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IN AUSTRALIAN LEGAL SCHOLARSHIP: (AND WHAT WAS  
REGULATING 'LABOUR' OR 'WORK' BEFORE LABOUR LAW  
AS WE KNOW IT)?**

Richard Mitchell

The Workplace and Corporate Law Research Group (WCLRG) is a research concentration within the Department of Business Law & Taxation, Monash Business School. It has been in operation since March 2008, having previously operated as the Corporate Law and Accountability Research Group (CLARG) since November 2005.

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# THE EVOLUTION OF THE IDEA OF A LABOUR LAW SUBJECT IN AUSTRALIAN LEGAL SCHOLARSHIP: (AND WHAT WAS REGULATING 'LABOUR' OR 'WORK' BEFORE LABOUR LAW AS WE KNOW IT)?\*

**Richard Mitchell\*\***

In his study *Judges in Industry* in 1954, the American scholar, Mark Perlman, observed that there was an absence of serious scholarship on the subject of industrial regulation of industry through labour arbitration in Australia.<sup>1</sup> He might also have made a similar observation about labour law more generally. Other fields of relevance to labour, including trade union regulation, strike law, the contract of employment, workers compensation and so on were also relatively neglected at this time, particularly in book-length studies which might

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\* I am grateful to my colleague Carolyn Sutherland for her assistance in the preparation of this paper. I also thank Bill Ford, Andrew Frazer and Richard Naughton for reading through various versions of the paper and for their valuable suggestions on the paper's contents. The paper's title reflects a general debt owed to Guy Davidov and Brian Langille (eds.), *The Idea of Labour Law*, Oxford University Press, Oxford, 2011, and other similar works pioneered by these and other scholars associated with this broad debate. Readers should note that the discussion focuses on books dealing with Australian labour law rather than the published literature in this area generally. It does not include a consideration of journal articles or other published papers. The paper is also confined to studies of labour law at a Federal or Federal/State level. It does not cover works which are confined to the study of labour law at a specific State level. I have tried to be as comprehensive as possible. Inevitably, though, there will be works that I have missed, or that I have not selected for discussion for one reason or another. In particular I may have failed, in some instances, to note important changes in later editions of books which I have treated cursorily in respect of earlier editions. Also, in preparing the paper it has been necessary for me to deal with work in which I have been involved. I have tried to be impartial. I hope the reader will excuse any errors of judgement in this respect. A shortened version of the paper was published as follows: Richard Mitchell, 'The Evolution of a Labour Law Subject in Australian Legal Scholarship' in John Howe, Anna Chapman and Ingrid Landau (eds.), *The Evolving Project of Labour Law: Foundations, Development and Future Directions*, Federation Press, Sydney, 2017.

\*\* Professor, Department of Business Law and Taxation, and Ethical Regulation Research Group, Monash University.

<sup>1</sup> This observation is also made in J. H. Portus, *Australian Compulsory Arbitration 1900-1970*, Hicks Smith & Sons, Sydney, 1971. Perlman's brief account of the main literature on compulsory conciliation and arbitration in Australia can be found in Mark Perlman, *Judges in Industry: A Study of Labour Arbitration in Australia*, Melbourne University Press, Carlton, 1954, at pp. 23-29. The general (parlous) state of labour law scholarship in Australia has been an ongoing theme in the literature, as we will note throughout. As late as 1979, Brian Brooks was pointing to the 'relative paucity of publications' examining 'the operation of the mechanism for handling industrial disputation' and the 'almost total absence of writing on ...the relationship of employer and employee': Brian Brooks, *Contract of Employment: Principles of Australian Employment Law*, CCH Australia Limited, Sydney, 1979. Australia is not alone in this kind of observation, particularly of the pre-1950s period: see, for example, Harry W. Arthurs, 'National Traditions in Labor Law Scholarship: The Canadian Case' (2002) 23 *Comparative Labor Law & Policy Journal* 645, at p. 656.

have drawn together some or all of these into a conceptual whole justifying the title Labour Law, Industrial Law, or, perhaps, Industrial Regulation.

Of course this does not mean that there were no books on these topics. There were several studies based on the Australian systems of compulsory arbitration, their legal foundations, their institutions, and their operations and impacts, some emanating from early in the twentieth century. Henry Bournes Higgins had published his book on arbitration, *A New Province for Law and Order*, in the early 1920s.<sup>2</sup> A major scholarly study by George Anderson of wage determination through the Australian compulsory arbitration system was published in the late 1920s.<sup>3</sup>

However, clearly the early leading authority on the compulsory arbitration system from the 1930s onwards was Orwell Foenander. Foenander had been advised by Higgins some time during the First World War to take up the study of arbitration law, and this he did, apparently single-mindedly. Over a very lengthy career stretching from the 1920s through to the 1970s, Foenander published eleven books on various aspects of industrial regulation. The first four of these were published before the 1950s.<sup>4</sup> There was no mention of 'labour law' or 'industrial law' in the index of any of these works, nor was there a consideration of the contract of employment. The core conception grounding the studies was the 'regulation of industry' through compulsory conciliation and arbitration, with the associated objectives of maintaining industrial peace, but also assisting the improvement of the welfare of working people. The main subject matter dealt with included legislation for conciliation and arbitration, its constitutional base, associated case law, wage fixation and working hours, awards, State provisions, and studies of particular industries. There was some coverage of trade unions under the arbitration systems, and there was increased attention paid to the regulation of trade unions (and employers associations), their registration and rules and so on, as the series of Foenander's works evolved.<sup>5</sup>

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<sup>2</sup> Workers Educational Association, Sydney, 1922. Some of this had earlier been published in serial article form in U.S. academic journals.

<sup>3</sup> *The Fixation of Wages in Australia*, Macmillan, Melbourne, 1929.

<sup>4</sup> These were *Towards Industrial Peace in Australia*, Melbourne University Press, Melbourne, 1937; *Solving Labour Problems in Australia*, Melbourne University Press, Melbourne, 1941; *Wartime Labour Developments in Australia*, Melbourne University Press, Melbourne, 1943; and *Industrial Regulation in Australia*, Melbourne University Press, Melbourne, 1947.

<sup>5</sup> Particularly *Industrial Regulation in Australia*.

The recognition of a subject 'labour law' first appeared in Foenander's next book *Studies in Australian Labour Law and Relations* published in 1952.<sup>6</sup> However, apart from this specificity in title, the content of the work was largely identical to the earlier works, dealing basically with 'industrial regulation' as it applied to the Court of Conciliation and Arbitration, hours and wage regulation and the constitutional base of the Federal Government's powers to regulate industry.

It is thus not until the publication of Foenander's book *Better Employment Relations* in 1954<sup>7</sup> that we find something of a discussion of what might be regarded as the subject matter of 'labour' or 'industrial' law. In what was otherwise a typical coverage of the 'machinery' of conciliation and arbitration at federal and state levels, the making of awards, the basic wage and other conditions of work, and some dimensions of trade union regulation, Foenander also included some material on the classification of industrial law and its relevance to employment relations.<sup>8</sup> His approach was to divide 'industrial law' into two categories: 'public industrial law' and 'private industrial law'.<sup>9</sup> Private industrial law referred to those laws protecting the weaker party (labour) in the making of, and the carrying out of obligations pursuant to, the contract of employment such as obligations set out as part of master's and servant's law, worker's compensation law and employer's liability law. These regulations were regarded by Foenander as relatively unimportant in the scheme of things. Where Foenander considered Australia to have taken a *leading* role was in its commitment to 'public' industrial law: i.e. 'industrial regulation' in the form of compulsory arbitration, awards, Factories and Shops Acts and the like, whose purpose it was to safeguard the community against dangers to body and health, or disruption of the common peace. In this respect Australia was ahead of the development of social policy internationally, and it was these kinds of measures that justified the categorisation of industrial law as a branch of public law.<sup>10</sup>

In his subsequent works Foenander adopted much the same approach as in this earlier body of material. At a time when British scholars were grappling with the conceptualisation of 'labour law',<sup>11</sup> there was no follow-up discussion on the

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<sup>6</sup> Melbourne University Press, Melbourne.

<sup>7</sup> The Law Book Co. of Australasia Pty Ltd, Sydney, 1954.

<sup>8</sup> *Ibid.*, ch.2.

<sup>9</sup> To all intents and purposes 'industrial law' is used interchangeably with 'labour law' in this discussion (see p. 14).

<sup>10</sup> See at p. 16.

<sup>11</sup> See R. Mitchell (ed.), *Redefining Labour Law*, Centre for Employment and Labour Relations Law, University of Melbourne, 1995, pp. vii-xv.

meaning of 'labour' or 'industrial' law by Foenander after 1954. A work devoted to workers' compensation appeared in 1956.<sup>12</sup> The contract of employment makes a brief appearance in *Industrial Conciliation and Arbitration in Australia*<sup>13</sup> in relation to awards, and in the same work there is a reasonably lengthy discussion of collective bargaining and profit sharing as possible alternatives to industrial regulation by government.<sup>14</sup> There followed a work on trade unions, which dealt with some political and legal background, but explored at great length the laws governing their registration pursuant to statute, the regulation of their rules, the rights of membership and so on pursuant to the provisions of Australian industrial regulation,<sup>15</sup> and a work on shop stewards and shop committees.<sup>16</sup> Foenander's last work, *Recent Developments in Australian Industrial Regulation*,<sup>17</sup> dealt typically with aspects of the Federal and State arbitration systems.<sup>18</sup>

There were other lengthy studies of various aspects of Australian labour law in existence at this time. These included works comprised of legislative annotations and cases applying to the Federal and other arbitrations systems,<sup>19</sup> as well as worker's compensation legislation.<sup>20</sup> These were, however, as their titles suggest, highly subject-specific in purpose. Probably the most *general* work in Australian labour law published prior to the 1960s was *The Development of Australian Trade Union Law* by J. H. Portus, which appeared in 1958. Interestingly Portus described the origins of his book as arising from difficulties he had experienced in 'preparing a course of lectures on industrial arbitration' in the late 1930s.<sup>21</sup> This might say something about the general

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<sup>12</sup> *Developments in the Law Governing Workers Compensation in Victoria*, The Law Book Co. of Australasia Pty Ltd, Sydney.

