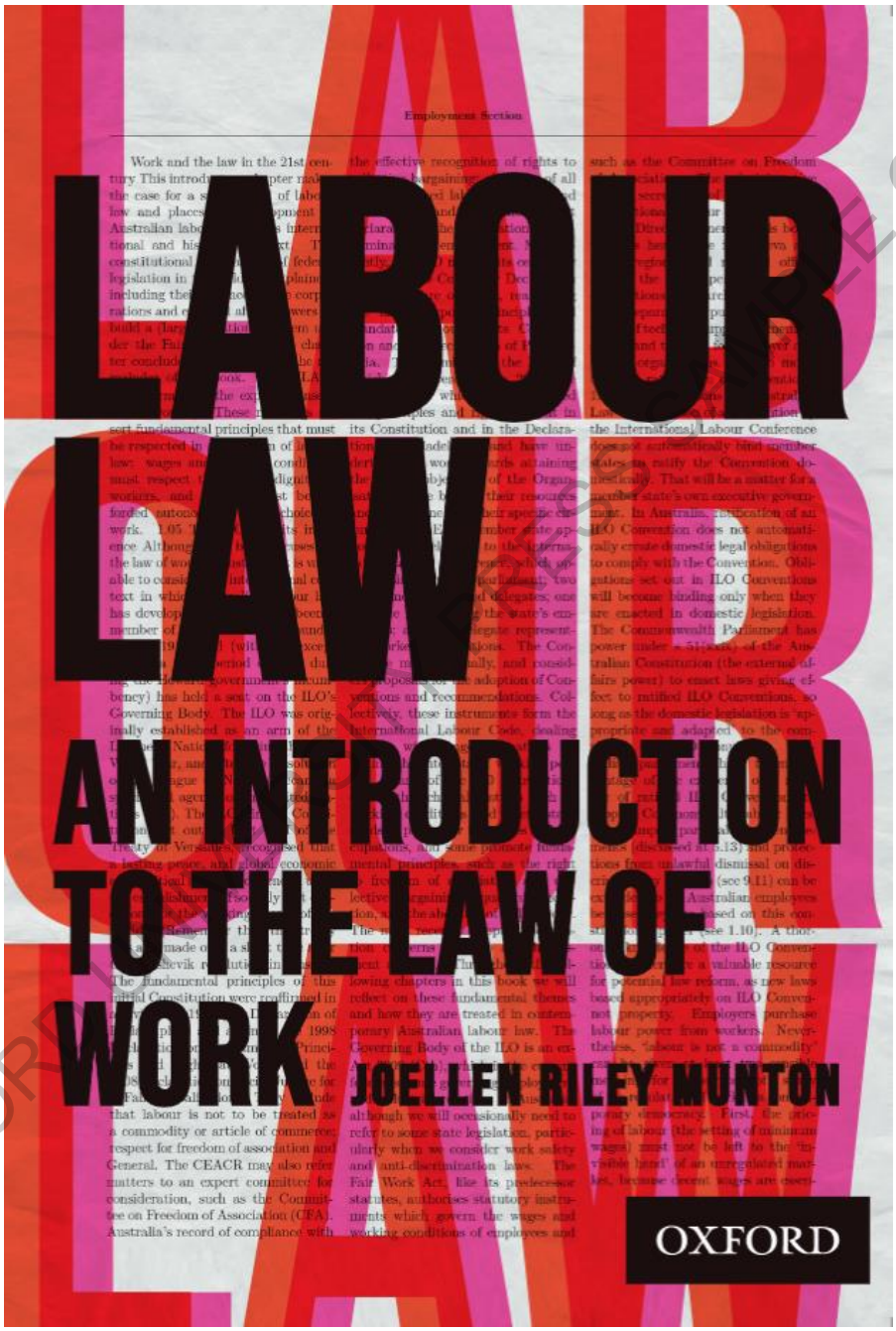
Labour Law:
An Introduction to the Law of Work
Instructor's Resource Manual



Joellen Riley Munton

Oxford University Press
9780190324179

Preface to *Labour Law: An Introduction to the Law of Work*

This book is the result of thinking about labour law for more than 20 years, particularly for the purposes of explaining its purposes and principles to various cohorts of students. It is informed by my experience in teaching labour law related subjects at four Australian universities, in three different law faculties, and in two different Business Schools, to cohorts of undergraduate and graduate law students undertaking electives in Bachelor of Laws and JurisDoctor programs, and to postgraduate students undertaking Masters degrees in Labour Law and Relations, or a management program.

