

**THE EVOLUTION AND DEVELOPMENT OF UNFAIR
DISMISSAL LAW IN BRITAIN AND AUSTRALIA**

JOANNA HOWE
ST JOHN'S COLLEGE
D.PHIL IN LAW
MICHAELMAS 2011

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ABSTRACT

This work explores the evolutionary dynamic exhibited by the trajectory of unfair dismissal law in Britain and Australia. A different comparative evolutionary dynamic is observed in the phase leading up to the enactment of a statutory unfair dismissal scheme and in the period subsequent to enactment. It is argued that the shared common law origin of the legal systems of Britain and Australia masks significant divergence in their respective labour law traditions. Whilst collective laissez-faire in Britain, and conciliation and arbitration in Australia both sought to secure industrial peace, these divergent traditions operated in a manner particular to their jurisdiction in constraining the evolution of a statutory unfair dismissal law. It was only when these traditions underwent severe economic, social and political challenges that they faced a crisis of legitimacy and new ideas for labour law were canvassed. Although occurring over twenty years apart, the breakdown of Britain's and Australia's labour law traditions saw the juridification of domestic labour law, with a central reform being the inception of a statutory right protecting against unfair dismissal. Despite emerging from divergent legal traditions and according to different timeframes, the trajectory of unfair dismissal law subsequent to its enactment was to converge upon a common theme of peeling back the statutory superstructure in favour of localised and alternative dispute resolution. Although these developments are diachronistic across the two jurisdictions, this evolutionary dynamic of divergence giving way to convergence is revealing of a high degree of path dependency as between the unfair dismissal laws of Britain and Australia.

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ABBREVIATIONS

ACAS	Advisory, Conciliation, and Arbitration Service
ACAC	Australian Conciliation and Arbitration Commission
ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
AIRC	Australian Industrial Relations Commission
ALP	Australian Labor Party
BCA	Business Council of Australia
CBI	Confederation of British Industry
EAT	Employment Appeals Tribunal
FCA	Federal Court of Australia
FDC	Fair Dismissal Code
FWA	Fair Work Australia
HCA	High Court of Australia
HL	House of Lords
IRC	Industrial Relations Court of Australia
IR Club	Industrial Relations Club
IRLIRB	Industrial Relations Legal Information Bulletin
MP	Member of Parliament
NIRC	National Industrial Relations Court
NJAC	National Joint Advisory Council

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CHAPTER ONE

INTRODUCTION

A path-breaking innovation: the inception of unfair dismissal law

Albeit at different times, a statutory unfair dismissal system in Britain¹ and Australia² was ushered in as part of a promise for a new beginning for domestic labour law. The traditions of collective laissez-faire and conciliation and arbitration were being replaced and with them disappeared the old ordering of protecting workers from unfair dismissal through union strength. Overturning these traditions was no mean feat. The central debate was not over unfair dismissal rights but reordering the entire kaleidoscope of industrial relations. Britain's Industrial Relations Act of 1971 was a fruit of fierce debate in the preceding decade over the future of British labour law and an attempt by the Conservative Government to replace strife with orderly industrial relations. For Australia, the legislative desire of the Industrial Relations Act of 1993 was not order but modernisation: to re-order industrial relations so that enterprise bargaining and not the traditional processes of conciliation and arbitration became the central determinant of wages and conditions. As part of both countries' departure from their traditional path, a statutory unfair dismissal system was canvassed and ultimately introduced as an enhancement of legal protection to working people so as to guarantee a greater degree of universal job security that was not contingent upon their ability to garner union support for their dismissal claim against their employer. With the shift to

¹ The author recognises that 'Britain' is a legally imprecise term. It is used in this thesis to refer to the common framework of unfair dismissal law that was created for England, Wales and Scotland in 1971.

² Whilst a statutory unfair dismissal system was created earlier in some Australian States, the focus of this thesis is on the introduction and evolution of a nationwide federal unfair dismissal system. A description of the state unfair dismissal systems that existed prior to the inception of the federal law can be found in Chapter 2.

a more juridified concept of industrial relations, workers in Britain and Australia were empowered to query their employer's decision to dismiss before an independent tribunal. The notion of job security conceived by each system tended to focus upon providing compensation for unfair dismissal: in both Britain and Australia it was the exception rather than the rule that an unfairly dismissed worker would get their job back. Providing a 'cost' to employers for unfair dismissal was intended to bring about the cultural reform of workplaces so that dismissals occurred according to the correct procedure and resulted in fairer outcomes. The idea was to incentivise employers to only dismiss a worker with good reason and according to the dictates of natural justice.

Yet, despite these aspirations, the reality of the unfair dismissal systems of Britain and Australia was that they afforded only limited protection for the job security of working people. In both countries, from the outset, constraints were placed upon who was eligible to bring an unfair dismissal application. Casual employees, those on fixed term contracts, and those who were still part of a statutorily mandated qualifying period were unable to query their employer's dismissal decision. From the beginning, both countries placed limits on the amount of compensation that could be awarded and whilst the statutory preference was for reinstatement, tribunals were given significant discretion to award compensation, if in their view, the employment relationship had been sufficiently severed. Despite these constraints of jurisdiction and upon the remedy, working people in both Britain and Australia began to use their new unfair dismissal rights, so much so, that in both countries concern was quickly raised about the caseloads of tribunals and the onus upon business of challenging unfair dismissal

claims. Common to the trajectory of both Australia and Britain's unfair dismissal systems was the emergence of a movement towards limiting access to unfair dismissal protection by reforming the jurisdiction according to the needs of business. This latter parallel reoriented the focus of both unfair dismissal systems from their original anchorage in a primary concern for protecting job security to a new situation in which that is combined with an increasingly overt preoccupation with the protection of business efficiency and the control of regulatory burdens.

Despite the challenge to the legitimacy of unfair dismissal law, in both Britain and Australia, statutory protection for workers from unfair dismissal still exists to some extent. No political party or major interest group has seriously canvassed and constructed an argument against eliminating unfair dismissal protection altogether. Instead, the unravelling of the statutory unfair dismissal systems of Britain and Australia have occurred more covertly via an argument to reduce the burden of the unfair dismissal system upon business and to ensure that the presence of statutory protection does not act as a disincentive to job creation. This has led to the peeling back of the statutory superstructure governing unfair dismissal law. Whilst neither system has achieved complete deregulation of their unfair dismissal law, recent reform of the unfair dismissal systems in both Britain and Australia has centred on enabling localised and alternative dispute resolution. The objective of policy-makers is to resolve disputes within the workplace and without recourse to tribunals.

This story of a general pattern of parallel, diachronic developments between the unfair dismissal systems of Britain and Australia should not be overstated. Real differences occurred in the emergence of unfair dismissal law in both jurisdictions because of their divergent labour law traditions, with Britain's traditional labour law culture one of collective *laissez-faire*, and Australia's culture one of conciliation and arbitration. In spite of these divergent traditions, British and Australian unfair dismissal law was introduced in a broadly similar substantive manner, although some divergences remained. For example, in Britain a new specialist labour court was created and charged with resolving unfair dismissal disputes, whereas in Australia, the traditional processes of conciliation and arbitration, whilst out of favour with the direction of Australian labour law more generally, were chosen as the adjudicative mechanism for resolving unfair dismissal claims. This was a body traditionally charged with resolving collective disputes. Its choice as the arbiter of individual disputes brought with it different unfair dismissal outcomes to that resulting from British tribunals. The timing of legal change in both countries is also divergent. In Britain unfair dismissal protection was introduced over two decades earlier than in Australia. Constitutional shackles in the latter jurisdiction played a key role in this delay. In part, these variations reflected both the different labour law traditions of Britain and Australia and the consequent differences in the design of the unfair dismissal systems adopted by each country.

Most important of all, however, is to observe from the outset, the significance of this introduction of unfair dismissal law in Britain and in Australia. Hepple and

Veneziani in their study of the transformation of European labour laws, characterise the establishment of individual rights against unfair dismissal as a ‘path departure’ which they define as ‘when a juncture is reached at which substantively different laws and policies begin to be followed’.³ The establishment of a statutory unfair dismissal system in Britain and Australia represents a break with the past tradition of resolving unfair dismissal disputes through industrial tactics rather than through independent tribunals.

The Aims, Methods and Scope of this Thesis

In seeking explanations for this path-departure this thesis aims to make a comparative historical analysis of the trajectory of British and Australian unfair dismissal laws. Part of being a comparative labour lawyer is identifying processes of convergence and divergence which develop over time between the labour laws of different jurisdictions. As Kahn-Freund notes, upon the comparatist, ‘the gods have bestowed the most dangerous of all their gifts, the gift of freedom’,⁴ because in comparing labour laws, the comparatist is faced with a multiplicity of choices in order to select which jurisdictions to study and upon which aspects of the law to focus. I have chosen unfair dismissal law as the subject of this thesis, and by this I mean, the legal system which governs the situation when a dismissed worker queries the fairness of their termination of employment. This thesis will focus upon the general law of unfair dismissal and not

³ Bob Hepple and Bruno Veneziani, *The transformation of labour law in Europe: a comparative study of 15 countries from 1945-2004* (Hart, 2009) 21.

⁴ Otto Kahn-Freund, ‘Comparative Law as an Academic Subject’ (1966) LQ Review 82, 41.

the specific law of discriminatory dismissal, which involves dismissal by reason of pregnancy, gender, sexual orientation or any other attributed protected from discriminatory conduct by the law. Excluded from this thesis is the evolution of mutual trust and confidence, and good faith. These concepts are expanding the common law of wrongful dismissal and are not part of this thesis which concentrates upon the statutory system of unfair dismissal law.

The scope of this comparative study is limited to identifying the evolution of unfair dismissal laws in Australia and Britain. Zweigert and Kotz caution against unbridled enthusiasm in selecting too many jurisdictions to compare, they state that ‘although a selection may be painful, it is unavoidable on practical grounds’ and that ‘if a selection must be made, a criterion of selection must be adopted’.⁵ Whilst mindful of Kahn-Freund’s warning that ‘nothing is more difficult than to understand from the other side of the Globe systems of industrial relations as subtle and complex as those of Australia and that of New Zealand’,⁶ I have selected Britain and Australia as the focus of this study because the two jurisdictions have many of their fundamentals in common. Legal origins theory, which is discussed in more detail below, recognises that Australia and Britain are from the same legal family as Australia adopted Britain’s common law system.⁷ Australia has also adopted Britain’s Westminster political

⁵ Konrad Zweigert and Hein Kotz, *An Introduction to Comparative Law* (3rd edn, Clarendon Press, 1998) 42.

⁶ Otto Kahn-Freund, *Labour and the Law* (2nd edn, Stevens, 1977) 117.

⁷ Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Schliefer, and Robert Vishny, ‘Legal Determinants of External Finance.’ (1997) 52 *Journal of Finance* 1131; Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Schleifer and Robert Vishny, ‘Law and Finance’ (1998) 106 *Journal of*

system and both countries have closely connected union movements. Both are social democracies and have a common economic system. These similar foundations for Britain and Australia mean that a study of the evolution of their unfair dismissal laws is not a case of comparing polar opposites. Ewing argues that the labour laws of Britain and Australia have more in common than has been popularly acknowledged and that this similarity exists on a rudimentary level so that, 'in different ways and by different methods of determination the state delegated to public or quasi-public institutions an important regulatory function, in the construction of which it played an essential part'.⁸

I am aware of the challenges faced when a comparatist selects their own jurisdiction as one of the countries to be studied. Whilst they do not explain how exactly this should be done, Zweigert and Kotz mandate that 'the comparatist must eradicate the preconceptions of one's own national system' because 'one must never allow one's vision to be clouded by concepts of one's own national system'.⁹ To avoid being influenced by my own subjective interests and experience of Australia's unfair dismissal system, I have adopted a method of legislative history as I seek to analyse the policy developments leading up to and dictating the shape of unfair dismissal legislation in both Australia and Britain. In identifying the particular factors which shape legal growth and change in the unfair dismissal laws of Britain and Australia, I

Political Economy 1113; Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Schleifer 'Corporate Ownership Around the World' (1999) 54 *Journal of Finance* 471.

⁸ Keith Ewing, 'Australian and British Labour Law: Differences of Form or Substance?' (1998) 11 *AJLL* 44.

⁹ Zweigert and Kotz (n 5) 35.

am aware of the centrality of legal history to comparative law. As Watson notes ‘the nature of any such relationship [between the countries under comparison], the reasons for the similarities and differences is discoverable only by a study of the history of the systems or of the rules’.¹⁰ In following a method of legislative history advocated by Davies and Freedland in their work on British labour law and public policy, I rely upon policy documents and parliamentary debates as the main source of primary evidence.¹¹ In relying predominantly on primary sources my aim is to avoid the errors of law that can be contained in secondary materials which Watson observes as one of the peril of comparative legal studies.¹² However, I do rely on some secondary sources as I recognise that to provide a closely-grained analysis of my subject and not a broad-brush account, a multiplicity of sources is needed. Of the importance of ‘comprehensiveness’ for the comparatist, Zweigert and Kotz note ‘the basic principle for the student of foreign legal systems is to avoid all limitations and restraints. This applies particularly to the question of “sources of law”.’¹³ This approach rejects a static conception of labour law and is mindful of Hepple’s warning to avoid becoming ‘immersed in the ephemeral details of the present’ in favour of studying the evolution of labour law across jurisdictions.¹⁴ Developments after 2010 belong to ‘present’ labour law and fall outside the scope of this work.

¹⁰ Alan Watson, *Legal Transplants* (Scottish Academic Press, 1974) 6-7.

¹¹ For a description of their methodology, see: Paul Davies and Mark Freedland, *Labour Legislation and Public Policy* (Clarendon Press, 1993) 1-7.

¹² Watson (n 10) 9.

¹³ Zweigert and Kotz (n 5) 35-36.

¹⁴ *ibid.*

A normative purpose for comparative labour law has been recognised by scholars. As Watson observes, the subject has a practical utility: ‘it can enable those actively concerned with law reform to understand their historical role and their task better. They should see more clearly whether and how far it is reasonable to borrow from other systems and from which systems, and whether it is possible to accept foreign solutions with modifications or without modifications’.¹⁵ Zweigert and Kotz consider normativity to be inherent and necessary in the final stage of a comparative legal study. They suggest that the comparatist must proceed to a critical evaluation of what has been discovered and that ‘sometimes one of the solutions will appear ‘better’ or ‘worse’. Often he will find that the different solutions are equally valid’.¹⁶ In this short dissertation I avoid any ambition of writing a ‘one size fits all’ solution to guaranteeing the job security of working people whilst addressing the concerns of business of over burdensome regulations and the needs of the economy to remain internationally competitive and foster job creation. I am not the first to recognise there is no such panacea. Labour law involves compromises: the balancing of the interests of employers, workers, the government and the public. Whilst this work aims to be a comprehensive historical comparative work of unfair dismissal legislation and public policy in Australia and Britain, it by no means is intended as a comprehensive historical comparative work of labour legislation and public policy more generally. Thus, any conclusions I come to about the effectiveness and limitations of unfair

¹⁵ Watson (n 10) 17.

¹⁶ Zweigert and Kotz (n 5) 47.

dismissal law in either jurisdiction are constrained by the confined subject matter and necessary word constraints of this thesis. Nonetheless, to merely stop at a description of the unfair dismissal laws of Britain and Australia would fall short of the vocation of the comparatist to expand knowledge: to understand that comparative law is an *ecole de verite* which extends and enriches the ‘supply of solutions’. This approach to comparative law is judgmental and normative – its goal is to make laws better by comparison and evaluation. To this end, there is a degree of normativity inherent in this dissertation contained in my critical evaluation of what I have discovered about the unfair dismissal laws of Britain and Australia.

Frameworks for Comparative Legal Study

The central concern of this work is with understanding the dynamics of comparative legal change. Unfair dismissal law is the locus that I have chosen to anchor this study of the trajectory of Britain and Australia’s evolutionary trajectories in abandoning their respective labour law traditions in favour of statutory intervention. One way of conducting a comparative labour law study is to identify the processes of convergence and divergence that develop over time between the labour laws of different jurisdictions. Hepple and Veneziani recently revisited debates about convergence and divergence in their work on the transformation of European labour laws.¹⁷ They sought to identify processes of convergence and divergence by examining the historical relationships arising from the labour laws of different jurisdictions. They

¹⁷ Hepple and Veneziani (n 3).

explore the existence of ‘inner’ social, economic and political relationships of parallel developments in different countries.¹⁸ Another theoretical perspective which discusses path dependency, albeit from a different standpoint, is that of legal origins theory which suggests that diversity across national systems of production can be explained by the influence of common law and civil law modes of regulation on economic development.¹⁹ These theoretical perspectives respond to the central question of comparative law: *how* and *why* do countries come up with particular solutions for solving legal challenges? With this central question in mind, this thesis explores the nature of evolutionary dynamics in two significantly different labour law cultures, which despite their shared common law heritage, produces highly path dependent outcomes in the context of unfair dismissal law. These ideas of path dependency and divergences arising from particularities in legal culture are the primary comparative legal theoretical tools that have enabled me to discover the development and evolution of unfair dismissal law in Britain and Australia.

One way of understanding the introduction of unfair dismissal law in Britain and Australia is through the concept of an ‘inner’ social, economic and political relationship of parallel developments in different countries.²⁰ This notion of an ‘inner’ relationship originated in the writings of Pringsheim who identified the relationship as resting upon a spiritual and physical relationship between the two countries and upon

¹⁸ Zweigert and Kotz (n 5) 47.

¹⁹ La Porta et al (n 7).

²⁰ Hepple and Veneziani (n 3) 9.

an undeniable similarity between the populations.²¹ According to Pringsheim the existence of an ‘inner’ relationship is an unproveable hypothesis.²² As the notion of an ‘inner’ relationship is inherently ambiguous Watson cautions against overuse of the concept:

The difficulties and dangers in this branch of study are obvious, the relationship cannot be closely defined, its nature will not always be apparent, it will not exist in all areas or at all periods of development, and above all there is no reasonably objective way of determining the importance of similarities and differences which are observed.²³

Hepple and Veneziani have contributed significantly to further concretising this notion of an ‘inner’ relationship which goes some way to dealing with these challenges outlined by Watson. They have rejected any notion of a universal path dependency between countries, arguing instead that ‘the development of legal systems in general, and labour law in particular, is the product of a variety of factors which are neither “necessary” nor “natural”.’²⁴ Locke and Thelen also argue against the notion of universal path dependency in their work, which focuses on the importance of national level institutions in responding to the common economic challenge of globalisation in different ways and according to a country’s institutional culture.²⁵ As Weiss argues, ‘the relationship between the pressures associated with globalisation and the effects on

²¹ Fritz Pringsheim, ‘The Inner Relationship between English and Roman Law’ in *Gesammelte Schriften* (Heidelberg, 1961) 77.

²² *ibid.*

²³ Watson (n 10) 8.

²⁴ Hepple and Veneziani (n 3) 11; Bob Hepple (ed) *The making of labour law in Europe: a comparative study of nine countries up to 1994* (Hart, 2010) 4.

²⁵ Richard Locke and Kathleen Thelen, ‘Apples and Oranges Compared: Contextualized Comparisons and the Study of Comparative Politics’ (1995) 23 *Pol. & Soc’y* 337.

national labour law systems seems to be much more complex than the simplistic and one-dimensional globalisation approach suggests'.²⁶ This amounts to a repudiation of the convergence thesis that the 'logic of industrialism' leads to a tendency for technological and market forces to push national systems towards uniformity or convergence²⁷, and a repudiation of the claim by other scholars that the pressures associated with globalisation leave little scope for national differences as countries 'race to the bottom' in order to compete.²⁸

Whilst I recognise that the convergence thesis or globalisation approach are overly simplistic, in this work I observe that the evolutionary dynamic of Australia and Britain's unfair dismissal laws exhibits a substantial degree of convergence despite the evolution of those laws from divergent legal traditions. This evolutionary dynamic of divergence giving way to convergence is revealing of a high degree of path dependency as between the unfair dismissal laws of Britain and Australia. This forces a consideration of *why* these divergent labour law traditions converge to produce broadly similar systems in the context of unfair dismissal law and *why* the evolutionary dynamic of these systems subsequent to their inception is one of parallel developments occurring diachronically.

²⁶ Manfred Weiss, 'Convergence and/or Divergence in Labor Law Systems? A European Perspective' (2006) 28 *Comparative Labor Law and Policy Journal* 469.

²⁷ The convergency thesis was developed in several branches of the social sciences in the post-1945 period. This approach was applied to the social sciences by Kerr et al: Clark Kerr, JT Dunlop, FH Harbison, CA Meyers, *Industrialism and Industrial Man*, (Harvard University Press, 1960).

²⁸ Thomas Kohler, 'Comparative Labor Law: Some Reflections on the Way Ahead' (2003) 25 *Comparative Labor Law and Policy Journal* 87.

Identifying power relationships within jurisdictions is seen as central to observing the existence of an ‘inner’ relationship between jurisdictions and to understanding the dynamics of legal change between and within jurisdictions. Hepple’s view is that power relationships provide ‘a key to understanding both the common tendencies and the divergences in the labour laws of societies which have shared the experience of capitalist industrialisation’.²⁹ There are common tendencies in the trajectories of Britain and Australia’s unfair dismissal laws as power struggles have occurred, broadly speaking, on the same topics and have resulted in parallel outcomes. In the period prior to the enactment of unfair dismissal law, both jurisdictions experienced the same controversies over legalism and procedural fairness which were addressed in debate over what is the most suitable adjudicative mechanism. Upon introducing unfair dismissal law this led to both Australia and Britain eschewing the common law courts in favour of independent tribunals staffed by lay representatives. A second parallel development, subsequent to the introduction of unfair dismissal law, is the emergence of an ‘argument of principle’ against unfair dismissal in Britain and the counteraction to the ‘Industrial Relations Club’ in Australia, which has prompted conservative and business actors in both jurisdictions to argue that the unfair dismissal system should prioritise the achievement of business efficacy even if this leads to a diminution in worker protection. This has been critical in persuading successive governments in both jurisdictions and of different political persuasions to deregulate unfair dismissal law by constraining access to the adjudicative mechanism and

²⁹ Hepple (n 24) 5.

encouraging the resolution of unfair dismissal disputes within the workplace by mandating that employers dismiss staff according to a state-sanctioned procedure.

These parallels in the development of unfair dismissal law in Britain and Australia reveal the choices that domestic actors have made in making and remaking this law. According to Hepple these choices were not the ‘inevitable solutions to the social problems created by the workings of the market’.³⁰ Rather, these choices stem from the normative perceptions that different actors possess about the rationale for unfair dismissal law and the impact of the existence of unfair dismissal law on business efficacy. The role of conservative actors in both Britain and Australia in leading to the emergence of an ‘argument of principle’ against unfair dismissal and the counteraction to the ‘IR Club’ has effectively dominated the discussion so that all attempts at reform are now required to be justified according to their impact upon business and the goal of job creation. This outcome of the power struggle over unfair dismissal law is consistent with the view that ‘what any particular group of people get is not just a matter of what they choose or want but what they can force or persuade other groups to let them have’.³¹ In Britain and Australia this has resulted in a paradigmatic shift from unfair dismissal law embedded in an industrial justice rationale to a peeling back of the statutory superstructure. This is because the Conservative Government’s (1979-1997) argument of principle and the Coalition

³⁰ Hepple (n 22)

³¹ Phillip Abrams, *Historical Sociology* (Cornell University Press, 1982) 15.

Government's (1996-2007) counteraction to the IR Club have effectively influenced the agenda so that all subsequent attempts at reform are now required to be justified according to their impact upon business and the goal of job creation. Not only have these actors chosen a deregulated unfair dismissal law, they have also largely persuaded their opposing political party to adopt this deregulatory agenda, with the New Labour Governments of Britain (1997-2010) and the Labor Government (2007-present) of Australia, failing to return unfair dismissal law to its original anchorage in a primary concern for protecting job security.

An alternative explanation for path dependency in the evolutionary dynamic exhibited by Britain and Australia's unfair dismissal laws is that of legal origins theory. Legal origins theory says that national regulatory styles in economic ordering are principally influenced by whether the country is of common law or civil law origins.³² Botero et al applied the legal origins hypothesis to labour regulation, arguing that 'the historical origin of a country's laws shapes its regulation of labour and other markets'.³³ Their claim is that legal origin influences the predominant regulatory approach of a particular country, which results in a greater or lesser propensity for adopting protective labour legislation, after accounting for the influences of politics and culture. According to this perspective, common law countries tend to rely more on markets and contracts, and civil law countries on regulation. Legal origins theory would suggest that because Australia received its legal system exogenously rather than

³² La Porta et al (n 7)

³³ Juan Botero et al (2004) 'The Regulation of Labour' (2004) 119 Quarterly Journal of Economics 1340.

being self-developed, Australia's labour law would resemble the regulatory style of other countries with a legal system of common law origin such as Britain, the United States of America, New Zealand, India and Canada. According to Mitchell et al, this theory would suggest that 'there would be a certain path dependency in the evolution of Australian labour law fixed by certain ground rules and institutions and that any development in the regulatory regime would be basically in accord with comparable systems.'³⁴ This theory would suggest that Australia's subsequent introduction of unfair dismissal law in 1993 is because of the 'legal origin effect' arising from Britain's original adoption of unfair dismissal law in 1971. Their similar legal origins would also mean that the development of Britain and Australia's unfair dismissal laws would be according to a similar pattern and ultimately result in a high degree of convergence between the two jurisdictions.

Ahlering and Deakin's recent work has contributed to the development of legal origins theory by establishing a modest typology for categorising complementarities within civil law and common law countries.³⁵ In their typology, they divide countries according to two varieties of capitalism: liberal, market economies and coordinated market economies.³⁶ In the former economic systems, employee representation within the business is characterised as 'voluntarist' as it is contingent upon the outcomes of

³⁴ Richard Mitchell, Peter Gahan, Andrew Stewart, Sean Cooney and Shelley Marshall (2010) 'The Evolution of Labour Law in Australia: Measuring the Change' 23 AJLL 61, 66.

³⁵ Beth Ahlering and Simon Deakin, 'Legal Regulation, Corporate Governance, and Legal Origin: A Case of Institutional Complementarity?' (2007) 41 Law and Society Review 865.

³⁶ Ahlering and Deakin (n 35) 876.

enterprise bargaining.³⁷ Employee input into the day-to-day running of the business is beyond the scope of this bargaining-based relationship. Regulation of the labour market occurs on a partial, uneven basis as the safety net of minimum terms and conditions of employment tends to apply differently among and between different groups of workers. In contrast, coordinated market economies tend to exhibit a more ‘universalist’ approach to labour market regulation with all workers’ terms and conditions of employment protected by a stronger statutory minimum. Ahlring and Deakin characterise employee representation in these countries as ‘integrative’ as employees are involved and consulted in ongoing decision-making by the business.³⁸ This discussion raises some very interesting points for exploration in a study of the comparative evolution and development of unfair dismissal laws in Britain and Australia, both of whom are of the same liberal market system and common law origin.

In recent years, a number of Australian researchers have done considerable work unpacking and applying legal origins theory to the trajectory of Australian labour law.³⁹ Their work starts by using Ahlring and Deakin’s typology of identifying complementarities in corporate governance and labour law between liberal market

³⁷ Ahlring and Deakin (n 35) 872-876.

³⁸ *ibid.*

³⁹ See: Mitchell et al (n 32); Richard Mitchell, Peter Gahan, Andrew Stewart, Sean Cooney and Shelley Marshall (2010) ‘Legal Origins and the Evolution of Australian Labour Law’ (Research Report, 2010); Meredith Jones and Richard Mitchell, ‘Legal origin, legal families and the regulation of labour in Australia’ in Shelley Marshall, Ian Ramsey and Richard Mitchell (eds), *Varieties of Capitalism, Corporate Governance and Employees* (Melbourne University Press, 2008) 60-94.

systems and coordinated market systems.⁴⁰ Their initial assumption is that Australia's adoption of a conciliation and arbitration system in 1901 was a 'path-breaking innovation', which, on its face, suggests that Australia's labour law trajectory is distinctive to that of other common law countries such as Britain, the US and Canada.⁴¹ Applying Ahlering and Deakin's typology, they argue that Australia's labour laws traditionally looked more similar to that of coordinated market economies than that of liberal market economies because employee representation was a natural consequence of compulsory arbitration and the regulation of the labour market was more 'universalist' than 'partial' given the system of awards which regulated the minimum wages and conditions for the vast majority of Australian workers. Nonetheless, despite this appearance of Australia's labour laws as more analogous to those countries of a civil law origin, Marshall et al identify two reasons why there are important underlying similarities between the Australian system and those of other common law based countries. Firstly, in terms of worker representation and involvement, Australia diverges significantly from the coordinated systems. There is no joint rule-making or employee voice in management decision-making. Unions are only really involved in collective bargaining over industrial matters. Once the bargaining period has concluded, unions have little input in the day-to-day running of the business. When there are consultative committees these are usually creations of management rather than genuine power sharing arrangements.⁴² Secondly, the

⁴⁰ Shelley Marshall, Richard Mitchell and Anthony O'Donnell, 'Corporate governance and labour law: Situating Australia's regulatory style' (2009) 47 *Asia Pacific Journal of Human Resources* 150, 153.

⁴¹ Marshall (n 40) 159.

⁴² Marshall (n 40) 160-1.

trajectory of the Australian system and its ‘apparent convergence on a stylised Anglo-American liberal market model over recent decades’ provides another reason to rethink Australia’s apparent distinctiveness.⁴³

Marshall et al’s application of legal origins theory and Ahlering and Deakin’s typology to the trajectory of Australian law provides a useful point of departure for my study into the introduction and development of unfair dismissal law in Britain and Australia. Marshall et al conclude their research by suggesting that despite the appearance of similarity with civil law countries, Australia’s labour laws are, in substance, more analogous to the laws of other liberal market systems of common law origin. A question arising from my study is whether another reason giving cause to rethink Australia’s apparent distinctiveness in labour laws is that of employment protection. Is there evidence of convergence between unfair dismissal protection in Australia and Britain which suggests some degree of path dependency? Or, are there real points of contrast emerging between the unfair dismissal laws of Britain and Australia, indicating that despite their common legal origin, their trajectories in terms of employment protection are divergent?

The purpose of this discussion of legal origins theory is, therefore, a relatively straightforward and confined one. I aim to discover whether Australia’s enactment and subsequent reform of unfair dismissal legislation is consistent with legal origins theory and accords with the expected outcomes of Australia’s membership of the common

⁴³ *ibid.*

law legal family, of which Britain is the parent. In seeking to answer this question, my research is in no way trying to assess the validity of the legal origins theory itself: this is a much larger challenge than I can hope to address given the inherent limits of a doctoral study. My purpose is to advance our understanding of the dynamics of legal change in Britain and Australia in the specific context of unfair dismissal law. I seek to show why, in both jurisdictions, there was a shift from the labour law tradition in favour of statutory intervention.

A consequent question arising from the preceding discussion is whether the particular path chosen by British and Australian unfair dismissal law subsequent to their introduction stems from their shared common law origins. Botero et al argue that common law countries favour market-based solutions to legal challenges.⁴⁴ The hypothesis I explore in this work is how the trajectory of British and Australian unfair dismissal law, subsequent to its introduction and albeit diachronically, is to peel back the statutory superstructure in favour of localised and alternative dispute resolution. Governments of either political persuasion and in both jurisdictions uniformly reform unfair dismissal law in this manner subsequent to its introduction. It could be argued that this particular path for unfair dismissal law which represents a lesser rule for an external adjudicative mechanism to determine the merits of an unfair dismissal application and a greater role for managerial prerogative in determining the dismissal of staff, is chosen because this solution is essentially market-based, relying less on external regulation and more on the contract of employment to determine the outcome

⁴⁴ Botero et al (n 33).

of dismissal disputes. Supiot regards the dogmatic foundation of the market to be the contract of employment and argues that ‘for the market economy to be universal, it is necessary for all nations to be converted to the contract culture’.⁴⁵ Arguably, the recent convergence of unfair dismissal law in Britain and Australia has been to further the adoption of this ‘contract culture’.

Key themes and ideas

Ideology is a driving factor in the making and re-making of unfair dismissal law in Britain and Australia. In this thesis different ideas of ‘job security’, ‘neo-liberalism’, ‘Third Way’ and ‘industrial citizenship’ are referred to as being instrumental to prompting legal change. It is important to state from the outset that often these ideas are more complex and nuanced than their name suggests. In this section I briefly outline the central debates around the key ideologies discussed in this work.

Unfair dismissal law was conceived as a way of protecting workers’ ‘job security’. ‘Job security’ is a taxonomy of different ideas and can be analysed from a variety of perspectives. One way of understanding job security is to identify ‘what’ it is that is requiring protection. Kahn-Freund observes that ‘for the vast majority of people their job is their principle asset. They have invested their skill and their strength in their job’.⁴⁶ Or as Reich states, ‘a profession or a job is frequently far more valuable

⁴⁵ Alan Supiot, ‘The dogmatic foundations of the market’ (2000) 29 ILJ 321, 323.

⁴⁶ Otto Kahn-Freund, *Labour Law: Old Traditions and New Developments* (Clark, Irwin & Co, 1968) 38.

than a house or bank account, for a new house can be bought, and a new bank account created, once a profession or job is secure'.⁴⁷ A similar recognition of the importance of a person's job is made by the Donovan Commission in their observation that 'in reality people build much of their lives around their jobs' and that 'for workers in many situations dismissal is a disaster'.⁴⁸ Thus, inherent in the notion of 'job security' is an acknowledgement of the significant investment that employees make in their jobs and that this investment should not be viewed as subordinate to the employer's investment in the employment relationship.

'Security' is more difficult to define. From one viewpoint, 'security' suggests that workers ought not to be deprived of their jobs in the first place, or at least not in a manner which is arbitrary or unjust. 'Security' could be maintained in accordance with workers' procedural rights and/or substantive rights in dismissal. The former suggests that fairness in dismissal is satisfied by technical adherence to procedural requirements whilst formulating a substantive notion of job 'security' is more challenging. 'Security' is not immunity from dismissal. I would argue that it can be broken down into *ex ante* job security and *ex post* job security. With regards to the employer's conduct prior to dismissal, the concern of job security is to strengthen the safeguards ensuring that dismissal only occurs for a valid reason. With regards to the employer's conduct during the dismissal process, job security is about ensuring that dismissal occurs according to a valid procedure and for a valid reason. The prevailing view in

⁴⁷ Charles A. Reich, 'The New Property' (1964) 73 Yale Law Journal 734, 738.

⁴⁸ Report of the Royal Commission on Trade Unions and Employers' Associations (Cmnd 3888,1969) para 526 ('Donovan').

both Britain and Australia is that *ex post* job security is about ensuring compensation for unfair dismissal rather than necessarily mandating that the aggrieved employee is allowed to return to their job. The justification for this is that the employment relationship is so broken down by dismissal that ordinarily the employee does not want their job back but to be adequately compensated for being arbitrarily deprived of it.

In sum, the term ‘job security’ is used in this thesis to reflect the view that an employee’s investment in the employment relationship should be protected from being unjustly removed. This protection is best provided by a system that awards a remedy reflective of the worker’s loss of property, making it exceedingly difficult for the employer to dismiss unless there is good reason and due process.

Another set of ideas explored in this thesis is those emanating from the liberal tradition. Crouch argues that the term ‘neo-liberalism’ is a misnomer.⁴⁹ He draws a distinction between ‘conservatism’ which retains a significant role for the state, trade unions and workers’ protection and ‘liberalism’ or ‘libertarianism’ which emphasizes non-intervention from government and rejects regulation of the market. In this thesis I argue that the Conservative Government (1979-1997) in Britain and the Coalition Government (1995-2007) in Australia are of conservative political persuasion in that they sit on the right of the political spectrum but that they are motivated by liberalism not conservatism in their public policy. In particular, I suggest that they are motivated by a particular variant of liberalism, that being neo-liberal ideology, in that they are

⁴⁹ Colin Crouch, *The Strange Non-Death of Neoliberalism* (Polity Press, 2011).

influenced by the writings of Friedrich Hayek who argued that employment protection leads to an inefficient operation of the labour market. He suggested that the social goals to which trade unions purport to aspire are in fact misguided and selfish, for ‘social justice’ is a ‘mirage’ and the only real justice is that meted out by the unhampered operation of market forces free from collective or other interference.⁵⁰ In relation to individual labour rights, another neo-liberal writer, Richard Epstein, claimed that statutory unfair dismissal protection interferes with the efficient incentive structures provided by the law of contracts.⁵¹ He suggests that the employment-at-will doctrine produces efficient labour markets by reducing the costs and the stakes of disputes over dismissal. This in turn, ‘protects’ dismissed employees as it promotes a free labour market in which jobs are frequently created and readily available.

The ideology of the Third Way began to permeate labour law policy in the 1990s. ‘Third Way’ ideology contained many different perspectives but as Fredman explains, had several common elements.⁵² It rejected both the neo-liberal dedication to free markets and the traditional left wing adherence to a social democratic state. Third Way writers argued for a balance between the individual and the state within a competitive market economy. The idea of mutual obligation was central to the Third Way as no longer could citizens be regarded as passive recipients of state benefits. Individuals were seen by the Third Way as having a civic duty to take responsibility

⁵⁰ A useful synopsis of Hayek’s view on this is Eamonn Butler, *Hayek* (Temple Smith, 1983) chapter 4.

⁵¹ Richard Epstein, ‘In Defense of the Contract at Will’ (1984) 51 *University of Chicago Law Review* 947.

⁵² Sandra Fredman, *The Ideology of New Labour Law* (Hart, 2004) 10-18.

for their lives and to enter the labour market. Notions of active citizenship, social inclusion and democracy were intrinsic to the Third Way. This paper makes a tentative hypothesis which will hopefully be borne out in the substantive chapters that follow, that the practical implementation of Third Way ideology represented a prioritisation of the market over the individual. In the attempt to create a partnership between employers and employees, the needs of the former took precedence. This hypothesis is based on an exploration of the influence of egalitarian liberal ideas on New Labour's Third Way project. The idea of egalitarian liberalism will be explored in greater detail in chapter seven of this work. The egalitarian liberalism idea draws upon the liberal faith in free markets although this is tempered by recognition that some state regulation is needed to achieve economic justice. Davies and Freedland suggest that the New Labour Government's (1997-2010) labour law policy can be regarded as 'having subsumed labour legislation and its associated body of social policy into a larger activity or pursuit of labour market regulation in the interests of a free and competitive market economy'.⁵³

The ideas of Dr Alan Bogg in his writings on 'civic republican citizenship'⁵⁴ and Professor Ron McCallum contained in his writings on 'industrial citizenship'⁵⁵ are discussed in chapter seven as a potential successor to industrial justice in providing a new justification for unfair dismissal law beyond that articulated by the Donovan

⁵³ Paul Davies and Mark Freedland, *Towards A Flexible Labour Market* (OUP, 2007) 9.

⁵⁴ Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart, 2009).

⁵⁵ Ron McCallum, 'Crafting a New Collective Labour Law for Australia' [1997] JIR 405.

Commission. Whilst their ideas differ to some degree, there is a general agreement between these scholars that notions of community, fair play and freedom from arbitrary power or domination are central to the normative ideal of citizenship. T.H. Marshall's post-war conception of citizenship has left a lasting imprint on the development of social citizenship scholarship.⁵⁶ According to Marshall, citizenship is a matter of ensuring that every person is treated as a full and equal member of society. Marshall offered a tripartite view of citizenship, dividing it along the lines of civil, political and social, and is concerned with notions of liberty and equality, achievable through civil and political rights which guarantee full and equal membership. Marshall's definition of what social rights come under the banner of social citizenship is fairly sketchy and is limited to providing the following guidance: 'The right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society.'⁵⁷ Whilst Marshall does not specify the level, form and content of social rights, he does argue that the purpose of social citizenship is as a class-abatement mechanism moderating the impact of capitalism upon citizens. In his view, even though the capitalist profits at the expense of the labourer, the welfare state intervenes to certify that a certain standard of living is maintained. In so doing, social citizenship is 'no longer merely an attempt to abate the obvious nuisance of destitution in the

⁵⁶ TH Marshall, *Class, Citizenship and Social Development* (Anchor, 1965).

⁵⁷ Marshall (n 56) 30.

lowest ranks of society. It has assumed the guise of modifying the whole pattern of social inequality'.⁵⁸

Marshall's view of citizenship has been criticised for its passivity because of its emphasis on the welfare state which provides entitlements to citizens without any corresponding duty to participate in public life. More recently, Marshall's conception of citizenship as social rights has transmogrified into a new concern with mutual obligation and reciprocity. Different theories have used this new concern and taken up the language of citizenship. For liberal theorists, also described as the 'New Right', the market is viewed as 'a school of civic virtue' as it encourages citizens to be self-supporting rather than passive recipients of welfare.⁵⁹ According to this view of citizenship, the focus should be on people's responsibility to earn a living and markets encourage this through promoting self-reliance, initiative and full membership of society through work. Markets are also said to promote citizenship through their ability to encourage civility. This is the argument that there is a business case for employers to avoid discriminatory hiring policies or discrimination in customer service as a failure to do so would result in the business being penalised by the market through reduced custom or an inability to access the best labour. This is not the view of citizenship adopted in this work as I agree with Kymlicka's analysis that 'the limits of

⁵⁸ Marshall (n 56) 37.

⁵⁹ Will Kymlicka, *Contemporary Political Philosophy* (2nd edn, OUP, 2002) 304.

the market as a school of civic virtue are clear...markets teach initiative but not a sense of justice or social responsibility'.⁶⁰

Ideas of citizenship also feature strongly in the Third Way approach to labour law. The idea of a partnership at work between employers and employees, and of a balance between fairness and competitiveness in the employment relationship, contain an understanding of citizenship as requiring reciprocity. This involves an expectation that the employer manage the business fairly in return for the employee's willingness to work productively and contribute to absorbing the organisation's goals. For the unemployed, there is an expectation that as the recipient of unemployment benefits, the unemployed person will re-train and apply for jobs in order to contribute to the national economy. This Third Way approach to citizenship can be distinguished from the liberal idea of the market as a school of civic virtue on the grounds that the Third Way sees the need for government programs and assistance to enable the unemployed to enter the labour market and to develop labour market regulation so as to facilitate employers to achieve the civic good, not just the good of the business. Examples of this would be the introduction of the minimum wage, provisions outlawing discrimination and the strengthening of unfair dismissal laws during the New Labour Government's first term.

Drawing upon these general debates between different notions of citizenship is the work of some scholars to provide a theory of 'industrial citizenship' in an attempt

⁶⁰ *ibid.*

to concretise notions of industrial justice and industrial fair play to justify the existence of protective labour laws in response to the challenges presented by liberal ideology.⁶¹ This notion of citizenship is distinct to the market view of citizenship and the Third Way conception as there is a more explicit acceptance of the traditional labour law perspective of the inherent power imbalance in the employment relationship. Unlike in the Third Way, notions of a ‘partnership’ between employers and employees, and of a ‘balance’ between fairness and competitiveness are seen (rightly in my view) as ultimately prioritising employer needs and competitiveness over that of employee needs and fairness. The normative agenda of industrial citizenship has been described as a form of ‘aspirational citizenship’ because the focus is on ‘what would be an ideal labour relations mechanism in which rights would grow and flourish’?⁶² This aspirational conception of industrial citizenship justifies the existence of statutory unfair dismissal protection on the basis that an individual employee is an industrial citizen who can only be deprived of his or her status as a citizen for a valid reason. At its essence, citizenship’s central meaning has to do with membership in a community⁶³ and providing an employee with the right not to be unfairly dismissed protects the employee from arbitrary removal from the workplace community. Industrial citizenship perceives this right as an inalienable and a legitimate limit upon managerial

⁶¹ Ron McCallum, ‘Citizenship Theory and Labour Law’ (Citizenship at Work? An International Colloquium Theorising Citizenship at Work, University of Laval, Quebec, June 2004); Judy Fudge, ‘After Industrial Citizenship: Market Citizenship or Citizenship at Work?’ [2005] IR 631, 632; Harry Arthurs, ‘Developing Industrial Citizenship: A Challenge for Canada’s Second Century’ [1967] Canadian Bar Review 786.

⁶² McCallum (n 61).

⁶³ JM Barbalet, *Citizenship Rights, Struggle and Class Inequality* (University Minnesota Press, 1988); Linda Bosniak, ‘Citizenship’ in Peter Crane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (OUP, 2003) 185.

prerogative and not as an interference with the market mechanism resulting in efficiency, or as a constraint upon the business's competitiveness in the economy. Even if unfair dismissal rights result in inefficiencies or un-competitiveness, this is seen as a necessary by-product of a system of labour laws achieving industrial citizenship.

The challenge for the proponents of industrial citizenship is to differentiate it from theories of industrial justice. As Kymlicka states:

It is difficult to think of cases where people have defended policies on grounds of citizenship that they were not already committed to on grounds of justice. In this sense, it is not clear whether adopting the perspective of citizenship really leads to different policy conclusions from the more familiar perspectives of justice. It may instead be a matter of putting old wine into new bottles.⁶⁴

Outline of the Thesis and Argument

This thesis is made up of two distinct 'stories'. A different comparative evolutionary dynamic is told in each story. In the first 'story' the tale is one of divergent legal cultures producing a convergence upon unfair dismissal law when the traditional labour law culture is seen to have broken down. In the second 'story' the tale is one of a striking degree of convergence between the evolution of unfair dismissal law in Britain and Australia. It is reformed in a broadly similar, albeit diachronic, manner across the two systems. This evolutionary dynamic of divergence giving way to convergence is revealing of a high degree of path dependency as between the unfair dismissal laws of Britain and Australia.

⁶⁴ Kymlicka (n 59) 319.

As a result, this work is necessarily divided into two parts. Part A addresses the need for a comparative law work to understand the legal culture and history of the jurisdictions under the microscope. This is the longest Part in my thesis given the importance of the divergent labour law traditions of Britain and Australia in constraining the evolution of statutory unfair dismissal law. To understand the reasons prompting the introduction of unfair dismissal law and the time frame that this legal change occurs in, it is essential to understand the institutional context in which it emerged. As Schregle argued, ‘it is extremely problematical and dangerous to extract from a national industrial relations system a single institution or rule and to compare it with what appears to be the corresponding intuition or rule in another country...Institutions must be considered within the general context of the industrial relations system of which they are an integral part’.⁶⁵ Or as Teret puts it, ‘one must not compare elements but relations between these elements’.⁶⁶ The aim is to understand the shift from the labour law tradition in favour of statutory intervention by developing ‘case-intensive knowledge’.⁶⁷ Accordingly, Part A contains two initial chapters with each focussing on an in-depth exploration of the labour law tradition of one case. The final chapter of this Part explores the interaction and contestation of normative ideas against which we can evaluate the unfair dismissal law adopted in both jurisdictions.

⁶⁵ Johannes Schregle, ‘Comparative Industrial Relations: Pitfalls and Potential’ (1981) 120 *International Labour Review* 15, 21-2.

⁶⁶ Bruno Theret, ‘Theoretical Problems in International Comparisons’ in Marc Maurice and Arndt Sorge (eds), ‘Embedding Organizations: Societal Analysis of Actors, Organizations and Socio-Economic Context’ (John Benjamins, 2000) 111.

⁶⁷ James Mahoney, ‘Qualitative Methodology and Comparative Politics’ (2007) 40 *Comparative Political Studies* 122, 130.

Part A seeks to uncover the drivers of legal change in favour of statutory intervention to safeguard unfair dismissal rights in both Britain and Australia. This intervention represents a ‘path-departure’ as it amounts to a transformation of the traditional labour law system into a new structure. In Hepple’s and Veneziani’s view, transformation is the identification of path departures.⁶⁸ They argue that whilst path dependencies continue to frame the development of European labour law, transformations have occurred and these involve labour law changes not simply in form, but of substance.⁶⁹ They cite the introduction of individual rights against unfair dismissal and individualised, juridified procedures for the enforcement of labour laws as examples of path departure.⁷⁰ Part A addresses why this ‘path-departure’ or ‘transformation’ occurs at different times in Britain and Australia, and the importance of contextual factors in enabling or restraining unfair dismissal reform.

Part A’s central hypothesis is how the shared common law heritage of Britain and Australia masks the highly divergent labour law traditions of the two systems. The primary similarity of the British tradition of collective *laissez-faire* and the Australian tradition of conciliation and arbitration is their common normative ideal of securing industrial peace. This objective was expressed more explicitly in Australia because of the work of Higgins in openly identifying industrial peace as the proper yardstick for

⁶⁸ Hepple and Veneziani (n 3) 21.

⁶⁹ Hepple and Veneziani (n 3) 4.

⁷⁰ Hepple and Veneziani (n 3) 21.

decisions concerning industrial relations. Nonetheless, collective laissez-faire in Britain also sought to achieve industrial peace via voluntary collective bargaining, which provided a forum for the resolution of disputes between employers and unions.

In Part A I explore how it takes the overturning of the long ascendancy of voluntarism in Britain and conciliation and arbitration in Australia for statutory unfair dismissal protection to be introduced. Both Britain and Australia accorded individual employees with a statutory right not to be unfairly dismissed when it became clear that the traditional collective labour law systems had stalled and were not achieving the objective of the government to secure industrial peace. Whilst this parallel should not be overstated, Part A draws a functional contrast between the dismantling of British voluntarism and the dismantling of Australia's conciliation and arbitration in providing a convergence over the need for unfair dismissal protection according to a rationale of an individualised notion of industrial justice. Part A investigates how the idea of unfair dismissal law was highly challenging to the labour law traditions of both jurisdictions, and how, to some extent, a trade off was made between union security and job security with the traditional systems prioritising the achievement of the former. Adverse economic conditions and problems with the operation of the traditional labour law systems increased the pressure on the national government for labour law reform providing an impetus for the introduction of unfair dismissal law. The divergent timing of the move to unfair dismissal law in the two systems is very much tied up in the demise of the two collective labour law cultures which come under near terminal stress and strain in the periods leading up to the introduction of unfair dismissal legislation.

Unfair dismissal law is one of the outcomes of the breakdown of the traditional labour law system in both Britain and Australia

The discussion of the divergent labour law traditions contained in Part A gives way to a new focus in Part B on the convergent evolution of unfair dismissal law in Britain and Australia subsequent to its enactment. This period is characterised by a significant degree of convergence in the unfair dismissal laws of the two jurisdictions. Whilst both countries preserve the existence of their statutory unfair dismissal scheme, there is a concerted attempt to reduce access to the system and the quality of the remedy that can be awarded. In both Australia and Britain subsequent to the introduction of statutory unfair dismissal protection, a conservative government driven by liberal ideology is in power for a period lasting more than a decade, affording a unique opportunity for wholesale labour law reform predicated upon liberal ideas. Whilst unfair dismissal law was not the central target of the conservative agenda as the goal of these governments was broader and focused more on reducing the power of trade unions, in both Britain and Australia attempts were made to peel back the statutory superstructure governing unfair dismissals. In Britain the Conservative Government (1979-1997) developed what Davies and Freedland call an ‘argument of principle’ against unfair dismissal.⁷¹ This saw the recasting of the debate about unfair dismissal laws with a replacement of the original anchorage of the system with a concern for job security with new justifications for protecting the profitability of free enterprise, especially small business and ensuring that regulation was not a

⁷¹ Davies and Freedland (n 11) 555-558.

disincentive to job creation. A similar theme emerged in the Australian debate over the future of the statutory unfair dismissal scheme. The Coalition Government (1995-2007) led a coalition of interest groups who emerged to challenge the validity of protective labour law, in particular, what they termed the 'IR Club' – a term used to deride unions, the Commission and those of left-wing political persuasion who advocated for employment protection and collective rights.⁷² The counter-movement arising against the IR Club recast the debate about Australian labour law in favour of deregulation and a minimal safety net topped up by widespread enterprise bargaining. The agenda of the Conservative Government's argument of principle and the Coalition Government's counteraction to the IR Club was again, broadly similar. In Britain the argument of principle was against tribunal processing of unfair dismissal disputes as it was believed that tribunals resulted in vexatious litigation, onerous costs and regulation for business and resulted in fewer jobs being made available to the unemployed. In Australia the counteraction to the IR Club was largely about the Commission and the perception that it was too close to the labour movement resulting in favourable outcomes for unfair dismissal applicants.

Part B explores how, underpinning these comparable legislative efforts in both jurisdictions was a desire to peel back the statutory superstructure governing unfair dismissals. This prompted a tendency towards localised and alternative dispute resolution which has led to a dilution of the original ideal of Australia and Britain's

⁷² The phrase 'Industrial Relations Club' was coined by Gerald Henderson in 1983, a prominent Australian journalist and Executive Director of the Sydney Institute, an influential policy think-tank: Gerard Henderson, 'Industrial Relations Club', *Quadrant* (September 1983).

unfair dismissal systems in industrial justice. I explore three ways in which this has occurred: first, the tendency towards resolving disputes locally has meant that business is becoming the arbiter of substantive fairness in order to reduce reliance on the tribunal system. The development of the right to accompaniment in Britain and the right to a support person in Australia has been used by centre-left governments as a way of improving the employee's position under the contract of employment. This perspective holds that so long as an employee is able to bring a co-worker or unionist to their meeting with the employer about a potential dismissal, this then allows the discussion to occur on a relatively equal footing. In this way, employers are able to self-regulate the dismissal process instead of it being open to external scrutiny. Second, there is a greater emphasis on resolving disputes prior to tribunal. This has resulted in experiments with statutory codes governing dismissal in both jurisdictions and the recent British reform of pre-claim conciliation. Third, this tendency has led to declining standards of procedural fairness in both jurisdictions as governments have minimised the procedural requirements on an employer seeking to dismiss staff.

These three developments represent a new desire to promote cultural reform of workplaces so that businesses adopt a state-sanctioned, albeit fairly weak, process for dismissing employees. Once the process is adopted, this emerging rationale of localised dispute resolution means that the state seeks to extract itself from unfair dismissal disputes because of the belief that compliance with the process equates to fair dismissal. This represents a significant deviation from the original anchorage of both Britain's and Australia's unfair dismissal systems in protecting employees' job

security by limiting managerial prerogative and providing external review of the employer's decision to dismiss. This original ideal is now being counterbalanced with an increasingly overt preoccupation with the protection of business efficiency and the control of regulatory burdens.

* * * * *

Both a historical and evolutionary perspective is essential for understanding the emerging questions surrounding the legitimacy of statutory unfair dismissal law in Britain and Australia. On the one hand, an understanding of the specific historical developments leading to the enactment and subsequent reform of unfair dismissal law in Britain and Australia provides insight into the dynamics of legal change; and on the other, an external perspective of the paradigmatic evolution of unfair dismissal law in the two jurisdictions over time reveals why this change is occurring in the form it is. With regards to the former, the movements away from prioritising the achievement of industrial peace via the conciliation and arbitration system in Australia and of recognising the inadequacy of collective *laissez faire* in protecting job security in Britain are analogous historical developments occurring diachronically. They both represent the overturning of a particular labour law path in order to bring about statutory intervention. Beyond the minutiae of *how* this occurs, this thesis explores *why*, through an analysis of the paradigmatic evolution of unfair dismissal law in Britain and Australia. Using a methodology of legislative history and with reliance on a multiplicity of sources, I seek to examine the distinctive origins, and convergent trajectories of unfair dismissal regulation in the two jurisdictions. In my view, the

process of convergence displays a similar dynamic in each jurisdiction. This dynamic is the progressive ascendancy of an ‘argument of principle’ against tribunal resolution of unfair dismissal disputes, and the corresponding erosion of ‘job security’ as a normative ideal of the regulatory framework. This argument of principle motivates a trend towards the peeling back of the statutory superstructure of unfair dismissal law. This deregulation is a deeper current underlying shifts in the political complexion of governments over the period under review. Governments of either political persuasion and in both countries have been active in reforming the unfair dismissal system by scaling back statutory regulation of unfair dismissals and increasing the power of employers to determine the fairness of their decision to dismiss. This convergence upon a deregulated unfair dismissal law to resolve the challenge of job security requires us to revisit the theoretical foundations and core institutions of unfair dismissal law in order to locate their role and function in an increasingly market-driven economy and polity.

PART A

HOW DO THE DIVERGENT LABOUR LAW TRADITIONS OF BRITAIN AND AUSTRALIA PRODUCE UNFAIR DISMISSAL LAW?

INTRODUCTION TO PART A

Part A explores the story behind the introduction of unfair dismissal law in Britain and Australia. To tell this story an in-depth discovery of the nature of Britain and Australia's labour law cultures is required. The first idea I shall be exploring in this Part is whether the shared legal cultures of Anglo-Saxon common law mask a huge divergence in the field of British and Australian labour law. There exists a significant divergence between pre-1971 labour law in Britain based on collective laissez-faire and the contrasting phenomenon of pre-1993 labour law in Australia of conciliation and arbitration. This produces two different legal cultures in the labour law field, albeit with an underlying Anglo-Saxon common law tradition.

The second idea I wish to explore is the normative ideal of Britain and Australia's traditional labour laws. An argument is made in this Part that both systems prior to the introduction of unfair dismissal law are strongly preoccupied with the achievement of industrial peace. Collective laissez-faire in Britain and conciliation and arbitration in Australia are viewed as the ideal models for achieving industrial peace. This relationship between collective laissez-faire and conciliation and arbitration produces a fundamentally interesting enquiry into the comparative evolution of two employment law systems, those of Britain and Australia. Both labour law cultures sought to guarantee industrial peace, albeit through substantially different means. In both systems this leads to the prioritisation of achieving union security over job security. It was believed that safeguarding the collective concerns of workers would

reduce industrial conflict at a collective level and deter individual workers from upsetting the apple cart. I believe we can discover the comparatively late arrival of unfair dismissal law in Britain and its even later arrival in Australia through a closer examination of the commitment by the British and Australian industrial relations systems to industrial peace.

However, even if both the traditional labour law cultures sought to achieve industrial peace through prioritising union security over job security, I think they give rise to a fundamental difference in the way that the role of the law was conceptualised in legal thought as between the employment and labour law systems of Britain and of Australia. Law plays a different role in collective laissez-faire Britain and conciliation and arbitration Australia. In Britain before 1971 there is an essentially non-juridified set up characterised by regulation consisting of the practice of collective bargaining between employers and unions. In Australia there is a more highly juridified system, but juridified around the practices and procedures of awards rather than litigation in the courts or through government statutes directly regulating industrial relations. Australia's labour laws are juridified around a culture of a collective award system supervised by an independent commission. These arbitrated awards established wage rates and work rules that all employers in the relevant industry were bound to comply with when employing labour. When unfair dismissal law comes about in the two systems, it is spawned in these two very different labour law environments. Unlike in Britain, which relies on the newly created industrial tribunal system to adjudicate unfair dismissal disputes, Australia chooses to anchor the unfair dismissal system in

the traditional machinery of conciliation and arbitration. Thus, the degree of juridification occurring in each system upon the introduction of unfair dismissal law was different. Nonetheless, in each case the coming in of unfair dismissal law represents a crucial departure from the pre-existing system.

A fourth idea explored in this Part is of the dynamics of legal change in Britain and Australia in the specific context of unfair dismissal law. I seek to show why, in both jurisdictions, there was a shift from the labour law tradition in favour of statutory intervention. It is my tentative hypothesis that the divergent timing of the move to unfair dismissal law in the two systems is very much tied up in the two collective labour law cultures which come under near terminal stress and strain in the periods leading up to the introduction of unfair dismissal legislation. In both Britain and Australia the breakdown of the traditional labour law system is accompanied by the introduction of a statutory unfair dismissal scheme. The unravelling of collective laissez-faire in Britain in the 1960s produces the Industrial Relations Act of 1971 as an attempted grand response to the industrial chaos that is taking place. This Act does not endure but leaves behind unfair dismissal law as a heritage that does prove a fairly durable addition to the corpus of British labour law. In my view, for highly path dependent reasons, Australia's conciliation and arbitration system of awards does survive for longer (it is less fragile and more durable than collective laissez-faire, and successive Australian Governments perceive themselves to be constitutionally constrained in the field of industrial relations), but ultimately, it too breaks down and gives way to the introduction of unfair dismissal law. The breakdown of conciliation

and arbitration comes twenty years after it occurs in Britain, with a growing sentiment in the 1980s that Australia needed to undergo wholesale labour law reform. That a broadly similar body of unfair dismissal legislation emerges in both systems may mask the substantial difference between the two paths that got them there.

Thus, the introduction of unfair dismissal law in Britain and Australia is marked by a high degree of divergence in their labour law traditions, despite their shared common law heritage. In both systems, the bringing in of unfair dismissal law is a path departure that occurs when the traditional system that sought to guarantee industrial peace has broken down. This Part explores the nature of evolutionary dynamics in these two significantly different legal cultures which produce highly path dependent outcomes in the context of unfair dismissal law.

CHAPTER TWO

AUSTRALIA

Introduction

In this chapter I analyse the theory dominant in the early years of the Australian Federation as to the appropriate government policy towards labour law. This theory of ‘industrial peace’ is associated strongly with the work of Justice Henry Bourne Higgins, who as President of the Conciliation and Arbitration Court and through his highly influential writings, sought to respond to all Australian industrial relations questions through the lens of industrial peace. Industrial peace was developed by Higgins and other Australian scholars as the overriding justification for the creation and continuing existence of the conciliation and arbitration mechanism. According to this perspective, the key to accessing employment protection are not issues concerning individuals but rather the collective economic and social vulnerability of employees. This commitment to industrial peace, achieved through prioritising the collective characterisation of industrial relations, was sustained until 1992. I believe we can discover the comparatively late arrival of unfair dismissal law in Australia through a closer examination of the commitment by the Australian industrial relations system to industrial peace. In turning our focus to why the conciliation and arbitration mechanism was so enduring over a period of 90 years, we can perhaps explain why unfair dismissal law was off the mainstream agenda for so long, and why when it was introduced in 1993, it relied upon a pre-existing collective mechanism to resolve unfair dismissal disputes.

Despite reliance upon the traditional conciliation and arbitration system to adjudicate federal unfair dismissal disputes, the underlying policy orientation of the federal unfair dismissal system introduced in 1993 was one of industrial justice and not the traditional notion of industrial peace. While industrial peace and industrial justice are not antithetical as the latter tradition incorporates notions of fairness and justice in its approach, a new individualised strand of industrial justice emerged with the introduction of federal unfair dismissal law. Prior to 1993, the industrial peace tradition had always attempted to achieve justice for individual employees through relying on unions and the collective mechanism of conciliation and arbitration. With the unravelling of conciliation and arbitration more generally and with the introduction of enterprise bargaining in 1993, there was a clear shift away from industrial peace as the theoretical basis of Australia's labour laws. This provided an opportunity to develop safeguards for individual rights even if violation of these rights was not especially threatening to industrial stability overall. Accordingly, the notion of industrial justice for individuals began to emerge as the justification for Australia's federal unfair dismissal system. This concept encompassed recognition of universal access to the system regardless of union affiliation and was closely interwoven in the uniquely Australian phenomenon of industrial fair play.

This chapter is structured in three parts: first, there is an analysis of the writings of Justice Henry Higgins in establishing industrial peace as the theoretical foundation of labour law in Australia; second, a discussion of how industrial peace became embedded in Australia's institutional framework; and third, an examination of how the

dominance of industrial peace upon Australia's labour laws influenced the development of unfair dismissal law both at a state and federal level.

The Australian momentum for the development of unfair dismissal law in the federal system was delayed by the foundation of the traditional system in industrial peace. The state-maintained conciliation and arbitration system was seen as the primary way to settle disputes and achieve industrial peace. Under this system, unfair dismissal law was conceived as mostly unnecessary or even inappropriate. It was only when the traditional system was dismantled after 1993 and the dominance of the industrial peace tradition whittled away, that statutory unfair dismissal protection was introduced in Australia.

Section One

Justice Higgins and Industrial Peace

In a series of three papers published in the Harvard Law Review, Higgins outlined his belief that industrial peace provided the best explanatory basis for Australian labour law.⁷³ For Higgins, industrial peace was not a Utopic endpoint but a realistic appraisal of the emergence of Australian labour laws relating to conciliation and arbitration, and the development of minimum wages and conditions. The title of his three papers, 'A New Province for Law and Order' was significant: it conveyed his belief that the new

⁷³ These papers were subsequently published as part of a compilation of Higgins' writings: Henry Bourne Higgins, *A New Province for Law and Order* (Constable & Company Limited, 1922).

realm to be rescued from anarchy is that of industrial matters. Higgins believed that labour law could be used to achieve orderly industrial relations. This was not support for the juridification of labour law but rather a desire for the law to create the conditions for the parties to resolve their differences without undue legalism and recourse to the common law courts. He supported the continuing existence of a conciliation and arbitration system that was inexpensive to maintain and did not rely on lawyers to present the cases of the parties. Higgins wrote favourably about section 27 of the Conciliation and Arbitration Act 1904 which allowed either party to refuse consent for the other to use a lawyer as the preference was for union officials and employers themselves to articulate their positions before the Conciliation and Arbitration Court (CAC).⁷⁴

As President of the CAC, it is unsurprising that Higgins saw conciliation and arbitration as the optimal framework for guaranteeing industrial peace. In an oft quoted passage reflecting on the first ten years of conciliation and arbitration, Higgins observes, ‘the process of conciliation, with arbitration in the background, is substituted for the rude and barbarous processes of strike and lock-out. Reason is to displace force; the might of the State is to enforce peace between industrial combatants’.⁷⁵

For Higgins, industrial peace cannot be achieved through traditional industrial weapons.⁷⁶ As these are contingent upon the relative strength of the parties, fair

⁷⁴ Henry Bourne Higgins, ‘A New Province for Law and Order’ [1915] HLR 13.

