



# LABOUR LAW AND LABOUR MARKET REGULATION

## EDITORS

Christopher Arup  
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THE FEDERATION PRESS

# **Labour Law and Labour Market Regulation**

*Essays on the Construction, Constitution and  
Regulation of Labour Markets  
and Work Relationships*

Editors

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## Preface

This book forms part of an ongoing project, based in the Centre for Employment and Labour Relations Law at the University of Melbourne, and in the Department of Business Law and Taxation at Monash University, regarding the subject matter and objectives of labour law. An earlier part of the project, carried out by the Centre and its associates from several universities, took place under the title “Redefining Labour Law” more than a decade ago. The key objective for us at the Redefining Labour Law Conference (16-17 June 1995) was to open up for discussion questions and issues bearing upon the challenge presented to labour law as a field of research, teaching and social policy by rapidly changing social, economic and labour market contexts. (See Mitchell R (ed), *Redefining Labour Law: New Perspectives on the Future of Teaching and Research*, Centre for Employment and Labour Relations Law, the University of Melbourne, 1996.)

Following the completion of that stage of the project, we set about trying to discover more about the institutions and rules governing labour markets and work relationships beyond the traditional focus of labour law, the employment relation. These issues were explored through a series of more or less discrete research projects, many of which were supported by Australian Research Council funding, or other competitive research grant sources. The subject matter covered in these various projects included labour market dimensions of immigration law, social security law, and the law relating to vocational education and training. Work was also carried out on employment agencies, and on job creation schemes.

This work has been led by Richard Mitchell and Anthony O'Donnell over the past seven years or so, but it has been supported by Chris Arup, John Howe, Joo-Cheong Tham, Ann Shorten, Ian Robertson, Sean Cooney, Jill Murray, Richard Johnstone, Colin Fenwick, Kristen Murray, Paula Darvas and Rolf Sorensen. From time to time Harry Glasbeek, a regular visiting professor in the Centre, has contributed critically to the research also. A substantial volume of published work emerged from these projects, much of which has been pressed into service, in one way or another, in this collection.

Along the way, other interventions have helped to keep the project bubbling along. In 2002, Rosemary Hunter and Richard Johnstone organised a workshop at Griffith University under the auspices of the Socio-Legal Research Centre to discuss progress under the broad title of “Rethinking Labour Law”. This was an important spur at the right time. Around the same time we were able to complete a book on comparative labour law using the broader “labour market” focus for subject matter (see Cooney S, Lindsey T, Mitchell R and Zhu Y (eds), *Law and Labour Market Regulation in East Asia* (Routledge, London, 2002)).

Meanwhile we could see that labour law scholars around the country were beginning to change the focus of their research too. The immediate catalyst for the present collection of essays was the two-day conference "Labour Law, Equity and Efficiency: Structuring and Regulating the Labour Market for the 21st Century" which was held in the Law School at the University of Melbourne on 8-9 July 2005. The purpose of the conference was to encourage contributors to think about the connections between regulation and labour markets and work relationships in ways which would transcend the usual boundaries of labour law. The editors gratefully acknowledge the spirit of enthusiasm with which the contributors joined in this process, and we trust that the collection does justice to their efforts. The collection is principally comprised of revised versions of the conference papers, with a handful of additional contributions from the editors themselves.

There are a number of people to whom we owe a great deal in respect of the "Labour Law, Equity and Efficiency: Structuring and Regulating the Labour Market for the 21st Century" conference. Professor Glyn Davis, Vice Chancellor of the University of Melbourne, and Professor Margaret Gardner very generously hosted a dinner for the organising group on the eve of the conference, and the Vice Chancellor very kindly agreed to give the opening address on the following morning. Their support for the project is greatly appreciated.

