

11-2008

Reconceiving Labour Law: The Labour Market Regulation Project

Andrew D. Frazer

University of Wollongong, afrazer@uow.edu.au

Follow this and additional works at: <https://ro.uow.edu.au/lawpapers>



Part of the [Business Law, Public Responsibility, and Ethics Commons](#), [Labor and Employment Law Commons](#), [Labor Relations Commons](#), and the [Work, Economy and Organizations Commons](#)

Recommended Citation

Frazer, Andrew D.: Reconceiving Labour Law: The Labour Market Regulation Project 2008.
<https://ro.uow.edu.au/lawpapers/57>

Reconceiving Labour Law: The Labour Market Regulation Project

Abstract

This paper reviews the recent work by Australian labour lawyers that has embraced the 'new regulation' and in particular the idea of law as regulation. This approach has recast the academic study of labour law as being concerned with regulation of the labour market. While much of this work has concentrated on expanding the field of labour law to include many areas of law affecting the labour market (beyond the employer-employee relationship), the work has also developed the view of law as a mechanism of state regulation. The paper examines how the 'regulatory turn' in Australian labour law has affected the accounts it provides, and assesses the connection between seeing the labour market as the field of study and the adoption of a regulatory perspective to the study of labour law.

Keywords

labour law, labor law, regulation of labour, labour market regulation, Richard Mitchell

Disciplines

Business Law, Public Responsibility, and Ethics | Labor and Employment Law | Labor Relations | Law | Work, Economy and Organizations

Publication Details

This article was originally published as Frazer, AD, Reconceiving Labour Law: The Labour Market Regulation Project, *Macquarie Law Journal*, 8, (2008), 21-44.

Reconceiving Labour Law: The Labour Market Regulation Project

Andrew Frazer*

Abstract

This paper reviews the recent work by Australian labour lawyers that has embraced the ‘new regulation’ and in particular the idea of law as regulation. This approach has recast the academic study of labour law as being concerned with regulation of the labour market. While much of this work has concentrated on expanding the field of labour law to include many areas of law affecting the labour market (beyond the employer-employee relationship), the work has also developed the view of law as a mechanism of state regulation. The paper examines how the ‘regulatory turn’ in Australian labour law has affected the accounts it provides, and assesses the connection between seeing the labour market as the field of study and the adoption of a regulatory perspective to the study of labour law.

Introduction

Labour law, in Australia as elsewhere, is undergoing a transformation. In the last decade or so there has been a change in purpose and orientation, from the elucidation of legal rules governing employment and industrial relations, to the analysis of regulatory strategies and mechanisms affecting the labour market. The change in academic approach has been prompted by the tide of changes in work relations associated with globalisation and economic restructuring. We have seen the rise of the post-industrial, internationalised ‘new economy’ involving ‘networked, boundaryless (sometimes virtual) organizations’ which utilise floating professionals on a project-by-project basis.¹ There has also been an increase in so-called ‘Mac-jobs’ involving work that is precarious, dependent and socially

* Senior Lecturer, Faculty of Law, University of Wollongong. Email: afrazer@uow.edu.au. I would like to thank Mark Bray for his comments on an earlier version of this article.

¹ Linda Dickens, ‘Problems of Fit: Changing Employment and Labour Regulation’ (2004) 42 *British Journal of Industrial Relations* 595, 595.

marginalised. Workers in these jobs are engaged on a casual or contract basis, develop few portable skills, experience or contacts (and so have no real career development) and often work unsociable hours. In the face of both these developments, traditional regulation through union organisation and collective bargaining is difficult or impossible. The prevailing attitude in business and politics towards the state's role in industrial relations has moved away from collectivism and protective intervention. This has been reflected in the reduction of legal protection for trade unions and industrial action. There has been increasing concern that the reach of the nation state itself is no longer sufficient to deal with the problems that are being fomented by the modern international economic order.²

The explosion of comparative studies in the last decade testifies to the commonality of issues facing most countries, including questions of disciplinary boundaries, 'modernization' and the autonomy of national traditions.³ The success of neoliberalism in dismantling the institutions and legislative basis of collective rights has led to a questioning whether there is a future for labour law, and (assuming that there is) the search for a new foundation. Some scholars have proposed greater emphasis on individual employment rights, which are grounded in social ideals such as citizenship, autonomy and decent work.⁴ The regulatory function of labour law in this view is to provide a bulwark against the influence of markets. A few writers see possibilities for social goals to be integrated into the operation of labour markets. Significantly, such a view stems from seeing law as only part of the total regulatory picture, and by viewing labour law as extending beyond its traditional protective function. Labour law then becomes the means for providing the institutional framework and mechanisms for redressing the deficiencies

² Massimo D'Antona, 'Labour Law at the Century's End: An Identity Crisis?' in Joanne Conaghan, Richard Michael Fischl and Karl Klare (eds) *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (2002) 31.

³ Alain Supiot, 'Law and Labour: A World Market of Norms?' (2006) 39 *New Left Review* 109; Silvana Sciarra, 'Evolution and the "Autonomy" of Labour Law' in *The Evolution of Labour Law 1992–2003* (2005) 21 <http://ec.europa.eu/employment_social/labour_law/docs/generalreport_en.pdf> at 31 Jan 2008; Silvana Sciarra, 'Modernization" of Labour Law: A Current European Debate' (2007) <<http://www.ilo.org/public/english/bureau/inst/download/sciarra.pdf>> at 1 Feb 2008.

⁴ Bob Hepple, 'The Future of Labour Law' (1995) 24 *Industrial Law Journal* 303; Bob Hepple, 'Four Approaches to the Modernisation of Individual Employment Rights' in Roger Blanpain and Manfred Weiss (eds) *Changing Industrial Relations and Modernisation of Labour Law* (2003) 181; Ronald McCallum, 'Collective Labour Law, Citizenship and the Future' (1998) 22 *Melbourne University Law Review* 42; Ron McCallum, 'Justice at Work: Industrial Citizenship and the Corporatization of Australian Labour Law' (2006) 48 *Journal of Industrial Relations* 131.

of markets for labour, and for promoting goals of flexibility and competitiveness in a socially sustainable way.⁵

Many of these new approaches to labour law build on the interdisciplinary field of ‘new regulation’ studies, which encompasses the variety of techniques by which state agencies and private actors influence their environment and co-participants. Regulation studies reflects the new mode of governance that has emerged since the 1980s, which itself accompanied demands for an end to traditional state controls associated with the welfare state (deregulation) and their replacement by more distanced and concessional techniques (self-regulation). In following these changes, many of the social sciences have taken a ‘regulatory turn’, which follows an institutionalist approach based on the study of regulation through networks of relations and the embeddedness of state and business actions in historically conditioned social practices.⁶ In the context of legal studies, this means recognising that legal rules and norms are only part of the web of regulatory forces, but that law often functions as the medium through which such forces are articulated and coordinated.⁷

In Australia over the last decade and more, a body of scholarship has built up around a program of redefining labour law as being concerned with labour market regulation. This program has two dimensions. First, it involves expanding the *field* or scope of labour law to embrace all aspects of the labour market, rather than the employer-employee relationship as it has been traditionally conceived. Second, there is a methodological change in *perspective* or focus towards regulation rather than law – including all aspects of the state’s activities rather than the legal institutions and sources conventionally studied by academic lawyers. The twofold change in the disciplinary field has been claimed to have both positive and normative justifications. By moving beyond the traditional coverage and assumptions, it is said that the actual inputs, operation and effects of labour law will be more readily revealed, allowing for a more systematic and realistic analysis. Also, seeing law in its wider context of forces affecting the labour market should allow for a more

⁵ Alan Hyde, ‘What is Labour Law?’ in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (2006) 37; Hugh Collins, ‘Regulating the Employment Relation for Competitiveness’ (2001) 30 *Industrial Law Journal* 17.

⁶ Robert Baldwin, Colin Scott and Christopher Hood, ‘Introduction’ in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (1998); Christine Parker and John Braithwaite, ‘Regulation’ in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) 123.