⁷⁵ Higgins (n 74) 14.

⁷⁶ *ibid.*

outcomes are not guaranteed. More importantly, the process of ascertaining the stronger party necessitates industrial action, often of a protracted nature. Instead, his view is that the parties should be compelled to discuss their differences, in the first instance with a conciliator, and if this fails, with an arbitrator who will assess the relative merits of their positions.⁷⁷ Higgins argues that the commitment to achieving industrial peace trumps managerial prerogative. In listing the many aspects of the employment relationship that the employer is free to regulate, such as choosing employees, using technology, developing new methods, organising their finances and so on, Higgins states that ‘the Court leaves every employer free to carry on the business of his own system so long as he does not perpetuate industrial trouble or endanger industrial peace’.⁷⁸ In this way, industrial peace is viewed as a normative ideal by requiring all managerial and union decisions and all judicial outcomes to lay prostrate before the altar of industrial peace.

Key to the notion of industrial peace is recognition of the inherent inequality of the employment relationship. Failure by the industrial relations system to recognise this power imbalance and compensate for it was believed to result in industrial conflict. Higgins was of the view that the individual employee was relatively powerless to assert their desire for more favourable wages and conditions or to make complaints to their employer as the latter could arbitrarily end the relationship. He was sceptical of the notion of freedom of contract as he believed that the employer was in a

⁷⁷ Higgins (n 74) 91.

⁷⁸ Higgins (n 74) 21.

strategically stronger position during the negotiation of employment contracts. In another oft-quoted passage, he states this in no uncertain terms, ‘the power of the employer to withhold bread is a much more effective weapon than the power of the employee to refuse to labour. Low wages are bad in the worker’s eyes, but unemployment, with starvation in the background, is worse’.⁷⁹

In tandem with this notion of the disadvantage of the individual employee, was Higgins’ belief that it could be remedied by collective organisation. Accordingly, Higgins supported a state system which legitimised the presence of unions in the employment relationship so as to achieve industrial peace.⁸⁰ He felt this would minimise disruption because of individual complaints as employers would develop a more consistent and equitable approach to managing their staff.⁸¹ Higgins believed that ‘complaints should be presented collectively by some responsible union’ and that the best venue for this to occur was the Conciliation and Arbitration Court.⁸² In his view, the primary purpose of the Court was to resolve disputes and that the Court’s ability to determine wages and conditions was incidental to the central ‘object of the Court’ which was ‘to preserve or restore industrial peace’.⁸³

⁷⁹ Higgins (n 74) 25-26.

⁸⁰ Higgins (n 74) 23.

⁸¹ Higgins (n 74).

⁸² Higgins (n 74)13.

⁸³ Higgins (n 73) 31.

If recognition of unions was important to curing the defect of an unequal employment relationship, the methodology for ensuring unions would preference dialogue over strikes, was Higgins' belief in the pursuit of industrial fairness as the means to achieving industrial peace. Said differently, according to this view, the aim of the Australian system is to achieve industrial peace via a method of industrial fairness. This is because if each party is accorded what is rightly theirs, they will have far less reason to engage in industrial action. In the most pivotal decision of the early Court to determine the minimum wage, Higgins adopted a standard based on 'the normal needs of the average employee, regarded as a human being living in a civilized community'.⁸⁴ To determine 'normal needs' Higgins instigated a process where the Court looked at real life household budgets to determine the cost of living in each of the Australian states. The eventual decision led to the Court preferring to adopt a 'living wage' rather than a minimum wage – the former takes into account not just the skill level of the work being performed but the costs associated with the worker's ordinary existence.⁸⁵ In justifying the development of a 'living wage' culture whereby 'fairness' and 'reasonableness' in terms of remuneration was determined according to human need, Higgins stated:

Industrial peace cannot be secured without recognition of the principle which the Court has adopted, that each worker must have, at the least, his essential human needs satisfied, and that among the human needs there must be included the needs of the family. Sobriety, health, efficiency, the proper rearing of the young, morality, humanity, all

⁸⁴ *Ex Parte HV McKay* (1907) 2 CAR 1.

⁸⁵ For an analysis of the origins of the living wage in Australia see: John Portus, *Australian Compulsory Arbitration* (2nd edn, Hicks Smith & Sons, 1971) 24-26.

depend greatly on family life, and family life cannot be maintained without suitable economic conditions.⁸⁶

Higgins' rationale for a basic wage incorporating the worker's need to sustain his or her living conditions was inextricably linked to his commitment to industrial peace. He reached the conclusion that 'one cannot conceive of industrial peace unless the employee has secured to him wages sufficient for the essentials of human existence'.⁸⁷

For labour lawyers, an important consequence of Higgins' conviction that Australia's industrial relations system should be based upon a theory of industrial peace was that this had tremendous influence upon the outcomes of the CAC. Higgins was not merely a legal scholar but the President of the institution at the apex of Australian industrial relations. According to Professor Ron McCallum, Australia's leading present day labour law scholar, 'during this forty year reign, Higgins was able to set his mark on the nature and scope of interest arbitration in Australia. No other arbitrator has been held in such esteem, nor has any other tribunal member possessed such influence'.⁸⁸ Higgins' leadership, combined with the support of successive Federal and State Governments saw Australia develop a strongly institutional framework to maintain industrial peace. This framework was highly interventionist but not legalistic. It was prescriptive as to the manner of solving disputes but sufficiently

⁸⁶ Higgins (n 74) 38-39.

⁸⁷ Henry Bourne Higgins, 'The future of industrial tribunals', *The New Outlook* (8-9 April 1922) 6.

⁸⁸ Ron McCallum, 'The New Millennium and the Higgins Heritage: Industrial Relations in the 21st Century' [1996] *JIR* 294, 295.

flexible as to their outcome. The following section explores how the institutionalisation of industrial peace in Australia's labour laws evolves over time.

Section Two

The Institutionalisation of Industrial Peace

The desire to institutionalise industrial peace arose from the protracted industrial battles of the 1890s. At the conclusion of the nineteenth century, the outcome of these battles was that the striking unions lost: the employers had successfully asserted their right to agree terms and conditions of employment directly with their workplace without third party intervention.⁸⁹ However, the employers' victory around a contractual model of labour relations was short-lived. They might have succeeded if not for patrician liberals like Higgins, Charles Kingston, William Pember Reeves and Bernard Ringrose Wise who advocated the resolution of collective labour disputes by final and binding interest arbitration supported by the state.⁹⁰ In the constitutional debates of the 1890s, these figures were prominent in influencing the agenda so that the industrial relations power accorded to the Federal Government through the Constitution explicitly mandated a power to create a system of conciliation and

⁸⁹ William Spence, *Australia's Awakening: Thirty Years in the Life of an Australian Agitator* (The Worker Trustees, 1909) 47-241; James Sutcliffe, *A History of Trade Unionism in Australia* (2nd edn, Macmillan, 1971) 90-167.

⁹⁰ For a description of who these liberals were, and the role they played in leading to the introduction of compulsory arbitration in Australia, see: Stuart Macintyre, 'Neither Capital nor Labour: The Politics of the Establishment of Arbitration' in Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration* (OUP, 1989) 186-187; See also: Tim Rowse, 'Elusive Middle Ground: A Political History' in Joe Isaac and Stuart Macintyre (eds) *The New Province for Law and Order* (CUP, 2004) 17-54.

arbitration for interstate disputes.⁹¹ The aim of this constitutional power was to facilitate industrial peace through the use of labour courts who would attempt to solve disputes through conciliating the conflict between the parties, but where conciliation failed, the labour courts were empowered to utilise final and binding interest arbitration to impose fair and reasonable conditions of employment upon the parties.⁹² The outcome of the conciliation and arbitration process was an ‘award’ which bound the parties and guaranteed minimum employment rights. Each award listed those parties (employers and unions) bound by it and in the event of a breach by one of the parties, award conditions could be enforced through the courts. De Vyver describes an Australian award as resembling ‘an American labor agreement except that awards are more detailed and do not contain clauses for union security or seniority’.⁹³ An observation made almost one hundred years after the Constitution’s formation by Justice Kirby of the High Court is revealing of why this constitutional grant of power establishing a system of conciliation and arbitration through section 51(xxxv) was so significant:

It imported a safeguard, restriction or qualification protective of all those involved in collective industrial bargaining: employer and worker alike. It provided an ultimate constitutional guarantee of fairness and reasonableness in the operation of any federal law with respect to industrial disputes, including for the economically weak and vulnerable...these values profoundly influence the nature and

⁹¹ The Constitution 1901, s 51(xxxv).

⁹² Orwell Foenander, *Industrial Conciliation and Arbitration in Australia* (The Law Book Company of Australasia, 1959) Chapter 1.

⁹³ Frank de Vyver, *Conciliation and Arbitration in Australia: The Case of the Clothing Trades Award* (Duke University Press, 1959) 457. This short book explains the procedures of award-making by tracing a clothing trades award through its several steps and is useful for providing information about the Australian award-making process.

aspirations of Australian society, deriving as they did from a deep-seated constitutional prescription.⁹⁴

This importation of fairness and reasonableness into the Constitution was seen as the means by which to guarantee industrial peace, culminating in the enactment of the Conciliation and Arbitration Act 1904 which saw compulsory arbitration as the only means of settling labour disputes. The primary rationale for the introduction of arbitration was to manage conflict in the wake of the protracted industrial battles of the 1890s.⁹⁵ As observed by Alfred Deakin in his second reading speech on the Conciliation and Arbitration Bill, the realisation of industrial peace was a long-term objective of the conciliation and arbitration mechanism:

It is not a matter of today or tomorrow - of the success of a single measure or device. It is the introduction of a new principle, which, when it has found its proper means of working and exerting its influence, will comprehend necessarily as great a transformation in the features of industrial society as the creation of the King's Peace brought about in civil society.⁹⁶

This Act established the Conciliation and Arbitration Commission which was specifically charged with effecting reconciliation between parties to industrial disputes, for preventing and settling such disputes by amicable agreement and if this is not reached, for preventing and settling such disputes by conciliation and arbitration.⁹⁷ The

⁹⁴ *New South Wales and Others v Commonwealth* [2006] HCA 52 [530] (Kirby J).

⁹⁵ DH Plowman 'Forced march: the employers and arbitration' in Stuart Macintyre and Richard Mitchell (eds) *Foundations of Arbitration* (OUP, 1989) 135; Robert Drago, Mark Wooden and Judith Sloan, *Productive Relations? Australian Industrial Relations and Workplace Performance* (Allen & Unwin, 1992) 10-11.

⁹⁶ Alfred Deakin, *Commonwealth Parliamentary Debates*, 22 March 1904, 2864.

⁹⁷ Conciliation and Arbitration Act 1904 (Cth) s 23(2).

Australian Labor Party was also pivotal to the institutionalisation of industrial peace during the early years of the Federation, as it held the balance of power in several of the State and Federal Parliaments and threw its support behind governments who advocated compulsory arbitration.⁹⁸ The appointment of Justice Higgins as the second President of the Conciliation and Arbitration Court in 1907 was also critical. Justice Higgins believed that freedom of contract was a ‘misnomer’ when applied to the individual contract between an employer and individual employee.⁹⁹ He developed a line of the Court’s jurisprudence that explicitly accepted an inherent power imbalance in the employment relationship that could be remedied through recognition of collective organisations.¹⁰⁰

Industrial peace came to be inextricably linked with the concept of industrial fairness. Key decisions of the Conciliation and Arbitration Court cemented the Court’s role in the Australian psyche as safeguarding the lot of working people. This can be traced back to the decision of Justice Higgins in the *Harvester Case* which had a profound effect on the wages and conditions of Australian workers and their families.¹⁰¹ Whilst this decision has since been criticized for its institution of the male

⁹⁸ Ray Markey, ‘Trade unions, the Labor Party and the introduction of arbitration in New South Wales and the Commonwealth’ in Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration* (OUP, 1989) 156-177; Janice Bellace, ‘The Role of the Law in Supporting Cooperative Employee Representation Systems’ [1994] CLLJ 15.

⁹⁹ Higgins (n 74) 25.

¹⁰⁰ Higgins (n 70) 121-144.

¹⁰¹ *Ex Parte HV McKay* (1907) 2 CAR 1.

breadwinner model,¹⁰² it was important in signifying recognition by the Court of the obligations of employers to provide decent and fair conditions at work, recognizing that labour is not just like any other commodity but that workers have social and family responsibilities too.¹⁰³ Other decisions were of a similarly egalitarian nature emphasising industrial fairness - concerning standard hours of work,¹⁰⁴ the development of the principle of equal pay for women workers,¹⁰⁵ the introduction of bereavement or compassionate leave entitlements,¹⁰⁶ and the removal of discriminatory employment conditions for Aboriginals.¹⁰⁷ In the decision introducing paid annual leave for all award workers, the full bench of the Arbitration Court explicitly recognised a need for employers to provide for their staff to have a break from continuous work, stating, ‘a standard of living consists not only of the capacity to participate in the fruits of material production and services but comprehends also a reasonable period of respite from toil with the enjoyment of the cultural, social and recuperative benefits which respite permits’.¹⁰⁸

¹⁰² Keith Hancock and Sue Richardson, ‘Economic and Social Effects’ in Joe Isaac and Stuart Macintyre (eds) *The New Province for Law and Order* (CUP, 2004) 146-147.

¹⁰³ Orwell Foenander, *Towards Industrial Peace in Australia* (Melbourne University Press, 1937) 69-72.

¹⁰⁴ *Australian Timber Workers’ Union v John Sharp and Sons Ltd* (1920) 14 CAR 811; (1921) 15 CAR 836 and (1922) 16 CAR 649; *Amalgamated Engineering Union v J Alderdice & Co Pty Ltd* (1927) 24 CAR 755; *Australian Railways Union v Victorian Railways Commissioners* (1937) 37 CAR 937 [938].

¹⁰⁵ *National Wage Cases* (1967) 118 CAR 655 [660]. See *Equal Pay Cases* (1969) 127 CAR 1142; *National Wage and Equal Pay Cases* 1972) 147 CAR 172.

¹⁰⁶ *Commonwealth Hostels Award* (1962) 100 CAR 755.

¹⁰⁷ *Cattle Station Industry (Northern Territory) Award* (1966) 113 CAR 651; *Pastoral Industry Award* (1967) 121 CAR 454 [457-8].

¹⁰⁸ *Annual Leave Case* (1945) 55 CAR 598.

Eventually, this developing notion of industrial fairness as the formula for achieving industrial peace culminated in the official recognition of the uniquely Australian phenomenon of the 'fair go'. Macintyre notes that the emphasis of the Constitution's framers and the Conciliation and Arbitration Court's early members was on egalitarianism and 'shaping the political economy according to the national ethos of the fair go'.¹⁰⁹ While seemingly a colloquialism, the 'fair go' became deeply embedded in Australia's labour laws and jurisprudence. According to Professor Joellen Riley:

The 'fair go' is an idiomatic expression of the Australian commitment to an egalitarian democracy which respects the autonomy and dignity of its citizenry. Those who engage workers and those who work are all working citizens, and as such they are entitled to equal respect and consideration in the determination of matters affecting their working lives.¹¹⁰

This notion of the 'fair go' has been developed by the Australian Industrial Relations Commission as the 'arbitral principle' which is an overarching principle governing decision-making by industrial tribunals in Australia. In the decision of *FEDA v Robe River Iron Association* the Commission explained it in the following terms, 'managerial prerogative is not a sword that can be wielded in wanton disregard of the industrial consequences nor is it a shield to hide behind. An employer has a responsibility to manage fairly.'¹¹¹

¹⁰⁹ Stuart Macintyre, 'Arbitration' in Graeme Davison, John Hirst and Stuart Macintyre (eds), *The Oxford Companion to Australian History* (OUP, 2001) 31.

¹¹⁰ Joellen Riley, 'Good Faith Performance' in Mordy Bromberg and Mark Irving (eds), *The Australian Charter of Employment Rights* (Hardie Grant Books, 2007) 13.

¹¹¹ *FEDA v Robe River Iron Association* (1987) AILR 131.

Despite the tectonic changes that have occurred in Australia's labour laws since the demise of conciliation and arbitration in the mid 1990s, the uniquely Australian concept of the 'fair go' still endures and has even made it into federal legislation governing unfair dismissal.¹¹² In a recent speech, the President of the NSW Industrial Relations Commission observed that the 'notion of a fair go is a profound one, firmly rooted in the Australian psyche'.¹¹³ While this principle of industrial fairness or of a 'fair go' is initially embedded within Australia's industrial peace tradition, it later becomes central to the construction of the uniquely Australian formulation of 'industrial justice' within the unfair dismissal system.¹¹⁴

The achievement of industrial peace was made possible through the placement of industrial tribunals at the apex of Australia's institutional labour law framework. The establishment of the Conciliation and Arbitration Court in 1904 was matched by the creation of tribunals and Wage Boards in each of the Australian States.¹¹⁵ These tribunals were primarily charged with dispute settlement via a process of setting minimum wages and conditions across Australia. It was believed that the use of a neutral third party to set minimum standards according to principles of fairness would aid better relations between employers and unions, thereby minimising the threat of

¹¹² Workplace Relations Act 1996 (Cth) s 170CA(2); This will be discussed in more detail in the following section.

¹¹³ Justice Boland, *In Defence of Industrial Tribunals* (Paper presented to the National Conference of the Industrial Relations Society of Australia, May 2010)

¹¹⁴ This will be discussed in more detail in the following section.

¹¹⁵ Richard Mitchell, 'State system of conciliation and arbitration: the legal origins of the Australasian model' in Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration* (OUP, 1989) 74-103.

industrial action and in so doing, would 'augment the prosperity and harmony of the nation'.¹¹⁶ The role of industrial tribunals, at both the Federal and State level, was so strongly embedded and supported by the community, that the few attempts to reduce their role has resulted in electoral oblivion for those making the attempt. At the federal level there has only been one direct attempt to abolish the industrial tribunal and that was in 1929. The result was that the Prime Minister, Stanley Bruce, lost his seat and his government resoundingly lost the election.¹¹⁷ According to Macintyre 'the decisive defeat of the government on this issue in the national election of 1929 demonstrated public support for arbitration'.¹¹⁸ The Commonwealth Government's Work Choices legislation introduced in 2006 did not have as its aim the abolition of the Australian Industrial Relations Commission, but the tribunal's powers were severely weakened and the reforms were predicated upon a more individualised notion of the employment relationship. The conventional wisdom seems to be that the Work Choices legislation was a significant factor in the defeat of the Coalition Government in 2007, where Prime-Minister John Howard lost his seat; only the second time a sitting Prime-Minister had ever lost his seat.¹¹⁹ These two events, so many years apart, suggest

¹¹⁶ Stuart Macintyre, 'Neither Capital nor Labour: The Politics of the Establishment of Arbitration' in Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration* (OUP, 1989) 195.

¹¹⁷ Stuart Macintyre, 'Arbitration' in Graeme Davison, John Hirst and Stuart Macintyre (eds) *The Oxford Companion to Australian History* (OUP, Oxford 2001) Accessed 5 July 2011 <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t127.e55>>

¹¹⁸ *ibid.*

¹¹⁹ Dennis Woodward, 'WorkChoices and Howard's Defeat' (2010) 69 AJPA 274; Michael Bachelard, 'Burned by IR, Howard's Battlers Exact Revenge', *The Age* (Melbourne, 26 November 2007); Judith Brett, 'Exit Right: The Unraveling of John Howard,' (2007) *Quarterly Essay* 28; Frank Bongiorno, 'Howard's End: The 2007 Australian Election' (2008) *The Round Table* 97(397); Kathie Muir, *Worth Fighting For: Inside the Your Rights at Work Campaign* (UNSW Press, 2008).

strong community support for an active, well-resourced industrial umpire able to bring fairness into the work relationship so as to achieve industrial peace.

Another aspect of the endeavour to secure industrial peace was the recognition and legitimisation of the unions as the exclusive voice for working people by the conciliation and arbitration system. The 1904 Act enabled unions to be registered and accorded them security of tenure. Once one union was registered in a particular industry, no other union could be registered as an organisation of employees in that industry.¹²⁰ This prevented competition between unions once recognition had been accorded, and led to particular unions developing strangleholds over the relevant industry. The development by the Conciliation and Arbitration Court of the Metal Trades doctrine gave unions coverage of all employees working in the industry.¹²¹ Under this doctrine, employers who were parties to an interstate industrial dispute were required to pay the minimum wage rates and to apply the minimum conditions of employment to all of their workers, even if they did not employ anyone who was a member of the relevant trade union.¹²² Another key decision indicating the court's willingness to preference the union movement, was the *Burwood Cinema Case* which recognised that industrial disputes could exist between trade unions and employers who did not currently employ any trade union members over the employment of future

¹²⁰ Conciliation and Arbitration Act 1904 (Cth) s 142.

¹²¹ *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387.

¹²² Michael Kirby and Breen Creighton, 'The Law of Conciliation and Arbitration' in Joe Isaac and Stuart Macintyre (eds) *The New Province for Law and Order* (CUP, 2004) 106-108.

trade union members.¹²³ Under the many different means through which the Court achieved union recognition, federal awards were able to cover most of the Australian workforce. Even in 1990 when trade union membership had fallen to 46%,¹²⁴ awards and agreements instituted by unions still covered 80% of the Australian workforce.¹²⁵ Such strong state commitment to promoting unionism in the conciliation and arbitration system was because unions were viewed as essential to achieving industrial peace. This saw union membership swell to 51.6 percent by 1921, growing from 6.1 per cent at the start of the century.¹²⁶ By channelling union activity into the conciliation and arbitration system rather than into industrial action, Australia's labour laws enabled unions to achieve their agenda whilst minimising the opportunity for industrial disruption.

Another key institutional layer to foster industrial peace occurred through the proliferation of Federal and State laws to squash industrial action. In return for receiving recognition and support through the conciliation and arbitration system, unions effectively surrendered their right to strike which is evident in both the terms of the Conciliation and Arbitration Act 1904 and extrinsic material from the time. Prime-Minister Alfred Deakin declared in the second reading speech that after the passage of

¹²³ *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees Association* (1925) 35 CLR 528.

¹²⁴ Australian Bureau of Statistics, *Trade Union Statistics December 1995* (Catalogue no. 6323.0.40.001, 1995).

¹²⁵ Australian Bureau of Statistics, *Award Coverage, Australia, May 1990* (Catalogue no. 6315.0, 1990).

¹²⁶ ABS (n 124).

the Act there would be ‘no more strikes or lockouts’.¹²⁷ The chief objects of the Act stated this goal,¹²⁸ and the prohibition against industrial action was contained in section 6 which expressly prohibited all strikes or lockout conduct occurring within the jurisdiction of the Act. While prevention of industrial action was a central component of the Act, the longer term significance of this legislation lay in the establishment of the mechanisms of conciliation and arbitration to facilitate industrial peace.

Nonetheless, despite the institutionalisation of industrial peace as the guiding principle of Australia’s labour law system, in practice, industrial conflict remained prevalent. Despite section 6, strike action had not been prevented. In 1912 an anonymous Australian contributor to *Round Table* noted, ‘the prevalence of strikes in Australia has become almost a byword ... the tendency to secure redress of grievances by refusing to work until they are redressed goes on apparently unmodified in spite of all the elaborate machinery for preventing it.’¹²⁹ The hoped for ‘substitution of the might of the State’ for the rude and barbarous processes of strike and lockout had not resulted in a general surrender of the weapon of industrial action by trade unions. The years 1916-1929 were strike prone and included two widespread and prominent strikes in 1919 and 1929.¹³⁰ Notably, the section 6 prohibition on industrial action did not

¹²⁷ Alfred Deakin, *Commonwealth Parliamentary Debates*, 22 March 1904, 765.

¹²⁸ Conciliation and Arbitration Act 1904 (Cth) s 2.

¹²⁹ Anonymous, ‘Australia: Strikes and Legislation’ [December 1912] *Round Table* 152, 152-153.

¹³⁰ DW Oxnam, ‘The Incidence of Strikes in Australia’ in JE Isaac and GW Ford (eds), *Australian Labour Relations Readings* (2nd edn, Sun Books, 1973) 19, 27. For discussion of the 1919 seamen’s strike see Richard Morris, ‘Mr Justice Higgins Scuppered: The 1919 Seamen’s Strike’ [1972] LH 52. For discussion of the 1929 miners’ strike see Laura Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and the Law* (LBC, 1994) 24.

play a significant role in the resolution of the major industrial conflicts of the time. Nonetheless, there was never a return to the national strikes of the 1890s that had brought industry to a standstill and after 1904 it was extremely rare for a strike to extend beyond State boundaries. As noted proudly by Justice Higgins in 1915, ‘those who are old enough to recall the terrible shearers’ strike and seamen’s strike of the “nineties”, with their attendant losses and privations, turbulence and violence, will realise how much ground has been gained. The strikes which still occur are strikes within a single State.’¹³¹

Despite the continuing existence of strikes, the legislature maintained its efforts to guarantee their eradication. The Industrial Peace Act 1920 provided for the establishment of special tribunals in different industries to deal with disputes independently of the CAC.¹³² Amendments to the Conciliation and Arbitration Act in 1920 inserted section 6A into the Act making it illegal for any person or organisation bound by an award, or entitled to the benefit of an award, to engage in a lockout or strike.¹³³ This largely unnecessary amendment (given that such action was already illegal under section 6) was a reassertion of the trade off in the Act between strike action and access to compulsory arbitration. Further ad hoc legislative measures against industrial action were passed in the 1920s. The Immigration Act 1925 (Cth)

¹³¹ Higgins (n 74) 37.

¹³² Industrial Peace Act 1920 (Cth) s 13; In response to the passage of this Act Justice Higgins resigned from the Conciliation and Arbitration Court declaring that “a tribunal of reason cannot do its work side by side with executive tribunals of panic”, quoted in John Portus, *Australian Compulsory Arbitration*, (2nd edn, LBC, 1979) 9.

¹³³ Commonwealth Conciliation and Arbitration Act 1920 (Cth) s 3.

authorised the deportation of persons who had not been born in Australia and who had been involved in 'serious industrial action',¹³⁴ amendments to the Crimes Act 1916 (Cth) in 1926 inserted sections 30J and 30K to deal with serious industrial disturbances and boycotts of Commonwealth services or international trade,¹³⁵ and the Transport Workers Act 1928 (Cth) authorised licensing of transport workers to replace those on strike.¹³⁶ Additional amendments to the Conciliation and Arbitration Act in 1928 bolstered the prohibition against industrial action by tightening controls over the internal affairs of trade unions, strengthening union responsibility for the actions of union officials and encouraging union discipline by allowing for reduced fines if unions actively sought to halt unlawful strike action by members.¹³⁷

The adoption of industrial peace as the basis of Australia's labour laws occurred via complex institutional arrangements whereby compulsory, collective and cooperative dispute resolution was reaffirmed at every level. Through the establishment of a national Conciliation and Arbitration Court, and tribunals or wage boards in each of the states, it became clear that Australia's industrial relations system was predicated upon the involvement of a state-initiated, neutral third party to ensure the fair settlement of differences between labour and capital. The aim was to avoid the protracted industrial battles of the 1890s. The model was one of institutions guaranteeing dialogue rather than strikes and lockouts. The outcome was the

¹³⁴ Immigration Act 1925 (Cth) s 7.

¹³⁵ Crimes Act 1926 (Cth) s 17.

¹³⁶ Transport Workers Act 1928 (Cth) s 3.

¹³⁷ Commonwealth Conciliation and Arbitration Act 1928 (Cth).

proliferation of union negotiated awards and agreements, developed via the mechanism of conciliation and arbitration, and governing the industrial lives of over four fifths of the Australian labour force. Thus, the notion of industrial peace was extremely influential and was so firmly embedded that the protection of individual rights such as unfair dismissal were ignored for most of the twentieth century. Violation of the rights of individuals was seen as less threatening to industrial peace, as without collective support, industrial action would not occur. Moreover, the notion of industrial peace was sufficiently robust that the Australian industrial relations system managed without a federal unfair dismissal system for a significantly longer period than in Britain who developed their system over twenty years earlier. The following section traces how the theoretical basis of Australian labour law in the concept of industrial peace constrained and influenced the development of a statutory remedy for unfair dismissal.

Section Three

The Impact of the Industrial Peace Doctrine on Unfair Dismissal Law

The beginning of an understanding of the origins and the apparent tardiness of the Australian unfair dismissal legislation when compared with the spread of unfair dismissal protection abroad lies in an appreciation of how it sits uneasily with the dominant labour law policy of successive Australian governments during the twentieth century. Australia's traditional labour law was built upon the achievement of industrial peace. This commitment to industrial peace had far-reaching implications for the structural and substantive development of unfair dismissal law in Australia prior to the enactment of a federal statutory scheme in 1993. Firstly, the prevailing theory of industrial peace delayed the development of a statutory remedy for unfair dismissal in the federal system as the priority of Australia's national labour law system was to minimise the potential for disruption by collective disputes between unions and employers. A trade off was made between the need to achieve union security and job security, with the conciliation and arbitration system prioritising the former. Secondly, the industrial peace doctrine was sufficiently robust so that even when conciliation and arbitration was losing the support of the parties, there was a shared willingness to experiment with another collective method for regulating disputes between unions and employers premised upon industrial peace. During this period of experimentation in the 1980s, few inroads were made in developing a federal statutory remedy for unfair dismissal as industrial peace was still the dominant approach. At the federal level, it

was only when the prevailing theory of industrial peace was dismantled more generally as the basis of Australia's labour laws that we see reform being made on the unfair dismissal front. The introduction of a federal statutory remedy for unfair dismissal is based upon the primary policy rationale, developed initially at the state level, of industrial justice. Throughout the period of federal inaction on the unfair dismissal front prior to 1993, more interesting developments were occurring within the state jurisdictions. Most of the Australian states built unfair dismissal jurisdictions hinged upon maintaining industrial peace which later evolved into developing a new concern with achieving industrial justice. This section will explore how this notion of industrial justice evolved so that by 1993 we see the emergence of a federal statutory unfair dismissal system which draws upon this notion of industrial justice that originated at the state level. I believe that this has led to the evolution of a uniquely Australian formulation of industrial justice upon which the federal unfair dismissal system was initially founded.

A. The development of state unfair dismissal systems

Three of the state tribunals developed unfair dismissal jurisdictions based upon the perceived utility of adjudicating dismissal disputes in order to achieve industrial peace. Unlike their federal counterpart, industrial tribunals in three states took a liberal view of their authority to make binding orders of re-employment for workers whom they believed had been unfairly dismissed under a state award. The earliest recorded re-employment order made in Australia was in 1902 handed down by the predecessor to

the NSW Industrial Commission.¹³⁸ From this point, arbitrators in NSW,¹³⁹ Western Australia¹⁴⁰ and South Australia¹⁴¹ chose to interpret their industrial dispute resolution power in a broad, instrumental fashion in order to judicially create de facto re-employment jurisdictions. By 1970 tribunals in all three states had fully institutionalised the review of collectively initiated applications for re-employment with minimal statutory support. This review of unfair dismissals was justified on the basis that the tribunals were fostering industrial stability by ensuring that a dismissal dispute concerning an individual worker did not escalate into a large-scale collective dispute. In each of these three states, access to the tribunals was controlled by the unions as only unions or employers could make a claim. Tribunal outcomes for dismissal disputes were not only contingent upon whether the employee had been granted a ‘fair go’ in dismissal but also about whether upholding the dismissal would be a threat to industrial peace. Here, the industrial strength of the union making the claim was instrumental to the tribunal’s decision.

The constitutional chalk-lines which had hamstrung the development of a statutory remedy for unfair dismissal at the federal level worked in the favour of state legislatures who held constitutional power over all remaining industrial matters. Consequently, in the 1970s and 1980s state governments began to enact legislation

¹³⁸ *Newcastle Wharf Labourers Union v Newcastle & Hunter River Steamship Co. Pty Ltd* (1902) AR 1.

¹³⁹ *Re: Bank Officers (State) Board* (Rawson case) (1921) AR 138 [145] (Roland J).

¹⁴⁰ *Kwinana Construction Group v Electrical Trades Union* (1954) 34 WAIG 51 [52] (President Jackson).

¹⁴¹ *Guymer v Department of Tourism* (1969) 36 SAIR 52 [57] (President Bleby).

pertaining to the adjudication of unfair dismissal disputes. At this point, we can discern the materialisation of an alternative industrial relations philosophy, namely industrial justice, being used to justify legislative intervention. This is not a new argument but it is different to the traditional argument under the industrial peace tradition that justice for individual employees is best achieved through conciliation and arbitration facilitated by unions. This new strand of the industrial justice argument emerging in the state jurisdictions is much more concerned with facilitating the achievement of industrial justice for the individual employee regardless of whether they have union representation by according to the individual employee rights that accrue to them by virtue of their employment. This notion of industrial justice rejected union monopoly on access to the unfair dismissal jurisdiction on the basis that individuals should be able to seek a remedy for unfair dismissal with or without union support. This Australian 'take' on the concept of industrial justice hinged upon the belief that individuals should be able to challenge the justice of their dismissal based upon their perception of the fairness of their experience.

In South Australia, the Dunstan Government passed the Industrial Conciliation and Arbitration Act 1972 which established the first individually initiated, justice-oriented system of employment termination review in Australia. The South Australian Industrial Court was given the power to hear unfair dismissal claims and to order reinstatement of an employee to his or her former position. The 1972 Act was subject to major revision in 1984, and the insertion of a new section 30 transferred the Court's jurisdiction to the Industrial Commission. The introduction of a power to award

compensation in 1984 contributed to the growing popularity of the state unfair dismissal jurisdiction.¹⁴² The South Australian system represents a break with the traditional arbitral approach to unfair dismissal predicated upon industrial peace as the Commission's jurisdiction is triggered by an application from an individual worker who has been dismissed rather than by notification of an industrial dispute. The Commission's decision-making power is less discretionary and not concerned with how to achieve industrial stability but limited by a set standard that the Commission examine whether there has been an infraction of the individual employee's rights as to whether the dismissal has been 'harsh, unjust or unreasonable'.

Western Australia followed suit leading to the creation of two unfair dismissal jurisdictions operating side-by-side, one system predicated upon industrial peace, and the other upon industrial justice. While these two philosophies are not dichotomies and the argument of this chapter is that the industrial justice notion is derived from a strand of the industrial peace tradition, the creation of two separate unfair dismissal jurisdictions in Western Australia illustrates how policy makers were wrestling with how to accord individual employees with the right to challenge the fairness of their dismissal from within a traditional system which had only ever accorded the right to challenge managerial decision making to unions. The industrial peace system was the traditional one that had existed in WA and was maintained to allow the tribunal to hear collectively initiated complaints about an individual's dismissal. However, this was supplemented by the establishment of a separate parallel cause of action for

¹⁴² *Royal Children's Hospital v President of the Industrial Relations Commission of Victoria* [1989] VR 527; *Coleman v Aluminum Anodisers Pty Ltd (No 3)* (1988) 30 AILR 474.

individually initiated claims under the Industrial Relations Act 1979 (WA). This decision to introduce an individually initiated wing to the West Australian unfair dismissal system was recognition that industrial justice for individuals needed to be achieved by the system as well as the traditional goal of industrial peace overseen by the collective. Victoria adopted an unfair dismissal system based upon the South Australian model in 1983 as jurisdiction was conferred upon the Victorian Conciliation and Arbitration Board to scrutinise individually initiated unfair dismissal jurisdictions and to order compensation or reinstatement if the dismissal was found to be ‘harsh, unjust or unreasonable’.¹⁴³ In each of the three states to develop justice-oriented unfair dismissal systems, the rationale of industrial justice was primarily concerned with achieving justice through guaranteeing universal access to the system to all individuals, regardless of whether they had union affiliation.

New South Wales was the only state to rigorously defend the sanctity of its industrial peace model by mandating the resolution of unfair dismissal disputes through union monopoly. Unlike in other jurisdictions where provision was made for individually initiated dismissal disputes, in NSW unions retained their right to act as the gatekeeper to the conciliation and arbitration system for every industrial dispute, including disputes relating to individuals. An individual employee was not able to initiate proceedings without the support of a union, or alternatively, a group of aggrieved fellow workers because the unfair dismissal application had to be signed by

¹⁴³ Industrial Relations (Further Amendment) Act 1983 (Vic).

the union secretary or the employer.¹⁴⁴ The rationale for union monopoly was that the best way to guarantee industrial peace was through unions vetting unfair dismissal applications and only pursuing those of merit. It also was a way of ensuring that only dismissals that could give rise to industrial disruption are dealt with by the NSW conciliation and arbitration mechanism. This had the practical effect, however, that if an individual had a legitimate unfair dismissal claim but was unable to secure union support because pursuing the individual's claim did not complement the union's broader agenda or undermined their relationship with the employer, then that individual had no opportunity for redress. In contrast, dismissal of a union official was much more likely to receive adjudication by the conciliation and arbitration system as such a claim would naturally attract union support.¹⁴⁵ The remedy awarded by the NSWIRC depended more upon maintaining industrial peace than achieving justice for the individual concerned. As Stewart observes, 'the likelihood of a remedy being secured is often directly related to the industrial muscle of the relevant union and to its willingness to act as an enforcer of any order made'.¹⁴⁶ This is because the primary task of the NSWIRC was to settle disputes in order to promote industrial harmony and the application of this task, usually aimed at collective disputes, to individual dismissal disputes, meant that remedies could be awarded on the basis of averting sympathy strikes rather than whether the dismissal breached defined standards of employer behaviour. Despite the obvious criticisms that can be made against the NSW system

¹⁴⁴ *Roberts v Mona Vale District Hospital* [1975] 2 NSWLR 132, 138 (Court of Appeal); Industrial Arbitration Act 1940 (NSW) s 74.

¹⁴⁵ Andrew Stewart, 'Employment Protection in Australia' [1989] CLL 27.

¹⁴⁶ *ibid.*

because of union monopoly, Stewart does note that the emphasis on industrial peace led to the elevation of conciliation as the primary method for resolving dismissal disputes and resulted in the resolution of the vast majority of disputes at this stage.¹⁴⁷

Even in NSW which remained staunchly committed to industrial peace as the governing objective of the state unfair dismissal system, key arbitral decisions refined the notion of a ‘fair go’ or ‘industrial fair play’ in the context of unfair dismissal disputes. The first judgment to concretely assess the matrix of factors impacting upon whether a dismissal was fair was the judgment of Justice McKeon in *Western Suburbs District Ambulance Committee v Tipping*.¹⁴⁸ While this was a dissenting opinion, the statement of principles contained within the judgment has been widely regarded as authoritative.¹⁴⁹ Justice McKeon characterised the employer’s right to dismiss as clear and fundamental and placed the burden on the individual employee to prove the unfairness of the dismissal. He suggested that in deciding whether to order reinstatement, the question the court should ask is whether there has been oppression, injustice or unfair dealing on the part of the employer. This discussion of justice in dismissal is extended by the significant decision of the NSW Industrial Relations Commission in *Loty & Holloway v Australian Workers Union*¹⁵⁰ which concerned an application for reinstatement of two employees dismissed from their positions in a

¹⁴⁷ Stewart (n 145) 27-28.

¹⁴⁸ *Western Suburbs District Ambulance Committee v Tipping* (1957) NSW AR 273.

¹⁴⁹ See *North West County Council v Dunn* (1970) CLR 247 [263] (Walsh J); see also *In Re Coccia and Australian Iron and Steel Pty Ltd* (1971) NSW A.R. 111 [115] per Sheldon J.

¹⁵⁰ [1971] AR (NSW) 95.

union after a change in the composition of the union executive. In determining whether to make awards providing for their reinstatement, Justice Sheldon asked whether the employees had 'received less than a fair deal'.¹⁵¹ Justice Sheldon also referred to the objective of the unfair dismissal jurisdiction as being to provide 'industrial justice' by reference to a number of factors including the inviolability of the right of the employer to manage his business, the nature and quality of the work in question, the circumstances surrounding the dismissal and the likely practical outcome if an order of reinstatement is made. Justice Sheldon affirmed an earlier statement of a Commissioner that the purpose of the exploration into the individual's dismissal by the NSWIRC is to ascertain whether there has been a 'fair go all round'.¹⁵²

The idea of industrial justice which emerged in the state jurisdictions was heavily tied to principles of access and fairness. Because of the disputes over whether unions should control access to the conciliation and arbitration system by individuals wishing to challenge the fairness of their dismissal, universal access became a core foundational principle of industrial justice in the Australian context. The tradition of a 'fair go' or industrial fair play which had developed as a means of guaranteeing industrial peace also came to be incorporated in the expression of industrial justice by state tribunals. This understanding of fairness in dismissal was seen to be about weighing up the circumstances of dismissal and assessing whether these amounted to some degree of oppression, injustice or unfair dealing. Thus, industrial justice, as it

¹⁵¹ *ibid* 99.

¹⁵² [1971] AR (NSW) 95 [99].

developed as a notion within the state jurisdictions, tended to focus on the practicalities of dismissal rather than a more highly theorised understanding of precisely where and why this notion of justice is relevant.

B. The development of the federal unfair dismissal system

Federally, the fixation with industrial peace delayed the development of a statutory remedy for unfair dismissal law as the priority of the Australian labour law system was to minimise the potential for disruption by collective disputes between unions and employers. Industrial peace proved to be a rather robust doctrine. Even when the conciliation and arbitration system was under threat or international jurisdictions were developing statutory remedies for unfair dismissal, the Australian system maintained its commitment to achieving industrial peace and the policy prescriptions that naturally flowed on from this position tended to inhibit the advancement of unfair dismissal law. Other factors too were relevant to the comparatively late arrival of unfair dismissal law in Australia. The constitutional division of power between the states and the Commonwealth government was a significant constraint upon the federal development of a statutory remedy for unfair dismissal. Another factor pertinent to the delayed arrival of unfair dismissal law in Australia is that until the oil-price driven 'stagflation' of the 1970s, and excepting the Depression era of the 1930s, full employment or something close to it tended to be the norm in Australia. This meant there was less imperative for unions to lobby for unfair dismissal reform if arbitrarily dismissed employees could find other work with little difficulty. Despite the existence of these

other factors, three phases can be identified in the evolution of industrial peace as a doctrine influencing the maturation of federal unfair dismissal law: the first phase was characterised by the dominance of industrial peace between 1901 and 1982 which saw little support for introducing unfair dismissal law as there was a trade off between job security and union security; the second phase was marked by growing dissatisfaction with the ability of conciliation and arbitration to deliver favourable economic outcomes for Australia coupled with an unwillingness to move away from industrial peace. This saw a novel attempt to circumvent the conciliation and arbitration system which did not encompass the development of a statutory remedy for unfair dismissal; finally, the third phase is the introduction of a comprehensive federal unfair dismissal system in 1993 which sees the prevailing theory of industrial peace transmogrify into a new concern with achieving industrial justice. In this third phase, the Commonwealth Government draws upon the experiences of the state unfair dismissal systems and constructs a federal system which relies upon the collective mechanism of conciliation and arbitration to provide an individual statutory remedy for unfair dismissal.

1901 - 1982

The first phase in the evolution of Australia's federal unfair dismissal system is marked by an unwillingness to provide a statutory remedy for unfair dismissal because of the dominance of industrial peace as the basis of Australia's labour laws. The national conciliation and arbitration system introduced in 1904 was explicitly concerned with preventing disputes that had the potential to become large-scale

disruptions like that which occurred in the mining, maritime and shearing industries in the 1890s. Within the Australian federal tradition, disputes involving the dismissal of an individual did not usually hold the potential to threaten industrial peace, and moreover, were of a local nature and could not be characterised as an ‘interstate’ dispute for which the federal Conciliation and Arbitration Court possessed jurisdiction.¹⁵³ Higgins justified the federal system’s focus on the collective on the basis that:

It is of course, better for an employers, that he should not be worried by complaints of individual employees and that any complaints should be presented collectively by some responsible union. He has then the advantage of being able to deal with his employees on a consistent scheme, equitable all round the service, and his time is not taken up by petty complaints or individual fads.¹⁵⁴

In fact, the hallmark of Australia’s traditional industrial relations system was the substantial degree of security accorded to collectively organised labour, namely the explicit recognition and preference given to unions within the conciliation and arbitration mechanism. This propensity for delivering union security was seen as the best way of achieving security for individual workers, although this meant that job security was not statutorily protected as it was a minor part of the union movement’s agenda for much of the twentieth century. Whilst not necessarily explicitly stated, unions tended to be more preoccupied with making inroads into the traditional industrial concerns of wages, conditions and working hours.

¹⁵³ *R v Gough; ex parte Cairn Meat Export Co. Pty Ltd* (1962) 108 CLR 343; *In Re Stanton; ex parte Associated Airlines* (1978) 52 ALJR 454; *In Re Staples and another; ex parte Australian Telecommunications Commission* (1980) 54 ALR 507.

¹⁵⁴ Higgins (n 74) 23.

Another reason for the lack of momentum for a statutory system protecting unfair dismissal rights is perhaps the prevailing view of the parties that the conciliation and arbitration machinery did not allow individual workers to be arbitrarily deprived of their employment. Stemming from the influence of Higgins was an enduring belief in the need for management to provide job security by resolving staff problems within the workplace rather than resorting to dismissal.¹⁵⁵ Higgins viewed unemployment as an ‘industrial sore’ and wrote that ‘it is impossible to overstate the evil effects, moral and physical, on the worker and on the community’ of a person having no job.¹⁵⁶ This view, held by the most influential President of the Conciliation and Arbitration Court, meant that the arbitration system favoured keeping workers in their jobs and viewed dismissal as a last resort.¹⁵⁷ Stewart claims that unions were confident of their ability to deal with job security with employers directly rather than through the conciliation and arbitration system.¹⁵⁸ Foenander makes a similar observation, noting that the award system operated in practice to ensure that individual employees were not arbitrarily deprived of their jobs:

The great majority of Australian employees are now working under conditions of weekly hiring, with no real fear that their employment will be terminated at short notice unless they are guilty of incompetence, neglect or dereliction of duty, malingering on the job or other conduct or offence that permits, under the relevant award or determination, of their summary or instant dismissal. In the case of professional and staff employees the guaranteed term of employment is

¹⁵⁵ Higgins (n 73) 160-162.

¹⁵⁶ Higgins (n 73) 160.

¹⁵⁷ *ibid.*

¹⁵⁸ Stewart (n 145) 25.

invariably longer. Tenure is just as important as other conditions of employment, and as the wage rate.¹⁵⁹

No political will existed during this first phase to seriously challenge the perceived constitutional constraints limiting the establishment of a statutory remedy for unfair dismissal. It was believed that the Conciliation and Arbitration Court, later the Conciliation and Arbitration Commission, had no jurisdiction to order the reinstatement of a dismissed worker. This is because under the conciliation and arbitration power a dispute between a union and an employer needed to extend beyond the boundaries of one state, and an unfair dismissal dispute involving an individual does not meet this criterion. This jurisdictional difficulty was perceived to exist despite the fact that the Conciliation and Arbitration Act 1904, in its definition of industrial matters that the Court had purview over, included 'the right to dismiss or to refuse to employ, or the duty to reinstate in employment, a particular person or class of persons'.¹⁶⁰ However, this was not seen as enough to trump the interstate requirement explicit in section 51(xxxv) of the Constitution. As one member of the High Court remarked about the conflict between these two conferrals of power, 'Be it so. You must still have an industrial dispute about that matter extending beyond one State'.¹⁶¹ However, despite the constraints of the constitutional arrangements establishing the conciliation and arbitration system, no serious attempts were made to introduce an individual remedy for unfair dismissal within the federal system as it was generally

¹⁵⁹ Orwell Foenander, *Industrial Conciliation and Arbitration in Australia* (The Law Book Company of Australasia, 1959) 45.

¹⁶⁰ Conciliation and Arbitration Act 1904 (Cth) as amended, s 4.

¹⁶¹ *R v Gough; Ex parte Cairns Meat Export Co. Pty. Ltd.* (1962) 108 CLR 342 [350] (Dixon J). See also *R. V. Porus; Ex parte City of Perth* (1973) 129 CLR 312.

believed that the ability of the system to achieve industrial peace took precedence. This period was characterised by the willingness of the parties, particularly unions, to support the conciliation and arbitration system federally because the industrial peace doctrine was sufficiently robust and institutionally embedded to be challenged. The parties accepted that individuals could not make a claim even when their individual rights had been infringed because of the benefit guaranteed by industrial peace that unions were legitimised by the system and could make claims to improve the collective position of working people.

1983 - 1992

The second phase in the evolution of industrial peace as a doctrine influencing the maturation of federal unfair dismissal law occurred during the period 1983-1993 when there was an experiment with breaking away from Australia's conciliation and arbitration tradition. The introduction of a new labour system predicated upon centralised wage fixing in 1982 indicates that there was a shared willingness by the parties to try and resuscitate the collective labour law system by establishing an Accord between the Labor Government, the unions and employer groups.¹⁶² The rationale for this policy shift was not purely about industrial relations, although certainly a key objective was to secure industrial peace and reduce the incidence of

¹⁶² Tim Rowse, 'Elusive Middle Ground: A Political History' in Joe Isaac and Stuart Macintyre (eds) *The New Province for Law and Order* (CUP, 2004) 43.

strikes and working days lost to strikes.¹⁶³ In addition, there was a shared belief that conciliation and arbitration had become unable to achieve important economic objectives of productivity gains and low inflation, so there was need for a national solution predicated upon securing agreement between the social partners.¹⁶⁴ Again, this leads to the marginalisation of a statutory remedy for unfair dismissal because of the pursuit of an industrial relations and economic agenda aimed at securing industrial peace. Interestingly, the industrial peace doctrine was sufficiently robust in this period to survive this threat to conciliation and arbitration and instead of pushing seriously for legislative reform, unions sought to secure unfair dismissal reform from within the existing conciliation and arbitration paradigm by trying to insert a condition mandating fair dismissals into awards.

Australia's experiment with the Accord represented an attempt to move away from conciliation and arbitration whilst preserving a collective labour law model predicated upon industrial peace. The Hawke Government was elected in 1983 against a backdrop of mounting economic problems including increasing inflation, high wage costs and high industrial disputation.¹⁶⁵ At the National Economic Summit of April 1983 agreement was reached between the peak union body, the Australian Council of Trade Unions (ACTU) and employers on the need to explore centralised wage fixing in order to address Australia's escalating economic and industrial relations

¹⁶³ Bill Harley 'Managing Industrial Conflict' in Joe Isaac and Stuart Macintyre (eds) *The New Province for Law and Order* (CUP, 2004) 343.

¹⁶⁴ Rowse (n 162) 44-45.

¹⁶⁵ Malcolm Rimmer, 'Unions and Arbitration' in in Joe Isaac and Stuart Macintyre (eds) *The New Province for Law and Order* (CUP, 2004) 205.

challenges.¹⁶⁶ Consequently, in September 1983 there was a new national wage case before the Conciliation and Arbitration Commission where the social partners, along with the Government, agreed to a system of centralised wage fixing updated based on half-yearly indexation to inflation.¹⁶⁷ Central to the Accord was the notion of union restraint, not just on wages, but on all costs associated with labour. The Accord emphasised the framing of wage claims with due regard to economic policy, no extra claims could be made except for in exceptional and extraordinary circumstances and bargaining to reduce working hours was tied to increases in productivity.¹⁶⁸ In return, the Labor Government agreed to reforms aimed to benefit all working people: the establishment of a price surveillance mechanism, tax restructuring, superannuation and free universal health care financed by a 1% income tax levy.¹⁶⁹

This culture of union restraint made it difficult for unions to make headway in lobbying for unfair dismissal reform. This issue was increasingly on their agenda because of rising unemployment and concern over arbitrary dismissals. However, more central to the union agenda in this period was their desire to work with the Labor Government and business groups to ensure that the ‘social wage’ improved even if this meant that real wages fell and that workplace rights such as dismissal rights were not advanced.¹⁷⁰ This agreement between business, unions and the government can be

¹⁶⁶ Gwynneth Singleton, *The Accord and the Labour Movement* (MUP, 1990) 120-156.

¹⁶⁷ *ibid.*

¹⁶⁸ Harley (n 163) 343.

¹⁶⁹ Tom Bramble, *Trade Unionism in Australia* (CUP, 2008) 123-156.

¹⁷⁰ David Peetz, *Unions in a Contrary World* (CUP, 1998) 145-173.

seen as a form of corporatism as hidden decisions were made between the peak functional groups behind closed doors and where only the tripartite partners were accorded access. Loveday opposes this conception of the Accord as a corporatist reform because he views the Australian state as too fragmented and argues that Australia's particular economic and political history renders it impossible to view the Accord as an example of corporatism.¹⁷¹ He rejects the corporatist principle that the Accord granted to the peak bodies a deliberate representational monopoly because he argues that the fragmented state makes such a grant theoretically impossible.¹⁷²

Another Australian political scientist advances a somewhat different argument, characterising the period of the Accord as one of 'partial corporatism'. He argues that 'the politics of partial corporatism may be less concerned with organising the monopoly representation of the tripartite partners and more concerned with disorganising the representation of those outside the partial corporatist network'.¹⁷³ Stewart develops his argument on the basis that this form of partial corporatism benefits business more than unions as the former receives industrial peace and wage restraint without having to provide concessions as these are made by the Government. Moreover, only some forms of workers are represented by unions under the Accord as there is a disorganizing of representation for those outside the partial corporatist network. Stewart lists those outside the network as including the unemployed, women

¹⁷¹ Peter Loveday, 'Corporatist Trends in Australia' (1984) 19 *Politics* 1, 50.

¹⁷² *ibid*; see also Phillippe Schmitter and Gerhard Lehmbruch (eds), *Trends Towards Corporatist Intermediation* (Sage, 1979) 13.

¹⁷³ Randal Stewart, 'The Politics of the Accord does corporatism explain it?' [1985] *AJPS* 26, 33.

and welfare recipients as their needs are not addressed by the Accord. I would add to this list unfairly dismissed workers, as their needs were also marginalized under the Accord as their need to have their dismissal independently scrutinised was seen as an additional labour cost for business and too individual a concern to warrant being made part of the unions' Accord agenda. Instead, the unions advocated for unfair dismissal reform, albeit rather ineffectively, from within the conciliation and arbitration system. In 1984 the Australian Council of Trade Unions launched a test case on the issue of job security before the Conciliation and Arbitration Commission. In the *Termination, Change and Redundancy Case*¹⁷⁴ the Commission decided that the Metal Industry Award 1984 was able to include a clause that a dismissal must not be 'harsh, unjust or unreasonable' and that this clause could be flowed on to other federal awards. Nonetheless, the effectiveness of this was limited as penalties were small and there was no provision for compensation for losses that might flow from unfair dismissal.¹⁷⁵

The little headway made in developing remedies for unfair dismissal at the federal level during the Accord years is perhaps best explained by both the robustness of industrial peace as a doctrine and the perceived successful attainment of industrial peace during this period. The Accord was seen as the happy marriage of economic and industrial relations objectives. According to Lewis and Spiers, 'on the wages and employment front the Accord has brought about significant falls in real wages, and

¹⁷⁴ 8 Indus. R. 34; 9 Indus. R. 115 (1984).

¹⁷⁵ Stewart (n 145) 31-36.

with regard to industrial relations since the introduction of the Accord, Australia has had one of the longest periods of industrial peace in more than twenty years.¹⁷⁶

While there was some disagreement as to whether Australia's improved industrial peace during the Accord years was directly attributable to the Accord or the result of other factors,¹⁷⁷ the reduction in industrial action was significant. For example, the working days lost in February 1989 was 41 000, the lowest February figure since monthly records began in 1969.¹⁷⁸ Furthermore, a comprehensive study by Beggs and Chapman in response to the international criticisms that the Accord was not the main cause in the achievement of industrial peace found that the decrease in working days lost through strikes per employee under the Accord was 82 per cent.¹⁷⁹ In sum, the gains made in achieving industrial peace during the Accord years continued the obscuration of unfair dismissal reform by the parties and policy makers as preference was given to economic objectives and reducing strikes.

1993 - 1996

At the federal level, it was only when the prevailing theory of industrial peace was dismantled more generally that we see real progress being made on the unfair

¹⁷⁶ P.E.T. Lewis and David Spiers, 'Six Years of the Accord: An Assessment' [1990] JIR 53, 67.

¹⁷⁷ Richard Blandy, 'Australian Strike Activity in an International Context: 1984-85' [1988] JIR 316.

¹⁷⁸ Blandy (n 177) 62.

¹⁷⁹ John Beggs and Bruce Chapman, 'Australian Strike Activity in an International Context: 1984-85 Rejoinder' (1988) JIR 318.

dismissal front. By the early 1990s it became clear that both the traditional conciliation and arbitration mechanism, and the system of centralised wage fixing mandated by the Accord, were breaking down and had lost the support of unions and employers. This led to the Labor Government to introduce the Industrial Relations Act 1993 (Cth) which marked a watershed in Australia's industrial relations as it was the first attempt to directly regulate the employment relationship through reliance on a range of constitutional powers rather than the traditional usage of section 51(xxxv). This reform sees a statutory remedy for unfair dismissal being introduced into the federal sphere for the first time. This occurs because the traditional theory of industrial peace is increasingly marginalised after 1993 and replaced with new ideas of what shape Australia's labour laws should take. Specifically in terms of unfair dismissal, the introduction of a federal statutory remedy occurs because of reliance on the concept, developed initially at the state level, of industrial justice.

The demotion of industrial peace as the theoretical basis for Australia's labour laws resulted from the increasing pressure by the early 1990s to reduce Australia's labour law reliance on the traditional machinery of conciliation and arbitration. There were a number of key reasons for this. Firstly, the opening up of the Australian economy led to support for the deregulation of conciliation and arbitration and of abandoning industrial peace as the primary objective of the system. Key developments here were the floating of the Australian dollar in 1983, the deregulation of the Australian financial system and the progressive removal of tariffs protecting Australian manufacturing. Secondly, Australia began to experience mounting

problems associated with its balance of payments in the late 1980s and the economy went into recession. Unemployment was at record levels and the nature of the labour market was changing with decreasing employment in manufacturing, casualization of 25% of the workforce and increasing participation of women. Thirdly and perhaps most importantly, these economic changes led to increasing pressure by interest groups who argued that the prevailing government policy of deregulating product markets needed to be complimented by deregulation, or at least, decentralization, of the labour market.¹⁸⁰ The recession, in particular, laid the groundwork for the removal of conciliation and arbitration as it gave impetus to the argument that Australia's productivity was hamstrung by the setting of wages and conditions on an industry basis.

There was immense intellectual pressure to reduce centralized wage fixation predicated upon achieving industrial peace and economic objectives, and move towards a focus on the enterprise – typified by both the Niland Report¹⁸¹ and the BCA Report.¹⁸² Pressure for enterprise bargaining was not just from employer groups but also engendered by unions who saw it as a means of fostering collectivism at the workplace. By April 1991 the AIRC was faced with pro-enterprise bargaining submissions from all the major employer groups, the ACTU and all the then

¹⁸⁰ Russell Lansbury and Mark Wescott, 'Collective Bargaining, Employment and Competitiveness: The Case of Australia' (2000) IJES 102.

¹⁸¹ John Niland, *Transforming Industrial Relations in New South Wales, A Green Paper* (Government Printer, Sydney 1989).

¹⁸² Business Council of Australia, *Enterprise-based Bargaining Unit: A Better Way of Working* (Report to the Business Council of Australia by the Industrial Relations Study Commission, 1989).

Commonwealth and State Governments. When the AIRC initially opposed enterprise bargaining in its ruling, it faced almost universal criticism with the ALP and the ACTU both deciding to launch an industrial campaign advocating enterprise bargaining.¹⁸³ Dabscheck argues that the AIRC's reluctance to innovate the traditional processes of conciliation and arbitration by introducing enterprise bargaining was key to its eventual demise as it was out of step with the regulatory pressures placed by all the other parties.¹⁸⁴ Furthermore, the advent of globalisation meant that influential international organisations exerted pressure on Australia to abandon its conciliation and arbitration tradition and gave impetus to neo-liberal reformers within Australia to make the case for change.¹⁸⁵

Thus, in 1993 the prevailing industrial peace doctrine embedded in a system of conciliation and arbitration was replaced by a new industrial relations order with new objectives, not necessarily contingent upon the primacy of industrial harmony. Interestingly, despite the dismantling of conciliation and arbitration and the extension of enterprise bargaining more generally, conciliation and arbitration machinery came to be of increasing importance in the area of unfair dismissals as the AIRC machinery was chosen to conciliate unfair dismissal disputes. The Labor Government chose not to

¹⁸³ Chris Briggs, 'Australian Exceptionalism: Australian Trade Unions in the Emergence of Enterprise Bargaining' [2001] JIR 27.

¹⁸⁴ Braham Dabscheck, 'The Slow and Agonising Death of the Australian Experiment with Conciliation and Arbitration' [2001] JIR 277.

¹⁸⁵ For example, in an assessment of the Australian economy at the time, the IMF argued that decentralization was not progressing fast enough and that lingering high levels of structural unemployment were the result: Russell Lansbury and Mark Westcott, 'Collective Bargaining, Employment and Competitiveness: The Case of Australia' [2000] IJES 102, 103.

place the entire unfair dismissal system in the AIRC's jurisdiction and created the Industrial Relations Court which was constituted by Federal Court judges and bound by legal rules of procedure. This decision was motivated by the Labor Government's interpretation of the *Boilermakers' Case*¹⁸⁶ which they viewed as preventing the AIRC from granting individual remedies as this would involve the use of judicial power which could only be exercised by a court.¹⁸⁷

In a controversial move the Labor Government chose to eschew the existing Industrial Division of the Federal Court and to create a separate court, the Industrial Relations Court, as the first procedural point of call for unfair dismissal applications. All applicants had to lodge their application with the IRC.¹⁸⁸ The IRC was then required to refer the matter to the AIRC for conciliation unless the IRC was satisfied that such a referral was inappropriate.¹⁸⁹ The AIRC's role was to inquire into the matter and help the parties reach settlement. If settlement did not occur within a reasonable period, the AIRC could produce a certificate stating that conciliation failed and the matter was remitted to the IRC for resolution.¹⁹⁰ Remedies that could be

¹⁸⁶ *R v Kirby Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

¹⁸⁷ In the *Boilermakers'* case the High Court held that the Court of Conciliation and Arbitration created in 1904 could not exercise both the quasi-legislative function of making awards and the judicial functions of interpreting and enforcing them.¹⁸⁷ Consequently, two new bodies were created: firstly, the Australian Industrial Relations Commission (before 1989 the Australian Conciliation and Arbitration Commission) to exercise the non-judicial power of conciliation and arbitration and secondly, the Industrial Division of the Federal Court to exercise strictly judicial functions. See: Michael Kirby and Breen Creighton, 'The Law of Conciliation and Arbitration' in Joe Isaac and Stuart Macintyre (eds) *The New Province for Law and Order* (CUP, 2004) 126-132.

¹⁸⁸ s 170EA.

¹⁸⁹ s 170EC.

¹⁹⁰ s 170ED.

awarded by the IRC included compensation and reinstatement. Reinstatement was intended as the primary remedy and involved either reappointing the employee to their former position, or else appointing the employee to another position on terms and conditions no less favourable.¹⁹¹

Despite the marginalisation of industrial peace as an objective of Australia's labour laws after 1993, this was not replaced by a robust and cohesive ideal of industrial justice at the federal level. The introduction of unfair dismissal law was characterised by the Labor Government as necessitated by Australia's obligations under international law, not because of a need within Australian workplaces. In introducing the Bill into the Parliament, the Federal Minister for Industrial Relations, Mr Brereton did not refer to any rationale other than giving effect to Australia's international obligations as the impetus for these provisions and a new object was added to the Act which read, 'the protection of wages and conditions of workers through awards and by ensuring that labour standards meet Australia's international obligations'.¹⁹² The use of this single rationale was interesting because it meant that unlike in Britain where the introduction of unfair dismissal laws was accompanied by discussion as to why such protection was needed in order to afford greater job security, in Australia this debate did not occur.

¹⁹¹ s 170EE.

¹⁹² Part 2, 4(b).

