REVIEW ARTICLE
REPRESENTING GENDER IN LEGAL ANALYSIS: A CASE/BOOK STUDY IN LABOUR LAW

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Labour Law: An Introduction by Breen Creighton and Andrew Stewart (Federation Press, 1990) pages iii-xxx, 1-282, bibliography 283-298, index 299-306. ISBN 1 86287 031 4.

The Law of Employment by The Honourable James J. Macken, Greg McCarry and Carolyn Sappideen (Law Book Co., 3rd ed., 1990) pages v-xxxiv, 1-610, index 611-618. ISBN 0 455 20965 0.

Australian Labour Law: Cases and Materials by R. C. McCallum, Marilyn J. Pittard and Graham F. Smith (Butterworths, 2nd ed., 1990) pages v-xxxv, 1-696, bibliography 697-703, index 705-716. Price $115 (hardback). ISBN 0 409 49512 3.

These three books are recent additions to an already sizeable literature in the discipline of labour law. They do not purport to break new ground, but to give some kind of overview of the existing legal landscape. That terrain, however, is both extensive and disparate, and cannot be neutrally re-presented. Authorial decisions must inevitably be made as to the selection and organization of material to be covered, and those decisions will inevitably be guided by particular views of what is central and what is marginal. The influence of authorial values and interests is demonstrated by the fact that there are many areas of difference, as well as areas of similarity, between the three books.

One area of similarity, though, is an unquestioned acceptance that the subjects of labour law are male workers. Women workers, and the particular features of women's work, are either ignored altogether or afforded merely token treatment. This cannot be excused as simply an accurate reflection of the current state of the discipline, as an admittedly small but nevertheless significant portion of the literature available to these authors has focussed on women workers, and, equally importantly, has argued that gender is an essential analytical category within labour law. The un- or barely-acknowledged masculinist orientation of the three books is thus a product of choice, not of lack of choice. Moreover, their

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endorsement of the dominant paradigm renders them complicit in the entrenchment of women workers' legal invisibility — and hence women's oppression as workers.

EXERCISES OF CHOICE

The province of labour law is defined by Creighton and Stewart in *Labour Law: An Introduction*,[1] as covering three subject areas: the relationship between individual workers and employers; the collective relations between organized labour and capital and/or the state; and the regulation of the market in the interests of workers, unions, employers and/or the general public.[2] The textbook aims to set out the 'basic themes and principles of labour law', as well as to convey 'the full range and depth of what is a complex, challenging and fast moving subject'.[3]

In *The Law of Employment*,[4] Macken, McCarry and Sappideen have chosen to concentrate on the individual contract of employment rather than the collective aspects of labour law. Their primary focus, in fact, is on the common law of employment, although they do consider various aspects of the statutory regulation of employment relationships, most notably anti-discrimination legislation. Macken, McCarry and Sappideen use case extracts and commentary to illustrate the historical development of particular principles up to the present, exhibiting a strictly positivist concern with what the law *is*. They include a great deal of English material, according virtually equal weight to English as to Australian case law.[5] The exposition is tight, with few interstices that might provide a site for questioning the inevitability of the book's structure or mode of analysis. Although some colourful historical material is included, there is little advertence to contemporary contexts for the legal rules set out.

By contrast, McCallum, Pittard and Smith in *Australian Labour Law: Cases and Materials*,[6] express an interest in placing labour law in its social, economic and political context[7] (although they are not very systematic about doing so). They do deal with collective as well as individual aspects of labour law, but concentrate on the federal industrial relations system. The features of the various State systems are not described. Neither do they cover anti-discrimination or occupational health and safety legislation.[8] The style of the book varies considerably between the three authors, in terms of the length of extracts reproduced from

1 Hereinafter Creighton and Stewart.
2 Creighton and Stewart 2.
3 *Ibid.* iii.
4 Hereinafter Macken, McCarry and Sappideen.
5 Creighton and Stewart take the other, nationalistic, side of this particular debate, expressing the hope that labour law will become more 'Australian', with less automatic copying of English developments: 28.
6 Hereinafter McCallum, Pittard and Smith.
7 McCallum, Pittard and Smith 1.
8 Although this essay will argue that the standard content of labour law is both gendered and blind to gender issues, it might be noted that occupational health and safety is another area treated as marginal to labour law. See, for example, Carson, W.G. and Henenberg, C., 'The Political Economy of Change: Making Sense of Victoria's New Occupational Health and Safety Legislation' (1988) 6 *Law in Context* 1.

cases or articles,[9] the ratio of commentary to extracts, the use of questions or discursive commentary and the idiosyncracy of the commentary.

Mary Joe Frug has drawn attention to the normative power of casebooks (and her argument is equally applicable to textbooks): 'The editorial choices within a casebook determine how many readers think about the law of a doctrinal area, about lawyering in that field, about clients and about legal reasoning'.[10] In her 'Feminist Analysis of a Contracts Casebook', Frug considered the effect of editorial choices on readers' views regarding gender.[11] Certainly readers of Macken, McCarry and Sappideen and McCallum, Pittard and Smith do not have to look very far to learn something about the gender of labour law. The cover illustration of Macken, McCarry and Sappideen shows silhouettes of men apparently standing on a girder above a building site, against a green-washed cityscape. The cover illustration of McCallum, Pittard and Smith shows silhouettes of hard-hatted men on an oil rig, against a blazing yellow sunset. Despite the fact that one author of each of the two books is a woman, these romantic images leave little doubt that labour law (like Marlboro) is a Man's Country. (The cover of Creighton and Stewart is mercifully abstract.)

All three books give the impression that gender is virtually irrelevant *within* labour law. They consistently fail to ask what Katharine Bartlett has termed the 'woman question'. Asking the 'woman question' involves 'examining how the law fails to take into account the experiences and values that seem more typical of women than of men ... or how existing legal standards and concepts might disadvantage women'; it is 'designed to identify the gender implications of rules and practices which might otherwise appear to be neutral or objective'.[12]

Thus, for example, when Creighton and Stewart discuss award coverage, they relegate to a footnote the fact that while male workers are fairly evenly distributed between federal and state awards, the pattern for women workers is quite different, with a substantial majority of women workers being covered by State awards.[13] The footnote status of this information clearly relieves the authors of any obligation to consider its possible ramifications. McCallum, Pittard and Smith do provide a gender breakdown for State/federal award coverage in the text,[14] but again the figures are left to speak for themselves.

Creighton and Stewart develop quite a practice of putting women in the footnotes. When they come to the notorious *Harvester* judgment of 1907, the

[9] As an aside, it is striking that the utility of casebooks as teaching texts (as they purport to be) is so often fatally undermined by the fact that the case extracts are reproduced in such tiny print as to positively discourage reading. McCallum, Pittard and Smith conforms to the familiar pattern of larger print commentary and smaller print extracts, although the small print is not as bad as some. One of the great virtues of Macken, McCarry and Sappideen, on the other hand, is that extracts and text are printed the same (readable) size.

[10] Frug, M. J., 'Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook' (1985) 34 *American University Law Review* 1065, 1069.

[11] *Ibid.* 1080.

[12] Bartlett, K. T., 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829, 837.

[13] Creighton and Stewart 43, citing Australian Bureau of Statistics figures for 1985: federal awards covered 32.6% of all workers, 40.8% of male workers and 21.6% of women workers; state awards covered 49.8% of all workers, 40.5% of male workers and 63.4% women workers. The authors note that the State systems have been gaining ground over recent years, but fail to notice that this might be due to the increased labour force participation of women.

[14] McCallum, Pittard and Smith 303-4.

decision which introduced the notion of a basic wage sufficient to keep a man, his wife and three children in 'a condition of frugal comfort',[15] readers are directed in a footnote to refer to a single article for the detrimental effects of this judgment on equal pay for women.[16] This is a fairly breathtaking dismissal of 67 years of overt wage discrimination against women workers (the detrimental effects of the judgment were not formally removed until 1974; they are still felt in practice) and also of a great deal of feminist scholarship and energy.[17] Later still, Creighton and Stewart give the figure of 50% of Australian employees covered by superannuation at the end of 1988. Only in the footnote do we learn that this breaks down into 58% of full-time workers but only 19% of part-time workers. And who constitute the vast majority of part-time workers . . .?[18]

Similarly, McCallum, Pittard and Smith tell us that during the 1973-74 wages explosion, average male earnings increased 27.7%.[19] They do not give a figure for average female earnings. In discussing the 1981-83 period of decentralized wage bargaining, though, they do note that unions with bargaining power in the market place gained wage increases while unions without power or operating in the public sector did not.[20] The fact that powerful unions tended to be male unions, and that most women workers were covered by public sector or less powerful unions, is not mentioned. And yet the historically observed gender differential in the impact of unregulated wages systems is crucial information when one contemplates the current push towards enterprise bargaining.

The objection will no doubt be made: why should these books ask 'woman questions'? Or, as Christine Boyle has posed the issue, 'the authors did not set out to write feminist books so why should they be criticized for not having done so?'.[21] There are a number of possible responses.