Apart from the editors of this collection, foremost Richard Mitchell, a number of our colleagues, from the University of Melbourne Law School and beyond, played a role in the conference proceedings. These include Colin Fenwick, the Director of the Centre for Employment and Labour Relations Law, Christine Parker, Glenn Patmore, Miranda Stewart, Sunita Jogarajan, Bill Ford, Iain Ross, Marilyn Pittard, Ron McCallum, Anthony Forsyth and a now very much missed colleague Philippa Weeks. We wish also to record our thanks to those who contributed to the organisation and administration of the conference before, and during, the proceedings. Elena Goodey, administrator of the Centre for Employment and Labour Relations Law, bore most of the responsibility for organising the conference, and we thank her for her outstanding work. We also thank Kathryn Taylor, Hannah Fitzgerald, Lucy O'Brien, Julia Mitchell and Marc Trabsky for their various inputs. Finally, we wish to record that the conference was a joint project of the Australian Labour Law Association, the Bowater School of Management at Deakin University, the Socio-Legal Research Centre at Griffith University, the Law School at Victoria University and the Centre for Employment and Labour Relations Law at the University of Melbourne. The publication of this collection is consequently a direct result of their contribution. The immediate publication costs have been generously assisted by a publication grant from the University of Melbourne. We also acknowledge the support given to the project by the Department of Business Law and Taxation, Monash University, in respect of Richard Mitchell's contribution.

Inevitably in a project this size, the final editing process was both difficult and time consuming. We are grateful to Elena Goodey, Chiara Bryan and Sam McQueen for their patient and accurate work in this process.

The idea that labour law might be looked at more broadly as “labour market regulation”, without necessarily detracting from the scholarly standards and normative values with which most of us identify, has now been under consideration for more than 15 years. The emergence of similarly oriented projects or outlooks to this one (eg Stone K, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge University Press, Cambridge, 2004); Conaghan J, Fischl RM and Klare K (eds), *Labour Law in an Era of Globalisation: Transformative Practices and Possibilities* (Oxford University Press, Oxford, 2002)) seems to suggest a general interest by labour lawyers in moving beyond the limitations of the traditional paradigm. Our aim here is to consolidate the Australian version of this new perspective.

The content of such a perspective is, of course, open to many diverse interpretations. But in our view it suggests at least two initiatives. The first concerns method. We have found that regulatory analysis provides useful tools for broadening our understanding of labour law. Consequently, many of the contributions rehearse that regulatory theory, while some also revisit other adjacent disciplines. In this respect, our work reflects the opening up of method that is characteristic of legal scholarship generally in this country.

The second concerns subject matter. We have stressed the need to consider the problems of labour as they extend beyond the conventional employment relationship. Many of those problems, we find, have an enduring quality. At the same time, however, our intention is to raise questions and issues that we believe require some consideration in the current debate over changes to labour law. We do not doubt that the recent changes are significant. But we wish to indicate that these changes will take their place in a field of labour market regulation that is much richer than we might conventionally understand.

These two initiatives explain the arrangement of the contributions, 30 something in all, which we have divided into four parts: purposes of regulation; labour market institutions and regulatory techniques; constituting the labour market; and labour market status, forms of engagement and rights and obligations in work relationships. The book also contains an introduction to the study of the field and some short conclusions, which are designed to capture the range in the chapters. The chapters have been allocated according to their contributor’s main focus; naturally their interests overlap with the other parts of the book.

In offering these contributions, we wish to make it clear that this work does not pretend to offer a statement of the central concerns and themes of a “new” labour law paradigm. That task awaits further attention.

*The Editors*  
August 2006

## Contributors

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### Christopher Arup

Chris Arup is Professor of Law at Victoria University in Melbourne. As well as labour law and injury compensation, he researches intellectual property, professional services and international trade regulation. He is co-editor of the Cambridge University Press series *Studies in Law and Society* and a past editor of *Law in Context*.

### Michael Barry

Michael Barry is Senior Lecturer in Industrial Relations at the Griffith Business School, Griffith University. Michael's research interests and publications include work on industrial relations in the mining, water-front, and meat industries; employer strategy and the development and functions of employer associations; trade union renewal and new forms of employee representation; and comparing systems of employment regulation in Australia and New Zealand. He is also currently involved in research examining employment relations in the low-cost airline sector.

### Peter Brosnan

Emeritus Professor Peter Brosnan is an Adjunct Professor in the Department of Industrial Relations at Griffith University. From 1992 until his retirement in November 2004 he was Professor of Industrial Relations at Griffith University. Before that he held posts at Victoria University of Wellington and the University of Melbourne. He has held visiting posts at Trinity College Dublin, Cambridge University and Université Nancy 2. His research interests are in the functioning of labour markets, most aspects of industrial relations, and non-standard employment relations. His current research is a history of the labour markets in Australia and New Zealand.

