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LABOUR LAW AND EMPLOYMENT RELATIONS: AN INTRODUCTORY NOTE ON AUSTRALIAN SCHOLARSHIP AT THE INTERSECTION OF TWO FIELDS OF STUDY, AND THE QUESTION OF INTERDISCIPLINARY RESEARCH

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LABOUR LAW AND EMPLOYMENT RELATIONS: AN INTRODUCTORY NOTE ON AUSTRALIAN SCHOLARSHIP AT THE INTERSECTION OF TWO FIELDS OF STUDY, AND THE QUESTION OF INTERDISCIPLINARY RESEARCH

Richard Mitchell and Carolyn Sutherland*

Labour law and employment relations are two fields of academic scholarship and study dealing with very similar and overlapping problems and issues, and yet utilising very different research methodologies and styles of analysis. The possibility of mistakes and misconceptions in research occurring in the interaction of these two fields has long been the subject of contention. The purpose of this introductory note is to draw together some of the arguments and to suggest the need for more open and aware discussion of the contributions and limitations of the two fields and for greater collaboration in relation to the ongoing research combining labour law and employment relations study.

I. Introduction.

The purpose of this note is to raise and discuss, in a preliminary manner, some important issues concerning the research of labour lawyers and employment relations scholars, and the interaction of those two fields of scholarship. The foundation for this exercise is grounded in some responses by Australian scholars in both fields towards work which is carried out principally in one, while at the same time engaging with the other. These responses are discussed later in the text.[1] At the outset, however, one or two points of clarification are necessary by way of introduction. The note is intended as a vehicle for stimulating discussion in what is an important, but often overlooked, issue concerning law-related research methodology. It does not cover all the relevant material in detail, and the discussion is conducted in broad general terms. While the content of the note also points to some relevant literature, this is largely indicative of other broader debates, particularly in legal literature, about the intersection of law and other disciplines. It is also important to understand that it is not the intention here to indicate acceptance of the definitions used of the two fields under discussion. It is well

*Department of Business Law and Taxation, Monash University. This note was written with the collaborative assistance of a number of colleagues who are scholars in the two fields under discussion. We thank them for their very generous support. The authors are currently engaged, with other colleagues, in a project investigating the effectiveness of collective industrial dispute resolution systems in three Southeast Asian countries ('The Formal and Informal Regulation of Collective Labour Disputes in Indonesia, The Philippines and Vietnam', ARC DP 190100821). The conceptual framework for that project draws both on employment relations theories for the evaluation of labour dispute resolutions systems and on emerging labour law theories for the analysis of both formal and informal types of regulation that governs those systems.

[1] See Part IV.

understood that there is continued debate within the two areas concerning their respective scope, subject matter, purpose and so on. However, the respective definitions employed here are common in the literature generally, and are drawn upon principally for the purpose of illustrating the central points under discussion.

It hardly needs to be pointed out that the fields of labour law and employment relations are, at least in terms of the subject matters with which they engage, very closely related to each other. 'Labour Law',[2] for example, may be broadly defined as the 'study of the legal rules governing the employer-employee relationship',[3] and hence the study of the contract of employment/contracts for work, laws regulating trade unions, collective bargaining, industrial action, occupational health and safety, employment discrimination and so on.[4] 'Employment Relations', similarly, is defined as 'the study of the formal and informal rules which regulate the employment relationship and the social processes which create and enforce those rules'.[5] Both fields, then, deal with 'rules' relating to 'employment relationships', though while labour law has undoubtedly expanded in terms of subject matter and approach,[6] at this point of time it remains the case that it is largely confined to dealing with 'formal' rather than 'informal' regulation.[7]

Moreover, it is commonly the case that the research work published by labour law scholars deals with matters that might be regarded as within the boundaries of the 'employment relations' field (for example reflecting on the political/social context of the legal rules and the impact of their operation), and, equally, in many cases the work

[2] Or what was called 'industrial law' before it: see E. I. Sykes, *The Employer, the Employee and the Law*, Lawbook Co., 1960, at p. 1. Reference to research in the discipline or field of 'law' here (and correspondingly 'labour law') is intended to denote research grounded in the specific conceptual and methodological foundations of doctrinal legal work. In this sense it is narrower than 'legal research', or 'research about law' generally, which is otherwise also a subject of discussion throughout the note.

[3] Sykes, *ibid.*

[4] See further, John Howe, 'Labour Regulation Now and in the Future: Current Trends and Emerging Themes' (2017) 59 *Journal of Industrial Relations* 209 at p. 211; Richard Mitchell, 'The Evolution of the Idea of a Labour Law Subject in Australian Legal Scholarship' in John Howe, Anna Chapman and Ingrid Landau (eds.), *The Evolving Project of Labour Law*, Federation Press, 2017, p. 22.

[5] Mark Bray, Peter Waring, Rae Cooper and Johanna McNeil, *Employment Relations: Theory and Practice*, McGraw Hill Australia, 4th ed., p. 19. See also Greg Bamber, Russell Lansbury, Nick Wailes and Chris Wright (eds.), *International & Comparative Employment Relations*, Allen and Unwin, Sydney, 6th ed., 2016, at p. 3. For the purposes of present argument 'employment relations' is taken to include 'industrial relations', and these two fields of study, or sub-disciplines, are treated the same throughout the note notwithstanding the label applied.

[6] See Chris Arup, 'Labour Law as Regulation: Promises and Pitfalls' (2001) 14 *Australian Journal of Labour Law* 229; Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds.), *Labour Law and Labour Market Regulation*, Federation Press, 2008; John Howe, 'A Different World: The Regulatory Project in Labour Law' in Howe, Chapman and Landau, above n. 4.