First, there is the point noted earlier that casebooks and textbooks exert a powerful influence. They are constitutive, not merely reflective, of their disci-

[15] *Ex parte H. V. McKay* (1907) 2 C.A.R. 1. McCallum, Pittard and Smith quaintly refer to this judgment as 'part of Australia's folklore': 415. If only its effects had been merely folkloric!

[16] Creighton and Stewart 46, n. 84. The article is Hunter, R., 'Women Workers and Federal Industrial Law: From *Harvester* to Comparable Worth' (1988) 1 *Australian Journal of Labour Law* 147.

[17] See, for example, A.C.T.U., *Equal Pay Manual: Working Women's Charter Implementation Manual No. 2* (1985); Beaton, L., 'The Importance of Women's Paid Labour: Women at Work in World War II' in Bevege, M., James, M. and Shute, C. (eds), *Worth Her Salt: Women at Work in Australia* (1982); Bennett, L., 'Equal Pay and Comparable Worth and the Australian Conciliation and Arbitration Commission' (1988) 30 *Journal of Industrial Relations* 533; Gaudron, M. and Bosworth, M., 'Equal Pay?' in Mackinolty J. and Radi, H. (eds), *In Pursuit of Justice: Australian Women and the Law 1788-1979* (1979); Hunter, T., 'Industrial Courts and Women's Wages in Australia' in Isaac, J. E. and Ford, G. W. (eds), *Australian Labour Economics: Readings* (1967); O'Donnell, C. and Golder, N., 'A Comparative Analysis of Equal Pay in the United States, Britain and Australia' (1986) 3 *Australian Feminist Studies* 59; Pettman, B. O. (ed.), *Equal Pay for Women: Progress and Problems in Seven Countries* (1975); Ryan, E. and Conlon, A., *Gentle Invaders: Australian Women at Work 1788-1974* (1975); Ryan, P. and Rowse, T., 'Women, Arbitration and the Family' in Curthoys, A., Eade, S. and Spearritt, P. (eds), *Women at Work* (1975); Short, C., 'Equal Pay — What Happened?' (1986) 28 *Journal of Industrial Relations* 315; Thornton, M., '(Un)equal Pay for Work of Equal Value' (1981) 23 *Journal of Industrial Relations* 466; Whelan, D., 'Women and the Arbitration System' (1979) 4 *Journal of Australian Political Economy* 54.

[18] In January 1990, 83.7% of part-time workers were women: National Women's Consultative Council/Labour Research Centre, *Pay Equity for Women in Australia* (1990) 17.

[19] McCallum, Pittard and Smith 429.

[20] *Ibid.* 440.

[21] Boyle, C., 'Book Review' (1985) 63 *Canadian Bar Review* 427, 429.

pline. Thus in the field of labour law, books that centre on male workers contribute to the writing out and writing off of women workers. Students will internalize the masculinist paradigms employed by the books and will not be encouraged to ask 'woman questions' in their study or, later, in their practise of labour law.

Secondly, if the books do not have feminist writers, they will certainly have feminist readers among the students who are required to learn from them[22] and among the teachers who might wish to teach from them. The authors are thus failing to address a significant section of their potential audience by suggesting that gender issues are unimportant or of only marginal importance in labour law. The masculinist bias of the books may also diminish their androgogical[23] value. For example if a doctrinal point is made by means by a sexist illustration, some readers will only see the sexism and miss the point. This includes both readers who are offended by the sexism and readers who strongly endorse it.[24]

Thirdly, turning from student/teacher readers to practitioner readers, Christine Boyle has made the point that '[p]ractitioners whatever their feelings about feminism, have female clients who seek remedies too'.[25] Since women constitute a not negligible proportion of the labour force (40.7% in the year these books were published),[26] it is reasonable to assume that women constitute a not negligible proportion of the clients of labour lawyers. It is all very well for a practitioner to ascertain that a woman client is covered by a State rather than a federal award, or is not entitled to superannuation, or is an independent contractor rather than an employee (see below), but then what help do these books offer? By focussing on men's issues, they provide incomplete coverage and thereby sell short another group of readers.

Finally, although Macken, McCarry and Sappideen could not be accused of laying themselves open to feminist criticism, Creighton and Stewart and McCallum, Pittard and Smith do invite censure on this ground. McCallum, Pittard and Smith begin with an explicitly theoretical chapter, which contains nothing about women workers' different experiences or the differential impact of labour law upon men and women, despite the availability of feminist theoretical material.[27] Creighton and Stewart complain that there is little or no Australian 'alternative' writing on labour law (such as feminist or economic analysis) and that what feminist writing there is has mostly focussed on sex discrimination and

22 Frug, M. J., *op. cit.* n. 10, 1070-74. Frug considers the responses of a range of hypothetical readers — including a range of different feminist or 'woman-centred' readers — to various aspects of the casebook that is the subject of her analysis.

23 Pedagogy is the teaching of children; androgogy is the teaching of adults. Thanks to Marlene LeBrun for making this terminological point.

24 Frug, M. J., *op. cit.* n. 10, 1081.

25 Boyle, C., *op. cit.* n. 21, 434-435.

26 Australian Bureau of Statistics Cat. No. 6203.0 (1990). It has been pointed out that 'women's low labour-force participation rate does not mean that large numbers of women are not working; it means that women are not paid for their work': Purdy, J., 'Women, Work and Equality: The Commonwealth Legislation' (1989) 19 *University of Western Australia Law Review* 352, 353-4, citing Connell, R. W., *Gender and Power* (1987). See the discussion of paid and unpaid work, *infra*.

27 For example Conaghan, J., 'The Invisibility of Women in Labour Law: Gender-neutrality in Model-building' (1986) 14 *International Journal of the Sociology of Law* 377; Matthews, J. J., 'Deconstructing the Masculine Universe: The Case of Women's Work' in Women and Labour Publications Collective, *All Her Labours, One: Working it Out* (1984).

equal pay rather than attempting a wide-ranging analysis of the absence of women from labour law.[28] Yet the text barely gives credence even to the feminist writing on sex discrimination and equal pay and some of the major feminist work taking a wider perspective is missing from the bibliography.[29]

WHAT'S WRONG WITH THE MALE PARADIGM?

Examples have already been given of some of the ways in which women's work experience is different from men's, as a consequence of which, it is argued, writing about male employment is not the same as writing about employment. The empirical evidence that women's work experience is *in general* different from men's comes from two sources. First, there is the evidence of workforce segregation. Australia has one of the most highly sex-segregated workforces in the Western world, with the great majority of women workers working in a few, female-dominated occupations.[30] In other words, women mostly do different jobs from men. This has several implications, particularly in relation to the collective aspects of labour law. Second, there is the issue of women's reproductive capacity and the domestic gender division of labour that has been erected upon it. Women do the vast bulk of unpaid work in the family;[31] consequently women and men experience different relationships between work inside and outside the home. This has implications particularly in relation to the individual employment aspects of labour law. The two are related, of course, since female-dominated occupations tend to involve 'domestic'-type skills and/or significant components of service to others.

None of this is obscure, esoteric or startlingly new. Hence it is remarkable that eight authors purporting to be on top of their field could remain so oblivious. A quick check of the indexes of the three books[32] revealed no entries for (workforce or labour market) segregation, no entries for protective legislation,[33]

28 Creighton and Stewart 1-2 and n. 6 therein.

29 In particular Laura Bennett's articles: 'The Construction of Skill: Craft Unions, Women Workers and the Conciliation and Arbitration Court' (1984) 2 *Law in Context* 118 and 'Job Classification and Women Workers: Institutional Practices, Technological Change and the Conciliation and Arbitration System 1907-72' (1986) 51 *Labour History* 11. Also O'Donnell, C. and Hall, P., *Getting Equal: Labour Market Regulation of Women's Work* (1988).

30 In 1985, 82% of women worked in female-dominated occupations — Australian Bureau of Statistics Cat. No. 6101.0, cited in National Women's Consultative Council/Labour Research Centre, *op. cit.* n. 18, 23. See also Power, M., 'Woman's Work is Never Done — By Men: A Socio-Economic Model of Sex-Typing in Occupations' (1975) 17 *Journal of Industrial Relations* 225; Mumford, K., *Women Working: Economics and Reality* (1989).

31 Several empirical studies have found ample evidence of this. See, for example, Baxter, J. and Gibson, D. with Lynch-Blosse, M., *Double Take: The Links Between Paid and Unpaid Work* (1990); Bittman, M., *Juggling Time: How Australian Families Use Time* (1991).

32 The following remarks must be qualified by the observation that only Creighton and Stewart has anything like an adequate index. Macken, McCarry and Sappideen's index is little more than a rearrangement of the Table of Contents, while McCallum, Pittard and Smith's index is also less than totally helpful.