It has been written in the hope that it will be the kind of book that is read from cover to cover, front to back, as a discursive introduction to the broad architecture and themes of labour law, suitable for anyone with an interest in understanding how work is regulated in Australia in the early decades of the twenty-first century. While written with university students particularly mind, it is also intended to be a useful introduction to the subject for anyone wishing to understand Australian labour law.

A study of the law of work in all its forms would be a mammoth enterprise, comprising chapters on the history of human endeavour since the earliest agrarian times until our contemporary digital age, and would traverse productive and reproductive work, paid and unpaid, subservient and entrepreneurial. This book is both more modest and more ambitious in its aims. It is more modest, in presenting a limited set of topics essential for introducing the curious and intelligent but inexpert reader to key aspects of the law regulating working relationships in Australia. It is perhaps more ambitious, in seeking to frame those topics in a way that does not merely catalogue rules, but provokes critical reflection on why our laws are as they are, and whether reform would produce laws better served to the challenges of our contemporary world. The Discussion Questions framed at the end of each chapter are intended to provoke further reflection on the adequacy of our labour laws, and proposals for reform.

A word about the primary title: *Labour Law*. Even the names we choose to give our systems of law reveal the values and priorities that our leaders and policy-makers ascribe to work. At the turn of the twentieth century, this would have been a book about ‘master and servant’ law. When the author studied the subject in the 1990s, it was labelled ‘employment and industrial law’, reflecting an artificial bifurcation between the laws dealing with the individual relationship between employers and their staff, and the system of regulation dealing with industrial relations between capital and labour. The federal statute at that time was named the *Industrial Relations Act 1988* (Cth). During the Howard government’s time in office (from 1996

until 2007) a political decision to diminish attention to industry-wide regulation of labour relations resulted in major amendment to and renaming of this legislation as the *Workplace Relations Act 1996* (Cth), a name which purported to locate the single enterprise, or 'workplace', as the primary site for the regulation of work. Since the enactment of the *Fair Work Act 2009* (Cth) by an Australian Labor Party–led government, a preference has emerged for the term 'labour law'—the word 'labour' encompassing the broad scope of interests, both individual and collective, of working people. Hence the title of this book.

The secondary title, 'An Introduction to the Law of Work', recognises that this book is an introductory work, and also that it follows an approach adopted by the author in her collaboration with Professor Rosemary Owens, in *The Law of Work* published in 2007. First, it is introductory. It is not an encyclopaedic work, and does not promise answers to practitioners to every technical question that arises in employment law practice. Readers seeking a more comprehensive encyclopaedia of our labour laws are advised to consult more detailed treatises.[1] Hopefully it will nevertheless be of interest to lawyers in practice who would like to contemplate the broad themes of the field and gain an overall appreciation for how the various elements of our system of labour laws fit together, however imperfectly. It is necessarily selective in its choice of topics. The publisher's brief was to produce a readable work of no more than 130,000 words, suitable for introducing the subject to students of labour law, so it focuses principally on the topics dealt with in Labour Law and Employment Law courses. It is necessarily more concise when covering topics such as Discrimination Law and Work Health and Safety, which are most often taught in separate courses at universities. It is not a 'cases and materials' book, but the suggested readings at the end of each chapter—particularly the suggested case extracts—may provide some guidance, to students of the law, on where to begin their reading of case law. There is absolutely no substitute for reading case law, if your mission is to become a lawyer yourself. Medium-neutral citations to the cases have been provided to make it easy for students to locate these extracts in freely available case databases.

