

## BOOK REVIEWS

### A NEW PARADIGM FOR LABOUR LAW?

SIMON DEAKIN\*

*Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* edited by Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (Sydney: The Federation Press, 2006) pages i–xvi, 1–752. Price A\$85 (hardcover). ISBN 1 86287 6118.

[This article reviews a major new work in the labour law field, *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, edited by Christopher Arup, Richard Mitchell et al. The book, which brings together the work of over 40 individual contributors, maps out the conceptual changes which are occurring as the focus of labour law shifts away from the employment contract and collective bargaining towards consideration of a wider set of labour market relationships. The article argues that while a new paradigm has not yet emerged to replace labour law, the future of the subject lies in the development of inter-disciplinary approaches of the kind exemplified by the work under review.]

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#### I INTRODUCTION: FROM 'LABOUR LAW' TO 'LABOUR MARKET REGULATION'

*Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*<sup>1</sup> is a collection of chapters marking the culmination of the most recent phase of a research project begun by Richard Mitchell and Christopher Arup in the 1990s. The aim of this project was to consider the implications of the reorientation of labour policy away from the traditional subject matter of labour law, which can

\* BA, PhD (Cantab); Professor, Faculty of Law, University of Cambridge.

<sup>1</sup> Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) ('*Labour Law and Labour Market Regulation*').

be loosely thought of as the employment relationship and the collective bargaining process, towards a wider range of regulatory issues affecting the organisation of labour supply and demand. This shift in focus began in Australia and in numerous other countries in the preceding decade and, as the title of the present volume suggests, it marked a transition from labour law to 'labour market regulation'. Mitchell's 1997 edited collection, *Redefining Labour Law: New Perspectives on the Future of Teaching and Research*,<sup>2</sup> set out the relevant issues and offered some preliminary conclusions based on work carried out up to that point. This new collection indicates both a widening and deepening of that initial project. There are several new theoretical chapters and a very broad range of empirical and legal-conceptual chapters from a total of 38 contributors. Much of the work has been carried out by members of the Centre for Employment and Labour Relations Law at the University of Melbourne, or those with a connection to it, although scholars from a number of other universities have also made major contributions. The book is unquestionably a landmark in Australian labour law scholarship and, in addition to this, will influence debates in many other countries over the future of labour law. It will also make an important contribution to interdisciplinary legal research, particularly in the area of regulation.

According to Mitchell and Arup in their introductory chapter, the regular labour law paradigm 'lacks both "explanatory and normative power"'.<sup>3</sup> This is essentially for three reasons: changing labour market practices, both within the enterprise and beyond it; the rise to prominence of new economic theories of the labour market; and wider changes in the structure of society. However, what they propose is not the abandonment of the existing field, but rather its broadening. This takes two forms: examining different aspects of firms' structures; and addressing new actors and groups 'out there' in the labour market. The change in terminology, which is already occurring as the narrow concept of the 'employee' is displaced by the wider one of the 'worker' or 'active labour market participant', is mirrored by a broader shift from the workplace to the 'world of work'.

The change proposed by Mitchell and Arup has several dimensions. The first is the sense in which areas of law beyond the traditional 'core' become relevant to understanding work relations. Thus aspects of social security law, superannuation law, tax law, company law, commercial law, competition law, family law and housing law all become potentially relevant. A second and related change involves a commitment to legal pluralism: labour lawyers need to understand and incorporate into their analyses the role of forms of regulation beyond the formal law. The third change is a normative one: it is necessary to acknowledge that labour law performs a multiplicity of purposes beyond its traditional protective ones, including the promotion of employment opportunities, and, conceivably, economic goals such as competitiveness. Finally, a different methodology is implied — one which is explicitly interdisciplinary, and which is influenced by a long-term historical perspective.

<sup>2</sup> Richard Mitchell (ed), *Redefining Labour Law: New Perspectives on the Future of Teaching and Research* (Centre for Employment and Labour Relations Law, The University of Melbourne, 1995).

<sup>3</sup> Richard Mitchell and Christopher Arup, 'Labour Law and Labour Market Regulation' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 3, 3.