33 Legislation barring women from certain workplaces, such as underground mines or lead processing areas, or from performing certain tasks such as manual weight lifting, so as to protect the 'weaker' sex, and to safeguard their childbearing capacities. Protective legislation has been and continues to be a significant issue in the debate over equal rights for women workers. See, for example, Bacchi, C., *Same Difference: Feminism and Sexual Difference* (1990). The exclusion of women from the lead industry has been a contentious issue for some time in Australia, with litigation over the granting and continuation of exemptions from sex discrimination legislation and National

and no entries for part-time work. Only Creighton and Stewart had an entry for maternity or parental leave; and only Macken, McCarry and Sappideen had (as part of a much larger entry on Discrimination) an entry for sexual harassment — which might be described as the quintessential occupational health and safety issue for women workers.[34] Only McCallum, Pittard and Smith had entries for equal pay, or, indeed, for female or women workers (although Macken, McCarry and Sappideen did have an entry for taxi drivers). Of course there were no entries for male workers, as the assumption implicit in each book (and in labour law in general) is that workers *are* male.

Exclusive reference to the male paradigm means that women's experience is ignored. Hence the information upon which rules are based excludes women, which in turn means that the rules construct men as their subjects and women as 'other', and may materially disadvantage women. But this experience of disadvantage will be considered unimportant and can continue to be ignored. And so on . . .

Where Women and Men are in the Market

Workforce segregation helps to account for the pattern noted earlier of differential State/federal award coverage between men and women workers. Women's work tends to be subject to regulation by the State industrial relations systems rather than by the federal system, yet the State systems are given short shrift by both Creighton and Stewart and McCallum, Pittard and Smith. The latter justify their concentration on the federal system by reference to the fact that although more workers are covered by State than by federal awards, a 'significant' portion of the labour force, including large-scale manufacturing, transport, electricity, gas and petroleum, post and telecommunications, and the Australian Public Service and statutory authorities, come under federal awards.[35] The 'significance' of these industry groupings is apparently self-evident. They are all infrastructural, therefore the relevant unions have a considerable amount of industrial leverage, and (not by coincidence) they are mostly male-dominated. Creighton and Stewart are equally attracted to industrial muscle: the 'dominance' of the federal system is partially explained by the fact that it is 'more likely to attract the parties with most power and influence in shaping the labour relations process'.[36]

Occupational Health and Safety Commission consultations directed towards establishing new standards in the industry. See *In the matter of an application by the Broken Hill Associated Smelters Pty Ltd* (1987) E.O.C. 92-210 (South Australian Equal Opportunity Tribunal); *Re application for an exemption by Broken Hill Associated Smelters Pty Ltd* (1988) E.O.C. 92-235 (Human Rights and Equal Opportunity Commission); *The Broken Hill Associated Smelters Pty Ltd v. the Human Rights and Equal Opportunity Commission* (1990) E.O.C. 92-302 (Commonwealth A.A.T.); Human Rights and Equal Opportunity Commission, *Discrimination Against Women in the Lead Industry* (Occasional Papers from the Sex Discrimination Commissioner, No. 5) (1990). See also Kenney, S.J., 'Reproductive Hazards in the Workplace: The Law and Sexual Difference' (1986) 14 *International Journal of the Sociology of Law* 393. Creighton and Stewart do mention protective provisions in their chapter on discrimination (251), despite its absence from the index.

[34] See, in particular, MacKinnon, C., *Sexual Harassment of Working Women* (1979).

[35] McCallum, Pittard and Smith 303.

[36] Creighton and Stewart 44.

The federal system also dominates by providing leadership to the States. Standards set at federal level usually flow on to the various State systems (interestingly, on the issue of equal pay for women workers, the flow went in the opposite direction).[37] One unacknowledged consequence of this is that standards derived from and appropriate to male workers are then picked up and applied, sometimes unreflectively, to women workers. For example the 'benchmark' awards used by the A.C.T.U. in its blueprint for award restructuring were primarily male awards: metals, transport, building, storemen and packers, with clerks being the only (partial) exception. Some award restructuring strategies have proved disastrous for women workers. Broadbanding, for example, is designed to rationalize classifications in awards where minute distinctions between classifications had often reached ridiculous levels. However, broadbanding in the Western Australian public service had the effect of relegating the great majority of women to the bottom level of the service, on the basis of assumptions about the unskilled or unstrategic nature of their work.[38] In textiles, clothing and footwear (T.C.F.), the problem was not so much the proliferation of classifications but the dearth of classifications for women's work,[39] with, for example, women sewing anything from work singlets to intricate wedding dresses being classified and paid the same. Thus award restructuring in T.C.F. would more appropriately involve unpacking rather than compressing classifications.[40] Another example is the current vogue issue of superannuation, which is actually of questionable value to women workers, given that contributions on behalf of women are made from a wages base that is, on average, lower than men's, and that most superannuation funds discriminate against women in their terms and benefits.[41]

[37] *Equal Pay Case 1969* (1969) 127 C.A.R. 1142; *National Wage and Equal Pay Cases* (1972) 147 C.A.R. 172. In each case the Australian Conciliation and Arbitration Commission justified the granting of equal pay to women covered by federal awards by reference to the fact that the States had already legislated on the issue.

[38] Western Australia, Commissioner for Equal Opportunity, *Annual Report 1987-88* 34.

[39] Historically, women's work has not been recognized as skilled, hence awards might contain many classifications for men but only two for women: Adult Female and Junior Female. See in particular Bennett, L., 'The Construction of Skill', *op. cit.* n. 29. The point has also been well made by Eva Cox: 'I think basically what we are looking at is men in tiny, little bitty jobs which have all got separate names, and women are in these broad banded jobs which have a multiplicity of skills involved in them, many of which are not named in the work place.' Joint Seminar of the House of Representatives Standing Committee on Legal and Constitutional Affairs and the Women's Bureau of the Department of Employment, Education and Training, *Women and Employment* (22-23 May 1991) 41.

[34] Roxon, N., *Potential and Reality: Women Workers and the Structural Efficiency Principle* (Centre for Industrial Relations and Labour Studies Working Paper No. 56) (1991) 28. Laura Bennett has also drawn attention to the questionable comparison drawn, in the restructuring of a childcare workers' award, between directors of childcare centres — workers with 'managerial, administrative and educational functions' — and the Engineering Tradesperson Level 1 in the Metal Industry Award. Under the new childcare award, a director is worth a mere 145% of the base trades rate. 'Women, Exploitation and the Australian Child-Care Industry: Breaking the Vicious Circle' (1991) 33 *Journal of Industrial Relations* 20, 32.

[41] Anti-Discrimination Board, *Discrimination in Superannuation* (1978); New South Wales, Human Rights Commission, *Report No. 19: Superannuation and Insurance and the Sex Discrimination Act, Part 1 — Superannuation* (1986). The Sex Discrimination Act 1984 (Cth) has recently been amended to outlaw *some* (not all, only the most overt) forms of discrimination in the terms of superannuation funds. However when the provisions come into force, they will apply only to new funds set up after that date.

The male paradigm is also well in evidence in discussions of the role of unions. Creighton and Stewart declare that unions are necessary to represent employees in the industrial relations system,[42] but their history of unionism does not include the less than glorious history of union efforts on behalf of women workers. Unions in female-dominated industries have been weak, badly organized and patronizing (it has not been unknown for male union officials to side with employers in keeping 'the girls' under control); and unions in mixed-sex industries have often advanced the interests of their male members at the expense of their female members.[43] As Joanne Conaghan points out, 'the "two sides" of industry ... is a picture which does not include the majority of working women.'[44] Creighton and Stewart, however, do not admit the possibility that some employees may be un- or poorly represented by unions. Neither do they notice any of the conflicts between women's interests and union interests that have been catalysed by the advent of sex discrimination legislation.[45] Of course some unions have more recently sought to implement affirmative action measures for their women members, particularly by designating positions within union hierarchies for women. Neither Creighton and Stewart nor McCallum, Pittard and Smith refer to this trend, nor to what were then the leading cases on the question of whether union rules which establish women-only positions contravene anti-discrimination legislation.[46] Yet this is a matter with which an increasing number of unions are becoming concerned, particularly in the context of union amalgamations.[47]

All three books exhibit labour law's characteristic preoccupation with distinguishing between 'employees' and 'independent contractors'. Much case law and scholarly writing has been devoted to elaborating this distinction, which originated in the common law but has also been imported into Australian industrial regulatory systems, with the result that almost all statutory and award rights are available only to 'employees' (those working under a contract of employment/contract of service) and not to 'independent contractors' (those working under a 'contract for services'). Hence the orthodox view, unquestioned by these books, that labour law, in both its individual and collective aspects, is primarily concerned with 'employees'. Indeed Creighton and Stewart explain

42 Creighton and Stewart 60.

43 Hunter, R., *op. cit.* n. 16, 151-3.

44 Conaghan, J., *op. cit.* n. 27, 384.

45 For example in the leading Australian case on indirect discrimination, women workers found themselves lined up against both management and the union when they challenged a last-on, first-off redundancy policy (and won): *Australian Iron & Steel v. Banovic* (1989) 168 C.L.R. 165. Creighton and Stewart's discussion of redundancy, including the last on, first off criterion, contains no reference or even a footnote to this case.