⁷ John Braithwaite and Christine Parker, ‘Conclusion’ in Christine Parker, Colin Scott, Nicola Lacey and John Braithwaite (eds), *Regulating Law* (2004) 274.

realistic formulation of the social ends to which labour law can properly contribute. As Arup puts it, the regulatory perspective ‘asks us to look at our field of labour law both in a more expansive and more strategic way than we might conventionally do.’⁸ The reconceptualisation of labour law in terms of labour market regulation results from the attempt by many scholars to adopt a more inclusive perspective. It may be seen as part of a wide-ranging program within legal studies to find ‘a place at the table’ for a larger range of people and interests than has been recognised by either traditional rights or state agencies.⁹

This paper charts the development of the labour market regulation program and its impact on labour law scholarship in Australia. Its purpose is to contribute to this program by highlighting the contribution made by the substantial volume of work already produced, and to identify directions that might be taken in taking the project further. It is argued that a strong connection emerges between the labour market reorientation and the adoption of a regulation approach. However, most of the studies so far have remained focused on state-based regulation rather than adopting a more sociologically oriented institutional approach. In part this is because of the adoption of the labour market as object of study, leading to a concentration on state programs. The continuing state-centredness is also a result of the program being constructed within the academic discipline of law with its focus on formal state-derived norms, even though at the same time it seeks to transcend that discipline.

The Discipline of Labour Law in Australia

Labour law has traditionally been a minor player among the disciplines concerned with the study of work relationships. Within the field of labour studies in Australia, the strongest contributions have traditionally come from labour economics, labour history and industrial relations. Moreover, it is only relatively recently that the study of labour law has become part of legal academia. Writing on labour law dates back a century and more, having largely been prompted by the establishment of compulsory arbitration systems from 1900 onward. While some of this early work was analytical, it was predominantly descriptive and tailored to the needs of practitioners. The first true labour law academic, Edward Sykes, began teaching in and writing on the subject in the late 1950s but divided his

⁸ Christopher Arup, ‘Labour Law as Regulation: Promises and Pitfalls’ (2001) 14 *Australian Journal of Labour Law* 229, 229.

⁹ For a similar critique of consumer law, drawing on regulation theory, see Vijaya Nagarajan, ‘Reconceiving Regulation: Finding a Place for the Consumer’ (2007) 15 *Competition and Consumer Law Journal* 93; for other areas of law see the other contributions to this journal issue.

energies among several legal fields.¹⁰ Others were located outside the law schools and continued to write mainly practical commentaries.

For the most part, the study of law in relation to the workplace until the 1980s was largely undertaken in economics and commerce faculties by scholars working in the developing field of industrial relations. In Australia, like the United States, industrial relations was founded largely by labour economists at a time when the economics discipline in Australia was strongly institutionalist in orientation. The early American economists of regulation, such as John Commons and Selig Perlman, played an influential role in the emergence of industrial relations as a separate discipline in America and then Australia. Distinctively though, in Australia it was lawyers (or rather, the legally trained) who played a large and formative part in the development of the academic study of industrial relations.¹¹

From an early stage, the arbitration system captured the attention of those with backgrounds or interests in both law and economics. In 1929 George Anderson had published a lengthy study of the development of wage-fixing principles by the industrial tribunals, and there were several early studies of the politics of arbitration legislation.¹² The pre-eminent early scholar of arbitration was Orwell Foenander, a graduate in law and economics, who wrote ten books and numerous articles between 1937 and 1970, becoming the first head of an industrial relations department at an Australian university.¹³ Foenander used the term 'industrial regulation', but not with any precision; he was interested mainly in the legal structures dealing with 'labour relations', and the decisions of tribunals as instances of the juristic method for solving social problems by the authoritative setting of rules and standards.

Until very recently, regulation analysis has not been a significant part of labour law in Australia. Academic discourse in labour law did not draw on social (or even legal) theory at all until the 1990s. This is not to say that the discipline has been without viewpoint; most

¹⁰ Harry Glasbeek, 'EI Sykes and the Significance of Law' (1998) 11 *Australian Journal of Labour Law* 24.

¹¹ Bruce E Kaufman, *The Global Evolution of Industrial Relations: Events, Ideas and the IIRA* (2004) 423.

¹² George Anderson, *Fixation of Wages in Australia* (1929); see Ros Bischoff, Richard Mitchell and Andrea Steer, *Australian Labour Law: A Selected Bibliography* (1985).

¹³ Braham Dabscheck, 'Orwell de Ruyter Foenander: Australia's First Labour Law Scholar' (1998) 11 *Australian Journal of Labour Law* 1.

academic studies in labour law have tended to take a broadly liberal approach.¹⁴ We might see the implicit approach as falling within the labourist tradition, a practical, non-ideological reformism aimed at protecting and advancing the material interests of workers and the power of the labour movement, particularly through the agency of the state. A labourist approach is not deeply critical of the social structure and political institutions, and sees the state and law as basically neutral.¹⁵ This approach is in keeping with the pluralist tradition in industrial relations, which saw the state as concerned with balancing the interests of capital and labour, as well as the view put forward by prominent legal scholars such as Kahn-Freund that the purpose of labour law should be beneficent and protective.¹⁶ It is this normative approach which the English scholar Hugh Collins called ‘labour law as a vocation’: the ‘assumption that labour law should address and seek to relieve a fundamental social and economic problem in modern society: the subordination of labour to capital, or of employee to employer.’¹⁷

While the study of labour law in Australia has a long history of concern with the working of regulation through state agencies, it has until recently remained narrow in scope and ambition. It is not, however, that legal writing on labour law was devoid of context or purpose. Rather, it was the specifically *legal* problems raised by the practical operation of arbitration that preoccupied labour lawyers. They were concerned with the novelty of industrial tribunals as legal institutions and the complex jurisdictional issues that they generated, for the arbitration tribunals were among the first quasi-judicial bodies in Australia, and their study was an applied branch of public or administrative law. Their integration within the legal system, and the development of distinctive statute-derived concepts by the courts and tribunals, became the prime focus of academic labour lawyers. The highly formalised view of law taken by the early labour law scholars reflected an assumption that industrial relations was heavily grounded in the legal relations that played themselves out in the courts and tribunals. The studies undertaken by labour lawyers were

¹⁴ For a similar view, see Suzanne Jamieson, ‘Regulation and Deregulation in Australian Labour Law: Through a Reflexive Lens’ in Mark Hearn and Grant Michelson (eds), *Rethinking Work: Time, Space and Discourse* (2006) 60, 65.

¹⁵ Peter Beilharz, ‘The Labourist Tradition and the Reforming Imagination’ in Richard Kennedy (ed), *Australian Welfare: Historical Sociology* (1989) 137. For a critique of labourism as a concept, see Terry Irving, ‘Labourism: A Political Genealogy’ (1994) 66 *Labour History* 1.

¹⁶ Otto Kahn-Freund, *Labour and the Law* (2nd ed, 1977) 6: ‘The main object of labour law has always been, and I venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.’

¹⁷ Hugh Collins, ‘Labour Law as a Vocation’ (1989) 105 *Law Quarterly Review* 468, 469.

distinct, though not completely isolated, from the related discipline of industrial relations. Figures from Richard Mitchell's 1987 study of Australian labour law publications shows that, between 1956 and 1985, 58% of the 223 articles on labour law were published in industrial relations journals, and these were predominantly (70%) on labour law systems – in other words, arbitration.¹⁸

It was this interest which tended to keep labour law locked within a formalist paradigm into the 1980s, leading Richard Mitchell to claim that development of research in the field was being occluded by 'the continuing dominance of traditional legal writing in the form of the exposition of technical principles, divorced from the social context in which the law is placed.'¹⁹ Mitchell identified several deficiencies of the dominant approach: the lack of a developed 'conceptual framework' specifically for labour law; the failure to address the relationship between labour law and related fields (specifically industrial relations); and the neglect of comparative studies with other countries to highlight the range of systems for legal regulation of work and labour relations. It is these deficiencies that are potentially addressed by the reformulation of labour law as the regulation of the labour market.

