Book Reviews

Labour Law in New Zealand (2 Vols Looseleaf Service), by John Hughes. The Law Book Company, Sydney, 1989, no price indicated.

Labour Law in New Zealand, by John Hughes. The Law Book Company, Sydney, 1990, lxxi + 830 pp including index, no price indicated.

Reviewed by John Kaburise*

These two works by John Hughes are designed to serve two interrelated purposes: (1) the first work to provide a looseleaf service for lawyers, union representatives, personnel managers, and law students; and (2) the second work to facilitate accessibility for law students and portability for practitioners in the field. In other words, the second book represents a "textbook" version of the first *opus*. The "textbook" reproduces the first eleven chapters of the looseleaf service (ie the contents of Volume One). Unless otherwise stated, this review concentrates on the two volumes of the looseleaf service.

The choice of title, *Labour Law in New Zealand*, struck this reviewer as significant, coming as it does at a time when a debate has emerged in the UK about the "death of Labour Law" (see K Ewing "The Death of Labour Law" (1988) 8 OJLS 293; and H Collins "Labour Law As A Vocation" [1989] 105 LQR 468). That debate highlights some of the terminological difficulties that can beset our subject. The Kahn-Freund-domination emphasis on the the study of the law relating to collective labour relations which came to be called *Labour Law* appears now to be under attack, and that attack gave rise to the argument that "labour law" so conceived is now in its death throes. That view, of course, ignores the fact that the term "labour law" extends beyond the law regulating the relations between organised labour and management *inter se*. The conceptualisation of labour law primarily in terms of collective bargaining marginalises areas such as the individual contract of employment (together with the regulation of working conditions), and the ever-increasing body of "Welfare Law" - both of which are of considerable significance to those who deal with labour law as a vocation. The range of topics covered by John Hughes amply refutes any such conception of our subject. That means that the present title is to be preferred to *Industrial Law in New Zealand*. It also means that, at least in New Zealand, our subject continues to blossom.

Labour Law in New Zealand (Looseleaf Service) comes in two volumes. Volume One contains chapters on the Contract of Employment; Personal Grievances; Unions; Conciliation and Arbitration; and Strikes and Lockouts. The chapters in Volume Two deal with Apprentices, Waterfront, Maritime; The State

---

* Senior Lecturer in Law, Victoria University of Wellington.

Sector; Wages, Holidays, Leave; and Safety, Trading Hours, Welfare. There is therefore something for every one. Whether one sees labour law as a tool for redressing the disquiparant incidence of social power as between employers and employees (ie the relief of subordination), or as a science for the study of the incidents of the individual contract of employment and regulation of working conditions, or as a vehicle for delivery of social welfare in society, or indeed as a part of the macro-economic goal of controlling inflation, John Hughes and the Law Book Company have produced a work that is comprehensive enough to act as a guide to the basic principles. For in-depth and specialised treatment of the various topics, however, the reader may have to look elsewhere. For instance, Dr Alexander Szakats' *Introduction to the Law of Employment* (3 ed 1988) remains the most comprehensive analysis of the contract of employment in New Zealand.

The author himself draws attention to certain omissions - inevitable in an area of the law which is so prone to constant legislative activity. These include the law relating to school teachers, the Protection of Personal and Property Rights Act 1988, the Waterfront Industry Reform Act 1989, the provisions of the Law Reform (Miscellaneous Provisions) Bill 1988, and a more considered treatment of the State Sector Act 1988. The reader will look forward to updating releases dealing with these matters.

Each chapter begins with a recapitulation of the law as it stood before 1987, and in that way provides a useful backdrop for the treatment of the current legislation. Liberal notes at the end of each chapter enable the reader to pursue specific issues of special interest. Where necessary, the author refers to English and/or Australian authority for assistance in untangling the meaning or import of the relevant legal rules. As an exposition of current labour law in New Zealand, the work is concise and clear.