46 *Re Australian Journalists Association, in the matter of an appeal* digested at (1988) E.O.C. 92-224 (Australian Conciliation and Arbitration Commission); *Re application for an exemption by the Australian Journalists Association* (1988) E.O.C. 92-236. (Human Rights Commission and Equal Opportunity Commission).

47 See, for example, *Municipal Officers Association of Australia and another; approval of submission of amalgamation to ballot* (1991) E.O.C. 92-344 (Australian Industrial Relations Commission); The Australian Teachers' Union has also recently had a rule change certified which guarantees 50% female representation on its Federal Council.

that labour law is about 'workers' (that is, employees); not those in business on their own account.[48]

The notion of 'those in business on their own account' has a nice ring of individual choice about it. It creates an image of people who have decided to opt out of the system for the freedom of 'being their own boss'. Unfortunately, the idea of choice (or freedom or control) could not be further from reality for many women whose work is structured in such a way that they are classified as 'independent contractors', and hence deprived of award protection. Macken, McCarry and Sappideen, in their brief discussion of independent contractors,[49] convey no real sense of the disadvantages of not being an employee. Their paradigm case of independent contractors is transport workers. Creighton and Stewart do acknowledge that employers might arrange work in such a way as to avoid any obligation to provide award conditions,[50] but this is not connected to their later discussion of the long-standing practice of outwork in the clothing industry.

It is outworkers — described by Creighton and Stewart as '(commonly female and from migrant backgrounds)'[51] — who have for years been exploited by virtue of their non-employee status.[52] Yet recent steps to end this notorious situation are again relegated to a footnote, without explanation, in Creighton and Stewart.[53] McCallum, Pittard and Smith do mention the 1987 attempt to extend award coverage to outworkers by varying the definition of 'employee' in the clothing award.[54] This case is said to show the former Arbitration Commission taking 'a refreshing approach to the plight of homeworkers in the textile industry',[55] although it surely took more than the Arbitration Commission to move on the issue. Less 'refreshing' is a recent decision by the Australian Industrial Relations Commission that family day-care workers are not 'employees' entitled to award coverage. Rather, they are independent contractors, who may continue to provide childcare in their homes for as little as $1.40 per

48 Creighton and Stewart 95. So employee-focused are Macken, McCarry and Sappideen that they barely notice that the definition of 'employee' in the Sex Discrimination Act 1984 (Cth) eschews the narrow common law notion and actually includes independent contractors in its ambit (519-20, 598-9). Creighton and Stewart do note that anti-discrimination legislation covers independent contractors, partners and other non-employees (259), but do not go on and draw the obvious comparison with the rest of labour law, or even cross-reference the point back to their extensive discussion of 'employees'.

49 Macken, McCarry and Sappideen 25-28, 31-32.

50 Creighton and Stewart 83-4.

51 *Ibid.* 104.

52 This is not to say that in any individual case an outworker would necessarily be categorized as an independent contractor rather than, say, as a casual employee, especially since the High Court case of *Stevens v. Brodribb Sawmilling Co. Pty Ltd* (1986) 160 C.L.R. 16 mandated the consideration of a variety of factors or indicia, apart from control, in determining the nature of the legal relationship. Outworkers have been held to be employees in English cases such as *Airfix Footwear Ltd v. Cope* [1978] I.C.R. 1210 and *Nethermere (St Neots) Ltd v. Gardiner* [1984] I.C.R. 612. See also Owens, R., 'Employment Law and Atypical Work Relationships' (August 1991) 13 *Law Society Bulletin* 6, 7. The real point is, however, that for many years the general view in the Australian industrial relations system was that outworkers were not employees. It is this general perception, rather than the realities of any particular case, which has had widespread material effects.

53 Creighton and Stewart, 104, n. 54.

54 *Re Clothing Trades Award 1982* (1987) 19 I.R. 416.

55 McCallum, Pittard and Smith 269-70. The homeworkers referred to are in fact in the clothing industry, not the textile industry.

hour for each child, without holiday pay, superannuation, or sick leave.[56]

The independent contractors in whom Creighton and Stewart are more interested are home-based clerical workers, whose numbers are predicted to rise with the development of computer technology.[57] Slaving over a computer is perhaps more glamourous than slaving over a sewing machine, although the potential for exploitation is equally obvious. The pattern that emerges from these three examples — outworkers, family day-care workers and independent clerical workers — however, is that there is a link between classification as an independent contractor and the performance of varieties of 'women's work' in 'the home'. What does this tell us about the operation of labour law that the books under review do not?

Where Women and Men are in the Family

The liberal dichotomy between public and private spheres poses the domain of capitalist enterprise as public and the domain of the family (the home) as private. Within liberal legalism the 'public' is the area of legal regulation while the 'private' is the area that is not regulated — or where the law is very reluctant to 'intervene'.[58] Since legal regulation of the labour market concerns itself with employees, it is a hallmark of the home, as an area free from regulation, that it does not contain employees. One manifestation of this is that home-based paid workers are often legally classified as independent contractors. Likewise, unpaid workers in the home are also legally classified as non-employees.

The latter classification is also a product of contract law. An employee is someone who performs work pursuant to a contract (of employment). Therefore, someone who performs work without a contract is not an employee. Two crucial items are needed in order for a contract of employment to exist. One is 'consideration' — that is, money in exchange for services. Unpaid ('voluntary') workers clearly do not meet this requirement; thus they do not have contracts and therefore are not employees and consequently, as Creighton and Stewart note, they are excluded from the ambit of labour law.[59] The second requirement is an 'intention to create legal relations'. The law applies a presumption (stemming from its reluctance to 'interfere' in the family) that such an intention is lacking in relation to work arrangements in domestic contexts, such as 'housework' and childcare.[60] Thus again there will be no contract and hence no employee. Macken, McCarry and Sappideen, for example, quickly dispose of 'work ...

56 *Re Municipal Association of Victoria* (1991) 33 A.I.L.R. para. 163. Laura Bennett comments: 'The application of the common law distinction between types of contracts of employment to home-based child-care workers is an example of the way doctrinal distinctions can be used to perpetuate the exploitation of women.' She also notes that the extended definition of 'employee' used in the clothing award to cover outworkers would still exclude family day-care workers. 'Women, Exploitation and the Australian Child-Care Industry', *op. cit.* n. 40, 26, 27.

57 Creighton and Stewart 105. A federal government report on this 'sunrise' industry is Dawson, W. and Turner, J., *When She Goes to Work, She Stays At Home: Women, New Technology and Home-Based Work* (Women's Research and Employment Initiatives Program, Department of Employment, Education and Training) (1990).

58 See O'Donovan, K., *Sexual Divisions in Law* (1985).

59 Creighton and Stewart 99.

60 *Ibid.*

done pursuant to obligations arising from say, a person's position in a family.'[61] That this work is non-contractual and hence not the concern of employment law is an apparently obvious and unproblematic fact.

It is worth dwelling further, however, on the nature of 'obligations arising from a person's position in a family.' Stripped of its misleading gender neutrality, this phrase, employing concepts of status and obligation, begins to describe the place of women in the private sphere. Feminist theorists have made the point that non-regulation of the private sphere really means freedom for men to exercise untrammelled patriarchal power in that domain, to extract domestic and reproductive labour from women (the family as the site of women's oppression).[62] Indeed Carole Pateman has argued that while men's market work is the subject of the employment contract, women's domestic labour is the subject of the marriage contract, the work of a housewife being that of 'a sexually subject being who lacks jurisdiction over the property in her person, which includes labour power.'[63]

Macken, McCarry and Sappideen assert that labour law 'recognizes' and applies different rules to different kinds of relationships, such as employer/employee, employer/independent contractor, and familial,[64] as if these relationships had some pre- or extra-legal existence. In truth, labour law helps to construct these relationships, and to perpetuate the public/private dichotomy.[65]

One particular effect of this has been a perception that unpaid work done by women in the private sphere has no value and does not count.[66] Creighton and Stewart, for example, speak of 'labour' being bought and sold in capitalism,[67] with the implication that something that is not bought and sold is not labour.[68] Similarly, McCallum, Pittard and Smith declare that the 'contract of employment has evolved as the dominant legal relationship regulating the performance of work in our society'.[69] They do not need to specify that they are referring to *paid* work, because only paid work is recognized as 'work'. Such attitudes reinforce Rosemary Owens' argument that labour law's non-recognition of work relationships in the home does not just render women invisible, it actively subordinates women.[70] When labour law texts reproduce rather than question the assumptions

61 Macken, McCarry and Sappideen 31.

62 Thus by its failure to intervene, the law does have a regulatory effect on women's lives, operating to maintain their subordinate position: Conaghan, J., *op. cit.* n. 27, 379, 385.

