LaWS5146: Labour Law

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Introduction to Studying Labour Law

This class will involve the distribution of materials, an explanation of assessment tasks and a discussion about the semester's program and the expectations for class preparation.

The class will then briefly examine the evolution of Australian labour law and outline the modern

How does the law of work differ from ordinary commercial law?
- The law of work focuses on a particular subset of ‘commercial transactions’ concerning the law that applies to employees. However, it is often difficult to identify what is ‘in’ and what is ‘out’. Independent contractors increasingly blur this boundary.

Does the traditional bifurcation of the subject still work as an organising ‘frame’?
- Employment law tends to focus on the relationship between the employer and employee
  - Contract law and statutory law which imposes obligation on employers
- Industrial law is concerned the labour market generally and the relationship between capital and labour
  - Industrial law was a particular study of the regulation of trade unions and collective regulation of conditions of employment
- The Fair Work Act today focuses on collective bargaining at the enterprise level.
A Global Perspective: The International Labour Organisation, and International Labour Standards

This class will situate the law of work within its international context, considering the role and influence of the international labour organisation, and the international labour code.

The class will also consider the influence of globalisation on Australian labour law and practice.

- The ILO Declaration on Fundamental Principles and Rights at Work
- The ILO Constitution
- The ILO Declaration on Social Justice for a Fair Globalization at Work

The international context has always been significant in understanding the law of work. However, the ‘internationalisation’ of the law of work in Australia is a more recent phenomenon, developing in the second half of the 20th century from the proliferation of international human rights Conventions. The development of Australian law of work must now be placed in the context of globalisation.

The International Labour Organisation:

- The foundation of the ILO in 1919 was premised upon the conviction that universal and lasting peace could only be established and maintained if it were based on social justice and improved working conditions. The aims of the ILO, as expressed in its preamble, are to establish and achieve the application of global standards of social justice with respect to work, and thereby to ensure that some workers are not placed in a position of competitive advantage or disadvantage over others.
  - This requires the interests of the various stakeholders in the employment relationship to be balanced (employees, employers, unions, employer associations and government)
- The original ILO Constitution identified the following general principles as being of 'special and urgent importance':
  1. The guiding principle that labour should not be regarded merely as a commodity or article of commerce
  2. The right of association for all lawful purposes by both employees and employers
  3. The payment to employees of a wage adequate to maintain a reasonable standard of life
  4. The adoption of an eight hours a day (48hrs weeks) as the standard
  5. The adoption of the weekly rest of the least 24 hours, which should include Sunday
  6. The abolition of child labour
  7. That men and women should receive equal remuneration for work of equal value
  8. The standard with respect to the conditions of labour should have due regard to the equitable economic treatment workers lawfully resident therein
  9. Each state should make provision for a system of inspection in order to ensure the enforcement of the laws and regulations
- These fundamental principles were reaffirmed in the Declaration of Philadelphia in 1944. This also espoused anti-discrimination principles, as well as affirming the right of everyone to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity
- The conventions and recommendations of the ILO often referred to collectively as the International Labour Code. Today, this comprises over 188 Conventions and 200 recommendations.
The ILO and the Law of Work in Australia:

- Australia has been a member of the ILO since its establishment. Since 2005, the Australian government has sat on the ILO’s governing body, as well as a representative of Australian business and the representative of Australian workers. The ILO Constitution, as amended, has been legislatively approved by the enactment of the *International Labour Organisation Act 1947 (Cth)* and the *International Labour Organisation Act 1973 (Cth)*.

- Although there has never been any legal impediment to Australia ratifying and legislatively implementing ILO conventions, for political reasons, only 12 conventions had been ratified up until the end of WWII. The Australian practice of ratifying the convention only with the agreement of all its states, and when existing law was already conformed with it, inhibited the rate of ratification. However, since 1970, 30 ILO conventions have been ratified.