Transformation of Study and Object

Many of the deficiencies of a narrow formalist labour law became obvious in the 1990s, as the traditional arbitration system itself was first redirected, then transformed and partially dismantled. Both the discipline of labour law and its object of study changed in response to the same factors: changing patterns of work and the demise of traditional regulatory mechanisms. Changes in the labour market, such as the growth of atypical work (casual, part-time, contractor) and the impact they had on the gendered nature of work, challenged the traditional patterns of legal regulation through protective standards.²⁰ In particular, growing recognition of the ways in which arbitrated decisions had reinforced not only differences in pay between male and female workers, but gender disparities in workforce participation and the non-recognition of unpaid work, led to an appreciation of how limited was an approach based on the formal institutions in even recognising the most important issues affecting the social context and experience of work.

¹⁸ Richard Mitchell, 'Labour Law Research in Australia: A Review of the Literature 1975–1985' (1987) 1 *Labour & Industry* 96, 99–100.

¹⁹ *Ibid* 97.

²⁰ Rosemary J Owens, 'The Traditional Labour Law Framework: A Critical Evaluation' in Richard Mitchell (ed), *Redefining Labour Law: New Perspectives on the Future of Teaching and Research* (1995) 11, 14.

At the same time, increasing demands to dismantle the arbitration system made many of the traditional legal issues much less significant. With demands for deregulation said to be urged by an increasingly competitive and globalised business world, the old legal issues, such as the jurisdiction and powers of tribunals and the legal status of trade unions, were now being replaced by political debate over whether such institutions should even continue to exist. From the mid-1970s collective industrial regulation had become increasingly centralised under the regime of wage indexation, and this was continued under early versions of the Hawke Labor Government's Accord with the unions. While there was a shift towards decentralised regulation during the late 1980s, the arbitral tribunals retained much of their prominence into the 1990s. However the function of the tribunals changed from the setting of detailed rules to the coordination of processes for achievement of goals of productive efficiency and industry restructuring. The transformation of the arbitration system drew labour lawyers into giving closer attention to the implementation of industry reform policy through awards and other legal devices, such as certified agreements. Lawyers noted the considerable change that had already occurred on the ground without major change to the legislation or the formal institutions.²¹

The Accord period saw labour lawyers adopting a more interdisciplinary approach and a broader definition of legal sources. By the 1990s labour lawyers were increasingly working collaboratively with industrial relations scholars and were also more interested in the operation of the law, with attention being given to the content of awards at industry and enterprise levels, particularly in the implementation of national wage principles which from the late 1980s linked wage increases to efficiency gains and award restructuring. While Australian labour law traditionally had focused on the constitutional constraints affecting the power of the federal arbitration tribunal to make awards, the actual content and operation of awards were dealt with largely by reciting the march of general principles adopted in national wage cases. This approach gave the study of labour law a hollow feel about it, for it was constantly dealing with the demarcation of powers whose actual expression was never really examined. With the decline in centralism and a greater concern for the impact of law this began to change. The second edition of Creighton, Ford and Mitchell's massive text-and-materials book was noteworthy for the detailed attention it

²¹ Richard Mitchell and Malcolm Rimmer, 'Labour Law, Deregulation and Flexibility in Australian Industrial Relations' (1990) 12 *Comparative Labor Law Journal* 1; Andrew Stewart, 'Procedural Flexibility, Enterprise Bargaining and the Future of Arbitral Regulation' (1992) 5 *Australian Journal of Labour Law* 101.

paid to the contents and operation of awards, in an attempt to redress what the authors recognised as a deficiency of previous studies: ignoring the very legal norms which had the greatest impact on actual work relations.²²

In 1991 two authors (one a labour lawyer, the other an industrial relations academic) noted that ‘increasing numbers of Australian labour lawyers are dissatisfied with a very narrow orthodox approach and are working with wider definitions of what constitutes the field of labour law’, before going on to make the point that law plays an important part in structuring the industrial relations system and constituting its participants.²³ For the most part, textbooks on labour law continued to adopt a narrow approach to the definition of the field, anchored firmly in the employment relationship and the constitutional confines of the arbitration system. However, this was more than before an approach conscious of its limitations and more aware not only of the importance of non-legal forces but of the significance of other areas of law in moulding work relations.²⁴

The major legislative changes that were to occur from the mid-1990s were, in many ways, a setback to these developments. The Keating Government’s *Industrial Relations Reform Act 1993* (Cth) transformed the formal system in several ways. First, it symbolically shifted the basis of regulation away from the settlement of industrial disputes towards the implementation of international labour standards in several areas. Second, it increased the impetus towards enterprise bargaining by reducing the powers of the federal commission to refuse to certify agreements. Finally, by recasting awards as providing a minimum safety net of standards, formal state agency-based regulation was de-emphasised (even though in practice awards still set the going rate for a substantial part of the workforce).²⁵ These changes were continued by the *Workplace Relations Act 1996* (Cth), which, as the product of compromises in order to pass the legislative process, only partially implemented the conservative Government’s policy of abolishing awards and marginalising the arbitral tribunals. That Act did at least restrict the scope of matters that could be covered in both awards and collective agreements, while allowing for individual statutory agreements –

²² William B Creighton, William J Ford and Richard J Mitchell, *Labour Law: Text and Materials* (2nd ed, 1993) ch 22; note especially discussion at 698–9.

²³ Laura Bennett and Michael Quinlan, ‘The Australian Workplace Industrial Relations Survey: A Critical Review’ (1991) 4 *Australian Journal of Labour Law* 282, 287, 288.

²⁴ Creighton, Ford and Mitchell, above n 22, 1–2.

²⁵ Australian Centre for Industrial Relations Research and Training, *Australia at Work* (1999) 77.

Australian Workplace Agreements – to oust collective bargaining when adopted by employers.

These changes led to a questioning not just of the terms and boundaries of the discipline of labour law, but to its conception and purpose. Papers published by labour lawyers began to question the utility of both individual and collective dimensions of labour law in dealing with the problems raised not only by the ‘deregulatory’ push in legislation, usually accompanied by juridification – an apparently paradoxical increase in the volume, inflexibility and complexity of rules, but the changes in the workforce, such as the increase in casual and other ‘atypical’ labour, and the balance of power in industrial relations, the problem of enforcement.²⁶ The legislative ‘reforms’ created other problems for legal scholarship. Simply keeping up with the technical effects of the increasing volume of legislative amendments became an achievement. The shift towards bargaining also raised fundamental juridical issues, which only began to be analysed before they were displaced by even newer ones.

Australia was no exception to this questioning of purpose in the face of legal and industrial change. In other countries, especially the United Kingdom and the United States, similar disquiet about the future of labour law was being expressed in the wake of deregulation and the decline in collective bargaining.²⁷ In Britain under the Thatcher Government, a tradition of ‘collective *laissez faire*’ was supplanted by legislation, which restricted trade union activities while promoting individual rights. In America, where the core labour relations legislation had remained virtually unaltered for fifty years, it was employer

²⁶ For example, Paul Ronfeldt and Ron McCallum (eds), *A New Province for Legalism: Legal Issues and the Deregulation of Industrial Relations* (1993); Ron McCallum, Greg McCarry and Paul Ronfeldt (eds), *Employment Security* (1994). Both these volumes comprise papers presented at the annual labour law conferences at the University of Sydney from 1993.