[7] However, it needs to be noted that a 'regulatory' approach to the governance of work and work relationships necessarily integrates the 'formal /legal' outlook with the 'informal' regulation of such relations in certain respects: see Petra Mahy, Richard Mitchell, John Howe and Maria Azzurra Tranfaglia, 'What is Actually Regulating Work? A Study of Restaurants in Indonesia and Australia' in Diamond Ashiagbor (ed.), *Re-Imagining Labour Law for Development*, Hart Publishing, Oxford, 2019; Robert MacKenzie and Miguel Martinez Lucio, 'The Realities of Regulatory Change: Beyond the Fetish of Deregulation' (2005) 39 *Sociology* 499; Robert MacKenzie and Miguel Martinez Lucio, 'Regulation, Migration and the Implications for Industrial Relations' (2019) 61 *Journal of Industrial Relations* 176.

of employment relations scholars addresses directly the rules of 'labour law' (being the content of at least part of the regulation which operates in relation to businesses and employers, and the interaction of those organisations with workers and their representative bodies). The concerns of the two fields of study necessarily make this intersection between them inevitable, and the relevant leading text books and journals are full of examples.[8] The underlying question, and the central concern of this note, is to consider generally how this 'labour law/employment relations' research interaction is being conducted in a methodological sense in Australian scholarship, and what problems might be occurring as a result. Are these important issues, and if so why?

In Part II of this note, we discuss the nature of cross-disciplinary research in labour law and employment relations and some of the perceived challenges that arise at the intersection of these two fields. In Part III, we explain why it might be important in 'labour law/employment relations' research for researchers from each discipline to be rigorous in explaining their own disciplinary and methodological approaches, and to explicitly engage with the methodological approach of the counterpart discipline in understanding what that might mean for their own discipline. Part IV illustrates some specific problems that have arisen in the interaction between these fields, as identified by researchers from both disciplines in Australia. Part V sets out the prospects for a more integrated sub-field of labour law/employment relations scholarship, and Part VI concludes.

II. The Challenge of Cross-Disciplinary Research in Labour Law and Employment Relations

A (supposed) well-established and, perhaps some would say, *inherent* interaction between *labour* law and the social sciences (including 'employment relations'), has long been identified in the labour law literature.[9] At the same time scholars have also recognised the use in 'employment relations' of accounts of legal rules.[10] But the point is not merely the relevance of the connection, but more importantly *how the investigation and understanding of it is carried through*. For example, back in 2005 Linda Dickens and Mark Hall, commenting on research on some British labour legislation, noted that generally social scientists investigated areas where legal

[8] The journal articles which form the basis of the present study have been drawn from *The Journal of Industrial Relations, The Australian Journal of Labour Law, The Economic and Labour Relations Review,* and *Labour and Industry*.

[9] For example, see Simon Deakin, 'A New Paradigm for Labour Law?' (2007) 31 *Melbourne University Law Review* 1161, at pp. 1169-1172; Andrew Frazer, 'Industrial Relations and the Sociological Study of Labour Law' (2009) 19 *Labour and Industry* 73; Sue Hammond and Paul Ronfeldt, 'Legal Methods: Asking New Questions About Law and the World of Work' in Keith Whitfield and George Strauss (eds.), *Researching the World of Work: Strategies and Methods in Studying Industrial Relations*, ILR Press, Ithaca, 1998, p. 227. For a more recent account, see Ralf Rogowski, 'Sociology of Labour Law' in Jiri Priban (ed.), *Research Handbook on the Sociology of Law*, Edward Elgar, Cheltenham, 2020, ch. 27.

[10] See Frazer above n. 9. See also Julian Teicher, 'Industrial Relations and the Law: The New Industrial Relations Issues' (2004) 15 *Labour and Industry* 114.

regulation was playing a role without 'engaging with' that dimension of the problem.[11] Thus legal rules, and accounts of legal rules, might be being treated by some researchers simply as factual data notwithstanding the problems and complexities in those rules.[12]

From the perspective of labour lawyers, it is important firstly for employment relations scholars to understand the complexity of legal rules and categories. A simple example of this is seen in the idea of 'casual' employment, and the impact that this concept has in thinking about conditions of employment for workers and on society more broadly. Interest in this topic has escalated during the COVID-19 pandemic. For example, policy makers have directly linked the spread of the virus to the lack of paid sick leave for casual employees, and the necessity of their attending work when vulnerable to infection, or even while infected.[13] Where employment relations scholars address this question they may set out the legal context to explain why employers are motivated to classify workers in this way, and to indicate the effects of this classification on workers. However, there is a risk of significant gaps and misstatements in these accounts because of the complexity of provisions in legislation, awards and collective agreements that cover this category of employment. The failure to appreciate that workers might be classified as casual for the purposes of one type of labour-law protection but not for another, and that the legal status of many casuals will evolve over time, can obviously directly affect the validity of the findings in employment relations research.

It is also important, secondly, for employment relations scholars to understand that law is, among other things, contested and constantly in a state of flux, that it may be completely ineffective, and may come to serve quite different socio/economic purposes from those it was designed to achieve.[14] Testing propositions involving law

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[11] Linda Dickens and Mark Hall, 'The Impact of Employment Legislation: Reviewing the Research' in Linda Dickens, Mark Hall and Stephen Wood 'Review of Research into the Impact of Employment Relations Legislation', DTI Employment Relations Research Series No. 45, DTI, London, 2005, p. 32. See further on this issue, Chris Arup, Anthony Forsyth, Peter Gahan, Marco Michelotti, Richard Mitchell, Carolyn Sutherland and David Taft, *Assessing the Impact of Employment Legislation: The Coalition Government's Labour Law Programme 1996-2007 and the Challenge of Research*, Research Report, Workplace and Corporate Law Research Group and Australian Centre for Research in Employment and Work, Monash University, 2009, pp. 28-37. Electronic copy available at http://ssrn.com/abstract=1544028.

[12] However, depending upon the objectives of the exercise, this perhaps might not always be a defect: see Richard Johnstone, 'Using Legal Research Methods in Human Resource Management Research' in K. Townsend, R. Loudoun and D. Lewin (eds.), *Handbook of Qualitative Research Methods on Human Resource Management*, Edward Elgar, Cheltenham, 2016, 61 at p. 71.

[13] See Ben Butler and Josh Taylor, 'Victorian Premier Links COVID-19 Surge to Insecure Work', *The Guardian*, 23rd July 2020; Australian Council of Trade Unions, 'Submission to the Select Committee Inquiry into the Australian Government's Response to the COVID-19 Pandemic, 28th May, 2020, pp. 7-8.

