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Articles

In the last 30–40 years, the courts in a number of jurisdictions have revised their approach in cases involving the employment contract and have recognised that regard should be had to key attributes such as disparity in bargaining power. Manifestations of this have included developments in the law of implied terms and contractual classification.

The outlook of the Australian courts had appeared to be reasonably well aligned to this direction of travel but since the decision in the mutual trust and confidence case of *Commonwealth Bank of Australia v Barker* (*Barker*), the High Court of Australia has reverted to a more traditional stance. In decisions subsequent to *Barker*, it has become increasingly evident that the employment contract will be treated no differently to any other type of contractual relationship. Moreover, a conservative approach will be taken to the exposition and application of contractual doctrine in general.

This article seeks to review those developments and to assess what they mean for the evolution of the employment contract in Australia.

This article highlights opportunities to amend the National Employment Standards (NES) in order to meet the new Fair Work Act 2009 (Cth) objective of promoting secure work. We set the scene by summarising the concept of insecure work, its link to weaknesses in labour regulation, and the scope and peculiarities of insecure work in Australia. We argue that statutory regulation for minimum labour standards in the NES provides a good platform for innovative policy proposals. We detail two proposals that can supplement the ideas currently in circulation and make useful contributions to addressing the important problem of insecure work in Australia. Our first proposal applies to the difficult but pressing challenge of casual work and its inferior rights and entitlements. We propose extending rights to paid personal and annual leave to casual employees. Our second proposal is more encompassing. We propose replacing current employer obligations under the NES to provide generic 'information statements' to new employees with a new obligation, modelled on requirements in most other industrialised societies, to provide a written 'statement of terms and conditions', tailored to the employment relationship between an employer and a particular employee.

There are increasing expectations that Australian tertiary graduates will have developed practical 'real-world' skills through participation in work experience, internships or work-integrated learning (WIL). Many WIL opportunities are unpaid, often in an attempt to ensure the requirements of the 'vocational placement' exception from employment status in the Fair Work Act 2009 (Cth) are satisfied, or to try and avoid creating a contract of employment at common law. However, for a range of reasons (for example, altruistic, recruitment, reputational) a variety of stakeholders choose to provide practical and/or monetary support to tertiary students engaging in WIL. This support may be provided through bursaries, scholarships, or stipends (collectively, WIL studentships). However, if improperly designed or implemented, WIL studentships can have inadvertent legal consequences. This can include constituting consideration which contributes to the formation of a common law contract of employment or being considered remuneration which means the vocational placement exception in the Fair Work Act will not apply to the WIL placement. Ironically, this may obviate the legal reasons which encourage WIL to be unpaid. This article considers the labour law risks associated with WIL studentships. It then situates these risks in context, by presenting novel empirical research on the design of WIL studentships in Australia, and the extent of awareness among university staff of the legal risks associated with WIL studentships. Together, this analysis provides original insights into the degree of labour law risk associated with WIL studentships in Australia, how that risk is being managed, and strategies that can be used to minimise the chance of unintended legal outcomes.

Case Note

Age discrimination in Australia remains prevalent and pervasive. However, age discrimination law has led to few cases at the federal level, with claimants struggling to establish a successful claim. *Gutierrez v MUR Shipping Australia Pty Ltd*, the first successful employment case handed down under the Age Discrimination Act 2004 (Cth), promises to fundamentally disrupt this status quo. This article considers the way Gutierrez might reshape the age discrimination law landscape, acting as a lightning rod case for claimants and helping to re-balance the costs of claiming. It also considers the impact of costs orders in the federal discrimination jurisdiction. I argue that Gutierrez should prompt us all to challenge our assumptions and stereotypes about age, ageing and the utility of age discrimination law.