The reason the parliamentary debate took the form of assessing the merits of reliance on international conventions to introduce domestic reform on unfair dismissal is because the Labor Government was using the external affairs power in the Constitution to avoid the constraints of section 51(xxxv). The external affairs power¹⁹³ enables the Federal Government to make laws with respect to Australia's external affairs and was more expansively interpreted in a series of cases upholding Federal laws giving effect to Australia's obligations under international treaties and conventions.¹⁹⁴ To utilise this power the international instrument must be ratified by the Executive arm of the Commonwealth Government and the judicial test for assessing whether an Act is supported by section 29 is:

The law must be capable of being reasonably considered to be appropriate and adapted to achieving what is said to impress it with the character of a law with respect to external affairs...Implicit in the requirement...is a need for there to be a reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it.¹⁹⁵

The key sections governing unfair dismissal were contained in Part VIA Division 3 of the Industrial Relations Reform Act and were founded upon the ILO Termination of Employment Convention 1982 (No.158) which was ratified by Australia in February 1993 and the associated Termination of Employment Recommendation (No.166). The debate over the proposed unfair dismissal scheme focused upon the appropriateness of relying upon section 29 to introduce a domestic law based on a treaty that most of

¹⁹³ s 51(xxix).

¹⁹⁴ *Koowarta v Bjeke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1; *Richardson v Forestry Commission* (1988) 164 CLR 261; *Polyukhovich v The Commonwealth* (1991) 65 AJLR 521.

¹⁹⁵ *Commonwealth v Tasmania* (1983) 158 CLR 1 [260] (Deane J).

Australia's trading partners had not ratified. The use of section 51(xxix) instead of section 51(xxxv) to introduce federal unfair dismissal reform represents the use of a novel constitutional power with no affiliation to the traditional doctrine of industrial peace. The final chapter of this Part explores how this narrow parliamentary debate contributed to a fairly under-theorised notion of industrial justice as the basis of Australia's unfair dismissal reform.

Section Four

Conclusion

This chapter has charted the evolution of Australia's labour laws from the traditional conciliation and arbitration system predicated upon a doctrine of industrial peace until the introduction of a new system after 1993. This new system did not involve the complete overturning of tradition as conciliation and arbitration was chosen as the mechanism for resolving unfair dismissal disputes between an individual employee and his or her employer. This development saw the transformation of a tribunal system previously concerned with resolving collective disputes into a new concern with individual dispute resolution. As a result, the unfair dismissal system introduced in 1993 did not represent as much of a break with the past as might be initially thought – this system was steeped in the ideas of industrial peace and industrial fair play which were the bedrock of the traditional conciliation and arbitration process.

The following chapter explores the development of unfair dismissal law in Britain. Whilst Chapter Three does not refer explicitly to Australia's evolution of unfair dismissal law from a traditional conciliation and arbitration model, the reader should keep in mind both what is common, and what is different, to these evolutions as outlined in the Introduction to Part A. In terms of the similarities, both traditional labour law models sought to guarantee industrial peace through prioritising the achievement of union security over job security. In both cases, when the traditional labour law model was viewed as no longer adequate there is wholesale labour law reform, of which the introduction of unfair dismissal law is a central component. Despite these similarities, what is striking about the evolution of unfair dismissal law in Britain and Australia is that this evolution occurs at different times and from different labour law heritages.

CHAPTER THREE

BRITAIN

Introduction

Much has been written about Kahn-Freund's theory of collective laissez-faire. Recently, Bogg revisited the question of the usefulness of this theory in aiding our understanding of British labour law and assessed the validity of the main critiques of collective laissez-faire which have emerged, namely the absentionist, neutrality and coherence critiques.¹⁹⁶ He concluded that each of these critiques is somewhat misplaced and that 'collective laissez-faire still offers the most compelling theoretical rationalisation of the pattern of auxiliary intervention in the post-war period'.¹⁹⁷ In accepting this proposition I wish to explore a slightly different question: does the theory of collective laissez-faire help explain what Collins describes as the 'apparent tardiness' of Britain's unfair dismissal system?¹⁹⁸ Or said differently, did the commitment of successive British governments to voluntarism in industrial relations and the promotion of collective bargaining delay the development of unfair dismissal protection for British employees? Up until 1971 when statutory unfair dismissal protection was introduced, the perceived deficiencies in the contract of employment in protecting individual employees were seen to be remedied through the voluntary development of procedures within industries and workplaces rather than through providing individual employees with statutory rights to protect their interest in job

¹⁹⁶ Bogg (n 54).

¹⁹⁷ Bogg (n 54) 3.

¹⁹⁸ Hugh Collins, *Justice in Dismissal* (Clarendon Press, 1992) 24.

security. This delay can be largely attributed to the significant influence of the voluntarist tradition upon British industrial relations. As Wedderburn observes:

Legal enactment has not been the modern method. Voluntary collective bargaining has developed in a system which owes very little to the law, which is covered by very few judicial decisions because it has rarely been brought into any court, and which is controlled by statute very little, if at all. In other countries with comparable economic systems (such as the United States, France, Australia, Sweden, West Germany) the 'collective agreement' and the process which produces it are closely regulated by legal sanction.¹⁹⁹

In addressing this situation it will be possible to see how the durability of the state's commitment to voluntarism, as understood by collective laissez-faire theory, has been significant in impacting upon the evolution of statutory unfair dismissal laws in Britain.

So how did voluntarism become part of the general British cultural heritage in industrial relations prior to 1971? This was primarily due to a view that voluntary collective bargaining provided the best mechanism for securing agreement between the parties. Industrial conflict permeated British industrial relations in the late 19th century in the form of strikes, lockouts and picket line violence between hired strike-breakers and unionists. A Royal Commission on Labour was established in 1891 to examine the causes of this conflict and to propose solutions. The Royal Commission reported in 1984 and identified collective bargaining as an effective system of regulating industrial relations. The Commission recommended that the Government use its powers to support voluntary agreements between unions and employers and provide conciliation

¹⁹⁹ KW Wedderburn, *The Worker and the Law* (1st edn, Penguin, 1965) 13.

mechanisms to help resolve disputes and achieve industrial peace.²⁰⁰ This was followed by the Whitley Committee's First Interim Report in 1917 which recommended 'the establishment for each industry of an organisation representative of employers and workpeople, to have as its object the regular consideration of matters affecting the progress and well-being of the trade from the point of view of all those engaged in it'.²⁰¹ According to Clay, this amounted to a 'public and official recognition of trade unionism and collective bargaining as the basis of industrial relations'.²⁰² In this way, voluntarism prioritised the achievement of union security over other industrial relations goals because it was believed that collective bargaining would lead to the orderly resolution of industrial conflict and thereby bring about industrial peace.

The industrial parties also supported the securing of industrial peace via a method of voluntarism. Unions preferred to sort out conflict with employers through industrial tactics during the bargaining process rather than through the common law courts. According to Flanders the British trade union movement's staunch support for voluntarism was not based upon distrust of labour legislation but rather of the courts.²⁰³ He observed that it is when legislation has the object of bringing employers and unions before courts of law that it is met with almost universal disapproval by the

²⁰⁰ Charles Barrow, *Industrial Relations Law* (Taylor & Francis, 2000) 138.

²⁰¹ The Whitley Committee, Interim Report on Joint Standing Industrial Councils (Cd. 8606, 1917) para 5.

²⁰² Henry Clay, *The Problem of Industrial Relations* (Macmillan & Co, 1929) 154 and 177.

²⁰³ Allan Flanders, 'The Tradition of Voluntarism' (1974) 12 BJIR 352.

parties with the latter sceptical of their ability to make an impartial decision.²⁰⁴ Flanders quotes both Lord Justice Scutton and former British Prime-Minister Winston Churchill in their acknowledgement of the actual and perceived class bias of the courts, with the latter observing that ‘it is not good for trade unions to be brought in contact with the courts because ‘where class issues are involved, it is impossible to pretend that courts command the same degree of general confidence’.²⁰⁵ Wedderburn also identifies a strong sentiment of suspicion by British trade unions of the courts and a correspondingly strong sentiment of support for voluntarism in industrial relations. He attributes this to the fact that judicial legal intervention in the nineteenth century was inimical to the unions as ‘it was the judges who repeatedly declared trade unions and their activities criminal during the first half of that century’.²⁰⁶ Commitment to voluntarism was not just exhibited by the trade union movement but also by employers. The Contracts of Employment Act 1963, often seen as the first deliberate inroad by the government into abandoning voluntarism in industrial relations, was passed against the wishes of both the Confederation of British Industry and the Trade Union Congress.²⁰⁷

In the specific context of unfair dismissal reform, both the peak employer and union bodies were initially opposed to statutory intervention and favoured the

²⁰⁴ Flanders (n 203) 354.

²⁰⁵ Winston Churchill, 1911 quoted in Flanders (n 203) 354.

²⁰⁶ Wedderburn (n 199) 18.

²⁰⁷ Wedderburn (n 199) 355.

extension of voluntary procedures.²⁰⁸ Even though there was recognition that voluntarism did not effectively protect individual employee's job security or unfair dismissal rights, the primary sentiment of unions and employers up until the late 1960s was one of aversion to using the courts to resolve unfair dismissal disputes. While it is perhaps less surprising that employers did not lobby governments to confer statutory unfair dismissal protection upon employees as this would have eroded their managerial prerogative, it is interesting that the unions too exhibited a strong preference for the extension of voluntary procedures rather than legal intervention. The core agenda of British unions was not to secure unfair dismissal rights for individuals but to secure favourable terms and conditions for the collective and to ensure that unions were able to bargain and strike as part of a system of free collective bargaining. In this way, British unions perceived that the achievement of trade union security trumped the achievement of job security. Their support for the British tradition of voluntarism in industrial relations hinged upon their belief that voluntarism strengthened their position in collective bargaining as it limited the involvement of the law, in particular, the courts. They were suspicious that adjudicating unfair dismissal disputes in the courts would erode the position of unions as the exclusive spokesperson for British workers and that the courts would ultimately side with the employer in making decisions as to the fairness of a dismissal. Successive governments were also complicit in supporting the development of a particular British culture in industrial relations of voluntarism. While labour legislation was enacted prior to 1971, this legislation tended to favour the promotion of collective bargaining and the maintenance of the autonomy

²⁰⁸ Ministry of Labour, *Dismissal Procedures* (Report of a Committee of the National Joint Advisory Council, 1967), para. 11-13.

of the industrial parties. This was not a policy of legal non-intervention but rather a state commitment to providing the conditions necessary for enabling employers and unions to resolve industrial relations disputes via collective bargaining.

This chapter assesses how the British tradition of voluntarism used to guarantee industrial peace impacted upon the evolution of unfair dismissal law. The first section explores how the voluntarist tradition initially acted as a constraint upon the development of statutory unfair dismissal protection as the industrial parties preferred to rely on voluntary methods to resolve unfair dismissal disputes so as to achieve industrial peace. The strong commitment to promoting collective bargaining by successive British governments meant that legislation to protect individual employment rights was only introduced where there was perceived to be a pressing case for legislative intervention because persistent industrial conflict was seen as damaging Britain's economic performance. In this way, a trade off was made between the need to achieve union security and job security as under the voluntarist tradition it was believed that the most effective method of remedying the disadvantaged contractual position of individual employees was to compensate for this through collective organisation. The second section of this chapter explores the emergence of challenges to the British tradition of voluntarism, in particular, the perceived failure of unions and employers to act in the national interest and the growing willingness to chip away at voluntarism in industrial relations through legislation, exhibited in the modernisation statutes of the 1960s.

Nonetheless, despite the growing perception that greater legislative intervention in industrial relations could be warranted in order to achieve the national interest, the building momentum to confer greater unfair dismissal protection on employees was conceived as being part of a voluntary industrial relations system aimed at extending collective bargaining. This is the focus of the third section which looks at the recommendations for unfair dismissal reform contained in both the final reports of both the National Joint Advisory Council and the Donovan Commission. While the latter does advocate statutory protection of unfair dismissal rights, this recommendation is not intended to provide a break with Britain's cultural heritage of voluntarism in industrial relations. The fourth section of this chapter looks at the introduction of unfair dismissal law in Britain and the dismantling of the voluntarist tradition. I argue that this tradition is replaced by a new concern with the achievement of industrial justice and that this can be identified in both the policy platforms of Labour and the Conservatives, and the reliance upon industrial tribunals staffed by lay members to give effect to this notion of industrial justice. This concept of industrial justice is not just a post-hoc rationale of the unfair dismissal system by theorists but is actively adopted by both political parties, and the members of the tribunal system as the basis for Britain's unfair dismissal system.

Section One

Unfair Dismissal under the Voluntarist Tradition

The voluntarist tradition initially acted as a constraint upon the development of statutory unfair dismissal protection as the industrial parties preferred to rely on voluntary methods to achieve industrial peace. Unions were highly suspicious of any attempt to involve the courts in British industrial relations and preferred to resolve disputes according to the relative strength of the parties. Accordingly, unions were reluctant to lobby governments to provide statutory protection of unfair dismissal rights and instead preferred to rely on traditional industrial tactics to secure reinstatement for an unfairly dismissed employee. Employers too, did not advocate for reform in this area, although their commitment to voluntarism in this respect was perhaps motivated by other concerns, namely, their desire to avoid litigation around dismissal disputes and their preference for relying upon unions to only pursue industrial action for disputes which were of merit. In this way, both unions and employers placed little pressure on the British government to provide statutory protection of unfair dismissal rights. This section also looks at how the strong commitment to promoting collective bargaining by successive British governments meant that legislation to protect individual employment rights was only introduced where there was perceived to be a pressing case for legislative intervention. In this way, a trade off was made between the need to achieve union security and job security as under the voluntarist tradition it was believed that the most effective method of

remedying the disadvantaged contractual position of individual employees was to supplement this through collective organisation.

A. Industrial autonomy

The commitment of successive British governments to preserving the autonomy of the parties in collective bargaining produced an industrial relations system which prioritised the achievement of the collective agenda of the labour movement. This meant that the pursuit of individual rights such as job security was marginalised as bargaining between employers and unions tended to focus upon collective industrial issues. Kahn-Freund's collective laissez-faire theory suggested that this principle of 'industrial autonomy' meant that employers and employees 'formulated their own codes of conduct and devised their own machinery for enforcing them'.²⁰⁹ This resulted in the rights, obligations and duties of employers and employees being determined and enforced according to industrial tactics rather than via the parties resorting to legal measures. Nonetheless, while the parties were mainly able to avoid the law in resolving their disagreements, the principle of industrial autonomy was preserved by the presence of auxiliary legislation which conferred upon unions a basic framework for engaging in collective bargaining with employers. By 1871 the right of trade unionists to associate was enshrined by the Parliament who decreed that the common law doctrine of 'restraint of trade' should no longer apply to trade unions. Also pivotal to the development of a strong labour movement was the Trade Union

²⁰⁹ Otto Kahn-Freund, 'Legal Framework' in Allan Flanders and Hugh Clegg (eds), *The System of Industrial Relations in Great Britain* (Blackwell, 1954) 44.

Disputes Act 1906 which protected the capacity of British unions to take industrial action which was increasingly being eroded by the development of corporate tortious liability for unions after the Taff Vale case.²¹⁰ The cumulative effect of these two Acts in excluding the common law doctrines constraining union activity provided a framework for collective bargaining but could not be characterised as overly interventionist as ‘the legislators of 1906 did not go on, as they might have done, to erect their own statutory structure of restrictions on the contract of employment of social sanctions in trade disputes’.²¹¹

In practice, the principle of industrial autonomy meant that unions and employers set the industrial relations agenda with the former primarily concerned with achieving strength in collective bargaining negotiations and favourable outcomes in terms of wages and working conditions. Less pressing to the union agenda was securing the fairness of an employee’s dismissal through exerting industrial pressure on the employer to develop formal procedures for determining dismissal decisions or by lobbying parliament to impose statutory duties upon employers during dismissal. In 1961 the Trades Union Congress questioned officials of its affiliated unions on their attitude towards the introduction of legislation providing protection against unfair dismissal. The majority of respondents, from 44 out of 57 unions, said they preferred the matter to be dealt with through collective bargaining.²¹² This view was of course in

²¹⁰ *Taff Vale Railway v Amalganated Society of Railway Servants* [1901] Ac 426 (HL).

²¹¹ Davies and Freedland (n 11) 22.

²¹² ___ ‘Protecting Against Unjustified Dismissal’ *The Times* (London 15 March 1965).

keeping with the voluntarist tradition whereby it is thought that workers can best achieve their goals by relying on their own organisation. The traditional strategy employed by unions to protect individual employees facing a dismissal which they deemed to be unreasonable was to threaten the employer with industrial action in order to secure the individual's reinstatement. From the union's perspective, this situation was mainly satisfactory as they could use their industrial leverage to enable an unfairly dismissed employee to get their job back. This was an industrial tactic unions were not afraid to use. Unofficial dismissal-related strikes were a well-known phenomenon of British collective laissez-faire, for example, between 1964 and 1966 there were 276 strikes resulting from dismissal.²¹³ Furthermore, it was not high on the unions' agenda to secure statutory unfair dismissal protection for workers in non-unionised industries, as it was perceived that the first priority for these workers was to achieve unionisation. It was believed that this would then result in greater all-round protection for these workers, including protecting their right to job security by using industrial tactics rather than legal measures. The union's position is aptly summated by the following submission from a union representative to the Donovan Commission:

I do not think there is any one on the TUC side who would argue against the rights of the worker to be protected equally with the rights of the employer, but we are facing the law as it stands and what we are saying is, do we want the court to protect it or do we want the ordinary industrial machinery to protect it? *The evidence of the TUC has been in favour of the strengthening of the industrial machine...* it is not an argument as to whether we think the worker is entitled to the protection, but the method by which the protection is given. (emphasis added)²¹⁴

²¹³ Donovan (n 48) para 528.

²¹⁴ Royal Commission on Trade Unions and Employers' Associations, Minutes of Evidence of 29 November 1966 and 31 January 1967 (Her Majesty's Stationery Office, London 1967) para 10402 (Mr Frank Cousins).

A key reason behind the union position favouring the extension of voluntary methods for resolving unfair dismissal disputes was the strong suspicion held by the British trade union movement towards legal intervention. In the 1950s and 1960s, while other European countries were well underway in the process of developing dismissal protections for employees,²¹⁵ and there was increasing international pressure for unfair dismissal rights to be recognised, British unions perceived the individual's claim to job security as being secondary to the collective's claim for favourable terms and conditions of employment, and secondary to the union's claim for the right to bargain freely and engage in industrial action. Unions favoured a non-legal solution to the perceived problem that many employees were left unprotected from unfair dismissal and were against involving the courts. During its oral evidence before the Donovan Commission, the General Secretary of the TUC voiced the unions' opposition to the use of labour courts involving lawyers to resolve unfair dismissal disputes, 'we say no to the outside labour court with the judicial approach and the judicial function. It has got to be within the setting of the industry and we say that the machinery should be established for that purpose'.²¹⁶

The unions were also sceptical of the ability of labour courts to understand industrial relations realities. They argued that a legal solution to an individual's unfair dismissal disputes would not contain the escalation of these disputes into a collective

²¹⁵ For example, see the discussion of international developments in France, Germany, Italy and America in KW Wedderburn (n 199) 89-94.

²¹⁶ Royal Commission on Trade Unions and Employers' Associations (n 214) paras 10383-10384 (Mr Victor Feather).

issue because if the other union members were unsatisfied with the legal solution then they would strike in solidarity with the individual. There was a strong sense that ‘legislation begets legislation’²¹⁷ and that the introduction of statutory protection of unfair dismissal rights would lead to increased legal intervention in industrial relations, thus undermining the role and position of unions over the long term.

It was not just unions who were reluctant to lobby for the introduction of statutory unfair dismissal protection but employers too. The principle of industrial autonomy meant it was unlikely that employers would press for any limit on their contractual right to dismiss employees. While the high incidence of dismissal-related strikes was an issue of potential concern to employers, the prevailing attitude amongst employer groups was that a statutory scheme protecting an individual from unfair dismissal would lead to a greater number of contested dismissals as unions acted as a filtering mechanism, weeding out weak complaints as they only resorted to industrial action for dismissals they genuinely disagreed with.²¹⁸ When employer groups raised this concern about a statutory scheme with the Donovan Commission, Professor Kahn-Freund of the Commission responded to this argument suggesting the CBI consider the American model where the union decides whether or not to take the unfair dismissal case to the arbitrator as a mechanism for preventing vexatious litigation. However, Mr Taylor rejected this approach arguing that under collective *laissez-faire* the union

²¹⁷ Royal Commission on Trade Unions and Employers’ Associations (n 214) para 10392 (Sir Harry Douglass).

²¹⁸ Royal Commission on Trade Unions and Employers’ Associations, Minutes of Evidence of 23 November 1965 and 7 December 1965) (Her Majesty’s Stationery Office, London 1966) para 1529 (Mr Taylor).

recognises that to take on an unfair dismissal claim it may ultimately have to call upon industrial action, whereas a union is more likely to support a claim if the union is only responsible for pursuing a case before a tribunal instead of organising a strike.²¹⁹

B. The role of legislation

The strong commitment to promoting collective bargaining of successive British governments meant that legislation to protect individual employment rights was only introduced where there was perceived to be a pressing case for legislative intervention. Under Britain's voluntarist industrial relations tradition it was believed that the most effective method of remedying the disadvantaged contractual position of individual employees was to supplement this through collective organisation. A trade off was made between the need to achieve union security and job security with successive governments prioritising the achievement of the former in their legislation. For Kahn-Freund the theory of collective laissez-faire did not demand the complete absence of government intervention, rather, he identified a distinctive British mode of positive intervention via a method of indirect inducements to encourage and facilitate collective bargaining, and where this failed, the provision of substitute standards enforceable by law.²²⁰ The objective of this 'organised persuasion' by the government was the entrenchment of collective bargaining and the achievement of orderly industrial

²¹⁹ *ibid.*

²²⁰ Davies and Freedland (n 11) 27.

relations through providing a framework for employers and unions to interact. In Kahn-Freund's words:

The collective bargaining process itself and the observance of concluded agreements are supported by a series of legislative measures, of institutions and of administrative practices. The gist of these is that they provide a statutory framework for organised persuasion...Persuasion and indirect sanction, that is, promise of benefits and threat of disadvantages, are the ways by which in this country the law traditionally exercises its functions as auxiliary to collective bargaining.²²¹

This principle of organised persuasion achieved via a method of indirect inducements meant that the dominant role for legislation introduced by the British government was aimed at promoting collective bargaining and ultimately at delivering its full realisation.²²²

Despite this, British governments did legislate to protect certain rights of individual employees because of the perceived inadequacy of collective bargaining to achieve protection in some areas, ultimately paving the way for the introduction of a statutory unfair dismissal scheme once it was recognised that the collective bargaining system could not speedily be adapted to provide more comprehensive protection of individual employees during dismissal disputes. Kahn-Freund's theory of collective laissez-faire did conceive of a role for regulatory legislation as a supplement to collective bargaining in order to fill the gaps left by the latter.²²³ Over time, British

²²¹ Otto Kahn-Freund, 'Retrospect and Prospect' (1969) 7 BJIR 301, 304.

²²² For a comprehensive exploration of the types of legislative devices used by British governments to promote collective bargaining such as Wage Boards and Order 1376: Simon Deakin and Gillian Morris, *Labour Law*, (5th edn, 2009, Hart) 15-16 and 21-22; See also: Davies and Freedland (n 11) 26-34.

²²³ Otto Kahn-Freund, *Selected Writings* (Stevens & Sons, 1978) 25.

governments developed health and safety standards, working hours regulations and laws protecting women and juveniles from exploitative working conditions because these areas required ‘gap-filling’ by the law as they were ineffectively addressed by collective bargaining.²²⁴ The achievement of full employment in the post-war period until the 1960s meant that the unfair dismissal rights of individual employees was not seen as an important enough issue as to warrant regulatory legislation. Moreover, this legislation would directly interfere with voluntary methods of ensuring fair dismissal which were already being developed through collective bargaining and enforced through the threat of industrial action by unions. However, Davies and Freedland observe that once this concept of the need for regulatory legislation to fill the gaps left by collective bargaining became linked with the fact that ‘even in the flourishing British system of collective bargaining, a substantial proportion of the workforce was not covered by collective agreements, the way would be open for a considerable extension of regulatory legislation’.²²⁵ Nonetheless, in the period prior to the mid 1960s, the durability of the voluntary tradition, underpinned by the principle of industrial autonomy, the presence of auxiliary legislation to promote collective bargaining and a perceived marginal, ‘gap-filling’ role for regulatory legislation, were pivotal to restraining the momentum of the argument that statutory unfair dismissal protection should be introduced. It was only when it became clear that economic conditions had worsened significantly, unions could not be relied upon to moderate their wage claims, and that collective bargaining was not achieving as widespread

²²⁴ Davies and Freedland (n 11) 36.

²²⁵ *ibid.*

coverage as had been hoped, that the path was cleared for alternatives to voluntarism in industrial relations to be considered.

Section Two

The Emergence of Challenges to Voluntarism

In the 1960s when cracks began to emerge in the effectiveness of voluntary collective bargaining to achieve stable and efficient industrial relations, then successive governments displayed a willingness to chip away at the edifice of Britain's traditional industrial relations system. Pressure began to mount for reform of industrial relations either through a winding back of the voluntarist tradition, long considered characteristic of British industrial relations, or through the development of an alternative system. Initially, these challenges were prompted by Britain's declining economic position relative to its trading partners and the emerging problem of rising unemployment and inflation. This led to renewed pressure to improve the productivity of British workplaces and the efficiency of the economy overall. Strikes were now seen as clearly undermining the national interest even if these were in unions' sectional interests. The cumulative effect of these factors led to an increasing willingness to depart from two foundational aspects of Britain's voluntary industrial relations tradition. First, there was a growing awareness that the principle of industrial autonomy did not result in the achievement of the national interest as it legitimised the rights of unions and employers to pursue their own agendas. Attempts to build a

national partnership between the government, employers and unions to moderate wage claims and to improve national productivity during the 1960s were not largely successful. Second, there was a growing willingness by successive governments during this period to legislate for industrial relation because the voluntary system was seen as too slow to innovate in delivering much-needed reform of industrial relations. The consensus emerging in the 1960s that modernisation of the British industrial relations system was needed in order to improve labour mobility and efficiency saw an increased preparedness on the part of governments to directly legislate for industrial relations. Dissatisfaction with Britain's tradition of voluntary industrial relations led to Kahn-Freund's reflection that the end of the 1960s was marked by a mounting conviction that 'collective bargaining machinery has stalled and legislation has to take its place'.²²⁶

A. The failure of industrial autonomy to achieve the national interest

The argument of this section is that pressure to introduce unfair dismissal protection for employees came about from a growing recognition by the political parties that wide-reaching labour law reform was necessitated to address the failure of unions and employer associations to act in the national interest. Despite its long industrial relations pedigree, there was an increasing perception that voluntarism did not safeguard the national interest when it came to responding to the economic challenges facing Britain. Collective bargaining between unions and employers seemed unable to

²²⁶ Otto Kahn-Freund, *Labour Law: Old Traditions and New Developments* (Clarke, Irwin and Co, 1968) 40-1.

guarantee the necessary preconditions for improving Britain's performance in the world economy. In the post-war period, Britain was outperformed by all its major trading partners with the exception of the USA. The primary challenge was one of spiralling inflation as retail prices were increasing at a faster rate than economic productivity and the increase in money wages was on average 6% which comfortably exceeded the growth of output per capita.²²⁷ In this context, the achievement of wage restraint was vital to reducing inflation but under the voluntarist tradition industrial relations outcomes were contingent upon collective bargaining. This required unions to place the national interest of reducing inflation above that of their own sectional interest of achieving the highest possible wage increase that their industrial muscle allowed them to achieve. Because of this inherent tension, there was a growing realisation that collective bargaining did not always serve Britain's economic interests as evidenced by the following statement in the Government's White Paper:

But the satisfactory operation of this whole system depends upon everyone involved being fully aware of the issues at stake, and upon their acceptance of the full duties of citizenship which this realisation places upon them. If they always place sectional interest before the nation's welfare, economic stability will be endangered and the possibilities of future expansion impaired, possibly to the extent of jeopardising those very sectional interests which they seek to protect.²²⁸

This inherent tension was also identified by the Ministry of Labour in its Covering Note which introduced its written evidence to the Donovan Commission:

It is obvious that trade unions have a cardinal role in promoting the interests of their members. It is not self-evident that they have an obligation to play a part in accelerating the social and economic

²²⁷ Davies and Freedland (n 11) 109.

²²⁸ The Treasury, *The Economic Implications of Full Employment* (Cmd 9725, 1956).

advance of the nation, and there is certainly scope for an argument about the priorities between the two and the way in which possible conflict between the roles can be reconciled.²²⁹

The significance of this recognition that the industrial autonomy principle was unable to secure Britain's best interests led to an increasing willingness on the part of the British government to intervene in the national economy and to canvass industrial relations reforms that went beyond the scope of traditional collective bargaining. In terms of the latter, this paved the way for both Labour and the Conservatives to conceive of a statutory unfair dismissal system that resolved dismissal disputes without resorting to traditional industrial relations machinery and to propose legislative intervention according to a rationale of industrial justice.²³⁰ In terms of the national economy, successive British governments exhibited a willingness to adopt a more interventionist economic policy. In 1962 the Conservative Government set up the National Economic Development Council which set a growth objective of 4% per annum for the years between 1961 and 1964. Upon their election in 1964, the Labour Government strengthened the state's commitment to economic planning with the establishment of the Department of Economic Affairs (DEA) which developed a National Plan with a growth object of 25% between 1964 and 1970. The purpose of the DEA was to promote economic growth through seeking to coordinate the economic decisions of the government, unions and employers by the development and

²²⁹ Royal Commission on Trade Unions and Employers' Associations, Minutes of Evidence of 29 November 1966 and 31 January 1967 (Her Majesty's Stationery Office, London 1967) 246.

²³⁰ This is the focus of sections three and four of this paper.

implementation of a productivity, prices and incomes policy.²³¹ This policy saw the establishment of a National Board for Prices and Incomes which was charged with scrutinising the justifications for wage and price movements and for advising the DEA on ways of increasing productivity. Despite the government's intention that the prices and incomes policy would take a long term view of what was needed in order to promote economic growth, as the economic crisis became more severe it became increasingly used to prevent wage rises. After July 1966 a total freeze was imposed and backed with state powers to delay wages and price increases. As Jenkins writes, 'at each sterling crisis the clamps were tightened. An originally voluntary experiment became an exercise in state compulsion'.²³²

Support for the voluntarist tradition was also undermined by the perception that it was unable to guarantee industrial stability. Once this perception took root it paved the way for the introduction of a statutory system for dealing with dismissal disputes as it was argued that voluntarism saw the escalation of individual disputes into collective disputes because of the involvement of unions to resolve them. There was increasing concern that the productivity of the British economy was being diminished by the loss of too many working days to industrial action. This prompted a growing willingness on behalf of Labour and the Conservatives to express an intention of intervening in industrial relations without gaining union consent on the grounds that the national interest was at stake. In 1958 the Inns of Court Conservative and Unionist

²³¹ For a gripping account of the events and political machinations leading to the establishment of the DEA, see: Peter Jenkins, *The Battle of Downing Street* (Charles Knight & Co Ltd, 1970) 3-4.

²³² Jenkins (n 231) 4.

Society published a document, 'A Giant's Strength', which identified some union officials as 'overmighty subjects' who used their industrial muscle to achieve their own ends. Davies and Freedland observe that this document 'set down a marker for the future' because it represented an emerging conservative opinion that some unions were prepared to risk national economic interests.²³³ In the specific context of dismissal disputes, there was an increasing belief that there were too many dismissal-related strikes which were unnecessarily disrupting productivity as this resulted in the collectivisation of an individual's desire to challenge the legitimacy of their dismissal. The Ministry of Labour, in its evidence to the Donovan Commission, emphasized that 'the employment and discharge of workers' was the second major cause of disputes after wage disputes, accounting in the period between 1960 and 1964 for between 10 and 11 percent of both numbers of stoppages and days lost.²³⁴ Labour too, was increasingly willing to canvas economic solutions without union support. It released its White Paper on industrial relations reform, 'In Place of Strife', without consulting the unions and with proposals that allowed the Secretary of State to ban strikes breaching the statutory procedure and to allow a conciliation pause of 28 days to help the parties to reach agreement. According to Jenkins, these proposals were the proverbial last straw for the union movement because whilst 'the trade unions for some while had stomached the Government's income policy powers', 'a restriction on the *proceeds* of collective bargaining, necessarily temporary, was one thing, while a permanent

²³³ Davies and Freedland (n 11) 129.

²³⁴ Royal Commission on Trade Unions and Employers' Associations, Minutes of Evidence of 29 November 1966 and 31 January 1967 (Her Majesty's Stationery Office, London 1967) para 10402.

restriction on the *process* of collective bargaining was another'.²³⁵ Of this tumultuous period, Davies and Freedland observe, 'by the end of the 1960s relations between the government and the TUC had reached a very low point as the unions were reasserting in militant fashion the illegitimacy of governmental "interference" in wage setting'.²³⁶

B. The growing willingness to chip away at voluntarism through legislation

Perhaps the biggest challenge to the voluntarist tradition was the push to modernise the British economy via a series of legislative measures aimed at improving the efficiency of British industrial relations. This initial phase of modernisation in the 1960s was characterised by a significant amount of bipartisan support as both political parties conceived of a more active role for the state in order to increase economic efficiency and growth. The first of the modernisation statutes was the Contracts of Employment Act 1963 which conferred a statutory right to a minimum period of notice for employees who were dismissed for reasons other than misconduct and a new requirement that written particulars should be supplied by employers for those on oral employment contracts. This Act achieved bipartisan support because of the cross-party belief that it would aid the regularisation of British industrial relations and reduce industrial disputes by enabling the parties to have a better grasp of the basic conditions of their employment contract. The Industrial Training Act of 1964 was aimed to improve the overall productivity of the British economy by imposing a levy upon

²³⁵ Jenkins (n 251) 50.

²³⁶ Davies and Freedland (n 11) 177.

employers to finance the establishment and operation of Industrial Training Boards administered by the government. The Redundancy Payments Act 1965 established minimum entitlements to redundancy payments on the basis that it would increase labour mobility as the monetary payment upon redundancy would increase an employee's willingness to move into another job. The National Insurance Act of 1966 introduced the principle of relating unemployment benefits to previous earnings in exchange for a linking of the contributions in the same way.

A striking feature of each of these Acts was the government's willingness to seize the initiative in order to achieve industrial relations reform. The National Joint Advisory Council comprised of employers and unions were not consulted about the 1963 Act and during the parliamentary debates in this period both parties exhibited a preparedness to eschew the voluntary system of collective bargaining because of a belief that it was too slow to innovate. Both sides of parliament recognised the limits of the traditional system, with the Conservative Government's Minister for Labour stating in 1963, 'voluntary methods are fine but they are fine only if they are effective. Some progress has been made on a voluntary basis in recent years but not nearly enough'.²³⁷ A similar attitude was shared by the Opposition, with Mr Gunter, the future Minister for Labour stating that under Labour 'there will be greater intervention by the State in industry...we and the party opposite will have to accept State intervention if the national needs are to be met'.²³⁸ The Contracts of Employment Act

²³⁷ Hansard HC 14 February 1963, vol. 671, col 1505.

²³⁸ Hansard HC 20 November 1963, vol 684, col. 1017.

1963 and the Redundancy Payments Act 1965 indicate that both Labour and the Conservative were prepared to support legislative efforts to confer statutory rights upon individuals justified according to the economic argument that by giving employees legal entitlements to money payments upon dismissal or redundancy, they would be less likely to resist the loss of their job and more willingly undertake the risks involved in looking for alternative employment. Davies and Freedland draw a distinction between these two Acts and the unfair dismissal legislation introduced in 1971 as the ‘latter was designed to make dismissal less likely; the former to make it easier for management to secure termination’.²³⁹ However governmental motives are construed in this period, what is certain is that the commitment to voluntarism was eroded over time and could be trumped in specific cases by the argument that government intervention was necessary on economic grounds.

Section Three

Proposals for Unfair Dismissal Reform from within a Voluntarist Paradigm

Despite the growing perception that greater legislative intervention in industrial relations could be warranted in order to achieve the national interest, the building momentum to confer greater unfair dismissal protection on employees was conceived as being part of a voluntary industrial relations system aimed at extending collective bargaining. The movement to confer unfair dismissal rights upon individual employees

²³⁹ Davies and Freedland (n 11) 158.

was aided by the British Government's acceptance of the ILO's Recommendation 119 concerning Termination of Employment at the Initiative of the Employer. This acceptance meant that the Government was indicating its willingness to consider the proposals of the Recommendation, although it noted at the time that it had 'certain reservations...in light of [industrial relations] practice in this country'.²⁴⁰ In this White Paper the Government did acknowledge that they considered the application of the principles embodied in the Recommendation could play a useful part in promoting a sense of security at work which was in the interests of both employees and the national economy.²⁴¹ Following on from the White Paper, the Government asked the National Joint Advisory Committee, made up of employer and union representatives, to consider the present extent of unfair dismissal protection in Britain in light of the Recommendation and to canvass potential avenues for reform.

The NJAC's final report indicates a substantial degree of unwillingness by employers and unions to depart from the voluntary tradition in the resolution of dismissal disputes. Despite establishing that existing procedures do not cover the whole of industry, particularly in the private sector, and that in other countries statutory unfair dismissal schemes seem to work fairly well, the Committee resisted the argument that Britain should introduce a statutory scheme. The Committee advanced the assumption that some formal procedure is better than none when dealing with dismissal disputes and made two recommendations: that the concluding of

²⁴⁰ Ministry of Labour, White Paper on the International Labour Conference (Cmnd 2548, 1964) 255.

²⁴¹ *ibid.*

voluntary agreements on dismissal procedure, both internal and external is to be encouraged; and that the Ministry of Labour should ‘keep under review’ the possible need for statutory machinery to supplement these voluntary agreements. This position indicated the strong attachment of unions and employers to the voluntary system and their support for the autonomy that it afforded them in dispute resolution. The parties viewed a statutory scheme for unfair dismissal as a disincentive to cultural change within workplaces inhibiting the internal development of fair dismissal processes.²⁴² The NJAC believed that voluntary procedures were more effective in obtaining reinstatement and employers and unions would be more likely to set up adequate internal procedures if they could avoid outside interference.²⁴³ The NJAC was also of the view that a statutory scheme might import a legalistic element into industrial relations leading to employers increasingly recording workers’ misdeeds or shortcomings to manage the risk of an unfair dismissal claim.²⁴⁴ The NJAC believed that such legalism would fracture the ongoing relationship between workers and employers and impede the development of fair dismissal procedures beyond the legal minimum.²⁴⁵

The reasons underlying the reluctance of the parties to support the development of a statutory unfair dismissal scheme is made even clearer in their submissions to the Donovan Commission. A strong supporter of the NJAC final report, and the most

²⁴² Ministry of Labour (n 208) para 170.

²⁴³ Ministry of Labour (n 208) paras 171-174.

²⁴⁴ Ministry of Labour (n 208) para 171.

²⁴⁵ Ministry of Labour (n 208) para 171.

vocal industrial relations player opposing a statutory unfair dismissal scheme was the Confederation of British Industry (CBI). In both oral and written evidence submitted to the Royal Commission on Trade Unions and Employers' Associations²⁴⁶ the CBI expressed their belief in the traditional system of voluntary collective bargaining as the best method of securing unfair dismissal protection for employees and ensuring industrial stability.²⁴⁷ The only area of weakness in the status quo that the CBI was prepared to concede was that, where necessary, there should be encouragement of the development of voluntary procedures to ensure that joint rules were established by unions and employers to scrutinise the fairness of an employer's decision to dismiss. In addressing one of the primary perceived inadequacies of the voluntarist tradition in according unfair dismissal protection to all employees, including the non-unionised, the CBI argued that this situation would ameliorate over time as 'the balance of advantage lies in developing procedures so that we can gradually reduce the numbers of unprotected workers.'²⁴⁸ While the CBI acknowledged the lack of statutory machinery left workers in non-unionised sectors of employment without unfair dismissal protection, they argued 'legislating [for a statutory scheme] would provide a poor second best' and the NJAC obtained 'no evidence that in these sectors there were large numbers of unjustified dismissals or of workers with grievances over dismissals'.²⁴⁹ The CBI also argued that the statutory scheme would favour

²⁴⁶ Hereafter referred to as 'the Donovan Commission'.

²⁴⁷ Royal Commission on Trade Unions and Employers' Association, Minutes of Evidence of 12 December 1967 (Her Majesty's Stationery Officer, London 1968) para 11362.

²⁴⁸ *ibid.*

²⁴⁹ Royal Commission on Trade Union and Employer Associations, Minutes of Evidence of 12 December 1967 (Her Majesty's Stationery Office, London 1968) para 11357.

compensation over reinstatement and that the advantage of encouraging voluntary procedures is that they allow for reinstatement which ‘goes to the heart of what an unjustly dismissed worker wants’.²⁵⁰

Another employer group strongly advocating the traditional system was the Engineering Employers’ Federation (EEF) who believed that its procedure which graduated from informal to formal mechanisms for dealing with unfair dismissal was more flexible and responsive to employee needs than a statutory scheme.²⁵¹ In providing evidence before the Donovan Commission, the EEF was extremely critical of a statutory scheme as they thought it unlikely reinstatement would be awarded unlike under its scheme where reinstatement was regularly achieved.²⁵² In response to the criticism of Professor Kahn-Freund that it would be more just and forward thinking to develop a statutory scheme, the EEF’s view was that their system predicated upon the collective laissez-faire notion of industrial autonomy afforded more justice to the worker. Mr Brown stated, ‘we believe that the unions and the employee is much more concerned with getting his job back than with monetary compensation. Our figures show in a surprising number of cases he does in fact get his old job back which shows that we do not favour the employer in dealing with these cases’.²⁵³

²⁵⁰ Donovan (n 48).

²⁵¹ Royal Commission on Trade Unions and Employers’ Associations, Minutes of Evidence of 1 February 1966 (Her Majesty’s Stationery Office, London, 1967) para 3069.

²⁵² Donovan (n 48) para 3958.

²⁵³ Donovan (n 48) para 3072.

Unions too were strong advocates of the traditional model and believed the expansion of collective bargaining would lead to greater unfair dismissal protection for British employees over time. The Trade Union Congress (TUC) articulated a position favouring the extension of voluntary procedures believing that disputes about dismissal should not be individualised and incumbent upon individual employees to present their case before tribunals. In its evidence before the Donovan Commission the TUC argued for the strengthening of the industrial machinery and widening access to unions.²⁵⁴ In responding to Professor Kahn-Freund's questioning that a statutory system would reduce the amount of strikes resulting from dismissals, the TUC's Mr Douglass stated that, 'if a man is sacked on the job and his mates make up their mind he should not have been sacked, you can put up all the courts you like, they are not just going to tolerate it'.²⁵⁵ Mr Lowthian of the TUC gave evidence that a statutory unfair dismissal scheme would not address the primary problem associated with unfair dismissals, which in his view, is the management belief that it has a blanket power to hire and fire.²⁵⁶ Mr Lowthian also argued there needs to be scrutiny of the decision to dismiss before it has been made, as afterwards is too late. Given these fundamental objections to the introduction of a statutory unfair dismissal scheme, the TUC was only prepared to articulate support for a scheme that allowed the worker to be suspended on full pay while making an unfair dismissal claim in a system that

²⁵⁴ Royal Commission on Trade Unions and Employers' Associations, Minutes of Evidence of 29 November 1966 and 31 January 1967 (Her Majesty's Stationery Office, London 1967) para 10402.

²⁵⁵ Donovan (n 48) para 10360.

²⁵⁶ Donovan (n 48) para 10370.

processed claims speedily through a non-court like tribunal.²⁵⁷ This position reflected significant TUC suspicion of the unfair dismissal system becoming legalistic and their preference for the maintenance of the principle of industrial autonomy which allowed unions and employers to negotiate without the shadow of the courts.

Despite the reluctance of employers and unions to wholeheartedly back statutory protection of unfair dismissal rights, the Donovan Commission supported the introduction of independent machinery to adjudicate the fairness of dismissals from within a collective laissez-faire paradigm. Their view was that this expansion of individual rights should not replace, but merely supplement collective bargaining. The Donovan report argued that ‘properly constituted, collective bargaining is the most effective means of giving workers the right to representation in decisions affecting their working lives, a right which is or should be the prerogative of every worker in a democratic society.’²⁵⁸

While the Donovan Commission was divided in its final report, the majority was of the view that the current system was unsatisfactory in protecting job security for a number of reasons. First, the majority noted that there were 276 unofficial strikes between 1964-1966 resulting from dismissal disputes and believed that a statutory unfair dismissal scheme would aid industrial peace.²⁵⁹ Second, the majority was of the view that the introduction of a statutory scheme would lead to an immediate raising of

²⁵⁷ Donovan (n 48) paras 10373-10375.

²⁵⁸ Donovan (n 48) para 212.

²⁵⁹ Donovan (n 48) para 528.

standards to a more satisfactory level as employers would seek to comply with the legislative framework governing dismissal procedures.²⁶⁰ Third, a statutory scheme would protect workers in non-unionised industries and would greater protect workers in unionised industries, as even in the latter situation, ‘employer procedures tend to leave the final decision on dismissal in the hands of management and this cannot be accepted as sufficient to ensure that an employee both has fair treatment and is seen to have it’.²⁶¹ The cumulative weight of these arguments led the majority to advocate the establishment of statutory machinery to adjudicate unfair dismissals.

Nonetheless, the Donovan Commission’s support for a statutory scheme was predicated on their belief that the scheme should operate from within a collective bargaining paradigm and should facilitate the extension of voluntary methods to secure unfair dismissal. They believed the existence of a statutory unfair dismissal scheme would prompt employers and unions to develop joint procedures within workplaces for dealing with dismissal disputes, thereby resulting in procedural reform of firms’ internal management:

If employers know that employees have the right to challenge dismissal in a statutory tribunal then there is a clear incentive for them to see that dismissals are carried out under a proper and orderly procedure, so as to ensure that as many cases as possible are settled satisfactorily without recourse to an outside appeal and that in those cases where appeal is made it can be shown that the dismissal was fair and justified.²⁶²

²⁶⁰ Donovan (n 48) para 540.

²⁶¹ Donovan (n 48) para 542.

²⁶² Donovan (n 48) para 533.

Their belief that the statutory system could simultaneously operate as both a safety net and as a floor of rights drew upon the ideas of Kahn-Freund who argued that ‘regulatory legislation’, such as that concerning dismissal, which lays down rules of employment, provides a safety net for those with no access to collective bargaining but also exists as a floor ‘on which we can all stand...a ground floor for an edifice of collective bargaining’.²⁶³ In addition to stimulating collective bargaining, it was also believed that the statutory unfair dismissal system would aid the activities of unions. Professor Wedderburn, an important witness to the Donovan Commission, provided his support for a statutory unfair dismissal system on the proviso that it would foster trade unionism and be underpinned by strong unions:

The employment rights should as far as possible involves collective machinery. It would seem not unreasonable to say specific grounds for summary dismissal ought to be negotiated with the trade union. They are not necessarily things which concern management alone, and they ought not to be open to the dictation of management alone at the place of work.²⁶⁴

Professor Wedderburn did not support the wholesale introduction of labour law to regulate British industrial relations but favoured ‘the introduction of new laws which can be grafted on to the present, essentially voluntary, system’.²⁶⁵ In his influential text, ‘The Worker and the Law’ Wedderburn sets out his argument that a statutory unfair dismissal scheme should contain an official place for the individual employee’s trade union because of his belief that ‘far too much English procedure bring on to the

²⁶³ Kahn-Freund (n 4) 43.

²⁶⁴ Royal Commission on Trade Unions and Employers’ Associations, Minutes of Evidence of 22 March 1966 (Her Majesty’s Stationery Office, London 1966) para 4760.

²⁶⁵ Donovan (n 48) para 4760.

stage the individual contestants, employer and employees, but leaves their backers in the shadows in the wings'.²⁶⁶

The Donovan Commission's final report provides another example of the prevailing belief in the late 1960s that a statutory unfair dismissal scheme would coexist with a strong union movement and work to encourage the growth of collectivism in British industrial relations. While advocating independent machinery to adjudicate unfair dismissal claims, the majority supported the extension of voluntary procedures and proposed an exemption scheme, whereby the Secretary of State could exempt certain industries or undertakings from the statutory scheme if an agreed voluntary procedure was of a satisfactory standard.²⁶⁷ The majority intended this provision to facilitate the development of voluntary schemes. Even when this was not achieved the majority believed that the existence of a statutory unfair dismissal scheme would improve the position of unions, arguing that:

Statutory machinery can afford increased protection for the exercise of freedom of association...and will therefore assist the growth of collective bargaining on sound lines. Without such growth, the circumstance in which effective voluntary dismissal procedures can be developed will in some areas of employment not exist.²⁶⁸

Finally, another indication that the Donovan Commission's support for a statutory unfair dismissal system was closely connected with their desire to facilitate more efficient collective bargaining is their choice of industrial tribunals, rather than the

²⁶⁶ Wedderburn (n 199) 98.

²⁶⁷ Donovan (n 48) para 540.

²⁶⁸ Donovan (n 48) para 540.

courts, to adjudicate dismissal disputes. As Dickens et al note, ‘the voluntary principle in British industrial relations has never denied legislation a role but has displayed a pragmatic approach’.²⁶⁹ In advocating a legal remedy for unfair dismissal, the Donovan Commission recognised the need for statutory intervention to combat the deficiencies of the common law and the inadequacy of collective bargaining to achieve comprehensive unfair dismissal protection. However, this was not a rejection of Britain’s voluntary tradition because there was still a clear desire to introduce a system of dispute resolution that was speedy, accessible and non-legalistic, and therefore, unlike the procedures associated with the common law courts. As Flanders noted:

It is when legislation has the effect, or appears to have the effect, of bringing unions and their members into courts that it meets with almost universal disapproval and the [collective laissez-faire] tradition asserts its full force. This is exactly what one would expect given the unions’ history and their accumulated lessons of experience.²⁷⁰

Therefore, the Donovan Commission’s belief that a statutory unfair dismissal scheme would stimulate the growth of voluntary procedures, supplement collective bargaining and be free from legalism of the common law courts indicates their attachment to collective bargaining and their support for the traditional voluntary model as providing the ideal framework for British industrial relations. By the end of the 1960s the prevailing belief of the industrial parties, academics and the Donovan Commission was that a legislative scheme to protect job security should ‘build in the collective

²⁶⁹ Linda Dickens and others, *Dismissed: A Study of the Unfair Dismissal and the Industrial Tribunal System* (Blackwell, 1985) 253.

²⁷⁰ Flanders (n 203) 354.

reality from the start rather than leave the new storey perched uneasily on the summit of the old individualist legal structure'.²⁷¹

Section Four

The Introduction of Unfair Dismissal Law and the Dismantling of Voluntarism

The late 1960s were characterised by heated debate over the future of British industrial relations with a growing belief that 'collective bargaining machinery has stalled and legislation has to take its place'.²⁷² The context to this debate was the spiralling of inflation and unemployment from the mid 1960s coupled with increasing industrial disputation which the Wilson Labour Government seemed unable to stem. Davies and Freedland make the following observation illustrating the breakdown of relations between the Labour Government and the union movement during this time:

This was a period in which a public perception intensified of an industrial relations problem consisting of the inability of trade unions to control or channel into constructive form the shop-floor militancy which was causing more and more unofficial wild-cat strikes, and hence delay in delivery of orders which was fundamentally weakening the manufacturing economy and destroying foreign confidence in British exports.²⁷³

Newspaper headlines from April 1969, the month where relations between the government and unions were perhaps at their most fraught, indicate a situation of

²⁷¹ Wedderburn (n 199) 98.

²⁷² Kahn-Freund (n 46) 40-1.

²⁷³ Davies and Freedland (n 11) 241.

impalpable tension: ‘Unofficial strike halts London freightliners’,²⁷⁴ ‘Strike hits Welsh steel plant’s output’,²⁷⁵ ‘Strike by 1,500 dockers’,²⁷⁶ ‘Walk out by 1,500 at Ipswich factory’,²⁷⁷, ‘Car men to strike if DEP rejects £2 rise’,²⁷⁸ ‘Electricians’ strikes holds up magazine production’,²⁷⁹ ‘Nurses may strike over meal row’,²⁸⁰ ‘Warning of destruction by unofficial strikes’,²⁸¹ and ‘Textile unions’ militant ‘no’ to pay offer: steel row continues’²⁸². Strikes were threatened or taking place in a number of different industries, so much so, that Prime-Minister Wilson described the situation as one of ‘industrial relations anarchy’ in a meeting with the TUC.²⁸³ He acknowledged that the government would prefer to resolve the problem of unofficial strikes without reliance on legislation but that relying upon collective bargaining would not be an immediate enough solution for the British public.²⁸⁴ Indicating the pressure confronting the government to act on industrial relations, Prime-Minister Wilson stated, ‘We can be destroyed economically and politically if we have no answer to unofficial strikes. We

²⁷⁴ --, ‘Unofficial strike halts London freightliners’ *The Financial Times* (London 11 April 1969).

²⁷⁵ --, ‘Strike hits Welsh steel plant’s output’ *The Financial Times* (London 11 April 1969).

²⁷⁶ Geoffrey Whiteley, ‘Strike by 1,5000 dockers’ *The Guardian* (London 12 April 1969).

²⁷⁷ --, ‘Walk out by 1,500 at Ipswich factory’ *The Financial Times* (London 11 April 1969).

²⁷⁸ --, ‘Car men to strike if DEP rejects £2 rise’ *The Guardian* (London 12 April 1969) 11.

²⁷⁹ --, ‘Electricians’ strikes holds up magazine production’ *The Guardian* (London 12 April 1969) 11.

²⁸⁰ --, ‘Nurses may strike over meal row’ *The Times* (London 12 April 1969).

²⁸¹ --, ‘Warning of destruction by unofficial strikes’ *The Times* (London 12 April 1969) 9.

²⁸² --, ‘Textile unions’ militant ‘no’ to pay offer: steel row continues’ *The Times* (London April 12 1969) 13.

²⁸³ Prime-Minister Wilson cited in John Torode, ‘Wilson brushes off TUC Plea against Reform’ *The Guardian* (London 12 April 1969)

²⁸⁴ *ibid.*

cannot just fold our arms and say that because the TUC do not like it we will not do anything about it'.²⁸⁵ Davies and Freedland characterise this period as one of 'constitutional crisis' because the union movement was challenging the primacy and legitimacy of the government to regulate industrial relations.²⁸⁶ Thus, it was in this context that both the Conservatives and Labour advocated the introduction of a statutory unfair dismissal scheme. Given the evidence that many of the unofficial strikes were about dismissals, there was a prevailing belief that providing a statutory remedy to determine the fairness of a worker's dismissal would help tame shop floor power without interfering with free collective bargaining. As Collins notes, 'the law of unfair dismissal was conceived in order to manage a crisis in industrial relations'.²⁸⁷

Despite the prevailing belief in academic circles that unfair dismissal law was the fruit of a bipartisan political consensus that ensured the longevity of the unfair dismissal provisions, this consensus between Labour and the Conservatives was precarious and arose at a time of fierce contestation over labour law between the political parties. Given the growing divergence between Labour and the Conservatives during the 1970s over the substantive operation of the unfair dismissal system, to what extent can a political consensus around the principles for introducing the system be identified? Two main principles which achieved bipartisan support, albeit to varying degrees can be identified. First, both Labour and the Conservatives were united in their

²⁸⁵ *ibid.*

²⁸⁶ Davies and Freedland (n 11) 242-243.

²⁸⁷ Hugh Collins, 'Capitalist Discipline and Corporatist Law- Part I' (1982) 11 ILJ 78, 87.

desire to reduce the incidence of dismissal-related strikes and to achieve greater industrial stability. Second, there was an increasing willingness to support the introduction of safeguards protecting the rights of individual employees during dismissal on the basis of an argument for industrial justice. This is not a new argument but it is different to the traditional argument under the voluntarist system that justice for individual employees is best achieved through collective bargaining facilitated by unions. This new strand of the industrial justice argument emerging in the 1970s is much more concerned with facilitating the achievement of industrial justice for the individual employee regardless of whether they have union representation by according to the individual employee rights that accrue to them by virtue of their employment. While there was a certain amount of consensus about the principle that statutory unfair dismissal protection should exist in order to aid the achievement of industrial justice for individual employees, this consensus did not extend to political agreement over the substantive achievement of industrial justice. In the 1970s the key concern was not whether a return to the voluntarist tradition should be canvassed but rather how to reform the legislative model of resolving dismissal disputes so as to achieve industrial justice in practice.

A. The fragile political consensus over the principle of industrial justice

Despite the heavily contested labour law debates occurring during this period, there existed a fragile consensus between Labour and the Conservatives that a statutory scheme for unfair dismissal should be introduced according to a rationale of industrial

justice. For the Conservatives, their central argument for general reform of British industrial relations beyond unfair dismissal law was predicated on support for a new era of responsible trade unionism closely regulated by the state. Their policy platform, 'Fair Deal at Work' contained their prescription for how this could be achieved, namely, through the comprehensive regulation of British industrial relations with a state supervised system of trade union registration enabling the state to regulate collective bargaining in a procedural sense. The aim was to stop the proliferation of industrial conflict and to achieve stability in industrial relations. To this end, their proposal for a statutory unfair dismissal scheme was contained in the section on industrial disputes and was justified on the basis that the introduction of a legal right not to be unfairly dismissed would remove the cause of dismissal and discipline related strikes.²⁸⁸ Therefore, the primary motivation for the Conservatives in proposing a statutory unfair dismissal scheme is the achievement of industrial peace by removing one of the primary causes of industrial action. This fitted in with their reform agenda overall which sought to achieve state regulated collective bargaining aimed at securing industrial stability. Writing in a national newspaper prior to the national election, the Opposition Spokesperson on Employment and Productivity, Mr Robert Carr, wrote:

We do not claim that the system proposed in Fair Deal at Work would bring about any magic cure overnight. What we do claim is that it would alter the balance of power significantly in favour of those employers and trade union leaders who wish to act responsibly and tilt the balance against the irresponsible minority. This is an indispensable condition for the success of the voluntary action within industry, on which the solution must ultimately depend.²⁸⁹

²⁸⁸ Conservative Political Centre, *Fair Deal at Work* (London, 1968) 41-42.

²⁸⁹ Robert Carr, 'Britain's urgent need of a code for industrial relations' *The Times* (London, 30 July 1968) 9.

It is also possible to identify an alternative motivation for the Conservatives in introducing unfair dismissal protection: a desire to achieve industrial justice for individual employees by drawing upon the idea of a common ground between unions and employers as to what constitutes good industrial relations practice in the treatment of individual workers. In *Fair Deal at Work*, this notion is said to necessitate the introduction of a statutory unfair dismissal system ‘on principle’ by providing important new safeguards for individual employees.²⁹⁰ Conservative support for this developing notion of industrial justice as providing a basis for statutory unfair dismissal protection is also evidenced in the Government’s justification for the new system contained in the second reading debates for the Industrial Relations Bill 1970. As articulated by Mr Robert Carr, the Secretary of State for Employment and Productivity:

I believe that we have in this Bill the most comprehensive and enlightened code of workers’ rights in the history of our country... As the Royal Commission pointed out, we are almost the only industrialized country that does have some kind of statutory protections against unfair dismissal. We agree that is high time that this is put right.²⁹¹

Nonetheless, the Conservative Government’s time in office was short-lived because despite the fragile consensus over the necessity of their unfair dismissal reform, the other aspects of their industrial relations agenda were heavily contested. Despite winning the 1970 election by successfully branding itself as a party willing to pass

²⁹⁰ Conservative Political Centre (n 288) 42.

²⁹¹ HC Deb 14 December 1970, vol 808, cols 961 – 1076.

industrial relations reform despite union protestation, the Heath Conservative Government period from 1970 until 1974 was typified by intense conflict between the Government and the unions. The latter's campaign of deregistration successfully undermined the operation of the Industrial Relations Act 1971.

Labour's agenda post 1971 is not one of responsible unionism but the pursuit of collective and individual rights as an alternative to both the chaos of the voluntarism of the 1960s and the juridification during the Heath years. Labour justified the strengthening of the unfair dismissal protection afforded to individual employees on the basis that this was necessary to achieve industrial justice. However, the adoption of a rights-based approach to industrial relations had not always been the Labour agenda. Prior to the 1971 election the Labour Government had outlined proposals in its White Paper, 'In Place of Strife' to accord coercive powers to the government to regulate industrial disputes. This was vehemently rejected by the union movement, and was never statutorily enacted. The Labour Government's Industrial Relations Bill 1970 contained no mention of these coercive powers and thus, 'the impetus behind the White Paper "In Place of Strife" [was] altogether deflected'.²⁹² In winning the 1974 election, Labour had rerouted its industrial relations agenda, believing that if it could provide the unions with a floor of statutory rights, including the right to a legal remedy for unfair dismissal, that this would minimise industrial action and halt the instability of the Heath Government years. Labour's idea was not the wholesale juridification of labour law but support of the voluntary system through a series of legal measures

²⁹² Davies and Freedland (n 11) 273.

aimed at improving the starting position of unions and individual employees. This included maintaining the unfair dismissal system enacted in 1971 by the Heath Government but strengthening the protection afforded under it by mandating re-employment as the primary remedy under the Act,²⁹³ by unequivocally placing the burden of proof in dismissal cases on employers,²⁹⁴ and the introduction of a compensatory award for unfair dismissal to supplement the existing basic award.²⁹⁵ Cumulatively, these provisions were aimed at building an industrial relations system in Britain upon the foundation of industrial justice, thus, minimising the need for industrial action and the so-called ‘British disease’ of destructive industrial relations. As stated by Mr Janner, a Labour member of the House of Commons during the debates about whether the protection afforded by the unfair dismissal system should be strengthened:

This is what the law is for – to set up minimum standards with which people should comply and with which, unfortunately too many do not comply. Therefore, I suggest that these laws should not be regarded as a burden on industry but should be welcomed by industry as providing the best environment in which to produce better treatment and conditions for and relations with their own work forces.²⁹⁶

In strengthening the protection afforded under the unfair dismissal system, Labour further developed the notion of industrial justice as an important justification for statutory intervention.

²⁹³ Employment Protection Act 1975 s 72.

²⁹⁴ Employment Protection Consolidation Act 1978 s 57(3).

²⁹⁵ Employment Protection Act 1975 s 71(1).

²⁹⁶ HC Deb 20 December 1976, vol 923, col 42-114.

While during the years when the Conservatives were in Government between 1971-1974, the articulation of industrial justice was limited to recognising that such a system should be introduced ‘on principle’ and to achieve more stable industrial relations, during their years in Opposition the Conservatives began to reconceptualise the notion of justice in employment as needing to address the disadvantage faced by employers as well as individual employees. In developing the employer, particularly the small business employer, as a legitimate subject of legislation aimed at the achievement of industrial justice, the Conservatives argued that employers should be protected from the excess militancy of unions or vexatious litigation by individual employees. The Conservative Opposition increasingly articulated an argument that industrial justice not only included the achievement of fair dismissal processes for employees but also included justice for the employer based on a need to achieve a fair balance of rights and responsibilities between the parties in the employment relationship. This was first signalled by the Conservative amendment during the Second Reading of the Employment Protection Bill 1975:

That this House, while recognizing that parts of the EPA give legislative effect to good industrial practice, declines to give a Second Reading to a Bill which makes no attempt to establish a fair balance between the rights of management and unions, adds a heavy burden of cost without proper consideration of how it should be shared by employer, employee and State, and takes no account for particular problems of small business.²⁹⁷

While this amendment was defeated because of Labour’s slim majority in the House of Commons, Conservative pressure to reform the unfair dismissal system to be more responsive to the needs of business continued to mount after 1975. The Conservative

²⁹⁷ HC Deb 28 April 1975, vol 891, col 47-48.

argument was not just predicated on the grounds of unfair dismissal regulation but also on a whole raft of government policies impacting upon business. In 1976 Mr Ian Stewart of the Conservatives moved a motion urging the Government to alleviate the growing legislative burden on business,²⁹⁸ with Mr Finsburg commenting in this same debate about the Employment Protection Act, ‘This Act has cost jobs, because companies are not taking on people because of the burdens placed on them by the Act. These are companies with first class records of employment’.²⁹⁹

The unfair dismissal system was increasingly represented by the Conservatives as undermining the achievement of industrial justice because it impacted unfairly upon the viability of small business. In a 1977 debate on the topic of job creation, Mr James Prior stated ‘I do know that every small business man in the country believes the Employment Protection Act is now an Act stopping him from taking on additional labour because he does not know what the future holds’.³⁰⁰ Even a debate on the topic of ‘the family’ in the House of Lords during 1978 sees a reference to the adverse impact of the Employment Protection Act on small business, indicating the increasing perception that the unfair dismissal legislation was hindering job creation and business efficacy:

There exists a large number of small firms and if each of them took on one unemployed person it would make a very great difference to the figure of those who are unemployed. From talking to a number of people in that position I am led to believe that one of the things which

²⁹⁸ HC Deb 20 December 1976, vol 923, col 42-114.