- Australia now follows a procedure whereby there is parliamentary scrutiny before it commits to final ratification. Because Australian law incorporates the dualist theory of a separation between international and national legal systems, legislative enactment is necessary before Australia’s obligations at international law are incorporated into domestic law in a way that can create new, or modify existing, public or private rights or obligations.

- Although since the 1970s discrimination legislation applying to work has been enacted to implement Australia’s international obligations under a range of UN Conventions, only with the passage of the *Industrial Relations Reform Act 1993 (Cth)* was there any incorporation of ILO standards into the mainstream of Australian labour law by relying upon the external affairs power [s 51(xxiv)]. This Act provided for the termination of employment, parental leave, limited immunity from liability to certain strike action, and a legislative framework for ensuring minimum wages and equal pay for work of equal value.

Globalisation and its Challenges:

- Globalisation refers to the complex set of phenomena transforming the world from an International is a global community. It has largely been facilitated by the technological revolution the emergence of the information age. A global ‘new economy’ has emerged, facilitated by the opening up of national economies, primarily through the deregulation of their trading and financial institutions and their integration into world markets. This is heavily reliant upon a neo-liberal political system that believes that market forces are superior to all other forms of social ordering. The new global era is dominated by, and given form fruits, the restructuring of capital: the cross border flows of goods and services and the increase of foreign direct investment.

- The social effects of globalisation are striking. With the expansion of international trade, the revolution communications and the reduction in transportation costs, work can now often be performed easily and economically in one concert for a business situated in another. In an effort to maintain their competitiveness in the global con, transnational corporations want workers in different parts of the globe to work on the various components of particular project.

- To some workers, globalisation presents exciting new prospects. It offers opportunities to gain wide experience and new skills, and places a premium on knowledge and creativity. However, many workers globalisation has thus far been a negative experience, bringing more threats than opportunities. Many workers must now compete for work with those from developing countries who have much lower pay and poor conditions of work. Consequently, many have seen that once secure positions disappear altogether or become replaced by precarious forms of employment.
The ILO and the Challenges of Globalisation:

- The ILO was designed to enable broad participation, guarantee accountability and fair treatment, and ensure that large-scale projects be planned, managed and achieved. Its structure is a very large, hierarchical formalised bureaucracy was intended to facilitate those purposes. However, its bureaucratised procedures have become cumbersome, time-consuming and inflexible.

A. The Declaration on Fundamental Principles and Rights at Work (Geneva, 1998)

- This is a social and political statement representing a new, more targeted approach aimed at ensuring widespread adherence to the labour standards. It is argued that social dialogue through freedom of Association would lead to greater worker commitment and better productivity and enable a better balance between flexibility and security, and that equal opportunity workplaces tend to be more productive.
- However, more significantly the ILO made it clear that declaration also represented a move to reorientate the debate on labour standards in the global era towards focusing on the recognition of labour rights as human rights, and the need for all in the global community to respect common norms and values.
- Although the Declaration contains no new obligations, it reaffirms the constitutional values of the ILO. It identifies four fundamental principles and rights of work:
  1. Freedom of association and the effective recognition of the right to collective bargaining
  2. The elimination of all forms of compulsory labour
  3. The effective abolition of child labour
  4. The elimination of discrimination in respect of employment and occupation

B. The Declaration on Social Justice for a Fair Globalisation (2008)

- The unanimous adoption of this declaration acknowledges that while in some instances there have been positive consequences from the globalisation movement to some areas of the world in some individuals, there is a need to intensify efforts everywhere to ensure these benefits are distributed fairly.
- The declaration is a strong reaffirmation of the fundamental values embraced by the ILO since 1919. Specifically, it endorses the promotion of a ‘sustainable institutional and economic environment’ as the key to promoting employment; the need to develop and enhance social security and Labour protection; the promotion of tripartism and social dialogue as the means to forward economic and social development; and respecting, promoting and realising the fundamental principles and rights at work.
- The ILO commits to ensuring that its own organisation and government processes capable of facilitating in achieving these aspirations.