[14] See Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122 *Law Quarterly Review* 632, and see also Lizzie Barmes, 'Individual Rights at Work, Methodological Experimentation and the Nature of Law' in Amy Ludlow and Alysia Blackham (eds.), *New Frontiers in Empirical Labour Law Research*, Hart Publishing, Oxford, 2015 at pp. 24-25, and Lizzie Barmes, 'Common Law Confusion and Empirical Research in Labour Law in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds.), *The Autonomy of Labour Law*, Hart Publishing, London, 2015, at p. 108. For examples see Paul Davies and Mark Freedland, *Labour Legislation and Public Policy*, Clarendon Press, Oxford, 1993, pp.142-161; W. B. Creighton, W. J. Ford and R. J. Mitchell, *Labour Law: Text and Materials*, Law Book Co., Sydney, 2nd ed. 1993, ch.1.

without understanding these kinds of complexities,[15] may also produce research outcomes which are fundamentally flawed.

On the other hand, there may also be a problem when lawyers are dealing with the 'world of work' beyond its 'legal' dimensions. How lawyers go about drawing conclusions from economic, political, and cultural dimensions of society also requires an understanding of the appropriate methods of doing so. Indeed, some time ago two Australian scholars pointed out quite directly the apparent *methodological gaps* in the shaping of Otto Kahn-Freund's conceptualisation of the British labour law system which had largely held sway as *the* intellectual foundation of that system since the 1950s.[16]

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The fact that these kinds of problems can arise strongly suggests that at least some level of methodological understanding across the two fields would be advantageous, if not to say essential. However, here again there are complications.

One problem for scholars in relating to legal research is that lawyers as a general rule tend to take for granted the legitimacy of their objectives and method, and the comprehension of those aspects of legal research across the legal discipline generally. According to the literature, the core purpose of the 'doctrinal' approach (or 'internal' approach) in law is both to discover the relevant legal rules (drawn from common law or legislation) and to analyse and interpret them in relation to a particular legal question. It uses in this process various forms of reasoning such as induction, deduction and analogy and its essential objective is to find out 'what the law is', and how it operates in relation to the problem.[17] The common failure by lawyers carefully to articulate hypotheses/questions or to explain methodologies as to how this is done has long been a running source of controversy about the legal discipline generally.[18]

Overall, the position in relation to this first issue appears not to be very different in the case of *labour law* research specifically. As Chris Arup and colleagues have noted 'labour lawyers generally have adhered to their traditional approaches' (i.e. to an 'internal' doctrinal approach).[19] Not only does this mean that there is a general absence of work dealing, at least explicitly, with multi- or inter-disciplinary approaches to labour law,[20] but also an overall failure to address methodological issues at all. Perhaps it comes as no surprise to learn that the idea of 'research method'

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[15] For example, see Barmes, 'Common Law Confusion', above n. 14, at p. 108.
[16] See Hammond and Ronfeldt, above n. 9, at pp. 232-233.
[17] A recognised text on these matters is Terry Hutchinson, *Researching and Writing in Law*, Lawbook Co., Sydney, 3rd ed., 2010. See also Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83.
[18] See Theunis Roux, 'Judging the Quality of Legal Research: A Qualified Response to the Demand for Greater Methodological Rigour' (2014) 24 *Legal Education Review* 173.
[19] See Arup *et.al.*, above n. 11, at p. 29.
[20] '[T]here is still only a relatively limited amount of interdisciplinary/multi-disciplinary research bringing together academic lawyers and those trained in social science': see Dickens and Hall, above n. 11, at p. 32. See also Frazer, above n. 9.

does not appear in the indexes of any of the major scholarly texts on Australian labour law, but even a search of the contents of *The Australian Journal of Labour Law* over the 30 years of its existence reveals only a few instances in which a specific 'research methodology' is articulated, and these do not necessarily deal closely or exhaustively with the issues inherent in such matters. Other examples of the use of explicit methodological outline in what might be regarded as labour-law-associated research can be found in several of the other Australian labour-specific journals, including the *Journal of Industrial Relations*, the *Economic and Labour Relations Review*, *Labour and Industry*, and the *Asia Pacific Journal of Human Resources*. These analyses are usually limited to identifying and describing methods used in assembling the relevant data, rather than dealing with matters associated with the legal discipline and legal methods, and their interconnection with the other subject disciplines examined in the pages of those journals.

One notable exception is a recent article in the *Economic and Labour Relations Review* by Anita Tyc which uses a doctrinal approach to analyse the protection of workers' rights in the Transatlantic Trade and Investment Partnership. In a clearly articulated section on methodology, Tyc outlines three important components of her approach: first, she outlines the hypotheses for the study; second, she explains the way that the study clarifies the content of the law by using 'a logical linguistic method which allows the exegesis and interpretation of the content of legal norms'; and, third, employing an 'axiological method', Tyc makes explicit the values that underpin labour law in general and this study in particular, namely, the importance of protecting workers' rights.[21] However, this kind of approach is unusual in legal research generally.

A second issue concerns the use labour lawyers make of research carried out in the field of employment relations. Employment relations scholars utilise a diverse set of methods in examining 'how the world of work works'.[22] Over the past two decades or more, this field has expanded considerably from one originally focussed largely on collective union/management relations, bargaining and dispute settlement (industrial relations) to one encompassing a much broader set of human resource and individual employment issues.[23] While 'industrial relations', so defined, already traditionally exhibited a variety of research methods, the expansion of the subject matter in this field (now 'employment relations') appears necessarily to have further broadened the methods used in both quantitative and qualitative terms.[24]

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[21] Anita Tyc, 'Worker's Rights and Transatlantic Trade Relations: The TTIP and Beyond' (2017) 28 *Economic and Labour Relations Review* 113 at p. 116.

[22] Keith Whitfield and Suhaer Yunus, 'Research Methods in Employment Relations' in Adrian Wilkinson, Tony Dundon, Jimmy Donaghey and Alex Colvin (eds.), *The Routledge Companion to Employment Relations*, Routledge, 2018, 142 at p. 142.

[23] See George Strauss and Keith Whitfield, 'Research Methods in Industrial Relations' in Keith Whitfield and George Strauss (eds.), *Researching the World of Work*, ILR Press, Ithaca, 1998; Whitfield and Yunus, above n. 22.

