BOOK REVIEWS

Laura Bennett, *Making Labour Law in Australia* (The Law Book Company, Sydney, 1994) pages i-xxxvi, 1-250, index 251-3. Price $55.00 (soft cover). ISBN 0 455 21212 0.

Laura Bennett's book is a provocative and critical study of Australian labour law which attempts to place the subject in its political and industrial relations context. It argues, at different points, that Australian labour law has been subverted by the courts and employers, which have traditionally held legal and political values hostile to labourism. There is much value in adopting a fresh perspective on a subject like labour law, which is so entangled with politics, economics and industrial relations. For this reason, Bennett's book is likely to provide a useful reference point in courses and studies of the subject. However, the difficulty (at least for this reviewer) is that the central thesis of the book is subject to considerable argument or doubt. As a result it was my impression that Bennett filled out many parts of her argument with overstatement and some exaggeration. For me this limited the validity of arguments she made, but of course it does not detract from the provocative nature of her book.

Making Labour Law in Australia is certain to be of interest to students of labour law because of the way it places many important developments in an historical and political context. After commencing with an historical account of the development of collective labour law, the book considers the impact upon labour law of the political system (chapter 2), the courts (chapter 3), and the industrial tribunals (chapter 4). In her discussion of the political system, Bennett looks at two major legislative issues in the post-war period: industrial action, and the institutional structure of the arbitration system. The discussion confirms that the nature of the party system, the electoral system, and the fluctuations in the economy are likely to determine what issues emerge on the legislative agenda. Much of the discussion centres, however, on the author's claim that Australian legislators have traditionally been adverse to the interests of organised labour. This reviewer's main criticism of the discussion is Bennett's use of extremely narrow and particular examples to make out what is a broadly critical and general case.

The discussion of the courts in chapter 3 is based on the premise that common law courts have been traditionally hostile to workers' rights, collective organisation and collective action. In addition, according to Bennett, judges have actively subverted labourist legislation by adopting particular techniques of interpretation. The author claims that the legal culture and system is adverse to labourism. It is a challenging argument which is able to be accepted only to an extent. There is an interesting discussion of appointments to the High Court, and the culture of the body. Bennett's analysis of the High Court's approach to bans clauses (and

also certain decisions of the Industrial Court) is used to demonstrate her argument that tension between labour and the courts is 'systemic and structurally based'.[1] In my view the argument becomes a little unstuck when applied to more contemporary examples. The example chosen by Bennett is the judiciary's approach to the secondary boycott provisions in the Trade Practices Act (section 45D). But why should members of the Industrial Division of the Federal Court be attributed with this sort of anti-labourist tendency in their interpretation of section 45D? It is certainly true that the boycott provisions (now considerably amended) were vague and complex in the extreme, and introduced by a conservative government as an anti-union measure. I am not satisfied, however, that this makes judges utilising particular techniques of interpretation part of an anti-labourist conspiracy. Bennett then claims that the judiciary's interpretation of facts is value-laden, and provides a detailed analysis of the decision of Morling J in *Mudginberri Station Pty Ltd v Australasian Meat Industry Employees' Union*.[2] At one point she says that Morling J '*could* not accept'[3] that members of the Mudginberri picket line were employees of the abattoir, which would have brought a defence provision into play. It is an odd example upon which to build her argument. Many observers would argue that the approach of Morling J was quite sustainable considering the complex nature of the provisions. A far better example to develop this argument about the 'inevitable tension' between labour and the courts might have been to consider the approach of the Victorian Supreme Court in the *Airline Pilots Case*.[4]

One important feature of Bennett's book is the examination she makes of the background, culture and structure of labour law institutions. In chapter 4, she discusses different forms of industrial tribunals and develops a model to compare 'judicial tribunals' with what are termed 'contextualised tribunals' (those usually connected with non-legal institutions and groups and engaging in non-legal discourse). In chapter 6, Bennett considers different forms of enforcement agencies that have existed in Australian labour law. The chapter includes some useful research material on the nature and role of regulatory agencies.

Chapter 7 is entitled 'Employers v Unions', and allows the author another opportunity to repeat her claims that the common law system operates with a systemic doctrinal bias against unions. The chapter seeks to demonstrate that throughout the 1970s and 1980s, employers have sought to avoid the collective labour law system through the adoption of contracting and franchising arrangements. This part of the book is a descriptive account of what the author terms 'militant managerialism', which was manifested in the Robe River and Mudginberri disputes. The material is interesting but contains some flaws. For example, it is highly critical of the decision in *Odco Pty Ltd v Building Workers Industrial*

[1] Laura Bennett, *Making Labour Law in Australia* (1994) 96.

[2] (1985) 61 ALR 291.

[3] Bennett, above n 1, 95.

[4] *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* (1989) 95 ALR 211.

Union (The Troubleshooters Case).[5] However, it fails at any point to explain that the legal position in that case was able to be circumvented by the interposition of a third party labour hire agency. By contrast, the following chapter headed 'Unions v Employers: the Labourist Response' (chapter 8) is a clear and measured account of the process of award restructuring and changes in union structure.

The final part of the book provides a comparison and evaluation of labour law regimes. It focuses upon moves toward an individualised, contractualised labour law system in Australia, and contrasts this with the traditional Australian 'labourist' arbitration system. The contractualised systems in New Zealand and Victoria are subject to detailed analysis and criticism. This is extremely useful material because it undertakes this analysis by reference to overseas literature and interdisciplinary material.

The conclusion Bennett reaches is that the Australian 'labourist' system is preferable to any contractualist system because it allows a more equal balance of power between employers and unions. In her view the arbitration system has given unions 'a base to counter employer domination of law and politics'.[6]

Making Labour Law in Australia is a provocative account of Australian labour law. Its critical and theoretical approach provides a useful addition to the literature in this area.

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[5] (1989) 31 AILR ¶ 449 (Woodward J).
[6] Bennett, above n 1, 250.
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