

# Who controls your contract?

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Ladies and gentlemen.

There is an Internet online newsletter called 'Workers Online'. It describes itself as 'the official journal of LaborNet, a union portal sponsored by the Labor Council of NSW in partnership with Social Change Online' and 'is recognized as a world-leader in union communications ... emailed to about 5,000 subscribers across the globe.'

Late last month, Workers Online ran an editorial in response to a ruling released by New South Wales' highest court (Fish v Solution 6, July 21 2004). The article began as follows:

## **Kill the Lawyers**

What's left of the HR Nicholls Society must be popping the champagne this week, with a NSW court ruling that sees the triumph of their 20-year battle to kill industrial relations and replace it with a 'rule of law'.

It's such a good editorial that I shall quote it at length.

That's the upshot of this week's ruling by the NSW Court of Appeal that employment contracts have become so complex that the Industrial Relations Commission no longer has the expertise to deal with them.

It is an argument bizarrely circular in its logic—it goes something like this.

The industrial relations jurisdiction was established to provide cheap, practical, negotiated settlements to workplace disputes free from the formal bonds of black letter law.

Industrial commissioners and advocates were traditionally practitioners rather than professionals, able to nut out conciliation by banging heads together and delivering an arbitrated outcome where necessary.

The system hummed along for the best part of 100 years delivering practical outcomes with bipartisan support until the neo-conservative ethos of union busting was imported into this country.

The prime attack weapon was the 'rule of law'—advocating for legislative change to the Trade Practices Act and corporations laws to shift employment and industrial matters out of the tribunals and into the courts.

The logic was venal, in tribunals the settlement was invariably a compromise, in the courts it was winner take all. And with laws in your favour and the greater legal firepower that the wealthier party brings to the table, the odds suddenly shifted in favour of the boss.

Workers Online goes on to explain the horrors of the Howard period, then says:

Thanks largely to the Carr Government, NSW tribunals were not emasculated but retained a place where justice could prevail over these power relations.

In fact the industrial jurisdiction has extended so that workers whose conditions were set by contract, but were really just employees, could also avoid costly court litigation.

It was coincidental that, on the day the NSW Court of Appeal released the ruling that so inflamed Workers Online, I had an article published in the *Australian Financial Review*.

In part, I said:

The key point about NSW is that IR legislation introduced by the Carr government does not regulate relationships between employers and employees. The legislative scope embraces 'work in an industry'. This simple definitional shift away from normal employment regulation to regulation of 'work' has turned the NSW Industrial Relations Commission into a powerful regulator of commercial transactions. The implications of this comparatively recent and radical shift are now only being understood as the NSW Commission tests its new powers...

The NSW Court of Appeal is unhappy. A surprise twist in the NSW legislation is that appeals against decisions of the full commission are not allowed.... The Supreme Court (has) stated it was 'troubled by the continued intrusion of the NSW IR Commission into commercial contracts'. The court also expressed 'grave doubts' as to the constitutional validity of denying people their right to appeal to the High Court of Australia.

In their ruling of 21<sup>st</sup> July, the NSW Court of Appeal denied the Industrial Relations Commission the jurisdiction to hear the case in question, stating that the Commission was largely comprised of judges from the specialist industrial bar and was an inappropriate forum for the dispute. It explained that

Few, if any, of the members of the commission have substantial experience of commerce or of commercial law

And

The defect in the jurisdiction of the commission is patent, plain or clear.

This brief story—comprising the tirade from Workers Online and the ruling of the NSW Court of Appeal—is not the end of, but rather a major flash point in, a protracted and hugely important social and economic battle being waged in Australia. In years to come, historians who choose to look at it will mark it as a defining point in the evolution of our society. It is a process in which members of the HR Nicholls Society have been observers and bit players. It is a process which has, as its centre, wholesale ‘cheating at Scrabble®’.

The pocket history is that, for some 20 years, Australasian labour regulators have been trying by legislative means to rope the commercial contract into their net. They failed in New Zealand. They succeeded in New South Wales and Queensland. They have had a little success in Victoria. They are trying in South Australia and attempting to do it via the back door in Western Australia. Legislatures are currently silent in Tasmania, although review is under way. The federal ALP intends to do so in their jurisdiction if they win office. NSW is the pack leader, with nearly a decade of legislative success and years of experimenting with implementation. But, it would appear, the highest court in NSW has just put the whole process on hold—perhaps even frozen its application for the moment.