[24] See Whitfield and Yunus, above n. 22 at p. 143.

As the scholars referred to here have made clear, these are particularly problematical issues for employment relations scholars themselves.[25] However, in the context of the present discussion there are also obvious implications for labour lawyers in particular. As noted earlier, labour lawyers do engage with employment relations issues in their research work, but the critical issue is *how* they do so. Much of the observation may be highly casual, intended perhaps merely to provide the law with no more than a modicum of socio/political context. However, the more the 'employment relations' territory of the research becomes integrated with the 'legal' domain, one might argue the more critical it is for the labour lawyer to engage with the employment relations research, and to investigate carefully its method and its outcomes. There is little evidence that this is occurring, and we return to this matter shortly.

In summary, then, the lack of explanation of methodological approach appears to be a complicating factor in legal research generally, but also in labour law, both in relation to that field specifically, and in relation to how that field may interact with employment relations as a field of social science. At the same time, scholars interested in the methodologies used in employment relations research have pointed to the overall weakness of genuinely interdisciplinary research in that field,[26] and as noted earlier that holds true of the employment relations/labour law interaction in particular.

III. The Importance of Methodological Transparency in Labour Law/Employment Relations Research

Several questions arise. 'Is any of this important?' 'Why should it matter whether or not legal scholars utilise explicit methodological approaches in relation to their work?' 'Isn't it sufficient that in relation at least to doctrinal work, other legal scholars will fully understand the process/method without the need for explanation?'[27] And, 'If lawyers are doing no more than gathering data derived from non-legal sources, why is it then necessary for them to investigate the workings of the outside disciplines involved?' And again, from the outsider's (social science) perspective: 'If scholars from non-legal backgrounds are simply treating the law as straightforward data [information], isn't that sufficient for their purposes without the need to explain their work in terms of a connection between their discipline and a *legal* methodology?'

It is apparent that these kinds of outlooks still have strong influence among scholars in law generally, and in the two sub-fields under discussion in this note. Some legal scholars openly discount the relevance of adopting an explicit methodological approach in their research. On the other hand, there are views which suggest that this is no longer an adequate approach to legal research in general, or to labour law in particular. Some scholars have argued that doctrinal research itself would benefit from

[25] E.g. Whitfield and Yunus, above n. 22.
[26] E.g. see Strauss and Whitfield, above n. 23, at p.22.
[27] See Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds.), *Advanced Research Methods in the Built Environment*, Wiley-Blackwell, Oxford, 2008, pp. 32-35.

'a better methodological justification'.[28] One example given relates directly to the multi-disciplinary and empirical projects which typify the labour law/employment relations sub-disciplines. In such cases, according to one legal scholar, '[m]ethodological questions are unavoidable. The researcher not only has to gather knowledge on what is required in other disciplines for reliable and valid research, but he or she has to adapt the research to the *peculiarity* of legal scholarship. What determines that *peculiarity*? Answering that question inevitably leads to doctrinal research'.[29] Attitudes may, then, be changing, albeit slowly.

A further issue of concern is the general direction of educational and social interest in the kind of problem solving and learning that cross-disciplinary work entails. For example, the Australian Research Council, which is a major source of funding for research in higher education, now positively asserts its support for 'the highest-quality fundamental and applied research across all disciplines…*[including] fostering excellence in research that traverses or transcends disciplinary boundaries*' (our emphasis) and requires applicant researchers across relevant programmes to 'identify whether…and in what ways [their] research is interdisciplinary'.[30] As some Australian scholars have noted, this greater emphasis on 'group, interdisciplinary and empirical research' coupled with 'increasing links with industry' has implications for doctrinal research in particular. Simply put, the perceived failure of lawyers to communicate what they are doing, and how they are doing it, may not match what is required in an 'increasingly sophisticated research context'.[31] As a consequence, there is a risk that labour law researchers will reduce their opportunities to attract competitive funding and to address important questions that require input from disciplines beyond law.

There may be, then, reasons to suppose that labour lawyers might need to pay greater attention to issues of methodology in their research, particularly in the areas of work which interact most directly with other fields such as employment relations. As noted above, there may already be a slow gravitation in that direction. But the central critical issue is whether there are mistakes being made in labour law and employment relations scholarship which are due to the failure of either, or both, of these disciplines to understand and engage with the methodology and intellectual framework of the

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[28] Jan Vranken, 'Methodology of Legal Doctrinal Research: A Comment on Westerman' in Mark Van Hoecke (ed.), *Methodologies of Legal Research*, Hart Publishing, Oxford, 2011, p. 120. See also, Will Baude, Adam Chilton and Anup Malani, 'Making Doctrinal Work More Rigorous: Lessons from Systematic Reviews' (2017) 84 *University of Chicago Law Review* 37; Barmes, 'Individual Rights at Work', above n.14.

[29] *Ibid*. Emphasis added. See also, Barmes, 'Common Law Confusion', above n.14.

[30] Australian Government/Australian Research Council, *ARC Statement of Support for Interdisciplinary Research*, 2020: accessible at https://www.arc.gov.au/policies-strategies/policy/arc-statement-support-interdisciplinary-research. See also William B. Lacy, Gwilym Croucher, Andre Brett and Romina Mueller, *Australian Universities at a Crossroads: Insights from Their Leaders and Implications for the Future*, Melbourne Centre for the Study of Higher Education and Berkeley Center for Studies in Higher Education, 2017.

[31] See Hutchinson and Duncan, above n. 17, at pp. 86, 94 and 118. The same reasoning would also apply to the construction of arguments by scholars undertaking Ph. D research work involving law, and law-related research work: see Roux, above n. 18 at pp. 181-184; and Darren O'Donovan, 'Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls' in Laura Cahillane and Jennifer Schweppe (eds.), *Legal Research Methods: Principles and Practicalities*, Clarus Press, Dublin, 2016.

other. If this was found to be the case, the issue, self-evidently, would appear to be more pressing.