²⁷ On the UK: Sandra Fredman, ‘The New Rights: Labour Law and Ideology in the Thatcher Years’ (1992) 12 *Oxford Journal of Legal Studies* 24; Bob Hepple, ‘The Future of Labour Law’ above n 4; Aileen McColgan (ed), *The Future of Labour Law* (1996); Hugh Collins, ‘The Productive Disintegration of Labour Law’ (1997) 26 *Industrial Law Journal* 295; Paul Davies and Mark Freedland, ‘National Styles in Labor Law Scholarship: The United Kingdom’ (2002) 23 *Comparative Labor Law and Policy Journal* 765. On the US: Paul Weiler, *Governing the Workplace* (1990); Samuel Estreicher, ‘Labor Law Reform in a World of Competitive Product Markets’ (1993) 69 *Chicago-Kent Law Review* 3 (and other papers in the volume); James J Brudney, ‘Reflections on Group Action and the Law of the Workplace’ (1996) 74 *Texas Law Review* 1563; Janice R Bellace, ‘Labor Law for the Post-Industrial Workplace: Breaking the New Deal Model in the USA’ in Janice R Bellace and Max G Rood (eds) *Labour Law at the Crossroads: Changing Employment Relationships* (1997) 11; more recently on the US see Cynthia L Estlund, ‘The Ossification of American Labor Law’ (2002) 102 *Columbia Law Review* 1527; Cynthia L Estlund, ‘The Death of Labor Law?’ (2006) 2 *Annual Review of Law and Social Science* 105.

activism in undermining the operation of collective bargaining that proved most important. Labour lawyers responded by charting the changes in work, calling for new forms of representation and individual rights,²⁸ and then reflecting on the scope and purpose of labour law as an academic discipline. By confronting the decline of unionism and the effects of new management strategies in the utilization of labour (especially outsourcing and increased use of temporary or casual workers), many studies began to push against the traditional boundaries of labour law that were founded in the permanent employment relationship. This led to increasing advocacy of a broader perspective, one based not on labour relations but on the labour market.

The Labour Market Approach

The reformulation of labour law based on the labour market was first proposed and developed by Davies and Freedland in the 1984 edition of their influential textbook.²⁹ Prompted by the ways in which the spread of part-time work and independent contracting were affected by government programs in areas such as job creation and training, Davies and Freedland discussed measures affecting the labour market as the starting point in their analysis of the employment relation. Their labour market approach was in part prompted by the spread of programs designed to reduce unemployment, and in particular the Thatcher Government's policies of promoting labour flexibility and creating an 'enterprise economy' by the use of tools not conventionally regarded as part of labour law.³⁰ By including state action that was administrative in nature, the labour market approach led to a broader conception, one that saw judicial and statute law as only part of a wider regulatory picture. Davies and Freedland went even further than this, though, in emphasising that choices over the mode of engagement, such as whether to use agency labour or contracting, were made by the parties themselves, and with regard to economic and organisational factors. Whereas labour law had traditionally seen such matters as a matter of determining the nature of the relationship *ex post facto*, and attaching a label of 'employee' or 'independent contractor', this new approach required attention to be paid to the environment of the participants (mainly the employer), the ends they sought to achieve, and the effects which their decisions had in terms of legal protections and rights.

²⁸ See the papers in Aileen McColgan (ed), *The Future of Labour Law* (1996).

²⁹ Paul Davies and Mark Freedland, *Labour Law: Text and Materials* (2nd ed, 1984) 1.

³⁰ Paul Davies and Mark Freedland, *Labour Legislation and Public Policy* (1993) 537.

Davies and Freedland were aware of the risks that a labour market orientation could prove boundaryless and ‘might be viewed as a rationale for regarding all aspects of governmental regulation of the economy as an aspect of labour law.’ They pointed out that all of government’s activities for promoting economic activity are to some degree concerned with expansion of the labour market. However, they did not want to lay claim to such a large and open-ended program for labour law.³¹ They went on to show how policies aimed at stimulating the labour market and reducing unemployment could unintentionally influence employers’ decisions to use ‘atypical’ work arrangements, such as temporary or part-time engagement, which then had significant effects in terms of the availability of legal protections and entitlements for the workers concerned.

It was in response to their innovative approach that Hugh Collins called for a new ‘vocation’ for labour law. He expressed concern that the labour market perspective might lead labour law studies to forsake its purpose in the pursuit of a more descriptive account. Labour law as a field of study, he noted, is contextually rather than conceptually oriented; it is marked out by its concentration on an area of social activity (work relations), rather than by a distinct body of doctrine. For much of the twentieth century, the coherence of labour law depended on seeing the law of work relations as properly concerned with the protection of the disadvantaged and providing a counterbalance to the natural inequality that exists between capital and labour. This vocation of labour law was being challenged by an account that replaced the focus on a particular kind of social relation with the operation of the labour market. In this view, labour law does not have one single purpose or vocation, but involves a shifting balance of objectives in regulating the labour market.³² So labour lawyers were being faced with a challenge and a choice:

Labour Law, viewed as an autonomous subject within the legal curriculum, stands at a crossroads. In one direction we see the traditional emphasis upon collective bargaining and legal regulation to counteract the subordination of labour. In the other, a novel approach beckons us down the road of the legal steering mechanisms of the labour market.³³

The labour market approach not only widened the scope of labour law to include aspects of law beyond those founded in the employer-employee relationship and the contract of employment, but signally also changed its focus from the courts and tribunals to legislation and government programs. In this latter respect, the new approach was concerned with

³¹ Davies and Freedland, *Labour Law*, above n 29, 3.

³² Collins, ‘Labour Law as a Vocation’, above n 17, 472–3.

³³ *Ibid* 468, 483–4.

regulation *through* – rather than *by* – law. Collins criticised this new direction for shifting the locus of labour law from the social to the economic sphere, for seeing the purpose of labour law as achieving economic goals rather than social justice ones, and sought to construct a new vocation founded in the realisation that work is the means by which people seek to achieve their goals of security, well-being and self-worth. The debate over normative versus positive ends has continued, being fuelled by the concept of the ‘labour market’ and the ideological baggage which is often assumed to accompany its use.

The Labour Market Regulation Project

These issues gained an impetus in Australia with the creation of the Centre for Employment and Labour Relations Law (CELRL) at Melbourne University’s law school in 1994. The Centre has provided the greatest ever concentration of academic scholarship on labour law in the country with around seven full-time academics and a similar number of research staff at its peak, plus a string of associates drawn from a range of disciplines. Its director for the first decade was Richard Mitchell who, we have seen, was long critical of labour law studies in Australia. As a scholar trained in industrial relations as well as law, and for long employed in a business law department (that is, outside the law school), Mitchell was ideally positioned to stage a thoroughgoing reformulation of the field. His writings from the 1980s onward plot a surprisingly uniform trajectory, one aimed at reformulating the program of the academic study of the law and work relations.

Questions about the conception and scope of labour law were at the forefront of CELRL’s activities from the beginning. One of its objectives was to develop labour law as a discipline ‘with particular regard to developing an understanding of the role of law in regulating all aspects of the labour market’.³⁴ ‘Redefining labour law’ became a major theme during the first decade of the Centre’s operation, along with related but more specific projects arising from the ongoing legislative changes.³⁵ A large part of the impetus to reformulate the academic field came from the demise of arbitration, and with the recognition that many of the legal forces shaping work were now coming from outside the traditional boundaries of labour law: from corporations, trade practices, tax and social security law.

³⁴ See the Centre’s website at <<http://celrl.law.unimelb.edu.au>> at 12 May 2008, which includes annual reports from 1997.

³⁵ Centre for Employment and Labour Relations Law (CELRL), *Annual Report 1997*(1997).