²⁹⁹ *ibid.*

³⁰⁰ HC Deb 9 November 1977, vol 938, col 689-814.

prevents them from taking on any additional person is the effect of the EPA. I think this needs to be taken very seriously by the Government. The situation is made very difficult because after six months, no matter what the circumstances of the person or the firm, almost any dismissal is deemed to be unfair dismissal. The effect of this situation, whatever may have been intended by the Government, is that everybody is very reluctant indeed to employ one extra person. I believe that this is having a very real effect on unemployment.³⁰¹

Labour resisted Conservative attempts to reduce the qualifying period or create an exemption for small business according to a different perception of industrial justice, that is, their belief that a small business exemption would be unjust because it would create a two tier labour market. In response to the Conservative attempt to introduce the Employment Opportunities (Small Business) Bill in 1979, Labour's Mr Cryer stated:

If this Bill were enacted it would create two classes of citizen. That is not fair on small businesses. There are some small business organisations that take the view that because they face difficulties, various steps should be taken. They always take that view and their wants vary enormously. Different small business organisations put forward different points of view about the effect of a Government policy, but the fact is that if this Bill were enacted there would be one set of values for people working in businesses employing fewer than 200 and another set of values for businesses employing more than 200 people. That is unfair.³⁰²

From Labour's perspective, the principle of industrial justice mandated that access to unfair dismissal protection should not be constrained because of the size of an individual's employer. However, the Conservative Opposition consistently maintained the position that Labour's employment protection legislation was over burdensome

³⁰¹ HL Deb 2 May 1978, vol 391, col 15-122.

³⁰² HC Deb 16 February 1979, vol 962, col 1441-1539.

upon employers and this was fundamentally unjust to ‘good’ employers who did not need this legislative intervention in order to ensure their employees were fairly treated.

As stated by Mr Knight of the Conservatives:

Good employers frequently are dragged in front of the industrial tribunals when they have done nothing wrong. Even when the tribunal absolves them, the cost that they have to bear is immense. The Secretary of State said that he had no evidence that the legislation acts unfairly. I beg him to read the reports from the CBI conference last week. Ample evidence that it does act unfairly was given at that conference. The cost to industry of industrial tribunals in the way in which they deal with unfair dismissals is enormous. The cost to the taxpayer is disgraceful and the cost in terms of job opportunities is serious. One of the heaviest of all the burdens that small businesses have to carry is the industrial tribunals.³⁰³

B. Industrial justice and the tribunals

The decision to confer protection against unfair dismissal as an individual legal right, calling for the interpretation and application of rules to a particular factual scenario, established judicial adjudication as the most suitable form of decision-making for unfair dismissal disputes. The 1971 Act conferred this decision-making upon industrial tribunals rather than the ordinary courts, although the former was set up as a quasi-court with legal chairpersons leading proceedings. This choice of industrial tribunals as the arbiter in unfair dismissal disputes represents a replacement of the British voluntarist tradition in industrial relations. Keeping out the courts was a cornerstone of traditional British industrial relations with Flanders noting in 1974, ‘it is when legislation has the effect, or appears to have the effect, of bringing unions and their members into the courts that it meets with almost universal disapproval and the

³⁰³ HC Deb 21 November 1977, vol 939, col 1113-1171.

tradition asserts itself in full force'.³⁰⁴ Instead, the unfair dismissal system introduced in 1971 instituted industrial tribunals at the apex and while these bodies were not intended to operate as courts, their tripartite composition and the distinctive way they conducted their business led them to be described as a 'specialist, modern form of court'.³⁰⁵

The replacement of the voluntary method for resolving dismissal disputes with industrial adjudication was predicated upon a conception of industrial justice administered by lay members. Lay members were accorded equal status with the legal chair of the tribunal and were appointed on the basis of their industrial experience and practical knowledge.³⁰⁶ The rationale for choosing one lay representative from an employer perspective, and another from a union background, was aimed to achieve just decision-making not based on legal principles but upon custom and practice in British industrial relations. This also aided the perception that the unfair dismissal system was centred upon the achievement justice as fairness was seen to exist because each tribunal had a lay member drawn from each side of industry. As stated by one chairperson during the tribunals' early days of dealing with unfair dismissal disputes:

Lay members, experienced in industrial relations, know what an employer should or should not put up with, equally they know what an employee can expect. They know the unwritten custom and practice which form such an important part of industrial relations. *Thus they have a most valuable part to play in reaching a just decision.*³⁰⁷ (Emphasis added)

³⁰⁴ Flanders (n 203) 354.

³⁰⁵ Brian Abel-Smith and Robert Stevens, *In Search of Justice* (Penguin, 1968) 228.

³⁰⁶ Industrial Tribunals (Rules of Procedure) Regulations 1980 (SI 1980 No.884).

³⁰⁷ M Jukes, 'Reply: Tribunals – Justice for All?' (1968) 60 *Industrial Society* 5-6.

The choice of industrial tribunals to resolve unfair dismissal disputes was based upon a desire to establish a mechanism for administering justice that was ‘easily accessible, speedy, informal and inexpensive’.³⁰⁸ This oft-quoted prescription of how industrial tribunals should operate illustrates that the conception of industrial justice by the Donovan Commission was one of tribunal adjudication of dismissal disputes that was both efficient and fair in resolving differences between the parties. Accordingly, the primary duty of the tribunal was to bring about an amicable settlement between the employer and employee as the achievement of industrial peace was seen as a fundamental component to administering justice.³⁰⁹ Another aspect of the type of justice being facilitated by industrial tribunals was contained in the desire to create a non-court like setting where individual employees would feel comfortable to bring their disputes. This notion of informal justice is identified by the one-time President of Industrial Tribunals, Sir Diarmaid Conroy who stated, ‘the tribunals are meant to provide simple informal justice in an atmosphere in which the ordinary man feels he is at home’.³¹⁰

³⁰⁸ Donovan (n 48) 156.

³⁰⁹ Donovan (n 48) 159.

³¹⁰ Diarmaid Conroy, ‘Do Applicants Need Advice or Representation?’ (Conference on The Future of Administrative Tribunals, edited transcript of proceedings of a conference held at Institute of Judicial Administration, University of Birmingham, April 1971) 4, 5.

Section Five

Conclusion

The introduction of unfair dismissal law in Britain was characterised by a replacement of the view that the voluntary tradition was adequate for resolving dismissal disputes with a new idea that industrial justice should be the cornerstone of the unfair dismissal system. Industrial justice was not just a post hoc rationale on the part of theorists but actively adopted by both political parties, and the members of the tribunal system, as providing the basis for Britain's unfair dismissal system. While industrial justice was not strongly articulated by either the Conservatives or Labour in their policy documents in the late 1960s, it does become strongly embedded in the industrial relations discourse embodied within the parliamentary debates between the two parties over the 1970s, it is contained within the ethos of the tribunals and also becomes strongly associated with the idea of those tribunals having lay members who give effect to this notion of industrial justice.

CHAPTER FOUR

A NORMATIVE EVALUATION OF THE ENACTMENT OF UNFAIR DISMISSAL LAW

Section One

Introduction

At the outset of this thesis it was observed that the story of the evolution of unfair dismissal law in Britain and Australia is one of two distinct phases, one of introduction and another of evolution over time. In the first phase when statutory unfair dismissal systems were enacted in either jurisdiction, this comes about at a time of radical adaptation in labour law policy with both countries moving away from their labour law traditions in order to introduce unfair dismissal law. There was a substantial departure at a policy level over how to achieve worker protection. The two preceding chapters of this Part have shown how Britain replaced its traditional collective *laissez-faire* prescription with a highly juridified legislative protection of individual rights, whilst Australia departed from its traditional conciliation and arbitration prescription for achieving industrial peace in favour of a decentralised labour law promoting enterprise bargaining underpinned by a safety net. Whilst we should bear in mind that these transformations occurred diachronically, they do represent a parallel legal development in the enactment of statutory unfair dismissal law at a time when the mainstream labour law traditions were being overturned.

Underscoring these evolutions is the writings of theorists at the time seeking to provide a normative template for unfair dismissal law. The task of this final chapter of Part A then, is to explore their theoretical writings to see if these provide us with a

basis for building a normative understanding and a normative evaluation of this parallel legal development involving the enactment of statutory unfair dismissal law in Britain and Australia. In this chapter I draw upon two roles of academic theorisation: one of theorists' directly feeding into and actively influencing the legislative process; and one of theorists' writings providing a normative template which assists in the making of critical assessments of the legislation and its interpretation. In the dichotomy between influencing and critiquing that is inherent to a theorist's work, we must keep in mind that these can be intersecting activities.

The contribution of Professor Kahn-Freund and Lord Wedderburn is one of both actively feeding into the legislative design of unfair dismissal law and of developing normative templates to assist in the making of an evaluation of this law. Their ideas, of 'social ethics',³¹¹ and a 'floor of rights',³¹² respectively, can be considered as providing normative templates for unfair dismissal law. Their influence extends beyond this, however, as Kahn-Freund and Wedderburn were also key actors in helping construct an idea of unfair dismissal law, with Kahn-Freund's role as a member of the Donovan Commission and Wedderburn's influential written and oral submissions that he provided to the Commission. Whilst their role in influencing the actual introduction of unfair dismissal law in Britain is recognised here, the primary purpose of this chapter is to attempt to further a normative understanding and normative evaluation of the enactment of unfair dismissal law in Britain and Australia.

³¹¹ Kahn-Freund (n 46) 38.

³¹² Wedderburn (n 199) 97.

Other theorists identify different normative ideals against which the actual introduction of unfair dismissal law can be normatively assessed. From Frederick Meyers we receive the concept of job property which provides one basis for building a legal framework protecting against arbitrary dismissal contingent upon a belief in an employee's ownership of their job.³¹³ This notion has been recently developed by Dr Wanjuru Njoya in her influential work on job security and job property.³¹⁴ Professor Bob Hepple's piece on a right to work was identified for its significant contribution to the field by the Industrial Law Journal's editor, Professor Simon Deakin to mark the Journal's fortieth anniversary.³¹⁵ Hepple's notion of a right to work provides another basis for normatively understanding and evaluating unfair dismissal law. Distinct from Hepple's work is that of Professor Hugh Collins' who develops a complex and subtle set of ideas about justice in dismissal which engages very elaborately with the practical operation of the unfair dismissal laws and their judicial interpretation but still represents an independent normative critique which we can rely upon to help evaluate the enactment of unfair dismissal law in Britain and Australia.³¹⁶ These theoretical concepts of job property, a right to work, a floor of rights and justice in dismissal are useful normative templates from which we can understand and critique the introduction of unfair dismissal law.

³¹³ Frederick Meyers, *Ownership of Jobs: A Comparative Study* (Los Angeles, 1964).

³¹⁴ Wanjuru Njoya, *Property in Work* (Ashgate, 2007).

³¹⁵ Bob Hepple (1981) 'A Right to Work' 10 ILJ 65.

³¹⁶ Collins (n 198).

Before embarking on this discussion, a final point must be made: that is, the absence of a corresponding body of literature in the theorisation of unfair dismissal law in Australia. In the period preceding the enactment of unfair dismissal law in Australia, scholars were largely concerned with practical questions of implementing and expanding unfair dismissal remedies, rather than on examining their theoretical aspects.³¹⁷ Of particular concern was the ability of individuals to bring actions without the permission and involvement of the relevant union. What Australian scholars were seeking, were federal remedies for unfair dismissals based upon the existing arbitral processes then operating in several of the States. Australian scholars were far more concerned about the practical issues of expanding state unfair dismissal regimes, to the development of a theoretical framework for a network of regimes under federal law and in all of the States. Despite the absence of academic theorisation more generally, it is possible to identify an Australian reliance on the ILO's normative push for an international universalising of unfair dismissal standards and also upon the traditional concept of 'a fair go all round' which first emerged in the decision of Justice Sheldon in the NSW case of *Re Loty and Holloway v Australian Workers' Union* (1971) AR 95. These influences are discussed in this chapter and pave the way for a discussion in Part B of Professor Ron McCallum's normative theoretical ideal of industrial citizenship which seeks to provide a way forward for the evolution of unfair dismissal law in response to the challenges posed by neo-liberal ideas.

³¹⁷ See, for example: Stewart (n 145); J O'Donovan, 'Reinstatement of Dismissed Employees by the Australian Conciliation and Arbitration Commission: Jurisdiction and Practice' (1976) 50 ALJ 636.

Section Two

Theories of job property and ownership

The argument that the employee holds a proprietary interest in the individual employment relationship provides a potential theoretical ideal for statutory unfair dismissal protection. Frederick Meyers pioneered this concept in his comparative study of dismissal law in four countries which sought to develop an argument in favour of recognising employees' property rights in their job.³¹⁸ Meyers defines the idea of property in the job as the right to undisturbed possession of a job which cannot be taken away without due process of law.³¹⁹ Meyers conceives the employment relationship as existing between the employee and their job, rather than as between the employee and their employer. He states that 'short of economic or technological change which may modify the relation, an employer who is party to a collective agreement takes on an employee for life or at the pleasure of the employee'.³²⁰ Thus, Meyers argues that compensation is not an adequate remedy for unfair dismissal and has only been permitted by legal systems because of the erroneous belief that the job and the employer are one and if the relationship with the employer has broken down, so has the employee's relationship with their job. Meyers advocates the US model where dismissal rights are protected under collective bargaining and reinstatement is

³¹⁸ Meyers (n 313)

³¹⁹ Meyers (n 313) 1.

³²⁰ Meyers (n 313) 15.

regularly achieved because ‘we have succeeded in separating the job from the employer so completely that the issue of impossibility or impracticability or indeed immorality of requiring continued association is no longer raised’.³²¹ According to this perspective, where the employee holds a proprietary interest in the individual employment relationship, ‘if the job belongs to the employee, he should be restored to it, and to do so in no way impairs an inherent individual liberty of the employer’.³²² Meyers studies the British phenomenon of unofficial strikes relating to dismissal and observes that the willingness of the collective to take industrial action because of an employee’s loss of their job suggests that ‘British workers are quite willing to invoke their solidarity and economic strength to protect themselves against what they regard as unwarranted loss of employment; and second, that their object is to secure reinstatement, not merely pay in lieu of notice or some other solution implying continued separation from employment’.³²³

The tenability of the job ownership concept rests upon the discernment of an employee’s proprietary interest in the job which could be said to be acquired during the time spent in employment. The tangible asset being taken away is the deprivation of the employee’s labour services which are in the employee’s possession, causing income and other property in the job to be foregone. Unlike a physical asset where it is quite clear what is being taken away, with an employee’s labour services it is not just

³²¹ *ibid.*

³²² *id.*

³²³ Meyers (n 313) 29.

an employee's income that is being deprived but potentially many other interests too: an employee's dignity, autonomy, livelihood, sense of self-worth, membership of a union and place in the community. This argument began to emerge in Britain during the 1960s with the enactment of the Redundancy Payments Act 1965. While this Act was primarily justified on the grounds that it would increase labour mobility, there were hints of an alternative rationale. The analogy of jobs as property was employed in connection with the Redundancy Payments Act by Mr Gunter during the House of Commons debates stating that, 'a man has some rights in his job just as an employer holds right in his property'.³²⁴ He was quoting, with approval, a *Times* leader which charted what it called the development of a 'new conception of the relationship between man and his employment' because 'he is no longer just a hand to be engaged and disregarded as required'.³²⁵

Others too began discussing this concept of job ownership arising from Britain's Redundancy Payments Act 1965. Wedderburn and Davies note that 'such a concept of property in the job and in a particular job has become widespread',³²⁶ and the President of the Industrial Tribunal advocated the equivalent situation of long term employees and property owners, stating that, 'just as a property owner has a right in his property...so a long term employee is considered to have a right analogous to a

³²⁴ HC Deb 26 April 1965, vol 711, col 35.

³²⁵ Labour Correspondent, 'Protecting Workers Against Unjustified Dismissal' *The Times* (London 15 March 1965) 9.

³²⁶ KW Wedderburn and Paul Davies, *Employment Grievances and Disputes Procedures in Great Britain* (University of California Press, 1969) 41.

right of property in his job'.³²⁷ A major study of the vehicle manufacturing industry written in the 1960s referred to the 'increasingly influential idea of "job property rights" among workers'.³²⁸ This right was said to be 'more than a right of appeal against management decisions'.³²⁹ According to the authors, the idea also included 'rights to a particular job at a particular place'.³³⁰ However, this recognition of property ownership by British writers was more limited than that accorded by the Meyers study as it was seen as providing a theoretical justification for the Redundancy Payments Act 1985 on the basis that statutorily mandated severance pay provided an individual with adequate compensation for loss of their job. Fryer criticises the ability of this Act to confer job property rights describing this as a 'myth' because in the situation of a redundancy the 'property owner ought at least to be able to say whether or not there ought to be a redundancy, and if so, just when that redundancy ought to occur'.³³¹ He is also critical of the disconnected nature of the statutorily imposed limits for severance payments as this has no financial tie to the property lost by the worker and does not enable the worker to then purchase property 'comparable to that which he has lost in terms of job interest, authority, seniority, familiarity, utilisation of skills and so on'.³³² Anderman provides a more radical analysis of the Redundancy

³²⁷ Cited in Cyril Grunfield, *The Law of Redundancy* (Sweet and Maxwell, 1980) 8.

³²⁸ HA Turner, Garfield Clack and Geoffery Roberts, *Labour Relations in the Motor Industry*, (Allen and Unwin, 1967) 336.

³²⁹ *ibid.*

³³⁰ *ibid.*

³³¹ Robert Fryer, 'The Myths of the Redundancy Payments Act' (1973) 2 ILJ 1, 4-5.

³³² Fryer (n 331) 5.

Payments Act as enabling the entrenchment of employers' property rights because of its legislative assumption of 'non-interference with managerial discretion' in the period prior to the unfair dismissals legislation.³³³ He puts forward a notion that this Act entrenches countervailing property rights held by employers because of the wide discretion it affords to employers making redundancies. Anderman cites the reasoning of Lord Denning in *Johnson v Nottinghamshire Combined Police Authority* as a typical judicial interpretation of the Act which placed managerial prerogative at its highest for employers making decisions about economic dismissals.³³⁴ In this case Lord Denning states that, 'an employer is entitled to reorganise his business so as to improve its efficiency and in so doing to propose to his staff a change in the terms and conditions of their employments: and to dispense with their services if they disagree'.³³⁵ The emerging normative template of job property for employees can be seen as seeking to counteract the traditional belief in managerial prerogative which upheld employers' countervailing property rights to determine the composition of their staff without interference.

Given the diffident foundations of the Redundancy Payments Act 1965 in conferring property rights to employees, it is unsurprising that the British development of a right to fair dismissal achieved only a diluted version of the normative ideal of job property. The British case for a statutory unfair dismissal system saw some recognition

³³³ Steven Anderman, 'Termination of Employment: Whose Property Rights?' in Catherine Barnard, Simon Deakin and Gillian Morris (eds), *The Future of Labour Law: Liber Amicorum Sir Bob Hepple QC* (Hart, 2004) 115.

³³⁴ *ibid.*

³³⁵ *Johnson v Nottinghamshire Combined Police Authority* [1974] ICR 170.

of the intrinsic value of a person's job but did not go as far as mandating that the employee should receive their job back if a finding of unfair dismissal was found by the tribunal. British employers were extremely reluctant to recognise this notion of jobs as property with the Director of the CBI noting in 1964, 'I do not consider myself that a man has any vested interest in a particular job'.³³⁶ The Donovan Commission's final report recognises that while reinstatement would be the ideal remedy, it is more realistic and therefore preferable for compensation to be the primary relief unless both parties elect for reinstatement.³³⁷ While there is no explicit reference to the concept of property rights in the job, it is possible to still identify the influence of this concept in the Donovan Commission's reasoning. Their final report recognises the significant investment that employees make in their jobs and argues that this investment should not be viewed as subordinate to the employer's investment in the employment relationship. The Commission observes that 'in reality people build much of their lives around their jobs' and that 'for workers in many situations dismissal is a disaster'.³³⁸ A similar perspective recognising the intrinsic value of a person's job is echoed by Otto Kahn-Freund in his statement that the essence of property rights in work is not immunity from dismissal but the aspirations of 'social ethics':

There is something in the analogy between the ownership of tangible assets and tenure of employment. For the large majority of people their job is their principle asset. They have invested their skill and their strength in the job. Just as the Government may, in virtue of its right of eminent domain or compulsory acquisition, for the public good, deprive a person of land and other property so it may be in the public interest

³³⁶ Sir George Pollock, *The Times* (London 30 April 1964).

³³⁷ Donovan (n 48) 149.

³³⁸ Donovan (n 48) 142.

that a person may have to sacrifice his job. But in both cases a rule of social ethics requires that he who sacrifices an asset should receive a fair amount of compensation.³³⁹

While Kahn-Freund recognises the strong similarity between the analogy of property ownership of tangible assets and of jobs, he imposes limits upon the job ownership concept believing that ‘the analogy can be taken too far’.³⁴⁰ He favours establishing a theoretical basis for unfair dismissal law in a ‘rule of social ethics’ which dilutes the job ownership theory by regarding compensation as an adequate remedy for loss of an individual’s job. He does not argue that an employer should be mandatorily required to provide the employee with his or her job back in the case of unfair dismissal, but rather that there should be an obligation to pay compensation because of the substantial investment the individual had made in the job prior to dismissal. This perspective has greater analytical similarity to the ‘industrial justice’ theory discussed later in this section, rather than Meyer’s job ownership concept. Moreover, it should be pointed out that Kahn-Freund was not merely influential as a theorist but also an actor in the construction of British unfair dismissal law because of his key role as a member of the Donovan Commission. His view that the essence of property rights in work is not immunity from dismissal but the aspirations of ‘social ethics’ can be seen as influencing the diluted version of job property that the British unfair dismissal system ultimately achieved.

³³⁹ Kahn-Freund (n 46) 38.

³⁴⁰ *ibid.*

A significant critique of the job ownership concept has come from Hugh Collins who sees the idea of an employee possessing a proprietary interest in their job as untenable. Deriving from his own ideas concerning the achievement of justice in dismissal, Collins' fundamental objection to the job ownership concept is that an employee cannot have absolute control over, and possession of, their job.³⁴¹ According to this view a job cannot be 'owned' by an employee as many factors can dispossess an employee of his or her job: managerial decisions interpreting market changes, technological advancement and restructuring can destroy and create jobs. Collins argues that the job ownership concept is not only unfeasible but undesirable as the labour market would be inefficient if an employee could insist on their absolute right to remain in his or her job.³⁴² This view advocates the prerogative of employers to manage their staff by allocating jobs to the most productive workers and legitimately discarding idle members of the workforce. As well as undermining productivity, Collins states that ownership of jobs would limit the ability of employers to meet declining demand in the economy and provide a disincentive for employees to work productively in their current job and seek a new job better suited to their skill set. He argues that rejecting a job ownership concept ultimately rewards productive employees with higher remuneration and society as a whole through more prosperous,

³⁴¹ Collins (n 198) 10. Others have also questioned the viability of the job property concept as a normative template for British unfair dismissal law. See: Tony Honore, *The Quest for Security: Employees, Tenants, Wives* (Stevens & Sons, 1982) 9; Bob Hepple, 'Individual Labour Law' in GS Bain (ed) *Industrial Relations in Britain* (Blackwell, 1983) 408.

³⁴² Collins (n 198) 10.

competitive markets leading to improved living standards and greater levels of employment.³⁴³

The essence of Collins' critique of the job ownership concept is that it primarily takes issue with the argument that an employee has an absolute entitlement to remain in their job, put simply: immunity from dismissal. However, Meyers never argued that an employer should have absolute control of their job but advocated that there should be 'effective enforcement of the right to undisturbed possession of a job against the threat of unjustified disciplinary dismissal' which would result in the wrongly dismissed employee getting their job back.³⁴⁴ This relative right to own one's job means that 'the job is his, for his and its life, irrespective of the will of the employer' unless and until 'he can be shown to be incompetent or have abandoned his equity by improper conduct'.³⁴⁵ In terms of dismissals prompted by economic or technological circumstances, Meyers recognises that employers may have to shed labour but argues that a job ownership concept requires employers to keep workforce reductions to a minimum or to transfer 'the equities of employees in existing jobs to newly appearing ones'.³⁴⁶ He also argues that the decision to make employees redundant cannot be made unilaterally by an employer but rather that an objective and externally decided criteria should be used to select employees for redundancy.³⁴⁷ Thus,

³⁴³ Collins (198) 11.

³⁴⁴ Meyers (n 313) 5.

³⁴⁵ Meyers (n 313) 7.

³⁴⁶ Meyers (n 313) 15.

³⁴⁷ Meyers (n 313) 15.

both in the situation of disciplinary dismissals and redundancies, Meyers' theory of job property does not confer upon employees absolute immunity from dismissal but protection from unjustified dismissal. A recent analysis of the utility of the job ownership concept in the case of economic dismissals by Njoya states that Meyers' theory of job property and its evolution by other theorists was 'not simply on trying to keep one's job at all costs, but on drawing attention to the true value involved when the job was lost'.³⁴⁸ She limits the usefulness of Collins' critique to forcing the job ownership theorists to 'map the contours of their claim' as beyond this, his critique is less relevant considering that both traditional and modern manifestations of the job property case rests on a relative entitlement that does not exclude the employer's right to dismiss workers for incompetence or for economic reasons in a fair manner and according to due process.³⁴⁹

Accepting Njoya's view that contemporary theories of job property are considerably more humble than might be initially thought, the enactment of statutory unfair dismissal law in neither Britain nor Australia can be viewed as achieving the normative ideal of job ownership. Whilst in both jurisdictions the enactment of unfair dismissal law represents increasing recognition of the intrinsic value of having a job for individual employees beyond mere receipt of remuneration, neither jurisdiction genuinely fosters a culture where unfairly dismissed employees receive their jobs back after a finding of unfair dismissal. The job ownership concept forces acknowledgment

³⁴⁸ Njoya (n 314) 63.

³⁴⁹ Njoya (n 314) 64-65.

of what the employee is deprived of when he or she is unfairly dismissed: not just pay, but other things too such as a social network, opportunities to invest in his or her career, a sense of dignity and autonomy and so on. To the extent that the British and Australian unfair dismissal legislation recognised that individuals should not be deprived of their jobs unfairly, there is an echo of job ownership theory in that the managerial prerogative to fire at will is rejected. As Davies and Freedland observe about the British system, 'in its conception the unfair dismissal legislation made substantial steps in the direction of job property, a trend even more prominent in the reforms of the unfair dismissal legislation made by the Employment Protection Act 1975'.³⁵⁰ Nonetheless, on the other hand, the failure of the legislation in either jurisdiction to guarantee or prioritise reinstatement of unfairly dismissed employees is a clear indication that the introduction of unfair dismissal law does not achieve the normative template provided by the job ownership concept. This concept requires that the job be returned to the employee if this is his or her desire as because of the employee's proprietary interest, this was not the employer's to take away. It is irrelevant that the employment relationship appears broken down as the job ownership concept draws a distinction between the relationship of an employee and his or her job, and the employee and his or her employer. The key reason that Britain and Australia's statutory unfair dismissal protection cannot be concretely anchored in a concept of job property is because reinstatement is not achieved in practice or sufficiently prioritised in the legislation. Financial compensation is viewed as an adequate remedy for unfair dismissal.

³⁵⁰ Paul Davies and Mark Freedland, *Labour Law: Text and Materials* (2nd edn, Weidenfeld and Nicholson, 1984) 431.

Section Three

‘A floor of rights’

Lord Wedderburn contributed to the enactment of British unfair dismissal law by directly influencing the normative debate as to what this law should seek to achieve. Wedderburn was both a central historical and academic actor in effecting legal change because of his involvement as a witness to the Donovan Commission and his work as a legal scholar. As we shall explore in this section, Wedderburn engaged with the debate surrounding the normative ideal of job property as he advocated a stronger recognition of employees’ interest in their job than was currently recognised by the law. His primary idea however, sought to facilitate the achievement of job property by increasing the incidence of reinstatement through envisaging unfair dismissal law as providing a baseline (or ‘a floor of rights’) which could be continuously improved upon over time through collective bargaining. In this way, the enactment of unfair dismissal law would gradually bring about greater dismissal protection for employees through facilitating increasing dialogue between employees and employers over what was an appropriate level of unfair dismissal protection

The idea of property ownership was canvassed by Wedderburn in Britain in the period leading to the introduction of unfair dismissal law in 1971. As noted by Wedderburn in his influential text, ‘The Worker and the Law’, ‘we have to decide to

what extent the existence of a 'job', in which the worker is to have this 'property', is limited by management considerations such as cost. We have to decide to whom, in a modern society, jobs really "belong".³⁵¹ In answering this question, Professor Wedderburn in his written submission to the Donovan Commission favoured a stronger recognition of the employee's ownership of their job. He advocated that unfair dismissal complaints should be resolved quickly, and a complainant should be suspended from their employment but have their remuneration guaranteed until the determination of the hearing.³⁵² While Wedderburn acknowledged that this system might still be unable to guarantee reemployment in all cases, he advocated greater pressure upon employers to provide a successful complainant with their job back. In his view tribunals should be able to order reinstatement which would protect the worker against dismissal for six months except for misconduct but:

Since no court or tribunal can create a satisfactory employment situation out of a human relationship which does not allow for it, the employer faced with such an order should have the right to make application to the same tribunal for discharge of the order. Where he shows that despite reasonable efforts at conciliation by management, it is reasonable to end the employment, the order could be discharged on condition that the worker be paid the remainder of his wages which would accrue over the six months period.³⁵³

The Donovan Commission did not concur with this argument that the doctrine of managerial prerogative be limited by recognising a right to reinstatement. They believed that compensation should be viewed as the primary remedy and rejected the argument that complainants should be suspended with full pay because it would be

³⁵¹ Wedderburn (n 199) 97.

³⁵² Royal Commission on Trade Unions and Employers' Associations, Minutes of Evidence of 22 March 1966 (Her Majesty's Stationery Office, London 1966) 1255-1256, 1260.

³⁵³ *ibid* 1261.

‘highly undesirable and indeed impossible to deprive the employer of the power to dismiss without notice for misconduct’.³⁵⁴

Another function of the unfair dismissal system advocated by Wedderburn that would aid its ability to achieve reemployment was that the system should provide a ‘floor of rights’ upon which collective bargaining may improve. Echoes of this approach can be found in the system introduced by the 1971 Act as this included an exemption procedure that allowed collective agreements to improve upon the statutory unfair dismissal system via the development of an internal industry procedure. Wedderburn argued that such a system would work most effectively if there were high levels of unionisation as the new unfair dismissal legislation would give union representatives a floor from which to argue and to negotiate for the employee to get his or her job back.³⁵⁵ The Donovan Commission also advocated the possibility for exemption if employers and unions agreed on an alternative procedure. They believed that this would improve dismissal procedures within industries by enabling the voluntary system to build upon the statutory minimum.³⁵⁶ Even the National Joint Advisory Council was of the view that if a statutory system was introduced, it should only be as a ‘fall back’ for the voluntary development of internal dispute resolution procedures within firms and industries.³⁵⁷ In practice, the exemption procedure was

³⁵⁴ Donovan (n 48) para 547.

³⁵⁵ Royal Commission on Trade Unions and Employers’ Associations, Minutes of Evidence of 22 March 1966 (Her Majesty’s Stationery Office, London 1966) 1255-1256, 1260.

³⁵⁶ Donovan (n 48) para 561.

³⁵⁷ Ministry of Labour (n 208).

rarely used and the union movement did not seek to use collective bargaining as a means of improving upon the statutory unfair dismissal system.³⁵⁸ In this way, the unfair dismissal protection afforded to British employees under the legislation became a safety net rather than a floor of rights upon which unions could seek to achieve reemployment according to a theory of a right to work.

A similar critique can be made of the Australian unfair dismissal system. This was introduced in 1993 as part of an industrial relations reform project aimed at facilitating enterprise bargaining between the parties rather than the determination of wages and conditions via conciliation and arbitration. The Labor Government saw unfair dismissal law as both part of a safety net and as a floor of rights, as the basic provision of a right to fair dismissal under the legislation could be improved upon through an enterprise agreement. Nonetheless, as in Britain where the exemption procedure was rarely used by unions, in Australia unions did not seek to increase unfair dismissal rights in agreements. In this way, the unfair dismissal protection afforded to Australian employees under the legislation became a safety net rather than a floor of rights. In neither jurisdiction could it be argued that unfair dismissal law was enabling of a gradual improvement in job security standards over time. Wedderburn's normative template of unfair dismissal law as a floor of rights highlights the failure of unfair dismissal law in either jurisdiction to achieve this.

³⁵⁸ In fact, between 1971 and 1979 there was only one exempted agreement for unfair dismissal. See: Bob Hepple, 'Individual Labour Law' in GS Bain (ed) *Industrial Relations in Britain* (Blackwell, 1983) 412; Colin Bourn, 'Statutory Exemptions for Collective Agreements' (1979) 8 ILJ 85.

Section Four

A right to work

Like the job ownership theorists, the ‘right to work’ theory of unfair dismissal law advocates reinstatement as the appropriate remedy for an individual found to be unfairly dismissed. An influential public survey entitled ‘Poverty in the United Kingdom’ raised the idea that there should be a ‘legally enforceable right to work’ and placed the onus upon the government, local authorities and employers to facilitate this.³⁵⁹ From a labour law perspective, this issue was explored by British scholar Bob Hepple who canvassed the possibility of the unfair dismissal system being used to achieve a ‘right to remain continuously employed including the right to re-employment in the event of unjustified termination’.³⁶⁰ Unlike the theory of a right to work, job ownership theory has a broader agenda than the achievement of reemployment because of its foundation upon recognising the power of employees to have relative control and autonomy over their jobs. A right to work approach hinges upon the extent to which an employee who is unfairly dismissed can insist upon returning to his or her job.

It seems unlikely that either the introduction of unfair dismissal law in Britain or Australia can be regarded as achieving Hepple’s normative ideal that individuals have a right to work. Following the advice of the Donovan Commission that

³⁵⁹ Peter Townsend, *Poverty in the United Kingdom: a Survey of Household Resources and Standards of Living* (1979) 926.

³⁶⁰ Hepple (n 315).

compensation should be the primary remedy, Britain's Industrial Relations Act 1971 limited the ability of tribunals to award reinstatement to certain circumstances. This prioritisation of compensation was later reversed by the Labour Government on the basis that the tribunal must make an order of reinstatement or reengagement unless it is satisfied by the employer that it is impracticable for the employer to comply with an order or that it would not be fair to make such an order given that the employee contributed to the dismissal.³⁶¹ Despite the provision that reinstatement was to be the primary remedy, this did not change the fact that only a tiny proportion of successful unfair dismissal complainants were reinstated or reengaged. In 1973, 4.2% of those whose cases were settled through conciliation received their jobs back and by 1979 this had fallen to 1.8%.³⁶² Of those who went to a tribunal hearing, 2.3% were recommended to be given their job back in 1973 but by 1979 only 0.8% received reinstatement orders.³⁶³ Freedland and Davies note that the commitment to reinstatement by Labour was limited at best, 'the crucial point, however, is that the 1970 Bill, 1971 Act and 1975 reforms all protected the freedom of the employer to buy its way out of an award of reinstatement upon payment of a relatively modest additional lump sum'.³⁶⁴ Simpson also observed the failure of Britain's unfair dismissal system to provide for a right to work, arguing that the system reinforced

³⁶¹ Employment Protection (Consolidation) Act 1978, ss 68-71.

³⁶² Bob Hepple, 'Individual Labour Law' in GS Bain (ed) *Industrial Relations in Britain* (Blackwell, 1983) 409.

³⁶³ *ibid.*

³⁶⁴ Paul Davies and Mark Freedland (n 11) 210.

basic managerial prerogative by only attaching a price on arbitrary dismissal.³⁶⁵ He cautions against overestimating the impact of the unfair dismissal system on improving dismissal standards given the ‘retrogressive impact’ of the common law origins for many of the terms in the statutory system.³⁶⁶ He notes that statutory unfair dismissal protection only benefits workers who are ‘employees’, with ‘contracts of employment’, who are ‘dismissed’ and concludes that:

Perhaps more fundamental is the extent to which the traditions of common law thinking have influenced and moulded the shape of much of the new statutory regime. As long as this remains, the potential for creating effective change in labour relations through employment protection legislation remains limited if not illusory.³⁶⁷

Hepple too, posits a number of reasons as to why the British unfair dismissal system is unable to achieve a right to work in practice: the unwillingness of employers to accept re-employment, the lukewarm commitment of ACAS conciliation officers to the statutory requirement to give priority to re-employment and the lengthy nature of proceedings that means most employees are not seeking re-employment by the time their case comes up for hearing.³⁶⁸ One proposal canvassed by proponents of the position that the unfair dismissal system should facilitate a much greater achievement of re-employment is that the complainant’s employment contract be continued pending decision by the tribunal. Hepple cites the Swedish system where there can be no dismissal until a dispute about dismissal for ‘cause’ has been resolved by an

³⁶⁵ Bob Simpson, ‘British Labour Relations in the 1980s: Learning to Live with the Law’ (1986) 49 MLR 796, 804-805.

³⁶⁶ Simpson (n 365) 804.

³⁶⁷ Simpson (n 365) 806.

³⁶⁸ *ibid.*

independent court.³⁶⁹ He notes that under this system cases are resolved quickly enough to encourage the complainant to await a decision of the court instead of seeking alternative employment.³⁷⁰

Applying Hepple's normative ideal of a right to work provides a similar critique of the Australian unfair dismissal system for its failure to return unfairly dismissed employees to their job. The Industrial Relations Act 1993 indicated plainly that 'it was Parliament's intention that the primary remedy for unlawful termination should be reinstatement and that compensation should be available only where this was impracticable',³⁷¹ however, in the Workplace Relations Act 1996 this was amended so that reinstatement is the 'primary' remedy under the Act, only in the sense that reinstatement must be considered *first*. There is no overriding presumption in favour of reinstatement under section 170CH.³⁷² Nonetheless, it appears that from its inception, Australian unfair dismissal law failed to achieve a right to work for unfairly dismissed employees. Of the 774 applications disposed of by arbitration in 1997-1998, seventeen resulted in an order for reinstatement and 403 resulted in compensation orders.³⁷³ Perhaps a reason for the failure of the Australian unfair dismissal system to achieve a right to work is that the imposition of the 'fair go all round' concept to the

³⁶⁹ Hepple (n 315) 77.

³⁷⁰ *ibid.*

³⁷¹ *Liddell v Lembke* (1994) 127 ALR 342, 360 (Wilcox CJ and Keely J).

³⁷² *Newtronics Pty Ltd v Salenga*, Print R4305, 29 April 1999, Polites SDP, Acton DP, Smith C, at 6, affirming the decision of the Full Bench in *Australia Meat Holdings v McLaughlan* (1998) 84 IR 1.

³⁷³ Annual Report of the President of the Australian Industrial Relations Commission and Annual Report of the Australian Industrial Registry 1 July 1997 to 30 June 1998, Table 9.

working out of remedies means that the employee's right to work is counterbalanced against the employer's right to determine their staff. Of relevance to the Commission's determination of whether reinstatement is a suitable remedy is the concept of 'a fair go all round' being accorded to both the employer and employee in working out remedies.³⁷⁴ The Commission has emphasised, however, that 'the *fair go* object does not constitute a basis for ignoring, or for rolling into one amorphous act of judgment, the procedures or conditions associated with the powers and discretions to determine remedies'.³⁷⁵ The Commission specifically referred to the requirement for a 'fair go all round' in *Brooks v Australian Dried Fruit Sales Pty Ltd*.³⁷⁶ The Commission found that the termination of two employees on the grounds of redundancy was harsh, unjust or unreasonable. Only one was reinstated. In deciding that reinstatement was not appropriate for the other employee, Commissioner Simmonds took into account the low score that the employee had achieved on a competency test, which was 17% below the lowest person retained by the company during the redundancy process. He considered that in these circumstances 'there are insufficient grounds for me to conclude that reinstatement is appropriate as it would not provide the company with a "fair go all round"'.³⁷⁷

Therefore, neither the British or Australian unfair dismissal systems can be seen as achieving Hepple's normative ideal of a right to work to any large degree.

³⁷⁴ Workplace Relations Act 1996 (Cth), section 170 CA(2).

³⁷⁵ *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21, 31.

³⁷⁶ (1998) 84 IR 33, 50.

³⁷⁷ *ibid* 51.

Despite both systems making some provision that reinstatement be the primary remedy, in practice, it is only awarded in the small minority of cases. The tribunals in Britain and the Commission in Australia have preferred to award compensation which provides a financial price on unfair dismissal for employers but stops short of requiring employers to rehire unfairly dismissed staff. Even taking into account the fact that a significant number of unfair dismissal applicants do not seek to return to their jobs, the unfair dismissal laws of Britain and Australia only achieve a very limited delivery of the right to work ideal.

Section Five

Collins' theory of justice in dismissal

In the previous section I discussed Hepple's normative template of a right to work and concluded that the achievement of this ideal was undermined by the unlikelihood of an unfairly dismissed employee returning to their job. I now proceed to Professor Hugh Collins' work entitled 'Justice in Dismissal' which raises a complex set of ideas by which we can normatively evaluate both the introduction and subsequent evolution of unfair dismissal law.³⁷⁸ Published in 1992, his work straddles the divide between enactment and evolution pragmatically put forward by this thesis. Based on his belief that unfair dismissal law is an evolving legal construct as the legislator may reform it, and the courts and tribunals will fashion it over time based on their interpretation of

³⁷⁸ Collins (n 198).

the law, Collins' work is concerned with the original decision to introduce British unfair dismissal law, the enactment of this law and its subsequent evolution. Whereas the other theorists discussed in this chapter are strongly focussed on the introduction of unfair dismissal law, Collins develops a particular kind of critique which relates to its introduction and its evolution. This is instantiated by his notion of 'the best explanation' for unfair dismissal law that he develops in the Introduction to his work.³⁷⁹ Collins argues that he is seeking to depart from conventional legal scholarship methodology by engaging in a method of interpretation which is about discerning the underlying principles of justice at stake in unfair dismissal law and choosing between the principles to discover the best interpretation of the law.³⁸⁰ In his view, the discovery of the best interpretation of the law necessitates a moral choice between competing principles. Collins' central thesis is that the principle of efficiency best accounts for the law and suggests the best interpretation of it.³⁸¹ However, this elevation of the efficiency principle incorporates notions of dignity and autonomy as he argues that achieving the latter produces the most efficient outcomes. One example he provides is that a requirement that employers consult staff before making redundancies is best accounted for on grounds of efficiency.³⁸²

Consequently, I will discuss in this section the ideas of dignity, autonomy and efficiency which provide the basis of Collins' normative template for unfair dismissal

³⁷⁹ Collins (n 198) 4.

³⁸⁰ *ibid.*

³⁸¹ *ibid.*

³⁸² *ibid.*

law. I also wish to foreshadow here that in Part B I will continue this discussion of Collins' work so as to enable a normative evaluation of the subsequent evolution of unfair dismissal law over time. In this later discussion I will also refer to Collins' development of unfair dismissal law as needing to provide employment security in his 2001 work on 'Regulating for Competitiveness'.³⁸³

(i) Applying Collins' notion of Justice in Dismissal to the enactment of British unfair dismissal law

Before embarking on a discussion of Collins' work, I wish to briefly allude to the influence of the general notion of industrial justice in influencing the enactment of British unfair dismissal law. At a purely explanatory level, we can observe that ideas of industrial justice began to influence those advocating reform of Britain's collective laissez-faire tradition. Davies and Freedland trace the British industrial justice argument as gaining momentum in the 1960s when questions began to be asked about whether the 'law did not have a role to play in reducing the degree of arbitrariness in the exercise of authority in the employment sphere'.³⁸⁴ They describe a growing dissatisfaction with the institutions of collective bargaining to protect all employees from the arbitrary exercise of management power as stakeholders began to query whether the rule of law would be achieved in the internal functioning of workplaces by

³⁸³ Hugh Collins, 'Regulating the Employment Relation for Competitiveness' (2001) 30 ILJ 17, 18.

³⁸⁴ Davies and Freedland (n 11) 192.

the voluntary system alone.³⁸⁵ While they note that collective agreements often regulated internal matters such as dismissals, discipline, promotion or training, there was a growing concern for individual employees with no access to collective organisation.³⁸⁶ This concern for employees in unorganised industries was shared by the Donovan Commission in their final report as they advocate the use of labour tribunals to adjudicate unfair dismissal complaints because of the ‘very large numbers of employees to whom no voluntary machinery applies’.³⁸⁷ They reject the argument of the National Joint Advisory Committee in their report, ‘Dismissal Procedures’, that an extension of collective bargaining is enough to achieve job security because ‘legislation has the advantage of making possible an immediate raising of standards to a much more satisfactory level’.³⁸⁸

Nonetheless, our focus in this chapter is not so much to describe how these normative ideals influenced the construction of unfair dismissal law but the extent to which the normative template of justice in dismissal can help us normatively evaluate and understand the British enactment of unfair dismissal law. Collins argues that an industrial justice justification for unfair dismissal law hinges upon two principles: first, that there needs to be a restraint on absolute managerial prerogative to terminate the employment contract; and second, that the ‘interest’ being protected by legislative intervention is the individual employee’s self-worth, which goes beyond the

³⁸⁵ Davies and Freedland (n 11) 193.

³⁸⁶ *ibid.*

³⁸⁷ Donovan (n 48) para 568.

³⁸⁸ Donovan (n 48) para 539.

remuneration he or she receives for their work. Collins' influential work aimed at developing a theory of justice in dismissal argues that these two strands provide justification for the law of unfair dismissal:

A respect for the dignity of the individual and an improvement in the conditions of work which are conducive to autonomy – amount to a defence of an employee's interest in job security, but not to a property right in a job.³⁸⁹

Collins' concern with untrammelled management power stems from dissatisfaction with the inadequacy of the common law contract of employment to require fair dismissal. The common law merely requires the payment of notice, a situation which had long been regarded as an unsatisfactory state of affairs.³⁹⁰ There was also an awareness that using industrial action to deal with dismissal disputes was undesirable as employees in unorganised industries had no recourse to industrial action and because of the inefficiency of using a collective dispute resolution mechanism to resolve individual dismissal disputes. Selznick's distinct work on industrial justice also advocated the application of the rule of law to industrial relations so as to reduce arbitrariness in managerial decision making.³⁹¹ In his view, while the application of the rule of law to industrial relations initially acts as a constraint upon managerial prerogative, its end result is transformative because it achieves more than the correct exercise of power. With rhetorical flourish he argues:

The 'progressive reduction of arbitrariness' knows no near stopping-place. The closer we look at that process, the more we realise that it

³⁸⁹ Collins (n 198) 21.

³⁹⁰ Collins advances this on pages 29-34 of his work. Also, for an excellent exposition of the development of English law and the contract of employment, see Honore (n 341) 2-9.

³⁹¹ Philip Selznick, *Law, Society and Industrial Justice* (Russell Sage Foundation, 1969) 12-13.

calls for an affirmative view of what it means to participate in a legal order, whether as citizens, judge or executive. In its richest connotation, legality evokes the Greek view of a social order founded in reason, whose constitutive principle is justice.³⁹²

In the context of unfair dismissal, Collins argues that legislative intervention is justified on the basis that management power needs to be regulated so as to enhance the ‘opportunities for people to bring meaning to their lives through work’.³⁹³ He draws upon the writings of Joseph Raz to develop this justification for unfair dismissal law based on the principle of autonomy, arguing that a liberal society should foster worthwhile opportunities for people to pursue their personal goals and become ‘the author of his or her own life’.³⁹⁴ Likening internal management structures to a form of bureaucratic organisation, Collins says that workplace policies and procedures should not constrain individual employees from discovering meaning in their work.³⁹⁵ Going beyond Selznick’s application of the rule of law as the foundation for achieving industrial justice in the workplace, Collins advocates a further restriction on management disciplinary power so that all disciplinary rules which restrict individual freedom in the workplace should be ‘shown to be reasonably necessary for the efficient coordination of the work or they will comprise an unjust restriction upon autonomy’.³⁹⁶ Writing elsewhere, Collins also argues that an industrial justice theorisation of Britain’s statutory unfair dismissal scheme is more appropriate than the

³⁹² Selznick (n 391) 18.

³⁹³ Collins (n 198) 19.

³⁹⁴ Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986) 369-73, 417.

³⁹⁵ Collins (n 198) 19.

³⁹⁶ Collins (n 198) 20.

‘floor of rights’ theory which other writers have favoured.³⁹⁷ He says, ‘this interpretation misses the revolutionary form of legal intervention involved in the legal review of managerial decisions’. In his opinion, by introducing legal regulation and judicial review to managerial decision making in the workplace, the unfair dismissal scheme ‘goes further than the floor of rights and has many of the hall-marks of corporatist legislation’.³⁹⁸

Collins put forward the other cornerstone of a theory of justice in dismissal as being a concern with guaranteeing the dignity of employees during the dismissal process. This justification hinges upon the realisation that an unfair dismissal deprives an individual not merely of his or her source of income, but also has the potential to deprive the individual of his or her self-worth, a social network, others’ esteem and even his or her place in the community. In their famous statement identifying the job security case for legislative intervention in the area of unfair dismissals, the Donovan Commission outlines the importance of these non-monetary deprivations caused by unfair dismissal:

We share in full the belief that the present situation is unsatisfactory. In reality people build much of their lives around their jobs. Their incomes and prospects for the future are inevitably founded in the expectation that their jobs will continue. For workers in many situations dismissal is a disaster. For some workers it may make inevitable the breaking up of a community the uprooting of homes and families. Others, and particularly older workers, may be faced with the greatest difficulty in getting work at all.³⁹⁹

³⁹⁷ Collins (n 300) 83-84.

³⁹⁸ *ibid.*

³⁹⁹ Donovan (n 48) para 526.

Collins argues that this justification of needing to protect an individual's dignity during the dismissal process permits scrutiny of the reasons for the individual's dismissal so as to ensure that no irrelevant considerations were made.⁴⁰⁰ Above all, preserving the individual's dignity during the dismissal process requires the employer to have exercised managerial power in a rational manner, and with due regard for procedural fairness, thus permitting tribunal scrutiny of not just the reason for dismissal but the way in which it occurred.⁴⁰¹ The unfair dismissal system introduced in 1971 was sufficiently flexible as to enable tribunals to engage in this two-step endeavour, although the importance accorded by tribunals to procedural fairness went through two distinct phases of development in the first decade of the legislation's operation.⁴⁰² The first phase from 1971-1977 was characterised by a strict adherence to due process although they were reluctant to award compensation.⁴⁰³ The importance of encouraging fair procedures stemmed from the governing legislation which required the courts to interpret the law in a way that would encourage the development and maintenance of orderly procedures within the workplace.⁴⁰⁴ The second phase was also prompted by legislation as the introduction of a basic award under the Employment Protection Act 1975 meant that unfairly dismissed employees received the basic award as the minimum. This could be topped up by a compensatory reward based on the

⁴⁰⁰ Collins (n 198) 16-17.

⁴⁰¹ *ibid.*

⁴⁰² Collins (n 198) 112-137.

⁴⁰³ Collins (n 198) 112.

⁴⁰⁴ Industrial Relations Act 1971, s 1.

tribunal's decision as to the degree of the employee's fault. Nonetheless, Collins suggests that the tribunals began to resist making compensatory awards on the basis of poor procedure as they decided that the dismissal was fair if the proper procedure would have made no difference.⁴⁰⁵ This second stage represented a dilution of the protection of an unfairly dismissed employee's dignity as procedural unfairness was not seen as sufficient to warrant a finding of unfair dismissal.

Collins' normative ideal of justice in dismissal as providing a basis for British unfair dismissal law is not without its detractors. Some argued that a focus on justice legitimised the introduction of a statutory unfair dismissal system which has put a price on jobs and undermined the willingness of employees to safeguard their jobs in return for monetary compensation and procedural fairness.⁴⁰⁶ Mellish and Collis-Squires argue that the introduction of unfair dismissal law in Britain was predicated upon a corrective approach which seeks to ensure that disciplinary rules are well known and accepted and that dismissal only occurs as a last resort after management has attempted a series of softer disciplinary measures such as warnings and lesser punishments.⁴⁰⁷ They contrast this to the punitive approach which they see as existing prior to 1971 where employers would often discipline employees through harsher penalties, albeit on a more ad hoc basis, aimed at deterring the offensive behaviour.⁴⁰⁸

⁴⁰⁵ Collins (n 198) 115.

⁴⁰⁶ Michael Mellish and N Collis-Squires, 'Legal and Social Norms in Discipline and Dismissal' (1977) 6 ILJ 164; RH Fryer, 'Redundancy, Values and Public Policy' (1973) 4 IRJ 2; R Martin and RH Fryer, 'The Myths of the Redundancy Payments Act' (1973) 2 ILJ 1.

⁴⁰⁷ Mellish and Collis-Squires (n 406) 164-165.

⁴⁰⁸ *ibid.*

While the corrective approach issued in greater standardisation of dismissal procedures in British firms, a number of criticisms can be made as to the extent to which this approach actually achieves the industrial justice justifications of preserving employees' dignity and autonomy. Firstly, the argument could be made that the focus of the system on achieving procedural reform of dismissal practices has merely resulted in the formalisation of rules rather than the substantive guarantee of justice in dismissal. Significant weight is given to procedural reform in the Industrial Relations Code of Practice and the code issued by ACAS on Disciplinary Practice and Procedures,⁴⁰⁹ but as has been pointed out, 'procedures in themselves tell us little about the disciplinary process'.⁴¹⁰ In other words, employers may formalise the process of dismissal and strictly adhere to this process, but this does not necessarily mean the decision to dismiss the employee has been substantively fair, only that the correct process for dismissal has been followed.

A second criticism of the ability of the unfair dismissal system to achieve justice is that it seeks to regulate management's power to dismiss but from 'an essentially managerial perspective'.⁴¹¹ According to Mellish and Squires, this focus on a management oriented view of discipline 'assumes that management has both the will to reform and the freedom of action to do so and that – in this area of discipline and

⁴⁰⁹ The ACAS Code issued in 1976, replaced and amplified paras. 130-133 of the Industrial Relations Code of Practice, but other provisions of the latter code remain relevant to unfair dismissal.

⁴¹⁰ Mellish and Collis-Squires (n 406) 168.

⁴¹¹ Brian Weekes et al *Industrial Relations and the Limits of the Law: The Industrial Effects of the Industrial Relations Act 1971* (Blackwell, 1975) 28.

dismissal – unions are passive recipients of such reform’.⁴¹² A related criticism made by Elias is that the yardstick of industrial justice used by the unfair dismissal system legitimises management’s prejudices and unfair decisions rather than challenging them to more enlightened decision-making.⁴¹³ He argues that the system is ‘norm-reflecting’ rather than ‘norm-setting’ because the tribunals judge the reasonableness of an employer’s decision to dismiss based upon their perceptions of how a body of employers might behave, rather than how a reasonable employer would behave.⁴¹⁴ Elias cites the case of *Saunders v Scottish National Camps* where both the tribunal and Employment Appeals Tribunal held that because a commonly held belief of some employers was that a homosexual employee would pose a special risk to minors in his care, it was not unfair to dismiss the employee for his sexual orientation.⁴¹⁵ According to Elias this decision results in ‘reasonableness being defined by the attitudes of the most prejudiced body of employers rather than by the tribunal’s perception of how an enlightened employer might behave’.⁴¹⁶

But perhaps the most serious critique of the industrial justice justification of the British unfair dismissal system is that it has sought to individualise the employment relationship by separating the issue of discipline from the wider issue of control. In

⁴¹² Mellish and Squires (n 406) 170.

⁴¹³ Patrick Elias, ‘Fairness in Unfair Dismissal: Trends and Tensions’ (1981) 10 ILJ 201.

⁴¹⁴ Elias (n 413) 212-213.

⁴¹⁵ *Saunders v Scottish National Camps* [1980] I.R.I.R. 174 (EAT). The appeal to the Court of Session is reported in [1981] I.R.I.R. 277.

⁴¹⁶ Elias (n 413) 213.

other words, unfair dismissal law has legitimated ‘the existing structure of authoritarian control and inequality of reward in industry’ by diverting the collective’s attention from dismissal issues by providing individuals with a remedy that seeks to ‘buy them out’ rather than return them to their job.⁴¹⁷ Mellish and Collis-Squires articulate that an alternative view of discipline is needed based on their study of port transport employees.⁴¹⁸ They argue that discipline can be a collective issue depending on whether the collective can identify with the individual concerned and whether they support or are indifferent to any corrective action taken against the individual by management.⁴¹⁹ They critique the existing unfair dismissal system as seeking to disincentivise the collective from caring about the unfairness of the individual’s dismissal even if the dismissal itself reflects a disturbing management trend to unjustifiably increase control over employees’ work. Furthermore, they argue that the tribunals entrench the individualisation of dismissal issues because the tribunal only has a duty to settle the individual complaint and does not seek to analyse whether endemic problems exist in the bargaining context from which the complaint is derived.⁴²⁰ In this light, the industrial justice justification of unfair dismissal law with its focus on preserving the dignity and autonomy of individual employees against unchecked management power separates this issue from the legitimate trade union concern with the control of jobs by management.

⁴¹⁷ Brian Bercussion, ‘Employment Protection’ in Charles D. Drake and Brian Bercussion (eds) *The Employment Acts 1974-1980 with Commentary* (Sweet and Maxwell, 1981) 33.

⁴¹⁸ Mellish and Squires (n 406) 172-175.

⁴¹⁹ *ibid.*

⁴²⁰ Mellish and Squires (n 406) 176.

By way of conclusion, whilst different theories have sought to provide normative templates for what unfair dismissal law should achieve, the normative ideal closest in realisation to the British unfair dismissal system introduced in 1971 is that of industrial justice. Many elements of the British unfair dismissal system can be seen as having their rationale contained in this normative template. The focus of the British system on limiting managerial prerogative in decision-making and recognising the monetary and non-monetary deprivations occurring from dismissal can find their theoretical basis in the preoccupation of industrial justice theory in preserving the dignity and autonomy of employees during the dismissal process.

(ii) Industrial Justice in the Australian Context

There was no prominent discussion amongst Australian theorists as to the appropriate normative template for a local unfair dismissal law. In the period preceding the enactment of unfair dismissal law in Australia, scholars were largely concerned with practical questions of implementing and expanding unfair dismissal remedies,⁴²¹ rather than on examining their theoretical aspects. What Australian scholars were seeking, were federal remedies for unfair dismissals based upon the existing arbitral processes then operating in several of the States. Australian scholars were far more concerned about the practical issues of expanding state unfair dismissal regimes,⁴²² to the

⁴²¹ See above (n 317).

⁴²² *ibid.*

development of a theoretical framework for a network of regimes under federal law and in all of the States. In relying upon Australia's need to comply with international standards of unfair dismissal protection as the basis for introducing domestic unfair dismissal law, an argument can be made that the Labor Government in 1993 was drawing upon the ILO's normative push for unfair dismissal law to be enacted across member countries. Whilst this was not made explicit by the Labor Government, or acknowledged in Australian academic writing at the time, the ILO's ideas on unfair dismissal law have been noted by Kahn-Freund as evolving out of a post WWII type of German constitutionalism concerned with removing arbitrariness from the dismissal process,⁴²³ and by Cronin as originating from the Cyprus model of resolving unfair dismissal disputes.⁴²⁴ Nonetheless, an articulation of why unfair dismissal law was perceived as necessary in Australia did not go beyond the Labor Government's assertion that Australia needed to comply with its international obligations. This assertion framed the debate as to the legitimacy of enacting unfair dismissal law as the Coalition opposed it from the start based on their belief that the government was selectively choosing which international conventions to comply with, and their argument that there was no local mandate or case for introducing unfair dismissal law.

⁴²³ Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 MLR 1, 21.

⁴²⁴ JB Cronin suggests that the Cyprus system of regulating unfair dismissals was critical to the development of the ILO Recommendation: JB Cronin, 'ILO. Recommendation 119: Job Security in Cyprus' (1968) 17 *The International and Comparative Law Quarterly* 760; Yemin notes that the ILO Recommendation was the result of the unfair dismissal laws of different national systems: Yemin, 'Job Security: Influence of ILO standards and recent trends'. For a survey of the legal situation as of 1961 in different countries see ILO: *Termination of employment (dismissal and lay-off)*, Report VII (International Labour Conference, 46th Session, Geneva, 1962) Chapter 1.

Whilst Australia's normative tradition had been previously built upon the achievement of union security rather than job security (although the two notions do not necessarily conflict), the Industrial Relations Act 1993 does seek to protect job security through a rationale that Australia needs to comply with international labour standards. The absence of a local highly theorised basis for having unfair dismissal legislation meant that the Australian enactment of this law was significantly influenced by Australia's conciliation and arbitration tradition and its preoccupation with achieving 'a fair go all round'. The Australian conception of industrial justice emerged from Higgins' notion of industrial peace which combined dispute resolution and reduction of industrial conflict with notions of fairness and equity being achieved through collective conciliation and arbitration, and not at an individual level. The upshot of this is that Australia's conciliation and arbitration tradition was founded upon the achievement of justice for employees at and through the collective. The concept of industrial justice emerges from this conciliation and arbitration tradition but involves a much greater individuation of the notion of fairness and a much stronger emphasis on access to justice. What occurs by 1993 is that notions of industrial justice eventually broke loose from the conciliation and arbitration tradition and emerged as a rationale for the introduction of statutory unfair dismissal protection in its own right. However, it is important to avoid any attempt to dichotomise these two notions: industrial justice was always a strand of the conciliation and arbitration system's preoccupation with achieving industrial peace. Higgins also clearly conceptualised fairness for the worker as part of industrial justice and believed that industrial peace

could not be achieved purely by procedural means (i.e. by providing access to the system) but also contained the notion of fairness with a strong substantive component.

Nonetheless, the Australian unfair dismissal system's achievement of a notion of industrial justice did begin to emerge after 1993. Central to this was the recognition that the ideal of industrial justice encompasses a universal entitlement for which unions should not hold the key. This is supported by the decision in the federal jurisdiction to not build unfair dismissal law around the NSW model of only allowing unions to bring unfair dismissal claims before the commission. The federal notion of industrial justice recognises that any arbitrary dismissal is a source of concern as the wrong committed is primarily one against the individual employee and this should not be subjugated by a discussion of whether the dismissal poses a potential threat to collective interests or industrial stability. Accordingly, the Australian notion of industrial justice which was first realised at the state level in all the states other than NSW and was then affirmed in the development of the federal system, prioritises issues of access and procedure so as to ensure that all dismissed workers should be eligible for relief regardless of organisational affiliation or support.

While the Australian notion of industrial justice sprung from dissatisfaction with the prevailing theory of industrial peace as a means of safeguarding individual rights, the latter notion was not wholly discarded in the establishment of the federal unfair dismissal system. Perhaps the most interesting decision made with regards to the unfair dismissal reform was the choice of the Labor Government in 1993, and later the

Coalition Government in 1996, to anchor the federal system in the conciliation and arbitration mechanism – an apparatus purpose-built for achieving industrial peace. The traditional system of conciliation and arbitration prioritised collective dispute resolution at the expense of individual dispute resolution as the latter was seen as an insufficient threat to industrial stability. Yet, this did not dissuade the Labor Government from using the AIRC to adjudicate unfair dismissal disputes even though this now required the recognition of individuals as legitimate participants in the conciliation and arbitration process. The long-term significance of the decision to use the AIRC as the venue for unfair dismissal dispute resolution was that this embedded the new right of individuals to not be unfairly dismissed in a body of industrial relations jurisprudence that had been built over the previous century. Central to this jurisprudence was the belief that the AIRC's task was one of achieving industrial peace through a method of quantifying 'industrial fair play' in each dispute.