Clearly these are very difficult matters to address. Academic work, research work, scholarship, and so on, all are inherently highly critical activities, as might be expected. In the process of advancing knowledge, reviewing the work of others, refereeing work for publication or assessing the quality of research projects for funding, we are all commonly engaged in such critical activity. Thus, relevantly to the present discussion, labour lawyers criticise the work of other labour lawyers, employment relations scholars criticise the work of other employment relations scholars, labour lawyers criticise the work of employment relations scholars, and vice versa.

How much attention in all of this intellectual activity is being paid to research 'method' in particular, as compared with research content or outcomes, is an open question. But if there are mistakes or misunderstandings in what is being published, it is perhaps to 'methodological' questions that we should be devoting greater attention. There are some very well-known instances where large scale quantitative work on labour law has been criticised for precisely this reason. One such example is found in the 'legal origins' idea adopted by economists as a way of explaining a certain character of labour law in particular types of economies.[32] This work has been called into question by lawyers for failing properly to consider the nuances of the practical operation of the law, failing to distinguish between different types of legal and other rules and so on.[33]

IV. Identifying Specific Problems in Australian Labour Law/Employment Relations Research

To identify examples of problems that may arise at the intersection of labour law and employment relations research, an informal exercise was undertaken by the authors to draw on the views of Australian researchers who work in these two sub-fields. A number of articles were selected from several leading Australian journals which specialise in the publication of research work in the fields of labour law and employment relations. An attempt was made to select articles which were ostensibly grounded in one of these two fields (i.e. where the contributors were recognised scholars in either labour law or employment relations, and where the research work was oriented accordingly), but in which there was also a degree of reliance on

[32] Juan Botero, S. Djankov, R. La Porta, F. Lopez-de-Silanes and A. Schleifer. 'The Regulation of Labor' (2004) 119 *Quarterly Journal of Economics* 1340.

[33] See David Pozen, 'The Regulation of Labour and the Relevance of Legal Origins' (2007) 28 *Comparative Labor Law & Policy Journal* 43; Beth Ahlering and Simon Deakin, 'Labour Regulation, Corporate Governance and Legal Origin: A Case of Institutional Complementarity' (2007) 41 *Law and Society Review* 865; and Petra Mahy, Richard Mitchell, Carolyn Sutherland, Peter Gahan, Anthony O'Donnell, Sean Cooney, Gordon Anderson, Ling-Feng Mao and Andrew Stewart, 'Measuring Worker Protection Using Leximetrics: Illustrating a New Approach in Four Asia-Pacific Countries' (2019) 67 *American Journal of Comparative Law* 515.

information/data drawn from the other field as a material part of the research project. These articles were then distributed among a group of Australian colleagues including employment relations scholars and academic labour lawyers. In a small number of cases the participants were qualified in both fields whilst being principally recognised as specialists in one or the other.

The participants were asked to assess, from their specialist perspective, the legitimacy/acceptability of the use of information drawn from that field by the other discipline in the articles they were reviewing: i.e. the labour lawyers were asked to assess the appropriateness or suitability of the legal information/methodology adopted by employment relations researchers in their work, and the employment relations scholars were asked to assess the appropriateness or suitability of the empirical information and methodological approaches drawn from employment relations research and used in labour law work. As this was a limited and unsystematic exercise, the outcomes are not intended to be representative of trends in the research, but rather to highlight the types of problems and questions that can arise in research carried out across these two fields of study.

Most of the participants found what might be regarded as *serious errors* (leading potentially to incorrect research conclusions) or at least held *serious reservations* about what was being done across the two fields of study, and how it was being done. However, the level and type of problems identified (particularly in the case of assessment of the employment relations research) were quite diverse.

Taking the use of labour law by employment relations scholars first, the simplest problems identified were that *the accounts of the law were inadequate* either because some relevant legal sources/provisions were omitted in the discussion in the employment relations articles, or because of the tendency of employment relations scholars to focus particularly on a 'simple' sense of the law (predominantly legislation) while ignoring judicial interpretations which very often make a major difference to the law's operation.[34] An associated concern in relation to this issue was that *employment relations scholars tended to rely on the views of other employment relations scholars about the way that legal provisions work in practice*, rather than the views of labour lawyers. This, of course, suggests the possible compounding of error, and at the same time verifies the observations made by Dickens and Hall (and others) about the failure of the employment relations discipline to engage with labour law in a meaningful way.[35]

Beyond these observations, however, were other, more serious criticisms of the use of legal information observed in several of the works of employment relations scholars reviewed in the exercise. These included instances of *misstatements of the legal position* by employment relations scholars, and instances of the *irrelevance* of

[34] See below nn. 59-60, and associated discussion.
[35] See above n. 11.

particular provisions providing legal context to the empirical work of employment relations projects.

The responses from the perspective of employment relations scholars were similarly diverse. There were in some cases very broad criticisms, going principally to methodology. For example, in utilising empirical approaches involving interview techniques, lawyers were found to have *failed properly to state the methods used*, including an indication of the types of research questions used in interviews, and approaches to the selection of interviewees. In short, participants identified a failure to provide appropriate information about method which would enable the research outcomes to be assessed for accuracy and validity, and for the research to be built upon in future studies. Similar types of criticisms were directed to *the failure of lawyers to provide appropriate historical and theoretical underpinnings explaining how the legal analysis being undertaken fitted the problem being addressed* (and thus not complying with the usual research approach adopted in the social sciences). In some instances, the participants in the exercise also indicated that employment relations scholars would have taken a different approach to a particular problem in terms of gathering data (for example, by using more empirical work rather than relying on secondary sources).

A noticeable aspect of this dimension of the exercise (and highly relevant to the present discussion) included the observations of a number of employment relations scholars about the approaches of labour lawyers to *their own* subject matter. One observation was that *some questions addressed in the articles were not capable of being answered using conventional legal analysis*. For example, questions about the impact of particular legislative provisions on the behaviour of labour law actors were purported to be answered using doctrinal analysis of cases, but in fact could only be answered using social science methods. A second observation was that *labour law researchers generally failed to clearly delineate their own methods in identifying and selecting appropriate legal material.* A final observation was that *lawyers tended to rely on stated legislative intention as a source of information about law rather than its operation or impact.* The first two of these points, of course, reflect many of the observations made elsewhere in this note. The last is a similar criticism to that made by some of the labour lawyers in relation to the work of some employment relations scholars!