<sup>13</sup> The Law Book Co. of Australasia Pty Ltd, Sydney, 1959

<sup>14</sup> See ch. VII.

<sup>15</sup> *Trade Unionism in Australia: Some Aspects*, The Law Book Co. of Australasia Pty Ltd, Sydney, 1962.

<sup>16</sup> *Shop Stewards and Shop Committees: A Study in Trade unionism and Industrial Relations in Australia*, Melbourne University Press, Melbourne, 1965.

<sup>17</sup> The Law Book Company Limited, Sydney, 1970.

<sup>18</sup> For a comprehensive assessment of Foenander's contribution to Australian labour law see Braham Dabscheck, 'Orwell de Ruyter Foenander: Australia's First Labour Law Scholar' (1998) 11 *Australian Journal of Labour Law* 1.

<sup>19</sup> For example N. G. McWilliam and R. H. Boyt, *Commonwealth Conciliation and Industrial Arbitration Law*, Law Book Co. of Australasia, Sydney, 1946; J. R. Nolan and K. A. Cohen, *Federal and State (NSW) Industrial Laws: Being the Statutes Comprehensively Annotated*, Butterworths, Sydney, 1948. Subsequent versions of this latter work eventually moulded into a series of editions of C.P. Mills and G. H. Sorrell, *Federal Industrial Law*, and then the Butterworths, *Industrial Laws Service*, which began in 1975. Another work which has gone through numerous editions since 1979 is the CCH *Guidebook to Australian Industrial Law*: see for example, Peter Punch, *Australian Industrial Law*, CCH, Sydney, 1995.

<sup>20</sup> For example, K. Anderson and B. W. Beach, *Worker's Compensation Acts*, Butterworths, Melbourne, 1948.

<sup>21</sup> Melbourne University Press, Melbourne, p.1.

make-up of 'labour law' or 'industrial law' courses in university law degrees prior to the 1960s, although we would need further research to confirm that conclusion. Portus's book covered the English background to the law on trade unions and strikes; the early Australian trade union law; the development of compulsory arbitration; industrial agreements and awards; the registration of trade unions and control over their internal affairs. Subject-matter wise then, this is as close to a comprehensive account of Australian labour law as can be found up to this point of time in one work. However, the work lacks any detailed treatment of the contract of employment, and it is constituted, as Portus's opening sentence suggests, not to deal with the legal position of labour but to examine *the legal position of trade unions* in Australia in the context of the system of compulsory arbitration.

This brings us to the work of Ted Sykes. Like Foenander, Sykes was a long term contributor to labour law research in Australia, though from the outset his scholarly interests were generally broader than most of those who preceded him in this field of enquiry. As Harry Glasbeek has pointed out, Sykes's scholarship ranged across '[t]he laws relating to individual contracts of employment, to workers' compensation, to the personality and legal status of trade unions, to strikes, to the compulsory conciliation and arbitration systems of Australia, as well as aspects of specific labour relations institutions and events'.<sup>22</sup>

Sykes's two early book-length contributions to labour law both appeared in 1960: *The Employer, the Employee and the Law*; and *Strike Law in Australia*.<sup>23</sup> While Glasbeek is undoubtedly correct in his summation of Sykes's contribution as both 'towering' and 'brilliant',<sup>24</sup> he also describes it as 'foundational',<sup>25</sup> and it is this last quality that is particularly relevant to the present discussion. What foundation was Sykes setting down for the notion or idea of 'labour law' in Australia (beyond drawing together a body of subject matter perceived appropriate for discussion and analysis under this title)?

In their own way, each of these works is indicative of a changing approach to the concept of 'labour law' in the Australian context, but, as we shall see, one

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<sup>22</sup> See Harry Glasbeek, 'E I Sykes and the Significance of Law' (1998) 11 *Australian Journal of Labour Law* 24, at p. 25.

<sup>23</sup> Law Book Company, Sydney, in both cases. Throughout the 1950s Sykes had made numerous contributions to scholarship in labour law through publications in academic journals. These works are listed in Glasbeek, above n. 22, at p. 43.

<sup>24</sup> Above n. 22, at pp. 24 and 26.

<sup>25</sup> At p. 26.

which underwent a long period of gestation. *Strike Law*, as the title suggests, focused solely on one part of what is now regarded as 'labour law', but at the outset made some cogent observations with broader implications. 'Both historically and logically...' stated the author, all forms of collective action by workers '...came into being through the disparity in economic power and resources between the employer and the individual workman'.<sup>26</sup> Inequality of power led to collective action by workers, to trade unions, collective bargaining, and to industrial action, which, in turn, led to the regulation of those institutions and activities. Interestingly, Sykes's book set out the legal controls over strikes and other forms of industrial action, but did not do so using the Australian conciliation and arbitration system as its core. Rather, the text dealt with the different sources of legal controls, including criminal law and tort law, and the various administrative powers available to the arbitration tribunals and other associated authorities. The conciliation and arbitration legislation of the Federal government and the States were merely one species of law in this discussion rather than the conduit for investigation.

If *Strike Law* gave some slight indications of a shifting focus in Australian labour law towards the employment relationship and its regulation as a conceptual grounding, *The Employer, the Employee and the Law* simply confirmed that idea. The work was designed for company officers and trade union officials, and did not purport to be 'a treatise on industrial law'.<sup>27</sup> But on the other hand the text began as follows: 'Industrial law comprises a study of the legal rules governing the employer-employee relationship'.<sup>28</sup> Many of these rules, the author noted, 'still [lay] as a rather vaguely comprehended background to the activities of Australian industrial tribunals'.<sup>29</sup> In Sykes's view it was necessary to overcome this gap in knowledge: 'the *learning* governing industrial relationships has impact on certain established branches of the normal law and the principles governing such established branches have impact in turn on the framing of industrial relationship policies. Such branches of the law are the law of contract, the law of torts, the criminal law and constitutional law...'.<sup>30</sup>

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<sup>26</sup> At p. 1. The conceptualisation of the principal objectives of British labour law were also moving in a similar direction at this time see Roy Lewis and John Clark (eds.), *Labour Law and Politics in the Weimar Republic*, Basil Blackwell, Oxford, 1981, pp. 52-56.

<sup>27</sup> See at p. (iii).

<sup>28</sup> At p. 1.

<sup>29</sup> At p. (iii).

<sup>30</sup> At p. 1. The emphasis is added.

Thus by 1960, albeit in preliminary and abstracted form, we have some indication of what the legal subject 'labour law' or 'industrial law' might be comprised of and about, even if we were still uncertain of its title.<sup>31</sup> The relevant parties included Federal and State governments, employers and employees (i.e. those employing, or employed, pursuant to contracts of employment) and trade unions; they probably also included masters and servants and other similar work-related designations - workmen, labourers and so on where these remained in legal effect. The focus was on the various legal rules and institutions which shaped, governed, regulated and impacted upon the relationships between those parties, and how those relationships interrelated with the broader society. The relevant sources of law included (as noted) criminal law, contract and tort law, constitutional law, and the various statutory provisions and other rules, orders, and awards which ordered and regulated those relationships.

On the other hand, what labour law (or industrial law) was *for* was perhaps still less clear. If, as we have noted in relation to the work of Foenander, the field of 'industrial regulation' in Australia (in the shape of conciliation and arbitration legislation, workers' compensation and factories legislation) could be said to be associated with multiple purposes, including the improvement of working lives, protection against various risks, and the maintenance of economic and social stability, what purposes could be attributed to a newly conceived 'industrial' or 'labour' law? Was the purpose of 'labour law' to pursue these same objectives? Or was the purpose of 'labour law', as indicated, principally to rectify the imbalance of power inherent in the employment relationship between employer and employee? And if it was to rectify this imbalance, what subject matter should be included in an investigation of this objective?

There was little occasion for further exploration of these and other associated issues in the following decade. Leaving aside various specific-subject texts and statutory commentaries it seems to have been the case that no new 'industrial' or 'labour' law text appeared devoted to the field as a whole until the 1970s.<sup>32</sup> What

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<sup>31</sup> For example, the subject taught in the University of Melbourne law degree in 1968 was still titled 'Industrial Law'.

<sup>32</sup> I am relying on the following publication for this information: Ros Bischoff, Richard Mitchell and Andrea Steer, *Australian Labour Law: A Selected Bibliography*, Labour Studies Programme, University of Melbourne, 1985. There are two other (now dated) bibliographical studies of Australian labour law: see Breen Creighton, 'A Review of Labour Law Research in Australia' in S. Edlund (ed.), *Labour Law Research in Twelve Countries*, Swedish Work Environment, Stockholm, 1986; and Richard Mitchell, 'Labour Law Research in Australia: A Review of the Literature 1975-1985' (1987) 1 *Labour & Industry* 96. Up until, and including vol. 12, the

this means in essence is that it is only with the emergence of the new works in the 1970s, and beyond, that we can begin to speak seriously of the emergence of a body of scholarly books dealing with the entire legal subject 'labour law' (or 'industrial law' as it continued to be titled in some cases).

