Labour Flexibility and Employment Law: The New Order

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Abstract

In the past decade there has been a retreat from full employment and a fundamental change in the labour market away from physical production work and towards the service sector. There have been changes in the structure of industry and the workforce, and changes in arrangements under which work is performed. There is emerging a secondary or marginal labour market in which both full-time and casual, temporary and part-time workers are confronted with a situation where they are required to decide whether or not to enter work arrangements geared to the flexible organisational needs of the business enterprise rather than their own needs. Tensions between employer demands for flexibility, and for a largely unregulated use of the workforce, and employee concern to ensure job security and minimal protection in employment (including health and safety) means that employment law today has to respond to organizational relationships in determining whether or not to intervene between the parties to new work arrangements. The question is whether or not the principles of traditional employment law are flexible enough to become the legal framework of a technological society.

1. Labour Market Flexibility

By the end of the 1980s there was agreement amongst the major political parties, and peak organisations of employers and employees, that one of the main aims of reform in Australia was labour market flexibility. While there continues to be disagreement as to exactly how to achieve flexibility, there is agreement that flexibility is the ability to respond to the changing needs of the economic environment; it is a responsiveness to economic variables.

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A distinction may be drawn between numerical, functional and financial flexibility. Numerical flexibility has to do with achieving exactly the right number of employees at each stage of the fluctuations in the level of demand. Functional flexibility has to do with the ease of changing from one job to another; with the mobility of workers; with the change of function or location within an enterprise; with the redeployment of employees between different tasks. Financial flexibility deals with the possibility of taking into account the real constraints of the economic environment while at the same time determining wage levels at industry, enterprise or individual employee level. In this way financial flexibility is used to promote functional and numerical flexibility.

Australia is undergoing a fundamental change in the way that the production of goods and services is being organized. The interlinked pressures of accelerating technological flexibility, institutionalized inflation and historically unprecedented levels of inflation is creating a new economic, social, political and industrial landscape. That emerging landscape has certain sharp features amongst which we can identify the following:

a. the manufacturing sector is shrinking as evidenced by the decline in the traditional "smokestack industries" and in the amalgamations amongst metal trades union in the past twenty years;

b. the primary and secondary sectors are shrinking and the service sector is expanding with tourism being Australia's largest export-earner at the end of the 1980s;

c. in the past decade there has been a retreat from full employment and a fundamental change in the labour market away from physical production work and towards the service sector;

d. there is a transformation in the composition of the workforce, in particular an increase in the participation rates of women in the paid workforce;

e. new employment patterns are emerging: there is an increased growth of the casual, part-time, temporary workforce both in absolute numbers and relative to the "full-time" or permanent workforce and a growing use of "workers on a long leash" such as home workers;

f. trade union membership is declining as a proportion of the workforce and unions are facing the challenge of "de-industrialisation", that is, a decline in the smokestack industries and associated job losses;

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g. the population is ageing and the birthrate is declining: the "baby boom" is over but people are retiring earlier at one end of the age spectrum and finding employment scarce at the other;

h. there is evidence of a growing employer "militancy";a perceived willingness to resort to legal action outside the arbitration system as a first step rather than as a last step. There are also emerging management practices which are characterised as anti-union by opponents and as union-substitution by proponents;

i. there is a growing call for workforce "flexibility". By the close of the 1980s all major political parties, the employers' organisations and the ACTU were agreed that flexibility could be achieved through the development of a highly skilled, productive and therefore more rewarded workforce. The main mechanism presently employed to achieve this goal is award restructuring which is occurring in the context of union negotiations for wage increases with the focus upon broadbanding skill levels and efficiency and the pursuit of stronger international competitiveness. The ACTU agenda which embraces union restructuring and amalgamations as well as award restructuring would facilitate this goal. It is not only the ACTU which is committed to a process of shifting the focus of bargaining. By the end of the 1980s both the federal Labor government and the Liberal-National Party opposition were committed to reform based on enterprise bargaining;

j. the welfare state is in crisis in all industrialised countries and the role of the government as the model employer is under question. There is public debate over issues such as privatisation of publicly owned enterprises, deregulation of the labour market, the provision of social security and the "user pays" principle.