Finally, it is important to note that a common observation among the comments of the various participants in this exercise were directed to the practice of journal editors in dealing with journal articles of this type (i.e. those crossing disciplinary boundaries, as in the intersection of labour law and employment relations). There are a number of specialist journals which would fit within this category in Australia, several of which were drawn upon for this immediate exercise. It would seem rather to go without saying that journal editors would need to pay particular attention in seeking referees with relevant disciplinary and methodological expertise in work of this kind, and the

extent to which this actually occurs is unclear.[36] We suggest this is a further point for consideration in the context of the discussion in this note.

V. Prospects for a More Integrated Field of Labour Law/Employment Relations Scholarship

While the perspectives arising from the assessment exercise (in the previous part) do not establish a clear and consistent view of the problems which might emerge from the intersection of labour law and employment relations research, they do *suggest* that there might be some value in looking more carefully at what is happening and why, and what might be done about it.

As we observed earlier, there is among some lawyers a view (though contested) that labour law is, of its nature, necessarily, or inherently, interdisciplinary in terms of its methodology and orientation.[37] For some, labour law is an area which is *particularly* likely to engage with socio-legal perspectives, and thus to give rise to a stronger possibility of 'methodological pluralism' than in some other legal fields.[38] Increasingly closer 'collaboration' between labour lawyers and industrial relations scholars is also noted.[39] At the same time, employment relations scholars, too, have stressed the multi-disciplinary nature of their field,[40] and the central relevance of legal and other rules to that field of social science.[41]

Nevertheless, it is necessary not to be overly optimistic about the emergence of a more integrated approach between these two fields, even if the evidence adduced in the preceding section of this note suggests its desirability, at least to avoid error. It is one thing to note the potential for disciplinary interaction, and another to demonstrate or indicate ways in which this is occurring. Andrew Frazer's forceful argument in favour of a 'sociological study of labour law' (a renewed collaboration between labour law and industrial relations) was at the same time accompanied by his more pessimistic observations, noting the general lack of empirical study of the operation of labour law in Australia, and the generally narrow view taken of what law is.[42] Around the same time Simon Deakin had made the point that not much interdisciplinary work was done by labour lawyers, and that where labour lawyers did participate in multi-disciplinary teams 'it [was] not always clear what their specific contribution [was] beyond supplying a basic level of knowledge on the content of legal rules'.[43] Moreover, the task of labour lawyers in persuading social scientists that they had something to offer

[36] The same might be said for the assessment of research projects for funding by the Australian Research Council and other similar bodies: see n. 30 above, and associated discussion.
[37] See above n. 9.
[38] McCrudden, above n. 14.
[39] See Frazer, above n. 9.
[40] See above n. 22.
[41] See Teicher, above n. 11.
[42] Frazer, above n. 9.
[43] Deakin, above n. 9, at p. 1161

was further complicated by the fact that 'legal scholars rarely [thought about] what the methodology of their discipline [was] in a social science sense'.[44] For its part, as noted earlier, while the study of employment/industrial relations plainly at least is 'contextualised' if not 'embedded' in legal rules, the engagement with those rules tends to be largely descriptive rather than analytical.[45]

While these observations were made some time ago, and there has since been renewed attention paid to the research concept-orientation and methodologies in labour law,[46] overall our view is that there is still limited progress in this area. One valuable contribution in the form of an interdisciplinary exercise was that undertaken by Paul Gollan and Glenn Patmore comparing the different approaches of employment relations and labour law scholars to the question of 'employee voice' at the workplace.[47] However, there have been few, if any, other direct examples and, if that is so, one must ask why it is the case that scholars in these two fields are seemingly reluctant to reflect on the contributions and limitations of their core disciplines and to engage *more closely* with the other discipline, especially when one considers the importance of one field to the outcomes of research work in the other. There are several possible responses to this question. In the first place there is some resistance, at least in the legal field, to what might be a *downgrading* of the doctrinal approach through 'interdisciplinarity'.[48] Thus, one question that might be asked among lawyers in such interdisciplinary contexts is whether what is being done *is still (labour) law, or legal research, at all*?[49] And, given that lawyers may lack the requisite skills for engaging with social science,[50] the question also arises as to whether that dimension (i.e. the non-doctrinal part) of the research will be of an appropriate standard or otherwise comprise of little more than casual observations of the law's context largely based on secondary literature, and largely impressionistic evaluations of the law's operation.[51] Presumably the same reasoning must apply to those working in the field of employment relations: without legal training, employment relations scholars are seen to incorporate extensive descriptions of labour law and regulation into their work while largely eschewing any real engagement with that area.

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[44] *Ibid.* See also the references in n. 17 above.
[45] See Dickens and Hall above n. 11; Teicher, above n. 10; Frazer, above n. 9.
[46] See, for example, Ruth Dukes, 'The Economic Sociology of Labour Law' (2019) 46 *Journal of Law and Society* 396 and Eleanor Kirk, 'Legal Consciousness and the Sociology of Labour Law' (2021) 50 *Industrial Law Journal* (forthcoming). See further, The Special Issue on Labour Law Methodologies in (2017) 33 *International Journal of Comparative Labour Law and Industrial Relations*; and Amy Ludlow and Alysia Blackham (eds.), *New Frontiers in Empirical Labour Law Research*, Hart Publishing, Oxford, 2017.
[47] Paul Gollan and Glenn Patmore, 'Perspectives of Legal Regulation and Employment Relations: Limits and Challenges for Employee Voice' (2013) 55 *Journal of Industrial Relations* 488. See further below at n. 63 and associated discussion.
[48] Some of the pronouncements by judicial office-holders on these sorts of matters are quite scathing: see the discussion in O'Donovan above n. 31. See also H.T. Edwards, 'The Growing Disjunction between Legal Education and the Legal Profession' (1992) 91 *Michigan Law Review* 34.
[49] See O'Donovan, above n. 31.
[50] Frazer, above n. 9, at pp. 77-78.
[51] See Frazer, above n. 9, at p. 78; Hammond and Ronfeldt, above n. 9, at p.234.