The redirection of labour law was initially in terms of critiquing the effectiveness of a collective model based on arbitration under contemporary circumstances, and proposing a broadened scope of study to include workers who were not employees under the conventional judicial tests. However, with the shift to a labour market approach, CELRL's work increasingly drew on regulation theory. There was already a body of work on regulation studies in occupational health and safety, as well as more recent work on discrimination law and corporate structure. Several CELRL members and affiliates were leaders in these fields. Other influences came at least indirectly from organisational theory. In an early paper, Chris Arup highlighted the ways in which organisational controls of labour within firms interacted with state control through legislation and the structuring of the labour market to produce regulation that blurred the distinction between legal and non-legal means. Arup also pointed to the legal sphere as a field of contestation between competing interests, as well as 'a distinctive, semi-autonomous social institution.'³⁶

Arup's work on how the law affects intellectual innovation drew on the new regulation literature, and gave strong attention to government policies, such as direct spending, subsidies, concessions and market structuring through licensing requirements, which formed a regulatory space for innovation along with more conventional legal areas such intellectual property. He concluded that government policies were of limited effect in a space dominated by strong private interests (who might themselves become regulatory actors).³⁷ Arup later drew on wide-ranging work on corporate regulation and the role of the state that suggested the need to explore the connection between developments within firms and government structuring of the labour market. These linked changes reflected the decline in the state's reliance on broad-brush command strategies, and Arup suggested that 'studies of contemporary regulation are likely to reveal a more particularised and solicitous interaction with the market.'³⁸ This kind of approach was trying to get beyond a simple labour-capital dichotomy, which tended to see arbitration, the institutionalised locus of class struggle, as the natural focus of interest. In this respect, the idea of reflexive law became a useful borrowing. Reflexive law is seen as a form of regulation more responsive and particular than universal legislation; it is more embedded in organisational strategies

³⁶ Christopher Arup, 'Labour Law, Production Strategies and Industrial Relations' (1991) 9 *Law in Context* 36, 42. However this work was distracted by a concern to distinguish different kinds of action by their distinctive legal forms.

³⁷ Christopher Arup, *Innovation, Policy and Law: Australia and the High Technology Economy* (1993) 303–6.

³⁸ Christopher Arup, 'Labour Law as Regulation: Promise and Pitfalls' (2001) 14 *Australian Journal of Labour Law* 229, 234.

and practices.³⁹ The concept of reflexiveness carried with it the idea that law was concerned not with imposing behaviour through enforced observance, but with promoting cooperation and participation in the articulation of ends as well as means. It was also developed within a social theory that saw law as but one element contributing to organisation of modern society whose hallmark is increasing complexity and differentiation, where universal rules are of declining real significance.⁴⁰

In 1995 CELRL hosted a conference on ‘Redefining Labour Law’, the first national gathering of labour law academics held in Australia. In his introduction to the published papers, Richard Mitchell opened up the debate over new directions for the discipline, argued that labour law should not be confined to the protective vocation described by Collins. With the shrinking of protective law,

there are other laws, other policies and other institutions which impact upon or regulate those same, and other, relationships and markets. That is because the decline of the original purpose allows other laws and policies a greater measure of influence, or because they are designed to pursue different or opposing purposes.⁴¹

All of these, he ventured, should be considered part of labour law. Significantly, he included in his purview not only laws passed for a variety of purposes but different kinds of sources as well, including those extending beyond the employment relation. He went on to argue that expanding the field of labour law was really to revisit areas that had been neglected with the post-war focus on collective bargaining. Drawing on studies of newly industrialised countries in Asia, where unions and bargaining remained undeveloped or unrecognised, he emphasised that the full range of laws, policies and state actions affecting the labour force needed to be included in any meaningful account of those countries’ labour law. At the same time, he denied that taking an approach based on the labour market meant the adoption of neoliberal pro-market ideology or the forsaking of a normative perspective that advocated socially progressive objectives for the law.

The connection between labour markets and regulatory analysis was developed in two substantial papers in the 1995 collection. Gahan and Mitchell argued the need for labour

³⁹ Gunther Teubner, ‘Substantive and Reflexive Elements in Modern Law’, (1983) *Law and Society Review* 239; Gunther Teubner, ‘After Legal Instrumentalism: Strategic Models of Post-Regulatory Law’ (1984) 12 *International Journal of the Sociology of Law* 375 (both cited in Arup, ‘Labour Law, Production Strategies and Industrial Relations’, above n 36, 43).

⁴⁰ Niklas Luhmann, *The Differentiation of Society* (1982); Niklas Luhmann, ‘The Self-Reproduction of Law and its Limits’ in Gunther Teubner (ed), *Dilemmas of Law in the Welfare State* (1988) 122.

⁴¹ Richard Mitchell, ‘Introduction’ in Richard Mitchell (ed), *Redefining Labour Law: New Perspectives on the Future of Teaching and Research* (1995) ix.

law to draw on interdisciplinary perspectives if it was to remain relevant to contemporary debates and address the major questions about the operation and effects of law in the field of work. In so doing, they situated labour law within the larger field of regulation. They accepted that ‘under this broadened conceptualisation of the field legal scholarship must continue its interest in “rules” which are derived from traditional sources (ie principally from statutes and judicial decisions)’. However they noted that not all rules are legal ones, and went on to claim (uncontroversially, they thought) that:

[L]abour law must also embrace the study of regulation which emanates from other sources – public and private – which impact upon labour markets. Such regulation would include, for example, government policy documents, private arrangements such as the Labor/ACTU Accord, government administrative schemes and bureaucratic systems within enterprises, whether or not they have the force of law.⁴²

This approach saw labour law as centrally located in the field of regulation, but as needing to draw on an interdisciplinary understanding of regulation. In the context of the then-current debate over deregulation of the labour market, Gahan and Mitchell saw an interdisciplinary labour law as being able to contribute to an appreciation of the inevitability of regulation of some kind or other, as well as providing information on the different types of regulation in actual use and their combined effects.

In his contribution to the 1995 conference and book, Chris Arup presented the case for taking a labour market approach by showing the expanding range of legal areas now involved in the regulation of work relations. Rejecting the idea that the labour market was being (or could be) ‘deregulated’, he noted that the demise of centralised regulation through arbitration had simply involved ‘a change in the locus and content of regulation’ in which other areas of law, especially contract and property, assumed greater significance.⁴³ Arup’s approach was not purely market focused; it gave emphasis to relations between and within organisations, noting the increasing importance of links and alliances between. Significantly, he extended the concept of regulation to include the influence of private actors, including power relations within organisations. For example, in emphasising the limits of marketised contract regulation, he noted that workers often ‘enter the regulatory domain of large private organisations through the market medium of a bare contract’.⁴⁴

⁴² Peter Gahan and Richard Mitchell, ‘The Limits of Labour Law and the Necessity of Interdisciplinary Analysis’ in Richard Mitchell (ed), *Redefining Labour Law: New Perspectives on the Future of Teaching and Research* (1995) 70.

⁴³ Christopher Arup, ‘Labour Market Regulation as a Focus for a Labour Law Discipline’ in Richard Mitchell (ed), *Redefining Labour Law: New Perspectives on the Future of Teaching and Research* (1995) 31.

⁴⁴ *Ibid* 48.

The 'law and labour market regulation' project was a major component of CELRL's research from 1997, forming an umbrella for a changing array of issues concerning labour market formation and entry. It was complemented by several related projects that developed in subsequent years, including: employee participation in decision making; individualisation and forms of labour contracting; regulation of information and privacy in labour markets; and labour market regulation in East Asia.⁴⁵ Research on the content of individual statutory agreements widened to become a study of the ways in which work activity is regulated by a range of different legal instruments within enterprises, such as collective agreements, Australian Workplace Agreements, contractor hire, labour hire agencies and contracting out, and the inter-relationship between the instruments.⁴⁶ Work under the labour market regulation banner became more concentrated and specialised over time, with specific (and separately funded) projects developing on vocational training, employment agencies and job creation schemes. The connection between labour regulation and social policy was developed more recently by a separate project on 'A New Social Settlement: Rethinking Social Policy Across the Life Course'.⁴⁷

After nearly a decade of work, the labour market regulation project culminated in another conference held in 2005 with the title 'Labour Law, Equity and Efficiency: Structuring and Regulating the Labour Market for the 21st Century'. Both the conference and the resulting book published in 2006 were highly organised around the central themes. A common grounding in regulation theory came from leading works recommended by the conference organisers,⁴⁸ as well as a paper which summarised the theoretical perspective developed by leading members of CELRL.⁴⁹ Context and direction for each of the four streams were provided by introductory thematic papers circulated to the participants well before the conference. These streams were initially identified as: how the labour market is constituted for social and economic purposes; the status and forms of engagement under which

⁴⁵ See Sean Cooney and Richard Mitchell, 'Examining Labour Law Policy in the Countries of the Asian Region: Some Suggestions for an Approach' in Richard Mitchell and Jesse Min Aun Wu (eds), *Facing the Challenge in the Asia Pacific Region: Contemporary Themes and Issues in Labour Law* (1997); Sean Cooney, Tim Lindsey, Richard Mitchell, and Ying Zhu Routledge (eds), *Law and Labour Market Regulation in East Asia* (2002); Sean Cooney, 'China's Labour Law, Compliance and Flaws in Implementing Institutions' (2007) 49 *Journal of Industrial Relations* 673.

