

**EMPLOYMENT AND
INDUSTRIAL RELATIONS
LAW SUMMARY**



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Sample

Topic 1: The Source of Labour Law

There are a variety of ways in which people may 'work' and hence, be regulated by the broad framework of employment and industrial relations law. Work may be defined in terms of both 'productive labour' that produces commercial wealth, and 'reproductive labour' that produces and allows other people to engage in productive labour.¹

The context of industrial relations law is made up of economic, social and cultural factors. In addition, the political context of the law of work is informed by the nation state acting as a key player in regulating various forms of work at local, national and international levels. Through work, people develop a relationship of interdependence with society, and form groups with collective opinions on issues of work to be regulated.

1.1 Labour Law Theories

1.1.1 Theory 1 (Left wing) – The power imbalance

Otto Kahn-Freund: Labour and the Law

"It is the theory of English law that a contract is a freely concluded agreement. The norm postulates an exchange of offer and acceptance. Precisely this legal institution however has been put to the service of monopoly. The monopolist and his client are parties to a 'contract.' A passenger who takes a railway ticket 'accepts' the terms offered by the company...Conditions by which a monopolist excludes or limits his liabilities are 'deemed' to have been freely accepted if reasonable notice was given to the other party eg...'for conditions see back.'...The customer has assented even if he is blind."

Kahn-Freund believed the contract for employment was merely a submission by the employee to the predetermined terms and conditions which the employer chose. Therefore, the contract for employment was a farce due to the power imbalance between the employer and employee – Result = take it or leave it scenario. His position represents the prevailing theory in Australia during 1900s – 1970s, formation of trade unions to temper the strength of employers. Accordingly, he argued the law should step-in to protect employees and reduce the power and influence of employers.

1.1.2 Theory 2 (Right wing) – The free market is the best protection for both workers and business

Hayek: The Constitution of Liberty

¹ R Owens, J Riley and J Murray, *The Law of Work* (2nd ed, 2011), [1.1.1].

“Freedom is seriously threatened today by the tendency of the employed majority to impose upon the rest their standards and views of life...Whoever desires a regular income for which he sells his labour must devote his working hours to the immediate tasks which are determined for him by others...the risk of sacrifice in giving up his job may often be so great as to make him continue in it, even though he intensely dislikes it...”

Hayek disagreed with the views of Otto Kahn-Freund. The themes woven through his work are: individualism, freedom, private ownership and the rule of law (as opposed to the pursuit of social goals by Government). Trade unions were viewed as coercive and large governments as arbitrary (and therefore undesirable).

Accordingly, Hayek believed the growth of an advanced society was only possible through individual freedom. The individual must be able to use their own talents and build their own property. The answer for individual suffering is not for the government to intervene on their behalf. Likewise, trade unions, which pursue industrial ends, were considered coercive and ultimately pushed labour costs so high as to cost jobs. The purpose of a trade union, according to Hayek, should be little more than a friendly society – assisting employees in choosing between jobs offered on the employer’s terms. Employers are, after all, actually the supporters of working people – without their growth and wealth (that purchases the means of production), there would be no jobs at all.

Wedderburn criticised Hayek’s work – polar and lacks shades of grey. He considered employment processes enable economic growth which is paramount. If employees don’t like it, too bad because when the market is strong, employment is relatively secure and workers can change jobs if they do not like the way in which they are being treated.

Hayek represents an extreme argument against both power imbalance and any extensive government intervention. He supports employers and believed the more support given to employers, the more businesses will prosper, the more businesses that prosper, the more jobs and in-turn, the more economic growth there will be. Hayek noted trade unions could operate in their own interests but considered it important to advance the interests of businesses, entrepreneurs and those avenues that will make opportunities to employ others.

1.1.3 Theory 3 (Middle) – The third way

Hugh Collins: Labour Law as a Vocation

“The source of inequality of bargaining power should not be exaggerated; most employers are subject to the capital market ...and employees may find jobs elsewhere...Explanations of

the source of subordination of employees, which rely upon the notion of inequality of bargaining power, provide shaky foundations for a concept of Labour Law which sees its vocation in the relief of the subordination of labour.”²

Collins argued labour law was not so much a means of addressing social problems as it was a means of dealing with economic problems – it was a means of regulating the labour market and inflation. He claims the lack of bargaining power stems from problems of supply and demand. It is inherent that there will be some imbalance between employer and employee and trade unions are the only way to address that imbalance – should be noted that whilst necessary, unions can have flaws.

His argument acknowledged pros and cons with each so why not take the best of theory 1 and the best of theory 2 and meld to form the mantra: ‘Flexibility and fairness are mutually supporting goals, not mutually exclusive goals’.

Collins accepted there were some instances where workers will be at a tremendous disadvantage to their employers and he hastens to add that ‘we should not lose sight of Kahn-Freund’s analysis altogether’. He suggests that organisational structures (workplace hierarchies) are the real cause of problems for working people – he, therefore, favours minimum conditions and changes to corporate law as a ‘safety net’.

1.2 The Constitutional foundation

By virtue of the *Constitution of the Commonwealth of Australia*, Australia is a federation – this means there is a distribution between state and federal powers.



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² “Labour Law as a Vocation” (1989) 105 *Law Quarterly Review* 468-484 at 479.