BOOK REVIEWS

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MAKING LABOUR LAW IN AUSTRALIA: INDUSTRIAL RELATIONS, POLITICS AND LAW

By Laura Bennett

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ALTHOUGH traditional scholarship on labour law may have ignored its political, industrial and social context, there is an increasing acceptance nowadays that law does not operate in a vacuum. At first glance, then, the thesis that labour law is created not in isolated common law decisions or statutory enactments but in the interaction of social, economic, political and legal structures does not appear to be all that novel. However, previous contextual accounts of labour law have often portrayed a fairly one-dimensional picture of

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capitalist-labour conflict or have failed to establish the connections between context and law. In *Making Labour Law in Australia: Industrial Relations, Politics and Law* Laura Bennett sets out to remedy these deficiencies, firmly establishing the contextualised nature of her subject. The book, divided into five parts, offers a complex analysis and a perceptive understanding of the diversity of influences and their multiple interactions in the construction of a system of regulation for industrial relations.

The historical development of labour law and the foundations of the unique system of arbitration in Australia have already been discussed extensively in existing academic works. The treatment of "Origins and Theory" in Part One is, thus, justifiably brief. Yet even here existing explanations are challenged and the full range of motivations behind the establishment of compulsory arbitration up until the time of World War II are explored. While the federal arbitral legislation may have taken its impetus from labour, it drew support from liberals and conservatives as well. The compromises and tensions behind this legislation are emphasised, for the divisions over the exact form which arbitration should take have surfaced in varied combinations at different points in history resulting in a system that has been far from monolithic. The following sections of this book trace the struggles between all players over the precise form the system should take.

The site of that struggle is the subject of Part Two, "The Creation of Australian Labour Law", in which one chapter is devoted to each of the major institutional players: the Parliament, the Courts and the Tribunals. This part comprises nearly half the book reflecting the importance Laura Bennett ascribes to the study of institutional structures and characteristics, which, she argues, are crucial to understanding the way in which law mediates social change. Parliament as an institution, we are reminded, is far more complex than the simple interaction of political parties and conflicting ideologies. The juxtaposition of the history of the major political parties, the prevailing electoral and social conditions, and the economic environment allows a full appreciation of the initiation of legislative reform in the sphere of industrial relations. The constitutional constraints imposed by the conciliation and arbitration power traditionally relied upon by Parliament to regulate industrial relations are also dealt with, although there is surprisingly little attention devoted to the question of why Parliament for so long considered itself limited to this power.

Institutions are never viewed by Bennett as isolated, and it is their interactions that frequently determine the shape of labour law. This is true even of the Federal Industrial Commission which has a certain institutional

autonomy, dictated by the nature of the arbitral power it exercises. Government influence over this body has, consequently, had to be asserted indirectly. This has been achieved through legislative shaping of the very structure of the institution itself. The requirement that certain issues be referred to a Full Bench, the organisation of industry panels, and the removal of some disputes to specialist tribunals are certain obvious examples of this. Further, the statutory right of intervention in certain hearings granted to the Minister and the legislative requirement that factors such as "the impact of decisions on the national economy" be taken into account by the Commission have helped to forge the development of a "public interest" jurisprudence. These have become the most important vehicles for the development of governmental influence over national wages policies. The autonomy of the Commission is also tempered by the fact that it has ongoing relationships with employers, employees and government. The degree of integration of any tribunal into the judicial system, the nature of the parties who may appear before it and the personnel who comprise it are all presented as further factors which influence the structures and hence their outcomes. In all of this analysis Bennett draws together a vast range of issues and factors which are woven into an intricate picture of the development of the law.

It is the courts which Bennett subjects to the most severe criticism. They are, she argues, dominated by an "ideology of legalism", which has been utilised in a way that reasserts the centrality of a conservative and disciplinary response to industrial relations and subverts legislative reforms. This criticism, that the courts are committed to an "excessive legalism", is a long-standing one in Australian labour law.[1] There is the related criticism that the inherent bias of the common law is towards property rights, that is the "old" property of commerce and business not the "new" property of job ownership, and towards individual rather than collective rights. At different times in the history of the legal regulation of industrial relations in this country these criticisms have fuelled debates as to the merits of a specialist industrial court. Nor are these criticisms peculiar to Australia, as the savage critiques of British labour law by Wedderburn have shown.[2] The common law has thus periodically been represented as no friend of labour. According to the author the courts have indeed "hijacked" the system. This accounts for the ways in which the legal system has provided openings for

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1 See, for example, Maher & Sexton, "The High Court and Industrial Relations" (1972) 46 *ALJ* 109.

