

**Talk to IPA on Trades Practices Act and IR** by Ron Callus, Director acirrt, University of Sydney [www.acirrt.com](http://www.acirrt.com)

Why labour law is an anathema to free market supporters:

*“The principal purpose of labour law, then is to regulate, to support and to restrain the power of management and the power of organised labour” (Kahn-Freund, 1972)*

Thank you for the invitation Though clearly I’m the odd ball or wild card on this program I’m open to new ideas and to be challenged and I trust you are as well. Before I begin I’d like to briefly give some background to acirrt, the organisation that I have been Director of for the past 13 years. We were established in 1989 as a National Key Centre in Industrial Relations initially being provided with seed funding from the ARC, we are now self funding. At one time acirrt actually stood for the Aust centre for IR and Training. We no longer use that title. IR is not a very marketable term, after all people no longer have automobiles, radiograms or television receivers they buy cars, walkmans and flat screens. So now we have a descriptor under the acirrt title that says research training and information services on the world of work and that pretty much tells you our area of interest and expertise. The bulk of our clients are actually private sector employers and current public sector clients include the Reserve Bank of Australia, Sydney Water and

the Office of the Employment Advocate the organisation that administers AWAs. We also do research for unions as varied as the ACTU, AMWU and AWU. If there is an IR club I guess we are part of it, but who isn't perhaps the IPA is just part of the disgruntled membership that wants to take over the club and change the rules and direction. Apart from pretty traditional consultancy type of work for clients such as employee surveys, etc we also over the years have done policy research, particularly looking at the changing nature of the regulatory system and the dramatic changes to the labour market that have taken place. There are two principles that drive our policy interest one is we have always believed that we have a role in policy debates to debunk or challenge myths and the second is to put out new ideas and options out there. I suspect these are exactly the same vision statements of the IPA, perhaps Ken we have more in common than you think, though I am pretty confident that our vision of how the world of work should or should not be regulated is quite different and that a healthy starting point for any discussion.

Today's seminar is about further radical reforms to our laws governing aspects of employment relations in Australia. It's interesting to reflect on the course of reform debate when it comes

to employment matters in Australia and how the debate has matured or perhaps just become more honest. When the push to reform Australian IR system started over twenty years ago the language was one of ensuring that the labour market could operate more freely to minimise the interference by third parties and to allow competitive forces to determine market outcomes. To this end the talk was all about deregulating the Australian labour market. Well of course that always was little more than a slogan a marketing trick by the reformers; in reality of course it was nonsense. There is no such thing as an unregulated labour market at least not in civilised market economies. Rules and rule making are an integral part of any effectively operating labour market. Can you imagine an organisation having no rules governing the employment and conduct of its employees? The reform movement was really about who should be able to make the rules. Since the 1980's it's been about moving from a system where the rules are made or heavily influenced by a third party eg AIRC to where many of the rules are made by the organisation unilaterally. Similarly there has been a lot of mythmaking about what enterprise bargaining was really about but more of that later. So this seminar is clearly about regulating the conduct or behaviour of the players in our system of workplace, employee relations or

industrial relations or whatever term you are comfortable with.

What's novel is the idea that that the vehicle for this rule making should be the Trade Practices Act rather than the conventional wisdom that sees labour laws, being the most appropriate vehicle.

Rules and rule making is of course critical to any market based system and is critical if we have a system that is about contracts, be they employment or commercial in nature. The rule of law is there amongst other things to protect some against the uncompetitive or coercive or whatever behaviour of others when it comes to TPA or more generally enforce the terms of the contract or provide some remedy when the terms of the contract have been broken by one side. Indeed the law of the jungle has no place in a well operating a sophisticated market system. A free market system does not ensure that there will be no bad, uncivil or unfair behaviour. Markets do nothing to correct imbalances of power, certainly not in the short to medium term, when most of the damage is done to those with little or no power. So we don't allow markets to operate without interference. Market don't follow the text book they don't necessarily operate effectively when left to their own devices, they certainly don't necessarily operate fairly.

Professor Keith Hancock from Flinders University and of course a former Snr Dep President of the AIRC put it as follows a few years ago;

“The results of competition are not necessarily to be admired. Amrtya Sen a Nobel Laureate in Economics has said that the prices generated by competitive market may be both perfectly efficient and perfectly disgusting. Low wages, long hours, dangerous working conditions and the employment of children can be unlovely despite being the outcome of competitive processes”.

Certainly my reading of previous seminars which are exploring the desirability of beefing up the TPA powers with respect to industrial issues that now lie beyond its reach there is a sense of those that favour this approach seek some redress in the perceived conduct of those that are seen to act unfairly or to put it more fairly to act uncompetitive.

