

# 1

## Introduction

**[1.01]** Labour law is one of the most controversial parts of the legal system. It is, after all, concerned with some very basic social relationships: those between employers and workers; between trade unions and employers; and between employers, unions and the state. These relationships can and do generate conflict. They also matter a great deal. In a capitalist society, most people both rely on paid work to provide a living for themselves and their dependants, and derive a sense of worth and identity from the jobs they perform. At the political level, the question of how to regulate workplace relations can give rise to sharp differences of opinion. This is especially true in Australia, where labour regulation represents one of the few areas of substantial policy difference between the major political parties. This was particularly evident at the 2007 federal election, at which the Australian Labor Party (ALP) successfully exploited community concerns about the Liberal/National Coalition's 'Work Choices' reforms to help it win government. The *Fair Work Act 2009* (FW Act) enacted by Labor to replace the Work Choices regime constitutes a principal focus of this book, as does the ongoing debate about whether changes are warranted to the Fair Work laws themselves. That issue will continue to loom large after the July 2016 poll – a double dissolution election called by the Turnbull Government to resolve a deadlock over the passage of industrial relations legislation.<sup>1</sup>

**[1.02]** There has been a great deal of debate in recent years as to the proper scope of labour law.<sup>2</sup> There are, however, three themes which – at least on a conventional view of the subject – continue to provide its conceptual cohesion:

- the need to give legal effect to the relationship between workers and those who require labour for the purpose of their enterprises (employers);
- the need to regulate collective relations between organised labour and employers, and/or the state; and
- the need to moderate the operation of the labour market in the interests of workers, unions, employers or the public.

These themes are amplified and (briefly) explored in the remainder of this chapter, as a prelude to the more sustained conceptual analysis of labour regulation in Chapter 2. Before doing so, however, it is necessary to say something of the assumptions that underlie labour law in its traditional form, and of the competing values that may be brought to bear in analysing its content and development.

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1 See [3.81].

2 See generally the essays collected in Mitchell 1995; Conaghan et al 2002; Arup et al 2006; Davidov & Langille 2006, 2011; Bogg et al 2015; and see also Mitchell 2011; Arthurs 2013a.

## 1.1 Assumptions and Values

### (a) Work, Employment and Regulation

**[1.03]** One of the most important assumptions that underpins the traditional conception of labour law concerns the concept of work, the social phenomenon which triggers the operation of the legal regimes typically encompassed by the subject. For most legal purposes, 'work' plainly means, or is assumed to mean, *paid* work. Accordingly, unpaid work has received little or no recognition in the legal context. This is especially true of 'domestic' work,<sup>3</sup> which under the sexual division of labour entrenched in Australian society is still predominantly performed by women.<sup>4</sup> By exclusion from the public systems which regulate paid work, domestic work is consigned to the private (unregulated) sphere of the home, thus helping to perpetuate the subordination of women to men. In so far as commentators or policy-makers fail to expose and question the assumption that only paid work is sufficiently important to be subject to regulation, they contribute to what has been termed the 'invisibility' of women to labour law.<sup>5</sup> This is not to say that unpaid domestic work can or should simply be equated to paid work for all purposes.<sup>6</sup> The challenge is rather to take more nuanced account of the relationship between the two forms of work. The concentration on payment has also tended to exclude various other forms of 'voluntary' labour from being regulated by the state, albeit with important exceptions.<sup>7</sup> One type of arrangement that has attracted increasing attention from regulators is the unpaid 'internship', a phenomenon considered further in Chapter 10.4.

**[1.04]** Another important assumption often made by policy-makers and legislators rests on a distinction between those who perform paid work as the *employees* of another person or organisation, and those who contract out their services without assuming that dependent status. Labour statutes such as the FW Act typically detail the conditions on which employees can be engaged and require employers to assume various responsibilities as to their treatment. These obligations do not tend to apply in the case of 'self-employed' workers. With certain exceptions, most notably in the fields of discrimination and work health and safety,<sup>8</sup> independent contractors are generally left to negotiate the terms on which they supply their services, without a statutory 'safety net'. It is assumed that labour law is not concerned with transactions between persons or bodies who are identifiably carrying on businesses in their own right, even if work is performed as a result of those transactions. Whether this assumption is well founded, and whether it is possible in practice to distinguish in a meaningful manner between employees and those who are genuinely in business on their own account, are issues which are explored in Chapter 8.

**[1.05]** Despite the importance of questioning the assumptions just described, it will become apparent that this is a book that primarily deals with labour law in its traditional domain – that of paid employment. It does not, for example, seek to analyse the position of a person whose work contributes to the maintenance of a household,<sup>9</sup> or the duties imposed on those who contract to provide services to

3 See eg Graycar & Morgan 2002: ch 5.

4 See eg HREOC 2005: ch 3; Baxter & Hewitt 2013; Wilkins 2014

5 See Conaghan 1986; Owens 1995; Owens & Riley 2011: 19–20, 72–6.

6 See Pateman 1988: ch 5; and see also Adams & Geller 2006.

7 See [9.28]–[9.34], Chapter 10.6.

8 See [18.29]–[18.31], [20.06].

9 See eg *Baumgartner v Baumgartner* (1987) 164 CLR 137; and see further Parkinson 2015: ch 19.

consumers;<sup>10</sup> or the regulation of franchises or other business arrangements that can sometimes closely resemble employment relationships in functional terms.<sup>11</sup> Where the treatment of contractors or other non-employees is considered at all, it is generally in the context of regimes (such as those on health and safety) that also cover employees. There may well be merit in developing or recognising a 'law of work', or a legal framework for the regulation of 'personal work contracts' in some broader sense.<sup>12</sup> But the fact remains that in Australia (and indeed in other developed economies) the core content of labour law centres around the employment relationship, and is likely to continue to do so for the foreseeable future.