Following this introductory chapter, the book is divided into four parts, followed by a concluding chapter by Arup. The first part considers the purposes of labour market regulation. Michael Quinlan introduces this issue by providing an historical context to the question of labour law's objectives, explaining that the protective role accorded to it in the middle decades of the 20<sup>th</sup> century was only one of the purposes which this area of law has served, and emphasising the relatively short-lived nature of this period in labour law's evolution. Michael Barry, Marco Michelotti and Chris Nyland stress the importance of the role played by employer interests in shaping labour law,<sup>4</sup> while Margaret Lee considers labour law as a framework for bargaining and contracting using regulatory theory.<sup>5</sup> Karen Wheelwright examines economic arguments for labour law reform and points to the absence of a sound empirical basis for the claim that deregulation assists the growth of small and medium-sized enterprises.<sup>6</sup> Finally, Belinda Smith analyses the *Sex Discrimination Act 1984* (Cth), drawing a distinction between its significant role in redressing harms after the event and its much less successful use as a mechanism for embedding equality in the practices of organisations.<sup>7</sup>

Part two is concerned with labour market institutions and regulatory techniques. The introductory chapter to this section, by Peter Brosnan and Peter Gahan, surveys what they call the 'repertoire' of regulatory techniques operating in this area.<sup>8</sup> Starting out from a definition of 'command and control' regulation as prescriptive regulation based on formal rules and sanctions which are enforced through inspectorates and courts,<sup>9</sup> they identify a series of alternatives in the form of 'economic instruments' (including taxation and subsidies), the management of public functions (public procurement, floatation and privatisation, and public sector employment policy),<sup>10</sup> management-based regulation (into which they place various types of reflexive or responsive regulation including voluntary self-regulation, mandated self-regulation, disclosure rules and the demonstration of best practices)<sup>11</sup> and, finally, market-based regulation (where they not only place licensing and social insurance, but also, interestingly, 'roll-back' and 'regulatory neglect').<sup>12</sup> Individual chapters in this part examine particular mechanisms in more detail. These include studies of the nature of deregulation in

<sup>4</sup> Michael Barry, Marco Michelotti and Chris Nyland, 'Protectionism, Common Advocacy and Employer Interests: Business Contribution to Labour Market Regulation in Australia' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 43.

<sup>5</sup> Margaret Lee, 'Regulating Bargaining and Contracting Systems in Australia' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 67.

<sup>6</sup> Karen Wheelwright, 'Protecting and Promoting Small and Medium Enterprises: A Role for Labour Law in the New Labour Law Era?' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 86.

<sup>7</sup> Belinda Smith, 'A Regulatory Analysis of the *Sex Discrimination Act 1984* (Cth): Can It Effect Equality or Only Redress Harm?' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 105.

<sup>8</sup> Peter Gahan and Peter Brosnan, 'The Repertoires of Labour Market Regulation' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 127.

<sup>9</sup> *Ibid* 142–3.

<sup>10</sup> *Ibid*.

<sup>11</sup> *Ibid*.

<sup>12</sup> *Ibid* 143.

the Australian labour law context and its real nature as a new variety of command and control (John Howe),<sup>13</sup> the use of public expenditure to direct policy (Howe again),<sup>14</sup> self-regulation in the mining industry (Sean Cooney),<sup>15</sup> the regulation of ‘hybrid’ business forms (Igor Nossar),<sup>16</sup> the regulation of bargaining through industrial tribunals (Andrew Frazer),<sup>17</sup> unfair dismissal legislation and its impact on the common law of employment (Carolyn Sutherland),<sup>18</sup> and regulation via trade unions (Peter Gahan)<sup>19</sup> and employment agencies (Elsa Underhill).<sup>20</sup>

In part three the emphasis is on the way in which regulation ‘constitutes’ the labour market. John Howe, Richard Johnstone and Richard Mitchell argue that the neoliberal ideal of a ‘free’ labour market that pre-exists regulation turns a blind eye to ‘the role of formal, public institutions in constituting markets and shaping market relations’.<sup>21</sup> They suggest that when viewed in this way, there is no single ‘labour market’ but a series of labour market contexts: these can refer to particular geographic, industrial or occupational categories, to the enterprise, or to the ‘general labour market’ within which the overall labour supply is constituted by the rules determining who can or must enter the workforce and on what basis.<sup>22</sup> A similar pattern to the other parts follows, with in-depth studies of specific aspects of market-constituting rules: immigration control (Mary Crock and Leah Friedman);<sup>23</sup> unemployment benefit (Anthony O’Donnell);<sup>24</sup> tax law

<sup>13</sup> John Howe, ‘“Deregulation” of Labour Relations in Australia: Towards a More “Centred” Command and Control Model’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 147.

<sup>14</sup> John Howe, ‘“Money and Favours”: Government Deployment of Public Wealth as an Instrument of Labour Regulation’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 167.

<sup>15</sup> Sean Cooney, ‘Exclusionary Self-Regulation: A Critical Evaluation of the AMMA’s Proposal in the Mining Industry’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 187.

