

Thesis abstract

Deference and intervention in the characterisation of work contracts

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This thesis examines judicial approaches to the characterisation of work contracts in Australia. Important consequences flow from the characterisation of a contract as one of employment. A significant number of labour statutes bestow rights and protections upon employees only, thereby excluding other types of workers, such as independent contractors, from their coverage. Employing entities seeking to avoid statutory labour obligations use various contractual techniques to disguise employees as independent contractors. In some cases, courts have afforded deference to these contractual arrangements. In other cases, courts have adopted an interventionist approach, disregarding or according limited weight to the terms of the written contract, and focusing instead on the underlying substance of the relationship. There is, however, an absence of clarity as to the conceptual and doctrinal justifications for such intervention, resulting in judicial oscillations between deference and intervention.

This thesis argues that Australian courts should adopt the interventionist approach to the characterisation of work contracts. It presents the conceptual and doctrinal justifications for the interventionist approach and constructs a two-stage analytical framework for the application of this approach by the courts. In the course of elucidating and defending the interventionist approach to characterisation, this thesis addresses

broader conceptual questions concerning the distinction between formalism and substantivism in common law adjudication, the interaction of common law and statute, and the normative tensions that arise when the norms of public regulation are channelled through the vehicle of private law. The thesis focuses primarily on Australian law, though it also draws upon the law of the United Kingdom, United States and Canada, where relevant.

The increasing diversity of work arrangements in the modern economy, fuelled in part by the emergence of the gig economy in recent years, has placed strains upon the common law's architecture for identifying the beneficiary of labour law's protections. This thesis seeks to make a contribution to the important task of reconstructing that architecture and consolidating its conceptual and doctrinal foundations. The thesis takes the form of a thesis by compilation, comprising an integrative chapter and seven sole-authored peer-reviewed journal articles.

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