The appropriate starting point here is with the formative work by Sykes and Glasbeek, *Labour Law in Australia*, published in 1972.<sup>33</sup> Though largely divided into two separate books, in terms of its broad coverage of what would then have generally been regarded as virtually the entire subject matter of a 'labour law' subject ('the whole complex of rules'<sup>34</sup>), embodying both individual and collective relationships between employers and employees, this work is unquestionably the first complete labour law text produced for use by legal students and scholars in Australia.<sup>35</sup> In this respect it more or less followed the same lines set out by Sykes more than a decade earlier.<sup>36</sup> Of further importance to the present discussion is the fact that the Introduction to the work<sup>37</sup> was also grounded in Sykes' earlier view of the 'labour law' purpose: i.e. to overcome the inequality of bargaining power between employer and employee ('the comparative helplessness of the individual employee in the face of superior economic resources').<sup>38</sup> In these two respects the idea of labour law in Australia thus largely mirrors, at this point of time, the conceptual approach taken by British legal scholars to labour law in relation both to subject matter and objective.<sup>39</sup> Because of its importance, it is perhaps useful to look at the division of subject matter in this account of labour law. Sykes' account of the individual aspects of labour law included more than 100 pages on the contract of

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*Australian Journal of Labour Law* included an annual bibliography. It is also important to note the extremely valuable role now played in the upkeep of, and additions to, the bibliography in Creighton and Stewart's *Labour Law* (see below at n. 67). This has become especially marked as the work has evolved. For example the fifth edition, published in 2010, contains more than 1,500 bibliographical entries in a work of some 880 pages.

<sup>33</sup> E. I. Sykes and H. J. Glasbeek, *Labour Law in Australia*, Butterworths, Sydney, 1972. Harry Glasbeek has explained how this collaboration came about: see, above n. 22, at p. 24. A planned second edition of this work appeared only as Sykes and Yerbury, *Labour Law in Australia: Volume One, Individual Aspects*, by E. I. Sykes, Butterworths, Sydney, 1980. This work basically updated Book One of the earlier work. The second volume of this second edition was never completed.

<sup>34</sup> See *ibid*, at p.1.

<sup>35</sup> This fact was also recognised by the authors themselves: see Preface, p.v.

<sup>36</sup> See above nn. 28-30, and associated discussion.

<sup>37</sup> *Labour Law in Australia* was divided into two separate books, *Individual Aspects* and *Collective Aspects*, the first authored by Sykes and the second by Glasbeek. There was a separate Introduction to each book, but in essence these assume the same stance, and proceed from the same philosophical standpoint (see p. 365).

<sup>38</sup> *Labour Law in Australia*, p.2.

<sup>39</sup> For example, K. W. Wedderburn, *The Worker and the Law*, Penguin, Harmondsworth, 1965; K. W. Wedderburn, *Cases and Materials on Labour Law*, Cambridge University Press, Cambridge, 1967; Otto Kahn-Freund, *Labour and the Law*, Stevens, London, 1972.

employment and nearly 200 pages on workers compensation. It also included 30 pages on the application of civil law and some legislation to industrial action. Glasbeek's treatment of the collective dimensions of Australian labour law was predominantly concerned with the Federal and State conciliation and arbitration systems, their constitutional foundation, awards and agreements, enforcement of the system, and some particular regulatory outcomes in wages, working hours and so on - a text of almost 350 pages in length. The accompanying treatment of trade union law was limited by comparison, some 50 pages dealing with registration, legal personality and union security. In introducing his work, Harry Glasbeek tentatively identified the role of the state in protecting the social and economic wellbeing of the nation in the context of the 'perpetual "war between the profit-maker and the wage-earner" ' as providing an appropriate philosophical grounding for Australian labour law.<sup>40</sup>

Three subsequent general works on labour law appeared in the 1970s.<sup>41</sup> The first of these, *Cases and Materials on Industrial Law in Australia* by Glasbeek and Eggleston, appeared in 1973.<sup>42</sup> While this work covered aspects of both collective and individual employment issues, the individual aspects were largely confined to industrial injuries. Consequently this was not really a comprehensive treatment of labour law, and appears to have been designed to meet the requirements of specific legal subjects as part of a university law degree.<sup>43</sup> While there is no extensive exposition of a conceptual grounding to labour law in the work, it appears to have been intended to act as an informal

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<sup>40</sup> At pp. 365-367. The quote relied on by Glasbeek is drawn from Higgins' *New Province* (see above n.1).

<sup>41</sup> There were also other more subject-specific works of scholarship published during this period. One example is D. W. Smith, *The Legal Status of Australian Trade Unions*, Butterworths, Sydney, 1975. A second edition of this work was published as Douglas W. Smith and Donald W. Rawson, *Trade Union Law in Australia: The Legal Status of Australian Trade Unions*, Butterworths, Sydney, 1985. Another area of relevance in this regard is the Constitutional foundation of the Federal Government's powers to make industrial laws see, for example, J. J. Macken, *Industrial Law: The Constitutional Basis*, Law Book Company, Sydney, 1980; and Neil Gunningham, *Industrial Law and the Constitution*, Federation Press, Sydney, 1988. The capacity for the publication of these more specialised labour law works was stimulated considerably with the establishment of the Monographs on Australian Labour Law series, published by Federation Press in Sydney. This initiative was supported very graciously and positively by the late Chris Holt and his colleagues at Federation, and has given rise to five volumes, the most recent of which was published in 2010. The works are as follows: Phillipa Weeks, *Trade Union Security Law: A Study of Preference and Compulsory Unionism*, 1995; Richard Johnstone, *Occupational Health and Safety, Courts and Crime: The Legal Construction of Occupational Health and Safety Offences in Victoria*, 2003; Joellen Riley, *Employee Protection at Common Law*, 2005; John Howe, *Regulating for Job Creation*, 2008; and Shae McCrystal, *The Right to Strike in Australia*, 2010.

<sup>42</sup> By H.J. Glasbeek and E. M. Eggleston, Butterworths, Sydney. See also the Preface, p. ix, of R. C. McCallum and R. R. S. Tracey, *Cases and Materials on Industrial Law in Australia*, Butterworths, Sydney, 1980. This work is discussed in further detail below: see nn. 52-53 and associated discussion.

<sup>43</sup> Preface p. vii.

supplement to Sykes' and Glasbeek's *Labour Law in Australia*, and moves from basically the same starting premisses.<sup>44</sup>

In 1978 the first edition of what would prove to be a long-running publication in Australian labour law under the title *The Common Law of Employment* was published.<sup>45</sup> As the title indicated, the core purpose of this work was to explore the 'common law aspects of the employer/employee relationship',<sup>46</sup> because, in the authors' view (and, apparently, notwithstanding the detailed coverage of these areas in Sykes and Glasbeek) 'many of those who work[ed] in this area...tend[ed] to regard the industrial arbitration statutes...as comprising the whole body of the law relevant to employer and employee relationships in this country'.<sup>47</sup> To the extent that the work revealed a purpose in the evolution of the law pertaining to the employment relationship, it was as a response to the struggle for freedom and protective terms and conditions of employment for working class people.<sup>48</sup>

In 1979 CCH published the first edition of what was to become another long-running text in Australian labour law authored by Brian Brooks.<sup>49</sup> While titled *Contract of Employment: Principles of Australian Employment Law*,<sup>50</sup> the author, noting that the employment relationship should be considered to be central to 'employment law', argued that the 'personal relationship' lay also at the heart of the broader concept of 'industrial law', principally because the operation of the legislated award and industrial agreements system acted only upon the existence of an employment contract.<sup>51</sup> Notwithstanding its title, then, this was a work which dealt with the broad sweep of labour law content: the contract of employment, collective regulation of employment, job security, 'industrial welfare' (wages, working hours, occupational health and safety), and 'industrial warfare' (strikes and other forms of industrial action). The section on

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<sup>44</sup> Preface p. vii, and General Introduction, p.1.

<sup>45</sup> By James Joseph Macken, Carolyn Moloney and G. J. McCarry, and published by The Law Book Company, Sydney. By 2011 this work had gone through seven editions under varying authorships. The most recent edition is Carolyn Sappideen, Paul O'Grady, Joellen Riley and Geoff Warburton (with Belinda Smith), *Macken's Law of Employment*, Thomson Reuters, Sydney, 7th. ed. 2011.

<sup>46</sup> Preface, p. v.

<sup>47</sup> At p. 182.

<sup>48</sup> Chapter One. A second edition of this same work appeared in 1984. It was largely unchanged from the first edition in content and structure: see James Macken, G. J. McCarry and Carolyn Sappideen, *The Law of Employment*, Law Book Company Limited, 2nd ed., 1984.

<sup>49</sup> The work ran through four editions until 1992.

<sup>50</sup> See for details, above n. 1.

<sup>51</sup> Brooks p. 5.

'industrial welfare' proceeds from Kahn-Freund's observation about the inequality of power inherent in the contract of employment.<sup>52</sup>

Geoff Sorrell's book, *Law in Labour Relations: An Australian Essay*,<sup>53</sup> while reasonably comprehensive of subject matter (it dealt with aspects of the individual employment relationship, the legal regulation of trade unions and their relations with members, conciliation and arbitration, awards, and the law pertaining to strikes and other forms of industrial action) nevertheless stands apart from the other works considered so far in this survey. By the author's own account, the work was not designed as a vehicle for teaching 'labour law' to law students, but rather as an exploration of the role of law as one of a number of 'aspects' which bear upon and shape the 'social discipline' of industrial relations.<sup>54</sup> Shaping the study was the author's view that industrial relations within society was characterised by conflict, and that 'labour law' reflected this social reality. The four main areas of conflict which the author used to shape the book's discussion were conflict between employers and employees, conflict between trade unions and employers, conflict between unions, and conflict between unions and individual workers (members and non-members). As the stated purpose of the work suggested, the treatment of the legal material was far more discursive and less doctrinally oriented than the other works reviewed here.

The successor to Glasbeek and Eggleston's 1973 casebook appeared in 1980 under new authorship, but bearing the same title: *viz.* R. C. McCallum and R. R. S. Tracey, *Cases and Materials on Industrial Law in Australia*.<sup>55</sup> Fundamentally this edition adhered to the earlier version of the work in terms of both spread and depth of subject matter. Part One dealt with the system of 'industrial regulation' including conciliation and arbitration, awards, national wage determination, and enforcement. State systems and aspects of the law pertaining to trade unions were also covered. One inclusion which was indicative of the evolution of Australian labour law by 1980 was a chapter dealing with unfair dismissal. As with the earlier version, Part Two covered Industrial Injuries, and there was no general coverage of the individual employment relationship beyond that aspect.