- These declarations were made in the context of wider changes in the ILO. In response to globalisation, the ILO redefined its policy aims, announcing a new agenda to embrace the aspirations and needs of all, both in the developed and in the developing world. The ILO has acknowledged that globalisation has been accompanied by increased inequality. While the ILO concedes that developments in technology may be irreversible, it refuses to accept that social inequality is an inevitable consequence of globalisation. A ‘fairer globalisation’ in which opportunities are created for all is its goal.
A fundamental issue for the bore of work is the identification of its subject – who is included within its realm and who is excluded? Modern employment law divides workers into two main categories:

a) Employees: engaged in a contract for service

b) Independent contractors: agree to work for a principal in a contract of service.

The need to protect those who are vulnerable and powerless in the marketplace has been a central rationale of labour law since the 19th century has been to protect Whilst an independent contractor falls outside the scope of labour law, those with a ‘personal’ contract of employment in which they subordinate to the one they work for (employees) have long been the intended beneficiaries of any legal protections offered to workers.

- An employee, at law, encompasses all sorts of employees. As such, the category of ‘employee’ has been described as a false unity. Not all employees are the same.
- The distinction between employees and independent contractors has been described as a false dichotomy, with the distinction between the two groups often blurred.

Whether a worker is an employee or an independent contractor may be relevant for issues including: vicarious liability; workers compensation; minimum wages and conditions; unfair dismissal; priority creditors- GEERS; freedom of association (union rights).

At common law, the distinction between an employee and an independent contractor is usually drawn in cases concerning questions of vicarious liability for the negligent acts of a worker. In determining whether a worker is an employee or an independent contractor, judges consider all the circumstances of the work relationship, including:

- The degree of control exercised over the worker
- The obligation on the worker to do the work personally (ie, their capacity to delegate to others)
- The freedom to work for others
- The place of work
- The mode of enumeration, especially whether the worker is paid per hour
- The responsibility for the provision and maintenance of assets and equipment
- The creation of goodwill and the ownership of this
- The risks and responsibility for loss or profit
- The degree of integration of the worker into the organisation
- Who makes payments for sick leave, annual leave and long service leave
- The arrangements made in relation to payment of taxation and workers compensation
- The party’s own characterisation of their relations

No one factor is determinative; rather, all must be considered together

- Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16
  - Found to be an independent contractor
- Hollis v Vabu Pty Ltd (2001) CLR 21
  - Found to be an employee
The ‘Control’ Test:

- In feudal times control signified the subordination of the servant to the master. The master was recognised as a person in law, responsible for all the property in his household including his servants and his wife. As society developed, the law continued to see the degree of control exercised over the worker as a critical element in understanding the nature of work relations. But the assessment of the control exercised over the worker in modern work relations has long proved problematic.
- Control can be viewed in terms of commands given by one individual to another. But this has generally not been an adequate conceptualisation. Control over workers in the modern workplace is as likely to be exercised through the hierarchical structure of the organisation by as it is by immediate personal direction. Furthermore, the specialised skills of many workers make it inconceivable for their employers to instruct them in any detailed way about how to do their job.
- The inadequacy of the control test prompted the law to change its focus away from the actual day-to-day exercise of control over the work towards the notion of ‘ultimate authority’ or ‘right to control’ [eg, Zuijs v Wirth Bros Pty Ltd (1955) 83 CLR 561].
- Control is often a significant element in the multiple indicia test and the legal understanding of it has become quite sophisticated. Compass situations where workers are required to follow closely manuals of instruction For instance, it can encompass situations where workers are required to closely follow manuals of instruction, even though there is little face-to-face interaction between the workers and those exercising the control.
  - However, control is no longer the sole criteria on defining an employee.