63 Pateman, C., *The Sexual Contract* (1988) 135-6. Interestingly, each of the three books makes a point of mentioning the derivation of modern employment law from master/servant law, which was originally part of the (private sphere) law of domestic relations: Creighton and Stewart 10; Macken, McCarry and Sappideen 123; McCallum, Pittard and Smith 28. None of them, however, explains the significance of this history, or offers an adequate account of labour law's shift from private to public.

64 Macken, McCarry and Sappideen 29.

65 Conaghan, J., *op. cit.* n. 27, 388-9.

66 Owens, R., 'Casual Labour: Women's Work and Men's Law', paper delivered at 45th Annual Australasian Law Teachers' Association Conference, A.N.U., Canberra, 27-30 September 1990, 2. Probably the best-known analysis of this phenomenon is Waring, M., *Counting for Nothing: What Men Value and What Women are Worth* (1988).

67 Creighton and Stewart 2.

68 Carole Pateman makes the point that housewives cannot sell their labour power: *op. cit.* n. 63, 135.

69 McCallum, Pittard and Smith 32.

70 'Casual Labour', *op. cit.* n. 66, 2.

about paid/unpaid work, employees/non-employees, and the public/private dichotomy that underpin the discipline, they help to further entrench those assumptions and contribute to the continuing subordination of women as domestic workers.

How Women and Men are in the Market

Because of their reproductive role and domestic responsibilities, women participate in the paid labour market in different ways from men. Women have periods out of the workforce, work part-time or casually.[71] The masculine subject of labour law, however, is not just an employee, but a full-time employee with a permanent attachment to the market. Consequently, non-full-time/full-year work is termed 'atypical' work and afforded relatively little space in labour law books, even though 'atypical' jobs are increasing dramatically as women's labour force participation increases.[72] '[T]he full-time continuous employee still constitutes the central paradigm around which other types of workers plead for recognition.'[73]

Creighton and Stewart do recognize that the 'modern' trend towards 'atypical' or 'marginal' work arrangements is 'gradually displacing many of the traditional assumptions on which the common law conception of employment was founded.'[74] But male labour lawyers' dawning attention to casual and agency work in particular seems to have been prompted not by the fact that more and more women are working this way, but by the fact that some men are beginning to do so. The recent *Troubleshooters* case,[75] in which agency arrangements were used to circumvent award requirements, had a considerable symbolic impact. This is the illustration of casual/agency work that Creighton and Stewart give, disregarding the fact that nurses and secretaries have been working through agencies for decades.

Perhaps if more men become casual or 'atypical' workers, employment protections will begin to be extended to such workers. At present, many award benefits and standard provisions are available only to full-time continuously employed (real) workers, which means the chief beneficiaries are male workers. Those who may be excluded from certain provisions (temporaries, other casual workers, part-timers) are also the workers who may in fact be most in need of protection as they are the lowest paid and the least organized.[76] Only Creighton and Stewart acknowledge that casual workers are denied benefits, although they suggest that loadings on casual wages adequately make up for the loss of sick pay, annual leave and so on.[77] They do not mention that the benefits denied may include the award clauses arising out of the A.C.T.U.'s *Termination, Change*

71 Of course, part-time and casual work for women 'both reinforce and perpetuate the sexual division of labour' in familial ideology: *ibid.* 4.
72 *Ibid.* 2-3.
73 Conaghan, J., *op. cit.* n. 27, 382.
74 Creighton and Stewart 104.
75 *Building Workers' Industrial Union of Australia v. Odco Pty Ltd* (1991) 29 F.C.R. 104.
76 Conaghan, J., *op. cit.* n. 27, 382.
77 Creighton and Stewart 100.

and Redundancy Case.[78] Nor do they consider the gendered impact of such restrictions.

On the issue of termination, Macken, McCarry and Sappideen state that dismissal can be disastrous because 'people' build their lives around their jobs.[79] This is hardly true of the (primarily female) people who are required to juggle paid work and domestic responsibilities. Yet at the same time one would not wish to deny their attachment to the labour market. Often when it comes to 'downsizing' the workforce, it is part-time[80] and/or casual workers who are the first to go. Casual workers in theory have no on-going relationship with their employer, merely an end-dated contract which is simply not renewed. Of course this legal arrangement precludes any entitlement to a redundancy package (regardless of how long the 'casual' relationship has in fact subsisted). Redundancy entitlements for 'normal' workers may indeed serve to increase the vulnerability of 'other' workers. But part-timers and casuals are also shed first because it is assumed that the loss of a job will mean less to them than to a full-time worker. In other words, it is only those who do build their lives around their jobs who are recognized as having a strong interest in keeping their jobs.

Similarly, those who have built their lives around their jobs, and have long periods of continuous service, are rewarded by being able to gain the maximum benefit from redundancy provisions if they do lose their jobs, or by becoming eligible for long service leave.[81] Again, these provisions have an adverse impact on women workers who are more likely to have interrupted (paid) working lives, and again such impacts do not seem to be acknowledged in the books or in the system.

Perhaps the best example of this prevalent form of gender blindness is the fact that federal award maternity leave provisions require 12 months continuous service and do not extend to casuals. This means that across the board, men would find it easier than women to qualify for maternity leave![82] Research on this issue shows that a significant proportion of working women are not eligible for maternity leave.[83] One could argue that the rules were framed in ignorance of the realities of women's employment patterns, or more cynically, that those involved were well aware of the realities of women's employment patterns and imposed the familiar male standard specifically in order to limit the availability of maternity leave.[84] None of the books, however, suggest that maternity leave is at

[78] (1984) 8 I.R. 34; Supplementary decision, 9 I.R. 115.

[79] Macken, McCarry and Sappideen 252.

[80] Interestingly, in the current recession, part-time jobs, and women's jobs in general, have not suffered disproportionately. However, women who do lose their jobs are more likely to become 'discouraged' — that is, not seek to re-enter the labour force. Neales, S., 'Female Jobless Figures Reveal Disturbing Trend', *Australian Financial Review* 16 April 1991.

[81] See for example Creighton and Stewart 141, 172.

[82] Owens, R., 'Casual Labour', *op. cit.* n. 66, 24.

[83] *Ibid.* 25. According to Glezer, *Maternity Leave in Australia: Employee and Employer Experiences: Report of a Survey* (1988), 25% of all women wage and salary earners would be ineligible.

[84] Laura Bennett has made a similar argument in relation to the federal Commission's grant of equal pay for women — the way in which equal pay had to be claimed (by union applications to amend each award) minimized its impact on the economy: 'Equal Pay and Comparable Worth and the Australian Conciliation and Arbitration Commission', *op. cit.* n. 17, 533.

all problematic. Moreover, while Creighton and Stewart note the general availability of up to 12 months maternity leave, they do not mention that most or all of it would be unpaid, though they do hasten to assure readers that any 'short period' of paternity leave available to men would be paid.[85] It would also be interesting to know whether the States make any better provisions for maternity leave than do federal awards, but no such information is given.

McCallum, Pittard and Smith include in an Appendix an edited version of a 'typical' federal award. It is an excellent idea to include this, although one may question the criteria used to determine typicality, as it is hard to imagine a more masculine area than that covered by the award chosen — the Vehicle Industry — Repair, Services and Retail award (how many female motor mechanics and car salespersons can you think of?). The award is actually a fascinating blend of sexism, protective provisions and indirectly discriminatory criteria, providing a map of the ways in which women workers are institutionally subordinated.

The language of the award conveys an interesting variety of messages. People are generally referred to as 'he', although there have been some superficial attempts at gender inclusiveness, with the obviously newer clauses using 'he/she'. 'Maintenance man' and 'vehicle salesman', though, are unchanged. It is clear, however, that the award is designed to apply not just to men but in a sex segregated context, as the short-term replacement employees who may be hired to substitute for a person on maternity leave are referred to as 'her'[86] — that is, a woman's job is expected to be filled by another woman.

Protection appears in the restrictions on junior females (who are permitted to be employed in areas covered by the award, but not on such work as is declared by a special Board of Reference to be unsuitable for junior female employees);[87] in the maternity leave provisions (an employer may require an employee to commence maternity leave at any time within six weeks of the expected date of birth, and the woman must take six weeks leave after the birth);[88] and in the clause intriguingly labelled 'seats for females' (appearing in the award's table of contents, but not reproduced). Although such clauses may have had (at least partly) chivalrous or even feminist motivations in an earlier era, they now operate to discourage the employment of women.

Part-time work under the award may not be less than 32 hours per week and is not to be done by salesmen.[89] Such restrictive provisions were generally inserted to protect men's working conditions (a breadwinner needs full time work in order to win enough bread), but again may have the effect of excluding women whose preference may be for part-time work. Rosemary Owens has also pointed out that the lack of provision for regular part-time work in awards means that employment is forced into the categories of full-time or casual, with again casuals not being afforded all award benefits.[90] Extra rates are awarded for those working in

[85] Creighton and Stewart 142. In fact, contrary to this assertion, the A.C.T.U.'s parental leave test case resulted in the granting only of unpaid paternity leave: *Parental Leave Case* (1990) 36 I.R. 1.
[86] McCallum, Pittard and Smith, Appendix 682 ff., C1.47 (k).
[87] *Ibid.* C1.13(d)(vi)(1).
[88] *Ibid.* C1.47(b).
[89] *Ibid.* C1.6A(a).
[90] 'Casual Labour'. *op. cit.* n. 66, 12.

confined spaces or doing dirty work.[91] Such work (for example, inside or underneath vehicles) is characteristically done by men but not by women. Extra rates are not prescribed for any of the work that women do. Finally, while maternity leave does not break a woman's continuity of service, it is not counted as part of service for any other purpose.[92] This means that women taking maternity leave are penalized in terms of seniority, eligibility for long service leave, and when calculating redundancy payments.

