

Regulation at Work

Why regulation at work?

- The contract is at the centre of all employment relations
- Contract is an inadequate regulatory tool
 - o Not simply a regulatory device to give effect to agreement
 - o Courts have implied terms into employment contracts

Regulation Theory

- Standing's analysis of 'work', 'labour' and 'employment'
 - o Work-a fulfilling and essential human activity which should be supported in all of its guises
 - o Labour - toil work performed out of sheer necessity (hence focus in past of relief from labour in the form of protected leisure time)
- Standing argues that decent work (rather than employment) should be the primary social goal
- Decent work entails construction of standards and means to enforce re:
 - o Provision of adequate knowledge re rights and obligations
 - o Maintenance of workplace free from harassment and risk of injury
 - o Adequate remuneration (not subject to arbitrary reduction)
 - o Capacity for workers to adjust work time with changed personal circumstances
 - o Freedom from unlawful discrimination
- But:
 - o Assumptions - equal bargaining power/know the future
 - o Employee and employer preferences don't always coincide
 - o Public policy – not dealt with in contract (minimum wage/race-to-the-bottom)
 - o Emphasis on express terms
 - o Implied terms - duties to obey lawful and reasonable commands and render loyal and faithful service
- Some modern developments in contract law - e.g. implied mutual duty of trust and confidence; estoppel (promise) but:
 - o Limited damages (compared to tort)
 - o Means of enforcement - costly and slow
 - o Therefore, argument for public regulation: command and control OR responsiveness

Changes to Australian Society and Workforce

- Industrial → global
- Male breadwinner → complex participation
- Protection → open
- Pluralism → unitarism
- Collective → individual

Philosophical approaches to work regulation

- Balance inequalities between capital and labour: the main object of labour law has always been, and we venture to say always will be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship
- Neo liberalism:
 - o Competition - market - efficiency
 - o Private interest = public interest
 - o Unwanted 3rd party interference
- Social democracy:
 - o Maintain public regulation
 - o Social justice within capitalist system

Formation of the Work Relationship

Who is the subject of work regulation?

- The main legal distinction is between employee and independent contractor
- Key features of an independent contract: operating own business, freedom to enter contracts and a commercial arrangement
- Key features of employment: subordinate relationship to employer and a personal arrangement
- Why would a business want independent contractors instead of employees?
 - o Don't have to worry about tax, super and insurance
 - o Don't have to pay penalty rates
 - o Less risk for employer
 - o However: there is a lack of control
- Why would a worker want to be an independent contractor?
 - o Flexibility, how much to change, who to work for
 - o Avoid paying tax e.g. when paid cash
- The 'Control' test:
 - o *Zuijs v Wirth Bros* (1955) 93 CLR 561 **Right to control** rather than actual control
 - o 'Right to control' is considered outdated as sole determinant
- The "Multiple Indicia" Test
 - o Examine all relevant aspects of the relationship between worker and employer/ principal
 - o Some examples of factors considered: degree of integration into the business (uniform requirements; provision of equipment), the right to delegate work, the method of calculating remuneration - related to time or task, who bares the risk for loss or profit, exclusivity or not, leave payments, taxation arrangements, responsibility for insurance and the express intention of the parties

Adequacy of common law and corporate law to regulate work

- Businesses (and to a lesser extent workers) have sought to avoid employment obligations by setting up independent contract arrangements.
- Methods of avoiding employment obligations
- Common Law Assumptions regarding work relationships:
 1. Bilateral: Two parties in employment relationship
 2. Binary: Two types of work relationship - E/ee or Independent Contractor
- Casual employees - an important category - difficult to define

CASUAL EMPLOYEE	"DEPENDENT" CONTRACTOR
Often work for multiple businesses	All / most of work for one business
Not "integrated into business"	Req'd to provide equipment e.g. truck
Often supply own equipment e.g. delivery	
Sometimes paid for task, not time	
No pay during absences	

- Casual e/ees sometimes have many indicia of independent contractors
- Mainly businesses seeking to avoid employment obligations e.g. workers compensation and other insurance; payroll tax; etc by:
 - o Entering contract with express intention (and indicia) of an independent contract
 - The C/L is reluctant to look behind the bargain
 - Particularly if enough indicia suggest independent contract