The ‘Organisational Integration’ Test:

- The degree of a worker’s integration into the enterprise is another significant element in classifying workers as either employees or independent contractors. Although being criticised on the grounds that it was impossible to measure the economic reality of the work relation by reference to it, it has the advantage of capturing the idea that the distinction between an employer and an independent contractor is rooted fundamentally in the difference between a person who serves his employer and a person who carries on a trade or business of his own.
  - The identification of another business’s workers (eg, through a contractual requirement to wear its livery) can indicate that they are not operating in their own business as contractors.
  - On the other hand, the ownership of assets used in the execution of the work is often seen as indicating that the workers are operating in the marketplace on their own account, rather than in the cause of another’s enterprise. This is especially so if it can be seen a goodwill is acquired through the performance of the work.

The ‘Delegation of Work’ Test:

- The ability of the worker to delegate work is a significant factor.
  - If a contract for work does not require the contracting party to render personal service, this can be a strong, almost conclusive, indicator that the worker is an independent contractor.
  - However, in cases where an employee has some capacity, albeit usually limited, to delegate the work to another on unknown

The ‘Intention of the Parties’ Test:

- The choice of the parties may be influential, particularly when the multi-indicia test yields an ambiguous result. However, the law is concerned with the reality of the work relation. As such, form cannot dominate substance.
Vabu Pty Ltd v Federal Commissioner of Taxation (1996) 33 ATR 537

- The courier company had unsuccessfully sought a declaration from the NSWSC that its careers were independent contractors and not employees, and therefore outside the scope of the Superannuation Guarantee (Administration) Act 1992 (Cth).
- The couriers signed documents relating to working hours, behaviour and uniforms. However, they supplied and maintain their own vehicles, bore the risk of loss, were taxed as independent contractors and received commission but no wage or salary.

- The court held that the requirements of the couriers regarding their vehicles, their form of earnings and taxation status led to the conclusion that, at common law, they were independent contractors, not employees. Accordingly, the Superannuation Act did not apply.

Meagher JA:

- While it is almost never an easy task to decide whether a given person is an employee or an independent contractor, there is no doubt that the oldest test of ‘control’ is now superseded by something more flexible.
- On the facts, the couriers supply their own vehicles and they have to bear the expense of providing for and maintaining these vehicles. The company provides telephones, uniforms and signage. The couriers’ expenses are very considerable and they were taxed as independent contractors, not as employees. They receive no wage or salary, instead of being paid at prescribed rate for the number of successful deliveries they make.
  - What is significant is not that the couriers tell the Commissioner that they are independent contractors, but that the Commissioner, presumably after making whatever investigation he deems proper, taxes them accordingly.

Sheller JA:

- The importance of control was not so much in its actual exercise, though that is relevant, as in the right of the employer to exercise it.
- I agree with Meagher JA that there was not between the appellant and the couriers it engaged a common-law relationship of employer and employee. The couriers provided the resource and bore the cost of delivering parcels and other items which the appellant had contracted with its clients to deliver. The couriers were paid a flag fall payment and a running rate per kilometre to each contract of carriage undertaken. The contracts between the appellant and the couriers were neither wholly nor principally for the labour of the couriers.
The respondent conducted business of delivering parcels and documents. The appellant was struck by a courier on a bicycle who worked for the respondent. The bicycle courier did not identify himself at the time of the accident and remained unidentified up until the trial.

At trial, it was held that the accident was caused by the bicycle courier’s negligent riding, but that the respondent was not vicariously liable because the bicycle courier was an independent contractor, not an employee.

The HCA held that the relationship between the respondent and the bicycle courier who struck down the appellant was that of an employer/employee. Vabu Pty Ltd was therefore vicariously liable for the consequences of the courier’s negligent performance of his work.

Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ:

It has long been accepted that an employer is vicariously liable to the tortious acts of an employee but that a principal is not liable for the tortious acts of an independent contractor.