**[1.06]** Even in relation to paid employment, this book does not provide a detailed examination of a number of areas of regulation that may have an important impact on the labour market, including immigration, taxation, social security and vocational training. Gahan and Mitchell (1995: 69) argue that the field of labour law should be redefined to include such areas:

The traditional concept [of labour law] is basically constructed upon relationships (usually under contracts of employment) which are already established. For that reason it cannot easily accommodate matters which impinge prior to the establishment of the relationship. Thus questions which bear upon a person's appearance in the labour market in the first place, such as the division of wealth, taxation, social security and unemployment benefits, and matters which pertain to the ability to obtain jobs, or to switch from one sector of the labour market to another, such as labour demand, education and training and so on are at least marginalised if not entirely excluded ... [W]hy is the law which pertains to the size, constitution, industry segmentation and skills of a labour force not 'labour' law?<sup>13</sup>

There is considerable force in these observations. There is also much to be said for the view that a proper understanding of labour law (even on an attenuated definition) requires an appreciation of the perspectives afforded by disciplines such as economics, industrial relations, political science and sociology.<sup>14</sup>

**[1.07]** It is also important, as emphasised in the next chapter, to recognise that labour law can properly encompass a number of different types of 'regulation' that extend well beyond conventional rules of common law and statute. For example, study of labour market regulation can include consideration of a whole range of methods used by employers to organise and control the performance of work; by trade unions to affect not just wages and working conditions, but the composition of a workforce; and by governments in influencing all of that and more, including through procurement processes.<sup>15</sup>

**[1.08]** Despite the undoubted importance of these broader perspectives, however, limitations of both space and competence dictate that the principal focus of a book of this kind must be on the legal rules and processes that govern the core relationship between sellers and purchasers of labour, together with the collective and regulatory

10 See eg *Australian Consumer Law* Pt 3-2 Div 1; and see further Corones 2013: ch 9.

11 See eg Johnstone et al 2012b: 70-3; Riley 2012a.

12 See eg Owens & Riley 2011: 197-207; Freedland 2003; Freedland & Kountouris 2011; Johnstone et al 2012b: ch 8; and see further the various essays in Davidov & Langille 2006, 2011; Fudge et al 2012; Stone & Arthurs 2013.

13 See further Arup 1995; Howe et al 2006; Frazer 2008; Howe 2011.

14 See eg Frazer 2009; and see generally Arup et al 2009: 28-37.

15 See eg Gahan & Brosnan 2006; and see further [2.13]-[2.16].

issues associated with that relationship. It is also a book, naturally enough, that concentrates on the legal position in Australia. At the same time, attention is paid (especially in Chapter 4) to the international dimensions of the subject. There are also various points at which Australia's rules and processes are compared with those of other countries.<sup>16</sup>

## (b) Philosophies of Labour Law and the Role of the State

**[1.09]** Any meaningful assessment of the content and development of laws regulating labour relations must proceed from an appreciation of the objectives of those laws, and the values that underpin them. Of particular significance in this context is the role that the state can and should play in relation to the operation of the labour market. The many different approaches that could be adopted to this issue are discussed in more detail in Chapter 2.1. But for now it is helpful to identify two broad and competing philosophies.

**[1.10]** The first is summed up in Kahn-Freund's much-quoted observation that 'the main object of labour law [is] to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship'.<sup>17</sup> This takes as its starting point a matter of social reality: that in a capitalist economic system, most workers find it difficult, if not impossible, to deal on anything like an equal footing with those who wish to purchase their labour.<sup>18</sup> It conceives labour law as having a *protective* function: the state's objective must be to enact laws which will relieve employees from some of the consequences of their relative lack of power. At one time or another in the 20th century this view found favour in all liberal democracies, and indeed its influence is still discernible in most developed countries. A key element in this vision is the principle of 'freedom of association', which requires that workers be allowed to form, join and participate in trade unions so that their collective strength may be used in order to counter the inherent power of employers. Another is the notion that the state should, on some issues at least, prescribe minimum labour standards, to prevent employers imposing employment conditions which fail to meet accepted social norms.

**[1.11]** How far this protective objective is taken – for example, whether unions are positively encouraged rather than just tolerated, or the range of matters on which minimum standards are set – varies from country to country and from time to time. In some instances, the emphasis has been on creating a climate in which collective bargaining may take place between employers and organised labour, with the state playing a relatively minor role in the determination of employment conditions. The United States offers a classic example of that approach, though its efficacy must be open to question in light of the fact that the percentage of the private sector covered by collective bargaining has declined to the point where relatively few American workers benefit from it. In other countries, notably in Europe, the state has tended to adopt a more interventionist approach to the otherwise 'private' relationship of employer

16 As to the comparative method in labour law, see Kahn-Freund 1974; Vranken 1995; Schregle 1997; Arthurs 2013b. For general works of comparative labour law, see eg Finkin & Mundlak 2015; Blanpain 2014; Finkin et al 2013.

17 Davies & Freedland 1983: 18. For Collins (1989: 484), this is the 'original vocation' of labour lawyers.

18 See Westcott et al 2006; van Wanrooy et al 2009b: 69–73; Productivity Commission 2015c: 85–6, 1137–49. As to the reasons for this imbalance, see [2.07]–[2.08].

and employee.<sup>19</sup> Some systems have also sought to find ways of providing workers with a 'voice' for their interests and concerns, through methods other than just trade unions or collective bargaining.<sup>20</sup> This may include providing for 'alternative' forms of worker representation, such as by mandating the establishment of 'works councils' or the appointment of employee directors at firms over a certain size.<sup>21</sup>

**[1.12]** A more recent expression of the protective view of labour law is couched in terms of the need to ensure 'decent' work. This has been said to encompass:<sup>22</sup>

productive work in which rights are protected, which generates an adequate income, with adequate social protection. It also means sufficient work, in the sense that all should have access to income-earning opportunities. It marks the high road to economic and social development, a road in which employment, income and social protection can be achieved without compromising workers' rights and social standards.