Secondly, this is a sequel of sorts to *The Law of Work*. The content of the chapters has drawn on some of my own previous writings in that work published by Oxford University Press, first in 2007 with Professor Rosemary Owens, and again in a second edition in 2011, with Rosemary and also Professor Jillian Murray. The first edition of *The Law of Work* was written just after the passing of the notorious *Work Choices* laws, and the second soon after the commencement of the *Fair Work Act 2009* (Cth). I owe an abiding debt of gratitude to my coauthors on those much more

[1] For a comprehensive study of the law of employment, see C Sappideen et al., *Macken's Law of Employment* 8th edn (2016) and M Irving, *The Contract of Employment* (2012). On labour law more generally, see A Stewart et al., *Creighton & Stewart's Labour Law* 6th edn (2016).

extensive and scholarly volumes for their insights into the subject. Readers familiar with those works will see some of the themes and ideas revisited here, albeit in a more condensed form. Chapters 3 and 11 in particular owe much to the earlier work.

As is customary in prefaces to new works, I would like to acknowledge my debts also to other scholars. I must first acknowledge the inspiration I first gained from my own teachers in labour law, principally Associate Professor Greg McCarry, who first introduced me to the subject as an undergraduate law student myself, and my PhD supervisor and colleague for many years, Professor Ronald C MCallum at the University of Sydney. It has been a great privilege to learn from these leaders in the field.

In recent years I have learned a great deal—especially about discrimination at work and workplace dispute resolution—from the opportunity to work on joint research projects with Professor Therese MacDermott at Macquarie Law School in Sydney. I have also learned a great deal about methods for unpacking the subject of labour law for a variety of cohorts of students from my labour law colleagues at the University of Technology Law School: Michael Rawling, Eugene Schofield-Georgeson and Brett Heino. And before joining UTS, I had wonderful colleagues with whom to share delivery of an extensive labour law program at the University of Sydney Law School: Shae McCrystal, Kate Peterson, Belinda Smith, and two eminent silks who teach in that program, Elizabeth Raper and David Chin. Dr Troy Sarina at Macquarie Business School has also taught me much about ways of thinking about the subject from the perspective of students in human resources management.

Labour law is indeed a rich field, and I have been privileged to work with many great scholars over the years. Professor Mark Freedland at Oxford University showed me great generosity in inviting me to join one of his major projects, *The Contract of Employment* (Oxford University Press, Oxford, 2016). Professor Carolyn Sappideen and Paul O'Grady likewise afforded me the great honour of joining them as an author in two editions of the leading practitioner text on employment law, *Mackens' Law of Employment* (Thomson, Sydney, 2011, 2016). Most recently, I have learned a great deal from collaborating with professors Gordon Anderson and Douglas Brodie on projects imagining a future for the common law in employment regulation. Many other scholars, in Australia and internationally, have enriched my understanding of the subject, and if I were to mention them all here in this Preface it would be a very long list indeed. Their names, and their influential works, can be found in the footnotes and additional references provided in each chapter, although,again, the need to produce a concise and not overly complex introduction to the subject has limited the scope for extensive reference to international scholarship.

I have attempted to state the law as it stood in December 2020. The *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (Cth) was tabled late in December, and referred to a Senate Committee to report in March

2021, so commentary on the proposed amendments in the Bill are necessarily tentative. In a rapidly evolving field such as this, readers are advised to keep an eye to new developments since the publication date. Writing commenced before anyone was aware of the coming pandemic, and was concluded while we were still dealing with its social and economic impact. This is all the more reason for taking the approach chosen in this book. Although specific technical rules are susceptible to regular amendment, particularly in times of economic strain and political instability, the broad themes, purposes and principles of labour law are more abiding. A solid understanding of those broad themes places the student—and the reader more generally—in the best position to monitor technical amendments as they arise, and hopefully, to contribute themselves to the important debates we join in as working citizens, about desirable reforms in this field of law so important to our daily lives.

And speaking of our daily lives, I wish to thank my long-suffering husband for his patience while I worked, too often at home, messing up our shared 'home offices' in the kitchen and living room during the 2020 pandemic. Finally I am pleased to dedicate this book to my granddaughter, Lilith May Behrman, barely two years old at the time of writing this. What brave new world of work will she enter, I wonder?

