

Tax and the Regulatory Conception of Labour Law

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Introduction

Regulatory theory offers us a framework for integrating taxation considerations into the legal analysis of the constitution and regulation of labour markets. The regulatory approach is concerned to identify the different ways in which social, political and economic life is ordered and controlled.¹ It argues that legal analysis of regulation of human behaviour will be incomplete if the subject matter is limited to direct “command and control” regulation by the state through the use of legal rules backed by sanctions. It recognises that the state may use a range of alternative instruments indirectly to regulate human behaviour. It acknowledges that other aspects of the social framework may indirectly regulate human behaviour without the state having consciously intended or designed the regulatory effect. While there may be debate as to the extent to which regulatory scholarship should seek to encompass the full extent of these indirect regulatory influences, there is little doubt that a regulatory analysis of labour markets properly includes consideration of taxation law, and associated social security arrangements.

The object of this chapter is to consider the factors that may be relevant in developing a regulatory analysis of taxation and labour markets in Australia. The chapter first considers the place of taxation in regulatory theory. It considers the regulatory analysis of the use by the state of specific tax instruments, such as corrective taxes and tax incentives, as an alternative to traditional “command and control” regulation in effectuation of government policy. Such tax instruments are not, however, a significant factor in labour market regulation in Australia. The chapter, accordingly, suggests that a regulatory analysis of taxation and labour may need to broaden its focus to include more general features of the taxation (and social security) regime.

In this respect, the chapter draws assistance from the treatment of the impact of taxation on labour markets in economic theory. A considerable body of economic theory has been developed to analyse how the

¹ Braithwaite J and Parker C, “Regulation” in Cane P and Tushnet M (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, Oxford, 2003).

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