Underpinning those features of the new landscape are tensions between an employer-driven demand for flexibility and the largely unregulated use of the workforce, and, on the other side, the employee-generated concern to ensure job security and minimal protection in employment, in particular safety, health and welfare. Increasingly, both full-time employees and the growing army of casual/temporary/part-time workers are faced with a situation where they are required to decide whether or not to enter arrangements geared to the flexible organizational needs of the business enterprise rather than their own aspirations. The introduction of continuous shift work (e.g. in mining), longer hours and fewer penalty rates (e.g. in essential services), early retirement schemes (e.g. in the public sector) and the introduction of

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night work and weekend trading in the retail industry are examples of new employment patterns which are associated with the move to labour market flexibility. The tensions between flexibility and minimal protection have been disguised in Australia in the past decade by the corporatist, social contract approach embodied in the various versions of the Prices and Incomes Policy Accords. Whether or not the social contract approach continues, labour market flexibility raises questions about the traditional promotional and protective role of labour law.

2. The Choices

Labour market flexibility can be achieved either directly or indirectly. It may be a deliberate policy of economic deregulation, as in the airline industry, or it may be the consequence of a broader social deregulation program. Since deregulation is often seen as necessarily entailing the removal of restrictive and protective legislation and the restoration of unfettered managerial prerogatives, safety and jobs may be traded off. Thus, there are real dangers in a headlong rush to achieve flexibility. A recent OEDC study of the service sector (the largest employment sector in Australia with the highest concentration of part-time and casual workers) has argued:

> the search by large enterprises for increasingly flexible responses to changing technological and market conditions appears to have led in some countries to the emergence of a new type of labour market segmentation. The share of stable 'core workers' in these countries is shrinking, especially through the reduction of permanently employed low-skilled personnel, while growing segments of more mobile workers ('contingent workers') are seen to be developing both at the upper and lower end of occupational skill structures. The contingent workforce would then be composed of highly skilled consultants and the low-skilled workers whose flexibility was simply a matter of their rate of turnover. (Women's Bureau, 1989, p. 2)

In its 1985 report *Flexibility and Jobs - Myths and Realities*, the European Trade Union Institute (ETUI) spoke of flexibility as

> a slippery concept which covers a range of proposals. In some countries it has come to mean: cutting real wages; cutting lowest wages most; breaking up national negotiating procedures; abolishing employment protection legislation; making it easier to sack

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people; increasing job insecurity; attacking social security systems; and dismantling health and safety and environmental protection. (Evans et al, 1985 p. 10)

3. The Impact on Employment Law

A labour law system performs two functions: it is both protective and promotional. It protects through laws which regulate the workplace, to ensure health and safety, facilitate job security, promote income support through unemployment benefits when jobs are lost, and determine minimum wages. The law performs a promotional role when it attempts to remove discrimination and harassment at work, when it creates new job opportunities; and when it provides for the better distribution of existing employment. In many instances both functions operate together. An example is law aimed at ensuring the health, safety and welfare of people at work. This type of law protects. At the same time it performs a promotional or educative role by drawing attention to welfare matters and by making them matters of community concern. These two traditional functions of labour law have an added element in Australia which is found in the machinery established to settle industrial disputes by processes of conciliation and arbitration.

These aspects of traditional labour law are confronted with the challenge of accommodating conflicting demands in the context of a move towards labour market flexibility. On the one side is the call for less regulation of the workplace and for a greater freedom in the use of the workforce. On the other side is employee concern for job security and for the maintenance of minimal protection at work, including health and safety. The concerns of employees are frequently expressed thorough trade unions. The opposed demands of employers and employees are the direct outcome of the effects of three deep currents: technological change, unemployment and inflation. How the conflicting pressures will be resolved raises three central questions for labour law: how far should the law intervene in the individual relationship of employer and employee; how far can labour law continue to play a protective and promotional role; what is the future of the law which regulates disputes between employers and employees? These questions are addressed in the next sections.

