

Joint Employment – Legal Myth or Practical Reality?

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Introduction

As this audience is fully aware, the modern Australian workplace features a range of employment and working arrangements that would bewilder and amaze the HR/IR practitioner of 20 or 30 years ago. A typical medium or large business will now employ employees directly on full-time, part-time, casual and fixed term arrangements. In addition, the workforce will comprise a range of people other than employees of the business, who may be supplied to the business through labour hire companies, who may be independent contractors and/or who may be on secondment from other organisations. Within all of these arrangements, there will be a further range of employment and industrial relations choices that will be evident; union and non-union, collective and individual, federal and state, the federal collective agreement underpinned by state award, state collective industrial agreement underpinned by no award, and so it goes!

Not surprisingly within this context, industrial tribunals and courts are increasingly exploring a range of legal doctrines in order to impose whatever values or sense of fairness they regard as appropriate. As always, statute is also evolving, although perhaps more slowly, to accommodate these issues.

Joint employment occurs where one employee may have two or more separate entities jointly responsible for employer obligations. It is one of the doctrines that have emerged from this complex picture. This paper considers recent decisions that have explored the concept of joint employment, and considers which direction such decisions may take in the future. It also assesses whether governments should legislate to give statutory effect to the concept of joint employment and, if so, on what basis.

The United States Position

As identified by Rohen Cullen in *"A Servant and Two Masters? The Doctrine of Joint Employment in Australia"* (2003) 16 *Australian Journal of Labour Law* 1, statute (and common law which has developed partly in response to the statute) in the US has firmly established the principal of joint employment. The position under the *National Labour Relations Act* and under most US common law is that a joint employment relationship will be found where more than one employer "shares or co-determines" matters relating to essential terms and conditions of employment. These matters include obvious considerations such as:

- the power to supervise, inspect and approve work;

- the power to control scheduling of work and approve leave;
- the power to hire and fire, or remove a worker from a workplace;
- disciplining of the employee;
- handling of dispute resolution;
- involvement in collective bargaining and processes; and
- similar such matters.

It appears the doctrine of joint employment was predominantly developed in order to prevent abuses where employers or other businesses sought to avoid their legal responsibilities to employees through the use of labour-hire contracts and/or independent contractors as a mere device or sham.

The United Kingdom Position

The position in the United Kingdom is similar to that in Australia. Courts and tribunals are seeking to establish a doctrine of joint employment but as yet, the position remains unclear. However, the recent decision of the Court of Appeal (Civil Division) *Brook Street Bureau (UK) Ltd v Dacas* [2004] EWCA Civ 217 handed down on 5 March 2004, clearly illustrates the common difficulties that emerge in joint employment cases. The issues are neatly identified in the introductory remarks by Lord Justice Mummery at p1:

“The issue here is whether a cleaner, who is the applicant in proceedings for unfair dismissal, was an employee of an employment agency. The other possibilities are that she was an employee of a client (the end-user) of an employment agency, or that she was not an employee at all. Although the statement of the issue suggests that it is short and simple, it is neither of those things. Recent cases... demonstrate that there is confusion in the workplace and considerable uncertainty in the law about the status of individuals who obtain work through employment agencies...”

He further comments that:

“Some may be surprised to learn that a significant number of people in the labour market, who cannot be accurately described as casual, intermittent or temporary workers, who reasonably think that they are in stable employment relationships and whom reasonable people would regard as employees, may not be employees after all and will be denied the protection of such basic employment rights as the right not to be unfairly dismissed. If those people are not employees, it follows that the doctrine of vicarious liability would be unavailable to claimants in actions for tort against those exercising control over such workers, who committed torts in the course of their work... It is also the case that an entire industry for the supply of workers has been established and is in practice conducted on the basis, for which there is support in the cases, that an individual is not employed under a contract of service, if the end-user, who exercises day to day control over the worker, is not contractually bound to pay remuneration for the work to the worker...”

The circumstances of the appeal in this case demonstrate the way that future cases exploring the doctrine of joint employment are likely to run. Brook Street Bureau is a large employment agency and labour hire business in the United Kingdom. It argued

that it had an independent contractor relationship with the applicant, Ms Dacas, who provided labour services as a cleaner. Ms Dacas had worked at the Wandsworth Borough Council as a cleaner for some years. At the Council's request, Brook Street Bureau ceased providing her work at the Council, or anywhere else, due to complaints about her conduct while cleaning at the Council. She had worked substantially full-time, regular hours for approximately five years.