The promotion of decent work has become a major focus of the International Labour Organisation (ILO),<sup>23</sup> a body whose nature and functions are outlined in Chapter 3. It is also formally recognised as part of the United Nations' 2030 Agenda for Sustainable Development.<sup>24</sup>

**[1.13]** Since the early 1970s, however, there has been a significant lessening in support for the traditional, protective view of labour law in many parts of the developed world.<sup>25</sup> This reflects a growing consensus that economic growth (and thus prosperity) can best be attained by greater reliance on the operation of market forces and private decision-making rather than state intervention. Inevitably, this has caused critical attention to be focused on the level of legal protection accorded to the paid workforce. In some instances, this has resulted in governments instigating or tacitly approving a reduction in wages and other labour costs, on the basis that the previous standards were no longer 'affordable'. There have been notable examples of this, especially in Europe, in the wake of the Global Financial Crisis in the late 2000s.<sup>26</sup> Even before then, efforts had been made in many countries to reduce the role of the state in setting standards, in favour of greater autonomy for management and labour: the theory being that they are more likely than bureaucratic planners or politicians to respond to market pressures and produce efficient outcomes. Starting with the election of the first Hawke Government in 1983, Australia has been among the nations that have chosen to pursue this path.

**[1.14]** This latter trend does not necessarily run counter to Kahn-Freund's view of the purpose of labour law. It can, for instance, be said that the debate is about the

19 For an overview of labour regulation and industrial relations in the US and other leading economies, see Bamber et al 2011a. As to the recognition of the principle of freedom of association, see Bogg & Ewing 2015.

20 As to the concept of worker 'voice' and the various ways it can be accommodated or facilitated, see generally Wilkinson et al 2014; Bogg & Novitz 2014.

21 See eg Schlachter & Seifert 2015; and see further [7.88].

22 ILO 1999a: 11, quoted in Owens 2002: 217.

23 See eg ILO 2007, 2012d. For details of the ILO's regional decent work initiatives, see <[www.ilo.org/global/topics/decent-work/lang--en/index.htm](http://www.ilo.org/global/topics/decent-work/lang--en/index.htm)>. But cf Charlesworth & Macdonald 2015, highlighting the decent work agenda's lack of impact in developed economies, for example in addressing gender equality.

24 See United Nations 2015: 23–4 (Goal 8); and see further United Nations Development Programme 2015.

25 See eg Bercusson & Estlund 2008; Bamber et al 2011b.

26 See eg Clauwaert & Schömann 2012; Kuttner 2013; Keune 2015.



appropriate form of state intervention or the level of minimum standards, rather than about the principle of protective regulation itself. Furthermore, recognition that the labour market should be regulated in such a way as to promote competitiveness, productivity and employment opportunities does not have to mean simply leaving workers to the mercy of market forces and treating labour as just another commodity.<sup>27</sup> For example, there is some evidence to support the view that, by providing a voice for workers, unions may enhance productivity and efficiency in certain ways, not reduce it.<sup>28</sup>

**[1.15]** That said, a competing view has emerged over the past 30–40 years which *does* fundamentally challenge the protective principle. In its most extreme form, it can be found in the writings of libertarians such as Hayek, or neo-classical economists like Epstein.<sup>29</sup> It suggests that the function of the law should merely be to facilitate the individual transaction between the seller and purchaser of labour, without, as far as possible, seeking to regulate the outcomes of that transaction. If individual workers are willing to be hired on apparently harsh or unfavourable conditions, this is not only unobjectionable, but indeed a vindication both of their ‘freedom of choice’ and the operation of the forces of supply and demand. For the state (or indeed for trade unions) to interfere in the contractual exchange between employer and worker is economically harmful. As Wailes (1997: 47) puts it: ‘These theories regard the last 100 years of industrial relations regulation, not as [a] viable attempt to balance efficiency and equity, but rather as a fatal mistake which has taken rich countries and made them poor’.

**[1.16]** The ‘neo-liberal’ approach has attracted a significant measure of support in Australia. Since the mid-1980s, there have been calls for Australian workplaces to be freed from ‘interference’ by trade unions and overly restrictive state regulation.<sup>30</sup> The supporters of this approach have included leading politicians such as John Howard and Peter Costello, as well as some business groups.<sup>31</sup> Under their influence conservative governments at both federal and State levels have sought, with varying degrees of success, to re-cast labour regulation in this country. More will be said in Chapter 3 about their efforts, including the highly contentious Work Choices reforms. But their cause has suffered a recent setback, in the form of a Productivity Commission report on the workplace relations framework, commissioned by the Abbott Liberal/National Government. Defying the expectations of many commentators, the Commission rejected the case for radical change, on both economic and social grounds. In doing so, it articulated a case for state regulation that looks remarkably similar to the conventional ‘protective’ view of labour law.<sup>32</sup> At the global level even the World Bank, whose *Doing Business* reports have traditionally been highly critical of employment protection laws, now accepts the case for regulating to ‘help

27 For a powerful expression of this view, see Collins 2000, 2001; and see further Weiler 1990; Deakin & Wilkinson 2000; Tucker 2010; Lee & McCann 2011; Moore 2014. As to the principle that labour is not a commodity, see [2.09].

28 See eg Freeman & Medoff 1984; Miller & Mulvey 1993; but note also the more equivocal views expressed in Aidt & Tzannatos 2002.

29 See eg Hayek 1960: ch 18; Epstein 1983; and see further [2.03]–[2.05]. As to the influence of Hayek on labour law reforms in Britain, and of Epstein on reforms in New Zealand, see respectively Wedderburn 1989, and Ryan & Walsh 1993.

30 See eg HR Nicholls Society 1986; Moore 2005.

31 See generally Dabscheck 2006.

32 See Productivity Commission 2015c; and see further [2.10], [3.79].

correct market imperfections, support social cohesion and encourage economic efficiency' (World Bank 2016: 247).<sup>33</sup> Those who still believe in the need for labour market 'deregulation' are unlikely to relinquish their efforts, despite the lack of hard evidence to support their theories, either nationally or internationally.<sup>34</sup> But from both a political and intellectual perspective, it is becoming steadily harder to mount a serious case for radical change.