<sup>16</sup> Igor Nossar, ‘Cross-Jurisdictional Regulation of Commercial Contracts for Work beyond the Traditional Relationship’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 202.

<sup>17</sup> Andrew Frazer, ‘Industrial Tribunals and the Regulation of Bargaining’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 223.

<sup>18</sup> Carolyn Sutherland, ‘Regulating Dismissals: The Impact of Unfair Dismissal Legislation on the Common Law Contract of Employment’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 242.

<sup>19</sup> Peter Gahan, ‘Trade Unions as Regulators: Theoretical and Empirical Perspectives’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 261.

<sup>20</sup> Elsa Underhill, ‘The Role of Employment Agencies in Structuring and Regulating Labour Markets’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 282.

<sup>21</sup> John Howe, Richard Johnstone and Richard Mitchell, ‘Constituting and Regulating the Labour Market for Social and Economic Purposes’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 307, 308.

<sup>22</sup> *Ibid* 309.

<sup>23</sup> Mary Crock and Leah Friedman, ‘Immigration Control and the Shaping of Australia’s Labour Market: Conflicting Ideologies or Historical Imperatives?’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 322.

<sup>24</sup> Anthony O’Donnell, ‘Re-Inventing Unemployment: Welfare Reform as Labour Market Regulation’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 344.

(Cameron Rider);<sup>25</sup> the intersection between labour law and social security law (Terry Carney, Gaby Ramia and Anna Chapman)<sup>26</sup> and between labour law and population structure (Rosemary Owens);<sup>27</sup> work–life balance policies (K Lee Adams and Chris Geller);<sup>28</sup> employment benefits and family structure (Anna Chapman);<sup>29</sup> the professions (Carla Lipsig-Mummé);<sup>30</sup> and the relationship between health and safety, and sex discrimination law in the context of sexual harassment (Richard Johnstone and Nicky Jones).<sup>31</sup>

The fourth part is entitled ‘Labour Market Status, Forms of Engagement, and Rights and Obligations in Work Relationships’. The opening chapter, by O’Donnell and Mitchell, makes it clear that what is at stake here is the changing nature of the status relationships associated with labour law and their reshaping by the processes of economic exchange.<sup>32</sup> This idea is explored more specifically in the context of supply chain outsourcing (Michael Rawling),<sup>33</sup> vertical disintegration of the firm (Shelley Marshall),<sup>34</sup> business format franchising (Joellen Riley)<sup>35</sup> and the regulation — through trade practices laws — of small firms and independent contractors, which is contrasted to legal control of collective bargaining (Shae McCrystal).<sup>36</sup> Aspects of intra-firm relations that are covered include the role of the concept of good faith (Andrew Stewart)<sup>37</sup> and the opera-

<sup>25</sup> Cameron Rider, ‘Tax and the Regulatory Conception of Labour Law’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 364.

<sup>26</sup> Terry Carney, Gaby Ramia and Anna Chapman, ‘Which Law Is Laggard? Regulation and the Gaps between Labour Law and Social Security Law’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 383.

<sup>27</sup> Rosemary Owens, ‘Reproducing Law’s Worker: Regulatory Tensions in the Pursuit of “Population, Participation and Productivity”’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 410.

<sup>28</sup> K Lee Adams and Chris Geller, ‘Regulating at the Work-Life Boundary: Towards Re-Integrating the Household into Labour Market Policy’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 432.

<sup>29</sup> Anna Chapman, ‘Regulating Family through Employee Entitlements’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 454.

<sup>30</sup> Carla Lipsig-Mummé, ‘Negotiating Regulation: The State, the Professions and the Dilemma of Autonomy’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 470.

<sup>31</sup> Richard Johnstone and Nicky Jones, ‘Constitutive Regulation of the Firm: Occupational Health and Safety, Dismissal, Discrimination and Sexual Harassment’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 483.

<sup>32</sup> Anthony O’Donnell and Richard Mitchell, ‘Participation, Exchange, and Rights and Obligations in Labour Markets and Work Relationships’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 505.

<sup>33</sup> Michael Rawling, ‘A Generic Model of Regulating Supply Chain Outsourcing’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 520.

<sup>34</sup> Shelley Marshall, ‘An Exploration of Control in the Context of Vertical Disintegration’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 542.

<sup>35</sup> Joellen Riley, ‘Regulating Unequal Work Relationships for Fairness and Efficiency: A Study of Business Format Franchising’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 561.

<sup>36</sup> Shae McCrystal, ‘Regulating Collective Rights in Bargaining: Employees, Self-Employed Persons and Small Businesses’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 597.