The Scrabble® game and cheating involves a protracted but sophisticated technique of inventing new language, giving alien and contorted meaning to words with already established meaning, leveraging the contortions and new language in the public domain to create the impression of community will, and then plonking these words onto the legislative Scrabble® board to see what can be got through.

In the area of labour law, the most significant cheat Scrabble® words in play include

Dependent contractor, outworker, homeworker, employment deeming, triangular relationship, employee like, cascading contract. The list can go on.

The cheat words roll over into other areas and include

Corporate manslaughter, corporate social responsibility, triple bottom line, and others

My focus, clearly, is the labour area. In this forum and in many others, I have repeatedly sought to study and explain the cheating that is going on. Today, I want to cut to the chase and look at the core of the cheating. I then wish to enunciate the only way I think we can move forward to stop this foolish, self-delusional and socially and economically destructive legislative game.

To this end, Workers Online has provided a great service. Its editorial contains all the elements of not only *how* Australian legislatures are engaged in wholesale cheating at Scrabble®, but most importantly *why* they are cheating.

Workers Online summarizes the essential assumptions underpinning all labour regulation across the globe in the last 100 years thus:

- 1) The employment relationship is one of unequal power—employers are powerful; employees are powerless.

- 2) Employees must collectivise their efforts to redress this power imbalance.
- 3) Employers are so all-powerful that the state must institutionalize and give special monopoly authority to the manifestation of employee collectives, that is, unions.

These assumptions are the air of every breathing moment of the labour lawyer and academic community, and constitute the principal formula that focuses the minds of the human resources management community.

Within our professional economics community, there exists strong tensions between those who reject the idea of the inequality of power in employment, those who are ambivalent or confused, and those who side with the labour lawyers.

It is now universally accepted that, over the last 15 years or more, labour arrangements have entered a phase of change not seen in the previous 100 years. Workers Online reasons that this change is a con, a sham, a subterfuge designed by the bosses to reassert their position of power.

Their reasoning is that

- 1) Trickery by way of the law is being used to stop workers accessing the protections available to them. That is, that the law of contract is being used against workers.
- 2) The people who use this trickery—bosses, lawyers and judges—pushed by the neo-conservative politicians and their string-pullers, are immoral at best, evil at worst.
- 3) Legislatures must stop this legal trickery by rewriting law and imposing discipline on judges.

The headline ‘Kill the lawyers’ is a scream of frustration at having their rewriting of law usurped.

But, most importantly, what can be noticed from Workers Online is the passionate, religious-like genuineness of their belief. Let us put to one side the naked desire for old-fashioned rent-seeking which demands state monopoly privilege for the most conservative of institutions, the union movement. Let us also forget that the unions’ claim to be representative of all workers is wafer-thin and rejected by workers themselves.

Let us look, instead, at their central insistence that employment is an environment of unequal bargaining power. On the inequality of power, the passion, the commitment, the genuine belief in this as a fundamental truth cannot be denied and must be respected.

And it is on this single point—that is, on the perceptions of power—that the entire cheating game hinges. Assess this point accurately and every other item in the debate becomes clearer. And on this point we find that all sides to the debate cheat at Scrabble®.

What I am about to say next, I have dared occasionally to say in forums of persons who are supposed to be on the employer side of the debate—including HR Nicholls gatherings. On every previous occasion that I have uttered what I am about to utter, I have raised ire, annoyance, resentment, anger and denial from a significant sector of the audience. Lawyers write me off, CEOs choose to ignore me, human resource managers think I’m ignorant and economists think I’m strange and lack credibility. I normally lose the attention of large parts of the audience because of a deep-seated, negative, emotional response.

The fact is that Workers Online is correct. Employment is a contract of inequality in bargaining power.

The employer side of the debate cheats at Scrabble® by not accepting this single truth. And the employers' cheating is the principal explanation as to why policy resolution is not being achieved, why the cheaters on the other side get away with what they do, and why economic development is more constrained than it needs to be.

The facts are clear for anyone who chooses to look.

