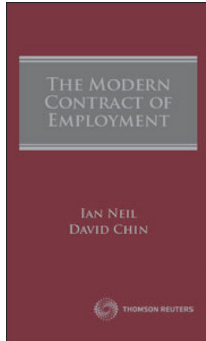


## A MODERN TAKE ON EMPLOYMENT CONTRACTS



*The Modern Contract of Employment* by Ian Neil SC and David Chin (Thomson Reuters, 2012) ISBN: 9780455224534; pages: 347.

A new book in the employment law area is always welcome. *The Modern Contract of Employment* by Sydney barristers, Ian Neil SC and David Chin, is particularly welcome. To date, one has been left with a range of textbooks dealing with the employment contract. *Macken's Law of Employment*, now up to its 7th edition, has been a mainstay of any employment law library. The reach of *Macken's* is wide, whereas the focus of this book is the modern issues confronting the contract of employment. A focus of this kind follows the important English text written by Professor Mark Freedland, entitled *The Personal Employment Contract* (Oxford University Press, 2003). I predict that this book will be as influential as Freedland's book is in England and other common law jurisdictions.

The book contains a generous foreword by retired High Court Judge Michael Kirby AC CMG. Kirby notes the important focus of the book, that is, the contract of employment rather than the other instruments which impact upon employees, such as statutes, industrial awards or enterprise agreements. Kirby also, as the book does, focuses upon the changing nature of work where the very name of the antiquated topic called "Master and Servant" has given way to other descriptors dealing with a more contemporary society.

The book itself is said to state the law up until 31 March 2012 and fortunately has had regard to the April 2012 New South Wales Court of Appeal decision of *Shaw v New South Wales* [2012] NSWCA 102, dealing, inter alia, with the implication of the term of good faith, mutual trust and confidence in contracts of employment. (See a summary of *Shaw* at (2012) 3 WR 74.)

This book has a particularly good coverage of the changing nature of the relationships which give rise to the performance of work, whether that of independent contract, employee or otherwise. Importantly, Ch 2 of the book deals with what is becoming an increasingly vexed problem, that is, identifying who is the employer amongst a range of potential entities. The chapter refers to, inter alia, the American doctrine of joint employment, a concept not yet adopted in the common law of Australia, although there have been a range of cases, discussed in the book, where the identity of the true employer has proved to be problematic.

Any book, despite its scholarship, can draw one or two criticisms. One matter which appears to be overlooked is the nature of damages for commission schemes and/or bonus payments. In dealing with damages in Ch 14, correctly it is noted:

The modern basis for measuring damages for breach of an employment contract, as for all contracts, is by an assessment of the probabilities or possibilities of what, but for the breach, would have happened. (p 299)

The treatment of unpaid bonus payments earned during the term of the contract, or which would have been earned during a period of notice, appears to have been overlooked. *Addis v Gramophone Co Ltd* [1909] AC 488 is generally quoted for the proposition that compensation cannot be ordered for injured feelings because of the manner in which the dismissal took place. However, that case is also authority for the position that damages are available not only for "the salary" to which the plaintiff was entitled for the six months between October 1905 and April 1906 (the express notice period) but, more importantly, also for "the commission which the jury think he would have earned had he been allowed to manage the business himself" (at 490-491 (Lord Loreburn LC)).

This principle has been given modern effect, perhaps in a more telling way with respect to discretionary bonus schemes. One needs to have regard to the decision in *Silverbrook Research Pty Ltd v Lindley* [2010] NSWCA 357. That case considered the terms of the contract of employment which purported to set objectives in relation to how the bonus would be calculated and its payment's discretionary nature.

## BOOK REVIEWS

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In *Silverbrook*, at no stage were performance objectives set. In any event, the company employer said it would not have exercised its discretion in favour of the employer even if such objectives had been set. The President of the Court of Appeal Allsop P found that:

The bonus in question was the loss of a commercial chance of opportunity and such losses are recoverable in contract, the breach being that the objectives have not been set and when words which would suggest a discretion are found in such contracts, the discretion does not permit the employer to withhold the bonus capriciously, arbitrarily or unreasonably. (at [5])

Such a case is of immense importance for persons whose employment contracts have some or all of their remuneration set by bonus or commission payments. (See also a summary of *Silverbrook* at (2011) 2 WR 28.)

However, this book will be an important addition to any legal library. It is particularly relevant in New South Wales with the demise of the unfair contracts jurisdiction and its replacement by the limited and apparently toothless *Independent Contractors Act 2006* (Cth).

No doubt this book will go into many reprints as the pace of change in employment law continues. Already, the Federal Court has made inroads into the implied term of mutual trust and confidence. (See *Barker v Commonwealth Bank of Australia* [2012] FCA 942, a decision of Bezanko J, who cites this book at [323] on the question of whether the implied term of mutual trust and confidence existed in the contract at issue.)

I congratulate and thank the authors for this excellent work.



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