This meant that the federal unfair dismissal system was not adjudicating the fairness of an employee's dismissal in a vacuum or on a fresh slate as the AIRC relied upon its pre-existing methodology of industrial fairness. The application of the traditional notion of a 'fair go' to the unfair dismissal system can be seen as an attempt to advance a substantive notion of industrial justice. This normative ideal of a 'fair go' does not originate from academic theory but was first referred to in the NSW unfair dismissal jurisdiction by Justice Sheldon in the case of *Re Loty and Holloway v Australian Workers' Union* (1971) AR 95. This ideal became part of the political discourse surrounding unfair dismissal law when it was used by the Liberal-National

Coalition to critique the enactment of unfair dismissal law in 1993. This phrase of ‘a fair go all round’ was then inserted by the Coalition Government in 1996 into the unfair dismissal legislation.⁴²⁵ Central to the idea of industrial fairness developed at the judicial level by the Commission is an explicit recognition of the power imbalance in the employment relationship and that managerial prerogative is counterbalanced by the duty of employers to manage fairly. When applied to the unfair dismissal jurisdiction, this recognition necessitates scrutiny of an employer’s decision to dismiss according to whether the employee’s dismissal was merited by their behaviour, performance or conduct in the workplace. Because of its long history of intervening in collective disputes, the Commission, once it had been accorded jurisdiction over unfair dismissal, had no hesitation in drawing limits upon the employer’s right to dismiss employees according to the dictates of industrial justice. In an early case it was established that the notion of industrial justice is seen as a way of guaranteeing the employee’s security or safety in the workplace by ensuring that a reason for termination be ‘sound, defensible or well-founded’ rather than ‘capricious, fanciful, spiteful or prejudiced’.⁴²⁶ In 1996 this notion of industrial fairness was explicitly recognised as a guiding principle for the AIRC to follow in determining unfair dismissal remedies with the insertion of the phrase a ‘fair go all round’ into the Workplace Relations Act 1996 (Cth).⁴²⁷ The notion of ‘a fair go’ has also been relied

⁴²⁵ The Workplace Relations Act 1996 (Cth) section 170CA(2).

⁴²⁶ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371.

⁴²⁷ s 170CA(2).

upon by the Commission to reject the argument that the standard required of a business's dismissal processes should be limited because a business is small in scope:

While the significance of the absence of the human resource management specialists or expertise in an undertaking in relation to the procedures for effecting termination of employment are reasonably evident, the same cannot be said of the size of the employee's undertaking in relation to such procedures. Employers who are about to lose their employment are entitled to expect a fair go, regardless of the size of the employer's undertaking.⁴²⁸

The notion of industrial justice that was achieved under Australia's federal unfair dismissal system proceeded from an assumption that protection of job security is necessary due to the investment of human capital that employees make in the enterprises that employ them and to ensure that employees are treated fairly and with dignity in the workplace. This principle of justice in dismissal is closely interwoven with, and influenced by, the pre-existing notions of industrial fairness and industrial peace. Thus, in the Australian context, while industrial justice in dismissal is primarily about achieving universal access to the dismissal system, it also draws upon the notion of industrial fair play and chooses not to eschew the traditional reliance upon the conciliation and arbitration mechanism to achieve this. This results in the interesting Australian development of relying upon the collective mechanism of conciliation and arbitration to provide an individual statutory remedy for unfair dismissal.

⁴²⁸ *Pergaminos v Thian Pty Ltd t/as Glenhuntly Terrace*, Print 920123, 16 July 2002, 10.

Section Six

Is there a functional equivalent in English law of ‘a fair go all round’?

Above I have talked of a ‘uniquely Australian phenomenon of ‘a fair go all round’. Yet Zweigert and Kotz talk of a basic rule of comparative law: that ‘different legal systems give the same or very similar solutions, even as to detail, to the same problems of life, despite the great differences in their historical development, conceptual structure, and style of operation’.⁴²⁹ A question I wish to explore here is whether the influence of the Australian notion of ‘a fair go all round’ can be seen as functionally equivalent in influence to the British notion of ‘mutual trust and confidence’.

‘Mutual trust and confidence’ has been expressed in British case law as an implied duty of the employment contract requiring that the employer not act in such a way as would be calculated or likely to destroy or seriously damage the relationship of trust and confidence existing between the employer and its employees.⁴³⁰ The implied term has generated a great deal of British litigation in recent years⁴³¹ and led to

⁴²⁹ Zweigert and Kotz (n 5) 39.

⁴³⁰ *Malik v BCCI* [1998] AC 20, 35 per Lord Nicholls and 45 per Lord Steyne adopting the wording of Browne-Wilkinson J in *Woods v Car Services (Peterborough) Ltd* [1981] ICR 666, 670 (which was also approved by the British Court of Appeal in *Lewis v Motorworld Garages Ltd* [1985] IRLR 465. See also: The Honourable Mr Justice Lindsay, ‘The Implied Term of Trust and Confidence’ (2001) 30 ILJ1.

⁴³¹ For a discussion of the case law, much of which have been grounded in constructive dismissal claims, see: Mark Freedland, *The Personal Employment Contract* (OUP, 2003) 154-7.

significant academic discussion over its breadth and significance.⁴³² My concern here is not to revisit these debates but merely to identify the existence of this British jurisprudence and to question whether the implied duty of mutual trust and confidence in British labour law is equivalent to the Australian jurisprudence on a ‘fair go all round’ in Australian labour law. There are similarities between the two notions: they both impose obligations upon the employer to treat the employee fairly, they both arise out of the employment relationship and they both have been interpreted by the courts or tribunals as acting as a deterrent on capricious behaviour by the employer wantonly disregarding the well-being of the employee.

Nonetheless, in my view, important differences arise when comparing the two terms. The first of which is that mutual trust and confidence is a positive law notion rather than a normative idea. When the courts evolved mutual trust and confidence as an implied term of the contract of employment, they regard this notion as emerging from within the common law. In contrast, the notion of ‘a fair go all round’ is a normative idea imposed from outside upon the positive law of unfair dismissal. Whilst the two notions produce some similar outcomes in the positive law in that they require a regard for fairness and mutuality of interests, they derive from different levels of thinking.

⁴³² Douglas Brodie, ‘Mutual Trust and the values of the Employment Contract’ (2001) 30 ILJ 84; L Barmes, ‘The Continuing Conceptual Crisis in the Common Law of the Contract of Employment’ (2004) 67 MLR 435; David Cabrelli, ‘The Implied Duty of Mutual Trust and Confidence: An Emerging Overarching Principle?’ (2005) 34 ILJ 284.

A second difference between the two concepts is in how they substantively operate. Inherent in the notion of ‘a fair go all round’ is an idea of the employee as the ‘underdog’ which I do not think emerges in the British notion of ‘mutual trust and confidence’. In the entry on the ‘Fair go’ in ‘The Oxford Companion to Australian History’, there is reference to the 1964 writings of influential Australian public intellectual and journalist David Horne that “‘Fair-goes”, are not only for oneself, but for underdogs’ and a recognition that the concept might be used to justify assistance for less gifted students or pensions for the old.⁴³³ The term is identified as originating from the British expression ‘a fair show’ and to give a person a ‘fair go’ was to give them a reasonable opportunity or to ensure that the rules of competition were fair to all. In his seminal work Hancock identified it as ‘the popular refrain of Australian democracy, repeated incessantly in pleas and judicial decisions, in statutes, Parliamentary debates, trade union conferences and platform orations’.⁴³⁴ The term was introduced into the specific context of Australian arbitration and conciliation by Justice Higgins who sought to identify what was ‘fair and reasonable’ in determining wages and conditions.⁴³⁵ This notion of the employee as the ‘underdog’ is relevant to the development of unfair dismissal law as it has led to a recognition that the employee needs to be protected from arbitrary dismissal and that part of according the employee ‘a fair go’ in dismissal is that accepting that the employee is in a vulnerable, perhaps even disadvantaged, position during the dismissal process. The Commission has

⁴³³ Graeme Davison, ‘Fair go’ in Graeme Davison, John Hirst and Stuart Macintyre (eds), *The Oxford Companion to Australian History* (OUP, 2001).

⁴³⁴ William Hancock, *Australia* (Ernest Benn, London 1930).

⁴³⁵ Keith Hancock and Sue Richardson, ‘Economic and Social Effects’ in Joe Isaac and Stuart Macintyre (eds) *The New Province for Law and Order* (CUP, 2004) 146-147.

interpreted the notion of a 'fair go' as allowing the tribunal to scrutinise the dismissal decision in order to counter-balance the employer's managerial prerogative and assess whether the decision to fire was unjust given the subordinate status of the employee. Reflecting on the period after the Second World War, Kirby noted that the federal tribunal's role as 'the guardian of industrial equity and the ultimate enforcer of the Australian nation's commitment to a fair go in industrial relations' seemed indisputable.⁴³⁶ The application of the traditional conciliation and arbitration process to unfair dismissal disputes and the use of the traditional conciliation and arbitration tribunal as the arbiter of these disputes has led to reliance on the traditional notion of 'a fair go all round' in unfair dismissal disputes.

As a result, I think it is possible to make a tentative hypothesis that the Australian unfair dismissal system was better able to deliver fairness in substance because of the ability of the Commission to rely on the Australian labour law tradition of delivering industrial fair play or 'a fair go all round'. The British system had no such tradition to call upon in adjudicating unfair dismissal disputes as the contractual duty of 'mutual trust and confidence' is not functionally equivalent to 'a fair go all round' and encompassed no recognition of the employee-as-underdog. As a result British unfair dismissal decisions came to be based upon their perception of how a reasonable body of employers might behave, rather than how a reasonable body of employers should behave. In this way, it is possible to argue that the British unfair dismissal system was structured to be norm-reflecting rather than norm-setting.

⁴³⁶ Michael Kirby, 'Human Rights and Industrial Relations' [2002] JIR 562, 563.

However, the Australian system can perhaps be seen as better able to achieve the gradual improvement of unfair dismissal standards over time because of the emphasis upon the achievement of industrial fair play.

Section Seven

Conclusion

When unfair dismissal law was enacted in Britain and Australia, albeit at different times, it was part of a comprehensive re-ordering of labour law based on a commitment to juridification so as to provide more secure and orderly industrial relations. As part of the reform package in both jurisdictions, a broadly similar unfair dismissal law was introduced. While this seemed to diverge from the labour law traditions of Britain and Australia, the variant of industrial justice realised by each country was influenced by the tradition being overturned. In Britain this involved a voluntarist commitment to alternative dispute resolution as applicants were able to choose how to resolve their unfair dismissal dispute, although this would ultimately end up in the tribunal system. Tribunals themselves were constituted by a member of each of the industrial parties who had played a pivotal role under the traditional system of collective laissez-faire. In Australia the concept of 'a fair go all round' was used to quantify industrial fair play in unfair dismissal disputes. Moreover, the traditional processes of conciliation and arbitration which had previously been used to resolve collective disputes were now applied to the unfair dismissal jurisdiction so as to resolve individual disputes. Despite the divergent labour law traditions prior to this point, the unfair dismissal laws of Britain and Australia, albeit occurring diachronically, represent a convergence on the achievement of unfair dismissal rights for individuals. Nonetheless, the normative templates for unfair dismissal law such as

job property, a right to work or a floor of rights were not largely achieved by the unfair dismissal systems introduced in Britain and Australia. Each of these ideals required a greater realisation of the ability of an unfairly dismissed employee to return to their job should they desire, thereby guaranteeing them a stronger degree of job security. In practice, neither the British or Australian systems sufficiently prioritised the remedy of reinstatement as compensation was used as the primary remedy. In this way, a financial price was placed on unfair dismissal and this could be seen as achieving some justice for an unfairly dismissed employee, although it failed to guarantee them a more radical set of rights, such as a right to work or greater control and autonomy over their working lives.

This Part has shown how divergent legal cultures produced a convergence upon unfair dismissal law when the traditional labour law culture was seen to have broken down. The following Part explores the evolutionary dynamic of British and Australian unfair dismissal law subsequent to its introduction. The dynamic I seek to understand is the striking degree of convergence between the evolution of unfair dismissal law in Britain and Australia. Subsequent to enactment, unfair dismissal law is reformed in a broadly similar, albeit diachronic, manner across the two systems. I argue that the failure of the justice ideal in either Britain or Australia to provide unfairly dismissed employees with a more concrete set of rights – a right to job property or effective tenure except for misconduct, or to address the more fundamental problems of worker control has perhaps paved the way for unfair dismissal rights to be eroded in the future. This is discussed in Part B which seeks to identify the ways in which statutory

unfair dismissal protection for employees has been modified over time from its original anchorage in a primary concern for protecting job security to a new situation in which that is combined with an increasingly overt preoccupation with the protection of business efficiency and the control of regulatory burdens. This evolutionary dynamic of divergence giving way to convergence is revealing of a high degree of path dependency as between the unfair dismissal laws of Britain and Australia.

PART B

WHY IS THERE A CONVERGENCE IN THE REFORM OF UNFAIR DISMISSAL LAW IN BRITAIN AND AUSTRALIA?

INTRODUCTION TO PART B

Having thus described the historical contrast between British and Australian law with regards to their traditional formulae for achieving industrial peace, I proceed to consider how important that contrast has been for the development of legal protection of job security in the two systems. My argument has two parts, one that emphasises the extent of the path convergence between the two systems with regard to unfair dismissal law subsequent to its introduction; and the other that asserts that any divergence that exists in that regard, although far from negligible, is not or at least is no longer primarily explicable by reference to the presence or absence of the influence of the traditional models of guaranteeing industrial peace in each of the systems.

The traditional institutional apparatus of voluntary collective bargaining in Britain or conciliation and arbitration in Australia have been sufficiently adapted and reformed so that their original significance in ordering industrial relations has been significantly diminished. In Britain the tribunal system which had no substantial role in the traditional collective laissez-faire context is the primary mechanism by which unfair dismissal law is regulated. Other new methods for resolving unfair dismissal disputes such as pre-claim conciliation, ACAS conciliation, mediation and arbitration are also practices which have no predecessor in the traditional system. Whilst in Australia conciliation and arbitration is still the method used to resolve unfair dismissal disputes, it is the contention of the author in this Part that contemporary conciliation and arbitration now operates very differently to its traditional

manifestation. Overseen by Fair Work Australia and no longer the Australian Industrial Relations Commission, conciliation and arbitration has been emptied of its legal procedures and orientated around a new practice of 'telephone conciliations' which are the primary method relied upon for the resolution of unfair dismissal disputes.

With the overturning of Britain and Australia's divergent legal traditions, this Part explores how the phase subsequent to the introduction of unfair dismissal law is characterised by many parallels, although occurring in a different time frame. In both jurisdictions emerges a tension between the industrial justice model and a free choice model. This tension predominantly displays itself in the contestation about whether tribunals provide an adequate dispute resolution process. Those in favour of employment protection argue the merits of tribunals, whereas those in the freedom of choice camp argue that tribunal adjudication of unfair dismissal disputes is too time-consuming, expensive, encouraging of vexatious outcomes and provides a disincentive to job creation. In Britain the freedom of choice model is made manifest in the articulation of an argument of principle against unfair dismissal law under the Conservative Government (1979-1997) which transmogrifies into an argument of principle against tribunal resolution of unfair dismissal disputes under subsequent governments. In Australia those proposing that employers be free to choose whom to hire and fire emerged in the counteraction to the Industrial Relations Club occurring in the late 1980s and gaining momentum with the election of the Coalition Government in late 1995.

In both jurisdictions those advocating a freedom of choice model are successful in putting the pressure on the unfair dismissal system to facilitate the resolution of disputes by means other than tribunals. This results in longer probation periods, arbitration, reforms to conciliation, a right to accompaniment, statutory grievance procedures and restrictions on small firms. Crucially these debates interplay in similar ways across the two jurisdictions that go beyond the ebb and flow of national politics.

This results in a paradigmatic shift from unfair dismissal law embedded in an industrial justice rationale to a peeling back of the statutory superstructure of unfair dismissal law in favour of the promotion of localised dispute resolution and/or alternative dispute resolution. This is because the Conservative Government's (1979-1997) argument of principle and the Coalition Government's (1995-2007) counteraction to the IR Club have effectively influenced the agenda so that all subsequent attempts at reform are now required to be justified according to their impact upon business and the goal of job creation. There is a new movement to remove unfair dismissal law from its original anchorage in a primary concern for protecting job security to a new situation in which that is combined with an increasingly overt preoccupation with the protection of business efficiency and the control of regulatory burdens. This occurs through a new argument that the traditional conception of employee disadvantage under the contract of employment is counterbalanced by employer disadvantage from having to operate in a highly competitive globalised economy. Increasingly governments in both jurisdictions are

seeking to reform the contract of employment so as to require employers to dismiss staff according to a state-sanctioned procedure. If the employee wishes to then query the dismissal, constraints are imposed upon external adjudication, although both systems have moved to extend alternative dispute resolution in the shape of conciliation. The impact of all of this is that managerial prerogative has increasingly been reinstated in the dismissal process, albeit with fairly weak protection offered by the state by way of improving the operation of the contract of employment and encouraging conciliation (rather than tribunal resolution) to resolve disputes.

The final chapter to this Part explores this contestation of ideas fuelling the reform of unfair dismissal law in Britain and Australia. Common to both jurisdictions is a movement towards deregulating unfair dismissal law, although this occurs to varying degrees under centre-left and centre-right governments. This chapter explores how the latter's reform agenda for labour law is connected with neo-liberal ideas for how the labour market should operate. As a result, both the Conservative Government (1979-1997) in Britain and the Coalition Government (1995-2007) in Australia seek to deregulate unfair dismissal law by placing significant barriers upon those wishing to access the jurisdiction and by undermining the substantive protection afforded under the law. Whilst both governments stop short of abolishing unfair dismissal law, their conception of this law as a labour market rigidity and their preference for a free labour market, can lead us to question whether their ultimate motive is complete deregulation and a return to the common law of wrongful dismissal. It does not seem likely that this is the agenda of the New Labour Governments (1997-2010) in Britain or the Labor

Government (2007-present) in Australia as their reform ideas for unfair dismissal law focus on promoting localised and alternative dispute resolution. Whilst these centre-left governments do seek to deregulate unfair dismissal law, their philosophy seems closer to that of egalitarian liberalism. Their motive appears to be to create efficient dispute resolution and to use market institutions such as the contract of employment to achieve economic justice. By way of conclusion, whilst the underlying policy orientation of governments of either political persuasion and in both jurisdictions appears to be deregulatory, this is moderated according to the economic vision of the party in government.

CHAPTER FIVE

AUSTRALIA

Introduction

Australia's unfair dismissal law has been under constant revision since its inception in 1993. Only eight weeks after the introduction of a statutory scheme for resolving unfair dismissal disputes, and then nearly every year subsequent to this, a legislative attempt was made to reform the federal unfair dismissal system.⁴³⁷ This reveals the significant and persistent debate around the imposition of a statutory standard for fair dismissal upon employers. In each of the reform attempts, it is possible to identify the influence of employers groups in making the case for reform and the increasingly overt preoccupation of policy-makers with the protection of business efficiency and the control of regulatory burdens. This chapter seeks to examine the basis for reform to Australia's statutory unfair dismissal scheme post 1993. My argument is that this can be understood as an axiomatic resistance to the idea of appending a statutory obligation to fairly dismiss employees upon the contract of employment. From 1993 there appears to be an argument being made by the Liberal-National Coalition to peel away the statutory superstructure regulating unfair dismissal because of a belief in the illegitimacy of unfair dismissal law. More recently, this argument appears to have been accepted in part by the Labor Party with their reforms to Australian unfair dismissal law exhibiting a deregulatory mindset, although not with a view of returning to the pre-1993 situation.

⁴³⁷ Industrial Relations and Other Legislation Amendment Act 1993 (Cth); Industrial Relations Amendment Act 1994 (Cth); Workplace Relations Act 1996 (Cth); Workplace Relations Amendment Bill 1997 (Cth); Workplace Relations Amendment Bill 1997 (No.2) (Cth); Workplace Relations Amendment (Unfair Dismissals) Bill 1998 (Cth); Workplace Relations Amendment (Unfair Dismissals) Bill 1998 (No.2) (Cth); Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001 (Cth); Workplace Relations Amendment (Fair Dismissal) Bill 2002 (Cth); Workplace Relations Amendment (Work Choices) Act 2005 (Cth).

That the role and validity of unfair dismissal law continued to be politically contentious after 1993 is unsurprising given that there was no bipartisan consensus for its introduction. The case for unfair dismissal law was characterised by the Labor Government as being predicated upon international law. In introducing the Bill into the Parliament, the Federal Minister for Industrial Relations, Mr Brereton did not refer to any rationale other than giving effect to Australia's international obligations as the impetus for these provisions and a new object was added to the Act which read, 'the protection of wages and conditions of workers through awards and by ensuring that labour standards meet Australia's international obligations'.⁴³⁸ The use of this single rationale meant that unlike in Britain where the introduction of unfair dismissal laws was accompanied by discussion as to why such protection was needed to afford greater job security, in Australia this debate did not occur. Instead, the introduction of unfair dismissal law was characterised as being required because of international law, not because of a need within Australian workplaces.

Why was the introduction of unfair dismissal law so politically divisive in Australia compared with Britain? In my view a number of factors are relevant to understanding this dissonance. First, the divergent timing of legal change meant that the economic context for introducing unfair dismissal law was different. Britain in 1971 faced a very different economic climate to Australia in 1993, with the latter jurisdiction introducing unfair dismissal law subsequent to the Thatcher and Reagan

⁴³⁸ Industrial Relations Reform Act 1993 (Cth) Part 2, 4(b).

administrations abroad which had resulted in the proliferation of neo-liberal ideology amongst policy-makers. Economic rationalism exposed unfair dismissal law as interfering with the efficiency of the market mechanism.⁴³⁹ Second, the Labor Government's decision to frame the introduction of unfair dismissal law as required under international law meant that the Australian political debate hinged upon the suitability of applying international labour standards to Australia whilst the British debate was more concerned with the need to provide for job security and to prevent unofficial strikes. In Britain in the 1960s and early 1970s there was a more comprehensive reflection upon the investment that individual employees make in their job and the perceived need for the state to protect this investment from being arbitrarily taken away. In Australia the argument against unfair dismissal law was articulated by the Liberal-National Coalition on the basis that business owners invest their livelihoods in their business which was threatened by the increasing paper and compliance burden imposed by the statutory unfair dismissal system. Furthermore, in Australia the introduction of unfair dismissal laws was characterised by the Coalition as part of an agreement between the union movement and the Labor Government. During the second reading debates for the Workplace Relations Amendment (Work Choices) Bill 2005 (Cth), Prime-Minister Howard stated:

Of all the things that are contained in this legislation, none is more important than our commitment to repeal the unfair dismissal laws, which have not been part of our industrial scene since Federation; they have only been part of our industrial scene since 1994, and then only as

⁴³⁹ Richard Epstein, 'In Defense of the Contract at Will' (1984) 51 University of Chicago Law Review 947; Richard Epstein, 'The Common Law and the Labour Market' (HR Nicholls Publications, 2001) <<http://www.hrnicholls.com.au/articles/hrn-epstein.php>> accessed 18 July 2011.

a result of a secret deal made between the then Labor government and the trade union movement during the 1993 election campaign.⁴⁴⁰ The Coalition has remained consistently opposed to unfair dismissal law since its inception, never having let go of this idea of unfair dismissal law as a payback to the unions, and thus unjustified on policy grounds.

Against this backdrop of political division caused by the introduction of unfair dismissal law, this chapter seeks to examine the emergence of an argument against unfair dismissal law. This first emerged during the Coalition's time in Opposition and continued to be developed during their eleven years in Government after 1996. The ensuing Labor Government has not reverted back to the traditional justification of industrial justice for unfair dismissal regulation but has continued the deregulatory trend of the previous Government. Whilst it is possible to identify an overarching preference to return to the common law of wrongful dismissal to regulate dismissal emerging in this period, there are three distinct phases in the Coalition's reform agenda contingent upon their access to power. In the first phase between 1993 and 1996, the Coalition is in Opposition and is characterised by their unconditional disagreement with the Labor Government's plan to introduce a statutory unfair dismissal scheme. The second phase is between 1996 and 2005 where the Coalition's opposition to unfair dismissal law is tempered by their need to negotiate with the minor parties in the Senate in order to get their legislation passed. During this phase repeated attempts are made to limit the application of unfair dismissal law to small business. The third phase is between 2006 and 2007 which reveals the Coalition's intention for unfair dismissal

⁴⁴⁰ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 9 November 2005, (John Howard, Opposition Leader).

law when it holds full legislative power because of its majority in both Houses of Parliament. This phase sees jurisdictional bars placed on unfair dismissal law that effectively removes unfair dismissal rights for the majority of Australian employees. In all three phrases it is possible to identify a Coalition argument against unfair dismissal law. They were opposed to the enactment of this law and whilst they stop short of deregulating it completely, their intention does appear to be to ultimately seek a return to the common law of wrongful dismissal. The basis of the Coalition's desire to return to the common law of wrongful dismissal is in their belief that the contract of employment provides a balanced system of regulation for disputes between employees and employers. In their view, the doctrinal remedies for wrongful termination provided under the contract of employment and enforced by the common law are sufficient.

The key elements of the Coalition's argument in favour of the employment contract are threefold: first, outright opposition to the idea of a specialist labour court to regulate unfair dismissal disputes and a desire to see disputes about dismissal resolved in the common law courts; second, an unmitigated belief in small business exceptionalism on the basis that the employment contract is an equal agreement between an employee and a small business owner; and third, an ambition for direct relationships to exist between employers and employees without statutory requirements appended onto the employment contract. Cumulatively, these arguments reveal the Coalition Government's tendency to peel away the statutory superstructure and return to the common law of wrongful dismissal.

The election of Labor to Government in 2007 does not result in a revival of the industrial justice rationale for a statutory unfair dismissal scheme. Instead Labor continues the deregulatory policies of the previous Government although this is not with the explicit intention of bringing about a return to the common law of wrongful dismissal. Unlike the previous Coalition Government, the Labor Government does not view the contract of employment as a balanced system of regulation because of their belief in the unequal power relationship between employers and employees. Nonetheless, the Labor Government after 2007 does seek to deregulate the statutory unfair dismissal scheme which has the effect of increasing managerial prerogative and restoring freedom of contract to some extent. The most striking feature of the contemporary Australian regulatory landscape subsequent to the Coalition Government is the tendency towards localised dispute resolution of unfair dismissal disputes. Upon decisively winning the Federal Election in 2007 the Labor Government sought to reverse the Coalition Government's operational reasons exemption and the 100 Employee Rule. These jurisdictional bars were removed and access to the unfair dismissal system was reinstated for the majority of Australian employees. Despite this, Labor's concern is not with delivering industrial justice through the unfair dismissal system. Their rhetoric and policy outcomes post 2007 have centred upon resolving disputes within the workplace and without recourse to tribunals. In many ways this represents a reformulation by Labor of its original vision for unfair dismissal law as a vehicle for achieving job security according to international norms. Labor in 2007, whilst still articulating a positive view of unfair dismissal law, was more prepared to canvas reforms that would increase managerial prerogative and allow an employer's

decision to dismiss staff to be free from independent scrutiny or if scrutinised, to be tested according to a lower standard of procedural and substantive fairness. An alternative way of conceptualising the Labor Government's re-regulation of the statutory unfair dismissal scheme is that it is a deregulatory approach that amounts to a return to a peeling back of the statutory superstructure governing unfair dismissals.

The key elements of Labor's platform for localised dispute resolution built upon the previous Government's argument for a peeling away of the statutory superstructure. Where the Coalition Government argued that specialist labour courts have no place in the employment relation, the subsequent Labor Government implicitly accepted this argument with their replacement of the AIRC with Fair Work Australia and their dilution of conciliation as a method for testing the fairness of an employee's dismissal. This is coupled with a continuation of the Coalition Government's efforts to dissuade parties from resorting to arbitration to resolve their unfair dismissal dispute. Where the Coalition Government argued that small businesses should be exempt from the unfair dismissal system altogether because of the sufficiency of the contract of employment in regulating interactions between a small business owner and an employee, the Labor Government has echoed this philosophy in their creation of a Small Business Fair Dismissal Code, which if followed, allows small businesses to be exempt from the unfair dismissal system. Again, this reflects a Labor willingness to deregulate unfair dismissal law and return to the contract of employment for employees of small businesses, albeit with a very limited form of statutory protection. Finally, where the Coalition Government argued

that unfair dismissal protection was an unjustified 'statutory on-cost' to the contract of employment, the Labor Government has accepted some of this argument as to the burdensome nature of unfair dismissal law. Accordingly, Labor has sought to allow employees a support person during discussions with their employer about dismissal in return for a dilution of unfair dismissal standards overall. Thus, whilst Labor has undoubtedly reinstated unfair dismissal rights for the majority of Australian employees and reversed some of the more radical oscillations in unfair dismissal policy of the previous Government, many of their ideas represent a continuation, rather than a departure, from the previous Coalition Government's desire to deregulate unfair dismissal law.

Section One

Opposition to the Idea of Specialist Labour Courts

A key aspect of the Coalition Government's argument against unfair dismissal law was their desire to return to the common law to regulate disputes between employers and employees. They were opposed to the idea of a specialist labour court because in their view, the employment contract was analogous to any other contract regulated under the common law. In 1993 the Labor Government established the Industrial Relations Court to deal with unfair dismissal applications made by individual employees and disputes between unions and an employer about secondary boycotts. Inherent in this

notion of a specialist labour court was Labor's belief that the common law courts could not adequately deal with employment disputes because of the special nature of the contract of employment and the perceived power imbalance that a specialist labour court would help alleviate.

From the IRC's inception the Liberal Party opposed the idea of a specialist labour court and advocated a return to the common law courts. The creation of the IRC under the Labor Government's 1993 Act had long been in the pipeline. In 1987 the Hawke Government proposed the creation of a separate labour court through the Industrial Relations Bill 1987 and the Industrial Relations (Consequential Provisions) Bill 1987. The most controversial aspect of this legislation was the transfer of jurisdiction from the Industrial Registrar of the Federal Court to a new Labour Court but the dissolution of parliament in July 1987 meant these Bills never became law. Nonetheless, in 1993 the IRC was created but many were opposed to its existence with Liberal and National Members of Parliament arguing that it was another example of the Industrial Relations Club. They argued that the primary motivation of Labor in establishing a specialist labour court was to stack the court with judges close to their political persuasion. The Liberal Party drew upon the notion of an 'Industrial Relations Club' to argue that the IRC would be a 'club court'. The term 'Industrial Relations Club' was coined by Gerald Henderson in 1983, a prominent Australian journalist and Executive Director of the Sydney Institute, an influential policy think-tank.⁴⁴¹ In his 1983 essay entitled 'The Industrial Relations Club', Henderson described what he

⁴⁴¹ Gerard Henderson, 'Industrial Relations Club' *Quadrant* (September 1983).

called the rituals of a self-serving club comprised of key unionists, Labor Party figures and others who fixed industrial relations outcomes with an ethos of complacency and self-congratulation. He opposed its reliance on 'consensus', 'negotiations' and 'doing deals ... to secure industrial harmony' because 'economic realities take what is very much second place, if a ... [decision need to be] made according to tough-minded economic criteria'.⁴⁴²

Henderson's conception of an Industrial Relations Club was very significant to solidifying the Coalition Government's opposition to the idea of a specialist labour court. Henderson's key premise of an industrial relations system predicated on special deals done behind closed doors was championed by Liberal and National members of parliament and figured prominently in the debates over the unfair dismissal laws throughout the 1990s. In particular, the phrase was applied by Mr Howard, who was the key driver of the Coalition's industrial relations policy during their time in Opposition:

The Prime Minister is not doing the bidding of the average Australian family in this dispute. He is not doing the bidding of the tourist industry. He is not doing the bidding of the airlines. *He is doing the bidding of the mandarins of the industrial relations club.* That is why he is taking the attitude that he is taking. (Emphasis added)⁴⁴³

The Second Reading debates about the establishment of the Industrial Relations Court illustrate the significant opposition of the Liberal Party that 'specialist courts are always a little suspect because the concern is they will do special deals for special

⁴⁴² Henderson (n 72) 23-24 and 29.

⁴⁴³ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 5 September 1989 (John Howard, Member of House of Representatives).

groups'.⁴⁴⁴ Their view was that the common law courts should be used to regulate employment disputes and that the Government should not append statutory requirements to the employment contract. Mr Peter Costello of the Liberal Party, who later became the Federal Treasurer for the Coalition Government argued:

Normal courts tend to dispense equal justice. So we have a proposal to set up a whole new court, a whole new regime – the industrial relations court – a special court for special justice for special mates. We do not have a special court for corporations. We do not have a special court for men. We do not have a special court for women...but we have a special court for trade unions to make sure that people are appointed because of their understanding of their special problems.⁴⁴⁵

In addition to their opposition to the IRC's role in resolving unfair dismissal disputes, the Coalition was particularly against the IRC's involvement in collective disputes about secondary boycotts. Prior to 1993, disputes about secondary boycotts were regulated by sections 45D and 45E of the Trade Practices Act 1975 and an employer could bring an action under these provisions in the common law courts for an injunction preventing a union from engaging in a secondary boycott. In 1993 the rules about secondary boycotts were transferred from the Trade Practices Act 1975 to the Industrial Relations Act 1993 with the powers of adjudication given to the IRC. This was accompanied by a new provision mandating a 72 hour conciliation period once the secondary boycott had been initiated before the IRC could get involved in resolving the dispute. In the Coalition's view the replacement of the common law jurisdiction with the special jurisdiction of the IRC was directly motivated by the Labor Party's

⁴⁴⁴ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 17 November 1993 (John Howard, Opposition Leader).

⁴⁴⁵ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 22 November 1993 (Peter Costello, Shadow Treasurer).

desire to allow trade unions engaging in secondary boycotts to achieve their industrial goals by delaying the legal consequences. As Mr Peter Costello stated during the second reading debates:

The ordinary law of tort is a civil law that applies to citizens equally...but a special provision will now say that it does not apply to trade unions. If we happen to be mates with this government, we get a legal holiday. Even if we get through the secondary boycotts and the legal holiday, under this proposal we are not allowed to take trade unions to a normal court.⁴⁴⁶

The establishment of the IRC was antithetical to the Coalition's belief in the common law courts as the appropriate place for the adjudication of disputes about the contract of employment. Their argument in this regard was not limited to repudiating the IRC's role in relation to unfair dismissal disputes but also with regards to the adjudication of collective disputes about secondary boycotts. In both individual and collective disputes, the Coalition was of the view that a specialist labour court was unnecessary as these disputes should be resolved in the ordinary common law courts.

Nonetheless, the Coalition's support for the common law to regulate disputes in the workplace was fiercely contested by the Labor Party. Their view was that relying upon the common law courts to enforce rights under the contract of employment placed the achievement of industrial justice beyond the capability of the individual. Labor argued that 'when individual workers are forced to go to the [common law] courts, how many of them can afford to pay the extraordinary fees which are levied on them when they go through the formal legal process? What we

⁴⁴⁶ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 22 November 1993 (Peter Costello, Shadow Treasurer).

have under challenge is a total attack on the cost of industrial justice, placing it beyond the reach of individual workers'.⁴⁴⁷

Upon winning the federal election in 1996, the Coalition Government did not abolish the statutory system of unfair dismissal and reinstate the law of wrongful dismissal enforced by the common law courts. Despite advocating a move away from compulsory conciliation and arbitration more generally,⁴⁴⁸ the Coalition Government abolished the IRC and anchored the unfair dismissal system solely in the traditional processes of conciliation and arbitration, with the AIRC as the adjudicator of unfair dismissal disputes. This occurred in 1996 and the Coalition Government never removed the sole jurisdiction of the AIRC over unfair dismissal during their time in office. This leads to the question of why unfair dismissal law goes against the Coalition Government's dominant policy of dismantling conciliation and arbitration in this period.

A primary reason for extending the role of conciliation and arbitration was the Coalition Government's belief that the unfair dismissal system introduced by Labor was 'far too detailed, too prescriptive and too legalistic and hence a disincentive to employment'.⁴⁴⁹ The abolition of the IRC was aimed to replace a legalistic

⁴⁴⁷ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 29 September 1999, (Mr Kevin Rudd, Member of the House of Representatives).

⁴⁴⁸ Mr Howard, *Radio Interview: PM*, Australian Broadcasting Corporation, quoted in David Peetz, 'Coming Soon to a Workplace Near You – the New Industrial Relations Revolution' (2005) 31 *Australian Bulletin of Labour* 90, 91; Peter Reith, Shadow Minister for Industrial Relations, 'Better Pay for Better Work' (Coalition Industrial Relations Policy, 1996) 1.

⁴⁴⁹ Reith (n 448) 1.

determination of unfair dismissal applications with the more common sense approach of the AIRC. The Coalition Government imposed the AIRC's longstanding arbitral principle of a 'fair go all round' into the jurisdiction of unfair dismissal. In determining whether a dismissal is harsh, unjust or unreasonable. Section 170CA(2) contained an express statement of legislative purpose as being to provide a system to ensure a 'fair go all around' to the employer and the employee. This section noted the origins of this arbitral principle as stemming from Justice Sheldon in *Re Loty and Holloway v Australian Workers' Union* (1971) AR 95. The use of this specific phrase in the Act arose out of significant debate over the predecessor Act which did not include this phrase. In the Second Reading debates over the 1995 amendments, Mr Reith referred to the judgment of Justice Gray of the IRC and stated:

They (Labor's unfair dismissal laws) proved to be totally biased against employers. Honourable members do not have to accept my view of that. Justice Gray, in one of the very many court cases we have had on these provisions, said, "The former South Australian and the present State Act, like their counterpart in New South Wales, operate in the realm of the 'fair go all round'...This is not a realm that this Court inhabits. The provisions of division 3 of part VIA of the federal Act are not directed to achieving some balance between the interests of employers and employees in particular cases. They constitute a charter of rights for employees. They are directed towards the protection of the existing jobs of employees."⁴⁵⁰

In replacing the IRC's role in adjudicating unfair dismissal applications with the AIRC, the Coalition Government chose to eschew the legalism that was perceived to be associated with the IRC's jurisdiction.

⁴⁵⁰ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 30 August 1995 (Mr Peter Reith, Minister for Workplace Relations).

The Coalition Government's preference for conciliation and arbitration of unfair dismissals was perhaps motivated by employer concerns that the IRC accorded too much importance to procedural fairness. Under the predecessor Act a failure to provide due process could singlehandedly lead to a finding of unfair dismissal but this was heavily criticised by the Coalition when they were in Opposition. In debating the Labor Government's 1995 amendments the Opposition repeatedly referred to cases where the IRC had overturned a dismissal that was not procedurally fair but in their view seemed to fly in the face of common sense:

A worker in a funeral parlour was dismissed for cremating the wrong body and then awarded \$8000 as compensation....There was a company that had a crackdown on people who were nicking stuff from work. One bloke was actually caught red-handed nicking stuff from work whilst the company had a campaign against pilfering. That guy was compensated and reinstated. In another case, the court found an employee's dismissal had been unfair even though his employer had given him three written warnings about unsatisfactory performance...in another case a manager was dismissed because of a \$300 000 business deficit. He was reinstated because the deficit was not considered by the court to be conclusive evidence of a downturn in business. \$300 000 in the red and that is not enough to prove a downturn in the business.⁴⁵¹

Consequently, the Coalition Government's reform package regulating termination of employment sought to dilute the role of procedural fairness in determining whether a dismissal was unfair. Under section 170CG(3) the AIRC was now required to take into account the following factors in order to determine whether an unfair dismissal took place:

- a) Whether there was a valid reason for the termination relating to the capacity or conduct of the employee or to the operational requirements of the employer's undertaking, establishment or service; and

⁴⁵¹ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 30 August 1995 (Mr Peter Reith, Minister for Workplace Relations).

- b) Whether the employee was notified of the reason; and
- c) Whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and
- d) If the termination related to unsatisfactory performance by the employee – whether the employee had been warned about that unsatisfactory performance; and
- e) Any other matters that the Commission considers relevant.⁴⁵²

Whilst these factors all appeared individually in the 1993 Act either expressly or by implication, the 1996 Act rearranged these matters as indicia under a single test – was the dismissal harsh, unjust or unreasonable? A failure by an employer to fulfil any one (or more) of the factors in section 170CE (1) (a)-(e) did not necessarily give rise to a contravention of the Act as procedural fairness was only one consideration. The Explanatory Memorandum to the Bill explained that the intention was that undue weight would not be given to procedural defects in termination.⁴⁵³ The Government's reduction in the role of procedural fairness under the 1996 Act by making it one aspect of a multi-factor test is consistent with their decision to anchor the unfair dismissal system in the AIRC. Unlike the IRC, the AIRC is not constituted by legally qualified judges but is comprised of members with industrial relations expertise. This key difference has led to the AIRC's approach being less concerned with procedural fairness and with more regard to the particular dynamics of the employment relationship.

The Government's sole reliance on the conciliation and arbitration machinery of the AIRC by abolishing the IRC was also accompanied by a desire to discourage

⁴⁵² Workplace Relations Act 1996 (Cth) s 170CG(3).

⁴⁵³ Workplace Relations and Other Legislation Amendment Bill Explanatory Memorandum, para 7.44.

disputes proceeding to arbitration. Whilst, the first step for the AIRC was still to conciliate the dispute, if this failed, the AIRC was required to issue a certificate stating that it was satisfied that all reasonable attempts to settle the matter have been or were likely to be unsuccessful and was then required to indicate the Commission's assessment of the merits of the application.⁴⁵⁴ This new provision was aimed to help the AIRC make a costs order against an applicant who elects to proceed to arbitration despite the dubious merits of their case. Once a certificate had been issued it was up to the applicant to determine their next move within the strict time frame of 7 days – either to drop their application, or proceed to the AIRC's arbitration wing (or in the case of unlawful termination to a court). Arguably, 7 days was not a long time for an applicant to consider their options after receiving legal advice, especially given the complicated nature of section 170CF(2).

Perhaps a final reason for the Coalition Government's willingness to rely upon conciliation and arbitration of unfair dismissal applications, despite their policy of dismantling conciliation and arbitration more generally, is because the unfair dismissal system involves the determination of individual rights. Prior to the 1996 election, the Coalition's industrial relations policy 'Better Pay for Better Work' outlined the need for direct relations between employer and employee without the 'uninvited intervention' of trade unions.⁴⁵⁵ This continued to be the focus of the Coalition Government throughout their time in office as the Work Choices Act provided strict

⁴⁵⁴ Section 170 CF(2).

⁴⁵⁵ Reith (n 448) 1.

controls over union activity which was intended to address ‘a system where third parties of all stripes can insert themselves too easily into workplace processes to the detriment of cooperation between employers and employees.’⁴⁵⁶ The traditional system of conciliation and arbitration was used to resolve collective disputes and the determination of these disputes saw the AIRC automatically recognise trade unions. In contrast, the unfair dismissal system is concerned with providing individuals with a statutory remedy and the use of conciliation and arbitration in this system does not require a recognition or encouragement of trade unionism. Perhaps this is a key factor why conciliation and arbitration was permitted by the Government in the unfair dismissal system but was marginalised in all its policies regarding collective wage determination and collective dispute resolution.

The question remains as to whether the Coalition Government’s reliance on conciliation and arbitration to resolve unfair dismissal disputes reveals a preference for the contract of employment to regulate relations between employers and employees. I would argue that the abolition of the IRC illustrates that the idea of a specialist labour court was antithetical to the Coalition Government. Their preference was for the common law courts to resolve employment disputes. However, faced with a hostile Senate for most of its years in Government meant there was no possibility of returning to the common law of wrongful dismissal until 2006 when it had a majority in both Houses of Parliament. Prior to this the Senate was very reluctant to curtail the unfair

⁴⁵⁶John Howard, ‘Workplace Reform: The Next Logical Step’ (Address to the Sydney Institute, Four Seasons Hotel, Sydney, 2005) <<http://www.pm.gov.au/media/Speech/2005/speech1455.cfm>> accessed 13 April 2007.

dismissal laws and was only willing to canvas minor changes to the jurisdiction such as watering down the procedural fairness test and introducing filing fees, time limits and disincentives for cases to proceed to arbitration. The minor parties in the Senate were unwilling to acquiesce to a more radical set of reforms such as abolishing unfair dismissal rights or removing these rights for the employees of small business. When the Coalition Government finally possessed a majority in both Houses of Parliament they removed the unfair dismissal rights of the majority of Australian workers. Although they stopped short of abolition of the unfair dismissal system altogether, the Government's opposition to the idea of a specialist labour court and their preference for the common law courts reveals the Coalition's tendency to peel away the statutory superstructure and return to the common law of wrongful dismissal.

Upon its decisive victory in the federal election in 2007, the Labor Government did not seek to recreate the Industrial Relations Court. Instead, Labor's policy was to resolve unfair dismissal disputes at the conciliation stage so as to eliminate the need for dispute resolution via a labour court. Whilst conciliation has always been a compulsory precursor to arbitration in the Australian unfair dismissal system, the recent introduction of telephone conciliation is intended to empty the conciliation process of legal rules of procedure, formal submissions and lengthy proceedings. This dilution of Australia's traditional conciliation process and the emphasis on resolving disputes prior to arbitration evinces a Labor Government objective of reinstating managerial prerogative to some extent as the opportunity for independent scrutiny of an employer's decision to dismiss is now more limited. Labor's goal is not explicitly

about returning to the common law of wrongful dismissal but rather about scaling back the statutory superstructure.

Labor's establishment of conciliation by telephone eschews Australia's one hundred year model of face-to-face conciliation carried out by a member of a labour court. Although the name of this labour court has changed over the past century,⁴⁵⁷ the essence of the conciliation process has remained the same. The formality and legal nature of Australia's traditional conciliation process is a hangover from the early days of conciliation being carried out by the Conciliation and Arbitration Court. As it evolved, the conciliator was always a member of the Commission, the parties stood when the Commissioner entered the room, there were formal submissions and statements and the conciliation took place at the labour court's headquarters. The parties were compelled to attend the conciliation and only if it failed, would the parties proceed to arbitration, which is when the Commissioner made a determination that was legally binding. These features of the traditional conciliation process, used between 1901 and 1993 to determine collective disputes about wages and conditions, were applied to the resolution of unfair dismissal disputes from 1993 until 2009. In the traditional process, the objective of conciliation was to encourage the parties to reach agreement with the spectre of arbitration used to motivate settlement. As Justice Henry Bourne Higgins stated in his succinct summary of the Commission's role:

But it ought to be more generally understood that the Court has no power to award, to make a compulsory award, except so far as it cannot secure agreement between the contending parties. Its first duty is to try

⁴⁵⁷ From the Conciliation and Arbitration Court, to the Conciliation and Arbitration Commission, to the Australian Industrial Relations Commission and now Fair Work Australia.

to conciliate, to get an agreement... But without the power to award in the final resort, there often could be no agreement procured. A few unreasonable employers could hold up a fair settlement, could indeed hold up the whole industry. ... The ideal of the Court is to secure regulations such as would be fitting for a fair collective agreement; *and the power to award is held by the Court in reserve, as a whip over a horse.* (Emphasis added)⁴⁵⁸

The move to carry out conciliations by telephone subverts the neutrality and independence achieved by the traditional process, begging the question: is the first step in the new unfair dismissal system really “conciliation” at all? The conciliation is no longer carried out by a member of the Commission who has security of tenure and who has been appointed because of his or her distinguished career in industrial relations. Instead, Fair Work Australia has appointed 23 conciliators who are lay professionals experienced in dispute resolution. Unlike an independent judiciary that is not susceptible to performance management, the conciliators have targets as to the number of conciliations they are required to carry out each week and as to how long these should take. By Fair Work Australia’s own admission, the conciliator’s role is an activist and interventionist one, aimed at finding a resolution to the dispute between the two parties.⁴⁵⁹ Fair Work Australia believes that it has been largely successful in resolving unfair dismissal applications in a ‘timely, informal, effective and efficient manner’ with 9,369 applications out of a total 11, 116 applications being finalized

⁴⁵⁸ HB Higgins, ‘Industrial Arbitration’, an address delivered in the Chapter House of St Paul’s Cathedral, Melbourne on 22nd March 1926, and reprinted in (2001) 27 Australian Bulletin of Labour 177, 187.

⁴⁵⁹ Jennifer Acton, ‘Where have all the cases gone? Voluntary resolution of unfair dismissal claims’ (ALLA National Conference, Adelaide, November 2010).

during the financial year, and only 87 applications (less than 1%) requiring determination by Fair Work Australia as to their merits.⁴⁶⁰

A key difference between the use of Fair Work Australia members and lay conciliators to resolve unfair dismissal disputes is that the latter are not steeped in the Commission's tradition of ensuring a balance of the interests of the employer and employee. Through a century of conciliation and arbitration, the Australian Commission developed an arbitral principle which governed its decision-making. This principle recognised the inherent power imbalance in the employment relationship and mandated that employees need to be protected from unchecked management power: 'managerial prerogative is not a sword that can be wielded in wanton disregard of the industrial consequences nor is it a shield to hide behind. An employer has a responsibility to manage fairly'.⁴⁶¹ When the traditional conciliation mechanism was applied to unfair dismissal disputes after 1993, this arbitral principle and the Commission's century-long experience of judicial decision making in industrial relations was applied to determining the fairness of an employee's dismissal. This important legacy has been lost in the move to telephone conciliations.

Whilst telephone conciliation has been undeniably efficacious in resolving unfair dismissal disputes and reducing the cost to Fair Work Australia and the parties of the dispute proceeding to arbitration, there are doubts as to its use in protecting job

⁴⁶⁰ *ibid.*

⁴⁶¹ *FEDFA v Robe River Iron Associates* (1987) AILR 131.

security. The duty of the conciliation officer to achieve settlement over the phone to avoid the case going to arbitration prevents the conciliator from adopting a truly impartial stance. There is significant pressure upon the conciliation officer to negotiate an agreement between the parties as the conciliator is required to conduct up to three conciliations per day. This target allows each conciliation to last for about one hour and a half. Given that over the phone there is more opportunity for misunderstanding to occur and often more time spent on explaining is required, a conciliator may struggle to uncover the truth of a situation in that timeframe. In this context, it is fairly likely that justice is not achieved for either the employer or the employee. In a case where an employee has been unfairly dismissed, the conciliator is likely to encourage the employee to accept the employer's offer or in the case of a fairly vexatious or trivial claim, an employer may be persuaded to offer a minimal amount to stop the complaint proceeding to arbitration. Despite there being no powers to compel the parties to reach agreement, a Fair Work Australia conciliator is still able to use all his or her powers of persuasion, knowledge and experience to encourage settlement. This is a considerable advantage considering this is likely to be the first unfair dismissal conciliation an employee has been involved in, and one of only a handful that an employer has participated in.

The move to resolve unfair dismissal disputes via telephone conciliation represents the prioritisation of resolving disputes quickly over resolving disputes fairly. Collins, writing about conciliation in the British context, articulates a drawback

of the conciliation process in its ability to deliver procedural justice.⁴⁶² He argues that during conciliation the primary concern of the conciliator is to encourage the parties to resolve the substantive quality of the case which usually results in the employer putting down a modest sum which reflects the merits of the case but does not account for breach of the standards of a fair procedure.⁴⁶³ This observation is even more pertinent in the Australian context of telephone conciliations where the time pressure to resolve the dispute over the phone affords less time to draw attention to the potential procedural defects of the employee's dismissal. Bedfore and Creyke note that many tribunals must carry out their functions in a way which is 'fair, just, economical, informal and quick'. I would argue that telephone conciliations prioritise the latter three of these objectives at the expense of the former.⁴⁶⁴ Whilst the Labor Government has not sought to replace the statutory unfair dismissal system with the common law of wrongful dismissal, it is arguable that their decision to dilute the conciliation process and emphasise the importance of localised dispute resolution reveals a desire to move away from a specialist labour court to regulate the employment relationship. The emphasis on resolving disputes prior to arbitration evinces a Labor Government objective of reinstating managerial prerogative to some extent as the opportunity for independent scrutiny of an employer's decision to dismiss is now more limited.

⁴⁶² Collins (n 198) 137-139.

⁴⁶³ Collins (n 198) 138.

⁴⁶⁴ N Bredford and Robin Creyke, *Inquisitorial Processes in Australian Tribunals* (Australian Institute of Judicial Administration, 2006) 33.

Section Two

Small Business Exceptionalism as a Challenge to Unfair Dismissal Law

That the Coalition Government desired to exempt small business from unfair dismissal law is clear. Eleven unsuccessful legislative attempts were made between 1996 and 2005 to remove small business from the unfair dismissal system on the basis that these businesses do not have specialist human resources personnel.⁴⁶⁵ Unfair dismissal laws were viewed as an additional regulatory burden that should not fall upon small business because the immense pressure of running a small business meant that small business owners did not possess the time or resources to acquaint themselves on how to comply with statutory dismissal standards. During its fourth term, the Coalition Government was finally successful in its intention to exempt small business from the unfair dismissal system. Its Workplace Relations Amendment Act 2005 (Cth) which came into effect in 2006 removed businesses with less than 100 employees from the unfair dismissal jurisdiction.⁴⁶⁶ Prior to this reform the only threshold numbers that had been discussed by the Government were 15 or 20. The increased threshold was described as ‘the single biggest surprise’ of the Work Choices reforms.⁴⁶⁷ Nevertheless, even leaving aside the well-trodden arguments about the adequacy of

⁴⁶⁵ These attempts to make amendments included two via regulations, both of which were unsuccessful and ten Bills, nine of which were unsuccessful while the tenth Bill [which ultimately became Work Choices] was successful: Steve O’Neill, ‘Unfair Dismissal and the Small Business Exemption’ (Parliament of Australian Library, March 2008) <http://www.aph.gov.au/library/pubs/BN/2007-08/UnfairDismissal.htm#_ftn15> Accessed 10 June 2010.

⁴⁶⁶ Workplace Relations Amendment Act 2005 (Cth) (Hereafter ‘Work Choices’).

⁴⁶⁷ Peetz (n 448).

this numerical figure in defining a small business, my concern here is whether the Coalition Government's argument about small business exceptionalism exhibits a desire to return to a reliance on contract law to regulate dismissal. From the Coalition Government's perspective the case of the small business owner entering into an employment contract with each of his or her employees makes it easier to identify a more equal power relation, thereby undermining the argument that the employment contract is a special type of contract that requires statutory intervention to remedy the disadvantaged position of the employee. The Government advocated a return to the common law of wrongful dismissal as this provided both employers and employees with rights under the contract of employment. Thus, it is possible to identify a contractual philosophy underpinning the Coalition Government's ideological preoccupation with inoculating small business from the unfair dismissal system.

The Coalition Government argued that the small business case challenges the traditional labour law characterisation of the employment contract as an unequal bargain between an employer and employee. Traditional labour law views the assumption of freedom to contract as problematic because of a belief that the parties are unequally matched. As Higgins famously opined, 'the "haggling of the market" for labour, with the pressure for bread on one side and the pressure for profits on the other' is usually an unequal contest.⁴⁶⁸ In his view 'despotism in contract' is more common than freedom of contract in employment relationships.⁴⁶⁹ The Coalition

⁴⁶⁸ *Ex Parte H V McKay* (1907) 2 CAR 1, 3.

⁴⁶⁹ *Federated Engine Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (1911) 5 Car 9, 28 (Higgins J).

Government challenges this traditional notion of labour versus capital through honing in on the relationship between the small business owner and the employee. In their view the actual workings of the contract of employment in this context reveals a very different power relationship to the traditional imbalance of power characterised in academic literature. The Coalition Government depicts a small business owner as part of the 'engine room of the Australian economy' who works on behalf of the national prosperity, investing their time, energy and resources into making their business a success.⁴⁷⁰ As Prime-Minister Howard noted, 'we remain, unapologetically, a party that supports and encourages the 1.9 million small businesses in Australia. I grew up believing that the best thing you could do in life was to start a business, work hard, take risks, employ people and pass on that legacy to your children'.⁴⁷¹ The Government saw the ability of the small business owner to succeed as hampered by unfair dismissal law which sets up 'procedures, rules and regulations surrounding relationships between employers and employees' and as a result shrouds 'the whole relationship with legalism and procedural arguments'.⁴⁷² The Government viewed unfair dismissal law as unnecessary because the employee is seen as a valued member of the small business whose direct relationship with the owner enables the employer to accurately assess the employee's performance. According to this perspective, small business owners are deterred from dismissing employees arbitrarily because they

⁴⁷⁰ John Howard 2007, 'The Challenge of Economic Management' Menzies Research Centre, date unknown)<http://www.mrcld.org.au/research/economicreports/Challenge_of_Economic_Management.pdf> accessed 4 November 2010.

⁴⁷¹ *ibid.*

⁴⁷² Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 9 June 1994 (Mr Charles, Member of the House of Representatives).

invest heavily in the recruitment process in order to employ quality staff. The Government also argued small business owners could be disadvantaged in the employment relationship because of the investment of not just their work but their livelihood in the business, often referring to their perception that ‘in many small businesses the employees are taking home more pay than the employers’⁴⁷³ and observing that ‘employers are never compensated when their valued employees leave’.⁴⁷⁴ This personalisation of the parties entering into the employment contract was a strong feature of the Coalition’s argument against the introduction of unfair dismissal laws by the Labor Government in 1993. In contesting this reform, the Coalition argued the importance of enabling small business owners to enter into direct relationships with their employees because they are ‘good people of principle, who want that freedom, as employers, to agree with their employees, man to man, woman to woman, *equal to equal*...and to get on with business without this paraphernalia’.⁴⁷⁵

The Coalition Government’s notion of small business disadvantage counterbalancing employee disadvantage in the employment contract was fiercely contested by the Labor Party during their period in opposition. Their view was that the employment contract was different to a commercial contract because ‘the thing being sold is indivisible from the seller and thus associated with a complex dynamic web of

⁴⁷³ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 9 June 1994 (Mr Slipper, Member of the House of Representatives).

⁴⁷⁴ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 31 August 1995 (Mr Wilson Tuckey, Member of the House of Representatives).

⁴⁷⁵ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 22 November 1993 (Mr Peter Costello, Shadow Treasurer).

social interactions which lie outside the simple market transaction'.⁴⁷⁶ Labor's view was that there is an imbalance of power in the employment contract that is remedied by statutory intervention. As Senator Beahan observed during the parliamentary debates about the unfair dismissal laws:

The term bargaining is used to disguise what is in truth the imposition of terms and conditions over which most individual employees will have no control. "Flexibility" in the Liberal lexicon is code for wholesale reduction in wages and conditions and the restoration of employer control over every aspect of the workplace – or the return, to the old and outdated concept of managerial prerogative.⁴⁷⁷

Both prior to, and during the term of the Coalition Government, Labor did not agree that small businesses should be exempt from the unfair dismissal jurisdiction. In the second reading debates for the Industrial Relations and Other Legislation Amendment Bill 1995, Labor's Minister for Industrial Relations explicitly recognised that the unfair dismissal system involved a cost for employers. He stated that whilst 'it is true that the unfair dismissal provisions do put certain burdens on employers who wish to dismiss employees, there is no doubt that we are proud that those burdens are there. We say that the burden is entirely commensurate with the importance of the decision to the employee'.⁴⁷⁸ Thus, the debate over the application of Australia's unfair dismissal laws to small business revealed a clear point of demarcation between the major political parties. During their time in opposition between 1996 and 2007, the Labor Party consistently repudiated the argument of the Coalition that the contract of

⁴⁷⁶ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 7 December 1993 (Mr Lindsay Tanner, Member of the House of Representatives).

⁴⁷⁷ Commonwealth of Australia, *Parliamentary Debates*, Senate, 7 December 1993 (Senator Beahan, Member of the Senate).

⁴⁷⁸ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 18 September 1995 (Mr Laurie Brereton, Minister for Industrial Relations).

employment represented an equal bargain that adequately regulated the dismissal of an employee.

The Coalition Government's belief in the equal ability of small business owners and employees to enter into the employment contract led to numerous attempts to remove small business from the unfair dismissal jurisdiction. The Coalition Government advocated a return to the common law of wrongful dismissal as this provided both employers and employees with rights under the contract. Their argument was that the contract 'guaranteed an employee certain rights, on the other hand they left the employer to run his own business as he wished, within reasonable limits, and to hire and fire'.⁴⁷⁹ Upon winning the federal election in 1995, the Coalition Government commissioned a taskforce to investigate the compliance and paper burden on small business.⁴⁸⁰ A key finding of this taskforce in its final report was the perception that the unfair dismissal laws were 'the final nail in the coffin for a segment of the society that has now felt besieged for more than a decade.'⁴⁸¹ According to the report's authors, the unfair dismissal laws were raised time and again even though only a small number of businesses reported as having been directly affected.⁴⁸² This report set the background for the Coalition Government's endeavour to exempt small

⁴⁷⁹ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 9 June 1994 (Mr Slipper, Member of the House of Representatives).

⁴⁸⁰ Small Business Deregulation Task Force, 'The Bell Report, Time for Business, Report of the Small Business Deregulation Task Force' (Small Business Deregulation Task Force, 1996).

⁴⁸¹ Kirsten Falconer and Fadil Pedic, 'Small Talk - Group Discussions with Small Business about Paper and Compliance Burden' (Small Business Deregulation Task Force, 1996) 29.

⁴⁸² Small Business Deregulation Task Force (n 480) 15.

business from the unfair dismissal system. Between 1997 and 1998 six Bills were passed through the House of Representatives seeking to extract businesses with less than 15 employees from the unfair dismissal laws. These failed to get through the Senate where the Coalition Government did not have a majority as the Government was unable to garner the support of the minor parties who held the balance of power. For a Bill to become law in Australia it must be passed by a majority in the House of Representatives and the Senate. Between 2001 and 2004 the Government attempted on five further occasions to pass laws exempting businesses with more than 20 employees from the unfair dismissal system. Again, these Bills failed to become law. Nonetheless, the Government was able to secure the passage of the Workplace Relations Amendment (Termination of Employment) Act 2001 (Cth) which added some further factors to those already existing in section 170CG(3) in deciding whether a dismissal was unfair, unjust or unreasonable. These were:

- (da) the degree to which the size of the employer's undertaking, establishment or service would be likely to impact on the procedures followed in effecting termination; and
- (db) the degree to which the absence of dedicated human resource management specialists or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination.

In the first case to examine these factors, Senior Deputy President Lacy of the AIRC indicated the reluctance of the Commission to modify the standard required of dismissal processes because a business was small in scope:

While the significance of the absence of the human resource management specialists or expertise in an undertaking in relation to the procedures for effecting termination of employment are reasonably evident, the same cannot be said of the size of the employer's undertaking in relation to such procedures. Employees who are about to

lose their employment are entitled to expect a fair go, regardless of the size of the employer's undertaking.⁴⁸³

A watershed in Australia's unfair dismissal laws occurred in 2006 with the enactment of the Coalition Government's Work Choices reforms.⁴⁸⁴ After a decade in office and finally with a majority in both Houses of Parliament, the Work Choices Act represented the Government's bold attempt to establish a largely national system of labour relations in the Australian private sector and represented the most fundamental change to the Australian labour law landscape for more than 100 years. The case for Work Choices was premised upon the need for Australia to compete in a globalised world by improving the productivity of the labour force. A key aspect of the Government's agenda was to provide a framework for business to increase their international competitiveness. The small business exemption which the Government was finally able to introduce had the effect of removing unfair dismissal rights for the majority of Australian employees.

The Work Choices Act excluded employees of businesses with a labour force of 100 or less from unfair dismissal protection. The Government argued that this would allow a 'small' business to hire new employees without the threat of an unfair dismissal claim if that employee is let go. The decision to use 100 employees as the threshold number for a small business was surprising as prior to this reform the only

⁴⁸³ *Pergaminos v Thian Pty Ltd t/as Glenhuntly Terrace*, Print 920123, 16 July 2002 at 10.

⁴⁸⁴ In late 2005, the Australian Parliament enacted the Workplace Relations Amendment (Work Choices) Act 2005 (Cth) (hereafter "Work Choices Act") which made very significant amendments to, and re-numbered the sections of the Workplace Relations Act 1996 (Cth).

threshold numbers that had been discussed by the Government were 15 or 20. There was no policy document outlining why 100 was chosen and debate around this number was scant. The decision to use 100 as the threshold number exempted small business as well as medium to larger employers from the unfair dismissal laws.⁴⁸⁵ The Australian Bureau of Statistics estimated that at the time the Work Choices Act was introduced over ninety percent of Australian businesses employed one hundred staff or less.⁴⁸⁶

The 100 employees rule increased confusion and the administrative burden upon the business as the task of determining the number of employees was not as straightforward as first appeared. Only full-time, part-time and regular casuals were included in the headcount of employees but employees that were employed by a 'related body corporate' could also be included. What determined a 'related body corporate' was stipulated in section 50 of the Corporations Act 2001 (Cth). The *Triangle Cables* case exemplified the difficulty in determining whether the 100 employees rule applied to a particular company.⁴⁸⁷ In order to ascertain whether the sacked employees could claim that their dismissal was unfair because there were less than 101 employees, the Commission underwent a very detailed examination of the company's relationship with related companies in Thailand, Germany, USA, Italy and

⁴⁸⁵ Marilyn Pittard, 'Back to the Future: Unjust Termination of Employment under the Work Choices Legislation' (2006) 19 AJLL 225.