I must say a quick review of the literature does not find much support for regulating labour relations through the TPA. In fact as you know in 1999 The National Competition Council report examined whether the exemptions in the TPA that remove from

reach arrangements between employers and employees that relate to employment conditions should be retained. If not then of course this would allow the TPA to extend into dealing with IR matters as the IPA advocates. The recommendations were unequivocal the Council recommending the exemptions be retained the reasons given included the following:

- The objective of the exemption is to excise the labour market from the goods and services markets for the purposes of applying competition law. Thereby supporting a public policy, observed both nationally and internationally those labour markets are treated differently to markets for goods and non-labour services. The report cites the submission of the Dept of Productivity and Labour Relations in WA which says as follows

“It is a point of IR and legal history both in Aust and internationally that contracts of employment and their negotiation are dealt with in a way distinct from normal contracts for goods and services. This difference is a reflection of a variety of factors including

- (a) the imbalance in bargaining power between an employer and employee and
- (b) the social costs of allowing labour to be determined solely on the basis of competitive pressures

➤ The report then goes on to state that the exemptions have a number of clear benefits such as :

- Maintaining the primacy of the industrial relations framework in labour relations
- Compliance with Australia's ILO treaty obligations
- The relative certainty provided by the exemption to employment agreements and arrangements

Similar exemptions exist in countries such as the USA, Canada, NZ and the UK

It should finally be noted that the Council received 27 submissions commenting on the exemption provisions in the TPA. All submitters supported the retention of some form of exemption

with ACCI DOPLAR and DEWRSB suggesting that while the exemption should remain the Council should investigate whether the mechanism for revocation of the exemption in certain circumstances should be put in place

Let me move on. There are a few truisms when it comes to employee relations or industrial relations and these remain the case twenty years after the system has been partially reformed.

First, the debate is still about the balance of power between employer interests and those of unions. There are a range of reasons I suspect that some people want to beef up the TPA. In part this is a result of experiences and a perception that the tactics of unions in using secondary boycotts, or in trying to enforce pattern bargaining or whatever are acting unfairly and in a way that will shift the balance of power in so called negotiations in the unions favour. It follows this will lead to outcomes that will be more costly or less efficient than if the employer could decide purely in terms of what's in their best interest. The perception of unfairness in IR is a two way street. Unions bleat unfair when employers in a dispute seek to break a strike and take back power by seeking

alternate sources of goods or manpower through the use of contractors or labour hire workers. It is therefore not surprising that over the past ten years or so employers have very determinedly and in many cases very successfully, sought to wrestle back the frontiers of control. No matter how many studies unions might proffer that show that unionised workplaces can produce as good or even more productive outcomes than non unionised workplaces I have yet to meet a CEO that in all honesty would prefer to have to deal with a union than have no union presence in their organisation. There is not going to be any consensus about what actions are fair by the other party. In short any strategy or action that an employer does that undermines the power of the union is unfair and anything that a union does that constrains or imposes hardship on an employer or reduces their power is unfair. There will never be any agreement on this and the only certainty is that the balance of power does swing over time and unfortunately the more the power pendulum is seen to have swung too far in favour of the other side the more vindictive and acrimonious the powerless become when it's their turn in the power seat.

Others have already indicated how the TPA can be used by aggrieved employees or potential employees who have been

misled about aspects of their job or commission they might expect etc. This development or use of the TPA effectively casts the employee as consumer. There are of course fundamental differences in the behaviours, actions, priorities, and needs of the citizen as employee and the citizen as consumer. We recognise that a breakdown in the marriage contract is not a commercial contract matter and deal with this through specialised Family Law so it is with individual and more particular collective relationships to do with work matters we deal with this through relevant and specialist legislation.

I now want to look at the misuse of the TPA when it comes to dealing with a changing labour market. The growth of union activities that are aimed at labour hire firms or contractors that are being used by the host organisation simply reflects the changing nature of the work engagements in Australia. Employers that outsource work that was previously undertaken in-house could hardly be surprised when unions target the agency or labour hire firms. Clearly if successful that will lead to higher costs in time being passed on to the host organisation that had seen outsourcing as a cost effective strategy. All of this is of course is not a major concern for the union.

With the growth of forms of engagement that sever the traditional employment contract so unions will look for new ways of exercising power. I suspect there is a view by advocates of extending the reach of the TPA that as the traditional contract of service becomes less common and the contract for service turns the employment relationship into a commercial relationship so commercial law principles should be the dominant regulatory instrument. Clearly currently there is a tussle between the NSW IRC and its interpretation of S 106 and higher courts about the borders between industrial and commercial regulation. I suspect this form of turf war is not actually going to resolve what is a very important issue and merely reflects the fact that the labour market is being radically transformed here and Overseas in such a fundamental way that our traditional legal models are completely ill suited to the realities of the new world of work that is emerging.

While the primacy of the employment contract is being tested labour law still starts with establishing whether a worker is an employee. If not it's over to the commercial law field to deal with relationship and that's where unions and what they do are so out of

place. Of course from a commercial viewpoint unions have no legitimate role to play. So what is the scale of these changes?