Joellen Riley Munton

8 January 2021

[Introduction to Instructor's Resource Manual]

This Instructor's Resource Manual provides ideas for lecturers, tutors and seminar leaders in ways to use *Labour Law: An Introduction to the Law of Work* for the purposes of courses of study at University level in degree programs in labour law, industrial relations, and business studies. Each chapter of the book already provides some general discussion questions appropriate to the content of each chapter, and also some further reading suggestions. This Manual adds to those suggestions.

Not all of the ideas presented in this Manual will be appropriate to every program. Different instructors will find that some of the ideas are more useful than others, depending on class delivery methods, the duration of classes, and the particular degree program within which the course of study in Labour Law sits. The suggested 'Icebreaker' exercises, for example, are most useful in classes in which students can be separated into small groups, and some will be more appropriate to students who already have some experience of the working world.

A number of the 'Suggested essay and assignment' questions encourage students to develop skills in types of long-form writing other than scholarly essays. These kinds of activities are particularly suitable to law students who are developing research and writing skills for the kinds of tasks they are likely to undertake in practice as legal practitioners, or legally-trained policy advisers. Some of the essay and assignment questions involving close reading of particular leading cases will be more appropriate to courses for law students, while broader policy questions may be better suited to industrial relations and business students. The sample essay questions may also be suitable for use as general discussion questions in tutorials, in place of the more technical activities, where the instructor is more interested in generating general policy discussion than familiarizing students with technical rules.

Ideas are arranged under the chapter headings in the book, and references in square brackets are to the paragraphs in the book. Some examples of multiple issue questions, suitable for using in law exams, are provided in the resources for Chapter 12.

This Manual is accompanied by a set of 12 Chapter summaries, provided on power-point slides, which can be adapted for use in structuring classes. These summaries provide a skeletal outline of the material covered in the chapters of the book, and can be used as a framework for presenters who wish to develop a lecture or seminar program based on the book.

Chapter 1 Work and the Law in the 21st Century Resources

Icebreaker

Locate a study of the law of work within students' own experience of work.

The following exercise is a useful way for students to begin thinking about the reasons why we regulate work relationships, by reflecting on their own experiences. The reason for asking them to reflect on their worst experience of work is that university students typically enjoy a greater degree of socio-economic privilege than many workers, once they graduate and move into the labour market. It is useful for them to remember what work can be like for people without a high level of skill and education.

Ask students to take ten minutes to introduce themselves to their immediate neighbours in the classroom (or use 'break out rooms' in a real-time online class).

During this 10 minutes, discuss (among a group of three to five):

- What experience do you already have of paid work, for a person or organisation outside of your own family?
- What is the worst job you have ever done?
- What was bad about it?
- Did you keep doing it? If so, why and for how long?

Ask students to be prepared to volunteer to share these anecdotes in a general discussion.

Some of these anecdotes may be 'saved' for discussion later in the course. For example, anecdotes relating to underpayment of wages, or denial of leave entitlements might be recalled when discussion Chapter 5 Safety Net entitlements. Anecdotes about discriminatory treatment at work might be recalled when introducing Chapter 9 General Protections.

Tutorial Activities

1. Call up the International Labour Organisations home page -- International Labour Organization (ilo.org) – and browse its sections. Under 'About the ILO', you can find 'Background documents' to call up the ILO Constitution and Declaration. Encourage students to browse the website to find other important documents under 'Labour Standards'.

2. Examine the *Australian Constitution*, section 51(xxxv). Ask students to identify the elements of this provision that influenced the shape of Australia's traditional system of conciliation and arbitration, at federal level.

> 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: . . . (xxxv) conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

3. Call up on screen COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 51 Legislative powers of the Parliament (austlii.edu.au), and use this to ask students to identify any powers suitable for legitimate federal legislation of the labour market and working relationships.