One of the aims of award restructuring is the removal of discriminatory provisions from awards.[93] The Vehicle Industry — Repair, Services and Retail award is plainly un-restructured. Unfortunately, the lack of accompanying commentary from McCallum, Pittard and Smith means that practitioners are offered no suggestions as to what needs to be done in this respect.

Overall, the texts under review confirm Joanne Conaghan's conclusions that

> labour law is a world made up of full-time male breadwinners and the legal rules reflect this conception of the worker. Moreover the models labour lawyers employ to analyse and evaluate the rules are gender-blind in that they fail to recognize that for men and women experiences of work and the workplace may be very different ... [L]abour law, by rendering women invisible legitimates patriarchal conceptions of work and workers.[94]

Conaghan further points out that while 'women are affected by labour law generally', they are only made visible in a few recognized — and marginalized — 'women's' areas such as equal pay and sex discrimination law.[95] Again, the three books fit rather than break this mould.

TOKENISM AND MARGINALITY

The marginal status of the equal pay issue in Creighton and Stewart has already been adverted to.[96] The point is further reinforced by their eulogy to the basic wage as the great achievement of the Australian industrial relations system,[97] despite the fact that the uniform minimum wage was strictly men-only until 1974. Should women join the celebrations?

McCallum, Pittard and Smith deal with the un/equal pay issue in a section titled 'Aborigines, Women, Equal Pay and Comparable Worth' — to which a total of six pages (out of 696) are devoted. Such tokenism invites questioning, especially since the brief space allowed inevitably renders the analysis oversimplified and unsatisfactory. A particular problem is the way in which 'women and Aborigines' are grouped together, as if their treatment by the system and the reasons for it were in some way comparable. Thus it is said that after the *Harvester* judgment, the basic wage was payable to European men, and those who did not fit this paradigm, and who therefore did not receive the basic wage,

91 McCallum, Pittard and Smith, Appendix 682 ff. *op. cit.* C1.17(a), (b).
92 *Ibid.* C1.47(h).
93 *National Wage Case August 1988* (1988) 25 I.R. 170, 175. Curiously, Creighton and Stewart describe restructuring as designed to increase industry efficiency (277-8); they do not see it as involving any potential benefits for workers.
94 Conaghan J., *op. cit.* n. 27, 377.
95 *Ibid.*
96 *Supra* p. 000.
97 Creighton and Stewart 46.

were women and Aborigines. It is inaccurate to try to fit Aborigines into this framework, however, as their non-receipt of the basic wage had nothing to do with *Harvester* or the ideology of the male breadwinner. Aboriginal employment (and the concern does seem to be with *male* Aboriginal employment) involved a different set of issues — to do with colonisation rather than patriarchy — which are not examined.

In relation to women, the explanation of the move to (formally) equal pay is flawed by the absence of any analysis of segregation. It is said that employers were at first 'entitled' to pay women less than 'their male counterparts',[98] which is misleading, given that a large part of the source of pay inequity was the undervaluation of women's work precisely because they had no male counterparts.[99] The minimal impact of the 1969 *Equal Pay Case*, which prescribed equal pay for equal work, and the need for a second *Equal Pay Case* (in 1972) to establish the principle of equal pay for work of equal value, only make sense if we know about the demographics of the labour market.[100] The sex-typing of occupations is cited as the major reason for women's persistently lower average earnings than men in the post-1972 period,[101] but again the picture is rather simplified, providing little basis for the design of future strategies to reduce the male/female earnings gap.[102]

Macken, McCarry and Sappideen do not discuss (equal) pay (or maternity leave), as their focus on the common law bargain between employer and employee precludes any detailed concern with the actual substance of awards.

Anti-discrimination legislation makes an appearance, to varying degrees, in all three books. Although there is only a small anti-discrimination literature in Australia to date,[103] these texts add little to it. McCallum, Pittard and Smith do

98 McCallum, Pittard and Smith 466.

99 Laura Bennett has also insisted that the Arbitration Court did not 'entitle' employers to pay particular rates, but rather set and justified award wages at the rate(s) already existing in the market: 'Legal Intervention and the Female Workforce: The Australian Conciliation and Arbitration Court 1907-1921' (1984) 12 *International Journal of the Sociology of Law* 23.

100 Only the 18% of women workers who were doing identical work to men were able to benefit from the 1969 case. The 1972 principle, in permitting broader comparisons across classifications, had the potential to transcend the straightjacket of segregation. In fact there was a third equal pay case, the *National Wage Case, 1974* (1974) 157 C.A.R. 293, which finally entitled women to the minimum wage, abandoning any family-support connotations that wage might have had. This is not mentioned at all in McCallum, Pittard and Smith.

101 McCallum, Pittard and Smith 467.

102 The other two factors said to explain the pattern of women's lower average earnings are that women have less educational opportunities and therefore less career opportunities than men, and women's working lives are interrupted to have children. It is not inevitable, however, that interruptions to women's working lives to have children should depress their earnings. Moreover, women's supposed lack of education does not account for the evidence that men are rewarded more highly in the market than are women with the same educational levels: see for example Mumford, K., *op. cit.* n. 30, 22-3, 59-60, 71, 74. For more sophisticated accounts of the male/female earnings gap, see A.C.T.U., *op. cit.* n. 17, National Women's Consultative Council/Labour Research Centre, *op. cit.* n. 18.

103 See for example Astor, H. and Nothdurft, J., 'Anti-Discrimination Law and Physical Disability: A Leap in the Dark' (1986) 11 *Legal Service Bulletin* 250; Nothdurft, J. and Astor, H., 'Laughing in the Dark — Anti-Discrimination Law and Physical Disability in New South Wales' (1986) 28 *Journal of Industrial Relations* 336; Astor, H., 'Discrimination in Employment on the Ground of Physical Impairment' (1988) 1 *Australian Journal of Labour Law* 79; Astor, H., 'Anti-Discrimination Legislation and Physical Disability: The Lessons of Experience' (1990) 64 *Australian Law Journal* 113; Bailey, P. H., *Human Rights: Australia in an International Context* (1990); Davis, C.

not in fact set out to discuss anti-discrimination law, but they do make a passing reference to sexual harassment.[104] Unfortunately, the reference is extremely cursory, the relevant legislation is not properly cited (there is simply a mention of 'the Equal Opportunity Act'), and there is no discussion of either the legislation or the issue of sexual harassment itself. The effect is to deliver a message that sexual harassment is a marginal issue in workplace relations: something that is acknowledged to occur, but the remedy for which is not worth considering.

Creighton and Stewart's chapter on discrimination and equal opportunity manages to leave out sexual harassment altogether, even though it is arguably the greatest success story of anti-discrimination legislation. Some of their other material is incomplete.[105] At the theoretical level, they make the valid point that negative regulation (making certain activities unlawful rather than imposing positive duties) can be at best only a partial response to the problems of disadvantaged groups in the labour market.[106] But they omit to suggest other possible responses. Perhaps the best indication of the marginality of this area to Creighton and Stewart and to Macken, McCarry and Sappideen is that they both thank another person for reading their discrimination chapters (although they claim sole responsibility for the rest of their respective books). Moreover, they both thank the same person![107]

Macken, McCarry and Sappideen devote their last three chapters (nearly 100 pages) to anti-discrimination legislation, thus adding considerably to the size, weight and presumably price of the book. It might seem strange, then, to describe the product as marginal or tokenistic. The discrimination chapters in Macken, McCarry and Sappideen are, however, quite unlike the rest of the text. This appears to be a product not of someone else having read them, but of the absence of a large body of case law from which settled principles can be extracted. No other aspect of the book receives the same analytical treatment as do the discrimination chapters. The tone becomes argumentative rather than

and Nieuwenhuysen, J., *Equal Work Opportunity in Australia: Anti-Discrimination Laws and the Wider Issues* (Committee for Economic Development of Australia, Monograph No. M75, 1984); Hunter, R., 'Anti-Discrimination', in *Lawyers' Practice Manual (Victoria)* (1991); Law Reform Commission of Victoria, *Report No. 36: Review of the Equal Opportunity Act* (1990); Mathews, Hon. Justice J., 'Protection of Minorities and Equal Opportunities' (1988) 11(2) *University of New South Wales Law Journal* 1; Ronalds, C., *Affirmative Action and Sex Discrimination: A Handbook on Legal Rights for Women* (2nd ed. 1991); Sadurski, W., 'Equality Before the Law: A Conceptual Analysis' (1986) 60 *Australian Law Journal* 131; Sadurski, W., *'Gerhardy v. Brown* v. the Concept of Discrimination: Reflections on a Landmark Case that Wasn't' (1986) 11 *Sydney Law Review* 5; C.C.H., *Australia and New Zealand Equal Opportunity Law and Practice* (looseleaf service, 1991). For critical appraisals see Purdy, J., *op. cit.* n. 26; Thornton, M., *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990).