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<sup>52</sup> See Brooks, p. 145. See also n. 26 above, and associated discussion.

<sup>53</sup> The Law Book Company of Australia, Sydney, 1979.

<sup>54</sup> Preface p. vii.

<sup>55</sup> Butterworths, Sydney.

There was, however, at least one important, if minor, difference between these two early editions of this labour law text. Part One of the first edition, dealing with the system of industrial dispute settlement was labelled 'Collective Relationships'. In the McCallum and Tracey version it was retitled 'Industrial Regulation', and, as if to re-emphasise the particular *national* character of Australian labour law's grounding and purpose, the work opened with the following pronouncement: 'In the last 75 years...our federal system of compulsory conciliation together with final and binding interest arbitration has directly ensured minimum wages and work rules for over half of the nation's work force and has indirectly affected the remaining workers...The hub of the federal machinery, *the Conciliation and Arbitration Commission, is the most important tribunal in the land. Its national wage decisions are as important to the nation as the many economic and monetary statements emanating from the Australian government*'.<sup>56</sup> This echoed, clearly enough, the sentiments of Orwell Foenander expressed in his studies of the Australian compulsory arbitration system from the 1930s onwards and probably, to a large degree, the views of those like Higgins and Anderson before him. Australian labour law was 'industrial regulation'. That regulation embodied differing and potentially conflicting purposes, social and economic. But at its heart lay the fundamental objective of securing the welfare of working people.

A second casebook in the field was introduced with the publication in 1983 of *Labour Law: Materials and Commentary* by W. B. Creighton, W. J. Ford and R. J. Mitchell.<sup>57</sup> This work sought, as some others had before it, to distinguish itself from some earlier works in the field, and at the same time, to propose a reconstitution of the subject. The work purported to present 'a balanced view of the totality of the relationship between Law and Labour Relations in Australia', and also to present the law in its 'historical, social, political and economic' contexts'.<sup>58</sup> It was also critical of the 'undue emphasis' in other labour law texts on 'constitutional issues and workers compensation'.<sup>59</sup> In terms of its subject matter, the five main parts of the book covered the employment relationship, the systems of conciliation and arbitration, trade unions, industrial action and

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<sup>56</sup> McCallum and Tracey, above n. 51, at p. 3. My emphasis.

<sup>57</sup> Law Book Company, Sydney.

<sup>58</sup> Preface p. v.

<sup>59</sup> Preface p. v. Despite these protestations, in a work of some 950 pages, still some 180 pages, and more, were devoted in this work to the constitutional limits on the Federal Government's powers to make laws for the regulation of labour.

occupational health and safety.<sup>60</sup> The breadth of its subject matter, and the balance in the treatment of its separate parts, probably identified *Labour Law: Materials and Commentary* as the most comprehensive text since the 1972 work of Sykes and Glasbeek, though the brevity of its textual content meant that it could not be ranked alongside that earlier book. Perhaps one innovation in the 1983 work was the more extensive treatment given to the actual contents of awards. Certainly the separate treatment of occupational health and safety was innovative for an Australian labour law work, grounded in developing an understanding of the problems and issues of workplace injury and ill-health, and an investigation of the development of law and policy relating to these issues. On the other hand workers compensation, which was a major topic in some other labour law texts, was dealt with in less than five pages!

As with other works, the conceptual starting point for these authors was the conflict between employers and employees inherent in capitalist society.<sup>61</sup> The role of the state was crucial in regulating this conflict. The book offered a number of theoretical interpretations of the state's role, and how that might shape the practice of industrial relations and the law.<sup>62</sup> As with the Sykes and Glasbeek model, Creighton, Ford and Mitchell introduced Australian Labour Law through the lens of the individual contract of employment, since it was that relationship which underpinned the application of most of the rights and obligations prescribed in collective labour law.<sup>63</sup> Seen in this light, a consideration of the respective legal positions of the parties to the individual contract of employment was not merely filling a gap in labour law knowledge, it was an essential link in understanding how labour law and its processes are constructed and operated.

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No new major labour law text appeared in the years between the publication of Creighton, Ford and Mitchell in 1983 and the end of the decade,<sup>64</sup> and, for various reasons that will be discussed below, it might be argued that the period from the late 1980s onwards marked something of a re-energising, or

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<sup>60</sup> The work's content and organisation were strongly influenced by the earlier British text of Bill Wedderburn: see K. W. Wedderburn, *Cases and Materials on Labour Law*, Cambridge University Press, Cambridge, 1967.

<sup>61</sup> Page 5.

<sup>62</sup> Chapter One, pp. 1-5.

<sup>63</sup> Chapter 2, p. 13. See also Sykes and Glasbeek, above n. 33, at p. 13.

<sup>64</sup> As noted above (see n. 49) a new edition of Macken et. al. appeared in 1984, but was basically unchanged in format and content from the earlier edition of the same work.

revitalisation, in the field of labour law, and ultimately in what it should be about.

Several factors fed into this upsurge in interest. First, around this time some universities began to offer specialised post-graduate courses in labour law - something that reflected a growth in labour law specialisation in legal practice, a demand for more specialised legal knowledge among industrial relations practitioners, and at the same time a way forward for students who were interested in pursuing careers in research and teaching in this field. Secondly, the *Australian Journal of Labour Law*<sup>65</sup> had been established in 1988, offering a specialised outlet for publication, and a vehicle for the development of issues and themes seen as important to the labour law field.<sup>66</sup> Thirdly there were increasing numbers of labour law specialists teaching as part of groups based in institutions of higher education (law schools and business faculties) which were both the result of, and a further stimulation for, specialised labour law programmes, and labour law subjects in industrial relations programmes. One outcome of this kind of process was the formation of the Centre for Employment and Labour Relations Law, at the University of Melbourne, as the result of the merging of several groups of law academics into the Law Faculty in 1994.

All of these factors indicate a burgeoning interest, both practical and scholarly, in labour law across a broad field of practitioners and scholars alike. Some of this sense of a heightened 'significance' of labour law, and a sense of changing contexts which would affect the direction of labour law policy, are noted in some of the works published in the early 1990s. For example, writing in the Foreword to *Australian Labour Law: Cases and Materials*, by R. C. McCallum, Marilyn J. Pittard and Graham F. Smith<sup>67</sup> in 1990, Justice Peter Gray described the ongoing changes to labour law as 'dramatic'.<sup>68</sup> He continued on to note 'a growing realisation of the growing importance of the employment relationship', and, most relevantly for this present discussion, the fact that 'political attitudes

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<sup>65</sup> Published by Butterworths, Sydney.

<sup>66</sup> This point is also noted by Breen Creighton and Andrew Stewart in the first edition of their text *Labour Law: An Introduction*, Federation Press, Sydney, 1990, at p.1.

<sup>67</sup> Butterworths, Sydney. This was the second edition of *Cases and Materials on Industrial Law in Australia*, by Ron McCallum and Richard Tracey, discussed above (see nn. 52-53 and associated discussion). This second edition (and third in the sequence of Butterworth's Labour Law casebooks originating with Glasbeek and Eggleston's work) was now retitled and, again, under new authorship. For discussion on the book's radically revised content, and its orientation, see below at nn.70-71 and associated discussion.

<sup>68</sup> Page xiii.

to the respective social responsibilities of labour and capital in Australia [had] diverged. Statutory changes [were] occurring already and [might well] continue, with the possibility of quite large swings until new [sic] broadly accepted direction is reached'.<sup>69</sup> Similarly, in the Preface to their 1990 text *Labour Law: An Introduction*, Creighton and Stewart noted of labour law its status as a 'complex, challenging and fast-moving subject'.<sup>70</sup> Thus whilst there was a growing understanding of labour law's importance in social and economic terms in this period, and an ever increasing body of work designed to examine and explain its operation,<sup>71</sup> at the same time there was less certainty of its current stability and its future direction. In these post-1990 texts there was, perhaps, a sense of foreboding about the future of labour law in terms both of content, and purpose. Eventually the very survival of the subject 'labour law' would come to be questioned, in Australia as elsewhere.<sup>72</sup>

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Three important works were published in 1990, though each was significant in differing ways. The third edition of Macken, McCarry and Sappideen's *The Law of Employment* was notable, first, for its expanded length (now 618 pages as compared with the 348 pages of the second edition). Secondly, the work became one of two texts in 1990 to include detailed coverage of the law regulating discrimination in employment, on the basis of race, sex, and other grounds, as part of a labour law subject.<sup>73</sup> Thirdly, while this work was thus expanding its content in some ways, it was also reducing it in other ways. This third edition removed the chapters on conciliation and arbitration previously included in the book's two earlier editions, thereby confirming its status as a work more or less exclusively devoted to the individual employment relationship rather than one which also included coverage of aspects of the law relating to 'collective' labour relations. While there is some brief discussion of the system of award regulation, this appears largely as an adjunct to the discussion of the common

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<sup>69</sup> Ibid.

<sup>70</sup> See above n. 63 at p. (iii).

<sup>71</sup> See Creighton and Stewart, *Labour Law: An Introduction*, above n. 67, at p.1.

<sup>72</sup> See Martin Vranken, *Death of Labour Law? Comparative Perspectives*, Melbourne University Press, Melbourne, 2009.

<sup>73</sup> The other was Creighton and Stewart, *Labour Law: An Introduction*, above n. 67.

law contract and the interrelationship of those contracts with both award and statute.<sup>74</sup>

The second edition of *Australian Labour Law: Cases and Materials*,<sup>75</sup> authored by McCallum, Pittard and Smith also broke the mould set by earlier editions of these Butterworths published casebooks. Whereas earlier editions were largely confined in subject matter to a coverage of 'industrial regulation' through conciliation and arbitration, and industrial injury under the title 'Industrial Law', the 1990 version drew the work more into line with some of the other, more comprehensive, texts published earlier. 'Labour Law' was substituted for 'Industrial Law'. Chapter One offered 'An Introduction to Themes in Australian Labour Law' in which the central importance of the employment relationship in labour law was noted, and the necessity of the law, in regulating that relationship, to 'balance the interests of the disputants [i.e. workers, unions and employers] and the interests of the national economy'.<sup>76</sup> Thereafter the work followed a pattern of organisation and content now becoming something of an established model in dealing with Australian labour law, commencing with the contract of employment, then the constitutional framework of the conciliation and arbitration systems, aspects of industrial regulation and awards, trade unions and industrial action. On the other hand, regulation dealing with industrial injury and workers compensation was entirely removed from this volume.