4. The Employer-Employee Relationship

The emergence of new forms of work arrangements are challenging the assumptions on which traditional labour law was erected. Put briefly, those assumptions were that employment was engaged in by a worker employed full-time throughout much of the day to perform personal service in accor-

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dance with a contract of indefinite duration and playing a subordinate role to an employer who owned the workplace. The social relationship between the parties was asymmetrical in that the worker carried out tasks under orders from the employer who controlled the performance of the preordained job, the content of which the worker had no power to affect. Thus the traditional master-servant model assumed three unities: that work is performed on the premises; that work is carried out in a single time sequence; that work is a single skilled activity.

The move to labour market flexibility is eroding these assumptions and requires a new response from the law which regulates the individual relationship of employer and employee. New technologies have had a profound effect upon work patterns and upon the structure of the workforce. Today's worker is increasingly engaged in activities related to a post-industrial society. That society is characterised by the absence of a factory regime. Today it is the tourist industry, the fast food industry and the information industry which are the growth areas for employment. In these areas the video screen and the computer are destroying the unities of time, place and skill. The use of computers allows for the decentralisation of many types of productive activities, ranging from the most sophisticated (e.g. commercial, accountancy, programming, research and the collection, elaboration and exchange of information) to the most elementary (e.g. teletypewriting). Clearly these activities destroy the assumption of a unity of place and work. At the same time computers destroy the unity of time and work since the autonomy of the machine entails the use of the worker at periods which may not be continuous. Moreover, mechanisation generally destroys the unity of action and work. Instead of being asked to perform one repetitive skilled activity the worker is required to perform several skilled, and often different, activities. This has many consequences, including an increased capacity on the part of the worker to control the manner in which he or she carries out the task. This is profoundly important to the common law of employment, for the characteristic which traditionally identified an employment relationship was the exercise of control by the employer over where the job was performed and how it was done. Nearly a century ago Bramwell LJ defined a servant as "a person subject to the command of his master as to the manner in which he shall do his work" (6 QBD 532).

That definition drew a line between those who worked subject to control and those who did not. The control test is an echo from the past, from a time when a servant sat beside the master and was told how to do the work. Where there is a dispute over the legal nature of a work arrangement a court will ask if one party to the arrangement has control over the manner in which

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the task is to be performed, where it is to be done and how it is to be done? If the answer is "yes" then it is likely that the court will find a master-servant relationship, or to use a more modern term, a contract of employment or a contract of service. Using this approach the High Court of Australia has made a distinction between the contract of service and a contract for services: in the latter arrangement the person who is to do the work stipulates merely to produce a given result but does not agree to the exercise of control by another over the manner in which he/she goes about producing that result.

The traditional control test was based on assumptions mentioned earlier about how work was actually carried on. Today however, the traditional employment model is being replaced by non-typical arrangements whereby both full-time and temporary workers enter arrangements dependent on the organizational needs of business enterprise. These atypical arrangements include: workers on loan from one business to another; auxiliary workers called in when there is a sudden and temporary need for staff; job sharing arrangements; part-time employment, including permanent part-time employment; casual work; short, fixed-term contracts; home working; and subcontracting. In short, as noted earlier, the structure of the labour market has undergone massive changes associated with the decline in full employment and the demand for flexibility (Brookes, 1985).

Flexibility in the labour market, associated with the emergence of atypical work arrangements, raises two issues for employment law:

a. are the legal principles which have been applied to the traditional employment model to be extended also to these atypical arrangements?

b. is it sensible to attempt to maintain the traditional legal boundary between contracts of subordinate employment on the one side and contracts for services provided by autonomous self-employed persons on the other?