2 Wedderburn, "Labour Law: From Here to Autonomy?" (1987) 16 *Industrial Law Journal* 1; Wedderburn, "The Social Charter in Britain - Labour Law and Labour Courts?" (1991) 54 *Mod LR* 1.

employers to manipulate legal categories and thus exploit the law for their own purposes (a theme which is developed further in Chapter 7). Where the effects of judicial decisions have been otherwise, as in *Whybrow*,[3] the author describes this result as "unintended". The courts are thus presented as actively pursuing their own (capitalist/employer) agenda in the development of labour law.

The immediate explanation that Bennet offers for this is the fact that in Australia the great majority of judicial appointments, especially those to the High Court, have been made by conservative governments. This, in turn, it is argued, has resulted in members of the judiciary being drawn from a narrow social group and bringing a predominantly anti-union bias to the interpretation of the law. As a *total* explanation this is unsatisfying and unhelpful. It is certainly not a sufficient basis for law reform. For it is surely not as if some more bias, only in the other direction (a different social class perhaps?), could remedy the situation. Such analysis is superficial, ignoring many other considerations. Take, for example, the author's critique of the *Boilermaker's Case*.[4] Like many she dismisses this decision as essentially inconvenient. Its reasoning, she argues controversially, reflects merely "the judiciary's dislike of tribunals". Her only evidence for this is an anecdote borrowed from D'Alpuget from which she infers Sir Owen Dixon's hostility to the Conciliation and Arbitration Court.[5] Yet, even if this is accepted, it does not necessarily serve to undermine the constitutional rationale for the separation of powers doctrine which the decision also embodies. Any serious critique of the role of the courts in the making of Australian labour law ought not fail to address this question.

Laura Bennett's criticisms of the courts, which I agree are justified, raise for consideration the much more fundamental issue of what is meant and required by "the independence of the judiciary". Bennett would possibly be dismissive of this reaction. The phrase "the independence of the judiciary" is, as she notes, firmly entrenched in legal discourse. But it desperately needs to be translated into the real world at the present. In this post-modern era where the separation between "objective reality" and "subjective perception" is continually questioned there is the need for a clear articulation of what it is that is demanded of those who must make a judgment as to the rights of two parties in adversarial contest. This is, perhaps, the most

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3 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 311.

4 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

5 D'Alpuget, *Mediator: A Biography of Sir Richard Kirby* (Melbourne University Press, Melbourne 1977) p142.

pressing issue of our time and, as the now well publicised concerns of gender bias in the courts have shown in recent years, not just for labour law. Law deserves at least the acknowledgment that the problem is more fundamental and more difficult than a simple cause-effect relationship between the social background of the judge and the judicial decision. While that might be part of the problem, Bennett has failed to convince this reader that it is the whole problem. Her critique of the courts as "imposing common law values" on labour relations is more precisely a claim for *equal* recognition for a perspective that has been persistently devalued and ignored. It is the claim that to this extent labour law has been decontextualised in the courts. The force of this criticism, which is that the courts have failed to deliver justice in labour relations, is a demand not for a different bias but for the exercise of judicial power by a judiciary which understands the true meaning of its constitutional independence: an absolute openness to all parties and perspectives before the court.

A more considered response to the role of the courts in the creation of labour law is demanded. To a certain extent Bennett does provide this by pursuing her initial criticisms of the legal system in a more detailed analysis of the role of the courts in industrial decisions. Her two chosen examples concern the legislative provisions in relation to bans clauses and the use of secondary boycotts provisions of the *Trade Practices Act* 1974 (Cth). In her analysis of the treatment of bans clause provisions Bennett provides a considerable insight into the movement of law and the intricacies of the interaction between judicial decision and legislative reform within a wider context of institutional interaction between the courts and commissions on the one hand, and those bodies and Parliament on the other. She thus presents a serious alternative analysis to the more traditional view that the main contest over bans clauses was between employers and trade unions.

The application of trade practices legislation to industrial relations has proved highly contentious. The legislation provides a defence in industrial cases where the dominant purpose of the industrial action is related to the wages and conditions of employees. It is virtually impossible for trade unions to establish the defence successfully because of judicial distinctions between immediate and ultimate purposes, the requirement that the dominant purpose relate to the former, and the discounting of the subjective intentions of those engaged in the industrial action. The focus of the courts is, thus, inevitably on the injury to commercial interests. It is clear that the judiciary has entirely failed to appreciate the alternate arguments of trade unions in trade practices cases which would arguably lead to an interpretation of the Act more in harmony with the initial parliamentary expectations.