Two of the three members of the Court of Appeal (Lord Justice Mummery and Lord Justice Sedley) commented that a triangular or joint employment relationship may have existed between the Council, Brook Street Bureau and Ms Dacas. However, they made no finding to that effect, as the issue was not directly before them in the appeal. The third member of the Court, Justice Munby, rejected the possibility of such a relationship.

The *Dacas* case was recently followed by the UK Employment Appeal Tribunal in *Bunce v Postworth Ltd (t/as Skyblue) & Anor* [2004] UKEAT 0052 where the Judge held that the facts in that case were similar to Ms Dacas' situation and that the terms of the contract between the parties needed to be considered. In the case of *Bunce*, there was a single written agreement relating to the general engagement of the applicant by Skyblue. The point depended upon a proper construction of the written terms. The Tribunal held that in relation to mutuality of obligation and control, Mr Bunce was in the same position as Ms Dacas and, as there was an absence of any mutuality of obligation, Mr Bunce's contention that he was an employee of Skyblue was flawed and the appeal was dismissed.

The Australian Position

Australian courts and tribunals, in a variety of contexts, have considered whether or not joint employment may arise. Apart from the obvious labour hire context, joint employment relationships may have arisen where the worker was said to be engaged as an independent contractor, not as an employee of any entity, and where a group of related companies potentially were found to be the employer.

In addition, employees in a number of cases have sought to utilise the doctrine of joint employment to overcome the practical difficulties caused by insolvency. Thus, where an application would ordinarily have been pursued against a particular business which would commonly be regarded as the employer, and the business has become insolvent, employees have sought declarations of joint employment to achieve joint and several liability for accrued entitlements.

The main Australian authority to date is the WA decision of *Matthews v Cool or Cosy* (2003) WAIRC 10388. There are numerous other decisions that have considered the potential application of the doctrine with varying degrees of fervour. The doctrine is being used more readily in the context of labour hire contracts where the courts are able to more clearly distinguish the employment relationship. What is clear from the authorities is that joint employment is primarily being used by applicants seeking relief under the unfair dismissal jurisdiction.

***Matthews v Cool or Cosy* (2003) WAIRC 10388, 14 December 2003**

The applicant brought an unfair dismissal claim against related operating companies Cool or Cosy Pty Ltd, Ceil Comfort Home Insulations Pty Ltd and the management company Citigroup Pty Ltd. There was no written agreement between the applicant and any of the companies other than a draft agreement made with Ceil Comfort. At first instance, Citigroup was found to be the employer. It was revealed that Citigroup

was insolvent and on appeal, the Commission found that Ceil Comfort was the employer at the time the applicant was made redundant. The Full Bench found that Citigroup was the vehicle for employing staff at the head office for the whole group of companies. The Commission held that the applicant was employed by the group (at 317) and that the creation of multiple separate legal entities was a sham to avoid liability and therefore piercing the corporate veil in this context was warranted.

Morgan v Kitchside Nominees Proprietary Ltd (2002) 117 IR 152

Although the Full Bench of the Australian Industrial Relations Commission did not decide on the issue of joint employment, it stated, at 175, “*we would incline to the view that no substantial barrier should exist to accepting that a joint employment relationship might be found and given effect for certain provisions under the [Workplace Relations] Act*”. In explaining the joint employment doctrine, the Full Bench noted that its development in the US appeared to have been a response to the use of labour hire arrangements made to avoid labour regulation and employee protections.

On the facts, the Full Bench held that through the set up of the respondent pharmacist, there was co-determinative control over the work and conditions of employment of the applicant.

Oanh Nguyen v ANT Contract Packers Pty Ltd and Thiess Services Pty Ltd [2003] NSW IR Comm 1006

This case related to an unfair dismissal on the basis of pregnancy. The applicant sought compensation from both Thiess and the labour hire company, ANT. The NSW Industrial Relations Commission found that there was no authority in NSW upon which a finding of joint employment could be made. However, Commissioner McKenna found the “host employer” to be the “actual, or real and effective” employer of a labour hire worker, rather than the labour hire company itself due to the following factors:

- the relationship between the worker and ANT was minimal;
- Thiess directly selected and appointed the worker to her position;
- Thiess initially directly employed the worker (before she was transferred to ANT);
- Thiess had day to day control over the worker’s employment in every real and practical sense;
- Thiess had control over disciplinary matters; and
- Thiess had control over the termination of her employment.