104 McCallum, Pittard and Smith 16.

105 For example they do not mention that the Anti-Discrimination Act 1977 (N.S.W.) and the Equal Opportunity Act 1984 (Vic.) cover discrimination on the ground of pregnancy (252). See Anti-Discrimination Act 1977 (N.S.W.) s. 24(1A); *Wardley v. Ansett Transport Industries (Operations) Pty Ltd* (1984) E.O.C. 92-002; and now *Marshall v. Marshall White & Co. Pty Ltd* (1990) E.O.C. 92-304, *Smith v. Frankl* (1991) E.O.C. 92-362. They also claim that the concept of direct discrimination equates with intentional discrimination — quoting 'Creighton, 1979' as authority (257)! The High Court thought otherwise in *Australian Iron & Steel v. Banovic* (1989) 168 C.L.R. 165 at 176 (per Deane and Gaudron JJ), 184 (per Dawson J); as did the House of Lords in *Birmingham City Council; ex parte Equal Opportunities Commission* [1989] A.C. 1155.

106 Creighton and Stewart 251.

107 Criticisms of these chapters are in no way intended to implicate that person.

neutrally expository. Regrettably, much of the argument is repetitive and devoted to abstract reasoning rather than empirical reality. For example, it is stressed that the Affirmative Action (Equal Employment Opportunity for Women) Act 1986 (Cth) will not be a valid implementation of Article 4 of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women,[108] which permits temporary special measures aimed at accelerating *de facto* equality between men and women, 'once equality is achieved'.[109] We would all like to live in that utopia. This is hardly a pressing issue at present, however, and the point betrays little understanding of the egregious and embedded nature of sex discrimination in employment.

On the other hand, the very real problem of the unenforceability of Human Rights and Equal Opportunity Commission determinations[110] is not acknowledged. Indeed the suggested solution to the perceived constitutional problems arising from the overlap of federal and State sex and race discrimination laws is for the States to repeal their laws.[111] These constitutional problems, however, have shown no sign of arising in practice. On the other hand, the practical disadvantages of the proposed 'solution' would be the loss of enforceable orders currently available from State tribunals and possibly the loss to State government employees of protection against sex discrimination.[112]

The constitutional discussion is followed by a treatment of the substantive law of employment discrimination that is unambiguously addressed to employers and their legal representatives. One unfortunate consequence is that the authors convey no sense of the *harm* that anti-discrimination laws are designed to remedy. There is a brief and rather stilted discussion of legislative policy taken from judgments of the New South Wales Supreme Court.[113] In this instance, though, it might have been useful to look beyond judicial pronouncements to other primary and secondary source material on discrimination theory and experiences of discrimination. A series of legal propositions does not help readers to understand what discrimination *is*.

Lack of comprehension may be compounded by analyses such as that of the English case, *Skyrail Oceanic v. Coleman*.[114] This was a case in which a woman who worked for one travel agency married a man who worked for a rival agency. The heads of the two agencies conferred and decided that the best way to deal

108 The 'external affairs' power basis of the Act.

109 Macken, McCarry and Sappideen 527.

110 The Human Rights and Equal Opportunity Commission, as an administrative tribunal, can only make non-binding determinations, according to *Boilermakers* doctrine. If a complainant wishes to enforce a determination with which a respondent has failed to comply, she must seek an enforcement order in the Federal Court, which may insist upon a *de novo* hearing of the case: *Aldridge v. Booth* (1988) 80 A.L.R. 1, 8; *Maynard v. Neilson* digested at (1988) E.O.C. 92-226; *Hall and Ors v. Shieban Pty Ltd* (1989) E.O.C. 92-250, 77, 399.

111 Macken, McCarry and Sappideen 542. The constitutional arguments are largely reproduced from McCarry, G., 'Landmines Among the Landmarks: Constitutional Aspects of Anti-Discrimination Laws' (1989) 63 *Australian Law Journal* 327.

112 While the Racial Discrimination Act 1975 (Cth) does purport to bind the Crown in right of the States, the Sex Discrimination Act 1984 (Cth) does not. 'States' in the latter Act include the Northern Territory and Australian Capital Territory.

113 Macken, McCarry and Sappideen 544.

114 [1981] I.C.R. 864.

with what they saw as a potential security problem was to sack the woman, as the man was presumably the breadwinner. The woman's dismissal was held to constitute sex discrimination — that is, she was, by reason of her sex, treated less favourably than a man in the same circumstances. Macken, McCarry and Sappideen sum up the effect of the case thus:

> Where an existing employee marries an employee of a rival firm and so poses a real risk to the security of confidential information, the employer would be unwise to dismiss the wife on the assumption that it would be fairer to do so because the husband would be the primary breadwinner. Semble she could be dismissed, on due notice, simply because of the security problem, or perhaps if consultation with the other employer revealed that the husband was, *in fact*, the primary breadwinner. But the dismissal of a woman based on a generalized assumption of this kind, as distinct from the factual position in a particular case, can amount to impermissible discrimination.[115]

The anti-discrimination law expounded by Macken, McCarry and Sappideen is mostly English and New South Wales law.[116] Again, because of differences between English and Australian legislation, and between Australian jurisdictions, this can lead to lengthy discussion of non-issues (such as whether discrimination against women because of pregnancy constitutes sex discrimination)[117] and silence on real issues. In concentrating on sex discrimination, the authors also miss some of the particular problems encountered by people with disabilities in establishing that they have been treated less favourably than, in circumstances that are the same or not materially different, the employer treats or would have treated someone who did not have a disability.[118]

The discussion of sexual harassment would have benefited by incorporation of the analytical distinction between *'quid pro quo'* harassment (promise of benefit from acceptance of sexual advances/threat of detriment from rejection) and 'hostile environment' harassment (sexually threatening work atmosphere). Once more, though, it would have been necessary to refer to some of the extensive literature on sexual harassment, rather than just cases, to find this. Much space is devoted to a minute dissection of the leading New South Wales case, *O'Callaghan v. Loder*,[119] with the aim of showing that sexual harassment may not be covered by the Anti-Discrimination Act 1977 (N.S.W.).[120] The problem with *O'Callaghan v. Loder* is that it began with a theoretical definition of sexual

115 Macken, McCarry and Sappideen 555.

116 For example they do not mention the leading Victorian case of *Department of Health v. Arumugam* [1988] V.R. 319. There are also some highly dubious propositions based on English cases where the wording between English and Australian legislation may differ significantly.

117 This question was only ever relevant in the United States (which is not mentioned), England (which is emphasized), New South Wales (where it has been firmly resolved by statutory provision) and Victoria (which is not mentioned). The Sex Discrimination Act 1984 (Cth) and the other State Acts in Australia all specifically prohibit discrimination on the ground of pregnancy. Another example is the statement that the 'most important' exception relating to sex discrimination in employment is the defence that sex is a 'genuine occupational qualification' for a particular position (521). In fact, this exception has been relied on so rarely that it is virtually a dead letter in the Australian legislation.

118 Macken, McCarry and Sappideen 557-8. See Johnstone, R., 'Physical Disability in Employment' (1989) 63 *Law Institute Journal* 728.

119 (1984) E.O.C. 92-023.

120 Macken, McCarry and Sappideen 578-80. But even if *O'Callaghan v. Loder* is demolished, there is now strong authority from other jurisdictions that could be relied on to support the proposition that in the absence of specific sexual harassment provisions, sexual harassment complaints can be brought as sex discrimination cases. See for example *R. v. Equal Opportunity Board; ex parte Burns* [1985] V.R. 317; *Hall and Others v. Shieban Pty Ltd* (1989) E.O.C. 92-250.

harassment drawn from the literature, rather than proceeding from the facts in the complaint. This seems to be an impermissible, non-adversarial mode of reasoning. It is interesting, too, that the issue of sexual harassment is confined to the chapters on discrimination. Some of the cases suggest the emergence of a duty on employers to provide a harassment-free environment.[121] But this is not raised in the treatment of implied duties earlier in the book.

Finally, Macken, McCarry and Sappideen present an account of anti-discrimination procedures[122] that virtually ignores the mandatory conciliation of complaints. This, too, is an unfortunate choice, as conciliation is the procedural centre-piece in all the Australian legislation, and it has become increasingly obvious that lawyers — particularly respondents' lawyers — need to learn how to play an appropriate role in the conciliation process. Lawyers also need to be aware that costs may be awarded against respondents as well as against complainants and that possible remedies for a complaint substantiated in adjudication include orders that the respondent refrain from discriminating and/or perform specified acts of redress, reinstate a complainant, and so on, as well as pay damages. The concluding page on private and/or federal public sector equal employment opportunity legislation (the two regimes are conflated) is particularly unilluminating.