The first is the growth of the contractor, here we are not talking about the self employed business person that offers a service to a range of clients eg plumbers, electricians, suburban lawyers etc I'm really taking about workers who are classified the Aust bureau of Statistics as dependent contractors. For all intent and purposes they are working for only one client, they work under direction and the control of their one client. They are employees in all ways except their legal and tax status if that of contractor. For the most part they lie outside the jurisdiction of the industrial tribunals and courts, except again in NSW and now I think Qld they can be effectively deemed to be employees and their contract set aside or altered. Allied to this has been the creative corporate restructuring by organisations that in part have the effect of removing any industrial responsibility for people who they once employed again our existing laws were not designed to deal with this new reality and the courts all the way to the high court spend too much time trying to make sense of these new structures and the relationships that have been recast. On a day to day basis these restructured workers are doing the same thing for the same boss. Some don't

even realise they are no longer employed by the organisation that hired them.

The other side of the contractors story is the growth in the use of agency workers or labour hire workers some who are contractors but many who are employees employed by the labour hire firm or agency. Again some of these employees work for different host organisations every day and some are virtually permanently outplaced to the host organisation. That does blur the responsibilities of the labour hire and host organisation to these workers and increasingly the host employer can't simply abrogate their responsibilities to people that are working with the host organisation to produce a product or provide a service, most obviously this is the case now with Occupational health and safety. Organisations that have contractors on site have the same duty of care to those contractors as they do to their own direct employees.

You can see what a regulatory minefield this dramatically varied and different forms of worker engagement can be. I don't think it as simple as saying contractors of the type I've described are engaged in a commercial relationship and the TPA should apply while employees should be covered by the workplace relations act

## IANS typology of typed of relationships

The other quite different change in employment that has been dramatic has been the growth of the casual employee. The issues are quite different to the one of contractors as clearly they are employees. But the terms and conditions of their engagement are quite different to those of other employees. Traditionally it was easy to identify a casual they were the ones that got no holiday or sick pay and instead got compensated by having a loading which invariably gave them a higher hourly rate of pay than regular employees. But today's labour market has created a new style of casual employee. Many of these so called casuals are not what we would have regarded as casuals decades ago those employees brought in on a temporary basis perhaps seasonally as per fruit picking or when there is a spike in business activity or someone is away on leave and need to be covered. We now have a sizeable proportion of so called casuals who have been given the ridiculous label of permanent casuals and some of these get holidays and sick days

Allied to the rise of casuals has been the dramatic rise in part-time employment some of this is supply driven with a significant proportion of women re-entering the workforce after having children but preferring to work part-time (i.e. less than 35 hours a week) some of it is demand driven and reflects the need of businesses particularly in the service sector accommodation, restaurants and retail industry where there are needs for different levels of staffing at different times of the week

The real problem is that our system continues to look for solution to these new labour market challenges blinkered by a model of work that really continues to inform the way we regulate work that is a view of a worker as a full-time male, working 5 days a week, 38 hours and in most cases Monday to Friday, for one employer on an ongoing secure basis. Increasingly that model on which our regulatory system is based is becoming less real We actually have a very dynamic labour market lots of churning, people working all sorts of hours on any day, most households have two working adults that need to balance their working time arrangements so they can have time together

I would like to say some words about enterprise bargaining and pattern bargaining in particular. Here more than elsewhere there is a strong belief by some that in employment matters employers act competitively or if they don't they should and they don't because they have no choice but to collude under threat of union action if they don't accede to unions demand. Just as employee as consumer is an inappropriate analogy so when it comes to the aspects of employment relations is it incorrect to see efficiencies being achieved by employers competing. Cooperation between employers often brings them better, cost effective and more efficient outcomes than competition. This manifests in better employment relations and higher productivity and better results. Cooperation is not collusion; it makes labour markets more efficient.

Who initiates the pattern bargaining is a key issue Gerard Boyce at last years IPS seminar how do you get a pattern bargaining agreement across a whole industry? Answer you don't bargain at all you don't negotiate at all the "the outcome here is take it or leave it? In fact this is exactly what happens when an employee takes up employment. Employees don't choose what conditions they work under (except senior managers or employees in short

supply). Employers don't offer employees the choice of an award, a certified agreement or an AWA. For the vast majority of employees conditions of employment are not negotiable.

Finally, it is a market fact that the overwhelming majority of so called pattern outcomes are not the result of unions demanding similar conditions for members employed by different employers in the industry. The similarity of wages and conditions in most industries is often the outcome of employers paying the same as other employers. Employers want to be competitive in what they pay, what this means in reality is that most employers pay pretty much the same as each their competitors, reducing wages is not a realistic alternative for achieving a competitive edge, as employers realise that paying less means they will attract less qualified and appropriate staff.

The Trade Practices Act is not the appropriate means of ensuring either fairness or efficiency in labour market outcomes. The employment relationship is unique and equating it to a commercial contract will only create greater inefficiencies and poor outcomes for both employers and most workers.