Damevski v Giudice [2003] FCAFC 252

The Full Bench of the Federal Court held that a cleaner who was employed as an independent contractor by a labour hire agency was in fact an employee of the cleaning company.

Endoxos Pty Ltd originally employed all of its cleaners directly. It later arranged for the cleaners to resign and contract their services through a labour hire company. After the change over, the applicant continued to perform the same work, use the same vehicle, uniform and equipment, supplied by Endoxos and under the direction and control of Endoxos. A dispute arose and the applicant brought an action in unfair dismissal against Endoxos. The Court held that by “looking beyond the documentary

evidence” it was clear that the labour hire agency did little more than actually paying the applicant’s wage and Endoxos was held to be the employer.

National Union of Workers and George Weston Foods & Anor (PR944285)
5 March 2004

This case concerned a dispute about wages and conditions of workers. George Weston Foods argued that the union was not a party to the agreement and that the individuals they represented were not bound by the agreement as they were employees of a labour hire company. The union argued that George Weston was a joint employer but the tribunal held that whilst there was persuasive evidence that they could have been employees given the length of service and the fact that staff were engaged by multiple agents, this was not sufficient to prove that they were employees of George Weston.

Costello v Allstaff Industrial Personnel (SA) Pty Ltd [2004] SAIR Comm 13,
29 March 2004

The applicant brought an unfair dismissal claim against Bridgestone and Allstaff, a labour hire company. Bridgestone claimed they were not the employer as Allstaff had hired the applicant. The Commissioner found that the direction and control exercised by Bridgestone was necessary in the context of the contract between Allstaff and the applicant and Allstaff was held to be the sole employer. The Commission stated that, in respect of joint employment, where related corporations are conducting a common enterprise and operating as a group with ill-defined boundaries, this may lead to a finding of joint employment.

Staff Aid Services v Josie Bianchi (PR945924) 5 May 2004

Staff Aid was unsuccessful in appealing a decision that found they were the sole employer of Ms Bianchi. The fact that Staff Aid had day-to-day control over the work performed by Ms Bianchi was not determinative where Staff Aid did not have ultimate control over the work she performed. The Commission held that the day-to-day control was vested in the labour hire company and that where the Commission is faced with a joint employment argument, all potential employers must have the right to intervene and be heard.

CFMEU v Personnel Contracting Pty Ltd t/as Tricord Personnel [2004] WAIRC 1445, 12 May 2004

This case related to a dispute between the union and Personnel Contracting over the dismissal of a worker. At first instance, the Commissioner found that Personnel Contracting was not the employer as they had no control over the work “provided by” the worker. They were merely contractors. On appeal it was held that the worker was in fact an employee of Personnel Contracting because:

- the workers were required to report to Personnel Contracting;
- the workers had to act in accordance with Personnel Contracting’s guidelines;
- Personnel Contracting could discipline, hire and fire the worker; and finally because of
- the existence of restraint of trade provisions.

The Commission also said that there was scope for the application of the doctrine of joint employment and that whilst it has been considered in the context of labour hire cases, it can be considered outside them.

Jane Savage v Department of Education (PR947727) 7 June 2004

A casual teacher employed by a labour hire company (Staffing Organisation Solutions) brought an unfair dismissal action claiming that the department was her employer, or in the alternative, there was a joint employment relationship. The Commission held that there was an employment relationship with Staffing Organisation Solutions. It was held that the fact that once placed with a school, the applicant was under that school's control was not a feature which automatically translated to the school being the employer. The Commissioner referred to the case of *Costello*, finding that the factual circumstances in that case were more compelling.

Australian Meat Industry Employees' Union, Newcastle and Northern Branch v Australian Independent Contractors Agency and Anor [2004] NSW IR Comm 238, 19 August 2004

The Commission followed the decision of *Damevski* finding that the approach to take is to look at the reality of the situation. In this case, the independent contractors were happy with their working relationship and were kept fully informed of the processes and any changes to their working arrangements. The Commission held that, in this case, the workers were independent contractors and not employees.

CFMEU v BHP Billiton Iron Ore Pty Ltd and Integrated Group trading as Integrated Workforce (2004) WAIRC 12757

The applicant brought an action on behalf of its member, Mr Brandis, who was employed by the Integrated Group and provided services to BHP Billiton. The Commissioner found that there was no joint employment as there was no "mutuality of obligation" where such obligation relates to the provision of work and remuneration and the exertion of control. He did not expressly endorse or reject the possibility of such a doctrine. In this case, Integrated Group provided the worker to BHP Billiton, but BHP Billiton did not have an obligation to accept him and any control BHP Billiton exerted over the worker was in consideration of safety requirements. The applicants in this matter have elected to appeal the Commission's decision and the appeal is due to be heard in December 2004. The writer acts for Integrated in this matter.