The first question is important for the simple reason that until quite recently, the issue never arose. Today in the context of labour market flexibility, the question occurs regularly. The response of the law to the casual and part-time arrangement has been ad hoc and confusing. There is a lack of attention to atypical employment relationships in standard textbooks and there are little common law case reports. In Australia most of the law touching casual and part-time employment arises from decisions determining entitlements under awards and protective industrial legislation. Until recently the most common areas have been claims for workers' compensation and

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long service leave. However, of recent times the issue of atypical workers' legal rights and obligations have arisen in contexts such as: the correct mode of payment; sick leave; penalty rates; payment for public holidays; maternity leave; entitlements to superannuation; unfair dismissals; claims for reinstatement; and rights to notice of termination. Put shortly, the contemporary position is that casual and part-time employees are treated in Australian law in the same manner as the traditional, permanent, full-time employee.

The second question is more contentious. The major impact of flexibility has been upon the organizational structure of enterprises with the most characteristic change being the decentralisation of the organization which retains a core of permanent employees and redistributes many other functions to the periphery. Increasingly, today's worker is a "long distance worker" connected to an enterprise by technology of varying levels of sophistication. A worker who utilises hardware or software, or both, may operate in a variety of ways. He/she may have a "workstation" in isolation, or linked to a series of others, or may work only on the program, or may work only on the machine when the program is planned by the enterprise. Such workers, particularly those who work in isolation (including especially teleworkers based at home), are workers on a long leash, they are the other side of the factory without a chimney. Associated with this has been the undermining of the three unities upon which the traditional legal approaches to employment have been based. The trend to decentralisation of the business enterprise has the immediate effect of requiring the worker to have increased control over his/her work and a measure of independence hitherto unknown. By the same logic, it has the consequence of reducing the traditional role of the employer as the party who controls and of accentuating the employer's role as a manager. In turn this requires employment law to respond to organizational relationships in determining whether or not to intervene between parties to new work arrangements. To put the issue in formal terms the question is: what is the legal relationship between the worker on a long leash and the enterprise? Is this worker an employee in a traditional employment contract or is he/she an independent, self-employed contractor providing service to the organisation? It is no easy matter to answer that question by the application of traditional criteria of control by one party over the other. In the words of a judge in the Federal Court of Australia:

> A contract of service is that form of contract which embodies the social relationship of employer and employee. It cannot be identified by reference to the presence of any one or more static characteristics. The relationship is a dynamic one which needs to be accommodated to a variety of different and changing social and economic circumstances (26 ALR 36).

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Those social and economic circumstances are changing fast. Accelerating technological change and new work arrangements are making it more and more difficult for courts to draw the line between the employee and the person who works as a self-governing, self-employed contractor. In the middle of this century the High Court of Australia demonstrated that it was aware that the emergence of highly skilled workers - such as hospital surgeons, professional actors, professional truck drivers - were difficult to accommodate under the control test if the emphasis in the test was upon the fact of control. In response to these social changes the High Court modified the traditional control test and placed emphasis upon the rather more abstract concept of an ultimate right to exercise control. In a now famous passage, the High Court observed:

> The duties to be performed may depend so much on special skill or knowledge or they may be so clearly identified or the necessity of the employee acting on his own responsibility may be so evident, that little room for direction or command in detail may exist. But that is not the point. What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, even if only in incidental or collateral matters (93 CLR 571).

While the control test has a long history in Australian employment law, and the application of the test remains the paramount policy of Australian courts (160 CLR 27) the continuing strength of the control test has not prevented the courts from recognizing that work arrangements are changing and that a new approach is needed. Increasingly it is becoming clear that Australian courts are aware that they should look to the organizational arrangements which link the worker to the business enterprise, rather than looking to the traditional subordinate relationship where one is controlled by another. An approach which is gaining ground is that which asks whether or not the task being performed is "part and parcel of the organisation"; is the job "an integral part of the organisation" as distinct from being merely an accessory to the business? In Albrighton v Royal Prince Alfred Hospital Mr Justice Reynolds in the New South Wales Court of Appeal observed that:

> So far as the control test is concerned, it is no longer acceptable in its full rigour, and, as the law stands today, the uncontrollability of a person forming part of an organisation as to the manner in which he performs his task ... does not preclude the finding of a relationship of master and servant." (2 NSWLR 557).