The chapters on Personal Grievances, on Conciliation and Arbitration, and on Strikes and Lockouts are particularly comprehensive and should become the most-thumbed parts of the book. Conciliation and Arbitration form, as the author puts it, "the centre piece of New Zealand's labour law" (para 8.5). Whatever else modern labour law does, there is no dispute that it seeks to regulate one of the more ungovernable features of social behaviour in society. In its concern with the control of power and the conflict of contending powers, labour law represents the very limits of law as a technique of social regulation. Its holy grail is industrial peace. Its more modest object is to limit industrial conflict where it can and to regulate it where it cannot. This philosophy to some extent underlies labour law in New Zealand, and the chapters under discussion bear out that view. Part X of the Industrial Relations Act 1987 expressly states that the "right of workers to strike and the right of an employer to lock out are recognised, *subject to constraints*: ..." (emphasis mine). Section 230 goes on to provide that an injunction is available as a remedy for an unlawful strike or unlawful lockout. The author observes, rightly, that few topics in labour law have given rise to more controversy than the so-called "labour injunction"; that the injunction procedure leaves little scope for consideration of the labour relations merits of the particular case; and that the transfer of jurisdiction to the Labour Court was in part at least aimed at

securing for trade union objectives a more sympathetic forum than the common law courts had provided. Unfortunately, the law's concern is often with the control of power and only incidentally with the advancement of trade union concerns. The acid test came during the "ferry dispute" in September/October last year (*NZ Railways Corporation* v *NZ Seamen's Union IUW and Evans*, Unrep WLC 88/89, 88A/89, 88B/89 and 88C/89). It will be recalled that the Labour Court found that the strike in question was an unlawful one. The Court therefore issued an injunction to restrain seamen employed on two Inter-Island ferries from continuing to strike or carrying out an imminent threat to strike, including a mandatory order requiring the defendants to undo what they had done. When the defendants failed to comply with the order, the Labour Court had no hesitation in ordering the issue of a Writ of Sequestration against the property of the defendant union. The "ferry dispute" illustrates the point that where it can labour law seeks to limit industrial conflict. The case, of course, is little comfort to the union movement which had hoped for a more sympathetic ear from the Labour Court. The decisions in *NZ Railways Corporation* v *NZ Seamen's Union IUW and Evans* were delivered too late for the author to canvass their impact on the law. It is again one of the advantages of a Looseleaf Service that the author will be able to use updating releases to bring the law up to date.

Where the legal position on a particular point is unclear or unresolved, the author does a good job of presenting the options available; and where appropriate he does not recoil from offering a well-reasoned preference. A good example is in his treatment of Contempt (paras 9.260 - 9.265). The issue was whether the Labour Court has an inherent power to punish for contempt in cases not falling within the terms of sections 281 and 207 of the Labour Relations *Act* 1987. It had been held by the Court of Appeal that the Arbitration Court (established under the Industrial Relations Act 1973) did not have an inherent jurisdiction to punish for contempt (*Quality Pizzas Ltd* v *Canterbury Hotel Employees IUW* [1983] NZLR 613). The moot question was whether the new Labour Court had such an inherent power under the Labour Relations Act 1987. The author outlines the two competing views, and, in a well reasoned argument, submits that "contrary to the outcome of the examination of the 1973 Act in the *Quality Pizzas* case, it might now be argued that the inherent power to punish for contempt might be implied from the scheme of the legislation under the 1987 Act". This view has since been vindicated by the Labour Court in *NZ Railways Corporation* v *NZ Seamen's Union IUW* (WLC 88A/89 and WLC 88B/89) where the Court faced the issue squarely and ruled that it *did* have such an inherent power to punish for contempt, and exercised it by the issue of a writ of sequestration.

The sheer volume of research that went into writing *Labour Law in New Zealand* is evident throughout the book, notably in the notes at the end of each chapter. There is also a useful directory of some of the primary and secondary materials on labour law in New Zealand. A list of the most commonly used abbreviations is also supplied.

Turning specifically to the "text book" version, the reader might find the omission of chapters on Equal Employment and on Pay Equity regrettable. It is

also to be hoped that any future edition would do something about the pagination. Whilst the leap-frogging style of numbering pages is perfectly appropriate for a Looseleaf Service, it becomes a drawback when used for a textbook.