<sup>37</sup> Andrew Stewart, ‘Good Faith and Fair Dealing at Work’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 579.

tion of job security laws (Joo-Cheong Tham).<sup>38</sup> Christopher Arup looks at the regulation of ‘human capital’, by which he means education policy, training, and firm-based learning.<sup>39</sup> Graeme Orr and Jill Murray analyse two status-relationships on the extreme margins (conceptually speaking) of labour law: unauthorised foreign workers<sup>40</sup> and volunteers,<sup>41</sup> respectively.

The brief description just given will hopefully have provided the reader with an impression of the enormous breadth of issues covered in this book. There are no weak links and many of the chapters offer entirely new perspectives on labour law issues. What is most impressive is the way in which such a diverse range of chapters — diverse in their subject matter, at any rate — have been brought together. The editors have succeeded in realising not simply a huge organisational task, but also a very considerable intellectual one, in providing unity and coherence to the collection.

This is, then, a seminal work, packed with new information and insights, with an overarching theme that will be digested and discussed by labour lawyers for some time to come. How does that theme stand up in the light of the individual contributions to this book and against the backdrop of continuing turbulence in the labour law field in Australia and other countries? To address that question, three particular aspects of the debate over the nature of labour law as a disciplinary field will be addressed: its scope, methodology and normative focus in the light of empirical evidence.

## II THE SCOPE OF LABOUR LAW

If labour law is to have coherence as a disciplinary field, its limits must be defined. The process of defining them is intimately tied up with conceptions of the purpose of labour law. The editors of another recent and important collection of essays, Guy Davidov and Brian Langille, have suggested that

terms like employer and employee — and the boundaries they create — have a purpose. Our task is to understand and define this purpose, indeed the *goal*, and thus the very idea, of labour law — and to develop the best *means* (conceptual boundaries and other legal techniques) to achieve it.<sup>42</sup>

For Mitchell and Arup, ‘a broader focus on “labour market regulation” has a stronger chance of holding the subject together than does the existing framework’.<sup>43</sup> The existing focus on the employment relationship and collective

<sup>38</sup> Joo-Cheong Tham, ‘Job Security Laws: Constituting “Standard” and “Non-Standard” Employment’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 657.

<sup>39</sup> Christopher Arup, ‘The Regulation of Human Capital: Public Frameworks and Firm-Based Policies’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 637.

<sup>40</sup> Graeme Orr, ‘Unauthorised Workers: Labouring Beneath the Law?’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 677.

<sup>41</sup> Jill Murray, ‘The Legal Regulation of Volunteer Work’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 696.

<sup>42</sup> Guy Davidov and Brian Langille, ‘Introduction: Goals and Means in the Regulation of Work’ in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (2006) 1, 10 (emphasis in original).

<sup>43</sup> Mitchell, *Redefining Labour Law*, above n 3, 16.

bargaining tends to exclude growing numbers of individuals whose work status falls outside the employment model and who are not covered by collective agreements or awards. It also fails to take into account a wide range of regulatory influences situated outside the labour law framework, that condition the way in which labour is contracted. Thus

the debate which affects the interests of 'labour' and 'workers' today, in addition to the debate concerning employment conditions and job regulation (labour law), substantially occurs in legal and regulatory categories that do not directly regulate the employment relationship itself.<sup>44</sup>

These influences 'include social security, training and education, immigration, job promotion, taxation, and perhaps other fields'.<sup>45</sup> But Mitchell and Arup's approach is conditioned by two caveats. The first is that '[n]o one is proposing that the concerns of "core" or traditional labour law be abandoned'.<sup>46</sup> The growing emphasis on the individual employment contract resulting from deregulatory legislation such as the *Workplace Relations Amendment (Work Choices) Act 2005 (Cth)* ('*Work Choices Act*') would indeed make this a strange moment to give up researching the employment model. The second is the frank but slightly disarming suggestion that 'we do not yet have a clear view of what the new field might look like'.<sup>47</sup> Labour law's disintegration, whether 'productive' or not,<sup>48</sup> continues apace; but there is less evidence of conceptual reconstruction.

There seems to be general agreement that while labour law can only be understood by reference to its context and may therefore lack the foundational status of fields such as contract law or tort law, it is not exclusively defined by a particular subject matter. Labour law has always been more than the 'law about work'. The concepts used within labour law, the most important of which is the contract of employment, provide the field with such unity and coherence as it possesses, and set its boundaries. This is not to say that any work relationship outside the scope of the contract of employment is therefore outside labour law — simply that the employment relationship is the focal point of most of the rules and regulations which are contained within labour law. These therefore have to be adapted to deal with other cases. That is not impossible, as the large literature on 'dependent contractors'<sup>49</sup> and the 'dependent self-employed'<sup>50</sup> indicates. Many areas of law that are generally thought of as being within the scope of labour law, such as discrimination law and industrial action law, apply to 'workers' and job applicants as well as employees, and have long done so without undermining the systematic doctrinal organisation of the wider field.