Sample Essay Topics

1. Explain the meanings given to the notion that 'Labour is not a Commodity'. Do our current labour laws in Australia respect this notion? (See [**1.04**]. Note that the Paul O'Higgins article cited in footnote 7 provides a useful starting point for research on this topic.)

2. What was the "New Province for Law and Order" described by H B Higgins in (1915) 29 *Harvard Law Review* 13-39? What argument did Higgins make in this article about the virtues of the Australian system of conciliation and arbitration? Are Higgins' observations relevant today?

3. Consider the constitutional foundations of Australia's federal system of labour laws. To what extent have constitutional limitations influenced the shape of those laws over time? Do constitutional constraints continue to limit the evolution of our laws dealing with working relationships?

Short-Answer Questions

1. *What are the four fundamental principles of the International Labour Organisation (ILO), as expressed in its various constitutional documents and declarations?*

Answer.
See [**1.05**]: The fundamental ILO principles are: Labour is not to be treated as a commodity or article of commerce; respect for freedom of association and the effective recognition of rights to collective bargaining; abolition of all forms of forced labour; and the elimination of all forms of discrimination in employment.

2. By what means do ILO Conventions become part of Australian domestic law?

Answer:
See [**1.06**]: ILO Conventions will only become part of Australian law if the Australian Parliament enacts domestic legislation giving effect to obligations under those Conventions. Even a Convention which Australia has ratified will not create domestic legal obligations until domestic legislation is passed that is appropriate and adapted to giving effect to the Convention. The external affairs power in Constitution s 51(xxix) underpins the constitutional legitimacy of laws enacted to give effect to ILO Conventions.

3. *Which Act of federal parliament first introduced non-union enterprise bargaining into Australian federal labour law?*

Answer:
See [**1.08**]: The *Industrial Relations Reform Act 1992* (Cth) first introduced enterprise bargaining, and provided a stream for collective bargaining between employers and their employees directly, without the involvement of trade unions. These agreements were called 'enterprise flexibility agreements', and they could be made, subject to compliance with a 'no disadvantage test' and certain procedural rules.

4. *To what extent does the Fair Work Act 2009 (Cth) create a uniform national system of labour laws for Australia?*

Answer:
See [**1.11**]-[**1.13**]: Reliance on the corporations power – even extended by the trade and commerce and Territories powers – still leaves employers who are not 'national system

employers' outside of the system. Unincorporated employers are covered only by virtue of the State referrals of industrial matters to the Commonwealth (by Victoria in 1997 and in other states, except Western Australia, in 2010). Western Australia has still not referred matters, so unincorporated employers in Western Australia remain covered by state industrial laws. Even the Fair Work Act contemplates that some laws dealing with matters affecting work will continue to be governed by State laws, including workers' compensation, long service leave, antidiscrimination laws, child labour and some other matters: see Fair Work Act s 27.

5. *Which law will apply when the term of a common law employment contract is inconsistent with an obligation imposed by statute?*

Answer:
See [**1.18**]: The general principle is that statutory law prevails over common law, so if an employment contract purports to deal with a matter covered by a statutory provision, the employment contract term will have no effect if it undermines the statutory provision. Statutory provisions include the NES and any applicable instrument made under statute, including a modern award or enterprise agreement. Common law employment contract terms will be enforceable to the extent that they provide more generous terms than a statutory provision or instrument.

Additional Material

A Chapter summary is provided in power points.

Chapter 2 The Subject of Labour Law
Resources

Icebreakers

1. What do students already observe of the world of work?

Ask students to recall workers with whom they have had interactions, and decide which of those workers were likely to employees, and which were 'independent contractors'.

If students do not volunteer suggestions, ask whether the following people are likely to be independent contractors or employees, and if employees, who would the employer be?

- The security guards in the building. Are they employees? If so, are they university employees? How could you tell? What did it say on their uniforms if they were wearing one?
- The person who sold them a beverage in the food court.
- The person who delivered a parcel that they ordered on e-Bay or Amazon.
- A taxi driver? A bus driver? If the answers to these are different, why?

Encourage them to explain what, in their experience, marks out the kind of worker who is treated as an employee covered by labour laws, and which are entrepreneurial business people.