Any library catering to lawyers, union representatives, employer representatives, personnel managers, and law students should not be without a copy of the Looseleaf Service. And it will come as no surprise to this reviewer if the book version soon appears on the prescribed reading lists for most conventional labour law courses in New Zealand.

Criminal Confiscation Orders - The New Law, by David Feldman. Butterworths, London, 1988, 231 pp.

Reviewed by Simon France*

In a speech delivered in May 1989, the then Minister of Justice, the Right Hon Geoffrey Palmer, noted the international problem of drug dealing and observed:

> Asset confiscation appears to be one answer. Confiscation of the offender's assets strikes directly against the object of the drug dealer or criminal cartel. And it has the added effect of denying the offender or his criminal associates the working capital for further offences. The New Zealand Government proposes to introduce an asset seizure Bill this parliamentary term.

Given this declaration of intent, Feldman's book is timely reading. The book is very much an annotation of the relevant, and in many cases quite recent, English legislation in the area of drug laws and confiscation of assets. It details and comments upon the vast array of powers given to enforcement officers. The book undertakes little in the way of a critique of the scheme and powers, and at times reads as the prosecutor's manual, but these factors probably reflect the fact that the statutory provisions are a fait accompli. As New Zealand lurches towards similar provisions, seemingly out of a desire to keep up with the Joneses, the book will provide useful reading to those with an interest in this development. At a later date, depending upon the parallels in any legislation, the detailed notes may be of greater value to the New Zealand reader.

---

* Senior Lecturer in Law, Victoria University of Wellington.

Unconscionable Bargains, by Mindy Chen-Wishart. Butterworths, Wellington, New Zealand, 1989. 184 pp (including Selective Bibliography, Table of Cases, Index).

Reviewed by D L Holborow*

Practitioners and academics alike can breathe a sigh of relief with the release of this exhaustive and concise guide to unconscionability. Among the many works which have dealt with the area this one stands out as one of the most clearly written and helpful overviews of the jurisdiction.

The aim of the book is essentially descriptive:[1]

> [t]o understand the nature of judicial action under the head of unconscionability in the past, and so formulate some basis for predicting judicial action in the future.

At this level it functions brilliantly, providing simple general formulations of the factual elements that are involved in a finding of unconscionability and explaining the inter-relationship of the elements. There is also detailed analysis of the approach taken to each element in the decided cases, giving practitioners ready access to lines of authority that may be utilised in resolving issues.

The discussion of the elements takes up the major part of the work. The familiar elements of special disability in the complainant, lack of independent advice, contractual imbalance[2] and enforcer knowledge (actual or constructive) of disability are all discussed.

Chen-Wishart then deals with the more contentious element of "unconscionable conduct" or "victimization" identified, but inadequately defined, in leading cases.[3] This section of the work demonstrates that deliberate and conscious exploitation of the complainant (active victimization) is not a necessary component of a finding of unconscionability. Knowledge of contractual imbalance, coupled with knowledge of impairment, shows passive victimization[4] satisfying the victimization requirement.

There follows a very useful section from the practitioners point of view entitled "Ensuring Enforceability". It is an outline of the steps a stronger party

---

* Don Holborow is a solicitor at the firm Simpson Grierson Butler White.

1 At p 14.

2 Chen-Wishart uses the phrase "substantive unfairness" to refer to this requirement, which denotes inadequacy of consideration flowing from the stronger party or improvidence in the bargain from the point of view of the weaker party.

3 See *O'Connor* v *Hart* [1985] 1 NZLR 159; *Nichols* v *Jessup* [1986] 1 NZLR 226.

4 This refers to the passive acceptance of a benefit in unconscionable circumstances: knowing that the provider of the benefit is suffering from a disability or having constructive knowledge of that disability, "constructive knowledge" being found where the stronger party ought to have been aware of the disability.

can take to lessen the risk that contracts made with persons suffering from disabilities will be set aside. The difficulty of finding an approach that can give the stronger party total confidence in contracts made with disadvantaged bargainers is abundantly apparent in this section.

