



The Modern Contract of Employment by Ian Neil SC and David Chin, Thomson Reuters Australia, 2012, ISBN 9780455224534, RRP \$195.

There are many good Australian text books which concern themselves with employment and industrial relations. *Macken's Law of Employment* is in its seventh edition; Creighton and Stewart's fifth iteration of *Labour Law* has grown with each edition; although 30 years old, Sykes on *Strike Law* is still worth consulting and a second edition of Donaghey's *Termination of Employment* is due with the publisher shortly. But there has not, until this year, been a text devoted exclusively to the contract of employment. Even Volume 1 of Sykes and Yerbury's *Labour Law*, ostensibly devoted to the 'individual aspects' devotes about half of the text to related torts and statutes.

Practitioners will therefore greet the publication of not one but two texts, published in 2012, devoted to the contract of employment with some gratitude. One is green and thickish, entitled the *Contract of Employment*, and written by Mark Irving of the Victorian Bar. The other is red and thinnish, entitled *The Modern Contract of Employment*, and authored by Ian Neil SC and David Chin of the New South Wales Bar.

Despite the foreword having been written by Michael Kirby, it is our pleasure to review *The Modern Contract of Employment*. Not simply because there is less reading to do, but because the book is written in a beautifully crisp style, refers only, with one exception, to the cases decided by courts and focuses, as Mr Kirby observes, upon the law as it is, not what it ought to be. Notwithstanding the focus in the book upon viewing the contract of employment through, with that one exception, the judicial exposition of the employment contract, the authors have exposed the distinctive features of the law pertaining to employment, and placed them in context.

The one exception is a case from an industrial tribunal, reported as *Bowker v Prophecy Technologies Pty Ltd*.¹ It perhaps struck a chord with the authors — because one of them appeared in it. In much the same vein, in the foreword, Mr Kirby refers to only one case — his own decision, during his time on the High Court, in *Blackadder*.

The book commences with an analysis of the identification of a contract of employment, as distinct from some other legal relationship. This issue has for many decades, and remains, at the heart of a significant number of employment law cases. *The Modern Contract of Employment* analyses the test for identifying a contract of employment in a most coherent way, by reference to the law, as we have observed, as it stands in early 2012.

One of the most important contributions the book makes to the field of employment law is in relation to the implied term of mutual trust and confidence. The existence and effect of this term has not yet been considered in any detailed way by the High Court. It has, however, been the subject of much consideration by a number of judges at first instance and by a number of intermediate appellate courts around Australia. The book makes a valuable contribution to the debate about this important development in the law of employment by tracing the history of the implied term of mutual trust in both

¹ [1999] NSWIRComm 248.

Australia and in other common law jurisdictions, including the United Kingdom. The authors then provide a very helpful explanation of the current state of the law in Australia in relation to the implied term of mutual trust and confidence. The valuable contribution made by this part of the book is evident from the fact that it has already been cited by Justice Besanko in the recent case of *Barker v Commonwealth Bank of Australia*.²

After dealing with the existence and content of the contract of employment, the book then turns to address in a detailed manner a number of the issues that arise during, and as a consequence of the termination of, the contract of employment. The chapters on confidential information, termination, restraints of trade and contractual remedies, in particular, will be of great assistance to those who study or work in the field of employment law. The analysis of the principles at play in connection with these topics is expressed clearly and comprehensively, and in a manner which rewards both the novice student and the experienced practitioner.

The succinct and expository approach enables the reader to quickly identify and comprehend the principles applicable to a particular aspect of employment law. The footnotes for each principle stated in the book are helpful and thorough. They will enable students, practitioners and, indeed, judges to readily locate the leading authorities for a particular proposition and then, if necessary, to read further into that area to provide a deeper understanding of the proposition for which the case is cited.

In our view, this is the outstanding virtue of *The Modern Contract of Employment*. Many, including Cicero, Lincoln and Mark Twain have been said to have apologised to their respective correspondents, for lacking the time to produce a short letter. To have, in just over 300 pages, explored and explained the key aspects of the contract of employment is a task which, no doubt, took a great deal of time. But the result is exceptional. It will quickly become an essential text. Indeed a tool of trade for any serious Australian practitioner.

The senior author has a website, decorated like a Ted Baker sock, which describes him as 'a Modern Barrister'. It does not compare with Mr Kirby's website, depicting him as a Christ like figure standing amongst a sea of young(ish) disciples. But it is a start. *The Modern Contract of Employment* by a Modern Barrister. A scholarly work, promoted by the author on his own website, which includes prominent references to his own cases. Mr Kirby now has some competition.