Every superior court legal ruling that considers the contract of employment looks for a string of elements which, when tied together, identify one single thing: does the employer have the right to control the employee? And control denotes power.

At Independent Contractors of Australia we have identified some 22 separate elements from which the courts will choose to test if an employment contract exists. They include the traditional elements of intention, withholding of money for holidays and sickness, delegation, working for a result, capacity to create goodwill, and so on.

What surprises me is that, within the legal, labour economics and regulation fraternity, these 'template' elements are treated as if they are disparate, disconnected and confusing. As a result, they assert that the employment contract is ill-defined. But when these elements are looked at and studied carefully, what emerges is a clear template directed toward finding one thing—is there control?

For example:

- 1) The withholding of wages for holidays and sickness is a control and power function. Employees have income withheld from them so that the managerial class can use the money withheld as the bargaining tool for the organization of non-work periods at the convenience and discretion of the managerial class. This managerial power is thought necessary for the efficient operation of the firm, certainly on the Taylorist model of the firm.
- 2) The inability of employees to create goodwill when they work is a control and power function. The value of a firm is seen to lie substantially in the goodwill it creates around its activities. The function of employees, it is reasoned, is to spend their time, effort, energy and, most importantly, their creativity in the building of goodwill for the firm—goodwill which is owned by the firm. Employees are not allowed to garnish goodwill for themselves because it diminishes that collective goodwill which is the property of the firm. Or at least that's the Taylorist-modelled thinking.
- 3) The inability of an employee to delegate is a control and power function. An employee is not allowed to have someone else do their job in their place. Power of delegation is exclusively vested in the managerial class to ensure managerial control of the firm.

Each of the 22 elements can be discussed in this way to show how the template is used by the courts to look for one thing—control, and hence power.

In this setting, it is an unavoidable truth that that the employment contract is an evolved derivation of the master–servant relationship, and in the current context it is a contract that remains closer to master–servant than is often admitted. Master-servant embodied a higher level of control than the current employment contract, but control and power remain the issue

The words of the great nineteenth-century American jurist Oliver Wendell Holmes remain closest to the truth, even when he described the employment contract this way in 1892:

There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech, as well as idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered to him.

Holmes’s words have not dated. No matter how much the convoluted processes of 20<sup>th</sup> Century legislative activism or common law evolution may pretend or appear to alter this legal reality, Holmes’s words still describe the core fact of the employment contract and the expectations of it constituted within the law.

Workers Online is correct.

How do we know this? Quite simply, the judiciary almost daily instructs the community through their published rulings on the law of employment contract.

Yes, the very black letter lawyers that Workers Online wishes (metaphorically) to kill concur with Workers Online.

Yet I find it incredible that if one talks to most practising lawyers, they will state that the employment contract is unclear. Talk to almost any economist and complete ignorance of the ABCs of the contract of employment is nearly always displayed. Yet these are the professions with most influence over parliamentary approaches to labour regulation. It is ignorance of the simple fact that power lies at the heart of the contract of employment, which is the primary cause of our legislatures cheating at Scrabble®.

However, note that my remarks to date have been specifically about the facts of the employment contract. The word ‘contract’ is the critical item.

Now I need to paint the picture of the employment relationship. Because, then, a different picture emerges. ‘Contract’ and ‘relationship’ are different and understanding the difference leads us to understand how Scrabble®cheating has come about.

Simple, basic contract law teaches us that a relationship does not constitute a contract. For a contract to exist, there must be a relationship, but that relationship must also have the key

elements of intent, offer, clear terms, consideration and acceptance. Take out any one of those elements and no contract exists, although the relationship may continue.

When the important difference between contract and relationship is understood, the confusion that exists in the labour regulation debate becomes clearer.

Economists focus on the employment relationship. They assert that there is no predetermined or systemic power imbalance in the employment relationship. They are correct. But a finding at law on employment is a finding of a contract, not a relationship. And regulation of labour is a process of legal regulation of contracts, not regulation of relationships. But economists invariably fail to recognize this.

Pro free-market economists tend to make the fatal error of engaging in the public policy debate while missing the point that when they talk about labour regulation they must specifically consider the employment contract. Instead, they wax lyrical about the behaviour of people in economic relationships, thinking that this is the same as employment contracts. Consequently, their musings come to be ignored by legislatures.

