

### Book Review:

## Making Labour Law in Australia: Industrial Relations, Politics and Law

Author: **Laura Bennett**

Bennett, L. (1994). *Making Labour Law in Australia: Industrial Relations, Politics and Law*, The Law Book Co., Sydney

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In *Making Labour Law in Australia*, Laura Bennett (1994) disputes orthodox legal scholarship's conviction that received Australian labour law is immutable. Bennett considers that courts, tribunals, employers and political parties are institutions which create labour law and claims to have identified how each institution develops this law. The economic and political context of each institution's role, not the institutions *per se*, are considered to determine labour law. Labour law is perceived as a "social phenomena with distinctive legal characteristics". This is considered an important departure from the traditional legal scholarly pre-occupation with how labour law doctrines are developed or statutes revised.

Bennett considers research about Australian labour law to be fragmented and devoid of its political, economic, industrial and social context. To obtain a holistic perspective of labour law Bennett argues that it is necessary to examine the process of how the various institutions create law. Bennett argues that this is achieved by analysing how economic and political factors combine to produce certain legislative or judicial outcomes.

Conflict between legislation initiatives and the political system are considered to have shaped labour legislation. Dissension within labour law institutions, the courts and tribunals is seen as resulting from constant struggle between forces antagonistic to employees and those committed to labourist principles. The Australian system of compulsory conciliation and arbitration is also thought to create law. The resolution of legalism, economic conditions, union and employer dynamics are reasoned to have combined to produce labour legislation.

Bennett argues that employers have enhanced their power through the conflict between labour law institutions. Conservative legislation is regarded as having been liberally interpreted by the courts in ways which have significantly extended its disciplinary application. Enforcement of sanctions for industrial action against unions are considered indicative of the conservative preoccupation with discipline, whereas award evasion occurs on a significant scale and enforcement is difficult.

New Australian labour laws are believed to result from employer initiatives to counter economic and legislative changes arising from doctrinal interpretations by the courts. Bennett asserts that extending common law doctrines of contracts for service and franchise contracts has permitted crucial changes to the employment relationship. Bennett argues that the courts have reproduced British anti-labour common law precedent to defeat collective labour law reforms.

This process can be summarised:

- Labour law created in the U.K. to benefit capital is received into Australia.
- Australian courts reproduce anti-labour common law from U.K.
- Common law principles are used to defeat the intention of reformist labour legislation.

The book is divided into five parts; 1) Origins and Theory, 2) The Creation of Australian Labour Law, 3) The Implementation of Australian Labour Law, 4) The Utilisation and Avoidance of Australian

Labour Law, and 5) Comparison and Evaluation. Each part is further divided into one or two conceptually related chapters. Bennett begins by exploring the origins of the conciliation and arbitration system, then progresses to a detailed examination of labour legislation and the political system. Parts 1 and 2 represent *why* labour law has developed the way it has, while parts 3 to 6 analyse *how* the socio-legal system has evolved.

*Prima facie* there is a logical consistency to these groupings. However, closer examination reveals that the content has been selected to give authority to the thesis being developed, rather than for any conceptual veracity. Bennett does not explicitly justify the book's framework apart from, "Concentrating on institutions involved in the creation of law provides a framework for analysis which allows links to be made between the characteristics of the institutions." (Bennett, 1994: 3).

Bennett is determined to advance a definite position, so the grouping of concepts serves more to this end than to provide any inherent cogency. By implication the *content has supposedly determined the structure of this book*. Bennett uses this rationale to form temporal links to the propositions being examined, rather than to trace the development of specific law making. While this approach has literary appeal, shifting back and forth in time, and between institutions, can be confusing.

Bennett's arguments are tautological, presumably to reinforce the propositions espoused. Although revisiting the same concepts from slightly different perspectives supports the arguments, it also serves to alienate a reader constantly force-fed a diet of Marxist philosophy. Instead of allowing logical conclusions to be drawn from the evidence, Bennett decides the legitimate interpretations for the reader.

From the outset an historical dialectic dominates the discourse. Statements of this ilk abound; "The economic instability of capitalism has meant that the unions were vulnerable to economic downturns when the full extent of the employers' dominance of legal and political institutions was revealed." (Bennett, 1994: 3). Bennett draws from the panorama of Australian history to expound the view that the forces of capital conspire with the legal and political institutions to exploit workers. Detailed consideration of events and cases are given to elucidate the propositions made.

International comparisons are made to contextualize the statements made in the introduction to each chapter. Each chapter ends by providing a cursory summary of the arguments made in the chapter. New perspectives are often introduced, as is a contrived thematic link to the next chapter. Introducing new material in the conclusions makes it difficult to consolidate the arguments being developed.

Blain and Plowman (1987: 311) consider there is, "insufficient attention to theory especially general theory ... in industrial relations." There is agreement (with Taylor, 1982) that, "Australian research has tended not to be particularly cumulative and has not demonstrated any real enthusiasm for theory building." (Blain & Plowman, 1987:311). This book attempts to construct a grand theory of how labour law is made in Australia. It could also be a credible history of unionism and the Australian Labour Party.