## 1.2 The Individual Employment Relationship

**[1.17]** The capitalist mode of production requires businesses to 'buy' labour in order to utilise capital to generate profit. Those who lack capital must 'sell' their labour in order to obtain the means of subsistence and (perhaps) to start to accumulate a capital base of their own. In any regulated and ordered society this transaction, and the control of the performance of work that comes with it, must be legitimated through the legal process. This is generally done through some form of enforceable agreement. The form and content of this contract vary greatly from place to place and from time to time. The latter-day Australian variety is a curious creature. In theory, and occasionally in practice, it embodies the norms upon which employer and employee have expressly agreed to base their relationship. For the most part, however, these norms are supplied by sources more or less external to the parties: the notion of 'agreement' is largely a legal fiction. These external sources include legislation, common law principles developed by the judiciary, 'awards' made by industrial tribunals, and collective agreements negotiated between employers and worker representatives. The ways in which these sources combine to shape the modern employment relationship pose some of the more interesting and difficult challenges for those studying Australian labour law. They also help to explain why Australia has one of the most (if not *the* most) complex systems of labour regulation in the world.<sup>35</sup>

**[1.18]** Academic commentators frequently suggest that the contract of employment is an inappropriate vehicle for the legitimation and regulation of the individual employment relationship.<sup>36</sup> This point assumes particular importance in light of the suggestion, advanced by adherents of the 'market approach' described earlier, that the law of contract provides a sufficient framework in itself for the regulation of employment relations and that no further external intervention in the parties' private dealings is warranted. To some extent, criticisms of the employment contract are really directed at the general law of contract itself. Premised on 19th century notions of 'freedom of contract', its conception of a contract as a freely negotiated bargain is now widely acknowledged to be inappropriate in most contexts.<sup>37</sup> The proposition that a freedom of contract approach necessarily reinforces and legitimates the social and economic superiority of those parties who enter a market with greater bargaining power and skills is just as true of employment relationships as it is of consumer transactions.

**[1.19]** However, it is not just the general law of contract with which critics take issue, but more specifically the 'common law of employment'. This is the body of

33 See further McCann 2015.

34 See eg Deakin et al 2014; Z Adams et al 2015.

35 See Fetter & Mitchell 2004; Bray & Waring 2005; Stewart 2005: 212–16. However, the level of complexity has decreased over the past decade: see Stewart et al 2015: 23–6.

36 See eg G Smith 1992; Brooks 1988, 1993a; Creighton & Mitchell 1995; Riley 2013a; Mummé 2015.

37 See eg Robertson 2005.

rules developed by the English judiciary in the 18th and 19th centuries to govern a relationship – that of ‘master and servant’ – that was originally conceived in terms of social ‘status’, but that gradually came to be recognised as resting in contract.<sup>38</sup> As will be explained in Chapter 11, these rules include a series of obligations which may become binding on the parties as ‘implied terms’ of the contract. Other common law rules regulate the remedies available for breaches of contractual duties. In theory, they apply only to the extent that they are not ousted by the express or implied agreement of the parties, or by some legislative provision. In practice, however, all employment relationships remain subject to the common law rules in important respects; and the influence of common law values is often felt well beyond the context of the principles themselves, for example in the interpretation of statutes.<sup>39</sup>

**[1.20]** Traditionally, the common law of employment has been characterised by an emphasis on the need for employees to be loyal and obedient, while lacking any corresponding emphasis on the responsibility of the employer for the worker’s economic welfare or job security.<sup>40</sup> The principles and rules of the common law are subject to change and, from time to time, there have been signs of revised judicial perceptions of the employment relationship. In the United Kingdom, for example, the Supreme Court has accepted that the rules governing ‘arms-length’ commercial transactions between parties of equal bargaining power should not necessarily apply to employment contracts.<sup>41</sup> The notion of a ‘master and servant’ relationship is now treated as ‘obsolete’.<sup>42</sup> It has been recognised that:

the nature of the contract of employment has been transformed ... [A] person’s employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem. The law has changed to recognise this social reality.<sup>43</sup>

Reflecting that view, the British judiciary has been willing to describe the employment contract as ‘relational’ in nature,<sup>44</sup> and to recognise an implied duty on both employer and employee not to damage the ‘mutual trust and confidence’ inherent in their relationship.<sup>45</sup> But in its 2014 ruling in *Commonwealth Bank of Australia v Barker*,<sup>46</sup> the High Court of Australia did not just reject that implied term as the product of a

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38 For Australian perspectives on this development, see Howe & Mitchell 1999; Irving 2012a: 17–35. Deakin (1998, 2002, 2006) suggests that the emergence in Britain of the modern contract of employment should really be dated from the 20th century, and that it should in any event be seen as an evolving mechanism. See also Deakin & Wilkinson 2005: chs 1–2; Veneziani 1986.

39 See [11.41].

40 For some scholars, the common law of employment represents a fusion between the notion of freedom of contract, and rules and perceptions derived from the pre-Industrial Revolution law of master and servant: see eg Selznick 1969: 121–54; Fox 1974: 152–206. But cf Deakin & Wilkinson 2005: 23, suggesting that this kind of analysis ‘truncates a process of historical development which in practice, was both more complex and considerably more elongated’.

41 See eg *Autoclenz Ltd v Belcher* [2011] ICR 1157 at [33]–[35]; and see further [8.35]–[8.36]. As to the elements that distinguish employment agreements from other contracts, even on a more traditional view, see Irving 2012b.

42 *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 at 45–6.

43 *Johnson v Unisys Ltd* [2003] 1 AC 518 at [35].

44 *Ibid* at [20]. As to the large body of theoretical work that explores the ‘relational’ aspects of (particularly) long-term contracts and how they might or should be accommodated by the rules of contract law, see generally Macneil 1978; Campbell et al 2003; Paterson et al 2016: [1.130]–[1.170]. For relational analysis of employment contracts, see eg Riley 2005a: 45–54; Brodie 2011.