<sup>44</sup> Ibid 13.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid 4.

<sup>47</sup> Mitchell, *Redefining Labour Law*, above n 3, 5.

<sup>48</sup> Hugh Collins, 'The Productive Disintegration of Labour Law' (1997) 26 *Industrial Law Journal* 295.

<sup>49</sup> See, eg, H W Arthurs, 'The Dependent Contractor: A Study of the Legal Problems of Countervailing Power' (1965) 16 *University of Toronto Law Journal* 89.

<sup>50</sup> See, eg, Brendan Burchell, Simon Deakin and Sheila Honey, *The Employment Status of Individuals in Non-Standard Employment* (Employment Relations Research Series No 6, 1999).

There are, without doubt, problems in applying certain protective labour law regulations to casual, fixed-term and part-time workers. The difficulties that arise from the tendency of labour law to assume an indeterminate employment relationship have been much debated since the late 1970s, and numerous solutions suggested.<sup>51</sup> Despite changes in terminology, none of these solutions has done away with the functional need to have a legal category of some kind which captures the essence of 'dependent labour'; that is, a relationship involving the coordination of labour resources, coupled with the partitioning of risks between the employer, the worker and the state. Some of the solutions, by expressly identifying forms of 'para-subordinate' status beyond the core employment model (as in Italy), or conferring lower-level protections on the wider category of the 'worker' (as in Britain), run the risk of creating a two-tier employment status which may simply end up taking us back to square one.

What of other subjects? Fields like company law, family law and social security law have their own points of reference, conceptual structures and value systems. The dissolution of the boundaries between these areas as juridical categories is hard to envisage. Those divisions serve a purpose: in 17<sup>th</sup> century England, there was a single body of 'poor law', which regulated both the conditions under which poor relief was granted and, for a significant part of the labouring population, what we would now think of as their terms of employment.<sup>52</sup> The very absence of the modern division between 'social security law' and 'labour law' says a lot about the nature of labour market institutions at that point: most households relied on a combination of wage labour and alternative forms of subsistence. 'Permanent' employment, involving a more complete reliance on wage labour, was regarded by many as neither necessary nor desirable.<sup>53</sup> The later emergence of 'social security' law is one of the phenomena that accompanied the generalisation of the employment model to cover most of the working population, and the disappearance of traditional alternatives for subsistence. Social security law is today the field of law most closely related to labour law and is largely complementary to it, as suggested by the French term *droit social*, which is sometimes used to cover both. However, the sheer size and complexity of social security law will probably ensure that labour law will not be assimilating it any time soon, whether in France or elsewhere.

Another kind of difficulty is encountered with company law. The implicit assumptions of company law, particularly during a period when shareholder value is to the fore, often run counter to those of labour law, so that complementarity is hard to achieve. This gives rise to interesting issues concerning which field has priority in specific contexts (corporate restructuring being the most obvious). Courts have to use techniques reminiscent of the conflict of laws to resolve these tensions, which cannot be solved by merging the two fields except in the sense of completely subordinating one set of values and goals to the other.

<sup>51</sup> For a recent overview: see Davidov and Langille, above n 42.

<sup>52</sup> Karl Polanyi, *The Great Transformation* (1957) 86–7.

<sup>53</sup> Christopher Hill, 'Pottage for Free-Born Englishmen: Attitudes to Wage Labour in the Sixteenth and Seventeenth Centuries' in Charles Feinstein (ed), *Socialism, Capitalism and Economic Growth: Essays Presented to Maurice Dobb* (1967) 338.



Is it then the case that the field of labour law would better cohere if ‘labour market regulation’ were its focus, as Arup and Mitchell suggest? The shift from the enterprise to the labour market, and from law to regulation, seems intended to do two things: first, to capture changes which have occurred in the contextual setting of labour law; and secondly, to reflect its development as an academic discipline. For the *legal discipline* of labour law to be redefined, however, requires corresponding changes to its conceptual foundation. To replace ‘employment status’ with ‘*état professionnel*’ (labour market status), as suggested by Alain Supiot’s *Beyond Employment* in the European context, is an example of the kind of shift which could occur, though it is one that has yet to be realised even in that setting.<sup>54</sup> It is in the nature of conceptual watersheds that they are rarely obvious until after the event. The invention of the employment category itself was an example of this. Thus the suggestion made by Arup and Mitchell should perhaps be seen more as a prediction than a proposal. We can be reasonably sure that the conceptual foundations of the subject are moving and that the employment model will give way, in due course, to new forms and concepts, just as it displaced earlier notions such as ‘servant’ and ‘workman’. But what form precisely that change might take is not yet clear. What does seem clear is that without a conceptual reformulation of some kind, the field will be folded back into private law or merged into a related field, such as company law. This would mean the loss of doctrinal reference points which, however imperfect they may have been, provide some basis for the application of protective labour standards. Upholding those standards remains one of labour law’s main purposes, even if it is not the only one.