2. Why does employment status matter?

Brainstorm all the reasons why it matters whether someone is an employee or a contractor:

- Entitlement to minimum wages and conditions
- Access to unfair dismissal protection
- Superannuation entitlements
- Tax treatment – PAYG and payroll tax liability
- Liability for accidents that the worker causes
- Access to workers' compensation.

See what other legal consequences students identify. Observe how much of our system of laws depends upon this categorisation. Is it any wonder regulatory avoidance occurs?

Tutorial Activities

1. *Assess the Odco contract* (see [2.09]).

Examine the Odco Contract (extracted here, or encourage students to locate it themselves in *Re Odco Pty Ltd v Building Workers' Industrial Union of Australia* [1989] FCA 336 (24 August 1989) at [53]).

- Why are certain clauses included in this contract?
- How do those clauses affect a finding that the worker is not an employee?
- What do the clauses tell us about the kinds of obligations that the employer is seeking to avoid?

The Odco Contract

AGREEMENT TO CONTRACT

CONDITIONS OF CONTRACT

Hereunder let Troubleshooters Available be read as:

TROUBLESHOOTERS AVAILABLE AND/OR ASSOCIATED CLIENTS.

1. I (the undersigned) acknowledge and agree that there is no relationship of Employer-Employee with TROUBLESHOOTERS AVAILABLE and that TROUBLESHOOTERS AVAILABLE does not guarantee me any work. I (the undersigned) am self-employed and, as such, I am not bound to accept any work through TROUBLESHOOTERS AVAILABLE.

2. I (the undersigned) hereby agree to work for ..... per hour for actual on-site hours or job price to be agreed.

3. I (the undersigned) hereby acknowledge and agree that TROUBLESHOOTERS AVAILABLE does not cover me in respect of Workcare, the onus of responsibility and liability in respect of insurance is mine only. Further, I have no claim on TROUBLESHOOTERS AVAILABLE in respect of Workcare.

4. I (the undersigned) expressly forbid TROUBLESHOOTERS AVAILABLE to make deductions in respect of P.A.Y.E Taxation.

5. I (the undersigned) hereby agree that I have no claims on TROUBLESHOOTERS AVAILABLE in respect of Holiday Pay, Long Service Leave, Sick Pay or any similar payment.

6. I (the undersigned) hereby agree that TROUBLESHOOTERS AVAILABLE has no responsibility or liability to me except that I am guaranteed to be paid agreed hourly rate for actual on-site hours or agreed job price for work done.

7. It is agreed that I (the undersigned) must carry out all work that I agree to do through the Agency of TROUBLESHOOTERS AVAILABLE in a workmanlike manner and TROUBLESHOOTERS AVAILABLE is hereby guaranteed against faulty workmanship. All work must be made good. Further I agree to cover the work (where necessary), for Public Liability, Accident Insurance, Long Service Leave, Holiday Pay, Sick Pay and superannuation, and have no claims on TROUBLESHOOTERS AVAILABLE in respect of the above.

...

9. I (the undersigned) Hereby agree to supply my own plant and equipment, safety gear, boots, gloves or any necessary ancillary equipment required and that I (the undersigned) have no claim on TROUBLESHOOTERS AVAILABLE in respect of the above.

Guide to this exercise

Students should be encouraged to relate the clauses in the contract to factors / indicia in the common law tests for employment, and to consider the particular obligations that the workers agree to take upon themselves.

For example:

- Clause 1 – no obligation to be given or to accept work. There is no 'mutuality of obligation' according to the English test. In Australia, this may still create a casual employment contract.
- Clause 2 – an apparent entitlement to negotiate rates. So perhaps the worker is not a 'price-taker' and is running their own business.
- Clause 3 – no workers' compensation cover – but this is really a consequence of a finding that the worker is not an employee, and not an indicator in itself.
- Clause 4 – no PAYG tax deductions – but this is also a consequence not an indicator of employment status
- Clause 5 – no leave entitlements – also a consequence not an indicator of employment status.
- Clause 9 – provision of own equipment – an indicia of independent contracting.