The real strength of the work, however, lies in the distinction made between judicial *theorising* and judicial *action*. Chen-Wishart not only deals with judicial expressions of the basis and content of the jurisdiction, as so many previous works have done, but also analyses decisions with a view to providing a clear picture of the basis on which cases are actually decided. The importance of this exercise cannot be exaggerated - the opacity and inconsistency of judicial descriptions of what constitutes an unconscionable bargain are notorious.

Parts IV and V of the work contain this theoretical analysis of rationales for the jurisdiction and an analysis of how well the rationales conform with the nature of judicial action. There are two features of the analysis that demand attention. The first is a rationale developed by Chen-Wishart which goes some way to reconciling unconscionability with the fundamental principles of contract law. The second arises out of Chen-Wishart's recognition of the primacy of substantive concerns - contractual imbalance. This recognition could lead to a re-assessment of the concept of morality that courts of equity, as courts of conscience, are applying.

At first glance the unconscionability jurisdiction appears to be at odds with fundamental principles of contract law - particularly the concepts of freedom of contract and sanctity of contract. The setting aside of contracts that are found to be unconscionable undermines their sanctity and belies a lack of faith in the parties to set the terms of their contracts freely. The picture emerges of a legal battleground, where equity fights for control of situations in which the economically efficient principles of contract law, born out of laisez-faire, have dominated for so long.

Chen-Wishart explodes this myth by re-assessing the basis of equity's interference in contracts on the basis of unconscionability.[5] One role of contract law is the protection of the reasonable expectations of the parties to the contract. These expectations arise out of reasonable reliance on the other party's express or apparent consent to the contract. If the party wishing to enforce the contract is aware of a disability in the other party - that the party is particularly irrational, uninformed or unintelligent - reliance on the consent of the other party becomes unreasonable. Thus the role of contract law falls away - the expectations of the enforcing party are not worthy of protection. The way is clear for equitable tests of bargain reasonableness to be applied. It should be noted that Chen-Wishart does not present this as a full scale theory of reconciliation between contract law and unconscionability, nor does she present it as an underlying motivation for judicial action in the area. Nevertheless, the concepts outlined have enormous potential for

---

5 At pp 94-97.

development in relation to prescriptive models of unconscionability and in the formulation of a more consistent relationship between contract and equity.

The second point arises out of the conclusion of Chen-Wishart's discussion of the judicial practice in exercising the unconscionability jurisdiction. The conclusion is that despite the attention given to procedural defects[6] in the process of contract formation in the theory of unconscionability, it is the substantive concern - contractual imbalance - that has primacy in practice. It is the improvidence of the bargain itself, as measured objectively or from the point of view of the weaker party, that is the largely determinative factor in cases of unconscionability and is the main motivation for intervention in practice. It is not that procedural concerns have little weight in the jurisdiction - the factors making up procedural impropriety are necessary for a finding of unconscionability - but that far greater emphasis is given to substantive concerns in deciding cases.[7]

This conclusion forces a question regarding the concept of morality that a court of equity (a court of conscience) is applying when coming to a decision on the unconscionability of a transaction. Traditionally courts have been concerned with the conscience of the stronger party. As Lord Brightman commented in *O'Connor* v *Hart*:[8]

> In the opinion of their Lordships it is perfectly plain that historically a Court of equity would not restrain a suit at law on the ground of unfairness unless the conscience of the plaintiff was in some way affected.

This suggests the enforcement of a theory of personal morality, developed by Chancery as a branch of the judiciary inhabited by the church. Chen-Wishart's conclusion challenges this conception. If the underlying approach is not centred on the conscience of the stronger party, but on the fairness of the consideration, a different theory, or rather emphasis of theory, must be operating. The focus is no longer on the personal conscience of the stronger party but on the morality of the *consequences* of the transaction, the distribution of wealth that results. In this sense the primacy of substantive concerns could represent the primacy of distributional justice in the unconscionability jurisdiction. This raises serious jurisprudential questions, not only in the area unconscionability, but for the whole of equity itself: what *is* the conscience of the courts of conscience?

When the fascinating questions and possibilities this work raises are weighed alongside the usefulness of its descriptive sections, its full import can be felt. Once the jurisprudential questions this work raises are resolved lawyers can look forward to a better reasoned and practised theory of unconscionability.