45 See further [17.47].

46 (2014) 253 CLR 169.



different regulatory framework. It repudiated the very idea of adopting 'a view of social conditions and desirable social policy that informs a transformative approach to the contract of employment in law'.<sup>47</sup> Given the 'complex policy considerations' involved, recognition of a duty of mutual trust and confidence was considered a matter 'more appropriate for the legislature than for the courts to determine'.<sup>48</sup>

[1.21] The decision in *Barker* is analysed in more detail in Chapters 11 and 17. But as a general observation, it appears to entail preserving the common law of employment in more or less the state that it emerged during the 19th century and abdicating any judicial responsibility for further development. That in turn has the effect of reaffirming what is essentially a *unitary* view of labour relations.<sup>49</sup> According to this frame of reference, management and labour are seen to be committed to the common goal of success of the relevant enterprise. Heavy emphasis is placed on the notion of worker loyalty and on the legitimacy, even inviolability, of managerial authority. Unions are at best regarded with distrust and are only reluctantly accorded any role in determining the rights and duties of individual workers. This line of reasoning, which is also reflected in much of the literature in the field of human resources management (HRM),<sup>50</sup> has exerted a strong (if not always clearly articulated) influence on thinking in business and conservative political circles in Australia. On the unitary approach, any doubts as to the legal rights and duties of the parties to an employment contract will tend to be resolved in favour of the employer.<sup>51</sup> In *Barker*, the High Court was unwilling even to consider whether the detailed regulatory framework established in statutes such as the FW Act might warrant a different approach. The ruling bears out the view that 'the key instrumental regulatory regimes established by the state ... have, on the whole, scarcely reshaped the common law of employment' (Johnstone & Mitchell 2004: 102) – at least in Australia.

[1.22] The unitary view can be contrasted with two other frames of reference. The *pluralist* approach recognises that management and labour may and do have divergent interests, the former (broadly speaking) in profit, the latter in the best possible employment conditions, job security, and the provision of a safe and healthy work environment. While these interests may in many respects coincide, conflicts are both inevitable and legitimate, as is the role of organised labour. The *radical* approach, which was traditionally linked to Marxist analyses of capitalist economies,<sup>52</sup> takes this approach several steps further, by postulating that industrial conflict is endemic to a society based on economic exploitation, with the consequence that any such system is fundamentally unstable. Of the three, it is the pluralist approach that seems to us to provide the most credible basis for analysing contemporary Australian labour relations.

[1.23] Adoption of a more realistic approach to the conceptualisation of the employment relationship has become all the more important in light of the modern

47 Ibid at [41].

48 Ibid at [40].

49 As to the frames of reference described in the text that follows, see Fox 1974: ch 6; Bray et al 2014: ch 3.

50 See eg Mitchell & Fetter 2003b. As to the way in which HRM has come to displace the more traditional study of 'industrial relations', see eg Bray et al 2014: 6–9, 16, 51–2.

51 See further Chin 1997; Carrigan 2009.

52 See eg Hyman 1975. Note too the insights provided by labour process theory, which in itself may be regarded as a form of radical critique: see eg Bray & Littler 1988; Thompson & Newsome 2004.

shift towards 'non-standard' work arrangements. This is a trend apparent in almost all industrialised economies.<sup>53</sup> During the 20th century at least, the paradigm of paid work had come to involve a single-skilled occupation, performed at the employer's premises over a single and prolonged period on each working day. But that no longer holds good for many workers. Working time arrangements, in particular, have become much more varied. It is increasingly common for employees to work on a fractional or part-time basis rather than be engaged to do a full-time job, and to spread their working hours in a variety of different ways. The use of 'outworkers' or 'homeworkers' has also become more common, as technology has permitted more tasks to be performed away from a set workplace. Many people indeed now perform paid work without entering into a 'regular' employment relationship at all. These include 'casual' employees, who (in theory at least) are engaged on a temporary and irregular basis, performing work as and when needed by the employer; workers who are hired out by agencies to work for different firms or organisations ('labour hire'); and 'self-employed' workers who provide services on a contract basis, without becoming the employee of those for whom the work is done.<sup>54</sup>

**[1.24]** The number of workers who potentially fall into the last of these categories has been boosted in recent years by the rise of what is variously called the 'sharing', 'gig', 'crowdwork' or 'on-demand' economy.<sup>55</sup> Online intermediaries, such as TaskRabbit or the Uber ridesharing app, connect 'freelancing' workers with customers who are seeking what may range from 'micro-tasks' to more substantial services. The organisations that facilitate these arrangements typically deny any suggestion that the 'taskers' or 'driver-partners' who obtain work through their technology are employees – although this is currently under challenge in some jurisdictions.<sup>56</sup> It is difficult to assess just how many people are working in the gig economy, and to what extent they are doing more than just supplementing other sources of income.<sup>57</sup> But there is clearly a possibility, at least without regulatory intervention, of the 'Uberisation' of other forms of work.<sup>58</sup>

**[1.25]** With so many workers now engaged on a part-time, casual or self-employed basis, it makes little sense to think of these arrangements as 'atypical'. This is especially true for many women, for whom 'non-standard' engagements may be their normal form of participation in the labour market (especially if they have dependent children).<sup>59</sup> A more appropriate description for such workers is

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53 See eg Standing 2011; Stone 2013; ILO 2015e. Australia is no exception in this regard, although the proportion of the workforce engaged under 'non-standard' arrangements has stabilised over the past decade: see Shomos et al 2013.

54 In addition to these categories, Cordova (1986) lists 'clandestine work', such as arrangements within family businesses, or work performed by foreigners without valid work permits. It has also become common for policy-makers and commentators to refer to the prevalence of 'informal employment', though the term is hard to define with any precision: see eg Williams & Lansky 2013; La Hovary 2014.

55 For a useful overview of the literature on this issue, see De Stefano 2016.

56 See eg Means & Steiner 2016.

57 In Australia, Minifie & Wiltshire (2016: 33) have estimated that 'fewer than half of one per cent of adult Australians (80,000 people) work on peer-to-peer platforms more than once a month', but expect that number to grow.

58 See Bornstein 2015; and see further Productivity Commission 2016b: 76–80, recognising the possible need for changes to workplace regulation as the gig economy grows.

59 See generally Pocock 2003: ch 7; Fudge & Owens 2006. As to the changing patterns of female participation, see the helpful overview in Baird 2016.

'marginal' or 'precarious', which helps to convey not just the relative insecurity of their working arrangements, but the fact that they tend to receive far less protection and significantly fewer benefits from the law compared to 'regular' employees.<sup>60</sup> The nature and regulation of such forms of engagement are explored in Chapter 10.

