

# **EMPLOYMENT** LABOUR and INDUSTRIAL **LAW** in Australia

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CAMBRIDGE

# EMPLOYMENT, LABOUR AND INDUSTRIAL LAW IN AUSTRALIA

Louise Floyd, William Steenson, Amanda Coulthard,  
Daniel Williams and Anne C Pickering  
with Jim Jackson and Annaliese Jackson



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*For God, my mother Jessica and my dog Mack, who are my best friends.  
And for Justices Margaret McMurdo and David Octavius Joseph North,  
who have been inspirations, mentors and supports in my career.*

*Louise Floyd, Brisbane, May 2017*

# FOREWORD

Until the Industrial Revolution, the regulation of employment was not a subject which engaged the minds of legislators to any great extent. Even so, attempts to control employment had been made as early as 1351 when, in the reign of Edward III, the Statute of Labourers sought to reduce wages to the levels which applied before the Black Death. The labour shortage caused by that awful plague had seen wages rise and labourers move in search of improved conditions. As has often been the case, the statute failed to realise its goal.

In this country, colonial governments made sporadic attempts to control the labour market, and often with the same lack of success as had been experienced half a millennium earlier in England. It was not until the great strikes of the 1890s that a concentrated effort was made to create a system which might prevent or settle disputes. Legislation to establish systems of conciliation and arbitration emerged, first in Western Australia (1900) and then New South Wales (1901), the Commonwealth (1904), South Australia (1915) and Queensland (1916). Tasmania and Victoria retained a curious attachment to wages boards until 1984 and 1992 respectively.

The slow march in legislation was mirrored in the common law of employment, where principles established in the 19th century and earlier were applied with varying degrees of precision well into the late 20th century. But the market for labour does not wait for parliaments or courts. While changes in the types and styles of employment have been recognised to a limited extent by the various industrial commissions through awards and agreements, the pace of change continues to quicken.

This book recognises that the acceleration in change means that decades of labour law jurisprudence are being relegated on a continuing basis to the file marked 'of historical interest'. Knowledge of the interstices of interstate industrial disputes or the effect of ambit claims was once an essential part of an industrial lawyer's armoury. After the *WorkChoices* case, the thousands of pages devoted to those matters are now consigned to the dusty shelves of unvisited libraries.

The factors which give rise to the inevitable mutation of the law come from both within and without this country. Australia long ago ceased to be immune from the influence of world trade and international corporate employers. To that end, this book contains a very welcome consideration of transnational and international employment law and the special problems it engenders.

The authors provide, to both the student and the professional, a clear description of the law and rigorous analyses of both the challenges which exist and the changes which are in prospect.

**The Hon Justice Glenn Martin AM  
President, Industrial Court of Queensland and  
Queensland Industrial Relations Commission  
Judge of the Supreme Court of Queensland**

# ABOUT THE AUTHORS

**Louise Floyd** (PhD) is Associate Professor of Law, James Cook University Law School and a Barrister to the Supreme Court of Queensland. Louise was awarded the MacCormick Fellowship to the University of Edinburgh Law School, Scotland, and is International Visiting Fellow at Cornell University in New York State. Louise has been awarded numerous teaching prizes. She is former Sub Dean of the University of Queensland Law School and was awarded that institution's Promoting Women Fellowship. Louise's career began when she was Judge's Associate to Hon MA McMurdo AC.

**William ('Bill') Steenson** is a government lawyer and a lecturer in industrial and labour law at the University of Technology Sydney. He was General Counsel and Director Legal and Policy for the Royal Commission into Trade Union Governance and Corruption. Previously, Bill worked as a Principal Lawyer for WorkCover NSW, and has also worked as an Industrial Officer and as a part-time member of the Government and Related Employees Appeals Tribunal (GREAT), dealing with employment-related appeals and grievances. Bill is an accredited mediator and a member of the Professional Conduct Committee of the Law Society of NSW.

**Dan Williams** is a Partner at Minter Ellison Lawyers, Brisbane. He has a particular interest and expertise in industrial relations strategy and has for many years provided advice and support in these matters for some of the largest employers in Australia in both the private and public sectors. His practice has spanned the entire period of enterprise bargaining in Australia from the early 1990s, and this historical perspective allows him to bring valuable insight to an analysis of this complex topic.