⁴⁶ Centre for Employment and Labour Relations Law (CELRL), *Annual Report 2005* (2005), 23.

⁴⁷ Centre for Employment and Labour Relations Law (CELRL), *Annual Report 2002* (2002), 19.

⁴⁸ These included Baldwin, Scott and Hood, above n 6.

⁴⁹ Richard Mitchell et al, 'Constituting the Labour Market and Regulating Labour Market Transactions: A Mapping Exercise for a New Labour Law Paradigm', January 2004 (unpublished paper circulated to contributors to Labour Law, Equity and Efficiency Conference).

participants enter into the labour market; and the regulation of work transactions and relationships. The resulting book contained 37 chapters by 38 contributors (including 9 multi-authored chapters), with six chapters providing context or conspectus, and 31 more specific studies.⁵⁰ The papers were divided into sections on: purposes of regulation; institutions and regulatory techniques; constituting the labour market; and status, forms of engagement, and rights and obligations.

A substantial number of the papers examined the range of regulatory institutions and techniques, from business contracting and small business, to government subsidies and agencies, tribunals and trade unions. Aspects of ‘new economy’ organisation, such as outsourcing, franchising and atypical labour, received close attention. So too did the relationship between labour law and other legal fields: immigration, social security and taxation, though less so commercial and corporate law. Several papers examined state regulation directed at the household and family as a means of boosting workforce participation and efficiency, and also how labour law has reinforced ‘traditional gendered values’ and produced ‘a normative workplace vision of family.’⁵¹ The constitutive function of legal and other forms of regulation in creating, directing and maintaining the labour market was addressed systematically and in detail. However, by comparison with the original vision, regulation of the power dynamics of work relationships, particularly within work organisations, received limited attention.

The Impact of the Labour Market Approach

Adopting a perspective based on the labour market had been intended to make labour law more relevant by taking in a wider range of work, and by including factors which contributed to the work environment but were prior to or outside traditional employment

⁵⁰ Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O’Donnell (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006). I have included among the broader chapters Michael Quinlan, ‘Contextual Factors Shaping the Purpose of Labour Law: A Comparative Historical Perspective’.

⁵¹ Rosemary Owens, ‘Reproducing Law’s Worker: Regulatory Tensions in the Pursuit of “Population, Participation and Productivity”’ in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O’Donnell (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 430; Anna Chapman, ‘Regulating Family through Employee Entitlements’ in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O’Donnell (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 455.

relations. Reservations to the approach were founded in concerns that discussion framed in terms of the labour market concept would tend to reflect a narrow market-based economic rationality. There was also concern that the wider perspective would reduce the attention given to issues of power and equity within the employment relationship and industrial relations.

The scope of the labour market project contemplated by Arup and Mitchell was first revealed in 1995.⁵² It was a dauntingly long list, taking in all kinds of legal influences, including: restrictions on the structure of and entry into the labour force; the demand for labour, including the constitution of different business organisations; different forms of participation in work (permanent, casual etc.); controls over deployment, promotion, training and reward, including those derived within firms in the form of policies and procedures; employment security and safety; and the regulation of responsibilities, which included much traditional state labour regulation.

Clearly not all these topics could be pursued productively. Work by members of CELRL has tended to concentrate on the constitution of the labour market and entry into it. It is these areas which have been most neglected in the past by labour lawyers. It has been argued that, for many workers, work no longer resembles the model of permanent full-time employment assumed by labour law. For those working in a series of casual jobs, or combining paid and unpaid work, or state-supported welfare or self-employment and work, many of the concerns of labour law are meaningless: job security, comparative equity, skill development, career progression; even workplace voice and collective bargaining to the extent that they are concerned with longer-term benefits. Instead, labour law needs to address the experience of workers on a life-cycle basis as they enter and re-enter the labour market in different capacities at various stages of their lives. There have been several studies examining regulation of the transition into and between jobs, including the state's unemployment services, employment agencies and job-creation schemes.⁵³ Much of the research has examined areas that were traditionally regarded as part of labour law but located at its fringes, such as regulation over immigrant labour and employment agencies.

⁵² See the appendix to Arup, 'Labour Market Regulation', above n 43, 58–61.

⁵³ Anthony O'Donnell, 'The Public Employment Service in Australia: Regulating Work or Regulating Welfare?' (2000) 13 *Australian Journal of Labour Law* 143; Anthony O'Donnell, 'Inventing Unemployment: Labour Market Regulation and the Establishment of the Commonwealth Employment Service' (2003) 31 *Federal Law Review* 343; John Howe 'The Job Creation Function of the State: A New Subject for Labour Law' (2001) 14 *Australian Journal of Labour Law* 242.

While concerned mainly with labour market supply, it is shown that these areas can only fully be understood through their articulation with both the social security system and the regulation of labour conditions.⁵⁴ While these areas might previously have been seen as concerned exclusively with labour market regulation as distinct from industrial relations, the distinction is crumbling as all now contribute to the discipline and regularisation of the workforce.⁵⁵

In much of this scholarship, the labour market approach provides a new link between labour law and social policy. For some, rethinking labour regulation is part of a wider project involving a reinvigoration of the state's function in securing social welfare.⁵⁶ Apart from reflecting a concern for social equity, researchers who draw this connection are highlighting the shift in the state's social welfare programs, which are now mainly directed for labour market purposes, such as increasing participation, development of skills and subsidising low-pay industries through benefits. Focus on the labour market helps to capture a significant shift in the orientation of state action. Instead of seeking to create jobs by increasing demand for labour, governments are now more concerned to increase the quality and level of labour supply: the aim of regulation is nowadays to 'create workers'.⁵⁷ This has been associated with a significant shift in risk bearing away from employers and the state and towards workers, who now carry a large part of the burden of training and job insecurity. The point has also been made that because of the withdrawal of protective regulation and government job promotion strategies, workers are now required to behave as

⁵⁴ Anthony O'Donnell and Richard Mitchell, 'Immigrant Labour in Australia: The Regulatory Framework' (2001) 14 *Australian Journal of Labour Law* 269; Anthony O'Donnell and Richard Mitchell, 'The Regulation of Public and Private Employment Agencies in Australia: An Historical Perspective' (2001) 23 *Comparative Labor Law and Policy Journal* 7.

⁵⁵ The historical connection between labour market and industrial relations is brought out in the examination of unions' role in promoting security of employment at the industry level through labour supply arrangements: see Richard Mitchell, 'Union Security and the "Hiring Hall": A Note on the Sanctioning of Union Labour Supply Arrangements in Australian Labour Law' (2003) 16 *Australian Journal of Labour Law* 343.

⁵⁶ Anthony O'Donnell, 'Welfare after Work?' (1999) 14 *Arena Journal* 140; Brian Howe, and Anthony O'Donnell, 'All Work and No Play?' (2000) 10 *Eureka Street* 22; Anthony O'Donnell, 'Savings, Risk and Redistribution: Some Options for Working-age Income Support' (2001) 49 *Growth* 41; Anthony O'Donnell and Linda Hancock, 'The Challenge of Reshaping the Social Settlement' (2000) 48 *Growth* 7; Richard Mitchell, Jill Murray and Anthony O'Donnell, 'Labour Law and a New Social Settlement' (2001) 49 *Growth* 66.