Note that in the case, many aspects of the relationship and the nature of the work were relevant context to the finding that these skilled tradespeople were not employees.
Ask student whether this particular contract should necessarily be effective in turning a tomato-picker, a cleaner or a builders' labourer into an independent contractor.

2. Practise some strategic advice.

Rumpole Pty Ltd (RPL) operates a business providing document review services to property owners and developers. Until now, RPL has employed clerks to undertake these services. During the 2020 pandemic, all RPL's employed clerks worked remotely from home. RPL's CEO, Horace, has taken the view that since the clerks are now working from home, RPL should cease engaging them as employees, and instead engage them as independent contractors to provide the same clerical services.

- Advise Horace on the kinds of contractual terms he will need to include in their contracts, to ensure that the clerks he engages are truly independent contractors and not employees.
- Advise Horace of any risk he runs in adopting this strategy.

(Law students should be encouraged to explain their advice with reference to decided cases, especially *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.)

***Guide to this exercise*:**

(Note: This exercise also provides an opportunity to reflect on the benefits of hiring staff as employees, if an entity needs a reliable workforce to meet its own contractual obligations to clients.)

- Students should recognise that merely changing the place of work will not be sufficient to change the status of the workers.

- If Horace is to convert their engagement to independent contractor status he will have to be prepared to relinquish the usual level of control over their work and working

hours. He will need to include in his contract an entitlement for the clerks to choose their own hours, and to enjoy an entitlement to stop working at their own initiative. He cannot demand certain hours of work.

- Likewise, Horace cannot demand exclusive service, and he will need to be careful to include appropriate confidentiality clauses, because he will not be able to rely on the implied duty of loyalty and fidelity of employees to control their use of information gained from their work. (This point allows the instructor to signal issues that will be raised in Chapter 4.)

- Horace will improve the prospects of successfully converting the clerks to independent contractors if he requires them to own and maintain their own equipment and meet their own expenses, to leave room for them to manage their own little business themselves (see [**2.07**]). Allowing them to enter into negotiation for their rates of remuneration for work would also improve the prospect of finding that they are engaged in a business of their own (see [**2.10**]).

- Paying by the task rather than by the hour may be relevant, but will not be determinative on its own.

- Asking the clerks to form their own companies, or to contract through an Australian Business Number, will be of benefit to RPL, but will not be determinative of employment status (see [**2.08**]).

- Students should also recognise the risk of breaching *Fair Work Act 2009* (Cth) ss 357-359, which make it a statutory offence to misclassify workers as independent contractors. (See [**2.09**].)

- And of course there are risks that the workers will still be considered to be employees and RPL will still be obliged to meet a range of statutory obligations in respect of their work. (This allows the instructor to signal issues that will be dealt with in later Chapters, notably Chapter 5 dealing with the Fair Work Safety Net of wages and conditions of work for employees.)

Sample Essay and Assignment Topics

1. *Unpaid internships* (see [**2.06**]).
Prepare a briefing paper for the board of a media corporation that is proposing to hire all new recruits to journalist roles as unpaid interns. The Human Resources Director of the company has stated: "So many new graduates are interested in careers in journalism, that we see an opportunity in offering year-long internships on an unpaid basis, with a view to hiring only those who prove most capable at the end of the year-long trial." Your briefing paper for the board should include an explanation of the law applying to unpaid internships, and advice on any legal risks of this strategy. Your paper should include reference to any relevant legislation and case law.

2. *Labour hire* (See [**2.14**]).
Consider the outcomes of *Staff Aid Services v Bianchi* (2004) 133 IR 29 and *Costello v Allstaff Industrial Personnel and Bridgestone* [2004] SAIRComm 13. Do you think Australian employment law is satisfactory, in the way it ascribes responsibility for employment obligations between labour hire entities and host employers? What reforms (if any) would you propose?