**Anne C Pickering** is undertaking a PhD at the University of Queensland TC Beirne School of Law, where she is also a tutor. She completed her LLM (Research) at the Queensland University of Technology. Anne has practised as a solicitor, and most recently worked for both the Queensland Law Society and the Legal Practitioners Admissions Board.

**Amanda Coulthard** is Associate Professor of Law at Bond University and has a part-time practice at the Brisbane Bar. She has previously worked at a variety of Brisbane law firms.

**Jim Jackson** (PhD) is Emeritus Professor and the former Chair of the Academic Board at Southern Cross University where he was the Foundation Dean of the Law School. He is an academic lawyer specialising in higher education law, including academic employment law. He has also worked for Wollongong and Bond Universities and internationally for Kaplan in Singapore.

**Annaliese Jackson** is a solicitor at Queensland University of Technology. She has previously been a Senior Lawyer at the Fair Work Ombudsman, specialising in employment law, and an Associate at Minter Ellison Lawyers in the Human Resources and Industrial Relations Team.

# PREFACE

The photograph on the front cover of this book was taken by me whilst flying in a Qantas charter flight over the South Pole. To many, there might not be any immediate connection between that photo and labour and employment law. The South Pole is vast and beautiful, but it is largely uninhabited; it is not a thriving hub of either businesses or trade unions.

But the photograph is a metaphor. The South Pole is, at once, something that has been with us forever, and something that is undergoing great change. There are settlements that have been in existence since Mawson's hut, yet there are vast expanses comprising a new frontier. Terrain that is majestic yet challenging (even threatening) on the ground can be enjoyed for all its magnificence comparatively easily from the sky. There is wildlife and nature so spectacular that it must not be destroyed as the world changes and develops.

In what some would call a crowded market of good employment or labour texts, this book offers its own perspective and contribution. The book:

- analyses the **key elements and new developments of both employment and labour law** – issues relating to the employment of workers as well as trade union-related issues and new developments such as **the responses to the Trade Union Royal Commission** and **anti-bullying laws**;
- analyses the **crucial emerging issues and new frontiers, such as transnational labour law** (including a discussion of Chinese labour standards and Brexit, and their relevance to Australia); immigration and employment; volunteering; as well as **the impact of robots and automation**;
- **analyses areas of work that either have not previously been considered in texts or that are important, yet do not regularly appear in labour and employment texts**, such as public sector work and 'The Big Society'; judicial work; and taxation;
- provides **teaching materials**, such as tutorial and group work questions and chapter summaries at the end of chapters; and
- has **accompanying web materials** – so developing areas (such as workplace policy) have a flexible medium with which materials can be presented in a useful and timely way.

The book is useful for law and business students and also for the profession. It is written in an accessible way.

Broadly, the book begins, in Chapters 1 and 2, by studying the contract of employment, the differences between contractors and employees (and sham contracting), outsourcing and supply chains; as well as the duties implied into the employment relationship (including the remaining questions after the High Court of Australia decision in *Barker*). Chapter 3 then considers theories of labour and employment law and why Australia has the unique

legislative system that it has and why the contract of employment is not like any other contract. Adverse action forms part of that discussion as it relates in part to that other feature of the Australian system, the prominence of group representation. Chapter 4 deals with the terms of employment and connects with that enterprise bargaining, Modern Awards and the National Employment Standards, as well as the statutory provisions and case law that govern the processes of bargaining (such as bargaining in good faith). In Chapter 5, the machinery provisions covering trade unions are analysed (as unions typically bargain for enterprise agreements); so too is the law on industrial action. In this context, there is a useful discussion of the recent Trade Union Royal Commission and the subsequent legislative developments relating to trade union governance. Chapter 6 deals with the end of the employment relationship. It traverses statutory unfair dismissal laws (which cover vast swathes of the Australian workforce); wrongful dismissal (which is often relevant for high-income earners); and further issues arising at the end of the employment relationship, such as: restraint of trade,<sup>1</sup> transfer of business (what happens to employment conditions when workers transfer with a business) and the fair entitlements guarantee (which applies in the event of job loss through employer insolvency). Chapter 7 deals with public work – public sector employment, judicial work (something not often considered in texts) and academic employment. Chapter 8 deals with specialist employment law issues: workplace health and safety (including bullying), anti-discrimination law and taxation. (Areas such as tax are so complex that they are specialties unto themselves, yet it is important for all employment lawyers to understand the connection between labour and tax, and to be able to flag issues that might require specialist tax expertise.) Finally, Chapter 9 deals with those emerging issues and new frontiers – transnational labour law (dealing with transnational corporations, conflicts of laws, and with China, Brexit and key issues in trading blocs) as well as labour and immigration, volunteer work and robots/automation. At the end of each chapter, there are summaries and work questions, and there are accompanying web materials for the entire book.