'Decent work' and the ability to enforce rights

- Decent work entails:
 1. Construction of standards; and
 2. Means to enforce them
- What are the implications of this for: dependent contractors and employees in precarious corporate structures

Rights and Obligations

Sources of workplace rights and obligations

- Contract: employment contract or independent contract
- Statute e.g. Fair Work Act (2009)
- Industrial instrument: collective agreement (refer to Bargaining and Agreement Making week)
- Award e.g. "Modern Award"

Terms of the employment contract

- Express terms: written or verbal
 - o Be careful with representations/promises during recruitment
 - May form express term of contract (despite template written contract to the contrary)
 - May give right of rescission to employee
- Incorporated terms: from another document
 - o Reasonable person – what are intended to be terms of contract E.g. Policy Manual
 - o To the extent that terms in the policy are 'promissory'
- Implied terms:
 - o In fact
 - The parties would have agreed to the term had they addressed their minds to it
 - BP Refinery:
 - Reasonable and equitable
 - Necessary to give business efficacy to the contract
 - Capable of clear expression
 - Doesn't contradict any express term of the contract
 - o In law
 - Because it is an employment contract, certain terms are implied to every employment contract unless expressly excluded e.g.:
 - Duty to obey
 - Duty of good faith and fidelity
 - Reasonable notice
 - Derived from master-servant relationship
 - o By custom
 - So, well-known and accepted that everyone entering a contract always expects terms to be part of agreements
 - E.g. Discount merchandise; redundancy

Employer Rights (Employee Obligations) at common law

- Duty to obey
 - o E/ee's duty to obey lawful and reasonable commands e.g. hours of work and office romance
 - o Express terms may limit scope of duty
 - o Lawful
 - o Reasonable: within scope of particular employment contract
 - E.g. - clothing and appearance directions - consistent with e/er image
 - E.g. - Dangerous work
- Duty of good faith and fidelity
 - o During employment: confidential information and competition
 - o After employment: confidential information and restraints
 1. Non-compete
 2. Poaching e/ees
 - o Restraint of trade doctrine – legitimate interests of e/er
 - o In terrerum effect

Employee Rights (Employer Obligations)

- At Common Law
 - Work-Wages Bargain: wages follow work
 - Duty to provide work: only for specific classes of e/ee
 - Duty to act reasonably: not a developed obligation beyond right of e/ee to accept e/er's repudiation in case of constructive dismissal for e.g. demotion, pay cut, harassment etc
 - Duty of care: duty to take reasonable care to avoid exposing e/ees to unnecessary risk of injury
 - Liability to compensate depends on whether the risk was necessary to perform the ordinary course of work
 - Duty of trust and confidence: duty not to abuse or destroy the relationship of trust (Malik - UK decision). But not in Australia - Commonwealth Bank v Barker
 - Reasonable notice – for e/er and e/ee
- Under Statute
 - Fair Work Act (2009) - NB - National System Employee
 - Part 2.2 - The National Employment Standards
 1. Maximum weekly hours
 2. Requests for flexible working arrangements
 3. Parental leave
 4. Annual leave
 5. Personal/carers/compassionate leave
 6. Community service leave
 7. Long service leave
 8. Public holidays
 9. Notice of termination and redundancy pay
 10. Fair Work Information Statement
 - NES - Who is caught in the safety net?
 - All employees covered by FW Act except casual employees* who do not get the benefit of: right to request flexible working arrangements, parental leave, annual leave, paid personal/carers/compassionate leave, paid jury service, notice of termination and redundancy pay
- Maximum weekly hours
 - An employer must not request or require an employee to work more than the following number of hours in a week unless the additional hours are reasonable:
 - For a full-time employee, 38 hours; or
 - For an employee who is not a full-time employee, the lesser Of 38 hours; and the employee's ordinary hours of work in a week"
- Requests for flexible working arrangements
 - Reasonable business grounds may include, for example:
 - The effect on the workplace and the employer's business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity and customer service;
 - The inability to organise work among existing staff; or
 - The inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee's request.
- Parental leave: up to 12 months unpaid leave for every employee, right to request an additional 12 months unpaid leave and other forms of maternity, paternity and adoption related leave
- Annual leave
 - For each year of service with his or her employer, an employee is entitled to: 4 weeks of paid annual leave; or 5 weeks of paid annual leave, if [a shiftworker]
 - An employee's entitlement to paid annual leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.