⁴⁸⁶ ABS 2004 cited in 'Unfair Dismissal: Perception and Reality' (Government of Victoria, date unknown) <<http://pegsnet.pegs.vic.edu.au/studentdownloads/Economics/Students/Year%2012%20Folder/Microeconomics/unfair-dismissal%20laws.pdf>> Accessed 10 January 2011.

⁴⁸⁷ *Baldacchino and Ors v Triangle Cables (Aust) Pty Ltd* (Australian Industrial Relations Commission, Smith C, 24 May 2006).

the Netherlands, as well as, scrutiny of employees that worked at Triangle Cables but were employed by labour hire companies.⁴⁸⁸ This was a very complex and time-consuming process undermining the simplicity of the reform, as well as, putting immense pressure on employers seeking to rely upon the exemption to ensure they had made a correct headcount before terminating an employee.

The removal of unfair dismissal rights for the majority of Australian employees via the 100 employees rule begs the question: was the real intent of the Coalition Government to remove the unfair dismissal laws altogether and to return to the common law of wrongful dismissal? Certainly the Government's decision to increase the threshold for the exemption from 15 or 20 to 100 adds credence to this argument. In the second reading speech introducing the Work Choices Bill into Parliament, the Minister for Workplace Relations assured the House that 'Work Choices will take the unfair dismissal monkey off the back of business' and 'whatever their intended purpose, unfair dismissal laws have acted as a brake on job creation...they have fostered a climate of complaint and litigation...to the point where some firms go to any lengths to avoid hiring extra staff'.⁴⁸⁹ Nothing in this speech or in any of the public statements issued by members of the Coalition Government indicate any support for the existence of a statutory right not to be unfairly dismissed. The following quote from Prime-Minister Howard's speech to the small business community in 1996 illustrates the strength of the anti-unfair dismissal law rhetoric and

⁴⁸⁸ *ibid.*

⁴⁸⁹ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 2 November 2005 (Mr Kevin Andrews, Member of the House of Representatives).

pro-business ideology which characterised the Government's approach throughout its eleven years in office:

I want to assure all of you that we will not weaken or tire in our efforts to secure the passage through the Senate of further reforms of the unfair dismissal laws. They remain to me one of the greatest blots on the escutcheon of small business. I hold strongly to the belief that if we could get rid of the restrictions we're trying to get rid of we will see more jobs created in the small business community.⁴⁹⁰

The 100 employees rule had the effect of severely curtailing unfair dismissal rights in Australia. As the Government lost the subsequent federal election one can only posit that their next legislative reform to the unfair dismissal laws would have been to abolish them altogether or preserve them for employees in a very small minority of businesses. The Government's belief in the appropriateness of the employment contract to govern relations between employees and employers and their willingness to advocate a special case of employer disadvantage for small business owners provides evidence of their desire to substantially deregulate unfair dismissal law.

It is against this backdrop of the previous Government's argument about small business exceptionalism that the Labor Government introduced the Fair Dismissal Code, which represents Labor's attempt to balance the need to protect employees' job security with the recognition that 'small businesses do not have the human resources support that larger businesses enjoy'.⁴⁹¹ So thus, whilst access to the unfair dismissal system is enlarged under the Fair Dismissal Code as small business is defined as a

⁴⁹⁰ John Howard, 'The Challenges Facing Small Business' (Speech to the Council of Small Business Organisations of Australia, 29 March 2002) <www.pm.gov.au/news/speeches/2002/speech1670.htm> Accessed 12 August 2002.

⁴⁹¹ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, Second Reading Speech for the Fair Work Bill 2008 (Cth) (Ms Julia Gillard, Minister for Workplace Relations).

business with fewer than 15 employees, the establishment of this Code limits procedural fairness requirements. Furthermore, the introduction of the Fair Dismissal Code is illustrative of the success of the Coalition Government in establishing the rights of small business as a legitimate focus of the unfair dismissal system and the willingness of the Labor Government to accept this argument. The Government's use of the Fair Dismissal Code to regulate small businesses represents the significant reinstatement of managerial prerogative for small business owners as their employees are unable to access statutory unfair dismissal protection if the Code is complied with. In this way, Labor has reneged on its earlier commitment to provide universal access to the unfair dismissal system. In the specific case of small business, Labor is prepared to deregulate unfair dismissal law by restoring the contract of employment because of their acceptance of the Coalition's argument that employee disadvantage under the contract is counterbalanced by the disadvantage faced by small business owners.

The Fair Dismissal Code provides a streamlined dismissal process for small business employers seeking to fire a member of staff. All that is required is a meeting between the employer and employee where the latter is given a warning. The employee is allowed to bring a support person to the meeting. Dismissal is then permitted if the employee's performance does not improve. As a result of the Fair Dismissal Code being complied with, the employee is unable to make a claim of unfair dismissal before Fair Work Australia. In this way, the design of the Fair Dismissal Code is 'to provide small business employers and employees with clear guidelines to minimise the

extent of unfair dismissal action'.⁴⁹² The Fair Dismissal Code is accompanied by a checklist which employees can use when dismissing an employee, although this does not mean the Code has been complied with. In the case of serious misconduct, the employer can dismiss the employee without complying with the Fair Dismissal Code. In this situation, there is no requirement that the employer has reported the situation to the police, just that the employer has reasonable grounds to suspect the employee of serious misconduct.

This Code is likely to put pressure on small business to adopt the Government's checklist rather than developing an approach which is tailored to the needs of their individual workplace. The requirement of a formal warning may lead to small business employers warning employees more expansively and indiscriminately in order to have a warning on the record so that a dismissal is permissible down the track. The requirement of a formal warning as a precursor to dismissal may lead to increased internal conflict within workplaces that undermines the ongoing employment relationship. From an employee perspective, the Code also effectively limits access to unfair dismissal protection because even if the substantive merits of the dismissal are contestable, the application is barred if the employer has followed the Code's requirements. The checklist approach of the Code and its brevity in only requiring a warning and a reasonable opportunity to improve performance hardly guarantees an employee that their dismissal be fair. The requirement of only one warning does not take into account the individual circumstances of the case and does not obligate small

⁴⁹² Fair Work Bill 2008, Explanatory Memorandum, xiix.

business employers to work with the employee to assist in improving performance. It does not require an employer to provide targeted training or a pastoral plan which would enable the employee to receive ongoing feedback or greater supervision in order to aid improved performance.

Thus, the introduction of the FDC indicates Labor's willingness to accept the previous Government's argument that the power balance between small business owners and their staff is more evenly distributed. This has resulted in their use of the FDC to effectively remove statutory unfair dismissal protection for small business employees and to return these employees to the common law of wrongful dismissal.

Section Three

The Characterisation of Unfair Dismissal Protection as a 'Statutory On-Cost'

The most significant aspect of the Coalition Government's rhetoric and policy ideas for Australian labour law hinged upon their ambition for direct relationships between employers and employees without statutory protection for employees appended to the contract of employment. To forge direct relationships, the Coalition Government argued that legislative prescription was necessary because the Australian labour law framework had been constructed over one hundred years to tie the employment relationship to third parties such as unions and the Australian Industrial Relations Commission. The Coalition's view was that there needed to be an end to the 'uninvited

intervention of third parties' upon the employment relationship and that this could be achieved through the promotion of enterprise bargaining which would enable direct communications between employees and employers about the substance of their employment contract. The Coalition Government believed the ideal workplace relationship was that between an employer and an individual employee and sought to promote Australian Workplace Agreements (AWAs) which was the outcome of bargaining at the individual level. Significant attention has been given to the question of whether AWAs were really the result of an individual bargaining with the employer or merely imposed by an employer upon staff. Given that AWAs were often standardised across a workforce questions were asked as to the extent to which AWAs genuinely represented individual negotiations between an employer and a staff member and whether the employer primarily won the benefits of flexibility. Much has been written about the problem of individual bargaining and there is a significant consensus amongst Australian commentators that 'most workers are unable, alone and unaided, effectively to contest the demands or decisions of employers'.⁴⁹³ This paper does not intend to revisit these debates over the merits of AWAs but instead seeks to identify whether the existence of the Coalition Government's 'freedom of agreement-making' philosophy is analogous to a 'freedom of contract-making' philosophy and what ramifications, if any, this had for the development of unfair dismissal law.

The primary difference between AWAs and individual contracts is that the former could prevail over awards and, in some circumstances, enterprise agreements.

⁴⁹³ Breen Creighton and Andrew Stewart, *Labour Law: An Introduction* (The Federation Press, 2000) 5.

This meant that AWAs could be used as a vehicle to reduce conditions contained in those collective forms of regulation. After 2006 the conditions for making AWAs were relaxed with the abolition of the No Disadvantage Test and the opportunity for an AWA to be a condition of an offer of employment, thus allowing them to be offered on a ‘take it or leave it’ basis. In this way, it could be argued that for the purposes of analysing the Coalition Government’s unfair dismissal law reforms, the promotion of AWAs over common law individual contracts is of negligible importance. Both forms of individual contract promoted direct relationships between employers and employees and sought to reduce the statutory protection of employees’ wages and working conditions. Thus, it could be argued that the Government’s desire to make AWAs more widespread is consistent with their unfair dismissal law reforms seeking to promote the contract of employment and return to the common law of wrongful dismissal. Their legislative preference is for individual contracts, whether of a statutory or common law nature, to regulate the employment relationship. Waring and Bray suggest that the significance of this is that it has resulted in the growth of unilateral decision making by management.⁴⁹⁴ They argue that ‘the effect of expanded individual contracting has not been to promote direct bargaining between employees and employers, but rather to increase directly management power and to undermine further the power of unions’.⁴⁹⁵ This promotion of individual contracting occurs synchronously with the scaling back of the statutory unfair dismissal superstructure in favour of the common law of wrongful dismissal. Both reforms seek to increase

⁴⁹⁴ Mark Bray and Peter Waring, ‘The rise of managerial prerogative under the Howard Government’ (2006) 32 *Australian Bulletin of Labour* 45

⁴⁹⁵ Waring and Bray (n 494) 58.

managerial prerogative by removing independent scrutiny of the relationship between the employer and employee.

The Coalition Government's promotion of workplace agreements is founded upon their normative ideal of direct employment relationships. According to the Government, 'the third pillar of successful economic management is something close to the heart of Australian liberalism – supporting and trusting the individual' underpinned by 'the idea that someone can sit down with his or her employer and come to mutually beneficial work arrangements'.⁴⁹⁶ This perspective led to the framing of unfair dismissal law as a constraint upon direct relationships because it allows a third party to adjudicate the fairness of the employer's decision to terminate the contract of employment. The Government believed that this would lead employers to make staffing decisions not according to the needs of their business but rather to manage the risk of an unfair dismissal suit being made against them. In this view, the Government was supported by a leading Australian lobby group, the HR Nicholls Society, formed in 1985 to promote the contract of employment and the deregulation of Australian labour laws. With a key member of the Coalition Government, Mr Peter Costello, one of its founding members, the HR Nicholls Society has continued to have strong links with the Liberal Party. Their argument is for a return to the common law in order to achieve direct relationships between employers and employees. In a keynote address, the HR Nicholls Society's President stated, 'if they [employers and employees] have the freedom, as they did under the common law rules of property,

⁴⁹⁶ Howard (n 446).

contract and tort, to make adjustments as to how they carry out the day-by-day business of an enterprise, then the likelihood of making the right decisions is far, far greater than decisions made by an arbitral tribunal in a far-away city.’⁴⁹⁷ Both the Government and the HR Nicholls Society characterised the unfair dismissal laws as an example of ‘paternalism’, originating from an archaic view of the employment relationship as exploitative, thus requiring protective legislation as employers and employees could not be trusted to make decisions about their relationship.⁴⁹⁸ The Government viewed the expansion of the contract of employment as a liberating and equalising force upon the employment relationship which would ‘end the paternalism of the old system which told workers, their workmates and their employer what was good for them without any regard to their own circumstances’.⁴⁹⁹ The Coalition advocated a return to the contract of employment as this would prevent third parties from interfering in the employment relationship. Amongst other things, the rules of contract law exclude third parties such as members of the public or industrial organisations from legally challenging the term or the operation of such agreements through judicial review.⁵⁰⁰ As noted by a Liberal Party MP, ‘the Coalition moved away from the master-servant attitude a number of years ago. The Coalition is about

⁴⁹⁷ Ray Evans, ‘Globalisation and the Australian Labour Market’ (Annual Workforce Conference, September 2008) <<http://www.hrnicholls.com.au/articles/hrn-evans12.pdf>> Accessed 9 March 2009

⁴⁹⁸ Reith (n 448).

⁴⁹⁹ Peter Reith, Federal Minister for Workplace Relations, House Hansard, Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, Second Reading, p7852-7853.

⁵⁰⁰ See for example, Richard Mulgan ‘Contracting out and Accountability’ (1997) 56 AJPA 106; Richard Mulgan, ‘Comparing Accountability in the Public and Private Sectors’ (2000) 59 AJPA 87, 89-91: Mulgan notes that there are only a limited number of ways in which private companies can be held accountable by private citizens; Kate Owens, ‘The Job Network: How Legal and Accountable are its (Un)employment Services?’ (2001) 8 AJLA 49, 50-3.

cooperation, understanding and working things out. In the great enterprises of Australia today, you will find that the manager talks with the employers, has a good relationship with them and encourages them to give ideas about the whole business structure'.⁵⁰¹

As part of their direct relationships philosophy, unfair dismissal law was characterised by the Coalition as a prohibitive 'on-cost' imposed by statute upon the contract of employment. In 1993 during the second reading debates about whether unfair dismissal laws should be introduced in Australia, Mr John Howard, outlined the Liberal's opposition to the imposition of statutory requirements upon the employment contract, 'the problem is the "on-costs", such as the redundancy requirements, the superannuation guarantee levy, the termination requirements, the training guarantee levy, and all the other "on-costs"'.⁵⁰² This view of statutory protection as an additional cost for employers appended to the employment contract forms the basis for the Coalition Government's policy platform after 1996 which seeks to peel back the statutory superstructure in favour of the common law of wrongful dismissal in order to regulate employment. In 1996 the Government introduced the principle of a 'fair go all round' to the realm of unfair dismissal. In determining whether a dismissal is harsh, unjust or unreasonable, section 170CA(2) contained an express statement of legislative purpose as being to provide a system to ensure a 'fair go all around' to the employer

⁵⁰¹ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 31 August 1995 (Mr Miles, Member of the House of Representatives).

⁵⁰² Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 17 November 1993 (Mr John Howard, Shadow Minister for Small Business).

and the employee. This was used by the Government as a mechanism for protecting employers from the ‘on-costs’ imposed by the unfair dismissal laws upon the contract of employment. By mandating that the Commission consider the ‘fair go all round’ principle the Government required there to be a consideration of the business’ capacity to pay in the Commission’s determination of the amount of compensation accorded to an individual after a finding of unfair dismissal. The ‘fair go all round’ principle originally emerged in Australian labour to protect the employee as they were seen as the disadvantaged party in the employment relationship.⁵⁰³ Mr Mark Vaille, a key member of the Government, characterised the introduction of the ‘fair go all round’ principle as being partially about the reinstatement of managerial prerogative and requiring the Commission to consider fairness to the employer, not just the employee, in disputes about dismissal. He stated that ‘the expression of a “fair go all round” has been used to refer to the importance, but not inviolate ability, of the right of an employer to manage the employer’s business, the nature and quality of the worker in question, the circumstances surrounding a dismissal and the likely practical outcome of an order being made’.⁵⁰⁴

In this way, the ‘fair go all round’ principle undergoes this ironical reversal during the Coalition Government’s term in office. Their adoption of the ‘fair go all round’ principle in the unfair dismissal legislation is actually about rebalancing the

⁵⁰³ For an exploration of how the concept of a ‘fair go all round’ evolved in Australia, see: Part A, Section Two ‘The Institutionalisation of Industrial Peace’.

⁵⁰⁴ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 26 June 1996 (Mark Vaille, Minister for Trade).

system in favour of employers, whereas in its general inception and usage it is about the underdog, which was traditionally depicted as the Australian worker. This transformation of the ‘fair go all round’ principle is symptomatic of the Government’s efforts to recast the contract of employment as a relationship between equals, not as a relationship between the employee-as-underdog, and the employer-as-master. In their view, at different times, both the employee and the employer could be disadvantaged through the contract of employment and that providing for a ‘fair go all round’ is the appropriate way of ensuring that a balance between the interests of the parties is observed.

The Coalition Government’s characterisation of unfair dismissal law as a prohibitive “on cost” imposed by statute upon the contract of employment provided the justification for the introduction of the operational reasons exemption as part of their Work Choices reform. This excluded an employee from the unfair dismissal jurisdiction if one of the reasons for termination of his or her employment included ‘genuine operational reasons’.⁵⁰⁵ If such reasons were asserted by an employer or were otherwise apparent to the AIRC, a hearing was held to deal with the issue before proceeding any further with assessing the substantive merits of the application. If satisfied that the operational reasons were genuine, the AIRC was required to dismiss the application. Whilst the operational reasons exclusion in section 649(1)(a) was drafted as a jurisdictional bar, it operated as a substantive bar on unfair dismissal applications. This exclusion was given a wide reading by the AIRC because of the

⁵⁰⁵ Section 649(1)(a).

terms of the section and it was held permissible for an employee to be made redundant from his position and subsequently have the position advertised at a lower salary.⁵⁰⁶ The test that the AIRC developed for assessing a genuine operational reason emerged in *Village Cinemas Australia Pty Ltd v Carter*⁵⁰⁷ and it was held to be irrelevant whether an employer might have taken another course of action rather than dismissing an employee. The key consideration was merely whether ‘a reason for termination of the employment of a particular employee can be genuine in the sense that it is real, true or authentic, not counterfeit whilst it may not have been valid, meaning sound, defensible or well founded.’⁵⁰⁸ Thus, at this preliminary proceeding, questions of fairness – either procedural or substantive – were unable to be investigated by the AIRC. If a genuine operational reason was found to exist, even if its merits were dubious, this would render the application jurisdictionally barred.

In sum, the Coalition Government’s promotion of direct relationships in the workplace was fundamental to their attempt to peel back the statutory superstructure and promote the common law of wrongful dismissal. Whilst their central argument was about ‘freedom of agreement making’, in the context of unfair dismissal, this argument can be seen as analogous to the Coalition Government’s promotion of freedom of contract. This is because their direct relationships philosophy led to the characterisation of unfair dismissal as a statutorily-imposed ‘on cost’ to the contract of

⁵⁰⁶ *Cruikshank v Priceline Pty Ltd* (2007) PR976793, Melbourne, 17 April 2007 per Eames C.

⁵⁰⁷ *Village Cinemas Australia Pty Ltd v Carter* (2007) PR975821, Sydney, 15 January 2007.

⁵⁰⁸ *Village Cinemas Australia Pty Ltd v Carter* (2007) PR975821, Sydney, 15 January 2007, para 26.

employment, thus increasing the regulatory burden upon employers. This led to the introduction of the 'fair go all round principle' to the unfair dismissal jurisdiction in 1996 and the more radical reform ten years later which saw the operational reasons exemption used as a jurisdictional bar preventing widespread access to the unfair dismissal system. Both reforms were justified according to a need to promote the freedom of the employer to determine their staff without the uninvited intervention of third parties. It was argued that the contract of employment is best regulated by the common law and statutory mechanisms for determining the fairness of an employee's dismissal inhibited the ability of employer and employee to have a direct relationship.

The election of the Labor Government saw a continuation of the legislative preference for direct relationships between employers and employees. Whilst Labor abolished AWAs and strengthened opportunities for unions to be involved in workplace bargaining, the significance of their commitment to the achievement of localised dispute resolution is that it represents a movement towards allowing self-regulation of unfair dismissal disputes. Self-regulation is synonymous with 'internal regulation', a concept coined by Allan Flanders as part of his depiction of industrial relations as a 'study of the institutions of job regulation'.⁵⁰⁹ Flanders argues that external and internal regulation address different dimensions of the industrial relations challenge. External regulation aims to supervise and manage the conflict between unions and employers, as well as to protect workers from potential exploitation in an unregulated labour market. In contrast, Flanders saw internal rules as set by

⁵⁰⁹ Allan Flanders, *Industrial Relations: What is Wrong with the System?* (Faber & Faber, 1965) 10.

‘managements seeking to bring the work behaviour of employees under greater control’.⁵¹⁰ Flanders’ understanding of internal regulation is consistent with the traditional doctrine of managerial prerogative which provides that it is an employer’s right to organise their work arrangements in such a way as to ensure the most efficient operation of the business. Self-regulation allows employers to opt out of the formal regulatory process by agreeing to resolve disputes within the workplace according to a state-endorsed procedure. Australia’s Fair Dismissal Code allows small businesses to self-regulate with regards to protecting employees’ job security because as long as the Fair Dismissal Code is complied with, then the business is exempt from undergoing external scrutiny of their decision to dismiss. The primary concern of Australian legislators in going down this route is to facilitate workplace cultural reform by mandating that employers develop better procedures for governing dismissals. The upshot of this is that the state acquiesces to the employer becoming the arbiter of substantive fairness. As long as there is an adequate process for determining dismissal, then, the employer’s decision to dismiss is beyond scrutiny. In this context, procedural fairness trumps substantive fairness.

Nonetheless, questions remain as to the adequacy of a statutory right to a support person in protecting an employee’s job security under the contract of employment. Unlike a union representative well versed in industrial issues and with knowledge of the law, a support person has none of this background. The disciplinary or dismissal situation that the support person is involved in is likely to be their first,

⁵¹⁰ Flanders (n 509) 15-18.

whereas employers routinely handle these kinds of situations. Given that the support person is usually a fellow worker this places the support person in a difficult position of becoming involved in another person's conflict and may even threaten their relationship with the employer. The conclusion of Antcliff and Saundry in their study of the impact of the right to accompaniment in Britain is that union presence and involvement in the workplace is a much better safeguard of job security than a right to a representative during a disciplinary hearing:⁵¹¹

By the time an issue reaches a disciplinary hearing it is difficult for any companion, even an experienced trade union representative, to make a significant impact. Accordingly, it could be argued that broader workplace representation as opposed to accompaniment at a hearing is the key to dispute resolution. In this way, issues that may lead to individual conflict, dispute and ultimately discipline can be resolved at an early stage.⁵¹²

In Australia the right to a support person has evolved to mean something different depending upon the size of the employer. Under the Fair Dismissal Code applicable to businesses with less than 15 employees there is a right to a support person during a meeting about a prospective dismissal. However, it is unclear whether it is the employer's duty to advise the employee of this right and to give them the opportunity to exercise it before initiating discussions about possible termination of employment or merely whether the employer is required to permit the presence of a support person during the meeting. Recent cases suggest that the Fair Dismissal Code only requires employers to acquiesce if the employee wishes to bring along a support person.⁵¹³ That

⁵¹¹ Valerie Antcliff and Richard Saundry, 'Accompaniment, Workplace Representation and Disciplinary Outcomes in British Workplaces — Just a Formality?' (2009) 47 BJIR 100.

⁵¹² *ibid.*

⁵¹³ *Banana Tree Cafe* [2010] FWA 7891.

there is no obligation for employers to inform employees of their right to a support person during a meeting about a prospective dismissal undermines its protective ability as many employees may be unaware of this right. In one case, an employee was called over to attend a meeting with the employer at the end of his shift and confronted with evidence that he had been involved in illegitimate transactions involving over \$2000 being stolen from the employer. This meeting led to the employee being dismissed despite his denial of the allegations. According to Fair Work Australia because the employee did not seek to have a support person present there was no breach of the Fair Dismissal Code.⁵¹⁴ However, given that the employee had no advance warning of the meeting and he was called over at the end of his shift, did the employee really have the opportunity to arrange for a support person to be present? At this stage, the employee was even unaware that the meeting was one about his prospective dismissal so this constrained his ability to ask for a support person. During the meeting when it became apparent that there were serious allegations being made, the employee would have had to unilaterally halt the meeting invoking his right to have a support person present. However, given the employee was from a non-English speaking background and a subclass 457 visa holder,⁵¹⁵ it is unlikely he would have been aware of his right to a support person in the first place. This case shows the weakness inherent in the right to a support person unless it is interpreted as a positive duty upon employers to notify the

⁵¹⁴ *ibid* para 52.

⁵¹⁵ For research identifying the disadvantaged position of subclass 457 visa holders, see: Joanna Howe, 'The Migration Amendment (Worker Protection) Act 2008: Long overdue reform, but have migrant workers been sold short?' (2010) 24 *AJLL* 251.

employee of a meeting about their prospective dismissal and to give them the option of bringing along a support person.

For businesses with more than 15 employees the right to a support person during a prospective dismissal hearing is even more limited. The Explanatory Memorandum to the Fair Work Act 2009 makes it clear that there is no positive duty upon employers to offer an employee the opportunity to have a support person present when they are considering dismissing them. Instead, it is only one factor Fair Work Australia must consider when determining whether a dismissal is unfair, having regard to all the circumstances, including the capacity of the employee to respond to the allegations put to him or her without such a support person being present.⁵¹⁶ The definition of a support person is broader in Australia than it is Britain, although there are the same constraints over the use of a lawyer. Unlike in Britain where the support person has to be a fellow employee or union official, in Australia there is no such restriction as the support person can be either the aforementioned or even a friend, family member or colleague. The only constraint is that the support person cannot be a lawyer acting in a professional capacity, arguably because of the Government's keenness to resolve workplace disputes without recourse to lawyers.

Essentially, the legislative requirement that a support person be present during a meeting about an employee's dismissal is indicative of Labor's desire to promote localised dispute resolution. Their concern is with improving the efficiency of

⁵¹⁶ Fair Work Bill 2008 (Cth), Explanatory Memorandum, para 1542.

dismissal decisions within the workplace so as to minimise the need for external scrutiny of the employer's decision. In effect, Labor's reforms increase managerial prerogative as they allow employers to dismiss their staff so long as a support person is present during the discussions. This is indicative of Labor's deregulatory approach to unfair dismissal law.

Section Five

Conclusion

The trajectory of Australian unfair dismissal law since its inception in 1993 has been to erode the statutory protection of employees' job security over time. Whilst unfair dismissal law was initially introduced in order to bring Australian law in line with its obligations under international law according to a rationale of industrial justice, this rationale has not figured prominently in the debate about reform of these laws post 1993. Instead, the Australian debate over unfair dismissal law has been between two slightly distinctive visions. For the Coalition, their ultimate desire has been to peel back the statutory superstructure and return to the common law of wrongful dismissal. Their view is that the contract of employment provides a balanced system of regulation for disputes between employers and employees and that the traditional characterisation of the employee as disadvantaged is at odds with the immense pressure faced by employers to remain competitive. In contrast, the Labor Party's unfair dismissal reforms reveal an alternative vision for Australian unfair dismissal law. Since gaining

Government in 2007 they have sought to deregulate unfair dismissal law on the basis that this will lead employers to make more efficient choices about dismissal than what is enforced upon them by unfair dismissal law. Labor's preference is for employers to adopt fairer procedures for making decisions about dismissal rather than for a return to the common law of wrongful dismissal. Their view is that if the legislation improves the process for dismissing workers within a business by requiring that a support person be present or that a Code be complied with, then this will lead to fairer dismissals. This is different to the Coalition's argument that the contract of employment is sufficient for ensuring the fairness of an employee's dismissal which can ultimately be adjudicated according to the common law of wrongful dismissal.

These Australian reforms to unfair dismissal law largely mirror the reforms to unfair dismissal law in Britain after 1971. Similar themes of contractualisation and a desire to facilitate localised and alternative dispute resolution emerge in the British debate over unfair dismissal law. These are explored in the following chapter which charts the British development of an argument of principle against unfair dismissal law, and in particular, against tribunal resolution of unfair dismissal disputes.

CHAPTER SIX

BRITAIN

Introduction

This chapter seeks to examine the basis for reform to Britain's statutory unfair dismissal scheme after 1971. Although frequently reformed after its introduction, Britain's statutory unfair dismissal scheme has never been dismantled, proving to be a durable addition to the corpus of British labour law. The introduction of a statutory unfair dismissal scheme in 1971 as the result of rigorous debate in the previous decade over how to address the perceived inadequacies of the common law of wrongful dismissal meant that the scheme's merits had been largely accepted by both sides of politics at its inception.⁵¹⁷ While there was political agreement over the need to introduce unfair dismissal protection for workers, this arose at a time of labour law crisis more generally, as there was significant disagreement over the future of Britain's industrial relations system.⁵¹⁸ The convergence over the rationale for statutory unfair dismissal protection began to unravel towards the tail end of the 1970s and the differences between Labour and the Conservatives became more acute with the development of an argument of principle against unfair dismissal law by the Conservative Government in the 1980s. Davies and Freedland coined this term to describe government acceptance of 'an argument of principle against unfair dismissal legislation, namely that it discouraged employers from taking on labour and so contributed to unemployment'.⁵¹⁹ The Conservative Government advocated a return to

⁵¹⁷ Conservative Political Centre (n 288) para. 103.

⁵¹⁸ For an explanation of the fiercely contested nature of labour law during this period, see Davies and Freedland (n 11) 241-243.

⁵¹⁹ Davies and Freedland (n 11) 200.

the common law of wrongful dismissal because of their belief in the right of employers to dismiss staff without independent scrutiny. Unlike its manifestation during the Conservative Government's duration in office, under subsequent governments this argument of principle did not seek to argue against unfair dismissal law but sought to justify mechanisms for reducing access to the system and the substantive protection it offered.

While Davies and Freedland suggest that this 'argument of principle' is against unfair dismissal legislation, this chapter hypothesises that the decades subsequent to the 1980s reveal the need to refine this position somewhat. I suggest that there is an argument of principle against the resolution of unfair dismissal complaints through the employment tribunal system. Although the Conservative Government (1979-1997) may have had aspirations to dismantle the unfair dismissal system in its entirety, this was not the government's main objective which was to break the power of the trade unions. However, no subsequent government had the aim of abolition. There was not an argument of principle against unfair dismissal legislation more generally, otherwise this would not adequately explain the fact that, although frequently reformed, no attempt has been made to dismantle the unfair dismissal system. However, it is possible to identify an argument of principle about the processing of dismissal disputes via the employment tribunal system with each Government, regardless of its political persuasion, seeking to limit access or reduce the amount of compensation awarded.

This chapter explores how this argument of principle against the perceived inefficiencies of tribunal resolution of unfair dismissal complaints is developed over time. I first trace the debates during the first decade of Britain's unfair dismissal system and chart the growing divergence between the political parties over how job security should be protected. The next section explores the emergence and formulation of the argument of principle against the unfair dismissal system during the initial years of the Conservative Government. This section is followed by an analysis of how the argument of principle is subsequently developed by the Conservative Government in the early 1990s. While it is arguable that initially there existed an outright argument of principle against the unfair dismissal system, by the early 1990s, it is possible to observe the identification of an argument of principle against the tribunal system in terms of the perceived problem of vexatious litigation and burdensome regulation. The Conservative Government was successful in reframing the parameters of the debate around the unfair dismissal system to be about protecting business from these perceived problems rather than protecting employees from the threat of unfair dismissal. This results in a new effort to facilitate the resolution of unfair dismissal disputes within businesses and by reference to the contract of employment.

The latter part of this chapter looks at the moderation of the argument of principle against tribunal resolution of unfair dismissal complaints under New Labour. Instead of articulating a renewal of the Donovan ideals of protecting job security and guaranteeing justice in dismissal, New Labour borrowed from the pro-business rhetoric and policies of the previous Conservative Government and by 2008 were

beating the same drum. While the first term of the New Labour Government saw some moderation of this argument of principle with attempts to improve the protective quality of the unfair dismissal system by indexing the compensation cap to inflation and reducing the qualifying period, New Labour's second and third terms in Government usher in new ways to constrain access to employment tribunals and to limit the quality of protection these tribunals could afford to unfairly dismissed employees. While New Labour presented its 2002 and 2008 reforms under the guise of achieving a marriage of economic efficiency and social justice, these reforms represent a continuation of the argument of principle against tribunal resolution of unfair dismissal and a willingness to be persuaded by employer dissatisfaction with tribunal resolution of unfair dismissal complaints. These reforms sought to facilitate localised dispute resolution by relying upon the mechanisms for resolving conflict under the contract of employment.

Section One

The Growing Political Divergence over Unfair Dismissal Law

It is difficult to identify an argument of principle against tribunal resolution of dismissal disputes before 1979. The first decade of the unfair dismissal system was characterised by bipartisan support for the existence of the system and the primary concern of both Labour and the Conservatives was with how the system could substantively deliver industrial justice for unfairly dismissed workers. The

parliamentary debates about the unfair dismissal system were concerned with the remedies which could be awarded by the tribunal, the length of the qualifying period and who should bear the burden of proof. In none of these debates was there a desire to dismantle the system altogether, as in this decade, the debate between Labour and the Conservatives was about practicalities. In one light, it could be argued that these disagreements were nothing more than a necessary sifting through the teething problems associated with a new system in order to make it more efficient. However, an alternative analysis could be that both Labour and the Conservatives sought to reform the unfair dismissal system during the 1970s based upon their different conceptions of industrial justice. For Labour, prioritising the remedy of reinstatement, reducing the qualifying period and placing the burden of proof squarely upon the employer, were all necessary components of achieving industrial justice. In Labour's view achieving justice in dismissal was not limited to awarding compensation for unfair treatment suffered which was the main aim of the Conservatives. Labour saw that while industrial justice was concerned with preserving the dignity and autonomy of individual employees against unchecked management power during dismissal, this could not be separated from the broader trade union concern with the control of jobs by management. Accordingly, Labour sought to achieve reinstatement as a viable remedy for unfair dismissal, to increase access to the tribunal system by reducing the qualifying period and to ensure that employers bore the burden of proof for disproving a charge of unfair dismissal. As the 1970s progressed, Labour's position was increasingly divided from that of the Conservatives who sought to develop the idea of industrial justice as encompassing justice for employers too. Thus, despite the unfair

dismissal system originating from a political consensus that such legislation was necessary, by the end of 1979 the political consensus on unfair dismissal had unravelled.

The debate between Labour and the Conservatives over remedies reflects their different conceptions of industrial justice. For Labour, the unfair dismissal system needed to provide for the possibility of reinstatement as justice for the unfairly dismissed employee included the opportunity to return to their job. In this way, Labour was influenced by Meyer's theory of job ownership and Hepple's theory of a right to work, both of which encompassed recognition of the right of an unfairly dismissed employee to be reinstated.⁵²⁰ The Labour Government's lapsed Industrial Relations Bill provided for reinstatement to be the primary remedy. Tribunals were required to order reinstatement where the employee wished to be reinstated, and the tribunal thought it an appropriate case for reinstatement. If the reinstatement order was not complied with, the tribunal could award additional compensation of up to six month's pay.⁵²¹ While the Conservatives claimed that their Industrial Relations Act 1971 retained reinstatement as the primary remedy, the provisions in Labour's bill were effectively weakened by the downgrading of the tribunal's ability to make an order of reinstatement to a recommendation and by the Act's failure to regard reinstatement as a remedy of priority over compensation.⁵²² The parliamentary debates over this point

⁵²⁰ For more on these two theories, see Chapter Four, Part 5, sections (i) and (iii).

⁵²¹ Bill 164, Session 1969/70, cls. 37-9 and 52.

⁵²² Industrial Relation Act 1971, s 106.

indicate that there was never any political consensus with regards to remedies. The Conservative Government's Solicitor General argued that Labour's Bill could not secure reinstatement as under both Bills 'an employer could buy off someone who is unfairly dismissed'.⁵²³ Labour's industrial relations spokesperson, Mrs Barbara Castles responded by asserting:

What I provided in my Bill was that the tribunal must have some freedom at the end to decide in a particular situation whether reinstatement would be unworkable. *That is very different from saying that the employer shall decide whether it is unworkable. Our purpose was to safeguard the right to reinstatement without which this is meaningless.*⁵²⁴ (Emphasis added)

Upon winning the 1974 general election, Labour introduced provisions into the Trade Union and Labour Relations Act 1974 specifying reinstatement as a separate remedy to re-engagement.⁵²⁵ These provisions regarding reinstatement and re-engagement were strengthened the following year when more weight was given to both remedies under the Employment Protection Act 1975 which empowered tribunals to order, and not merely recommend, re-employment. The sanction for non-compliance is the payment of compensation between 13 and 26 weeks pay, or double this if the dismissal was found to be based on discrimination.⁵²⁶ Although tribunals must consider whether re-employment is 'practicable'⁵²⁷ the fact that the employer has taken on a permanent

⁵²³ HC Deb 16 March 1971, vol 813, col 1285.

⁵²⁴ *ibid* 1286.

⁵²⁵ Trade Union and Labour Relations Act 1974, Sched. I, Pt III, para. 17(2).

⁵²⁶ Employment Protection Act 1975 s 72(2)(b).

⁵²⁷ *ibid* s 69 (5)(b) and (6) (b).

replacement is not an automatic indication of impracticability.⁵²⁸ Nonetheless, Labour was unsuccessful in its desire to make reinstatement the primary remedy as this did not alter the fact that only a tiny proportion of successful unfair dismissal complainants were reinstated or reengaged. In 1973, 4.2% of those whose cases were settled through conciliation were given back their jobs and by 1979 this had fallen to 1.8%.⁵²⁹ Of those who went to a tribunal hearing, 2.3% were recommended to be given their job back in 1973 but by 1979 only 0.8% received reinstatement orders.⁵³⁰ Davies and Freedland note that the commitment to reinstatement by Labour was limited at best as, ‘the crucial point, however, is that the 1970 Bill, 1971 Act and 1975 reforms all protected the freedom of the employer to buy its way out of an award of reinstatement upon payment of a relatively modest additional lump sum.’⁵³¹

Unlike the issue of remedies which was contentious from the start, there was an initial political consensus to reduce the qualifying period for unfair dismissal claims. The introduction of the statutory scheme for unfair dismissal in 1971 was accompanied by concern from both Conservative and Labour governments that lower qualifying periods would provide too many people with access to the tribunal system which would buckle under the increased demand. At this stage, both parties believed there should be a two year qualifying period before an employee could access unfair dismissal protection. In the House of Lords debates about the 1971 Act there was

⁵²⁸ *ibid*, s 70 (1).

⁵²⁹ Hepple (n 315) 409.

⁵³⁰ *ibid*.

⁵³¹ Davies and Freedland (n 11) 210.

recognition that this two year period was too long and only a temporary measure that would ultimately come down once the tribunal system could cope with the expansion of its jurisdiction into unfair dismissal. As Earl Jellicoe stated in the House of Lords debate ‘it is our intention as soon as may be to lower the ceiling of this exclusion clause, to make it clear that there is absolutely nothing between noble Lords opposite and myself on this issue’⁵³² and on another occasion, ‘I too, should like to see 104 become 52. I do not believe that there is anything sacrosanct about 52. I think it could well come down...I am quite certain that my right honourable friend will use his powers [under the Act] to reduce that ceiling as rapidly as possible.’⁵³³ In Labour’s Trade Union and Labour Relations Act 1974 the qualifying period was halved to one year, despite amendments at the Committee stage for the qualifying period to be reduced to 12 weeks. Again, the concern of the Government, this time a Labour Government, was that of protecting the tribunal system from breaking down but the long term goal was still to broaden access to this jurisdiction. In fact, as Michael Foot, the Minister of Labour stated:

We are faced with the difficulty that the tribunals are not fully manned to carry out the procedure, and that is the only reason we are not able to agree to the amendment proposed and carried by my honourable friends in Committee being made in one step. We are, however, proposing to do it in two or three steps.⁵³⁴

⁵³² HL Deb 5 April 1971 vol 317, cc 4-192.

⁵³³ HL Deb 5 July 1971, vol 321, col 777.

⁵³⁴ HC Deb 11 July 1974, vol 876, cc 1721-3.

Evidence of this commitment was that the qualifying period was reduced to six months in 1975 according to Schedule 1, para 10 of the Trade Union and Labour Relations Act 1974.

An unravelling of the political consensus supporting the ongoing reduction of the qualifying period occurred in the late 1970s as the Conservatives began to question the impact of the unfair dismissal system on business, and in particular, small business. Again, this growing political divergence over qualifying periods is reflective of the broader philosophical divergence between Labour and the Conservatives over how to achieve industrial justice in dismissal disputes. Labour conceived of industrial justice as being a universal entitlement and sought to achieve the realisation of providing every person with a right to industrial justice in dismissal which could not be diluted or affected by a worker's length of service. In contrast, the Conservatives, while initially committed to reducing the length of the qualifying period, came to develop the notion of industrial justice as encompassing the achievement of justice for the employer too. In this way, the Conservatives sought to make the argument that industrial justice includes the employer's right to a legitimate period of probation or qualification as the employer should have the time to see if the decision they made to recruit the worker is supported by their performance on the job. While this concern for an employer's right to a period of qualification was not articulated by the Conservatives at the start of the 1970s, by the end of this decade, the Conservatives were increasingly influenced by complaints of business owners and the fear of, and perception that, the unfair dismissal system allowed vexatious litigation. After Labour's 1974 amendment halving the

qualifying period to 26 weeks, over the next five years repeated questions were asked by Conservative MPs to the Minister for Labour as to the possibility of reducing the qualifying period.⁵³⁵ In a 1979 debate the Conservative Party's Mr James Prior stated, 'I believe that the six months rule relating to unfair dismissal ought to be changed to 52 weeks. All experience since then has suggested that 6 weeks is too short a time and that it ought to be changed to 52 weeks'.⁵³⁶ However, Labour appeared firmly wedded to the 26 week qualifying period throughout its time in government, with the Secretary of State for Employment, Mr Harold Walker, stating:

I am satisfied that the 26 weeks qualifying period is right. The honourable Member will know that the qualifying period has been progressively reduced since 1972. We consider, however, that the qualifying period of 26 weeks is necessary to give an employee time to establish himself in his job. It is also sufficient time generally for an employer to assess an employee's suitability and capability for the job.⁵³⁷

Upon losing the general election later that year, one of the first changes to be made by the Conservative Government was the doubling of the qualifying period, indicating a clear point of demarcation between the unfair dismissal systems envisaged by Labour and the Conservatives by the end of the 1970s.

The final area emerging as a point of division between the political parties was the question of who should bear the burden of proof in unfair dismissal claims. The original burden of proof provisions in the Conservative Government's Industrial

⁵³⁵ For example: HC Deb 11 July 1974 vol 876 cc1692-737; HC Deb 04 February 1976 vol 904 c 581W per Mr Kimball; HC Deb 06 March 1979 cc655-7W per Mr Dodsworth.

⁵³⁶ HC Deb 08 March 1979, vol 96,3 col 1547.

⁵³⁷ HC Deb 06 March 1979, cc 655-7W.

Relations Bill 1971 appeared to impose no clear burden of proof upon the employer in relation to unfairness of dismissal. This is perhaps indicative of the Conservatives' conception of industrial justice as encompassing justice for both parties to the employment relationship. In contrast, Labour believed that the burden of proof in unfair dismissal cases should rest squarely upon the employer. For Labour, industrial justice was about providing protection from arbitrary dismissal for the employee because their belief in the inherent power imbalance under the contract of employment mandated statutory protection. Labour was very critical of the Conservative's lack of clarity in their 1971 legislation with regards to the burden of proof:

The whole question is who has to prove. That is what matters in these cases, and that is what the ILO Convention says. Therefore we say that we have proof that these Clauses on unfair dismissal are so weak as to be practically meaningless in the view of many independent legal observers.⁵³⁸

A similar observation was made by Lord Bernstein, 'moreover, as I read the Bill, as soon as the employer shows a 'good reason', which need not be a 'fair' reason, the burden of proof shifts to the employee. What chance has an employee against a mighty, powerful employer?'⁵³⁹ These concerns led to an amendment introduced by the Government at the Report stage in the House of Lords, which led to the enactment of section 24 in the Industrial Relations Act 1971. This section introduced a two stage process for determining the unfairness of a dismissal with different rules about the burden of proof operating at each stage. Section 24(1)(a) requires the employer to establish the reason for dismissal and subsection (b) requires a consideration of

⁵³⁸ HC Deb 16 March 1971, vol 813, cc 1281-1284.

⁵³⁹ HL Deb 13 May 1971, vol 318, cc1380-519.

whether in the circumstances of the claim the employer acted fairly in treating his reason as a sufficient reason for dismissing the employee. Labour accepted this amendment with Lord Delacourt-Smith expressing Labour's position as follows:

My Lords, this amendment is not an easy one for those of us who are not deeply experienced in legal matters to appreciate, but I am fortified by the assurance of the noble and learned Lord, which naturally I accept, that its intention and effect is to place beyond any doubt at all the proposition that the onus of proof is on the employer to establish that the dismissal was a fair one.⁵⁴⁰

In practice however, the burden of proof was only partially placed upon the employer under section 24 of the Conservatives' 1971 legislation as the employer had to prove the reason for the dismissal but not necessarily that the dismissal was a fair one.⁵⁴¹ Under section 24(1)(b) the employee had to bear the evidentiary burden of making out a prima facie case of unreasonableness. This situation was clarified by Labour via section 57(3) of the Employment Protection Consolidation Act 1978 which unequivocally placed the burden on the employer to satisfy the tribunal that the employer acted reasonably in treating the reason for dismissal as a sufficient enough reason. In a subsequent debate on the Employment Protection Acts, this was criticised by the Conservative Opposition as requiring 're-examination'⁵⁴² but defended by Labour on the basis that 'only the employer can know the reasons why he has dismissed a worker. For that reason alone it would be sufficient and proper to place the burden of proof on the employer'.⁵⁴³ However, only a short while later in 1980, the

⁵⁴⁰ HL Deb vol 321, col 744.

⁵⁴¹ Mark Freedland, 'The Burden of Proof in Claims of Unfair Dismissal' [1972] ILJ 20.

⁵⁴² HC Deb 08 March 1979, vol 963, col 1547.

⁵⁴³ HC Deb 08 March 1979, vol 963, col 1614.

onus of proof was amended once again, with the Conservative Government making neutral the burden of proving the reasonableness of dismissal as between employer and employee.⁵⁴⁴

By 1979 it was clear that the unfair dismissal system had become a point of division between Labour and the Conservatives, with the former advocating a system predicated on protecting workers' job security, and the latter advocating a system responsive to the needs of business and of facilitating job creation. Crucially, neither party called for the abandonment of statutory unfair dismissal as both maintained that the system was useful in achieving industrial justice. However, while there was political agreement over the notion of industrial justice as the basis of Britain's unfair dismissal system, the emerging divisions as to how to achieve this in substance, present in the parliamentary debates between 1974 and 1979, indicates the growing willingness by the Conservatives to enlarge the notion of industrial justice in dismissal to include a new concern with how to remedy the disadvantage faced by employers, not just employees.

⁵⁴⁴ Employment Act 1980 s 6.

Section Two

The Emergence of an Argument of Principle against Unfair Dismissal Law

Davies and Freedland observe that an argument of principle against unfair dismissal legislation emerged with the election of the Conservative Government in 1979.⁵⁴⁵ They mark the origins of this argument in the 1979 Conservative Working Paper which revealed a new agenda of amending laws ‘where they damage small businesses – and larger too – and actually prevent the creation of jobs’.⁵⁴⁶ The argument of principle against employment legislation protecting against unfair dismissal represents a departure from the broad consensus which existed for most of the 1970s supporting the enactment of unfair dismissal legislation. According to Davies and Freedland, in mounting the argument of principle against unfair dismissal, ‘the substantive formulation of the right was left largely untouched, but the conditions of access to that right became more stringent’.⁵⁴⁷

While not left untouched, the statutory unfair dismissal system avoided a full frontal attack to its legitimacy during the years of the Conservative Government (1979-1997). Prime-Minister Margaret Thatcher’s famous statement about social security, ‘there is no society’ could perhaps have been uttered about job security,

⁵⁴⁵ Davies and Freedland (n 11) 200.

⁵⁴⁶ As quoted in the Department of Employment, *Proposed Amendments to the Employment Protection Legislation* (Working Paper, September 1979) para. 1, set out in IRLIB 146 (10 October 1979) 3.

⁵⁴⁷ Davies and Freedland (n 11) 200.

‘there is no unfair dismissal’. However, the Conservative Government did not go through with its intention of abolishing the jurisdiction altogether⁵⁴⁸ as scaling back the unfair dismissal system was only a sideline concern of the Conservative Government’s labour law agenda. The driving force behind the Conservative Government’s industrial relations reforms was economic policy and a desire that the labour market work free of the perceived obstacles created by trade unions. The government’s strategy for achieving this was articulated in the 1985 White Paper, ‘Employment: the Challenge for the Nation’ which provided a platform for the Government to justify its existing policies and future program of reform for the deregulation of the labour market.⁵⁴⁹ This White Paper sought to reorient labour law so that its central concern was one of fostering employment through the formula of a free market economy. As stated in the White Paper’s Introduction, ‘the key contribution of Government in a free society is to do all it can to create a climate in which enterprise can flourish, above all by removing obstacles to the working of markets, especially the labour market’.⁵⁵⁰ The stated impetus for this White Paper was the high unemployment facing the British economy which the Thatcher Government believed was caused by the failure of the jobs market. Following this White Paper, reforms were implemented that restricted the right to strike, constrained the ability of trade unions to organise members and to bargain effectively and eliminated closed shops.⁵⁵¹ Thus, the

⁵⁴⁸Department of Employment, *Building Businesses...Not Barriers* (Cmnd 9794, 1986).

⁵⁴⁹ Cmnd 9474.

⁵⁵⁰ Department of Employment, *Employment: The Challenge for the Nation* (White Paper, Cmnd 9474, 1985) 1.

⁵⁵¹ For a detailed look at the labour market policies of the Thatcher and Major Governments between 1979 and 1997 see: Simon Deakin and Gillian Morris, *Labour Law* (4th edn, Hart, 2006) 30-42.

Conservative Government's industrial relations reforms were primarily concerned with damaging the power of collective labour and so the unfair dismissal system, albeit weakened, was not subject to a concerted attempt to eliminate it altogether.

Despite not being the main target of the reform agenda, the Conservative Government did mount an argument of principle against the unfair dismissal system. This case rested upon acknowledging the need for protection for unfairly dismissed workers whilst simultaneously arguing that such protection should not stymie managerial prerogative or job creation. Despite a brief recognition of the need for 'proper protection for workers', the overarching emphasis of the White Paper was on limiting 'over burdensome regulation' as 'too much regulation can make employing people not only expensive but also time-consuming and complicated, and a company may then hesitate before taking on more workers'.⁵⁵² According to the Government 'the most significant worry'⁵⁵³ in terms of employment protection regulation was unfair dismissal claims leading to industrial tribunal proceedings, which provided the basis for the Government's efforts to reduce access to, and the quality of, the right to unfair dismissal in Britain during their years in elected office.

Both prior, and subsequent, to the 1985 White Paper, there was significant reform to the unfair dismissal laws, although the Conservative Government did not go

⁵⁵² Department of Employment, *Employment: The Challenge for the Nation* (White Paper, Cmnd 9474, 1985) 14.

⁵⁵³ *ibid* 21.

through with its original intention of abolishing the jurisdiction altogether.⁵⁵⁴ The Government raised the qualifying period from its historic low of six months in 1979 back up to two years, at first for small employers and then from 1985 on a general basis. This was justified on the basis that ‘this change will give a fair balance between the genuine concern of employers about becoming too easily embroiled in claims, and maintaining full protection for all employees with any significant length of service’.⁵⁵⁵ This focus on increasing the qualifying period so that an employee had to be employed for two years before an application could be brought was a clear attempt to restrict access to the unfair dismissal system as it extended the period in which an employer could terminate a worker’s employment without legal ramifications. Such an extended period is unnecessary if the rationale of a period of a qualification is to ensure that the employer’s positive impression of a person during the recruitment process is validated by the person’s performance on the job. Arguably, two years is not needed in order to assess a person’s suitability. The Government’s enactment of a two year qualifying period represented the prioritisation of the perceived needs of business above the perceived need to provide job security for employees.

The Conservative Government not only constrained access to the unfair dismissal jurisdiction but also reduced the size of the award that could be given by a tribunal. In 1980 the two week’s pay minimum for the basic award was abolished and tribunals were instructed to reduce compensation according to the conduct of an

⁵⁵⁴Department of Employment, *Building Businesses...Not Barriers* (Cmnd 9794, 1986).

⁵⁵⁵ *ibid* (n 554) 21.

employee prior to dismissal. The failure to index the maximum compensation limit meant that by 1994 the maximum possible remedy was only £11,000 when it should have been almost £28,000.⁵⁵⁶ Significant procedural hurdles were introduced as a disincentive to bringing an unfair dismissal application including the possibility of being made to pay a pre-hearing deposit as a contribution to the employer's costs.⁵⁵⁷ The justification for this was the desire to 'deter ill-founded claims' which is the first time arguments of vexatious litigation were seriously mounted in the debate over unfair dismissal legislation.⁵⁵⁸ In 1980 a 'pre-hearing assessment' stage was introduced to weed out the weakest cases, which ACAS reported as being unhelpful in its work of conciliation.⁵⁵⁹ Ironically, whilst these measures were instituted to deal with the perceived problem of vexatious litigation, their very existence sought to further embed this perception and legitimise the fear of it in the minds of British employers. This galvanising of British employers and in particular the small business lobby was highly effective in cementing the emergence of an argument of principle against unfair dismissal and according to Davies and Freedland, 'commanded the active sympathy and support of 1980s governments'.⁵⁶⁰ Writing in the mid 1980s, Wedderburn is extremely critical of whether this fear of vexatious litigation in the unfair dismissal jurisdiction is legitimate, citing research to suggest that it did not act

⁵⁵⁶ Linda Dickens, 'Individual Statutory Employment Rights Since 1997: Constrained Expansion' (2001) 24 ER 619, 622.

⁵⁵⁷ Employment Act 1989.

⁵⁵⁸ *ibid* (n 546) 23.

⁵⁵⁹ ACAS (1984) cited in Lord Wedderburn, *The Worker and the Law* (3rd edition, Penguin Books, 1986) 259.

⁵⁶⁰ Davies and Freedland, (n 11) 556.

as a deterrent to recruitment, and arguing that merely because there is a perception that the unfair dismissal system unfairly favours employees and prevents legitimate dismissals 'is a poor basis for legal policy'.⁵⁶¹

The British Conservative Government (1979-1997) was also influential at an international level in developing an argument of principle against unfair dismissal legislation. Despite the impact of the Termination of Employment Recommendation 1963 (No. 119) on the Donovan Commission in formulating its conception of unfair dismissal and on the subsequent introduction of a right to unfair dismissal in British individual employment law, during the negotiations for the updating Convention (No.158) and Recommendation (No.166) on Termination of Employment at the Initiative of the Employer, the Government sought to reduce the protective quality of international unfair dismissal law.⁵⁶² In particular, the British Government mounted strong resistance to the proposal that standards previously contained in the form of a Recommendation should be replaced by a Convention as the latter is conceived to directly influence national legislation while the former acts more as a guideline influencing national policy over time.⁵⁶³ The British Government also tried, albeit unsuccessfully, to convince the ILO that the new provisions on burden of proof would be more appropriate in the Recommendation than the Convention in an attempt to

⁵⁶¹ Wedderburn (n 559) 260.

⁵⁶² Brian Napier, 'Dismissals: The New ILO Standards' (1983) 12 ILJ 17.

⁵⁶³ For details of the comments received by the Committee of Experts: Committee of Experts, 'Termination at the Initiative of the Employer' (International Labour Conference, 68th Session, 1982). The comments made by the government of the United Kingdom are contained in a letter (6/OS 319/81) sent from the Department of Employment in December 1981.

dilute the influence these provisions would have on British unfair dismissal law. Consistent with their approach of resistance during negotiations, the Government rejected the final Convention and Recommendation when it was adopted by the ILO in 1982.

By way of conclusion, we can observe the far-reaching impact of the Conservative Government's approach to unfair dismissal law. Whilst the central reform was to double the qualifying period, the mounting of an argument of principle against the unfair dismissal system during the 1980s was significant for ending the bipartisan political consensus that unfair dismissal protection was desirable. Davies and Freedland write of the 1980s, 'labour law began to move out of the zone of "social law" and worker protection, and became part of a larger and rather different vision of labour market regulation in the interests of a free market economy'.⁵⁶⁴

⁵⁶⁴ Davies and Freedland (n 53) 5.

Section Three

The Emergence of an Argument of Principle against Tribunal Resolution of Unfair Dismissals Disputes

Whilst the Conservative Government of 1979-1990 advocated a stronger deregulation of unfair dismissal law, under the Conservative Government of 1990-1997 led by Mr John Major, the Conservative position became one of supporting the achievement of efficient dispute resolution of unfair dismissal disputes. The focus was not upon eliminating state intervention in the employment relationship but to ensure that where regulation existed, it was administered efficiently. This view recognised that some government intervention was necessary to achieve justice but that this intervention should require as little interference with managerial prerogative as possible and should not operate as a burden upon business. This position meant that whilst the Conservative Government of 1990-1997 recognised the possibility that employees could be unfairly dismissed, this was tempered by a desire to ensure that tribunals achieved efficient resolution of unfair dismissal disputes with minimum cost to the taxpayer and disruption to business. The Government's 1994 Green Paper 'Resolving Employment Rights Disputes: Options for Reform' is highly significant in augmenting the argument of principle against the unfair dismissal system to an argument against tribunal resolution of unfair dismissal complaints and identifying the key agenda items for the ensuing decade. This Green Paper highlights four key ideas which subsequent New Labour Governments largely adopt: first, the preoccupation with achieving

efficient dispute resolution and the marginalisation of the traditional worker-protective goals of the unfair dismissal system. The focus on efficient dispute resolution becomes part of the 'Third Way' agenda trumpeted by New Labour. The second idea focuses on encouraging in-house dispute resolution as a mechanism for avoiding tribunal cases. This idea is central to the Conservative Government of 1990-1997 promoting a more efficient operation of the contract of employment to resolve disputes between employers and employees. The third idea is the emergence of a clear preference for conciliation and other non-tribunal alternatives for resolution of disputes and the fourth is the official recognition of the perceived problem of vexatious litigation undermining the efficiency of the tribunal system. All four themes are identified in the 1994 Green Paper but continue to influence reform of the unfair dismissal jurisdiction by New Labour after 1997. These distinctive but interrelated trends first emerge in this Green Paper but have far-reaching consequences for the evolution and development of the unfair dismissal system as there is a high level of continuity between Majorism and Blairism. This section identifies these trends in some depth and explores the normative assumptions behind them.

The Conservative Government's argument of principle against the unfair dismissal system led to reconsideration of the tribunal system's viability and purpose. By the early 1990s the tribunal system was viewed as costly and inefficient by the Government whose 1994 Green Paper sought to 'review the operation of the industrial tribunals with a view to identifying any changes which would help them to cope with an increasing volume and complexity of cases with reduced delays, while containing

demands on public expenditure'.⁵⁶⁵ The terms of this review were explicitly oriented to reducing the costs of the tribunal system and increasing the efficiency of its operation. The Government chose to focus on improving the standard of service provision by reducing delays as the objective of the review. In so doing, what the Government chose *not* to focus on is noteworthy. The review did not seek to achieve greater fairness in tribunal outcomes, or a better review of dismissal decisions, or the need for tribunals to balance managerial prerogative given the increasing absence of a collective presence in the workforce. In outlining the case for review of the tribunal system, there is no hint in the Green Paper of Kahn-Freund's traditional formulation of the need for a countervailing power to balance the inherent inequality in the employment relationship.

Nor is there recognition that the Green Paper's terms of reference represent a shift from the original anchorage of the tribunal system in a primary concern with workers' claims to job security.⁵⁶⁶ In fact, this is masked by the Government's open acknowledgement and support for the continuing relevance of the Donovan Commission's prescription of tribunals as being 'easily accessible, informal, speedy and inexpensive'.⁵⁶⁷ However perhaps this oft-quoted phrase of the original prescription of tribunals is somewhat misleading as to what their intended operation was in 1968. This prescription of the tribunal system which has survived since 1968

⁵⁶⁵ Department of Employment, *Resolving Employment Rights Disputes: Options for Reform* (Consultation Paper, Cm 2707, December 1994) 4.

⁵⁶⁶ Donovan (n 48) 162.

⁵⁶⁷ Donovan (n 48) 5.

and is still relied on in the present debates over the unfair dismissal system focuses solely on the need for efficient dispute resolution. Yet this phrase, and the Government's decision to rely upon it in 1994, makes no mention of *why* tribunals were established in the first place, or the perceived need in 1968 for an equitable means of providing dispute resolution. As has been mentioned earlier in this thesis, the Donovan Commission recognised that for many workers 'dismissal is a disaster'⁵⁶⁸ and that a tribunal system was necessary given the negative consequences for dismissed employees and the concern that collective bargaining outcomes were unequal leaving many employees unprotected from unfair dismissal because of the lack of collective bargaining arrangements overall.⁵⁶⁹ The recognition of the Donovan Commission of the need for the tribunal system to provide remedies in the case of unfair dismissal was obscured by the discourse on efficient dispute resolution favoured by the Government in its 1994 Green Paper, and by subsequent New Labour Governments as well.

Given the framing of the review of the tribunal system in Chapter One of the Green Paper, it is therefore unsurprising what the Government found in the remainder of the Paper. In Chapter Three, the Government reviewed expenditure trends and influences in the tribunal system, finding that the percentage of cases coming to hearing within 26 weeks was well below the efficiency target of 80%, and that the cost of daily tribunal hearings was around £966. Chapter Four outlined the Government's

⁵⁶⁸ Donovan (n 48) para 526.

⁵⁶⁹ Labour Party, *In Place of Strife* (Cmnd. 3888, 1969) para 103.

preference for resolving unfair dismissal complaints in-house as ‘any reductions in the caseloads of the tribunals and ACAS which might result from such measures would assist towards reducing delays and improving the quality of service provided to the public’.⁵⁷⁰ There is a key normative assumption in the Government’s argument that caseload reduction *prima facie* leads to improved service provision. This is true in terms of dealing with cases expediently, which no doubt saves the public purse and assists applicants and employers in resolving their dispute sooner, however *other* measures of quality service provision, such as dealing with cases fairly, informally and consistently, are conspicuously absent from this assumption.

Another assumption which deserves critique is the view expressed in the 1994 Green Paper that conciliation of unfair dismissal disputes is preferable to tribunal resolution. In Chapter Five the Government acknowledged that ‘a major theme of the review has been the desirability of increasing the number and proportion of complaints resolved without recourse to a tribunal hearing’.⁵⁷¹ After cataloguing the benefits of conciliation, at no point does the Green Paper attempt to discuss the drawbacks of this method. In stating the advantages of conciliation it does not break down the advantages and disadvantages in terms of employers and employees as it assumes a mutuality of interests, ‘conciliation offers the potential for the dispute to be settled relatively quickly, informally and without publicity. No charges are made. ACAS is

⁵⁷⁰ Department of Employment, *Resolving Employment Rights Disputes: Options for Reform* (Consultation Paper, Cm 2707, December 1994) 20.

⁵⁷¹ Department of Employment, *Resolving Employment Rights Disputes: Options for Reform* (Consultation Paper, Cm 2707, December 1994) 27.

independent and its services are impartial and confidential. Conciliation is voluntary and can be declined by either party'.⁵⁷² The Green Paper does not take into account how the conciliation settlement is reached, what pressure is placed on the parties to settle or even whether settlement is a fair outcome in situations where one party is more wholly in the wrong. Collins criticises the British conciliation process because there is no duty for the conciliation officer to ensure that the settlement is fair to the employee as their central duty is to prevent applications proceeding to trial.⁵⁷³ Relying on Dickens' study of the system, Collins states, 'in most cases the officer assists a bargaining process and advises the employer to accept the employee's first offer'.⁵⁷⁴ The Green Paper does not attempt to grapple with these critiques and instead recommends an expansion of conciliation and the development of voluntary arbitration as an alternative to a tribunal hearing.

While it is difficult to retrospectively pinpoint when a particular concern becomes central to the mainstream agenda, the 1994 Green Paper is significant in that it contains somewhat strong rhetoric about the perceived problem of vexatious litigation. This Paper extends the mentioning of this issue of vexatious litigation in the 1985 White Paper and explicitly lends it credibility and prominence in an official government policy document. In Chapter Six on tribunal procedure the Green Paper refers to anecdotal evidence from tribunal Chairmen seeking the power to dismiss

⁵⁷² *ibid.*

⁵⁷³ Collins (n 198) 138.

⁵⁷⁴ *ibid.*

cases out of hand. The Paper comments favourably on the introduction of the concept of ‘reasonable prospects of success’ to the unfair dismissal jurisdiction the previous year, and there is consideration of a proposal requiring the applicant to place a bond with the court so as to discourage frivolous claims and encourage pre-tribunal settlement.⁵⁷⁵ This Paper marks the origins at an official governmental level of significant pressure, continuing to this current day, for governments to reform the unfair dismissal system based on the perception that it is failing to efficaciously process unfair dismissal applications.

