

CONTENTS

Editorial

Editorial

97

Articles

Defining Employment

— *Joellen Riley Munton*

99

Reliance on the common law for a definition of ‘employment’ has long created a loophole through which some employers have escaped statutory obligations. The inclusion of a new s 15AA in the Fair Work Act 2009 (Cth) to stipulate what kind of evidence a decision-maker must regard in classifying a work relationship as employment goes some of the way in closing this loophole. It will mean that the ‘practical reality’ of the relationship as a whole will be regarded, and not merely the terms of a contract drafted by the employer. There is still work to do, however, in ensuring that the underlying tests for determining employment status better reflect the reality of worker engagement in the 21st century, particularly in the case of lowly paid precarious work.

The ‘Casual’ Problem in Australian Labour Law

— *The Hon Justice David Chin and Dan Fuller*

115

The difficulty in defining and regulating casual work has been a persistent challenge for Australian courts and lawmakers. Tracing the evolution of forms of insecure work under English and Australian law reveals a long-standing tension between security and flexibility in the employment relationship. There is an oscillation between adopting a more expansive definition of casual employment to provide more rights to a greater span of insecure workers, and a desire to narrow the definition to provide more certainty as to the employment status of employees. The High Court’s decision in *Workpac Pty Ltd v Rossato*, adopting a strictly contractual view of casual employment and the subsequent legislative reinstatement of a more expansive definition, exemplifies this dynamic. Although new amendments to the Fair Work Act 2009 (Cth) attempt to strike a balance between providing certainty for employers and employees, the inherent tension between security and flexibility remains.

Closing the Labour Hire Loophole: Legislative Enshrinement of the ‘Same Job, Same Pay’ Principle for Australian Labour Hire Workers

— *Anthony Forsyth*

135

Labour hire arrangements have been a significant focus of public policy attention in Australia over the last decade, with labour hire licensing schemes introduced in several jurisdictions followed by a more

recent reform providing labour hire workers with the right to ‘same job, same pay’. This article examines and assesses the latter measure, implemented through provisions now found in Pt 2-7A of the Fair Work Act 2009 (Cth). The analysis covers the labour hire arrangements covered by the same job, same pay scheme; the powers of the Fair Work Commission to make ‘regulated labour hire arrangement orders’; the obligations of labour hire employers subject to such orders and relevant exceptions; the obligations of host businesses; dispute resolution provisions; and prohibited anti-avoidance arrangements. The article finds that, despite several limitations, the enactment of the same job, same pay provisions amounts to a significant policy intervention. It will help address some perversions that have arisen in the use of the labour hire business model, and return labour hire to its original purpose of enabling employers to address genuine workforce gaps.

A Loophole Big Enough to Walk a Stolen Horse Through: Delegates’ Rights and the Precarity of Workplace Activism under the Fair Work Act

— *Rosalind Read*

157

To assess the delegates’ rights provisions in the Fair Work Legislation Amendment (Closing Loopholes) Act 2023 (Cth) it is useful to identify the particular ‘loophole(s)’ that they are intended to close. Known loopholes in the protections for workplace delegates and activists under the Fair Work Act 2009 (Cth) (FW Act) are discussed. The new delegates’ rights are contextualised by reference to international labour standards and pre-existing protections for delegates’ rights in the FW Act and in enterprise agreements.

Regulating beyond the Employment Relationship to Protect Road Transport and ‘Gig’ Workers: The Regulated Worker Provisions

— *Michael Rawling*

178

Over at least the past decade in Australia, there have been twin pressures on working conditions from digital labour platform operators as well as from large clients at the apex of supply chains. This article details a new regulatory strategy designed to address these pressures. Specifically, the article examines the ‘regulated worker’ provisions as amended by the Commonwealth Senate and inserted into the Fair Work Act 2009 (Cth) by the enactment of the federal Closing Loopholes No 2 Act. This legislation will provide the Fair Work Commission with the power to make minimum standards for non-employed road transport workers and employee-like ‘gig’ workers. The article posits that the new regulatory scheme embodied in these statutory provisions may considerably assist in the implementation of fairer pay and conditions and reduce the risk of death and injury for these workers.

Unwinding Australia’s New Right to Disconnect

— *Gabrielle Golding*

201

A right to disconnect became part of Australian labour law on 26 August 2024 (but not until 26 August 2025 for small business employees) following the passage of the Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024 (Cth). This development presents a momentous societal shift, particularly in a time where employees have been plagued by chronic overwork and constant electronic connectivity. This article traverses the right’s legislative evolution and operational framework. It then offers a rationale for the right’s existence by examining the loopholes it is set to close.

Criminalisation of Wage Theft under the Fair Work Act: A New Dawn for Deterrence?

— *Tess Hardy*

218

After much anticipation, the criminal offence of wage theft has been introduced into the Fair Work Act 2009 (Cth) as part of the Closing Loopholes reforms. Following a brief examination of the meaning and extent of 'wage theft', and a review of previous attempts to address it, the article considers the core elements and features of the new wage theft offence. It then sets out the most significant changes to the civil penalty regime as it applies to 'serious contraventions'. The analysis reveals that the interposition of criminal sanctions — into a predominantly civil domain — raises a number of regulatory conundrums: not least of which is whether criminal sanctions are likely to shift the dial on deterrence.

Style Guidelines

In preparing material for submission of articles, authors should be guided by the following points.

1. Where an earlier version of a submission has been published as a working paper or conference paper, the Journal will only proceed with the submission where it is significantly different to the earlier working paper or conference paper.
2. Manuscript Presentation All article manuscripts should be emailed as a Microsoft Word document to law-ajll@unimelb.edu.au. Case notes and other short pieces should be emailed direct to the appropriate section editor. Electronic submissions need not be accompanied by paper copies.
3. Title Each manuscript should have a title which is both succinct and descriptive.
4. Abstract An abstract of no more than 150 words must be supplied at the beginning of each article. The abstract should briefly outline the structure and content of the article and summarise its conclusions.
5. Footnotes These should be numbered consecutively throughout. All bibliographical details, case citations etc should be contained in the footnotes and not in the text. Footnotes should not be used to make substantive points.
6. Word length policy In making editorial decisions we will accept articles up to 12,000 words (including footnotes), and section contributions up to 5,000 words (including footnotes).

Please see

<http://law.unimelb.edu.au/centres/celrl/research/publications/australian-journal-of-labour-law#style-guidelines> for a copy of the Style Guidelines.

In this issue...

Editorial

Articles

Defining Employment — *Joellen Riley Munton*

The 'Casual' Problem in Australian Labour Law — *The Hon Justice David Chin and Dan Fuller*

Closing the Labour Hire Loophole: Legislative Enshrinement of the 'Same Job, Same Pay' Principle for Australian Labour Hire Workers — *Anthony Forsyth*

A Loophole Big Enough to Walk a Stolen Horse Through: Delegates' Rights and the Precarity of Workplace Activism under the Fair Work Act — *Rosalind Read*

Regulating beyond the Employment Relationship to Protect Road Transport and 'Gig' Workers: The Regulated Worker Provisions — *Michael Rawling*

Unwinding Australia's New Right to Disconnect — *Gabrielle Golding*

Criminalisation of Wage Theft under the Fair Work Act: A New Dawn for Deterrence? — *Tess Hardy*