MAKING LABOUR LAW IN AUSTRALIA

by

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Introduction

Laura Bennett's book makes a significant contribution to the practical and academic future of industrial relations. The author's avowed purpose in this book is to provide a contextual statement of the development of Australian labour law. The essence of this purpose is to rid the subject of its more traditional textual focus on law as doctrine. The reader is presented with a critical statement of the law, one which places particular emphasis upon contemporary authorities, current issues and above all, on the legal institutions themselves. There is a specific focus upon the institutions involved in the creation of law, and the aim is to provide the reader with a framework of analysis which 'allows links to be made between the characteristics of the institutions, the way they mediate change and the production of law.'[1] The concern is with the players in Australian industrial relations and the ways in which they have created and contributed to the law's development. The contrast with the determined emphasis in traditional labour law texts upon the employee/independent contractor distinction could not be clearer.

Tensions and Conflicts

The more specific aim is to reveal, through this analysis, the tensions and conflicts between the players, that is, the institutions that create law. What emerges is a picture which contains not only the institutional but ideological dimensions to our collective labour law. This will inevitably provide a challenge to the static 'omnibus'[2] version of law presented in standard texts. Bennett takes issue with the traditional labour law text's tendency to depoliticise issues, asserting, for example, that 'the emphasis in legal scholarship on revealing the continuities in doctrinal developments obscures very radical changes in the law and, more importantly, the judicial choices that were made and the basis on which they were made.'[3] For Bennett, this approach to labour law is too simplistic, for conflict over social values has been 'overt'[4] and 'highly politicised'[5] throughout the 19th and 20th centuries. The need for the refocus is a critical one: a labour law text which depoliticises contemporary legal practices also simultaneously 'creates and justifies present practices.'[6] It is clear that for Bennett, this is one of the vital tasks of contemporary labour law scholarship.

Part of Bennett's refocus (and it is part only) involves a different perspective – or a writing in – of the relevance of gender in labour law. There is an increased emphasis upon aspects of labour law that impact upon women, although there is no overall gender based theme. Yet, as such, the task is an admirable and ambitious one and one sorely needed in the labour law context. For, as Rosemary Hunter has asserted, in her insightful analysis of labour law texts, gender has

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* Law Book Company (1994).
1 Bennett, p.3-4.
2 *Ibid*, p.4.
3 *Ibid*, p.169 .
4 *Ibid.*
5 *Ibid.*
6 *Ibid.*

virtually been deemed irrelevant within labour law and part of this sidelining has been the narrow concept of work which dominates in many texts.[7] This is one of many deficiencies in the more orthodox labour law analysis which Bennett seeks to overcome. Bennett does not accept a narrow concept of work, and indeed, devotes a section of the book to the growth of marginal work and women workers. It is not the overall focus, but it is one of the vital and enduring themes to the book and contributes much of the scholarship in the book. For example, a salient point is made in the context of women, marginal work and domestic responsibilities. Bennett asserts in relation to the increasing incidence of marginal work, and to this work being so often occupied by women:

'The fact of these trade-offs is often interpreted by unionists, academics and others to mean that women are less committed to work than men. This, however, ignores the role of unions, governments, employers and fathers in constructing the situations which effectively force women into a series of trade-offs between family and work which men rarely have to face'.[8]

A Challenging New Perspective on Labour Law

The quote provides a constructive illustration of the approach in the book. The result is an at times flawed but wholly interesting and challenging new perspective on Australian labour law. Debate and a new perspective on these vital issues is sorely needed.

The work consists of five parts. Part One, Origins and Theories, deals with the origins and development of collective labour law. Part Two, the creation of Australian labour law, deals with the political system (industrial relations, governments and legislation), the courts (in the context of institutional autonomy and the common law) and industrial tribunals (industrial relations and tribunal forums). Part Three, the implementation of Australian labour law, deals with enforcement (award evasion and unions) and enforcement agencies.

Part Four is concerned with the utilisation and avoidance of Australian labour law and contains two sections, one dealing with employers and unions and the other with unions versus employers. Part Five, comparison and evaluation, presents a comparative analysis of labour law regimes. A comprehensive and scholarly picture of our collective system is built from this framework.

Of the many issues canvassed, three deserve particular mention besides the inclusion of women. The first is that Bennett pinpoints the dominance of the manufacturing industry in award restructuring, a dominance that has not necessarily been clear hitherto and has not necessarily been positive. Secondly, the book emphasises a neglected issue, that of award enforcement. The author notes the singular absence of substantive attention paid to award evasion and argues persuasively for more research in this area. Finally, while the book is concerned mostly with Australia, there is a valuable comparative perspective towards the conclusion of the book which puts our push to individualised bargaining into a cautionary perspective.

Concerns

The only real concerns of this reader were that the references to the bias of the courts, while often seemingly substantiated, read at times (and only at times) like rhetoric. There are also some intriguing footnotes that might have been productively developed in the text. One example is the reference to the 'rush to establish innovative law schools in Australia in the late 1980's and early 1990's'[9] and to the generally 'conservative approach'[10] of the academic legal community. It

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7 Hunter, R. (1991) 'Review Article: Representing Gender in Legal Analysis: A Case/Book Study in Labour Law' 18 *Melbourne University Law Review* 305.
8 Bennett, p.204.
9 *Ibid*, p.72.
10 *Ibid.*

would be interesting to know what these innovative law schools have done and how they approach labour law. Do they take a doctrinal approach? If this is where the next generation of players in the industrial relations system is being schooled, does their labour law schooling differ from the traditional approach with which Bennett takes issue? Even if only briefly, such considerations might have indicated (and reinforced) why labour law is so strongly in need of an academic overhaul.

Another criticism is that the index is not particularly comprehensive. There could have fruitfully been an index item for tort and for conspiracy, for example. Then there is the problem that Australian labour law is currently changing so rapidly. But these are not to detract from the overall value of a work that is innovative in its approach and scholarly in its endeavour.

Conclusion

Labour law has never been more important. It has been pointed out elsewhere[11] that an understanding of the political dimensions to labour law is critical if the reality of enterprise bargaining and individual employment contracts are to be confronted. This may be particularly crucial in the race towards an uncertain future under a possible Liberal Government led by the 'reformed' industrial relations individualist John Howard.

The book could be used as a guide for an Australian teacher of labour law who teaches from a contextual perspective. It might also be of assistance for the industrial relations teacher who includes legal aspects to their course. It both offers an interesting conceptual framework for an analysis of labour law and provides a scholarly and critical evaluation of the modern Australian institutional framework to decision making in this area.

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11 Hocking, B.A., (1994) 'Economic Rationalism and Social Justice' *Socio-Legal Bulletin* 4.