If this general summation has at least some veracity (i.e. that there is, first, something of a perceived need for genuinely interdisciplinary work in Australian research and scholarship; that there is, second, a common intersecting thread in Australian scholarship on labour law and employment relations; and that there is, third, the evident potential for mistakes occurring in this work as a result of misunderstandings arising across these boundaries), the obvious question then is - what should be done about it? And if the answer to this question is 'some kind of interdisciplinary work', *when* might that be required, and *what* might it entail? What are the circumstances in which labour lawyers might be required to come to grips with the research questions, methods and outcomes of the relevant employment relations work, and to draw that understanding into the legal discussion and analysis, and, in reverse, when should employment relations scholars be required to fully (or perhaps sufficiently) understand what the legal method entails in a doctrinal (insider) sense, and that law cannot simply be treated as data?[52]

It may perhaps be the case that not all instances of research work at the intersection of two fields of study such as labour law and employment relations necessarily require what one might consider serious 'interdisciplinary' scholarship. Indeed, the scholarly literature categorising legal research-work carried out across disciplines points to several levels of 'legal interdisciplinarity', some of which are more basic than others, and some of which are more advanced.[53] It is not necessary to delve into all of the categories of multi-, cross-, and trans-disciplinarity and their respective meanings and qualities here. However, it is important to note that various authors tend to recognise *higher* level interdisciplinary research, involving law, as work *where other disciplines are required to be incorporated into the research in order to answer a key question about law* (the social science equivalent here would be when law is required to be incorporated into the research in order to answer a key question generated by that social science), or *where law is one of a number of disciplines used to approach or answer an independent issue or question*. In the latter case each of the constituent disciplines (lawyers working alongside non-lawyers) would be used to provide a definition of the central problem or issue. If each discipline, then, working within its own terms, provides an answer to, or an outlook upon, the problem, the work may be termed multi-disciplinary, trans-disciplinary or even inter-disciplinary (depending on whom one is relying),[54] but will not constitute what might be regarded as fully integrated interdisciplinary work. Rather, in such cases each discipline (the legal and the other(s)) will have provided a separate answer to or outlook upon the common

[52] It may be said that there is much in the legal decision-making process which 'makes no sense to non-lawyers': see Barmes, 'Common Law Confusion', above n. 14, at p. 108.
[53] Mathias M. Siems, 'The Taxonomy of Interdisciplinary Legal Research: Finding the Way Out of the Desert' (2009) 7 *Journal of Commonwealth Law and Legal Education* 5; Bart van Klink and Sanne Taekema, 'A Dynamic Model of Interdisciplinarity: Limits and Possibilities of Interdisciplinary Research into Law', Tilburg Working Paper Series on Jurisprudence and Legal History No. 08-02, Tilburg University, 2008.
[54] See the references cited in n. 53 above, and see also Malcolm Langford, 'Interdisciplinarity and Multimethod Research', University of Oslo Faculty of Legal Studies Research Paper Series No. 30, 2016; Hanoch Dagan and Roy Kreitner, 'The Interdisciplinary Party' (2014) 1 *Critical Analysis of Law* 23.

problem or issue. This may, of course, still be a valuable exercise in providing a comparative study of how different disciplines approach the same issue.

On the other hand, it may be the case that the problem or question being dealt with belongs to the first of the two categories identified in the previous paragraph, that is, it begins from what we might call a *joint-discipline-based-problem* definition. In other words, the research project is such that it can only be properly fulfilled through the *integration* of the disciplines involved, and hence, in the context of this note, through the *integration* of labour law and employment relations. Here the researchers from different disciplines weld together the concepts and methods from each, and apply a general research method to the project as a whole. In effect this more or less requires an adjustment in each separate disciplinary approach to achieve the required outcome.[55]

It follows from the foregoing that the answer to the '*when*' question posed above is dependent upon the nature of the research project being carried out. At least in cases where other disciplines are required to be *fully incorporated* into the research on a legal problem in order *to resolve that problem*, or where the research problem or question *cannot be answered or properly dealt with through the use of a single discipline*, some form of interdisciplinary work will be required, and possibly of a *highly integrated* nature. And it would follow that this would probably entail something more specific than mere 'engagement'[56] with the other discipline, something more than the level of 'collaboration' which is already occurring.[57]

When such interdisciplinary work is required, *what* that might entail, *how* it might be done, is a more difficult question. Some legal scholars have made various suggestions in relation to this issue. For example in his 2007 review article, Simon Deakin suggested that at a minimum it was necessary for lawyers to 'better understand what social scientists [were] doing' and 'to convince social scientists that [law] [had] something useful to offer'.[58] For lawyers to 'better understand' what social scientists are doing, one must suppose that they either must be trained in that field themselves (which usually they are not), or they must work alongside, and with, the social scientists and participate in that side of the research to a sufficient degree to enable them to understand its significance in relation to their own method of 'internal' (doctrinal) legal research.

What might lawyers, in turn, have to say to the social scientists? What might employment relations scholars need to understand as to how the outcomes of an internal, doctrinal, approach to law can influence their perceptions in a relative integrated study drawing upon both fields? What can a deeper appreciation of the law

[55] See Laura Bennett, 'Rethinking Labour Law: Methodological Issues' in Richard Mitchell (ed.), *Redefining Labour Law: New Perspectives on the Future of Teaching and Research*, Centre for Employment and Labour Relations Law, The University of Melbourne, 1995, at p. 144.
[56] See Dickens and Hall, above n. 11; and McCrudden, above n. 14, at p. 645.
[57] See Frazer, above n. 9.
[58] See Deakin, above n. 9.

(and its method) contribute to a fuller understanding by employment relations scholars of 'how the law is used...how people come to accommodate and live with it...how it impacts on, and interacts with, various aspects of employment relations, labour markets and outcomes (such as performance and competitiveness)'?[59]

Some suggestions are relatively straightforward.[60] Understanding legal 'concepts' may help social science research with *conceptual* clarity - for example what might be meant by a 'right' or an 'obligation' in legal discourse. Law might also provide a way forward in providing a *normative* outlook in the policy-orientation of the employment relations work. But far more important are two further points. First, lawyers will be well placed to demonstrate to social scientists when law is playing an important role in relation to the economic, social or political phenomena that they are examining. Second, a point made earlier in this note indicates the tendency of social scientists to treat law as data, and this is no less the case in the field of employment relations.[61] Here, then, employment relations might require integration with labour law.