Bennett's analysis goes further here and includes the important point that the most profound impact of the law often derives not from its substantive content but from its procedural, including evidentiary, aspect. The finding of facts, for example, is a matter of interpretation and through a detailed analysis of the *Mudginberri Case*,[6] another s45D action, Bennett convincingly argues for alternate constructions to that accepted by the Court. It is also obvious that the possibility of obtaining an interim injunction in a s45D action has a quite singular impact on industrial relations in comparison with its impact on any other arena, especially purely commercial relations. In industrial relations the interim injunction becomes the primary remedy. Yet all the rules relating to procedures and proof are relaxed in interim proceedings on the basis that the issues will be dealt with more seriously at trial. The assumptions which underpin the whole structure of the application of the law are thus plainly untenable in the context of industrial action. These assumptions operate in industrial cases in a way that makes it easier for business to insulate itself against more appropriate participation in industrial relations.

The issue of enforcement is the subject of Part Three, "The Implementation of Labour Law". In most books this topic focuses on an examination of the sanctions for industrial action, reflecting, Laura Bennett says, the disciplinary bias that pervades every aspect of approaches to labour law. By contrast Laura Bennett has chosen to deal with the issues of award compliance and examine the mechanisms for enforcement, both judicial and administrative. It is an area which has been generally neglected in all studies of labour law, which is somewhat strange as the system of enforcement is crucial to the maintenance of standards and confidence. She argues convincingly that the problem is immense: in one state alone the statistics show that between one quarter and one third of employers were found to be in breach of their award obligations. In an overview of the history of the administration of enforcement Bennett once again presents the issue in the context of a complex intersection of factors. She shows the way in which politics has been influenced by the attitudes of industrial parties, economic considerations and resources to produce a system that has rarely worked well. Given the scale of the task of enforcement there is a strong argument for targeted selective inspection rather than the comprehensive, regular but rare inspections usually favoured by governments. The characteristics of workplaces where non-compliance is commonplace are identified. They include small business, areas using large numbers of outworkers or illegal immigrant workers, and work places

6 *Mudginberri Station Pty Ltd v Australasian Meat Industry Employees' Union* (1985) 61 ALR 291.

where unionisation rates are low. The criticisms of the existing "public" award system find particular point when considered in the context of the reality of modern industry as exemplified by the hospitality industry and the emerging force of the "privatising" movement of "deregulation". The issues of award evasion and equity are also linked here. As anyone familiar with Laura Bennett's previous writings might expect, her analysis is never confined within a capitalist-labourist paradigm. The gender implications of workplace relations and regulations are exposed in a way that is incisive if somewhat disappointingly truncated.

In the industrial relations turmoil of the 1980's and 1990's the law has frequently become a weapon to be used in a war between the two parties of employers and trade unions rather than an instrument of justice. Part Four therefore examines some of the tactics of "Utilisation and Avoidance". On one side aggressive managerialist practices are prepared to exploit fully the traditional legal distinction between employees and independent contractors in order to transform the workforce through the use of the "contracting out" system. Industry is also restructuring through processes such as the granting of franchises. All these tactics re-order risk taking and labour market responsibility. The astute observer in Laura Bennett recognises these developments as part of a new order. Disputes, such as those at Robe River and Mudginberri, should not be seen as aberrations: they are symptomatic of the new industrial relations. On the other side, trade unions, the traditional representatives of collective labour relations, are having to adapt in order to survive in the newly ordered arrangements. Here there is an examination of award restructuring and policies of amalgamation which have been part of the strategy adopted.

The final section of *Making Labour Law in Australia*, "Comparison and Evaluation", looks to the future and uses the experiences of New Zealand, the United States and Europe to evaluate the Australian developments. A plethora of issues is examined, briefly but purposefully. Bennett questions the conventional view that the move toward the deregulation of industrial relations in Australia is the result of irresistible international trends. She concludes by suggesting that the way in which this trend does develop in Australia will undoubtedly be influenced by the unique system of industrial regulation which has preceded it. The insights offered by this book caution against any simplistic predictions as to the future of labour law.

In conclusion the ambitious scope of this book is the key to both its considerable strengths and its weaknesses. *Making Labour Law in Australia* is surely the most comprehensive account of the evolution of the

Australian system for the regulation of industrial relations. It is well researched and brings together an enormous amount of information. It provides new insights into many familiar issues as well as dealing with some matters which have been systematically ignored in the past. Labour law needs and can only benefit from the fresh perspectives in this work. However, the very breadth of the work is not always matched by a depth of argument and this can at times undermine the whole thesis. *Making Labour Law in Australia* is ultimately more tantalising than satisfying and if that means Laura Bennett's readers are urged to pursue further their own investigations in labour law the book will have made a valuable contribution.