3. *Regulation of 'gig work'* (see [**2.01**] and [**2.19**]).
Consider the decision of the UK Supreme Court in *Uber BV v Aslam et al* [2021] UKSC 5, and compare it will the decision of the Fair Work Commission in *Gupta v Portier Pacific Pty Ltd; Uber Australia trading as Uber Eats* [2020] FWCFB 1698. Why was the result in these decisions different? Would Australian labour law benefit from the adoption of the English solution to regulating this kind of work?

4. *Asset ownership as an indicium in the multifactorial test* (see [**2.07**]).
How reliable is ownership of assets and equipment as an indicator of the character of a working relationship? Are there grounds for reassessing this aspect of the multifactorial test for determining employment status, given contemporary practices?

Short-Answer Questions

1. *How is the control test understood in Australia, in the context of the engagement of professional and managerial staff?*

Answer:
See [**2.03**]. The control test asks, does the putative employer exercise a residual right to determine the conditions under which work is to be performed, give directions and monitor performance? It is no longer necessary to demonstrate that the employer gives specific directions as to how tasks are to be performed, so managerial staff and strategists can still be employees.

2. *What is the significance of a right to delegate work to others when determining whether a worker is an employee?*

Answer:
See [**2.08**]. A right to delegate (i.e. to subcontract the work to others) indicates that the work engagement is not one for the personal service of the worker, so will not be an employment contract. Care needs to be taken in relying on this indicium of employment, that the right to delegate is genuine, and cannot be construed merely as an entitlement for employees to swap shifts with other employees.

3. *What is meant by the concept of 'mutuality of obligation'?*

Answer:
See [**2.11**]. Mutuality of obligation refers to a test applied in the United Kingdom to determine employment, on the basis that the employment relationship is one that requires parties to undertake a commitment to an on-going relationship. This concept is less meaningful in Australia where we have long accepted the notion of 'casual' employment. Workers engaged with no ongoing commitment to accept shifts are still treated as employees, although as casuals they enjoy fewer statutory entitlements than permanent employees.

4. *Under Australian law, which entity is treated as the employer in a triangular labour hire relationship?*

Answer:
See [**2.13**]-[**2.14**]. Generally, Australian law views the labour hire agency who enters into a contract with the worker as the employer. The host employer does not enter into any direct contract with the employee, so is treated as the commercial client of the labour hire agency. Note that this conclusion may be compromised in cases where the host employer was the

original employer of the worker, and has sought to outsource the work to an entity for the purposes of managing labour costs: see *Damevski v Giudice* (2003) 133 FCR 438.

5. *If an employer requires a worker to incorporate her own small company for the purposes of accepting work and receiving payment, the worker can never be an employee. Is this an accurate statement?*

Answer:
No, this is not an accurate statement. See [**2.08**]. In *ACE Insurance v Trifunovski* it was held that an arrangement by which an employer agrees to pay a company for the services of a person can be understood as the employee exercising a prerogative to direct the employer to pay their wages to another entity. Cases in Australia (*Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119) and the United Kingdom have found that arrangements requiring workers to incorporate or form partnerships for the purposes of receiving work have not precluded a finding that the workers are employees, if other aspects of the multifactorial test point in the direction of employment.

6. *Consider AIAPA v Qantas and Jetconnect, [2011] FWAFB 3706 and FWO v Valuair Ltd (No 2) [(2014) 224 FCR 415. What is the significance of these decisions for Australian labour law?*

Answer:
See [**2.16**]. These cases have demonstrated that when an Australian employer engages staff through a labour hire entity incorporated in another jurisdiction, there will be no employment contract made in Australia, so Australian industrial instruments (such as modern awards and enterprise agreements) will not apply to those workers. Australian industrial instruments apply only to employment contracts subject to Australian law. This means that employers who are able (by virtue of the nature of their businesses) to engage labour through labour hire agents based in other jurisdictions, can escape the application of the Fair Work Act;

Additional Material

A Chapter Summary is provided in power points.

New cases:

Look out for the High Court of Australia's decisions in:

- *Jamsek v ZG Operations Australia Pty Ltd*, and
- *CFMMEU v Personnel Contracting Pty Ltd*.

These cases were given special leave to appeal in February 2021. Decisions in these cases will provide important guidance on the issues dealt with in this Chapter.