### III LABOUR LAW METHOD

The idea that labour law has a method which is distinct from that used in, say, company law or legal scholarship in general, might strike some as odd. However, there is a strong case for arguing that ‘interdisciplinarity’ is at the heart of labour law methodology and that this approach has its origins in the formative years of the subject in the early 20<sup>th</sup> century. Sir Otto Kahn-Freund wrote on this issue in his introduction to the collected shorter works of Hugo Sinzheimer, written in German in 1976 and subsequently translated into English by Jon Clark and published in 1981.<sup>55</sup> In light of current debates it is fascinating to reread this chapter and be reminded that:

For Sinzheimer, the sociology of law did not imply any ‘mixing of methods’ (*Methodensynkretismus*). He emphasized again and again ... the legitimacy of, and need for, strictly positivistic research into formal law. It is his continued recognition of the importance of such research that makes the contrast between ‘formal’ law (*geltendes Recht*) and ‘real’ law (*wirkendes Recht*) and between both of these and ‘just’ law (*richtiges Recht*) so convincing — all the more

<sup>54</sup> Alain Supiot (ed), *Beyond Employment* (Pamela Meadows trans, first published 1999, 2001 ed) 50–7 [trans of: *Au dela de l’Emploi*].

<sup>55</sup> Sir Otto Kahn-Freund, ‘Hugo Sinzheimer 1875-1945’ in Hugo Sinzheimer, *Labour Law and Politics in the Weimar Republic* (Jon Clark trans, 1981 ed) 1 [trans of: *Arbeitsrecht und Rechtssoziologie: Gesammelte Aufsätze und Reden*].

convincing when the contrast is made between the corresponding academic disciplines of positive law, the sociology of law and the philosophy of law.<sup>56</sup>

‘Interdisciplinarity’, then, does not involve the fusion of disciplines but, on the contrary, requires their continued separation, and legal-doctrinal skills remain one, critical part of interdisciplinary legal work. Doctrinal work is, indeed, going to be at the core of what most legal scholars do, as that is the foundation of their training. But labour lawyers in all jurisdictions have inherited from Sinzheimer and Kahn-Freund, through those scholars’ wider influence upon the development of the subject, a commitment to its expansion to include theoretical perspectives of the social sciences and to the empirical study of law in action. The social sciences were used to provide a critique of existing legal models and to advance the case for social reform, although at the end of the day there remained the legal-doctrinal tasks of ‘translating’ the information from social science into workable legal concepts and terms.

For Sinzheimer and Kahn-Freund, legal sociology and anthropology were the disciplines with the greatest potential to shed light on the empirical operation of legal rules and through which an evaluation of the impact of law could be attempted. Today, economics is more prevalent and the challenges it poses at a methodological level are of a wholly different order from those facing labour law scholars in the first half of the 20<sup>th</sup> century. Whereas industrial sociology offered an analysis of social relations, which was complementary to the aims of protective labour legislation, economic analyses tend to challenge those protective goals. Orthodox or neoclassical economics, in the guise of ‘law and economics’, often seems to have a colonising agenda which rejects the notion of interdisciplinarity in favour of a universalising economic logic.<sup>57</sup> Economics relies upon concepts of ‘rationality’ and ‘equilibrium’,<sup>58</sup> which many legal scholars find counter-intuitive, and upon quantitative methods,<sup>59</sup> which require a considerable investment of time and effort to understand — let alone to apply. All this poses real difficulties for the emerging discipline of ‘labour market regulation’. How are they dealt with here?

At the core of the approach in *Labour Law and Labour Market Regulation* is a broadly ‘institutionalist’ analysis which insists on the role of legal regulation in ‘constituting’ the conditions for the operation of the labour market. This is stressed both by the economists Gahan and Brosnan in their chapter on the repertoires of labour market regulation,<sup>60</sup> and by the lawyers Howe, Johnstone and Mitchell in their chapter on constituting and regulating the labour market.<sup>61</sup> The idea that legal rules serve as preconditions for the market opens up a research agenda within which both doctrinal legal research and the empirical

<sup>56</sup> Ibid 97.