⁵⁷ Christopher Arup et al, 'Employment Protection and Employment Promotion – The Contested Terrain of Australian Labour Law' in Marco Biagi (ed), *Job Creation and Labour Law: From Protection towards Pro-action* (2000) 100.

market actors much more than previously, responsible for selling themselves and adapting to changing market conditions.⁵⁸

More recently, the concern with the labour market has developed a normative orientation as a result of seeing the labour market as a *social* institution, concerned with the functions of allocating and securing the resources necessary for welfare in a capitalist society. In recent work flowing from their project on ‘social policy and a new social settlement’, Anthony O’Donnell and others have sought to place the role of labour law within the broader context of social welfare policy across the whole life course. Labour law is important in this project if it is seen as concerned with state regulation of all aspects of the labour market. If, as these authors assert, we see one of the major functions of the labour market as providing sufficient resources for workers to maintain their material self-sufficiency, and labour law is regarded as the means by which the state regulates that market, then (at least from the viewpoint of workers) labour law must be concerned with upholding values such as fair reward, equity and rights to participation. This is so particularly if the labour market is viewed across the life course, including not only work as an employee or in non-employee capacities, but also periods of education and training, child rearing, unemployment and retirement.⁵⁹

Particularly when viewed across the life-course, labour law, when seen as labour market regulation, becomes less concentrated on its traditional concerns of collective dispute resolution and bargaining (because these play a limited function for most phases in life). Of greater interest is the broad range of techniques used by the state to influence the flow of resources into and through the labour market. The labour market focus leads to a broader idea of regulation well beyond the traditional perspective of law. It includes ‘soft law’ methods for implementing government policy through such techniques as license conditions, subsidy guidelines, tender contracts, and auditing requirements. Their significance in contemporary labour regulation was highlighted when the State Labor Governments turned to such mechanisms to belay the effects of the Federal Government’s Workchoices legislation.⁶⁰ One effect of seeing these state activities as part of labour law is to bring them within the realm of legal discourse, subjecting the discretion with which they

⁵⁸ Ibid 112.

⁵⁹ See Mitchell, Murray and O’Donnell, ‘Labour Law and a New Social Settlement’, above n 56.

⁶⁰ John Howe and Ingrid Landau, “Light Touch” Labour Regulation by State Governments in Australia’ (2007) 31 *Melbourne University Law Review* 367.

are exercised to the language of rights and responsibilities. John Howe has suggested that the inclusion of labour market programs in the scope of labour law has a democratising purpose. He notes, for example that the trend to program delivery through contracts with private providers has left the very subjects of the programs, the unemployed, with no rights to assert.⁶¹ It is hoped that inclusion of such programs in the domain of law will help to empower them.

The labour market perspective also provides a platform for examination of more general trends in regulation. O'Donnell and Arup note, in their examination of the relationship between social security and labour law, that both fields have been moving towards contract-based regulatory techniques. In labour law, they argue, this trend has resulted in a reduction of middle-order regulation, in a process that they call the 'hollowing out of the regulatory subject'. Increasing control is exercised at the level of the market, through universal legislated requirements, and at the workplace, through specific contract terms, with a vacuum in state authority at the level traditionally occupied by the welfarist state and arbitral regulation:

The mid-century model of taxonomy and division (the wage earner, the unemployed etc.), with each category requiring its own distinct form of intervention (wages, welfare) and discrete regulatory domains (industrial tribunals, social security offices), has been taken apart and, on the one hand, reconstituted at a higher level of abstraction – the active citizen – on the other, reduced to a morass of individual dynamics and dealings.⁶²

The implications of their approach extend beyond labour law to social security law, which they argue has moved beyond an administrative law paradigm to one which can only be understood in the broader context of labour market constitution and reproduction.

The labour market approach has also been extended into the examination of rights and obligations within work relationships. Here, though, most of the work under the umbrella of the labour market regulation project has concentrated on non-employment arrangements. Few of the chapters in the 2006 book that dealt with work status and relationships did so by applying regulatory analysis to employees and relations *within* employing organisations. Several studies compared developments in labour law with the regulatory regimes of business and competition law, noting that many protections traditionally provided by labour law (but dismantled under the Howard Government) were being applied in business

⁶¹ Howe, 'The Job Creation Function of the State', above n 53, 266–7.

⁶² Anthony O'Donnell and Christopher Arup, 'Social Security and Labour Law: Constructing the Labour Market Subject' (Working Paper No 24, Centre for Employment and Labour Relations Law, University of Melbourne, 2001) 28–9.

environments to provide protection to small business. Richard Johnstone's study of occupational health and safety regulation showed the limitations of the current regulatory approach (even one which is reflexive and internalised) in dealing with 'the fragmentation of organisational structures'.⁶³ Other studies demonstrate that increasingly the legal status of the work relationship is a matter of choice for the hirer, a choice reflecting how a particular status will affect the attitudes and behaviour of the worker.⁶⁴ The result is a degree of 'regulatory convergence' between the law of labour and capital.⁶⁵ So, for example, outsourcing contracts and franchise arrangements are adopted by big business to harness the features of commercial legal relations and the disciplinary strictness that they bring. At the same time, though, new regulatory regimes, such as codes of practice for fair treatment of franchisees and collective bargaining for small businesses in dealing with their large clients, must be developed in conjunction with the state in order to support the trust and fairness that actual business relations require. In the process, the distinction between hierarchical and market organisation becomes blurred along with the boundaries of the firm. These studies indicate the ways in which non-traditional work relationships and regulatory regimes provide the means for new kinds of exchange beyond the wage-work bargain symptomatic of industrial employment. Relationship types, such as franchising and contracting, but also limited and casual tenure employment, are harnessed to extract qualitative goods, such as commitment, consistency and emotional investment from workers.⁶⁶ The approach taken to the labour market in these studies owes more to political rather than economic ideas; it is institutionalist in orientation, with the focus on relations, interests and strategies rather than a monistic price-driven exchange.

⁶³ Richard Johnstone, 'Regulating Occupational Health and Safety in a Changing Labour Market' in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 636.

⁶⁴ Anthony O'Donnell and Richard Mitchell, 'Participation, Exchange and Rights and Obligations in Labour Markets and Work Relationships' in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 509.

⁶⁵ Shae McCrystal, 'Regulating Collective Rights in Bargaining: Employees, Self-Employed Persons and Small Businesses' in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 616. See also Joellen Riley, 'Regulating Unequal Work Relationships for Fairness and Efficiency: A Study of Business Format Franchising' in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006).

⁶⁶ O'Donnell and Mitchell, 'Participation, Exchange and Rights and Obligations', above n 64, 512-4.

We can see, then, that the labour market approach leads towards a broader perspective on law, one oriented mainly towards the state, its various techniques of regulation, and the many purposes for which they are deployed. ‘Labour market’ and ‘regulation’ are not simply two different dimensions in which labour law can be expanded; they are closely connected, both part of the same reorientation of the field. The shift towards a market orientation has mostly not led to an arid economism, as had been feared of Arup and Mitchell’s original proposal. The dominant approach in the Australian literature has been to recognise labour law as both more broadly constituted than before, and to draw on a wider range of disciplinary perspectives. It is true, as one international commentator noted, that the labour market perspective results in ‘a more diffuse and ultimately less self-contained set of concerns’.⁶⁷ However, the work undertaken by members of the CELRL has obtained focus and coherence through its concern for the purposes for which the labour market is or should be regulated. The normative dimension of the project is emphasised by Mitchell and Arup in their introduction to the 2006 book, where they reiterate that their approach not only examines the range of functions performed by labour law, but works towards the recognition of new values and objectives, such as the promotion of human capabilities in order to reduce inequality.⁶⁸

Regulation beyond the State?