This brings us to Creighton and Stewart's *Labour Law: An Introduction*.<sup>77</sup> This work, now in its sixth edition,<sup>78</sup> has developed into what most labour lawyers would view as the leading scholarly authority on Australian labour law: a comprehensive, extensively footnoted, substantive text. Even in the work's self-declared 'introductory' form of 1990, among Australian works it already most closely approximated the 1972 Sykes and Glasbeek volume as a labour law 'text' as such.

Noting that 'until comparatively recently, the field of labour law [had] largely been neglected by both academic commentators and those who sought to cater

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<sup>74</sup> See Chapter 14. See also James J. Macken, Paul O'Grady and Carolyn Sappideen (with Chris Ronalds), *Macken, McCarry and Sappideen's: The Law of Employment*, LBC Information Services, Sydney, 4th ed.1997.

<sup>75</sup> See above n. 64.

<sup>76</sup> Chapter One, p. 1.

<sup>77</sup> See above n. 63.

<sup>78</sup>

for the needs of practitioners',<sup>79</sup> the authors described their book as being concentrated 'on developing an understanding of the "core" areas of labour law in this country'.<sup>80</sup> The subject matter covered included an historical account of British and Australian labour law, the Federal system of conciliation and arbitration, the individual employment relationship, the regulation of trade unions, strikes and industrial action, discrimination in employment and occupational health and safety.

With the addition of employment discrimination to the text, in terms of breadth of subject matter the work was more comprehensive than any of the previous works we have examined. Oddly, however, following the introductory and historical chapters, the work began with a treatment of the conciliation and arbitration system,<sup>81</sup> thus interrupting what appeared to be an inexorable development in labour law texts towards an exploration of the individual employment relationship and the contract of employment as the appropriate conceptual starting for a discussion of labour law.<sup>82</sup>

There was no explanation in the text for why this approach was adopted. In the opening chapter, the perceived inequality of the employment relationship is observed,<sup>83</sup> and the 'collectivisation' of employee behaviour is noted as a means of rectifying this imbalance.<sup>84</sup> 'Collective Regulation' through labour law of these collective relationships, involving capital, labour, unions and the state was perceived by the authors as the acceptable or appropriate outcome in a democratic capitalist economy. The object of such regulation, according to the authors' Introduction, included the institutionalisation of collective relations and conflict, the protection of the public interest, public order and so on.

As we noted above, as the 1990s unfolded labour law scholars were increasingly drawn into a re- examination of what they believed 'labour law' to be about: that is to say there was renewed questioning of the subject's content and purposes.<sup>85</sup> Published in 1993, the second edition of Creighton, Ford and Mitchell's text, now retitled *Labour Law: Text and Materials* in recognition of

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<sup>79</sup> Page 1.

<sup>80</sup> Page 8.

<sup>81</sup> Chapters 3-5.

<sup>82</sup> As was the case. for example, with Sykes and Glasbeek (1972), Creighton, Ford and Mitchell (1983), and McCallum, Pittard and Smith (1990).

<sup>83</sup> Page 3.

<sup>84</sup> Page 3.

<sup>85</sup> See above nn. 67-72 and associated discussion.

its greater textual content, began by addressing the 'Purpose of labour law'.<sup>86</sup> In this discussion the authors, drawing on British precedents in the same vein, asserted that differing paradigms might be applied to the labour law subject. One of these was the so-called 'social' function - that labour law acted as a 'countervailing force against the inherent inequality embodied in the employment relationship'.<sup>87</sup> The second paradigm would see labour law as a tool of economic regulation (for example as a legal device for controlling inflation or unemployment and so on).<sup>88</sup> Depending on what the individual scholar thought to be the possible purposes for which the labour law system might be used, or what they identified as the ends to which the system *was* being used, then the subject matter might change accordingly. In the case of Australia, the authors noted that some core labour law institutions (for example the conciliation and arbitrations system) had historically been used, in a policy sense, to meet both social and economic functions, and that this reflected a systemic 'disunity'.<sup>89</sup>

It is important to note that in this engagement with labour law's purpose, the authors (and probably most others so engaged) were not necessarily representing their personal 'normative' vision for a 'vocation' in labour law.<sup>90</sup> No one could deny, as a matter of observation, the fact that in Australia the institutions of conciliation and arbitration were closely connected with the fulfilment of social objectives, through the regulation of pay, working hours, leave and so on. But nor could they ignore the fact that the system was also used to regulate the labour market for national economic objectives. None of this rumination necessarily signalled a preferred outlook on the part of the authors towards the objectives of Australian labour law. It is true that to some extent one might have assumed that most scholars working in this field began their analysis from a 'social' standpoint (this point was made more than once),<sup>91</sup> but it was not the intention of the authors to argue *in that discussion*, that either the social or economic objective should be the preferred starting point, nor to suggest how the (sometimes) competing objectives might be reconciled or balanced.

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<sup>86</sup> See p. 1.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Page 2.

<sup>90</sup> See Hugh Collins, 'Labour Law as a Vocation' (1989) 105 *Law Quarterly Review* 468.

<sup>91</sup> Creighton, Ford and Mitchell, 1st edn., p.5; 2nd edn. p.2.

Also important is the fact that while recognising the potential relevance of other dimensions of labour market regulation to the makeup of 'labour law' (for example, laws relating to social security, training and education, immigration) the second edition of Creighton, Ford and Mitchell in fact adhered very closely in terms of its subject matter to the first edition, and to what was now generally recognised as the appropriate content of the 'labour law' subject. To some extent this was no doubt due to assumptions made by most labour lawyers about what they were doing.<sup>92</sup> But specifically the work pointed to the requirements of teaching in a legal syllabus as a reason for so confining the content.<sup>93</sup> As in the first edition, the book opened with an examination of the contract of employment, leading into 'the legal structures which are used to establish a form of collective regulation which qualifies and/or overrides the common law of that contract; that is, the state-sanctioned process of dispute resolution, trade union regulation, and state control over industrial action'.<sup>94</sup> While there was a significant increase in the extent of the treatment of workers compensation in the book (presumably in recognition of teaching requirements),<sup>95</sup> the coverage of that subject still remained relatively muted. A plan by the authors to add a section on discrimination in employment to the work was not able to be realised due to time and space constraints.

Following on from this 1993 publication the labour law academic community in Australia and New Zealand combined in a 1995 workshop to consider the future of labour law from a pedagogical and scholarly perspective, thus potentially offering further impetus to the emerging line of discussion in labour law texts.<sup>96</sup> The ongoing relevance of this discussion was already very evident in the second edition of Creighton and Stewart's *Labour Law: An Introduction*.<sup>97</sup> In the Introduction to this new edition, under the general title 'Assumptions and Values', the authors addressed several issues, including the 'Philosophies of Labour Law and the Role of the State'. In dealing with these issues the authors

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<sup>92</sup> See Creighton and Stewart, 2nd ed p.2.

<sup>93</sup> See p.1.

<sup>94</sup> See p.1.

<sup>95</sup> See pp. 1469-1501.

<sup>96</sup> The outcomes were published in Richard Mitchell (ed.), *Redefining Labour Law: New Perspectives on the Future of Teaching and Research*, Centre for Employment and Labour Relations Law, University of Melbourne, 1995.

<sup>97</sup> Federation Press, 1994. Against the publication of this 2nd edition of Creighton and Stewart I think I would have largely disagreed with the assessment of Andrew Frazer in 1999 that the 1972 work of Sykes and Glasbeek remained 'The only true treatise on Australian labour law...': see 'Researching Labour Law' in D. Kelly (ed.), *Researching Industrial Relations*, Federation Press, Sydney, 2nd. ed. 1999, at p.95. Physical appearance and labelling, in books, can be deceptive.

pointed to the perceived major competing purposes of labour law, identified as the 'protective view' and 'the market approach', while also noting the gradual shift to prominence of the 'market-oriented' view of labour law. Questions were also raised about the relationship between labour law and 'Work and Employment': for example whether, and if so how, might labour law be connected with unpaid work generally, 'domestically-based' work, and/or work carried out by one person for another in an 'independent' capacity.<sup>98</sup> One or two of these types of issues were also briefly noted in the Introduction to the third edition of the Butterworths' casebook, *Australian Labour Law: Cases and Materials*, authored by Ron McCallum and Marilyn Pittard.<sup>99</sup>

Laura Bennett's valuable contribution, *Making Labour Law in Australia*, cannot readily be subsumed into this present discussion because, like Geoff Sorrell's earlier work,<sup>100</sup> it was not intended as a text delineating and describing the boundaries and content of 'labour law' as a subject. Nevertheless it bears consideration here for important reasons. Sub-titled *Industrial Relations, Politics and Law*, the Introduction to the work echoed earlier criticisms by some labour law scholars<sup>101</sup> of the inclination of labour law scholarship to be too narrowly focussed on legal doctrine and procedure and showing too little regard for the political, economic and social contexts in which the legal system was grounded.<sup>102</sup> According to Bennett, such an approach had been challenged by an alternative perspective (which we may perhaps label 'law in context' for present purposes), that gave much greater emphasis to the social, economic and other contexts of the law. In the author's view, however, such a broader scope for the study of labour law was not, of itself, enough. 'A contextual approach' in the author's view '[had] its own problems. It may produce a quite elaborate account of changing social, economic and political structures, a detailed description of changes in the law but a rather thin account of the links between the two. The link [was] often asserted and there [had] been relatively few studies in Australia

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<sup>98</sup> See pp. 2-6. Apart from a new chapter on International Labour Standards, the subject matter covered in this second edition was largely unchanged from the first. See also the third edition of this work, *Labour Law: An Introduction*, Federation Press, 2000, which, apart from some incidental reorganisation, remained largely the same in terms of orientation and content as the second edition.