---

6 Procedural defects are defects in the process of contracting - the factual elements of special disability, lack of independent advice and enforcer knowledge of disability.

7 At ch 17.

8 [1985] 1 NZLR 159, 171.

Administrative Tribunals Handbook, compiled by the Wellington District Law Society Tribunals Subcommittee. Butterworths, Wellington, 1988, 76 pp. Paperback $31.

Know Your Forum - The Lawyer's Role in Cases Before Planning and Other Administrative Tribunals, by JJM Wiltshire, H Sargisson and GM McGreevy. New Zealand Law Society, 1989, 70 pp.

Reviewed by Bernard Robertson*

These booklets are aimed at those who appear before administrative tribunals. They will also be of great interest to academics teaching administrative and public law. Administrative law is branching out from a study of judicial review to the study of other decision making styles, such as tribunals, ombudsmen, internal rule making, etc. Nor is this development merely of academic interest. Compared to some other methods of challenging administrative decisions judicial review may be slow, expensive and ineffective. A practitioner who has been taught at university that administrative law consists only or even primarily of judicial review may not be doing clients any favours at all.

While this may seem a statement of the obvious it is something frequently forgotten. Thus Mr Justice Thomas (as he now is) told the 1987 New Zealand Law Conference that judicial review was the 'chief' means of holding administrators accountable. No one seems to know how many applications for judicial review are made in a year in New Zealand, but I doubt that they would outweigh complaints to hierarchical superiors, to Appeals Tribunals and to the Ombudsman. Judicial review may well not be the central activity it is frequently assumed by lawyers to be.

Study of other methods of decision taking is therefore an essential part of the study of administrative law. Considerable effort has been expended in these areas in England and the task now needs to be performed in New Zealand. Why are some decisions allocated to tribunals, why some to Courts and some to Ministers? Is there any rime or reason to the allocation or is it merely historical and accidental?

Why have tribunals at all? The Law Society book canvasses the reasons for allocating some questions to Administrative Tribunals rather than courts. Some of the reasons given are the traditional ones of cheapness, speed and expertise. Is this to say that courts are expensive, slow and don't know what they are doing? Or can tribunals perform tasks that courts cannot perform? Why are there Appeals Tribunals for some functions and not for others? Some of the other reasons given may be more significant - such as that Tribunal decisions may involve applying government policy in a way the courts are not used to.

---

* Lecturer in Law, Victoria University of Wellington.

An equally interesting question is why are certain decisions allocated to Tribunals and not to Ministers? Is it to safeguard rights, to deflect criticism of government policy or to provide another method of information gathering? To what extent do Tribunals shape rather than merely apply policy? Is there, in any case, a clear distinction between a tribunal and an official who has to take particular decisions in a fairly formal manner - in other words what criteria determined inclusion in the *Handbook*?

This leads on to a consideration of the role of the courts. Why should there be appeal to the High Court on a point of law from almost every Tribunal? Is it helpful to the application of policy that a word in a social security statute should be interpreted the same way as the same word in an immigration statute? A glance through this booklet reveals that in New Zealand the lawyers have succeeded in capturing the administrative process to a greater degree than in England and to a greater degree than is arguably desirable. One might like to ponder, for example, the implications of the following entry in the *Administrative Tribunals Handbook*: **Social Security Appeal Authority ... Practice** ... (g) Appellant may appear in person or be represented. *The Commission will be represented*" (emphasis added).

The *Administrative Tribunals Handbook* is an invaluable compilation of information about the various tribunals and their procedures. *Know Your Forum* goes into the procedural aspects in much greater depth. At every stage the raw information is illuminating as to the assumptions which underlie the Tribunal structure. The academic who wished to research the activities of tribunals was previously handicapped by the inaccessibility of much of the information required, distributed as it is through numerous Acts and endless sets of regulations. These booklets provides a useful springboard for enquiry and should save many hours of research time.

Trusts Law: Text and Materials, by Graham Moffat and Michael Chesterman, with John Dewar. Weidenfeld and Nicolson, London, 1988, xliii and 746 pp (including Index). Hardback £35, paperback £22.95.