Industrial Relations Act 1979 (WA) section 23B

This provision provides the Western Australian Industrial Relations Commission a wide-ranging power to prevent a third party (such as the client of a labour hire company) from adversely effecting the employment of a person who may be employed by the labour hire company. While it is little tested to date, it appears to remove some of the scope for the application of a joint employment doctrine in Western Australia.

Determining Factors

What we can derive from recent case law on the doctrine of joint employment is a number of factors used to determine the nature of the employment relationship, and whether joint employment may arise, namely:

- power to hire and fire a worker;
- "client" involvement in the collective bargaining process;

- the right to supervise, discipline, inspect and approve work;
- determination of the rate of pay
- determination of the method of pay
- involvement in awarding workers increased pay;
- place of employment – ie whether the employment takes place on premises owned by the “client”;
- control over working conditions such as work schedules, and leave approvals;
- “client” involvement in the dispute resolution process;
- whether the worker may refuse to work for the “client”; and
- whether there is a mutual obligation to create a contract of service.

Concept of Mutuality of Obligation

This concept of the employer being obliged to provide work and the employee being obliged to perform has been discussed in a number of recent authorities and appears to be an emerging indicia in establishing the nature of the employment relationship.

The Commission in the *CFMEU v BHP Billiton Iron Ore Pty Ltd and Integrated Group* case found that there was no joint employment as there was no “mutuality of obligation”. In *Carmichael v National Power Plc* [1999] 1 WLR 2042, Lord Irvine of Lairg, with whom the other members of the House of Lords agreed, referred to “that irreducible minimum of mutual obligation necessary to create a contract of service”. His Lordship held that because the arrangements between the appellant and the respondent imposed no obligation upon the respondent to provide, or upon the appellants to undertake, any work, then there was no contract of service.

A similar conclusion was drawn in *Brook Street Bureau (UK) Ltd v Dacas* where Mummery LJ’s conclusion depended substantially upon the proposition that, for there to be a contract of service, there must be both an obligation to provide work and an obligation to perform it.

This concept was recently discussed in Australia in *Forstaff and Ors v The Chief Commissioner of State Revenue* [2004] NSWSC 573. This case examined whether a worker was an employee or an independent contractor. McDougall J held that “there is no obligation on Forstaff to offer any work to the worker, and no obligation on the worker to accept any work that is offered. There is no mutuality of obligation.” He went on to add that the “irreducible minimum of mutual obligation necessary to create a contract of service” to which Lord Irvine referred in *Carmichael* should be expressed, not as an obligation on the one side to provide and on the other to perform work, but as an obligation on the one side to perform work (or provide service) and on the other side to pay. This was consistent with the approach of the Full Federal Court in *Building Workers’ Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104.

Difficulties Caused by Such a Doctrine

If such a doctrine is to be found and applied, then, in my view, it raises a raft of practical legal and industrial difficulties. While courts and industrial commissions may be seeking to apply this doctrine as a way to remedy what they perceive to be

unfairness, it is certainly possible that the application of such a doctrine would create more difficulties and practical problems, cause greater confusion, uncertainty and disputation in the workplace and, in short, create more problems than it solves.

Some of the difficulties caused may include the following:

- If the two “employer” parties have entirely different and distinct employment or contractual arrangements, how are the two sets of arrangements to be merged? Which takes precedent, and how is this to be established?

For example, in the *CFMEU v BHP Billiton and Integrated* case mentioned earlier, Integrated employed Mr Brandis pursuant to an Australian Workplace Agreement under the federal legislation, while BHP Billiton employed persons performing similar work under a range of federal and state industrial instruments, both collective and individual. Which one would apply to Mr Brandis?
- Who would actually make payment of accrued liabilities? What if there is a dispute between the two joint employers as to who was responsible for what?
- Who would take responsibility for and meet accrued liabilities that had arisen prior to the finding of joint employment?
- Different industrial awards and agreements may apply to an employee depending on whether he or she is working for a contractor performing a particular type of work, as compared to working for a producer or operator performing the same work. For example, an electrical maintenance tradesperson may be covered by separate awards if he or she is working for an electrical contracting company performing services at a particular mine site, compared to an electrical maintenance tradesperson employed by the owner and operator of that mine site. What happens if that person becomes a joint employee?
- What happens to the joint employment if one of the parties to the joint employment seeks to terminate or vacate themselves from that field of work, line of business or particular employment arrangement, but the other does not? For example, if a contractor seeks to withdraw from a mining business altogether, but the operator of the mine continues to pursue that business, who takes responsibility for the employee, for his or her ongoing employment, and for his or her ongoing and accrued liabilities?
- If there was a grievance or dispute, to whom does the employee complain? What happens if one of the employers fails to communicate this complaint to the other?