**[1.26]** A number of factors help to explain the growth of precarious work. One lies in the efforts made by employers to claim (or reclaim) greater flexibility over the ways in which work is organised.<sup>61</sup> By combining a 'core' of permanent full-time employees with a 'periphery' of casuals and contractors, the employer is able to respond more readily to fluctuations in demand or the dictates of technology.<sup>62</sup> This can be done not only by varying the working hours of the peripheral workers, but by hiring and firing them as needed. The law may encourage the latter strategy, to the extent that it makes casuals, contractors or freelancers cheaper to hire (through limited access to various employment benefits), and easier to dismiss.<sup>63</sup> There can be disadvantages to the use of such workers, such as the administrative costs associated with a higher turnover of labour, and the lack of commitment (and hence lower productivity) that may be expected from those concerned. Nevertheless, if nothing is done to reduce the obvious financial incentives to employers, particularly in the services sector, precarious work can be expected to continue to flourish.<sup>64</sup>

**[1.27]** A related development has involved what Weil (2014) has described as the 'fissuring' of workplaces (or, more accurately, of organisations). He notes the way in which ostensibly 'large' American businesses have come to shed direct employees and instead source their labour needs through a network of smaller firms. As he notes (2014: 9), this has increased the profitability of these 'lead' businesses, at the expense of those who ultimately work for them:

Wage setting and supervision shift from core businesses to a myriad of organizations, each operating under the rigorous standards of lead businesses but facing fierce competitive pressures. Although lead businesses set demanding goals and standards, and often detailed work practice requirements for subsidiary companies, the actual liability, oversight, and supervision of the workforce become the problem of one or more other organizations. And by replacing a direct employment relationship with a fissured workplace, employment itself becomes more precarious, with risk shifted onto smaller employers and individual workers, who are often cast in the role of independent businesses in their own right.

Although this trend is also apparent in Australia, there are features of the regulatory system here that – at least compared to the United States – may reduce the incentives to outsource or sub-contract labour.<sup>65</sup> These include attempts, especially in industries such as clothing or road transport, to find ways of ensuring that businesses at the top of a 'supply chain' are held responsible for the pay and conditions of workers at

60 For a broader concept of 'precariousness', which may extend to many in standard as well as non-standard employment, see Burgess & Campbell 1998b.

61 For a dated but still useful survey of the voluminous literature on the elusive concept of 'flexibility', see Harley 1995: ch 2.

62 For a critical review of this 'flexible firm' model and the literature it has generated, see Burgess 1997.

63 See further [8.11], [10.03]–[10.08].

64 There has been much debate in Europe over ways to accommodate more flexible forms of engagement, while at the same time enhancing job security for the workers involved. For a critical overview of this 'flexicurity' agenda, see De Vos 2009. As to its possible application in Australia, see Belchamber 2010; Auer 2011.

65 See Johnstone & Stewart 2015.

the bottom.<sup>66</sup> With so much production now being offshored as part of 'global value chains', however, one of the challenges for any domestic labour law regime is how to ensure such controls reach across national boundaries.<sup>67</sup>

**[1.28]** A further factor driving change in the labour market has been the dramatic increase in the number of women entering, returning to or staying in the paid workforce on a part-time basis.<sup>68</sup> This has created something of a dilemma for policy-makers. On the one hand, it appears that part-time employment is the preferred mode of participation in the labour market for many women. On the other hand, the fact that women continue to bear a disproportionate share of family responsibilities means that they often have little choice but to seek paid work on a part-time basis. Far from resulting in a rearrangement of responsibilities, entry into the labour market has for many women simply resulted in an increased workload. Moreover, participation on a part-time basis may well serve to exacerbate the existing disadvantages women suffer by reason of their concentration in low-reward and low-status employment. Because of their lower level of hours or intermittent pattern of engagement, many part-time jobs do not qualify for various benefits and leave their holders lacking the seniority or the capacity for intense work effort which are often seen as essential to career advancement.<sup>69</sup> As with many other facets of the trend to precarious employment, this is an issue with which legislators and policy-makers in Australia have not yet come to terms.<sup>70</sup>

### 1.3 Regulation of Industrial Conflict

**[1.29]** One of the principal means of redressing the power imbalance between employers and individual workers is for the latter to form trade unions. Similar considerations may also cause employers to combine, either for trading purposes (for example, in the form of trade associations or cartels) or in order to counter the power of organised labour (in the form of employer organisations). Inevitably, these activities generate conflict as combinations seek to promote and protect their divergent interests. Equally inevitably, that conflict becomes a matter of concern to the state. Unless controlled, it has the potential to cause serious political, social and economic disruption.

**[1.30]** Up until the late 19th and early 20th centuries, the legal response to combination by workers in countries such as the United Kingdom and in Australia was generally one of extreme hostility. This manifested itself in attempts to suppress the combinations themselves and/or their collective activities. But attempts at total suppression could never be wholly successful, or at least not without massive social and economic dislocation. In most democratic societies, therefore, initial hostility gave

66 See further [2.24], [10.19]–[10.21], [15.29]–[15.30].

67 See eg Rawling 2014, 2015; and more generally, see Blackett & Trebilcock 2015. As to the extent to which Australian labour laws can apply overseas, see [6.23]–[6.26].

68 See eg Abhayarantna et al 2008: 2–5; ABS 2015b.

69 See eg Pocock 2003: ch 7; Chalmers & Hill 2007; House of Representatives Standing Committee on Employment and Workplace Relations 2009: 306–19. It is especially important to see the rise of part-time employment in the context of the high levels of 'gender segmentation' in the Australian labour market – that is, the extent to which men and women tend to work in different occupations: see eg Preston & Whitehouse 2004; Baron & Cobb-Clark 2010.