<sup>99</sup> 1995. The content of this edition was largely unchanged from the 2nd ed.

<sup>100</sup> See above n. 54.

<sup>101</sup> See, for example, the views expressed both by Creighton and Mitchell in the works cited in n. 32 above.

<sup>102</sup> See also McCallum and Pittard, above n. 100, at p. 4.

of how legal and contextual factors interact[ed] to produce particular patterns of legislative or judicial intervention'.<sup>103</sup>

In her text Bennett sought to overcome these kinds of problems through a study of the *institutions* involved in creating and utilising labour law.<sup>104</sup> The subject matter covered the political system and the role of governments and legislation; the role of the courts and the judiciary; the role of tribunals; the implementation of the law, enforcement agencies, and the role of employers and unions in the implementation process.

The implications in this, as far as the construction of labour law texts is concerned, are more or less self-evident. Several texts of the time recognised clearly enough the relevance of the contexts within which labour law systems operated.<sup>105</sup> Some authors aspired even to present their legal texts ('the substantive rules') 'in their historical, social, political and economic context[s]'.<sup>106</sup> But whether they did so, and if so how, and to what effect, was uncertain to say the least. As with the question of 'purpose' in labour law, to introduce such issues into a legal text designed for informing other scholars, students or practitioners about 'labour *law*' immediately raises questions about content and methodology. As we have noted, such matters were under consideration among the labour law community, but really had not penetrated the construction and delivery of labour law texts and courses to any substantial degree beyond the recognition of their relevance.

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Writing in 1992, Brian Brooks had argued that '[m]ost legal subjects [were] easy to define. They [fitted] together from convenience, from some rough historical similarity and from practical relevance. *Yet it [was] true to say that there [was] no widespread agreement as to the proper content of labour law*'.<sup>107</sup> It may also be true to say that there was, and always has been, an ongoing sense of a 'diversity' in the conception of the field, which applied (and applies) equally across both professional and academic perspectives.<sup>108</sup> Nevertheless, the

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<sup>103</sup> Page 3.

<sup>104</sup> See pp. 3-6.

<sup>105</sup> See, for example, McCallum, Pittard and Smith, p.1.

<sup>106</sup> Creighton, Ford and Mitchell 1st ed. p.v, and 2nd ed. p.v.

<sup>107</sup> See Brian Brooks, above n. 51, 4th ed. 1992, at p.1. My emphasis.

<sup>108</sup> See, for example, the Foreword by Nicholas Ellery to Rohan Price and Jennifer Nielsen, *Principles of Employment Law*, Lawbook Co., Sydney, 4th ed. 2012.

foregoing discussion in this paper seems at least to suggest very strongly that there was a sufficient degree of shared understanding among labour lawyers as to what the 'idea' of labour law might be about, perhaps as early as the 1970s, but certainly by the 1980s and beyond, even if the content, title and underlying objectives of the various scholars varied to a degree. This 'labour law' was predominantly based on a legal examination of the following elements: the contract of employment, and the rights and duties of the parties to such contracts; the state's powers to regulate employment relationships the terms and conditions of the contracts underlying them; the state's powers to deal with disputes arising from the relations between employers, employees and their representative bodies; the powers, functions and processes of the state institutions given power to regulate in these relations; the conduct of trade unions acting in both their internal and external capacities; and the industrial action taken by workers and unions (and employers) in pursuit of their interests. Labour law might also include an examination of the law relating to occupational health and safety, to discrimination in employment, and international standards applying to employment.<sup>109</sup>

The 'typicality' of this content across a broad spectrum of labour law texts seems to have been established. It was clear in Brooks' own work (notwithstanding its title);<sup>110</sup> in Peter Punch's work published in 1989,<sup>111</sup> in Creighton, Ford and Mitchell (both editions); in McCallum, Pittard and Smith; and in Creighton and Stewart's 1990 and 1994 editions. Broadly this same idea was carried through the 1980s and 1990s, and then into the 2000s. It was maintained in the subsequent editions of Creighton and Stewart (albeit with some readjustments in organisation),<sup>112</sup> and it was also the core subject matter of the fourth edition of the Butterworth's casebook *Australian Labour Law*, now authored by Marilyn Pittard and Richard Naughton.<sup>113</sup> It formed the basis of Karen Wheelwright's Butterworths Casebook Companion, *Labour Law*, published in two editions (1999 and 2003),<sup>114</sup> and even (in a general fashion) quite individualised works

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<sup>109</sup> See, for example, Creighton and Stewart's second edition of *Labour Law: An Introduction*, above n. 98, ch. 3; Rohan Price, *Employment Law in Principle*, Lawbook Co., Sydney, 1st ed. 2002, ch.16, and also R. Price and J. Nielsen, *Principles of Employment Law*, Lawbook Co. 4th ed. 2012, ch. 15.

<sup>110</sup> See above n. 51.

<sup>111</sup> Peter Punch, *Law of Employment in Australia*, CCH Publishers, Sydney, 1989. This was the successor (at that time) to CCH's *Guidebook to Australian Industrial Law*, see above n. 19.

<sup>112</sup> See for example *Labour Law*, 4th ed. 2005, and 5th ed. 2010.

<sup>113</sup> See nn. and associated discussion.

<sup>114</sup> LexisNexis Butterworths, Chatswood.

such as Martin Vranken's introduction to Australian labour law for Europeans , *Employees and the Law: Australasian Experiments*.<sup>115</sup>

But despite this apparent uniformity, there were also some emerging divergent trends in conceptions of labour law which have to be noted at least. For example some scholars elected to treat the individual and collective aspects of labour law as quite distinct subjects. Despite their (apparently) similar titles, the two works of Nii Lante Wallace-Bruce, *Employee Relations Law*<sup>116</sup> (collective), and *Outline of Employment Law* (individual),<sup>117</sup> reflected this approach. In both cases there were intersections of collective and individual aspects to meet the requirements of the particular text, but otherwise they were treated as separate subjects. Other scholars maintained a focus on 'employment law', but incorporated the dimensions of collective labour law required for the discussion. For example this continued to characterise the approach taken in the numerous editions of the longstanding text *Macken's Law of Employment*,<sup>118</sup> the seventh edition of which was stated to be 'essentially about the way that the law in Australia [has] construct[ed] and regulat[ed] the individual employment relationship' and included an 'analysis of the interrelationship between statutory instruments (such as awards and enterprise agreements) and the common law employment contract', but which did not 'explain in detail the processes for making enterprise agreements, or mounting collective industrial action...nor many other aspects of the regulation of collective labour relations'.<sup>119</sup> It also seems that some of these works were aimed more at business law students rather than students in law degrees, but at the same time they may also have fitted specialist labour law studies where the various courses had begun to compartmentalise the larger subject into more discrete units.

Notably, 'Employment Law' had begun to emerge as an important separate conceptual component in labour law, for reasons which we will return to shortly. Another important development at this time was the idea of 'work' as an alternative to 'employment' for a focus in labour law. This had been raised in

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<sup>115</sup> Leuven University Press, Leuven, 2001.

<sup>116</sup> LBC Publication Services, Sydney, 1st ed. 1998.

<sup>117</sup> Butterworths, Sydney, 1st ed. 1994, 2nd ed. 1999. This work was succeeded by Natalie van der Waarden, *Employment Law: An Outline*, LexisNexis Butterworths, Chatswood, 2004, and 2nd ed. 2010.

<sup>118</sup> The origins of this work are noted above at n.46 and associated discussion.

<sup>119</sup> See above n. 46 for author and publication details, at pp. 1-2. See also Rohan Price, above n. 109. A more recent work in this vein is by Mark Irving, *The Contract of Employment*, LexisNexis Butterworths, Sydney, 2012.

some earlier works,<sup>120</sup> but was most closely followed through in the works published after 2000. The remaining part of this review section of the paper deals with the ongoing editions of two major labour law texts (viz. Creighton and Stewart's *Labour Law*, and the successors to McCallum and Pittard's *Australian Labour Law: Materials and Commentary* by Marilyn Pittard and Richard Naughton), and a new addition to the field, *The Law of Work*.<sup>121</sup>

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The fourth edition of Creighton and Stewart, now *Labour Law*, was published in 2005.<sup>122</sup> While a much expanded version when compared with the book's third edition (now about 650 pages in length as compared with about 500 pages in the earlier version), as we noted above<sup>123</sup> the work essentially adhered, in terms of subject matter, to what was now largely assumed to be required of a fairly comprehensive labour law text: the federal and State institutions and processes for dispute resolution (and their Constitutional foundation), the making of awards and agreements and their enforcement, the contract of employment, the regulation of trade unions and their activities (including industrial action). The work also included material on international labour law, and occupational health and safety.<sup>124</sup>

The stated objective of the authors was 'to provide a general background, a concise but sophisticated account of major legal principles, a certain amount of commentary on issues which [were] controversial and/or topical, and references to further and more detailed sources of description and analysis.'<sup>125</sup> In so confining the text, the authors were clearly drawing a line between what was largely assumed (by teachers, scholars and practitioners) to be the 'traditional domain' of labour law,<sup>126</sup> and other areas of subject matter that might conceivably be included (such as social security, taxation, training and education and so on). From this perspective, useability, practicality, space and expertise, were pressures bearing upon what the title 'labour law' should be intended to mean. The paradigm was, first and foremost, a legal one. While

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<sup>120</sup> See above nn. 99-100.

<sup>121</sup> The first edition of this work was by Rosemary Owens and Joellen Riley. A subsequent edition (2011) has included Jillian Murray as third author.

<sup>122</sup> Federation Press, Sydney.

<sup>123</sup> See nn. 110-114 and associated discussion.