VI. Concluding Remarks

For various reasons, it is possible to point to a need for closer attention to be paid by labour lawyers and employment relations scholars to methodological questions. For labour lawyers this might apply in relation to work carried out in that field alone. As Barmes notes,[62] legal training in general provides a restricted grounding within which lawyers can properly come to grips with legal adjudication and process: hence they may simply have to 'do better' in explaining what they are doing. However, at the crossroads of labour law and employment relations the need for greater attention to explaining legal method and its interrelationship with social science methodology is doubly exposed. Quite apart from lawyers learning to deal better with empirical approaches, it would seem obvious that law should not be treated too casually either by lawyers themselves, or those engaging with law from the starting point of other disciplines (employment relations included). In concluding their employment relations/labour law study of employee voice, Gollan and Patmore noted that '[n]ew interdisciplinary research could provide fresh insights into how formal and informal rules are applied…how a legal perspective might assist employment relations scholars in addressing critical problems…and how law might support and enhance a diversity of voice mechanisms… [A]n obvious focus is to develop the link between legal perspectives on workplace institutions and organisational behaviour. *The challenge…for both disciplines is to draw a new map of the employment relations terrain with its legal contours'*.[63]

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[59] Dickens and Hall, above n.11, at p. 32.
[60] See McCrudden, above n. 14.
[61] See above nn. 14 and 15 and associated discussion.
[62] Barmes, 'Common Law Confusion', above n. 14 and Barmes, 'Individual Rights at Work', above n.14.
[63] See Gollan and Patmore above n. 47 at p. 501 (emphasis added).

That said, there are evident further difficulties associated with the integration/interdisciplinarity question. Exactly how one incorporates one discipline into another is difficult to foresee or predict, and this would undoubtedly confirm the reluctance of those scholars who assume a common methodological approach within a single disciplinary discourse as self-explanatory, and see no point in moving beyond it.[64] From that perspective, if the legal nature of one's work is purely doctrinal (i.e. work in which one is engaging with legal practitioners for the purposes of constructing and understanding legal doctrine), one might be justified in incorporating data from another discipline 'however incompetent this may seem to scholars within that other discipline'.[65]

Taking this cautionary note even further, as some others have argued it may perhaps be 'virtually impossible' to engage in two or more disciplinary methodologies at once: that is to say that 'one of the disciplines involved is always going to come out on top and that is typically going to be the discipline in which the researcher was first trained'.[66] In this situation, it is helpful for the researcher to be conscious that this is the case and perhaps to acknowledge that multi-disciplinary work borrows from one discipline (which might be seen as the secondary discipline) to inform another discipline (the primary discipline, which will be the audience for the work). Researchers who have trained and worked in more than one discipline clearly have an advantage in this respect. Which discipline becomes dominant in their work might then be determined by their own preferences, or the disciplinary context of the employment, or by their choice of publishing outlet

At the very least then, even scholars pointing to the fact that interdisciplinary conceptual work can produce insights that single disciplines cannot,[67] and who point to other important knowledge breakthroughs which might occur through the integration of labour law and empirical social science,[68] may nevertheless remain distinctly cautious in advocating the prospects and advisability of interdisciplinarity in the purest sense.

Yet be that as it may, it is still difficult to ignore entirely the argument that methodology must play a critical role when disciplines, or fields of study, interact, and that serious errors of judgement, or misunderstandings, may arise in the process of that interaction unless those methodological issues are dealt with.[69] As we have observed throughout this note, there is already a considerable amount of joint work being undertaken by labour lawyers and employment relations scholars in Australia.

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[64] '[O]ne does ultimately need to pick an audience': see Theunis Robert Roux, 'The Incorporation Problem in Interdisciplinary Legal Research: Some Conceptual Issues and a Practical Illustration' (2015) 8 *Erasmus Law Review* 55, at p. 63.
[65] Ibid.
[66] See Roux, above n. 64, at p. 61, citing Stanley Fish, 'There's No Such Thing as Free Speech (And It's a Good Thing Too)' 1994.
[67] Roux, above n. 64, at p. 56.
[68] See Barmes, 'Common Law Confusion', above n. 14 and Barmes, 'Individual Rights at Work', above n. 14.
[69] Vranken, above n. 28, at p. 120.

But in this work there is very little, if any, examination of *how* the legal elements were integrated with the empirical elements of the social science, and vice versa. At the same time, there is also a considerable amount of work written by employment relations scholars which details the law perceived to be relevant to their research, but which says nothing further about that dimension of the project and its operation within it.

As we have noted, there is already a strong push in Australian tertiary education for greater collaboration and interdisciplinary research between sectors.[70] This in turn has certain implications for education in law schools,[71] and perhaps also in social sciences and humanities faculties where specialist degrees are offered which also incorporate (usually at graduate level) law-related subjects (Employment Relations being a good example). As noted earlier it also has implications for editorial practices in journals where articles dealing with labour law, employment relations and other relevant social sciences are published

Finally, while accepting the legitimacy of the sentiments of those pointing to the difficulties of constructing a deeply-integrated interdisciplinary approach to a labour law/employment relations problem, at the same time it is a seemingly odd (and arguably counter-intellectual) position to assert that provided something is acceptable within a particular discourse then, for the purposes of that discourse, it doesn't matter if it is not convincing to a scholar from another discipline, even if the 'something' is drawn from the discourse in which that other scholar is an expert.[72] Surely the need here is for at least some kind of interactive research work, no matter how difficult that undertaking might be.

[70] See above n. 30.
[71] There are already questions concerning the appropriate training of lawyers who are subsequently elevated to a judicial position, and are then required to make decisions on the basis of information drawn from non-legal sources: see Carolyn Sutherland, 'Interdisciplinarity in Judicial Decision-Making: Exploring the Role of Social Science in Australian Labour Law Cases' (2018) 42 *Melbourne University Law Review* 232.
[72] See above nn. 64-65 and associated discussion.