70 See generally Owens 2002, 2006a; Hunter 2006; Owens & Riley 2011: 165–90, 201–6; Johnstone et al 2012b; Independent Inquiry into Insecure Work 2012.

way to tolerance of trade unions and eventually even a measure of encouragement and facilitation. Throughout the developed world, this evolutionary process has created a legal and social environment in which unions are generally free to engage in collective bargaining with employers (and their organisations) and, subject to limitations, to organise or threaten concerted industrial action. The law may be used to regulate the process of bargaining in some respects, but parties are generally allowed a considerable degree of autonomy in the way in which they conduct their relations.<sup>71</sup>

**[1.31]** This is also now broadly true of the Australian system of labour law. But that bald statement masks an intriguing process of development. For most of the 20th century, this country adopted an approach to the regulation of industrial conflict that was virtually unique among industrialised societies. It involved reliance on permanent and independent tribunals, funded from the public purse and established under both federal and State legislation, to help resolve industrial disputes between employers and their organisations on one side and trade unions on the other. The tribunals were empowered to summon representatives of the parties to conciliation conferences in order to encourage a negotiated resolution. If this could not be achieved, they could hear arguments from each side and then resolve the matters in dispute by a formal process of arbitration. Their decisions would take effect as legally binding 'awards', instruments that had the force of statute. The tribunals could be called upon to resolve a wide range of disputes, ranging from minor workplace grievances to the establishment of minimum wages and conditions across entire industries and occupations. Theoretically, the processes of conciliation and arbitration were only to be used as a last resort. In practice, unions routinely notified disputes to the tribunals, using them not just to force management to the bargaining table, but to establish an elaborate network of rights and protections for members and non-members alike.<sup>72</sup>

**[1.32]** A series of major reforms during the 1990s and 2000s, under both Labor and Liberal/National governments, have dramatically reduced the role played by conciliation and arbitration, especially in the federal sphere. Industrial legislation is now firmly focused on encouraging management and labour to negotiate formal agreements that set wages and working conditions at the level of the enterprise or workplace, and to establish their own processes for resolving any differences that might subsequently arise. Indeed, the FW Act no longer provides for the resolution of industrial disputes by conciliation and arbitration, except in the context of certain bargaining disputes, or with the consent of the parties.<sup>73</sup> The FW Act likewise still contemplates the making and variation of 'modern awards', albeit again not through a process of conciliation and arbitration.<sup>74</sup>

**[1.33]** The modern award system can properly be seen as a legacy of the old conciliation and arbitration system. So too is the idea of having an 'independent umpire', in the form of a specialist public tribunal, to oversee the conduct of workplace relations. The Fair Work Commission (FWC), the body that fulfils this role under the FW Act, has less extensive powers than the industrial tribunals of old. But it can still intervene in any type of bargaining dispute, at least to regulate the process of negotiation, and, as just noted, in limited circumstances it can impose an outcome

71 See generally Sheldon et al 2014; Doellgast & Benassi 2014.

72 Many of the 'disputes' that led to the making of such awards were in fact artificially created: see [3.33], [5.07].

73 See [7.40]–[7.45].

74 See Chapter 13.



through arbitration. The FWC is also routinely nominated by unions and employers, in preference to private mediators or arbitrators, to assist with the resolution of disputes arising during the life of a negotiated agreement.<sup>75</sup> So while there is much about the modern Australian system that resembles those overseas, many distinctive elements remain – and can only be understood by reference to what has gone before.

**[1.34]** A further important development in recent years has been a profound shift in responsibility for the regulation of industrial relations within the Australian federal system. As Chapter 5 explains, the Australian Constitution does not delineate in clear terms whether that responsibility is to lie with the Commonwealth, or with the States and Territories. For most of the 20th century, power was effectively shared. The Commonwealth and each of the States (but not the Territories) maintained their own systems for dealing with labour disputes. The federal system was based on the Commonwealth's power under s 51(35) of the Constitution to legislate for the conciliation and arbitration of 'interstate' industrial disputes (that is, disputes that extended beyond a single State). The boundaries between the federal and State systems were imprecise, unpredictable and constantly shifting. In the 1990s, the Commonwealth began to use other constitutional powers to extend the reach of federal regulation. But the big change came with the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). This largely abandoned any reliance on s 51(35) and instead sought to define federal responsibility primarily by reference to whether an employer was a trading, financial or foreign corporation, within the meaning of s 51(20) of the Constitution. With certain exceptions, State industrial laws were precluded from applying to such employers, thus for the first time creating a fairly clear demarcation between the various industrial systems. The FW Act has maintained this approach. Indeed under agreements made between the Commonwealth and all States bar Western Australia in 2009, the reach of the federal statute has been extended. As Chapter 6 explains, the federal regime now covers almost all employees in the private (non-government) sector, together with those working in the Territories, and for Commonwealth or Victorian government agencies.

## 1.4 Moderating the Labour Market

**[1.35]** In most industrialised societies, it was recognised at an early stage that the regulation of relations between capital and labour could not be left entirely to the 'laws' of supply and demand. Market forces on their own can often work to the severe disadvantage of the individual employee and of the wider community. For example, in 1802 the United Kingdom Parliament took the first halting step towards providing statutory protection against the excessive hours of work in insalubrious and unhealthy conditions that were often imposed on those unable to look after themselves in the market place.<sup>76</sup> As the 19th century progressed, the British Parliament and its counterparts elsewhere adopted an increasingly elaborate legislative regime intended to protect the interests of workers who were considered to be in need of protection in this regard: notably children, juveniles and women. Statutory provisions relating to occupational health and safety emerged during the development of this code of protective legislation.<sup>77</sup>

<sup>75</sup> For further discussion of the role and powers of the FWC, see Chapter 7.2.

<sup>76</sup> *Health and Morals of Apprentices Act 1802* (UK).

<sup>77</sup> See further [18.04]–[18.05].

**[1.36]** These early initiatives helped establish a pattern whereby the legislature intervened in order to remedy what might broadly be termed imperfections in the market, by establishing minimum standards for the treatment of workers.<sup>78</sup> In other countries, this interventionist role survived the widespread emergence of collective bargaining. In effect, the standards in question were considered to be too important to be left to the preparedness or capacity of trade unions to bargain for them. The same was true in Australia, despite the establishment of compulsory conciliation and arbitration. Although awards were used to set minimum standards on matters such as wages and working hours, other conditions continued to be left to direct regulation by the legislature. Indeed, over the years the list of legislated standards has grown very considerably.<sup>79</sup> Besides the original concerns for health and safety, there are now standards dealing with: conduct which is discriminatory on the basis of race, gender or other attributes; compensation for work-related injuries; maximum weekly hours; minimum wages; payment of wages; flexible work arrangements; the right to take leave from employment in various circumstances; termination of employment; redundancy pay, and superannuation.<sup>80</sup> While in some instances awards also deal with these issues, it is the legislatures rather than the tribunals which remain principally responsible for the maintenance of standards in these areas. With the increasing emphasis on bargained agreements, and a correspondingly reduced role for the tribunals in setting conditions through awards, the significance of legislative standards has increased over the past two decades under governments of all political complexions.