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2 [2012] FCA 942; BC201206576 at [323].

A judicial review

The Modern Contract of Employment, by Ian Neil SC and David Chin, was launched by Justice Monika Schmidt of the Supreme Court of NSW on 6 September 2012. The following is an extract from her Honour's speech:

Speaking as someone who was daily confronted by acute employment law problems which had to be solved quickly, while I was in practice as a solicitor for some 14 years and afterwards, for the 16 years that I sat on a Court and Tribunal which constantly dealt with such problems, I can say with confidence that [this] book's objectives and what it achieves are not modest.

To the contrary, the book deals with a fundamental, but constantly overlooked area, which in my experience is crucial to successful, practical engagement with any aspect of employment law.

Reading the book, it struck me that it fills a real gap for those who are daily dealing with the difficult human problems which employment law deals with. I commend it, because it deals succinctly and intelligibly with the crucial questions which the law of contract raises for employment and related fields. In my experience it is the all too frequent failure of those who have to deal with these problems, to engage with these questions and to get them right, which time and again results in difficulty and error, error which on occasions has led our society down quite wrong paths.

It seems to me that what is too often overlooked is that in our legal system, employment contracts are not only in every single case agreements which people freely enter with each other, but they are also the legal foundation on which people perform the work, which is the bedrock of our civil society and its economic success. This foundation may not be tangible, but it is both a real and very important part of how people in our society interact with each other, day in and day out.

As the book explains, employment relationships can arise from nothing else other than agreement, because while we certainly encourage volunteers, we do not permit either conscription or slavery. This is important because the employment contracts which people agree to make with each other, have a myriad of social consequences for all of us. Understanding such agreements, how they come to be made, the obligations and rights which they give rise to, how they can be brought to an end and what the consequences will then be, are all crucial not only to the individuals who enter such agreements, but also the society which depends on their effective operation.

This is why it seems to me that this is not only an important book for students, practitioners and judges, but also a really valuable tool for legislators and their advisers, as well as the drafters of legislation.

A better understanding of the operation of the law of contract in the employment context, would certainly help redress what appears to present a considerable challenge for legislators at the moment – and I don't mean producing a statutory law to regulate all Australian contracts - but rather more urgently, improving current federal regulation of employment law.

This is not as far removed from the book as it might seem. I suspect that not many people get tortured the way my family has from time to time, as I have I read about the latest twist or turn in federal industrial relations laws – does anyone else shout things like – hello have you met the employment contract? when you hear about why people ought not to be able to negotiate agreements with each other about their employment relationships. It seems to me that any system devised by people who have as a starting point that the contracting parties are either all imbeciles or rapaciously immoral, is a system which has lost touch with reality.

The reality is that people are perfectly capable of negotiating employment contracts with each other. They do it every day. They are perfectly capable of recognizing and acting in their mutual interests. That happens constantly and in reality is what Australia's economic success rests on. Every employee in this country has an economic interest in their own employer's financial success. Nowadays, given the superannuation investments on which their retirement incomes depend, every employee inevitably becomes a significant investor in the businesses which employ others. Indirectly we are all employers now. Australian people have also long accepted that there also needs to be some external impetus towards fairness in these arrangements. That is something which ordinary, reasonable people understand, not surprisingly because after all, that is what underpins almost the entirety of our legal system – fairly resolving competing demands made on all of our society's finite resources, including its people.

The legislation which regulates this most fundamental area of all of our lives, could better reflect the basic reality that what it is regulating is employment contracts, freely entered by capable people in order to produce what our society needs to function. The system established by that legislation also needs to be capable of delivering the help which people sometimes sorely need, when disagreements arise. That, after all, is what modern legal systems try to deliver, access to just, quick and cheap help.

These are not topics which the book deals with of course. An understanding of what it does deal with, however, is crucial to all that follows. Perhaps you won't all thrill as I did to read at paragraph [1.30] of the book, entitled a 'Summary of the Modern Approach to the Problem', that 'the starting point is that the parties are left to make their own choice between a contract of employment and an independent contract'. Perhaps your heart won't beat faster, as mine did, to read the discussion at paragraph [7.50] as to the existence of the implied term of mutual trust and confidence, where it is observed that statutory regulation of employment in Australia has been premised on the notions of fairness as between employers and employees, since the late nineteenth century.

The book deals lucidly with thrilling bedrock concepts such as these and I am happy to assure you, it will help ensure that they are better understood. That will be to the good of us all.

The Hon Justice Monika Schmidt
September 2012