<sup>124</sup> See the authors' description at pp. 33-34. The text also contains, as do many of the other texts written about in this review, an historical background to the development of labour law.

<sup>125</sup> Page 34.

<sup>126</sup> Page 2 and page 4.

recognising the increasing problems confronting the subject from changing socio/economic and industrial contexts, and particularly the issues of unpaid and domestic work, the growth of female employment, family and caring responsibilities, precarious and non-standard employment and so on, Creighton and Stewart's *Labour Law* (no longer *An Introduction*) was nevertheless defined by the tradition of the labour law subject; it was about the law applying to those engaged in paid work pursuant to contracts of employment, and the regulation of their individual and collective affairs in that capacity.<sup>127</sup>

Within this conventional framework, however, note is also made of the changing structure and orientation of the regulatory system itself. Of importance here is the observed relative decline of the conciliation and arbitration system and industry-wide regulation, and the corresponding shift to enterprise-based and individualised regulation in pursuit of greater efficiency and productivity,<sup>128</sup> - again, legal trends shaped by socio-economic and industrial contexts.

This general approach, in terms of the work's construction and objectives remained basically unchanged in the fifth edition, published in 2010.<sup>129</sup> Again this was a considerably expanded text of almost 1,000 pages. A notable addition to the subject matter saw the inclusion of a specific chapter dealing with the regulation of the Building and Construction Industry pursuant to the *Building and Construction Industry Improvement Act 2005* and the National Code of Practice for the Construction Industry.<sup>130</sup>

The fourth edition of *Australian Labour Law: Cases and Materials*, by Marilyn Pittard and Richard Naughton, as we have noted above, similarly adopted a conventional approach to the subject matter of a labour law text.<sup>131</sup> It commenced with a study of the employment relationship, the sources of legal obligation in that relationship, the contract of employment and employment termination, before moving on to the study of the collective dimensions of the subject - industrial disputes, the Federal government's constitutional powers to regulate in this area, Federal and State systems, awards and agreements, trade unions and industrial action. At the same time, however, the authors indicated in their Preface to this work that they were acutely aware of the numerous

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<sup>127</sup> See Chapter One generally.

<sup>128</sup> See pp. 23-32.

<sup>129</sup> Breen Creighton and Andrew Stewart, *Labour Law*, Federation Press, Sydney.

<sup>130</sup> Chapter 24.

<sup>131</sup> LexisNexis Butterworths, Sydney, 2003.

problems faced in the construction of a labour law subject by changing contexts, which include such matters as 'globalisation, privatisation, deregulation, flexible labour hire practices, outsourcing, business restructuring, declining private sector trade union membership and the emergence of "individualisation" in labour relations',<sup>132</sup> and they noted the restructuring of the book's content to accommodate some of those difficulties. As part of this explanatory process, Chapter 1, 'Themes in Australian Labour Law' began with the question 'What is labour law?', and proceeded to deal with a wide range of matters including 'the interrelationship of politics and law', 'deregulation', the connection between 'labour law and corporate law', and 'social justice and gender'.

Largely the same approach was adopted by these authors in the fifth and sixth editions of this work, published in 2010 and 2015 respectively. These works were, however, retitled - the fifth edition was published as *Australian Labour Law: Text, Cases & Commentary*,<sup>133</sup> while the sixth edition was published under the title *Australian Labour and Employment Law*.<sup>134</sup> There is no explanation in either of these texts for the change in title, although it is clear that the authors regarded the 2015 version as a textbook rather than a 'casebook' in the narrow sense. Again the introductory sections of these two editions pinpoint what are perceived to be the difficulties of scoping a labour law text in changing contexts: for example, 'Social Relations and Employment', 'Interests of society', 'The concept of flexibility', 'Social justice, family and gender issues', 'Labour law, welfare and social security', 'Labour law and regulating the labour market', 'labour law and immigration', and 'Labour law, international law and human rights'.

Beyond observing these issues, and their relation to the concept of labour law, the content in both works remained fundamentally consistent with the 'conventional' approach as it had evolved. There was a passing suggestion in the 2015 version that 'labour law' (or, presumably 'labour and employment law') might now be known as 'workplace law'.<sup>135</sup> In the 2010 edition a new chapter was added to the text exploring the law pertaining to the employment

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<sup>132</sup> See p. xxvii.

<sup>133</sup> LexisNexis, Butterworths, Sydney.

<sup>134</sup> LexisNexis Butterworths, Sydney.

<sup>135</sup> See p. 1.

dimensions of business restructuring.<sup>136</sup> This chapter and its subject matter were removed from the 2015 edition of the work.

The 2007 publication of *The Law of Work*, authored by Rosemary Owens and Joellen Riley,<sup>137</sup> (and its successor *The Law of Work*, by Owens, Riley and Jillian Murray<sup>138</sup>) offered something of an alternative approach to the subject of labour law. As we noted earlier, the prospect of adopting a broader idea of 'work' (as compared with employment) as the focus for regulation had been mooted in previous labour law texts.<sup>139</sup> In *The Law of Work*, as the title indicates, this idea became a core concept in the construction and analysis of the labour law subject, involving the examination of labour law in the context of global pressures and consequent domestic socio-economic change.

Noting that 'labour law' was 'in the midst of a paradigm shift' requiring scholars to 'rechart the structure of the new law of work',<sup>140</sup> the authors explained that the purpose of their work was 'to refocus the subject matter of the Australian law of workplace relations', 'to signal that the book's concerns [were] somewhat broader than those traditionally encompassed in employment, labour and industrial relations law', and thereby to lead to a 'more principled understanding of the law governing work'.<sup>141</sup> This approach involved a novel structuring of the law around several themes including contract/co-operation, equality/diversity and freedom of association. And, as we note below, it also drew in important, but in general marginalised, subject matter, including work/family/life issues, labour law as human rights, and adopted a more intense engagement with the global dimensions of the work/labour problem. However, notwithstanding the breadth of this approach, the work remained focused 'on the core of the discipline as it [had] been understood to date and [examined] the ways in which it [was] developing'.<sup>142</sup>

Part 1 of *The World of Work*, offered a detailed and closer examination of 'the world of work' than other contemporary texts. It dealt with the law of work in its global context, the role and structure of the ILO, the decline of that body in the context of globalisation, the role of other regulatory international bodies (such

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<sup>136</sup> Chapter 18.

<sup>137</sup> Oxford University Press, Melbourne.

<sup>138</sup> Oxford University Press, Melbourne, 2011.

<sup>139</sup> See above nn. 99-100.

<sup>140</sup> 1st edn., p. 11.

<sup>141</sup> 1st edn., p. viii.

<sup>142</sup> 1st edn., p. 12.

as the World Bank and the IMF), regulation through trade agreements, the renewal of the ILO's agenda and the role of human rights in labour law.<sup>143</sup> The historical transition of Australian labour law in the context of the changing 'world of work' (i.e. the shift from the 'industrial era' to the 'global era' with its emphasis on privatisation, deregulation, productivity and economic efficiency) was also explored at length.<sup>144</sup> One critical aspect of the book's approach was to signal who might properly be regarded as the subject of 'the new law of work'. Noting the ongoing problems surrounding the forms of work in the globalised 'new economy' the authors suggested that 'a different and perhaps better strategy is for the law to use the status of the worker as its touchstone and to focus its concern on all who participate in the community through doing work whether it is unpaid work in the public arena or within familial and friendship relations',<sup>145</sup> thereby prospectively broadening out the ambit of labour law well beyond employment and other similar relationships.

The legal/regulatory subject matter of the text was dealt with according to the various themes noted above. Part 2 of the work ('Contract and Cooperation') covered the contract of employment as the core legal concept underpinning the relationship between employers and workers in the twentieth century, and the obligations arising from pursuant to those contracts. Part 3 ('Standards and Rights') dealt with the regulation of employment standards, including pay, hours of work, and leave, as well as focussing particularly on equality and security in employment. Trade unions, collective bargaining and industrial action were covered in Part 4 ('Freedom of Association'), but this coverage appeared to include far less detail on trade union regulation and strike law than generally characterises Australian labour law texts. Part 5 dealt with the subject matter relevant to 'Dispute Settlement and Enforcement'.

*The Law of Work* seemed to provide something of a departure from previous labour law texts. While it covered much of the usual subject matter of Australian labour law texts, its discussion offered what might be seen to be a more connected contextualisation of the changing 'world of work' and its relationship with the changing legal or regulatory emphasis in the governance of that world. At the same time, however, it was, as indicated, a work grounded in

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<sup>143</sup> 1st edn., ch. 2.

<sup>144</sup> 1st edn., ch. 3.

<sup>145</sup> 1st edn., p. 161.

'law' (and perhaps less in the concept of 'work'), and still largely adhered to the conventional legal subject matter of Australian labour law.

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In summary, the subject 'labour law' in Australia still adheres strongly to some basic conventions in legal scholarship. That is to say, it relies on certain established notions of what the '*law*' is in relation to 'employment', 'labour' or 'work', and it is this understanding of relevant *law* and other *regulation* which takes the lead in the formulation of the subject. The background noise caused by the varying ideas of labour, employment and work is recognised, but our books and courses for 50 years have proceeded from the common law and statute operating and regulating in several categories: the employment relationship; employment conditions and standards; institutions of regulation and dispute settlement; collective bargaining; trade unions; industrial action; occupational health and safety; and discrimination and equality in employment. There is nothing particularly surprising in this, it reflects understandings and methods slowly accumulated in relation to employment regulation since the beginning of the twenty first century, and then consolidated with the emergence of (so-called) full employment, open-ended work contracts and the acceptance of trade unions and collective regulation of these arrangements after the Second World War. Prior to 1945 there were widely varying approaches to what might be covered in a labour law subject,<sup>146</sup> though as we have seen, the existence of the statutory conciliation and arbitration measures in Australia offered a focus for a labour law subject which well pre-dated this period.