I observe again that modern working arrangements are increasingly complex. However, it does not automatically follow, in my view, that more complex and multi-faceted laws will better serve the parties to these arrangements.

Should Governments Legislate or Leave it to the Common Law?

It is important not to overstate or oversimplify the nature of joint employment. As yet, no Australian court or industrial tribunal has definitively established that such a doctrine can or should exist. A number of members of various industrial commissions and tribunals, including the President of our own Western Australian Industrial Relations Commission, have commented that they consider such a doctrine

can or should exist in the appropriate circumstances; however, it has only been applied in limited circumstances.

A clear trend does emerge where industrial courts and tribunals have been ready to find that joint employment, with all of its associated obligations and liabilities, arises in situations where the parties have used other titles and formalities to mask the true nature of their working relationship. This is an application of the very well established employment law principle of “substance over form”.

It appears likely to be simply a matter of time before further decisions are made finding in favour of the doctrine of joint employment.

Turning to the more pointed question of whether or not governments should legislate, in this post election climate it is worth taking a reality check on this issue. With potential conservative party control of the Senate for the first time in many decades, a major reform, which would be seen as being “pro-employee” and “union friendly” such as expressly endorsing or providing for the doctrine of joint employment, is extremely unlikely at the federal level. At the state level, we have an election due within months, and the state Labor Government would seem unlikely to boldly take the initiative by implementing such a doctrine through reforms to our *Industrial Relations Act*. So this issue is perhaps entirely moot.

In any event, for the reasons described above, I consider that the difficulties raised by such a doctrine outweigh whatever benefits it may be perceived to create.

As in all things in industrial relations, a divided ideological perspective will determine what approach you take. Unions and those on the left of the spectrum would criticise the use of labour hire as a device to make it harder for unions to organise and enrol members in particular industries, and to casualise the work force. Businesses and those on the right of the spectrum will often thoroughly endorse the flexibility and range of options for businesses and employees that labour hire and other forms of engagement of labour provide. Any measures to recognise joint employment will be seen through this range of ideological prisms.

From a government’s point of view, of whatever political persuasion, leaving a matter like this to the courts and tribunals is often a way of avoiding buying into a complex and divisive issue. In my view, the statutory position in WA and at the federal level will remain status quo.

It should also be noted that in other realms such as health and safety, workers compensation and equal opportunity law, statute has ensured that all workers are adequately protected regardless of the nature of their working arrangements. As mentioned, section 23B of our *Industrial Relations Act 1979* serves a similar purpose. This has occurred without the need to develop an entirely new legal doctrine.

Conclusion

If joint employment is to emerge as a clear and effective doctrine, it is far more likely to emerge, in my view, in circumstances where the working or employment arrangements are clearly artificial devices designed to avoid or minimise legal and industrial liabilities. This may occur, for example, where a purported labour hire company is established, but in substance, that labour hire company is actually entirely subservient to and/or a related or subsidiary company of the client company.

Alternatively, it may arise where a person is said to be working as an independent contractor, and has a contract with the labour hire provider or contracting company,

but no contract with the client. If, in substance, this is seen to be a sham or a device to avoid liabilities and hide the substance of the working relationship, then industrial commissions are far more likely to find in favour of joint employment in such a context.

By contrast, where a genuine independent and free standing labour hire business is operating, providing services to numerous clients, and meeting its statutory and industrial obligations to employees who are providing services to clients of the labour hire company (as occurred in the *CFMEU v BHP Billiton and Integrated* case), then, in my view, there is less room for the application of the doctrine and it would be inappropriate for it to be imposed.

There are strong indications from some industrial tribunals that the concept of joint employment is considered favourably. However, the lack of clear authority is preventing its application. I doubt, however, that this doctrine is a genuine solution to the problems identified by these tribunals.

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