**[1.37]** Despite this trend, the award system remains extremely important in setting minimum standards for many Australian workers. Although the range of matters with which they can deal has been significantly diminished in recent years, awards still cover somewhere between 70% and 80% of the paid workforce in relation to key issues such as wages and working time.<sup>81</sup> For many low-paid workers in particular, it is awards that determine how much they are paid and when they can be required to work. Even where an award is displaced by the operation of a registered enterprise agreement, as is now the case for over 40% of employees,<sup>82</sup> it may still influence the content of that agreement. That is because an agreement cannot generally be registered unless it leaves the workers concerned better off overall than they would have been under an applicable award.<sup>83</sup> In this way, awards operate as a 'safety net' for workplace bargaining.

**[1.38]** Importantly too, this is a safety net that varies across different industries, and for different grades or classifications within a single type of work. Even under the

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78 See further Ramm 1986a.

79 See further Michelotti 2004; McCallum 2011.

80 Many of these matters form part of the National Employment Standards (NES) that are set out in Pt 2-2 of the FW Act, and as such are dealt with in Chapter 12. Wages and superannuation are dealt with in Chapter 15, hours and leave in Chapter 16, work health and safety in Chapter 18, discrimination in Chapter 20, and legislative provisions relating to termination of employment in Chapters 22 and 23.

81 The estimate is necessarily a rough one. Award coverage has not been formally measured by the ABS since 1991, with more recent surveys focusing instead on the proportion of employees who are *paid* in accordance with an award: see eg ABS 2015a. These and other studies radically understate award coverage, because of the large number of employees who are paid in accordance with registered agreements, or employment contracts that provide for 'over-award' wages, yet who still fall within the scope of an award: see Wright & Buchanan 2013.

82 See [3.50].

83 See further [14.87]-[14.97].

streamlined system that now operates under the FW Act, there are over 120 modern awards that apply to particular industries or occupations, together with a small number of enterprise-specific instruments. Not only do these set basic wage rates that vary according to the nature of particular jobs, they typically require the payments of additional 'loadings' or 'penalties', according to whether work is performed as a casual, or by way of overtime or night-shifts, or on weekends or public holidays. It is common for allowances to be payable to reimburse certain expenses, or to compensate workers for working in difficult conditions, or to reward them for having certain skills. Correspondingly, awards may allow lower wages to be paid to juniors, or trainees, or workers with a disability that reduces their productive capacity. So where other countries may set a single minimum wage, Australia has literally thousands of different pay rates set by law. These tend to be higher than the minimum wages in other countries, due to the legacy of the 'living wage' concept first articulated in the *Harvester* judgment of 1907.<sup>84</sup> Even the very lowest rate set for adult employees is the third highest minimum wage among OECD countries.<sup>85</sup>

**[1.39]** In maintaining and updating the standards contained in awards, Australia's industrial tribunals have effectively acted as legislators, even though their primary function (historically at least) was to settle disputes. The most visible and controversial manifestation of this role has been the practice of holding national or State wage cases in order to determine the appropriate adjustment of wages throughout the relevant jurisdiction by reference to factors such as inflation and productivity.<sup>86</sup> The history and details of wages policy are not a major focus of this book, but it is impossible to overstate the symbolic and practical significance of wage cases in shaping both the way in which the industrial systems have functioned and the way in which they are perceived in the community. The notion of a minimum wage which is capable of providing basic subsistence in a civilised community has become firmly entrenched as part of the Australian social structure. Just as important has been the capacity of unions to mount 'test cases' in the tribunals seeking new or improved award conditions.<sup>87</sup> During the 20th century this produced a steady reduction in the length of the standard week, new forms of leave entitlements, and the introduction of various protections and benefits for workers on the termination of their employment. These rights are in many instances now enshrined in legislation, as statutory rights for both award-covered and award-free employees. Whether the modern award system will continue to exhibit this capacity for flexibility and innovation is another matter – and one that is explored in Chapter 13.

## 1.5 Structure and Scope of This Book

**[1.40]** A work of this nature can only offer an overview of the ever expanding and more diverse topics that go to make up Australian labour law, even on the attenuated definition articulated earlier in this chapter. Accordingly, the chapters that follow concentrate on developing an understanding of the 'core' areas of labour law in this country: the creation and categorisation of work relationships (Chapters 8–10); the way in which different types of employment conditions are determined, controlled

84 *Ex parte HV McKay* (1907) 2 CAR 1: see [15.07].

85 See Productivity Commission 2015c: 181–3, although noting that the Australian minimum wage 'bite' (its relation to median earnings) has declined significantly in recent years.

86 See [3.34], [15.07].

87 See Murray 2008.

and enforced (Chapters 11–21); the rules governing termination of employment (Chapters 22–23); and the regulation of trade unions, collective bargaining and industrial action (Chapters 24–28). These are preceded by a theoretical discussion of the different aims, concepts, actors and mechanisms that can be involved in labour regulation (Chapter 2); an account of the historical development of labour law in Australia and (more briefly) in the country from which so much of our law and legal institutions are derived, the United Kingdom (Chapter 3); and an outline of international labour law and its impact in Australia (Chapter 4). Chapter 5 examines the constitutional framework for labour regulation, Chapter 6 explains the coverage and operation of federal, State and Territory laws, while Chapter 7 offers an overview of the regulatory institutions and processes for which those laws provide.

**[1.41]** In each instance the aim is to provide a general background, a concise but sophisticated account of the major legal principles, a certain amount of commentary on issues which are controversial or topical, and references to further and more detailed sources of description and analysis. In accordance with the shift in regulatory responsibility mentioned earlier in the chapter, the principal focus is on the rules and processes that apply to 'national system' employers and employees. There is only a limited treatment of the State industrial systems, given that they now cover relatively few workers.