In perceiving there to be a problem with vexatious litigation, the Conservative Government is focussing on business owners as requiring unfair dismissal protection. This is not the conventional formulation of protecting employees’ job security but instead focuses upon protecting business owners, in particular small employers, from vexatious litigation and over burdensome regulation. This agenda is revealed both in the Government’s attempts at unfair dismissal law reform and beyond. For example, in Part One of the Deregulation and Contracting Out Act 1994, there is specific reference to ‘reducing burdens on business’ and ‘cutting red tape’. Also in the Disability Discrimination Act 1995 the Government includes a number of caveats to the protection afforded in the Act, including barring those working for small businesses employing fewer than 20 employees. As noted by Davies and Freedland, ‘this exclusion, highly controversial at the time, was justified by spokesmen for the

⁵⁷⁵ Department of Employment, *Resolving Employment Rights Disputes: Options for Reform* (Consultation Paper, Cm 2707, December 1994) 23.

government partly by the general rhetoric of minimising burdens upon businesses, especially small ones'.⁵⁷⁶

In conclusion, the Conservative Government's 1994 Green Paper is highly significant in its solidification of the argument of principle against tribunal adjudication of unfair dismissal. The Government chooses to focus on improving the operation of the contract of employment as a mechanism for resolving employment disputes prior to reaching the tribunal. Although the Government is rejected at the subsequent general election, their approach to unfair dismissal and their preoccupation with achieving efficient dispute resolution within businesses and the efficient operation of the tribunal system strongly resonates and is continued by the unfair dismissal policies of New Labour. In the ensuing section, I argue that New Labour's election does not see a return to the traditional formulation of labour law with its original concerns of worker protection and industrial harmony, but that the argument of principle against unfair dismissal is not replaced but initially moderated, and then continued, by New Labour.

⁵⁷⁶ Davies and Freedland (n 53) 33.

Section Four

The Evolution of the Argument of Principle against Tribunal Resolution of Unfair Dismissal Disputes

This section explores the ideas underpinning New Labour's reform of unfair dismissal law during their three terms in office. I argue that it is possible to discern in New Labour's reforms the development of an argument of principle against tribunal resolution of unfair dismissal disputes which forms the basis for their promotion of both alternative dispute resolution and localised resolution of unfair dismissal disputes. Instead of articulating a renewal of the Donovan ideals of protecting job security and guaranteeing justice in dismissal, New Labour consistently showed its willingness to be persuaded by employer dissatisfaction with tribunal resolution of unfair dismissal complaints and implemented reforms limiting access to the tribunal system and the quality of the remedy that could be awarded. New Labour's catch-cry was one of 'better regulation' which encompassed two principal ideas for how state intervention in the labour market should operate. The efficient administration of justice was an idea which first emerged during the previous Government's period through the recognition that the employee's right to challenge their dismissal should be tempered by the public policy goal of ensuring that tribunals achieved efficient resolution of unfair dismissal disputes with minimum cost to the taxpayer. The second notion inherent in New Labour's 'better regulation' position was a desire to reduce the adverse impact of regulation upon business. 'Better regulation' is distinct from the concern of Labour in

the 1970s with the achievement of industrial justice as New Labour's objective was to ensure that the competitiveness of business is not hampered by the rights of individuals to pursue a claim against the employer. In New Labour's view, employee rights are held to exist but disputes arising from the existence of these rights should be resolved expediently and with as little disruption to the employer as possible. At its essence, 'better regulation' was about the pursuit of labour market regulation in the interests of a free and competitive market economy.

Whilst Labour of the 1990s has a different industrial relations agenda to traditional Labour of the 1970s, the self-proclaimed title of 'New' Labour belies the significant degree of continuity between the Blair Government and its Conservative predecessor. As this section will show, both the previous Conservative Government and the New Labour Governments are primarily concerned with achieving resolution of unfair dismissal disputes within businesses. They each seek to address the perceived legalism, costs and delays associated with the tribunal system. The two 'new' ideas of New Labour for managing the perceived inefficiencies of the unfair dismissal system, namely arbitration and a mandatory three-step process for resolving disputes, were both first canvassed in the 1994 Green Paper commissioned by the previous Government.⁵⁷⁷ New Labour, like their Conservative predecessor, took the view that business could be relied upon to be the arbiter of substantive fairness. This is an idea that would have been antithetical to the Labour Party of the 1970s who believed in the inherent conflict between the agenda of employers and employees necessitating trade

⁵⁷⁷ Department of Employment, *Resolving Employment Rights Disputes: Options for Reform* (Consultation Paper, Cm 2707, December 1994).

union protection of employees, or at the very least, state intervention to safeguard individual rights. As stated by Mr Janner, a Labour member of the House of Commons during the debates about whether the protection afforded by the unfair dismissal system should be strengthened:

This is what the law is for – to set up minimum standards with which people should comply and with which, unfortunately too many do not comply. Therefore, I suggest that these laws should not be regarded as a burden on industry but should be welcomed by industry as providing the best environment in which to produce better treatment and conditions for and relations with their own work forces.⁵⁷⁸

New Labour, like its Conservative predecessor, was susceptible to arguments that the unfair dismissal system was burdensome upon business and sought to reform the system to minimise this burden. In each term that it was in government, particularly in its second and third terms, New Labour continued the argument of principle and did not seek to carve a new trajectory for the tribunal system beyond the ideas conceived by the preceding Government. The industrial justice paradigm in which the unfair dismissal system was born, evolved by the 1990s, into a new paradigm where the primary concern was the pursuit of labour market regulation in the interests of a free and competitive market economy. This resulted in New Labour seeking to deregulate unfair dismissal law in favour of promoting alternative dispute resolution and localised dispute resolution of unfair dismissal disputes.

The establishment of ‘partnership’ between employers and employees as a central plank of New Labour’s industrial relations platform was built upon their belief

⁵⁷⁸ HC Deb 20 December 1976, vol 923, cc42-114.

in the employment contract as a bargain between equals. In the Prime-Minister's Foreword to New Labour's 1998 White Paper 'Fairness at Work' Mr Blair stated, 'this White Paper is part of the Government's program to replace the notion of conflict between employers and employees with the promotion of partnership'.⁵⁷⁹ The Foreword reflects a New Labour agenda of economic success driving social prosperity as it conceives that the achievement of a modern enterprise economy will lead to social gains across the board. Accordingly, the three pillars of New Labour's industry policy, as articulated in 1998, were the pursuit of strong markets, modern companies and the creation of an enterprise economy. Conspicuously absent is any explicit concern with workers' rights or protection of workers in this perceived need to create a modern, free market British economy. In 'Fairness at Work' the Government states 'individual contracts of employment are not always agreements between equal partners', implying that the contract of employment is a bargain between equals in the majority of cases.⁵⁸⁰

The promotion of the metaphor of partnership to represent the employment relationship reveals the Government's belief that the contract of employment is negotiated individually between the employer and the employee. In their view, the employee is not in need of special assistance or support as the contract of employment will then be tailored to meet the individual circumstance of the parties:

Employers and workers in the UK generally determine the detailed terms and conditions of employment at a local or individual level...[which] subject to minimum standards – leads to greater diversity of employment patterns because the outcome is dependent on

⁵⁷⁹ Department of Trade and Industry, *Fairness at Work* (White Paper, Cm 3968, May 1998) 3.

⁵⁸⁰ DTI (n 579) 21.

millions of individual decisions by individual workers and employers.⁵⁸¹

In this way, New Labour's concept of partnership is used to represent the idea that in a modern company the employee is no more disadvantaged than the employer, as the imperative on the latter to make the business competitive and profitable is akin to the investment of time, energy and resources that the individual employee makes in their job. According to New Labour, both the employer and the employee are partners in making the business a success and the contract of employment reflects the equitable nature of this partnership. Collins argues that the election of the Blair Government represented the emergence of a new theme of 'regulating the employment relation for competitiveness' with the dominant objective being 'to improve the competitiveness of businesses so that they may survive and prosper in an increasingly global economic system'.⁵⁸² He characterises New Labour's quest for competitiveness as 'facilitating changes in the organisation of the workplace that entails a transformation in the nature of the employment relation'.⁵⁸³ As such, whilst 'traditional' Labour sought to protect workers from their perceived disadvantaged position under the contract of employment, 'New' Labour believed regulating the employment relationship for competitiveness would create a partnership between employers and employees that would eliminate the need for statutory protection. New Labour conceived the contract of employment as a symbiotic contract in which 'the basic framework of incentives is designed as two simultaneous principal and agent relations' and although 'the interests

⁵⁸¹ Treasury, *Full and Fulfilling Employment: Creating the Labour Market for the Future* (London, 2002) 42-3.

⁵⁸² Hugh Collins, 'Regulating the Employment Relation for Competitiveness' (2001) 30 ILJ 17, 18.

⁵⁸³ Collins (n 582) 34.

of management and workers conflict...in order to maximise their self-interest they have to engage in extensive cooperation with each other'.⁵⁸⁴ New Labour viewed employees as the ultimate beneficiaries of the Third Way agenda of creating a partnership model at work based on fostering competitiveness because this agenda would provide employees with greater access to employment opportunities and protection through a minimal safety net.

So what is the impact of New Labour's idea of partnership on unfair dismissal law? First and foremost, New Labour's belief in the ability for employers and employees to work together as partners has led to the deregulation of unfair dismissal law through the resolution of unfair dismissal disputes within businesses and without recourse to tribunals. New Labour experimented with a variety of reforms during its three terms in office, each with the primary objective of diverting unfair dismissal applicants away from the tribunal system in favour of localised dispute resolution. This deregulation was intended to encourage employers and employees to rely upon the contract of employment to resolve unfair dismissal disputes within the workplace. New Labour's reforms with this objective were: the establishment of a right to a support person, the introduction of an arbitration scheme for resolving dismissal disputes, the experiment with a mandatory three step dismissals procedure, the introduction of pre-claim conciliation and the simplification and revision of the ACAS Code. In each of these reforms, discussed below in chronological order of implementation, it is possible to discern a New Labour argument of principle against

⁵⁸⁴ Hugh Collins, 'Is there a third way in labour law?' in Joanne Conaghan, Richard Fische and Karl Klare (eds), *Labour Law in an Era of Globalization* (OUP, 2002) 459-60.

tribunal resolution of unfair dismissal disputes and a desire to resolve these disputes locally within the workplace and without recourse to tribunals.

A. Arbitration

The first attempt to dissuade unfair dismissal applicants from proceeding to the tribunal system was in 1998 with the establishment of a voluntary arbitration scheme that if utilised by the parties would preclude the possibility of subsequently taking the application to the tribunal. The Government supported the Employment Rights (Dispute Resolution) Act 1998 introduced by Lord Archer of Sandwell which created a new voluntary arbitration scheme, developed by ACAS to settle unfair dismissal claims. Arbitration was intended by the Government to ‘create a change of culture so that individuals who have been dismissed unfairly are more likely to get their jobs back’.⁵⁸⁵ Under the Act, ACAS was asked to devise a scheme for providing an alternative route for parties, where they so agree, to eschew the traditional tribunal route and rely upon ACAS to adjudicate their unfair dismissal claim. The arbitral option came into effect from 21 May 2001 and was aimed to provide parties with the opportunity to resolve their dispute via binding arbitration.⁵⁸⁶ Nonetheless, this scheme has largely failed in its purpose to create cultural reform of the unfair dismissal system by diverting applications away from tribunals as less than fifty applications were dealt

⁵⁸⁵ DTI (n 579) 15.

⁵⁸⁶ Jill Earnshaw and Stephen Hardy, ‘Assessing an Arbitral Route for Unfair Dismissal’ (2001) 30 ILJ 289.

with during its first four years in operation.⁵⁸⁷ Many reasons have been suggested for the unpopularity of the Scheme such as over-formalisation, the restriction of the Scheme to two jurisdictions when the vast proportion of tribunal cases are multi-jurisdictional and the fact that ACAS arbitration is voluntary and both parties must agree to this route.⁵⁸⁸

B. The Right to Accompaniment

Another attempt by New Labour to resolve unfair dismissal disputes within businesses and without recourse to tribunals was the establishment of a right to accompaniment within the disciplinary process. This right to accompaniment, established in sections 10 to 14 of the Employment Act 1999, was for meetings that could result in a disciplinary sanction and for meetings at which an employer was examining an employee complaint about either a statutory or common law duty owed by them to a worker. The right to support in the disciplinary process was not intended to be a right to representation. The Government in 2003 expressly stated that it wished to maintain the distinction between the right to a companion and the right to a representative, with only the former being allowed to attend meetings under the law.⁵⁸⁹ Calls to widen the role of the ‘companion’ into that of a ‘representative’ were rejected by the Government

⁵⁸⁷ ACAS, *Making More of Alternative Dispute Resolution* (ACAS Policy Discussion Paper, No.1, January 2005).

⁵⁸⁸ Department of Employment, *Resolving Employment Rights Disputes: Options for Reform* (Consultation Paper, Cm 2707, December 1994).

⁵⁸⁹ Department of Trade and Industry, *Review of the ERA 1999: Government Response to the Public Consultation* (DTI, 2003) para 3.43.

and it was clarified that a companion is only there to ‘provide support and not to substitute for the worker’.⁵⁹⁰ Thus, the companion can only be one of two people: either a fellow worker or a trade union official.

The constraint against representation and the limitation on whom the employee could bring as a support person reflected New Labour’s belief that the contract of employment is a bargain between equals. They argued that whilst the employee may be in need of support from a co-worker or unionist, there is no need for representation or legal advice because the employee is not in a disadvantaged position when responding to the employer’s questioning. Nonetheless, low levels of unionisation means that not all employees have the option of bringing a union official as their companion, whilst asking a fellow employee to attend the meeting as a support person widens the number of those involved in the dispute and could perhaps place the fellow employee in a difficult position. In some situations, it may be difficult for the employee to find a fellow employee who could act as a support, especially where the employee has been a victim of widespread bullying or harassment in the workplace. Two recent cases have seen the expansion of this right to accompaniment into a right of representation for the purpose of workplace disciplinary proceedings.⁵⁹¹ In both cases the employee was accused of sexual misconduct but the employer refused the employee’s attempt to bring a legal representative to the disciplinary meeting. However, the court held that a right to representation does arise where the employee’s

⁵⁹⁰ *ibid.*

⁵⁹¹ *Kulkarni v Milton Keynes NHS Trust* [2009] IRLR 829; *R (on the application of G) v Governors of X School* [2010] IRLR 222.

right to practise his or her profession is in jeopardy. Furthermore, if the employer's own disciplinary policy allows the employee to bring a legal representative and the employee's contract of employment incorporates the employer's policies into the contract, then the court will deem this as providing the employee with a right to representation.⁵⁹²

C. The Three Step Dismissal Procedure

The clearest indication of New Labour's desire to promote the contract of employment as the primary mechanism for resolving disputes about dismissal was in their intention to statutorily imply a mandatory three step dismissal procedure into all contracts of employment. This proposed reform was aimed to aid the efficient internal resolution of unfair dismissal disputes and reflected the Government's desire to safeguard job security through facilitating workplace cultural reform. In the Government's view, the fact that there existed an estimated six million out of 25 million employees who had no access to internal dispute resolution procedures, needed to be addressed and of particular concern to them was the situation within small businesses who tended to be less formalised in their approach to dismissal. In response to this state of affairs, the Government proposed, via clause 30 of the Employment Bill 2002, that a three step statutory procedure to govern the dismissal of employees be implied into all contracts of employment. The implication of statutory dismissal procedures into the employment contract was recognised by Lord Wedderburn as a 'novel legal innovation' because a

⁵⁹² *Kulkarni v Milton Keynes NHS Trust* [2009] IRLR 829;

process for resolving unfair dismissal disputes would become an inherent part of the employment relationship based on the contract.⁵⁹³ According to Lord Falconer from the Government, this contractualisation of unfair dismissal law would equalise the balance of power between employers and employees under the contract of employment by providing that both parties would have to follow a set procedure in resolving disputes:

Clause 30 ensures that the statutory procedures will be incorporated into contracts as an implied term where employers do not already operate more elaborate procedures. This means that all employers and all employees will henceforward have disciplinary and grievance procedures.⁵⁹⁴

Despite New Labour's fanfare in unveiling clause 30 to the parliament it was never enacted. Rather predictably, New Labour responded to the concern of employers that clause 30 would lead to the qualifying period being circumvented as applicants could pursue a breach of contract claim in the common law courts, and that this would lead to an increase in litigation. In their response to the Government's consultation on the dispute resolution regulations in 2004 the CBI argued that clause 30 would represent a 'huge bureaucratic burden' for business and would lead to an increase in tribunal cases.⁵⁹⁵ The TUC made a contrasting submission to the Government's consultation process as the unions supported the statutory procedures being implied into employment contracts on the basis that this would universalise systems for resolving disputes within the workplace before they escalated. The TUC argued that abandoning

⁵⁹³ HL Deb 21 March 2002, vol 632, col 263.

⁵⁹⁴ HL Deb 21 March 2002, vol 632, col 263.

⁵⁹⁵ HL Deb 23 February 2004, vol 658, col 87.

clause 30 represented a squandered opportunity as ‘what is being proposed now is a fast-track, sacking procedure that is so confusing it will probably lead to an increase in tribunal cases rather than the desired decrease’.⁵⁹⁶ In choosing to defer the introduction of clause 30, New Labour indicated, once again, how susceptible they were to reforming labour law according to employer arguments about business efficiency and controlling regulatory burdens. New Labour’s plan to revisit in two years the question of statutorily implying the dismissal procedures into employment contracts was ultimately scuttled by the Gibbons Review which decreed the statutory procedures a failure and advocated their repeal.

Despite the abandoning of clause 30, the imposition of statutory dismissal procedures on employers is still revealing of a New Labour agenda of achieving efficient internal dispute resolution so as to minimise the opportunity for employees to require the tribunal system. The rules which all employers had to follow in dismissal were established in the Employment Act 2002 (Dispute Resolution) Regulations 2004. This required the employer to inform the employee of their intention to dismiss via a letter, to set up a meeting with the employee and to allow the employee to appeal this decision. Failure to follow this three step procedure rendered the dismissal “automatically unfair” and as a result, the employer risked the compensation awarded after a tribunal finding of unfair dismissal being increased by between 10 and 50 per cent. In the case of gross misconduct of which the employer possessed incontrovertible evidence of, an employer could dismiss an employee by using a modified version of

⁵⁹⁶ TUC, ‘Government squandered reform of work dispute system’ (Press Release, 16 December 2003).

this procedure which involved writing to the employee about their dismissal and giving them the right to an appeal.

This statutory dismissal procedure affected all businesses regardless of their size but was perhaps particularly conceived with small business in mind, given the attempt to streamline and simplify the requirements upon employers carrying out a dismissal. According to the Minister responsible for implementing the new system, Ms Patricia Hewitt, the three step dismissal procedure would ‘provide further incentives for business to raise productivity and to follow best practice’.⁵⁹⁷ However the procedure introduced in the 2004 regulations represented a minimalist approach to dispute resolution and was not indicative of best practice in this area. The paucity of the requirements reflected a New Labour Government unwilling to place too heavy a burden upon employers but instead seeking to foster a consistent and coherent approach to dismissal across businesses of varied shapes and sizes. Despite many proposed amendments during the Grand Committee stage to introduce more obligations upon employers seeking to dismiss staff,⁵⁹⁸ the Government was committed to a streamlined three-step dismissal procedure, arguing that ‘the purpose of the statutory procedures is simply to require suitable minimum procedures to be followed when employees are dismissed’.⁵⁹⁹ As a result, there was no requirement that multiple warnings be given, or that an employee be given a chance to improve performance or

⁵⁹⁷ HC Deb 27 November 2001, vol 375, col 869.

⁵⁹⁸ HL Deb 21 March 2002 , vol 632, cc 263-320.

⁵⁹⁹ HL Deb, 20 March 2002, vol 632, col 225.

any obligations upon employers to provide training and development. Instead, the three step procedure was remarkable for its brevity. During the Grand Committee debates Lord McCarthy characterised the primary purpose of the statutory dismissal procedures as being to reinstate the power of managers to dismiss staff:

Behind all this...is nothing less than the philosophy of the treatment of workers. It is not an accident that the idea of a statutory procedure—the essential elements of the statutory procedure—comes from the employers. Discipline is seen as something that can be done by anybody. Discipline does not have to be consistent; it does not have to be based on your past record; and it does not have to be placed on anything else but an exercise of managerial prerogatives. That is the philosophy. The alternative is that discipline could be consistent, that it should fit itself to the individual and that as far as possible it should be remedial and constructive. This is the philosophy of personnel management, not the philosophy of managerial prerogatives.⁶⁰⁰

Thus, it could be argued that the significance of New Labour's commitment to the achievement of localised dispute resolution through the statutory dismissal procedures represents a movement towards allowing internal regulation of unfair dismissal disputes. Flanders argues that internal rules are set by 'managements seeking to bring the work behaviour of employees under greater control',⁶⁰¹ which is consistent with the traditional doctrine of managerial prerogative which provides that it is an employer's right to organise their work arrangements in such a way as to ensure the most efficient operation of the business. Whilst New Labour's statutory dismissal procedures were imposed by the government upon business, the paucity of the requirements under these procedures gives credence to the argument that the real effect

⁶⁰⁰ HL Deb 21 March 2003, vol 632, col 270.

⁶⁰¹ Flanders (n 509) 15-18.

of this reform was to increase managerial prerogative during the dismissal process and to deter applications away from the tribunal process.

The introduction of statutory dismissal procedures was accompanied by another reform, in section 98A of the Employment Act 2002, which provided that the failure by the employer to follow a ‘procedure’ other than the three step procedure in relation to the dismissal of an employee shall not by itself make the employer’s action unfair if the employer shows that the dismissal would have occurred if the procedure had been followed. By reinstating the so-called “no difference rule” employers were no longer required to comply with their own internal procedures governing dismissal or even the Government’s more expansive ACAS Code of Practice.⁶⁰² Thus, it could be argued that the focus of New Labour was not on encouraging best practice but rather on precluding unfair dismissal complaints reaching the tribunal with the Government believing that this three step procedure would lead to a significant reduction of 23-31% in the caseload of employment tribunals.⁶⁰³ The regulations were clearly aimed at reducing the number of employment tribunal claims by forcing employers and, most importantly, employees to exhaust internal procedures before resorting to an employment tribunal claim.⁶⁰⁴ Failure to comply with the procedure and exhaust internal mechanisms for resolving unfair dismissal disputes would prevent an employee from accessing the tribunal system. According to Davies and Freedland,

⁶⁰² *Kelly-Madden v Manor Surgery* (2006) UK EAT 0105/06/1910.

⁶⁰³ Employment Bill, Explanatory Note, paras 179, 197; Standing Committee F (12.2.02) col 93 (Minister of State for Employment and the Regions, Alan Johnson).

⁶⁰⁴ Department of Trade and Industry, *Routes to Resolution* (DTI, 2001).

It is hard to avoid the conclusion that its proposals [contained in Parts 2 and 3 of the Employment Act 2002] quite extensively crossed the line which separates measures to facilitate the settlement of disputes from *measures to stifle the assertion of the rights which might give rise to disputes*. (Emphasis added) ⁶⁰⁵

Within two years the statutory dismissal procedure was reviewed and decreed a failure, prompting its repeal. In 2006 the Government commissioned a review of the dispute resolution system by Michael Gibbons, aimed at assessing the extent to which the 2002 reforms of the unfair dismissal system had met their objectives. The Gibbons Review found there to be a number of problems with the new statutory dismissal procedure. Firstly, the number of unfair dismissal cases proceeding to tribunals had not fallen and there was even anecdotal evidence to suggest that the new statutory grievance procedures had created 30% more cases.⁶⁰⁶ Secondly, employers consulted during the Gibbons Review frequently referred to problems with formalisation as employers feared that if anything was left informal, they would be open to claims, while employees wanted to ensure that a grievance was registered so that it could be used in a tribunal claim if need be. Gibbons found this so called ‘red tape’ and administrative burden to be particular onerous on small business with less sophisticated human resource management techniques. He found, ‘small businesses tend to have a more informal culture and the requirement to express problems in writing could act as a trigger for greater conflict.’⁶⁰⁷ Thirdly, the Gibbons Review found that the statutory grievance procedure was too complex and tended to ‘drive

⁶⁰⁵ Davies and Freedland (n 53) 65.

⁶⁰⁶ Michael Gibbons, *Better Dispute Resolution: A Review of Employment Dispute Resolution in Great Britain* (Department of Trade and Industry, 2007) 5.

⁶⁰⁷ Gibbons (n 606) para 2.11.

users to seek legal advice earlier' resulting in the further complication and escalation of the dispute.⁶⁰⁸ As a result of this critique, the Gibbons Review recommended the repeal of the three step statutory grievance procedure which the Government subsequently carried out through its Employment Act 2008. This repeal of the statutory dispute resolution procedures was on the basis that these procedures amplified the administrative responsibilities of employers, and had unintended consequences which outweighed their benefits.⁶⁰⁹

D. Reforms to Conciliation

Another attempt to resolve disputes within the business was New Labour's attempt to encourage conciliation of unfair dismissal disputes. In an attempt to resolve more disputes at the conciliation stage, the Blair Government introduced fixed conciliation periods. The Employment Act 2002 (Dispute Resolution) Regulations 2004 introduced provisions which in most cases restricted the ACAS duty to conciliate to a fixed period of seven or thirteen weeks. After that period was over, ACAS could still exercise a statutory power to conciliate; but ACAS used that power sparingly because they viewed the clear intention of Parliament to be that conciliation outside the prescribed periods should only be made available in exceptional circumstances. This experiment with fixed conciliation periods was short-lived with the review conducted by Michael

⁶⁰⁸ Gibbons (n 606) paras 2.7-2.19.

⁶⁰⁹ For more on this repeal process and the debates over the Employment Bill 2008, see: Astrid Saunders, 'Part One of the Employment Act 2008, "Better" Dispute Resolution?' (2009) 38 ILJ 30.

Gibbons in 2006 finding that limiting when conciliation is available to the parties had not led to more or earlier resolution of disputes about individual employment rights. ACAS's own research suggested that opportunities for resolving cases were frequently lost because parties were unable to access the conciliation service after the fixed period had expired.⁶¹⁰ The feedback of ACAS conciliators was that fixed periods led to a damaging focus by the parties on the minutiae of process including timescales which hampered the flow of the conciliation dialogue and the critical exploration of the substantive issues in the dispute.⁶¹¹

The decision to repeal fixed conciliation periods in 2008 was accompanied by a new experiment with pre-claim conciliation, also with the aim of resolving employment disputes at an earlier stage and prior to tribunal. This reform has been considered far more successful by ACAS in resolving disputes by encouraging conciliation. Pre-claim conciliation is initiated when one of the parties call the ACAS helpline to discuss a problem in their workplace or a complaint that they are considering making before the tribunal. The ACAS phone operator then gives the caller advice as to how to proceed and with their acquiescence calls the other party in order to try and arrange a conciliation meeting. This entire process hinges upon the willingness of both parties to participate but there are unwritten incentives: earlier resolution of the dispute, the offer of free conciliation, a low cost alternative to a dispute before the tribunal and the opportunity to keep the employment relationship

⁶¹⁰ ACAS, 'Response to the Government Consultation: Resolving Disputes in the Workplace' (2007) 22.

⁶¹¹ *ibid.*

going instead of it breaking down completely. By the end of December 2010 almost 20,000 potential employment tribunal claims had been referred for pre-claim conciliation since the service was launched in April 2009, with demand for the service continuing to rise.⁶¹² ACAS estimates that resolving a claim through its early conciliation service saves a business on average £5,200 when staff time and legal costs are factored in.⁶¹³ In a survey of users carried out for ACAS by an independent research organisation, businesses said they found disputes resolved through pre-claim conciliation typically occupied less than a day of management time, whereas cases settled after an employment tribunal claim has been made take up on average five days of management time.⁶¹⁴ This increases to nine days for those which reach a tribunal hearing. Similar time savings were evident for employees.⁶¹⁵ 75% of calls have been converted into pre-claim conciliations, with 80% of these avoiding recourse to the tribunal system. 88% of users of the helpline say that they would use this service again.⁶¹⁶ Thus, the ability of the pre-claim conciliation process to resolve disputes earlier and divert employers and employees away from the tribunal system has been largely considered to be successful in achieving New Labour's objective of facilitating partnership in the workplace by preventing the escalation of conflict so as to reduce the need for tribunal adjudication.

⁶¹² ACAS Research and Evaluation Section, *Evaluation of the First Year of ACAS' Pre-Claim Conciliation Service* (Research Paper by ORC International, 2011).

⁶¹³ *ibid.*

⁶¹⁴ *ibid.*

⁶¹⁵ *ibid.*

⁶¹⁶ *ibid.*

E. The Simplification of the ACAS Code

Another attempt by New Labour to facilitate localised dispute resolution was through a revised ACAS Code of Practice identifying the key procedures employers should follow in dismissing an employee. The ACAS Code of Practice has existed as part of Britain's unfair dismissal system since 1977 but in 2008 the Government revised this code to incentivise better dispute resolution practices. Prior to 2008, whilst the code was never legally binding, it could be taken into account by industrial tribunals in determining what was to be expected of a reasonable employer. However, under section 3 of the Employment Act 2008 tribunals were given discretionary powers to increase or decrease awards by 25% if parties failed to comply with the revised ACAS code. The question before the tribunal was whether the employer or employee failed to unreasonably comply with the code. Birrell criticises the equality of arms envisaged by the unfair dismissal system post 2008 as he suggests the placement of behavioural obligations upon both employers and employees assumes a false parity:

Whilst for many employees this brush with their employer's disciplinary or grievance procedures is likely to be their first, for the employer it is merely the latest episode of a familiar continuum. The stakes too are very different: for an employer it is about eliminating undesirable conduct or behaviour, for an employee it represents a threat to their livelihood.⁶¹⁷

The revised ACAS Code of Practice is considerably shorter than its predecessor code and has diluted the right to unfair dismissal as it existed in British labour law prior to

⁶¹⁷ Ian Birrell, 'The Employment Act 2008' (Institute of Employment Rights, London, May 2009) 7.

2004. In contrast to previous versions, the 2008 code gives no guidance to tribunals as to the behaviour of a 'reasonable' employer and comes close to replicating the minimalist standard set by the three step statutory dismissal procedure introduced in 2004. The revised 2008 code does not require proportionality in deciding on the appropriate action⁶¹⁸ and paragraph 17 of the new code does not compel the employer to take account of the employee's record or length of service. The detailed guidance provided by the new Guide to Discipline and Grievances at Work⁶¹⁹ has no legal standing as tribunals are not required to take the non-binding guidance into account when determining the fairness of a dismissal.

Section Five

Conclusion

This chapter has shown how the trajectory of British unfair dismissal post 1971 has been to peel back the statutory superstructure regulating unfair dismissal. The 1970s did not see major reform to the unfair dismissal system but the parliamentary debates from this period reveal growing differences between Labour and the Conservatives about the length of the qualifying period, who should bear the burden of proof and the remedy of reinstatement. The election of the Conservative Government in 1979 saw the emergence of an argument of principle against statutory protection of unfair

⁶¹⁸ ACAS Code of Practice on Discipline and Grievance (2004) para 17.

⁶¹⁹ ACAS Code of Practice on Discipline and Grievance (2009).

dismissal. Whilst the Government was unsuccessful in achieving its original intention of abolishing unfair dismissal law, the Government did reduce access to the tribunal system by substantially increasing the qualifying period and limiting the quality of the award that could be given by failing to index the compensation cap to inflation. For the subsequent Major and New Labour Governments the agenda became one of encouraging, or in some cases, mandating, that employers and employees resolve disputes about dismissal themselves. This has led to the deregulation of unfair dismissal law based on an argument of principle against tribunal resolution of unfair dismissal. This deregulation of the unfair dismissal system overall has also led to new types of regulation seeking to prevent disputes about dismissal from escalating. Reforms such as pre-claim conciliation, arbitration, a right to accompaniment, a revised ACAS code and a three step dismissal procedure were adopted on the basis that they would facilitate the settlement of disputes within businesses and prevent them from requiring tribunal resolution. The philosophy underpinning this preference for localised dispute resolution is one that conceives of the contract of employment as an equal bargain between the parties. According to this view, the traditional notion of the disadvantaged employee under the contract of employment is counterbalanced by the contemporary understanding of employer disadvantage because of the pressures facing business owners to remain competitive. These ideas have led to the peeling back of the statutory unfair dismissal superstructure established in 1971 because of renewed questioning as to the place and legitimacy of statutory unfair dismissal protection for employees. As the previous chapter observed, a similar questioning of the foundations of unfair dismissal law in protecting job security has occurred in Australia. The final

chapter of this Part seeks to understand the contestation of normative ideas behind the convergent evolutionary dynamic of British and Australian unfair dismissal law despite their origins in divergent labour law traditions.

CHAPTER SEVEN

A NORMATIVE EVALUATION OF THE EVOLUTION OF UNFAIR DISMISSAL LAW

Section One

Introduction

This chapter seeks to provide a normative critique of the evolution of unfair dismissal law in Britain and Australia subsequent to its introduction. In the final chapter of Part A (chapter four) I explored the role of worker protective normative templates in influencing the inception of unfair dismissal law. The ideas of Hepple, Wedderburn, Meyers and Collins were seen as providing alternative, yet occasionally overlapping ideal frameworks for how unfair dismissal law should operate. Broadly speaking, their ideas can be grouped together for their unifying objective of seeking to protect workers from arbitrary dismissal. In the second Part of this thesis my focus has been on the adaptation of unfair dismissal law over time according to different political, social and economic pressures that have arisen.

In his work identifying the philosophical bent of New Labour's Third Way, Bogg suggests we should be cautious in the ideological characterisation of legislative programmes.⁶²⁰ This is based on his view that a particular policy position may have a number of justificatory arguments.⁶²¹ He looks at political traditions liberalism and civic republicanism and suggests that these are best understood as 'family resemblance' concepts as there is a complex web of ideas contained within any one

⁶²⁰ Bogg (n 54) 80.

⁶²¹ Bogg (n 54) 80.

philosophical tradition.⁶²² The second aspect of Bogg's argument is predicated on the importance of 'incompletely theorised agreements'. This is when there is an 'agreement on the particulars of what ought to be done in a given case but there is no agreement on the underlying justifications for the course of action'.⁶²³ In my view, the evolution of unfair dismissal law in Britain and Australia is an example of an incompletely theorised agreement. What I have shown in Part B, albeit diachronously, is the general agreement amongst legislators to peel back the unfair dismissal statutory superstructure in both Britain and Australia. This general pattern of deregulation has not been identical as between successive governments or as between the two jurisdictions. In both Britain and Australia we have observed in the preceding two chapters of Part B the oscillations around the unfair dismissal legislation which can be seen as a contestation between deregulation and re-regulation, although the latter has still contained a deregulatory impulse in establishing some barriers to those seeking access to the unfair dismissal jurisdiction and diluting the substantive protection afforded under it. This contestation between deregulation and re-regulation occurred at both the practical legislative level and between theorists. The focus of this chapter is on the disagreement at the theoretical level between those seeking to support a deregulated unfair dismissal law and the emergence of a response by other theorists to provide a fresh normative template for this law based upon worker-protective goals.

⁶²² Bogg (n 54) 82.

⁶²³ Bogg (n 54) 82.

The deregulatory spectrum is broad and different theorists have articulated different rationales on the nature and extent of deregulation of unfair dismissal law which they perceive to be necessary. Of the more purist deregulatory school are neo-liberals Friedrich Hayek and Richard Epstein who have developed theories as to why a free labour market is ideal and how the law of unfair dismissal interferes with the attainment of this. Hugh Collins provides a more moderate case for deregulation based upon his set of ideas originating from his 1992 work about justice in dismissal and his later contribution advocating labour market regulation for competitiveness. Collins seeks to combine normative ideals of worker protection with the achievement of productive efficiency. Alan Bogg has also contributed to this contestation of normative ideas with his writings on the Third Way and his advocacy of civic republican ideas to temper the market-orientation of egalitarian liberalism. Australian scholar Professor Ron McCallum offers the normative template of industrial citizenship which seeks to combine ideas of rights and responsibilities in the workplace as a justification for a more efficient, albeit still worker protective unfair dismissal law. This theoretical normative contestation is the focus of this chapter as we seek to develop a normative understanding and evaluation of the trajectory of British and Australian unfair dismissal law subsequent to its introduction.

Section Two

The Influence of Liberal Doctrines on Unfair Dismissal Law

At the outset of this section it is important to flag the diversity of liberal doctrines. Otto Kahn-Freund has attributed the British trade union movement as heirs to a heritage of British 19th century liberalism valuing individual choice. He observes that in the context of labour law, ‘laissez-faire’ may have two very different meanings, one being the conventional notion of a free labour market but the other of ‘allowing the free play to the collective forces of society, and to limit the intervention of the law to those marginal areas in which the disparity of these forces, that is, in our case, the forces of organised labour and of organised management, is so great as to prevent the successful operation of what is so very characteristically called “negotiating machinery”.’⁶²⁴ The rise of neo-liberalism is thus seen as quite distinctive when compared and contrasted with the traditional liberalism written of by Kahn-Freund in Britain. However, the liberal church is a broad one housing many different ideas and with varying degrees of support for a free labour market as the ideal mechanism for ordering relations between employers and employees. In this section I focus on the influence of Hayek’s and Epstein’s respective interpretations of neo-liberalism and Bogg’s explanation of egalitarian liberalism in influencing the evolution of unfair dismissal law in Britain and Australia.

⁶²⁴ Otto Kahn-Freund (n 223) 8.

A. Neo-Liberalism

Common to the reform trajectory of British and Australian unfair dismissal law was a desire of rightist governments to substantially deregulate unfair dismissal law and to make an argument against the merits and legitimacy of this law. In Britain, the Conservative Government (1979-1997) and in Australia, the Coalition Government (1995-2007) can be seen as seeking to peel back the statutory superstructure governing unfair dismissal law, albeit to varying degrees and at different times. What ideas drove this deregulation of unfair dismissal law in Britain and Australia by these governments? Whilst points of divergence exist within neo-liberalism, the labour law reforms pursued by the Conservative Government in Britain and the Coalition Government in Australia can be regarded as following a type of Hayekian neo-liberalism favouring a free labour market resting on a belief that trade unions and collective bargaining raise labour costs beyond their true market level which in turn creates unemployment.⁶²⁵ Hayekian neo-liberalism is implacably hostile towards the presence of government regulation protecting labour standards which increase the rigidity of the labour market. In this light, unfair dismissal law represents an interference with the freedom of the labour market as it constrains the ability of

⁶²⁵ Friedrich Hayek, *1980s Unemployment and the Unions* (second edition) (Institute of Economic Affairs, 1984). The influence of Hayek upon the British Conservative Government's reform agenda for labour law is noted in KW Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18 ILJ 1. The Australian Coalition Government's Work Choices reforms have been explained as an expression of neo-liberalism, particularly for their focus on individual bargaining: Joel Fetter, 'Work Choices and Australian Workplace Agreements' (2006) 19 Australian Journal of Labour Law 210, 210–12. However, as Mary Gardiner observes, the neo-liberal explanation does not adequately explain the extent of the Coalition Government's increase in regulation and micro-management that characterised their Work Choices reforms: Mary Gardiner, 'His Master's Voice? Work Choices as a Return to Master and Servant Concepts' (2009) 31 Sydney Law Review 53.

employers to fire staff. This coercive distortion of the market mechanism can be criticised for restraining job creation because of a reluctance to hire new staff in case a need to fire them eventuates and stifling productivity by creating a disincentive for work effort. It is these ideas that provide the basis for a position against unfair dismissal law.

Whilst Hayekian neo-liberalism focuses predominantly on critiquing trade union power, another neo-liberal, Richard Epstein, has mounted a specific case against statutory unfair dismissal law. His argument rests on a belief that statutory unfair dismissal law alters the entire fabric of contract law by creating an environment that makes it difficult for the vast majority of good employers and good employees to structure their relationships efficiently.⁶²⁶ He says that the whole purpose of the unfair dismissal system is to target the less likely occurrence of a bad employer and thus it is inefficient as ‘it exposes every decision in labour markets to second guessing by either a court or an administrative agency’. He then goes on to observe that:

The upshot of this structural indecision is that virtually any dismissal for whatever reason, from redundancy to manifest incompetence may well be subject to legal challenge. And the message will not be lost on employers who will be slow to hire and slow to fire in order to minimize their exposure to liability under the unjust dismissal laws.

Thus, the essence of Epstein’s neo-liberal opposition to unfair dismissal law rests on a belief in the illegitimacy of the case for protecting job security as an unjustifiable interference with managerial prerogative. His view suggests that by removing unfair dismissal law, employers will be more likely to hire new staff because they will have

⁶²⁶ Richard Epstein, ‘The Common Law and the Labour Market’ (HR Nicholls Publications, 2001) <<http://www.hrnicholls.com.au/articles/hrn-epstein.php>> accessed 18 July 2011.

more confidence that they can end the employment relationship if the staff member proves to be unsuitable.

Whilst many scholars have noted the influence of Hayekian neo-liberalism on the British Conservative Government's (1979-1997) labour law platform,⁶²⁷ in the field of unfair dismissal law there is less concrete evidence to support an argument that the Government was motivated by a desire to unwind unfair dismissal law because of its role in inhibiting a free labour market. The most substantial reform of the Government was the introduction of a two year qualifying period for those seeking to access the unfair dismissal jurisdiction. This qualifying period had been six months at the start of the Government's term in office. Other reforms included the abolition of the basic award, the failure to index the compensation limits to inflation and the introduction of significant procedural hurdles to bringing an unfair dismissal application, including the possibility of being made to pay a pre-hearing deposit as a contribution to the employer's costs. One interpretation of these reforms is that they were motivated by a neo-liberal desire to deregulate unfair dismissal law and return to the common law of wrongful dismissal. Ewing has constructed such an argument with his claim that the Conservative Government was motivated by a reliance on the work of prominent neo-liberal Richard Epstein⁶²⁸ with a clear purpose of restoring 'the common law to the field of labour relations by removing the immunities and privileges

⁶²⁷ KW Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18 ILJ 1; Alan Bogg writes 'during the 1980s, the gradual extinction of all enforceable union security arrangements in the interests of individual liberty took on the guise of a fundamentalist crusade undoubtedly fired by Hayekian neo-liberalism': Alan Bogg (n 54) 85.

⁶²⁸ Richard Epstein, 'A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation' (1983) 92 Yale Law Journal 1357.

which legislation has extended to workers and their organisations'.⁶²⁹ In his view the Conservative Government saw protection against disadvantage for every individual circumstance as yielding for many people, the severest disadvantage of all - the lack of a job.⁶³⁰ Nonetheless, this view that the Conservative Government was motivated by Hayek's and Epstein's neo-liberal ideas in deregulating unfair dismissal law obscures the fundamental point that unfair dismissal law was still left very much intact by the end of the Conservative Government's period in office. Their most severe reform was to introduce a qualifying period of two years but this still maintained the right of workers who passed this threshold to access the protection of the unfair dismissal jurisdiction. The other aforementioned reforms reduced the protective quality of the jurisdiction but in no way eliminated its existence altogether. As a result, my argument in Part B has been to rely on Davies and Freedland's analysis of this period to suggest that an argument of principle was made against unfair dismissal law and whilst the conditions of access to the right were made more stringent, 'the substantive formulation of the right was left largely untouched'.⁶³¹

This more nuanced account of the Conservative Government's approach to unfair dismissal law prompts a further normative evaluation as to why neo-liberal arguments appeared to be less influential in motivating the Government's unfair dismissal law reforms when compared with their labour law reforms more generally.

⁶²⁹ Keith Ewing, 'Economics and Labor Law in Britain' (1990) 28 *Alberta Law Review* 632, 642.

⁶³⁰ Department of Employment, *Employment: The Challenge for the Nation* (Cmnd: 9474) (H.M.S.O., 1985).. See also: Department of Employment, *Building Businesses ... Not Barriers*. (Cmnd: 9794 (H.M.S.O., 1985).

⁶³¹ Davies and Freedland (n 11) 200.

An argument can be made that the Conservative Government's primary objective was to curb trade union power and reform collective labour law. Following the 1985 White Paper, a range of labour law reforms were implemented that restricted the right to strike, constrained the ability of trade unions to organise members and to bargain effectively and eliminated closed shops.⁶³² These industrial relations reforms were primarily concerned with damaging the power of collective labour and so the unfair dismissal system, albeit weakened under the Conservative Government, was not subject to a concerted attempt to eliminate it altogether. Different explanations are possible for this more moderated reform of the unfair dismissal jurisdiction. One possible rationale could be that the Conservative Government believed its introduction of a two year qualifying period as abolishing the more extreme version of unfair dismissal law which had previously permitted access to any individual after six months of employment. They may have chosen not to deregulate unfair dismissal law any further based on political pragmatism: a view that the electorate would be unwilling to stomach further deregulation in light of the more radical reforms to collective labour law. Another possible rationale is that the Conservative Government chose not to further deregulate unfair dismissal law based on a departure from the purist neo-liberal anti-unfair dismissal law position favoured by Hayek and Epstein. The Conservative Government may have supported a juridified unfair dismissal law because of a belief that this was a superior method for resolving disputes than the traditional collective method of industrial action. Unfair dismissal law does not encourage trade unionism as

⁶³² For a detailed look at the labour market policies of the Thatcher and Major Governments between 1979 and 1997 see: Simon Deakin and Gillian Morris, *Labour Law* (4th edn Hart Publishing, 2006) 30-42.

it involves the more orderly resolution of individual disputes within an independent tribunal system. Supporting this interpretation is the acknowledgement, albeit brief, in the 1985 White Paper that there is a need for ‘proper protection for workers’ in terms of employment protection, although this should be limited by avoiding ‘over burdensome regulation’.⁶³³ Thus, it could be argued that the influence of neo-liberal ideas on the Conservative Government’s reform of unfair dismissal law was more moderate than might be conventionally thought. Whilst the Government did mount an argument of principle against unfair dismissal law, they did not seek to wholly deregulate unfair dismissal law and return to the common law of wrongful dismissal. There may even be cause for arguing that they did actually support a weaker version of unfair dismissal law as a preferable mechanism for resolving employment disputes. Whilst it may be the case that an argument can be made as to the weaker influence of neo-liberal ideas on the Conservative Government with regards to unfair dismissal law when compared with the influence the ideas on their labour law reforms more generally, much more work is needed before this conclusion can be sustained.

A stronger argument can be sustained that the Coalition Government (1995-2007) in Australia was more strongly influenced by the neo-liberal ideas of Hayek and Epstein in their reforms to unfair dismissal law during their decade in elected office. Whilst the Government never explicitly invoked these theorists as justifying their reform agenda, the Government’s desire to empower individual employers and employees through extending individual agreement making is representative of an

⁶³³ Department of Employment, *Employment: The Challenge for the Nation* (White Paper, Cmnd 9474, 1985) 14.

approach seeking to remove external interference in the workplace.⁶³⁴ In the context of unfair dismissal law, this individual choice rhetoric supported a belief in the ability of employers and employees to resolve disputes about dismissal themselves and without recourse to the conciliation and arbitration system. So whilst the Coalition Government stopped short of abolishing the jurisdiction altogether, by 2006 the Coalition Government had removed the majority of Australian employees from the unfair dismissal jurisdiction through the combined effect of the 100 employee rule and the operational reasons exemption. Unlike in Britain where the Conservative Government had not only supported but enacted unfair dismissal law in 1971, the Coalition was opposed to it from its inception in Australia and continued this opposition during their time in Government. The Coalition Government viewed unfair dismissal law as inhibiting job creation. They saw this to be particularly the case in small businesses where they argued that the fear of an unfair dismissal case leads small business owners to shelve financial resources rather than using this to invest in the business or to hire new staff. In a speech by Prime-Minister John Howard to the Australian Council of Small Business Organisations he stated, 'I hold strongly to the belief that if we could get rid of the restrictions we're trying to get rid of we will see more jobs created in the small business community'.⁶³⁵ This argument was underpinned by an assumption that the statutory protection of employees against unfair

⁶³⁴ 'I said at the outset that this government trusts employers and employees to make the right decisions in the workplace. Mr Speaker, the era of the select few making decisions for the many in the industrial relations system is now over': Commonwealth, Parliamentary Debates, House of Representatives, 26 March 2005 (John Howard, Prime Minister) at 43.

⁶³⁵ John Howard, 'The Challenges Facing Small Business' (Speech to the Council of Small Business Organisations of Australia, 29 March 2002) <www.pm.gov.au/news/speeches/2002/speech1670.htm> Accessed 12 August 2002.

dismissal restricts the capacity of small businesses to increase the number of people they employ. However, the Coalition argument against unfair dismissal law was not limited to small businesses. They suggested that all employees benefit from constraining unfair dismissal law because this is a ‘workplace rigidity’ preventing employers from hiring new staff. The Coalition’s argument was that maximising opportunities for employment in the economy overall was a more effective protection than job security. This is evinced by a Liberal MP’s observation during the second reading debates for the Work Choices legislation:

The best – indeed, the only – guarantor of a good, reliable job is a strong, growing and buoyant labour market. And the best – indeed, the only – guarantor of a buoyant labour market is a strong, growing and productive economy with laws that encourage firms to hire people, rather than discourage them...All the [unfair dismissal] regulations in the world will not save anybody’s job or push up wages if the economy is weak or if firms are uncompetitive’.⁶³⁶

The Coalition Government’s argument against unfair dismissal law evolved out of their belief in the economic imperative facing Australian businesses competing in a globalised world. Conaghan suggests that this economic imperative is derived from the ‘New Economy’ discourse facing labour law. Whilst she acknowledges that there is no single New Economy narrative, she writes that its central feature is ‘the assertion that to survive and succeed in the New Global Economy businesses must be competitive...The role of labour law in this context is the generation and maintenance of conditions in which competitive businesses can thrive’.⁶³⁷ Adopting this ‘New

⁶³⁶ Mr Lindsay, House Hansard, Workplace Relations Amendment (Work Choices) Bill 2005, Second Reading, 8 November 2005, 53.

⁶³⁷ Joanne Conaghan, ‘Labour Law and the New Economy’, 16 AJLL 9, 14.

Economy' mindset, the Coalition Government argued that burdensome regulations needed to be scaled back in order for businesses to be internationally competitive and that this would bring about a more robust labour market. As Prime-Minister Howard noted during the second reading debates about Work Choices:

The only thing that can guarantee the job security of the Australian people and the real wages of the Australian people is a strong economy. No set of laws, no set of dogma, no set of rules, no set of rulings by industrial tribunals can deliver a job when the economy is weak.⁶³⁸

So whilst the question can still be asked as to why the Coalition Government did not abolish unfair dismissal law altogether, it is apparent that in Australia (as opposed to in Britain) conservative political forces were more implacably and openly opposed to unfair dismissal law. Their opposition represented a closer unity with Epstein's and Hayek's view as to the unsuitability of unfair dismissal law in achieving a free labour market.

B. Egalitarian Liberalism

The above analysis has revealed the varying impact of neoliberal ideology on governments in Britain and Australia in informing their view that unfair dismissal law inhibits the ability of employers to dismiss staff and is an illegitimate interference with the free operation of the labour market. This impact varied between the jurisdictions as the deregulatory zeal and opposition to unfair dismissal law was stronger in Australia under the Coalition Government (1995-2007) than in Britain under the Conservative

⁶³⁸ Prime-Minister Howard, Workplace Relations Amendment (Work Choices) Bill 2005, Second Reading, House Hansard, 9 November 2005, 53.

Government (1979-1997). However, we could argue that other variants of liberalism, not just neo-liberalism, provide a basis for an argument against a strong unfair dismissal law. It could be argued that the particular variant of egalitarian liberalism is a more fitting description of the ideological bent of New Labour in Britain and the Labor Party in Australia with regards to their reform agenda for labour law. Drawing on Bogg, we could argue that egalitarian liberals might also wish to join with neo-liberals in condemning unfair dismissal law and this would explain the deregulatory position on unfair dismissal law adopted by these centre-left governments in Britain and Australia. In so doing, egalitarian liberals can participate in an incompletely theorised agreement with neo-liberals. Bogg defines egalitarian liberalism as concerned with the promotion of market institutions in order to achieve efficient resource allocation but unlike neo-liberalism, the zeal for free markets is tempered by an acknowledgement of the egalitarian limitations of market institutions.⁶³⁹ This is because egalitarian liberals recognise that ‘success in the marketplace is often based on morally arbitrary endowments such as natural talent, intelligence and social class’ and suggest the state can address imbalances arising from this.⁶⁴⁰ It could be argued that egalitarian liberalism would provide an ideological justification for scaling back unfair dismissal law. Requiring unfair dismissal disputes to be resolved via tribunals could be seen as limiting the efficient allocation of productive resources because it places too great a restriction on the labour market, constraining employers in their hiring and firing

⁶³⁹ Bogg (n 54) 83.

⁶⁴⁰ *ibid.*

decision and leaving both employers and workers in limbo whilst a tribunal reaches a decision as to the outcome of an unfair dismissal application.

Given egalitarian liberals acknowledge the limitations of market institutions in achieving social equality or economic justice, it could be argued that this provides a basis for the New Labour moderation of the previous Conservative Government's argument of principle against unfair dismissal law. New Labour still believe in the existence of some state restriction on the arbitrariness of an employer's decision to dismiss staff but that a better trade off between equity and efficiency would be achieved through less costly, time consuming ways of resolving unfair dismissal disputes, such as through facilitating localised or alternative dispute resolution. This position would support New Labour's reforms to unfair dismissal law during their three terms in government. In their first term, the egalitarian liberal belief that a diluted unfair dismissal law is desirable to counteract the inability of a free labour market to safeguard job security could provide a basis for New Labour's halving of the qualifying period and the indexation of the compensation cap to inflation. These two reforms went some way to improving the protective quality of statutory unfair dismissal law in Britain. The other reform during this term was the introduction of voluntary arbitration of unfair dismissal disputes which would preclude a claimant from then relying upon the tribunal system. This experiment with alternative dispute resolution, although not widely utilised by claimants, could be seen as revealing an egalitarian liberal preference for resolving disputes without tribunals as these are perceived as a less efficient way of resolving disputes. In their second term, New

Labour pursues a model of internal dispute resolution as the ideal way for resolving unfair dismissal disputes. The statutory dismissals procedure introduced in the Employment Act 2002 provides a three step mechanism for resolving unfair dismissal disputes within businesses and was initially intended to be inserted into the contract of employment. It could be argued that this policy is underpinned by an egalitarian liberal preoccupation with efficient dispute resolution. Whilst support for a diluted unfair dismissal law is maintained, the support for the tribunal system is moderated by a new desire to facilitate the resolution of unfair dismissal disputes internally and through less burdensome regulation. Whilst the Gibbons Review ultimately found this new reform placed too much red tape on businesses and led to the escalation of unfair dismissal disputes, this experiment with the statutory dismissals procedure could be indicative of New Labour searching for a way to resolve unfair dismissal disputes without third party involvement in the workplace and through relying upon the market institution of the contract of employment. Finally, in their third term, New Labour reformed unfair dismissal law by introducing a weaker ACAS code and other procedural hurdles for bringing an unfair dismissal claim. These deregulatory reforms could be seen as being underpinned by an egalitarian liberal belief in a diluted unfair dismissal law that does not impinge too significantly upon business freedom but still maintains some protection of job security.

The Labor Government's (2007-present) reforms to unfair dismissal law in the Fair Work Act 2009 could also be seen as deriving from an egalitarian liberal basis. Whilst the Labor Government re-regulated unfair dismissal law to some extent by

removing the 100 employees exemption and the operational reasons exemption, the introduction of telephone conciliation was aimed to produce more efficient dispute resolution and dissuade unfair dismissal disputes from reaching arbitration. The introduction of a Small Business Fair Dismissal Code could also be an example of the Government's egalitarian liberalism as this balanced the right of small business employees to justice in dismissal with the needs of small business owners to be efficient. Nonetheless, whilst the Labor Government preferred open markets, they recognised that these should be 'unambiguously regulated by an activist state, and one in which the state intervenes to reduce the greater inequalities that competitive markets will inevitably generate'.⁶⁴¹ Labor's egalitarian liberal faith in markets tempered by state regulation is also closely connected with their disavowal of neo-liberalism, arguing that:

The time has come, off the back of the current crisis, to proclaim that the great neo-liberal experiment of the past 30 years has failed, that the emperor has no clothes. Neo-liberalism, and the free-market fundamentalism it has produced, has been revealed as little more than personal greed dressed up as an economic philosophy.⁶⁴²

In both New Labour in Britain, and Labor in Australia, we can see a preference for efficient dispute resolution which necessarily involved some deregulation of unfair dismissal law rather than a desire to return to the common law of wrongful dismissal.

It is possible to identify an egalitarian liberal preference for the contract of employment to resolve unfair dismissal disputes in the policies of the Labor

⁶⁴¹ Kevin Rudd, 'The Global Financial Crisis' (February 2009) *The Monthly*.

⁶⁴² *ibid.*

Government in Australia and the New Labour Governments in Britain. These centre-left governments sought to reform the contract of employment so that unfair dismissal disputes could be resolved within businesses and without requiring external scrutiny of an employer's dismissal decision. The preceding chapter has shown how the British New Labour Government experimented with a statutory dismissal procedure which they had originally intended to be inserted into employment contracts. Their objective was to require employers to use this process when seeking to dismiss staff so as to ensure that a proper process was followed. New Labour's preference for creating a partnership model in the workplace between employers and employees is also evidence of their desire to reconceptualise the contract of employment as an agreement between equals. Similarly, in Australia, the Labor Government sought to bring about localised dispute resolution with their introduction of the Fair Dismissal Code for small businesses which prevents external scrutiny of the employer's dismissal decision and the introduction of telephone conciliations which do not even require employers to leave their place of work and for the dispute to be resolved within a finite time limit of ninety minutes. In both jurisdictions, it is possible to identify an argument in favour of deregulating unfair dismissal law through the facilitation of localised dispute resolution under the contract of employment. It could be argued that this specific reform idea is underpinned by egalitarian liberalism because it reveals a preference for market based institutions to resolve labour market challenges, whilst still recognising that complete deregulation is insufficient. The promotion of the contract of employment to regulate unfair dismissal by leftist governments can be seen as stemming from a pro-market origin. Supiot argues that the dogmatic foundation of the

market is in the concept of the contract, holding that ‘for the market economy to be universal, it is necessary for all nations to be converted to the contract culture’.⁶⁴³

Borrowing from Bogg once again, we can perhaps conclude by stating that the above analysis has pointed to some possible alternative justificatory arguments for the reform of unfair dismissal law by centre-left governments on a basis other than neo-liberalism. Whilst it may be the case that an argument can be made as to the significant influence of neo-liberal ideas on these governments, much more work is needed before this conclusion can be sustained. A more nuanced position would be to recognise the influence of egalitarian liberalism on the reform agenda of these leftist governments with regards to unfair dismissal law. I would argue that whilst the desire to deregulate unfair dismissal law can be found in both centre-left and centre-right governments, this represents an incompletely theorised agreement as there is disagreement as to why this deregulation is necessary and the extent to which it should occur.

C. Hugh Collins’ Idea of Employment Security

Building upon his 1992 work entitled ‘Justice in Dismissal’, Hugh Collins continued to construct a normative template for unfair dismissal law in his 2001 work on regulating the employment relation for competitiveness.⁶⁴⁴ This draws upon the efficiency principle outlined in his earlier work which suggests that the best interpretation of the

⁶⁴³ Suipot (n 45) 323.

⁶⁴⁴ Collins (n 198); Collins (n 581).

law of unfair dismissal should achieve a complex interplay between efficiency and dignity. He does not support the purist neo-liberalism of Hayek and Epstein, arguing ‘my view of the employment relation holds that this relation is too central to the quest to establish social and economic conditions under which individuals have the best chance to be the authors of their own lives to be left to be determined by market forces’.⁶⁴⁵ Nonetheless, Collins is not advocating a return to traditional worker protective normative ideas for labour law with his argument that the employment relation needs to be regulated for competitiveness, rather than for achieving an amelioration of workers’ disadvantage under the contract of employment. Whilst his notion of how to achieve efficiency or competitiveness includes recognition that such disadvantage must be addressed, the overriding principle is the former rather than the latter. As such, I would tentatively suggest that we discuss Collins’ normative template for unfair dismissal law under the broader ideological framework of egalitarian liberalism.

Our starting point is to identify the egalitarian liberal emphasis on the pursuit of efficient regulation of the labour market as being preferable to the neo-liberal idea of deregulation is founded upon a belief that the state has a legitimate role in promoting economic justice. This is required because of a recognition that morally arbitrary endowments like race, gender, sexuality, intelligence or social position are unjust from an egalitarian perspective and may impinge upon an individual’s ability to succeed in the marketplace. As Bogg observes, ‘the aim of liberal justice is the

⁶⁴⁵ Collins (n 198) 270.

rectification of these morally arbitrary inequalities'.⁶⁴⁶ The New Labour reform agenda can be seen as relying strongly upon this pursuit of economic justice based on the remedying of individual's different personal characteristics and backgrounds. New Labour's 2006 White Paper 'Success at Work' draws upon these themes:

Our ambition is to lift people out of dependence and liberate the talent and capacity of everyone...work is at the heart of that vision; as well as underpinning our economic growth, employment is the best route to independence, enables people to keep their children out of poverty, lays the foundation for successful retirement and enables people to develop their potential.⁶⁴⁷

This White Paper carves out a primary governmental objective of facilitating employment opportunity for all people but particularly for those identified as vulnerable. In terms of unfair dismissal law, this could be seen as justifying a reduction in unfair dismissal regulation so as to encourage employers to hire more staff, thus providing workers with greater opportunities in the labour market. This approach sees job creation as the most desirable policy goal.

This normative ideal of employment opportunity has been theorised by Hugh Collins as providing an alternative to the job security ideal of unfair dismissal law. Collins argues that labour law should seek to achieve 'employment security' which is the idea that 'the employment relation will continue indefinitely, but the employee will have to perform different kinds of work, for which training will be required.'⁶⁴⁸ Collins argues that job security (and therefore a strong unfair dismissal law) is only

⁶⁴⁶ Bogg (n 54) 101.

⁶⁴⁷ Department of Trade and Industry, *Success at Work* (2006) 9.

⁶⁴⁸ Collins (n 582).

needed for low skilled employees (whom he characterises as ‘compliant’) and the objective is to move employees to becoming flexible, with their security based upon their skills. For more skilled employees, Collins suggests that the aim should be to achieve employment security. He states, ‘the flexible employee does not simply work hard at her job but uses all her skills and knowledge to contribute to the process of continuous improvements in quality, efficiency and technological and product innovation’.⁶⁴⁹ This enables employees to be secure in their skill base rather than in their right to remain in their current job. Collins advocates the contract of employment as the best vehicle for enforcing employment security. He observes, ‘the contract of employment guards against of abuse of managerial discretion by constituting and enforcing a job specification, thereby achieving institutional stability in employment relations’.⁶⁵⁰ He then writes, ‘the common law reinforces this institutional arrangement both by enforcing job specifications as express terms of the contract and by placing weak limits on the exercise of managerial discretion through implied terms’.⁶⁵¹ Given this basis, Collins argues that the common law contract of employment could be strengthened in what it requires of employers and employees. Unlike unfair dismissal law which is conceived as employment protection for the employee but a cost to the employer, the concept of employment security offers mutual gains to both parties in the employment contract. He argues:

⁶⁴⁹ Collins (n 582) 24.

⁶⁵⁰ *ibid.*

⁶⁵¹ *ibid.*

For the employer, this commitment is a crucial long-term strategy for improving competitiveness by means of investment in human capital. For the employee, the commitment to training is an essential component to the promise of employment security and employability that replaces the earlier commitment to job security. Default rules that reflected such an economic model would require the employer to provide worthwhile training opportunities, including training in general skills, and require the employee to take up those opportunities'.⁶⁵²

Collins acknowledges that the weakness of his proposals lies in the 'normal defect of private law regulation: its weak sanction'.⁶⁵³ Collins suggests that this could be overcome through a mandatory legal right, similar to the right to paid leave that would enable the employee to take a certain number of days as paid leave to participate in employer-initiated training. According to Collins 'the reason why a mandatory legal right serves effectively to strengthen the commitment in this case is that the right is self-enforcing: the employee takes the time off work. It does not suffer from the weakness that the exercise of the right requires the threat to take an employee to court'.⁶⁵⁴ Nonetheless, Collins' normative template of employment security as a preferable alternative to the traditional job security ideal was not achieved in the practical reforms to unfair dismissal law that occurred under the New Labour Government (1997-2010) but provides a possible way forward for those seeking to deregulate unfair dismissal law because of a liberal belief in its illegitimate interference with the market mechanism whilst still maintaining some form of protection in the labour market for those from less fortunate situations.

⁶⁵² Collins (n 582) 40.

⁶⁵³ Collins (n 582) 44.

