

Unauthorised Workers: Labouring Beneath the Law?

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Introduction

Immigration law and policy, especially controls on entry and manipulation of the “skills mix”, are fundamental constituents of the labour market.¹ The traditional approach to labour law, as Anthony O’Donnell and Richard Mitchell observe, has marginalised broader issues of labour market regulation. As a result, “immigration law ... has rarely been viewed as proper to the study of labour law”.² The disinterest has been mutual, with immigration jurisprudence tending “to conceal the labour market rationales that drive much of the development of immigration law”.³

The status of unauthorised foreign workers attracted little scholarly attention in Australia until recent writings by Robert Guthrie.⁴ Such workers, after all, labour as outlaws. Short of interdiction by the authorities, they present themselves neither en masse for bureaucratic measurement, nor individually as subjects of the law. Treatises on immigration law invariably ignore the issue. At one level this is entirely understandable. As a burgeoning field, immigration and refugee law focuses on the complexities of administrative discretions. Further, whilst not nearly as controversial as in wealthy nations with land borders (like the United States), the topic of unauthorised work is an embarrassment to law-abiding immigrants, who fear resentment from established Australians.

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1 See Crock and Friedman (ch 17) in this collection.

2 O’Donnell A and Mitchell R, “Immigrant Labour in Australia: The Regulatory Framework” (2001) 14 *Australian Journal of Labour Law* 269 at 269-270.

3 *Ibid*, at 271.

4 Guthrie R, “Illegal Contracts: Impropriety, Immigrants and Impairment in Employment Law” (2002) 27 *Alternative Law Journal* 116; Guthrie R, “Tourists Overstaying their Welcome: When the Visa Runs Out and Workers Stay On” (2004) 6 *Legal Issues in Business* 27 and Guthrie R and Quinlan M, “The Occupational Health and Safety Rights and Workers Compensation Entitlements of Illegal Immigrants: An Emerging Challenge” (2005) 3 *Policy and Practice in Health and Safety* 41.

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