Bennett's research has met Niland's (1981) challenge to explore the connection between industrial relations reform process and research. Given the globalisation of the economy and the decline of the nation state it is difficult to envisage a scenario where any future Australian government will be able to implement the reforms suggested by Bennett. Whatever the colour of future Governments their capacity to implement changes to favour employees will depend on the economic context faced by the country, a reality test for Bennett's theory.

Bennett considers that *received labour law is not immutable, arguing that each institution - courts, tribunals, employers and political parties - creates labour law within an economic and political context*. A social justice agenda is evident, which is informed by notions of equity steeped in the ethos of Australian egalitarianism. A definite humanitarian value set is evident, as is a distrust of the legal establishment.

This is essentially a *political discourse*; a majestic narrative of received history, rooted in classical *critical theory*, with its accompanying Marxist ideology. Critical theory is *not* a neutral process of information dissemination but aims to understand events to "enlighten" the social actors involved. This is a naive way of confronting reality, since it assumes the enlightened will possess a social

conscience, as well as the power to rectify the inequities. Drawing on *exchange theory* (where people endeavour to maximise their gains from interactions) this historical drama is propelled by a belief system which casts employers as exploitative. Bennett neglects to consider how unions and management benefit from these interactions. A situation has actually developed in Australia where, "... management have allowed the unions to run their industrial relations and the unions have put their interests ahead of those of their members" (Wood, 1996: 21).

Bennett attacks the notion of free-market economic models, a postulate that has motivated many Western economic policies over the last decade. There are real dangers to a society of unrestrained commercial activity (Bates, 1994). Ormerod (1994: 124) alerts us that, "... unemployment is around three million in deregulated Britain, ii regulated France and in regulation choked Italy ... Labour market flexibility, or the lack of it, is not tremendously important in determining unemployment". The *social market* is beginning to seem a far more plausible explanation for unemployment, than Friedmanite general theories of competitive equilibrium (Bates, 1994). There are indications that lowering real wages will have minimal impact on unemployment, since employers hire on the basis of demand for their goods and services, *not* relative wage levels (Buchanan & O'Loughlin, 1996). There is a measure of support for Bennett's view that orthodox economics is unable to deal with, let alone explain, the current world economic crisis.

Defining important nominal concepts, such as; unions, employers, deregulation, enterprise bargaining, the New Right and the Accord, would have assisted to develop the logic of the thesis. Bennett does increase our understanding on labour law but the theory has only *moderate predictive power*, since it is unable to account for all occurrences, such as the popularity of franchising and apparent electoral mandate to reform the Industrial Relations (IR) system. Germany's supposed consensus approach to JR is constantly cited by Bennett as a model for emulation. As in Australia, Germany is experiencing an, "alarming competitive slide", forcing a break with labour consensus and an embrace of supply-side economics in an effort to revive the economy (Templeton & Javeski, 1996: 16).

Bennett makes an important departure from traditional legal scholarship but curiously still opts to use the convoluted language conventions of law, with its attendant qualifiers and null hypotheses. Since *form and content* are inextricably entwined, Bennett's work is dependent on the very archetype ('traditional legal scholarship') it seeks to avoid. Rather than establishing clear links in the propositions, this mode of expression results in a dense web of intrigue.

While challenging the general traditional approach to legal scholarship is defensible, Bennett uses this as a justification for *interpreting* the cases referred to, ignoring the convention of citing the justices *ratio decidendi*. Accepting that the correct interpretation has been given of each case requires an act of supreme faith by reader. Since each case is presumably selected to illustrate the position being supported, so the evidence can be scrutinised, it is important to know the justices' reason for deciding the case. Taking this liberty unreasonably privileges the author, making it difficult to be swayed by the narrative.

Failure to fully account for the economic realities faced by commerce in Australia is another serious weakness of this work. Real wage increases are mostly dependent on improvements in productivity. Bennett needed to take more account of economic imperatives and how these relate to labour laws. Bennett has attempted to integrate a diverse array of information related to the theory of how Australian labour law is created.

This is a meticulously constructed thesis. Although Bennett's position is ideologically driven and contains challengeable assertions, a consistent position is sustained. Bennett's statements initially seem radical but when closely examined are largely self-evident. While Bennett's propositions (i.e. received labour law is not immutable; courts, tribunals, employers and political parties combine to create labour law) are supported, there are too many weak links in the chain of propositions to give unequivocal support to Bennett's theory of how labour law is made in Australia.

The logic of Bennett's arguments is not compelling. There are too many alternative explanations which conflict with the conclusions. A number of intervening variables retard the progression of the arguments. For instance, Bennett's line on unfair dismissal legislation neglected to account for the

considerable negative impact of “wide” legal interpretations of this legislation on employers’ propensity to employ people. Bennett also failed to anticipate the potential significant legal impact of changing key areas of legislation, such as removing “conveniently belong” provisions (Cooke, 1996: 13). In combination Bennett’s propositions don’t produce a synergy greater than the parts.

Adopting such a strong ideological base makes the economic context naive and the legal analysis unsatisfying. More law and less context would have made for a more credible offering. By adopting a reactive stance Bennett fails to propose a plausible alternative theory of how labour law could be equitably created.

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