In writing this book, there are many people to be thanked. First, my co-authors. Bill Steenson of the Fair Work Commission and University of Technology, Sydney, wrote Chapter 5 on trade union law as well as the health, safety and bullying section in Chapter 8. He was a delight to work with and extremely diligent and punctual. Chapter 4, on enterprise bargaining, was written by Dan Williams (Partner, Minter Ellison – Brisbane) along with some of his work group. Another tremendous colleague, Dan's practical perspectives as a top lawyer, negotiator and litigator are invaluable for such a practical topic as bargaining. Professor Jim Jackson and his wonderful daughter Annaliese wrote the academic employment section of Chapter 7 – which is a significant contribution, as Jim is Australia's leading academic employment lawyer and Annaliese was a Judge's Associate to both the late President David Hall, of the Queensland Industrial Court, and Justice Philip McMurdo, of the Queensland Court of Appeal and she has worked for both the Fair Work Commission and Griffith University as an employment lawyer. I am grateful to call the Jacksons colleagues and friends. I am happy to introduce Anne Pickering of the Queensland Law Society, in her first foray into writing a major work. (She is also undertaking her PhD through the University of Queensland TC Beirne School of Law,

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1 While these are in employment contracts from their inception, the clause is usually litigated at the end of the relationship.

where she is also a tutor.) Anne wrote Chapter 2 on very short notice after the original person assigned that task proved unable to do it and withdrew shortly before the deadline. Anne showed her typical good nature and efficiency in writing. Amanda Coulthard wrote Chapter 1. For my part, I thoroughly enjoyed writing Chapter 3, Chapter 6 and Chapter 9, as well as all the material on judicial work, public sector employment and the big society theory in Chapter 7 and the material on discrimination and taxation in Chapter 8.

Secondly, I thank the many brilliant people who provided invaluable support other than writing. Lucy Russell of Cambridge University Press has been a strong support to the vision I have had in planning, designing and writing this work. She is truly first class in her commitment and organisational skills. Thanks to her whole team for their editing (Emily Thomas and Sarah Shrubb). Thanks to the anonymous referees for their comments, especially one whose table on the choice of remedy for job loss now forms a part of this book. My family, to whom this book is dedicated (my mother, Jessica, and my dog, Mackie), have been ever-present supports, as have the judges to whom this book is also dedicated. Hon President Margaret McMurdo AC of the Queensland Court of Appeal (to whom I was Judge's Associate in 1993) and Hon Justice David Octavius Joseph North of the Queensland Supreme Court (whom I first met as my lecturer in civil procedure in the 1990s) show a dedication to the profession that demonstrates their talent, professionalism and intellect. They have been particularly decent in their dealings with me. Justice Glenn Martin AM, also of Queensland's Supreme Court, who wrote the foreword, is similarly committed and respected by all. Thanks to Professor Michael Gold and his colleagues (especially the librarians) at the Industrial and Labor Relations School at Cornell University in New York State (where I was International Visiting Fellow while I was finalising this work) – I am grateful. Thanks also to Professors Tom Mayo and Fred Moss at Southern Methodist University Dedman School of Law, Dallas, Texas, which I was also visiting (for the fourth time) as this book was in its final stages. Tom and Fred are wonderful friends and colleagues, and they have been for years. Finally, thanks to Professor Neil Walker at Edinburgh Law School for his time in discussing some aspects of Brexit with me while I was visiting there in February 2017.<sup>2</sup>

Enjoy reading this work. May it provide useful insights for the established and not-so-established frontiers of Australian labour and employment law and the transnational employment law developing around it.

**Dr Louise Floyd (Lead Author and Associate Professor of Law, JCU)**  
***Barrister, Supreme Court of Queensland, and International Visiting Fellow,***  
***Industrial and Labor Relations School, Cornell University, New York***

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2 But obviously any discussion of Brexit in this book is my own work and I take responsibility for any opinions or flaws.



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