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### **Anna Chapman**

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Sean Cooney graduated in Arts and Law from the University of Melbourne and has also studied at Columbia University in New York, and at National Taiwan University. Sean completed his doctoral studies (JSD) at Columbia University, New York, in October 2005. His research interests are in international and comparative labour law, with a particular focus on East Asia. He has published in a range of international journals in English and Chinese, and is currently examining alternatives to the current system of international labour standards.

### **Mary Crock**

Mary Crock (BA (Hons) LLB (Hons) PhD (the University of Melbourne)) is an Associate Professor and Associate Dean (Postgraduate Research) at the Faculty of Law, University of Sydney. She is the author of many books and articles on immigration and refugee law including *Immigration and Refugee Law in Australia* (1998) and *NationSkilling: Immigration, Labour and the Law* (2003). She is Chief Examiner (Immigration Law) in various Specialist Accreditation programs across Australia; and editor of the *Immigration Review* (Butterworths).

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Andrew Frazer is a senior lecturer in the Faculty of Law, University of Wollongong, where he teaches employment, labour relations and anti-discrimination law. He has published several chapters and articles on the history, policy and politics of industrial tribunals.

### **Leah Friedman**

Leah Friedman (BA (Hons) LLB (Hons) (Syd)) is currently working as a Judge's associate. While studying at Sydney Law School, she worked as research assistant to Mary Crock and spent periods as an intern (legal clerk) for the United Nations International Criminal Tribunal for the former-Yugoslavia, Office of the Prosecutor; and for the Australian Law Reform Commission (reference on civil and administrative penalties). She is an active member of the NSW Council for Civil Liberties.



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Peter Gahan is Associate Professor in Human Resources Management at Monash University. He has previously held academic appointments at the University of Melbourne, the University of New South Wales and the University of Southern California. He has published widely on Australian industrial relations, work organisation and labour market regulation.

**Chris Geller**

Chris Geller is an anthropologist turned economist. He attended the University of Georgia and Washington University, was a social worker for five years, then earned his PhD from Georgia State University. While primarily a teacher, his research interests include labour and development, voting theory and experimental economics. He is at present a senior lecturer at Deakin University.

**John Howe**

John Howe is Senior Lecturer in the Law School at the University of Melbourne, where he is a member of both the Centre for Employment and Labour Relations Law and the Centre for Corporations Law and Securities Regulation at the Law School. He obtained his PhD in law from the University of Melbourne in 2004. Before commencing an academic career, John worked in private legal practice, and also as a researcher for public policy and advocacy organisations in Washington DC in the United States. He is the Secretary of the Australian Labour Law Association, and Associate Editor of the Australian Journal of Labour Law.

**Richard Johnstone**

Richard Johnstone is a Professor in the Griffith Law School, where he is the Director of the Centre for Socio-Legal Research. Until April 2004 he was the foundation Director of the National Research Centre for Occupational Health and Safety Regulation, based in the Regulatory Institutions Network in the Research School of Social Sciences at the Australian National University, and is now an Adjunct Professor in the Regulatory Institutions Network, and a member of the National Research Centre. He is also an Associate of the Centre for Employment and Labour Relations Law at the University of Melbourne. Richard's academic interests are in labour law, occupational health and safety regulation, socio-legal research and legal education.

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Carla Lipsig-Mummé is Research Professor of Political and Social Inquiry and Director of the Centre for Research on Work and Society in the Global Era at Monash University in Australia, and Professor of Labour Studies at York University in Canada. Her scholarly work focuses on labour studies within the context of political economy, precarious employment, the professions and trade union internationalism. A trade union activist, she was a union organiser in the US and Quebec, and works with trade unions and working students' movements in Australia and English Canada.

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work in this area is a collection of essays entitled *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (co-edited with Judy Fudge, Osgoode Hall Law School) (Hart Publishing, 2006). Rosemary Owens is joint editor of the *Australian Journal of Labour Law*.

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