in *Hollis v Vabu*)

INDICIA	EMPLOYEE	INDEPENDENT CONTRACTOR
<b>Degree of/ right to exercise control</b> <ul style="list-style-type: none"> <li>○ While significant, not the <b>sole</b> criterion (<i>Stevens v Brodribb</i>, Mason J);</li> <li>○ Nonetheless, remains the surest guide to whether a person is an employee (<i>Brodribb</i>, Wilson and Dawson JJ)</li> </ul>	The more the worker is subjected to <b>direction</b> and <b>control</b> , the <b>more likely</b> to be seen as employee: <ul style="list-style-type: none"> <li>i. <b>Actual control</b>;               <ul style="list-style-type: none"> <li>▪ <i>Hollis v Vabu</i>: Vabu retained control of allocation and delivery latitudes</li> </ul> </li> <li>ii. <b>Right to exercise control</b> i.e. lawful authority to command, even for incidental matters (<i>Zujis v Wirth</i>)</li> </ul>	Where workers can exercise own discretion or carry out business on own account

	<p><b>Control</b> may be manifested in (<i>Roy Morgan v Cmr of Taxation</i>)</p> <ul style="list-style-type: none"> <li>i. <b>Stipulating hours worked;</b> <ul style="list-style-type: none"> <li>▪ <i>Hollis v Vabu</i>: Couriers required to arrive at 9am and assigned work</li> <li>▪ <i>Brodribb</i>: Loggers set own hours</li> </ul> </li> <li>ii. Whether <b>dresscode</b> required;</li> <li>iii. <b>Workplace rules;</b></li> <li>iv. Detailed instructions relating to work and how it should be carried out; <ul style="list-style-type: none"> <li>▪ <i>Stevens v Brodribb</i>: D responsible for overall co-ordination; but no authority to command loggers re performance of work; left to exercise skill and judgment</li> </ul> </li> <li>v. <b>Quality control</b> procedures</li> </ul>	
<b>Mode of Remuneration</b>	<p>Receiving wages based on time worked → employee</p> <ul style="list-style-type: none"> <li>○ <i>Hollis v Vabu</i>: V supervised courier's finances; fixed-wage and produced pay summaries; deducted insurance</li> </ul>	<p>Paid according to task completion/ outcome-based → contractor (<i>Stevens v Brodribb</i>)</p> <ul style="list-style-type: none"> <li>○ Own invoice</li> </ul>

## TOPIC 5: EMPLOYEE'S IMPLIED DUTIES

### General Principle

Terms implied by law are:

- Incidents of a **special nature** attached to this type of contract;
- By reason of the **nature of the subject matter** and **personal obligation** resting on the employee to serve and obey the employer,
- and upon the employer to pay for services so rendered and to carry out any other obligations which he has assumed towards his employees (**Consolidated Press Ltd v Thompson**)

### Employee Duties: Summary

1. **Obedience** to lawful & reasonable orders;
2. **Co-operation**;
3. **Proper conduct**;
4. **Skill** and **care** in doing the work;
5. **Fidelity** and **good faith**;
6. **Confidentiality** (of information, trade secrets etc.);
7. **Restraints of trade** (post-employment restraints) and **negative covenants**;
8. **Work/Wages Bargain** – mutual duty (Topic 6);

### Duty of Obedience (to obey 'lawful and reasonable orders')

- An employer's power to give orders and expect them to be obeyed → **inherent feature** of employment relationships;
- Where a failure to obey lawful and reasonable orders is **sufficiently serious** → may entitle the employer to a **summary dismissal** (Topic 7)

#### A. Introduction: Lawful and reasonable:

- a. An employee is obliged to comply with any **lawful** and **reasonable** directions given by a supervisor (**Darling Island Stevedoring** as per **Dixon J**)
  - The order must relate to the **subject matter** of employment i.e. fall w/in scope of the contract; and

- i. Employment K is a **flexible** instrument, but there is a **limit** re what falls w/in scope of the employment ;
  - ii. Order must be **reasonable**
- **Reasonableness** depends on:
  - i. Nature of employment;
  - ii. Established usages;
  - iii. Common practices; and
  - iv. Any instrument affecting it
- b. Order must not be illegal/ unlawful**
  - i. Where order places employee in a position of **unreasonable danger (physical etc.)** (*Ottoman Bank v Chakarian*);
    - Employee was held to be entitled to refuse to stay in a country in which he was at risk of execution because of history of political activism;
    - What constitutes **unreasonable danger** would depend on the **nature of employment**
  - ii. Where orders would require the employee to break the law (*Kelly v Alford*)
    - Employer sent its employees onto the roads in an **unregistered** and **uninsured** vehicle

