p: Suite 303
97 Pacific Highway
North Sydney 2060

t: (02) 9231 2088
m: 0409 824 228

e: dan@firstir.com.au
w: www.firstir.com.au

Fair Work Act – Flaws and Fairness

This conference celebrates 100 years of Ports Australia and its predecessors. It is a good opportunity to take a look at, and think about what has changed in employment in the last 100 years and whether our approach to regulating employment today is still as relevant as the approach of 100 years ago.

The system is broken.

The Fair Work Act, and its predecessors, the Workplace Relations Act, the Industrial Relations Act and the Conciliation and Arbitration Act were and are designed to regulate "employment". These pieces of legislation try not to intrude on commercial relationships too much.

'Employment' as a concept has fractured and we are essentially chasing ghosts.

We have moved in theory, in the last 30 years from a system of compulsory conciliation and arbitration with a mixture of minimum rates and paid rate instruments that regulate *employment* at the level of the industry, to a system that moved to minimum national standards and industrial regulation at the level of the firm.

In the real world, we have moved from regulating employment State by State and industry by industry to a system with national standards, industry minimums and optional regulation at the level of the firm.

We are also trying to regulate emerging working relationships in the same way that we regulate the old working relationships.

The question for the future really is whether or not these emerging working relationships are really employment but disguised. Sham contracting, dependent contracting, third party solutions, the sharing economy, out sourcing are all expressions of new working relationships that may, or may not be employment.

What is pretty clear, is that the working relationships are increasing the stress on the regulatory regime. This stress is also impacting on the players within the system and their special status within the system.

Wider than simply changes to working arrangements, at the same time we have chosen to move from a system of taxation based overwhelmingly on income, itself based on the concept of employment, to a system based on a mixture of income and consumption.

Our transfer payments have moved from a universal system, to a needs based (and asset tested) system and now to a general system where qualification for a transfer payment is not necessarily based on need, rather it is based on membership of a class or trope.

In response to all of this, *people* have opted to arrange their own circumstances to fit their own needs. They do this by focusing on the outcomes that they are after, not based on a regulatory regime which is imposed on them.

Some people have opted to manage employment and transfer payments to maximise income and time.

Some people have opted to move outside of employment and work for themselves offering services to the world at large as service providers. Either as individuals or as some form of corporation.

Some people have opted to continue in employment, as employees.

The fracturing of consumer/employee/service provider divides has led to inevitable conflict. The conflict between the old, large scale sectoral regime with distinct roles for 'employers' 'employees' and 'consumers' compared with the newer economy made up in part of the sharing economy 'uber' 'air bnb' 'goget' which melds the distinction between consumer and service provider, with the service ultimately being provided not by an employee but by someone independent of a standard employment relationship.

Employees, and their representatives are concerned about service providers stealing their jobs.

Businesses (employers) often share the same concern that they are losing their markets to new entrants or disruptors.

Governments are concerned with service providers disguising income and hence a narrowing of the taxation base.

Governments are also concerned with the increasing costs of providing transfer payments to larger and more diverse groups in the pursuit of maintaining power.

The regulatory response to all this, with respect to employment, has also been fractured and has imposed additional costs and uncertainties. The regulatory response has largely been dictated by considerations as to what is the 'right' or 'correct' mode for people to work and earn a living, rather than regulating the living that people are making.

That is, the regulatory response has largely been about shoe horning different solutions into a tired and cumbersome framework that does not recognise the actual or real relationships.

The regulatory response, including the Fair Work Act prefers to deem than to adapt. That is why it has failed.

Some example of this include deeming provisions that treat an independent contractor as an employee for some issues (workers' compensation or superannuation) and as an employee for others. Making it an offence to 'misrepresent' an employment relationship as something else.

The various inquiries into 'labour hire' in various States (and Countries) with the intention of requiring direct engagement at all costs. Regardless of the interests of the people who need the work performed and the people who perform the work. The actual or real participants are locked out of any discussion as being mere whispers pushing a vested interest. The people setting the regulation are very tetchy about these modern arrangements. They might not know a lot about art but they know what they like and they know their 3 year old can paint better than that.

They take the same narrow focus as to what 'working relationships' should look like rather than looking at what is working in a working relationship. They deplore the fracturing of the bedrock of society – direct, secure, full-time employment.

Some of the examples of this shoe horning approach include;

The discussion papers about the iniquity of 'dependent' contracting, with every stake holder other than the participants themselves.

The development of the notion of 'joint employment' to cover outside labour hire arrangements and deeming the site controller as an employer for all aspects of the relationship.

The application of awards and industrial instruments to genuine contractors, such as outworkers.

The introduction of the Road Safety Remuneration Tribunal to regulate small business transport operators on the basis that the more money I get paid, the safer I will be. That must be because the more I have to charge, the less work I will get.

The explosion in 'ABN' contractors in the services industries such as cleaning and security. This can only be seen as a response to the 'outsourcing' of these former positions to outside agencies, who can't make a quid doing it through the employment relationship. Who wants to pay a bouncer more than a barman. One makes you money, the other doesn't.

The use of partnership arrangements on tugs and in airlines.

The widening of the Australian Employment law framework to capture non-Australian flagged vessels.

The demonization of non-traditional employment models.

Casual employment is bad. Part-time employment is not great, but it is better than casual employment. Fixed term employment is also a tool of exploitation. The only employment that is good employment is full-time permanent employment with the employee only working 9-5 in the employer's premises, though of course not all full time permanent is equal.

Indirect employment, such as labour hire, whether it is outsourced or clever accounting is very very bad, regardless of whether or not it is full-time or on any other basis.

Out-sourcing in general, regardless of whether it is outsourcing overseas or across the street is to be decried.

The evidence that the regulatory system is broken can be found with just a cursory view.

Where people, the unit of regulation, are making choices that put themselves outside of in opposition to regulation is a pretty clear indicator that the regulation is failing to meet its core objective. The regulatory response is deeming, then criminalising and punishing people who are trying to make their way in the world.

The regulatory inertia in trying to preserve some golden age of full direct employment in large firms only results in increasing costs at every point, for every transaction and making unlawful what is otherwise a perfectly normal and legitimate way of moving through life.

So what do we do?

Regulation is supposed to serve the interests of the broader community. It is supposed to be about ensuring that all participants can do so on the same footing and is an element of the rule of law. That ancient principle which holds Masters as accountable as Servants.

It is time to recognise, and accept that working doesn't just mean employment. That people making who are seeking to make a living are doing so on the basis, generally, of pursuing their own interest and that the regulatory role should be about the recognition of differing systems and methods of engagement, rather than a fixation on a classical model.