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In addition, Courts are showing signs of being willing to listen to an argument that work arrangements are being so structured as to disguise the reality that one party to the arrangement is economically dependent on the other and is therefore subordinate to that other. In Borg vs Olympic Industries Ltd the Industrial Court of South Australia had to determine the nature of the arrangement between a company and certain persons who erected garages. This exercise in drawing a line between the subordinate employee and the autonomous self-employed was characterised by the Industrial Magistrate as "a perennially vexed question". In addressing the question the Industrial Magistrate concluded that, on the facts, the erectors were controlled by the company. In addition he observed

> It seems to me that the question asked by the integration test and the economic reality test are very useful ones to ask, despite their obvious imprecision ... they seek to focus more upon the industrial and economic reality of a work situation. In the present case I have no doubt that the (erectors') work was well and truly 'part and parcel' of the company's business (26 AILR 363).

These new approaches indicate that a very flexible use is made of the central notion of subordination as a means of identifying an employment relationship. This means that it is possible for the courts to bring within the protection of the common law people who perform tasks under arrangements which in the past would have been held not to be contracts of employment. A further result is that such arrangements give the employee access to legislation which applies to employment. Thus the Australian net of protective legislation is being cast very wide indeed. So marked is this trend as to question attempts to maintain the traditional distinction between employment contracts and contracts for the performance of services by such workers as self-employed contractors.

5. Employment legislation

Employment legislation seeks to elevate living standards by providing various forms of paid leave; by providing compensation for workers who are injured and whose capacity to work and earn has been reduced; by providing social security payments and other forms of pensions; and by ensuring minimal wage levels. A further protective role for employment legislation is found in laws which regulate the workplace to ensure health and safety. The promotional role of employment legislation is demonstrated in laws which attempt to remove discrimination and harassment at work. The question for our immediate purposes is this: is the legislation confined to those who are employed

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under a traditional contract of employment or is it so drafted as to accommodate new work patterns? And the answer is, broadly speaking, entitlement to benefits under contemporary employment legislation does not depend upon the claimant being able to prove the existence of an employment contract. It is safe to say that the legislation reflects the economic reality of new work arrangements. An example is found in Section 5 of the Workers' Compensation Act 1981 (WA). That section contains the classic definition of a worker as being a person who "enters into or works under a contract of service" but goes on to extend the definition to include "any person engaged by another person to work for that other person's trade or business under a contract with him for service, the remuneration by whatever means of the person so working being in substance for his personal manual labour or services."

There is much employment legislation which extends its protection to persons working other than under an employment contract and it does so by "deeming" these people to be employees. An example is the *Factories, Shops and Industries Act* 1962 (NSW) where the obligations on the occupier of the factory extend to all persons who work in a factory or shop, whether for wages or not and at any kind of work whatever. New occupational health and safety legislation goes even further. It imposes duties on employers and on self-employed persons to ensure the safety and health of persons not their employees who are at their place of work and the obligations of the legislation can now possibly be enforced to give protection to outworkers including, in New South Wales, an outworker who is an independent contractor (Brooks 1988a). Finally we should note that, while most of the complaints brought under Australian discrimination and equal opportunity legislation have concerned employment, the thrust of this promotional, educative legislation is aimed wider than merely employment situations. The (Commonwealth) *Racial Discrimination Act* 1975, for example, makes it unlawful to do any act involving a distinction, exclusion, restriction or preference based on race which affects certain human rights and fundamental freedoms. The application of this type of legislation to a flexible labour market is obvious.