See *Ottoman Bank v Chakarian* [1930] AC 277

*Order is illegal where it places the employee in physical danger*

#### **FACTS:**

- Employee of OB was refused transfer even though he was in physical danger; dismissed for dereliction of duty, even though he left out of fear

**ISSUES:** Whether **refusal to transfer** Mr. C and ordering him to continue work was a **lawful** and **reasonable order**

- Did C have a **duty of obedience** to continue working in light of **physical danger**?

#### **HELD: Privy Council**

- Bank's order for him to remain: not a **lawful** or **reasonable order** → refusal to work at particular branch did not justify dismissal;

E. Relevant **Corporate Act 2001 (Cth)** provisions: **ss 182-3**

- a. **Position (s 182)**: Prohibits employee (director/ officer) of corporation from *improperly using position to gain an advantage/ cause detriment* to corporation;
- b. **Information obtained whilst in position (s 183)**: Similar prohibition re *improper use of information* acquired from employment; applies to ees and former ees of corporations; ASIC will impose penalties

<b>Intellectual Property and Inventions</b>
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A. Types of IP;

- a. **Copyright**: the right to prevent **unauthorised copying/ distribution** of information or ideas captured in a material form;
  - E.g. books, papers, computer files, software, drawings, photographs, music etc.
- b. **Patents**: for novel products or processes;
- c. **Designs**: new and distinctive designs for **visual presentation** of commercial products;
- d. **Trademarks**: signs (including names, logos and labels) which indicate that goods or services originate from a particular trader;

B. Statutory presumptions in **Copyrights and Designs**;

- a. **S 35(3), Copyright Act 1968**: States that there is a **presumption** that the rights in any work created during employment belongs to the employer;
- b. **S 13(1), Designs Act 2003**: States something to the same effect
- c. **Both** subject to any agreement to the contrary between the parties (**Insight v Australian Council for Educational Research**)

C. Trademarks;

- a. The proper owner of a trademark will generally be the business to which it relates (**Edwards v Liquid Engineering**)

D. Ownership of Patents/ Inventions

a. General Rule:

- i. Any invention made **in the course of employment** will belong to the **employer** (**Sterling Engineering v Patchett**)
  - If an employee **patented** such an invention → expected to **hold on trust** for the employee; and will be expected to **assign the patent** if requested by employer (**Sterling Engineering**);



- ii. Whether an invention made in the course of employment depends on the **scope** of the employment; whether employee was employed to invent i.e. '**duty to invent**' (*Spencer Industries v Collins*)
- Mere existence of **employment relationship**  $\neq$  employer gets **ownership** of inventions (*UWA v Gray*)
  - '**course of employment**': time of employment/ working hours/ employer's resources i.e. property of employment
  - *Spencer Industries*: Invention was held **not** to belong to the employer because it was developed in the employee's **free time** and **scope** of employment did not include inventing

### *Spencer Industries v Collins (2003)*

**FACTS:** Collins (Sales manager of SI) sold car products/ explained value of products etc; had invented a **machine that took old thread off tyres** (on own time/ resources). SI then reneged on agreement to share the benefits of the machinery and Collins subsequently patented in own name

**ISSUES:** Did the patent belong to Collins?

**HELD:**

**I. Nature of employment**

- Collins **not** hired to **invent**; cf. employed in the capacity of a **sales manager**;
- Invention was conceived and invented in own time, not product of employment

**b. Special case: Academic Employment & Duty to Invent**

- i. While being employed to **engage in research**, a professor does not have a duty to **invent** (*UWA v Gray [2009]*)
- Despite the fact that Gray developed a liver cancer treatment while being **employed** and **paid**, the university was **unable** to assert ownership over that invention;
  - Court held that it was **not** part of his **scope of employment** to invent;
    - Duty to **research**; distinguished from duty to **invent**;
      - Teach, supervise, research, promote research with team of researchers, seek funding to enable ongoing research to be fruitful
  - Furthermore, UWA had **patent regulations** attaching to Gray's contract → that any inventions in the course of his employment while using university resources would have to