By about 1960 the 'idea' of labour law in Australia was largely established in terms of content and orientation, and this certainly was tied up with what Harry Glasbeek has described as 'the conventional wisdom...that capital-labour regulation had created a stable system'.<sup>147</sup> That being said, there were always some differences in terms of title and subject matter even among general works, and some scholars sought to confine their view of the subject drastically, particularly in response what was perceived to be systemic shift to

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<sup>146</sup> For a short account of some of these see Mitchell, above n. 11, at pp. ix -x.

<sup>147</sup> 'Foreword' to Pittard and Naughton, *Australian Labour Law: Cases and Materials*, 4th edn. 2003. Building on that mistake, it might also have been thought that newly developing countries would follow in the same path, and thus, that 'labour law' would follow the same conventions in those countries: see Richard Mitchell, Petra Mahy and Peter Gahan, 'The Evolution of Labour Law in India: An Overview and Commentary on Regulatory Objectives and Development' (2014) 1 *Asian Journal of Law and Society* (First View Article, Online May 2014) pp. 1-41, at p. 35.

decentralisation, individualism and 'workplace' relations rather than 'industrial' relations.<sup>148</sup> In organisation also, there were variations among texts, particularly as subject matter was adapted to different explanatory approaches. Hence all three major texts discussed in the previous section of this paper commence with lengthy but preliminary discussions about what 'labour law' is, what it is for and does,<sup>149</sup> who are its subjects, and how its structures and orientations have altered over time. Thereafter the works in relation to core subject matter sometimes take a different direction. For example, in Pittard and Naughton, the contract of employment is dealt with at length ahead of the 'National System of Federal Regulation' (including the constitutional foundations of the Federal government's powers to regulate), whereas in Creighton and Stewart much of this institutional discussion takes place prior to the examination of the employment contract. And in Creighton and Stewart the discussion on regulated employment conditions appears prior to the discussion on termination of employment, while in Pittard and Naughton it appears several chapters later. In Owens, Riley and Murray, the coverage of employment security law appears in a Part of the work designated 'Standards and Rights', rather than as a completion of the sections on the contract of employment.<sup>150</sup>

One final point needs to be made before proceeding. In the labour law subject as conceptualised in Australian labour law texts, the changing socio-economic contexts of 'employment', 'work', 'industrial relations', and 'human resource management' are recognised as impacting on the 'law' that is 'labour law'. Indeed the *co-evolutionary* interaction of law and context is acknowledged, at least fleetingly, in Owens, Riley and Murray.<sup>151</sup> But as we have noted earlier, it is not clear that the way these law/context interactions are dealt with in labour law texts moves to an appropriate level of analysis.<sup>152</sup> This is something that requires more consideration,<sup>153</sup> but the problems are recognised. Among other

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<sup>148</sup> We are not principally concerned with these employment law texts in this discussion.

<sup>149</sup> Owens, Riley and Murray list seven objectives of labour law ranging from worker protection, human rights protection and social cohesion, through to economic purposes. Creighton and Stewart, on the other hand, focus upon two main objectives: the protection of workers in what is an unequal power relationship between employer and employee, and the efficient operation of the labour market.

<sup>150</sup> Compared with Pittard and Naughton, chs. 7-8.

<sup>151</sup> 1st edn. p. 7. See further, Simon Deakin and Frank Wilkinson, *The Law of the Labour Market*, Oxford University Press, Oxford, 2005.

<sup>152</sup> See above nn. 100-106 and associated discussion.

<sup>153</sup> Andrew Frazer has produced an interesting set of articles which traverse some of these issues: 'Reconceiving Labour Law: The Labour Market Regulation Project' (2008) 8 *Macquarie Law Journal* 21; 'Industrial Relations and the Sociological Study of Labour Law' (2009) 19 *Labour and Industry* 73; and 'Labour Law, Institutional Regulation and the Employing Organisation' (2014) 20 *International Employment Relations Review* 4.

things, matters of disciplinary competence, and of space and practicality, are all perceived to present barriers of a sort against a more expanded approach to the labour law subject.<sup>154</sup>

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In Australia, and internationally, the debate over the 'idea' of labour law has been underway since the early-to-mid 1990s,<sup>155</sup> and continues. Specific project work in Australia has been carried out across a wide cross section of labour market and associated subject matter, principally through the auspices of the Centre for Employment and Labour Relations Law at the University of Melbourne,<sup>156</sup> but also by other scholars interested in exploring the boundaries of 'labour law' as it is presently understood and the difficulties it faces in changing contexts.<sup>157</sup> Aspects of this broad agenda have focussed on purposes in labour law, others with what might be meant by 'law' in labour law and who might be subject to that law. Other themes have included what the appropriate subject matter of a revised labour law subject might include, and what disciplinary adjustments might be necessary to accommodate an adequate understanding and incorporation into the subject of relevant socio-economic contexts.

Despite this we still have no clear idea of where a new paradigm in labour law might take us, or what such a reformulated subject would look like in textual content. One choice might be simply to adhere to the conventional approach, and accept the fact that labour law as a field will play a less important role in terms of its supposed protective, redistributive or economic roles than it has done in the recent past. As Guy Davidov notes, 'We have to think "beyond"

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<sup>154</sup> See Creighton and Stewart, 4th edn. p. 5; and 5th edn. p. 5.

<sup>155</sup> We have noted some of this work along the way, for example the edited work of Davidov and Langille in the paper's acknowledgements, Mitchell above n. 9, and Deakin and Wilkinson, above n. 151. Other notable contributions include Guy Davidov and Brian Langille (eds.), *Boundaries and Frontiers of Labour Law*, Hart Publishing, Oxford, 2006; and Judy Fudge, Shae McCrystal and Kamala Sankaran, *Challenging the Legal Boundaries of Work Regulation*, Hart Publishing, Oxford, 2012. In Australia the most substantial single contribution to the debate has been by Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds.), *Labour Law and Labour Market Regulation*, Federation Press, Sydney, 2006. Harry Arthurs' series of papers on this issue are particularly thought provoking, ending with 'Labor as the Law of Economic Subordination and Resistance: A Thought Experiment' (2013) 34 *Comparative Labor Law & Policy Journal* 585. See also, Joanne Conaghan, 'Gender and the Idea of Labour Law' (2014) 4 *Feminists@law* 1-5.

<sup>156</sup> The content of some of this work is found in the publication edited by Arup et al., noted in the preceding footnote. A general overview of the Australian project as a whole can be found Andrew Frazer's articles surveying the socio-legal context of Australian labour law (n.153 above).

<sup>157</sup> One example being Richard Johnstone, Shae McCrystal, Igor Nossar, Michael Quinlan, Michael Rawling and Joellen Riley, *Beyond Employment*, The Federation Press, Sydney, 2012.

employment about ways to achieve economic security. This does not necessarily mean broadening the field of labour law...'<sup>158</sup> In other words it may be necessary to draw in other fields of law to draw an accurate picture of 'worker' or 'labour' security. In such a case, labour law remains 'whatever subject matter is conventionally taught in law school courses, written about by legal scholars, or practised by lawyers who identify themselves as specialists in the field'.<sup>159</sup>

On the other hand it might be thought that most scholars in labour law come to the field with a view that labour law is fundamentally about the redistribution of resources away from advantaged classes of people to disadvantaged classes of people. If that is so, then most labour lawyers witnessing the gradual growth in the ineffectiveness of this project would want to reappraise it (as they are doing), and, if possible, to reformulate it. The question is, how, and to what effect?

One proposal for a possible broader approach has been suggested by Harry Arthurs in the form of a 'Counterfactual' idea of law organised not around the concept of employment, but around the relationships between those with economic power and those subordinate to that power: *The Law of Economic Subordination and Resistance*.<sup>160</sup> Others might want to put it differently. For example we might want to pose a social problem or question rather than starting from a known legal field. One suggestion is to ask how societies are regulated so as ensure access to the material conditions of life when such conditions are, in most societies, owned or controlled by select groups. Obviously labour law 'as we know it' plays an important role here in many societies, in others less so. But apart from the fact that the question allows us to draw in legal subject matter relevant to the question rather than to an established field, the importance of asking the question in this way is that it is not historically specific, it requires that we be alert to different socio-economic systems, and it requires us to look beyond statutes and laws to other forms of regulation.<sup>161</sup> These are useful elements in what might now be a 'global' perspective on the regulation of 'work', and a useful approach in comparative work generally.

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<sup>158</sup> Guy Davidov, 'Setting Labour Law's Coverage: Between Universalism and Selectivity' (2015) 34 *Oxford Journal of Legal Studies* 543, at p.564.

<sup>159</sup> Harry Arthurs, above n. 155, at p. 586.

<sup>160</sup> See Arthurs, above n. 115.

<sup>161</sup> See Richard Mitchell, 'Where Are We Going in Labour Law? Some Thoughts on a Field of Scholarship and Policy in Process of Change' (2011) 24 *Australian Journal of Labour Law* 45.

The rhetorical question in the second part of the paper's title is intended only to illustrate these last points in a different way. Those who view 'labour law' as 'labour law as we know it' do not regard previous systems of labour ordering and regulation in different systems of socio-economic organisation as 'labour law'. Those previous systems were something else. Yet there are those who see this quite differently, and would view the regulation and social organisation of workers in the capacities of slave, serf, peasant, servant and so on as part of the same social enquiry as 'labour law'.<sup>162</sup> One can add employee, independent contractor, volunteer, unpaid carer, but from this point of view the enquiry is the same: how are societies organised and regulated to guarantee access of these categories of persons to the material necessities of life when those goods and services are owned and controlled by others? Historically the concepts and labels have changed, but the social reality has not. Most people must work in order to live. How society orders and regulates that condition, how effectively it does so, how the society's laws and regulations in relation to this issue change as socio-economic conditions change and so on might all be considered appropriate questions in labour law study.

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<sup>162</sup> For example, G. A. Cohen, 'The Structure of Proletarian Unfreedom' (1983) 12 *Philosophy and Public Affairs* 3.