<sup>57</sup> Gary S Becker, *The Economic Approach to Human Behaviour* (1976).

<sup>58</sup> See generally Joshua Gans, Stephen King and N Gregory Mankiw, *Principles of Microeconomics, Pacific Rim Edition* (3<sup>rd</sup> ed, 2005) ch 1.

<sup>59</sup> See generally Francis Ysidro Edgeworth, *Mathematical Psychics: An Essay on the Application of Mathematics to the Moral Sciences* (1881); Vilfredo Pareto, *Manual of Political Economy* (1906).

<sup>60</sup> Gahan and Brosnan, above n 8.

<sup>61</sup> Howe, Johnstone and Mitchell, above n 21.

study of law have a place. Some of the chapters go further and demonstrate the value of directly confronting one discipline with another. Lawyers reading the stimulating chapter by K Lee Adams, a legal scholar, and Chris Geller, an ‘anthropologist turned economist’,<sup>62</sup> are helped through the models by references to *Shrek 2*<sup>63</sup> and *The Outlaw Josey Wales*,<sup>64</sup> and a number of useful ‘translations’ of economic terms are provided ([w]hat we call “Life”, neoclassical economists call “leisure”).<sup>65</sup>

In the present context, the institutionalist method serves well enough to hold the collection together. However, there is more work to be done on this approach at a theoretical level. Labour lawyers — and, increasingly, legal scholars in many other fields — need little persuading of the merits of interdisciplinarity, but the same cannot be said of most social scientists. An enormous body of empirical literature now exists on the social and economic effects of labour legislation, but not much of this work is done by lawyers, and if they do participate in multi-disciplinary teams, it is not always clear what their specific contribution is, beyond supplying a basic level of knowledge on the content of legal rules. In most cases, sociologists and economists seem to be able to proceed without any help from lawyers at all. As Linda Dickens and Mark Hall pointed out in their recent review of empirical studies of labour legislation in Britain, ‘there is still only a relatively limited amount of interdisciplinary/multi-disciplinary research bringing together academic lawyers and those trained in social science’.<sup>66</sup> On the one hand, ‘labour law research and writing has been constrained by traditional methods’, while on the other, industrial relations scholars

still investigate labour markets and workplace relations focusing on areas where legal regulation is intended, or could be expected, to play a role (for example, employers’ labour use strategies; worker representation) without actively exploring or commenting on this aspect.<sup>67</sup>

This significant insight suggests that labour lawyers (and other legal scholars with an interest in interdisciplinarity) need to do two things. The first is to understand better what social scientists are doing. This is not at all the same thing as abandoning legal studies altogether in favour of an alternative approach. A clearer recognition that interdisciplinarity involves a degree of familiarity with the precepts and methods of another field, rather than a full working knowledge of the kind which can only come from years of experience in that area, would be useful. The specialisation of academic fields makes any other approach a counsel of perfection. Secondly, however, lawyers need to convince social scientists that their own discipline has something useful to offer. This is, if anything, a more difficult task, because legal scholars rarely think about what the methodology of

<sup>62</sup> Arup et al, above n 1, xii.

<sup>63</sup> (Directed by Andrew Adamson, Kelly Asbury and Conrad Vernon, DreamWorks Pictures, 2004).

<sup>64</sup> (Directed by Clint Eastwood, Warner Bros, 1976).

<sup>65</sup> Adams and Geller, above n 28, 440 fn 41.

<sup>66</sup> Linda Dickens and Mark Hall, ‘The Impact of Employment Legislation: Reviewing the Research’ in Linda Dickens, Mark Hall and Simon Wood, *Review of Research in the Impact of Employment Relations Legislation* (Employment Relations Research Series No 45, 2005) 32.

<sup>67</sup> *Ibid.*

their discipline is in a social science sense. Paradoxically, it may be that for lawyers to engage in interdisciplinary research, they will first have to understand their own task better.