It is this failure to play Scrabble® correctly, to distinguish between contract and relationship, which prevents economists and others within the 'employer' camp from understanding the issues, winning the debate and moving towards better regulatory structures for all parties.

I'll repeat my point. It is vital to understand that on labour issues that legislatures and the common law regulate contracts, not relationships.

I will qualify that by noting that in areas of equal opportunity, anti-discrimination and occupational health and safety, regulations embrace attempts to dictate relationships but get themselves into terrible difficulty as a result. My comments today however do not stretch into those two areas but are confined to the core area of economic labour regulation described generically as industrial relations.

And, for emphasis, I'll repeat my point again. Appreciate and openly accept the difference between contract and relationship, and that the employment contract is one of control and power, and we can move forward.

But I want to add another element into the Scrabble® mix. On this additional element, economists and the employer camp are not cheating, but our friends at Workers Online and their followers are.

The commercial contract is a very different contract to the employment contract. The commercial contract is a contract of equality. It is a contract in which all parties have equal rights to control the contract and in which no-one has control over another. This does not mean that the commercial relationship does not have elements of inequality of control, or that bargaining power inequalities do not exist. In fact, they always will. The vagaries of human nature are such that nothing in human relationships is ever equal. But in the commercial contract, equality before the law is assured.

The evidence of the equality of the commercial contract is the same evidence that demonstrates the inequality of the employment contract. And for the same reasons that the employer camp rejects the fact of the employment contract, the Workers Online of the world seem unable to accept, and refuse to fathom, the equality of the commercial contract.

In my personal life's choices, I reject the employment contract. I am not alone. Some 28 per cent of the Australian private-sector workforce earn their livelihood without recourse to the employment contract. Some people are consciously and intellectually aware of why they are not 'employed'. Most operate on instinct, an instinct perhaps surprisingly well enunciated by one of the 20<sup>th</sup> Century's greatest industrialists.

John Paul Getty once said:

When human beings relinquish their individuality and identity of their own volition, they are also relinquishing their claim to being human.

For those of us who work without the employment contract, Getty's words form the essence of the decision. To be on an employment contract is to relinquish individuality and identity to the greater good of a firm and to become part of a firm.

The commercial contract enables humans to retain their individuality, identity and their humanity and simply to sell their services to the firm. The firm can then do what it likes.

I will not today explore this area further because it involves a fundamental rethink about the nature of the firm, how an economy operates (including considerations of issues such as wage-induced inflation), and a very fundamental re-conceptualisation of commercial regulation in a free market economy. They are issues to be touched on in my developing book.

But when Workers Online and its fellow travellers induce legislatures to cheat at Scrabble<sup>®</sup> and to create legislation the likes of which we have witnessed in NSW and Queensland (and which has been attempted or is being attempted in other States), Workers Online is the instigator of inequality, not the protector of equality. To destroy the commercial contract by legislative means or to give tribunals the power at will to treat and regulate a commercial contract as if it were an employment contract, is to destroy a primary cornerstone of an equitable and fair society.

Workers Online does not understand this and, consequently, gravely misunderstands the decision of the NSW Court of Appeal. In jurisdictionally pulling the NSW IR Court back toward its traditional employment contract matters, the Court was not acting in cahoots with evil employers seeking to usurp the rights of workers. The Court was moving to protect the core contract that underpins economic equality in the community and upon which economic transactions and our economic prosperity are founded. In their cheating at Scrabble<sup>®</sup>, Workers Online poses the gravest and greatest of threats to economic equality.

The HR Nicholls Society exists for one simple reason. It is a network of people who hold to the view that current labour regulation regimes suppress the economic creativity of

Australians. As a result, our nation is less wealthy than it should be, the affliction of unemployment touches vastly more people than it should, and economic wealth is less equitably distributed than should be the case. And the disease of poor labour regulation is global, not just local.

But if, in our quest, we consistently fail to deal with truths, we will never successfully make our points and see the changes that Australia sorely needs. We must stop cheating at Scrabble® and accept the legal fact of control and power inequality that lies at the heart of the employment contract. If we do that, we can advance the debate in a vastly more constructive way.