⁶⁵⁴ Collins (n 582) 45.

D. The Liberal Disagreement on How to Achieve State Neutrality

A central tenet of liberalism is the importance of state neutrality. There is some disagreement between egalitarian liberalism and neo-liberalism on how to achieve this. On one view, the common law establishes a baseline of rights and entitlements allocated through the rules of contract, tort and property. This view suggests that to alter this baseline through statutory intervention is a violation of the state's obligation to be neutral. In the context of unfair dismissal law, Epstein, a proponent of this view, argues that statutory unfair dismissal law alters the entire fabric of contract law by creating an environment that makes it difficult for the vast majority of good employers and good employees to structure their relationships efficiently.⁶⁵⁵ He says that the whole purpose of the unfair dismissal system is to target the less likely occurrence of a bad employer and thus it is inefficient as 'it exposes every decision in labour markets to second guessing by either a court or an administrative agency'.⁶⁵⁶

This argument that the state should not alter the common law baseline establishes the neo-liberal objection to statutory unfair dismissal law and their advocacy of a return to the common law of wrongful dismissal. However, other liberals such as Kimel, Bogg and White argue that the common law baseline entrenches the disadvantages of workers and unions in the labour market.⁶⁵⁷ According

⁶⁵⁵ Richard Epstein, 'The Common Law and the Labour Market' (HR Nicholls Publications, 2001) <<http://www.hrnicholls.com.au/articles/hrn-epstein.php>> accessed 18 July 2011.

⁶⁵⁶ *ibid.*

⁶⁵⁷ Kimel and White are cited on page 95 of Bogg (n 54)

to Bogg, the common law is a ‘conventional legal construct embodying specific regulatory choices by the State’⁶⁵⁸ and relies on White’s ‘power adjusted’ conception of state neutrality. This view advocates statutory intervention to temper the disadvantage faced by workers and unions under the common law as ‘once groups enjoy a fair opportunity to access the cultural marketplace the State then remains neutral as to the outcome of the cultural contest that ensues’.⁶⁵⁹ This argument for a ‘power-adjusted’ conception of neutrality provides a liberal justification for unfair dismissal law. That the common law remedy of providing for the payout of the notice period for unfair dismissal is deficient provides a basis for statutory intervention creating a right to compensation or reinstatement for unfair dismissal.⁶⁶⁰ However, egalitarian liberalism requires this intervention to still be consistent with the liberal tradition more generally by supporting the market and not being too extreme. Thus, a form of liberalism could endorse an unfair dismissal law predicated on ‘softer’ regulatory techniques of promoting localised dispute resolution or alternative dispute resolution as preferable to the ‘harder’ regulation offered by tribunals. In this light, New Labour’s reforms in Britain and Labor’s reforms in Australia could be seen as creating a regulatory framework for unfair dismissal law that seeks to promote a freer labour market whilst militating against the harshness of the common law of wrongful dismissal according to an appreciation of the need for a ‘power-adjusted’ neutrality. This provides a point of demarcation between the deregulatory policies of centre-left

⁶⁵⁸ Bogg (n 54) 95.

⁶⁵⁹ Bogg (n 54) 96.

⁶⁶⁰ For an analysis of the doctrinal remedies for wrongful dismissal at common law, see: Mark Freedland, *The Personal Employment Contract* (OUP, 2003).

governments which seek to pare back the statutory unfair dismissal scheme in favour of alternative and/or localised dispute resolution; and the deregulatory policies of the Coalition Government (1995-2007) in Australia, and to a much lesser extent, the Conservative Government (1979-1997) in Britain which ultimately sought to more significantly deregulate unfair dismissal law because of doubts as to its legitimacy.

E. Conclusion

The influence of liberal ideas on the reform of unfair dismissal law in Britain and Australia has been profound. These ideas have persuaded governments to deregulate unfair dismissal law in pursuit of a freer, less rigid labour market. I have suggested that it is too simplistic to maintain that both centre-left and centre-right parties have deregulated unfair dismissal law according to the same motivation. This is because different variants contained within the liberal tradition have influenced reform of unfair dismissal law according to slightly different rationales. Neo-liberal ideas were influential in Britain in developing an argument of principle against unfair dismissal law under the Conservative Government (1979-1997). Their influence should not be overstated however, as ultimately this Government did not wholly deregulate unfair dismissal law and their most significant reform was to reduce access to the system by introducing a two year qualifying period. The Coalition Government (1995-2007) in Australia was more radical in its deregulation of unfair dismissal law as the Government was open about its opposition to the legitimacy of this law from its inception. It seems likely that the Coalition Government did desire a return to the

common law of wrongful dismissal although this did not occur during its time in office. Instead unfair dismissal protection was removed for the majority of Australian employees through less direct means, which was the combined effect of the 100 employees rule and the operational reasons exemption. This was based on the Coalition's fundamental neo-liberal opposition to the idea of a statutory unfair dismissal scheme as an illegitimate and unnecessary labour market rigidity. So whilst abolition did not occur under the Coalition Government in Australia or the Conservative Government in Britain, these governments were successful in mounting an argument against unfair dismissal law which required all subsequent reform to the jurisdiction to be justified according to its impact upon business burdens and labour market efficiency. By way of contrast, the New Labour Governments in Britain and the Labor Government in Australia did not advocate a return to the common law of wrongful dismissal. I believe these governments held a different view of state neutrality and recognised that the common law of wrongful dismissal left employees too vulnerable to arbitrariness and that this had to be mitigated through the presence of unfair dismissal law, albeit a deregulated one. These centre-left governments still believed that unfair dismissal law could be justified according to egalitarian liberalism as state neutrality could be achieved through altering the common law baseline which had traditionally provided too much power to an employer to arbitrarily deprive an employee of his or her job.

Section Three

The Influence of Civic Republican Ideas on Unfair Dismissal Law

Another philosophical tradition closely related to liberalism is that of civic republicanism. This latter school of thought aims to promote freedom, understood as independence from arbitrary power. This can be arbitrary power being exercised by a non-democratic state or by some individuals or groups within civil society who succeed in assuming arbitrary powers over others. The civic republican tradition seeks a public policy agenda through laws and policies designed to enhance individual freedom. The reason I wish to discuss civic republicanism in this sub-section is to explore the influence of these ideas on reform of unfair dismissal law by centre-left governments in Britain and Australia. The influence of the civic republican tradition upon centre-left governments provides another point of demarcation from the various neo-liberal positions adopted by centre-right governments with regards to labour law. In particular, the ideas of fair play, self-government and freedom from domination are civic republican ideas which have had some influence on the debate over how to reform unfair dismissal law and have the potential to provide a basis for a centre-left justification of a softer deregulatory approach than that advocated by neo-liberals. In Britain, in particular, civic republican ideas have featured prominently in the rhetorical debate. Writing about the British context, Bogg argues that ‘a striking feature of the New Labour project has been the extent to which its rhetoric has drawn upon civic

republican themes'.⁶⁶¹ He observes that Blair drew his ideas not just from liberalism but from civic republican themes emphasising community, democracy and civic responsibility:

For myself, I start from a simple belief that people are not separate economic actors competing in the marketplace of life. They are citizens of a community. We are social being, nurtured in families and communities and human only because we develop the moral power of personal responsibility for ourselves and each other.⁶⁶²

Nonetheless, according to Bogg 'there has been an almost total failure to translate civic rhetoric into concrete legal reforms'.⁶⁶³ In the field of unfair dismissal law, this criticism could also be applied to New Labour's reform agenda. This section will explore how New Labour's approach to unfair dismissal law did not achieve the normative expectations of fair play, self-government and non-domination. New Labour's partnership model of the employment relationship sought to achieve the ideal of fair play or civic friendship in rhetoric, but in substance, this model tended to favour the rights of employers. With regards to self-government, New Labour promoted the resolution of disputes within the workplace in their 2002 reforms with a view to facilitating the development of dispute resolution procedures which would confer rights and responsibilities upon employers and employees seeking to resolve unfair dismissal disputes. I seek to show in this section how this idea of self-government did not translate effectively in practice as employers sought to dismiss staff according to the correct procedure rather than facilitating genuinely equal discussions about the

⁶⁶¹ Bogg (n 54) 118.

⁶⁶² Tony Blair, 'The Stakeholder Society', in Tony Blair, *New Britain: My Vision of a Young Country* (London, Fourth Estate, 1996) 297, 299-300.

⁶⁶³ Bogg (n 54) 118-119.

issues surrounding dismissal between employers and employees where the latter could directly contribute to, and impact upon, the former's decision-making process. Finally, in terms of non-domination, New Labour's unfair dismissal reforms did not largely achieve this because they sought to dissuade applicants from pursuing claims in tribunals through facilitating greater localised and alternative dispute resolution. It is my view that tribunals provide a more effective mechanism for ensuring the employee is not subject to arbitrary decision-making by the employer by placing a rigorous, external check on the employer's decision to dismiss. In the context of unfair dismissal, non-domination in the employment relationship is most effectively secured when an independent external review of the employer's decision to dismiss is allowed.

The consideration and influence of civic republican ideas on motivating the reform of unfair dismissal law in Australia has been more limited. In reinstating unfair dismissal rights for the majority of Australian employees under the Fair Work Act 2009, the Labor Government (1997-present) did not seek, either in rhetoric or practice, to draw heavily upon republican notions of fair play, self-government or non-domination. Nonetheless, these normative ideals can be used to understand and evaluate the Labor Government's unfair dismissal reforms. In this section I seek to show how their deregulatory reforms of unfair dismissal law achieve only a weak version of these normative ideals. The other point of interest in the Australian debate over how to reform unfair dismissal law is the emergence of the normative ideal of industrial citizenship in the writings of influential labour law scholar Professor Ron

McCallum. His ideas are discussed in this section as a counterpart to Bogg's notion of civic republican citizenship as a way forward for reforming unfair dismissal.

There is a significant degree of similarity between the vision for labour law advocated by Bogg's civic republicanism and McCallum's industrial citizenship. Like civic republicanism, ideas of the workplace as a community of citizens and the importance of pursuing fairness, freedom from arbitrary power and joint decision-making are central to the normative template established by McCallum's interpretation of the industrial citizenship ideal. Both normative templates argue against individuating ideas of justice, preferring to emphasise collective rights over individual rights as these are seen to offer more secure and resilient protection.⁶⁶⁴ In this light, unfair dismissal law is seen as providing an opportunity for securing non-domination (in the case of civic republicanism) or the analogous concept of freedom from arbitrary power (in the case of industrial citizenship). However, the crucial point in both normative ideas is that they are interested in protective labour laws beyond the creation of a safety net for individual employees.

A. The Achievement of Industrial Citizenship by the Labor Government

Some Australian scholars have sought to draw upon the republican tradition and concretise notions of industrial justice and industrial fair play into a theory of industrial citizenship to justify the existence of protective labour laws in response to

⁶⁶⁴ McCallum (n 55) 422; P Pettit, *Republicanism: A Theory of Freedom and Government* (OUP, 1997) 141.

the challenge presented by neo-liberal ideology. Australia's leading labour law academic, Professor Ron McCallum has been advocating that Australia should adopt an industrial citizenship model since the mid-1990s and has openly acknowledged that because of the partial deregulation of Australian labour laws post 1993, he turned to 'the writings on citizenship at work, in an endeavour to find a well-spring of core rights which could be regarded as inalienable for all Australian citizens undertaking remunerated work'.⁶⁶⁵ Canadian scholar, Professor Judy Fudge, defines industrial citizenship as a status limiting the commodification of labour⁶⁶⁶ and she refers to the pioneering work of Professor Harry Arthurs in 1967, who, when writing about industrial citizenship declared that today's worker:

lives increasingly in a world of rights and duties created not by his individual contractual act, but by a process of public and private legislation. Members of the industrial community enjoy these rights solely by virtue of their membership in that community. In effect there is emerging a new status – that of 'industrial citizen' – whose juridical attributes may be analogized to citizenship generally.⁶⁶⁷

In the Australian context, industrial citizenship theory has emerged as a normative template for judging the success of labour law reform since the dismantling of conciliation and arbitration. The normative agenda of industrial citizenship has been described as a form of 'aspirational citizenship' because the focus is on 'what would

⁶⁶⁵ Ron McCallum, 'Citizenship Theory and Labour Law' (An International Colloquium Theorising Citizenship at Work, University of Laval, Quebec, 21 June 2004).

⁶⁶⁶ Judy Fudge, 'After Industrial Citizenship: Market Citizenship or Citizenship at Work?' [2005] IR, 631, 632.

⁶⁶⁷ Harry Arthurs, 'Developing Industrial Citizenship: A Challenge for Canada's Second Century' [1967] Canadian Bar Review 786.

be an ideal labour relations mechanism in which rights would grow and flourish'⁶⁶⁸ and creates a situation 'when the idea of citizenship expresses a project or an ideal or even a utopian aspiration'.⁶⁶⁹ In an influential paper entitled 'Crafting a New Collective Labour Law for Australia',⁶⁷⁰ McCallum argued that Australia needed a new vision for collective labour law predicated upon citizenship theory. He argued that a revival of conciliation and arbitration, or reliance on international conventions to safeguard labour rights, provided an insufficient basis for resurrecting collective labour law in Australia. This new vision for collective labour law predicated upon notions of citizenship rejects a conception of labour law based upon freedom of contract. It is argued that labour is unequivocally not a commodity and that emphasis on the employment contract fails to recognise this fundamental point. In writing about the components of an industrial citizenship model in 1997, McCallum identified the essence of an industrial citizenship approach:

It is trite to state that workers require fair terms and conditions of employment that give them adequate wages to sustain themselves and their families. However, I wish to focus upon less publicised needs. All employers have the right to be secure in body and mind at work. Workers require freedom from physical, genetic and mental injuries. This not only includes hazards like chemicals but sexual and other forms of harassment and bullying that occur in the modern enterprise. Employees also have the right to seek redress against arbitrary power, whether on an individual or a systematic basis. This covers unfair dismissals and demotions, as well as other forms of discrimination and arbitrary conduct.⁶⁷¹

⁶⁶⁸ McCallum, 'Citizenship Theory and Labour Law' (n 665).

⁶⁶⁹ Michael Cortu and Gregor Murray, 'Towards Citizenship at Work?' [2005] IR 617, 621.

⁶⁷⁰ McCallum (n 55)

⁶⁷¹ *ibid.*

This conception of industrial citizenship justifies the existence of statutory unfair dismissal protection on the basis that an individual employee is an industrial citizen who can only be deprived of his or her status as a citizen for a valid reason. At its essence, citizenship's central meaning has to do with membership in a community⁶⁷² and providing an employee with the right not to be unfairly dismissed protects the employee from arbitrary removal from the workplace community. Industrial citizenship perceives this right as an inalienable and a legitimate constraint upon managerial prerogative. According to this perspective, industrial citizenship provides a basis by which to challenge the neo-liberal argument that unfair dismissal laws operate as a disincentive to job creation by limiting the right of the employer to choose and manage the composition of their workforce. As McCallum writes, 'a modern labour law system must protect employees from the arbitrary and unjust wielding of power'⁶⁷³ because 'full citizenship means at the very least the right to a reasonable degree of security of employment, where employment terminations are fair, and where redundancies are only entered into after consultation'.⁶⁷⁴ In this regard, the Labor Government's (2007-present) decision to introduce telephone conciliations can be seen as only achieving a very limited version of citizenship because these dilute the protection of employees from being subjected to the arbitrary and unjust wielding of power by employers. As has been shown in the first chapter of this Part, telephone conciliations are not a robust and effective institutional mechanism for allowing

⁶⁷² Barbalet (n 63) 185.

⁶⁷³ McCallum (n 55)

⁶⁷⁴ McCallum (n 55) 421.

independent contestation of employer decision making. Telephone conciliations occur according to a strict time limit and the lay conciliator is under some pressure to reach a settlement between the parties. Given these constraints, it would be very challenging for the lay conciliator to identify whether the employee was arbitrarily deprived of his or her job without good reason. Similarly, the introduction of the Fair Dismissal Code for small businesses also does not sufficiently allow for independent contestation of the employer's dismissal decision. Compliance with the minimalist FDC precludes employees from making an unfair dismissal complaint. Thus, the realisation of the citizenship ideal of protection from arbitrary power for employees of small businesses in Australia can be seen as fairly limited.

While the emergence of an industrial citizenship approach draws upon the tradition of industrial justice, it seeks to differentiate from the individuation of the notion of fairness which occurs under industrial justice theory. Industrial citizenship attempts to restore the collective dimension of industrial justice as it 'entails the collective use of civil rights in order to assert claims for social justice and it cannot be reduced to an individual civil right'.⁶⁷⁵ While the Australian tradition of industrial peace was inherently built upon collective industrial relations, the emergence of an argument for industrial justice was used to justify the development of a safety net which provided a raft of rights for individual workers in the employment relationship. Even the reliance of the unfair dismissal system on the notion of 'a fair go' can be seen as an attempt to individuate the notion of industrial justice – this is the right to a fair

⁶⁷⁵ Barbalet (n 63) 27.

deal in the employment relationship for the individual, to contest the fairness of their dismissal and to be heard by a neutral third party. Industrial citizenship goes beyond advocating for justice for the individual but seeks to achieve justice for industrial citizens in both their collective and individual manifestations. In terms of an individual's right to contest the fairness of their dismissal, industrial citizenship theory would argue that while this right accrues to an individual employee, it requires the existence of a collective mechanism to scrutinise the employer's decision to dismiss. As McCallum notes, 'Rule making, and more especially, rule interpreting, goes beyond the individual employer and employee relationship. It requires a collective mechanism that mandates dialogue'.⁶⁷⁶ Industrial citizenship theory, unlike industrial justice theory, is interested in protective labour laws beyond the creation of a safety net for individual employees. Citizenship theory specifically advocates for a floor of minimum wages and conditions to protect labour, participatory institutions where worker representation is uncontested and a right to collectively bargain.⁶⁷⁷ Whilst it is more difficult to conceive of how citizenship theory might safeguard a collective dimension to unfair dismissal law which is inherently about the right of an individual to remain in his or her job, it could be argued that a requirement that unions be consulted in decisions about dismissal or that there be neutral and independent consultation by an external party of the employer's decision to dismiss could provide a way of securing a collective dimension to unfair dismissal law. Whilst the latter option

⁶⁷⁶ McCallum (n 53) 422.

⁶⁷⁷ These are a few commonly regarded aspects of an industrial citizenship model. However, for a more detailed discussion, see Keith Ewing, 'Australian and British Labour Law: Differences of Form and Substance' [1998] AJLL 44; Ron McCallum, 'The New Millennium and the Higgins Heritage: Industrial Relations in the 21st Century' [1996] JIR 294; Judy Fudge, 'After Industrial Citizenship: Market Citizenship or Citizenship at Work?' [2005] IR 631.

does not fit into the traditional conception of collectivism in industrial relations, it does ensure that there is another mechanism which goes beyond the individual employer and employee relationship as advocated by McCallum. The key point is that the citizenship ideal does not seek to achieve internal or localised dispute resolution of unfair dismissal disputes as the end goal: there is a recognition that some independent and outside scrutiny of the employer's decision is necessary to protect the employee from the wielding of arbitrary power.

Nonetheless, industrial citizenship theory requires further work if it is to provide a sustainable and coherent basis for justifying protective labour laws such as the unfair dismissal system. While some work has been done in categorising and in classifying the literature on industrial citizenship,⁶⁷⁸ there needs to be a greater exploration of what rights and obligations are seen to be elements of industrial citizenship. This is needed because 'the current industrial relations orthodoxy favours stripping away the standards of behaviour, terms and conditions that have been externally imposed on parties to an employment contract.'⁶⁷⁹ Of greater concern is the recent work of Fudge who has noted the contemporary challenges to industrial citizenship as a normative ideal posed by the processes of feminisation, deregulation and globalisation.⁶⁸⁰ She argues that there are two scenarios for industrial citizenship in the future; one in which the substance of citizenship is circumscribed by the market,

⁶⁷⁸ McCallum (n 665); Cortu and Murray (n 669).

⁶⁷⁹ David Chin, 'Exhuming the Individual Contract: A Case of Labour Law Exceptionalism' [1997] AJLL 257, 258.

⁶⁸⁰ Fudge (n 666).

and the other in which citizenship is no longer 'industrial' but is extended beyond employment to work. I have introduced the notion of a market conception of citizenship in the Introduction to this work and relied on Kymlicka's analysis to argue that 'the limits of the market as a school of civic virtue are clear...markets teach initiative but not a sense of justice or social responsibility'.⁶⁸¹ Markets find it difficult to protect the employee from arbitrary dismissal other than the damage done to an employer's reputation for repeatedly offending unfair dismissal rights. However if there is a ready supply of labour the opportunity for the market to censure the employer is limited.

Under Fudge's second alternative for the future of industrial citizenship theory, a conception of citizenship at work requires recognition of a wider range of work as a contribution to the community.⁶⁸² This would include volunteer work and household work and require an elucidation of the rights incumbent upon all forms of paid and unpaid work. Further scholarship needs to be done on how to theorise citizenship at work and to clearly differentiate it from ideas of citizenship as conceived by Third Way theorists. As discussed in the Introduction to this work, I argue that there is a difference between Third Way conceptions of citizenship and industrial citizenship, or citizenship at work. The former preferences notions of partnership, mutual obligation and juxtaposing fairness and competitiveness but I make the tentative hypothesis that in this balancing act, it is the needs of the market and business to be competitive that is

⁶⁸¹ Kymlicka (n 59) 304.

⁶⁸² Kymlicka (n 59) 646.

prioritised over the needs of the individual workers and their collective interest to receive fair and reasonable wages and conditions of employment.

In my view, the biggest challenge facing those seeking to articulate a theory of citizenship at work, or of industrial citizenship beyond the market and beyond the Third Way, is one of differentiating it from the traditional theory of industrial justice and theories of justice more generally. In the recent edition of his influential work titled 'Contemporary Political Philosophy' Kymlicka has penned an additional chapter on citizenship because of its increasing popularity amongst theorists and policy makers in recent years.⁶⁸³ His conclusion however, is that notions of 'justice' are merely being repackaged into notions of 'citizenship' and that it may simply be a 'matter of putting old wine into new bottles'.⁶⁸⁴ Kymlicka's argument is that 'what used to be rejected as intrinsically wrong (unjust), is now said to be instrumentally wrong (as eroding the virtues needed to sustain a liberal-democratic order)'.⁶⁸⁵ He does not think that merely because citizenship arguments are invoked strategically that they are invalid, but does suggest that more work needs to be done to differentiate citizenship theory from theories of justice.⁶⁸⁶ If a theory of industrial citizenship is to be used as the new rationale for statutory protection of unfair dismissal rights in response to liberal ideas, there needs to be a clearer exposition of how this would operate as a justification for why there should be regulation imposed upon businesses restricting their termination

⁶⁸³ Kymlicka (n 59) Chapter 7.

⁶⁸⁴ Kymlicka (n 59) 319.

⁶⁸⁵ Kymlicka (n 59) 318.

⁶⁸⁶ *ibid.*

of staff. This would need to go beyond traditional notions of arbitrary dismissal as unfair or unjust.

By way of conclusion, industrial citizenship theory provides a useful normative template for how an egalitarian liberal approach to unfair dismissal law could be moderated by recognition of other normative ideas such as the workplace as a community and the need to counter the exercise of arbitrary power by employers. To date, these ideas have not been very influential upon the reform agenda pursued by governments in Australia for unfair dismissal law. This section has shown how the Labor Government's (2007-present) reforms of unfair dismissal law have further diluted the ability of Australia's statutory unfair dismissal scheme to provide genuine and effective independent scrutiny of the employer's decision to dismiss.

B. The Achievement of Republican Normative Ideals by New Labour in Britain

Unlike in Australia, British centre-left governments have relied upon (in rhetoric at least) ideals deriving from republicanism and citizenship theory in their reform of unfair dismissal law. The New Labour Government (1997-2010) sought to reform unfair dismissal law by both deregulating it according to an egalitarian liberal ethos *and* re-regulating it according to republican notions of partnership and community. However, New Labour's re-regulation of unfair dismissal law according to republicanism was fairly weak, producing a diluted unfair dismissal law that sought to dissuade applicants from using the tribunal system in favour of internal and/or

alternative dispute resolution. Nonetheless, despite New Labour's inability to translate their republican ideals for unfair dismissal law into practice, the limits of egalitarian liberalism in providing a clear marker as to how and when to limit the power of the market in order to safeguard economic justice leads to the question of how far one should go in deregulating labour law standards. Some have suggested that the contours of a deregulatory labour law could be drawn with reference to the republican tradition. Bogg identifies the particular strand of civic republican citizenship as offering 'an attractive foundation for a radical new third way in labour law'.⁶⁸⁷ In this section, I seek to both normatively evaluate the extent to which New Labour's reforms to unfair dismissal law achieved civic republican citizenship and to develop how this model could justify a stronger unfair dismissal law.

One aspect of civic republican citizenship is to recognise the notion of 'civic friendship' which is to seek mutual benefit in economic and social relationships. New Labour's partnership model of the employment relationship certainly seeks to achieve civic friendship in rhetoric, although as illustrated in the preceding chapter, in substance, this model tended to favour the rights of employers. New Labour's promotion of the partnership model is prominently explored in the 1998 White Paper 'Fairness at Work'. In the foreword, Prime-Minister Blair explains that 'the new culture we want to nurture and spread is one of voluntary understanding and co-operation because it has been recognised that the prosperity of each is bound up in the

⁶⁸⁷ Bogg (n 54) 154.

prosperity of all'.⁶⁸⁸ This draws upon the republican notion of civic friendship which requires the parties to be willing to relinquish their own interests at times because of a recognition of the greater good that this could achieve. As Oldfield explains, this republican ideal is 'to seek the good of others at the same time, as and sometimes in neglect of, one's own good...it is this that creates the sense of community; and it is this that creates citizens'.⁶⁸⁹ A true vision for 'civic friendship' would not seek to consistently prioritise one party but an ebb and flow between the two which would see either party's agenda succeed at different points of time during the relationship. According to Dagger, an essential component of achieving civic friendship is an agreement of 'fair play and reciprocity', so that citizens are willing 'to bear a fair share of the burdens of a cooperative enterprise and to insist that others bear their share as well'.⁶⁹⁰ The central New Labour reform to unfair dismissal law arising out of the 1998 White Paper is the introduction of an arbitral route for unfair dismissal applicants. This was based on a view that alternative dispute resolution provides a better basis for achieving civic friendship as it requires greater dialogue and concession making than tribunal resolution of unfair dismissal disputes which is inherently more litigious in nature. Nonetheless, this scheme has largely failed in its purpose to create cultural reform of the unfair dismissal system by diverting

⁶⁸⁸ Department of Trade and Industry, *Fairness at Work* (Cm 3968, 1998) 3.

⁶⁸⁹ Adrian Oldfield, *Citizenship and Community: Civic Republicanism and the Modern World* (London, Routledge, 1990) 173.

⁶⁹⁰ R Dagger, *Civic Virtues: Rights, Citizenship and Republican Liberalism* (OUP, 1997) 197.

applications away from tribunals as less than fifty applications were dealt with during its first four years in operation.⁶⁹¹

The republican notion of civic friendship is closely linked with another republican ideal of self-government. This is the idea that individuals would be actively empowered to contribute and effect decision-making within the workplace community. Again, New Labour's partnership model can be seen as seeking to achieve this by facilitating frank and open communications between employers and employees in the workplace. In particular, this idea can be found in New Labour's 2001 White Paper, 'Routes to Resolution' which sought to bring about workplace cultural reform whereby employers and employees genuinely cooperated in the making of decisions affecting their future. In the foreword to this White Paper, the Minister for Employment Alan Johnson explains:

More disputes between employers and employees are ending up in litigation as shown in the three fold rise of applications to employment tribunals over the past decade. Recourse to litigation as a first resort is neither good for the individual nor the business. The Government is convinced that many of these disagreements could be resolved successfully in the workplace, if employers and employees work together.⁶⁹²

The central reform arising from this White Paper was the introduction of a mandatory statutory dismissal procedure in the Employment Act 2002. Whilst I have substantively analysed the impact of this reform in the preceding chapter, I wish to now evaluate whether this reform achieved the republican ideal of self-government.

⁶⁹¹ ACAS, *Making More of Alternative Dispute Resolution* (ACAS Policy Discussion Paper, No.1, January 2005).

⁶⁹² DTI (n 604).

New Labour believed that the workplace could be a site of civic significance if there was a change in workplace culture whereby employers and employees did not resort to litigation so quickly but sought to resolve their differences internally. Their belief was that the existence of internal procedures for resolving disputes would enable the parties to reach mutually agreeable decisions. However, in the context of discussions about dismissal, in question is the employee's right to remain employed because of doubts over performance or conduct that the employer might have. These discussions are inherently intensified by what is at stake for the parties. New Labour's mandatory procedures may have had in mind that employers would discuss concerns about conduct or performance with the employee under question with a view to improving the employee's ability to do their job subsequent to the discussions. In crude terms, this would be a win/win for both parties as the employer would retain the staff member but with a commitment to improve their performance; for the employee, he or she would get to remain in their job. However, New Labour's vision for frank and open discussions and for improved performance management did not translate in practice with the Gibbons Review observing:

Rather than encouraging early resolution, the procedures have led to the use of formal processes to deal with problems which could have been resolved informally. This means that problems escalate, taking up more management time. Employees find themselves engaged in unnecessarily formal and stressful processes, which can create an expectation that the dispute will end up in a tribunal.⁶⁹³

So rather than achieving self-government by replacing conflictual industrial relations with the partnership model, the statutory dismissals procedure was seen as resulting in the formalisation and escalation of disputes. It does not seem to be the case that the

⁶⁹³ Gibbons (n 606) 8.

mandatory procedures facilitated the involvement of employees in decision making about their future but rather that employers primarily sought to achieve compliance with the formal requirements of the statutory procedures when dismissing staff.

Another republican idea which could be used by centre-left governments to justify a muted deregulation of unfair dismissal law is that of non-domination. The purpose of unfair dismissal law is to remove arbitrariness from dismissal so that dismissal must be based on a valid reason and according to a fair procedure. This protects the worker from the domination of the employer during the dismissal process which the traditional doctrine of managerial prerogative entrenches in the employment relationship. The republican idea of non-domination runs counter to this traditional doctrine by mandating that ‘workers should not be exposed to the possibility of arbitrary interference’.⁶⁹⁴ Bogg identifies state support for collective bargaining as a method for securing non-domination. The republican tradition prefers to emphasise collective rights over individual rights as these offer more secure and resilient protection. As Pettit argues, ‘freedom as non-domination of industrial workers was surely more effectively furthered by the power they developed as a result of unionization than it was by the recognition of workers’ rights’.⁶⁹⁵ Nonetheless, with regards to individual rights, unfair dismissal law provides an opportunity for securing non-denomination.

⁶⁹⁴ Pettit (n 664)141.

⁶⁹⁵ Pettit (n 664) 304.

Freedland identifies welfare capitalism through the medium of ‘modern companies’ as New Labour’s method for achieving non-domination in labour law.⁶⁹⁶ This is manifest in the chapter on ‘modern companies’ in chapter two of the 1998 White Paper ‘Fairness at Work’ which focuses on the ideal of partnership as the way to achieve a marriage between the pursuit of equality and efficiency in the workplace. Bogg says this is a type of paternalism contingent upon the good will of the employer and that welfare capitalism is too insecure a foundation for guaranteeing non-domination in the employment context:

Kindly masters are still masters....Welfare capitalism relies upon the discretionary indulgence of employers in treating the workforce in accordance with workers’ perceived interests in fairness and security. However, what matters for civic republicans is not that workers are treated well by employers in a manner responsive to workers’ interests, but that employer are *forced* to track those interests through robust and effective institutional mechanisms allowing for democratic (or independent) contestation of employer decision-making.⁶⁹⁷

An argument can be made that New Labour’s reforms to unfair dismissal law prioritise softer regulatory techniques of trying to encourage positive treatment of staff by employers, rather than promoting robust and effective independent mechanisms for allowing external scrutiny of the employer’s dismissal decision. This is because New Labour’s preferred route for unfair dismissal applicants was not the tribunal system but either internal or alternative dispute resolution. Under New Labour, the right to unfair dismissal was diluted by the emphasis on the employer adopting the state-sanctioned, albeit fairly weak, procedure for dismissing employees at the expense of the

⁶⁹⁶ Mark Freedland, ‘Modern companies and modern manors – placing statutory trade union recognition in context’ (1998) 20 CLLPJ 3, 25.

⁶⁹⁷ Bogg (n 54) 148.

strengthening of tribunal adjudication of disputes. I have already discussed how this dilution occurred under the Employment Act 2002 which introduced a minimalist procedure by which employers could appropriately dismiss staff. The repeal of this procedure in 2008 did not result in a greater emphasis on procedural fairness to secure non-domination in the unfair dismissal context. The 2008 reforms revised the ACAS Code of Practise so that it is considerably shorter than its predecessor code. This has effectively diluted the right to unfair dismissal as it existed in British labour law prior to 2004. In contrast to previous versions, the 2008 code gives no guidance to tribunals as to the behaviour of a 'reasonable' employer and comes close to replicating the minimalist standard set by the three step statutory dismissal procedure introduced in 2004. This weakening of procedural standards has meant that managerial prerogative over dismissal has been somewhat increased, allowing greater domination by employers over employees during the dismissal process.

Finally, it could be argued that the tribunal process in Britain (and the arbitration process in Australia) still afford the most rigorous independent forum whereby employees can individually articulate their disagreement with their employer's dismissal decision, and independent scrutiny can monitor managerial decision-making. Whilst the rise of an argument of principle against tribunal decision making has occurred in both Britain and Australia, this mechanism does sufficiently safeguard individual employees against domination by providing a genuine opportunity to contest and scrutinise the employer's dismissal decision. The failure of centre-left governments to prioritise tribunal resolution of unfair dismissal disputes has

led to a concept of unfair dismissal law that legitimises the emergence of scrutiny mechanisms tainted by employer domination and control.

Section Four

Conclusion

This chapter has attempted to show the variation in unfair dismissal reforms proposed by those advocating deregulation of this law. This deregulatory trend has occurred in both Britain and Australia and by political parties on either side of the left/right spectrum. Nonetheless, the influence of neo-liberal ideology has not been as pervasive as might first be imagined as only the Conservative Government (1979-1997) in Britain and the Coalition Government (1995-2007) in Australia can be genuinely considered as advocating deregulation of unfair dismissal law with a view to challenging the legitimacy of the unfair dismissal jurisdiction. This challenge was more extreme in Australia where the Coalition was opposed to the idea of unfair dismissal law from its enactment. Neither Government completely deregulated unfair dismissal law, although they did somewhat reduce the protective quality of the system. For both Governments, their primary reform was to reduce access to the jurisdiction. For the Conservative Government (1979-1997) this was via the introduction of a two year qualifying period, and for the Coalition Government (1995-2007) the cumulative effect of the 100 employees exemption and operational reasons exemption removed unfair dismissal rights for the majority of Australian employees. Fuelling these

reforms, albeit to varying degrees, was a neo-liberal preference for a free labour market removed of the rigidity of unfair dismissal law and a belief that imposing unfair dismissal law altered the common law baseline which thwarted the achievement of state neutrality. According to this view, a statutory unfair dismissal scheme resulted in the state siding with workers over employers in the distribution of power.

This chapter has shown how these neo-liberal ideas were contested from within the liberal camp by egalitarian liberalism. In my view, both the Labor Government (2007-present) in Australia and the New Labour Government (1997-2010) in Britain can be considered as broadly subscribing to an egalitarian liberal way of thinking. This structured their reform agenda for unfair dismissal law in that they did not seek to advocate a complete deregulation of unfair dismissal law but to reform unfair dismissal law so as to control regulatory burdens so that it was less onerous on business. These centre-left governments considered ideas of localised dispute resolution and alternative dispute resolution as a softer way of scrutinising an employer's dismissal decision. Whilst these centre-left governments tended to largely accept that tribunal resolution of unfair dismissal disputes should be discouraged, their deregulatory zeal stopped short of removing this right to tribunal or arbitral review in its entirety.

In terms of a way forward, this chapter has drawn on the work of Bogg, McCallum and others to show that the republican tradition, and particularly notions of citizenship, could provide a foundation for reconstituting unfair dismissal law. This

would have the advantage of counter-balancing the egalitarian liberal preference for market institutions with the safeguarding of republican ideals of fair play, self-government and non-domination. In this way, the project to deregulate unfair dismissal law could be tested against these ideals so that this law was not so sufficiently undermined as to make unfair dismissal rights ‘paper tigers, fierce in appearance but missing in tooth and claw’.⁶⁹⁸

⁶⁹⁸ This evocative depiction of the continuing erosion of individual labour right was made by Sir Bob Hepple, ‘Social rights are like paper tigers, fierce in appearance but missing in tooth and claw’: Bob Hepple. ‘Enforcement: The Law and Politics of Cooperation and Compliance’, in Bob Hepple (ed) *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (CUP, 2003) 238.

CHAPTER EIGHT

CONCLUSION

Section One

Introduction

This thesis has been about the making of unfair dismissal law and the story of its subsequent evolution in Britain and Australia. In Part A of this work, I examined collective laissez-faire in Britain and conciliation and arbitration in Australia as the dominant labour law traditions prior to the inception of unfair dismissal law. This involved showing the way in which these traditions were embedded in the two systems' labour law heritages and how they acted as a constraining force upon the development of a statutory right not to be unfairly dismissed for individuals. I suggested that whilst Australia and Britain shared a common law tradition as the overarching legal principle for the two jurisdictions, this masked their highly divergent traditions in the area of labour law. Britain's collective laissez-faire system accorded the parties a substantial degree of industrial autonomy to determine the content of their agreements. In contrast, Australia's labour law tradition of conciliation and arbitration was significantly more juridified, although the state transferred its power to regulate industrial relations to an independent commission to determine the outcomes of disputes through a system of awards developed via conciliation and arbitration. These two methods, voluntary collective bargaining in Britain, and compulsory collective conciliation and arbitration in Australia, both sought to secure industrial peace. Moreover, when the two methods were regarded as failing in this objective, the labour law traditions of Britain and Australia were subject to near terminal stress and strain with alternative labour law models canvassed for consideration.

Drawing upon the concept of an ‘inner relationship’ between the labour laws of different countries and the theory of legal origins in my Introduction, I embarked upon this work with the suggestion that we might find that Australia’s and Britain’s unfair dismissal laws developed according to a similar evolutionary dynamic. With the emergence of an argument of principle against tribunal resolution of unfair dismissal law in Britain and the corresponding counteraction to the ‘IR Club’ in Australia which was seen as influencing labour law in the interests of employees and unions, Part B of this work charted the peeling back of the statutory superstructure of unfair dismissal law in favour of localised and alternative dispute resolution. I emerge from the attempt to explore these themes with the feeling that the hypothesis of a convergent evolutionary dynamic in the locus of unfair dismissal law arising out of divergent labour law traditions has been substantiated. This was reflected in the reversal of the original anchorage of Britain and Australia’s unfair dismissal systems in a desire to protect employees’ job security according to an industrial justice rationale manifested in higher qualifying periods, the imposition of filing fees for lodging applications and the carving out of small business from the unfair dismissal system. It also manifested in the experimental efforts in both jurisdictions with statutory codes requiring employers to dismiss staff according to a state-sanctioned procedure and to re-model unfair dismissal law so that conciliation rather than arbitration or tribunal determination became the primary adjudicative mechanism for unfair dismissal disputes. This, however, is to anticipate a series of conclusions which this chapter will now endeavour to more substantively develop.

Section Two

The role of labour law traditions in constraining legal change

To begin, I wish to go back to the importance of Britain and Australia's divergent labour law traditions which were put forward in Part A. My point of departure for that discussion was the pioneering work of Professor Kahn-Freund in Britain, and Justice Higgins in Australia, for establishing these traditions in theory and identifying the factors critical to their continuation. Higgins' contribution went beyond the theoretical realm as his ideas of how Australia's conciliation and arbitration system should operate were influential in his decision-making as President of the Commonwealth Court of Conciliation and Arbitration from 1907 until 1920. In Part A, what began as an account of these labour law traditions became an analysis of how they operated to constrain the development of unfair dismissal law. In many regards, whilst Australia and Britain's labour law traditions were deeply divergent, they operated to stymie legal change according to a similar evolutionary dynamic.

First and foremost, both traditional systems prioritised the achievement of union security over job security. In order to secure industrial peace, it was regarded that the union movement needed placating in the form of the legitimisation of their role in industrial relations by the state. In Britain both unions and employers were opposed to the introduction of statutory unfair dismissal protection because of their

attachment to the British tradition of voluntarism in industrial relations. Their reluctance can be identified in both the NJAC's Final Report advocating the extension of voluntary methods to secure unfair dismissal protection, and in their lukewarm support for statutory reform in their submissions to the Donovan Commission. Kahn-Freund's observation that collective laissez-faire accorded the industrial parties a substantial amount of autonomy provides a reason for the attachment of unions to retaining their control over industrial relations outcomes and their aversion to the juridification of labour law which would necessarily diminish this role. The preference of both British unions and employers to rely upon the extension of union coverage via collective bargaining can be seen as an attempt by the industrial parties to preserve their respective positions. The objective of British unions was to defend the traditional system and keep the courts out of industrial relations. They believed the position of workers would be strengthened through greater unionisation not through the achievement of statutory individual rights. British unions were highly suspicious of legal intervention and reluctant to support the enactment of statutory rights for individuals if this would involve the courts. Australian unions were shown to exhibit a similar protective trait with regards to maintaining their control over industrial relations. They were slow to canvas the development of statutory individual rights with their central concern being to ameliorate the collective disadvantage faced by working people in Australia. Unlike in Britain, this reluctance exhibited by Australian unions was not because of a suspicion of the courts; for over one hundred years unions had operated in the highly juridified conciliation and arbitration system to determine the outcomes of disputes with employers. Nonetheless, their preference was to secure the

protection of job security through the awards system and they had made significant advances through a test case during the 1980s recognising that the Metal Trades award could be inserted with a clause that a dismissal must not be ‘harsh, unjust or unreasonable’ and that this clause could be flowed on to other federal awards. So while Australian unions achieved their industrial agenda through state-sanctioned conciliation and arbitration, British unions attempted to secure their agenda through collective bargaining with only auxiliary support from the British state. We can conclude by observing that the traditional power structure existing within a legal system can operate as a powerful disincentive against legal change because groups which perceive their power to be threatened by the change will seek to lobby for the status quo.

A second, related point, is the role played by corporatist policies in both jurisdictions preceding the overturning of the labour law traditions of Britain and Australia in favour of statutory intervention. I rely here on the definition of corporatism provided by Crouch and Dore:

An institutionalized pattern which involves an explicit or implicit bargain (or recurring bargaining) between some organ of government and private interest groups (including those promoting ‘ideal interests’ – ‘causes’) one element in the bargain being that the groups receive certain institutionalised or ad hoc benefits in return for guarantees by the groups’ representatives that their members will behave in certain ways considered to be in the public interest.⁶⁹⁹

Again, whilst Australia and Britain’s labour law traditions were deeply divergent, a similar dynamic as between the two systems is played out in bringing about legal

⁶⁹⁹ Colin Crouch and Ronald Dore, ‘Whatever Happened to Corporatism?’, in *Corporatism and Accountability: The Role of Organized Interests* (OUP, 1990) 1-45.

change in the shape of unfair dismissal law enactment. In the 1960s in Britain, and in the 1980s in Australia, governments experimented with a form of corporatism in order to prop up the existing labour law tradition in the face of growing pressure that it be overturned. In both jurisdictions the failure of these experiments and the mounting belief in an economic crisis brought about wholesale labour law reform. Now that this general point has been outlined, perhaps we can explore this similar dynamic, albeit occurring at different times in each system, in more detail. In Britain when Labour won government in 1964 it endeavoured to secure from the trade union movement a commitment to a permanent incomes policy in the form of state-mandated wage restraint. It was able to secure this commitment because it was sought in the context of explicit governmental undertakings to accelerate the rate of economic growth. This led to unions, employers and the government signing the National Plan. Similarly, in Australia, the Labor Government formed an Accord between employers, unions and the Government in the 1980s in an attempt to control spiralling wage demands in return for a commitment by the state to comprehensively develop the welfare system and provide more aggressive tax breaks. Neither attempt at corporatism was successful and unravelled in the face of spiralling inflation. These eleventh hour corporatist reforms of governments in both systems ultimately gave way to wholesale labour law reform, occurring in 1971 in Britain with the enactment of the Industrial Relations Act, and in 1993 in Australia with the similarly titled Industrial Relations Act.

In addition to the failed experiments with corporatism in the decade preceding the enactment of statutory unfair dismissal law, another factor critical to prompting the

overturning of Britain and Australia's divergent legal traditions was the strengthening desire of the state to directly control industrial relations outcomes. In Britain successive governments had acquiesced to the collective laissez-faire tradition by a policy of abstentionism in industrial relations. While governments had enacted legislation facilitating the development of Wages Councils, Order 1305 and the modernisation statutes in the 1960s, successive British governments had refrained from legislating directly and comprehensively over industrial relations. This changed in 1971 with the enactment of the Industrial Relations Act which Wedderburn observed as resulting in the substantial juridification of industrial relations because of the influence of a 'phantom draftsman' he described as 'a Conservative lawyer imbued above all else with doctrines of individual rights, often without regard to the shop-floor problems of collective bargaining'.⁷⁰⁰ Whilst the Australian labour law tradition was more highly juridified because of the complex system of awards which developed over time, it is possible to make the claim that this system was created through the deferral of state power over industrial relations to an independent commission. This commission was empowered to exercise compulsory powers of final and binding interest arbitration to prescribe terms and conditions of employment. In this way, the Australian labour law tradition was highly juridified: the law was central to the development of awards. Yet, this system directly excluded the operation of the common law courts and federal parliament from determining industrial relations outcomes. Quite obviously, this can largely be attributed to section 51(xxxv) in the Australian Constitution which provided that the parliament could make laws with

⁷⁰⁰ K.W Wedderburn, 'Labour Law and Labour Relations in Britain', (1972) 10 BJIR 270, 282.

respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state'. It was this constitutional power that enabled the Australian Government to enact federal labour laws that had as their centrepiece first a labour court and later an industrial relations commission. Thus, in both Britain and Australia, their respective labour law traditions held a minimalist role for the government in regulating industrial relations. Nonetheless, once the taboo on the use of the law had been broken, in 1971 in Britain and in 1993 in Australia, it was more readily acceptable that a more juridified labour law would ensue, ultimately leading to development of unfair dismissal law.

All this amounts to the conclusion that it was the breakdown of Britain and Australia's labour law traditions which ultimately gave way to new labour laws, an essential component of which, recognised a statutory right not to be unfairly dismissed. Whilst certain aspects of Britain and Australia's labour law traditions operated to inhibit this legal change, the unravelling of these traditions allowed new ideas for labour law to be considered. In both systems this involved a direct role for national governments to regulate industrial relations, the juridification of labour law and enactment of statutory protection of unfair dismissal as part of a new individual employment law. I shall now proceed to discuss the evolutionary dynamic of Britain and Australia's unfair dismissal laws subsequent to their enactment which I found to be characterised by a high degree of convergence.

Section Three

The Reform of Unfair Dismissal Law according to a Convergent Evolutionary Dynamic

Despite the divergent labour law traditions from which they were fashioned, Britain and Australia adopted broadly similar unfair dismissal systems, albeit diachronically. Over time, these systems were subject to persistent reform according to a convergent desire to peel back the statutory superstructure of unfair dismissal law in favour of localised and alternative dispute resolution. This was a policy platform executed by governments of both political persuasions and in both jurisdictions, giving credence to Botero et al's claim that common law countries tend to prefer market based solutions to legal problems.⁷⁰¹

The impulse to wind back statutory unfair dismissal law in both jurisdictions occurred early on. The election of the Conservative Government (1979-1997) nine years after its enactment in Britain, and the Coalition Government (1995-2007) only three years after its enactment in Australia, sees the ascendancy of governments either questioning of (in the case of Britain), or outright opposed (in the case of Australia) to a statutory unfair dismissal scheme. In both jurisdictions attempts are made to reduce

⁷⁰¹ Botero et al (n 33).

access to the unfair dismissal system. In Britain the qualifying period is doubled so that for two years into the operation of their contract of employment, employees are unable to access the unfair dismissal jurisdiction. In Australia under the Work Choices legislation the Coalition Government removed unfair dismissal law for the majority of Australian employees through the 100 employees exemption and the operational reasons exemption. Neither of these attempts presented a direct assault upon the statutory unfair dismissal scheme. Instead, the Conservative Government in Britain, and the Coalition Government in Australia, were indirect in their intention to scale back unfair dismissal law. They introduced their reforms on the basis that this would make unfair dismissal law more efficient by reducing the regulatory burden on employers.

The unfair dismissal laws of Britain and Australia have also experienced a recent convergence in the preference of centre-left governments to promote the contract of employment to resolve disputes about dismissal. Supiot notes that ‘with contractualisation, laws are divested of substantive rules in favour of rules on negotiation. This trend called proceduralisation – shifts into the contractual sphere the concrete and qualitative matters which had previously been regulated by law’.⁷⁰² In both Britain and Australia governments are increasingly interested in guaranteeing that there is a state-sanctioned process by which employers dismiss staff which forms part of the contract of employment. Between 2004 and 2008 the New Labour Government in Britain experimented with statutory dismissal procedures which obligated

⁷⁰² Supiot (n 45) 340.

employers to make decisions about dismissing staff according to a statutorily mandated procedure. Whilst the Government reneged on its original intention of implying these procedures into the contract of employment, the introduction of a set process for the dismissal of staff is indicative of the Government's attempt to re-regulate unfair dismissal law and divert unfair dismissal applications away from tribunals. Similarly, in Australia, the Labor Government (2007-present) introduced a Fair Dismissal Code for small businesses, which if followed, precludes staff from these businesses from accessing the statutory unfair dismissal jurisdiction. In both countries, the statutorily mandated procedures are striking for their brevity and it has been observed that the real effect of these reforms has been to increase managerial power under the contract of employment.

Fuelling this deregulation of unfair dismissal law in Australia and Britain has been a reconceptualisation of the contract of employment as a relatively equal bargain between employers and employees. This represents a significant departure from traditional labour law discourse, which according to Kilpatrick, saw collective labour law coupled with individual employment rights as a 'legislative expression of a mission to redistribute wealth and power between capital and labour'.⁷⁰³ Kahn-Freund articulated this in the following manner:

But the relation between an employer and an isolated employee or workers is typically a relation between a bearer of power and one who is not a bearer of power. In its inception as an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that

⁷⁰³ Claire Kilpatrick, 'Has New Labour Reconfigured Employment Legislation?' (2003) 32 ILJ 135, 137.

indispensable figment of the legal mind known as ‘the contract of employment’. The main object of labour law has been, and I venture to say will always be to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.⁷⁰⁴

New Labour has reconceptualised the employment contract as a relationship between equals through their metaphor of ‘partnership’. Rather than redressing subordination, they conceived the object of their labour law to be about combating social exclusion so as to facilitate entry into the labour market. In their view, once a person had a job, they were the partner of their employer and this relationship could operate in a generally equal and cooperative fashion. The work of reconceptualising the contract of employment as a relationship between equals can largely be attributed to employer groups expressing concern over the disadvantage faced by employers, particularly small business owners. In a small business it is easier to see the relationship between an employer and employee as one between individuals rather than the traditional perception of the struggle between capital and labour. The employers’ ‘cause’ was then adopted by politicians of all political persuasion in both Britain and Australia who began to articulate a case for reform of the unfair dismissal system to contain the regulatory burdens imposed by the system upon employers. Australia’s Prime-Minister Howard was particularly proactive in seeking to protect small business owners from the statutory unfair dismissal laws assuring them that ‘we will not weaken or tire in our efforts to secure the passage through the Senate of further reforms of the unfair dismissal laws. They remain to me one of the greatest blots on the escutcheon of small

⁷⁰⁴ Kahn-Freund (n 6) 7.

business.’⁷⁰⁵ The subsequent Labor Government (2007-present) in Australia has continued this argument with its development of a Fair Dismissal Code exempting small business from the unfair dismissal system if the code is complied with.

The significance of this belief in the contract of employment as an agreement between equals is that it has resulted in a legislative preference for localised dispute resolution that essentially represents a movement towards allowing self-regulation of unfair dismissal disputes. Self-regulation is synonymous with ‘internal regulation’, a concept coined by Allan Flanders as part of his depiction of industrial relations as a ‘study of the institutions of job regulation’.⁷⁰⁶ Flanders argues that external and internal regulation address different dimensions of the industrial relations challenge. External regulation aims to supervise and manage the conflict between unions and employers, as well as to protect workers from potential exploitation in an unregulated labour market. In contrast, Flanders saw internal rules as set by ‘managements seeking to bring the work behaviour of employees under greater control’.⁷⁰⁷ Flanders’ understanding of internal regulation is consistent with the traditional doctrine of managerial prerogative which provides that it is an employer’s right to organise their work arrangements in such a way as to ensure the most efficient operation of the business. Self-regulation allows employers to opt out of the formal regulatory process by agreeing to resolve disputes within the workplace according to a state-endorsed

⁷⁰⁵ Howard (n 490).

⁷⁰⁶ Flanders (n 509)10.

⁷⁰⁷ *ibid* 15-18.

procedure. Australia's Fair Dismissal Code allows small businesses to self-regulate with regards to protecting employees' job security because as long as the Fair Dismissal Code is complied with, then the business is exempt from undergoing external scrutiny of their decision to dismiss. In Britain, the experiment with a three-step dismissals procedure between 2004 and 2008 was also an experiment with self-regulation: although there was still the possibility that an unfair dismissal claim might be adjudicated by the tribunal, this was only if the statutory procedure had been complied with. The primary concern of both British and Australian legislators in going down this route is to facilitate workplace cultural reform by mandating that employers develop better procedures for governing dismissals. The upshot of this is that the state acquiesces to the employer becoming the arbiter of substantive fairness. As long as there is an adequate process for determining dismissal, then, the employer's decision to dismiss is beyond scrutiny.

In this Conclusion I wish to question whether this increase in managerial prerogative can protect job security. Although the report of the NJAC in 1967 advocated a form of self-regulation in that they believed that 'the best way to improve safeguards against arbitrary dismissal is by the extension of satisfactory internal procedures',⁷⁰⁸ this was in the context of a strong role for unions in ensuring compliance with the procedure and acting as a check on managerial power. In the current context of declining unionisation the primary safeguard established in Britain and Australia to protect employees is the ability to be accompanied by a support

⁷⁰⁸ Ministry of Labour (n 208) 180.

person. The rationale underpinning the right to a support person is that it provides support and advice for an employee at a difficult time and helps prevent the escalation of disputes by deterring employers from making excessively harsh decisions because of the presence of a third party. Ultimately, this is intended to reduce reliance on the tribunal system by facilitating the resolution of disputes at the workplace level. Nonetheless, questions remain as to the adequacy of a support person in protecting an employee's job security. Unlike a union representative well versed in industrial issues and with knowledge of the law, a support person has none of this experience or expertise. The disciplinary or dismissal situation that the support person is involved in is likely to be their first whereas employers routinely handle these kinds of situations. Given that the support person is usually a fellow worker this places the support person in a difficult position of becoming involved in another person's conflict and may even threaten their relationship with the employer. The conclusion of Antcliff and Saundry in their study of the impact of the right to accompaniment in Britain is that union presence and involvement in the workplace is a much better safeguard of job security than a right to a representative during a disciplinary hearing.⁷⁰⁹

Another parallel development in Britain and Australia is the renewed efforts to resolve unfair dismissal disputes at the conciliation stage so as to eliminate the need for dispute resolution via a labour court. Whilst ACAS conciliation in Britain and AIRC conciliation in Australia has always been a feature of both countries' unfair dismissal systems, the subsequent evolution of unfair dismissal law has been to

⁷⁰⁹ Antcliff and Saundry (n 511).

increasingly rely on alternative dispute resolution rather than legally binding tribunal resolution or arbitration. The reforms to conciliation in both Britain and Australia typify the intention of policy makers to resolve unfair dismissal disputes in the workplace. The primary objective is to achieve localised dispute resolution so as to avoid the need for tribunal resolution of unfair dismissal disputes. In Britain this objective has manifested in the policy of facilitating pre-claim conciliation which encourages employees and employers to ring an ACAS hotline to arrange mediation in the workplace between the parties in dispute. This is to deter unfair dismissal applications from ever reaching a tribunal by resolving disputes early and seeking to maintain the parties' relationship under the contract of employment. Whilst conciliation has always been a compulsory precursor to arbitration in the Australian unfair dismissal system, the recent introduction of telephone conciliation is intended to empty the conciliation process of legal rules of procedure, formal submissions and lengthy proceedings. In Australia the Labor Government (2007-present) introduced telephone conciliations on the basis that these would efficaciously settle disputes whilst deterring applicants from proceeding to the more costly, time-consuming and legalistic process of arbitration. Both pre-claim conciliation in Britain and telephone conciliation in Australia can be critiqued on the basis that the emphasis is on resolving disputes expediently and cheaply at the expense of facilitating the achievement of justice in the individual case. Collins has criticised conciliation of unfair dismissal disputes because there is no duty for the conciliation officer to ensure that the

settlement is fair to the employee as the central duty of the conciliator is to prevent applications proceeding to trial.⁷¹⁰

Section Four

Conclusion

Underscoring the introduction and evolution of unfair dismissal law in Britain and Australia was the contestation between normative ideas. In this work, I have used the idea of ‘normative templates’ to evaluate and assess the actual introduction and evolution of unfair dismissal law in both jurisdictions. In the introduction phase, particularly in Britain where there was bipartisan political support for the enactment of unfair dismissal law, the contestation of ideas predominantly occurred within the parameters of a general agreement between theorists of the need for this law to achieve worker protection. In the post-introduction story, the contestation between normative templates becomes more acute as the very notion of a worker protective unfair dismissal law was increasingly under question from those seeking to deregulate labour law in pursuit of a freer labour market.

In the first phase, different theorists established templates from which we can normatively understand and evaluate the inception of unfair dismissal law. From Meyers we received the concept of job property which provides one basis for building

⁷¹⁰ Collins (n 198) 138.

a legal framework protecting against arbitrary dismissal contingent upon a belief in an employee's ownership of their job. This notion has been recently developed by Njoya in her influential work on job security and job property. Neither the unfair dismissal laws of Britain or Australia can be considered as greatly achieving the job property ideal. The inability of either system to effectively facilitate the reinstatement of unfair dismissed workers saw compensation being used as the primary remedy. This critique can also be applied to Hepple's notion of a right to work. His ideas sought to provide a normative understanding and evaluation of unfair dismissal law based upon a belief that unfairly dismissed employees had a right to return to their previous work should they so desire. Wedderburn developed a different normative ideal of unfair dismissal law as a floor of rights from which workers could improve dismissal standards through collective bargaining. In neither jurisdiction was this idea realised as unfair dismissal law more commonly operated as a safety net rather than a floor of rights, with unions rarely seeking to achieve greater unfair dismissal protection through collective agreements.

Despite the richness of ideas contained within these different normative templates, the idea of unfair dismissal law constructed in practice by British and Australian legislators was more limited in its goals. Both systems were designed in a broadly similar manner and sought to accord workers with the right to external scrutiny of their employer's decision to dismiss via processes of conciliation (voluntary in Britain, and compulsory in Australia) and then tribunal determination (in Britain) or arbitration (in Australia). Both systems rarely achieved reinstatement so the

primary sanction attached to a finding of unfair dismissal was a financial cost and the time and resources pressures associated with undergoing external review. Thus, neither system really envisaged employees as the property owners of their jobs but instead provided a fairly diluted recognition of the importance and worth of an employee's job to the individual.

The story of the evolution of unfair dismissal law from its initial introduction in Britain and Australia brings with it an even greater normative contestation. Broadly speaking, whilst there existed a deregulatory consensus between governments in either jurisdiction that some peeling back of the statutory superstructure governing unfair dismissals was required, different theorists articulated different rationales as to the nature and extent of deregulation of unfair dismissal law which they perceived to be necessary. Neo-liberals Hayek and Epstein developed theories as to why a free labour market is ideal and how the law of unfair dismissal interfered with the attainment of this. Collins provided a more moderate case for deregulation based upon his set of ideas originating from his 1992 work about justice in dismissal and his later contribution advocating labour market regulation for competitiveness. Collins has sought to combine normative ideals of worker protection with the achievement of productive efficiency. I argued that these theorists drew upon liberal doctrines in making a case for the peeling back of the statutory superstructure of unfair dismissal law. I also observed the disagreement within the liberal camp as to the degree of deregulation required. Despite the neo-liberal theorists Hayek and Epstein advocating complete deregulation of unfair dismissal law, and Collins arguing for the replacement

of unfair dismissal law with a law guaranteeing employment security, a less radical position was ultimately adopted at the practical legislative level in both Britain and Australia. Even centre-right governments did not wholly deregulate unfair dismissal law, whilst centre-left governments tended to be influenced by egalitarian liberal ideas in their partial deregulation of unfair dismissal law in favour of localised and alternative dispute resolution.

In an effort to establish a fuller and more balanced normative perspective than could be derived from those deregulatory stances, I drew upon the writings of Bogg and McCallum who respectively canvas the possibility for reforming labour law based upon civic republicanism and industrial citizenship ideas. I observed some overlap between their normative templates as each recognises the importance of the workplace as a community and the role of labour laws in achieving fairness and freedom from arbitrary power. Whilst Bogg's advocacy of civic republican ideas seeks to temper the market-orientation of egalitarian liberalism, McCallum's normative template of industrial citizenship seeks to combine ideas of rights and responsibilities in the workplace as a justification for a more efficient, albeit still worker protective unfair dismissal law. These ideas have not yet had substantive impact upon the evolution of unfair dismissal law in either jurisdiction.

Drawing upon liberal doctrines, the most significant impact of the reform agenda for unfair dismissal law has been the failure of centre-left governments to revive worker protective normative templates for unfair dismissal law, preferring

instead to rely upon notions of efficient or better regulation. Their objective has been to resolve disputes within the workplace and without recourse to tribunals. On the one hand there is still the maintenance of the statutory right to be protected from unfair dismissal; however, on the other hand, this right is being diluted by the desire to see this right arbitrated by management, or at best case, by a conciliator rather than through a tribunal. According to Ewing, this ‘alluring synthesis of regulation and deregulation’ amounts to nothing more than a ‘form of labour law dilution, and the creation of a labour law for employers’.⁷¹¹ Experiments with the introduction of procedural codes in both Britain and Australia have displayed an ironical potential to dilute the procedural obligations of employers when dismissing an employees, rather than to enhance those obligations. This dilution has not been effectively counter-balanced by the right of an employee to a support person during a meeting about a prospective dismissal. The increasing emphasis placed on conciliation, whilst desirable compared to self-regulation of unfair dismissal disputes given that an external person is used to resolve the disputes, is also of concern because of the pressure to reach settlement without the obligation that the settlement be fair. Ultimately, this tendency towards localised and alternative dispute resolution is indicative of an increasing desire to ignore any power imbalance that may exist in the employment relationship by facilitating dispute resolution within the workplace. This obfuscates the more vulnerable position of the employee in unfair dismissal disputes in that it is an employee’s livelihood that is at stake, whereas an employer can more readily replace one employee with another.

⁷¹¹ Keith Ewing, ‘Future Prospects for Labour Law – Lessons from the United Kingdom’ (2008) 18 ELRR 103.

The thesis has depicted a diachronous convergence of the labour law systems of Britain and Australia, from very different traditional starting points, upon the introduction of national systems of statutory protection of employees against unfair dismissal. The history of and reasons for that particular convergence have been carefully examined; particular attention was focused upon the question of why such provisions for individual employment protection were seen as paving-stones upon pathways of departure from essentially collectively-based systems of labour law and industrial relations; and consideration was given to changes in ideas of industrial justice which might have underlain these enactments.

Having reached that point, the thesis then concerned itself with the subsequent evolution of these two systems of unfair dismissal law, regarding them as focal points for the evolution of both labour law systems as a whole. In that regard, the very final and tentative reflection from this thesis is the following one. Although the two systems continued along the broadly convergent path at which they had, albeit diachronously, arrived, that path took a general direction somewhat different from the one which one might have predicted for it at the moment of introduction of national unfair dismissal law in the two systems. That is to say, one might at those two respective moments have imagined that unfair dismissal law would become a strongly entrenched and almost constitutionalised feature of the two labour law systems. In the event, as the thesis has tried to show, the status of unfair dismissal law has remained more or less continually contentious and contested. The latter part of the thesis has consisted of an endeavour both to identify the ideas and perceptions which have

animated those contestations and to sketch out, from the writings of labour theorists, a set of normative templates from which to understand and criticise these fraught evolutions as they have so far developed and as they will surely continue to develop in the immediate and medium-term future.

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