The adoption of regulatory analysis has allowed a fuller account to be taken of the importance of other areas of law in regulating the labour market, while fostering closer attention to the relationship between law and other social forces. In so doing, the labour market regulation project has made the field of labour law more responsive and relevant to contemporary developments. However, the focus has remained on state action, with limited attention to informal regulation by private actors as well as government. Much of the labour market program has remained resolutely state-centred. Mitchell describes labour lawyers’ object of study as ‘the state’s ordering of labour supply and demand’ which he equates with labour market regulation.⁶⁹ It is apparently to distinguish between labour law

⁶⁷ Mark Freedland, ‘Labour Law Beyond the Horizon’ (1999) 28 *Industrial Law Journal* 197, 198.

⁶⁸ Richard Mitchell and Christopher Arup, ‘Labour Law and Labour Market Regulation’ in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O’Donnell (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 13–4.

⁶⁹ Richard Mitchell, ‘Some Comments on Labour Law as an Academic and Social Discourse’ (1997) 13 *International Journal of Comparative Labour Law and Social Security* 193, 196.

and related fields such as industrial relations that the focus remains solidly on state actions. Similarly, while Johnstone and Mitchell's historically-based analysis treats law as a complex 'mix of custom, legislation and judicial activity', it too remains firmly state-centred and confined to conventional legal sources: the contract of employment and the ways in which it has intersected with and drawn upon legislation.⁷⁰ More recently though, Mitchell has suggested that the firm will become the next focus for labour lawyers, since 'our labour law is now more fundamentally about the regulation of enterprises for the pursuit of business success in a global economy than was the case 20 years ago.'⁷¹

So far, there has been little exploration in the labour law literature of regulation as extending beyond state-derived rules. This is despite the considerable body of work on socio-legal studies and legal pluralism, much of which has been concerned with relationship between state law and other forms of social ordering in part to determine the impact and operation of legal norms. Even the work that draws most explicitly on regulatory theory tends to do so with a resolutely state-based approach. Several studies have used a dichotomy between command-and-control and responsive regulation to examine the shift during the period of the Howard Government towards greater and more direct intervention in industrial relations. That shift is criticised as running contrary to the wider trend towards responsive and reflexive regulation, which depends on cooperation and power sharing with the regulatory community.⁷² Such studies have not, however, explored how this strategy of state regulation interacts with the individualised rights of employees and employers' discretionary power to shape the regulatory space.

The contribution of non-state actors to labour regulation was recognised by Gahan and Brosnan in their contribution to the 2006 book. Apart from adopting a broad definition,

⁷⁰ Richard Johnstone and Richard Mitchell, 'Regulating Work' in Christine Parker, Colin Scott, Nicola Lacey and John Braithwaite (eds) *Regulating Law* (2004) 120.

⁷¹ Richard Mitchell, 'Thinking about Labour Law: The Evolution of Ideas' (2004) 17 *Australian Journal of Labour Law* 213, 219.

⁷² Anthony Forsyth, 'Re-Regulatory Tendencies in Australian and New Zealand Labour Law' (Working Paper No 21, Centre for Employment and Labour Relations Law, University of Melbourne, 2001); John Howe, "'Deregulation" of Labour Relations in Australia: Towards a More "Centred" Command and Control Model' in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) (previously published as Working Paper No 34, Centre for Employment and Labour Relations Law, University of Melbourne, 2005); Sean Cooney, John Howe and Jill Murray, 'Time and Money under WorkChoices: Understanding the New Workplace Relations Act as a Scheme of Regulation' (2006) 29 *University of New South Wales Law Journal* 215.

which includes informal and non-state regulation in listing the range of regulatory instruments used in the labour field (almost all of them the product of state action), they demonstrated the extent to which such instruments involve participation by private actors or are susceptible to influence by them.⁷³ The influence of private actors on state regulation is a strong theme in several other studies, particularly in the regulation of outwork in the clothing industry through industry codes and supply chain arrangements. Rawlings' study of outsourcing in the clothing industry emphasised the use of commercial contracts by the large retailers and labels to 'impose a governance structure throughout the whole supply chain'. However, most of his study was concerned with attempts to regulate working conditions in the industry by conventional state regulatory techniques, such as deemed liability, albeit ones which were extended to unconventional multi-level relationships.⁷⁴ Sustained examinations of private actors were provided in studies of employer associations and their influence on government policy, as well as trade unions in their role as direct regulators of labour markets. Significantly, these contributions came from scholars working in the fields of industrial relations and management.⁷⁵

It is perhaps in the comparative studies that legal regulation is treated most clearly in its social context. One of the features of a comparative approach is the way that it reveals the social dimension of law. This is certainly so of the work undertaken on law and labour market regulation in East Asia. In these developing countries, as Cooney et al point out, 'there has been less of an estrangement between the formal "traditional" model of employee protection and the broader labour market dimensions of state policy-making and

⁷³ Peter Gahan and Peter Brosnan, 'The Repertoires of Labour Market Regulation' in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006).

⁷⁴ Michael Rawling, 'A Generic Model of Regulating Supply Chain Outsourcing' in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 525.

⁷⁵ Michael Barry, Marco Michelotti and Chris Nyland, 'Protectionism, Common Advocacy and Employer Interests: Business Contribution to Labour Market Regulation in Australia' in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006); Peter Gahan, 'Trade Unions as Regulators' in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006).

regulation.⁷⁶ Comparative legal study necessarily requires the recognition that the formal statement of law may differ from the norms operating in practice; that legal institutions are mediated by ‘legal culture,’ private actors and informal regulation. Cooney and Mitchell address these influences in their discussion of the place occupied by labour law in East Asia, particularly their treatment of the informal sector, the limits to the effectiveness of formal law, and the consideration of informal regulatory orders affecting general social values and workplace norms.⁷⁷

While regulatory analysis has provided a strong conceptual basis for recasting labour law as the law of the labour market, the full significance of a regulatory approach to law remains to be developed. This includes charting the limits of the state and its dependence on informal power, and the erosion of distinctions between law and other forms of regulation. In their introduction to the 2006 book, Mitchell and Arup note that the regulatory approach potentially challenges the framework of labour law, which has hitherto been based on legal categories such as the contract of employment. The adoption of a broad constitutive approach to regulation, they recognise, results in a perspective which not only cuts across traditional areas of law, but includes sources such as government policies and programs that derive from state legal authority but which have traditionally been treated as lying beyond the domain studied by lawyers. Inevitably, the search for regulation leads into sites of norms and regularised conduct beyond the state, and also into studies connecting law to other academic disciplines.⁷⁸

This leads to the question whether the adoption of regulation as the focus of study leads to the demise of labour law as a separate field. The expressed view of Mitchell and Arup seems to be that not only have the boundaries of labour law become indistinct through a regulatory approach, but also the field itself has become undefined through the adoption of an interdisciplinary perspective, and this is not really a problem. In most of the work produced under the banner of the labour market regulation project, there is a consistent

⁷⁶ Sean Cooney Tim Lindsey, Richard Mitchell and Zhu Ying, ‘Labour Law and Labour Market Regulation in East Asian States: Problems and Issues for Comparative Inquiry’ in Sean Cooney, Tim Lindsey, Richard Mitchell and Zhu Ying (eds), *Law and Labour Market Regulation in East Asia* (2002) 2.

⁷⁷ Sean Cooney and Richard Mitchell, ‘What is Labour Law Doing in East Asia?’ in Sean Cooney, Tim Lindsey, Richard Mitchell and Zhu Ying (eds), *Law and Labour Market Regulation in East Asia* (2002) 258, 262–6.

⁷⁸ Richard Mitchell and Christopher Arup, ‘Labour Law and Labour Market Regulation’ in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O’Donnell (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 17.

focus on formal rules approximating to law, plus of course the authors' common background of law as an academic disciplinary tradition. This is reflected in the conclusion to the 2006 volume, where the concern is not with regulation per se but with the regulatory functions of law. Only now it is recognised that the state is no longer the only source of law, and that the state is increasingly connected to and dependent upon, other interests.⁷⁹

⁷⁹ Christopher Arup, 'Labour Law and Labour Market Regulation: Current Varieties, New Possibilities' in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 729.