Reviewed by CEF Rickett*

The book is part of the *Law in Context* series. It could thus be expected to be a little different from standard treatments of trusts law. Even so, in the Preface the authors make a rather bold claim for it (at xvi):

> We offer it as a basis for a stimulating and full-rounded education about trusts, in which both general theoretical perspectives and insights into the practical operation of trusts receive distinctly more emphasis than hitherto.

---

* Senior Lecturer in Law, Victoria University of Wellington.

The reader, it must be said at the outset, will not be disappointed. What the authors have produced lives up to their claim for it. The book has important additional qualities. The text part of it, which actually makes up a much greater portion than is usual in these sorts of books, is very readable. The materials included range not only from the to be expected cases and statutes, but also include excerpts from articles, reports, newspapers and even a poem! The layout is easy to follow, although there is obviously some secret code as to what precisely gets only a footnote (and there are so few of those that one tends to pay greater attention to them on the basis that scarcity indicates importance) as opposed to warranting citation or mention in the text itself. Welcome use is made also of material from both Commonwealth and American sources.

The book should, and, I am sure, will *excite* its readers - no mean feat for a book about a subject which can be very dry and which students certainly find among the most difficult they study. The book is full of excellent detail and good analytical material (and includes some helpful diagrams), with numerous new insights offered. At the same time it opens up by the judicious use of material not usually found in textbooks - even of the cases and materials variety - wider sociological, philosophical and economic vistas to the reader. From the New Zealand perspective, whilst there is too much material nowadays of a distinctively New Zealand character to permit of the book's being adopted as a course textbook, nonetheless it is the type of work that teachers can frequently make very good use of it in their preparation of classes. It is also a book which, despite its title, can most profitably be purchased by large and medium-sized law firms because of the value to be gained from some of the general arguments, which *are* as applicable here as in England.

The work is structured in a unique way. The authors see the express private trust as concerned fundamentally with the preservation of private wealth. Thus, after a very useful first chapter introducing the trust as a concept and presenting its "tricks", the next six chapters focus on the context (with chapters on wealth redistribution and taxation) and creation of such trusts. Chapter 8 on "Flexibility in relation to beneficial entitlement" effectively drives home the wealth preservation aspect in its outstanding treatment of variation, advancement and maintenance. The next three chapters deal with the position of trustees, thus placing treatment of this aspect of trusts law well ahead of its usual position in more orthodox texts.

In my view, the most interesting chapters come after the material on express private trusts. The authors discuss, first, the area of family breakdown, in two chapters, where the interplay between resulting and constructive trusts is thoroughly explored, and where the law is presented most effectively alongside material concerned with the social and economic dimensions of family breakdown. These chapters rank as the clearest exposition of the English position that I have read, and could profitably be studied by family lawyers as well as trusts lawyers. Their major deficiency would be the lack of any real discussion of proprietary estoppel, although perhaps the latter is not very obviously a matter of trusts law. One major area where standard texts tend to be somewhat deficient, and certainly

confusing to students, is in regard to the role of trusts in commercial situations. Three excellent chapters cover this matter. One examines pension schemes, a second looks at the *Kayford, Quistclose* and *Romalpa* developments (a chapter which will be very useful to commercial law teachers), and the third outlines the area of fiduciary law and constructive trusts. In the family and commercial settings, the intrusion of trusts law is usually the result of the application of wider equitable considerations, of unconscionability or fiduciary law or even unjust enrichment. The authors quite clearly recognise this fact, and their treatment of resulting and constructive trusts thus extends beyond the traditional somewhat static, and certainly cautious, approach taken in many other texts.

Finally, the last 120 pages are given over to an examination of the law of charities, and non-profit organisations (where, it must be said, more could be included on property destination after dissolution). Much of this examination mirrors the earlier treatment of the area by Chesterman in *Charities, Trusts and Social Welfare*, published in 1979 in the same *Law in Context* series, but is nonetheless certainly in keeping with the philosophy and structure of the new work.

The authors are to be congratulated. They have produced a trusts textbook with a difference, one which, it is hoped, will see considerable use and more editions.