6. Industrial Dispute Settling Laws

An editorial in the Sydney Morning Herald on 4th November 1989 was headed, "Wage Deals in the Workplace". The opening paragraph of that editorial read:

> There is little disagreement between the parties, political or industrial, about the broad direction in which industrial relations and wage fixing should go. It is generally agreed that these functions

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> should be less centralised. It is also agreed that there should be more flexibility at the workplace or enterprise level for agreements and dispute resolution procedures which will allow for and encourage increased productivity. The disagreement is about how these goals should be pursued.

In a discussion paper prepared for the New South Wales Minister for Industrial Relations and Employment in October of that same year, Professor Niland forecast that:

> two trends are likely in New South Wales over the next decade: an increase in awareness about and significance of occupational health and safety issues in the workplace, and a shift by the industrial tribunals towards a more effective servicing of the enterprise. (Niland 1989)

These statements have profound implications for the traditional Australian system of laws which seek to prevent and settle disputes concerning employment conditions. The obvious example is the system of conciliation and arbitration of industrial disputes. In this area of employment law, as in the other identified areas, there is evidence of a response to changes in the labour market and a response to the call for flexibility. The Australian Industrial Relations Commission has shown its awareness of the need to respond to changes in the labour market. An example is the response to claims that awards should be altered to allow the use of part-time workers without the imposition of traditional penalty loadings. These loadings are seen by employers as a hindrance to the more flexible use of the workforce. In one instance the Commission even varied an award to allow weekly workers, by mutual consent with the employer, to change their arrangements so that they would be engaged on a part-time basis (1983 AILR 190). An even more striking example is found in the recent tribunal decision to extend the protection of the award system to people who worked at home as part of the garment industry. A further illustration of the response of the federal tribunal is found in the August 1988 National Wage Decision which required parties to demonstrate that they had achieved "structural efficiency" before certain wage increases were permitted and which obliged management to "implement measures to improve the efficiency of industry and to provide workers with access to more varied, fulfilling and better paid jobs." The desired result is a workforce which is multi-skilled and which has broad career paths. This decision continues a trend by which the federal tribunal is expanding its jurisdiction, an expansion which is assisted by recent High Court decisions

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(e.g. 57 ALJR 574; 59 ALJR 694; 84 ALR 80). As well as expanding the reach of the Industrial Relations Commission the High Court decisions, as a necessary corollary, have greatly narrowed the scope for managerial prerogatives - a trend parallelled in recent protective employment legislation.

Recent industrial legislation has also extended the grasp of the federal industrial tribunal. Examples are found in Section 4 of the Industrial Relations Act 1988 with its broad definition of "industrial dispute"; in Section 92 requiring the tribunal, when exercising its dispute-settling power, to have regard to the extent to which parties have complied with the grievance procedures laid down in awards; and in Sections 115-117 allowing parties to enter certified agreements. These latter provisions give employers and employees more room to reach agreements outside the formal system while retaining an element of tribunal supervision. New legislative provisions facilitating trade union amalgamation and the creation of enterprise unions are also to be seen as legislative responses to the need for labour market flexibility and recognition that multi-skilling and broadbanding will cut across traditionally demarked areas of employment.

7. Conclusion

A concern to improve productivity through more flexible labour market policies seems to be the one matter which unites governments, employers and trade unions in their perceptions of the way in which the production of goods and services will be organized in the future. That a re-organization is occurring is clear. Change is occurring in the social relationships of work; in work patterns; and in the structure of the work force. These changes are having an impact upon the nature and role of employment law. When we add together the absence of a firm definition of what constitutes an employment contract, the profound changes in work arrangements, the legislative extension of rights and duties to most forms of work arrangements and the extended jurisdiction of industrial tribunals, we find that there are few differences in contemporary law between those who work as "employees" and those who work under some other arrangement. Employment law requires a new philosophic basis and new principles to ensure that it provides a relevant framework for a new technological society and a flexible labour market. It may well be that in the near future the law, and society at large, will talk simply of contracts for the performance of work and that the traditional relationship of master and servant will have disappeared (Brookes, 1988b; Macken, 1984).

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