Couriers starting work with Vabu were given instruction and filled out ‘employment forms’. On the facts, the contractual relationship between the Vabu and its bicycle couriers, upon whom Vabu imposed its work practices, was partly oral and partly in writing. Some important aspects of the contract, such as the rate of remuneration for deliveries, were not recorded in the written documents.

But the relationship between the parties is to be found not merely from these contractual terms. The system which was operated thereunder and the work practices imposed by Vabu go to establishing ‘the totality of the relationship’ between the parties. It is this which is to be considered.

In the present case, guidance is provided by the various matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability. These include, but are not confined to, what now is considered ‘control’.

In classifying the bicycle couriers as independent contractors, the Court of Appeal fell into error in making too much of the fact that the bicycle couriers owned their own bicycles, bore the expenses of running them and supplied many of their own accessories. A consideration of the nature of the engagement, as evidenced by the documents to which reference has been made and by the work practices imposed by Vabu, indicates that they were employees.

1. These couriers were not providing skilled labour or labour which required special qualifications. A bicycle courier is unable to make an independent career as a freelancer or to generate any goodwill as a bicycle courier
2. The couriers had little control over the manner of performing their work
3. The couriers were presented to the public and to those using the career service as emanations of Vabu. They were to wear uniforms bearing Vabu’s logo.
4. Vabu superintended the courier’s finances: Vabu produced pay summaries and couriers were required to dispute errors with the organisation. There was no scope for the couriers to bargain for the rate of their remuneration.
   - The method of payment, per delivery and not per time period engaged, is a natural means to renew my employees who sold duty is to perform deliveries.
5. Apart from providing bicycles and being responsible for the cost of repairs, couriers were required to bear the cost of replacing or repairing any equipment of Vabu that was lost or damaged, including radios and uniforms
6. There was considerable scope for the actual exercise of control

The relationship between Vabu Pty Ltd and the bicycle courier who struck down Mr Hollis was that of employer and employee. Vabu was thus vicariously liable for the consequences of the courier’s negligent performance of his work.
The Notion of ‘Dependent Contractors’:

- In some instances where workers have been characterised as independent contractors, the high level of reliance which this contractors placed on the business has prompted the suggestion that this is a form of ‘disguised employment’ involving ‘dependent contractors’
- Even where a worker supplies a substantial asset as part of the work contract, it may be indicative of a high level of economic dependency upon the entity that whom they work rather than their independence in the marketplace. The practical reality may be that unless the workers provide this asset they will not get the offer of work in the first place. For this reason, ownership and contribution of assets to the performance of work should not be distinguished between independent contractors and employees. However, the fact is that in many cases this continues to be treated as strongly determinative. Because it is relatively easy to ensure that the worker does not appear to be integrated into the business of the other entity, the protection of vulnerable workers can be easily subverted if that is a dominant focus.

Contract, Intention and the Reality of the Work Relationship:

- The parties to a contract for the performance of work may, and often do, explicitly state that the worker is an ‘independent contractor’ or an ‘employee’. However, the courts of stress that the laws concern is with the reality of the work relation. Form cannot dominate substance. The parties cannot, with the strokes of the contractual pen, impose their own classification when it is contrary to the reality of their work relation.
  - The contracting parties cannot create something with all the features of a rooster and call it the duck!
    - Per Gray J
- The law is always reluctant to look behind the bargain made by the parties in question or interfere with their expressed intention. However, the reality is that most contracts for the performance of work contracts of adhesion: the terms are set by one of the parties and presented to the other on a ‘take it or leave it’ basis. This raises the possibility that the chosen classification and contractual arrangements are simply imposed by the dominant party for its own purposes and to the detriment of the other party (usually the worker).
  - The incentive to do this is primarily economic: an employer is required to incur the costs of complying with statutes and industrial instruments setting pay and conditions, and of paying levies arising under workers compensation legislation, payroll tax and superannuation contributions. These costs are either avoided altogether or transferred to the contractor where an independent contractor is engaged