#### IV NORMATIVE FOCUS AND THE RELEVANCE OF EMPIRICAL EVIDENCE

For the most part, the chapters in *Labour Law and Labour Market Regulation* concentrate on methodological discussion and detailed institutional accounts of the workings of legal rules; they steer clear of open engagement with the neoliberal policy precepts that challenge the legitimacy of those rules directly. This is to be welcomed. The work looks to the future and aims to outlast the *Work Choices Act* agenda and similar deregulatory initiatives. But some questions cannot be avoided. Where does the shift in focus from ‘labour law’ to ‘labour market regulation’ leave the traditional protective function of labour law? If, for example, ‘enhancing labour market opportunity’ replaces ‘job security’ or ‘income protection’, does this mean downgrading existing levels of regulation on the basis that they impede, not simply the efficient operation of market forces and competitiveness,<sup>68</sup> but also market access to ‘outsiders’ and the unemployed — perhaps even deny them ‘the right to work’?<sup>69</sup>

That is not a question that even a book as comprehensive and wide-ranging as this could hope to answer. Only a few chapters address it directly. The chapters by Wheelwright on small and medium enterprises,<sup>70</sup> and Howe on ‘deregulation’,<sup>71</sup> make important contributions to the debate by pointing to the lack of a clear evidence base for parts of the *Work Choices Act* agenda. Is it possible to go further and examine, in a broader sense, the empirical workings of labour laws, in terms of their impact on unemployment, employment and inequality? This is the most difficult question facing labour law scholars today, and the one that should be at the core of an interdisciplinary research agenda for ‘labour market regulation’.

As Dickens and Hall noted, legal scholars have made a relatively limited contribution to the resolution of this question from a social science perspective.<sup>72</sup> Labour lawyers are thereby reduced to relying on, or simply reporting, the empirical findings of social scientists. There is a danger that the orthodox economic view — that regulation impedes efficiency and competitiveness — will achieve the status of a conventional wisdom even within the labour law academy. If that happens, it will be difficult to renew traditional protective goals.

There are things which labour lawyers could do in order to avoid finding themselves pushed to the margins of the debate. One is to take a more critical

<sup>68</sup> Hugh Collins, ‘Regulating the Employment Relation for Competitiveness’ (2001) 30 *Industrial Law Journal* 17.

<sup>69</sup> Andrea Ichino and Pietro Ichino, ‘Who Is Served by Labour law? Interdisciplinary Reflections on the Economic Function and Constitutional Justification for the Inderogability Norm in Labour Law’ in A Amendola (ed) *Institutions and the Labour Market* (1998) 67.

<sup>70</sup> Wheelwright, above n 6.

<sup>71</sup> Howe, “‘Deregulation’ of Labour Relations in Australia”, above n 13.

<sup>72</sup> Dickens and Hall, above n 66, 32.

look at the economic literature. Economics sometimes takes on a monolithic appearance, as a discipline united by a common approach and taking a uniform view on issues of labour market policy, but this is not the case. It is not simply that there are powerful dissenting views within economics, which question neoliberal policies; economics is a discipline which is itself in flux. Heterodox ideas find their way into the supposed theoretical core more often than might be supposed. This is a process that opens up possibilities for alternative approaches, including those influenced by other disciplines. Thus legal scholarship has played some role in assisting the advance of 'neo-institutionalist' and 'behavioural' approaches, which have challenged the economic mainstream since the mid-1970s.

A second role which labour lawyers could usefully perform is in providing a better evidentiary base for economic and statistical studies of the effects of the law. The poor state of legal systems' data often goes unremarked in the debates surrounding the so-called 'legal origins hypothesis' which has become highly influential in economics, and in policymaking circles, since the mid-1990s.<sup>73</sup> Yet the empirical foundations for this growing body of literature are open to question. The 'codings' of legal variables upon which some very heavily cited economics articles depend, and upon which The World Bank constructs its annual *Doing Business* reports recommending deregulation in labour law among other fields,<sup>74</sup> are not transparent since the specific sources for the values are not stated. This is an area in which informed legal input is urgently needed.

There are no easy answers to these questions, but a simple realisation that this is the case might help labour law scholarship to avoid certain pitfalls. Too often the debate has been carried on, not simply in the absence of good empirical evidence on the workings of the law, but also without regard to the criteria which should properly be applied when evaluating findings from the social sciences. Labour law does not need to lose its normative focus on protection of the worker in the face of neoliberal economic theory, but if labour law, as a field, were to become more finely attuned to the need for a sound evidence base for policy, that might be no bad thing.

## V CONCLUSION

These are just some of the issues raised by a collection of chapters which has fully justified the immense efforts of its multi-member editorial team and almost 40 individual contributors. They have put forward a framework for an interdisciplinary research agenda that will influence the field of labour law for some time. While this work does not necessarily demonstrate the existence of a new paradigm to replace labour law, it is testimony to the richness and dynamism of Australian labour law scholarship at a critical time in the development of the field.

<sup>73</sup> In the labour law context: see Juan C Botero et al, 'The Regulation of Labour' (2004) 119 *Quarterly Journal of Economics* 1339, 1340–82.

<sup>74</sup> See, eg, The World Bank, *Doing Business 2007: How to Reform* (2007).