As well as tokenism in content, tokenism also appears in language. Each of the three books adopts some form of gender-neutral or gender-inclusive language in the text, which is indeed a welcome change from past practice. Nonetheless, substantial portions of Macken, McCarry and Sappideen and McCallum, Pittard and Smith are made up of extracts from cases or (in the latter) articles, in which the language is decidedly sexist. This rather spoils the overall impression. Admittedly, it is not easy to find gender-neutral extracts from historical documents, although one suspects that the authors did not go out of their way to try. But neither is it difficult to provide some indication of *commitment* to (rather than mere gestures towards) gender-neutral language by acknowledging in some way the problem with the language in the extracts. The point of insisting on gender-neutral language is not that this is the latest editing convention, but that language constitutes persons and influences behaviour. If all the characters are men, it makes it harder for women and for other men to imagine women playing a part. Perhaps, though, in light of the earlier argument about the masculine subject of labour law, gender-neutrality is false neutrality, obscuring the fact that the authors are still really only talking about men.

REPRESENTATION OF WOMEN

The issue of sexist language mainly arises when speaking of hypothetical characters, in this case notional workers. The range of real characters in a text- or casebook also projects a particular descriptive/normative view of reality, including gender roles.[123] Macken, McCarry and Sappideen is quite striking in this

[121] *R. v. Equal Opportunity Board; ex parte Burns* [1985] V.R. 317; *Hill v. Water Resources Commission* (1985) E.O.C. 92-127; *Hall and Others v. Shieban Pty Ltd* (1989) E.O.C. 92-250.
[122] Macken, McCarry and Sappideen, 595-602ff.
[123] See for example, Frug, M. J., *op. cit.* n. 10, 1076-77.

respect. All of the women in the book (and there are not many of them) fall into one of three overlapping categories.

The first category is that of powerless, passive victims. The first woman encountered in the book is 'a female lieutenant in the Salvation Army' who is denied workers' compensation for an injury suffered in the course of cleaning a church hall, because her relationship with the church is spiritual rather than contractual.[124] The case demonstrates the principle of no intention to create legal relations. In fact it seems to be irrelevant that she is female, unless a male doing the cleaning would be found to be contractually rather than merely spiritually bound. The chapter on termination of employment opens with a quotation concerning a requirement by the Northern Ireland General Health Services Board that female officers resign on marriage.[125] Curiously though, the issue of mandatory resignation on marriage is not taken up at all in the chapter itself, and there is no indication that such a requirement formerly applied to Australian as well as to Northern Irish public servants. It is not at all clear whether the quotation is included for curiosity value or because Macken, McCarry and Sappideen think that Northern Ireland had the right idea. Then there is a woman demoted from the position of production supervisor to operator, this being an exceptional case in which the alteration in duties was not considered to be so great as to put the employee in an impossible position amounting to termination of employment.[126] Other victims are an elderly widow defrauded of her money by a solicitor's clerk,[127] a 'girl' dying of pneumonia because her master refused to call a doctor,[128] and a group of chorus girls who were paid starvation wages and so resorted to prostitution to support themselves.[129]

The second category, into which the last example merges, is women who appear simply by virtue of their sexuality. There are two wives of employers who have sexual encounters with their husband's employees[130] (it seems the issue here is whether such conduct justifies the dismissal of the employee; that is, the woman is incidental to a matter between men). Other sex at work cases cited involve a relationship between a shelf filler and a senior employee (the gender of each and who was sacked is not specified), and an 'open' relationship between a General Manager and his secretary (the sacked party is again not specified, but we can guess).[131] There is also the student in the *Orr* case,[132] whose academic lover was dismissed from the University of Tasmania as a result of the affair. The circumstances of this case are described as 'quite exceptional', although most women in universities could name the odd predatory professor. Finally, there is

[124] *Rogers v. Booth* [1937] 2 All E.R. 751; Macken, McCarry and Sappideen 64.
[125] *McClelland v. Northern Ireland General Health Services Board* [1957] 1 W.L.R. 597. *Ibid.* 145.
[126] *Adrema Ltd v. Jenkinson* [1945] 1 K.B. 446. *Ibid.* 186.
[127] *Lloyd v. Grace, Smith and Co. [1912] A.C. 716. Ibid.* 313.
[128] *M'Keating v. Frame* (1921) S.C. 382. *Ibid.* 123.
[129] *Brimelow v. Casson* [1924] 1 Ch. 302. *Ibid.* 387.
[130] *Whitlow v. Alkanet Construction* [1975] I.R.L.R. 321. *Ibid.* 210, n. 93; *Wall v. Westcott* (1982) 1 I.R. 252. *Ibid.* 159.
[131] *Spiller v. F. J. Wallis* [1975] I.R.L.R. 362; *Newman v. Alarmco* [1976] I.R.L.R. 45. *Ibid.* 210, n. 93.
[132] *Orr v. University of Tasmania* [1956] Tas. S.R. 155. *Ibid.* 210.

an actress, who, presumably in the interests of maintaining her sexual attractiveness, was required to control her weight.[133]

The third category comprises bad, disobedient, uppity women who are put in their place. In *Lumley v. Wagner* we have the first ever instance of an injunction to restrain a breach of a negative covenant, awarded against a fickle opera singer.[134] Miss Wagner was in fact responsible for two foundation cases. The breadth of the measures used to keep her under control has never completely been replicated. *Warner Brothers v. Nelson* did follow suit, though, in preventing 'Mrs Nelson' (Bette Davis) from performing for anyone other than the studio with which she was contracted.[135] A hypothetical cook, whose judicial master is prepared to pay her wages but not to eat her meals, is informed she has no cause for complaint.[136] Finally, there is the fiery barmaid in *Deatons Pty Ltd v. Flew*, whose action in throwing a glass at a male customer was held to be outside the scope of her employment, thus absolving her employer of vicarious liability for the customer's injury.[137]

The three categories are perfectly bracketed by a housemaid dismissed because she left her master's house to be with her dying mother, in defiance of the master's orders. The judges gallantly conceded that she could disobey an order to stay in the house if she feared danger to her life or violence to her person from the master.[138] Here we have pathos, sexuality and disobedience all rolled into one. A truly piquant combination, but a somewhat limited range of possibilities. Macken, McCarry and Sappideen construct an almost mythic world of archetypally 'good' and 'bad' women. 'Bad' women fail in the public world of work because they are too assertive. 'Good' women fail in that world because they are too vulnerable. It seems the most appropriate place for women is in a relation of sexual servitude and domestic dependence with a 'good' man.

WHAT NEXT?

Creighton and Stewart, Macken, McCarry and Sappideen and McCallum, Pittard and Smith all present a version of labour law that has become outdated. The books fail to reflect an employment and industrial relations scene that is steadily approaching 50% women and whose contours are changing as a result; let alone do they offer any recognition of women's domestic labour. While women may be located at a variety of points along what is for them a public-private continuum, the male paradigm prevails, apart from brief and sometimes inept treatment of 'women's issues'. These signs do not augur well for any further incorporation of gender analysis into labour law.

One solution would be to drop all pretences — to continue to publish this sort of labour law but to abandon claims of generality and acknowledge openly that it is about men. In the words of Christine Boyle, '"Men and the Law" is tolerable

133 *Gaumont British Picture Corporation Ltd v. Alexander* [1936] 2 All E.R. 1686. *Ibid.* 81.
134 (1852) 1 De G.M. & G 604. *Ibid.* 220.
135 [1937] 1 K.B. 209. *Ibid.* 222.
136 *Collier v. Sunday Referee Publishing Co.* [1940] 2 K.B. 647. *Ibid.* 118.
137 (1949) 79 C.L.R. 370. *Ibid.* 315.
138 *Turner v. Mason* (1845) 153 E.R. 411. *Ibid.* 201.

as an area of intellectual activity', so long as it is not 'masquerading as "People and the Law"'.[139] On the other hand, the point has been made that ignoring women actively contributes to their oppression. So it would be preferable to see moves towards a greater representation of gender in labour law rather than even a principled retreat.

This review offers labour law authors a set of references and a program for the inclusion of gender. A broader definition of 'work' is required, and differing experiences of work — and hence the gendered impact of many legal rules and standards — must be recognized. The dichotomies and hierarchies of federal/State systems, employees/independent contractors, workplace/home need questioning. Matters that are perceived to be of greater concern to women should be treated as centrally as matters that primarily concern men and authors should bother to get them right. They should also display textual commitments to gender-inclusiveness and the positive portrayal of women. There is ample equipment with which to begin the task of shifting the male paradigm and achieving real rather than false universality. Will this challenge be accepted? Will it be ignored? Or (worst of all) will it be reduced to a footnote in the next edition?

[139] Boyle, C., *op. cit.* n. 21, 431.